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# Criminal Law: Incompatible Approaches to Interpreters' Translations: Protecting Defendants' Right to Confront — State v. Lopez-Ramos, 929 N.W.2D 414 (Minn. 2019).

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# CRIMINAL LAW: INCOMPATIBLE APPROACHES TO INTERPRETERS' TRANSLATIONS: PROTECTING DEFENDANTS' RIGHT TO CONFRONT – *STATE V. LOPEZ-RAMOS*, 929 N.W.2D 414 (MINN. 2019).

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## I. INTRODUCTION

The Minnesota Supreme Court recently held in *State v. Lopez-Ramos*[1] that an interpreter's translation of a defendant's foreign language statements during a police interrogation did not implicate the Confrontation Clause.[2] The *Lopez-Ramos* court applied the language conduit theory to determine an interpreter's translated statements were attributable to the

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[1] 929 N.W.2d 414 (Minn. 2019).

[2] U.S. CONST. amend. VI.

defendant.[3] Finally, the court concluded that because the defendant was the declarant of the statements, the statements were not hearsay.[4]

This Paper begins with a historical overview of hearsay, the Confrontation Clause, the right to an interpreter, the limited right to confront an interpreter, and the common law development of Confrontation Clause tests in America.[5] Then, it explains the facts and procedural posture of *Lopez-Ramos*.[6] Next, this Paper argues that *Lopez-Ramos*'s approach to interpreters' translated statements is based on flawed precedent.[7] This Paper contends that *Lopez-Ramos* failed to acknowledge the changing demographics of the United States as justification for adopting a unified approach to this issue.[8] Additionally, the majority's misconstruction of language translation led to its distinguishing of *Lopez-Ramos* and applicable case law.[9]

Therefore, to make the law more unified and protective of defendants' rights, this Paper argues the court should adopt a disciplined approach: interpreters must be subject to cross-examination under the Confrontation Clause.[10] Finally, this Paper concludes the *Lopez-Ramos* decision will likely lead to continued violations of foreign language speakers' due process rights.[11]

## II. HISTORY OF THE RELEVANT LAW

### *A. Origins of the Hearsay Rule*

Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted.[12] Generally, hearsay is inadmissible evidence.[13] A hearsay analysis can be broken down into four parts.[14] First, a "statement" is either an oral or written assertion, or nonverbal conduct if it is intended as an assertion.[15] Second, a "declarant" is the person who made the

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[3] *Lopez-Ramos*, 929 N.W.2d at 420.
[4] *Id.* at 423.
[5] *See infra* Part II.
[6] *See infra* Part III.
[7] *See infra* Part IV.
[8] *See infra* Part IV.
[9] *See infra* Part IV.
[10] *See infra* Part IV.
[11] *See infra* Part V.
[12] MINN. R. EVID. 801(c).
[13] *Id.* at 802.
[14] Casen B. Ross, *Clogged Conduits: A Defendant's Right to Confront His Translated Statements*, 81 U. CHI. L. REV. 1931, 1936 (2014).
[15] MINN. R. EVID. 801(a).

statement.[16] Third, the statement is made out of court.[17] Fourth, the statement offered must have been made to prove "the truth of the matter asserted."[18]

However, a statement satisfying the four conditions above may be admissible as non-hearsay if it is either a witness's prior statement or a statement offered against a party-opponent.[19] A witness's prior statements are admissible if the declarant testifies and is subject to cross-examination regarding the statement, and the statement satisfies one of four conditions.[20] A statement that is offered against a party-opponent to the litigation may be admissible if it is either "the party's own statement, in either an individual or a representative capacity . . . or . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."[21]

The hearsay rule began developing in the sixteenth century, but it did not fully advance until the early eighteenth century.[22] In fifteenth-century England, attorneys commonly "confer[ed] privately with witnesses outside of court" and refrained from calling such witnesses at trial.[23] Chief Justice Fortescue explained the standard treatment of hearsay: "[i]f the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable."[24] Due to the discouragement of calling witnesses to trial, juries in the late fifteenth century

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[16] *Id.* at 801(b).
[17] *See id.* at 801(c).
[18] *Id.*
[19] *Id.* at 801(d). *But see* State v. Brist, 812 N.W.2d 51, 54–55 (Minn. 2012) (citing Bourjaily v. U.S., 483 U.S. 171, 182–84 (1987)) (indicating the admission of 801(d)(2)(E) statements does not violate the Confrontation Clause because the admissibility requirements for 801(d)(2)(E) statements "are 'identical' to the requirements for admissibility under the Confrontation Clause").
[20] MINN. R. EVID. 801(d)(1) (noting the statement must be either: "(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding . . . or (B) consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness, or (C) one of identification of a person made after perceiving the person . . . or (D) a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter").
[21] *Id.* at 801(d)(2)(A), (D). The rule also allows admittance of a statement made by a party-opponent if "the party has manifested an adoption or belief in [the] truth" of the statement, or the statement was made "by a person authorized by the party to make a statement concerning the subject," or the statement was made "by a coconspirator of the party." *Id.* at 801(d)(2)(B), (C), (E).
[22] John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 437 (1904).
[23] Deborah Paruch, *Testimonial Statements, Reliability, and the Sole or Decisive Evidence Rule: A Comparative Look at the Right of Confrontation in the United States, Canada, and Europe*, 67 CATH. U. L. REV. 105, 108 (2018).
[24] Wigmore, *supra* note 22, at 440.

received a "counsel report" which described "what had been or would be said by persons not called or not put on the stand."[25]

However, by the early eighteenth century, opposition regarding the admission of out-of-court statements at trial arose.[26] Initially, objections regarding the admission of hearsay statements stemmed only from those accused of crimes.[27] Some judges began to recognize the insufficient veracity of out-of-court statements, but nevertheless continued to admit hearsay.[28] Eventually, juries' dependence on out-of-court statements as the primary source of evidence in trials led to an increase in challenges regarding the validity of verdicts because the verdicts relied on untrustworthy hearsay statements.[29] As a result, courts started to question the common practice of admitting hearsay.[30] Toward the end of the seventeenth century, the practice of admitting hearsay statements, whether made under oath or not, "was abandoned in favor of one that required the testimony of the [declarant] in court."[31]

In 1603, Sir Walter Raleigh's trial for treason presented "one of the earliest recorded" and most infamous examples of hearsay.[32] Raleigh was accused of "joining the . . . Main Plot to depose James I and to place Arabella Stuart on the throne."[33] The trial involved the admission of a statement made by Sir Walter Raleigh's alleged accomplice, Lord Cobham.[34] Lord Cobham provided a witness statement "before the Privy Council and in a written letter" regarding Raleigh's role in a plot to kill the English King.[35] Despite Raleigh's objections to the admission of Lord Cobham's statements, the jury heard the statements and subsequently convicted Raleigh.[36] The court sentenced Raleigh to death, which resulted in his execution.[37]

In modern times, hearsay, like the testimony in Raleigh's case, is generally inadmissible as evidence at trial.[38] Despite this general bar, there

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[25] *Id.* at 440–41.
[26] *Id.* at 448.
[27] *Id.* at 444.
[28] *Id.*
[29] *Id.* at 441–43.
[30] *Id.* at 441–42.
[31] Paruch, *supra* note 23, at 110.
[32] Ross, *supra* note 14, at 1936 (citing David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 S. CT. REV. 1, 38 (2009)).
[33] Ross, *supra* note 14, at 1936; *see* Sklansky *supra* note 32, at 38.
[34] *See* Crawford v. Washington, 541 U.S. 36, 44 (2004) (discussing the Raleigh trial).
[35] Hon. Daniel B. Shanes, *The Crawford Confrontation Clause: Governmental Involvement is Key to Testimonial Hearsay*, 96 ILL. BAR J. 574, 575 (2008).
[36] *Crawford*, 541 U.S. at 44.
[37] Sklansky, *supra* note 32, at 38.
[38] *See* Ross, *supra* note 14, at 1937 (noting the exceptions for hearsay's admissibility under "a federal statute, a contravening Supreme Court rule, or the FRE").

are several exceptions permitting admission of hearsay evidence.[39] The Minnesota Rules of Evidence, similar to their federal counterparts, provide exceptions permitting admission of hearsay when the declarant is available but the availability of the declarant is immaterial,[40] or the declarant is unavailable.[41]

### *B. Confrontation Clause*

The Confrontation Clause, in the Sixth Amendment of the United States Constitution, intersects with hearsay rules because the Confrontation Clause "allows a defendant to cross-examine a person providing testimonial hearsay offered against him, but this right does not attach to admitted evidence that is not hearsay."[42] The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[43] Minnesota has an almost identically worded confrontation clause in Article I, section 6 of its constitution.[44]

The right to confront a witness is generally known to be derived from the common law of England.[45] However, there are indications that the right originated from Roman law.[46] The concept of the Confrontation Clause existed in seventeenth-century England before it was transported to the United States.[47] Historical readings demonstrate that the Confrontation Clause serves "to ensure [the] reliability of evidence."[48] Courts have emphasized that the reliability of evidence must be tested through "the crucible of cross-examination," which is consistent with the Framers' intent.[49]

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[39] MINN. R. EVID. 803, 804.

