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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 29 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

CASE NO. 65,886

ALFREDO CHAO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent would tender those facts set forth in the opinion on Chao v. State, 453 So.2d 878 (Fla. 3d DCA 1984) as the operative facts with the following additions:

Both Rafael Menendez and Tracy Crabtree Clifton testified at trial that Chao the day prior to the shooting had spoken of Mary Dawn Hoef to them at the Whale Harbor Lounge. Each testified that Chao stated he planned on using the gun he had on the victim Ms. Hoef. (TR.76, 78, 87). The reason for said action revolved around Chao's unhappiness because Ms. Hoef and he had broken up.

Pedro Mendez testified for the state. Mr. Mendez, Chao's relative through marriage, was contacted by Chao concerning Chao's surrender. (TR.113). Mr. Mendez stated he acted as an interpreter for Detective Rigdon and read with Chao, the Spanish rights warnings given to them by Rigdon. (TR.110). After reading said rights Chao stated to Mr. Mendez he understood the rights' card. (TR.111).

When asked, Mr. Mendez could not remember what he translated. (TR.112). However, he testified he translated truthfully. (TR.112-113).

Detective Rigdon testified Mr. Mendez contacted him concerning Chao's surrender. (TR.115). Rigdon told Mr. Mendez that Chao was under arrest. (TR.116).

At this point, the defense objected:

> Q. After placing the defendant under arrest, what did you do next?
>
> A. Through Mr. Mendez, I--
>
> MR. WOLKOWSKY: Your Honor, I'm going to object at this point and ask to approach the bench on this.
>
> THE COURT: Object to what?
>
> MR. WOLKOWSKY: Yor Honor, there has been no predicate laid or authenticate that Mr. Mendez is a qualified interpreter or translator and I believe that anything that's passed through him would be hear-say.
>
> THE COURT: Sustained, lack of predicate.
>
> (TR.116-117).

At this juncture, the state endeavored to develop a proper predicate for the admission of said testimony. (TR.117-120).

> Q. Did you have an occasion to ask the defendant any questions through Mr. Mendez after the questions you've just told us about?
>
> A. Yes.

MR. WOLKOWSKY: Your Honor, I'm going to object the predicate has not been laid.

THE COURT: If you're coming up here to argue your position; you cannot. If it's for something else, you can.

MR. WOLKOWSKY: All right. Thank You.

(TR.120-121).

Following the above cited record, no further objections were made by the defense concerning Detective Rigdon's testimony. (TR.121-125).

Detective Rigdon testified that he believed Mr. Mendez was properly and truthfully translating and that he knew of no reason why Mr. Mendez would not have done so. (TR.118). Detective Rigdon had no problems in communicating with Mr. Mendez. (TR.118).

As a result of Detective Rigdon's conversation with Chao through Mr. Mendez, Chao stated that the gun used to shoot Mary Dawn Hoef was thrown away in the dumpster at the Lorilei Restaurant. (TR.121). While interpreting this question, Detective Rigdon saw Chao point over to the dumpster. (TR.121).

Detective Rigdon also asked if Chao had shot the gun,

to which Chao replied through Mr. Mendez: "He says he shot her because he loves her and wants no other man to have her." (TR.122).

Chao asked Detective Rigdon through Mr. Mendez if the police had followed him from Ms. Hoef's house. (TR.122).

Mr. Chao testified through an interpreter at trial. He stated that he understood some English and had been studying English in Plantation Key. (TR.129).

Mr. Chao denied making any statements that he wanted to harm or shoot Ms. Hoef (T.132), although he misrepresented to the court his relationship with Ms. Hoef (TR.131; compare TR.138). Mr. Chao testified that Detective Rigdon was telling the truth concerning his (Chao's remarks) as to where the gun was thrown away. (TR.142). Although he had his finger on the trigger, Mr. Chao stated he didn't know how to operate the gun. (TR.144).

