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**Criminal Law/Evidence—ADMISSIBILITY OF THIRD-PARTY
TESTIMONY ON OUT-OF-COURT STATEMENTS MADE TO A WITNESS
THROUGH AN INTERPRETER—*Chao v. State*, 478 So. 2d 30
(Fla. 1985)**

I. INTRODUCTION

Alfredo Chao was arrested for attempted first-degree murder after shooting his ex-girlfriend. Chao asked his uncle, Pedro Mendez, to summon a police officer so he could surrender. The officer, Detective Rigdon, advised Chao of his rights using a *Miranda* card printed in Spanish. Chao read and signed the card. Then, with Mendez translating, Detective Rigdon questioned Chao about the shooting. At trial, Chao maintained that the shooting had occurred accidentally. Detective Rigdon was sworn in as a witness and testified: "I asked Mr. Mendez to please ask Mr. Chao why did he shoot the girl. They had a conversation in Spanish. Mr. Mendez replied to me, 'He says he shot her because he loves her and wants no other man to have her.'"¹ Based on this testimony, Chao was convicted.

Chao's one point on appeal was that Detective Rigdon's testimony constituted inadmissible hearsay and should have been excluded.² The Third District Court of Appeal held that the testimony was not hearsay and was therefore admissible.³ In *Chao v. State*,⁴ the Florida Supreme Court affirmed Chao's conviction but came to a different conclusion on the evidentiary issue. The court held that while the detective's testimony was hearsay, it was admissible under an exception to the hearsay rule.⁵

In this Note, the author analyzes the problems inherent in the use of extrajudicial statements made through an interpreter and examines the history of Florida law on this issue. Finally, the author discusses the rationale of the *Chao* decision and its usefulness in predicting the admissibility of similar testimony in future criminal trials.

II. GENERAL HEARSAY FORMULATIONS

The Federal Rules of Evidence and the Florida Evidence Code define hearsay as "a statement, other than one made by the declar-

1. *Chao v. State*, 478 So. 2d 30, 31 (Fla. 1985).

2. *Id.*; FLA. STAT. § 90.801(1)(c) (1985).

3. *Chao v. State*, 453 So. 2d 878 (Fla. 3d DCA 1984), *aff'd*, 478 So. 2d 30 (Fla. 1985).

4. 478 So. 2d at 30.

5. *Id.* at 32.

ant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁶ Generally, a hearsay statement is inadmissible at trial⁷ unless it falls within a specific statutory exception.⁸ This prohibition is based on several concerns: a declarant who makes a hearsay statement has not spoken under oath; there is no opportunity for a jury to evaluate the credibility of the declarant; the person recounting the out-of-court statement may do so inaccurately; and, most importantly, there is no opportunity for the party against whom the statement is made to cross-examine an absent declarant whose statement is being reported.⁹ Because the testimony of a third-party witness regarding out-of-court statements made through an interpreter is based upon the translation alone rather than an understanding of the declarant's own words, and there may be no opportunity to cross-examine either the declarant or the interpreter about the asserted statements, use of such testimony implicates the concerns underlying the hearsay rule.

Jurisdictions differ in their treatment of out-of-court statements made through an interpreter.¹⁰ Several courts have held this testimony inadmissible hearsay;¹¹ in other jurisdictions, courts consider it admissible but do not agree on the legal theory that applies.¹²

6. FED. R. EVID. § 801(c); FLA. STAT. § 90.801(1)(c) (1985).

7. FLA. STAT. § 90.802 (1985).

8. In addition to the specific exceptions to the hearsay rule, the Federal Rules of Evidence include "catch-all" provisions which allow the court to admit hearsay evidence where there are

equivalent circumstantial guarantees of trustworthiness, [which would be met] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. §§ 803(24), 804(b)(5).

The Florida Evidence Code, FLA. STAT. ch. 90 (1985), provides for numerous exceptions to the hearsay rule. See FLA. STAT. §§ 90.803-.804 (1985). However, it does not contain a catch-all exception. The drafters believed that "the enumerated exceptions were the only types of hearsay which possessed the minimal guarantees of reliability in order to be admissible." C. EHRHARDT, FLORIDA EVIDENCE § 802.1 (2d ed. 1984).

9. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 224 (1954).

10. *Chao*, 453 So. 2d at 879; see, e.g., *Camerlin v. Palmer Co.*, 92 Mass. (10 Allen) 539 (1865); *State v. Noye*, 36 Conn. 80 (1869).

