
No. 26-

IN THE
SUPREME COURT OF THE UNITED STATES

ISABEL TZUNUX-ZACARIAS

Petitioner

v.

COMMONWEALTH OF KENTUCKY

Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY**

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QUESTIONS PRESENTED

Petitioner's guilt was established by two pieces of constitutionally dubious evidence. First, the Commonwealth was allowed to offer a *Bruton*-ized summary of Petitioner's statement stating that Petitioner confessed to the only disputed fact. Petitioner disputed the accuracy of that summary, however he was unable to offer the full text of the statement to give the jury a chance to determine what he meant. Second, the Commonwealth relied on out of court Spanish to English translations of text messages, the accuracy of which was disputed. The translations were prepared by a police officer in anticipation of trial, but introduced by a different officer who spoke no Spanish and could not be examined on the original meaning of the messages.

The Kentucky Supreme Court affirmed both rulings, giving rise to the following important questions:

- I. Whether a defendant's statement to police can be rewritten to comply with *Bruton v. United States*, 391 U.S. 123 (1968)? If so, are there limits to the extent to which a statement may be altered to meet *Bruton* requirements? If the defense disputes that the rewritten statement accurately presents what the defendant said, is it sufficient that the defendant was allowed to cross-examine the police witness without specifically describing the statement or must the defendant be permitted to present the full text of the statement to enable the jury to resolve the dispute?
- II. Whether, under *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause applies to a police interpreter's out of court translation of a written statement, created for later use at trial?¹

¹ This Question is also presented in the petition filed by co-defendant Mario Tzunux-Zacarias.

PARTIES TO THE PROCEEDING BELOW

The Petitioner is Isabel Tzunux-Zacarias, who was the Appellant below.

The Respondent is the Commonwealth of Kentucky, who was the Appellee below.

RELATED PROCEEDINGS

The proceedings directly related to this Petition are:

Tzunix-Zacarias v. Commonwealth, 2023-SC-253 (Ky., Oct. 23, 2025)

Commonwealth v. Tzunix-Zacarias, No. 21-CR-00020 (Hardin Cir. Ct.) (trial)

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	ii
PARTIES TO THE PROCEEDING BELOW.....	iii
RELATED PROCEEDINGS.....	iv
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES	vii
CITATIONS TO OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
INTRODUCTION	2
STATEMENT OF THE CASE.....	3
I. INCIDENT, INVESTIGATION, AND TRIAL.	3
II. HOW THE FEDERAL CLAIMS WERE RAISED AND DECIDED.	6
REASONS FOR GRANTING THE WRIT	9
I. THIS COURT SHOULD GRANT REVIEW TO COMPLETE ITS <i>BRUTON</i> JURISPRUDENCE AND RESOLVE A SPLIT OF AUTHORITY ON WHETHER A STATEMENT MAY BE REWRITTEN TO COMPLY WITH <i>BRUTON</i> , AND IF SO, WHAT PROTECTIONS MUST EXIST TO ENSURE THE ACCURACY OF THE REWRITTEN STATEMENT.	9
II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT OF AUTHORITY REGARDING WHETHER AN OUT OF COURT TRANSLATION IS A “STATEMENT”, AND THUS POTENTIALLY SUBJECT TO CONFRONTATION CLAUSE LIMITATIONS WHEN PREPARED BY AUTHORITIES FOR LATER USE AT TRIAL.	16
A.The Language Conduit Rule is a Modern Invention Without Historical Analogue.	17

B.The Split of Authority Regarding Both the Language Conduit Theory as an Court Created Evidence Rule, and its Use as an Exception to the Hearsay Rule, Is Deep and Unresolvable Without Intervention From this Court.....	19
C.The “Language Conduit Rule” is Contrary to Court’s Confrontation Clause Jurisprudence.....	22
III. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING BOTH ISSUES.	25
CONCLUSION.....	27

TABLE OF AUTHORITIES

CASES

<i>Alcorta v. State of Tex.</i> , 355 U.S. 28, 31 (1957),.....	12
<i>Bruton v. United States</i> , 391 U.S. 123 (1968).....	passim
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	15
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	passim
<i>Dessett v. State</i> , 951 So. 2d 46, 48 (Fla. Dist. Ct. App. 2007).....	15
<i>Garcia-Chicol v. State</i> , 597 S.W.3d 631, 638-39 (Ark. 2020)	20
<i>Giles v. California</i> , 554 U.S. 353, 358 (2008).....	17
<i>Gray v. Maryland</i> , 523 U.S. 185, 197 (1998),	11
<i>Hernandez v. State</i> , 662 S.E.2d 325, 330 (Ga. 2008).....	20
<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946).....	15
<i>Lopez v. State</i> , 636 S.E.2d 770, 772 (Ga. 2006).....	20
<i>Napue v. People of State of Ill.</i> , 360 U.S. 264, 269 (1959)	12
<i>People v. Romero</i> , 581 N.E.2d 1048, 1051 (N.Y. 1991).....	19
<i>Richardson v. Marsh</i> , 481 U.S. 200, 211 (1987)	10
<i>Saavedra v. State</i> , 297 S.W.3d 342, 349 (Tex. Crim. App. 2009).....	19
<i>Samia v. United States</i> , 599 U.S. 635, 641 (2023).....	3, 11, 12
<i>Smith v. Arizona</i> , 602 U.S. 779, 784 (2024).....	16, 24, 25
<i>State v. Alsup</i> , 876 P.2d 935, 938-39 (Wash. 1994)	15
<i>State v. Craney</i> , 662 A.2d 899, 904 (Me. 1995)	15
<i>State v. Garcia-Trujillo</i> , 948 P.2d 390, 392 (Wash.Ct.App. 1997)	21
<i>State v. Lopez-Ramos</i> , 929 N.W.2d 414, 420 (Minn. 2019)	20
<i>State v. Patino</i> , 502 N.W.2d 601, 610 (Wisc.Ct.App.1993).....	20, 23
<i>State v. Rakestraw</i> , 871 P.2d 1274, 1281 (Kan. 1994).....	15