Mr. Chao testified that he entered the Hoef's residence and saw Ms. Hoef on her bed watching T.V. (TR.135). He showed her the gun and, in half Spanish/half English, informed her he wasn't going to hurt or shoot her. (TR.136, 148). Ms. Hoef, Chao stated, hit his hand and the gun discharged. (TR.136). He testified that he thought about

going to the police but was nervous. Instead he fled and hid in an old house. (TR.136).

Ms. Hoef, who testified at trial, stated Mr. Chao and she just dated. (TR.26). She indicated that although not fluent in English, Mr. Chao spoke English and she spoke some Spanish. (TR.26, 34).

Mr. Chao came to her door and when she answered, Chao stood there holding a gun and the next thing she recalled, he had shot her. (TR.28-29, 30, 38).

POINT ON APPEAL

WHETHER DETECTIVE RIGDON'S TESTIMONY RECOUNTING THE INTERPRETER'S, MR. MENDEZ'S, TRANSLATION OF CHAO'S REMARKS CONSTITUTE IMPERMISSIBLE HEARSAY AMOUNTING TO PREJUDICIAL ERROR.

SUMMARY OF ARGUMENT

The State's argument is three-fold. First, a reassertion that no conflict exists between Chao v. State, 453 So.2d 878 (Fla. 3d DCA 1984) and decisions of this Court and other districts. Specifically, Chao v. State, supra, adheres to the controlling decision in Meacham v. State, 33 So. 983 (1903) and is factually as well as legal distinguishable from the dictum found in Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983) and State Farm Mutual Automobile Ins. Co. v. Ganz, 119 So.2d 319 (Fla. 3d DCA 1960).

Second, the issue of whether testimony recounting a translated conversation is inadmissible hearsay, was not properly preserved for appeal review because defense counsel failed to specifically object on the ground upon which he sought appellate review.

Third, testimony recounting a translated conversation is not inadmissible hearsay because the interpreter whether specifically selected or not, acts as an agent for the party to the conversation. As such, the adopted mode of communication or the language conduit, to wit: the interpreter, speaks as if he is the party speaking; thus making the translation presumptively the party's own. The only issue therefore is the weight not the competency of the translation.

ARGUMENT

DETECTIVE RIGDON'S TESTIMONY RECOUNTING THE INTERPRETER'S, MR. MENDEZ'S, TRANSLATION OF CHAO'S REMARKS DID NOT CONSTITUTE IMPERMISSIBLE HEARSAY AMOUNTING TO PREJUDICIAL ERROR.

Chao argues that the Third District Court's decision in Chao v. State, 453 So.2d 878 (Fla. 3d DCA 1984), is wrong because the testimony of Detective Rigdon was hearsay and as such did not fall within any exception provided in Section 90.801(2) Florida Statutes. Relying on two earlier District Court decisions, State Farm Mutual Auto Insurance Co. vs. Ganz, 119 So.2d 319 (Fla. 3d DCA 1960) and Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983), Chao sought and obtained conflict review.

Respondent takes issue with Chao's arguments and would submit there exists three bases for denying Chao any relief.

1. Conflict Jurisdiction of This Court has Been Improvidently Granted.

There appears no direct and express conflict in Chao v. State, supra with the controlling authority of Meacham v. State, 45 Fla. 71, 33 So. 983 (1903). See: Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). In fact the Chao,

decision adheres to the policy of stare decisis, and thus cannot serve as the basis for express and direct conflict simply because two other district court decisions "suggest" a contrary rule of law. See: Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970); Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980).

Indeed Judge Pearson, in footnote 3 of the Chao opinion recognizes same. Moreover, the Third District has followed the Meacham decision in at least one other similarly circumstanced case in Henao v. State, 454 So.2d 19 (Fla. 3d DCA 1984) wherein the Court held:

> "The primary point on this appeal...claims that the testimony of the investigating officer as to the contents of an oral statement by the defendant shortly after his arrest was hearsay and hence erroneously admitted because Henao made it in Spanish and the officer could and did testify only to the English translation rendered by an interpreter. Meacham v. State, 45 Fla. 71, 33 So. 983 (1903) compels rejection of this contention. There, the court stated in its syllabus:
>
> > 1. Where two parties, speaking different languages, and who cannot understand each other, converse through an interpreter, the words of the interpreter, which are their necessary medium of communication, are adopted by both, and made a part of their conversation, and the interpretation under such circumstances is prima facie

