

IN THE
SUPREME COURT OF FLORIDA

**IN RE: SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS –
REPORT 2005-7**

Case No. SC05-1961

**Proposed New Instructions – For Use in Cases in
Which An Interpreter or a Translator Is
Provided**

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**RESPONSE TO THE COMMENTS
BY
THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS**

**COMMITTEE ON STANDARD JURY INSTRUCTIONS –
CRIMINAL CASES**

Comes now the Supreme Court Committee on Standard Jury Instructions in Criminal Cases (the committee), by and through the Chair of the Committee, the Honorable Terry David Terrell, Circuit Judge of the First Judicial Circuit, and files this Response to the Comments of the Florida Association of Criminal Defense Lawyers (FACDL) and states:

The committee filed a petition with this Honorable Court on October 26, 2005, proposing a new set of five new standard jury instructions regarding the use of a translator or an interpreter in a criminal jury trial. The instructions are as follows:

1. Instruction 2.8 – Jury to be Guided by Official English
Translation/Interpretation – Preliminary Instructions
2. Instruction 2.9 – Jury to be Guided by Official English
Translation/Interpretation – Instructions During Trial
3. Instruction 2.10 – Jury to be Guided by Official English
Translation/Interpretation – Transcript of Recording in Foreign
Language (Accuracy Not in Dispute)
4. Instruction 2.11 – Jury to be Guided by Official English
Translation/Interpretation – Transcript of Recording in Foreign
Language (Accuracy in Dispute)
5. Instruction 2.12 – Jury to be Guided by Official English
Translation/Interpretation – Closing Arguments.

The proposed instructions were published by this Honorable Court in the *Florida Bar News* on December 15, 2005, with comments due by January 17, 2006. The FACDL filed comments with the Court on January 17, 2006. The FACDL supported the proposed instructions, but offered suggested changes.

Instructions 2.8 (Preliminary Instructions) and 2.9 (Instructions During Trial), include a paragraph providing a procedure to be followed if a

juror questions the accuracy of the English interpretation. The paragraph begins:

If, however, during the testimony there is a question as to the accuracy of the English interpretation, *you may bring this matter to my attention by raising your hand.* (Emphasis added.)

The FACDL recommended three changes to this instruction.

First, the FACDL submitted that the jurors should be instructed that they *must* bring to the attention of the trial judge any discrepancy in the interpretation. Second, the FACDL suggested that it may be easier for a juror to alert the trial court to any discrepancy in the interpretation by writing a note to the court, rather than by raising a hand. Third, the FACDL recommended that this paragraph also be included in instructions 2.10 (Transcript of Recording in Foreign Language (Accuracy Not in Dispute)) and 2.11 (Transcript of Recording in Foreign Language (Accuracy Not in Dispute)).

The committee met on May 12, 2006, and considered the comments submitted by the FACDL. The committee discussed the use of the word “must” as opposed to the use of the word “may,” and ultimately concluded that using the word “must” eliminated judicial discretion. By a vote of 11-2, the committee agreed to replace “may” with the word “should” and,

thereby, allow the trial judge discretion. The committee offers the following amended sentence to this paragraph:

If, however, during the testimony there is a question as to the accuracy of the English interpretation, *you should bring this matter to my attention by raising your hand.* (Emphasis added.)

Ms. Angelica Zayas, Assistant State Attorney, Eleventh Judicial Circuit and the lead author of the proposed instructions, was unable to attend the May 12, meeting. However in a subsequent email responding to the FACDL's suggestions, Ms. Zayas commented,

While I agree that all parties have a right to a fair trial, I am concerned that changing “may” to “must” will somehow create a ground for juror misconduct and otherwise open a can of worms by creating an obligation to speak up where there is even the slightest doubt (vs. a real or significant doubt) about the accuracy of the translation. In other words, when does the juror have to speak up? When does the failure to speak up constitute juror misconduct, when the language is “must” rather than “may”?

The second suggestion by the FACDL to substitute “writing a note” for “raising your hand” when a juror questions the translation and wishes to alert the trial judge, was rejected by the committee. The committee agreed that it was important that a juror bring a discrepancy to the attention of the trial judge as soon as possible, but determined that the trial court should have the flexibility to provide paper and writing utensils to the jury in addition to raising their hand. The committee had no objection to “note

taking” by a jury, but did not want to mandate “note taking” to the trial court. The committee reasoned that “writing a note” almost necessarily requires the juror to raise their hand to get the attention of the judge or a bailiff. The use of “raising your hand” does not preclude the use of “writing a note” and thus, provides discretion to the trial judge.

Finally, the committee agreed with the FACDL’s third recommendation to insert the same paragraph in instructions 2.8 and 2.9, directing the jurors to bring a question of the accuracy of the English interpretation to the court’s attention, into instructions 2.10 and 2.11. The vote was 11-2. Ms. Zayas offered a dissenting comment in her email after the meeting. She stated,

I disagree with the final suggestion. If the parties agree that the transcript is accurate (Instruction 2.10), the juror should not be allowed to question the accuracy. In my experience, the stipulation as to the accuracy is often a result of extensive pretrial negotiation etc. Often, slight, non-substantive or technical discrepancies will be ignored by the parties in the interest of moving the case forward. Moreover, the parties may have prepared the presentation of the case with the stipulation in mind. Allowing a juror to question a stipulation will upset or otherwise interfere with the pretrial litigation and negotiations. Instruction 2.11 allows the juror to reject the transcript based on factors unrelated to the juror’s unique knowledge of the language used. Allowing the juror to reject the transcript in the manner described in the instruction protects the rights to a fair trial. Allowing the juror to actively participate in the correction of the transcript in the manner described (similar to the method used for oral translation) would turn the juror into an expert

witness as was condemned in *United States v. Fuentes-Montijo*,
68 F.3d 352 (Ninth Cir, 1995).

The committee did address the specific point raised by Ms. Zayas.

The committee determined that it was better for the court and the parties to be aware of the translation issue in question. Thus, the issue could be addressed by the proper instruction from the trial judge so as to avoid the issue being injected into the deliberations of the jury without guidance from the court.

Respectfully submitted,

The Honorable Terry David Terrell
Circuit Judge, First Judicial Circuit
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing instrument
has been furnished to:

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by mail delivery this 26th day of May, 2006.