IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

William B. Murphy, P.J., and Patrick M. Meter and Amy Ronayne Krause, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

BRANDON JAMES HARBISON,

Defendant-Appellant.
_____/

Supreme Court No. 157404

Court of Appeals No. 326105

Circuit Court No. 13-18686 FC

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

(ORAL ARGUMENT REQUESTED)

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Table of Contents

Index of Authorities i

Statement of Jurisdiction iii

Statement of Questions Presented iv

Procedural History 1

Statement of Facts 3

I. The prosecution's admission of Dr. N. Debra Simms' expert testimony that the complainant suffered "probable pediatric sexual abuse" violated this Court's decision in *People v Peterson*. 13

II. The erroneous admission of Dr. N. Debra Simms' testimony that the complainant suffered "probable pediatric sexual abuse" was plain error requiring reversal of Mr. Harbison's convictions. 20

Summary and Relief 26

Attachment 1-2

Appendix

Index of Authorities

Cases

Edry v Adelman, 486 Mich 634 (2010) 13

Knowles v People, 15 Mich 408 (1867) 13, 17, 20, 21

People v Armstrong, 490 Mich 281 (2011) 23

People v Babcock, 469 Mich. 247 (2003) 13

People v Beckley, 434 Mich 691 (1990) ..... passim

People v Bentz, 501 Mich 1057 (2018) 22, 23

People v Carines, 460 Mich 750 (1999) 20

People v Chevis, unpublished per curiam opinion of the Court of Appeals issued October 8, 2013 (Docket No. 304358) 21, 22

People v Dobek, 274 Mich App 58 (2007) 22

People v Douglas, 493 Mich 557 (2014) 17

People v Feely, 499 Mich 429 (2016) 13

People v Ginther, 390 Mich 436 (1973) ..... passim

People v Gresham, unpublished per curiam opinion of the Court of Appeals issued December 7, 2010 (Docket No. 293580) 21

People v Harbison, unpublished Order of the 48th Circuit Court issued September 10, 2015 (Docket No. 13-18686-FC) 1

People v Harbison, unpublished Order of the 48th Circuit Court issued July 28, 2016 (Docket No. 13-18686-FC) 1, 9, 25

People v Harbison, unpublished Order of the Court of Appeals issued April 25, 2016 (Docket No. 326105) 1

People v Harbison, unpublished opinion per curiam of the Court of Appeals issued January 26, 2017 (Docket No. 326105) (*Harbison I*) 1, 11

People v Harbison (On Remand), unpublished per curiam opinion of the Court of Appeals issued January 23, 2018 (Docket No. 326105) (*Harbison II*) 2, 18

People v Harbison, 501 Mich 897 (2017) 2

People v Harbison, __ Mich __; 911 NW2d 199 (2018).....2

People v Izzo, 90 Mich App 727 (1979) 17

People v Jackson, unpublished per curiam opinion of the Court of Appeals issued April 29, 2010 (Docket No. 283092) 21, 22

People v Kowalski, 492 Mich 106 (2012).....13

People v McGillen, #2, 392 Mich 278 (1974) 15, 17, 21

People v Musser, 494 Mich 337 (2013).....20, 22, 23

People v Peterson, 450 Mich 349 (1995) ..... passim

People v Smith, 425 Mich 98 (1986) ..... passim

People v Trakhtenberg, 493 Mich 38 (2012).....23

Puckett v United States, 556 US 129 (2009).....20, 23

United States v Bailey, 444 US 394 (1980) 13, 17, 20, 21

Constitutions, Court Rules

Const 1963, art 1, § 17 14

US Const, Am XIV 14

MRE 702.....15

MRE 704.....15

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 had jurisdiction to consider this application for leave to appeal pursuant to MCR 7.303(B)(1) and maintains jurisdiction.

Statement of Questions Presented

I. Did the prosecution's admission of Dr. N. Debra Simms' expert testimony that the complainant suffered "probable pediatric sexual abuse" violate this Court's decision in *People v Peterson*?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. Was the erroneous admission of Dr. N. Debra Simms' testimony that the complainant suffered "probable pediatric sexual abuse" plain error requiring reversal of Mr. Harbison's convictions?

Court of Appeals made no answer.

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-Appellant 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. (46a-47a)

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. (51a) Mr. Harbison filed a Motion for New Trial or Resentencing in the circuit court on August 19, 2015. The circuit court denied a new trial and denied an evidentiary hearing, but granted resentencing. (52a-55a) *People v Harbison*, unpublished Order of the 48th Circuit Court issued September 10, 2015 (Docket No. 13-18686-FC). (56a) On January 21, 2016 Mr. Harbison was resentenced to the same terms. (57a-59a)

