

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

ERNESTO EVARISTO URIBE

Defendant-Appellant

\_\_\_\_\_  
EATON COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

\_\_\_\_\_  
MICHAEL R. WALDO (P72342)

Attorney for Defendant-Appellant

Supreme Court No. \_\_\_\_\_

Court of Appeals No. 338586

Lower Court No. 13-20404 FC

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: MICHAEL R. WALDO (P72342)

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### **Statement Of Jurisdiction**

Defendant-Appellant was convicted in the Eaton County Circuit Court by jury trial, and a Judgment of Sentence was entered on May 18, 2017. A Claim of Appeal was filed on May 18, 2017 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated May 25, 2017, as authorized by MCR 6.425(F)(3).

The Court of Appeals affirmed Mr. Uribe's convictions and sentence on January 3, 2019. Mr. Uribe's application for leave to appeal in this Court is properly before this Court within 56 days of the Court of Appeals order affirming his convictions. MCR 7.302(C).

## **Judgment Appealed From And Relief Sought**

Ernesto Uribe was convicted of four counts of first-degree criminal sexual conduct, following a jury trial in the Eaton County Circuit Court before the Honorable Janice K. Cunningham. He was sentenced to four concurrent terms of 50 to 75 years.

In a 2-1 decision, the Michigan Court of Appeals affirmed Mr. Uribe's convictions on January 3, 2019. The dissenting Judge agreed with Mr. Uribe that he was denied his right to a fair trial based on the improper testimony of prosecution expert, Dr. Stephen Guertin. Dr. Guertin examined the complainant four years after the last alleged incident of abuse, at the behest of the investigating law enforcement officers. The trial court permitted Dr. Guertin to testify, over defense objection, as to specific statements made by the complainant during his examination, pursuant to MRE 803(4). Additionally, Dr. Guertin improperly opined that the complainant was indeed a victim of sexual abuse, even though his opinion was not based on any physical findings.

This case presents the Court with the opportunity to address a critical issue regarding the applicability of MRE 803(4), the hearsay exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment, where the purported "treatment" was not only directed by law enforcement, but where substantial time had elapsed between the alleged injury and the consult. This case exemplifies the problematic yet recurrent situation where a complainant's trial testimony is improperly bolstered with "statements made for purposes of medical treatment" where medical treatment was neither sought by the complainant nor provided given the lack of any symptoms and the passage of time.

This Court should grant leave to appeal because this issue is of major significance to the state's jurisprudence (MCR 7.305(B)(3)), and the decision in this case conflicts with the recently

published Court of Appeals opinion, *People v Shaw*, 315 Mich App 668; 892 NW2d 15 (2016). (MCR 7.305(B)(5)(b)). Additionally, leave should be granted because a material injustice to Mr. Uribe will result if these errors are left uncorrected. (MCR 7.305(B)(5)(a)).

Dr. Guertin's testimony was also problematic in that he expressly opined the complainant was a victim of sexual abuse. The courts below concluded that this error was, at least to some degree, invited by defense counsel's questioning and was adequately remedied by the trial court's curative instruction. Accordingly, this Court should grant leave to clarify the efficacy of a curative instruction where an expert invades the province of the jury and improperly opines on the pivotal issue for the jury to determine, (MCR 7.305(B)(3)), and to prevent a material injustice to Mr. Uribe. (MCR 7.305(B)(5)(a)).

In addition to these critical issues, Mr. Uribe has raised two other legal claims worthy of this Court's consideration as he was deprived of his right to present a defense and to the effective assistance of counsel. (MCR 7.305(B)(5)(a)).

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Michael R. Waldo

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

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Dated: February 28, 2019

## **Statement of Questions Presented**

- I. Did The Trial Court Abuse Its Discretion In Admitting Hearsay Testimony By Dr. Guertin Repeating The Complainant's Accusations, Thus Unfairly Bolstering The Complainant's Credibility?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- II. Did The Trial Court Abuse Its Discretion In Denying A Mistrial After A Prosecution Expert Testified That He Believed The Accusations Against Mr. Uribe Were True, Thus Encroaching On The Jury's Province As The Exclusive Finder Of Fact?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- III. Was Mr. Uribe's Right To Present A Defense Violated When The Court Refused To Admit Evidence That The Complainant's Father Had Previously Been Convicted Of Sexually Assaulting A Minor?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- IV. Was Mr. Uribe's Right To The Effective Assistance Of Counsel Under Our State And Federal Constitutions Violated Where Trial Counsel Failed To Advise Him Of The Mandatory 25-Year Minimum Sentence He Faced If Convicted As Charged? Did The Trial Court Abuse It Discretion When The Court Concluded Otherwise, Where The Record Is Clear Mr. Uribe Was Given Inaccurate Advice On The Maximum Sentence He Faced On The Record?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

## **Statement Of Facts**

### **Overview**

In September 2012, thirteen-year-old Vanessa Gomez alleged that several years earlier, between 2004 and 2008, her mother's ex-boyfriend, Ernesto Uribe, anally raped her on several occasions. Vanessa's allegations arose during a conversation with a friend from school, several years after her mother had stopped dating Mr. Uribe. Vanessa's friend told her she had been sexually abused, then Vanessa told her friend that she had also been abused. There were no witnesses to the alleged assaults. Medical evidence could neither confirm nor rule out that any abuse occurred.

Due to extensive pre-trial litigation, including an appeal granted by this Court concerning the admissibility of alleged prior misconduct pursuant to MCL 768.27a, Mr. Uribe was not tried until March 2017. A jury ultimately found Mr. Uribe guilty as charged of four counts of first-degree criminal sexual conduct (person under 13). The Honorable Janice K. Cunningham of the Eaton County Circuit Court sentenced Mr. Uribe to four concurrent terms of 50 to 75 years. In a split decision, the Michigan Court of Appeals affirmed Mr. Uribe's convictions. (attached as Appendix A)

This Court should grant Mr. Uribe's application for leave to appeal because he was deprived of his right to a fair trial for several reasons. First, the prosecution improperly bolstered Vanessa's testimony by eliciting her statements, pursuant to MRE 803(4), through Dr. Guertin, who examined Vanessa four years after the alleged abuse and only after she was referred by law enforcement. Second, Dr. Guertin improperly testified that he believed Vanessa had in fact been the victim of sexual abuse. Third, Mr. Uribe was deprived of his right to present a defense where the trial court precluded Mr. Uribe from introducing evidence that Vanessa's biological father

had previously been convicted of a CSC offense involving a minor. Finally, Mr. Uribe was deprived of his right to the effective assistance of counsel where he declined a five-year plea offer on the misapprehension that he faced a sentencing guidelines range of eleven to eighteen years if convicted, as opposed to the 25-year minimum required by statute if convicted.