[40] *Id.* at 803 (listing numerous exceptions for when statements are not excluded by the hearsay rule, "even though the declarant is available as a witness").

[41] *Id.* at 804 (listing numerous exceptions for when statements are not excluded by the hearsay rule only "if the declarant is unavailable as a witness"). The legislature defined "unavailability as a witness" as including situations in which the declarant is either ordered by the court not to testify, continuously refuses to testify, lacks memory of the subject matter, is unable to testify, or is absent. *Id.* at subdiv. (a)(1)–(5).

[42] Ross, *supra* note 14, at 1937.

[43] U.S. CONST. amend. VI.

[44] MINN. CONST. art. I, § 6 ("In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

[45] *See* Marshall H. Tanick, *Confronting the Confrontation Clause*, 62 BENCH & BAR MINN. 16, 16 (Oct. 2005).

[46] Coy v. Iowa, 487 U.S. 1012, 1015–16 (1988) (quoting Roman Governor Festus, "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges").

[47] *See* Tanick, *supra* note 45, at 16.

[48] Crawford v. Washington, 541 U.S. 36, 61 (2004).

[49] *Id.*

Since its early adoption in the United States, the Confrontation Clause has been invoked in numerous circumstances.[50] Today, the right of confrontation is universally accepted as fundamental and is applied to the states through the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[51] The right to confront a witness is crucial in criminal proceedings, particularly to "'test[] the recollection and sift[] the conscience of the witness' and allow[] the jury to decide 'whether he is worthy of belief.'"[52]

Under a modern Confrontation Clause analysis, "if the state wishes to introduce hearsay at a criminal trial, the state must . . . show that the declarant of the hearsay is unavailable for trial."[53] Absent a valid reason for the declarant's unavailability, the declarant must be called to testify in court and be cross-examined by the defendant.[54] If a reason for the declarant's unavailability exists, "the court must then make a determination of whether the hearsay is testimonial or non-testimonial in nature."[55] If the hearsay is deemed testimonial, it is admissible "only if the defendant had a 'prior opportunity for cross-examination.'"[56] If the defendant did not have a prior opportunity to cross-examine the declarant, the hearsay statement is inadmissible.[57]

### *C. Right to An Interpreter*

In the landmark case, *Miranda v. Arizona*,[58] the U.S. Supreme Court held that criminal suspects must be protected against self-incrimination due to the "compulsion inherent in custodial surroundings."[59] The Court found that any statements spoken during a custodial interrogation without the "use of procedural safeguards" violate a person's constitutional right against self-incrimination.[60] As a result, the Court required law enforcement officers to administer explicit warnings to criminal suspects prior to any substantive questioning in custodial

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[50] *See* Tanick, *supra* note 45, at 17.
[51] J. Charles F. Baird, *The Confrontation Clause: Why* Crawford v. Washington *Does Nothing More Than Maintain the Status Quo*, 47 S. TEX. L. REV. 305, 308 (2005).
[52] Michael D. Cicchini & Vincent Rust, *Confrontation After* Crawford v. Washington*: Defining "Testimonial"*, 10 LEWIS & CLARK L. REV. 531, 534 (2006).
[53] *Id.* at 537.
[54] *Id.* at 537–38.
[55] *Id.* at 538.
[56] *See infra* note 103 and accompanying text.
[57] *Id.*
[58] 384 U.S. 436 (1966).
[59] *Id.* at 458. A custodial interrogation occurs when "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.
[60] *Id.*

interrogations.[61] The Court indicated these explicit warnings to criminal suspects must include the following: (1) they have the right to remain silent; (2) anything they say can be used as evidence against them; (3) they have the right to an attorney; and (4) the court will appoint an attorney if they cannot afford one.[62]

Despite the integral role the "*Miranda* warnings" play in our criminal justice system, Spanish speaking suspects tend to be less protected by this right.[63] Translations of the "*Miranda* warnings" can impact suspects' understanding of their rights before they are subjected to custodial interrogations.[64] *Miranda* requires that non-English speaking persons who are read the "*Miranda* warnings" must also understand and comprehend their rights.[65] Imprecise interpretation of the "*Miranda* warnings" can be detrimental because inaccuracies "can result in unnecessary delays, mistakes, and even wrongful convictions."[66] Nevertheless, the Minnesota Supreme court found that "*Miranda* warnings" do not need to be delivered rigidly, as long as the warnings are substantively accurate.[67]

Under Minnesota law, a person accused of a crime who is "disabled in communication"[68] has the right to have a "qualified interpreter" present at an interrogation.[69] Minnesota does not enforce strict education or professional experience requirements to ensure adequate performance for interpreters used in criminal proceedings.[70] Rather, the interpreter used during an interrogation is required only to be "qualified," not certified.[71] Despite the statutory requirement for interpreters to take an oath before translating,[72] "the failure of [an] interpreter to take an oath does not merit

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[61] *Id.* at 444–45.
[62] *Id.*
[63] Alison R. Perez, *Understanding Miranda: Interpreter Rights During Interrogation for Spanish-Speaking Suspects in Iowa*, 12 J. GENDER RACE & JUST. 603, 603 (2009).
[64] *Id.* at 617.
[65] *Miranda*, 384 U.S. at 470–71.
[66] Perez, *supra* note 63, at 617.
[67] State v. Dominguez-Ramirez, 563 N.W.2d 245, 252–53 (Minn. 1997).
[68] MINN. STAT. § 611.31 (2020) (defining "disabled in communication" as "a person who: (1) because of hearing, speech or other communication disorder, or (2) because of difficulty in speaking or comprehending the English language, cannot fully understand the proceedings or any charges made against the person . . . is incapable of presenting or assisting in the presentation of a defense").
[69] *Id.* § 611.32, subdiv. 2.
[70] *Id.* § 611.33, subdiv. 1 (defining a "qualified interpreter" as a person who is "readily able to communicate with the disabled person, translate the proceedings for the disabled person, and accurately repeat and translate the statements of the disabled person"); *see also* State v. Sanchez-Diaz, 683 N.W.2d 824, 835 (Minn. 2004).
[71] MINN. STAT. § 611.33, subdiv. 1 (2020). For a more in-depth discussion of interpreter qualifications see *infra* Section IV.B.
[72] MINN. STAT. § 611.33 subdiv. 2 (2020).

suppression."[73] Law enforcement officers are required to ensure the interpreter explains "all charges filed against the person, and all procedures relating to the person's detainment and release."[74]

The Minnesota Legislature enacted the interpreter statutes "to provide a procedure for the appointment of interpreters to avoid injustice and to assist persons disabled in communication in their own defense."[75] The Legislature acknowledged the importance of interpreters during all stages of criminal proceedings because "the constitutional rights of persons disabled in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings."[76] However, the Minnesota Supreme Court held "[t]his right is not a constitutional one."[77]

### *D. Restricted Right to Confront Interpreters*

The intersection between the hearsay rules, the Confrontation Clause, and the right to an interpreter is crucial because they significantly impact an individual's constitutional rights in criminal proceedings. The Confrontation Clause and hearsay rules influence a suspect's procedural rights, which in turn serve to protect their substantive rights.[78] "When a witness testifies to another person's out-of-court statements, a hearsay issue must be shown to exist for courts to consider whether the Confrontation Clause applies."[79] If the court determines the Confrontation Clause is invoked, the witness may be subpoenaed to appear in court.[80]

Recall that some statements are considered hearsay yet may be admissible under a hearsay exception.[81] This distinction is important because "it determines which evidence is subject to the Confrontation Clause."[82] The right to cross-examine a witness under the Confrontation Clause is invoked when the witness is providing "testimonial hearsay" against the accused, "but this right does not attach to admitted evidence that is not hearsay, including evidence that falls within FRE 801(d) despite meeting the four elements of FRE 801(a)-(c)."[83]

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[73] *Sanchez-Diaz*, 683 N.W.2d at 836.
[74] MINN. STAT. § 611.32 subdiv. 2 (2020).
[75] *Id.* § 611.30.
[76] *Id.*
[77] *Sanchez-Diaz*, 683 N.W.2d at 835 (citing State v. Mitjans, 408 N.W.2d 824, 830 (Minn. 1987)).
[78] Ross, *supra* note 14, at 1941–42; *see also* Crawford v. Washington, 541 U.S. 36, 61 (2004).
[79] Ross, *supra* note 14, at 1935.
[80] *Id.* (explaining that a subpoena may be invalidated if it is "unduly burdensome, unreasonable, or oppressive").
[81] *See* MINN. R. EVID. 803, 804.
[82] Ross, *supra* note 14, at 1937.
[83] *Id.*

Another layer of complexity is added because not only is the right to an interpreter limited, but the right to confront an interpreter is even more restricted. Under Minnesota law, an interpreter can be appointed either in preliminary proceedings involving possible criminal sanctions or confinement, or proceedings at the time of apprehension or arrest.[84]

However, despite the role interpreters play during criminal proceedings, the majority view in the United States is that interpreters are not witnesses against defendants under the Confrontation Clause.[85] Consequently, hearsay exceptions are implicated because the majority of courts find translated statements are admissible as "statements offered against a party that is the party's own statement."[86] "When an interpreter is used in the process of the interrogation, however, the police officer acting as a witness at trial does not testify about the defendant's statements – he testifies about the interpreter's statements."[87] Therefore, query whether the "hearsay exception that allows testimony about statements made during police interrogation[s]" should apply or not.[88]

Finally, there is no U.S. Supreme Court precedent that directly proscribes the right to confront an interpreter used during criminal proceedings. As a result, the complex interactions between the hearsay rules, the Confrontation Clause, and interpreter laws intersect to restrict defendants' right to confront their interpreters.