<i>Taylor v. State</i> , 130 A.3d 509, 517-41 (Md.App. 2016).....	21
<i>Tzunux-Zacarias v. Commonwealth</i> , 2025 WL 2999465 (Ky.).....	passim
<i>United States v. Charles</i> , 722 F.3d 1319, 1322-30 (11th Cir. 2013).....	21, 23
<i>United States v. Orm Hieng</i> , 679 F.3d 1131 (9th Cir. 2012).....	20, 21
<i>United States v. Gonzales</i> , 749 F.2d 1329, 1334 (9th Cir. 1984),.....	14
<i>United States v. Gooding</i> , 25 U.S. 460, 467 (1827),.....	17
<i>United States v. Kaminski</i> , 692 F.2d 505, 522 (8th Cir. 1982)	15
<i>United States v. Kershner</i> , 432 F.2d 1066, 1072 (5th Cir. 1970).....	14
<i>United States v. Koskerides</i> , 877 F.2d 1129, 1135 (2d Cir. 1989).	18
<i>United States v. Mussaleen</i> , 35 F.3d 692, 696 (2d Cir. 1994).....	15
<i>United States v. Nazemian</i> , 948 F.2d 522, 527 (9th Cir. 1991).....	19, 20, 21
<i>United States v. Range</i> , 94 F.3d 614, 621 (11th Cir. 1996)	14
<i>United States v. Solis</i> , 299 F.3d 420, 443 (5th Cir. 2002).	12
<i>United States v. Thuna</i> , 786 F.2d 437, 441 (1st Cir. 1986	14
<i>United States v. Ushakow</i> , 474 F.2d 1244, 1245 (9th Cir. 1973).	18

STATUTES

28 U.S.C. §1257(a)	1
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OTHER AUTHORITIES

4 J. Weinstein & M. Berger, <i>Evidence</i> ¶ 801(d)(2)(C)[01] at 801–217 n. 34 (1988) ..	19
Jeffrey Bellin, 30B <i>Fed. Prac. & Proc. Evid. (Wright & Miller)</i> § 7044 (2025 ed.)....	21
Casen B. Ross, <i>Clogged Conduits: A Defendant's Right to Confront His Translated Statements</i> , 81 U. Chi. L. Rev. 1931, 1965 (2014).....	22
Gregory J. Klubok, <i>The Error in Applying the Language Conduit-Agency Theory to Interpreters Under the Confrontation Clause</i> , 89 St. John's L. Rev. 1399, 1401 (2015)	22
<i>Rules of Evidence Rule 801</i> n.7 (2025 ed.)	21

Tom S. Xu, <i>Confrontation & the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of Crawford?</i> , 67 Vand. L. Rev. 1497, 1519 (2014).....	22
Zachary C. Bolitho, <i>The Hearsay & Confrontation Clause Problems Caused by Admitting What a Non-Testifying Interpreter Said the Criminal Defendant Said</i> , 49 N.M. L. Rev. 193, 214 (2019)	18, 22

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COMMONWEALTH OF KENTUCKY

Respondent

Petitioner Isabel Tzunux-Zacarias requests a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky affirming his conviction and sentence on direct appeal.

CITATIONS TO OPINION BELOW

The unpublished opinion of the Kentucky Supreme Court (“Opinion”), *Isabel Tzunux-Zacarias v. Commonwealth*, appears on Westlaw at 2025 WL 2999465 (Ky.), and is attached. Appendix (hereinafter App.) A, appendix pages 1-22. The order denying the timely filed petition for rehearing is attached. App. B., 23-24. The trial court order imposing judgment and sentence is attached. App. C, 25-27.

JURISDICTION

The Court has jurisdiction, under 28 U.S.C. §1257(a), to review the decision of the Supreme Court of Kentucky, rendered on October 23, 2025, with a timely petition

for rehearing denied on March 19, 2026. The Court granted an extension of time through August 16, 2026 to file a Petition for a Writ of Certiorari. This Petition is therefore timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him .
...

The Fourteenth Amendment to the United States Constitution provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This case involves two different aspects of Confrontation Clause jurisprudence that are both in need of clarification. The first issue, which this Court alluded to but did not decide in *Samia v. United States*, 599 U.S. 635, 641, n. 1 (2023), is “whether rewriting a confession may serve as a proper method of redaction”, and more generally, whether the state may rely upon a rewritten confession that states the defendant admitted to the crime, when the defendant disputes that statement and cannot rebut it without introducing the *Bruton*-excluded portions of the statement.

The second issue, which has hopelessly split the lower courts, is whether an out-of-court translation of a written document that was prepared by police for later

use at trial is a testimonial statement subject to *Crawford v. Washington*, 541 U.S. 36, 68 (2004), or whether it is exempted from the Confrontation Clause by the “language conduit” rule, which holds that a translation is identical to the original and therefore is not treated as a separate statement.

This Court’s review is warranted to address both issues.

STATEMENT OF THE CASE

I. Incident, Investigation, and Trial.

Petitioner Isabel Tzunux-Zacarias and his younger brother Mario² were both part of the small Guatemalan community in Elizabethtown, Kentucky. Opinion, at *1. Both had, for several years, carried on a sexual relationship with M.C., a woman in her 20’s who was part of the same community. *Id.*, at *11. This relationship included elements of consensual bondage and discipline, according to Isabel. *Id.* M.C. and Mario communicated regularly, and Isabel tagged along when he could. *Id.* Isabel was married to another person at the time, so the relationship was conducted surreptitiously.

