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.

REPLY TO PETITION FOR WRIT OF CERTIORARI

Graham R. Billings
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Robert M. Dudek
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1343

Attorneys for Petitioner Mario Valerio-Gonzalez Hernandez

Table of Contents

Table of Authorities ii

Argument 1

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. 1

A. Mr. Hernandez's argument that the DNA results are irrelevant is preserved. 1

B. The inconclusive DNA evidence is irrelevant. 4

C. The improper admission of the irrelevant DNA results was not harmless error. 7

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. 11

A. Mr. Hernandez's argument that Investigator Goodman's testimony should not have been admitted as hearsay is preserved 11

B. Investigator Goodman's testimony was hearsay and not cumulative. 13

C. The improper admission of Investigator Goodman's testimony was not harmless error 14

Conclusion 15

TABLE OF AUTHORITIES

Page(s)

Cases

Campbell v. Jordan,
382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009) 14

Clark v. State,
96 A.3d 901 (Md. 2014) 5

Malloy v. Thompson,
409 S.C. 557, 762 S.E.2d 690 (2014) 1

People v. Marks,
374 P.3d 518 (Colo. App. 2015) 10

State v. Chavis,
412 S.C. 101, 771 S.E.2d 336 (2015) 7

State v. Johnson,
862 N.W.2d 757 (Neb. 2015) 5

State v. LaCoste,
347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001) 12

State v. Mueller,
319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995) 3

State v. Rivers,
411 S.C. 551, 769 S.E.2d 263 (Ct. App. 2015) 12

State v. Rodriguez-Castillo,
188 P.3d 268 (Or. 2008) 14

State v. Thomason,
355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003) 1

United States v. Ghailani,
761 F. Supp. 2d 114 (S.D.N.Y. 2011) 13

United States v. Sanchez-Godinez,
444 F.3d 957 (8th Cir. 2006) 14

Virgin Islands v. Byers,
941 F.Supp. 513 (D.V.I. 1996) 10

Wright v. Hiester Const. Co.,
389 S.C. 504, 698 S.E.2d 822 (Ct. App. 2010) 14

Statutes

S.C. Code Ann. § 16-3-651 8

S.C. Code Ann. § 16-3-655 8

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.

A. Mr. Hernandez's argument that the DNA results are irrelevant is preserved.

Issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014). The issue must be "sufficiently clear" so that it can be "reasonably understood" and ruled upon by the judge. *Id.* "Moreover, a party cannot argue one theory at trial and a different theory on appeal." *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003).

For the reasons set forth in the Petition for Writ of Certiorari, the Court of Appeals erred in finding Mr. Hernandez's argument was unpreserved for appellate review. After coming back from a break, Mr. Hernandez moved to limit Ms. Bartman from testifying regarding the report describing the inconclusive DNA results and the chart showing those results on the grounds that they were irrelevant. (App. 386-89.) Mr. Hernandez specifically raised the issue of lack of relevance of the DNA evidence, noting that the term of art "neither included nor excluded," out of context, invited the jury to speculate on Mr. Hernandez not being excludable:

> MR. MCCULLEN: . . . And so that, the bottom line I think is that the SLED person can say we tested all these things and the best we can say is we can't include him or exclude him. Well, then the problem from the defense standpoint with even that is what you're saying to the jury is, what the witness is saying to the jury is, he can't be excluded. And so that's why the proposed language is an inconclusive result. I have no problem with her saying here's what we tested, here's what was never submitted for testing, but it was an inconclusive result. Some of these samples say no semen, no semen, no semen. And that, in effect, is part of this evidence too. That Ms. Bartman will state whatever else is true, no semen was detected on anything, even the nightgown. So whatever three

> people's DNA is on that nightgown, it didn't come from semen. And so I would just submit respectfully that under 403, when evidence doesn't help the trier of fact to better understand the testimony, then the evidence should just stay out. The chart should stay out. It would just confuse them. And Jennifer Bartman, I would submit she is an expert and she can state, you know, all the king's horses and all the king's men tried to get what we could out of this but all we can say is inconclusive, the samples we got don't shed any light on this, who's DNA this is. And let me add, Your Honor, that I would not open the door at any point by saying that if these things had been tested that they would have not found his DNA in the items that were not tested.