### *E. Conflicting Common Law Jurisprudence*

Originally, the U.S. Supreme Court admitted hearsay as evidence under the "reliability" test.[89] Under *Ohio v. Roberts*, if the state wanted to introduce hearsay evidence against a defendant, the state was required to show the declarant of hearsay statements was unavailable for trial.[90] If the declarant was not available for trial, the Court found that the hearsay could be admissible if it "bears adequate 'indicia of reliability.'"[91] If a witness's hearsay was deemed unreliable, the witness was subject to cross-examination under the Confrontation Clause.[92] Reliability was determined by either a

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[84] MINN. STAT. § 611.32 (2018).
[85] State v. Lopez-Ramos, 929 N.W.2d 414, 420 (Minn. 2019) (reviewing the majority view).
[86] *Id.* at 424 (citing MINN. R. EVID. 801(d)(2)(A)). This includes statements made by a criminal suspect during a police interrogation.
[87] John Kracum, *The Validity of* United States v. Nazemian *Following* Crawford *and its Progeny: Do Criminal Defendants Have the Right to Face Their Interpreters at Trial?*, 104 J. CRIM. L. & CRIMINOLOGY 431, 435 (2014).
[88] *Id.*
[89] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).
[90] *Id.* at 65.
[91] *Id.* at 66.
[92] *See id.*

"particularized guarantee of trustworthiness" or the evidence must have fallen "within a firmly rooted hearsay exception."[93] The "particularized guarantee of trustworthiness" test granted judges unfettered judicial discretion that was vague, subjective, and led to inconsistent results.[94]

In the landmark case *Crawford v. Washington*,[95] the Supreme Court abrogated the "reliability" test from *Ohio v. Roberts*, and instead adopted the "testimonial" standard.[96] In *Crawford*, a man convicted of attempted murder and assault appealed his conviction on the theory that his wife's statements to police officers were improperly admitted.[97] Crawford's wife made statements to the police that indicated her husband's attack was not in self-defense, which refuted Crawford's main defense.[98] Crawford's wife invoked marital privilege under Washington state law and refused to testify at trial.[99] As a result, Crawford did not have an opportunity to cross-examine his wife.[100]

The Court unanimously held that "testimonial" hearsay, like Crawford's wife's statements, is barred by the Confrontation Clause.[101] The Court determined testimonial hearsay is admissible only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.[102] Although the Court left "testimonial" undefined, it noted "testimonial" hearsay includes "affidavits, depositions, prior testimony, or confessions."[103] Notably, the Court found that "statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."[104]

Post-*Crawford* jurisprudence reflects the inherent difficulty in determining the reach of the Confrontation Clause—especially regarding interpreters as witnesses against criminal defendants. In *Melendez-Diaz v. Massachusetts*,[105] the Court determined that forensic analysts who created

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[93] *Id.*

[94] Crawford v. Washington, 541 U.S. 36, 67–69 (2004) (acknowledging that the reliability test was a "[v]ague standard [and was] manipulable" because "judges, like other government officers, [cannot] always be trusted to safeguard the rights of the people").

[95] *Id.*

[96] *Id.* at 51–54.

[97] *Id.* at 38, 40.

[98] *Id.* at 39–40.

[99] *Id.* at 41.

[100] *Id.*

[101] *See id.* at 51–53 (noting the Sixth Amendment language "witnesses" against the accused, meaning those who "bear testimony," as justification for adopting the testimonial standard).

[102] *Id.* at 54.

[103] *Id.* at 51 (noting testimonial as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact" including those statements that "declarants would reasonably expect to be used prosecutorially").

[104] *Id.* at 52.

[105] 557 U.S. 305 (2009).

reports regarding substances seized from Melendez-Diaz were adverse witnesses against the defendant.[106] The Court found that the analysts' reports were affidavits, which "fall within the 'core class of testimonial statements'" covered by the Confrontation Clause.[107] Consequently, the Court determined that the defendant had a constitutional right to cross-examine the forensic analysts.[108] The Court emphasized that "[t]here is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors," which justify the use of confrontation to test "analysts' honesty, proficiency, and methodology."[109]

In *Bullcoming v. New Mexico*,[110] the Court reaffirmed *Melendez-Diaz* and held that the defendant had a right to confront the analyst who certified his blood-alcohol analysis report.[111] The Court determined the analyst was a witness who should have been subjected to cross-examination under the Confrontation Clause, similar to the forensic analyst in *Melendez-Diaz*.[112] Again, the Court noted that documents created and used for evidentiary purposes and "made in aid of a police investigation, rank[] as testimonial."[113] The Court asserted that "the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar."[114] Lastly, the Court rejected the notion that unsworn statements should be treated differently than sworn statements for purposes of Confrontation Clause analysis.[115]

In *State v. Caulfield*,[116] the Minnesota Supreme Court did not apply the language conduit theory when it considered whether analysts' reports constitute testimonial evidence under *Crawford*.[117] The court found

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[106] *Id.* at 308–11. The Court rejected the notion that there is a "third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 314.

[107] *Id.* at 310 (finding the certificates were created to serve as evidence to prove facts in the criminal proceeding).

[108] *Id.* The Court noted that "[f]orensic evidence is not uniquely immune from the risk of manipulation." *Id.* at 318.

[109] *Id.* at 320–21.

[110] 564 U.S. 647 (2011).

[111] *See id.* at 652.

[112] *Id.* at 659–63 (recognizing that defense counsel's questions could have revealed the analyst's "incompetence, evasiveness, or dishonesty").

[113] *Id.* at 664.

[114] *Id.* at 660–61 (finding that such "representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination").

[115] *Id.* at 664 (emphasizing *Crawford*'s determination that "any construction of the Confrontation Clause that would render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements" is unreasonable because doing so "would make the right to confrontation easily erasable").

[116] 722 N.W.2d 304 (Minn. 2006).

[117] *Id.* at 308–09.

that the admission of a Bureau of Criminal Apprehension (BCA) laboratory report without allowing the defendant an opportunity to confront the analyst was contrary to his Sixth Amendment rights.[118] The court determined the laboratory report mirrored the "types of statements about which the Court in *Crawford* expressed concern."[119] As a result, the court reversed and remanded the judgment.[120]

## II. THE *LOPEZ-RAMOS* DECISION

### *A. Facts and Procedural Posture*

In May 2016, the State charged Cesar Rosario Lopez-Ramos with first-degree criminal sexual conduct.[121] Law enforcement discovered Lopez-Ramos's unlawful conduct when a county child protection worker contacted police regarding the suspected sexual abuse of a twelve-year-old child.[122] Then, Worthington Police Officer Daniel Brouillet began an investigation.[123] During the investigation, the victim and her parents identified Lopez-Ramos as the only suspect.[124]

After police officers contacted Lopez-Ramos and he agreed to provide a statement to police, an officer transported Lopez-Ramos to the county law enforcement center.[125] While in an interview room, the officer started a recording system and called the AT&T LanguageLine, a foreign language translation service, and requested a Spanish interpreter.[126] After the officer placed the call on speakerphone, the Spanish interpreter conducted the interview in sequential interpretation.[127] During the course of the interview, Lopez-Ramos admitted he sexually assaulted the victim on one occasion.[128]

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[118] *Id.* at 306–07.
[119] *Id.* at 309 (finding the report was "clearly prepared for litigation").
[120] *Id.* at 307.
[121] State v. Lopez-Ramos, 929 N.W.2d 414, 415, n.1 (Minn. 2019) ("Lopez-Ramos was charged with the sexual penetration of a victim under 13 years of age when he was more than 36 months older than the victim."); *see also* MINN. STAT. § 609.342 subdiv.1(a) (2018).
[122] State v. Lopez-Ramos, 913 N.W.2d 695, 699 (Minn. Ct. App. 2018).
[123] *Id.*
[124] *Lopez-Ramos*, 929 N.W.2d at 415.
[125] *Id.*
[126] *See id.* at 415, n.1 (Lopez-Ramos's first language is Mam, his second language is Spanish, and he is not fluent in English); *see* LanguageLine Solutions, *Over the Phone Interpreting Services*, https://www.languageline.com/interpreting/on-demand/over-the-phone [https://perma.cc/M8JF-953T].
[127] *Lopez-Ramos*, 929 N.W.2d at 415 (explaining that sequential interpretation means "the officer asked a question in English, the interpreter translated the question from English to Spanish, Lopez-Ramos responded in Spanish, and the interpreter translated the response from Spanish to English").
[128] *Id.*

