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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Mario Valerio-Gonzalez Hernandez ("Hernandez") hereby petitions this Court to issue a writ of certiorari to review the decision of the Court of Appeals captioned *State v. Hernandez*, Op. No. 2017-UP-324 (S.C. Ct. App. filed August 2, 2017). For the reasons stated herein, this Court should grant this petition and issue a writ of certiorari to review and reverse the Court of Appeals' opinion.

Certification Regarding Rehearing

The undersigned hereby certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on September 22, 2017. (App. 651.)

Questions Presented for Review

I. **Did the Court of Appeals err in affirming the trial court's admission of expert testimony that no conclusion could be reached regarding whether Mr. Hernandez could be included or excluded as a contributor to the DNA analysis when the evidence was irrelevant and invited the jury to speculate about its meaning?**

II. **Did the Court of Appeals err in affirming the trial court's admission of an investigator's testimony regarding what an interpreter said that Mr. Hernandez told him in Spanish when the testimony was hearsay not subject to any exception?**

Statement of the Case

This appeal arises out of the conviction of Mr. Hernandez of criminal sexual conduct with a minor in the second degree. Mr. Hernandez was found guilty of sexually assaulting the minor child of his girlfriend, Ms. Aguirre-Cruz, both of whom lived at the same residence as Mr. Hernandez. Mr. Hernandez had been charged with criminal sexual conduct with a minor in the first and second degrees, arising out of alleged criminal sexual conduct between approximately 2010, when the minor was eight years old, until June 29, 2013, when the minor was twelve.

At trial, Ms. Aguirre-Cruz testified that, on the evening of June 29, 2013, she found Mr. Hernandez and the minor, who was not wearing underwear, lying on a blanket on the floor of the minor's bedroom. (App. 170-76.) Ms. Aguirre-Cruz testified that the minor told her that Mr. Hernandez had touched and "had relations" with the minor. (App. 172.) Ms. Aguirre-Cruz testified that the minor left to call the police at a neighbor's house and Ms. Aguirre-Cruz called Liz Rivera, a Spanish-speaking neighbor, to assist with translations at the scene. (App. 173, 178-79.)

Andrew Rowe, a police officer with the Newberry Police Department, testified that he was dispatched and met Ms. Rivera, Ms. Aguirre-Cruz, and the minor at the house. (App. 214-16.) Officer Rowe testified that he brought Mr. Hernandez out of the home for questioning. (App. 216-18.) Officer Rowe testified that he read Miranda rights in English, and Ms. Rivera orally interpreted the Miranda rights into Spanish to Mr. Hernandez. (App. 219-21.) Officer Rowe then questioned Mr. Hernandez regarding what occurred, and Ms. Rivera interpreted the questions to Mr. Hernandez and his answers to Officer Rowe. (App. 224-26.) Officer Rowe called Investigator Kevin Goodman to the home, and Investigator Goodman overheard Officer Rowe questioning Mr. Hernandez through Ms. Rivera. (App. 300.)

On July 1, 2013, Mr. Hernandez was brought to the police department for an interview. (App. 306.) Investigator Goodman testified that he read Miranda rights to Mr. Hernandez in English and Corporal Alvarado read them in Spanish, after which Mr. Hernandez signed waiver forms in English and Spanish. (App. 308-13.) During the interview, Investigator Goodman asked questions to Corporal Boris Alvarado in English, who interpreted the questions and asked them to Mr. Hernandez in Spanish. (App. 306.) Mr. Hernandez then responded in Spanish to Corporal Alvarado, who interpreted the response back to Investigator Goodman in English. (App. 306.) After questioning Mr. Hernandez, Investigator Goodman offered him an opportunity to give a written statement, and Mr. Hernandez wrote a statement in Spanish. (App. 313-14.)