11. See, e.g., *State v. Fong Loon*, 158 P. 233 (Idaho 1916); *Garcia v. State*, 68 N.W.2d (Neb. 1955); *People v. Randazzo*, 87 N.E. 112 (N.Y. 1909); *State v. Lopez*, 631 P.2d 422 (Wash. Ct. App. 1981). For an overview of the states' positions on this issue, see generally Annot., 12 A.L.R. 4TH 1016, 1021 (1982).

12. See Annot., 12 A.L.R. 4TH 1016, 1029-34 (1982).

The most widely accepted rationale is that an interpreter operates as an agent of the parties to the conversation.¹³ Some courts applying this rationale consider the testimony to be hearsay, admissible only where it fits within an established exception to the hearsay rule.¹⁴ In other jurisdictions where the interpreter/agent is viewed as a medium of communication, the declarant is found implicitly to have adopted the interpreter's words as his own.¹⁵ In such cases, "statements of the interpreter are admissible as original evidence and are in no sense hearsay."¹⁶ Some jurisdictions have also found such testimony to be admissible where the interpreter has "authenticated his translation by testifying that his interpretation was accurately made."¹⁷ In these jurisdictions, the interpreter need not testify concerning the content or accuracy of the statement. He has only to authenticate his translation for the statement to be deemed admissible.¹⁸ Granting the opponent an opportunity to cross-examine the interpreter responds to the hearsay rule's underlying concerns regarding authentication.¹⁹

Finally, out-of-court statements made through an interpreter and testified to by a third-party witness have been held admissible when not offered to prove the truth of the matter asserted.²⁰ "An out-of-court statement which is not offered to prove the truth of the matter asserted, i.e., to prove that the facts contained in it are

13. Under this theory the interpreter is regarded as an agent of one or both parties under common law agency principles. As early as 1773, these principles were followed when allowing an interpreter's testimony into evidence. Annot., 116 A.L.R. 800, 805 (1938) (citing *Fabrigas v. Mostyn*, 20 How. St. Tr. 82, 123 (Eng. 1773)); see also *Boicelli v. Giannini*, 224 P. 777 (Cal. Dist. Ct. App. 1924) (interpreter acted as "joint agent" of the parties).

14. See, e.g., *State v. Letterman*, 616 P.2d 505, *aff'd*, 627 P.2d 484 (Or. 1980) (testimony met requirements common to all exceptions to hearsay rule); *State v. Agnesi*, 104 A. 299 (N.J. 1918) (testimony qualified as dying declaration).

15. See *Commonwealth v. Vose*, 32 N.E. 355 (Mass. 1892).

16. *Boicelli v. Giannini*, 224 P. 777, 779 (Cal. Dist. Ct. App. 1924). Several federal cases have also applied this agency, or adoption, theory. See *United States v. Alvarez*, 755 F.2d 830 (11th Cir.), *cert. denied*, 106 S. Ct. 274 (1985); *United States v. Da Silva*, 725 F.2d 828 (2d Cir. 1983); *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

17. Annot., 12 A.L.R. 4TH 1016, 1026 (1982).

18. See, e.g., *Commonwealth v. Storti*, 58 N.E. 1021 (Mass. 1901).

19. *C. McCORMICK*, *supra* note 9, § 224; see, e.g., *State v. Letterman*, 616 P.2d 505, *aff'd*, 627 P.2d 484 (Or. 1980); *Ching Lum v. Lam Man Beu*, 19 Hawaii 363 (1909).

20. See *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969) (statements admitted were only offered to prove a statement was made).

true, is not hearsay."²¹ In other words, testimony regarding an out-of-court statement may be admitted to prove only that a statement was made, but not to prove the truth of the statement's contents.

III. HISTORICAL DEVELOPMENT IN FLORIDA

Until recently, Florida case law concerning the admissibility of third-party testimony regarding extrajudicial statements made through an interpreter rested exclusively on the 1903 Florida Supreme Court decision in *Meacham v. State*.²² There, the court held that third-party testimony regarding a translated conversation had been improperly excluded.²³ Robert Meacham was charged with embezzling the proceeds of sixty-three boxes of cigars that allegedly had been left with him on consignment. Meacham claimed that the boxes had been sold to him with the "understanding that he was to pay for them at a designated time."²⁴ To support his contention, Meacham introduced the testimony of the interpreter who translated his conversation with the Spanish-speaking cigar seller. Meacham then tried to introduce the testimony of Robert Lore, a witness to the translated conversation. The lower court excluded Lore's testimony as inadmissible hearsay. The Florida Supreme Court reversed on the ground that the interpreter operated as the "necessary medium of communication, [whose words were] adopted by both, and made a part of their conversation."²⁵ The fact that the conversation was conducted through an interpreter was found to "affect the weight, but not the competency, of the evidence."²⁶