After the interview, officers arrested and charged Lopez-Ramos.[129] Lopez-Ramos pled not guilty, and the case proceeded to a jury trial.[130] The morning his trial was scheduled to start, Lopez-Ramos objected to the admission of his recorded translated statements on Sixth Amendment Confrontation Clause and hearsay grounds because the State was not going to call the interpreter to testify during the trial.[131] The district court asked the State to make a foundational offer of proof regarding the interpreter the police used during Lopez-Ramos's interview.[132] In response, the State explained that neither the interpreter's identification nor location were identified.[133]

The district court admitted the translated statements because they did not violate the Confrontation Clause or hearsay rules as the interpreter was acting as a language conduit.[134] The district court relied on the *Nazemian* factors to determine the interpreter acted as a language conduit and found the statements were attributable to Lopez-Ramos as the declarant.[135] As a result, the district court overruled Lopez-Ramos's objection.[136]

During the jury trial, the officer testified that Lopez-Ramos responded to the translated questions without requesting clarification from the interpreter.[137] Additionally, the officer testified that Lopez-Ramos admitted he sexually assaulted the victim.[138] The video recording of the interview, which depicted Lopez-Ramos's ability to fully participate in the interview, was admitted into evidence and played for the jury.[139] During the video, Lopez-Ramos did not demonstrate confusion, and he did not express misunderstanding of the questions the officer asked and the interpreter translated.[140]

During the trial, the victim testified that Lopez-Ramos sexually penetrated her.[141] "Lopez-Ramos testified in his [own] defense and denied

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[129] State v. Lopez-Ramos, 913 N.W.2d 695, 700 (Minn. Ct. App. 2018).
[130] *Id.*
[131] *Lopez-Ramos*, 929 N.W.2d at 415–16.
[132] *Id.* at 416.
[133] *Id.* (noting that the State argued the lack of verification stemmed from Lopez-Ramos's prior failure to challenge the accuracy of the translation).
[134] *Lopez-Ramos*, 913 N.W.2d at 700. The Court in *Nazemian* relied on several factors to determine whether an interpreter's statements should be attributed to the defendant under a language conduit theory. United States v. Nazemian, 948 F.2d 522, 527 (9th Cir. 1991). For an in-depth discussion of the *Nazemian* factors *see infra* Section IV.C.
[135] *Id.*
[136] *Lopez-Ramos*, 929 N.W.2d 414, 416 (Minn. 2019).
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*

having any sexual contact with the victim."[142] During his testimony, Lopez-Ramos alleged he was intoxicated during the interview and did not understand some of the officer's questions throughout the interview.[143] On cross-examination, Lopez-Ramos admitted he understood the officer's questions and the translation.[144] "On December 15, 2016, the jury found Lopez-Ramos guilty of first-degree [criminal sexual conduct]."[145] The district court convicted Lopez-Ramos and sentenced him to 144 months in prison.[146]

Lopez-Ramos appealed the decision, and the Minnesota Court of Appeals upheld the district court's ruling.[147] First, the court held the *Nazemian* factors were properly applied to determine the interpreter's translation was attributable to Lopez-Ramos.[148] Second, the court held the Confrontation Clause did not apply because Lopez-Ramos was the declarant, thus he could not be denied the opportunity to confront himself.[149] Finally, the court concluded that the statements were admissible over Lopez-Ramos's hearsay objection because the statements could be categorized as admissions by a party-opponent under Minnesota Rule of Evidence 801(d)(2).[150]

### *B. The Majority Opinion*

Lopez-Ramos appealed the appellate court's decision, arguing the admission of his translated statements violated the Confrontation Clause and that the translated statements were inadmissible as hearsay.[151] The Minnesota Supreme Court ruled in favor of the State on both issues.[152] Although the majority found that the facts of the case were materially different from *Crawford*, the court applied the underlying principle of *Crawford* to find that the interpreter was not a witness against Lopez-Ramos.[153] The majority analyzed the process of language translation based

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[142] *Id.*
[143] *Id.*
[144] State v. Lopez-Ramos, 913 N.W.2d 695, 700 (Minn. Ct. App. 2018).
[145] *Id.*
[146] *Id.* at 700–01.
[147] *Id.* at 710.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 709–10.
[151] State v. Lopez-Ramos, 929 N.W.2d 414, 417 (Minn. 2019) (arguing the admission of his translated statements violated the Confrontation Clause and the translated statements were inadmissible as hearsay).
[152] *Id.* at 423.
[153] *Id.* at 419–20 (finding the interpreter was not a witness against Lopez-Ramos because the interpreter does not bear testimony like the wife in *Crawford* did, and language translation "does not transform the interpreter into a witness against the defendant").

on its simplified view of an interpreter's role.[154] The court concluded that Lopez-Ramos was the declarant of the admitted statements, thus his Confrontation Clause rights were not violated.[155] The majority reasoned the interpreter was acting as a language conduit, consistent with *Nazemian*.[156]

The majority distinguished the case from *Bullcoming v. New Mexico* and *Melendez-Diaz v. Massachusetts*.[157] Again, focusing on the "simple" process of translating a language, the court determined an "interpreter is more like a court reporter" than a forensic laboratory analyst.[158] Because the majority already held that Lopez-Ramos was the declarant of the admitted statements, it found his hearsay challenge lacked merit.[159] As a result, the court affirmed the decision of the court of appeals.[160]

### *C. The Dissenting Opinion*

The dissenting opinion written by Justice Hudson, joined by Justices Lillehaug and Thissen, argued that the majority decision violated "the Sixth Amendment by permitting the State to introduce testimonial statements made by an unidentified interpreter . . . without calling that interpreter as a witness."[161] The dissent reasoned that the language-conduit theory is unsupported by Minnesota precedent[162] and is undermined by the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico*.[163] The dissent drew parallels between *Caulfield*, *Melendez-Diaz*, and *Bullcoming* to argue Lopez-Ramos's conviction should be reversed.[164] The dissent rejected the majority's view that *United States v.*

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[154] *Id.* (declaring an interpreter's role "is not to provide or vary context . . . [but] to relay what the defendant said in another language"). The majority added that an "interpreter is simply the vehicle for conversion" and asserted that an "interpreter simply makes the language-conversion process more efficient and effective." *Id.* at 419.

[155] *Id.* at 420.

[156] *Id.* The majority agreed with the Ninth Circuit's reasoning in *Nazemian* that "a *generally* unbiased and *adequately* skilled" interpreter "simply serves as a 'language conduit.'" *Id.* (emphasis added).

[157] *Id.* at 421–22.

[158] *Id.* at 422 (insisting that both interpreters and court reporters translate one form of communication to another, "conveying information but not adding context").

[159] *Id.* at 423.

[160] *Id.*

[161] *Id.* (Hudson, J., dissenting).

[162] *Id.* at 425 (citing State v. Caulfield, 722 N.W.2d 304 (Minn. 2006)).

[163] *Id.* (Hudson, J., dissenting) (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) and Bullcoming v. New Mexico, 564 U.S. 647 (2011)).

[164] *Id.* (comparing the primary evidence used in the stated cases and Lopez-Ramos was a report, created by someone who was not called to testify, which was admitted and led to a conviction). The dissent also highlighted the fact that the interpreter used during Lopez-Ramos's interview was never identified, including the interpreter's full name and location. *Id.*

*Charles* and *Taylor v. State* were inapplicable, and instead asserted that both cases support a finding against the language conduit theory.[165]

The dissent acknowledged the complexities of language translation while drawing parallels between "the translation process and between each step of the chemical-analysis process . . . ."[166] The dissent emphasized *Crawford*'s holding that the Confrontation Clause guarantees individuals the right to cross-examine witnesses against them.[167] The dissent criticized the majority's boasting of sections 611.30 through 611.34 of the Minnesota Statutes and the Minnesota Code of Professional Responsibility for Interpreters because "those protections are irrelevant to a Confrontation Clause analysis" and "Lopez-Ramos did not receive those protections."[168] The dissent concluded that the interpreter was the declarant of the hearsay statement, the statement was testimonial, and the district court erred when it denied Lopez-Ramos's motion to suppress the statement.[169] The dissent asserted that Lopez-Ramos's conviction should have been reversed and remanded for a new trial—where the State could have offered the "live testimony of the AT&T interpreter, or [brought] a different interpreter . . . [to] translate Lopez-Ramos's recorded statement."[170]

Lopez-Ramos's petition for a writ of certiorari to the U.S. Supreme Court was denied on January 13, 2020.[171]

## IV. ANALYSIS

The majority erred by applying the *Nazemian* test to determine the interpreter in *Lopez-Ramos* was acting as a language conduit.[172] Even though the court reflected on the importance of interpreters in the criminal justice system,[173] the court failed to consider the changing demographics of the United States.[174] The court's oversimplified construction of language

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[165] *Id.* The dissent notes that the language conduit theory requires judges to "'make a threshold determination of the interpreter's honesty, proficiency, and methodology *without testimony from the one witness whose testimony could best prove the accuracy of the interpretations*—the interpreter himself or herself.'" *Id.* (citing Taylor v. State, 130 A.3d 509, 539 (Md. Ct. Spec. App. 2016) (emphasis added)).

[166] *Id.* at 426 (including adding context and nuance, applying knowledge, and potentially making mistakes throughout the process).

[167] *Id.* at 427.