Mr. Harbison filed a Brief on Appeal in the Court of Appeals, concurrently with a Motion to Remand on March 18, 2016. The Court of Appeals granted the motion to remand on April 25, 2016. *People v Harbison*, unpublished Order of the Court of Appeals issued April 25, 2016 (Docket No. 326105). (60a) A hearing was held pursuant to *People v Ginther*, 390 Mich 436, 443-444 (1973) June 2, 2016. (61a-216a) On July 28, 2016, the circuit court granted a new trial. *People v Harbison*, unpublished Order of the 48th Circuit Court issued July 28, 2016 (Docket No. 13-18686-FC). (217a-233a) 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*). (234a-241a)

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). (242a) 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 II*). (243a-251a) Mr. Harbison again sought leave to appeal to this Court, which ordered oral arguments on the application and ordered this supplemental brief. *People v Harbison*, __ Mich __; 911 NW2d 199 (2018). (252a)

Statement of Facts

2014 Trial Testimony

The complainant had a tumultuous childhood involving a drug-addicted mother, Child Protective Services visits, and living with two foster families. (17a-19a, 22a) At age 12, while with her first foster family, the complainant made accusations of sexual abuse against her uncle, Brandon Harbison. (16a)

The complainant 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 grandmother's home. (21a) One detail the complainant did provide was that her brother was present in the bedroom during the abuse at her grandmother's house. (20a)

Dr. N. Debra Simms testified as an expert witness for the prosecution. Dr. Simms testified she was the Section Chief for the Center for Child Protection at Helen DeVos Children's Hospital, and that she had been employed there since 2006. (24a) She also testified she is the medical director at the Safe Harbor Children's Advocacy Center in Allegan County and at the Ottawa County Children's Advocacy Center as well as her role at the Center for Child Protection at the Helen DeVos Children's Hospital. (26a) She testified she is board certified in pediatrics, as well as the sub-specialty of "child abuse pediatrics." (25a) She testified she had participated in research studies concerning child sexual abuse and examination, and that she had examined thousands of children who had been sexually abused. (25a-26a) She testified she had previously been qualified as an expert in "child maltreatment," "child physical abuse," and "child sexual abuse." (26a) Dr. Simms testified she has map of Michigan's 83 counties on which she colors the counties she has testified in, and she had so far testified in 32 counties. (27a) The circuit court recognized Dr. Simms as an expert in "child sexual abuse diagnostics and treatment." (27a)

Dr. Simms testified the complainant's physical exam did not show any definitive signs of sexual contact or abuse, but maintained that many sexually abused children had "normal" physical exams. (34a) Dr. Simms also made a conclusion that the complainant had been sexually abused:

> Q Did you have a diagnosis based on your exam and history?
>
> A Yes, ma'am.
>
> Q What was that?
>
> A Probable pediatric sexual abuse. (35a)

The circuit 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 In an attempt to allow pediatricians that do child abuse evaluations to communicate with one another effectively, what I may look at and say this is concerning, and someone else may say it's suspicious, and someone else may say it's this or it's that, what happened is there became a national consensus that we need to look at all of the evaluations and we need to be on the same page. We need to look at how is it that we are evaluating these patients and how are we coming to a conclusion. And, what occurred is that instead of using various and sundry words to describe the outcome of these evaluations, an attempt was made to standardize this by saying if there is no disclosure of abuse and it is a normal exam with no concerning situations, this means that there are no medical indications of abuse at this time, and that is a negative evaluation. If—other criteria exists but it's what we would consider a lower form of history. 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. If the child makes a statement but the statement is limited because the child may have a developmental disability, they may be young, they may not be able to really tell me what has happened to their body, then that can be possible pediatric sexual abuse. They're making a statement but for some reason they're not able to be clear, consistent, detailed and descriptive like with the headache analogy. To get a diagnosis of definite pediatric sexual abuse we have very high tough standards. You have to be pregnant, you have to have a sexually transmitted disease that does not come from anything other than direct sexual contact. There has to be a video, a picture or an eyewitness to you being abused. Or, you have to have physical examination findings that have no other explanation than penetrating trauma to the inter-vaginal area. That's a really tough standard. So, that's our definite. Then, clear, consistent, detailed and descriptive history is probable, and then we have the other 2 categories for less than that.
>
> Q You refer to a WE have this standard. Who is WE?
>
> A The WE are the individuals that do pediatric sexual abuse evaluations nationwide, nationwide. We have this standard. So when I'm communicating with Dr. Chris Greely down at Children's Hospital in Texas, when I say I have this then he knows that the criteria that I'm using. So for individuals that do this on a regular basis, there's no rule to it because as a physician you can choose to do what you want to do, but it's basically a practice standard for those of us that are professionals in the field. (41a-44a)

The court did not give a jury instruction to disregard Dr. Simms' statement of her medical opinion that the complainant had been sexually abused.