Jennifer Bartman, a DNA analyst employed by the State Law Enforcement Division, testified that she performed a DNA analysis on four pieces of evidence recovered from the scene: buccal, vaginal, and rectal swabs from the minor obtained during the sexual assault examination; a buccal swab from Mr. Hernandez; a cutting from the chest area of the minor's nightgown; and a cutting from the minor's underwear. (App. 431-32.) Ms. Bartman generated DNA profiles from each of the pieces of evidence, then performed short tandem repeat ("STR") and Y-chromosome short tandem repeat ("YSTR") analyses on the profiles. (App. 434.) The STR analyses identified fifteen loci for comparison, and Ms. Bartman compared the number of repeating sections of DNA in the profile between Mr. Hernandez and the minor at the fifteen loci against established statistical standards to reach conclusions on the data. (App. 434.) Ms. Bartman testified that Mr. Hernandez could be excluded as a contributor to the DNA mixture samples generated from the vaginal and rectal swabs and the cutting from the minor's underwear. (App. 454-55, 459.) However, no conclusion could be made regarding the inclusion

or exclusion of Mr. Hernandez as a contributor to the DNA mixture generated from the cutting of the minor's nightgown. (App. 443.)

Mr. Hernandez was found not guilty of criminal sexual conduct with a minor in the first degree and guilty of criminal sexual conduct with a minor in the second degree. (App. 528.) A sentence of sixteen years of incarceration was imposed. (App. 534.)

Mr. Hernandez timely filed and served his Notice of Appeal on November 7, 2014. The Court of Appeals affirmed the sentence in an unpublished decision dated August 2, 2017. (App. 639-43.) Mr. Hernandez timely petitioned for rehearing, which was denied by order dated September 22, 2017. (App. 651.)

Argument

I. The Court of Appeals erred in affirming the trial court's admission of expert testimony that no conclusion could be reached regarding whether Mr. Hernandez could be included or excluded as a contributor to the DNA analysis because the evidence was irrelevant and invited the jury to speculate about its meaning.

The Court of Appeals erred in affirming the trial court's admission of the expert testimony of Jennifer Bartman, the State's expert witness in the field of DNA analysis, that no conclusion could be reached regarding the inclusion or exclusion of Mr. Hernandez as a contributor to the mixture of DNA found on the cutting from the front of the minor's nightgown. Her testimony had no probative value whatsoever and could not have assisted the jury determine any fact in issue, so it should have been excluded as irrelevant pursuant to Rules 402 and 702 of the South Carolina Rules of Evidence. Any probative value of the DNA test result was substantially outweighed by the risk of prejudice in this case because her testimony invited the jury to serve as their own amateur experts using their preconceived, and likely incorrect, ideas of the meaning of DNA evidence that could not conclusively exclude Mr. Hernandez. The admission of Ms. Bartman's testimony was prejudicial, and a new trial is required to correct the error.

A. The DNA evidence was irrelevant and should not have been admitted.

"Relevant evidence is any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Additionally, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Generally, South Carolina law recognizes that DNA evidence offered by an expert is reliable, although the

admissibility of the DNA evidence may still be challenged on relevance or prejudice grounds. *State v. Ford*, 301 S.C. 485, 490, 392 S.E.2d 781, 784 (1990).

Under the South Carolina Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. The evidence to which the expert will testify must be relevant, reliable, and helpful to the jury. *State v. Tennant*, 383 S.C. 245, 255, 678 S.E.2d 812, 817 (Ct. App. 2009). This analysis by the trial court is part of its gatekeeping function "in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. Cain*, 413 S.C. 508, 520, 776 S.E.2d 374, 380 (Ct. App. 2015), *reh'g denied* (Sept. 2, 2015) (quotation omitted). "Generally, the admission of expert testimony is a matter within the sound discretion of the circuit court." *Id.*, 413 S.C. at 520, 776 S.E.2d at 380 (quotation omitted). The Court will not reverse a trial court's decision to admit improper expert testimony unless the decision constituted a prejudicial abuse of discretion. *Id.* "An abuse of discretion occurs when the circuit court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Id.* (quotation omitted).