Around 7:00 a.m. on November 25, 2020, Mario and Isabel had a sexual encounter with M.C.. *Id.* at *1. Both brothers claimed this was an assignation between willing adults that Mario had arranged with M.C. ahead of time. Around midday on November 25, 2020, a person known only as Gabriel—a person known to the brothers and also a member of Elizabethtown’s Guatemalan community—called police to report that he had found M.C. bound with duct tape in her apartment. *Id.*

² For clarity the brothers will be referred to in this petition by their first names.

An examination revealed she had a number of sexual injuries and abrasions, and a DNA test found the presence of semen from Isabel and another unidentified male. *Id.* M.C. and Gabriel both disappeared shortly after this incident, and no statements from them about the source of M.C.'s injuries are in the record, nor did police collect Gabriel's DNA to determine if he was the unknown contributor. *Id.*

Mario had left his identification at the scene, and suspicion quickly focused on the two brothers, who could also be seen on a security camera. *Id.* Isabel, who is not a native English speaker and spoke the language very poorly at the time, gave a statement in English to Elizabethtown Police Detective Joshua Burris, who understood no Spanish, and Officer Guandique, who did speak Spanish and occasionally answered Spanish language questions from Isabel. *Id.*, at *14.

During Isabel's interview he stated that he, Mario and M.C. had previously had sex and indicated that the current incident was part of that relationship. *Id.*, at *6. Eventually, the Detective asked:

Detective: But she didn't want to have sex.

Isabel: Okay, yeah. I asked that a couple times because we have sex before then.

Detective: Right.

Isabel: Mm-hmm (affirmative)

Detective: But that day she didn't want to have sex.

Isabel: Okay, I asked them, and then that Mario told me that we have, and then I say no . . .

Detective: But she didn't want to have sex.

Isabel: Mm-Hmm. (affirmative) ,

Detective: Right?

Isabel: Yeah, so I told Mario –

Detective: [Interrupting] Let me lay it out for you the way that I think it went. . . .

Id. While Detective Burris then went through the events of the morning of the 25th seriatim, he did not ask again whether M.C. wanted to have sex on that day, though Isabel explicitly stated elsewhere in the interview that he told his brother that they could not force M.C. to have sex, and that he did not force M.C. to have sex.

After the statement was given police obtained text messages between Isabel and Mario that were written in Spanish. *Id.*, at *9. Officer Guandique translated the messages for Detective Burris. *Id.* For example, Officer Guandique translated “Me dijo que fui yo que entre en su casa. Y me dijo que lo reporto en la Corte” to be: “She told me that it was me that entered her house. She told me that she reported it to the court.” Translations, Appendix D, at 30. However, no pronouns are used in the original, and “me dijo” is gender neutral, so the translation just as easily could be: “**He** told me that it was me that entered her house. **He** told me that **he** reported it to the court.” This is a significant difference, as the first translation would plainly be referring to M.C., while the second would likely be referring to Gabriel, who was a plausible alternative suspect for M.C.’s injuries and the unidentified DNA profile.

Based on the information gathered during the investigation, police arrested both Isabel and Mario and charged them each with Rape in the First Degree, Sodomy in the First Degree, Burglary in the First Degree, and Kidnapping. Opinion at *1. Prior to trial, the brothers moved to be allowed to testify to the prior relationship with M.C., a relationship that he claimed involved occasional sexual intercourse, often accompanied by bondage and discipline. *Id.*, at *12. Isabel claimed that these

interactions were generally arranged through Mario. *Id.* The trial court denied permission to testify to this citing Kentucky's rape shield statute. *Id.* The effect of this ruling, which was affirmed by the Kentucky Supreme Court,³ was that it prevented the brothers from testifying, since they could not explain their actions on that morning without reference to the prior relationship.

At trial, Det. Burris was the Commonwealth's primary witness. *Id.*, at *1. The jury also heard from the SANE nurse who examined M.C. and those who took and tested DNA samples from the rape kit performed on M.C. *Id.* In spite of the fact that no fact witness testified in the trial, and the physical evidence was ambiguous in light of the unidentified DNA profile, both Isabel and Mario were convicted of all charges and sentenced to thirty years imprisonment. *Id.*, at *2. The Kentucky Supreme Court affirmed on appeal, and this Petition is sought to review that decision.

II. How the Federal Claims Were Raised and Decided.

Prior to trial, Isabel made two motions relevant to this Petition. First, Isabel and Mario each moved to redact the statement of the other to comply with *Bruton*. *Id.*, at *3. The motion was sustained, but at no point was any "*Bruton*-ized" statement provided prior to trial.

At trial, the Commonwealth asked Detective Burris what Isabel had said concerning whether M.C. wanted to have sex that day. Isabel's counsel immediately objected, arguing that this was misleading in context, and he was unable to cross-

³ In the Kentucky Supreme Court's view, the prejudicial effect outweighed the probative value on the narrow issue of M.C.'s consent on the date of the offense. Opinion, at *12.

examine or provide any context for it, because the actual statement both references the prior sexual relationship with M.C., and Mario, and so had been excluded. *Id.*, at *6. The trial court overruled those objections, and then the following exchange occurred before the jury:

Prosecutor: I think the question I asked you was whether or not you asked Isabel whether [M.C.] wanted to have sex that day?

Detective: That's correct.

Prosecutor: And what did he advise?

Detective: He advised she did not.

Id., at *7. Thereafter, Isabel's lawyer attempted to cross-examine Detective Burris to clarify this issue, culminating in the following exchange:

Defense: And you agree that he started talking about that and you cut him off, right?

Detective: I remember him saying that she didn't, but I don't remember exactly what.

Defense: Do you remember the exact words that he used for?

Detective: No.