The jury began deliberations on November 20, 2014 and continued deliberating until the next day when it returned a guilty verdict. (48a-50a)

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. (70a) Mr. Hunter was aware that the complainant had told police her brother had witnessed the abuse she was alleging. (70a) Mr. Hunter was aware that police had spoken with the brother, and that the brother told police he

never saw any abuse. (71a) Mr. Hunter mistakenly thought that the brother had himself been convicted of abusing the complainant.[1] (77a) When asked, "why didn't you call [the brother] as a witness in Mr. Harbison's defense," Mr. Hunter answered, "I don't know." (72a) After review of the police reports in which the complainant alleged the brother witnessed the abuse, and the complainant's trial testimony where she again claimed the brother witnessed the abuse, Mr. Hunter was again asked why he didn't call the brother to refute the claim. Mr. Hunter said "I have no idea." (89a) Mr. Hunter also admitted that the morning of trial he was not ready for the brother to be called as a witness, and that he had already forgone the opportunity to call him. (90a) Mr. Hunter was asked:

> Q: So you can't today give us any strategic reason not to be prepared with [the brother's] testimony as trial began?
>
> A: Right. (92a)

Mr. Hunter was also aware that the complainant had made allegations of abuse against her mother's boyfriend, Elias Garcia. (74a) Mr. Hunter investigated those allegations, and determined they were false or did not result in charges. (75a) Mr. Hunter spoke with Mr. Garcia. (82a) Mr. Hunter was aware that prior false allegations by a complainant were admissible. (76a) Mr. Hunter could not recall why he did not use this evidence in Mr. Harbison's defense. (76a) 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." (87a-88a) The prosecution stipulated that "Allegan County never pursued criminal charges against Elias Garcia as a result of allegations made by [the complainant]." (103a)

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[1] The prosecution conceded at the evidentiary hearing that the brother was never convicted or adjudicated as having abused the complainant. (98a)

The complainant's brother also testified at the evidentiary hearing. The brother testified that he was aware the complainant had accused Mr. Harbison of abusing her. (105a) The brother was also aware that the complainant had said the brother was present during the abuse. (105a) However, the brother never saw Mr. Harbison have sexual contact with the complainant, and never saw Mr. Harbison try to have sexual contact with the complainant. (105a-106a) The brother 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." (106a) The brother said Mr. Hunter never contacted him. (106a) If he had, the brother would have told Mr. Hunter he never saw any sexual contact between Mr. Harbison and the complainant, and that he would testify at trial. (107a)

The brother also testified that at one point the complainant accused him of having sexual contact with her, but that it never happened. (107a) The brother testified that if Mr. Hunter had asked him about allegations made by complainant toward him, he would have said they were untrue. (107a) The brother also testified he is fearful of being falsely accused by the complainant:

> Q: . . . 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. (121a)]

Elizabeth Allred also testified. Ms. Allred testified she previously dated Brandon Harbison, and they have children in common. (133a) Ms. Allred sat in on all the meetings between Brandon Harbison and Mr. Hunter, "so that we can understand completely what was

going on." (134a) Ms. Allred testified that she and Mr. Harbison made Mr. Hunter aware that the complainant had previously made false allegations against Elias Garcia and her brother. (135a) Ms. Allred saw the police report which alleged that the brother was present when Brandon abused the complainant. (135a-136a) Ms. Allred and Mr. Harbison asked that this be used in Mr. Harbison's defense. (135a)

> Q: So did you ever tell Mr. Hunter, trial counsel, that he needed to contact [the brother]?
>
> A: Yes, we did and he said he would. (139a)
>
> . . .
>
> 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 [the brother] 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. (140a-141a)
>
> . . .
>
> Q: Ms. Allred so just to be clear, you and Brandon did ask Mr. Hunter to speak with [the brother].
>
> A: Yes, we asked him more than once and he did not. He didn't help really at all. (140a-141a)

Ms. Allred testified that although she had children in common with Mr. Harbison, their relationship ended on bad terms. (138a) She testified that she told appellate counsel before the hearing she and Brandon had problems and that she "didn't want to be here [at the hearing]." (137a)

Anjennette Harbison also testified. Ms. Harbison is the complainant's mother, and Brandon Harbison's sister. (143a) Ms. Harbison testified her daughter had previously made allegations of abuse against her boyfriend, Elias Garcia, and her son. (144a) Ms. Harbison was

present when police came to interview Elias Garcia in connection with the complainant's allegations against him. (145a) 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. (146a) Ms. Harbison testified that Mr. Garcia was subsequently deported, and that the complainant continued to view him as her father, and often expresses a desire to see him. (147a) The complainant does not harbor any fear or anger toward Mr. Garcia. (147a) Ms. Harbison also testified that the complainant told her any allegations against the brother were untrue. (165a) Ms. Harbison testified she had never been contacted by Mr. Hunter, and if she had, she would have told him the same things she testified to, and that she would so testify at trial. (166a)

On July 28, 2016 the circuit court issued on opinion which concluded trial counsel had not been ineffective regarding failure to investigate false allegations against Elias Garcia, but that trial counsel had been ineffective regarding failure to investigate the brother. As to the false allegations against Elias Garcia, the circuit court focused only on whether Elias Garcia himself should have been called as a witness. *People v Harbison*, unpublished order of the 48th Circuit Court issued July 28, 2016 (Docket No. 13-18686-FC). (217a-233a) The court noted that Mr. Garcia was out of the country during trial. *Id*. The court concluded it was "not persuaded that Garcia had any helpful and admissible testimony with which to challenge the victim's credibility." *Id*.