The State offered the expert testimony of Ms. Bartman, a SLED forensic scientist, in the field of DNA analysis. (App. 429-30.) Ms. Bartman performed STR and Y-STR analyses on the DNA mixtures taken from four pieces of evidence: a buccal swab from Mr. Hernandez; the minor's buccal, vaginal, and rectal swabs; a cutting from the minor's underwear; and a cutting from the chest area of the minor's nightgown. (App. 432-33.)

Ms. Bartman testified that the DNA profile developed from the nightgown chest cutting was a mixture of at least two individuals. (App. 442-43.) Ms. Bartman testified that the minor could conclusively be included and not excluded as a contributor to the mixture. (App. 442.) In the context of the minor's contribution to the DNA profile, Ms. Bartman testified that "[t]he probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately 1 in 1,600." (App. 443.)

The results from all of the samples conclusively excluded Mr. Hernandez except for the nightgown chest cutting. (App. 454-55, 459.) Ms. Bartman testified that, for the DNA profile and the partial YSTR profile developed from the nightgown chest cutting, "[n]o conclusive statement can be made regarding the inclusion or exclusion of Mario Gonzales Hernandez as a contributor to the mixture." (App. 443.) She did not explain the meaning of that terminology.

The Court of Appeals erred in affirming the trial court's admission of Ms. Bartman's testimony about the result of the DNA test on the nightgown chest cutting sample. Because the result was inconclusive, it did not and could not provide any information about Mr. Hernandez's contribution, and inherently had no value. "Truly inconclusive results, in failing to either include or exclude the defendant, are wholly neutral," and they "are not relevant [] because they do not have a tendency to prove any particular fact that would be material to an issue in the case." *State v. Johnson*, 862 N.W.2d 757, 775-76 (Neb. 2015). Ms. Bartman's testimony was evidence of nothing, and it was totally irrelevant. As a result, it should not have been admitted.

Of crucial importance is the difference between truly "inconclusive" results and other types of results, including incomplete, inclusion, exclusion, and non-exclusion. *See Com. v. Cameron*, 39 N.E.3d 723, 728 (Mass. 2015); *Com. v. Nesbitt*, 892 N.E.2d 299, 313 (Mass. 2008) (explaining meaning of "inconclusive" results). Ms. Bartman's testimony is clear that the DNA

result was "inconclusive." The result was not inconclusive because of a tainted sample or insufficient sample size, however; to the contrary, Ms. Bartman's DNA analysis was complete and reached a result—that no conclusions or inferences could be made. That result is intrinsically irrelevant and should not be admitted.[1]

B. The error in admitting the irrelevant DNA evidence was prejudicial because it invited the jury to engage in amateur speculation about its meaning.

The error in admitting the non-exclusion DNA testimony was prejudicial because it invited the jury to become amateur experts and speculate about the meaning of the data for themselves. Any probative value of the irrelevant results was substantially outweighed in this case by the prejudice to Mr. Hernandez of the jury being misled. As a result, this Court should reverse the decision of the Court of Appeals and remand the case for a new trial.

"To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) (quotation omitted). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quotation omitted). Error is only considered harmless if it could not reasonably have affected the outcome of the trial. *State v. Williams*, 380 S.C. 336, 344, 669 S.E.2d 640, 644 (Ct. App. 2008) (citing *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)). In such cases, the defendant's guilt must be

[1] The trial court understood the irrelevance of the testimony but pre-emptively allowed it out of a concern that, if the evidence was excluded, Mr. Hernandez would argue the State failed to do DNA testing. (App. 384-85.) The fact that testing occurred may be relevant if Mr. Hernandez opened the door by challenging the thoroughness of the State's DNA testing investigation. No such challenge was made. Regardless, the fact that testing occurred, *but not the results themselves*, would become relevant in such a scenario.

"conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Kirton*, 381 S.C. 7, 25, 671 S.E.2d 107, 115-16 (Ct. App. 2008) (quotation omitted). "The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *Id.*, 381 S.C. at 25, 671 S.E.2d at 115.

