

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

BRANDON JAMES HARBISON,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 326105

Circuit Court No. 13-18686FC

ALLEGAN COUNTY PROSECUTOR  
Attorney for Plaintiff-Appellee  
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**JUDGMENT APPEALED FROM, RELIEF SOUGHT, AND  
CONCISE ALLEGATIONS OF ERROR**

Defendant-Appellant Brandon Harbison seeks leave to appeal from the Court of Appeals opinion reversing the Circuit Court and affirming his conviction. This Court should grant leave to appeal because the Court of Appeals decision is clearly erroneous and will cause a material injustice to Mr. Harbison, MCR 7.305(B)(5), and the case presents a legal principle of major significance to the state's jurisprudence, MCR 7.305B)(3).

The Court of Appeals disregarded more than two decades of precedent in failing to follow this Court's decisions in *People v Beckley*, 434 Mich 691 (1990) and *People v Peterson*, 450 Mich 349 (1995), even after this Court remanded the case for reconsideration in light of *Peterson*.

Mr. Harbison was accused of sexually abusing his niece. Her allegations were vague and covered a long period of time leaving Mr. Harbison with practically no way to refute them. The prosecution presented the expert testimony of Dr. N. Debra Simms that the complainant suffered from “probable pediatric sexual abuse” based not on any physical evidence, but only on Dr. Simms’ interviews with the complainant. This was in clear violation of *Beckley* and *Peterson* where this Court cautioned that such testimony gives the impression the expert possesses some “some specialized knowledge for discerning the truth” and unfairly enhances the credibility of the complainant. The Court of Appeals denied the expert was opining on the complainant’s credibility, but was merely “leaning toward taking the victim at her word.” *People v Harbison*, unpublished per curiam opinion of the Court of Appeals issued January 26, 2017 (Docket No. 326105) (*Harbison I*). This Court vacated that portion of the Court of Appeals opinion and remanded for reconsideration in light of *Peterson*. *People v Harbison*, 501 Mich 897 (2017) (*Harbison II*). However, the Court of Appeals found “no basis for reversing defendant’s convictions.” *People v Harbison (On Remand)*, unpublished per curiam opinion of the Court of Appeals issued January 23, 2018 (Docket No. 326105) (*Harbison III*).

The Court of Appeals reasoned that “probable pediatric sexual abuse” was a “term of art” used by pediatric sexual abuse professions to communicate with each other. The court concluded:

In other words, Dr. Simms never directly opined on the ultimate question in this case—i.e., whether the victim was abused by defendant—she merely stated a medical diagnosis based on established diagnostic criteria, *all of which were explained to the jury*. Moreover, she never stated that she personally, or as an expert, found the victim’s account of the abuse to be credible. Rather, she indicated that the victim had provided a history that was “clear, consistent, detailed *or* descriptive” (Emphasis added.)

*Harbison III* (Emphasis in original).

Once again, the Court of Appeals is simply disagreeing with *Peterson*. The Court of Appeals said Dr. Simms did not opine on the ultimate question, but merely stated a medical diagnosis. But stating a medical diagnosis that the complainant suffered “probably pediatric sexual abuse” *is* opining on the ultimate question. The Court of Appeals said Dr. Simms never stated she found the victim’s accusation credible, but only that the history was clear, consistent detailed or descriptive. But opining on the clarity and consistency of an accusation and then opining that abuse is “probable” *is* finding the accusation credible.

For the reasons expressed in detail in this Application for Leave to Appeal, this Court should either grant leave to appeal, peremptorily reverse the decision of the Court of Appeals and order a new trial for Mr. Harbison, or in the alternative hold this case in abeyance pending the outcome of *People v Bentz*, 501 Mich 915 (2017).

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Court of Appeals No. 326105

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**NOTICE OF HEARING**

TO: ALLEGAN COUNTY PROSECUTOR

PLEASE TAKE NOTICE that on April 10, 2018, the undersigned will move this Honorable Court to grant the within Application for Leave to Appeal.

