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Case Number 101,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE BRYAN, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 101, 2025

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On April 20, 2023, after extradition, Andre Bryan[1] was charged with one count of Rape in the Second Degree and a dozen other felony sexual offenses that he was alleged to have committed against two minors, K.M. and M.M.,[2] while staying in their family home, years earlier, as a friend of their mother. A1, D.I.#1; A9—14; A98; A199. Bryan was indicted on August 28, 2023. A1, D.I.#2.

On May 28, 2024, Bryan requested an interpreter at Final Case Review. A17; A3—4. Another Final Case Review was held on June 10, 2024, at which time it was confirmed that interpreter services would be needed at trial. A28—30; A4, D.I.#21. Trial was scheduled to begin on July 8, 2024. A4, D.I.#21.

On July 5, 2024, Bryan filed a Motion for Relief from Prejudicial Joinder, seeking to sever the charges pertaining to each of the minors. A4, D.I.#31; A34—43. The charged conduct against M.M. was alleged to have occurred during a single visit that occurred sometime between January 1, 2010, and January 1, 2012. A12—14. The charged conduct against K.M. was alleged to have occurred during a single visit that occurred sometime between January 1, 2014, and January 1, 2015. A9—11. Bryan argued that the approximate four-year gap separating the alleged incidents, among other reasons, required severance of the charges. A35—41.

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[1] Though he was charged as Bryan Andre, the Appellant asserts his surname is Bryan. Transcripts that refer to "Mr. Andre" are referring to Mr. Bryan.
[2] Assigned pseudonyms.

The State filed its response, opposing Bryan's Motion, on July 7, 2024. A4, D.I.#33; A44—51.

On July 8, 2024, the trial court held a pretrial hearing with the parties to discuss outstanding matters before trial. A53. The hearing began with a brief discussion of evidentiary concerns that might lead to *nolle prosequi* of some charges, but the State noted that the decision would wait due to strategic considerations. A55—56. The trial court then heard brief oral arguments on the Motion for Relief from Prejudicial Joinder. A57—60. The trial court made several statements during and after the arguments that appeared to indicate that the motion was denied. Ex. A at 1—2; A58; A60. The trial court indicated that a memorandum opinion would be issued, stating "[w]e'll put that in a memo that we didn't have time to really write because of the filing and the timing of the trial." Ex. A at 2; A60.

Subsequently, after a brief recess, the trial was continued due to lack of available interpreters. A62—65.

On July 18, before trial, the State filed a *nolle prosequi* of Counts 9, 10, 12, and 13, all of which pertained to charged conduct against M.M., leaving only two charges pertaining to that witness: Count 11, Unlawful Sexual Contact First Degree, and Count 8, Sexual Abuse of a Child by a Person in a Position of Trust, which alleged the same instance of contact. A5, D.I.#23; A12—14; A68. The State cited "Insufficient Evidence" as the reason for the *nolle prosequi*. A68.

Jury selection began on July 18, 2024, after Bryan rejected a plea offer in which the State capped its recommended sentence at five years of incarceration. A70—72. There was no *voir dire* examination of potential jurors as to whether Bryan's use of an interpreter while testifying in Spanish might influence their view of his testimony. A72—75.

On July 22, 2024, after opening statements, the State called five witnesses in its case: M.M., K.M., their parents, and then Officer Ashlee Starratt, a Detective with Delaware State Police who was employed by New Castle County Police Department at the time of her investigation of the case. A29; A77; A192—94.

After the State rested, Bryan took the stand to testify in his defense, with the assistance of an interpreter. A209. The trial court instructed the jury to disregard any communication between Bryan and the interpreter. A210. After Bryan answered multiple questions directly, in English, the prosecutor sought a sidebar conference and objected, stating "I'm sorry, Your Honor. The State was simply - - he's got the interpreter. I think the rules are that he has to use the interpreter. He can't converse back and forth in English. Sorry, Your Honor." A211—12. After the sidebar, the trial court then ruled that Bryan had to answer through the interpreter. Ex. B at 4; A212. The remainder of Bryan's testimony was delivered through the interpreter, aside from one brief answer in English. A212—21; A220. After Bryan's testimony, the defense rested. A221.