> to be deemed correct. In such cases either party, or a third party who hears the conversation, may testify to it as he understands it, although for his understanding of what was said by one of the parties he is dependent on the interpretation which was a part of the conversation. The fact that such conversation was had through an interpreter affects the weight, but not the competency, of the evidence.
>
> But cf., Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983); rev. den. 446 So.2d 100 (Fla. 1984)(dictum indicating contrary rule without citing to Meacham); State Farm Mutual Automobile Ins. Co. v. Ganz, 119 So.2d 319 (Fla. 3d DCA 1960)(same); see generally Annot., Statements to Witness Through Interpreter, 12 A.L.R. 4th 1016, 1023 (1982).
>
> Henao v. State, 454 So.2d at 20.

Although Chao seeks to embellish the dictum found in both Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983) and State Farm Mutual Automobile Ins. Co. v. Ganz, 119 So.2d 319 (Fla. 3d DCA 1960) to demonstrate conflict, neither measures up to a direct and express conflict with Meacham v. State, supra, Henao v. State, supra, or the Chao, decision under scrutiny.

In Rosell v. State supra, the decision reversing was

based on the state's failure to show voluntary consent. Citing only to State Farm Mutual Automobile Ins. Co. v. Ganz, supra, the Court therein noted as dicta:

> We note that the trial court also erred in admitting over objection, Deputy Tucker's testimony as to what Mary Aldridge, the interpreter, told him concerning the statements which appellants made to Ms. Aldridge. Deputy Tucker's testimony is clearly hearsay....
>
> 433 So.2d at 1263.

Indeed a casual review of the facts in Rosell, reveal that they are quite different from Chao. A critical issue in Rosell, was whether Rosell, had knowledge that the garbage bags contained marijuana:

> ...Appellant's story was that they found the bags by the side of the highway, pulled over, and that Cabrera loaded the truck with the bags while Rosell remained at the driver's seat. Appellants testified that they though the bags contained clothing. Mary Aldridge, an interpreter, testified that she interpreted between appellants and Deputy Tucker on November 14, 1981. Aldridge testified that appellant's only statement at that time was that they did not know what was in the bags. Deputy Tucker was asked to testify concerning the interrogation session at which Alridge told him that the appellants had told her that they though at grassy material was in the bags....
>
> Rosell v. State, 433 So.2d at 1262. (emphasis added).

Clearly, Rosell had a legitimate hearsay complaint, because the officer's testimony was offered to impeach the interpreter's testimony that Rosell did not know what was in the bags. In Chao, the interpreter, Mr. Mendez, could not recall what he translated. As such, Meacham v. State, supra, and Henao v. State, supra, and even Rosell v. State, would support the lower court's finding that Detective Rigdon's testimony as to what Chao said through Mr. Mendez was admissible.

Having failed to satisfactorily support the exercise of this Court certiorari jurisdiction predicated on conflicts between the districts or a decision of this court, Respondent would submit further review be concluded because jurisdiction was improvidently granted.

2. The Third District Erroneously Concluded This Issue was Properly Preserved for Appellate Review.

Although the Third District affirmed the judgment and sentence entered below, Respondent maintains that the issue raised on direct appeal was not properly preserved for appellate review. The basis for objection at trial was that no predicate had been laid as to Mr. Mendez's qualifications as an interpreter, and therefore any evidence passing through him would be hearsay. (TR.116-117).

Such objection is a far cry from the complained of hearsay problem addressed by the Third District in Chao, and the current issue before this Court.