Meacham involved a pure application of the "adoption" theory, which is similar to the principles of common law agency. Two parties to a transaction had *expressly* agreed to conduct that transaction through an interpreter. Furthermore, the testimony of the third party was substantiated by the interpreter's own testimony.²⁷ It is unclear from the opinion whether the court, in applying the adoption theory, held that the testimony was not hearsay, or that it was admissible under an exception to the hearsay rule. The re-

21. C. EHRHARDT, *supra* note 8, § 801.4.

22. 33 So. 983 (Fla. 1903).

23. *Id.*

24. *Id.*

25. *Meacham*, 33 So. 983 (Fla. 1903) (quoting *Commonwealth v. Vose*, 32 N.E. 355 (Mass. 1892)).

26. *Id.*

27. *Id.*

sult was that the statements could be used against the declarant as his own words.

More than fifty years passed before a Florida court again addressed the admissibility of extrajudicial statements made through an interpreter. In *State Farm Mutual Automobile Insurance Co. v. Ganz*,²⁸ the Third District Court of Appeal held that statements made to the plaintiff through an interpreter were inadmissible hearsay. *Ganz* involved a civil claim against State Farm for willful and malicious interference with attorney/client contracts. The plaintiff, Ganz, was an attorney who had been asked to represent twenty-six Puerto Rican farmworkers who had been injured in an automobile/bus accident. The farmworkers released Ganz from the case, but they later told him through an interpreter that State Farm had coerced them into signing the release under the threat of losing their jobs. The trial court allowed Ganz to submit testimony into evidence concerning these statements.

The Third District reversed, finding that Ganz's testimony regarding the Puerto Ricans' statements made through their interpreter was excluded by the hearsay rule.²⁹ Because the person seeking to testify to the statements was a party to the action, the court concluded there were insufficient guarantees of trustworthiness in the testimony. Also, the interpreter was not called to testify, or to authenticate the translation.³⁰ The court reasoned that to allow such unsupported testimony into evidence for the purpose of proving a major element of a claim would thwart the purpose of the hearsay rule. No attempt was made to reconcile the Florida Supreme Court's earlier decision in *Meacham*. Indeed, *Meacham* was never mentioned by the majority. In a special concurrence, however, Judge Pearson expressed his concern that the majority opinion would be construed as "holding that all testimony as to what was said through an interpreter is hearsay."³¹ He opined that such a conclusion would be contrary to *Meacham*.³²

The analysis employed by the *Ganz* court was adopted by the First District Court of Appeal in a 1983 case. In *Rosell v. State*,³³ the court held that a deputy sheriff's testimony about a translated conversation with two defendants was excludable hearsay. The de-

28. 119 So. 2d 319 (Fla. 3d DCA 1960).

29. *Id.* at 320-21.

30. *Id.* at 319.

31. *Id.* at 322 (Pearson, J., concurring).

32. *Id.*

33. 433 So. 2d 1260 (Fla. 1st DCA 1983), *review denied*, 446 So. 2d 100 (1984).

fendants, Raphael Rosell and Ramiro Cabrera, drove past an agricultural inspection station without stopping. When authorities halted them, they found several large garbage bags of marijuana in their truck. Neither defendant spoke or understood English. Shortly after the arrest, a deputy sheriff interrogated them with the aid of an interpreter. At trial, Rosell and Cabrera maintained that they had found the bags on the road and were unaware of their contents. The interpreter testified that the defendants' only statements had been "that they did not know what was in the bags."³⁴ However, the deputy testified that the interpreter had said the defendants thought the bags contained a grassy material. After overruling the defendants' hearsay objection, the deputy's testimony was admitted into evidence.³⁵

Citing *Ganz*, the First District reversed the trial court, concluding that the deputy's testimony was "clearly hearsay" that should have been excluded.³⁶ Because Rosell and Cabrera were in police custody and under interrogation, they could be considered to have authorized the interpreter to speak for them. The court rejected the state's argument that the defendants had adopted the statements, because "[t]hat argument [was] premised on the assumption that appellants understand English."³⁷ An additional factor was the apparent inconsistency between the testimony of the interpreter and that of the interrogating officer. The interpreter's statements, which were not hearsay, were considerably more favorable to the defendants than was the testimony of the deputy sheriff.