The following morning, July 23, 2024, the State called the father of M.M. and K.M. back to the stand as the single rebuttal witness. A227. Before closing arguments, the trial court read a portion of the jury instructions. After the State's rebuttal argument, the trial court read the remainder of the jury instructions before the jury left the courtroom to deliberate. A240—54; A277—83. None of the jury instructions addressed Bryan's reliance upon interpreters for his testimony or for the proceedings in general. A240—54; A277—83.

After three hours of deliberation, the jury convicted Bryan of all charges. A283—86. A presentence investigation was ordered. A286.

Approximately two and a half months after trial, on October 9, 2024, the trial court issued its written Memorandum Opinion denying the Defendant's Motion for Relief from Prejudicial Joinder. Ex. C; A288—97.

At Sentencing on February 7, 2025, Bryan began his statement to the trial court through an interpreter. A304—05. He then began speaking in English and delivered the balance of his comments in English. A305—08. Bryan was sentenced to serve a combined total of fifty years of minimum mandatory incarceration. Ex. D. He is sixty-six years old. Ex. D at 1.

This is Bryan's Opening Brief to his timely filed notice of appeal.

SUMMARY OF ARGUMENT

1. In denying Bryan's Motion for Relief from Prejudicial Joinder, the trial court abused its discretion in two different ways. Firstly, the pretrial ruling on the Motion did not adequately supply the legal rationale for the decision, as compared with the ten-page Memorandum Opinion that was issued two and a half months after trial. Ex. A; Ex. C. By withholding the full legal rationale until months after trial, the trial court created an unfair procedural impediment that preventing Bryan from assessing whether any relevant basis existed for a Motion for Reargument or Motion for a New Trial until the deadlines for filing of those Motions had passed. Secondly, the ruling relies heavily upon readily distinguishable precedent and failed to balance the State's contemporaneous disclosure, on July 8, 2024, that a witness's lack of recollection would potentially require a *nolle prosequi* of a portion of the charges against Bryan. A55.

2. The trial court abused its discretion by compelling Bryan to testify through the provided interpreter in response to an objection from the State. The State's objection and subsequent ruling were made without any citation to controlling authority governing the use, disuse, or limited use of a requested interpreter. In effect, Bryan was prevented from telling the jury his side of the story in the words of his choosing and unexpectedly required to translate anything he had

planned to say in English into Spanish. The trial court did not conduct any colloquy with Bryan regarding his English proficiency and the specifics of his need for interpreter support before choosing, for him, the language in which he would testify. These issues were exacerbated by the lack of *voir dire* examination or appropriate jury instructions that would have ensured that jurors were not unfairly prejudiced by Bryan's use of an interpreter.

STATEMENT OF FACTS

Final Case Review on June 10, 2024

Bryan repeatedly spoke in both English and Spanish during the plea rejection colloquy. A19—29. After Bryan left the courtroom, the interpreter noted he had requested to use both English and Spanish, but that if he failed to utilize the interpreter at trial, the interpreter might seek to be recused. Ex. B at 1—2; A29—30.

Pretrial Hearing on July 8, 2024

During discussion of the continuance for interpreter availability, the prosecutor told the trial court that Bryan had communicated, through Department of Correction personnel, that he wished to proceed to trial without an interpreter. The prosecutor argued the request "may be worth exploring," despite reservations relating to Bryan's prior request for an interpreter. A63. It was further noted that the prosecutor believed Bryan had never used Spanish in conversation with the State's witnesses, and trial counsel stated that Bryan had historically utilized English in their communications. A64—65.

