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A Recent Post-Trial Rule 29 Acquittal in an FCPA Case Reveals a Curious Split in the Circuits on the Use of Translated Evidence in Criminal Cases

By Frederick T. Davis[1]

On April 14, 2026, Judge Kenneth M. Hoyt of the Southern District of Texas issued an order acquitting a defendant pursuant to F. R. Crim. P. 29 after a jury had convicted him of violating the Foreign Corrupt Practices Act. A Rule 29 acquittal after a jury verdict generally involves the court's scrutiny of the evidence presented to the jury to determine whether it had been "insufficient to sustain a conviction." Judges infrequently overturn a jury's verdict on this basis, but occasionally do so when the prosecutor's evidence failed to prove an element of the alleged offense or proceeded on an incorrect legal theory. This acquittal, however, was based on an occurrence during the trial that is rarely subject to critical legal review: the use by the jury of English translations provided by the prosecutor of communications among the defendant and his accomplices in Spanish. The Court ruled that the translations were themselves a form of hearsay, and that they should not have been admitted unless the prosecutor called the translator(s) as witnesses to allow the defendant to confront and cross-examine them.[2]

Courts frequently deal with evidence that is itself otherwise admissible but cannot be presented to a jury because it is not in English. The underlying evidence often takes the form of documents or communications in a foreign language which bear on the defendant's guilt and are either not hearsay or fall within a recognized exception. In many cases, the parties agree on a translation. But what does a court do in a criminal case if the defendant does not agree? Curiously, there is a split in the Circuits on this seemingly mundane issue. One group of cases holds that if the prosecutor provides some form of certification that a translation was competently done, the defendant then has the burden of challenging at least some part of the translation and offering a competing version; if the parties still cannot resolve their difference, both versions are presented to the jury which will be asked to determine the weight to be given to either. A different approach posits that the translation is part of the prosecutor's burden of proof and that the English translation is a "statement" different and independent from the underlying source and is thus itself hearsay; from this, it follows that the prosecutor bears the burden of calling the "witness" to this statement – that is, the translator – in its case in chief, whom the defense can cross examine without first offering a specific alternative translation.

The Rovirosa Case

As summarized by the Court, the *Rovirosa* case involved an allegation that "the defendants engaged in a bribery scheme in which they offered, paid, promised to pay, and authorized the payment of bribes in the form of cash payments, luxury items, and other things of value, to and for the benefit of three foreign officials in Mexico…" Not surprisingly, much of the evidence consisted of e-mails and other communications among the defendant and his accomplices that were in Spanish. Such communications would seem to fit comfortably within the definition of a statement "made by the party's coconspirator during and in furtherance of the conspiracy" within the meaning of F. R. Evid. 801(d)(2)(E) making them "not hearsay" and thus admissible if relevant. The actual Spanish texts of these communications were never offered or admitted at the trial. Rather, the prosecution introduced scores of documents that they said were English translations, accompanied by some form of a "certification" as to their reliability. The prosecutor explained that the English versions were done by a reputable commercial outfit specializing in translation, but the several individuals who actually did the work were not offered as witnesses. The prosecutor did identify a Special Agent working on the case as a bilingual Spanish speaker who would be available to testify that she had "re-examined" the commercial translations and was "of the opinion that they are accurate," but neither party

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[2] Memorandum and Order Dismissing Indictment and Granting an Acquittal, *United States v. Rovirosa Martinez*, No. 4:25-cr-00415, Dkt. 147 (S.D. Tex. Apr. 14, 2026).

called her as a witness. When the translations were offered into evidence, the defense consistently objected to them as "hearsay" in the absence of the translator as witness, but did not offer any specific alternative translations.

The jury convicted. Curiously, their very first note had been to ask to have the Spanish originals of the communications shared with them, which the Court denied because they had not been offered or admitted into evidence.

After trial, Judge Hoyt issued an order acquitting the defendant and dismissing the indictment pursuant to F. R. Crim. P. 29(c) on the basis that the evidence against him had been admitted "in violation of the Confrontation Clause of the Sixth Amendment." He noted that "[t]he record shows that the government intentionally did not call as witnesses the Translators [of the many communications]. Hence, Rovirosa was not provided an opportunity to cross-examine them prior to or during trial." He emphasized the "regional nuances and textual consideration" that bear on appropriate translation, reasoning that cross-examination is necessary because it "permits recognition of cultural sensitivity issues, specialized knowledge, and the level at which the Translator's education and usage of the language may rest." He thus rejected the value of the bi-lingual Special Agent, commenting that "to permit this type of 'expert' evidence, turns on its head the science and art of proper translation considerations." Judge Hoyt also took note of the jury's request to see the Spanish originals, observing candidly that "[t]he jury recognized that the English translations short-circuited its review of the evidence, an evidentiary fact missed by the Court."