As to the failure to investigate the brother, the circuit court concluded trial counsel had provided deficient performance, there was no strategic basis for the failure, and the failure prejudiced Mr. Harbison's defense. The circuit court concluded in part:

> 2) The police then interviewed [the brother], who denied that he was present during any such conduct. [The brother] testified at the Ginther hearing to the same effect. It is manifest that this information offered the potential for the

defense to make a meaningful challenge to the victim's credibility and place before the jury a substantial contradiction to the victim's testimony on some of the CSC allegations.

3) The police report information clearly put trial counsel on notice of this contradictory testimony. Also, [the brother] was named on the prosecutor's amended witness list. This was more than sufficient to warrant an interview of [the brother] by trial counsel acting in a reasonably diligent manner to investigate [the brother's] testimony, whether to harvest support for his clients denial of CSC, or to challenge the victim's credibility or to meet his testimony if he were called as a prosecution witness. Clearly, [the brother's] testimony that he was not an eyewitness to CSC events would have been admissible. Viewing the matter objectively, no reasonable diligent criminal defense attorney would fail to interview a witness of such potential importance.

4) Trial counsel in this case, Rick Hunter, never interviewed [the brother]. He admitted this at the Ginther hearing (Transcript 6/2/16, P 12. Line 13-14). Hunter never planned to call [the brother] as a witness (Transcript 6/2/16, P 31, Line 12, 21-22). This Court believes trial counsel was being candid in acknowledging these matters, although he was obviously struggling at the Ginther hearing with his memory of events and the roles of various actors in this case. . . .

5) Mr. Hunter failed to give a satisfactory explanation, practical or strategic, for his failure to interview [the brother] or call him as a witness. (Transcript 6/2/16, Page 32-33). When asked point blank to explain ". . . why did you not call [the brother] to say that he did not witness the abuse?", Hunter's response was "I have no idea" (Transcript 6/2/16, P 30, Line 14).

. . .

7) In a CSC prosecution like this, the importance to a jury of evaluating the credibility of a victim vis a vis the credibility of an eyewitness named by the victim who contradicts the victim's testimony, is hard to overstate. Trial counsel's performance fell far below the constitutional standard of reasonable performance in failing to interview [the brother] and present him as a witness.

. . .

9) A reasonable standard of performance requires that trial counsel make strategic choices based on a reasonable investigation, basing strategic decisions on the information available at the time. By failing to interview [the brother] and check local juvenile court records, trial counsel failed to meet the reasonable standard of performance. Because he failed to perform even a cursory investigation of [the brother's] testimony and local court records, trial counsel's claim of a sensible "strategic rationale" for not calling [the brother] cannot be sustained. "[S]trategic

choices made after less than full investigation will not pass muster . . .” *Dickerson v. Bagley*, 453 F3d 690 at 696 (CA 6, 2006).

10) We note in passing that Defendant’s pretrial attempt to mount an alibi defense was problematic from the outset, since it rested on an assertion that defendant had no opportunity to sexually abuse the victim over a period of approximately 3 years. When the late notice of his alibi defense resulted in an unfavorable ruling against this defense in a pretrial motion hearing, the relative importance of challenging the victim’s credibility and corroborating the defendant’s denial defense with [the brother’s] testimony increased substantially.

. . .

12) It is worth noting that the credibility of [the brother’s] testimony would likely be hotly contested by the prosecution at any retrial. It was argued at the Ginther hearing that [the brother] has a juvenile adjudication for sexually abusing a different minor female (not the victim). We note that the admission into evidence at retrial of [the brother’s] juvenile adjudication is generally not admissible under MRE 608 and 609(e). It is impossible to predict whether another jury would find [the brother] credible or not. Similarly, we cannot predict how the jury’s evaluation of [the brother’s] credibility would influence their evaluation of [the complainant’s] credibility. Suffice it to say that these determinations hold the potential to be highly influential as to guilt or innocence.

. . .

14) This Court [finds] that trial counsel’s deficient performance was prejudicial to the defendant. As a result, the Appellant lost a critically important opportunity to contest the credibility of the victim’s statements to police and a significant portion of the victim’s testimony and to corroborate the Defendant’s denial of grave sexual misconduct charges. Due to this ineffective assistance of trial counsel, this court has lost confidence in the integrity of the outcome of the first trial. The Court notes that the appropriate test of prejudice is “reasonable probability” of a different result but for the deficient performance, not the certainly of a different result. That standard has been amply satisfied in this case. (227a-229a)

Appellate Proceedings

The Court of Appeals reversed the circuit court and affirmed the conviction. *Harbison I*. (234a-241a) Concerning Dr. Simms’ 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 also explained when she will give a diagnosis of possible pediatric sexual abuse or definite pediatric sexual 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. (240a)

This Court vacated that portion of the Court of Appeals opinion and remanded in light of *Peterson*. (243a) 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. (248a)

The Court of Appeals once again affirmed Mr. Harbison's conviction. (243a-251a) Mr. Harbison again sought leave to appeal to this Court, which ordered oral argument on the application. (252a)

Argument

I. The prosecution's admission of Dr. N. Debra Simms' expert testimony that the complainant suffered "probable pediatric sexual abuse" violated this Court's decision in *People v Peterson*.

