On the legal status of an interpreted confession

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Abstract. *Aifang Ye, a non-English speaking woman, was convicted of making a false statement in a passport application. The conviction was based almost exclusively on a 'confession' produced at the end of an investigative interview with an Immigration and Customs Enforcement (ICE) agent that was conducted through an interpreter who was linked by telephone. The written confession was presented to the court solely in English, even though Ms Ye did not understand English and never wrote or spoke any of the words contained in the confession. Despite a request by the defense lawyer, the prosecutor refused to make the interpreter available for cross-examination. The defense, citing the Confrontation Clause of the Sixth Amendment, argued that prosecutorial actions and judicial decisions violated Ms Ye's rights, on the grounds that the prosecution had failed to make the interpreter available for cross-examination. The case revolves around the question of the status, reliability and output of interpreters – is an interpreter simply a mouthpiece or conduit, or does acting as an interpreter necessarily involve the interpreter in the co-production rather than just the conveying of the message? If the latter, then interpreted and/or translated statements like Ms Ye's confession which were produced outside the court must be considered to be* testimonial hearsay statements*, which are inadmissible at trial unless the defense has the possibility to cross-examine the declarant, in Ms Ye's case the interpreter.*

Keywords: *Telephone interpreting, Confrontation Clause, "conduit" theory.*

Resumo. *Aifang Ye, uma mulher não falante de inglês, foi condenada por prestar falsas declarações num pedido de passaporte. A condenação assentou quase exclusivamente numa "confissão" apresentada no final do interrogatório de um agente dos Serviços de Fronteiras,* o Immigration and Customs Enforcement (ICE)*, através de um intérprete, que prestou o serviço via telefone. A confissão escrita foi apresentada ao tribunal exclusivamente em inglês, apesar de Ye não falar inglês e de nunca ter dito nem escrito nenhuma das palavras incluídas na confissão. Não obstante o pedido do advogado de defesa, o procurador recusou chamar o intérprete para contra-interrogatório. A defesa, citando a Cláusula de confrontação da Sexta Emenda, argumentou que a condenação e as decisões judiciais constituíam violação dos direitos de Ye, uma vez que a acusação não tinha colocado o intérprete à disposição para contra-interrogatório. O caso apresentado*

neste artigo gira em torno das questões do estatuto, da fiabilidade e do trabalho dos intérpretes: será o intérprete meramente um altifalante ou uma conduta, ou o trabalho do intérprete implica-o necessariamente na co-produção da mensagem, e não só na sua transmissão? Neste último caso, então as declarações interpretadas e/ou traduzidas, como acontece com a confissão de Ye que foi produzida fora do tribunal, devem ser consideradas testemunho indireto*, sendo assim inadmissíveis em julgamento, a menos que a defesa possa contra-interrogar o declarante – que, no caso de Ye, é o intérprete.*

Palavras-chave: *Interpretação telefónica, Cláusula de confrontação, teoria de "conduta".*

Introduction

After giving birth to her second child, Jessie, in February 2012 in the Northern Mariana Islands, a U.S. territory in the Pacific, Aifang Ye, a Chinese national, sought to obtain a US passport for her newborn daughter. On March 29, 2012 she submitted a passport application for Jessie. A few days later she became the target of an investigation into suspected passport fraud and was questioned by an Immigration and Customs Enforcement agent, Officer Faulkner. As Ms Ye spoke only Mandarin and Officer Faulkner only English, he called the *Language Line*, a service used by the Department of Homeland Security when they need a foreign-language interpreter. The interpreter, Jingyan "Jane" Yin Lee, who will be referred to as Jane from now on, was actually based in the State of New York, some 8,000 miles away from where the interview was taking place.

A speakerphone served as the telephonic connection, but the officer made no audio-recording. Officer Faulkner would ask a question in English and Interpreter Jane would produce a Mandarin version of the question. Ms Ye would then respond in Mandarin and Jane would produce an English version of her response. From this interaction a first person monologic statement in English was produced, but the officer made no written record let alone an electronic recording of the questions and answers on which it was based. According to Officer Faulkner, the reliability of the interpretation/translation process was checked at the end of the interview by having the English text he had created back-interpreted into Mandarin, 'paragraph by paragraph', for Ms Ye to corroborate and initial.

By the end of the interview, Officer Faulkner had created a "confession" written in English, attributed to Ms Ye and ready for use in the subsequent prosecution, even though, of course, Ms Ye had never spoken or written any of the actual words therein.

