

No. 15-1002

In The
Supreme Court of the United States

AIFANG YE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

**BRIEF OF INTERPRETING AND
TRANSLATION PROFESSORS AS *AMICI
CURIAE* IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce an out-of-court, testimonial interpretation, without making the interpreter available for confrontation and cross-examination?

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INTERESTS OF *AMICI CURIAE*¹

Amici curiae are scholars with expertise in the language services industry. *Amici* have extensive experience with the education and training of interpreters and translators, as well as the research

¹ All parties have consented to the filing of this Brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief.

into the different disciplines. *Amici* do not address the legal arguments regarding the testimonial nature of interpretations in this case, or whether interpreters should be subject to cross-examination under the Confrontation Clause of the United States Constitution, but write to provide the Court with an understanding of the importance of uniformity among the federal courts as to these questions as it regards interpreters who may serve as witnesses. Currently there is a split among the federal Circuits, as well as within the State courts, as to whether interpreters must be made available for cross-examination in a criminal trial. In the Eleventh Circuit, as well as in certain states, the interpreter will be subject to requirements that she would not otherwise be subject to in other parts of the country. The interpreter's requirements in fulfilling her duties should not be dependent on the vagaries of where a defendant is put to trial. For this reason, *amici* request that the Supreme Court of the United States grant certiorari and provide a definitive answer on this issue.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Under the "language conduit" theory that has been adopted and applied by many of the federal Circuits (as well as many state courts), including in the Ninth Circuit below, interpreters are treated as simply conveying the words of the original speaker. For purposes of the Confrontation Clause of the United States Constitution, the words are treated as those of the defendant and interpreters are not subject to cross-examination. However, the Eleventh Circuit has held that the language conduit theory cannot survive this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny, and that therefore the interpreter should be treated as the speaker and be made available for cross-examination.

This conflict among the Circuit Courts, which also extends to state courts and between federal and state courts within certain states, significantly impacts interpreters and causes them to be subject to different requirements depending on the jurisdiction of the defendant's case. Such inconsistent standards make it difficult for interpreters to do their jobs of

conveying an accurate interpretation from one language to the other.

Further, the interpreter's role under the "language conduit" test is not clear. Interpreters convey the *meaning* of the original speaker's words from one language to another. They do not serve as word-for-word translators. Rather, interpreters work to provide the listener with every element of the original speaker's message, choosing the proper words to use.

Finally, whether interpreters are required to be made subject to cross-examination regarding their interpretations raises various ethical and practical considerations that further support the Court providing uniformity in the law.

Accordingly, it is important to the interpreting profession that there be uniformity in the courts on this issue so that interpreters may know exactly what the job entails. *Amici* believe that this Court should consider the language conduit test in light of *Crawford* and its progeny and determine whether interpreters must be made subject to cross-examination.

ARGUMENT

I. INTERPRETERS ARE CURRENTLY SUBJECT TO DIFFERING REQUIREMENTS AS TO CROSS-EXAMINATION DEPENDING ON THE JURISDICTION.

As the Petitioner makes clear, there is currently a split in the federal Circuits regarding whether interpreters should be subject to cross-

examination under the Confrontation Clause of the United States Constitution. In the Second, Fourth, Fifth, and Ninth Circuits an interpreter is not subject to cross-examination, while in the Eleventh Circuit the government is required to make the interpreter available for cross-examination. Compare *United States v. Shubin*, 722 F.3d 233 (4th Cir. 2013); *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012); *United States v. Budha*, 495 F. App'x 452 (5th Cir. 2012) (unpublished); *United States v. Koskerides*, 877 F.2d 1129 (2d Cir. 1989) with *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013). The Circuits holding that an interpreter is not subject to cross-examination have relied on the “language conduit” theory, which attributes out-of-court interpretations to the original speaker (*i.e.*, the defendant), viewing the interpreter as a conduit for the original speaker’s words. Breaking with this line of cases from the other Circuits, the Eleventh Circuit recently rejected the language conduit theory in *Charles* and found that, under this Court’s Confrontation Clause decisions, an interpreter must be made available for cross-examination. *Charles*, 722 F.3d at 1327-1328. The Eleventh Circuit determined that the interpreter is properly viewed as the speaker of the interpretation and the words spoken should be attributed to the interpreter rather than the defendant. *Id.*

The Ninth Circuit in the underlying case determined that it was bound by its precedent upholding the language conduit theory as applied to interpreters. The Ninth Circuit concluded that “as long as a translator acts only as a language conduit, the use of the translator does not implicate the

Confrontation Clause.” *United States v. Ye*, 808 F.3d 395, 401 (9th Cir. 2015) (citing *United States v. Nazemian*, 948 F.2d 522, 525-528 (9th Cir. 1991)); *id.* (noting that the Ninth Circuit had previously held in *Orm Hieng* that the language conduit test was not clearly irreconcilable with *Crawford* and its progeny). Accordingly, in the federal courts, an interpreter is currently subject to cross-examination—and the interpreter’s interpretation is treated as her own words—in the Eleventh Circuit but not in the Second, Fourth, Fifth or Ninth Circuits.

