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. 2017-002206

The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Petitioner.

REPLY BRIEF OF PETITIONER

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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.*

The Court of Appeals erred in finding that Mr. Hernandez's objection to the admission of Ms. Bartman's testimony regarding the results of her DNA testing was unpreserved for appellate review. In its opinion, the Court of Appeals focused on the question of whether Mr. Hernandez's motion to limit Ms. Bartman's testimony was sufficient to preserve the issue. In reaching this question, the Court of Appeals ignored Mr. Hernandez's contemporaneous objection. Because Mr. Hernandez did contemporaneously object, the argument is preserved, and this Court need not reach the question of whether his motion to exclude Ms. Bartman's testimony sufficiently preserved the issue. However, even if the Court did reach this issue, Mr. Hernandez's motion to exclude Ms. Bartman was sufficient to preserve the issue for appellate review as well. Finally, Mr. Hernandez did not waive review of the issue.

1. Mr. Hernandez's contemporaneous objection preserved the issue of the admissibility of the DNA testing results for appellate review.

Mr. Hernandez preserved this issue by contemporaneously objecting to Ms. Bartman's testimony. 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 objected to the admission of the inconclusive DNA results:

> THE COURT: That is kind of what I thought you said. So, what is the objection, Mr. McMullen.
>
> MR. MCMULLEN: Your Honor, it is a three-page report. And page two or three that has headlines or headings that says, results. She wasn't handed that, she was handed page three which shows a bunch of numbers.
>
> THE COURT: Doesn't she have her own file with her.
>
> 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. 435-36 (emphasis added).)

Thus, in explaining his objection, Mr. Hernandez referenced the trial court's prior denial of his motion to exclude Ms. Bartman. This objection gave the trial court another opportunity to revisit the ruling, and the court again found that the testimony was admissible:

> THE COURT: All right, now, it seems to me if she can read the results in conclusion that she just read that she can be allowed to explain how you arrived at that conclusion.

(App. 438.) After that argument was rejected, counsel for Mr. Hernandez argued that the chart displaying the numbers underlying the DNA testing should be excluded. (App. 438-40.) Thus, Mr. Hernandez's objection to the admission of the DNA testing results is preserved.

2. The Court need not reach the issue of whether Mr. Hernandez's motion to limit preserved the issue of the admissibility of the DNA testing results for appellate review, but the motion was also sufficient to preserve the issue.

Prior to Ms. Bartman's testimony and the contemporaneous objection described above, Mr. Hernandez moved to limit Ms. Bartman's testimony on the grounds that the DNA testing results were irrelevant and inadmissible. Although the Court need not reach the issue of whether this motion was sufficient to preserve the issue for appellate review because Mr. Hernandez also contemporaneously objected, the Court may find that this motion was also sufficient to preserve the issue.

Ms. Bartman was the second witness scheduled to testify in the afternoon session, after the State's forensic nurse, Donna Debrew. Prior to the trial court bringing the jury into the courtroom for Ms. Debrew's testimony, 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.) Ms. Debrew testified regarding the results of her forensic examination, then Ms. Bartman testified.

The Court of Appeals found that this motion to limit was insufficient to preserve the issue for appellate review, analogizing it to a pretrial motion *in limine*. 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, Ms. 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. However, as set forth above, Mr. Hernandez again objected to the testimony contemporaneously with it being offered.

3. Mr. Hernandez did not waive the issue of the admissibility of the DNA testing results.

The State argues that Mr. Hernandez waived any objection to the DNA testing results when counsel for Mr. Hernandez stated that he "[did not] have a problem with that." (State's Br. pp. 14-15.) The quotation cited by the State is taken out of context and did not waive review of this issue.

The quoted colloquy took place after the trial court found that Ms. Bartman would be allowed to testify about the inconclusive DNA testing results. Mr. Hernandez then shifted his argument to attempt to exclude the chart displaying the numbers underlying the DNA testing results from being shown to the jury. (App. 438.) The trial court hypothesized that the chart

would not be proper for the jury if Ms. Bartman had merely stated the numbers and "said, not included or excluded." (App. 439.) Counsel for Mr. Hernandez stated that he "[would not] have a problem with that. I have a problem with the--" (*Id.*) The trial court interrupted and stated that, because Ms. Bartman was instead going to explain how she arrived at her results, the chart could be shown to the jury. (*Id.*) Counsel for Mr. Hernandez then argued that, even if Ms. Bartman were permitted to reference the chart during her testimony, it should not be shown to the jury. (*Id.*)

Thus, Mr. Hernandez's counsel's statement that he "[would not] have a problem with that" did not waive, or even relate to, his argument that the DNA testing results are irrelevant and should not have been admitted.