Trial

Fatmata Jalloh testified that she is the mother of M.M. and K.M. She is married to their father, Yembah Mansaray. A93. She met Bryan around 2005, through a family friend. A95. She subsequently hired Bryan to perform home renovation work for her family. A96. In the course of his work in their home, she

testified that they became friends, and that once they became friends, she would sometimes let Bryan stay in their family home overnight and cook for him. A98. Jalloh testified that Bryan would often call her for extended phone conversations and also ask to speak to her children, but she never noticed anything amiss in his interactions with M.M. and K.M. A102—03; A113—14. She testified that she and her husband arranged their work schedules to split day and night shifts so that one of them would be home and available for their children. A105. Her testimony jumped forward in time to 2021, when Jalloh testified that a pastor at her church had been individually counseling her and her family because she and her husband had been planning to divorce. A107. The allegations against Bryan were disclosed to the pastor, who had a strong relationship with her children, during those counseling sessions. A108.

Yembah Mansaray then testified about his family's relationship with Bryan. A124—28. He also testified that he and his wife planned their work schedules so that "somebody has to be in the house at all times with the kids." A128; A136—37. Mansaray testified that, unlike his wife, he was not friendly with Bryan, so most of their interactions were related to Bryan's contractor work around the home. A129. Mansaray characterized Bryan's interactions with the girls by stating that "[w]ell, he did interact with them, but I had no reason to question because there was only chit chat and stuff like talk and stuff like that, so I had no reason to question that."

A132—33. At the time of the reported incidents, he did not suspect anything inappropriate. A133. He also testified that in their family home, which is a split level, there are direct lines of sight into the lower level from the middle level. A124; A132; A134.

M.M. then testified that Bryan was a family friend who had a good relationship with her mother. A143. She recalled him first staying in the home and performing repair work when she was about 9 or 10 years old, estimating the year to be 2010 or 2011. A143—44. She testified that she recalled an incident of Bryan playing a "tickle game" with her, while she was wearing pajamas, that made her feel uncomfortable because he caressed her body, including her "breast and vaginal area." A144—47. She testified that though she was uncomfortable, she did not identify it as inappropriate until approximately two years later. A147—48. M.M. said that she did not disclose the incident to her mother at the time because she thought it might be dismissed because of the nature of the contact and Bryan's relationship with her mother. A148—49. M.M. said she later disclosed the allegation to her pastor after her K.M.'s disclosure, noting that he shared K.M.'s disclosure with her and that he had also prompted K.M. to make the disclosure: "I'm very religious, so I felt like he was a man of god. He wouldn't have known that if he didn't feel like something was wrong. Because my sister didn't just tell him. He had - - he just knew something was wrong." A149—50.

On cross-examination, M.M. clarified the nature of their interactions with the pastor:

> Q. *You weren't aware that you were attending counseling because of your parents' divorce?*
> A. *No. What the pastor does is he pulls people aside and he gives everybody personal readings, what he sees, so I wasn't aware of them having counseling for their divorce.*
> Q. *Was it a counseling session at all?*
> A. *It wasn't really a counseling session. It was more like a reading like what he sees in our future, what our purpose in life is, so that type of counseling.*
> Q. *He states things to you?*
> A. *I'm sorry?*
> Q. *He declares or states things to you?*
> A. *Yes. He prophesies.*
> Q. *And so one of the last things you said before the break was that your sister didn't just tell him, he just knew something was wrong. Is that right?*
> A. *Yes.*
> Q. *So the session was not for the purpose of disclosing any issues with - -my client?*
> A. *No.*
> Q. *The pastor just knew something was wrong?*
> A. *Yes.*
> Q. *Were you there when the conversation happened between the pastor and your sister?*
> A. *No.*
> Q. *How did you know your sister didn't just tell him?*
> A. *Because he told me after her session with him. I was next.*
> Q. *Okay. He asked her questions about the possibility of being touched?*
> A. *Yes.* A151—52.

M.M. estimated that her disclosure to the pastor occurred approximately ten or eleven years since the alleged incident, and she had never previously disclosed it. A156—57.