Defense: Ok. If I told you that you said, isn't that right? Or isn't that correct? And his response was yeah. And kept talking. Would you agree that that's accurate?

Detective: I mean, that's probably accurate.

Trial Record at VR 1/25/23, 3:34:14-3:34:43.⁴ As Detective Burris claimed to no longer recall the statement, and the defense was unable to present it to the jury, the jury

⁴ Kentucky trial records are video records that are not transcribed in writing. The undersigned certifies that the transcribed passage fairly and accurately reflects the contents of the video record.

was left with the false impression that Isabel had confessed to the only disputed fact of the case, i.e., M.C.'s consent (or the lack thereof).

The Kentucky Supreme Court affirmed, finding that while Isabel's interpretation of Isabel's statement was "reasonable", so too was the Commonwealth's. Opinion, at *7. "[B]ecause Isabel's statements were susceptible of the meaning testified to by Detective Burris at trial and because Isabel had an opportunity to cross-examine Detective Burris regarding that interpretation, there was no error in the trial court's admission of that testimony." *Id.*

Finally, prior to trial it became clear that Officer Guandique would not be available to testify, and that the translations he produced would be admitted through Detective Burris who did not speak or understand Spanish. Counsel objected and argued, among other things, that his confrontation clause rights were violated by the admission of the translations through Detective Burris. *Id.*, at *9. Counsel's attempts to explain the issues with the accuracy of the translation were cut off by the trial court immediately, on the basis of the trial court's position that such information was evidence that could only be introduced through a qualified witness. *Id.* The basis for the trial court's ruling was Kentucky's adoption of the "language conduit" theory, which holds that a translated statement is the same as the original, and the translation is not hearsay but a mere conduit through which the statement is understood. *Id.*

Before the jury, Detective Burris testified regarding the translations of the text messages. He was unable to answer any questions about whether those translations

were in any way ambiguous or potentially incorrect, due to his lack of Spanish knowledge.

Once again, the Kentucky Supreme Court denied relief, finding that “as a mere conduit of information, an interpreter is not a ‘witness’ against the defendant because the interpreter does not make a solemn declaration or affirmation for the purpose of establishing or proving a fact, but rather simply enables the fact-finder to understand the words of the person whose words are translated.” *Id.*, at *10. Three Justices disagreed, finding that the “language conduit theory” should be “limited to the situation where the declarant makes an oral or written statement contemporaneously through an interpreter and should not be extended to the present facts involving the non-contemporaneous translation of written documents” *Id.*, at *20 (Nickel, J., concurring). These Justices found “potential hearsay and Confrontation Clause issues inherent in both situations [real time interpreter vs. out of court translator of a written document] which must be analyzed differently.” *Id.*, at *21.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review to Complete Its *Bruton* Jurisprudence and Resolve a Split of Authority on Whether a Statement May Be Rewritten to Comply with *Bruton*, and If So, What Protections Must Exist to Ensure the Accuracy of the Rewritten Statement.

This issue arose when the prosecution, in order to comply with *Bruton v. United States*, 391 U.S. 123 (1968), presented not the original statement but a detective's oral summary or paraphrase of it. This presented Isabel with a compound problem: (1) the summary misrepresented what he actually said, in a manner that was extremely inculpatory, and (2) he could not effectively challenge the inaccuracy

by presenting the original statement, because the original statement contains references to the co-defendant that would violate the co-defendant's *Bruton* rights. In this case, the Kentucky Supreme Court found that because the detective's summary was susceptible to the interpretation the detective gave it and that the defendants had the opportunity to cross-examine the detective about his interpretation, there was no error in admitting the summary and limiting cross-examination.

This raises a significant due process and confrontation issue that this Court has never spoken to directly. From *Bruton* to the present, this Court has exclusively dealt with this issue from the same perspective Bruton himself was in, i.e., evaluating whether the Petitioner's confrontation rights were violated by the admission of the non-testifying co-defendant's confession. *See, e.g., Richardson v. Marsh*, 481 U.S. 200, 211 (1987)(Allowing "the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence"); *Samia, supra*, (Allowing the admission of a statement where the name of the Petitioner had been removed and replaced with "the other person"). While these cases have never addressed the issue from the side of the person whose statement is being altered, it has at times alluded to the undecided nature of the issue. *See, e.g., Samia* ("This Court has never opined as to whether rewriting a confession may serve as a proper method of redaction.") 599 U.S. at 641, n. 1. This Court should accept review of this case to resolve this issue once and for all.

In *Gray v. Maryland*, 523 U.S. 185, 197 (1998), Justice Scalia, speaking for himself and three other Justices, wrote a dissenting opinion in which he noted that “[t]o my knowledge we have never before endorsed—and to my strong belief we ought not endorse—the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown.” 523 U.S. at 203 (Scalia, J., dissenting). Justice Scalia alluded to the fact that the more significant the redaction the more misleading the resulting statement, noting for example that “[i]f the question was ‘Who agreed to beat Stacey?’, and the answer was ‘Me and Kevin,’ we might redact the answer to ‘Me and [deleted],’ or perhaps to ‘Me and somebody else,’ but surely not to just ‘Me’—for that would no longer be a confession to the conspiracy charge, but rather the foundation for an insanity defense.” *Id.* Justice Scalia was dissenting because this Court had rejected the trial court’s decision to delete the references to other defendants and simply leave a blank, rather than rewriting the statement to be more vague.

In the absence of guidance from this Court, courts have generally embraced the idea that a witness may summarize a statement to avoid *Bruton* problems. *See, e.g., United States v. Solis*, 299 F.3d 420, 443 (5th Cir. 2002). Indeed, in *Samia* what was offered was not a transcript, but a summary of “the content of Stillwell’s confession in a way that eliminated Samia’s name while avoiding any obvious indications of redaction.” 599 U.S. at 641. Summarizing a defendant’s statement is not an issue in single defendant cases, where it is possible to cross-examine the witness with the specific statement to clarify any potentially misleading

interpretation. However, in the context of a co-defendant case, matters are more complicated.