Standard of Review

A circuit court's decisions to admit or exclude evidence are reviewed for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639 (2010). A circuit court abuses its discretion by selecting an outcome outside the range of principled outcomes, *People v Babcock*, 469 Mich. 247, 269 (2003), or when it makes and error of law, *People v Feely*, 499 Mich 429, 434 (2016). Questions of constitutional law underlying evidentiary rulings are reviewed de novo. *People v Kowalski*, 492 Mich 106, 119 (2012).

Analysis

As the United States Supreme Court has said "[t]he Anglo–Saxon tradition of criminal justice, embodied in the United States Constitution . . . makes jurors the judges of the credibility of testimony offered by witnesses. It is for them . . . to say that a particular witness spoke the truth or fabricated a cock-and-bull story." *United States v Bailey*, 444 US 394, 414 (1980). This Court has long held that when testimony is before the jury, "the weight and credibility of every portion of it is for them . . . to determine." *Knowles v People*, 15 Mich 408, 412 (1867).

This long-established rule was applied in *Peterson's* three holdings: "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." 450 Mich at 352. Dr. N. Debra Simms violated all three of those holdings in her testimony against Mr. Harbison. Dr. Simms testified she diagnosed the complainant with "probable pediatric sexual abuse." That was testimony that "sexual abuse occurred." Dr. Simms based her diagnosis solely on the

complainant's assertions. That was testimony that "vouch[ed] for the veracity of the victim." And because the assertions Dr. Simms vouched for were that Mr. Harbison committed the abuse, she "testif[ied] whether the defendant is guilty." 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); *Peterson*, 450 Mich 349.

A portion of Dr. Simms' testimony was unobjectionable. Dr. Simms is a medical doctor who conducted a physical examination of the complainant. (32a-35a) Dr. Simms testified about the physical findings from that examination, as well as general information about the female anatomy. (32a-35a) Dr. Simms testified that the examination "did not show any acute or remote indications of trauma . . . ." (34a) Dr. Simms testified the complainant's hymen was intact, with a "very small notch." (33a-34a) Dr. Simms explained that the notch was a "non-specific finding" because it could have been caused by commonly occurring events or have been "developmental in nature." (34a) Dr. Simms was qualified by her knowledge, experience, training and education to testify to all of this, and none of this required Dr. Simms to rely on the veracity of the complainant. Dr. Simms testimony on these points was permissible. *See People v Smith*, 425 Mich 98, 114 (1986). Had Dr. Simms found *physical* evidence of abuse, she would have been able to testify about those findings. *Id*. Where Dr. Simms violated *Peterson* was when she drew a conclusion on the likelihood of abuse based solely on the complainant's assertions.

Smith held that medical doctors could testify about their physical findings but their testimony should be limited to physical findings. In *Smith*, like here, the doctor's physical examination revealed no physical evidence of assault, but the doctor testified he believed the complainant had been sexually assaulted. *Id*. at 102-103. This Court held that testimony should have been excluded because the "opinion that the complainant had been sexually assaulted was

based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but, rather, on the emotional state of, and the history given by, the complainant. Like *McGillen # 2*, this opinion was, in effect, an assessment of the victim's credibility." *Id*. at 112-113.

In *Beckley*, this Court considered the issue of whether an expert is allowed to give testimony regarding the characteristics and behaviors typically exhibited by sexually abused children. This 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. [434 Mich at 725.]

While this Court recognized that MRE 704 provides that an expert opinion can "embrace an ultimate issue to be decided by the trier of fact," this 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. [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*, this 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 an 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 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.]

Several experts violated this principle in *Peterson*. Among them was Dr. Anselma Ramilo who testified she physically examined the complainant, and though she found no physical evidence of abuse, "she strongly believed the victim had been sexually abused on the basis of contents of the medical history . . . ." *Id*. at 354. Social worker Kathy Jo Gillan testified about the profile of a sexual abuse victim, and her opinion that the complainant "showed behavior manifestations that were symptomatic of sexual abuse." *Id*. at 355. Social worker Margaret Green testified she had treated about a hundred sexually abused children, and one way she verified their stories was through reenactments through drawing or play. *Id*. Ms. Green testified she so "verified" that complainant's story. *Id*. Finally, clinical psychologist Thomas O'Melia testified that there were "prototypes for both sexual abuse victims and perpetrators," and that the complainant's "symptoms were consistent with those of a sexual abuse victim." *Id*. at 355-356.

