THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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. 2017-002206

The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Petitioner.

BRIEF OF PETITIONER

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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?**

Introduction

Petitioner Mario Valerio-Gonzalez Hernandez hereby files his brief following the Court's March 28, 2018 Order granting his petition for a writ of certiorari to review the Court of Appeals' August 2, 2017 Opinion, which affirmed the conviction of Mr. Hernandez of criminal sexual conduct with a minor in the second degree. The Court of Appeals' Opinion erroneously finds that Mr. Hernandez's arguments that inconclusive DNA evidence and interpreted hearsay testimony should not have been admitted were unpreserved. As the appendix and below arguments demonstrate, the arguments are preserved, and the trial court's admission of this evidence was prejudicial error. The Court should reverse the decision of the Court of Appeals and grant Mr. Hernandez a new trial.

Statement of the Case

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 was charged with criminal sexual conduct with a minor in the first and second degrees, which allegedly occurred 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 interpret 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 the events, and Ms. Rivera interpreted the questions to Mr. Hernandez and his answers in response 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 Boris 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 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 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 about 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.) Mr. Hernandez petitioned for certiorari on October 23, 2017, which was granted on March 28, 2018.

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 a DNA test 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 testimony by the State's DNA analysis expert, Jennifer Bartman, 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. Inconclusive DNA test results are irrelevant on their merits, prejudicial, and inadmissible. Because there was no other basis for the DNA test result to be relevant, their admission was error that invited the jury to serve as their own amateur experts using their preconceived, and likely incorrect, ideas of the meaning of DNA evidence. The erroneous 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) (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.)

The results from all of the samples except for the nightgown chest cutting conclusively excluded Mr. Hernandez. (App. 454-55, 459.) Ms. Bartman testified that the DNA profile taken from the nightgown chest cutting included a mixture of at least two individuals. (App. 442-43.) Ms. Bartman testified that the minor could conclusively be included as a contributor to the

mixture. (App. 442.) Ms. Bartman testified that, for both the STR and YSTR profiles, "[n]o conclusive statement can be made regarding the inclusion or exclusion of Mario Gonzales Hernandez as a contributor to the mixture." (App. 443.)

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 to the mixture. The result inherently had no value.

Of crucial importance is the difference between truly "inconclusive" results and other types of results. "Inclusion" results guarantee, within a scientifically-accepted confidence threshold, that the defendant cannot be excluded as a contributor to the mixture and are plainly relevant, and "exclusion" results guarantee that the defendant cannot be included as a contributor and are exculpatory. "Incomplete" results suggest that the sample was too small or was otherwise tainted, so the results are invalid. Finally, "inconclusive" results are complete, but no conclusions about the defendant's involvement can be drawn from the test. *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). The result of the DNA test here was "inconclusive."

"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); *see also Com. v. Wiggins*, 81 N.E.3d 737, 746 n.12 (Mass. 2017); *Baggett v. State*, 110 S.W.3d 704, 707 (Tex. App. 2003). The admission of the result was error.

Importantly, inconclusive results can become relevant if the defendant challenges the thoroughness of the investigation or otherwise raises the issue of whether the DNA test was performed at all. *See Com. v. Cavitt*, 953 N.E.2d 216, 231 (Mass. 2011) (explaining how inconclusive DNA results can become relevant if defendant challenges the sufficiency of the investigation). Here, the trial court understood that the result itself was irrelevant, but pre-emptively allowed it out of a concern that Mr. Hernandez would argue the State failed to test the nightgown chest cutting for DNA if the evidence was excluded. (App. 384-85.) However, Mr. Hernandez never made such an argument and never opened the door to the DNA evidence.[1] Accordingly, the admission of Ms. Bartman's testimony regarding the inconclusive result of the DNA test on the nightgown chest cutting as to Mr. Hernandez was error.