The Court observed in footnote 2 of Chao v. State, supra, that:

> Despite the State's urging that the defendant's failure to review his hearsay objection after the trial court's ruling constituted a waiver of the objection, we believe that under the circumstances of this case the defendant's initial objection adequately preserved the point for appellate review. A ruling favorable to the defendant on hearsay grounds would have concluded all questioning of Rigdon as to the translated questions and answers, no matter what predicate was laid, that is, no matter how qualified Mendez was shown to be as an interpreter. Thus, when the trial court sustained the defendant's objection solely on the ground of improper predicate, this constituted an overruling of the hearsay objection and obviated the necessity of, and made futile, a further hearsay objection. In sum, defense counsel had adequately apprised the trial court of his position that what Mendez said to Rigdon was inadmissible hearsay, and the trial court, so appraised, ruled adversely to the defendant.
>
> Chao v. State, 453 So.2d at 879.

The District Court has misread the record and expanded the limited scope of the objection tendered at trial. The

initial objection was that a proper predicate had not been laid and therefore anything flowing from the interpreter's lips through the testimony of Detective Rigdon would be hearsay. (TR.116-117). The objection was sustained. (TR.117). The State attempted to lay its predicate (to qualify Mr. Mendez) and sought to requestion Detective Rigdon as to what Mr. Mendez related to him that Chao said. (TR.120). At this point, the defense objected again, stating specifically:

> MR. WALKOWSKY: Your Honor, I going to object again, same ground. I believe the predicate hs not been laid.
>
> THE COURT: Objection overruled as to predicate.
>
> MR. WALKOWSKY: Your Honor, could we approach the bench in that matter?
>
> THE COURT: If you're coming up here to argue your position, ypu cannot. If it's for something else, you can.
>
> MR. WALKOWSKY: All right. Thank you.
>
> (TR.120-121)

(Emphasis added).

No further objection was forthcoming. Certainly, no objection that Detective Rigdon's testimony was inadmissible hearsay. Contrary to the District Court's speculation as to what would have happened had a specific objection been

made, the reality of the record demonstrates that defense counsel's concern was that no predicate as to Mr. Mendez' qualification had been laid rather than the fact that Detective Rigdon's testimony was hearsay. This is true because the proper objection which should have been made initially was not that a failure to lay a predicate had occurred but rather, that whether Mr. Mendez was a qualified interpreter or not, the fact that Rigdon was testifying as to what the interperter said Chao said, resulted in answers which were inadmissible hearsay.[1]

Moreover, to suggest that the trial court's ruling on the ground of improper predicate "...constituted an overruling of the hearsay objection and obviated the necessity of, and made futile, a further hearsay objection," renders the contemporaneous rule and case-law attending thereto meaningless. See Kujawa v. State, 405 So.2d 251 (Fla. 3d DCA 1981); Ferguson v. State, 417 So.2d 639 (Fla. 1982) and Castor v. State, 365 So.2d 701 (Fla. 1978), wherein this Court held:

[1]It should be noted that defense counsel was not caught off-guard with regard to the state's efforts to have Detective Rigdon testify as he did. Prior to Mr. Mendez' testifying the State attempted to have Mr. Mendez declared a court or adverse witness. (TR.100-106). Although inquiry was made as to what Chao said to Mr. Mendez when he translated, Mr. Mendez at trial could not remember what Chao specifically said. (TR.112).

> To meet the objection of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the punitive error and to preserve the issue for intelligent review on appeal. (cites omitted).
>
> 365 So.2d at 703.

While a summary affirmance should obtain, such result should be predicated on the basis that the hearsay issue was not properly before the appellate court for review because it was not preserved.

> 3. Testimony Recounting an Interpreter's Translation does not Constitute Impermissible Hearsay Where the Interpreter Although Called to Testify at Trial Cannot Recall The Contents of the Defendant's Remarks.

The District Court concluded that the testimony recounting a translated conversation is not hearsay. Chao v. State, 453 So.2d at 880. Citing to an annotation on the topic [Annot., 12 A.L.R. 4th 1016 (1982)], the Court followed the Supreme Court's earlier decision in Meacham v. State, supra, which provides that the "very act of speaking through an interpreter constitutes an adoption of the interpreter's words as one's own." This is so whether the "persons who translated statements are being introduced selected or participated in the selection of the translator." Meacham v. State, 33 So. at 984.