## **Background**

Mr. Uribe met Vanessa's mother, Cathleen Ortez, in 2001. (II, 252) They began dating and moved in together soon thereafter. (II, 252) At the time they started dating, Ms. Ortez had two children, including the complainant, Vanessa Gomez.<sup>1</sup> (II, 252-253) Ms. Ortez had two additional children with Mr. Uribe, including their daughter, Jazmeen. (II, 252) The relationship ended in 2008 and Mr. Uribe moved out of the home. (II, 92, 263)

After Mr. Uribe moved out, he started dating Elizabeth Hall. He continued to spend time with his children, though they lived primarily with Ms. Ortez. Although Vanessa denied it, Ms. Hall stated that Vanessa always begged to accompany them when she and Mr. Uribe came to pick up her sisters. (III, 201-204)

## **Allegations**

In September 2012, about four years after Mr. Uribe moved out of Ms. Ortez's home, Vanessa disclosed that Mr. Uribe had previously sexually abused her over the course of several years, between 2004 and 2008. She was thirteen years old at the time of her disclosure, and between five and nine years old at the time of the alleged abuse.

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<sup>1</sup> Vanessa was born January 8, 1999. (II, 57)

Vanessa's disclosure arose during a conversation with her friend, Makayla, where Makayla first told Vanessa that she had been molested. Vanessa then told Makayla that she too had been molested. Vanessa told Makayla because she did not want Makayla to feel like she was alone. (II, 79) Vanessa then told her other friend, Jamara, and then her mother. (II, 79) Vanessa never told anybody about the alleged assault prior to her conversation with Makayla. (II, 88) At the time of Mr. Uribe's trial, Vanessa was seventeen years old.

Vanessa testified that Mr. Uribe assaulted her by penetrating her anus with his penis, when she was between the ages of five and nine. She specifically recounted four such events, which occurred while the family lived in Stonegate trailer park, in a house on Courtland Drive, and in Kensington Meadows trailer park, respectively. (II, 61, 67, 70, 75) According to Vanessa, the day after the first incident, Mr. Uribe told her not to tell anyone, he gave her a quarter, and he threatened to kill her father if she told anyone what happened. (II, 63) Mr. Uribe and Vanessa's father previously had a fight that left her father with a nose that looked broken and earrings ripped out. (II, 63-64)

Vanessa did not recall whether she cried when the alleged assaults occurred. (II, 62, 67, 71) She did not recall whether she experienced physical pain. (II, 128) She never screamed. (II, 117) She never bled. (II, 119, 188) She did not know where the other family members were during these alleged assaults. (II, 62-63, 68, 72) She did not complain about discomfort afterwards, even when visiting her family doctor. (II, 131)

During the time when she claimed she was being assaulted, Vanessa's school records consistently indicated that she was respectful, worked cooperatively and accepted responsibility. She was helpful, confident and contributed positively to the classroom environment. (II, 97-102)

When Vanessa's mother, Cathleen Ortez, learned about the allegations, she was shocked, because she did not think Mr. Uribe was capable of such conduct. (II, 266) Vanessa never complained that she was constipated or that her butt hurt. (II, 272, 286) Vanessa seemed happy as a child and did well in school. (II, 28)

Mr. Uribe's daughter and Vanessa's younger sister, Jazmeen, testified over defense objection about an alleged incident that occurred while she visited Mr. Uribe in the summer of 2013.<sup>2</sup> She said that while she lay in bed with Mr. Uribe and his fiancé Elizabeth Hall, with several other family members watching TV in the same room, Mr. Uribe "put his hand down [her] pants while [they] were sleeping." (III, 162, 165-166) Specifically, she said he would put his hand by her naval, with his fingers reaching into the top of her underwear, at the top of her crotch. (III, 186-187) She said she would toss and turn, then he would touch her butt cheek and try to put her hand on his penis. (III, 167) She would pretend to stretch and turn over, then she claimed he would put his hand in her underwear again. (III, 168) She did not know whether Mr. Uribe was awake during this incident. (III, 180)

When Jazmeen got up the next morning, she saw Mr. Uribe's penis under the blanket. (III, 171) That same morning, Jazmeen told her sister Gadida (sic: Querida) what had occurred. (III, 170)<sup>3</sup>

Mr. Uribe was not the only person Jazmeen accused of committing sexual misconduct. Her Godmother, Tina Gonzalez, sometimes babysat the children, along with her husband. (II,

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<sup>2</sup> The defense objected to the introduction of Jazmeen's testimony, and the trial court excluded the testimony. (Motion 3-21-14) However, on the prosecution's interlocutory appeal, the Court of Appeals reversed and held that the testimony must be allowed. *People v Uribe*, 310 Mich App 467; 872 NW2d 511 (2015). This Court granted leave and affirmed that Jazmeen's testimony was admissible in this case but vacated the Court of Appeals' reasoning. *People v Uribe*, 499 Mich 921; 878 NW2d 474 (Mem) (2016).

<sup>3</sup> Mr. Uribe's parental rights to Jazmeen and her younger sister were terminated later in 2013.

110-111) Jazmeen admitted telling her mother that Tina Gonzalez's husband would touch her butt and pinch it to wake her up. (III, 190) Relatedly, Elizabeth Hall said that Jazmeen reported that, around 2011, Ms. Gonzalez's husband would crawl into bed with her and her sister and "cuddle and fondle their butts." (III, 205)

Throughout her childhood, Vanessa visited her father, Jeremy Latunski, on alternate weekends, and on alternate weeks during the summer. (II, 106-107) Although Detective Dahlke knew that Vanessa spent weekends with her father, she never interviewed him. (III, 143) In fact, she never inquired about any of the adults who had lived with or otherwise had access to Vanessa. (III, 143-144)

Mr. Uribe's defense was that no sexual assault occurred, or if it did, it was committed by someone else. In pursuit of the latter, the defense intended to introduce evidence that Vanessa's father, Jeremy Latunski, had previously been convicted of sexual assault of a minor, and that he continued to be required to comply with the sex offender registry. (Motion 11/9/16, 35-79; Motion 12/12/16, 154-158) But the trial court granted the prosecution motion to exclude evidence of Vanessa's father's history of sexual assault from the trial. (Motion 11/9/16, 35-79; Motion 12/12/16, 154-158; III, 145-149)

### **Medical / Expert Testimony**

Vanessa's family physician, Dr. David Luginbill, had been treating her since she was born. (II, 156) He conducted thorough physical examinations of her numerous times over the years. (II, 162) He treated her for urinary tract infections twice in 2004, when she five years old, and also in 2010, when she was eleven. (II, 157-158, 165) He did not treat her for constipation. (II, 158) She never complained that her butt hurt or was bleeding. (II, 188) He examined her

genitals in 2004 and found that they were normal. (II, 163) He found her genitals were normal in 2010 as well. (II, 165, 192)