(App. 389-90.) Mr. Hernandez offered to the trial court two Maryland cases in which the defendant challenged "neither included nor excluded" DNA results on the grounds that they were statistically irrelevant. (App. 385.)

The trial court understood the relevance issue and allowed the testimony:

> THE COURT: I think the State can call an expert witness in a field of particularity if that expert is qualified in the field of DNA. They can call them, question them and if it gets outside of the scope of assisting the fact finder in determining the questions of fact they have then at that point, the testimony would not be allowed. However, what's been presented thus far is consistent with the DNA testimony I've heard in the past subject to cross-examination of, not having heard the testimony yet it's hard for me to rule on. An expert is allowed to proffer opinions and to proffer comments on the things they've analyzed and the facts and the data they relied upon in reaching those opinions and are subject to cross-examination. So I think at this time, I will listen for questions outside of the scope of assisting the trier of fact. But thus far, I think the State would be allowed to call that person and to testify consistently what she's done in this case.

(App. 390-401.) An intervening witness, Donna Debrew, then testified before Ms. Bartman testified.

First, 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 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 pretrial 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.

Second, 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 Mr. Hernandez's 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.) 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.

B. The inconclusive DNA evidence is irrelevant.

The State argues that the DNA evidence was relevant for three reasons: Mr. Hernandez "could not be excluded as a contributor;" the nightgown tested positive for acid phosphate; and male DNA evidence was found on the minor's nightgown. (Resp. Pet. Cert. at pp. 10-11.) None of the State's arguments for relevance are persuasive.

First, the State asks the Court to accept the same misinterpretation of the DNA results as it invited the jury to speculate. It is untrue that Mr. Hernandez "could not be excluded as a contributor," as the State argues. (*Id.* at p. 11.) To the contrary, no conclusive statement could be made regarding whether Mr. Hernandez could be included or excluded. (App. 448.) The difference between these terms of art is crucial and fundamental to Mr. Hernandez's defense. The State's interchangeable use of the terms further highlights its attempts to invite the jury's confusion regarding the meaning of the results. (App. 504.) No jury can be expected to understand the difference between a relevant "could not be excluded" result and an irrelevant "neither included nor excluded" result if the State does not explain the terms and instead blend its usage of them.

An individual who "could not be excluded" from the mixture is a contributor, unless the DNA result was a false positive. For example, the minor "could not be excluded" as a

contributor to the mixture developed from the nightgown sample, and in only 1 out of 1,600 cases would such a result be a false positive. (App. 442.) Although such a result may have some relevance concerns in the appropriate case, that is not the challenge Mr. Hernandez raises here. There was not a "could not be excluded" result.

Instead, Ms. Bartman testified that no conclusive statement could be made regarding the inclusion or exclusion of Mr. Hernandez. (App. 389.) This result is inherently meaningless. Importantly, a "neither included nor excluded" result is not meaningless because the sample was insufficient, unclear, or tainted; to the contrary, the sample was accurate and complete, but the analysis resulted in nothing conclusive. *See State v. Johnson*, 862 N.W.2d 757, 773 (Neb. 2015) (explaining the difference between an insufficient sample and sufficient sample without a conclusive result). The *only* permissible interpretation of a "neither included nor excluded" result is that it is "evidence of nothing." *Clark v. State*, 96 A.3d 901, 908 (Md. 2014).

A jury cannot be expected to understand the difference between these terms of art when the trial court admits the irrelevant testimony and the State suggests that "a whole bunch of numbers match up" even though those numbers have no statistical relevance. (App. 504.) The trial court erred by failing to fulfill its gatekeeping function by keeping this irrelevant DNA evidence out.[1]

[1] The trial court allowed the irrelevant testimony to be admitted 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 trial court noted that, if Mr. Hernandez had not continually argued the State's incomplete investigation as a theme of its defense case, it was "probably with [him]" that the DNA evidence should be excluded. (*Id.*) Although the trial court's concern was valid, the DNA results would only gain relevance in that context if Mr. Hernandez opened the door by challenging the thoroughness of the State's DNA testing investigation. No such challenge was made. The trial court's rationale for considering it relevant on that basis was thus pre-emptive.

