

State of Michigan  
In the Supreme Court

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

*v*

ERNESTO EVARISTO URIBE,

Defendant-Appellant.

Supreme Court 159194

Court of Appeals 338586

Trial Court 13-020404-FC

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**Plaintiff-Appellee's Answer Opposing**

**Application for Leave to Appeal**

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**Argument**

**Issue I**

Hearsay statements made for the purpose of medical treatment or diagnosis are admissible at trial. Following a motion hearing, and an analysis of *Meeboer* factors, Judge Cunningham determined VG had seen Dr. Guertin for a medical purpose, and VG’s statements during that evaluation and examination were admissible. On appeal, Uribe focuses on Dr. Guertin as the examining doctor, and that law enforcement made the referral, to argue error. Uribe fails to consider VG’s prior repeated testimony elicited by Pawluk, the circumstantial physical evidence observed during the examination, additional circumstantial evidence, VG’s mental injury, that previous to examination VG was seeking counseling, and VG’s youth and motivation to be truthful. Upon review of the totality of the circumstances surrounding, did Judge Cunningham err in allowing VG’s statements?

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### **Counter-statement of jurisdiction**

Plaintiff-Appellee does not dispute the Michigan Supreme Court's jurisdictional authority.

### **Counter-statement of judgment appealed from and relief sought**

Defendant-Appellant's application is presented challenging the unpublished decision of the Court of Appeals. This unpublished decision is highly fact-driven, and specifically considered *People v Shaw*, 315 Mich App 668; 892 NW2d 15 (2016).

Because it is an unpublished decision, and due to its unique facts, this decision does not present an issue of major significance to the state's jurisprudence. Further, and contrary to Uribe's assertions, since this case was not simply a credibility battle between Uribe and the victim, denial of this application will not result in a material injustice. This Court should decline to grant the application.

### **Counter-statement of questions presented**

#### **Issue I**

Hearsay statements made for the purpose of medical treatment or diagnosis are admissible at trial. Following a motion hearing, and an analysis of *Meeboer* factors, Judge Cunningham determined VG had seen Dr. Guertin for a medical purpose, and VG's statements during that evaluation and examination were admissible. On appeal, Uribe focuses on Dr. Guertin as the examining doctor, and that law enforcement made the referral, to argue error. Uribe fails to consider VG's prior repeated testimony elicited by Pawluk, the circumstantial physical evidence observed during the examination, additional circumstantial evidence, VG's mental injury, that previous to examination VG was seeking counseling, and VG's youth and motivation to be truthful. Upon review of the totality of the circumstances surrounding, did Judge Cunningham err in allowing VG's statements?

Defendant-Appellant Answer: Yes.

Plaintiff-Appellee Answer: No.

## Issue II

A mistrial may only be granted when a curative instruction cannot correct the error. In response to Pawluk's questions about his report and diagnosis, Dr. Guertin testified he diagnosed VG as a victim of sexual abuse. Judge Cunningham – concerned about the testimony caused by Pawluk's questions – struck Dr. Guertin's testimony and gave the jury a curative instruction. Uribe requested a mistrial – claiming the instruction was insufficient. Judge Cunningham denied the mistrial. Did Judge Cunningham abuse her discretion by denying the mistrial?

Defendant-Appellant Answer: Yes.

Plaintiff-Appellee Answer: No.

## Issue III

A defendant is entitled to present a defense based on admissible evidence. Uribe wanted to present that Latunski had been convicted of attempted CSC. Uribe had no information about the incident leading to the conviction, nor did VG allege sexual abuse during a time when Latunski lived with her. Uribe's expert indicated information about the incident was necessary before she could give an opinion. Judge Cunningham denied admission of the information. Did Judge Cunningham abuse her discretion in excluding the evidence?

Defendant-Appellant Answer: Yes.

Plaintiff-Appellee Answer: No.

## Issue IV

A defendant is entitled to effective assistance of counsel during plea negotiations. Uribe claims Pawluk never informed him, and he did not know, about a 25-year mandatory sentence. Uribe claims denial of this information caused him to reject a plea offer. Pawluk testified he discussed the mandatory minimum several times, gave Uribe charging documents including the notice, and Uribe was not surprised by the

requirement at sentencing. Pawluk also testified Uribe was unwilling to plead to any offer. Lab supported Pawluk's testimony. At arraignment, Judge Reincke informed Uribe of the mandatory minimum. At the conclusion of a *Ginther* hearing, Judge Cunningham ruled Uribe knew of the mandatory minimum, Pawluk was effective, and Uribe was not prejudiced – denying Uribe's claim of ineffectiveness. Did Judge Cunningham abuse her discretion by denying Uribe's motion?

Defendant-Appellant Answer: Yes.

Plaintiff-Appellee Answer: No.

## Introduction

From ages 5- to 9-years old, VG's mother's boyfriend – Ernesto Uribe – lived with them, as a parental figure. During this span of time, Uribe repeatedly anally raped VG – threatening to kill her biological father if she ever told. Due to this threat, VG did not tell until after Uribe no longer lived in her home, and she could no longer emotionally cope with the abuse.

Following an initial meeting with Detective Vicki Dahlke, VG was referred to Dr. Stephen Guertin, M.D. – a specialist – for examination, diagnosis, and treatment related to child sexual abuse. While VG had previously been treated by her family physician – Dr. David Luginbill, D.O. – she had never been given an opportunity by a doctor to discuss sexual abuse, she had never received an examination focused on sexual abuse, and she had never received testing to ensure she was not suffering from diseases related to sexual abuse.