In 2004, Dr. Luginbill diagnosed Vanessa with Attention Deficit Hyperactivity Disorder (ADHD), and began prescribing medications for that condition. (II, 159-160) In 2004, 2005, 2007 and 2013, he noted that her mood and affect were normal. (II, 180, 181, 183, 184) In 2010, he noted that she did not like visiting her father. (II, 158)

When she learned of Vanessa's allegation, Ms. Ortiz called the police, who responded on September 25, 2012. (III, 108) Detective Vicki Dahlke conducted a forensic interview with Vanessa, at the Children's Assessment Center, then referred Vanessa to Dr. Stephen Guertin to be examined. (III, 132-133, 154)

Dr. Stephen Guertin was admitted as an expert on child sexual abuse, child abuse and pediatric clinical care. (II, 207) He examined Vanessa on October 25, 2012, when she was thirteen years old, after she was referred by the police. (II, 207-208, 218) When he asked Vanessa if she knew why she was there, Vanessa stated it was because Mr. Uribe had done "bad things" to her when she was between the ages of five and nine. (II, 211-212)

Before trial, the defense moved to exclude the testimony of Dr. Stephen Guertin, in which Dr. Guertin would repeat the complainant's allegations that Mr. Uribe sexually assaulted her. (Motion 9/19/16; Motion 9/30/16) The trial court held that the testimony was admissible under MRE 803(4), the hearsay exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. (Motion 9/30/16, 34)

Specifically, Dr. Guertin repeated the facts of Vanessa's allegations during his testimony. He recounted that Vanessa told him that Mr. Uribe put his penis in her butt. (II, 214) She told Dr. Guertin it hurt, but there was no bleeding. (II, 215) She told Dr. Guertin that it did not hurt to

defecate afterward, which he found “a little surprising.” (II, 216) She also told Dr. Guertin that Mr. Uribe told her to keep it secret, and he threatened to kill her dad if she told anyone. (II, 217)

Dr. Guertin’s physical examination of Vanessa was “fairly normal.” (II, 225-226) He found a superficial notch on her hymen, which could be normal, but which could also be residual of sexual trauma by someone other than Mr. Uribe, since there was no claim that Mr. Uribe ever touched her vagina. (II, 224, 231) He also found an area of stretched skin on her anus, which can result normally from passing large or hard stool, or can be the result of sexual trauma. (II, 225) He tested her for disease, but the results were negative. (II, 225) To Dr. Guertin’s knowledge, Vanessa had never had a psychological evaluation. He said he should have suggested that Vanessa seek psychological treatment, but he neglected to do so. (II, 232) Dr. Guertin did not indicate a diagnosis in his report. (II, 238-239)

In the context of addressing Mr. Uribe’s pre-trial motion in limine regarding Dr. Guertin’s testimony, the trial court explicitly held that Dr. Guertin would not be permitted to opine on whether he believed that the complainant was telling the truth about being assaulted. (Motion 9/30/16, 28) Despite this ruling, Dr. Guertin testified at trial that, “in my opinion there would be no question that she’s been sexually abused.” (II, 239)

After Dr. Guertin testified, outside the presence of the jury, the trial court raised its concern about Dr. Guertin’s testimony, and the defense sought a mistrial. But the court opted to continue the trial, and to deliver a curative instruction to the jury. (II, 241-244, 293-294; III, 1-19) Accordingly, the court instructed the jury as follows:

Yesterday, you heard the testimony of Dr. Guertin. At the end of his testimony, you may believe that he rendered an opinion whether sexual assault occurred in this case. That testimony is not allowed and is stricken from the record.

An expert is prohibited from rendering an opinion that sexual assault occurred. You are not to consider any opinion that you think Dr. Guertin had regarding whether sexual assault occurred in this case. That is your decision and only your decision to make. (III, 24)

In addition to Dr. Guertin, the prosecution presented Dr. James Henry, who testified as an expert on the behavior of children who have been sexually abused or have experienced sexual trauma. (III, 55) He said that the vast majority of children delay disclosure for a significant length of time. (III, 31) His research showed an average delay of 2½ years. (III, 32) When they do disclose, they often do so in bits and pieces. (III, 60) They commonly disclose first to a peer, and often after learning that that person has had a similar experience. (III, 62-63)

Dr. Henry said that children who have suffered sexual trauma may be withdrawn, become depressed and exhibit a flat affect. (III, 67) They may become defiant, oppositional or aggressive. (III, 67) They may engage in hyper-sexualized behavior. (III, 70) They may be hypervigilant, which masks as ADHD. (III, 70-71) They can still seem cheerful and perform well in school. (III, 72)

Defense expert, Dr. Sharon Hobbs, testified as a clinical psychologist with a background in the behavior of children who have been sexually abused. (III, 225) She emphasized that a psychological evaluation is important for attempting to discern when abuse allegations are credible. (III, 232-235) A thorough assessment includes looking at school records and protective services reports, in order to ascertain how the child is behaving and performing in other aspects of her life. (III, 245-246) She said that anal penetration of a young child would be very painful, and children who have been sodomized often complain of constipation because they are afraid it will hurt to defecate. (III, 241-242)

Dr. Hobbs agreed that abused children sometimes appear to have ADHD, due to changes in their behavior. (III, 238) They may experience unconscious displacement, which is venting their emotions at a different person than the one who injured them. She described it as going home and screaming at her husband because the judge screamed at her earlier that day. (III, 243) They may experience unconscious transference, which is transferring their emotions about a harmful experience into a different situation. She described it as a child being angry at her for wearing a red dress, because a person who had mistreated the child had worn a red dress. (III, 243-244)

### ***Ginther Hearing***

Within weeks of the Court of Appeals' opinion, which reversed the trial court's order to suppress Jazmeen's testimony, the prosecution sent a letter to Mr. Uribe's attorney extending the following written plea offer:

If defendant pleads guilty to three counts of CSC 2<sup>nd</sup> degree, person under 13, the People will agree to a sentence agreement of 60 months at MDOC and dismiss the 4 counts of CSC 1<sup>st</sup> degree, person under 13.

(attached as Appendix B, Letter from Prosecution dated 5/27/15)<sup>4</sup> According to the letter, the offer expired on June 4, 2015. (See Appendix B)

At a subsequent hearing to discuss a stay pending Mr. Uribe's application for leave to appeal to this Court, the Eaton County appellate prosecutor urged Mr. Uribe to consider the plea offer extended by his office:

An offer has been made by our office to resolve the case. If application is denied or if we prevail at the Supreme Court, I suspect we will not make that offer again. I suspect that our offer is not going to get better... because if the Supreme Court does what they

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<sup>4</sup> The letter was admitted at the Evidentiary Hearing as Defendant's Exhibit A.

do in almost all the cases and denies application, we're going to be in a pretty – a significantly stronger position with the case than we prior to the Court of Appeals' ruling.

