IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,886

ALFREDO CHAO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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Statement of the Case and Facts

At the outset in replying to the Brief of Respondent, we are forced to take issue with the State's contention that petitioner spoke English at the time of the translation at issue. Respondent cites the Record to the effect that Chao stated at trial that he understood some English and had been studying English at Plantation Key. Unfortunately, the petitioner's testimony at trial was as to his *current* knowledge of English (T. 129), some eight months after the translated conversation, and after he had been incarcerated during this period at the Plantation Key custodial facility, where instruction in English is available.

Respondent flatly mischaracterizes Mary Hoef's testimony. She does not say "Mr. Chao spoke English." (Brief of Respondent, p. 5). She says that she understood some words in Spanish, he understood some words in English, and they communicated mostly by "gestures, you know, basic speaking, you know, such as, you know, Whale Harbor was--you know, things like that." (T. 34). When Mary said "Whale Harbor," Chao would understand she wanted to go to dance. When she said "beach" he would understand she wanted to go to the beach (T. 26).

The testimony of all other witnesses demonstrates Chao simply could not speak English. Even though he "can understand some Spanish" (T. 95), Chris Hoef couldn't communicate with him when Chao came to the residence the evening before the incident, so sent him to find an interpreter (T. 93, line 12). Chao could not make his English understandable to Tracey Crabtree (T. 93). He sought out Raphael Menendez to translate for him (T. 85). Det. Rigdon resorted to using Pedro Mendez as an interpreter (T. 116) and the petitioner testified through an interpreter at trial (T. 129).

On these facts, it is hardly accurate to assert that petitioner speaks English but is merely "not fluent."

Argument

In our Brief on the merits filed with this Court, petitioner argued that testimony recounting an interpreter's translation falls within the statutory definition of hearsay. We demonstrated that the "agency theory" relied upon in *Meacham v. State*, 45 Fla. 71, 33 So. 983 (1903) is inapplicable in this case because the record amply and emphatically demonstrates that the interpreter here was not acting as agent *for petitioner* in performing translation, but for the questioning police detective. We pointed out the danger of admitting as substantive evidence one person's paraphrasing of what he believes another's translation of yet a third person's statements to have been. This is particularly true where, as here, there is reason to believe the translation may be inaccurate, because the interpreter's qualifications are demonstrably weak.

Finally, we argued that the trial court's error in admitting such testimony was properly preserved for appellate review, and that its admission amounted to prejudicial error.

The State has chosen to contest only:

> 1. Whether conflict jurisdiction was "improvidently" granted by this Court.
>
> 2. Whether the Third District erroneously concluded the hearsay issue was properly preserved for appellate review.
>
> 3. Whether testimony recounting an interpreter's translation constitutes impermissible hearsay where the interpreter cannot recall the translated remarks.

The respondent's arguments regarding each of these three issues will be responded to separately below.

> 1. WHETHER CONFLICT JURISDICTION WAS "IMPROVIDENTLY" GRANTED BY THIS COURT.

Respondent contends that this Court has improvidently granted conflict jurisdiction in this matter, arguing that *State Farm Mutual Auto Ins. v. Ganz*, 119 So.2d 319 (Fla. 3rd

DCA 1960) and *Rosell v. State*, 433 So.2d 1260 (Fla. 1st DCA 1983) merely "suggest" a rule of law contrary to the Third District's ruling below. That ruling is very clearly spelled out in Judge Pearson's decision: that testimony recounting a translated conversation is not hearsay because the very act of speaking through an interpreter constitutes an adoption of the interpreter's words as one's own.

It is difficult to understand how the State can contend that *Ganz* and *Rosell* "merely suggest" a contrary rule. In *Ganz*, State Farm appealed from a verdict against it. The decision noted that

> State Farm has urged several reasons for reversal; however, we conclude that the determinative point is whether or not the trial court erred in admitting certain evidence of the plaintiff over defendant's objections.

119 So.2d 319, 320. The errors complained of regarded the admission of three types of evidence: hearsay testimony, certain depositions and the file of a prior proceeding.

The first category discussed by the Court, hearsay testimony, consisted entirely of testimony recounting translated conversations. The Court's holding could not be more plain:

> Plaintiff's testimony as to what an interpreter told him someone else said was incompetent as hearsay and should have been excluded.

119 So.2d 319, 320.

The decision goes on to discuss other errors committed by the trial court because, as it states, although they "are not necessary to the determination of this appeal, several of these will be discussed since they will undoubtedly arise upon a retrial of this matter." 119 So.2d 319, 320.

The only suggestion that the reversal in *Ganz* may rest in part upon other of the trial court's errors is found in the special concurrence of Judge Pearson who, as we know because he authored the decision petitioned from below, does not believe that *all* testi-

mony as to what was said through an interpreter warrants reversal as hearsay. There is no indication that the majority of the panel shared his beliefs.

