

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM NEWBERRY COUNTY  
Court of General Sessions  
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

AUG 16 2017

SC Court of Appeals

Case No. 2013-GS-36-00500  
Appellate Case No. 2014-002376

The State, ..... Respondent,  
v.  
Mario Valerio-Gonzalez Hernandez, ..... Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Mario Valerio-Gonzalez Hernandez petitions the Panel to grant rehearing in *State v. Hernandez*, Op. No. 2017-UP-324 (S.C. Ct. App. filed August 2, 2017). Mr. Hernandez respectfully submits that rehearing and/or issuance of a new opinion reversing the trial court and granting a new trial in favor of Mr. Hernandez is warranted in this action because the Panel’s opinion overlooked or misapprehended several matters of fact and law.

**I. The Panel overlooked or misapprehended the facts and law demonstrating that Mr. Hernandez’s objection to Ms. Bartman’s testimony was preserved.**

In its Opinion, the Panel found that the issue of whether the testimony from Ms. Bartman, the State’s expert in DNA analysis, should have been excluded as irrelevant was unpreserved for appellate review. The Panel found that Mr. Hernandez’s argument was unpreserved for two reasons: (1) Mr. Hernandez failed to contemporaneously object to the testimony; and (2) Mr.

Hernandez failed to raise the specific argument about the lack of statistical relevance of the DNA evidence to the trial court.

**A. No contemporaneous objection was required, but regardless, Mr. Hernandez did contemporaneously object.**

The Panel correctly recognizes that, under South Carolina law, no contemporaneous objection is required if a motion *in limine*, made at the beginning of trial, is ruled upon immediately prior to the introduction of the challenged testimony. *Id.* p. 5 (citing *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)). The Panel found that, because an intervening witness testified between Mr. Hernandez's motion to limit Ms. Bartman's testimony and the introduction of Ms. Bartman's testimony, Mr. Hernandez was required to renew his objection to Ms. Bartman's testimony in order to preserve the objection. *Id.* p. 6.

The Panel overlooks that the motion to limit Ms. Bartman's testimony was not a pretrial motion *in limine*, which are made prior to the introduction of any evidence and are necessarily subject to change based on developments at trial. *State v. Mueller*, 319 S.C. 266, 269, 460 S.E.2d 409, 410 (Ct. App. 1995). To the contrary, Mr. Hernandez moved to limit Ms. Bartman's testimony after the trial court had heard all of the evidence in the record about the DNA evidence other than Ms. Bartman's testimony. Ms. Bartman was the final witness to testify other than the minor, and the intervening witness, Donna Debrew, only testified regarding the findings of her forensic examination of the minor. Ms. Debrew's testimony was thus wholly unrelated to Ms. Bartman's testimony about the irrelevant DNA testing results and provided no basis to the trial court to revisit or change its ruling regarding the admissibility of Ms. Bartman's testimony. *Id.*, 319 S.C. at 269, 460 S.E.2d at 411. Unlike a motion *in limine*, the trial court was fully informed

regarding the evidence when it denied Mr. Hernandez's motion to limit Ms. Bartman's testimony, so re-raising the issue would have been futile.

Regardless, the Panel overlooked that Mr. Hernandez contemporaneously objected prior to the admission of the relevant evidence. After Ms. Bartman explained the background of the DNA testing, Mr. Hernandez objected and the trial court excused the jury. (R. 432.) Although the objection was directed to the admission of the chart of DNA results, counsel for Mr. Hernandez explained the objection in terms of the trial court's prior ruling allowing Ms. Bartman to testify regarding her results:

MR. MCMULLEN: Yes sir, but she was handed page three and it was marked as an exhibit and she was asked to refer to this and give the results of her testing. And the results of her testing, Your Honor, is that she, they can't make any statement regarding the inclusion or exclusion of the defendant. That is the results. **And that is why I wanted to keep all of this mumbo jumbo out because it doesn't shed any light, it does not assist the trier of fact at all, it is not going to change a fact that the results on page two don't tell us, they don't find Mario Hernandez's DNA.**

(R. 433-45 (emphasis added).)

The trial court heard the testimony at issue, then confirmed its prior ruling that "her testimony and the report being shown to the jury on how she arrived at it is absolutely allowable." (R. 437.) Accordingly, Ms. Bartman immediately testified regarding her conclusions. Mr. Hernandez was not required to raise the issue for a third time in order for the issue to be preserved for appeal. The Panel overlooked this contemporaneous objection, so rehearing is warranted.