(Motion 6/18/15, 11) The trial prosecutor then placed the plea offer on the record: “if the defendant pleads guilty to three counts of CSC – second-degree, person under 13, the People will agree to dismiss the four counts of CSC – first-degree, and also to a sentence agreement of 60 months at MDOC. (Motion 6/18/15, 16-17)

The court asked the prosecution about the guidelines. (Motion 6/18/15, 17) The prosecutor first provided the guidelines for the second-degree criminal sexual conduct charges: “36 to 71 [months] or 43 to 86 [months].” (Motion 6/18/15, 17) When asked about the guidelines specific to the charged first-degree offenses, the prosecutor advised, “[w]e have guidelines, as charged, 135 months to 225 months.” (Motion 6/18/15, 17) Mr. Uribe's attorney requested additional time to discuss the offer with Mr. Uribe. (Motion 6/18/15, 18) The prosecution agreed “to leave the offer open until July 17th.” (Motion 6/18/15, 18)

The court then addressed Mr. Uribe and impressed upon him the importance of considering the prosecution's plea offer. (Motion 6/18/15, 19) Judge Cunningham advised, “if you are unsuccessful in getting the Supreme Court to hear your case... if you were found guilty, as charged, **your minimum is 11.2 years.**” (Motion 6/18/15, 19) (emphasis added) The court clarified, “I could give you more after I hear all the evidence, but your minimum would be 11 years... so, what you're looking at is... [a] sentencing agreement of five years versus potential 11.2 years if you go to trial.” (Motion 6/18/15, 19) She further explained, “as you can see, it's about a six-year difference of – six to seven years difference of incarceration.” (Motion 6/18/15, 20) The trial prosecutor confirmed the accuracy of the court's advice. (Motion 6/18/15, 20)

The appellate prosecutor clarified the court was not guaranteeing Mr. Uribe would receive a particular sentence if he were convicted. (Motion 6/18/15, 20) The court agreed and further advised Mr. Uribe, “the maximum that I have is 18.7 years that I could sentence you.” (Motion 6/18/15, 21)

The Court of Appeals granted Mr. Uribe’s Motion to Remand for a *Ginther* hearing, which commenced on June 18, 2018. (EH 6/13/18, 1) At this hearing, Mr. Uribe’s trial counsel testified that he “did discuss the parameters of the counts with Mr. Uribe” when they met to discuss the plea offer. (EH 6/13/18, 21) Trial counsel further testified that he discussed the 25-year mandatory minimum with Mr. Uribe throughout his representation, as well as with his investigator and with Mr. Uribe’s family. (EH 6/13/18, 22)

Trial counsel did not recall the dialogue from the 6/18/15 hearing regarding the sentencing guidelines and Mr. Uribe’s potential exposure at trial, but he did not dispute the record. (EH 6/13/18, 23-32) He agreed the sentencing range placed on the record, roughly 11-18 years, was inaccurate at least as it pertained to one of Mr. Uribe’s counts at the time.<sup>5</sup> (EH 6/13/18, 35-36) He did not consider correcting the misstatements placed on the record as to the exposure Mr. Uribe faced, if convicted. (EH 6/13/18, 37)

Trial counsel testified that he discussed the merits of the prosecution’s offer with Mr. Uribe throughout his representation. (EH 6/13/18, 37) He also testified that, contrary to the prosecutor’s declaration on the record, the offer did not expire on July 17. (EH 6/13/18, 37) Rather, he believed the offer remained open throughout his representation of Mr. Uribe. (EH 6/13/18, 39)

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<sup>5</sup> Counsel explained that the initial charge sheet only contained notice of the 25-year mandatory minimum for one of the charges. (EH 6/13/18, 21)

According to trial counsel, Mr. Uribe repeatedly asserted that the prosecution had no evidence indicating guilt. (EH 6/13/18, 47-48) He did not recall any statements by Mr. Uribe indicating he was unwilling to plead guilty due to his innocence. (EH 6/13/18, 53) He recalled Mr. Uribe was willing “to entertain a two-year offer.” (EH 6/13/18, 53)

Mr. Uribe testified that his attorney did not advise him of the 25-year mandatory minimum sentence he faced if convicted as charged. (EH 6/13/18, 61) He believed he was facing a sentencing range of 11-18 years, if convicted, due to the guidelines discussed in court. (EH 6/13/18, 62) Though he maintains his innocence, he would have accepted the prosecution’s five-year plea offer if he had been properly advised of the mandatory minimum because that would have changed his risk analysis. (EH 6/13/18, 61, 64)

Mr. Uribe did not recall being advised at his arraignment that he faced a mandatory 25-year minimum, if convicted, but he did not dispute the accuracy of those transcripts. (EH 6/13/18, 63-64) He did not understand much of what occurred and what was said at his arraignment. (EH 6/13/18, 80-81) Likewise, Mr. Uribe conceded it was possible that his attorney mentioned the 25-year mandatory minimum at some point during his representation; but even if that were so, Mr. Uribe did not understand what it meant. (EH 6/13/18, 80)

A defense investigator was appointed on July 29, 2016 – approximately one year after the prosecutor stated on the record Mr. Uribe’s plea offer would close on July 17, 2015. (EH 6/13/18, 91) The investigator consulted with Mr. Uribe for the first time on August 18, 2016. (EH 6/13/18, 86) The investigator testified that, during their initial meeting, he told Mr. Uribe he faced a mandatory 25-year minimum if convicted. (EH 6/13/18, 86) He also testified that he heard trial counsel mention the 25-year mandatory minimum during the course of representation.

(EH 6/13/18, 88) However, he was never involved in any conversations regarding a plea offer.

(EH 6/13/18, 90)

The trial court concluded that Mr. Uribe knew he faced a 25-year mandatory minimum sentence if convicted as charged. (EH 6/13/18, 105) In support of that conclusion, the court relied on the advice provided to Mr. Uribe by the district court at his arraignment, the amended information, and the testimony from trial counsel and the defense investigator. (EH 6/13/18, 105) The court further reasoned that Mr. Uribe was not credible because he admitted he would have lied in order to establish a factual basis in support of a guilty plea even though he maintains his innocence. (EH 6/13/18, 108) Finally, as to the second prong, the court concluded Mr. Uribe was not prejudiced because the court did not believe Mr. Uribe would have pled guilty in this case under any circumstances, based on his repeated assertions of innocence. (EH 6/13/18, 111-112)

**I. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY TESTIMONY BY DR. GUERTIN REPEATING THE COMPLAINANT'S ACCUSATIONS, THUS UNFAIRLY BOLSTERING THE COMPLAINANT'S CREDIBILITY.**

Standard of Review

Generally, the standard of review of a trial court's decision whether to admit evidence is abuse of discretion. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). When the decision "regarding the admission of evidence ... involve[s] preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence, the trial court's decision is reviewed de novo." *Id.* at 609-610 citing *People v Sierb*, 456 Mich 519; 581 NW2d 219 (1998). Admission of legally inadmissible evidence is necessarily an abuse of discretion. *Craig v Oakwood Hosp.*, 471 Mich 67, 76; 684 NW2d 296 (2004).