There are many problems with this kind of verbal evidence. In the first place, in the absence of an audio-recording, there is no way that anyone can check the accuracy and thus the reliability of the interpreting, so one does not know to what extent the answers which the officer received in English were an accurate version of the answers given to the questions he (thought he) had asked. Other researchers have shown that serious mistakes can occur in both translated questions and translated answers (Berk-Seligson, 2002; Ng, 2012). Secondly, one is also unable to compare the answers Jane provided in English with the version the officer actually wrote down. This is worrying because, as Gibbons (2001) clearly illustrates, written versions of interrogations are by no means error free even when all the participants are using the same language. Thirdly, one does not know how much of the statement was contributed directly or indirectly by the officer himself. Coulthard *et al.* (2016: 166) exemplifies how, if a statement is produced by means

of the witness replying to questions, the wording of the statement will necessarily consist in part, and at times predominantly, of the language used by the questioning officer and not the language used by the witness. We can see this from the following extract taken from Officer Hannam's evidence in the 1952 trial of Alfred Charles Whiteway in the UK, where not a single word said by the accused appears in the exemplificatory quoted sentence "On that Sunday I wore my shoes" that was attributed to him.

> I would say "Do you say on that Sunday you wore your shoes?" and he would say "Yes" and it would go down as "On that Sunday I wore my shoes" (Court transcript of Hannam's evidence, p. 156)

Notwithstanding this, Officer Faulkner's written record of (his understanding of) Jane's interpretation of Ms Ye's answers to his questions is presented in the form of a written monologue – there is no record of the actual questions Officer Faulkner (thought he) had asked – yet this constructed monologue was labeled for the court as the *Sworn Statement of Aifang Ye*.

Ms Ye was indicted and tried in the District Court of the Northern Mariana Islands. She objected at trial through her lawyer to the introduction as evidence of her English 'confession', which the prosecutor himself agreed was central to the government's case, unless the interpreter was made available for cross-examination. However, the trial judge overruled the objection and admitted her English statement as inherently reliable evidence. Ms Ye was convicted and sentenced to 12 months imprisonment. She appealed.

All US lower courts are subsumed under one of 13 Circuits for the purpose of appeals. Ms Ye's district was subject to the Ninth Circuit. At appeal her lawyer argued that the district court had erred by admitting the out-of-court translated statement unchallenged, but her appeal was rejected on the same grounds as those used by the District court. Ms Ye was unfortunate because some Circuits do actually allow the cross-examining of interpreters, although the Ninth Circuit didn't and still doesn't. She appealed again, this time to the Supreme Court, hoping to achieve a federal ruling in her favor[1]. The question presented to the Supreme Court was

> Whether the Confrontation Clause permits the prosecution to introduce an out-of-court, testimonial translation, without making the translator available for confrontation and cross-examination. (Petition, 2016)

Disappointingly, on June 13, 2016, the Supreme Court declined to review the judgment of the Court of Appeals of the Ninth Circuit. So, there is still no federal ruling and the individual Circuits can continue to differ. In what follows we will rehearse the arguments for and against the cross-examining of out-of-court interpreters.

Why might a defendant like Ms Ye want to cross-examine the interpreter?

Firstly, out-of-court interpreters' professional competence is not independently tested and they are less regulated than are accredited court interpreters. They can be either employees or merely independent contractors, although telephone and video-remote interpreting is usually provided, as in Ms Ye's case, through private companies who are responsible for recruiting, testing, training, managing their interpreters and selling their services. Thus, there is no quality control exercised by either the police or the courts, yet

even so the interviewee has no say in the choice of the interpreter. As the record of such interviews can have a potentially life-changing effect, it seems reasonable to be allowed at least subsequently to evaluate the competence of the interpreter, especially when neither the suitability of the interpreter nor the quality of the interpreting is guaranteed by the service provider, as is evident from the following Warranty on the *Language Line* website:

> LANGUAGE LINE SERVICES MAKES **NO** REPRESENTATION, **WARRANTY** OR GUARANTEE, EXPRESS OR IMPLIED, **ABOUT** INTERPRETATION SERVICES, INCLUDING BUT NOT LIMITED TO THE AVAILABILITY, **ACCURACY**, **COMPLETENESS** OR TIMELINESS **OF ANY INTERPRETATION**. LANGUAGE LINE SERVICES DOES NOT WARRANT THE AVAILABILITY OF INTERPRETERS FOR ALL LANGUAGE PAIRS AT ALL TIMES, AND LANGUAGE LINE SERVICES SPECIFICALLY **DISCLAIMS ANY WARRANTY** OR CONDITION OF MERCHANTABILITY OR **FITNESS FOR A PARTICULAR PURPOSE**. CUSTOMER RECOGNIZES THAT **INTERPRETATIONS MAY NOT BE ENTIRELY ACCURATE IN ALL CASES** (highlighting in bold added). (GSA Advantage, 2017)