[168] *Id.* at 428 (highlighting that the interpreter in this case did not take an oath before translating Lopez-Ramos's statements and was not subject to a code of conduct).

[169] *Id.* at 429.

[170] *Id.*

[171] Petition for Writ of Certiorari, Lopez-Ramos v. Minnesota, 140 S. Ct. 845 (2020) (No. 19-5936).

[172] *Lopez-Ramos*, 929 N.W.2d at 420.

[173] *Id.* at 419–20 (reviewing MINN. STAT. §§ 611.30–.34 (2018) and CODE OF PRO. RESP. FOR INTERPRETERS IN MINN. STATE CT. SYS. Canon 1).

[174] *See infra* Section IV.A.

translation misguided its decision to apply the language conduit theory.[175] As a result of the implicit conflict between *Nazemian* and post-*Crawford* jurisprudence,[176] the court should have adopted a disciplined approach to determine whether interpreters' translations constitute hearsay.[177] Consequently, the majority erred when it distinguished interpreters from forensic analysts for the purposes of the analyses in both *Melendez-Diaz* and *Bullcoming*.[178] Instead, the court should have rejected the language conduit theory and mirrored other circuit court approaches like *Taylor* and *Charles*.[179]

### *A. Changing Demographics of the United States*

As the majority in *Lopez-Ramos* acknowledged, interpreters play an incredibly important role in the criminal justice system.[180] However, the court failed to acknowledge the changing demographics of the United States. The court should have recognized the evolving demographics and set clear precedent regarding the use of interpreters to ensure constitutional protection for all foreign language speaking defendants. Certainty in this area of law is crucial "in a country where over three million people cannot understand English and where interpreters are used 350,000 times each year in its courts."[181]

"In 1980, 23.1 million people spoke a language other than English at home . . . ."[182] Whereas in 2010, the national census showed that over 60 million people reported they spoke a language other than English at home.[183] According to the United States Census Bureau, "as of 2010, approximately forty million foreign-born individuals reside in the United States, an increase of approximately nine million over the same population

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[175] *See infra* Section IV.B.
[176] *See infra* Section IV.C.; Taylor v. State, 130 A.3d 509, 539 (Md. Ct. Spec. App. 2016) (finding the *Nazemian* analysis fails to withstand "scrutiny under the Supreme Court's current jurisprudence"); *see also* United States v. Orm Hieng, 679 F.3d 1131, 1140 (9th. Cir. 2012).
[177] *See infra* Section VI.D.
[178] *Lopez-Ramos*, 929 N.W.2d at 421 (arguing interpreters do not add context while "simply convert[ing] information from one language to another"); *see also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311–14 (2009) (holding forensic analysts are subject to the Confrontation Clause because they are adverse to the defendant); Bullcoming v. New Mexico, 564 U.S. 647, 663 (2011) (holding the admission of an analyst's certification rendered the analyst a witness subject to cross-examination under the Confrontation Clause).
[179] *Taylor*, 130 A.3d at 524; United States v. Charles, 722 F.3d 1319 (11th Cir. 2013).
[180] *Lopez-Ramos*, 929 N.W.2d at 419.
[181] Kracum, *supra* note 87, at 434.
[182] CAMILLE RYAN, AM. CMTY. SURV. REPS., LANGUAGE USE IN THE UNITED STATES: 2011 3 (2013) (noting this was a 158% increase, while the population grew only 38%).
[183] *Id.* at 3.

ten years earlier."[184] More than twenty-two percent of those individuals reported they spoke English either "not well" or "not at all."[185]

The majority of the population who reported speaking a non-English language at home spoke Spanish.[186] The Census Bureau noted that the percentage of the total United States population who spoke Spanish "increased from 2005 to 2011."[187] The largest numeric growth in languages other than English spoken in the United States was for Spanish speakers.[188] Notably, in 2011, over fifty percent of individuals who spoke Spanish and reported they spoke English less than "very well," were below the poverty line.[189]

Mirroring the increasing number of Spanish speakers in the United States, the number of Spanish speaking persons in Minnesota is also rising.[190] In Minnesota, over ten percent of the state's population reported they spoke a non-English language at home in the 2010 national census.[191] But nearly nineteen percent of Minnesota's total population reported they spoke English either "not well" or "not at all."[192] Almost ten years later, based on the 2018 American Community Survey, approximately twelve percent of Minnesotans spoke a language other than English at home.[193]

In response to the increase in non-English speakers in Minnesota, the Minnesota Judicial Branch attempted to improve interpreter access in the courts.[194] The Minnesota Judicial Branch created the Court Interpreter Program (CIP) in 1999 to address access to interpreters in Minnesota courts.[195] The CIP is tasked with "interpreter testing and certification, maintaining and publishing the interpreter roster, recruitment and training of new interpreters . . . developing and implementing language access and interpreter polices, [and] the training of court staff and judicial officers . . ."[196] The CIP coordinator collects court interpreter utilization statistics to analyze the needs of court users in Minnesota.[197] However, interpreter use

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[184] Kracum, *supra* note 87, at 431–32.
[185] RYAN, *supra* note 182, at 3.
[186] *Id.* (totaling over 37 million people who spoke Spanish or Spanish Creole).
[187] *Id.* at 5.
[188] *Id.* (indicating that 25.9 million more people speak Spanish in 2010 compared to 1980).
[189] *Id.* at 9.
[190] *See id.* at 11.
[191] *Id.*
[192] *Id.*
[193] MINN. STATE DEMOGRAPHIC CTR., DEP'T. OF ADMIN., *Immigration & Language*, https://mn.gov/admin/demography/data-by-topic/immigration-language/ [https://perma.cc/9Z2Q-22P2].
[194] MINN. JUD. BRANCH, LANGUAGE ACCESS PLAN FOR THE MINNESOTA JUDICIAL BRANCH 7 (2016).
[195] *Id.* at 12.
[196] *Id.*
[197] *Id.* at 13.

reports and "U.S. Census reports do not always reflect the actual language needs of the communities served by the court . . . ."[198]

In 2014, the most common language for which interpreters were used in Minnesota courts was Spanish.[199] "Spanish speakers account[ed] for 55% of the non-English needs of Minnesota court users, and is usually at the top of most district courts' top languages . . . ."[200] At the end of 2012, there were over 92,000 non-citizen inmates in federal and state prisons.[201] Consequently, there was a 13.8% increase in the number of annual interpretation events in federal district courts.[202] In fiscal year 2013, district courts reported that they used interpreters more than 330,000 times, compared to approximately 325,000 times in fiscal year 2012.[203] Spanish was the most commonly used language for interpreters in federal district courts, comprising over 96% of interpreter use during 2012 and 2013.[204]

Although access to interpreters is heavily regulated in Minnesota courts, the same is not necessarily true for interpreters used during interrogations.[205] The Minnesota Judicial Branch imposes an "order of preference for utilization" of interpreters based on their certification.[206] The Minnesota Judicial Branch focused its efforts on ensuring proper training and certification for interpreters used in the courts, rather than the early stages of criminal proceedings. The lack of strict requirements for interpreters used outside of court hearings is problematic for non-English speaking individuals who need an interpreter immediately following arrest because the quality of the interpreter is likely at its lowest in the earliest stages of the criminal proceedings due to the low certification requirements.[207] Unfortunately, the early stages of criminal proceedings, like

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[198] *Id.* (noting individuals "may not be availing themselves of court services precisely because of a real or perceived lack of language access resources in the district courts").
[199] *Id.* at 8.
[200] *Id.*
[201] *Id.* at 41.
[202] Kracum, *supra* note 87, at 432.
[203] ADMIN. OFF. OF THE U.S. CTS., PUBLIC ACCESSIBILITY AND SERVICE ANNUAL REPORT (2013), https://www.uscourts.gov/statistics-reports/public-accessibility-and-service-annual-report-2013 [https://perma.cc/ECX9-R4Z8].
[204] *Id.*
[205] *Compare* MINN. STAT. § 611.32, subdiv. 2 (2018), *with* State v. Sanchez-Diaz, 683 N.W.2d 824, 835 (Minn. 2004) (finding interpreters only need to be "qualified" not certified), *and* MINN. JUD. BRANCH, *supra* note 194 at 17 (asserting the Minnesota Judicial Branch's policy is to "provide qualified spoken-language . . . interpreters . . . in all court proceedings").
[206] MINN. JUD. BRANCH, *supra* note 194 at 17, n.27. The Minnesota Judicial Branch prioritizes the use of certified interpreters based on availability. "If there is no certified interpreter available after a diligent search . . . courts then look to employ another roster interpreter."
[207] *See infra* notes 228–32 and accompanying text.

custodial interrogations, frequently form the foundation for convictions and eventual loss of liberty.

Therefore, as the need for interpreters and the subsequent number of interpreters used in the criminal justice system increases, there must be a unified approach to challenges regarding the admission of interpreters' translations. A unified approach to treat interpreters as witnesses against criminal suspects, regardless of which stage the interpreter was used during the case, will ensure equal protection of criminal suspects' constitutional rights.