Further, not only is there division among the federal Circuits as to whether an interpreter must be made available for cross-examination, but in state courts as well this issue is being addressed. Maryland recently joined the Eleventh Circuit in rejecting the language conduit theory, relying on *Crawford* and its progeny. *See Taylor v. State*, ___ A.3d ___, 2016 WL 324902, at *26 (Md. Ct. Spec. App. Jan. 27, 2016) (conducting extensive review of Confrontation Clause jurisprudence and finding that “no court could adopt [the language conduit test] without abandoning or substantially undercutting *Crawford*, *Melendez-Diaz*, and *Bullcoming*”). Consequently, an interpreter in Maryland will now be subject to cross-examination in Maryland state courts but not in the United States District Court for the District of Maryland if this Court does not address the proper standard to be applied to interpreters. *See Shibin*, 722 F.3d at 247-248 (finding that “interpreter was nothing more than a language conduit”). Moreover, the Maryland court’s decision in *Taylor* is in contrast to other state courts that have adhered to the “language conduit” test

post-*Crawford*. See, e.g., *People v. Jackson*, 808 N.W.2d 541, 552 (Mich. Ct. App. 2011); *State v. Umanzor*, 682 S.E.2d 248 (N.C. Ct. App. 2009) (unpublished); *Hernandez v. State*, 662 S.E.2d 325, 329 (Ga. Ct. App. 2008); *People v. Morel*, 798 N.Y.S.2d 315, 319 (N.Y. App. Term 2005). Notably, like in Maryland, interpreters are now subject to diverse requirements in state and federal courts in Georgia, with interpreters not being subject to cross-examination in Georgia state courts but subject to cross-examination in federal courts in Georgia under *Charles*.

As interpreters within the industry, as well as considering teaching future interpreters, *amici* believe it is necessary for this Court to address this issue and clarify the role of the interpreter under the Confrontation Clause.

II. INTERPRETERS CONVEY THE MEANING OF THE ORIGINAL SPEAKER'S STATEMENTS, NOT WORD-FOR-WORD TRANSLATIONS.

While *amici* do not take a position on the merits of Petitioner's Confrontation Clause claim, *amici* believe it is necessary to the ultimate resolution in this case that the role of interpreters in court proceedings be properly understood in order to review the applicability of the language conduit test.

The language conduit test applied by the Second, Fourth, Fifth, and Ninth Circuits is based on the reliability of the interpreter and the basic premise that an "interpreter [is] nothing more than a language conduit" for the original speaker. *Shibin*, 722 F.3d 248. Of course, even the "obviou[s]"

reliab[ility]’ of a testimonial statement does not dispense with the Confrontation Clause.” *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011) (alterations in original) (quoting *Crawford*, 541 U.S. at 62). Essentially, the formulations of the language conduit test treat the words of the interpreter as the words of the original speaker. *Nazemian*, 948 F.2d at 527 (holding that under language conduit theory, the interpretation “fairly should be considered the statements [of the defendant]”). However, this is not exactly an accurate description of the interpreter’s role.

Interpretation is “the process of understanding and analyzing a spoken or signed message and re-expressing that message faithfully, accurately and objectively in another language, taking the cultural and social context into account.” ASTM International, ASTM F2089-01 STANDARD GUIDE FOR LANGUAGE INTERPRETATION SERVICES § 3.1 (2007). An interpreter’s job is to convey the original speaker’s meaning from one language to the other. Roseann Duenas González, Victoria F. Vásquez & Holly Mikkelson, FUNDAMENTALS OF COURT INTERPRETATION: THEORY POLICY AND PRACTICE 33 (1991) (“Interpreting almost universally refers to the transfer of meaning from one language into another for the purpose of oral (or signed) communication between two persons who do not share the same language.”). In doing so, an interpreter is to listen to a speaker’s words, process the meaning of those words from one language to another, and then convey the meaning of the speaker’s words to the listener in another language. Holly Mikkelson, INTRODUCTION TO COURT INTERPRETING 70 (2000) (“What is really

meant by a ‘verbatim’ interpretation is that every single element of *meaning* in the source-language message must be accounted for in the target-language version.” (emphasis added)); González, Vásquez & Mikkelson, *supra*, at 322 (“In court interpretation, conservation of meaning takes precedence over all other considerations.”). While an interpreter is to “convey . . . every element of the witness’s message as if they were speakers of the [source language] and the interpreter were not there,” an interpreter does not do so by simply repeating back the words of the original speaker in a different language. *Id.* Interpreting generally involves conveying the speaker’s meaning into another language through reformulation or restructuring of what was spoken. James Nolan, INTERPRETATION: TECHNIQUES AND EXERCISES 2 (2d ed. 2012) (“Interpretation can be defined in a nutshell as conveying understanding. . . . An interpreter listens to a spoken message in the source language and renders it orally, consecutively or simultaneously, in the target language.”); Mikkelson, *supra*, at 74 (“[I]nterpreters must ‘repackage’ the message to make it understandable in the target language.”); González, Vásquez & Mikkelson, *supra*, at 155 (“The interpreter is required ‘to transfer all of the meaning he or she hears from the source language into the target language’”) (quoting R.D. Gonzalez, FEDERAL COURT INTERPRETER CERTIFICATION EXAMINATION MANUAL 5 (1986))