Prior to trial, Uribe opposed the admission of VG's historical information through Dr. Guertin. Following a motion hearing, Judge Janice Cunningham determined that the appointment with Dr. Guertin was for a medical purpose, statements from VG were admissible under the medical exception, and the testimony was not substantially more prejudicial than probative.

At trial, VG testified in great detail to four times in which Uribe anally raped her, with Uribe's attorney – Daniel Pawluk – vigorously cross-examining her. Uribe's biological daughter testified to Uribe's attempts to sexually abuse her, once VG was no longer available. Dr. Guertin testified about the basic historical information he

had collected during VG's appointment, and about his observations.

Uribe was found guilty of multiple counts of CSC First Degree. Because of the egregious nature of the abuse, and the lack of an ability for Uribe to be rehabilitated, Judge Cunningham sentenced Uribe to a minimum of 50-years in prison.

In his application, Uribe make claims of ineffective assistance of counsel by Pawluk, and error by Judge Cunningham in excluding evidence, admitting evidence and denying a motion for mistrial. Uribe's claims of error are extremely fact-specific, and this unpublished decision – which does not conflict with established precedence – does not warrant review by the Supreme Court. As a result, Uribe's application for leave to appeal should be DENIED.

### **Counter-statement of facts**

Based on the Court's order to answer, the counter-statement of facts will focus on the record relevant for considering *People v Shaw*, *People v Thorpe*, and *People v Harbison*. Additional relevant facts are discussed in the issue sections.<sup>1</sup>

### **Dr. Guertin examines VG**

Dr. Guertin examined and evaluated VG in October of 2012.<sup>2</sup> VG was taken to see Dr. Guertin by her mother who remained with her during the examination.<sup>3</sup> Although VG was referred to Dr. Guertin for examination and evaluation by law

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<sup>1</sup> *People v Shaw*, 315 Mich App 668; 892 NW2d 15 (2016); *People v Thorpe*, 504 Mich \_\_; \_\_ NW2d \_\_ (2019)(Docket No. 156777); *People v Harbison*, 504 Mich \_\_; \_\_ NW2d \_\_ (2019)(Docket No. 157404).

<sup>2</sup> Jury Trial Transcript, Volume II of IV, March 27, 2017, at 207.

<sup>3</sup> Dr. Guertin's correspondence, November 5, 2012; Exhibit B to Defendant's Motion to Suppress Dr. Stephen Guertin's Testimony.

enforcement; Dr. Guertin never discussed the referral with any law enforcement officer, nor did he obtain any information from law enforcement.<sup>4</sup> Such referrals are common, and account for approximately 2/3<sup>rds</sup> of all patients he sees suspected of having been sexually abused.<sup>5</sup> In fact, Dr. Guertin refuses to see any patients unless referred by Child Protective Services, law enforcement, or another doctor. VG would not have been able to go directly to Dr. Guertin for examination and evaluation without a referral. <sup>6</sup>

In cases of late reporting, as this was, Dr. Guertin's examination is medically driven with the initial medical history dictating testing and treatment.

Actually the diagnostic process ultimately dictates what treatments are necessary. There may be more or less treatment. Usually, the first part of treatment is making certain that the child is protected. Second part of treatment is making certain that you do the proper diagnostic tests which most of the time is based on what she says. Third part of treatment is to respond to those diagnostic tests. Fourth part of treatment is to make certain that the process of psychological help is being done. So, at least it's been initiated. So, all of that goes to treatment.<sup>7</sup>

As explained by Dr. Guertin, in cases of late reporting, the collection of a history is essential to evaluation and treatment of someone who has been sexually abused.

Because in a remote examination, and/or depending on what happened to her, the likelihood of there being physical findings would be quite remote. But that doesn't preclude a diagnosis based on history. So, anytime a patient who can talk to you comes into your office with a

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<sup>4</sup> Defendant's Motion to Suppress Dr. Stephen Guertin's Testimony Transcript, September 19, 2016, at 21-22, 26, 28, 30, 33-34.

<sup>5</sup> *Id.*, at 41

<sup>6</sup> *Id.*, at 41.

<sup>7</sup> *Id.*, at 22.

complaint, the first thing you do is you talk about it. And, by talking about it often times you establish a diagnosis.

In the case of sexual abuse, it's common that the only element that you end up with in terms of establishing the diagnosis is the history. If you look at the American Academy of Pediatrics' guidelines regarding child abuse, specifically, sexual abuse, they indicate that the history is the most important element because of the likelihood of there being a negative examination.<sup>8</sup>

### **Uribe attempts to exclude testimony**

Prior to trial, Uribe's attorney, Pawluk, filed a motion to exclude Dr. Guertin's testimony – alleging the examination “was not for any SANE kit purposes or for any medical emergency or treatment.”<sup>9</sup> Following extensive briefing and oral arguments, Judge Cunningham analyzed the factors contained in *Meeboer* – determining under the totality of the circumstances that VG's statements to Dr. Guertin were sufficiently trustworthy to allow admission.<sup>10</sup> In denying Uribe's motion, Judge Cunningham specifically considered,

- VG was thirteen, and old enough to provide accurate information to Dr. Guertin.<sup>11</sup>
- Dr. Guertin “utilized open-ended, non-leading statements” to collect the historical information.<sup>12</sup>
- VG used age-appropriate terminology, not complex language that would come from an adult influencing her answers.<sup>13</sup>
- The determination by Dr. Guertin whether there is sexual abuse – as clarified by the American Association of Pediatric Physicians – is a medical diagnosis.