Secondly, none of the other trial participants – judge, attorneys, jury members, the public – were present to monitor the accuracy of the oral interpretation or to request clarification if the meaning of an interpreted utterance (into or out of the interviewee's language) was unclear (see Ng, 2012 for an example where a bilingual lawyer was able to dispute the court interpreter's choice for the interpretation of an ambiguous term). The problems with out-of-court interpreting are exacerbated when interviews are not electronically recorded. The possibility for interpreting error is too great for the courts not to be concerned about the potential harmful impact on the legal cases of many limited English individuals who receive less than acceptable service. Such defendants have a legitimate reason to seek confrontation. When a defendant's lawyers, as in the Ye case, are not given the right to confront the interpreter they cannot raise for the jury what may be reasonable general doubts about the interpreter's abilities, training, experience and biases, nor specific doubts about individual disputed interpretations and/or the lexical encoding of particular items. For example, in the Ye case, there was a doubt about whether the interpreter had understood and/or interpreted accurately what Officer Faulkner typed as "when Immigration first asked me about why I had my husband's Chinese passport, *I lied* and told them that he sent it in the mail to me," or "I know *what I did was wrong*."

Thirdly, there are irremediable problems inherent in all types of interpreting. The reality is that from a cognitive, sociolinguistic and legal perspective, however good the interpreter's training, knowledge, skills, experience and adherence to protocol she may occasionally transmit a message different from the one 'intended' by the speaker. This is because interpreting is an activity inherently subject to inaccurate renditions and even "'[c]ompulsory pre-service training will not guarantee error-free interpretation, just as legal training does not guarantee error-free lawyering" (Hale, 2010: 443).

Also, interpreting accurately, objectively, impartially, faithfully and completely, can only be ideals which interpreters strive to achieve.

> Some veteran court interpreters will acknowledge that they occasionally depart from the strictly neutral role of the judiciary interpreter and offer to provide sug-

> gestions or explanations when communication breaks down or misunderstandings occur. This type of intervention is a slippery slope . . . and it takes expertise to know how to navigate that slope. (Mikkelson, 2008)

As the most qualified senior interpreters will sometimes trip up even in the courtroom, it is to be expected that untrained remote out-of-court interpreters will do so too.

For the above reasons it is not unreasonable for the attorneys for limited English defendants to ask to cross-examine out-of-court interpreters under oath not only about individual assertions in any statement that the prosecutor seeks to introduce as inherently reliable evidence, but also more widely about the interpreter's professional competence. For example, defense counsel could legitimately and productively inquire about:

1. the approach and the reliability of the methods used by the interpreter to produce, preserve and present the linguistic evidence – alleged oral or written self-incriminating statements, confessions, etc.
2. the interpreter's professional background, credentials, experience and declarative knowledge of court interpreting procedures; about legal procedure and community protocol in police station interpretation; about telephone interpreting procedures and policies, and on codes of ethics of legal interpretation.
3. the interpreter's performance on the particular day in question, potential opportunities for mistranslation, interpreting inaccuracies, and about any specific disputed terms in the English text

Even if the interpreter is unfamiliar with certain legal-linguistic constructs, she will be competent to answer questions about the subjective and discretionary decisions that interpreters must constantly make, questions designed to inform the court about the complex nature of producing evidence through interpretation. Likewise the interpreter will be able to confirm that certain terms, utterances, propositions and narratives or discourses can be understood and interpreted in multiple ways and 'colored' with different tones of intention and force. She can be asked to comment on the observation that interpreting requires intralingual (both grammatical and lexical) 'decoding', as well as pragmatic inferential work by the interpreter before she can re-encode her own mental representation of the interviewee's message into the target language.

Judges and jury members capable of grasping these facts will be better able to evaluate the quality and reliability of out-of-court translated statements attributed to limited English proficient defendants – as they hear about the nature and intricacies of interpreting they will learn that it is anything but an exact science. And at the same time they would be able to assess the interpreter's credibility and good faith, as they already standardly do for all other witnesses, and also to get a sense of the interpreter's own linguistic competence. Please refer to Appendix A for a comprehensive list of possible cross-examination questions specific to the Aifang Ye case, but which could form the basis for the cross-examination of any interpreter.