Discussion

Legal analysis of procedures for use during trial of evidence not in English has been intermittent and inconsistent. This is in part because some of the analyses confuse three quite separate situations:

- Some discussions include reference to F. R. Evid. 604, which deals with in-court interpretation of witnesses who testify in a language other than English. It provides simply that "An interpreter must be qualified and must give an oath or affirmation to make a true translation." While such interpretation can be crucially important, and there is some limited case law on this Rule's implementation, it addresses a very different dynamic from the situation that arose in *Rovirosa*: the interpretation is done in open court in the presence of the accused and counsel, who can address any misinterpretation they perceive (although they would either have to understand the source language themselves or have immediate access to their own interpreters), and cross examination of the interpreter as a "witness" is simply not feasible.
- Some other decisions involve interpretations not after the fact but that occurred during actual criminal activity itself. A classic example is when an undercover agent who speaks only English negotiates with a suspect in another language using a collaborator of the ultimate defendant as an on-the-spot, informal interpreter. The courts have routinely held that the agent's testimony as to what he was told is admissible without locating and calling the go-between who offered the English translation, on the reasoning that the interpreter was a mere "language conduit" chosen by the accused and thus that the accused (not the government) was responsible for the English translation. ("[Such an] interpreter is 'no more than a language conduit and therefore his translation [does] not create an additional level of hearsay.' " *United States v. Lopez*, 937 F.2d 716 (1991), at 724, quoting *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989).
- While the parties in *Rovirosa* made reference to Rule 604 and the "language conduit" cases, they really had no bearing on the issue before Judge Hoyt. The translations at issue were done neither "in the street" by an accomplice nor "in court" and in real time in the presence of an accused and counsel; rather, they were essentially expert opinions done outside of court. As such, some degree of confrontation and ability to cross-examine would appear necessary: no one could plausibly argue, for example, that a true expert opinion offered under F. R. Evid. 702 should be admissible based on a certification by the expert without giving the accused an opportunity to confront and cross-examine the expert.

The relatively few opinions that have addressed this issue fall into two camps.

In *United States v. Llinas,* 603 F.2d 506 (5th Cir. 1979), the Fifth Circuit was faced with a challenge to the admission at trial of a proffered translation of an out-of-court document, specifically a transcript of another proceeding deemed relevant to the case at hand. The court noted that juries are often asked to consider evidence in a language other than English, and reasoned that "the proper procedure" for their use, derived from earlier Fifth Circuit precedent, was that

> Initially, the district court and the parties should make an effort to produce an "official" or "stipulated" transcript, one which satisfies all sides. If such an "official" transcript cannot be produced, then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version.

Id. at 510. It reasoned that once the prosecutor offers a translation,

> If the government's translation was inaccurate, it was petitioner's burden to challenge its accuracy by presenting another translation, so that the jury could choose which version to believe. [Citations omitted]. As we recently stated [citation omitted], "Once we have concluded that the defendants could have challenged specific portions of the Government's transcript or prepared an alternate version, it follows that they cannot be heard to complain on appeal because they failed to take advantage of their trial opportunity.

Id. at 509. While in *Llinas* the Court did not specifically address the defendant's Confrontation Clause rights as such, or whether the translators qualified as a "witness" creating "hearsay," it has been regularly followed to mean that a defendant can contest an out-of-court translation only by offering an alternative version, which Rovirosa did not do. See, e.g., *United States v. Cruz*, 765 F.2d 1020 (11th Cir. 1985).

While not cited by Judge Hoyt, the Eleventh Circuit in *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013) took a different analytical approach from *Llinas* that is very consistent with Judge Hoyt's reasoning. In *Charles*, key evidence against an accused consisted of an out-of-court interrogation where an accused who spoke no English was questioned by an agent who did not speak the defendant's language, Haitian Creole. To accomplish the interview, the agent called an official Creole speaker on the telephone, who in real time interpreted the agent's English questions into Creole for the interviewee, and her answers back in English, and at trial the official was allowed to testify about the conversation, including what he understood to be the defendant's statement as conveyed by the interpreter.