STATE APPELLATE DEFENDER OFFICE

/s/ Brett DeGross

BY: \_\_\_\_\_  
BRETT DEGROSS (P74898)

Date: March 19, 2018

IDEN NO. 28271T-J / Brett DeGross

STATE OF MICHIGAN  
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Circuit Court No. 13-18686FC

ALLEGAN COUNTY PROSECUTOR  
Attorney for Plaintiff-Appellee

BRETT DEGROFF (P74898)  
Attorney for Defendant-Appellant

**SECOND APPLICATION FOR LEAVE TO APPEAL**

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## **STATEMENT OF JURISDICTION**

Defendant-Appellant was convicted in the Allegan County Circuit Court by jury trial, and a Judgment of Sentence was signed on January 27, 2015. A Claim of Appeal was filed on February 23, 2015 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated January 26, 2015, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, § 20, pursuant to MCL 600.308(1); MSA 27A.308, MCL 770.3; MSA 28.1100, MCR 7.203(A), MCR 7.204(A)(2). This Court has jurisdiction to consider this application for leave to appeal pursuant to MCR 7.303(B)(1).

**STATEMENT OF QUESTIONS PRESENTED**

- I. WAS MR. HARBISON DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER US CONST, AM XIV; CONST 1963, ART 1, § 17, WHERE A PROSECUTION EXPERT WITNESS IMPROPERLY STATED A MEDICAL OPINION THAT THE COMPLAINANT HAD BEEN SEXUALLY ABUSED?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

## PROCEDURAL HISTORY

On November 21, 2014 before the Honorable Kevin W. Cronin in the Allegan County Circuit Court, a jury convicted Defendant Brandon Harbison of two counts of first degree Criminal Sexual Conduct (CSC), one count of attempted first degree CSC, two counts of second degree CSC, and one count of accosting a child for immoral purposes stemming from allegations of sexual abuse made by Mr. Harbison's niece, [REDACTED] Harbison. (T 11/20/14 94-95)

On January 26, 2015, Mr. Harbison was sentenced to concurrent prison terms of 25 years to 38 years; 26 years, 8 months to 40 years; 2 years to 5 years; 5 years, 5 months to 15 years; 6 years, 5 months to 15 years; and 1 year, 4 months to 4 years. (T 1/26/15 10) Mr. Harbison filed a Motion for New Trial or Resentencing in the Circuit Court on August 19, 2016. The Circuit Court denied that motion to the extent that it denied a new trial and denied an evidentiary hearing, but granted the motion to the extent that it granted resentencing. (T 9/10/15 84-87) On January 21, 2016 Mr. Harbison was resentenced to the same terms. (T 1/21/16 17-19)

Mr. Harbison filed a Brief on Appeal in the Court of Appeals, concurrently with a Motion to Remand for a *Ginther* hearing on March 18, 2016. The Court of Appeals granted the motion to remand on April 25, 2016. *See People v Harbison*, unpublished Order of the Court of Appeals issued April 25, 2016 (Docket No. 326105), *attached*. The *Ginther* hearing was held June 2, 2016. (T 6/2/16 1-159) On July 28, 2016, the Circuit Court issued Findings and Decision granting a new trial. *People v Harbison*, unpublished Order of the 48<sup>th</sup> Circuit Court issued July 28, 2016 (Docket No. 13-18686-FC), *attached*. On January 26, 2017, the Court of Appeals reversed the Circuit Court and affirmed Mr. Harbison's conviction. *People v Harbison*, unpublished opinion per curiam of the Court of Appeals issued January 26, 2017 (Docket No. 326105) (*Harbison I*), *attached*.

This Court vacated the “part of the Court of Appeal judgment concerning the testimony of Dr. N. Debra Simms” and remanded for reconsideration in light of *People v Peterson*, 450 Mich 349 (1995). *People v Harbison*, 501 Mich 897 (2017) (*Harbison II*), attached. The Court of Appeals once again found no error and affirmed Mr. Harbison’s conviction. *People v Harbison (On Remand)*, unpublished per curiam opinion of the Court of Appeals issued January 23, 2018 (Docket No. 326105) (*Harbison III*), attached.

Mr. Harbison now seeks leave to appeal.