The State's other two reasons why the DNA results were relevant are equally unpersuasive and do not respond directly to the challenge being made. The State next argues the DNA results are relevant because testing for acid phosphatase was positive, and acid phosphatase is found in semen. (Resp. Pet. Cert. at p. 11.) The positive result for acid phosphatase is a separate issue than the relevance of the "neither included nor excluded" DNA results. Regardless, the State's argument again asks the Court to make an incorrect inference based on the limited information it presents. Ms. Bartman immediately qualified her testimony that testing for acid phosphatase was positive by noting that acid phosphatase is found in other bodily fluids other than semen, including normal female vaginal fluid. (App. 450-52.) Furthermore, no semen was indicated on the underwear sample. (App. 452.) No spermatozoa were identified on the minor's vaginal or rectal smears. (App. 453.) No semen was found in the examination of the minor. (App. 417.) Ms. Bartman could not identify any evidence containing Mr. Hernandez's DNA. (App. 462.) The positive result for acid phosphatase is not relevant and more probative than prejudicial because it suggested the presence of Mr. Hernandez's semen when semen was never found and when Mr. Hernandez's DNA could not be identified.

The third reason that the State argues the DNA evidence is relevant is that it showed the presence of male DNA on the minor's nightgown. (Resp. Pet. Cert. at p. 15.) Again, the fact that male DNA was discovered is a separate issue than the admission of the irrelevant DNA test results. However, the State's rationale is unpersuasive. The minor lived with Mr. Hernandez and her brother, both of whom would leave DNA evidence containing Y-chromosomes across

the house.[2] The presence of male DNA in a place where two males lives does not in any way suggest criminal sexual conduct by either of those males. Moreover, no male DNA was found on either the vaginal or rectal swab sampled from the minor or from the underwear sample. (App. 458-59.) The results of the DNA test from the chest cutting is not relevant.

C. The improper admission of the irrelevant DNA results was not harmless error.

Finally, the State argues that any error in the admission of the DNA test results is harmless because of the overwhelming evidence of Mr. Hernandez's guilt. (Resp. Pet. Cert. at pp. 11-12.) Because there is not overwhelming evidence of guilt, and because the DNA evidence could have affected the jury's verdict by serving as the one piece of physical evidence that impermissibly invited speculation that Mr. Hernandez could not be excluded as a contributor to a sample, the Court should grant certiorari to reverse the decision of the Court of Appeals and remand for a new trial.

"An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (citation omitted). "Whether an error is harmless depends on the circumstances of the particular case." *Id.* (citation omitted). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Id.*, 412 S.C. at 109-10, 771 S.E.2d at 340 (citation omitted).

The State claims that there is overwhelming evidence of Mr. Hernandez's guilt in the record, citing to testimony from the minor, her mother, alleged statements made by Mr.

---

[2] The State argues the Y-chromosome evidence is relevant because Mr. Hernandez "was the only ***adult*** male living in the home." (Resp. Pet. Cert. at pp. 10-11 (emphasis added).) Y-chromosomes are not only present in adult males, and S.M. could have contributed to the sample.

Hernandez, the testimony of the State's forensic nurse, and the DNA evidence. (Resp. Pet. Cert. at p. 12.) None of this evidence supports a finding of overwhelming evidence of guilt of second degree criminal sexual conduct and instead only demonstrates the prejudice of the improperly-admitted DNA results.

In order to find Mr. Hernandez guilty of criminal sexual conduct, the jury had to find that Mr. Hernandez engaged in sexual battery with a victim who is between eleven and fourteen years old. S.C. Code Ann. § 16-3-655(B). Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." S.C. Code Ann. § 16-3-651.