The legal basis for the right to cross-examine

The Sixth Amendment, which protects not only citizens, but also visitors and immigrants (documented or not) in the USA, states that: "In all criminal prosecutions, the accused shall . . . *be confronted with the witnesses against him*" (The Bill of Rights, 2016) (italics added for emphasis). To preserve the integrity of the confrontation requirements, the [U.S. Supreme] Court held in *Crawford v. Washington* (2004) that the prosecution may

not introduce out-of-court statements by non-testifying witnesses (or, to use the legal term, *declarants*), when their statements are "testimonial", that is, when their statements were made primarily to establish facts for the criminal prosecution (Bibas and Fisher, 2016). This decision was reinforced in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), where the Supreme Court reasoned that it is "a violation of the Sixth Amendment right of confrontation for a prosecutor to submit a chemical drug test report without the testimony of the person who performed the test." The Court went on to say that "the original technician who made the certification – not a surrogate – must be made available for confrontation" (Petition, 2016).

Similarly, in the Ye case, the out-of-court interpreter was not called to testify but the prosecutor called Officer Faulkner to testify in lieu, thus creating an additional layer of potential unreliability. The fundamental question is: how was he able to testify about statements made by Ms Ye, when he does not speak Mandarin? The officer could only testify about statements which the telephone interpreter had reported to him *in English* during the interview. In other words he was reporting what he had heard the interpreter say and as such his evidence was literally *hearsay*. Thus, the only grounds on which Ms Ye's lawyer could be denied the right to cross-examine the interpreter would be if the interpreter had already been categorized as a *non-declarant*.

The legal basis for the rejection of the right to cross-examine an interpreter

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The legal basis for the rejection of the right to cross-examine an interpreter

The Aifang Ye rejection revolves around differing conceptions of the act of translation. The basis for rejection is the linguistically naïve and mistaken assumption that an interpreter decodes fixed values from one natural language and then re-encodes them unaltered into another, acting as if she were an "invisible pipe with words entering at one end in one language and exiting – completely unmodified – in another language" (Berk-Seligson (2002: 219) quoting Reddy (1979)). For obvious reasons, this conceptualization of the translation process has been labelled the 'conduit' metaphor. The translator is seen as having no personal input into the translation she produces; she is thought to simply facilitate the communication between the police officer and the defendant by turning a message in Language A into the identical message in Language B. Accordingly, the interpreter is simply acting as an "agent" or an extension of the defendant. Thus, following this line of argument, anything produced in English by the interpreter can, unquestionably, be directly attributed to the defendant. Consequently, there is only one author of the translated message, Ms Ye – the interpreter is regarded as having contributed absolutely nothing, except to transmit it – and consequently there is obviously only one declarant to (cross-)examine: the accused. We will leave on one side, as it is not the direct focus of this article, the other highly questionable assumption that the officer was also acting as a mere conduit, that is that he also contributed nothing to the individual written sentences making up the confession.

Courts have articulated four factors in determining whether an interpreter can justifiably be considered to be a mere language conduit. The four-factor criterion is labelled the "conduit" test and was justified by the Ninth Circuit, in a case involving an accused named Hieng and an interpreter named Lim, as follows:

> 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. 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. [...] In making the determination, the district court must consider all relevant factors, "such as 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 as translated" .... The district court properly treated Lim as a mere **language conduit** for Hieng. Under *Nazemian*, Hieng did not have any constitutional right to confront Lim because the interpreted statements are directly attributable to Hieng. (*United States v. Orm Hieng*, (2012) 679 F.3d 1131 (9th Cir. 2012, our highlighting with bold)

The conduit test is a discretionary faculty and an evidentiary tool supposed to determine the reliability and trustworthiness of the interpreter. If the interpreter passes the four-factor test repeated below then their translations into English are deemed to be accurate, reliable and admissible. As indicated in the quotation above the judge is required to examine the following:

> (1) which party supplied the interpreter,
> (2) whether the interpreter had any motive to mislead or distort,
> (3) the interpreter's qualifications and language skills, and
> (4) whether actions taken subsequent to the conversation were consistent with the statements as interpreted. (Petition, 2016: Appendix A)

As is evident this test focuses exclusively on the interpreter not the process of interpreting. Therefore, as long as the interpreter has no reason or motive to distort the speaker's words intentionally and as long as an *ex-parte* statement prepared by the prosecutor and signed by the interpreter is attached to the interpreter's resume, the "conduit" condition will be fulfilled. Once this "conduit" test has established the reliability of the translated/interpreted statements they become admissible without confrontation.