### *B. Language Translation is an "Art not a Science"*

Language interpretation is a highly challenging task and is not as simple and straightforward as the majority in *Lopez-Ramos* presents.[208] Notably, linguistic scholars "reject the notion that there are one-to-one equivalencies between languages."[209] Language translation inherently invokes the interpreter's discretion,[210] which undermines the majority's holding that language translation is merely converting words from one language to another "without adding conte[xt]."[211]

Language translation "has been defined as the replacement of textual material in one language [the source language] by equivalent textual material in another language [the target language] . . . ."[212] There are three different modes through which interpreters translate: consecutive, simultaneous, and sight translation.[213] During consecutive interpretation, "the interpreter waits until the source language speaker pauses, then renders the original meaning in the target language."[214] In simultaneous interpretation, "the interpreter conveys the target language message at the same time as the source language speaker."[215] Whereas sight translation is "the oral rendition into a target language of material written in a source language."[216]

Contrary to popular belief, most bilingual individuals are not competent enough to serve as interpreters.[217] Instead, an interpreter must

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[208] State v. Lopez-Ramos, 929 N.W.2d 414, 419 (Minn. 2019).
[209] Ross, *supra* note 14, at 1959.
[210] *Id.* at 1954.
[211] *Lopez-Ramos*, 929 N.W.2d at 421.
[212] Ross, *supra* note 14, at 1966.
[213] Elena M. de Jongh, *Court Interpreting*, 82 FLA. BAR J. 20, 26 (July/Aug. 2008).
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 234–35 (1996); *see also* MINN. JUD. BRANCH, *supra* note 194, at 18 (asserting that bilingual staff may not be used for interpreting in courtroom proceedings).

"perform two functions simultaneously in the field of language and communication that otherwise are always carried out separately: speech (the expression of our ideas) and understanding (our comprehension of the ideas of the other speaker)."[218] In order to translate another language into English,

> An interpreter must listen to what is being said, comprehend the message, abstract the entire message from words and the word order, store the idea, search his or her memory for the conceptual and semantic matches, and reconstruct the message (keeping the same register or level of difficulty as in the source language). While doing this, the interpreter is speaking and listening for the next utterance of the language to process, while monitoring his or her own output.[219]

Language interpretation in the legal field should be subject to the highest form of scrutiny. Interpreters in legal proceedings play a significant role in ensuring criminal suspects' constitutional rights are not infringed.[220] An interpreter's "presence and participation allow an individual who does not speak or understand English to meaningfully participate in the judicial proceeding."[221] The interpreter should work diligently to "place the non-English speaker, as closely as is linguistically possible, in the same situation as the English speaker" during court proceedings.[222] The "importance of language in law makes it doubly odd that courts would be so cavalier in considering the ability of languages to interrelate."[223] While general common words may be easier to translate, legal terminologies "rel[y] on specificity and exactness."[224]

Minnesota imposes strict requirements for interpreters used during court hearings.[225] First, court interpreters must pass an "English-only written exam, which assesses knowledge of the English language, court related terms and usage, and ethics and professional conduct."[226] Second, interpreters

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[218] de Jongh, *supra* note 213, at 25 (emphasizing that the "two processes are performed by the same person, often simultaneously").
[219] State v. Montoya-Franco, 282 P.3d 939, 943 (Or. Ct. App. 2012) (quoting Cathy Rhodes, *Court Certification*, 1 ACCESS TO JUST. J. 1, 2 (Summer 1999)).
[220] *See* People v. Carreon, 198 Cal. Rptr. 843, 847 (Cal. Ct. App. 1984) ("Various courts and commentators have noted denial of interpreter services impairs not only the defendant's due process rights, but also his rights to confront adverse witnesses, to the effective assistance of counsel, and to be present at his own trial." (citations omitted)).
[221] Grabau & Gibbons, *supra* note 217, at 241.
[222] *Id.*
[223] Ross, *supra* note 14, at 1965.
[224] *Id.* at 1968.
[225] MINN. JUD. BRANCH, *supra* note 194, at 22.
[226] *Id.*

must pass an "oral interpreting examination that measures knowledge, skills, and abilities in the three modes of interpreting (sight translation, consecutive, and simultaneous)."[227] Third, court interpreters must "demonstrate good character and fitness as evidenced through a background check."[228]

Unlike the certification requirements for court interpreters in Minnesota, there are no certification requirements for interpreters used during custodial interrogations.[229] This is problematic considering interpretation during interrogations includes the discussion and consideration of Constitutional rights, "and mistranslation (for example, one that conveys a denial of guilt as an admission) may violate due process."[230]

Interpreters regularly disagree about the proper translation of a statement because interpreters' use of discretion while translating ultimately impacts the end result of a translation.[231] Interpreters invoke their discretion to use "more (or less) polite language; . . . inject or omit hesitation; use more formal . . . language; or introduce ambiguities."[232] Some languages reflect cultural concepts that cannot be translated into other languages.[233] Similarly, interpreters regularly misinterpret testimony due to words that may appear similar "because they are derived from a common form but whose meanings in certain contexts are often completely different."[234] Additionally, "both the translated interaction and the translator's own cultural background influence the manner in which statements are translated."[235]

In sum, foreign language interpreters exercise judgment and add context similar to the work of forensic analysts.[236] Interpreters are not exempt from making mistakes, nor are interpreters unsusceptible from

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[227] *Id.*

[228] *Id.*

[229] *Compare* MINN. STAT. § 611.32, subdiv. 2 (2018), *with* State v. Sanchez-Diaz, 683 N.W.2d 824, 835 (Minn. 2004) (finding interpreters only need to be "qualified" not certified).

[230] Right to an Interpreter, 7 Minn. Pracs., Crim. L. & Proc. § 6:29 (4th ed.); *see* Ross, *supra* note 14, at 1934, 1965; *see also* Miranda v. Arizona, 384 U.S. 436, 469–70 (1966) (emphasizing the right to counsel during interrogations is "indispensable to the protection of the Fifth Amendment privilege" because unequivocally understanding the consequences of statements made during interrogations is paramount).

[231] Ross, *supra* note 14, at 1965.

[232] *Id.* at 1965–66.

[233] *See* Ellen Frances Saunders, *11 Untranslatable Words from Other Cultures*, MAPTIA BLOG (Maptia Aug. 21, 2013), http://blog.maptia.com/posts/untranslatable-words-from-other-cultures [https://perma.cc/8D43-HM33] (describing eleven words that cannot be translated directly into English, such as the Japanese word *komorebi,* which describes the sunlight that filters through the leaves of trees).

[234] de Jongh, *supra* note 213, at 27 (explaining "false or party false cognates").

[235] Ross, *supra* note 14, at 1972.

[236] *Id.* at 1978; *see also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009) (noting "[f]orensic evidence is not uniquely immune from the risk of manipulation").

succumbing to external pressures to interpret statements in favor of one party. Accordingly, the court should have treated an interpreter like a forensic analyst in *Melendez-Diaz* and *Bullcoming* to find that interpreters are witnesses subject to cross-examination.[237]

### *C. Inconsistent Jurisdictional Approaches*

Courts across the United States use different approaches to determine whether an interpreter's translations are hearsay and whether the interpreter is subject to the Confrontation Clause.[238] The twenty-nine-year-old holding in *United States v. Nazemian*[239] caused significant conflict post-*Crawford*. Even though the Court in *Crawford* did not explicitly overrule *Nazemian*, the two cases are implicitly at odds with one another.[240] The inherent conflict between *Nazemian* and *Crawford* caused a circuit split: the Eleventh Circuit rejected *Nazemian*,[241] while other circuits continue to apply the *Nazemian* multifactor analysis post-*Crawford*.[242]

After *Ohio v. Roberts*, the Ninth Circuit adopted a different approach to hearsay and Confrontation Clause issues.[243] As a threshold matter, the *Nazemian* court considered whether the interpreter or the defendant should be viewed as the declarant of the out-of-court statements.[244] The court relied on several factors to determine "whether the interpreter's statements should be attributed to the defendant under . . . [a] conduit theory."[245] The factors included reviewing "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."[246] The court found that an interpreter's translation of a defendant's out-of-court statements did not constitute hearsay because the

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[237] State v. Lopez-Ramos, 929 N.W.2d 414, 425 (Minn. 2019) (Hudson, J., dissenting) (noting the majority adopted the nonprecedential language-conduit theory).

[238] *See* Kimberly J. Winbush, Annotation, *Application of Confrontation Clause Rule to Interpreter's Translations or Other Statements—Post-Crawford Cases*, 26 A.L.R. 7th Art. 1 (2017).

[239] 948 F.2d 522 (9th Cir. 1991).

[240] Taylor v. State, 130 A.3d 509, 537 (Md. Ct. Spec. App. 2016); *see also* U.S. v. Orm Hieng, 679 F.3d 1131, 1140 (9th Cir. 2012).

[241] *See* United States v. Charles, 722 F.3d 1319, 1327–29 (11th Cir. 2013).

[242] Ross, *supra* note 14, at 1955–56 (noting courts in the Fourth, Fifth, and Eighth Circuits follow the *Nazemian* approach).

[243] *Nazemian*, 948 F.2d 522.

[244] *Id.* at 525–26 (finding that there would be no Confrontation Clause issue if the defendant was viewed as the declarant because a defendant cannot be "denied the opportunity to confront herself").