## STATEMENT OF FACTS

### *2014 Trial*

Complainant, [REDACTED] Harbison, had a tumultuous childhood involving a drug-addicted mother, Child Protective Services visits, and living with two foster families. (T 11/19/14 54-56, 137) At age 12, while with her first foster family, Ms. Harbison made accusations of sexual abuse against Brandon Harbison. (T 11/19/14 28)

Ms. Harbison was unable to specify any date on which the abuse occurred, even in relation to holidays or major life events, and alleged that the events occurred at her mother's home and her grandparent's home. (T 11/19/14 112) One detail Ms. Harbison did provide was that her brother [REDACTED] Harbison was present in the bedroom during the abuse at her grandmother's house. (T 11/19/14 92)

Dr. N. Debra Simms from the Safe Harbor Children's Advocacy Center testified that Ms. Harbison's genital exam did not show any definitive signs of sexual contact or abuse, but maintained that many sexually abused children had "normal" physical exams. (T 11/19/14 166) Dr. Simms also made a conclusion that Ms. Harbison had been sexually abused:

Q Did you have a diagnosis based on your exam and history?

A Yes, maam.

Q What was that?

A Probable pediatric sexual abuse. [(T 11/19/14 167)]

The Court asked Dr. Simms about the use of the term "probable pediatric sexual abuse" in her testimony on direct examination:

Q Alright. You described your conclusion as probable pediatric sexual abuse.

A Yes, sir.

Q Would you explain to the jury why you consider probable as opposed to maybe possible?

A . . . As a pediatrician I cannot always diagnose based solely upon the medical testing such as you referenced or from seeing something on the physical examination. If you come in to see me and you have a headache, I cannot see your headache, but based upon your history of where you tell me it hurts, when it hurts, how it hurts, how it feels, when it comes, when it goes, how often it comes, taking a comprehensive history, I can diagnose stress headache, cluster headache, migraine headache, etcetera, based upon the history. So in child sexual abuse we take the history that the child gives us and based upon how clear, consistent, detailed or descriptive it may be, if that is present with or without physical examination findings, that is probable pediatric sexual abuse. . . . [C]lear, consistent, detailed and descriptive history is probable, and then we have the other 2 categories for less than that. [(T 11/19/14 167-175)]

The jury began deliberations on November 20, 2014 and continued deliberating until the next day when it returned a guilty verdict. (T 11/21/14 6-8) Additional events of the trial are included, *infra*.

### ***2016 Ginther Hearing***

Trial counsel Fred Hunter testified at the 2016 *Ginther* hearing. Mr. Hunter testified he had reviewed the police reports relevant to this case before trial. (T 6/2/16 11) Mr. Hunter was aware that Ms. Harbison had told police her brother, ██████ Harbison, had witnessed the abuse she was alleging. (T 6/2/16 11) Mr. Hunter was aware that police had spoken with ██████ and that ██████ told police he never saw any abuse. (T 6/2/16 12) Mr. Hunter mistakenly thought that ██████ had himself been convicted of abusing ██████ Harbison.<sup>1</sup> (T 6/2/16 18) When asked, “why didn’t you call [█████ Harbison] as a witness in Mr. Harbison’s defense,” Mr. Hunter answered, “I don’t know.” (T 6/2/16 13) After review of the police reports in which ██████ alleged ██████ witnessed the abuse, and ██████ trial testimony where she again claimed ██████ witnessed the

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<sup>1</sup> The prosecution conceded at the evidentiary hearing that ██████ Harbison was never convicted or adjudicated as having abused ██████ Harbison. (T 6/2/16 39)

abuse, Mr. Hunter was again asked why he didn't call [REDACTED] to refute the claim. Mr. Hunter said "I have no idea." (T 6/2/16 30) Mr. Hunter also admitted that the morning of trial he was not ready for [REDACTED] to be called as a witness, and that he had already forgone the opportunity to call him. (T 6/2/16 31) Mr. Hunter was asked:

Q: So you can't today give us any strategic reason not to be prepared with [REDACTED] testimony as trial began?