From the other side of *Bruton*, several issues are apparent. First, by manipulating a statement to remove references to the co-defendant, a court or prosecutor is changing the meaning of the statement. However, a defendant whose statement is being manipulated has a due process right to not be prosecuted on the basis of testimony, which “taken as a whole, gave the jury the false impression . . .” *Alcorta v. State of Tex.*, 355 U.S. 28, 31 (1957), *see also Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959)(“[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.”) This case presents an extreme example of that, as the Commonwealth essentially fabricated a confession to the only disputed issue in the case, undermining the fairness of the proceeding against him. While the Kentucky Supreme Court found that the statement was not misleading because it was “susceptible of the meaning testified to by Detective Burris,” nothing in this Court’s jurisprudence authorizes a court to exclude the actual statement in favor of one of the most prosecution-friendly conclusions to which the statement was “susceptible.” Opinion, at *7.

Second, Isabel’s confrontation rights were limited by the need to protect Mario’s confrontation rights, which impaired Isabel’s ability to correct or clarify the evidence the Commonwealth presented. In this respect, the nearly 60-year history of *Bruton* as a kind of iron law of co-defendant cases was relevant. While counsel objected to admitting the statement, it was assumed by all—defense attorney, judge

and prosecutor—that of course the original statement could not be presented, because of *Bruton*.⁵

After nearly 60 years of *Bruton* jurisprudence, lower courts have never developed a coherent response to the issues created by redacting a statement, where the redacted statement was more inculpatory than the original might have been. Shortly after *Bruton* was decided, the Fifth Circuit noted that it was possible that “achieving literal compliance with the letter of the *Bruton* decision has weakened or distorted the truth of their statements to an extent that the overall result was an unfair trial.” *United States v. Kershner*, 432 F.2d 1066, 1072 (5th Cir. 1970). However, in that case, the Fifth Circuit found that “the defendants could point to no concrete examples where any exculpatory or explanatory statements had been deleted”, and so they could not state a claim in that regard. *Id.* Several years later, in *United States v. Gonzales*, 749 F.2d 1329, 1334 (9th Cir. 1984), the Ninth Circuit rejected even the possibility of what it called a “reverse *Bruton*” issue, stating that:

Both the rules and the rationale of *Bruton* are . . .
inapplicable to this case, since there can be no

⁵ Ironically, admitting the original statement would have not only benefited Isabel, but Mario as well. The trial court relied on redaction alone to cure the confrontation problem, and so the required admonition was given. The Kentucky Supreme Court recognized this was error but found the error harmless because “Detective Burris’ testimonial summary of each defendant’s statement scrupulously avoided any reference to the other defendant”, and the brothers did not have differing versions of events that night. Opinion, at *6. However, that meant that the jury was permitted to use Isabel’s apparent confession to M.C.’s nonconsent against Mario as well. The jury would have no reason not to do so, since both Isabel and Mario both conceded joint involvement. As such, Mario would have been much better served if Isabel’s actual statement was admitted, as that statement does not admit to knowing that M.C. did not consent, but only that Isabel had been asking Mario about it.

confrontation problem when the challenged statements were made by the complaining defendant himself. To hold otherwise would not only be illogical, it would lead to the exclusion of *all* statements by one defendant inculcating a jointly-tried codefendant, because in order to admit such a statement a trial judge would either have to refuse to redact the statement and violate the inculcated defendant's confrontation rights under *Bruton*, or redact it and violate the “reverse *Bruton*” rights of the defendant who made the statement.

749 F.2d at 1334.

Since that time, of the Federal courts only the First Circuit has adopted a freestanding principle that “[a] court may not recast admissible evidence so as to create a materially false impression that is harmful to the interest of one of the parties.” *United States v. Thuna*, 786 F.2d 437, 441 (1st Cir. 1986). By contrast, courts in the Second, Eighth and Eleventh Circuits have limited the issue on the basis of the rule of completeness under Fed.R.Evid. 106. *United States v. Range*, 94 F.3d 614, 621 (11th Cir. 1996)(“[T]he “rule of completeness” is “violated only when the statement in its edited form ... effectively distorts the meaning of the statement or excludes information substantially exculpatory of the nontestifying defendant” (quotations omitted)); see also *United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir. 1982); *United States v. Mussaleen*, 35 F.3d 692, 696 (2d Cir. 1994). Many state courts have similarly adopted a “rule of completeness” approach to the issue. *State v. Alsup*, 75 Wash. App. 128, 133, 876 P.2d 935, 938-39 (1994); *State v. Craney*, 662 A.2d 899, 904 (Me. 1995); *Dessett v. State*, 951 So. 2d 46, 48 (Fla. Dist. Ct. App. 2007). Other jurisdictions have adopted the “distortion” standard. *State v. Rakestraw*, 871 P.2d 1274, 1281 (Kan. 1994).

Looking at the issue primarily as a function of the rule of completeness ignores the constitutional dimensions of the problem. This is more significant than merely changing the harmless error test from a “harmless beyond a reasonable doubt” standard to a “grave doubt” standard – though that is not an insignificant change. Compare *Chapman v. California*, 386 U.S. 18 (1967) and *Kotteakos v. United States*, 328 U.S. 750 (1946). Narrowing the issue in this way also leaves many cases, including this one, without an obvious remedy. Here, Detective Burris testified to a conclusion about what Isabel meant that was both highly inculpatory and disputed by Isabel himself. There was no “statement” to “complete”, and Kentucky evaluated the Detective’s testimony only to the extent it was a distortion. This deprives the jury of the information they need to decide for themselves what Isabel meant when he gave his statement, under circumstances that do not benefit either Isabel or Mario.