Issue Preservation

This challenge was preserved in the trial court. (Motion 9/19/16; Motion 9/30/16, 4-34)

Argument

Before trial, the defense moved to exclude the testimony of Dr. Stephen Guertin, in which Dr. Guertin would repeat the complainant's allegations that Mr. Uribe sexually assaulted her. (Motion 9/19/16; Motion 9/30/16) The trial court held that the testimony was admissible under MRE 803(4), the hearsay exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. (Motion 9/19/16; Motion 9/30/16, 4-34)

As a result, Mr. Uribe's convictions relied on hearsay testimony on the only relevant question – whether Mr. Uribe sexually assaulted Vanessa.

At trial, Dr. Guertin stated that Vanessa said she had come to see him because Mr. Uribe had done "bad things" to her when she was ages 5 through 9. (Trial 3/27/17, 211-212) Specifically, he repeated her assertion that Mr. Uribe put his penis in her butt. (Trial 3/27/17,

214) He also testified that Vanessa said Mr. Uribe told her to keep it secret, and if she told, he would kill her dad. (Trial 3/27/17, 217)

Dr. Guertin's testimony conveying and repeating Vanessa's out-of-court statement accusing Mr. Uribe of abuse bolstered Vanessa's credibility and tipped the scales of credulity against Mr. Uribe. He was denied a fair trial as a result.

"Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c).

Hearsay is not admissible except as provided otherwise in the Michigan Rules of Evidence. MRE 802.

Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy. See *Solomon v Shuell*, 435 Mich 104, 119; 457 NW2d 669 (1990); 5 Wigmore, *Evidence* (Chadbourn rev), § 1420, p. 251. Hearsay evidence is not admissible at trial unless within an established exception. See *People v Eady*, 409 Mich 356; 294 NW2d 202 (1980).

MRE 803(4) provides a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." MRE 803(4). "In order to be admitted under MRE 803(4), a statement must be made for purposes of medical treatment or diagnosis in connection with treatment, and must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury."

*People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621, 626 (1992)

The Court of Appeals held in *People v Mahone*, 294 Mich App 208, 214–215; 816 NW2d

436 (2011) that statements made for the purpose of medical treatment are admissible pursuant to this provision “if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care.”

Vanessa’s statements to Dr. Guertin were not admissible under this exception because she did not consult with Dr. Guertin to seek medical treatment or diagnosis. She had no symptoms and was not complaining of any pain or injury. Rather, her sole motivation was to support criminal charges against Mr. Uribe. Rather than seeking medical treatment, she was referred to Dr. Guertin by Detective Dahlke strictly in order to support the allegations of child sexual molestation. Statements made under these circumstances do not meet the purposes of this hearsay exception. *People v Kosters*, 175 Mich 748; 438 NW2d 651 (1989).

On facts very reminiscent of those present here, the Michigan Court of Appeals found error in admitting hearsay testimony rendered by precisely the same witness in *People v Shaw*, 315 Mich App 668; 892 NW2d 15 (2016). The defendant in *Shaw* was tried on charges of sexually abusing the complainant when she was ages 8 through 16. *Id.* at 671. She made the accusation seven years after the last incident, at which time police sent her to Dr. Guertin. *Id.* at 674. The court held that MRE 803(4) did not permit introduction of Dr. Guertin’s testimony about the complainant’s statements, because the examination was conducted seven years after the last incident, the complainant had only seen Dr. Guertin in conjunction with the police investigation, and she had previously received gynecological care from a different doctor. *Id.* at 675. “Under these circumstances, the complainant’s statements to Guertin were not admissible because they were not statements for the purpose of medical treatment.” *Id.*

The same result regarding the same expert witness was reached in *People v Qureshi*, unpublished Court of Appeals decision issued January 5, 2016, Docket No 323247, 2016 WL

56836,<sup>6</sup> where the court held that “Dr. Guertin’s interview and examination occurred seven months after the final alleged sexual abuse occurred, after the allegations were reported to [Child Protective Services], and after [Deputy] Harrison’s forensic interview. Thus, complainant’s statements were meant to further the investigation and were not for medical diagnosis. *Id.* at \*3.

This case is no different. The last alleged incident occurred in 2008. Four years later, police were called, Detective Dahlke conducted a forensic interview, then sent the complainant to be examined by Dr. Guertin. The physical examination was essentially normal, as would be expected after so much time had elapsed. There were no signs of injury and there was no disease. No medical diagnosis was rendered. There was no referral or suggestion for further treatment, such as psychological counseling. The only purpose the examination served was to build a case for prosecution against Mr. Uribe.

Under these circumstances, the complainant’s statements to Dr. Guertin were not admissible as “[s]tatements made for purposes of medical diagnosis or treatment.” MRE 803(4). Her statements were not “reasonably necessary for diagnosis and treatment” and she did not have “a self-interested motivation to be truthful in order to receive proper medical care.” *People v Mahone*, 294 Mich App at 214–15. Her statements were not “made for purposes of medical treatment or diagnosis in connection with treatment,” and did not “describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury.” *Meeboer*, 439 Mich at 322. Statements made exclusively as part of a police investigation do not meet this definition, and therefore do not qualify for admission under this hearsay exception.

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<sup>6</sup> As an unpublished decision, *Qureshi* (attached as Appendix C) is not cited as precedent, but as an example of how the court reached a contrary decision under similar circumstances.

Furthermore, it is more probable than not that the erroneous admission of this testimony affected the outcome of the proceedings. *Lukity*, 460 Mich at 484, 495-496 (1999). There were no witnesses. There was no physical evidence. There was no scientific evidence. The trial was no more than a mere credibility contest between a troubled young woman and her former step-father. “In a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant, which means that the error is more harmful.” *People v. Gursky*, 486 Mich. 596, 620–621, 786 N.W.2d 579 (2010).

The hearsay testimony served the sole purpose of improperly corroborating the complainant’s credibility and tipping the scales against Mr. Uribe. The testimony came from a learned and highly credentialed expert on child abuse, who also stated affirmatively that he believed the complainant was telling the truth. *See* Issue II, *infra*. In essence, the hearsay testimony gave the illusion that there was more evidence against Mr. Uribe than the complainant’s bare and unsubstantiated allegations, thus unfairly impelling the jury to convict him. He must be given a new trial as a result.