Ms. Bartman's testimony about the inconclusive results prejudiced Mr. Hernandez because the potential existed for the jury to impermissibly infer that it had some significance. Stating that Mr. Hernandez could not be excluded suggests a link that could be more firmly established if more sampling was possible; as the Supreme Court of Nebraska noted, a jury could reasonably believe that testimony that the defendant could neither be included nor excluded could make that defendant a possible source of the DNA. *State v. Johnson*, 862 N.W.2d 757, 773 (Neb. 2015). However, that is a factually incorrect and prejudicial inference from an inconclusive result. No inferences may be made from an inconclusive result, which implies no greater link between Mr. Hernandez and the nightgown than *anyone* else. *See Com. v. Nesbitt*, 892 N.E.2d 299, 313 (Mass. 2008) (finding that testimony regarding inconclusive DNA evidence was prejudicial because it had no causal relevance but affirming because defendant did not object to the evidence). It has no statistical meaning or explanatory relevance whatsoever. *Johnson*, 862 N.W.2d at 773-74.

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. Ms. Bartman described how the presence of the same number in the box for the individual and the evidence indicated a match for that particular locus. (App. 445.) When prompted, however, Ms. Bartman never explained the *meaning* of the inconclusive result. Instead, she only repeated her explanation of the methodology:

Q. I guess the question is, it might just be semantics. Why can't you include him then. You can't exclude but you can't include him?

A. Right. Like I mentioned, we look at the profile as a whole. We don't look at each location individually. Just because, several people can have a 14 repeat and a 15 repeat. That is not necessarily indicative of a person. And we look at these 15 different locations because these are the locations that have been shown to be the most unique between individuals. So, when we look at all of those different locations combined it gives us the best look at whether a person can be there or can be excluded.

(App. 446.) When again prompted by the State to explain the meaning of the results rather than the methodology, Ms. Bartman only offered circular responses:

Q. And then you say that about Hernandez as well, he cannot be excluded?

A. No conclusive statement can be made regarding the inclusion or exclusion.

Q. What does that mean?

A. Like I said earlier, we can either include someone, we can exclude someone or there can just not be enough information to make a determination whether he can be included or excluded from a profile.

(App. 448.)

Q. Now, we are all looking at it and we see a lot of these numbers that are matching one another. Why can't you make a conclusion, just not reaching your threshold of confidence, I guess.

A. Because it is a mixture. We typically look at mixtures more cautiously, it is as cut and dry as it is them or it is not them. So, in this case there are some numbers that are around the parenthesis, so there are some lower level DNA there which you can see. This one and some of the other ones. So there is just enough, there is not to conclusively say that he cannot be excluded from that profile.

(App. 449.) The chart of the results of the testing, but not the report finding that no conclusion could be made from the testing, was shown to the jury. (App. 441-42; 540.)

Error in admitting irrelevant evidence is particularly harmful when the evidence is DNA analysis. While DNA methodologies continue to increase in reliability, juries expect DNA to be

presented and trust its results—despite usually having no personal understanding of its meaning. As the Colorado Court of Appeals noted:

> DNA is different from other identifying evidence. If a witness testified that she could not exclude the defendant as a suspect because the defendant, like the suspect, had brown hair, a juror would know to give almost no weight to that testimony. Jurors are presumed to have some knowledge of the frequency of this characteristic within the general population. But because a juror is unable to observe a person's DNA, "the juror has no idea of the frequency of a particular DNA profile." *Mattei* at 858. And, "[c]ertainly, a judge's or juror's untutored impression of how unusual a DNA profile is could be very wrong." [*State v. Tester*, 968 A.2d 895, 907 (Vt. 2009)] (quoting National Research Council, *The Evaluation of Forensic DNA Evidence* 193 (1996)).