A: Right. [(T 6/2/16 33)]

Mr. Hunter was also aware that [REDACTED] had made allegations of abuse against her mother's boyfriend, [REDACTED] Garcia. (T 6/2/16 15) Mr. Hunter investigated those allegations, and determined they were false or did not result in charges. (T 6/2/16 16) Mr. Hunter spoke with Mr. Garcia. (T 6/2/16 23) Mr. Hunter was aware that prior false allegations by a complainant were admissible. (T 6/2/16 17) Mr. Hunter could not recall why he did not use this evidence in Mr. Harbison's defense. (T 6/2/16 17) When asked to expand on why he didn't call Mr. Garcia, Mr. Hunter said "I don't know. At this time, I can't remember." (T 6/2/16 28-29) The prosecution stipulated that "Allegan County never pursued criminal charges against [REDACTED] Garcia as a result of allegations made by [REDACTED] Harbison." (T 6/2/16 44)

[REDACTED] Harbison also testified at the evidentiary hearing. [REDACTED] testified that he was aware [REDACTED] Harbison had accused Brandon Harbison of abusing her. (T 6/2/16 46) [REDACTED] was also aware that [REDACTED] had said [REDACTED] was present during the abuse. (T 6/2/16 46) However, [REDACTED] never saw Brandon have sexual contact with [REDACTED] and never saw Brandon try to have sexual contact with [REDACTED] (T 6/2/16 46-47) [REDACTED] said that if he had seen something like that, it isn't something he would have forgotten: "It's like an important thing, it's not like talking to a friend or something, it's something that will stick in your memory." (T 6/2/16 47) Trial counsel never

contacted [REDACTED] (T 6/2/16 47) If he had, [REDACTED] would have told him he never saw any sexual contact between Brandon and [REDACTED] and that he would testify at trial. (T 6/2/16 48)

[REDACTED] also testified that at one point [REDACTED] accused him of having sexual contact with her, but that it never happened. (T 6/2/16 48) [REDACTED] testified that if Mr. Hunter had asked him about allegations made by [REDACTED] toward him, he would have said they were untrue. (T 6/2/16 48)

[REDACTED] also testified he is fearful of being falsely accused by [REDACTED]

Q: [REDACTED] you said if you saw your sister you would stay away from her if possible. Why is that?

A: Because I don't want another issue happening between us. I don't want to be convicted of doing anything that I didn't do.

Q: But you're afraid she'll accuse you of something.

A: Yes. [(T 6/2/16 62)]

[REDACTED] Allred also testified. Ms. Allred testified she previously dated Brandon Harbison, and they have children in common. (T 6/2/16 74) Ms. Allred sat in on all the meetings between Brandon Harbison and Mr. Hunter, "so that we can understand completely what was going on." (T 6/2/16 75) Ms. Allred testified that she and Brandon Harbison made Mr. Hunter aware that [REDACTED] Harbison had previously made false allegations against [REDACTED] Garcia and [REDACTED] Harbison. (T 6/2/16 76) She saw the police report which alleged that [REDACTED] was present when Brandon abused [REDACTED] (T 6/2/16 76-77) She and Mr. Harbison asked that this be used in Mr. Harbison's defense. (T 6/2/16 76)

Q: So did you ever tell Mr. Hunter, trial counsel, that he needed to contact [REDACTED]

A: Yes, we did and he said he would. [(T 6/2/16 80)]

...

Q: Did you have any further conversation with Mr. Hunter about as you neared trial in the weeks before trial about using Mr. Garcia as a witness or using [REDACTED] as a witness or deciding not to do so?

A: We asked him to look into it and he said that he would. He never got back to us and maybe like a week or two before we started trial we asked again and he still said that he would get back to us and he never did. [(T 6/2/16 81-82)]

...

Q: Ms. Allred so just to be clear, you and Brandon did ask Mr. Hunter to speak with [REDACTED] Harbison.

A: Yes, we asked him more than once and he did not. He didn't help really at all. [(T 6/2/16 81-82)]

Ms. Allred testified that although she had children in common with Mr. Harbison, their relationship ended on bad terms. (T 6/2/16 79)