In *Rosell*, the First District held that the trial court's error in denying appellant's motion to suppress warranted reversal even without considering the hearsay issue raised. Nonetheless, their opinion noted that the trial court *erred* in admitting the appellant's translated statements. The *Rosell* court found the erroneous admission of this hearsay testimony reversible unless amounting to harmless error, but, because they found it necessary to reverse and remand based upon the error involving the motion to suppress, they found "it unnecessary to address" the prejudice issue. 433 So.2d 1260, 1263. This Court has properly exercised its jurisdiction in this matter.

2. WHETHER THE THIRD DISTRICT ERRONEOUSLY CONCLUDED THE HEARSAY ISSUE WAS PROPERLY PRESERVED FOR APPELLATE REVIEW.

Respondent argues that, contrary to the specific finding of the District Court below that petitioner "adequately preserved the point for appellate review," 453 So.2d 878, 879 n.2, the District Court "misread the record" and the hearsay issue was not properly preserved.

Florida Statutes §90.104 provides that:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
>
> > (a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection if the specific ground was not apparent from the context;
>
> * * * * *

Petitioner's brief amply demonstrates, and the State does not deny, that the admission of the hearsay testimony here adversely affected his substantial rights.

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The State however contends that error may not be predicated upon the trial court's admission of this testimony because the hearsay issue was not the basis for objection at trial. Curiously, the respondent's own brief quotes that portion of the trial record reflecting that the officer's paraphrasing of what the interpreter told him was objected to by defense counsel at trial on two grounds:

1. failure to lay a proper predicate; and

2. any of the interpreter's statements testified to by the officer "would be hearsay" (See Brief of Respondent, p. 2, quoting T. 116-117).

A timely objection to the testimony complained of here "appears on the record, stating the specific ground of the objection," F.S. §90.104(1)(a), which directed the "attention of the trial judge to the purported error in a way which will allow him to respond in a timely fashion." *Castor v. State*, 365 So.2d 701 (1978).

In *Castor*, relied on by the State to preclude review here, defense counsel failed to make any objection at all to the trial court's error in failing to properly reinstruct a deliberating jury or to submit to counsel all responses to that jury's questions. And in *Ferguson v. State*, 417 So.2d 639 (1982) and *Kujawa v. State*, 405 So.2d 251 (Fla. 3rd DCA 1981), the only other cases cited by respondent on this issue, defense counsel's objections to errors at trial were clearly insufficiently specific to apprise the court of potential error; in *Ferguson* the objection "was a general one" and in *Kujawa* was only that a certain jury instruction "violates our constitutional rights" and so required the trial court "to guess which phrase, clause, or amendment of the Constitution is offended." 405 So.2d 251, 252 n.3.

In contrast, trial counsel's objection to the officer's testimony in the instant case was distinct and specific: "I believe anything that's passed through him would be hearsay." (T. 116-117). Our argument here is the same as that of trial counsel: any statements passing through the officer (from the interpreter, as the records makes obvious) is hearsay. Because a hearsay objection is "the specific contention asserted as legal ground

for the objection, exception, or motion below" it is "cognizable on appeal." *Steinhorst v. State*, 412 So.2d 332 (1982).

The fact that a second ground for objection to the officer's testimony regarding the interpreter's statements was voiced at the same time, *i.e.* lack of proper predicate, does not nullify the fact that the hearsay objection was very specifically made.

Respondent takes it upon itself to conclude that "the District Court has misread the record and expanded the limited scope of the objection tendered at trial." (Brief of Petitioner at p. 13). But respondent's conclusion is only made plausible when it injects into the record words *never spoken* by defense counsel at trial. Respondent argues that

> The initial objection was that a proper predicate had not been made *and therefore* anything flowing from the interpreter's lips through the testimony of Det. Rigdon would be hearsay.

(Brief of Respondent, p. 14) (emphasis in original).

Respondent's argument is based entirely upon the words emphasized in its brief: "*and therefore*". But those words are not found in the trial transcript; they were never spoken by defense counsel at trial. They were added by respondent to make plausible the argument that trial counsel's hearsay objection was not a second, separate basis for objection, but part of and dependent upon the objection as to predicate. This Court should reject such a tortured interpretation of words plainly spoken at trial and rule that the hearsay issue was, as found by the District Court, properly preserved for appellate review.

3. WHETHER TESTIMONY RECOUNTING AN INTERPRETER'S TRANSLATION CONSTITUTES IMPERMISSIBLE HEARSAY WHERE THE INTERPRETER CANNOT RECALL THE TRANSLATED REMARKS.

Respondent's final contention is that testimony recounting a translation is not hearsay when the interpreter cannot recall the contents of the translated remarks. In support, respondent relies first on the conclusion of the District Court below that such testimony is not hearsay at all, at least where the interpreter is selected by and acts as

agent for, the party whose translated statements are offered. As we demonstrated in our brief on the merits, petitioner did not select the interpreter used here--that very interpreter testified Chao did not even want to talk to the detective (T. 112), and the record reflects over and over that it was the detective who selected and utilized the interpreter in pressing questions upon Chao. *See, e.g.*, T. 109, 110, 111, 116, 117, 122.

Respondent cites a number of cases from other jurisdictions adopting the "agency theory." It should be noted at the outset that, as the annotation cited by the District Court recites, the

> *general rule* [is that] the testimony of a witness concerning an interpreter by another person in a conversation with the witness or with a third person is inadmissible as hearsay where the witness understood the statement not as originally given, but as translated by the interpreter.