[245] *Id.* at 527.

[246] *Id.*

defendant was the declarant of the statements.[247] The court concluded that neither a Confrontation Clause nor a hearsay issue arose.[248]

*1. Acceptance of Nazemian*

In *United States v. Vidacak*, the Fourth Circuit found an interpreter acted as a language conduit, thus it declined a Confrontation Clause challenge.[249] The court determined the general rule is "an interpreter is no more than a language conduit" with an exception that "is applied 'where the particular facts of a case cast significant doubt upon the accuracy of a translated confession.'"[250] After the court reviewed the *Nazemian* multifactor test,[251] the court found the "application of the narrow exception is not warranted . . . and the translation did not create an additional level of hearsay."[252] The Fourth Circuit's reasoning for finding the interpreter in *Vidacak* was acting as a language conduit stemmed from general principles of reliability.[253] Ignoring the reality of language translation, the court found the absence of evidence proving the interpreter's "motive to mislead or distort" to be persuasive.[254]

Four years later, the Fourth Circuit again applied the language conduit theory to determine the admission of an interpreter's translations did not violate the defendant's constitutional rights.[255] However, the court did not explicitly rely on *Nazemian* to determine the interpreter was a language conduit.[256] Instead, the court found *Crawford* illustrative as showing testimonial statements can be admissible "for purposes other than establishing the truth of the matter asserted."[257] Consequently, the court rejected the defendant's Confrontation Clause challenge because the hearsay statements at issue were "introduced as prior inconsistent statements."[258]

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[247] *Id.* at 528.
[248] *Id.*
[249] United States v. Vidacak, 553 F.3d 344, 352 (4th Cir. 2009) (relying on United States v. Martinez-Gaytan, 213 F.3d 890 (5th Cir. 2000), which in turn relied on *Nazemian*, 948 F.2d 522).
[250] *Id.* (quoting *Martinez-Gaytan,* 213 F.3d at 891).
[251] *Id.* at 352 (citing *Martinez-Gaytan*, 213 F.3d at 892, which cited to *Nazemian*, 948 F.2d at 525–27 to review four factors including: "1) which party supplied the interpreter; 2) whether the interpreter had a 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 translated").
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] United States v. Shibin, 722 F.3d 233, 248 (4th Cir. 2013).
[256] *Id.*
[257] *Id.* (citing Crawford v. Washington*,* 541 U.S. 36, 60 n.9 (2004)).
[258] *Id.*

The Fifth Circuit similarly relied on the language conduit theory to determine whether an interpreter's translations were not hearsay in violation of the Confrontation Clause.[259] The Eighth Circuit also found that an interpreter is generally "viewed as an agent of the defendant; hence the translation is attributable to the defendant as his own admission and is properly characterizable as non-hearsay . . . ."[260] Although the Eighth Circuit court did not consider the officer who interpreted the defendant's statements a language conduit, it denied the defendant's hearsay appeal under the applicable standard of review.[261]

Marking a shift in post-*Crawford* jurisprudence, the Ninth Circuit acknowledged the tension between *Crawford* and *Nazemian* while it considered a foreign language speaking defendant's Sixth Amendment rights.[262] Nevertheless, the Ninth Circuit declined the opportunity to reject the *Nazemian* threshold analysis.[263] In *United States v. Orm Hieng*, the court held that the admission of a law enforcement agent's testimony regarding statements the defendant made through an interpreter did not violate the defendant's Sixth Amendment rights.[264] The court affirmed the defendant's conviction under the language conduit theory from *Nazemian*.[265] In reaching its decision, the court applied the *Nazemian* factors because it could "apply *Nazemian* without running afoul of *Crawford*."[266]

The court declined the opportunity to adopt an approach similar to *Melendez-Diaz* and *Bullcoming* because "[t]hey do not address the question whether, when a speaker makes a statement through an interpreter, the Sixth Amendment requires the court to attribute the statement to the interpreter."[267] Consequently, the majority of the Ninth Circuit panel distinguished an interpreter's translation of a defendant's statements from a laboratory analyst's report.[268] The Ninth Circuit continued to follow *Nazemian*, noting its hesitance to abrogate circuit precedent absent "clearly

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[259] Escalante v. Clinton, No. 09-41055, 2010 WL 2802369 at *498 (5th Cir. July 16, 2010).
[260] United States v. Sanchez-Godinez, 444 F.3d 957, 960 (8th Cir. 2006) (quoting United States v. Da Silva, 725 F.2d 828, 831 (2d Cir. 1983)).
[261] *Id.* at 961 (finding the error, if any, regarding the admission of the translated hearsay statements was harmless).
[262] United States v. Orm Hieng, 679 F.3d 1131, 1140 (9th Cir. 2012).
[263] *Id.* at 1140–41.
[264] *Id.* at 1140.
[265] *Id.* at 1139.
[266] *Id.* at 1140.
[267] *Id.* (finding the consequence is that "[n]one of these cases . . . are in direct conflict with our holding in *Nazemian*").
[268] *Id.*

irreconcilable" decisions between the Supreme Court and prior circuit precedent.[269]

The Ninth Circuit's application of the language conduit theory was premised on the assumption that "accurate interpretation by an individual with no motive to mislead or distort does not create a layer of hearsay."[270] However, this assumption ignores the reality of language interpretation—which is inevitably subject to both intentional and unintentional errors.[271] As Judge Berzon argued:

> Translation from one language to another is much less of a science than conducting laboratory tests, and so much more subject to error and dispute. Without the ability to confront the person who conducted the translation, a party cannot test the accuracy of the translation in the manner in which the Confrontation Clause contemplates.[272]

Judge Berzon's concurring opinion in *Orm Hieng* challenged the validity of *Nazemian* and the language conduit theory.[273] Judge Berzon viewed *Nazemian*'s holding as based "on a pre-*Crawford* understanding of the unity between hearsay concepts and Confrontation Clause analysis."[274] Judge Berzon also highlighted the significant tension between *Nazemian*'s holding and the U.S. Supreme Court's holdings in *Melendez-Diaz* and *Bullcoming*.[275] Importantly, Judge Berzon recognized *Nazemian*'s "implicit trust in the accuracy and independence of interpreters" and the Supreme Court's more recent "scrutiny of forensic reports."[276]

Judge Berzon's concurring opinion reflects the danger in the Ninth Circuit's continued application of *Nazemian*. The Ninth Circuit's reliance on its twenty-nine-year-old holding in *Nazemian*, despite clear conflicts between *Nazemian* and recent Supreme Court precedent, continues to muddy the waters in this important area of law.

### *2. Rejection of Nazemian*

Contrary to the Ninth Circuit's approach, the Eleventh Circuit determined the language conduit theory should not apply to challenges regarding foreign language interpreters as witnesses under the Confrontation Clause.[277] The Eleventh Circuit correctly rejected *Nazemian*

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[269] *Id.* at 1140–41; *see also Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir. 2003).
[270] Kracum, *supra* note 87, at 437.
[271] *See* de Jongh, *supra* note 213, at 27.
[272] *Orm Hieng*, 679 F.3d at 1149 (Berzon, J., concurring).
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] Kracum, *supra* note 87, at 451.
[277] United States v. Charles, 722 F.3d 1319, 1327–28 (11th Cir. 2013).

and the language conduit theory because an interpreter engages "some independent analysis when translating the defendant's statements," thus the interpreter is considered a separate declarant.[278]

In *United States v. Charles*, the Eleventh Circuit held that a defendant had the right to cross-examine the interpreter who translated his statements during a police interrogation.[279] The court determined the interpreter was the declarant of the defendant's translated statements, thus a police officer's testimony regarding the interpreter's translation was hearsay.[280] The court reasoned that the statements were easily categorized as testimonial under *Crawford* because they were elicited during an interrogation.[281]

Importantly, the court acknowledged the complexities of language translation to find that the interpreter's statements could not be considered identical to the defendant's statements.[282] The court reasoned that, post-*Crawford*, the language conduit theory is inapplicable because it is premised on the court's determination of the interpreter's reliability, similar to the reliability test used in *Roberts*, which *Crawford* overruled.[283] The court emphasized that *Crawford* controlled its decision because *Crawford* "rejected reliability as too narrow a test for protecting against Confrontation Clause violations."[284]

The court explained its rationale for rejecting *Nazemian* was also bolstered by *Melendez-Diaz* and *Bullcoming*.[285] The court was particularly persuaded by *Melendez-Diaz* because when "even the results of 'neutral, scientific testing,' do not exempt the witness who performed the test from cross-examination, certainly the Confrontation Clause requires an

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[278] Ross, *supra* note 14, at 1933; *Charles*, 722 F.3d at 1327 n.9 ("[The] interpreter's otherwise inadmissible hearsay statements bear upon the basic fact that the interpreter is the speaker (declarant) of the out-of-court . . . statements that are being testified to in court by a third party. And it is the declarant who is subject to the . . . Confrontation Clause.").

[279] *Charles*, 722 F.3d at 1323.

[280] *Id.* (finding the interpreter was the declarant of the out-of-court English language statements, and the defendant was the declarant of the out-of-court Creole language statements).