* * * * *

Perhaps following the lead of the Ninth Circuit in *Gonzales*, lower courts have refused to grapple with the confrontation and due process implications of redaction and revision of a statement. Fearing harm to the Confrontation Clause rights of those in Mario’s position, courts have limited themselves to a narrow inquiry that ignores the confrontation clause rights of those in Isabel’s position, and the due process implications of the state essentially manufacturing a sanitized statement that changes the meaning of the original, leaving the issues and shades of meaning beyond the jury’s reach.

This Court should accept review of this case to complete its *Bruton* jurisprudence, and provide the direction needed to allow lower courts to balance the interests at stake.

II. This Court Should Grant Review to Resolve a Split of Authority Regarding Whether an Out of Court Translation Is a “Statement”, and Thus Potentially Subject to Confrontation Clause Limitations, When Prepared by Authorities for Later Use at Trial.

In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), this Court found that “[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” Since that time this Court has addressed the issue on many occasions, applying the Clause “only to testimonial hearsay”—and in that two-word phrase are two limits.” *Smith v. Arizona*, 602 U.S. 779, 784 (2024). Those limitations are (a) “a statement must be hearsay (‘for the truth’);” and (b) “it must be testimonial.” *Id.* at 800. In doing so, this Court “do[es] not ‘accept a State’s nonhearsay label at face value,’” because “federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules.” 602 U.S. at 794.

This Court has also rejected attempts to carve out exceptions to the Confrontation Clause, finding that it is “most naturally read” to admit “only those exceptions established at the time of the founding.” *Crawford*, 541 U.S. 36, 54. Therefore, when seeking an exception to the Confrontation Clause, the question is whether the statement would be admissible under “a founding-era exception to the confrontation right.” *Giles v. California*, 554 U.S. 353, 358 (2008).

In this case, the Commonwealth admitted the Guandique's translations of Mario and Isabel's text messages as non-hearsay, relying on the "language conduit" theory. However, the "language conduit" theory is a modern creation with no historical roots at the time of the founding, whose application in this context is patently at odds with the founding era Confrontation Clause.

A. The Language Conduit Rule Is a Modern Invention Without Historical Analogue

The "language conduit" theory is a modern creation with no historical roots at the time of the founding. While true admissions by a party opponent may have been admissible at that time, the earliest American case allowing agency admissions limited those admissions to admissions related to the "res gestae," *United States v. Gooding*, 25 U.S. 460, 467 (1827), meaning that the statement needed to be intimately connected to the criminal transaction to be admissible. The role of interpreters in this relationship was not seriously addressed by American courts until the rise in immigration in the late 19th and early 20th centuries. See Zachary C. Bolitho, *The Hearsay and Confrontation Clause Problems Caused by Admitting What a Non-Testifying Interpreter Said the Criminal Defendant Said*, 49 N.M.L. Rev. 193, 201 (2019)(describing evolution of the "language conduit" rule). "At that time, most courts and commentators simply treated out-of-court statements made by an interpreter the same as any other out-of-court statements--they were inadmissible if offered to prove the truth of the matter asserted, unless an exception applied." *Id.*, at 204. That said, "[t]he early courts did recognize an exception in cases where the interpreter was acting as the agent of a party opponent. It was a limited exception that applied where

a non-English speaking party selected the interpreter for the purpose of facilitating a conversation with an English speaker.” *Id.*, at 205.

The first reference to an interpreter as a “language conduit” was in the pre-rules case of *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973). There the court issued a per curium opinion where they found, without discussion, that a recording of a statement where a third party was acting as a translator was admissible “within the same exception to the hearsay rule as when a defendant and another are speaking the same language”, as the translator “was merely a language conduit” between the two parties.

Ushakow lived in relative obscurity until the early 1980’s, when the *Ushakow*’s “language conduit” phrase began to take off. By the end of the 1980s, federal courts were interpreting *Ushakow* to hold that where the interpreter is “no more than a language conduit . . . his translation did not create an additional layer of hearsay.” *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989). The cases adopting this approach reasoned that where “the interpreter has a sufficient capacity, and there is no motive to misrepresent, the interpreter is treated as the agent of the party and the statement is admitted as an admission unless circumstances are present which would negate the presumption of agency.” *United States v. Nazemian*, 948 F.2d 522, 527 (9th Cir. 1991)(Quoting 4 J. Weinstein & M. Berger, *Evidence* ¶ 801(d)(2)(C)[01] at 801–217 n. 34 (1988)); *See also e.g., People v. Romero*, 78 N.Y.2d 355, 362, 581 N.E.2d 1048, 1051 (1991)(translator not agent because he was employee of police with motive to fabricate); *Saavedra v. State*, 297 S.W.3d 342, 349 (Tex. Crim.

App. 2009)(statement admissible as admission of agent, but only if *Nazemian* factors are met). In determining whether such an agency relationship existed, the court was to consider factors “such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.” *Nazemian* at 527. As noted above, a majority of courts have either adopted that rule, or like Kentucky, a broader rule that presumes the admissibility of a translated statement in the absence of evidence of unreliability.

B. The Split of Authority Regarding Both the Language Conduit Theory as a Court Created Evidence Rule, and Its Use as an Exception to the Hearsay Rule, Is Deep and Unresolvable Without Intervention From This Court.

Jurisdictions have split over whether the “language conduit” theory—or any theory—supplies a basis for avoiding a Confrontation Clause objection to an out of court translation made by a police officer for later use at trial.