Annotation, 12 A.L.R.4th 1016, 1020 (1982) (our emphasis). *See also* 2 Wharton's Crim. Evidence, §271 at 20 (13th ed. 1972).

Decisions reaching a contrary conclusion justify their result by use of the "agency theory," and respondent cites several of those decisions. But respondent's own discussion of those decisions reveals that *each* case cited turns upon the reliability of the interpreter.

In *State v. Letterman*, 616 P.2d 505 (Ore. CA 1980), for example, the qualifications of the interpreter and the accuracy of her translation were never questioned; they were said to be "unassailable."

In *U.S. v. Santana*, 503 F.2d 710 (7th Cir. 1974), respondent cites the court's observation that their real concern is less the hearsay nature of such testimony than the reliability of the translation, and they had "no reason to distrust the translation." 503 F.2d 710, 717. Respondent quotes *U.S. v. Da Silva*, 725 F.2d 828 (2nd Cir. 1983), that such testimony is admissible "provided the interpreter has sufficient capacity."

Yet in discussing the "reliability" of Pedro Mendez, the interpreter utilized here, respondent zeroes in on his presumed lack of a motive to falsify--while totally ignoring the interpreter's lack of ability to understand or speak the English language sufficiently to conduct a reliable interpretation! As we noted in our brief on the merits, Mendez fails to comprehend his examiner's questions at least nine times in less than seven pages of testimony (*see, e.g.*, T. 107, line 15; T. 109, lines 7 and 20; T. 111, lines 15 and 20; T. 113, lines 10 and 18; T. 114, line 1), his spoken English is barely comprehensible (*see, e.g.*, T. 112, lines 7-10) and the prosecution itself acknowledges Mendez's limitations in English (T. 107).

Mendez cannot understand such basic questions in English as

-- "And where was Alfredo?" (T. 109, lines 6-7).

-- "Did Det. Rigdon talk to Alfredo?" (T. 109, lines 18-20).

-- "Did he say that he would answer questions?" (T. 111, lines 13-15).

His English is in fact so poor that defense counsel suggests to the trial court that an interpreter be utilized:

> I don't know if he speaks English well enough to proceed. I know if he were to testify in Spanish, our interpreter would interpret for him.

(T. 106, lines 9-11).

Under these circumstances, it is ludicrous to suggest that Mendez's translation is accurate and reliable merely because he may have had no motive to falsify.

Mendez's extremely limited command of the English language destroys equally the argument that his hearsay statements should be admitted under some "circumstantial guaranty of trustworthiness" catch-all. There is no "external indicium of reliability" when the capacity of the interpreter to interpret correctly is so demonstrably weak.

Finally, respondent urges admissibility on the ground of necessity for the use of the out-of-court statements: "because Mr. Mendez could not recall, the only available evidence was that of Det. Rigdon's [sic]." (Brief of Respondent, p. 28).

It was not the testimony of Pedro Mendez that he could not recall what petitioner said to the detective. His testimony was: "I don't remember *exactly* what he told me." (T. 112, line 13) (our emphasis). The prosecution did not pursue this line of questioning to elicit what it was that Mendez *did* recall for reasons revealed twice to the trial court. At T. 102, lines 10-13, the prosecutor states:

> I believe there is a discrepancy in what he [Mendez] claims the defendant said at the deposition and what [Det.] Jay Rigdon claims that he [Mendez] told him the defendant said at the time.

And at T. 105, lines 11-18, he states:

> There's just a discrepancy between what he [Mendez] says he translated and what the detective who was present says he [Mendez] says the defendant said.
>
> In other words, when the defendant was arrested, Mr. Mendez was present. He translated between the detective and the defendant as to some statements and there was conflicts between what he says was said and what Detective Rigdon says was the translation.

Obviously, the State utilized Det. Rigdon to "recount" the translation not because Mendez, the interpreter, had *no* recollection of the conversation, but because Mendez's recollection was less favorable to the State than that of its own employee, Det. Rigdon. In fact, the prosecution originally attempted to have Mendez declared a court witness so it could impeach his recollection of the testimony with that of Det. Rigdon. (T. 102).

Moreover, petitioner testified at his trial. The detective's testimony was therefore not "the only available source of the evidence" as in *Letterman*, *supra*, at 616 P.2d 511.

Conclusion

In conclusion, petitioner submits that this Court should, in the exercise of its jurisdiction, resolve the hearsay issue he has raised by ruling that, under the facts and circumstances of this case, the admission of Det. Rigdon's testimony allegedly recounting petitioner's translated remarks was prejudicially erroneous. We ask that petitioner's conviction be reversed and this cause be remanded to the trial court for a new trial. To do so would not give petitioner "greater privileges than those who have become conversant in the English language" (Brief of Respondent, p. 30), but would afford him the right so carefully preserved and guarded by the decisions of this Court: the right to a jury who will decide his guilt or innocence upon the basis of properly admitted evidence.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 20th day of May, 1985, to: Office of Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128.

Respectfully submitted,

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