For example, in Ms Ye's case, the Court read the *ex-parte* statement and resume of interpreter Jane, which had been submitted by the prosecutor:

> "The interpretation services I rendered during [the] interview [of Ms Ye] were true, accurate, and to the best of my ability. (Signed, Jingyan "Jane" Yin Lee)" (Petition, 2016)

This was ruled to be sufficient to establish that she was a reliable conduit and therefore her out-of-court statements in English were deemed to be admissible in court without her presence for cross-examination. According to the line of reasoning of the "conduit" theory, it would be fruitless for Ms Ye's lawyer to confront interpreter "Jane" since, as a "conduit", the interpreter would be echoing the defendant's utterances, except doing so in English. By that account, it would be absurd for the defendant's lawyer to cross-examine the defendant! This means that any incriminatory statements, even if the defendant has claimed they were not said, or are not true or were interpreted wrongly, can be directly and rapidly attributed to the defendant under the language "conduit" theory, as long as the four-factor test has been satisfied.

According to Xu (2014: 1509) the Ninth Circuit was the first federal court of appeals to invoke the language conduit theory in relation to the admissibility of out-of-court interpreted statements. In *United States v. Ushakow* (1973) the defendant challenged the admissibility of an interpreter's testimony, but the Court rejected the defendant's argument, characterizing "the interpreter as a language conduit without discussing its reasoning." (Benoit, 2015: 308).

The following year, in *United States v. Santana* (1974), the reliability of out-of-court translations/ interpretations was discussed by the Second Circuit. Two co-conspirators, speakers of different languages had used a third co-conspirator to interpret between them. At the trial of the non-native speaker co-conspirator, the individual who had acted as interpreter did not testify, but the English speaking co-conspirator was allowed to testify as to what the interpreter, allegedly, told him the other had said. The Second Circuit upheld the 'admission' of the interpreted testimony based upon the agency theory.

> 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. The existence of "an external indicium of reliability" was a factor in the court's decision to admit the translation. Ten years later, in *Ohio v. Roberts*, the Court 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. 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. (Benoit, 2015: 310)

It should be mentioned here that the distinction between the agency and the *language conduit* theories has recently disappeared, because the courts have blended the analysis, making the interpreter a mere conduit. As long as the underlying interpretation is deemed 'reliable', the interpreter can be seen as a language conduit/agent and a "testimonial identity" is established for the defendant and the interpreter.

In *United States v. Nazemian* (1991), the Ninth Circuit held that the Roberts test required the government to prove that the declarant's statements were trustworthy. In order to establish "testimonial identity" between the defendant and the interpreter, the Ninth Circuit again applied the four-factor language "conduit test." With this ruling, if a Court determines that the interpreter is "a reliable conduit" there is no confrontation clause issue. Period. The obvious legal convenience in adopting the conduit theory is that if interpreters are viewed as conduits, that is, as the English voice of the defendant, then the involvement of the interpreter does not create a layer of hearsay.

To sum up this section, the conduit test serves as a gatekeeper for limited English defendants to prevent them invoking the Sixth Amendment's Confrontation Clause, which is in fact the only recourse they have to challenge out-of- court disputed interpretations.

The legal/linguistic basis for challenging the rejection of the right to cross-examine an interpreter

In 2013, in a case very similar to Ye's, *United States v. Charles*, the Eleventh Circuit ruled differently. In the original case, involving a Creole speaker who did not speak English and who had been interviewed through an interpreter, a Customs and Border Protection Officer was allowed to testify in court about the words provided to him *in English* by the interpreter. However, on appeal the Court found that the officer's testimony at the original trial had violated Ms Charles's Sixth Amendment right to confront and cross-examine the interpreter; in its judgement the court "held that the difficulties associated with language translation mean an interpreter **must** be considered a separate declarant for Confrontation Clause purposes." (bold added to original) (Benoit, 2015).

In presenting its judgement the court began by noting that the interpreter —- and not the defendant, Charles – was the "declarant of the out-of-court testimonial" (Petition, 2016). Therefore, the Eleventh Circuit concluded, Charles had a Sixth Amendment right to confront the interpreter, on the grounds that the interpreter was the declarant in English of the out-of-court testimonial statement which the government had introduced through the Customs and Border Protection Officer in live testimony. The court clearly discerned that the Officer had only been able to testify about the words in English provided to him by the interpreter, but not about Charles's words, since she did not speak English but Creole and the Officer did not understand or speak Creole. The Eleventh Circuit concluded that this violated the Confrontation Clause.