**B. Mr. Hernandez's argument about the lack of relevance of Ms. Bartman's testimony was specifically raised to the trial court.**

The Panel ruled that Mr. Hernandez's argument on appeal that Ms. Bartman's testimony was irrelevant due to a lack of statistical context regarding the DNA profile was unpreserved because it was not specifically raised to the trial court. *State v. Hernandez*, Op. No. 2017-UP-324 p. 2 (S.C. Ct. App. filed August 2, 2017). The Panel misapprehended the nature of the DNA test performed by Ms. Bartman and Mr. Hernandez's appellate argument.

If an YSTR DNA test does not meet the required confidence or statistical standards established by the scientific community, then the result will be that the defendant can "neither be included nor excluded." (*See* R. 443-44 (explaining that the tested locations must reach a certain confidence threshold approved by SLED in order for a number to appear on the results chart).) Thus, the statistical relevance of the test fundamentally *is* the relevance of the test; no distinction exists between the two terms. The result will not be "neither included nor excluded" unless the test results are statistically irrelevant. The argument is the same.

Mr. Hernandez's position that Ms. Bartman's failure to explain the scientific meaning behind the "neither included nor excluded" result exacerbated the trial court's error in admitting the irrelevant testimony is merely explanatory and is not a separate argument. (*See* App. Br. p. 8 ("The lack of relevance of the DNA analysis is *compounded* by the lack of evidence in the record about *why* Ms. Bartman could not reach a conclusion." (emphasis added)).) Ms. Bartman's testimony regarding the results remains irrelevant regardless of whether she had explained to the jury how the results were irrelevant. Her failure to do so simply heightened the error because it further invited the jury to speculate about the DNA test result's meaning. The

Panel misapprehended Mr. Hernandez's relevance argument as unpreserved, so rehearing should be granted.

**II. The Panel overlooked or misapprehended the facts and law demonstrating that Investigator Goodman's testimony regarding what Corporal Alvarado said that Mr. Hernandez told him in Spanish was not cumulative and harmless error.**

The Panel found that any error caused by the admission of Investigator Goodman's testimony regarding what Corporal Alvarado told him that Mr. Hernandez said in Spanish was harmless beyond a reasonable doubt because the testimony was cumulative to the unobjected testimony of Corporal Alvarado and consistent with the testimony of Officer Rowe and Ms. Rivera. Rehearing is appropriate because the Panel misapprehended that Investigator Goodman's testimony was not more detailed than Corporal Alvarado's and contextually different from Officer Rowe's and Ms. Rivera's.

Investigator Goodman testified before Corporal Alvarado, so the improper admission of Investigator Goodman's testimony nullified any value to objecting to Corporal Alvarado's testimony regarding the same statements. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again." (quotation omitted)). The Panel's finding that the additional statements to which Investigator Goodman testified were "inconsequential or favorable" misapprehends that the statements, including that Mr. Hernandez said the minor would sit on his lap or that Mr. Hernandez discussed the particular night in question, were actually prejudicial. Additionally, although Investigator Goodman's testimony about what Mr. Hernandez told Corporal Alvarado was consistent with what Officer Rowe and Ms. Rivera testified that Mr. Hernandez told them, the context for the statements differed. Investigator Goodman testified regarding alleged

statements by Mr. Hernandez which occurred on a different day than the statements testified to by Officer Rowe and Ms. Rivera and in a custodial setting. Accordingly, Investigator Goodman's testimony was not harmless, and rehearing to grant a new trial is appropriate.

**Conclusion**

Based on the above, the Court should grant rehearing, reverse Mr. Hernandez's conviction, and remand for a new trial.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

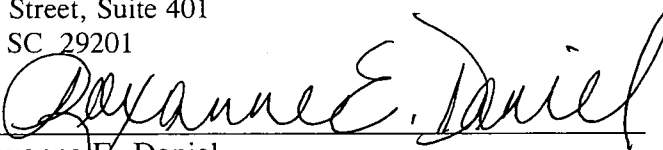
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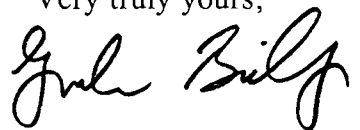
RE: The State, Respondent, v. Mario Hernandez, Appellant  
Appellate Case No. 2014-002376  
Our File No. 38769.01529

Dear Ms. Allen:

Enclosed please find an original and seven copies of Appellant's Petition for Rehearing in the above-referenced matter. Please file the original and return a file-stamped copy to me via our courier. By copy of this letter to opposing counsel, we are hereby serving a copy upon them.

Thank you for your assistance in this matter.

Very truly yours,



Graham R. Billings

GRB:rd

Enc.

cc: V. Henry Gunter, Jr., Esquire  
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