The State first claims that there is overwhelming evidence of guilt because the minor "described years of sexual abuse." (Resp. Pet. Cert. at p. 12.) However, the jury did not believe the minor's testimony regarding the alleged prior years of abuse because it found Mr. Hernandez not guilty of first degree criminal sexual conduct. (App. 528.) The State next suggests the minor's mother's testimony that she discovered Mr. Hernandez on top of the minor "with his penis exposed" and Mr. Hernandez's translated statements that he "touched [the minor] inappropriately" were overwhelming evidence of guilt. (Resp. Pet. Cert. at p. 12.) However, neither statement proves in any way that Mr. Hernandez engaged in sexual intercourse or intrusion with the minor between the ages of eleven to fourteen. Touching is not intercourse. "Inappropriate touching," even if it is presumed to have occurred, cannot support a conviction for criminal sexual conduct. None of this testimony provides overwhelming evidence of Mr. Hernandez's guilt.

The State next argues that Mr. Hernandez made multiple statements to investigators where he admitted that he touched the minor inappropriately. (Resp. Pet. Cert. at p. 12.) Again, inappropriate touching does not prove intercourse or criminal sexual conduct. Regardless, for the reasons set forth in Argument II below, these statements should not have been admitted.

The State also argues that overwhelming evidence exists that Mr. Hernandez engaged in sexual intercourse or battery with the minor because the State's forensic nurse testified that her findings in her examination of the minor were consistent with "some sort of trauma" because her hymen was discolored. (App. 403-05.) However, Mr. Hernandez's DNA was not found on the swabs sampled from the minor's vagina, cheek, or rectum, and Ms. Debrew testified that her examination did not show any vaginal secretions or semen. (App. 416-17.) Evidence of discoloration and "some sort of trauma" is not overwhelming evidence of Mr. Hernandez's guilt in engaging in sexual battery.

Finally, the State argues that the positive results for male DNA and acid phosphate on the minor's nightgown chest cutting also provide overwhelming evidence of guilt. Again, male DNA is not indicative of any sexual conduct, and the DNA could have come from Mr. Hernandez or S.M. at any time. Moreover, male DNA was not found in the minor's underwear. (App. 459.) Similarly, the presence of acid phosphate is indicative of other bodily fluids, including vaginal fluid, and no semen or spermatozoa were found in the underwear cutting or the vaginal or rectal swabs. (App. 450-53.) Moreover, all of the DNA samples tested from June 29, 2013 other than the nightgown chest cutting conclusively excluded Mr. Hernandez. (App. 453-55, 459.) Ms. Bartman was unable to identify a single piece of evidence that had Mr. Hernandez's DNA on it. (App. 462.)

Thus, there is no cumulative, overwhelming evidence of Mr. Hernandez's guilt. Mr. Hernandez was not found guilty of inappropriately touching the minor or even having his penis exposed around the minor. The lack of physical evidence of sexual intercourse or sexual battery—the absence of male DNA in the physical examination and the other DNA samples, the absence of semen or spermatozoa, and the determination that Mr. Hernandez could be excluded from all of the *other* DNA samples—weighed against a finding of guilt. The circumstantial nature of all of the other evidence before the jury only highlights the importance that the jury placed on the result of the DNA test from the chest cutting as the only physical evidence offered to prove beyond a reasonable doubt that Mr. Hernandez engaged in sexual intercourse or battery with the minor. However, as stated above, the inability to make a conclusive statement regarding the exclusion of Mr. Hernandez does not mean he could not be excluded. The evidence invited the jury to speculate exactly that and create the missing physical link in their minds.

Courts have noted that DNA evidence has "mythic infallibility" to a jury. *See People v. Marks*, 374 P.3d 518, 525 (Colo. App. 2015) (quoting *Virgin Islands v. Byers*, 941 F.Supp. 513, 526 (D.V.I. 1996)). The failure to exclude this irrelevant evidence directly invited the jury to become amateur scientists—and to create the relevance of the DNA results in their own minds when the State's witness declined to do so. Thus, the admission of inherently irrelevant test results, even with cross-examination about its irrelevance, is prejudicial and not harmless because it could have reasonably affected the result of the trial. The Court should reverse the trial court's erroneous decision to allow admission of the irrelevant DNA test results and chart, and remand for a new trial.