The court sustained that Charles had the constitutional right to confront the telephone interpreter in order to dispute the accuracy of her interpreted statements and

concluded that "where the admission of a declarant's testimonial statements is at issue, the Confrontation Clause permits admission only if the declarant is legitimately unable to testify [...]" (Xu, 2014: 1519). So, under this ruling, as long as the translations/interpretations are made during an investigative interview in contemplation of prosecutorial action, limited English proficient people are entitled to invoke their Sixth Amendment's Confrontation Clause right. The Eleventh Circuit observed:

> 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. See 541 U.S. at 60 ("This malleable standard [of reliability] often fails to protect against paradigmatic confrontation violations."); id. at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to ... amorphous notions of reliability."). Instead, the Court held that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Id.; see also id. at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."). And since Crawford, the Court has emphatically reiterated its rejection of a reliability standard, which may be sufficient under the rules of evidence, but does not satisfy the Confrontation Clause. See Bullcoming, 564 U.S. at —, 131 S. Ct. at 2715 (explaining the Court had "settled in Crawford that the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause.")

They further noted that the law enforcement officer could not testify about what the defendant had said, but rather could testify only about what the interpreter told him the defendant had said and therefore they did not treat the testimony as the defendant's own statement under Rule 801(d)(2)(A).

This argumentation and conclusion seems pretty clear then.

But no.

In the Ye case, the Ninth Circuit, in a judgment delivered some two years later in 2015, still based reasoning on the precedent of its own earlier rulings and argued that

> In *United States v. Nazemian*, (9th Cir. 1991), we held that, as long as a translator acts only as a language conduit, the use of the translator does not implicate the Confrontation Clause. Ye argues that *Nazemian* is inconsistent with the Supreme Court's decisions in *Crawford v. Washington* (2004), *Melendez-Diaz v. Massachusetts* (2009), and *Bullcoming v. New Mexico* (2011). As Ye correctly concedes, however, we already have held that Nazemian remains binding circuit precedent because it is not clearly irreconcilable with Crawford and its progeny. *United States v. Orm Hieng* (9th Cir. 2012). As a three-judge panel, we are bound by *Orm Hieng* and *Nazemian*. (*United States of America v. Aifang Ye*, 2015)

This is either a misunderstanding or a deliberate misinterpretation by the judges, because, although the Nazemian case of 1991 deals with language issues, that is the interpreter's reliability as a CONDUIT, it does not consider the confrontation issue decided later in *Crawford* in 2004, let alone does it set out to argue against the case made so powerfully by the Eleventh Circuit judges in the recently concluded *Charles* case.

At least the Eleventh Circuit judges have recognized that interpreting is inherently a subjective and discretionary process and that perfect interpreting is an unattainable goal, because no two languages are sufficiently similar to represent the same social reality. For this reason interpreters are frequently faced with situations where a language forces them to either make a distinction not made in the source text or obscure one that does exist. Even the physical world is not divided up identically linguistically, with equivalent labels attached to all physical objects and concepts. For example, English speakers are surprised that Portuguese does not distinguish lexically between *finger* and *toe* and Portuguese speakers that English does not distinguish lexically between a *pretty ear*, a *good ear* and an *ear of corn*.

Thus, any and every interpreter is inescapably a co-author of the resulting interpreted text. And if one sees the interpreter as an active participant who contributes meaning and 'owns' the translated text – a view accepted in the laws of many countries, which assign the copyright of a translation to the translator and not to the author of the original text – then one must also accept that any translated interview has two separate authors or *declarants*. And, if the translator is accepted as a declarant, then the translation itself must be regarded legally as testimonial hearsay, with all the legal consequences involved in the Confrontation Clause of the Sixth Amendment.

Concluding Observations

As noted above, in 2016 the Supreme Court declined to review the judgment of the Ninth Circuit in the Aifang Ye case and so, unless and until the Supreme Court agrees to accept another such case and makes a ruling on the defendant's right to confront the interpreter, the case to convince judges to assign co-author/declarant status to interpreters, with all that implies, will need to be made individually in most of the other Circuits in the US. As the country becomes more and more linguistically diverse, the use of interpreters of all kinds will become more and more frequent, as will cases in which defendants will want to assert their right to confront the interpreter.