K.M. then testified that she had initially had a playful, familial relationship with Bryan until two "back to back" incidents in which he touched her inappropriately when she was about nine years old. A166. She testified that during the first incident, when she went downstairs to take a shower, Bryan called her into the downstairs guest room where he stayed and lay beside her in bed while rubbing her genitalia and attempting digital penetration of her vagina before abandoning the attempt when she made a noise indicating pain. A168—71. She initially testified that she did not believe she had touched any part of Bryan, but after reviewing a portion of her 2021 interview with Starratt, she claimed that it refreshed her recollection and said that she had touched his erect penis over his clothing. A171—73.

K.M. testified that the following day, she was alone at the house with Bryan and her younger sister because both her parents had left for work. A174. While she waited for her godfather to come pick them up, her and her sister went down into Bryan's room to play with him. A174. She said that he was "play fighting" with her in an "overly sexual" manner that included touching of "my breast area and my butt" and continued into him placing in sexual positions and "acting as if we were having

sex just with our clothes on." A174—75. She said that, through clothes, she could feel his erect penis against her vaginal area. A175. She said that at one point, she believes that his penis became exposed through the opening in his boxers and made contact with her as he made thrusting motions. A176. She testified that she did not understand "what it was" until much later, when she was in fifth grade. A176. She recalled an "icky feeling" subsequent to the incidents when Bryan would want to talk to her and her sisters. A177. K.M. characterized her disclosure to the pastor as occurring in her third session of counseling with him, and when asked what they would discuss in the sessions, said that "We talked about my like experience with boys now that I was like entering high school and like hormones and all that stuff. So we'd talk about things like that. And how school was with like COVID and things like that." A178.

On cross-examination, K.M. estimated that the incidents occurred in approximately 2014 or 2015, but she could not remember exactly. A180. Despite her earlier testimony, she could not recall specifically whether she touched Bryan's penis during the first or second incident. A173; A183—84. She also recalled that in 2021, when interviewed by Starratt, she had specifically been asked during the second incident whether his penis had stayed in his boxers, and she told Starratt that his penis stayed in the boxers. A184—85. She explained the discrepancy by testifying that "I didn't see it a hundred percent" but that engaging in sexual activity

after reaching adulthood had made her "a hundred percent sure what I felt was what I felt." A186.

Ashlee Starratt then testified that she was currently employed as a patrol officer by the Delaware State Police, but was employed by the New Castle County Police Department's Special Victims Unit when she investigated this case in July of 2021. A192—94. She testified that she initiated the investigation as late-reported sexual abuse. A194. The pastor who had first heard the disclosure while counseling K.M. and M.M. told police that he "no longer wanted to be involved in the matter" and so she had not interviewed him. A195. She testified that she had been unable to recover any digital evidence of Bryan's communications with the family that might clarify the dates of the allegations. A199. When asked whether she could establish the timing based upon the family's cash payments to Bryan for repair work, she indicated that she did not have any information about specific amounts paid or specific time frames that would have "absolutely" enabled her to trace the withdrawals. A199—200. On cross, she confirmed that there was no corroborating evidence from other disclosures by M.M. or K.M., whether in writing or at school, nor was there any pertinent video evidence. A205. She testified that forensic interviewing techniques used for children are designed to "not suggest anything to the child" and that those same concerns about the suggestibility of a witness would still be present at the age of 20. A05; A206—07.

Bryan testified in his defense, using Spanish after the trial court ordered him to utilize the interpreter. A212. He testified that he is Cuban, but has American citizenship, and primarily resides in Brooklyn, New York. A212—13. He recalled visiting the Mansaray home in 2015, though he could not remember whether he had been there in 2010, as he had also been detained due to an accusation from an ex-girlfriend, which was dismissed. A213; A220. He adamantly denied touching the "private areas" of K.M. and M.M., denied playing any "tickling" games, and denied that they had ever touched his genitals. A215—16. On cross, Bryan testified that he always spoke English with the Mansaray family. A219.