A [REDACTED] Harbison also testified. A [REDACTED] Harbison is [REDACTED] Harbison's mother, and Brandon Harbison's sister. (T 6/2/16 84) A [REDACTED] testified her daughter had previously made allegations of abuse against her boyfriend, [REDACTED] Garcia, and her son, [REDACTED] Harbison. (T 6/2/16 85) A [REDACTED] Harbison was present when police came to interview [REDACTED] Garcia in connection with [REDACTED] allegations against him. (T 6/2/16 86) She testified Mr. Garcia was never arrested, and charges were never filed against him, and that she would have been aware if either event had happened. (T 6/2/16 87) A [REDACTED] Harbison testified that Mr. Garcia was subsequently deported, and that [REDACTED] continued to view him as her father, and often expresses a desire to see him. (T 6/2/16 88) [REDACTED] does not harbor any fear or anger toward Mr. Garcia. (T 6/2/16 88) A [REDACTED] Harbison also testified that [REDACTED] Harbison told her any allegations against [REDACTED] were untrue.<sup>2</sup> (T 6/2/16 106) A [REDACTED] Harbison testified she had never been

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<sup>2</sup> The Circuit Court cautioned this testimony could be inadmissible at any trial. (T 6/2/16 106)

contacted by Mr. Hunter, and if she had she would have told him the same things she testified to, and that she would testify at trial. (T 6/2/16 107)

On July 28, 2016 the Circuit Court issued Findings and Decision which concluded trial counsel had not be ineffective regarding failure to investigate false allegations against [REDACTED] Garcia, but that trial counsel had been ineffective regarding failure to investigate [REDACTED] Harbison. *People v Harbison*, unpublished order of the 48<sup>th</sup> Circuit Court issued July 28, 2016 (Docket No. 13-18686-FC) at 8-9, *attached*.

The Court of Appeals reversed the Circuit Court and affirmed the conviction. Concerning Dr. Simms's testimony, the Court of Appeals reasoned:

Although Dr. Simms's diagnosis of probably pediatric sexual abuse was based solely on the victim's statements, her testimony was not plainly erroneous. When questioned about the diagnosis, Dr. Simms testified that there was a national consensus about diagnosing child sexual abuse. She explained that she will give a diagnosis of probable pediatric sexual abuse if the child gives a clear, consistent, detailed, or descriptive history, regardless of whether there are physical findings of abuse. . . . Dr. Simms never testified whether she found the victim credible or whether she definitively believed that the victim was sexually abused; rather, it appears that Dr. Simms was simply leaning toward taking the victim at her word. [*Harbison I.*]

This Court vacated that portion of the Court of Appeals opinion and remanded in light of *Peterson. Harbison II.* On remand, the Court of Appeals reasoning was essentially the same.

While Dr. Simms testified that she diagnosed the victim with "probable pediatric sexual abuse," the context is vital. Dr. Simms later clarified that "probable pediatric sexual abuse" is a term of art used by "individuals that do pediatric sexual abuse evaluation nationwide[.]" She testified at considerable length that the phrase is merely part of a method intended to allow pediatricians "to communicate with one another effectively" about diagnostic criteria. She also explained those diagnostic criteria to the jury.

...

In other words, Dr. Simms never directly opined on the ultimate question in this case—i.e., whether the victim was abused by defendant—she merely stated a medical diagnosis based on established diagnostic criteria, all of which were

explained to the jury. Moreover, she never stated that she personally, or as an expert, found the victim's account of the abuse to be credible. Rather, she indicated that the victim had provided a history that was "clear, consistent, detailed or descriptive[.]" (Emphasis added.) Viewed in context, the testimony did not clearly run afoul of Peterson's admonishment that an expert may not vouch for the veracity of the victim or testify that the sexual abuse occurred or that the defendant is guilty. [*Harbison III* slip op at 8.]

The Court of Appeals once again affirmed Mr. Harbison's conviction. Mr. Harbison now seeks leave to appeal.

**I. MR. HARBISON WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER US CONST, AM XIV; CONST 1963, ART 1, § 17, WHERE A PROSECUTION EXPERT WITNESS IMPROPERLY STATED A MEDICAL OPINION THAT THE COMPLAINANT HAD BEEN SEXUALLY ABUSED.**

*Issue Preservation*

This issue was preserved with a timely trial court motion pursuant to MCR 7.208(B).

*Standard of Review*

Questions of constitutional law are reviewed *de novo*. *People v Lockridge*, 498 Mich 358, 373 (2015).

*Analysis*

The prosecution presented expert testimony that complainant [REDACTED] Harbison had been sexually abused, which was the ultimate factual dispute for the jury to resolve in this case. This testimony invaded the province of the jury and denied Mr. Harbison his state and federal constitutional right to a fair trial. US Const, Am XIV; Const 1963, art 1, § 17; *People v Beckley*, 434 Mich 691 (1990); *People v Peterson*, 450 Mich 349 (1995).