People v. Marks, 374 P.3d 518, 525 (Colo. App. Dec. 3, 2015). "[J]urors place great emphasis on DNA evidence—so much so that the evidence has long enjoyed a status of 'mythic infallibility' for juries." *Id.* (quoting *Virgin Islands v. Byers*, 941 F.Supp. 513, 526 (D.V.I. 1996)). The jury is invited to become amateur experts and guess the significance of the meaningless results. *See Com. v. Mattei*, 920 N.E.2d 845, 856 (Mass. 2010). Doing so is not weighing the evidence—it is impermissibly speculating.

The admission of Ms. Bartman's testimony improperly "invite[d] the jury to speculate about the probability of a match" by allowing her testimony. *Marks*, 374 P.3d at 525. As a result, there is a "significant possibility" that the "jury might have attributed the potential DNA match preemptive or undue weight." *People v. Coy*, 243 620 N.W.2d 888, 899 (Mich. App. 2000). The admission of the testimony improperly suggested that the DNA test had meaning when it did not.

The State further exacerbated the harm to Mr. Hernandez and the jury's confusion about the permissible inferences to be taken from the DNA testimony in its closing argument:

> DNA, it can be included or excluded. I guess the jargon or the terms SLED uses sometimes frustrate me. He can't be included and he can't be excluded. What are we to take away, I don't really fully know but when I look at this chart and I look at Mr. Hernandez and I look at that nightgown I see a whole bunch of numbers that match up. And I just don't understand why a male's DNA is on her nightgown and I just don't understand that this acid phosphate is present. And they are going to tell you, well, what about the little boy. Acid phosphate, there is male DNA in there but who is it from. And what are we do with all of these numbers that match up.

(App. 503-04.) Merely matching some numbers—or even a "whole bunch" of numbers, as the State argued—is meaningless when any two humans have nearly entirely identical genomic compositions. The State thus specifically encouraged the jury to continue speculating about the ultimate conclusion from the DNA analysis even after its own expert declined to do so. The admission of the irrelevant DNA evidence only created the potential for the jury to act as amateur experts and speculate about why it was inconclusive, fabricating the missing physical evidentiary link to Mr. Hernandez.

The error could not have been harmless because the competent evidence in the record, without the jury's speculation about the meaning of the DNA evidence, does not conclusively prove guilt such that no other conclusion could have rationally been reached. Crucially, Mr. Hernandez was not charged with lewd acts upon a minor or another non-penetration crime; he was charged with criminal sexual conduct. Accordingly, the State was required to prove penetration beyond a reasonable doubt. S.C. Code Ann. § 16-3-651. The nightgown DNA test result was the only non-testimonial evidence suggesting a link between Mr. Hernandez and the minor on June 29, 2013, which was the only night that any witness other than the minor testified

that an assault occurred.[2] All of the other DNA samples tested from June 29, 2013 conclusively excluded Mr. Hernandez and no spermatozoa from Mr. Hernandez were identified on any sample. (App. 453-55, 459.) Ms. Bartman's testimony regarding her DNA analysis should have been excluded as irrelevant, and the failure to exclude the evidence was not harmless error because it had the potential to mislead the jury. A new trial is warranted.

C. Mr. Hernandez's objection to the relevance of Ms. Bartman's testimony was preserved.

The Court of Appeals erred in finding Mr. Hernandez's argument was unpreserved for appellate review because Mr. Hernandez failed to contemporaneously object to the testimony. The Court of Appeals 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. (App. 641-42.)

The Court of Appeals erred because Mr. Hernandez's motion 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

[2] The jury did not find that the testimony regarding alleged assaults prior to the minor's eleventh birthday because Mr. Hernandez was found not guilty of criminal sexual conduct in the first degree. (App. 528.)

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 was unnecessary and would have been futile.

Regardless, the Court of Appeals 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. (App. 435.) 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.**

(App. 436-38 (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." (App. 440.) 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.

II. The Court of Appeals erred in affirming the trial court's admission of an investigator's testimony regarding what an interpreter said that Mr. Hernandez told him in Spanish because the testimony was hearsay not subject to any exception.