The following morning, Yembah Mansaray was again called to the stand as a rebuttal witness and testified that there were never interior security cameras in his family home and there was a single "old fashioned" camera on the exterior of the house that did not record footage. A227—28.

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I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING BRYAN'S MOTION FOR RELIEF FROM PREJUDICIAL JOINDER.

Question Presented

Did the trial court adequately supply the legal rationale for its denial of Bryan's Motion when the vast bulk of that rationale was issued in an opinion two and a half months after trial, and did the trial court's rationale unduly prejudice Bryan with erroneous analysis of relevant factors? A33—60; A288—97.

Scope of Review

A trial court's adherence to its mandate to "make factual determinations and supply a legal rationale for a judicial decision" is reviewed for abuse of discretion.[3] Denial of a motion for relief from prejudicial joinder under Delaware Superior Court Criminal Rule 14 is reviewed for abuse of discretion.[4] Denial of a motion under Rule 14 will not be overturned in the absence of a showing of prejudice by the defendant.[5]

Merits of Argument

The "adjudicative responsibilities" of the trial courts compel trial judges to "state the reasons" for a decision, "no matter how briefly."[6] This case presents an

[3] *Davis v. State*, 2023 WL 7382873 at *4 (Del. 2023) (Table) (citing *Holden v. State*, 23 A.3d 843, 846 (Del. 2011)).
[4] *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1998).
[5] *Id.*
[6] *Holden v. State*, 23 A.3d 843, 846—47 (Del. 2011) (quoting *Ademski v. Ruth*, 229 A.2d 837 at n. 1 (Del.1967)).

unusual scenario in which the trial court's very brief oral ruling endorsed the State's arguments,[7] yet the substance of the trial court's rationale was not provided until long after trial.[8] Though the trial court indicated that the Memorandum opinion would be released later due to the timing of the then-imminent trial, the trial was subsequently continued. A4—5; Ex. A at 2. When it finally arrived, the Memorandum opinion was not congruent with the arguments offered by the State, as it relied heavily upon the precedent of *Kendall v. State*,[9] a racketeering case that was never argued by the State or discussed during arguments. A44—51; A57—60. The oral ruling did not weigh the State's disclosure that it might enter a *nolle prosequi* on some charges due to problems with witness recall. A54—56. Though the Memorandum opinion noted the *nolle prosequi*, it did not examine its circumstances,[10] and was primarily written as though the matter was still awaiting trial.[11]

a. *The trial court failed to provide the specific legal rationale for its denial of the Motion until it issued a Memorandum Opinion two and a half months after trial.*

"In this jurisdiction the duty to exercise discretion by a trial judge generally includes the duty to make a record to show what factors the trial judge considered

[7] Ex. A.
[8] Ex. C.
[9] *Kendall v. State*, 726 A.2d 1191 (Del. 1999).
[10] Ex. C at 3, fn. 1.
[11] Ex. C.

and the reasons for his decision."[12] The availability of a trial court's reasoning is what allows both the parties and other courts to analyze and review the trial court's decisions. "The obvious purpose" of the rule was highlighted in review of a trial court's decision on a motion for a new trial in *Storey v. Camper*.[13] In the context of criminal cases, *Wiest v. State* found that a motion for a new trial should have been granted when denial of a Rule 14 motion for relief from prejudicial joinder resulted in unfair prejudice at trial.[14] Absent newly discovered evidence, a motion for a new trial must be filed within seven days of the jury's verdict.[15] Likewise, a motion for reargument must be filed within five days of the trial court's decision, [16] and permit the moving party to argue that the decision "overlooked controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.[17]

By withholding the full scope of its rationale until fixed deadlines for review and reargument of the decision had passed, the trial court violated Bryan's due