The prosecution presented expert testimony of Dr. N. Debra Simms who conducted an interview and physical examination of Ms. Harbison. Dr. Simms testified that Ms. Harbison's physical examination was generally normal. (T 11/19/14 166) Dr. Simms also testified about an ultimate conclusion as to whether Ms. Harbison had been sexually abused:

Q Did you have a diagnosis based on your exam and history?

A Yes, maam.

Q What was that?

A Probable pediatric sexual abuse. [(T 11/19/14 167)]

The Court asked Dr. Simms about the use of the term “probable pediatric sexual abuse” in her testimony on direct examination:

Q Alright. You described your conclusion as probable pediatric sexual abuse.

A Yes, sir.

Q Would you explain to the jury why you consider probable as opposed to maybe possible?

A . . . As a pediatrician I cannot always diagnose based solely upon the medical testing such as you referenced or from seeing something on the physical examination. If you come in to see me and you have a headache, I cannot see your headache, but based upon your history of where you tell me it hurts, when it hurts, how it hurts, how it feels, when it comes, when it goes, how often it comes, taking a comprehensive history, I can diagnose stress headache, cluster headache, migraine headache, etcetera, based upon the history. So in child sexual abuse we take the history that the child gives us and based upon how clear, consistent, detailed or descriptive it may be, if that is present with or without physical examination findings, that is probable pediatric sexual abuse. . . . [C]lear, consistent, detailed and descriptive history is probable, and then we have the other 2 categories for less than that. [(T 11/19/14 167-175)]

No jury instruction to disregard Dr. Simms’s statement of her medical opinion that Ms. Harbison had been sexually abused was given.

Under Michigan law, an expert medical witness is permitted to testify as to the results of a physical examination of an alleged sexual assault victim, and to render an opinion on whether the results of that examination are consistent or inconsistent with the specific allegations made in the case, but the witness is *not* permitted to state an opinion on the ultimate issue of whether sexual abuse actually occurred. *Peterson*, 450 Mich at 352. That factual determination is squarely in the domain of the jury.

Michigan jurisprudence has prohibited experts from invading the province of the jury in this manner for more than two decades. *See Beckley*, 434 Mich 691; *Peterson*, 450 Mich 349. In *Beckley*, the Court considered the issue of whether an expert is allowed to give testimony

regarding the characteristics and behaviors typically exhibited by sexually abused children. The Court held that such evidence is permissible, but also placed limits on the types of opinions that such experts can express, under MRE 702, in front of a jury:

Expert testimony is only admissible to cast light on the individual behaviors observed in the complainant, therefore the expert must not render an opinion that a particular behavior or a set of behaviors observed in the complainant indicates that sexual assault in fact occurred. We note that generally effective cross-examination will prevent the jury from drawing such a conclusion; however, a limiting instruction may also be necessary and should be given on request. [434 Mich at 725.]

While the Court recognized that MRE 704 provides that an expert opinion can “embrace an ultimate issue to be decided by the trier of fact,” the Court drew a distinction between expert testimony that a particular child was abused and testimony about the common characteristics of abused children:

Therefore, any testimony about the truthfulness of this victim’s allegations against the defendant would be improper because its underlying purpose would be to enhance the credibility of the witness. To hold otherwise would allow the expert to be seen not only as possessing specialized knowledge in terms of behavioral characteristics generally associated with the class of victims, but to possess some specialized knowledge for discerning the truth. \* \* \* We caution that to permit the expert witness to render a legal conclusion regarding whether abuse in fact occurred, exceeds the scope of the rule. The conclusion whether abuse occurred is outside the scope of expertise, and therefore not a proper subject for expert testimony. The jury must make its own determination from the totality of the evidence whether the complainant was sexually abused. [434 Mich at 727-728, 729.]

Finally, the *Beckley* Court noted the substantial influence expert testimony may have on a jury having to resolve difficult fact issues. This influence is the primary reason to forbid expert opinion on whether the alleged acts actually occurred:

To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat. Therefore admissibility of expert testimony, under the limitations set forth in this opinion, is an effort to accommodate the

uniqueness of the child victim's reactions while at the same time avoiding undue reliance on such testimony. [434 Mich at 722.]