As discussed, in *Nazemian*, the Ninth Circuit did the intellectual spadework to justify the language conduit rule, grounding the rule in principles of reliability and agency adoption. 948 F.2d at 527. Many jurisdictions have adopted the reasoning in *Nazemian* to find that a translation is not a “statement” for either hearsay or confrontation purposes. *See State v. Lopez-Ramos*, 929 N.W.2d 414, 420 (Minn. 2019)(no confrontation violation); *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012)(same), *Hernandez v. State*, 662 S.E.2d 325, 330 (Ga. 2008)(same), *overruled*

on other grounds by *Williams v. Harvey*, 858 S.E.2d 479 (Ga. 2021), *Garcia-Chicol v. State*, 597 S.W.3d 631, 638-39 (Ark. 2020)(same).

What *Nazemian* started, other courts quickly watered down. In 1993, the Wisconsin Court of Appeals held that “[a]bsent a motive to mislead, distort or some other indication of inaccuracy, when persons speaking different languages rely upon a translator as a conduit for their communication, the statements of the translator should be regarded as the statements of the persons themselves without creating an additional layer of hearsay. Like any other exception to the hearsay rule, the translated statements are admissible—if qualified by an exception to the hearsay rule—without calling the translator as a witness.” *State v. Patino*, 502 N.W.2d 601, 610 (Wisc.Ct.App.1993) (citations omitted). Since then, many jurisdictions, including Kentucky, have adopted that approach, and thereby created a presumptive rule of admissibility for all translated statements, placing the burden of proving unreliability on the opponent of the statement. *See, e.g., Lopez v. State*, 636 S.E.2d 770, 772 (Ga. 2006); *Garcia-Chicol v. State*, 597 S.W.3d at 639.

By contrast to both *Nazemian* and *Nazemian*-like jurisdictions, other jurisdictions have either rejected language conduit theory altogether or limited it to nonconfrontation circumstances. *See United States v. Charles*, 722 F.3d 1319, 1322-30 (11th Cir. 2013)(confrontation clause violated); *Taylor v. State*, 130 A.3d 509, 517-41 (Md.Ct.App. 2016)(same); *State v. Garcia-Trujillo*, 948 P.2d 390, 392 (Wash.Ct.App. 1997)(limiting admission to contemporaneous translations under an agency theory). Even in courts that have long treated a translator as a mere “conduit”

for a statement for confrontation clause purposes, judges have started to acknowledge that “the continued vitality of *Nazemian* after *Crawford* is an issue that merits *en banc* review in an appropriate case” because “its ultimate conclusion—that a translator's out-of-court version of a testimonial statement need not be subject to cross-examination at trial—seems in great tension with” *Crawford* and its progeny. *Orm Hieng*, 679 F.3d at 1145, 1149 (Berzon, J., concurring).

Finally, as the concurring opinion below pointed out, “several legal commentators have criticized the contemporary application and expansion of the language-conduit exception beyond its narrow origins.” See Opinion, at *22, citing Jeffrey Bellin, 30B *Fed. Prac. & Proc. Evid. (Wright & Miller)* § 7044 (2025 ed.) (observing the language-conduit theory “is essentially a court-created hearsay exception for translated statements” which is inconsistent with the rules of evidence and, “[a]s such, it is probably illegitimate and should be discarded.”); Paul F. Rothstein, *Fed. Rules of Evidence Rule 801* n.7 (2025 ed.) (criticizing the language-conduit theory as inconsistent with hearsay and Confrontation Clause jurisprudence); Zachary C. Bolitho, *The Hearsay & Confrontation Clause Problems Caused by Admitting What a Non-Testifying Interpreter Said the Criminal Defendant Said*, 49 N.M. L. Rev. 193, 214 (2019) (observing the language-conduit and agency “theories are fundamentally flawed, inconsistent with the law, and rest on faulty factual premises.”); Gregory J. Klubok, *The Error in Applying the Language Conduit-Agency Theory to Interpreters Under the Confrontation Clause*, 89 St. John's L. Rev. 1399, 1401 (2015) (“The language conduit-agency theory's imputation of translated

statements to the defendant improperly conflates the Confrontation Clause with the hearsay rules and has no basis in agency law.”); Casen B. Ross, *Clogged Conduits: A Defendant's Right to Confront His Translated Statements*, 81 U. Chi. L. Rev. 1931, 1965 (2014) (arguing the current application language-conduit and agency theories rest on untenable legal fictions); Tom S. Xu, *Confrontation & the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of Crawford?*, 67 Vand. L. Rev. 1497, 1519 (2014) (“There is no good justification for relaxing the Sixth Amendment standard when dealing with translated statements that would normally constitute testimonial hearsay, or for empowering judges to make a reliability determination that would ultimately avoid the confrontation requirement altogether.”)

In short, virtually all American jurisdictions have created some kind of rule regarding the admissibility of translations, without guidance from this Court. The mix of approaches ensures that no consistent Confrontation Clause rule will emerge. This Court should accept review to resolve the dispute and provide that rule.

C. The “Language Conduit Rule” Is Contrary to This Court’s Confrontation Clause Jurisprudence.

As noted above, the principle of the language conduit rule is that the translator is a mere conduit of the speaker, “the statements of the translator should be regarded as the statements of the persons themselves without creating an additional layer of hearsay.” *Patino*, 502 N.W.2d at 610.

This presumption—that a translation is simply a different form of the same statement—is itself illogical and contrary to human experience. As one court explained:

Interpretation is the oral form of transferring meaning from one language, known as the “source” language, into another language, known as the “target” language. . . . Language interpretation, however, does not provide for a one-to-one correspondence between words or concepts in different languages. . . . Rather than word for word, then, interpreters render meaning by reproducing the full content of the ideas being expressed. Interpreters do not interpret words; they interpret concepts. Language interpreters typically convert concepts in the source language to equivalent concepts in the target language. . . . [T]here are many forces, such as differences in dialect and unfamiliarity of colloquial expressions, which operate to frustrate the interpretation of semantic meaning. Not only does a language interpreter face obstacles in trying to convey the semantic meaning of a speaker's words but language interpretation necessarily requires the interpreter also to understand the contextual, pragmatic meaning of specific language so that much of the information required to determine the speaker's meaning is not contained in the words of the speaker, but instead is supplied by the listener.