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<sup>8</sup> *Id.*, at 23.

<sup>9</sup> Motion to Suppress Dr. Stephen Guertin's Testimony, August 31, 2016, at 2-3.

<sup>10</sup> Motion to Suppress Testimony of Dr. Guertin – Continued Transcript, September 30, 2016, at 28-34.

<sup>11</sup> *Id.*, at 29.

<sup>12</sup> *Id.*, at 29-30.

<sup>13</sup> *Id.*, at 30.

While the referral came from law enforcement, it was made so there could be a medical diagnosis.<sup>14</sup>

- The time between the examination and trial is a long-period of time.<sup>15</sup>
- The referral to Dr. Guertin occurred after VG was experiencing acting-out symptoms. The referral occurred because VG's behavior had changed, she was getting in trouble, and felt there was a "grudge over her" – leading to her disclosure and meeting with law enforcement.<sup>16</sup>
- VG had a close relationship with Uribe, so there is not a concern that VG was mistaken about who had sexually abused her.<sup>17</sup>
- No information or event has been provided to the Court as a motive for VG to fabricate her statements. At the point of disclosure, VG received no benefit.<sup>18</sup>
- Dr. Guertin's testimony is relevant, if for nothing more than to explain to the jury that a victim of sexual assault may not have physical injuries.<sup>19</sup>

### **VG's testimony**

At trial, VG testified in great detail about the abuse she suffered. She did not merely describe the sexual acts Uribe did to her; but discussed where and when the abuse occurred, how it felt, her fear for her father's life, and details about the places where the rapes occurred.<sup>20</sup> These details included, the floral pattern on the chair she was bent over at Stonegate.<sup>21</sup> Uribe's threat to kill her father if she told – conveyed while they were making tacos the next night.<sup>22</sup> The snapping noise as Uribe put on a

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<sup>14</sup> *Id.*, at 30-31.

<sup>15</sup> *Id.*, at 30.

<sup>16</sup> *Id.*, at 29, and 31.

<sup>17</sup> *Id.*, at 31-32.

<sup>18</sup> *Id.*, at 32.

<sup>19</sup> *Id.*, at 33-34. In making her ruling, Judge Cunningham incorporated the People's brief opposing Uribe's motion. *Id.*, at 34.

<sup>20</sup> Jury Trial Transcript, Volume II of IV, at 59-78.

<sup>21</sup> *Id.*, at 61.

<sup>22</sup> *Id.*, at 63-64.

condom the first time at Courtland.<sup>23</sup> The second time at Courtland when Uribe forced her face into the burgundy, floral comforter, and the slimy stuff Uribe wiped off her with a white cloth.<sup>24</sup> And the last time, at Kensington Meadows, remembering looking at her baby sister's crib while being raped.<sup>25</sup> These details were significant to the case, being highlighted by Assistant Prosecutor Morton during her closing.<sup>26</sup>

### **Pawluk's cross-examination**

During Pawluk's cross-examination, VG was prompted to repeat many details of her abuse, including,<sup>27</sup>

- Pawluk clarified with VG, multiple times, that Uribe had "anal intercourse," or "penis in the butt intercourse," with VG.<sup>28</sup>
- As VG had told Dr. Guertin, there was no oral sex, or touching of VG's private parts by Uribe.<sup>29</sup> VG never saw Uribe's penis, nor did she ever touch it.<sup>30</sup> And Uribe did not take pictures of VG, nor did he show her pornography.<sup>31</sup>
- Pawluk also got VG to re-assert that Uribe had threatened to kill her father if she "told anybody."<sup>32</sup>
- VG re-stated that Uribe abused her for the first time when she was five-years-old, living at Stonegate, and that it occurred when everyone was sleeping.<sup>33</sup>
- Pawluk, in an attempt to impeach VG, went on to repeat details about the first rape, including "Defendant calls you over, pulls your pants down, sticks his

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<sup>23</sup> *Id.*, at 66-67.

<sup>24</sup> *Id.*, at 70-71.

<sup>25</sup> *Id.*, at 74-77.

<sup>26</sup> Jury Trial Transcript, Volume IV of IV, March 29, 2017, at 14-22.

<sup>27</sup> Uribe has never alleged Pawluk's cross-examination constituted ineffectiveness.

<sup>28</sup> Jury Trial Transcript, Volume II of IV, at 114-116, 119.

<sup>29</sup> *Id.*, at 115.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, at 116.

<sup>32</sup> *Id.*, at 121-122, and 138-139.

<sup>33</sup> *Id.*, at 124-125.

penis in your butt at Stonegate.” In which VG responds “Yes.”<sup>34</sup>

- Pawluk continues by giving VG an opportunity to re-affirm a detail of one of the Courtland incidents.<sup>35</sup>
- Pawluk then clarifies that VG was diagnosed with Attention Deficit Disorder in 2004, which was around the time Uribe’s abuse of VG began.<sup>36</sup> This was significant because both Dr. James Henry, and defense expert Dr. Sharon Hobbs, testified that sexual abuse can cause behavior that is often misdiagnosed for ADHD.<sup>37</sup> And VG disclosed Uribe’s abuse because she was “having some emotional problems about how I felt about myself.”<sup>38</sup>
- Palwuk discussed VG’s abuse at Courtland, stating “He came in, pulled your pants down, and sticks his penis in your butt: true?” In which VG responds, “Yes.”<sup>39</sup>
- Pawluk proceeds to repeat the details of the second rape that occurred at Courtland.<sup>40</sup>
- Pawluk then gets VG to tell him that Uribe’s abuse stopped after being raped at Kensington Meadows, and Uribe moved out.<sup>41</sup>

### Dr. Guertin’s testimony

Following VG’s testimony, and her repeating descriptions of Uribe’s abuse – elicited by Pawluk on cross-examination – Dr. Guertin testified as an expert “in the

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<sup>34</sup> *Id.*, at 127-129.