In *Peterson*, the Court, recognizing that the multiple opinions in the *Beckley* decision made its holdings uncertain, again wrote to the limitations on expert medical testimony in child sexual assault cases. In so doing, the *Peterson* Court reaffirmed the language in *Beckley*, holding that a trial court cannot allow the expert to express an opinion on the credibility of the complainant's allegations, or a conclusion as to whether the charged abuse actually occurred:

Thus, the following may be discerned from the opinions in *Beckley*: Seven justices agreed that syndrome evidence is not admissible to demonstrate that abuse occurred and that an expert may not give an opinion whether the complainant is being truthful or whether the defendant is guilty. \* \* \* We continue to adhere to these holdings and reaffirm their application to child sexual abuse cases. [450 Mich at 369.]

There, the Court found that the trial judge erred in permitting expert witnesses to improperly vouch for the credibility of the complainant. 450 Mich at 375-76.

The *Beckley* and *Peterson* decisions are consistent with a line of Michigan Court of Appeals decisions which found error, and often reversible error, where a medical expert witness express an opinion as to the credibility of the complainant in a sexual assault prosecution. See *People v Izzo*, 90 Mich App 727 (1979); *People v Draper*, 150 Mich App 481 (1986); *People v Garrison (On Remand)*, 187 Mich App 657 (1991).

Here, Dr. Simms's testimony that she had reached an opinion that this child sustained "probable pediatric sexual abuse" clearly violated the limitations placed on expert testimony in *Beckley* and *Peterson*. Dr. Simms was not giving testimony regarding generally common characteristics of sexually abused children, but was stating a personal and purportedly scientifically reliable opinion as to the truth of the allegations in this specific case. *Beckley* clearly states "Expert testimony is only admissible to cast light on the individual behaviors

observed in the complainant, therefore the expert must not render an opinion that a particular behavior or a set of behaviors observed in the complainant indicates that sexual assault in fact occurred.” 434 Mich at 725. Dr. Simms did not testify generally about behaviors of abused children, she testified about the complainant’s allegations, and that because Dr. Simms viewed the allegations as “clear, consistent, detailed or descriptive,” Dr. Simms believed there was “probable pediatric sexual abuse.” That *is* opinion on the credibility of the accuser.

As this Court explained in *Beckley*, jurors trying to determine who is telling the truth in these exceptionally difficult and serious cases will tend to rely on seemingly objective and scientifically reliable conclusions of experts, as the “much sought-after hook on which to hang its hat.” 434 Mich at 722. That testimony remained on the record throughout the trial, without an objection by defense counsel and without an instruction by the court to disregard Dr. Simms’s opinion. Under these circumstances, the jury was allowed to consider that opinion and have it influence their deliberations, despite its clearly impermissible and prejudicial nature.

The testimony of Dr. Simms’s opinion as to the credibility of the allegations invaded the province of the jury and denied Mr. Harbison his right to a fair trial. In this case, where Mr. Harbison denied the allegations of sexual activity between himself and his niece, and where the prosecution’s case was based solely on the complainant’s allegations without any physical evidence, the jurors may have had some serious doubts about the reliability of Ms. Harbison’s allegations. The opinion stated by this experienced medical expert would have had a significant influence on the jurors. If, based on Dr. Simms’s opinion testimony, the jurors believed that Ms. Harbison’s allegations were medically and scientifically valid, they would have disregarded any uncertainty or doubt that they had. In the absence of any instruction by the judge, the jurors were within their rights to consider Dr. Simms’s opinion testimony as relevant and admissible during

their deliberations. Because Mr. Harbison was denied his state and federal constitutional right to a fair trial through the improper admission of evidence that likely affected the outcome of his trial his convictions must be vacated.

**SUMMARY AND RELIEF**

WHEREFORE, for the reasons expressed above, this Court should either grant leave to appeal, peremptorily reverse the decision of the Court of Appeals and order a new trial for Mr. Harbison, or in the alternative hold this case in abeyance pending the outcome of *People v Bentz*, 501 Mich 915 (2017).

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Brett DeGroff

BY: \_\_\_\_\_

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