B. The inconclusive DNA testing results is irrelevant.

1. The DNA testing results are substantively 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. (State's Br. p. 18.) 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.*) Ms. Bartman testified that no conclusive statement could be made whether Mr. Hernandez could be included or excluded. (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).

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. This confusion is only amplified where the State does not explain the terms, blends its usage of them, and suggests that "a whole bunch of numbers match up" even though those numbers have no statistical relevance. (*Id.*) The trial court erred by failing to fulfill its gatekeeping function by keeping this irrelevant DNA evidence out.

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. (State's Br. p. 18.) 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. (State's Br. p. 18.) 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.[1] 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.

2. Mr. Hernandez did not open the door and give relevance to the DNA testing results by challenging the thoroughness of the investigation.

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.*) On appeal, the State argues the DNA testing results were relevant because Mr. Hernandez had questioned the State's investigator regarding its

[1] The State argues the Y-chromosome evidence is relevant because Mr. Hernandez "was the only adult male living in the home." (State's Br. p. 18.) Y-chromosomes are not only present in adult males, and the minor's brother could have contributed to the sample.

collection of DNA samples and argued in his opening statement that the State's investigation was incomplete. (State's Br. p. 15.) According to the State, it became "incumbent" for it to introduce the inconclusive results in order to rebut the allegations that the investigation was incomplete and "provide the results of the DNA test so the jury heard the full context of the evidence[.]" (*Id.* at p. 16.)

It is undisputed that a defendant's challenge to the completeness of an investigation can give relevance to evidence establishing the State collected and tested samples. Such a challenge, however, does not make the substantive *results* of the testing relevant. Investigators frequently perform tests and conduct investigations that reach dead ends; the State cannot introduce the substantively inconclusive results of all such tests merely to prove that it was diligent in performing them in the first place. The prejudice from doing so is magnified when, as here, the issue is DNA testing, to which juries give "mythic infallibility" and where the pure number of numerical matches heavily implies relevance to an untrained observer. *People v. Marks*, 374 P.3d 518, 525 (Colo. App. 2015) (citation omitted).

Regardless, Mr. Hernandez hardly conducted an "assault on the State's investigation regarding DNA testing," as the State claims. (State's Br. p. 16.) In his opening statement, Mr. Hernandez argued about DNA testing results twice. First, Mr. Hernandez argued that there would be none of Mr. Hernandez's DNA found in the sample taken from the minor's vagina—which was true and supported by the evidence. (App. 155.) Second, Mr. Hernandez argued that the State would attempt to show the inconclusive DNA testing results at issue, which was also correct. (App. 158-59.) Mr. Hernandez then questioned one witness, the State's investigator, about DNA in three contexts. First, Mr. Hernandez asked the investigator whether people conducting the investigation could have left DNA in the house. (App. 325-26.) Second, Mr.

Hernandez asked about the State's failure to collect a DNA sample from the blanket where Mr. Hernandez allegedly committed the act. (App. 337.) Third, Mr. Hernandez also asked whether the investigator knew whether the minor and her brother would have different DNA due to having different fathers, and the investigator said that he did not know. (App. 351.)

None of these questions are an attack on the State's DNA testing process or give relevance to inconclusive DNA testing results from the minor's nightgown chest cutting, as the State claims. A defendant does not open the door to all irrelevant test results obtained in the course of the State's investigation merely by (correctly) asking whether the State failed to collect another potentially crucial piece of evidence.

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. (State's Br. pp. 19-20.) 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 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. Hernandez, the testimony of the State's forensic nurse, and the DNA evidence. (State's Br. pp. 19-20.) 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 at the hands of Petitioner." (State's Br. p. 19.) 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. (State's Br. p. 19.) 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 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.

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, the only one challenged on appeal, 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. The State argues that Mr. Hernandez's objection to this second instance of interpretation is not preserved for appellate review because the objection addressed completeness concerns, not hearsay. (State's Br. p. 25.)

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. 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. (State's Br. p. 25.) 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 Petitioner's Brief, 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 reverse the decision of the Court of Appeals, reverse Mr. Hernandez's conviction, and remand for a new trial.

[*signature page attached*]

Respectfully submitted,

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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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