<sup>35</sup> *Id.*, at 129.

<sup>36</sup> *Id.*, at 130, 158-161, and 253-254.

<sup>37</sup> Jury Trial Transcript, Volume III of IV, March 28, 2017, at 69-71, and 238. Dr. Henry was qualified as an expert in the “[b]ehavior of children who have been sexually abused or experienced sexual trauma.” *Id.*, at 55. Dr. Hobbs was qualified as an expert as a “clinical psychologist with a backgrounds in behavior of children who have been sexually abused. And further, that she is an expert when it comes to the evaluation and assessment and – and then, the treatment and counseling of sexually abused children and teen-agers.” *Id.*, at 225.

<sup>38</sup> Jury Trial Transcript, Volume II of IV, at 152-153.

<sup>39</sup> *Id.*, at 132.

<sup>40</sup> *Id.*, at 132-133.

<sup>41</sup> *Id.*, at 134-136.

area of child sexual abuse, child abuse, and pediatric clinical (sic) care.”<sup>42</sup>

Dr. Guertin testified VG’s referral came from the Lansing Police Department for the “possibility of sexual abuse,” but VG’s mother brought her to the appointment and was present during. He continued by testifying about his evaluation and examination procedure, including the collection of relevant historical information.<sup>43</sup> During his testimony, he indicated that he evaluated VG when she was 13-years-old, and she had told him,

- When asked if she knew why she was at the appointment, VG responded, “Yes, because I’ve had bad things happen to me when I was little.”<sup>44</sup>
- This occurred “over a span of time” from when VG was five-years-old to nine-years-old.<sup>45</sup>
- The person who did these “things” was “Ernesto,” VG’s little sister’s father – information that was necessary for medical diagnosis.<sup>46</sup>
- The abuse did not occur when other people were present.<sup>47</sup>
- While Ernesto did not do anything with his mouth or hands, he did “put his penis in her butt.” And when it happened she was either “bent over on something, or she’d be laying down on her stomach.”<sup>48</sup>
- While VG said this hurt, she denied any bleeding.<sup>49</sup>
- When asked, VG denied pain when she defecated following the sexual assault, which was “a little surprising” to Dr. Guertin – but is something he had seen

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<sup>42</sup> *Id.*, at 207; *notation in original*.

<sup>43</sup> *Id.*, at 113-114, 207-214, and 219.

<sup>44</sup> *Id.*, at 211.

<sup>45</sup> *Id.*, at 212.

<sup>46</sup> *Id.*; *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992); *citing People v Mahone*, 294 Mich App 208, 215; 816 NW2d 436 (2011).

<sup>47</sup> Jury Trial Transcript, Volume II of IV, at 212.

<sup>48</sup> *Id.*, at 214-215.

<sup>49</sup> *Id.*, at 215.

before.<sup>50</sup>

- When asked, VG denied Ernesto forcing her to do anything to him, or contact with her vagina.<sup>51</sup>
- When asked if Ernesto had “said anything about this,” VG answered, “He told me to keep it a secret. And if I told, he would kill my dad.” VG believed the threat.<sup>52</sup>
- When asked, VG denied that Ernesto took any pictures of VG, or being shown pornography.<sup>53</sup>
- And Ernesto’s abuse ended when VG was nine-years-old because Ernesto moved out of the house.<sup>54</sup>

On cross-examination, in response to Pawluk’s questions, Dr. Guertin also testified VG told him,

- VG described the penile/anal intercourse as painful.<sup>55</sup>
- And in response to Pawluk’s questions about Dr. Guertin’s diagnosis, Dr. Guertin read from his report. “She gives a very clear history of being sexually molested between the ages of five and nine. She indicates that the person who did this was a man . . .”<sup>56</sup>

In contrast to Pawluk’s cross-examination, the scope of Dr. Guertin’s testimony regarding VG’s statements were minimal, and focused on medically necessary information. His testimony did not corroborate or bolster VG’s testimony, as claimed by defense, but instead was limited in nature.

Dr. Guertin’s testimony was limited in scope to the information obtained

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<sup>50</sup> *Id.*, at 216.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, at 216-217.

<sup>53</sup> *Id.*, at 217.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, at 229.

<sup>56</sup> *Id.*, at 236.

during the medical appointment necessary for diagnosis and treatment. The admission was proper, and Judge Cunningham's ruling was not an abuse of discretion. Further, this unpublished decision does not offend other published precedent. As a result, Uribe's application should be DENIED.