On appeal, the Court affirmed the conviction because the defense had not objected to the officer's testimony, concluding that admission of the officer's testimony did not amount to "plain error" – but went on in considerable detail to make it plain that receipt of that testimony was in fact erroneous. The Circuit reasoned that the accused's own statements in Creole would be admissible because they were "made by the party" against whom they were offered and thus were "not hearsay" under F. R. Evid. 801(d)(2)(A), but that the testimony of the officer as to what the defendant said through an interpreter involved an extra step in the hearsay analysis. Following a detailed analysis of the Confrontation Clause and its development in *Crawford v. Washington,* 541 U.S. 36 (2004), the majority of the panel concluded that "Under *Crawford's* framework, as explained below, we find that Charles has a Sixth Amendment right to confront the interpreter, who is the declarant of the out-of-court testimonial statements that the government sought to admit through the testimony of the CBP officer." The key element of the panel's reasoning was:

> [A]lthough the CBP officer testified as if the out-of-court statements were made by Charles directly to him in English, they were not. Instead, his questioning of Charles was accomplished in two different languages, requiring the services of a language interpreter. Thus, for purposes of the Confrontation Clause, there are

> two sets of testimonial statements that were made out-of-court by two different declarants. Charles is the declarant of her out-of-court Creole language statements and the language interpreter is the declarant of her out-of-court English language statements.
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> The only possible out-of-court statements to which the CBP officer could testify to in court are the English language statements of the interpreter. When the CBP officer asked questions in English, the interpreter orally translated them into Creole for Charles. Charles then spoke to the interpreter in Creole, who in turn orally translated Charles's statements from Creole into English for the CBP officer. The CBP officer only heard Charles speak in Creole and never heard any statements from Charles in English. Thus, during the trial when the CBP officer testified as though the statements were made by Charles in English, he was actually testifying to the out-of-court statements of the interpreter. In other words, the interpreter made the testimonial statements to the CBP officer, and, accordingly, is the declarant of the English-language statements that the CBP officer heard and testified to at trial.

Id. at 1324.The Court then went on to explain that the inability to examine the interpreter was consequential because of the subtlety of the translation process: translation does not involve a simple "one-to-one correspondence between words or concepts in different languages," but rather requires a more sophisticated process sensitive to dialect, colloquial expressions, and other nuances in which the translator's reasoning becomes important. Distinguishing several of "language conduit" decisions referenced above, the Court specifically held that defendants opposing the admission of out-of-court translations of otherwise admissible evidence against them have a Constitutional right to examine the translator. *Id.* at 1325.

Comment

The Government has filed a notice of appeal from Judge Hoyt's order, so these issues will be argued to the Fifth Circuit.

Judge Hoyt's reasoning seems well-grounded: even though it appears to be inconsistent with precedent (*Llinas)* in that Circuit, the defendant carefully insisted on a right to examine the translators of crucial evidence against him and the persuasive reasoning of *Charles* will be difficult to refute. On the other hand, it is perplexing that Judge Hoyt issued an acquittal under Rule 29 rather than an order for a new trial in the "interest of justice" under F. R. Crim. 33(a) where the prosecutor would be allowed to support the contested evidence by calling translators – especially since the prosecutor seems to have complied with the procedures set forth in *Llinas* and where the Court noted that it had "overlooked" the Confrontation Clause problem during the trial.

As the law continues to develop, an inevitable next step will be when a court is asked to evaluate the admissibility of a translation not done by a translator but by one of the many artificial intelligence translation platforms that appear to meet or even exceed the accuracy and reliability of a human translator, but notably cannot be cross-examined. A court could condition receipt of such a translation if an expert witness testifies to the process of obtaining it and can speak to the reliability of the AI function. An examination of such a witness may well be important because the exact form of a query to the AI platform may return different translations depending on variables presented to it - the same platform may translate given text differently if it is asked to do a "literal" or "informal" translation, or if it is given contextual information. And if the prosecution introduces an AI-generated translation, nothing would stop the defense from producing an alternative translation by another platform – which could possibly lead to a presentation of both to the jury for it to decide which is more reliable. Instead of a classic "battle of the experts," the future may involve a "battle of AI bots."