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 admission of the DNA test result was prejudicial because it invited the jury to become amateur experts and speculate about the meaning of the result. Even, if the result had any probative value whatsoever, that value 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.*

[1] Regardless, the fact that testing occurred, *but not the result itself*, would become relevant in such a scenario.

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 "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.

The admission of Ms. Bartman's testimony about the inconclusive test result prejudiced Mr. Hernandez because it impermissibly invited the jury to speculate about the result's meaning. As the Supreme Court of Nebraska found, a jury could reasonably conclude that, where the defendant could "neither be included nor excluded," the defendant could be 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 because the result is evidence of nothing. *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).

While the admission of irrelevant evidence is rarely prejudicial, the calculus changes when the challenged evidence is DNA analysis. As DNA tests continue to increase in reliability and prevalence, juries expect DNA test results to be presented at trial and attach significant weight to them—despite usually having no personal familiarity or understanding of their meaning. As the Colorado Court of Appeals described,

> 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. 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 admission of Ms. Bartman's testimony improperly "invite[d] the jury to speculate about the probability of a match" and become amateur experts. *Marks*, 374 P.3d at 525; *Com. v. Mattei*, 920 N.E.2d 845, 856 (Mass. 2010). There is a "significant possibility" that the "jury might have attributed the potential DNA match preemptive or undue weight." *People v. Coy*, 620 N.W.2d 888, 899 (Mich. App. 2000). Moreover, the simple fact that testimony was admitted improperly suggested that the DNA test had meaning when it did not.

The prejudice is compounded by the lack of evidence in the record about *why* the test was inconclusive. Ms. Bartman described her methodology: that the presence on the chart 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 a match; 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 inconclusive result rather than her 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.

. . .

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. 448-49.) Moreover, the jury was shown the chart of the loci comparisons used in the DNA test, which contained a number of numerical matches, but not the report finding that not enough matches occurred to be conclusive. (App. 441-42; 540.)

The State further exacerbated the jury's confusion about the permissible inferences to be taken from the DNA evidence—and the harm to Mr. Hernandez—in its closing argument by disregarding the evidence and telling the jury that they should speculate about what the matches mean:

> 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, and the DNA test does not contain enough matches to reach a conclusion. The State thus specifically encouraged the jury to disregard the inconclusive result and speculate for themselves what the DNA analysis showed.

The admission of the irrelevant DNA evidence cannot have been harmless because it was the only non-testimonial link between Mr. Hernandez and the minor on June 29, 2013. 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 that Mr. Hernandez beyond a reasonable doubt that Mr. Hernandez penetrated the minor. S.C. Code Ann. §§ 16-3-651, -655(B). Testimony regarding inappropriate touching does not prove penetration. None of the other non-testimonial evidence[2] in the record established that fact; 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

[2] The record contains some testimony repeating the minor's statements that Mr. Hernandez penetrated her. However, by finding Mr. Hernandez not guilty of criminal sexual conduct in the first degree, the jury rejected the minor's statements regarding alleged assaults by Mr. Hernandez prior to the minor's eleventh birthday. (App. 528.) It is clear that the jury relied upon the physical evidence collected on June 29, 2013 to corroborate the minor's statements.

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 invited the jury to speculate and fabricate the link between Mr. Hernandez and the minor that was missing from the State's case. It cannot be "conclusively proven" that the jury could not reach any other rational conclusion other than a guilty verdict. A new trial is warranted.

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

The Court of Appeals found that, because an intervening witness testified after the trial court denied Mr. Hernandez's motion to limit Ms. Bartman's testimony but before Ms. Bartman took the stand, Mr. Hernandez was required to object again to Ms. Bartman's testimony to preserve the issue for appellate review. The Court of Appeals erred because Mr. Hernandez did contemporaneously object to the testimony. Regardless, even ignoring that objection, Mr. Hernandez's motion to exclude the testimony was sufficient to preserve it for appellate review.