In a majority of instances where courts have held testimony recounting translated conversation admissible, two theories have emerged. First, as in Florida per Meacham, an agency theory which justifies admissibility because it is not hearsay. Second, the theory that although said testimony is hearsay it is admissible hearsay, if trustworthiness and necessity are shown. People v. Randazzio, 87 N.E. 112 (N.Y. 1909).

In Chao v. State, supra, Judge Pearson concluded that based on Meacham v. State, the testimony of Officer Rigdon did not constitute hearsay testimony. The court further observed:

> ...While it might well be argued that the holding in Meacham should be confined to a situation which, as here, the person whose translated statements are being introduced, selected or participated in the selection of the translator, we find no such qualification in the rule announced in Meacham, which, in essence, is that the very act of speaking through an interpreter constitutes an adoption of the interpreter words as ones own. 4
>
> ---
>
> 4 It follows from this rule that Mendez's testimony that he accurately translated the conversation between Rigdon and the defendant was not a required predicate to the introduction of Rigdon's testimony, but was nonetheless admissible as going to the weight to be given to the translated words.
>
> Chao v. State, 453 So.2d at 880.

Likewise, in Henao v. State, 454 So.2d at 19, the Third District Court of Appeal concluded:

> The primary point on this appeal from a conviction for trafficking by possession of over 400 grams of cocaine claims that the testimony of the investigating officer as to the contents of an oral statement by the defendant shortly after his arrest was hearsay and hence erroneously admitted because Henao made it in Spanish and the officer could and did testify only to the English translation rendered by an interpreter.

Citing to Meacham v. State, the court in Henao concluded that the words of an interpreter, which become a necessary medium of communication when two parties are unable to communicate in the same language, are adopted by both and made part of the conversation of each of the parties. In that instance as well as the instant case, either party or a third party who hears the conversation may testify to it as he understands it, "Although for his understanding of what was said by one of the parties he is dependent on the interpretation which was part of the conversation." In essence, the court concluded that the fact that the conversation was through an interpreter affects the weight, but not the competency, of the evidence.

While it should be noted that in Henao that the interpreter took the stand and gave a version of Henao's statement which did not materially differ from the officer's

testimony whose testimony was challenged as being hearsay, the court did not bottom its ruling on the fact that the interpreter also testified as to what the defendant said to her in Spanish.

As previously noted, in Florida the main authority has been the Meacham decision decided in 1903. Since that time, the legal tomes of Florida have been void of any decisions which specifically address this particular issue until relatively recently. As previously noted, the decisions in State Farm Mutual Automobile Insurance, Co. v. Ganz, 119 So.2d 319 (Fla. 3d DCA 1960) and Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983), cert. den., 446 So.2d 100 (Fla. 1984) at best discuss the instant issue in dictum. The only other decisions, Henao and Chao, are of recent vintage and adhere to the Meacham decision. Assuming this court reaches the merits of the claim, a like result should obtain and the rule of law in Florida should be remain:

> Where a witness on the stand is asked to testify to words of "A" uttered out of court, as translated to him by "M" interpreting between them, the witness is not qualified by personal knowledge of "A's" utterances and may not testify; the interpreter "M" is the only qualified witness. But if "A", whose utterances are to be testified to, is a party opponent, then he may be regarded as having made "M" his agent to translate and thus "M's" translations are admissions usable against "A".

Thus emerges the agency theory. Such a theory has been adopted by a number of foreign jurisdictions as well as the federal judiciary.

In State v. Letterman, 616 P.2d 505 (Ore. CA. 1980), the court therein affirmed in a burglary case the issue of whether a police officer could testify as to an interpreter's translation of a defendant's statement where the defendant, at trial, raised a timely objection predicated on the fact that the officer's testimony was hearsay.