This Court concluded ". . . the experts in [*Peterson*] improperly vouched for the veracity of the child victim." *Id*. at 375-376. This Court observed that no witness "stated that the child

victim was telling the truth. However, the risk here goes beyond such a direct reference." *Id*. Further, "as we have cautioned before, the jury in these credibility contests is looking 'to hang its hat' on the testimony of witnesses it views as impartial." *Id*. In general terms, *Peterson* affirmed "the general prohibition on testimony 'vouch[ing] for the veracity of a victim.'" *People v Douglas*, 493 Mich 557, 583 n8 (2014).

As discussed above, this aspect of *Peterson* was not new. *See Bailey,* 444 US at 414; *Knowles*, 15 Mich at 412. Also, it was not novel in this context. Michigan courts were already finding reversible error where a medical expert witness expressed an opinion as to the credibility of the complainant in a sexual assault prosecution. *See People v Izzo,* 90 Mich App 727 (1979); *Smith*, 425 Mich at 114; *People v McGillen #2,* 392 Mich 278 (1974).

Here, Dr. Simms' testimony that she had reached an opinion that the complainant sustained "probable pediatric sexual abuse" clearly violated the limitations placed on expert testimony in *Peterson* and the many previous cases prohibiting witness vouching. Specifically, *Peterson*, *Smith*, and *McGillen #2* each addressed whether medical doctors could opine on their personal views about the probability of the veracity of a complainant's assertions based on factors beyond evidence of a physical examination. Generally, *Peterson,* as well as *Smith*, *McGillen #2*, *Bailey*, *Knowles* and many other cases, stands for the prohibition on testimony vouching for the veracity of a complainant. That prohibition is not defeated by framing the vouching as "probable," or wrapping it in clinical terms. As *Peterson* said, even if a witness does not explicitly state they believe the witness, "the risk here goes beyond such a direct reference." *Peterson*, 450 Mich at 375-376.

The Court of Appeals twice found no error in Dr. Simms' testimony in this case, most recently reasoning that Dr. Simms did not opine on whether the complainant was abused by Mr.

Harbison, but only diagnosed the complainant with "probable pediatric sexual abuse." *Harbison II*. (243a-251a) The Court of Appeals observed that the term "probable pediatric sexual abuse" is "a term of art used by individuals that do pediatric sexual abuse evaluation nationwide," and that it can be made "with or without physical examination findings of abuse based upon how clear, consistent, detailed or descriptive the child's vocalized history" of the abuse is." *Id*. (internal quotation omitted) The Court of Appeals observed "[Dr. Simms] never stated that she personally, or as an expert, found the victim's account of the abuse to be credible." *Id*. The Court of Appeals reasoning amounts to little more than a disagreement with the specific and general holdings of *Peterson* and its precursors.

In the course of their practice, Dr. Simms and her colleagues certainly have occasion to ascertain the veracity of allegations of abuse. That they have established guidelines, standards and terminology is certainly prudent. But it does not change the nature of what they are doing. Dr. Simms testified she categorizes her results as "negative evaluation," "possible pediatric sexual abuse," "probable pediatric sexual abuse," and "definite pediatric sexual abuse." (41a-43a) It exceeds the bounds of credulity to deny this is an opinion about whether a complainant was abused. The scale obviously assigns a probability to just that fact. To the extent that practitioners make this finding based on the assertions of the complainant alone, the finding is inadmissible under *Peterson*. The Court of Appeals was impressed that these are national standards, and that they are based on the evaluator's opinion that the complainant's allegations are "clear, consistent, detailed or descriptive." *Harbison II*. (248a) That was true of the testimony in *Peterson* as well. Mr. O'Melia was a psychologist and Ms. Gillan was a social worker testifying about the prototype for sexual abuse victims and its application to the complainant. *Peterson*, 450 Mich at 355-356. Ms. Green was a social worker who testified about a technique

she applied approximately a hundred times to "verify" allegations through reenactment. *Id*. at 355. That there are standards behind Dr. Simms' assessment of the veracity of the complainant does not change that Dr. Simms is assessing the veracity of complainant. That the assessment is dressed up in national standards and purported to carry the force of an entire profession, only worsens the dangers that "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." *Beckley*, 434 Mich at 722.

The Court of Appeals assertion that "[Dr. Simms] never stated that she personally, or as an expert, found the victim's account of the abuse to be credible," does not carve out an exception to *Peterson*. In *Peterson*, much of the testimony was not specifically opining on credibility findings of the witness, but application of professional standards to the situation. The *Peterson* court specifically said "the risk here goes beyond such a direct reference." *Peterson*, 450 Mich at 375-376. Dr. Simms' testimony that the complainant suffered "probable pediatric sexual abuse" violated *Peterson* and its precursors.

II. The erroneous admission of Dr. N. Debra Simms' testimony that the complainant suffered "probable pediatric sexual abuse" was plain error requiring reversal of Mr. Harbison's convictions.