Although *Meacham* was not mentioned by the court, some confusion apparently existed over the adoption theory embodied in that case and the adopted statements exception to the hearsay rule under the Florida Evidence Code.³⁸ The *Meacham* adoption theory contemplated application of principles of common law agency, which is more analogous to the admissions exception for specifically authorized statements in the Florida Evidence Code than to

34. *Rosell*, 433 So. 2d at 1262.

35. *Id.*

36. *Id.* at 1263. The court concluded that the marijuana bags should have been excluded and reversed the trial court's denial of the motion to suppress. Therefore, it did not reach the issue of whether the error in admitting the hearsay testimony was harmless or prejudicial. *Id.*

37. *Id.*

38. FLA. STAT. § 90.803(18) (1985) provides that certain hearsay statements are admissible even though the declarant is available as a witness. Those statements include a statement offered against a party in which that party "has manifested his adoption or belief in its truth." *Id.*

the adopted statements exception.³⁹ Under the adopted statements exception, an adverse party who manifests his belief in or adopts the statement of another person as his own may have that statement admitted into evidence against him.⁴⁰ While generally the adopted statements must be an express statement of agreement, in some cases the adoption can be implied from the silence or inaction of the party, or when his conduct "circumstantially indicates the party's assent to the truth of [the] statement."⁴¹ For these tacit admissions to be admissible, the adverse party must have been present and must have understood the statement before his action or inaction could be considered an adoption.⁴² It was this tacit adoption theory that the *Rosell* court rejected.

The Third District addressed the issue again in 1984 and reached a conclusion that differed from its decision in *Ganz*. In *Henao v. State*,⁴³ a defendant charged with cocaine possession made a statement in Spanish to a police officer through an interpreter. At trial, the police officer's testimony concerning the defendant's interpreted statements was confirmed by the interpreter. Citing *Meacham*, the Third District rejected the defendant's contention that the officer's testimony was hearsay and thus erroneously admitted.⁴⁴ In dictum, the court noted that even had the officer's testimony been held inadmissible, it would have been harmless error due to the interpreter's testimony.⁴⁵ The court did not attempt to reconcile *Henao* with its earlier decision in *Ganz*, or with the First District's decision in *Rosell*. These cases were simply dismissed as being "dictum indicating [a] contrary rule without citing *Meacham*," which the court considered controlling.⁴⁶ *Chao* offered the supreme court an opportunity to revisit *Meacham* and resolve the confusion surrounding this issue.

IV. *Chao v. State*

In *Chao v. State*, the Third District reaffirmed its holding in *Henao*.⁴⁷ While acknowledging that *Meacham* could be limited to

39. *Id.* § 90.803(18)(c).

40. *Id.* § 90.803(18)(b).

41. C. EHRHARDT, *supra* note 8, § 803.18b.

42. *Id.*

43. 454 So. 2d 19 (Fla. 3d DCA 1984).

44. *Id.* at 20.

45. *Id.*

46. *Id.*

47. *Chao*, 453 So. 2d at 879-80.

those situations where the defendant had a role in selecting the interpreter, the court rejected this argument. Instead it construed the rule announced in *Meacham* as stating that "the very act of speaking through an interpreter constitutes an adoption of the interpreter's words as one's own."⁴⁸

The Florida Supreme Court accepted jurisdiction because the *Chao* and *Henao* decisions created a conflict with the First District's decision in *Rosell*.⁴⁹ The supreme court rejected the Third District's interpretation of *Meacham* as taking interpreted statements out of the hearsay rule, although the court acknowledged that the *Meacham* opinion was difficult to fathom. "From a perspective of more than eighty years later, we cannot determine whether the Court was holding that the statement was not hearsay or that it was hearsay, but nevertheless admissible as an exception."⁵⁰ The court noted that while the interpreter's statements fell within the definition of hearsay, they were admissible under the admissions exception for specifically authorized statements.⁵¹ Under this exception, statements by a person specifically authorized to speak for a party are admissible when offered in evidence against that party.⁵² *Chao* had authorized Mendez to speak for him because *Chao's* request for Mendez to assist him in surrendering "undoubtedly contemplated verbal communication with the police."⁵³ A person who authorizes an agent to speak for him need not hear—or, presumably, even understand—the subsequent statement for it to qualify as an admission.⁵⁴ Thus, the construction of the authorized statements exception by the supreme court nullified the First District's suggestion in *Rosell* that a party must understand interpreted statements in order to adopt them.⁵⁵ The supreme court affirmed *Chao's* conviction *not* because Detective Rigdon's recounting of the interpreted statements was not hearsay, but because *Chao* had specifically authorized Mendez to speak for him.