[12] *Storey v. Camper*, 401 A.2d 458, 466 (Del. 1979) (citing *Wife F. v. Husband F.*, 358 A.2d 714, 716 (Del. 1976)).
[13] *Id.* at 466.
[14] *Wiest* at 1196.
[15] Del. Super. Ct. Crim. R. 33
[16] *State v. Westcott*, 2022 WL 1617687 (Del. Super. May 23, 2022) (citing Del. Super. Ct. Civ. R. 59(e)).
[17] *Id.* (quoting *Bd. Of M'grs of the Del. Crim. Just. Info. Sys. v. Gannet Co.,* 2003 WL 1579170, at *1 (Del. Super. Ct. Jan. 17, 2003)).

process rights under our State and Federal Constitutions.[18] Due process rights include "a reasonable opportunity to meet the charges by way of defense."[19] Failure to provide the basis for a decision is a violation of due process rights.[20]

While a motion for reargument will be denied if it simply rehashes earlier arguments,[21] had trial counsel promptly received the trial court's opinion citing new and highly distinguishable caselaw, there would have been a fair opportunity to argue its applicability with the trial court.

b. ***The trial court's ruling failed to properly balance the relevant circumstances and relied upon distinguishable precedent.***

The trial court cited *Kendall v. State* eight different times within its ten-page opinion. Ex. C. Kendall was charged with racketeering, and the trial court clearly viewed it as relevant precedent in analyzing the "remoteness in time" of the charged incidents under the forth prong of *Getz v. State*,[22] and also viewed it as relevant precedent to the second and third prongs, including admissibility of the evidence for purposes consistent with D.R.E. 404(b) (prong two) and requirement that the evidence of the other crimes be "plain, clear, and conclusive."[23]

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[18] U.S. Const. amend. V, XIV; Del. Const. Art I, §7.
[19] *Ungar v. Sarafite*, 376 U.S. 575, 589 at fn. 9 (1964).
[20] *Eckeard v. NPC Inter., Inc.*, 2012 WL 5355628 at *4 (Del. Super. October 17, 2012).
[21] *Strong v. Wells Fargo Bank*, 2013 WL 1228028 (Del. Super. January 3, 2013).
[22] *Getz v. State*, 538 A.2d 726 (Del. 1998).
[23] *Id.*

Kendall dealt with evidence of that defendant's racketeering, and specifically the manner in which he held himself out as a "reputable homebuilder" who claimed to have "20 years of experience building quality homes" when he defrauded Delaware homebuyers from 1992 to 1994.[24] The usage of "pattern" language is relevant in *Kendall* as it was a charged element under Delaware's racketeering statute.[25] Evidence reflected a very different background, as he had been convicted of federal bank fraud in 1992, filed for bankruptcy in 1983, 1989, 1995, changed his name and social security number in 1990, and left a trail of shoddy homes, unpaid subcontractors, and defrauded homebuyers in his wake.[26] Kendall's activities in Delaware were a direct, uninterrupted continuation of his fraudulent conduct in Maryland. The trial court used the *Kendall* opinion's characterization of that defendant's "continuous flow of related illicit activity spanning 12 years"[27] to characterize Bryan's activities in the Mansaray home as "sexually illicit activity" that "took place from 2010 through 2012," "took place from 2014 through 2015," and constituted a "continuous flow of illicit activity." Ex. C at 9. This is an absurd characterization of this case's allegations of two visits, separated by four or five years, featuring a single incident in one and a back-to-back pair of incidents in

[24] *Kendall* at 1192.
[25] *Id.* at 1194.
[26] *Id.*
[27] *Id.* at 1196.

another. A141—62; A164—92. The trial court's heavy reliance upon *Kendall* would have been grounds for reargument if trial counsel had seen its analysis before trial.