Therefore, it is not necessary that the interpreter provide a literal, word-for-word translation of what is said by the speaker, nor indeed is it desirable—“literal” should not be confused with

accurate. THE INTERPRETING STUDIES READER 120 (Franz Pöchhacker & Miriam Shlesinger eds., 2002); González, Vásquez & Mikkelson, *supra* at 281 (“Interpretation by language-deficient interpreters is marked by literal translation; interpreters focus not on the essential ideas but rather on the words, exchanging words between the [source language] and [the target language] without converting or conserving the crucial concept.”); National Association of Judiciary Interpreters and Translators, FAQ About Court and Legal Interpreting and Translating, <http://www.najit.org/certification/faq.php#judiciary> (last visited March 6, 2016) (“Some judges and attorneys have a mistaken belief that an interpreter renders court proceedings word for word, but this is impossible since there is not a one-to-one correspondence between words or concepts in different languages Rather than word for word, then, interpreters render meaning by reproducing the full content of the ideas being expressed. Interpreters do not interpret words; they interpret concepts.”). Indeed, spontaneous speech also often involves implicit messages in the form of sentence fragments that cannot be conveyed completely in another language because of different grammatical and syntactical features. See González, Vásquez & Mikkelson, *supra*, at 237-251, 478 (noting that the interpreter is likely to encounter multiple different nuances, variations, and cultural meanings of speech).

Moreover, it is unlikely that an interpreter would be able to give a word-for-word translation of the original speaker’s statements in any event, as the

interpreter “must instantaneously arrive at a target language equivalent, while at the same time searching for further input.” González, Vásquez & Mikkelson, *supra*, at 295. The interpreter does this by conveying her interpretation of what the speaker said, not by conveying specific words. *Id.* at 387-88 (“Very few words of the original message are written down, because interpreters focus on ideas, not words.”); *cf.* Peter W. Schroth, *Legal Translation*, 34 *Am. J. Comp. L. Supp.* 47, 53-54 (1986) (noting that word-for-word translations of documents that do not take into account context result in “awkward document[s]”).

Accordingly, rather than being a strict “conduit” conveying the words of the defendant, an interpreter is a participant in the conversation who works to best convey the meaning of the speaker’s words as spoken in a different language. *See Bullcoming*, 131 S. Ct. at 2714 (rejecting the notion that a testing analyst reporting a machine-generated number was a “mere scrivener” for purposes of Confrontation Clause). It is necessary that any review of the language conduit test be viewed through this formulation if the Court is to come to a true determination of which speaker is making a testimonial statement through the interpretation.

III. CLARITY AS TO THE INTERPRETERS’ CROSS-EXAMINATION REQUIREMENTS IS CRITICAL TO THE PROFESSION.

As noted, interpreters now face different requirements in different regions of the United States (and even between the federal and state courts in the same region) as to whether they are to be made

available for cross-examination in criminal trials. An interpreter in Maryland could be made to testify as if the interpretation were her own words in state court while not being subject to cross-examination in federal court. This distinction has consequences, as there are both ethical and practical considerations for an interpreter to consider if she is to be subject to cross-examination as if the words were her own.

The ethical codes governing court interpreters have some unique features dictated by the demands of due process and legal equivalence. González, Vásquez & Mikkelson, *supra*, at 16-17; *Model Code of Professional Responsibility for Interpreters in the Judiciary*, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 197 (William E. Hewitt ed. 1995). “Regardless of what type of setting they work in, professional interpreters must uphold certain standards of practice, including accurate and faithful interpretation, confidentiality, and impartiality.” Mikkelson, *supra*, at 48. An interpreter subject to cross-examination with regard to the statements made in the interpretation must determine how best she will be able to uphold those ethical duties while testifying about the words she chose to use to convey the meaning of the original speaker’s statements.

Further, the practical implications of being subject to cross-examination as to the words used in an interpretation mean that an interpreter could be required to remember the exact words of the defendant as well as her own words, and why one specific word was used as opposed to another. Such a requirement as to every testimonial statement may

necessitate changes in the way that interpreters are trained. While it is not clear what impact such a change would have on the quality of interpretations, it is important that interpreters have clarity in what is to be required of them in the future.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 7, 2016