In the meantime, we offer some recommendations to improve the current situation:

a) The Government should provide basic interpreter training and accreditation without which interpreters should not be allowed to work in out-of-court legal contexts.
b) There should be a national register listing out-of-court interpreters and indicating their areas of expertise, training, experience, license numbers and contact details.
c) There should be an independent quality-control monitoring system for all out-of-court interpreters.
d) All significant interpreting sessions should at least be audio-recorded, and a copy given to the interviewee at the conclusion of the interview.
e) Interpreters should be encouraged to take notes and to preserve these notes afterwards under the confidentiality privilege.
f) Any case where the cross-examination of interpreters is denied should be standardly appealed.

Finally, as we expect cases to continue to be fought in the Circuit Appeal courts, we hope this article will provide some ammunition for future appeals and so we offer, in an Appendix, a list of suggested cross-examination questions that defense lawyers could draw on to prepare for the cross-examination of an interpreter.

Notes

[1]Pilar Cal-Meyer worked *pro bono* as an expert providing input about interpreting matters to the Anfang Ye *amicus brief* that was sent to the Supreme Court

Cases

Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).

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Appendix

Possible questions for the cross-examination of an out-of-court interpreter

The following set of questions, while based on the needs of the Aifang Ye case, should provide a good basis for defense lawyers to work from when preparing for the cross-examination of an interpreter. The main purpose for cross-examining the interpreter is to ascertain her interpreting knowledge, experience, training and familiarity with the standards and procedures of legal interpreting. Of course, as we noted above in the body of the article, the added advantage of cross-examining an interpreter is that judges and jurors are incidentally able to assess for themselves both the quality of the English spoken by the interpreter and her own level of understanding of the questions being put to her. Of course, if the interpreter is only a second language speaker of the defendant's language, it may also be necessary to arrange for an independent test of her competence.

- Where were you born?
- What is/are your native language(s)?
- Where did you receive formal education?
- In what language(s)?
- If you were not born in the US, how old were you when you immigrated?
- What is your highest level of education?
- If you have more than one language other than English, in which contexts did you learn them?
- In what contexts do you now use each of your languages?
- Which is your dominant language?
- If you were born in the US with English as your native language, where did you learn your interpreting language(s) and for how many years have you spoken it/them?
- Which language do you normally use with your parents, partner, children, friends?
- Which languages do you interpret into and from? When do you use [the language of the accused] in non-interpreting situations and for what purposes?
- How much of your professional work involves interpreting into and out of [*the language of the accused*]?
- When did you last visit [*country of the language of the accused*]?
- How frequently do you visit?
- How long do you normally stay for?
- How do you keep up with language changes and new sociocultural terms in [*the language of the accused*]?
- What professional qualifications do you have in the areas of translating and interpreting?
- What kind of interpreting training have you received?
- When?
- What types of community, medical and/or legal certifications in interpreting do you have?

- What interpreting tests have you taken?
- Which have you passed?
- Did your current employer set you a language test?
- If so, what did it consist of?
- What kind of training have you received specifically for interpreting in *legal contexts*?
- To what professional associations do you belong?
- Does your association and/or employer require you to spend time each year following retraining or refresher courses and/or attending conferences about interpreting?
- When did you last attend a re-training course and/or conference?
- What journals, newsletters and publications do you subscribe to?
- What professional lists do you belong to and what translation-related blogs do you read?
- Have you ever worked as a *court* interpreter?
- If so, for how long or how many times and for which language(s)?
- Who employed you in this particular case?
- Are you a staff employee or an independent contractor?
- Is your employer a for-profit company?
- Did your employer give you any specifically designed training for legal telephone interpreting?
- If so, what did the training entail and what qualifications did the instructors have?
- If not, do you think you would have benefitted from some such training?
- What do you see as the main difficulties with telephone interpreting?
- Are there ways any or all of these difficulties could be reduced or even removed?
- Is phone interpreting more demanding than face-to-face interpreting?
- If so in what ways?
- Do you work exclusively doing legal telephone interpreting for [*the Agency who employed you in this case*], or does your employer assign you to other government and/or non-governmental jobs?
- Could you give examples of other work you have undertaken?
- Were you conscious at any time during this assignment of problems with the telephone line?
- Were you conscious at any time of the other participants having any difficulties in hearing and/or understanding you?
- Did you have any difficulties in hearing and/or understanding the other participants at any time?
- If so, how did you deal with these difficulties?
- Does the witness/accused speak the same language as you? (*There have been cases when the interpreter only spoke a cognate language.*)
- If so, are you familiar with the particular dialect used by the witness/accused?
- Is it the same, similar to or quite different from yours?
- Were there any words or phrases which s/he used that you did not understand?
- How did you deal with this?
- Were you aware of any words or phrases you used that the witness/accused did not understand?
- How did you deal with this?