Moreover, the trial court characterized the testimony that would be presented at trial as that of witnesses with "personal knowledge of the events," supporting joinder under the third prong of *Getz*. Ex. C at 8. This analysis disregarded that the State had just disclosed it was encountering difficulties with witness recall that might result in a *nolle prosequi* of some charges. A54—56. It appears that those problems eventually led to the *nolle prosequi* of the majority of charges relating to M.M. Ex. C at 3. Nonetheless, the State withheld its decision on a *nolle prosequi* "strategically" while it was still arguing against severance,[28] it did not even attempt to prove those charges at trial, signing the *nolle prosequi* on July 17, 2024. A68.

The trial court's reliance upon this cursory characterization of the third *Getz* factor should, like the trial court's reliance upon *Kendall*, been available to counsel for further argument at the trial level, but it was provided after a motion to reargue severance was moot and the deadline for a motion for a new trial had expired. Trial counsel should have also had the opportunity, in considering whether a motion for a new trial was meritorious, to consider this rationale alongside the prejudice demonstrated by the clear embarrassment that Bryan suffered when, in attempting to address inconsistent testimony from K.M. about whether his penis had been

[28] A55.

exposed, he testified that there would have been no confusion or ambiguity about whether his penis was exposed. A216. The prosecutor pounced upon the phrasing of his testimony, which was relayed through an interpreter, and later returned to it in closing to more generally attack his credibility and character. A221; A260. Had the allegations been severed, that testimony would likely not have been presented at a trial regarding the charges involving M.M.

In sum, the manner in which Bryan's Motion was denied demonstrably functioned in concert with the rationale under which the Motion was denied to unfairly prejudice Bryan, requiring reversal.[29]

[29] *Wiest* at 1195.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED BRYAN TO REFRAIN FROM USING ENGLISH IN HIS TESTIMONY AND ONLY PERMITTED HIM TO TESTIFY IN HIS OWN DEFENSE THROUGH THE INTERPRETER.

Question Presented

Was it in abuse of discretion for the trial court to compel Bryan to use an interpreter because he had originally requested one, without exploring his language proficiency in a direct colloquy or identifying any controlling rule or authority? Ex. B at 3—4.

Scope of Review

Decisions on the use of an interpreter are reviewed for abuse of discretion.[30]

Merits of Argument

In assessing the propriety of trial court decisions regarding the use of an interpreter, "[t]he essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capriciousness or arbitrary action…."[31]

In this case, the decision to compel Bryan to utilize the interpreter when he was prepared to testify as to certain information in English was a fundamentally arbitrary decision. Though it is unclear whether, when objecting to Bryan's use of English at trial, the State was thinking of an interpreter's comment on June 10, 2024,

[30] *DeJesus v. State*, 865 A.2d 521 at *1 (Del. 2005) (Table).
[31] *Liu v. State*, 628 A.2d 1376, 1384 (Del. 1993) (quoting *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954).

that Bryan's continued use of English might prompt the interpreter to seek recusal,[32] the record reflects that the mere presence of the interpreter, once testimony began, was treated as a bright-line rule compelling testimony in Spanish. Ex. B at 3—4. Had the State not objected, the issue appeared likely to trigger a *sua sponte* intervention from the Court to reach the same result. Ex. B at 3—4.

The decision was arbitrary because, despite his evident capacity to speak a substantial amount of English, which had been discussed pretrial, there was no direct colloquy with Bryan to ascertain the extent of his English proficiency. A63—65.

The trial court's handling of the interpreter issue conflicts with Delaware Supreme Court Administrative Directive 107, which provides requirements relating to the use of court interpreters in Delaware trial court proceedings.[33] The Directive contains a substantial amount of strong guidance to the courts and includes the Delaware Court Interpreters' Code of Professional Responsibility as an appendix.[34]

Paragraph 10 of the Directive instructs that Courts should provide appropriate notice of the role of the court interpreter to parties and witnesses. Moreover, it includes an example of appropriate notice that contains a direct question to the witness about whether they have any questions about the role or responsibilities of

[32] Ex. B at 1—2.
[33] *Diaz v. State*, 743 A.2d 1166, 1173 (Del. 1999).
[34] Del. Sup. Ct. Admin. Dir. 107 at 4—5.

the court interpreter.[35] Such notice would have afforded the Court and Bryan the opportunity to explore the issue and make a reasoned choice about whether to utilize the interpreter. The trial courts' important responsibility to provide notice was more recently reinforced by the Delaware Judiciary's 2021 Language Access Plan. Ex. E at 27, 33.