### **Argument**

#### **Issue I**

Hearsay statements made for the purpose of medical treatment or diagnosis are admissible at trial. Following a motion hearing, and an analysis of *Meeboer* factors, Judge Cunningham determined VG had seen Dr. Guertin for a medical purpose, and VG's statements during that evaluation and examination were admissible. On appeal, Uribe focuses on Dr. Guertin as the examining doctor, and that law enforcement made the referral, to argue error. Uribe fails to consider VG's prior repeated testimony elicited by Pawluk, the circumstantial physical evidence observed during the examination, additional circumstantial evidence, VG's mental injury, that previous to examination VG was seeking counseling, and VG's youth and motivation to be truthful. Upon review of the totality of the circumstances surrounding, did Judge Cunningham err in allowing VG's statements?

**Prosecutor's answer: No.**

#### **Counter-statement of issue preservation**

"In order to preserve an issue for appellate review, it must be raised before and considered by the trial court."<sup>57</sup> "An objection on one ground is not sufficient to preserve an issue on a different ground."<sup>58</sup>

Prior to trial, Uribe objected to Dr. Guertin's testimony, alleging the

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<sup>57</sup> *People v Solloway*, 316 Mich App 174, 197; 891 NW2d 255 (2016); citing *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995).

<sup>58</sup> *Solloway*, *supra* 57, at 197; citing *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

examination “was not for any SANE kit purposes or for any medical emergency or treatment.”<sup>59</sup> Uribe also alleged Dr. Guertin should not testify because VG had not suffered any injury.<sup>60</sup>

On appeal, Uribe claims VG “did not consult with Dr. Guertin to seek medical treatment or diagnosis.”<sup>61</sup> As a result, the issue is preserved for appellate review.

### **Counter-statement of standard of review**

A trial court’s findings of fact are upheld unless clearly erroneous, and conclusions of law are reviewed de novo.<sup>62</sup> “A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made.”<sup>63</sup>

The decision to allow Dr. Guertin’s testimony is reviewed for abuse of discretion.<sup>64</sup> An abuse of discretion occurs when the trial court picks an outcome that is “outside the range of principled outcomes.”<sup>65</sup> As a result, close evidentiary decisions are not an abuse of discretion.<sup>66</sup>

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<sup>59</sup> Motion to Suppress Dr. Stephen Guertin’s Testimony, at 2-3.

<sup>60</sup> *Id.*, at 5.

<sup>61</sup> Application for Leave to Appeal, Michigan Supreme Court, February 28, 2019, at 16.

<sup>62</sup> *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000); citing MCR 2.613(C); *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993).

<sup>63</sup> *People v Swirles*, 218 Mich App 133, 136; 553 NW2d 357 (1996); citing *People v Passeno*, 195 Mich App 91, 103; 489 NW2d 152 (1992).

<sup>64</sup> *Thorpe, supra* 1, at slip op 8; citing *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

<sup>65</sup> *Thorpe, supra* 1, at slip op 8; quoting *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014); quoting *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013).

<sup>66</sup> *Thorpe, supra* 1, at slip op 8; *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

### Medical exception to hearsay

While out-of-court statements are generally excluded from trial, one of several exceptions is when the statements are made for the purposes of medical treatment or diagnosis.<sup>67</sup> As a result, admissible hearsay statements include,

Statements made for the purposes of medical treatment or medical diagnosis in connection with 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 necessary to such diagnosis and treatment.<sup>68</sup>

This exception exists because “the hearsay statements are both necessary and inherently trustworthy.”<sup>69</sup> As explained by this Court,

Traditionally, further supporting rationale for MRE 803(4) are the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.<sup>70</sup>

In cases involving children over the age of ten – as in this case – there is a rebuttable presumption that the patient understood the importance of honesty for proper medical treatment.<sup>71</sup> This presumption has not been addressed or overcome by Uribe.

### ***Shaw, Thorpe, and Harbison***

As ordered by the Court, the prosecutor distinguishes the facts in Uribe’s case

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<sup>67</sup> MRE 801; MRE 802; MRE 803(4).

<sup>68</sup> MRE 803(4).

<sup>69</sup> *Meeboer, supra* 46, at 322; *citing Solomon v Shuell*, 435 Mich 104, 119; 457 NW2d 669 (1990).

<sup>70</sup> *Meeboer, supra* 46, at 322.

<sup>71</sup> *People v Garland*, 286 Mich App 1, 9; 777 NW2d 732 (2009); *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992).

with *People v Shaw*, *People v Thorpe*, and *People v Harbison*.<sup>72</sup>

### ***People v Shaw***

When she was 23-years-old, Barry Shaw's step-daughter disclosed Shaw had sexually abused her on several occasions between the ages of 8, and 16. Following disclosure, the step-daughter was referred by law enforcement to Dr. Guertin – an expert in pediatric sexual abuse – for examination and treatment.<sup>73</sup> After being convicted of nine counts of CSC 1<sup>st</sup> Degree, Shaw appealed claiming his trial attorney was ineffective for failing to object to several instances of hearsay, failure to discover and admit certain evidence, and failure to object to impeachment testimony. In a two-to-one decision, the Court of Appeals determined Shaw's attorney was ineffective, Shaw was prejudiced by the extensiveness of the ineffectiveness, and entitled to a new trial.<sup>74</sup>

On appeal, the Court of Appeals determined Shaw's trial attorney was ineffective for several reasons.

First the trial attorney failed to object to hearsay statements made by three of the step-daughter's family. This testimony was statements regarding the step-daughter's disclosures. The Prosecutor conceded that there was no applicable hearsay exception – agreeing that the statements should not have been admitted.<sup>75</sup>

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<sup>72</sup> *Shaw*, *supra* 1; *Thorpe*, *supra* 1; *Harbison*, *supra* 1.