48. *Id.* at 880.

49. *Chao*, 478 So. 2d at 31. FLA. CONST. art. V, § 3(b)(3) provides that the supreme court "may review any decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

50. *Chao*, 478 So. 2d at 32.

51. *Id.*

52. FLA. STAT. § 90.803(18)(c) (1985).

53. *Chao*, 478 So. 2d at 32.

54. *Id.*

55. *Rosell*, 433 So. 2d at 1263.

In *Chao*, the Florida Supreme Court attempted to resolve the inconsistent approaches taken by Florida courts by forming a coherent method of analysis for dealing with interpreted statements. It started by applying the statutory definition of hearsay to the testimony. When a third party offers testimony regarding statements of the interpreter to prove what the original declarant said, such testimony meets the definition of hearsay. As hearsay, this testimony must be excluded unless it falls within an exception to the hearsay rule. In *Chao*, the testimony of Detective Rigdon regarding *Chao's* statements as made through an interpreter, fell within the exception for statements by a specifically authorized person. Therefore, it was admissible.⁵⁶

In *Chao*, the defendant requested Mendez's assistance, and thereby authorized Mendez to interpret for him, thus adopting the translated statements as his own. Where the interpreter is provided by the police, the situation is less clear. Whether an interpreter provided by the police is specifically authorized to speak for an accused should depend upon the nature of the questioning, who initiated the conversation with the police, and whether the defendant validly waived his fifth and sixth amendment rights.

The Florida Supreme Court's decision in *Chao* has shifted the analysis of this issue from whether testimony of a third-party witness regarding statements made through an interpreter is hearsay to whether, as hearsay, any exception to the hearsay rule applies. A relevant statement that is not hearsay is presumptively admissible. If a statement is hearsay, however, it is presumptively inadmissible unless it fits an established exception to the hearsay rule. Because this presumption of inadmissibility must be overcome by those wishing to introduce interpreted statements, it may become more difficult to use such evidence if the courts narrowly construe the specifically authorized statements exception. Statements that may not fit within this exception include those made after an arrest but prior to the recitation of *Miranda* rights when an interpreter is furnished by the police; when an interpreter overhears the conversation of an accused and relates it to another; or when an interpreter, authorized to communicate with one person, has related the statements to another without express authorization.

When a party has been arrested and has validly waived his fifth amendment rights, subsequent statements made through a police-supplied interpreter logically should constitute specific authoriza-

56. *Chao*, 478 So. 2d at 32.

tion for the interpreter to speak for him. The interpreter is offered as a medium of communication with the police in a setting where the fifth amendment rights of the accused have been established and the adversarial nature of the interrogation is clear. When one speaks to the police in such a situation, he should anticipate that his remarks may be used against him. Furthermore, where the interpreter is a state employee, there should be no reason why he cannot testify to authenticate his translation.

V. CONCLUSION

Prior to the Florida Supreme Court's decision in *Chao v. State*, Florida courts had not developed a cohesive legal analysis of the issues presented by third-party testimony about out-of-court statements made through an interpreter. This shortcoming was alarming because Florida, with its large Spanish-speaking population, is likely to be frequently confronted with such situations. In *Chao*, the supreme court settled this question. The court held that such statements are hearsay, but that the exception for specifically authorized statements may apply. Once a party authorizes an interpreter to speak for him, he need not hear or understand the subsequent statement; he implicitly adopts the interpreter's translated statements as his own.

Future analysis of this issue probably will focus on what constitutes specific authorization within the meaning of the Florida Evidence Code. Certainly, one who provides his own interpreter has authorized the interpreter to speak for him. Moreover, in a conversation between two parties, use of an interpreter demonstrates authorization of the interpreter to speak for them, at least for that conversation.⁵⁷ Arguably, this exception can be extended to a person in custody who validly waives his fifth amendment rights and then speaks to police officers through a police interpreter. In any event, the classification of interpreted statements as hearsay may restrict their admissibility because of the presumption of inadmissibility that attaches. The courts, however, should strive for a balance between the interests of the state and the protection of the accused. The right of the accused to be presented with the evidence against him, and the opportunity to cross-examine those who testify against him, must be preserved.

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57. See, e.g., *Meacham*, 33 So. at 983.