The facts in State v. Letterman, supra, reflect that an officer obtained a statement from Letterman, a deaf mute, through an interpreter. At trial, the interpreter testified that she answered all questions accurately but was unable to recall the answers she translated from the defendant to the police officer. The officer testified at trial that the defendant said through the interpreter that while accompanied by a friend, he had entered the Monmouth Post Office while it was closed to the public and stole an AM/FM tuner, amplifier and two speakers. The defense argued that the officer's testimony was inadmissible hearsay. The record further reflects that the defendant did not question the interpreter's qualifications.

The court held that the officer's testimony concerning the defendant's out-of-court statement was

hearsay, however, under an agency theory the officer's testimony was admissible. Reasoning that the interpreter's words were those of the speaker, as such, the interpreter's words heard by the police officer equated to the words of the speaker heard by the police officer. See: Burkholter v. State, 247 S.W. 539 (Texas 1922); Leal v. State, 291 S.W. 226 (Texas 1927); Commonwealth v. Vose, 32 N.E. 355 (Mass. 1892); United States v. Santana, 503 F.2d 710 (7th Cir. 1974); United States v. DaSilva, 725 F.2d 828 (2d Cir. 1983) and United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985).

In Commonwealth v. Vose, supra, the Massachusetts Supreme Court held in an abortion case where an interpreter was utilized that: "The fact that a conversation was held through an interpreter affects the weight, but not the competency of the evidence."

Other courts have held testimony of a witness as to extra-judicial statements made through an interpreter by another person in a conversation with the witness or with a third person is not inadmissible as hearsay, where the interpreter was selected by and thus acted as agent for the parties to the conversation.

For example, in United States v. Santana, supra, the court upheld an attack as hearsay, the testimony of a

prisoner who had acted as interpreter between cohorts. The court observed:

> The real concern here is less the hearsay nature of Rimbaud testimony than it is the reliability of the Hysohion translation. (cite omitted). 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 contents of the conversations as translated. (cites omitted). We thus think it was proper to admit Rimbaud's testimony regarding these translated conversations.
>
> 503 F.2d at 717.

Two considerations must be determined under the agency theory. First, the cases appear uniform in stating that if the defendant asks or agrees to have the interpreter translate the defendant's words, no hearsay violation occurs. This is true whether the interpreter testifies at trial or a third party hearing the words of the translator testifies at trial. Second, if it is unclear as to whether a given defendant has acquiesced or agreed to an interpreter to translate his words, the courts have looked to the motive behind the translator or the third party testifying as to what the translator has said to determine whether there was some motive to mislead or to translate inaccurately. United States v. Ushakow, 474 F.2d 1244, 1245 (1973); United States v. DaSilva, supra and United States v. Alvarez, supra.

In the instant cause, the record reflects that not only was Mr. Mendez, the interpreter, voluntarily present and a relative of the Chao, but he was asked to assist Chao in turning himself into the police by Chao. It would appear on the record that Chao voluntarily made Mr. Mendez his agent or his language conduit in order to communicate his words from Spanish to English to Detective Rigdon. Even assuming for the moment that he did not voluntarily agree to Mr. Mendez, the record is void of any reason why Mr. Mendez would have a motive to mislead or reason to accurately translate the words of Mr. Chao. In United States v. Alvarez, 755 F.2d at 859-860, the Eleventh Circuit in discussing the admission of evidence thought to be inadmissible hearsay observed:

> The appellants also contend that the District Court erred by admitting into evidence the statements translated by agent Rios for the benefit agent D'Atri. According to the appellants, the translations constituted hearsay inadmissible under Rule 802 of the Federal Rules of Evidence. We disagree. In United States v. DaSilva, 725 F.2d 828 (2d Cir. 1983), the Second Circuit rejected a nearly identical argument, reasoning that the translator was acting as an "agent" of the defendant and the translation was therefore admissible under Rule 801(d)(2)(c) or (d). The DaSilva court explained:
>
> > Provided the interpreter has a 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 presumption of agency.