<sup>73</sup> *Shaw*, *supra* 1, at 671.

<sup>74</sup> *Id.*, at 671, 687-688. Judge Kathleen Jansen dissented, asserting that the majority had improperly substituted its judgment for the trial judge who had already held an extensive *Ginther* and denied Shaw relief. *Id.*, at 690-698; *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>75</sup> *Shaw*, *supra* 1, at 673-674.

Second, the Court found error in the attorney's failure to object to Dr. Guertin's testimony recounting the step-daughter's statements "in detail." At the *Ginther* hearing, the prosecutor successfully argued that trial counsel did not object to the testimony as part of his trial strategy attacking inconsistencies in the step-daughter's various statements.<sup>76</sup>

During trial, Dr. Guertin testified, based on the medical history, that he believed the step-daughter's allegations. He further testified that the physical findings were consistent with this history. Because he is a pediatrician, The Court questioned Dr. Guertin's qualifications to express such opinion about the step-daughter, who at the time of the examination was no longer a child.<sup>77</sup>

Ultimately, Judges Shapiro, and Gleicher, determined trial counsel was ineffective because Dr. Guertin's examination was not for a medical purpose, and any connected statements were not admissible under MCR 803(4).<sup>78</sup> This was based on the following unique facts,

- The examination did not occur until 7-years after the last alleged sexual assault.
- The step-daughter did not see Dr. Guertin for gynecological services, but instead was referred by law enforcement "in conjunction with" a criminal investigation.
- And, the step-daughter had seen a different doctor for gynecological services from the time the assaults had occurred, until the disclosure. And that doctor was not called to testify.<sup>79</sup>

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<sup>76</sup> *Id.*, at 675-676.

<sup>77</sup> *Id.*, at 678 n 4 and 5.

<sup>78</sup> *Id.*, at 674-675.

<sup>79</sup> *Id.*, at 675.

Third, the Court found error in Detective Reust’s “detailed description of the alleged abuse,” and double-hearsay in which the detective recounted Dr. Guertin’s statements describing information the step-daughter gave during examination. Detective Reust also testified that prior to filing charges, she had corroborated some of the step-daughter’s statements regarding other events. The court viewed the testimony about this corroboration as the detective vouching for the step-daughter’s credibility.<sup>80</sup>

Fourth, the court found error in Shaw’s trial attorney failing to discover testimony from the step-daughter’s boyfriend – to explain that an “injury” Dr. Guertin had observed had been caused by consensual sex.<sup>81</sup> While the trial attorney, and judge, believed such testimony was barred by the Rape-Shield Statute, the majority opined that such testimony would be admissible.<sup>82</sup>

Fifth, the Court found error in the admission of impeachment testimony, based

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<sup>80</sup> *Id.*, at 676-677.

<sup>81</sup> The opinion contradicts itself regarding the significance of Dr. Guertin’s observation of hymenal injuries. While the Court determined that the observation was significant enough to warrant a finding of ineffectiveness for failure of trial counsel to discover and refute the finding, in another part of the opinion the Court characterizes the physical evidence a “lack of any significant circumstantial proofs.” Based on this lack of physical evidence, the Court reasoned that the “case turned largely on the complainant’s credibility,” finding that the admission of the testimony resulted in “a reasonable probability that the outcome of this case would have been different.” *Id.*, at 677-678.

<sup>82</sup> *Id.*, at 678-681. On application to the Supreme Court, Justices Zahra, and Young, were critical of this opinion. While the statute permits testimony to explain the source of disease, it does not permit testimony to explain a source of injury, making the proffered testimony prohibited by the Rape-Shield Statute. As a result, Justices Zahra, and Young, would have granted leave to appeal or allowed oral arguments on the application. *People v Shaw*, Order of the Michigan Supreme Court, issued February 3, 2017 (Docket No. 154220).

on the procedure used to admit the testimony, the impermissibly prejudicial nature of the testimony, and the failure of the trial judge to give a limiting instruction.<sup>83</sup>

Based on all these errors, the Court determined Shaw was entitled to a new trial. In making this decision, the Court did not analyze the errors individually to determine which errors were prejudicial and which were harmless.

It can be fairly argued that in the context of an otherwise proper trial, the erroneous admission of this particular testimony might very well have been harmless error. However, given the extent to which the jury heard other improperly admitted evidence it is difficult to single out a particular error and conclude that it was harmless.<sup>84</sup>

The quantity of improperly admitted testimony was so extensive, and its contents so significant, that there is a reasonable probability that, but for counsel's errors the outcome of the trial would have been different.<sup>85</sup>

### ***Uribe distinguished***

On appeal, the Court of Appeals found many factual differences between its decision in Shaw, and Uribe's case.<sup>86</sup> As a result, the majority determined there was no error in the admission of VG's statements through Dr. Guertin. And even if there was error, it was harmless.<sup>87</sup>

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<sup>83</sup> *Shaw, supra* 1, at 682-687; MRE 403.

<sup>84</sup> *Shaw, supra* 1, at 687, discussing the improper admission of impeachment testimony.

<sup>85</sup> *Id.*, at 688.