A. Investigator Goodman's testimony was hearsay and should not have been admitted.

The Court of Appeals erred in affirming the admission of hearsay testimony by Investigator Goodman about his interview of Mr. Hernandez on July 1, 2013. Investigator Goodman was allowed to testify about alleged admissions made by Mr. Hernandez in Spanish to Corporal Alvarado—as interpreted to him by Corporal Alvarado in English—even though he was unable to understand Spanish or any of Mr. Hernandez's statements. Investigator Goodman's testimony about what Corporal Alvarado told him that Mr. Hernandez said was hearsay with no exception available to make the communications admissible, and its admission was error.

The South Carolina Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay testimony is inadmissible unless excepted by the South Carolina Rules of Evidence, by another Rule, or by statute. Rule 802, SCRE. However, a witness may testify regarding an out-of-court statement made to him by the defendant as a party admission not subject to the hearsay rule. Rule 801(d)(2), SCRE.

Investigator Goodman testified regarding what Corporal Alvarado told him in English that Mr. Hernandez allegedly said in Spanish:

> Q. All right. So what happens when he gets to your office?
> A. He comes in. I read him his rights and we fill out a form. He's read his rights from our English version and at the same time it's being translated on a Spanish form that he's signing off on the entire time. He waived those rights. I picked up from his conversation on the incident night about the inappropriate touching. And I asked him when had that started, and he said around December 2012. We

talked about the inappropriate touching and he said, you know, they would touch each other on their private parts and clothes would always be on. The mama was present. He spoke of her sitting on top of him while sitting on the couch. But I took that to be her sitting on his lap or something, not necessarily him laying down on top of her or her laying, him laying down and she's on top of him, but sitting on his lap. Those kind of things, sitting on his lap. Inappropriate touching, the clothes would always be on. We talked about the night in question, June 29th, June 30th and he said that he was in her room sitting on the bed. She was in the bathroom. Their clothes were on. The light was on and mom came in and nothing happened and he didn't put his penis inside of her. That's all he would say.

Q. Okay. Okay. So he is admitting to touching her private parts but not to penetration?

A. That's right.

Q. And so what -- you said something about 2012. What did he say about the year 2012?

A. He said that's when the inappropriate touching started around that time.

(App. 306-07.) Investigator Goodman could not testify directly about what Mr. Hernandez said because he did not speak Spanish. (App. 301.) During the interview, he was wholly reliant on what Corporal Alvarado had told him that Mr. Hernandez had said, and in court, he could only repeat what Corporal Alvarado told him that Mr. Hernandez had said. Thus, his testimony did not include any admissions made by Mr. Hernandez—only out-of-court statements made by Corporal Alvarado about what Mr. Hernandez allegedly admitted, being offered for the truth of the matter asserted therein. Interpretation is not recognized by Rule 802, SCRE, or the Court as admissible hearsay testimony, so Investigator Goodman's testimony was inadmissible. *See, e.g.*, *State v. Morales*, 269 P.3d 263, 271 (Wash. 2012) (en banc) (finding that testimony by officer that a Spanish-speaking interpreter had read warning to defendant was inadmissible hearsay because officer could not testify based on his own understanding and testimony was offered for truth of the matter asserted); *People v. Wing Choi Lo*, 570 N.Y.S.2d 776, 777 (N.Y. Sup. Ct. 1991) ("The testimony of the detective as to what the interpreter stated the defendant told him, in

a language the detective did not understand, was hearsay." (citation omitted)); *People v. Gomez*, 491 N.E.2d 68, 73 (Ill. App. 1986) ("[W]e note that a person conversing with a third person through an interpreter is not qualified to testify to the other person's statements because he knows them only through the hearsay of the interpreter who, ordinarily is the only person who may testify to the third person's words.").