Id at 831-832 (Quoting for J. Weinstein & M. Burger, Evidence Section 801 (d)(2)(c)(01), at 801-158, n.34 (1981). The court also stated:

> 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," United States v. Ushakow, 474 F.2d 1244, 1245 (9th Cir. 1973), and a testimonial identity between declarant and translator brings the declarant's admissions within Rule 801(d)(2)(c) or (d)....the fact that [the translator] was an employee of the government did not prevent him from acting as [declarant's] agent for the purpose of translating and communicating [the declarant's] statements to [the witness]. See Reinstatement (2nd) of Agency Section 392 (1958)(dual agency permitted).

DaSilva, 725 F.2d at 832. We find the reasoning of the DaSilva court persuasive, and we cannot accept Appellants' claim that the translation constituted inadmissible hearsay.

It should be noted that Rule 801(d)(2)(c) and (d) are similar if not identical to Section 90.803(18)(c) and (d), Florida Statutes.

In People v. Randazzio, 87 N.E. 112 (N.Y. 1909), the court therein held that a stenographer's interpretation of the statement made by a defendant through an interpreter to a district attorney was properly admitted. The court observed:

> ...In Jones on Evidence (2nd Edition) Section 265, it is stated that "when a person selects an interpreter to communicate with another person and to receive the answers, such interpreter is the accredited agent of the one employing and the statement of the interpreter in the course of the employee are admissible as original evidence, and are in no sense hearsay." It is claimed, however, that ...the interpreter was not selected by the defendant, but was selected by the district attorney. Assuming that he was so selected, still the defendant made use of him in communicating his statement to the district attorney. The interpreter, therefore, must be deemed to act for both parties, and the statement by the defendant consequently became original evidence the same as if the defendant had himself first selected the interpreter.

The court went on to observe:

> ...We do not, however, deem it essential that the interpreter should be the agent of either party; for a person who is unable to speak or understand our language is compelled by necessity to communicate his ideas through the means of an interpreter, and it matters not whether the interpreter

> be selected by him or some other person in order to make his statement original evidence. Of course, if there has been an error in correctly interpreting his statement, he is not bound thereby.
>
> 87 N.E. at 116.

Interestingly enough, the court in the Letterman case, discussed earlier, did not uphold the admission of statements made by a third party based solely on an agency theory but opined that the statements was admissible because they satisfied the two most common, if not all, exceptions to hearsay. Specifically, that there was the circumstantial guaranty of trustworthiness and there was necessity for the use of the out-of-court statement.

This, of course, provides the second theory upon which courts have upheld the recounting of an interpreter's translation as admissible evidence. In Timber Access. Ind. v. United States Plywood, 503 P.2d 482 (Ore. 1972), the court therein observed:

> The admission of a statement which cannot be neatly categorized into one of the traditional exceptions to the hearsay rule is not unknown in this country. For example, in G & C Merriam, Co. v. Syndicated Publishing Co., 207 F. 515, 518 (2 Cir. 1913), Judge Learned Hand, then a district judge, having been unable to find a case on point which would allow the admission of a statement in the preface of a

> dictionary as evidence of the facts it recited, relied solely on Wigmore on evidence and Wigmore's analysis that the requisites of an exception to the hearsay rule are necessity and circumstantial guaranty of trustworthiness. Wigmore on Evidence Sections 1421, 1422, 1690 (First Edition 1913). In Dallas County v. Commercial Assurance Co., 286 F.2d 388 (5th Cir. 1961), the court followed the analysis of Judge Learned Hand in considering the admission of a newspaper article under Rule 43(a) of the Federal Rules of Civil Procedure. In closing its opinion, the court said:
>
> > ...We do not characterize this newspaper as a "business record," nor as a "ancient document," nor as any other readily identifiable or happily tagged species of hearsay exception. It is admissible because it is necessary and trustworthy, relevant and material and its admission is within the trial judge's exercise of discretion in holding the hearsay within reasonable bounds. 286 F.2d at 397-98.
>
> 503 P.2d at 487-488.

Although it should be noted that under the Federal Rules of Evidence, specifically Rule 303(24), there is a general catch-all provision which provides in material part:

> (24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines (a) the

> statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any evidence which the opponent can procure through reasonable effort; and (c) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence....