In affirming Mr. Uribe’s convictions, the majority distinguished *Shaw* from the case at hand based on Vanessa’s age at the time she saw Dr. Guertin, a pediatrician. *People v Uribe*, unpublished per curiam opinion of the Court of Appeals issued January 3, 2019 (Docket No. 338586) at \*8. Vanessa was thirteen when she saw Dr. Guertin; the complainant in *Shaw* was an adult. *Id.* Accordingly, the majority reasoned, the adult complainant in *Shaw* could not have expected Dr. Guertin to be providing medical care at the time of her exam, thereby eliminating the rationale establishing her statements’ reliability. *Id.* The majority determined that unlike in *Shaw*, Vanessa’s exam was for the purpose of medical care as Dr. Guertin elicited Vanessa’s

history in order to test for sexually transmitted diseases, determine where to examine for latent injuries, and in order to determine whether Vanessa required psychological treatment. *Id.*

Additionally, the court relied on the fact that Vanessa's primary care pediatrician, Dr. Luginbill, never tested her for sexually transmitted diseases and never examined her anus, as Dr. Guertin did during his examination. *Id.*

However, despite these factual differences, as Judge Gadola indicated in his dissent, the circumstances regarding Dr. Guertin's testimony in this case are "virtually identical" to *Shaw*. *Id.* at 10. Here, as in *Shaw*, there was no medical treatment provided, apart from testing for sexually transmitted diseases. *Id.* In both cases, the complainants sought treatment because they were directed by the police, not due to any symptoms that had manifested. *Id.* Therefore, there was no inherent reliability to Vanessa's statements. Further, as the dissent explained, the *Shaw* Court did not rely on Dr. Guertin's status as a pediatrician in order to exclude the complainant's testimony from the MRE 803(4) exception. *Id.* Rather, the majority in *Shaw* focused primarily on the obvious factor, that the complainant did not seek Dr. Guertin's care on her own but at the behest of the police. *Id.*

Critically, Judge Gadola also refuted the majority's assessment that any error was harmless in light of Vanessa's testimony. As the dissent explained, the evidence was not overwhelming here, but as in *Shaw*, absent any eyewitnesses or corroborating medical evidence, the conviction turned on the jury's assessment of the complainant's credibility. *Id.*

**II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A MISTRIAL AFTER A PROSECUTION EXPERT TESTIFIED THAT HE BELIEVED THE ACCUSATIONS AGAINST MR. URIBE WERE TRUE, THUS ENCROACHING ON THE JURY'S PROVINCE AS THE EXCLUSIVE FINDER OF FACT.**

Standard of Review

The appellate Court reviews a trial court's denial of a mistrial for abuse of discretion.

*People v Ortiz-Kehoe*, 237 Mich App 508; 603 NW2d 802 (1999).

Issue Preservation

The challenge to the expert's remark was preserved by defense motion for mistrial.

(Trial 3/27/17, 241-244, 293-294; Trial 3/28/17, 1-19)

Argument

The prosecution presented the testimony of Dr. Stephen Guertin, who examined the complainant as part of the police investigation of her allegations that Mr. Uribe had sexually assaulted her. In the context of addressing the pretrial motion regarding Dr. Guertin's testimony, the trial court explicitly held that Dr. Guertin would not be permitted to opine on whether he believed that the complainant was telling the truth about being assaulted. (Motion 9/30/16, 28)

Despite this ruling, Dr. Guertin testified at trial: "in my opinion there would be no question that she's been sexually abused." (Trial 3/27/17, 239) This testimony essentially exhorted the jury to convict Mr. Uribe, and the trial court abused its discretion in refusing to grant a mistrial.

The law is clear. This Court held in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990) that, while experts may testify about the behavioral patterns of sexually abused children, "any testimony about the truthfulness of [the] 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 ...to possess some specialized knowledge for discerning the truth.” *Id.* at 727-728.

The following is the context of Dr. Guertin’s remark:

**RECROSS-EXAMINATION**

**BY [DEFENSE COUNSEL]:**

**Q** Dr. Guertin, you didn’t say in your report, back when you did the actual assessment or evaluation, that she is diagnosed with — as a — as a victim of sexual abuse. Now, five years later, reflecting back, you’re saying that’s my diagnosis?

**A** Well —

**Q** Do you see where I’m having a problem with that, Doctor?

**A** Actually, I don’t. So, I think the report speaks for itself. You can read this report, and you can see what’s said in it, you can see what I’ve pointed out in it. It’s true, I do not have a section —

**THE COURT:** Well —

**THE WITNESS:** -- of the report that says diagnosis of child abuse.

**[DEFENSE COUNSEL]:** Well —

**THE WITNESS:** That doesn’t mean I can’t hold that particular opinion. In fact, I have held that opinion since then.

**BY [DEFENSE COUNSEL]:**

**Q** Well, Doctor —

**A** And I’m now expressing it.

**Q** Dr. Guertin, if this report was then provided to a psychologist or a social worker, they’re reading it — another professional, they’re reading it, and they’re like where’s the diagnosis.

**A** Well, there’s not a statement there that say “diagnosis: sexual abuse.” If you read this report and read the content of this report and what

we discussed, **in my opinion there would be no question that she's been sexually abused.** And I feel that way now, and I felt that way then.

**Q** There's no specific diagnosis victim of sexual abuse. But you never say anything in your report, victim of sexual abuse. Despite a diagnosis, you say nothing in your report that she's a victim of sexual abuse. Now, what's your –

**A** The entire report tends to say that she's a victim of sexual abuse. In fact, it says how it happened. It says the period of years in which it happened, gives the implication of almost how many times it happened. It describes whether or not she was manipulated into not saying anything about it, describes the circumstances of the disclosure. It describes the reasons why we had to test her for venereal disease. It describes whether or not she's protected. It describes whether or not the police are aware of this.

It is true there's not a line that says "diagnosis: sexual abuse." But if you are asking my opinion, and if you read this, I think it should be clear that this document supports that she was sexually abused. And based on her history to me, **I believe that she was.**

(II, 239-240)

The trial court's refusal to grant a mistrial was partially based on its belief that defense counsel had opened the door to the objectionable testimony by asking Dr. Guertin whether he had rendered a diagnosis concerning the complainant. (III, 10) But that was an inaccurate characterization of the context.

The above colloquy demonstrates that trial counsel was criticizing Dr. Guertin's failure to indicate a diagnosis in his report, where his belated claim that there was such a diagnosis was being used by the prosecution to support the admissibility of hearsay under the exception for statements made for purposes of a medical diagnosis or treatment MRE 803(4). See Issue I, *supra*. Counsel was also clearly attempting to challenge the witness with the contradiction between his failure to indicate an actual diagnosis and his testimonial support for the allegations. But this does not mean that counsel opened the door for the witness to offer forbidden testimony that he *believed* the allegations.