<sup>86</sup> *People v Uribe*, Unpublished opinion per curiam of the Court of Appeals, issued January 3, 2019 (Docket No. 338586), at slip op 6-7; Exhibit A. *Uribe* is referenced because it specifically addresses the case facts warranting distinguishing *Uribe* from *Shaw*. These determinations were made by the Court of Appeals, and are consistent with the trial court's findings of fact, which must be given deference. *Snider, supra* 62, at 406; citing MCR 2.613(C); *Faucett, supra* 62, at 170; MCR 7.215(C)(1).

<sup>87</sup> *Uribe, supra* 86, at slip op 7; Exhibit A.

The Court of Appeals listed the following as factual distinctions from *Shaw*, warranting a different outcome.

- Unlike *Shaw*, VG was still a child when examined and diagnosed by a pediatrician, Dr. Guertin. Since Dr. Guertin regularly diagnosis and treats children, and Dr. Guertin testified to the medical importance of the history, VG’s statement was reasonably necessary. And the Court of Appeals determined that VG “could have possessed the ‘self-interested motivation to speak the truth to a treating physician to receive medical care.’”<sup>88</sup>
- While like *Shaw*, VG had previously been treated by her family physician, Dr. Luginball; unlike *Shaw*, Dr. Luginbill testified at trial and was available for cross-examination. This testimony revealed that Dr. Luginbill had never tested VG for sexually transmitted diseases, did not specifically examine her anus, and had not given VG the kind of medical examination, diagnosis, or treatment that Dr. Guertin was capable.<sup>89</sup>
- Like *Shaw*, “An injury need not be readily apparent. Moreover, ‘[p]articularly in cases of sexual assault, in which the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature, and thus not necessarily physically manifested at all, a victim’s complete history and recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment.’”<sup>90</sup>

In addition to the distinctions articulated by the Court of Appeals, additional differences include,

- Due to the extent of the improperly admitted testimony, and the trial attorney’s ineffectiveness, *Shaw* failed to analyze whether Dr. Guertin’s testimony alone impacted the outcome of the trial. As a result, *Shaw* does not require a new trial in every case – only one with extensive cumulative error.
- While in *Shaw*, Dr. Guertin recounted the victim’s testimony “in detail;” Dr. Guertin’s testimony regarding VG’s statements was not detailed. Rather, he merely recited allegations that had already been reinforced by Pawluk on cross-examination.<sup>91</sup> Considering Pawluk’s cross-examination, and the detail

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<sup>88</sup> *Id.*; quoting *Meeboer, supra* 46, at 322.

<sup>89</sup> *Uribe, supra* 86, at slip op 7; Exhibit A.

<sup>90</sup> *Id.*, quoting *Shaw, supra* 1, at 674-675.

<sup>91</sup> *Shaw, supra* 1, at 675-676; Jury Trial Transcript, Volume II of IV, at 114-116, 119, 121-122, 124-125, 127-130, 132-136, 138-139, 211-212, 214-217.

of the abuse provided by VG, Dr. Guertin's testimony was cumulative, and merely provided to give context for his expert opinion.<sup>92</sup>

- Contrary to the adult-victim in *Shaw*, who reasonably understood that the appointment with Dr. Guertin was to collect evidence for trial, VG as a child would not have the same understanding.<sup>93</sup> VG knew she had been referred to see a doctor due to Uribe's actions. Her mother took her to the appointment, she was questioned about what had occurred and possible injuries or pain, samples of her blood and urine were collected, and her anus was swabbed – for medical testing.

From VG's point of view, this is no different from when her mother would take her to see her family physician – Dr. Luginbill.<sup>94</sup> He would have questioned her about injuries and symptoms, and taken samples when testing was necessary.<sup>95</sup> While not as extensive an examination, Dr. Luginbill had even previously examined VG's genitalia in connection with a well-child exam, and a complaint of a UTI.<sup>96</sup>

- While the Court in *Shaw* considered it significant that Dr. Guertin's report was directed to the prosecutor, the Shaw majority failed to consider that the "report" was not the only document related to Dr. Guertin's examination.<sup>97</sup> In this case, VG's file consists of 13-pages of documents and photos, a report also would have been sent to VG's mother, 9 tests for diseases were conducted on urine, blood, and swabbed fluids, and any results from those tests would have been provided via telephone to VG's mother.<sup>98</sup>
- While Uribe asserts Dr. Guertin's examination was not for a medical purpose because he did not recommend psychological follow-up, such a recommendation was unnecessary because VG was either already seeking counseling, or already in counseling.<sup>99</sup>

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<sup>92</sup> *Uribe, supra* 86, at slip op 7; Exhibit A; MCL 750.520h.

<sup>93</sup> *Garland, supra* 71, at 9; *Van Tassel, supra* 71, at 662.

<sup>94</sup> Jury Trial Transcript, Volume II of IV, at 114, 146.

<sup>95</sup> *Id.*, at 158.

<sup>96</sup> *Id.*, at 162-165.

<sup>97</sup> *Shaw, supra* 1, at 675 n 2.

<sup>98</sup> Affidavit of Dr. Stephen Guertin; Exhibit B. At the time of the filing of the answer, Dr. Guertin's affidavit was not available. This will be submitted as soon as possible. This affidavit is an offer of proof for a possible later expansion of the record to address the medical necessity of the evaluation and examination. MCR 7.316(A)(4); MCR 7.316(A)(1); MCR 7.216(A)(4).

<sup>99</sup> Jury Trial Transcript, Volume II of IV, at 80, 90, and 267.

As a result of these many differences, and that the Court of Appeals decision in Uribe is not published, this case does not raise issues or conflicts warranting review by this Court.