Upon breaking for lunch on the second day of trial, the State had three witnesses left to offer: Donna Debrew, a forensic nurse; Ms. Bartman; and the minor. After the parties' return from the break but prior to re-seating the jury, Mr. Hernandez moved to limit Ms. Bartman's testimony about the DNA evidence on the grounds that it was irrelevant. After a lengthy argument, the trial court refused to exclude the evidence. (App. 383-92.) At that time, the trial court had heard all of the evidence in the record on the DNA testing question other than Ms. Bartman's testimony and understood the scope of Ms. Bartman's testimony. Accordingly, Ms. Debrew testified about her forensic examination of the minor, then Ms. Bartman took the stand.

After Ms. Bartman explained the background of her DNA testing procedure, Mr. Hernandez objected, and the trial court excused the jury. (App. 435.) Counsel for Mr.

Hernandez explained the objection by revisiting the trial court's earlier decision to allow the admission of the inconclusive DNA test result into evidence:

> 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. 436-37 (emphasis added).) In response to the objection, the trial court heard the proffered testimony, (App. 437-38), 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.) Thus, this issue is preserved. The Court of Appeals erred by ignoring that contemporaneous objection.

The Court of Appeals instead focused on Mr. Hernandez's motion to limit Ms. Bartman's testimony, analogizing it to 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). As set forth above, Mr. Hernandez did contemporaneously object. Regardless, the Court of Appeals erred in finding the motion to exclude Ms. Bartman's testimony to be insufficient to preserve the issue for appeal. Ms. Debrew's testimony was wholly unrelated to Ms. Bartman's testimony about the irrelevant DNA test result 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. When a party moves to exclude evidence as irrelevant after the judge has heard all other evidence regarding the challenged evidence's relevance, the court may resolve the relevance question at that point. That resolution is the same regardless of whether it takes place before or after an

intervening witness's testimony. *See Com. v. Grady*, 54 N.E.3d 22, 27 (Mass. 2016). Another objection is unnecessary to preserve the issue. Regardless, as stated above, Mr. Hernandez did contemporaneously object.

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 the 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 any of Mr. Hernandez's Spanish 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.

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.

Investigator Goodman did not speak Spanish. (App. 301.) Accordingly, Corporal Alvarado was used as an interpreter in the custodial investigation of Mr. Hernandez. In court, 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.)

That testimony is double hearsay and not subject to any hearsay exception. Interpretive testimony is not recognized by Rule 802, SCRE, or this Court as admissible hearsay. Accordingly, 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 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, which this Court has not accepted, 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, and the Court should not adopt the "language conduit" theory. *See Wright v. Hiester Const. Co.*, 389 S.C. 504, 522, 698 S.E.2d 822, 832 (Ct. App. 2010) (discussing language conduit theory).

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. Courts finding that an

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.* 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."). Under the third factor, Corporal Alvarado testified that he was fluent in Spanish, although he had no certifications in Spanish translations, had not spoken it on a daily basis in almost a decade, and his dialect of Spanish differed from Mr. Hernandez's. (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 admission of Investigator Goodman's testimony was erroneous and requires reversal. *See Wright*, 389 S.C. at 522, 698 S.E.2d at 831 (recognizing concerns 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).

B. The admission of 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 was harmless beyond a reasonable doubt because the testimony was cumulative to the 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 trial court addressed three instances of interpretations in this case. The first instance was when a neighbor, Ms. Rivera, interpreted into English Mr. Hernandez's Spanish statements to Officer Rowe at the scene of the alleged assault. The second instance occurred during a custodial interview several days later, when Mr. Hernandez was interrogated by Corporal Alvarado in Spanish, who interpreted his answers to Investigator Goodman in English. The third instance involved the reading of Mr. Hernandez's Spanish statement, written immediately after the interrogation while Corporal Alvarado and Investigator Goodman were still present, to the jury in English.

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

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals and remand for a new trial.

Respectfully submitted,

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Columbia, South Carolina
April 27, 2018

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. 2017-000226

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):

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