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Competent Translation of Hearsay

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COMPETENT TRANSLATION IN THE CONTEXT OF HEARSAY

United States v. Romo-Chavez, 681 F.3d 955 (9th Cir. 2012)

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I. FACTUAL BACKGROUND

In May 2009, Claudio Romo-Chavez attempted to cross the border from Mexico into the United States in a 1999 Buick Century. Romo-Chavez told Customs and Border Protection ("CPB") Officer Brian Tipling that he wanted to return two shirts to a Dillard's store in Scottsdale and that he was from Magdalena, Mexico. Officer Tipling, noticing that the vehicle exhibited evidence of tampering, referred Romo-Chavez to Officer David Aldrich for further investigation Romo-Chavez told Aldrich that that he was from a town south of Magdalena and between Obregon and Hermosillo and that he was going to "Tucson, maybe Phoenix" for business and for pleasure. Officer Aldrich noticed the signs of tampering on the vehicle, and later Officers Edward Vejar and Jeff Steger, with the aid of a drug detection dog, removed packages containing a substance later identified as methamphetamine as well as some items that were not preserved because they deemed to be of no "evidentiary value."

During the search, Special Agent Andrew Simboli of the Immigration and Customs Enforcement ("ICE") interviewed Romo-Chavez but was only able to traverse the language barrier well enough to ascertain basic information. Officer David Hernandez joined the interview to translate and Mirandize Romo-Chavez. During the interview, Romo-Chavez stated that he intended to return two shirts at a Dillard's store in Phoenix, then trade his Buick for a truck and $2,000 in Nogales, Mexico. He told the officers that he had recently submitted his vehicle for mechanical work, during which time the methamphetamine must have been planted. Further investigation revealed that he had crossed the Mexico-United States border several times with a known drug trafficker named Gustavo Vargas-Diaz.

Romo-Chavez was charged with possession of methamphetamine with intent to distribute[1] and with importing the substance into the United States.[2]

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[1] *See* 21 U.S.C. § 841(a)(1)(2010); *see id*. at § 841(b)(1)(A)(viii)(2010).

Romo-Chavez presented arguments at trial that Vargas-Diaz had supplied the car, that Vargas-Diaz secretly planted the methamphetamine, and that the items removed from his car that were not preserved would have supported his argument that his primary motive for going to the United States were to get information about attending the University of Phoenix, to return shirts at Dillard's, and to repair his vehicle. Despite his arguments, Romo-Chavez was convicted.

II. ISSUES ON APPEAL

Romo Chavez argued on appeal that the courts should have excluded as inadmissible hearsay the statements he made to Officer Hernandez as presented at trial by Agent Simboli and that under the Sixth Amendment he had a right to confront the adverse witness. The government argued, however, that the statements were party opponent admissible statements[3] acquired through a language conduit.[4] Because the statements were essentially "his," the government reasoned that Romo-Chavez did not have a right to confront those witnesses. The Ninth Circuit sided with the government. Romo-Chavez's argument that the evidence taken from his vehicle would have helped his defense similarly failed when he conceded that the officers did not act in bad faith in failing to preserve the evidence.[5]

III. RATIONALE

The Ninth Circuit affirmed Romo-Chavez's conviction. The court found that the statements that Romo-Chavez made to Officer Hernandez were admissions of a party opponent and therefore satisfied an exception to the general hearsay rule that out of court statements presented in court for the truth of the matter asserted are inadmissible. The court balanced the factors delineated in *United States v. Garcia*[6]and determined that Romo-Chavez's statements made to the interpreter Officer Hernandez should be treated as Romo-Chavez's own statements.

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[2] *See id*. at § 960(a)(1) (2010); *see id.* at § 960(b)(1)(H).
[3] *See* FED. R. EVID. 802.
[4] *See* FED. R. EVID. 801(d)(2).
[5] United States v. Artero, 121 F.3d 1256, 1259 (9th Cir. 1997); United States v. Jennell, 749 F.2d 1302, 1308-09 (9th Cir. 1984); *accord* Arizona v. Youngblood, 488 U.S. 51, 58 (1988); United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010).
[6] 15 F.3d 341, 342 (9th Cir. 1994).