Charles, 711 F.3d at 1324–25 (citations and quotations omitted). In short, “given the nature of language interpretation, the statements of the language interpreter and [the defendant] are not one and the same.” 722 F.3d at 1324.

In *Smith*, this Court rejected reliance on evidence rules to define what a “statement” is for Confrontation Clause purposes, finding that “federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules.” 602 U.S. at 794. States cannot avoid Confrontation Clause application merely by claiming the statement is reliable,

because “[t]he Clause, . . . commands[] not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” 602 U.S. at 784 (quoting *Crawford v. Washington*, 541 U.S. 36, 61 (2004)). As such, “the Clause bars the admission at trial of an absent witness’s statements—however trustworthy a judge might think them—unless the witness is unavailable, and the defendant had a prior chance to subject her to cross-examination.” *Id.*

In *Smith*, this Court made clear that something is a “statement” for Confrontation Clause purposes if is an “out-of-court statement[] offered ‘to prove the truth of the matter asserted.’” 602 U.S. at 785 (quoting *Anderson v. United States*, 417 U.S. 211 (1974)). Here, there can be no question that the translations were offered for the truth of the matter asserted within the translation, i.e., to show what the text messages mean. Therefore, Guandique’s statement meets the “hearsay” portion of *Crawford*.

Further, the statements were also testimonial. The issue of whether a particular statement is testimonial “focuses on the ‘primary purpose’ of the statement, and in particular on how it relates to a future criminal proceeding.” *Smith, supra* at 800. While this concept has been “variously described” by the Supreme Court, *id.*, at 784, it has been clear that “the document’s primary purpose must have ‘a focus on court’” to be testimonial. *Id.*, at 802. Here, it was undisputed that Guandique created the document, which contained translations of Isabel’s and Mario’s text messages to provide evidence for the Commonwealth to use at a later

trial. The very document he created was later admitted, through Detective Burris, who spoke no Spanish at all.

* * * * *

The Kentucky Supreme Court’s embrace of the “language conduit rule” flies in the face of this Court’s substantial jurisprudence on this issue. Until this Court steps in to address the issue, this rift among courts nationally will continue to widen, and the confrontation clause rights of litigants will continue to be ignored. This Court should therefore accept review to resolve this important issue.

III. This Case Is an Excellent Vehicle for Addressing Both Issues.

Both of the questions presented present significant issues in need of resolution by this Court. Both issues are properly preserved for review in the lower courts, and both resulted in lower court opinions that appropriately frame the issue in a manner that will permit this Court to provide meaningful guidance to lower courts in future cases. With respect to both issues, it is plain that such guidance is desperately needed.

This Court may note, and the Commonwealth will no doubt emphasize, that the Kentucky Supreme Court found many errors in this case to be harmless. However, that is not the case with these issues, which the Kentucky Supreme Court found not to be error at all. See Opinion, at *9 (“[W]e find no error in Detective Burris’ testimony summarizing Isabel’s statements to law enforcement”); and *10 (“[T]he trial court did not err in admitting those translations”).

To the extent that at other places in the opinion the Kentucky Supreme Court suggests that they regard the evidence as overwhelming, that conclusion is plainly wrong. There was only one factually disputed issue in the case, and that was whether M.C. had consented to sex with Isabel and Mario. Proving non-consent in this case was particularly challenging because this is a case that is entirely without witnesses. M.C. did not testify, Gabriel did not testify, Mario did not testify, and Isabel did not testify. Nobody else saw anything. The only statements offered were the statements to Detective Burris – which was presented to the jury as a confession, even when it was not – and the messages mis-translated by Officer Guandique. Isabel and Mario’s explanation of the events of that evening, which was that this was an occasional occurrence driven by M.C.’s desires, was excluded entirely, effectively preventing them from testifying. If the Commonwealth can make up its own evidence and prohibit the defense from either confronting that evidence or offering evidence in rebuttal, it is easy to see how a case can seem “overwhelming.”

But, even given those advantages, this was still a close case. The Commonwealth’s theory was primarily based on Isabel’s alleged confession, the text messages, and the fact that M.C. had presented with significant sexual injuries unlikely to have been the result of consensual sexual activity. If it could be definitively stated that Mario and Isabel were the last people to have been with M.C. sexually, the injuries alone would have been strong evidence, but that is not the case. A still-unidentified DNA profile was found as part of M.C.’s rape kit. If the

unidentified contributor was the last person to have sex with M.C., he is almost certainly the cause of the injuries, and Isabel and Mario are innocent.

In this regard, the two issues presented in this case are extremely harmful, so much so that they apparently persuaded the Kentucky Supreme Court to overlook this gaping hole in the evidence. First, Detective Burris' characterization of Isabel's statement was devastating, literally telling the jury that Isabel confessed to the crime. Then, the text messages were translated to read like the brothers were concerned for what M.C. was saying but could have just as easily referred to the brothers concern that Gabriel – the last person with M.C. before the police were called, and a plausible alternative suspect for her injuries – was trying to set them up. Thus, even with the advantage of a one-sided trial, had these errors not occurred a conviction was far from assured.

The highly deferential nature of § 2254 and the absence of any definitive ruling by this Court on these issues means that this Petition is the last good opportunity for these issues to be reviewed. Given the importance of the issues themselves, and the devastating effect on the fairness of the trial, review is warranted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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