Counsel never asked Dr. Guertin whether he had an opinion about the veracity of the allegations. Counsel never asked the witness if he had a diagnosis or had reached a conclusion about whether anything actually happened to the complainant. Rather, counsel was simply confronting the witness with the contradiction between his testimony and the glaring absence of any comment in his report that was consistent with that testimony. Counsel did not, therefore, open the door for Dr. Guertin's unsolicited and gratuitous assertion that he believed the allegations.

The prosecution was well advised that its witnesses were forbidden to opine on the truthfulness of the allegations. Indeed, the court had admonished the parties at a pretrial proceeding that such testimony was impermissible. (Motion 9/30/16, 28) And the prosecutor herself asserted that expert witnesses are not allowed to opine on the veracity of the charges. (Motion 11/9/16, 57-58) The prosecution was obliged to forewarn Dr. Guertin not to embark on this verboten territory, and Dr. Guertin's violation of this ruling belongs to the prosecution.

It is more probable than not that the erroneous admission of this testimony affected the outcome of the proceedings. *Lukity*, 460 Mich at 484, 495-496. There were no witnesses. There was no physical evidence. There was no scientific evidence. The trial was no more than a mere credibility contest between the complainant and Mr. Uribe. Dr. Guertin's prejudicial remark vouching for the complainant's credibility essentially commanded the jury to convict, since such a learned and celebrated expert on child abuse believed that Mr. Uribe was guilty. The delivery of a purported clarifying jury instruction did nothing to alleviate the harm emanating from this highly prejudicial testimony.

Affirming Mr. Uribe's convictions, the Court of Appeals explained, "an unresponsive volunteered answer to a proper question is not cause for granting a mistrial." *People v Uribe*,

unpublished per curiam opinion of the Court of Appeals issued January 3, 2019 (Docket No. 338586) at \*9, citing *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). The court further determined that, “to some extent,” Mr. Uribe’s trial attorney “open[ed] the door” to Dr. Guertin’s improper testimony that he believed Vanessa was assaulted. *Id.* Finally, the court concluded that the curative instruction provided by the trial court effectively prohibited the jury from considering Dr. Guertin’s improper opinion testimony. *Id.*

The dissent refuted the effectiveness of the curative instruction, noting that it did not address Dr. Guerin’s recapitulation of Vanessa’s allegations, nor were the jurors instructed that Dr. Guertin’s testimony should not be used to assess Vanessa’s credibility. *Id.* at 10. Finally, the dissent rejected the majority’s conclusion that Mr. Uribe’s attorney opened the door to Dr. Guertin’s improper testimony, since Dr. Guertin’s testimony was unresponsive to counsel’s question and unnecessarily narrative. *Id.*

In informing the jury that he believed the allegations, Dr. Guertin infringed on the jury’s exclusive domain and essentially directed it to convict Mr. Uribe. Mr. Uribe must be given a new trial as a result.

**III. MR. URIBE’S RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE COURT REFUSED TO ADMIT EVIDENCE THAT THE COMPLAINANT’S FATHER HAD PREVIOUSLY BEEN CONVICTED OF SEXUALLY ASSAULTING A MINOR.**

Standard of Review

Whether a defendant has been denied the right to present a defense is a question of law which is reviewed de novo. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

Issue Preservation

This challenge was preserved by pretrial motion. (Motion 11/9/16, 35-77; Motion 12/12/16, 154-158)

Argument

Mr. Uribe was tried on charges of sexually assaulting Vanessa when she was a child. His defense was that the assault did not happen, or alternatively, that someone else assaulted her. In pursuit of the latter, he sought to raise the possibility that Vanessa was assaulted by her father, Jeremy Latunski, rather than by him. In support of that theory, he intended to argue that Mr. Latunski had a propensity to sexually assault minors, and he sought to present evidence that Mr. Latunski had a prior conviction for sexually assaulting a young girl, that he continued to be required to register as a sex offender as a result, and that the authorities never investigated the possibility that he was the perpetrator against Vanessa. (Motion 11/9/16, 36, 49-53)

However, the trial court disallowed Mr. Uribe from presenting this evidence (Motion 12/12/16, 157), thus undermining his constitutional right to present a defense.

“There is no question that a criminal defendant has a state and federal constitutional right to present a defense.” *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment ... or in the Compulsory Process or Confrontation clauses of the Sixth Amendment ..., the Constitution guarantees

criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v Kentucky*, 476 US 683, 690; 106 SCt 2142 (1986), citing *California v Trombetta*, 467 US 479; 104 SCt 2528 (1984).

“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has a right to confront the prosecution’s witnesses for purposes of challenging their testimony, he has the right to present his own testimony, he has the right to present his own witnesses to establish his defense. This right is a fundamental element of due process of law.” *Washington v Texas*, 388 US 14, 19; 87 SCt 1920 (1967) (holding that the defendant was denied the Sixth Amendment right to compulsory process for obtaining witnesses in his favor by the State’s arbitrary rule disqualifying an alleged accomplice from testifying on his behalf).

“Few rights are more fundamental than that of an accused to present witnesses in his own defense...In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.” *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038 (1973) (holding that the hearsay exclusion of evidence that another man named McDonald had confessed to the crime, coupled with the State’s refusal to permit the defendant to cross-examine McDonald about his subsequent recantation of the confession, denied the defendant “a trial in accord with traditional and fundamental standards of due process.” (internal citations omitted)).

Here, the excluded evidence would have shown that Mr. Latunski was charged with first degree criminal sexual conduct, and pled to third degree criminal sexual conduct, for sexually assaulting a young girl. (Motion 11/9/16, 36, 40, 49-50) Evidence adduced at trial demonstrated

that Vanessa spent alternate weekends with her father, as well as alternate weeks during the summer. (Trial 3/27/17, 106-107) Thus, he certainly had the access and opportunity to assault her. In addition, evidence established that she reported disliking seeing her father (Trial 3/27/17, 158), which again raises a suspicion that he may have assaulted her.

The excluded evidence would have corroborated the defense theory that someone else may have committed the offense for which Mr. Uribe stood trial. It would have raised reasonable doubt concerning Mr. Uribe's guilt. Therefore, its exclusion violated Mr. Uribe's right to present a defense. He must be given a new trial as a result.