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. Mr. Hernandez's argument that Investigator Goodman's testimony should not have been admitted as hearsay is preserved.

The trial court addressed three instances of interpretations in this case. The first instance was when Ms. Rivera interpreted Mr. Hernandez's Spanish-language statements to Officer Rowe in English at the scene. The second instance occurred when Mr. Hernandez was interrogated by Corporal Alvarado in Spanish, who interpreted his answers to Investigator Goodman in English. The third instance involved the process for reading Mr. Hernandez's Spanish-language statement, written immediately after the interrogation while Corporal Alvarado and Investigator Goodman were still present, to the jury in English.

Prior to Investigator Goodman taking the stand, the trial court heard lengthy argument and proffer from the parties regarding the scope of Investigator Goodman's testimony as to the second instance of interpretation, which is the only instance on appeal. The trial court immediately addressed whether Investigator Goodman would be able to testify regarding the answers that Corporal Alvarado told him that Mr. Hernandez said. (App. 257-65.) Although the parties never used the term hearsay throughout the discussion, the trial court understood the objection to Investigator Goodman's testimony as encompassing hearsay issues:

> THE COURT: And then that, you know, where we're losing the translation and then the potential embellishment of reducing it to writing and refreshing my memory of what was translated back to me, that's where I'm kind of losing your argument is questions asked by Alvarado in Spanish, repeated in Spanish back to Alvarado's response. Alvarado translates in his version[] of Spanish back to Goodman and Goodman is taking notes. That's getting a step away.

(App. 262.) The exact name of a legal doctrine is not necessary for an objection on that basis to be preserved. *State v. Rivers*, 411 S.C. 551, 554, 769 S.E.2d 263, 265 (Ct. App. 2015). The State then proffered Investigator Goodman's testimony, and the trial court demonstrated his understanding of the hearsay objection by explaining it to Investigator Goodman:

> THE COURT: And he was there with you working with the suspect and he didn't translate it back to you, and so that's where the lawyers are exploring as to exactly what you knew as opposed to what Mr. Hernandez was saying to Corporal Alvarado. And you kind of, are out of the loop a little bit because you don't speak Spanish.
>
> MR. GOODMAN: Right.
>
> THE COURT: So that's what we're trying to explore to make certain that you don't violate any of my rules yesterday volunteering something that you shouldn't.
>
> MR. GOODMAN: Right.

(App. 272.) The trial court ultimately allowed Investigator Goodman to testify fully regarding Corporal Alvarado's statements, noting completeness concerns. (App. 295.) However, in so ruling, the trial court responded directly to a trustworthiness concern raised by Mr. Hernandez:

> MR. MCMULLEN: Well, just -- and I just didn't think that these things, Your Honor, bore a relationship to the verbal things that may lack trustworthiness but I think your opinion is the one that counts.
>
> THE COURT: I think he gets to say what Alvarado translated back to him as he initiated the oral interview being, tell me when this started, who was there, how'd it happened, just like what he said. He's allowed -- he will be allowed to do that and you're allowed the full breadth of cross-examination about what else he didn't do or analyze or otherwise.

(App. 292.) Such concerns about reliability for trustworthiness are the basis of the rule against hearsay, *see State v. LaCoste*, 347 S.C. 153, 170, 553 S.E.2d 464, 474 (Ct. App. 2001), and the

trial court understood Mr. Hernandez's trustworthiness objection. As a result, Mr. Hernandez's argument that Investigator Goodman's testimony should not have been admitted is preserved.

B. Investigator Goodman's testimony was hearsay and not cumulative.

The State argues that Investigator Goodman's testimony was not hearsay on the grounds that Corporal Alvarado was serving as a "language conduit" and not a declarant. (Resp. Pet. Cert. at pp. 17-19.) The "language conduit" theory, however, is not applicable and has not been accepted by this Court. Investigator Goodman's testimony was hearsay not subject to any exception, and its admission was erroneous.