The first factor of the *Garcia* test examines which party supplied the interpreter.[7] Officer Hernandez was government-supplied but because he was not acting as a law enforcement member and did not ask any questions *sua sponte*, this fact was not sufficient to make the statements inadmissible hearsay. The second *Garcia* factor contemplates whether the interpreter had a motive to mislead or distort the translation.[8] Romo-Chavez presented no evidence to support a finding that Officer Hernandez had a motive to do so, and the court would not presume the matter. The last *Garcia* factor considers whether the interpreter was sufficiently skilled as a translator [9] Despite the errors Hernandez made while Mirandizing the defendant, the court deemed Hernandez competent because he had grown up in El Paso, studied Spanish in school, spoke Spanish with his wife, conducted similar interviews regularly. Furthermore, the circumstances required only "low level" Spanish. The court did not consider the last *Garcia* factor, whether the actions that occurred after the conversations were consistent with the translation.[10]

The court ultimately determined that the statements that Romo-Chavez made to Hernandez were properly admitted because they satisfied an exception to the hearsay exclusion rule as statements made by a party opponent as translated by a "language conduit."

IV. RAMIFICATIONS OF THE DECISION

The Romo-Chavez decision will have a profound impact on all immigrants who do not yet possess a strong command of the English language. The decision will not only impact immigrants crossing customs inspections on the Mexico-United States border, but also those stopped by law enforcement in other circumstances. The court's opinion itself completely failed to consider that immigrants may view law enforcement in a more threatening light due to interactions in their own country and that it creates additional procedural loopholes for foreign language speakers, and marginalize and penalize foreigners for their lack of understanding of the English language.

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[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.

The court modified the first prong of the *Garcia* test to determine not only who supplied the interpreter, but also in what capacity the interpreter was acting and whether the interpreters play an active role in the interviews. Unfortunately, the modification of this prong fails to take into account the role that law enforcement officers play in foreign countries or even the nature of the officers in general. Additionally, the decision sets a murky standard for levels of Spanish fluency. As the concurrence noted, growing up around Spanish does not necessarily mean that the listener has a strong command of the language and that not all students of Spanish learn or retain the same information or develop the same abilities. The court was too willing to accept that elementary school Spanish and the ability to understand but not speak made Hernandez a competent translator of legal rights and essential facts. Immigrants do not always understand the procedures and rights that are guaranteed in the United States and therefore will suffer more as competency of interpreter diminish.

The *Romo-Chavez* decision sets a dangerous precedent for what the government is allowed to do in criminal circumstances with potential defendants who do not have a strong command of the English language. For instance, the court excused the translation mistakes Hernandez made reciting the *Miranda* rights in Spanish from memory instead of reading them from the standard "pre-printed form." In other words, the government can overcome the second prong of the *Garcia* test, which requires the court to examine whether the interpreter had any motive to mislead or distort the statements, if it fails to follow normal procedure to insure the accuracy of the information in the first place. If the interpreter or translator is unqualified, he or she will distort the translation without any bad faith, but will distorts the statements nonetheless. The *Romo-Chavez* court's reasoning will enable the government to circumvent the second prong of the *Garcia* test.

V. CONCLUSION

The *Romo-Chavez* decision will impact most notably immigrants who are not fluent in English. Though Romo-Chavez was convicted of drug offense, any circumstance under which an English-deficient immigrant is stopped by law enforcement will lend itself to similar difficulties and possibly detrimental consequences. The court established very subjective standards of translator competency and a person's view of the role and nature of law enforcement.

Ultimately, the court set dangerous precedent for when it provided the government with a procedural loophole whereby an interpreter who does his best is not qualified will be unable to give an accurate translation and thereby distort the information without bad faith.