Some courts have recently recognized that interpreters serve only as a "language conduit" between the defendant and the interviewer such that an agency relationship, and testimonial identity, arises between the defendant and the interpreter pursuant to Rule 801(d)(2)(C) or (D). *See, e.g.*, *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973). However, the language conduit theory fails to recognize that interpretation involves more than the one-to-one translation of words; it involves the translation of concepts. Even if the words originated with Mr. Hernandez, Corporal Alvarado provided the understanding of the "contextual, pragmatic meaning" of the words and attempted to reproduce the concepts in English to Investigator Goodman. *See United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013) (holding that interpreter's statements in interrogation were testimonial for purposes of Confrontation Clause). Moreover, whereas Mr. Hernandez speaks a Guatemalan dialect of Spanish, Corporal Alvarado speaks Bolivian Spanish, and he admitted that Spanish words can have different meanings in different dialects, including between Guatemalan and Bolivian. (App. 367.) As a result, Corporal Alvarado's interpretation did not have the same guarantees of reliability underlying the hearsay exceptions in Rule 803, SCRE.

Even if the Court were to find that Corporal Alvarado merely served as a language conduit, Investigator Goodman's testimony should still not be admissible. The cases finding that

the interpreter is merely a language conduit apply a four-factor test to determine whether the interviewer's testimony should be admissible:

(1) which party supplied the interpreter,
(2) whether the interpreter had any motive to mislead or distort,
(3) the interpreter's qualifications and language skill, and
(4) whether actions taken subsequent to the conversation were consistent with the statements as translated.

United States v. Romo-Chavez, 681 F.3d 955, 959 (9th Cir. 2012). Even if the Court were to apply such a test, each of these factors would weigh against the reliability of Corporal Alvarado's translation such that it cannot be presumed that he was merely a language conduit.

The State provided Corporal Alvarado, a police officer, as the interpreter. Although the fact that he is a government employee and police officer "does not, by itself, necessarily prevent his translations from being admissible" or allow a presumption that he would intentionally misinterpret the statements, it makes the first two factors weigh against the State. *Id.* Although Corporal Alvarado testified that he was fluent in Spanish, he had no certifications in Spanish translations and had not spoken it on a daily basis in almost a decade, so the third factor also weighs against the reliability of the testimony. (App. 367.) Finally, although Mr. Hernandez subsequently drafted a written statement, Corporal Alvarado noted that the written statement was inconsistent, as it did not include the words private parts or inappropriate touching. (App. 381.) Corporal Alvarado was acting as an interrogator, not a mere neutral translator, and he was not Mr. Hernandez's agent in the interview such that Investigator Goodman's testimony restating Corporal Alvarado's interpretation was not hearsay. The affirmance of the admission of Investigator Goodman's testimony was erroneous and requires reversal.

B. Investigator Goodman's testimony was neither cumulative nor harmless error.

The Court of Appeals 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. The Court of Appeals erred because Investigator Goodman's testimony was more detailed than Corporal Alvarado's and contextually different from Officer Rowe's and Ms. Rivera's.

The erroneous admission of Investigator Goodman's testimony regarding the July 1, 2013 interview was not harmless because it was the first time the jury had heard the statements made by Mr. Hernandez in the interrogation. Although Corporal Alvarado subsequently testified about the same conversation, his testimony provided significantly less detail:

> During the interview, Mr. Hernandez made the statements that around December 2012 is when the touching had started. Also, it was also said that during that time, it was more confidence built into it. And there was inappropriate touching in the private parts. And also it was said to, that there was no intercourse or penetration. But it was, and he also said that at all times he had his clothes on. And some of that stuff that I can recollect from.

(App. 364.) Investigator Goodman's testimony was thus more detailed and damaging; Corporal Alvarado did not testify that Mr. Hernandez said the minor would sit on his lap, that Mr. Hernandez made any statements about June 29, 2013, or that he engaged in "inappropriate touching." Furthermore, Investigator Goodman testified before Corporal Alvarado, providing the more prejudicial testimony to the ears of the jury first. 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 the affirmance of its admission was error requiring reversal.

Conclusion

Based on the above, the Court should grant certiorari to reverse the decision of the Court of Appeals, reverse Mr. Hernandez's conviction, and remand for a new trial.

Respectfully submitted,

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Petitioner.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioner, 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):

Pleadings: PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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