[281] *Id.* at 1323–24. The *Charles* court determined "testimonial" includes "'[s]tatements taken by police officers in the course of interrogations' . . . but also 'witness statements given to an investigating officer.'" *Id.* (citations omitted).

[282] *Id.* at 1324. The court found that there were two different sets of testimonial statements made by two different declarants "for purposes of the Confrontation Clause" analysis. *Id.* The court reasoned that "the statements of the language interpreter and Charles are not one and the same," furthering the notion that "[l]anguage interpretation . . . does not provide for a 'one-to-one correspondence between words or concepts in different languages.'" *Id.* (citations omitted).

[283] *Id.* at 1327–28.

[284] *Id.*

[285] *Id.* at 1329–30.

interpreter of the concepts and nuances of language to be available for cross-examination at trial."[286] However, given the lack of clear binding precedent from the Eleventh Circuit or the Supreme Court on this issue, the court found the district court did not plainly err by admitting the statements without allowing the defendant to confront his interpreter.[287]

Similarly, in *Taylor v. State*,[288] the court reflected on post-*Crawford* jurisprudence to determine a sign-language interpreter's translation of a deaf defendant's testimony qualified as "testimonial" for purposes of the modern Confrontation Clause analysis.[289] The court did not apply the *Nazemian* multifactor analysis because "[u]nlike a three-judge panel from the Ninth Circuit, this Court is not required to uphold prior Ninth Circuit precedent that is in significant tension with Supreme Court jurisprudence."[290] The court found the *Nazemian* holding was incompatible with *Crawford* because *Nazemian* "does exactly what *Crawford* forbids: it leaves 'the Sixth Amendment's protection to the vagaries of the rules of evidence' and to 'amorphous notions of 'reliability.'"[291]

In reaching its decision, the court analyzed four pillars upon which *Nazemian*'s analysis rests.[292] First, the court found that "*Nazemian* uses rhetorical sleight of hand to distract attention from the fact that an interpreter makes assertions about the English meaning of what the defendant has said in his or her own language."[293] Second, the court asserted that the language conduit theory "creates a legal fiction as to the identity of the speaker."[294] Third, the court determined *Nazemian*'s "analysis depends upon an analogy to evidentiary rules regarding hearsay."[295] Fourth, the court highlighted that "*Nazemian* premises the admissibility of the absent

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[286] *Id.* at 1329.
[287] *Id.* at 1331.
[288] Taylor v. State, 130 A.3d 509 (Md. Ct. Spec. App. 2016).
[289] *Id.* at 521. The court noted that the "structured police questioning after a *Miranda* warning carried as much formality and solemnity as the interrogation from *Crawford*." *Id.* at 523.
[290] *Id.* at 536.
[291] *Id.* at 539 (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004)).
[292] *Id.* at 537 (asserting "none of which withstands scrutiny under the Supreme Court's current jurisprudence").
[293] *Id.* at 537 (acknowledging *Nazemian* failed to recognize that "interpreters must understand what the defendant meant and remember what the defendant said while simultaneously exercising judgment and discretion to convert one set of symbols to another without altering what the defendant intended to convey").
[294] *Id.* at 537 (finding that the conduit approach "collapses the defendant and the interpreter into a single witness for constitutional purposes").
[295] *Id.* at 538 (asserting that the Supreme Court recentered the Confrontation Clause analysis to the Constitution, rather than the law of evidence).

interpreter's statements upon the apparent reliability of the interpretations."[296]

The court concluded that *Crawford*, *Melendez-Diaz*, and *Bullcoming* "illustrate[] the correct application of current law."[297] As a result, the court asserted that cross-examination is the proper means by which an interpreter's proficiency, honesty, or methodology can be tested.[298] Importantly, the court suggested that "*Nazemian* disregards the difficult realities of real-time language interpretation . . . ." and refused to call an interpreter a language conduit.[299] The court displayed clear disdain toward the language conduit theory because it requires the court "to endorse a fallacy or misconception that ignores the reality of language interpretation."[300]

### *D. Disciplined Approach*

Although the language conduit theory is the majority approach in the United States, this Paper argues that it must be rejected in favor of a more predictable and constitutionally protective approach. When an interpreter's translations are introduced at trial, the interpreter must be viewed as the declarant of those translated statements. As a result, the translated statements should be considered hearsay, "thereby affording the defendant a right to confront his interpreter under the Confrontation Clause."[301]

The *Nazemian* threshold test and language conduit theory are simply an "[a]lternative means of determining reliability,"[302] a standard which *Crawford* directly determined is inapplicable during Confrontation Clause analyses.[303] Throughout post-*Crawford* decisions, the Supreme Court clearly illustrated an intolerance for reliability as a standard for Confrontation Clause challenges.[304] Rather, "it is the interpreter who is

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[296] *Id.* (reemphasizing that the *Nazemian* multifactor analysis is "akin to the unpredictable and subjective multi-factor 'indicia of reliability' tests" which *Crawford* overruled).
[297] *Id.* at 539–40.
[298] *Id.* at 530; *see also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318–21 (2009) (identifying multiple ways in which cross-examination is crucial to expose dishonesty, bias, errors, incompetence, or deficiencies in training, judgment, or methodology).
[299] *Taylor*, 130 A.3d at 564–65.
[300] *Id.* at 528.
[301] Ross, *supra* note 14, at 1959.
[302] Kracum, *supra* note 87, at 456.
[303] Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (emphasizing 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").
[304] United States v. Charles, 722 F.3d 1319, 1330 (11th Cir. 2013) (reviewing post-*Crawford* jurisprudence to conclude that the language conduit theory is precedentially unsupported). The Eleventh Circuit strongly emphasized, "[t]he Supreme Court could not have been

subject to 'the only indicium of reliability sufficient to satisfy constitutional demands,' that is: confrontation."[305]

As the Court asserted in *Melendez-Diaz*, the Sixth Amendment separates witnesses into two categories: "those against the defendant and those in his favor."[306] The Supreme Court categorically defined forensic analysts as witnesses against the defendant because "regardless of their non-accusatory nature," they provide evidence contrary to the defendant.[307] The Court reasoned that forensic analysts' reports are not always the product of neutral testing, but instead found "some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination."[308]

Similarly, the process of language translation requires the exercise of judgment and discretion, which is inherently subject to errors.[309] As a result, the Confrontation Clause presents the best method of "weed[ing] out not only the fraudulent [interpreter], but the incompetent one as well."[310] "Just because a statement is non-accusatory, unusual, or supposedly neutral, does not remove it from the class of statements that require confrontation."[311] Rather, given the complex process of language translation, and the important legal rights at stake when an interpreter is used during criminal proceedings, confrontation provides the most consistent means to ensure the utmost protection over defendants' constitutional rights.

Consequently, the better course of action in *Lopez-Ramos* would have been to remand the case for a new trial.[312] Ultimately, the court should have found the interpreter was a witness under the Confrontation Clause, and the interpreter's translated statements constituted hearsay. The State could have "offer[ed] the live testimony of the AT&T interpreter."[313] Alternatively, Lopez-Ramos's original Spanish statements could have been admitted at trial, then both the State and Lopez-Ramos could either agree to a translation of Lopez-Ramos's statements, or each side could call its own interpreter. Nonetheless, a remand would set the precedent that interpreters are not immune from the Sixth Amendment and interpreters' translations

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clearer that reliability, absent cross-examination, is irrelevant for purposes of the Confrontation Clause." *Id.*

[305] *Id.* (quoting *Crawford,* 541 U.S. at 69).

[306] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313 (2009).

[307] Kracum, *supra* note 87, at 445; *see Melendez-Diaz*, 557 U.S. at 313; *see also* Winbush, *supra* note 238.

[308] *Melendez-Diaz*, 557 U.S. at 320.

[309] *See* de Jongh, *supra* note 213, at 27.

[310] *Melendez-Diaz*, 557 U.S. at 319.

[311] Kracum, *supra* note 87, at 447; *see also Melendez-Diaz*, 557 U.S. at 315–17.

[312] State v. Lopez-Ramos, 929 N.W.2d 414, 429 (Minn. 2019) (Hudson, J., dissenting).

[313] *Id.*

constitute hearsay. At a minimum, this approach would lead to increased consistency within foreign language criminal trials in Minnesota.

## V. CONCLUSION

The Minnesota Supreme Court was presented with an opportunity to set a disciplined approach to challenges regarding the admission of an interpreter's translations of a defendant's statements under the Confrontation Clause and hearsay rules.[314] Instead, the majority improperly determined that the interpreter was acting as a language conduit and found Lopez-Ramos's Sixth Amendment rights were not implicated.[315]

Because the Spanish population in the United States has increased significantly, courts should reevaluate their rulings regarding interpreters in the legal system. Specifically, courts should acknowledge the discretion interpreters use while translating languages and reject the language conduit theory. Although some circuits have properly rejected the language conduit theory, the Minnesota Supreme Court continued to adhere to clashing precedent that could lead to many unwarranted violations of foreign language speaking defendants' rights. The *Lopez-Ramos* holding will inevitably invite further unfettered judicial discretion by lower courts, leaving little protection over foreign language speaking defendants' right of confrontation.

[314] *Id.* at 415.
[315] *Id.* at 420.

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