**IV. MR. URIBE’S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER OUR STATE AND FEDERAL CONSTITUTIONS WAS VIOLATED WHERE TRIAL COUNSEL FAILED TO ADVISE HIM OF THE MANDATORY 25-YEAR MINIMUM SENTENCE HE FACED IF CONVICTED AS CHARGED. THE TRIAL COURT ABUSED ITS DISCRETION WHEN THE COURT CONCLUDED OTHERWISE, WHERE THE RECORD IS CLEAR MR. URIBE WAS GIVEN INACCURATE ADVICE ON THE MAXIMUM SENTENCE HE FACED ON THE RECORD.**

Standard of Review

Constitutional questions are reviewed de novo and any associated findings of fact are reviewed for clear error. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court’s ruling on a motion for new trial is reviewed for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001).

Issue Preservation

Mr. Uribe preserved this issue for appellate review by filing a post-conviction motion for new trial in the trial court and requesting an evidentiary hearing on trial counsel’s ineffectiveness. See MCR 6.431(A); *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Argument

The record is clear that during the critical stage of Mr. Uribe’s plea negotiations, he received inaccurate advice on the record as to the potential sentence he faced, if convicted as charged of first-degree criminal sexual conduct. Mr. Uribe was charged with four counts of first-degree criminal sexual conduct, for conduct involving a person under the age of 13. That offense carries a mandatory 25-year minimum sentence. MCL 750.520b(2)(b). Yet, during the 6/18/15

status conference, when discussing the five-year plea offer made by the prosecution, both the trial court and prosecutor misstated the possible sentence Mr. Uribe faced, if convicted.

These misstatements – that Mr. Uribe faced an approximate sentencing range of 11-18 years, if convicted – went uncorrected by his attorney and directly impacted Mr. Uribe’s decision to reject the prosecution’s five year plea offer. But for his misconception of the risk he faced, Mr. Uribe would have accepted the prosecution’s offer.

The Sixth Amendment of the U.S. Constitution guarantees to a criminal defendant the right “to have the assistance of counsel for his defense.” US Const, Am. VI. The Court has since recognized that “the right to counsel is the right to the effective assistance of counsel.” *Strickland v Washington*, 466 US 668, 685-686; 104 S Ct 2052 (1984). By “failing to render ‘adequate legal assistance,’” a defendant’s attorney can undermine the adversarial process counsel is appointed to protect, resulting in a conviction that “cannot be relied on as having produced a just result.” *Id.* at 688. In order to prevail on an ineffective assistance of counsel claim, “a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012) (citations omitted).

In *Lafler v Cooper*, 566 US 156; 132 S Ct 1376 (2012), the United States Supreme Court recognized the right to effective assistance of counsel in the forgone plea context. The Court stated: “If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.” *Id.* at 168.

In that case, Mr. Cooper's counsel advised him that he could not legally be convicted of the charged offense. Based on that erroneous premise, counsel believed that the proffered plea was worse than the sentencing consequences following trial, where he believed Mr. Cooper would be acquitted of the most serious offense and convicted of a lesser offense. Counsel advised Mr. Cooper to reject all plea offers and Mr. Cooper followed that advice.

The remedy for the ineffective assistance of counsel was to remand the case to the trial court. *Id.* at 174. There, the prosecution would reoffer the plea and the trial court would determine whether it would accept it. *Id.* at 174-175.

Here, the trial court abused its discretion when it denied Mr. Uribe's motion based on a credibility determination between Mr. Uribe and his attorney, where the record supports Mr. Uribe's testimony. Mr. Uribe believed he faced a sentencing range of 11-18 years, if convicted as charged, because that's exactly what the trial court and prosecutor advised him when the offer was discussed on the record. And Mr. Uribe's attorney made no effort to correct that misstatement.

Even if trial counsel's recollection that he advised Mr. Uribe of the mandatory minimum at least three times is accurate; at minimum, it is clear that Mr. Uribe received conflicting advice on his maximum exposure. According to trial counsel, the plea offer remained open throughout the course of his representation. (EH 6/13/18, 39) However, that testimony is belied by the record. The initial offer from the prosecutor clearly indicated the offer expired on June 4, 2015. (See Appendix B) At the request of defense counsel, with urging from the trial court, the prosecution agreed to keep the offer open until July 17, 2015. (Motion 6/18/15, 18) The only reference in the record to the plea offer after that was counsel's assertion that the offer was

rejected (Motion 7/15/16, 3), and the prosecution's indication, approximately four months before trial, that a final offer would not be forthcoming. (Motion 11/22/16, 5)

To that end, the appointed investigator's testimony is irrelevant. He was not appointed as an investigator on this case until July 29, 2016 – more than a year after the plea offer was discussed on the record. (EH 6/13/18, 91) He also testified that he was never part of any discussions pertaining to a plea offer. (EH 6/13/18, 90)

This case is distinguishable from *People v Douglas*, 496 Mich 557; 852 NW 2d 587 (2014), where this Court rejected the defendant's claim of ineffective assistance under similar circumstances. In that case, the defendant rejected a favorable plea where his attorney failed to advise him of the mandatory 25-year minimum sentence he faced, if convicted as charged of first-degree criminal sexual conduct. *Id.* at 593. The Court reasoned that, although counsel was clearly deficient, the defendant was not prejudiced because he would not have pled guilty due to his continued assertion of innocence. *Id.* at 593-595.

According to the attorney in *Douglas*, "the defendant's position had always been that the defendant would plead to nothing that would result in placing the defendant on the sex-offender registry, in part because the defendant was concerned about losing contact with his children, but also because he found the type of behavior to which he would be pleading 'disgusting and offensive and [he] would never engage in' it." *Id.* at 596. Further, though the defendant testified he would have accepted the plea if he knew about the mandatory 25-year minimum sentence, "he also testified, however, that he would not have accepted any plea that required sex-offender registration because he was innocent and because it would affect his relationship with his children." *Id.* at 597. The Court characterized the defendant's testimony as to whether he would have accepted the plea offer if he knew about the mandatory minimum as "confusing at best." *Id.*

In the case at hand, there was no such equivocation. Though Mr. Uribe maintains his innocence, he clearly testified that he would have accepted the prosecutor's five-year plea offer if he knew he faced a mandatory 25-year minimum sentence, if convicted. Further, trial counsel testified that Mr. Uribe never professed a refusal to negotiate due to his innocence. (EH 6/13/18, 53) Indeed, according to trial counsel, Mr. Uribe was interested in accepting a plea offer, if it were for less time than the prosecutor offered. (EH 6/13/18, 53)

Mr. Uribe testified he would not have gambled on a trial, despite his innocence, had he known he was facing a mandatory 25-year minimum sentence. Given the plea offer to second-degree criminal sexual conduct, with a five-year sentencing agreement, there is no question about prejudice. Deficient performance and prejudice equal ineffective assistance of counsel and demand relief.

**Summary And Relief And Request For Oral Argument**

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant leave to appeal, or other peremptory relief, reverse, and vacate his convictions.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Michael R. Waldo

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

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