- What type of interpretation did you use on the day in question? Consecutive or simultaneous or both? [*this is to test the familiarity of the interpreter with the most basic concepts of interpretation.*]
- Could you explain the difference between the two to the jury and why and when you might use one or the other?
- Did you have a video-link or only audio-link during the interpretation?
- If you didn't have a video-link do you think it would have helped you to interpret better?
- If you did have a video-link, were you able to see both participants?
- Was the image good enough to allow you to observe the participants' facial expressions, body language, reactions and their inter-personal dynamics?
- Did you at any time have visual access, as you were interpreting, to the interviewer's notes as they were being written?
- Did you ever see these notes again at a later time?
- Did the interviewer read out the written notes to you for confirmation?
- Did the interviewer ask you to interpret the notes so that the witness/accused could verify their accuracy?
- If so, was that after every question/answer or only when the interview/statement-taking was over?
- Did you need to correct his notes at all?
- If so what kind of mistakes had the interviewer made? Were they mis-hearings or misunderstandings or both?
- Do you work frequently with this interviewer?
- How long did the interview last?
- Did you feel tired towards the end of the interview?
- Do you agree that (*a list of terms which the accused claims to have used*) could be translated into English as "xx, yy", etc.?
- Were you aware at any point of any times when you had to choose between more than one possible translations of what the interviewee said?
- As far as you know, is it customary to audio-record telephone interviews?
- Do you or your employer ever record interviews for quality control purposes?
- Was this particular interview recorded?
- Do you ever work jointly with a colleague interpreter in order to monitor each other's performance and/or to avoid fatigue?
- Did you in this case?
- If not, in retrospect do you think it would have been useful to have done so?
- Do you normally take notes as an *aide-memoire* while you are interpreting as many interpreters do?
- Did you on this occasion? If not why not?
- Do you normally keep these notes afterwards?
- Did you on this occasion?
- How many interpreting sessions had you already performed that day, before you took the call in question?
- Were you aware of experiencing mental fatigue during the interview in question?
- How did you interpret the interviewer's questions, in the first person or in the form "Mr X asked"? (*Interpreters are usually told to perform as the voice of the interpreted, but many do not and the form "Mr X asked if…" frequently introduces small changes to the message*)

- How did you interpret the defendant's replies, in the first person or in the form "Ms X said"?
- Did you ever need to ask either of the participants to repeat what they had said?
- Did you ever need to ask either of the participants to rephrase or clarify what they had said?
- Do you believe that interpretation is always perfectly transparent if done by a highly qualified and experienced interpreter?
- Are there times when you cannot produce a perfect translation, when you have to choose between giving an accurate translation which is ambiguous or adding extra content yourself to make the answer unambiguous?
- Which option do you choose?
- When you are interpreting, are there times when you need to disambiguate words or expressions depending on the linguistic and pragmatic context? For instance you may need to add information to clarify unspecific reference words and phrases such as "they", "he", "she", "over there", "at that moment", "that night", "she told her to bring her to her car". etc.?
- Are there times when you need to infer meaning in order to understand what the interviewee has said before you are ready to convey it in the target language?
- Are there times when you would really need to ask the interviewee or the interviewer a clarificatory question in order to be able to translate unambiguously into the other language?
- Do you, or do you not see that as part of your role?
- Do you agree that there are numerous terms, expressions, metaphors and proverbs in any language pair for which there is no easy translation or equivalent? What do you do when faced with such a situation?
- What do you do when the client's meaning is implied and not made explicit? [*Question to see if the interpreter will choose to a) produce a translation that is as literal as possible and hope the interviewer will derive the same interpreted meaning; b) transmit the implied meaning; or c) ask the interviewee to clarify.*]
- Are the words you use when interpreting, that is the words on which the official record is based, always the best choices or are they sometimes the best you can find at that moment, but ones on which you could have improved if you had been producing a written transcript with no time pressure?
- Do you regard yourself when interpreting as a shaper of meaning? That is do you believe that your knowledge, intuition, instinct, experience and your personal place in the world shape your understanding of what you interpret?
- Could you list and explain some of the most relevant tenets of legal interpretation, especially the ones related to interpreting during a highly sensitive session?
- What is your understanding of the terms 'impartiality' and 'neutrality'?
- Were you able to be impartial and neutral during this interview?