Standard of Review

The plain error test has four prongs: 1) "error must have occurred," 2) "the error was plain, i.e., clear or obvious," 3) "the plain error affected substantial rights," and 4) the "error resulted in the conviction of an actually innocent defendant or . . . seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *People v Carines*, 460 Mich 750, 763 (1999). An error is "clear or obvious" if it is not "subject to reasonable dispute." *Puckett v United States*, 556 US 129, 135 (2009). An error affects substantial rights if the error affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763.

Analysis

The admission of Dr. Simms' testimony meets all four prongs of the plain error test. As described above, admitting her testimony violated *Peterson* and its long line of precursors, establishing error occurred. The testimony Dr. Simms gave in this case is identical to testimony which has been repeatedly held to violate *Peterson*, establishing the error was clear. Because the only evidence against Mr. Harbison was the uncorroborated testimony of the complainant, the only question the jury faced was whether to believe the complainant. Dr. Simms gave the jury a hook on which to "hang its hat," affecting Mr. Harbison's substantial rights. Finally, given the significant evidence presented at the *Ginther* hearing, there is much reason to believe Mr. Harbison is actually innocent.

Courts have repeatedly held that witnesses may not vouch for other witnesses. *See Bailey*, 444 US at 414; *Knowles*, 15 Mich at 412; *People v Musser*, 494 Mich 337, 349 (2013). Michigan

courts have applied that general rule in the specific context of limiting medical doctors to basing their conclusions on physical findings rather than the veracity of the complainant's statements. *See Smith*, 425 Mich at 114; *McGillen #2*, 392 Mich 278. Even more specifically, the diagnosis of "probable pediatric sexual abuse" on the scale used by Dr. Simms violates the prohibition of vouching for the veracity of a complainant. *See People v Gresham*, unpublished per curiam opinion of the Court of Appeals issued December 7, 2010 (Docket No. 293580), *attached*; *People v Chevis*, unpublished per curiam opinion of the Court of Appeals issued October 8, 2013 (Docket No. 304358), *attached*; *People v Jackson*, unpublished per curiam opinion of the Court of Appeals issued April 29, 2010 (Docket No. 283092), *attached*. The Michigan Attorney General even conceded that exactly this testimony from exactly this witness is erroneous. *People v Bentz*, Supplemental Brief of Appellee People of the State of Michigan, at 15-16, *attached*. It is difficult to imagine an error more clear or obvious.

Bailey, *Knowles*, *Smith*, and *McGillen #2* and their application have already been discussed above. In *Gresham*, *Chevis*, and *Jackson*, the Court of Appeals applied those precedents to identical testimony as that given by Dr. Simms here, and found it erroneous. In *Gresham*, Dr. Sara Jane Brown testified she conducted a physical examination which was normal, but nonetheless she reached a diagnosis of "probable pediatric sexual abuse" "based on the consistent and detailed statements provided by the victim during the medical history exam and to the investigating officers beforehand." The Court of Appeals held:

> The testimony clearly reveals that Dr. Brown's diagnosis was predominantly based on the statements of the victim, and in the absence of any medical findings or physical evidence of sexual abuse, we conclude that the testimony amounted to an improper vouching of the veracity of the victim. *Peterson*, 450 Mich. at 352–353; *Smith*, 425 Mich. at 112–113. [*Gresham*, at 2.]

In *Chevis*, the prosecution expert at issue was the same as in Mr. Harbison's case—Dr. N. Debra Simms. There, she testified a physical examination was normal, but "in giving a history, he was clear, consistent, detailed, and descriptive. And—I reached a conclusion of probable pediatric sexual abuse." *Chevis*, at 4. The *Chevis* court found this testimony "appeared to indicate that her conclusion of probable pediatric sexual abuse was not based on objective physical evidence, but rather simply on the child's statements and claims, which, if true, would be improper under *Smith*." *Id*. at 6.

In *Jackson*, again, none other than Dr. N. Debra Simms testified she diagnosed the complainant with "probable pediatric sexual abuse" based on allegations rather than physical findings. Relying on *Peterson* and its precursors, the court concluded:

> In the absence of any physical evidence of abuse, Dr. Simms's diagnosis that probable pediatric sexual abuse occurred constituted improper vouching of the complainant's credibility because her opinion was based solely on her assessment of the credibility of the complainant and the complainant's mother. Dr. Simms was qualified as a medical doctor, not as an assessor of credibility. [*Jackson*, at 2.]