Where, as here, out of necessity, and because there is circumstantial guaranty of trustworthiness, the testimony of Detective Rigdon was properly admitted. Clearly, in the instant case the deficiencies of "ordinary" hearsay testimony does not exist. If Mr. Mendez (who was Chao's uncle and had no reason to misstate or inaccurately state Chao's statement) could have recalled what he translated, his testimony would have been admissible in court. Out of necessity, because Mr. Mendez could not recall, the only available evidence was that of Detective Rigdon's. Moreover, because there was no motive shown for any misrepresentation, there was "the external indicium of reliability" which attached and the actions and testimony presented at trial were entirely consistent with what the translation reflected Chao said to his uncle, Mr. Mendez. United States v. Santana, supra. With regard to necessity, it is submitted that the very use of an interpreter by a defendant, or in an effort to communicate with a defendant, weighs heavily towards the admissibility of this type of evidence.

In Johnston v. State, 548 P.2d 1362 (Nev. 1976), the defendant therein was charged with two counts of first degree murder. Two other men had previously been convicted for their part in the same murders. Johnston maintained that he was not present at the time and he attempted at trial to introduce testimony of a detective who had spoken to a married couple staying at the motel where the murders took place. This couple had told the detective that they had seen two unkempt men prowling near the victim's room. Although it was inferrable from the evidence of Johnston's not being there with the two men at the time, the trial court excluded the detective's testimony on hearsay grounds. The Supreme Court of Nevada reversed holding that the statement was admissible on statutory grounds but further concluded that based on the principles set forth by Judge Hand in the G & C Merriam, case and Judge John Minor Wisdom's decision in Dallas County v. Commercial Union, the detective's testimony was admissible. The court found that neither the absence of the couple in coming forth and testifying nor any reason for the detective to lie, provided, sufficient reliability to allow the admission of the detective's testimony. A similar parallel can be drawn sub judice.

Of course there is a third theory which could emerge in the instant cause, that being, any testimony recounting an

interpreter's translation is inadmissible hearsay. Such a result is unneccessary in light of the well-reasoned decisions cited herein based on an agency theory and the early decision of the Florida Supreme Court in Meacham v. State, supra. To reach such a result avoids the reality of the cosmopolitan structure of Florida. Many individuals have come from South America as well as Central America and other foreign shores to Florida without fully becoming conversant in the English language. While we extend our justice to these individuals who may on occasion violate our laws, they (because they do not speak our language) should not be given greater privileges than those individuals who have become conversant in the English language.

The agency relationship discussed herein and authorized in Meacham v. State, supra, is sound and well recognized in other states as well as the federal system. The decisions relied upon by Chao are either distinguishable on their facts or dictum at best.

CONCLUSION

The state would submit that this court should dismiss the instant petition for writ of certiorari finding that jurisdiction has been improvidently granted. If not so disposed, Respondent would urge that the Third District opinion in Chao v. State, supra, be summarily affirmed preferably on the basis that the issue was not properly preserved and therefore was not properly before the Third District Court of Appeal. If not, then, the decision in Meacham v. State, supra, is valid law and should be reaffirmed.

Respectfully submitted,

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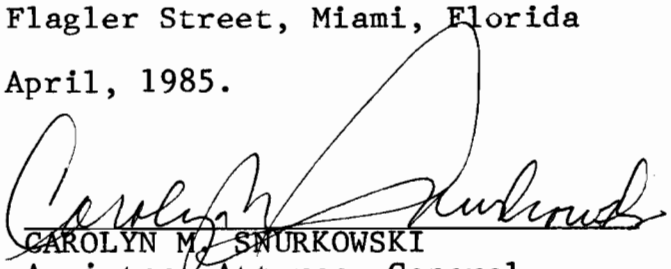
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to MARY V. BRENNAN, Special Assistant Public Defender, PODHURST & ORSECK, 25 West Flagler Street, Miami, Florida 33130, on this 26th day of April, 1985.



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