Instead, Bryan was deprived of the opportunity to testify in his chosen language. Given that he appeared ready to testify in English, the ruling would have forced him to translate any testimony he had prepared or memorized into another language on the spot, in front of the jury. Ex B at 2—3. The strenuous mental demand of courtroom interpretation has led the Administrative Office of the Courts' Court Interpreter Program to suggest that courtroom interpreters require regular rest breaks because even the accuracy of a trained interpreter declines significantly after 30 minutes of continuous interpretation. Ex. E at 34. Bryan's capacity or incapacity to accurately shift testimony between languages while on the stand, with his freedom at stake, received no scrutiny in the trial court's decision. Ex. B at 3—4. Through this lens, the sequence of events in which the prosecutor stymied Bryan's efforts to testify in English and then attacked the phrasing of his testimony in Spanish is cognizable as the sad culmination of a manifestly unfair and arbitrary process. Ex. B at 3; A221; A260.

[35] Del. Sup. Ct. Admin. Dir. 107 at 2.

The arbitrary nature of the trial court's ruling on Bryan's use of the interpreter is underlined by the failure to take other measures repeatedly recommended by the Delaware Judiciary to prevent the usage of an interpreter from prejudicially or erroneously impacting a jury's understanding of testimony through an interpreter. The Language Access Plan also provides an example of appropriate instructions to the jury, putting them on notice of the appropriate role of an interpreter and warning them against prejudicial interpretations of interpreter testimony:

> *1. Proceedings Interpretation "This court seeks a fair trial for all people regardless of the language they speak and regardless of how well they understand or speak the English language. Bias against or for persons who are not proficient in English is not allowed. Therefore, do not allow the fact that the party requires an interpreter to influence you in any way."*
> *2. Witness Interpretation "Treat the interpretation of the witness' testimony as if the witness had spoken English and as if the interpreter were not present. Do not allow the fact that the testimony is given in a language other than English to affect your perception of the witness' credibility. Those members of the jury who may be proficient or have some understanding of the foreign language being used during these proceedings shall base all deliberations and decisions on the evidence presented in English through the interpretation.*[36]

Instead, a very narrow instruction was provided. A210.

[36] Ex. E at 27.

These instructions expand upon similar instructions provided in Administrative Directive 107, which was published in 1996.[37] These considerations were emphasized in *Diaz v. State* as an "integral part" of appropriate *voir dire* "whenever a foreign language court interpreter will participate in the trial."[38] The need for specific *voir dire* extends both to jurors who speak only English and to bilingual jurors, given the potential "source of division" that can be found within the language barriers and trigger "racial hostility."[39]

Court interpreters act as officers of the court and have ethical duties to ensure the proper administration of justice.[40] The trial court had the discretion to examine the need for interpreter services with Bryan and fairly consider the possibility of him testifying in English, perhaps arranging for a standby interpreter, an approach upheld by the Iowa Supreme Court in *State of Iowa v. Gomez Garcia*.[41]

The lack of all necessary protective jury instructions that might limit potential prejudice or misunderstanding of his testimony compounded the manifest injustice of the trial court's decision requiring Bryan to testify in Spanish.

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[37] Del. Sup. Ct. Admin. Dir. 107 at 2.
[38] *Diaz* at 1173.
[39] *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 371 (1991)).
[40] Del. Sup. Ct. Admin. Dir. 107 at 1.
[41] State of *Iowa v. Gomez Garcia*, 904 N.W. 172 (2017).

CONCLUSION

For the reasons and upon the authorities cited herein, the judgment of the Superior Court should be reversed.

Respectfully submitted,

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