Finally, this Court very recently dealt with this exact type of testimony from Dr. N. Debra Simms in *People v Bentz*, 501 Mich 1057 (2018). There, the issue of Dr. Simms' testimony was framed in terms of ineffective assistance of counsel for failure to object to the testimony. This Court remanded for a *Ginther* hearing, but while this Court was considering the matter, the Michigan Attorney General conceded the testimony was prohibited:

> Dr. Simms' assessment that, based on the victim's medical history, A.B. was subject to "probable pediatric sexual abuse," is technically erroneous, but it lacks much tainting force. An expert should not vouch for the veracity of a victim because matters of credibility are for the jury. *People v Dobek*, 274 Mich App 58, 71 (2007); *People v Peterson*, 450 Mich 349, 352 (1995). Because the jury is charged with determining the facts of a case, a witness's opinion on the credibility of another is generally not helpful. See *People v Musser*, 494 Mich 337, 349 (2013). Where the jury observes a testifying witness, another witness's assessment of credibility, even that of a pertinent expert, is "superfluous" because "the jury [is] in just as good a position to evaluate the victim's testimony." *People*

> *v Smith*, 425 Mich 98, 109 (1986). Those statements lack probative value. *Musser*, 494 Mich at 349. [*People v Bentz*, Supplemental Brief of Appellee People of the State of Michigan, at 15-16, *attached*.]

Given the long history of Michigan courts finding error in witness vouching, error in medical doctors testifying beyond their physical findings, error in the diagnosis of "probable pediatric sexual abuse" without support from physical findings, and specifically error in this exact testimony from Dr. N Debra Simms to violate *Peterson* and its precursors, this error is not "subject to reasonable dispute." *Puckett*, 556 US at 135. If there were any kind of reasonable dispute to be made, the prosecution would certainly have done so in *Bentz*.

This error affected Mr. Harbison's substantial rights by affecting the outcome of the case. The only evidence against Mr. Harbison was the complainant's accusation. The jury's decision amounted to a referendum on her credibility. As this Court explained in *Beckley* "[t]o 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." 434 Mich at 722. Like in *Musser*, the "evidence offered against defendant was not overwhelming," and "assessing witness credibility was the pervasive issue for the jury." 494 Mich at 363-364.

This case is also like *People v Armstrong*, 490 Mich 281, 293 (2011) and *People v Trakhtenberg*, 493 Mich 38 (2012) in this regard. In those cases, the jury's decision "boiled down to whether the complainant's allegations of rape were true." *Armstrong*, 490 Mich at 293. In those cases, the error was not vouching for the complainant, but trial counsel foregoing a chance to challenge the credibility of the complainant. But when all the jury has to balance is the complainant's credibility, a challenge that removes weight from that factor can "tip[] the scales in favor of finding a reasonable doubt about defendant's guilt." *Id*. at 292. *See also Trakhtenberg*, 493 Mich at 57, quoting *Armstrong*, 490 Mich at 292. In this case, Dr. Simms put her thumb on

the scales of the jury's weighing of the complainant's credibility. This too will "tip[] the scales," especially when the jury has nothing else to weigh.

Finally, this Court should exercise its discretion to grant Mr. Harbison a new trial because he is actually innocent. At the 2016 *Ginther* hearing, appellate counsel presented evidence that the complainant had previously made false allegations against her mother's boyfriend and her brother, as well as evidence that the one detail from her allegations against Mr. Harbison which could corroborate them showed they were false.

The complainant's mother, Anjennette Harbison, testified that the complainant had previously made allegations of abuse against her boyfriend, Elias Garcia, and her son. (144a) Police responded to allegations against Mr. Garcia, but he was never arrested and no charges were ever filed. (146a) After that event died down, the complainant showed no anger or fear toward Mr. Garcia and, in Ms. Harbison's opinion, continued to think of Mr. Garcia like a father. (147a) The complainant also made allegations against her brother. At the *Ginther* hearing, Ms. Harbison testified the complainant told her those allegations were false. (165a) The brother also testified, and reiterated that allegations against him were false. (107a) The brother testified that when he sees his sister, he stays away from her or avoids being alone with her out of fear of being falsely accused by her. (121a)

The one detail from the complainant's allegations which could have corroborated them also proved false at the *Ginther* hearing. The complainant alleged that the brother was present for some incidents of abuse. (20a) The brother testified that was false, and he never saw Mr. Harbison have sexual contact with the complainant, or attempt to have sexual contact with the complainant. (105a-106a) Advised of these facts which the jury never heard, the circuit court granted a new trial. The circuit court observed "In a CSC prosecution like this, the importance to

a jury of evaluating the credibility of a victim vis a vis the credibility of an eyewitness named by the victim who contradicts the victim's testimony, is hard to overstate." *People v Harbison*, unpublished order of the 48th Circuit Court issued July 28, 2016 (Docket No. 13-18686-FC) (228a). The circuit court held determinations about the credibility of the complainant weighed against her brother "hold the potential to be highly influential as to guilt or innocence." (229a) The circuit court concluded "this court has lost confidence in the integrity of the outcome of the first trial. The Court notes that the appropriate test of prejudice is "reasonable probability" of a different result but for the deficient performance, not the certainly of a different result. That standard has been amply satisfied in this case." (230a) So too has the plain error standard, and this Court should grant Mr. Harbison a new trial.

Summary and Relief

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court to grant a new trial.

Respectfully submitted,

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