However, even if the language conduit theory were accepted under South Carolina law, it would not be applicable to Corporal Alvarado's testimony. As noted by the District Court for the Southern District of New York, cases finding that an interpreter "is no more than a language conduit" have one or more of the following circumstances, which indicate the trustworthiness of the interpretation:

> (1) the interpreter had no motive to mislead and there was no reason to question the accuracy of the translation,
> (2) the interpreter was the declarant's agent or co-conspirator,
> (3) the defendant was bilingual, was present when the out-of-court statement was made, and failed to object to the translation at the time, and
> (4) the defendant's statement was not offered for its truth.

United States v. Ghailani, 761 F. Supp. 2d 114, 119-20 (S.D.N.Y. 2011). These circumstances are not present here. Investigator Goodman's statements about what Corporal Alvarez told him that Mr. Hernandez admitted are offered for their truth. There are reasons to question Corporal Alvarado's ability to translate; there is evidence that he had not spoken Spanish on a daily basis in fourteen years and that certain words in Guatemalan Spanish are different than in Bolivian Spanish. (App. 127, 367.) Corporal Alvarado also Mirandized Mr. Hernandez as a law

enforcement officer. (App. 360-61); *see also United States v. Sanchez-Godinez*, 444 F.3d 957, 960-61 (8th Cir. 2006) ("Jauregui testified that he not only translated, he also 'Mirandized' Sanchez–Godinez and asked the types of questions he 'normally would ask' in his capacity as an ATF agent. Because Jauregui was not merely acting as a "language conduit," but rather initiated at least some of the questions posed in the interview, his out-of-court statements raise hearsay concerns."). Regardless, even if Corporal Alvarado merely repeated what Mr. Hernandez said, the language conduit theory has not been accepted by this Court. *See Wright v. Hiester Const. Co.*, 389 S.C. 504, 522, 698 S.E.2d 822, 832 (Ct. App. 2010) (discussing language conduit theory). "[I]t does not follow that the second person's repetition of the first person's statement does not add another layer of hearsay." *State v. Rodriguez-Castillo*, 188 P.3d 268, 273 (Or. 2008). Mr. Hernandez does not ask the Court to adopt a per se rule holding that law enforcement offers are motivated to mistranslate statements into confessions. Instead, the Court should only uphold its hearsay rules and recognize that Corporal Alvarado's statements about what Mr. Hernandez confessed in Spanish should only be admissible through Corporal Alvarado himself. *See Wright*, 389 S.C. at 522, 698 S.E.2d at 831 (recognizing concern about admission of interpreted statements where declarant did not have sufficient command of English and there were no other safeguards to ensure the accuracy of the interpretation).

C. The improper admission of Investigator Goodman's testimony was not harmless error.

As set forth in the Petition for Rehearing, Investigator Goodman's testimony about what Corporal Alvarado told him in English is significantly more detailed than Corporal Alvarado's testimony about what Mr. Hernandez told him in Spanish, so it is not "merely cumulative." *Campbell v. Jordan*, 382 S.C. 445, 453, 675 S.E.2d 801, 805 (Ct. App. 2009). Corporal

Alvarado did not testify that Mr. Hernandez said the minor would sit on his lap or that Mr. Hernandez made any statements about June 29, 2013. Investigator Goodman's translated testimony is also more expansive than the written statement given by Mr. Hernandez, which does not contain an admission to "inappropriate touching." (App. 378.) Thus, Investigator Goodman's testimony was not cumulative and instead expanded the purported admissions made by Mr. Hernandez. Accordingly, Investigator Goodman's testimony was not harmless.

Conclusion

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,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Graham R. Billings, SC Bar No. 101117
E-mail:graham.billings@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Robert M. Dudek
E-Mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1343

Attorneys for Petitioner Mario Valerio-Gonzalez Hernandez

Columbia, South Carolina
December 4, 2017

RECEIVED

DEC 04 2017

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 Paralegal 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: Reply to Petition for Writ of Certiorari

Counsel Served:

V. Henry Gunter, Jr., Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, SC 29211-1549

David M. Stumbo, Esquire
Eighth Circuit Solicitor's Office
Post Office Box 516
Greenwood, SC 29646

Meredith S. Keane
Senior Paralegal

December 4, 2017