***People v Thorpe***

Joshua Thorpe met BG during a three-year relationship with BG's mother, Chelsie. When Thorpe and Chelsie started their relationship, BG was three. During this relationship, Thorpe and Chelsie had a daughter. Thorpe and Chelsie both parented the children together. Even after Thorpe and Chelsie ended their relationship, Thorpe continued to take care of both children. The children attended a daycare run by Thorpe's mother.<sup>100</sup>

This arrangement ended when Chelsie began a new relationship. As a result, Thorpe's parenting time with both children ended. While Thorpe and his mother claimed he ended parenting the time with BG, Chelsie and BG claimed it resulted from BG no longer wanting to see Thorpe. At the same time, Chelsie became pregnant, and BG began having tantrums and outbursts.

BG then reported a sexual assault by Thorpe to Thorpe's mother at daycare – who reported it to Chelsie. During a police interview, BG reported multiple sexual assaults for improper touching by Thorpe. As a result, Thorpe was charged with three counts of CSC 2<sup>nd</sup> Degree.<sup>101</sup>

At trial, Thomas Cottrell testified for the prosecution as an expert on “the

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<sup>100</sup> *Thorpe, supra* 1, at slip op 2.

<sup>101</sup> *Id.* The Supreme Court noted that there were several contradictions in BG's trial testimony. *Id.*, at slip op 2 n 3-5.

broad range of reactions of children who are abused, the cost/benefit analysis children make in deciding whether to disclose abuse, and some of the reasons children may delay disclosure.”<sup>102</sup> On cross-examination, Cottrell was asked if kids lie, and could be manipulative – which he answered in the affirmative. On redirect, the prosecutor asked Cottrell about the percentage of children who lie about sexual abuse. Over defense counsel’s objection, Cottrell was permitted to testify that such lying was “extremely rare.”<sup>103</sup>

During closing arguments, the prosecutor referred to Cottrell’s testimony and specifically asserted that BG did not lie.<sup>104</sup> Although Thorpe’s convictions were affirmed by the Court of Appeals, on review, this Court determined that Cottrell’s testimony was improper because Cottrell’s testimony had the effect of vouching for BG’s credibility, and the case was purely a credibility contest.<sup>105</sup>

### ***Uribe distinguished***

In his supplemental authority, Uribe asserts that *Thorpe* applies because the defense attorney in *Thorpe* initially asked if children lied. This prompted the prosecutor to clarify that such lies were “extremely rare.” Uribe argues this situation is analogous to Pawluk opening the door for Dr. Guertin’s diagnosis testimony.<sup>106</sup> This assertion is wrong.

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<sup>102</sup> *Id.*, at slip op 3. Cottrell has a master’s degree in social work, and is the Vice President of Counseling Services at the YWCA Counseling Center. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, at slip op 11.

<sup>105</sup> *Id.*, at slip op 11; *People v Peterson*, 450 Mich 450 Mich 349, 375-376; 537 NW2d 857 (1995).

<sup>106</sup> Supplemental Authority, July 25, 2019, at 1; *Thorpe*, *supra* 1, at slip op 3.

*Thorpe* does not apply because Pawluk did not simply ask one broad question, but instead asked a series of questions, with a break between them, attacking Dr. Guertin's for failing to make a diagnosis. Unlike in *Thorpe*, Pawluk pursued a series of question likely to elicit an answer involving a diagnosis.<sup>107</sup>

Further, the error in *Thorpe* was the admission of the testimony over defense objection.<sup>108</sup> However in Uribe's case, Judge Cunningham struck the opinion testimony and gave a specific instruction to the jury that they disregard the answer.<sup>109</sup> Assistant Prosecutor Morton even referred to the special instruction in her closing to make sure the jury did not consider this excluded testimony.<sup>110</sup>

Finally, any testimony involving Dr. Guertin's diagnosis was harmless. Unlike *Thorpe*, in which it was purely a credibility contest, Uribe's case involved testimony by VG, plus – as discussed elsewhere – physical and circumstantial evidence supporting her assertion of sexual abuse.<sup>111</sup>

Upon careful analysis, *Thorpe* is distinguished from Uribe's case, and does not conflict with the holding. As a result, there is no basis for this Court to grant Uribe's

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<sup>107</sup> Jury Trial Transcript, Volume II of IV, at 236-237, and 283-240.

<sup>108</sup> *Thorpe*, *supra* 1, at slip op 8.

<sup>109</sup> Jury Trial Transcript, Volume II of IV, at 236-237, 241-245, and 293-295; Jury Trial Transcript, Volume III of IV, at 24; *People v Graves*, 458 Mich 476, 485; 581 NW2d 229 (1998); *citing People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994).

<sup>110</sup> Jury Trial Transcript, Volume IV of IV, at 12.

<sup>111</sup> A possible misdiagnosis of ADHD at the time the sexual abuse began. Jury Trial Transcript, Volume II of IV, at 130, 158-161, and 253-254; Jury Trial Transcript, Volume III of IV, at 69-71, 55, 225, and 238. Dr. Guertin's observation of anal stretching resulting from either sexual abuse or constipation, coupled with Dr. Luginbill's testimony that he had never treated VG for constipation. Jury Trial Transcript, Volume II of IV, at 157-158, and 224-225; Jury Trial Transcript, Volume IV of IV, at 28, and 31.

application.

***People v Harbison***

TH was 9-years-old when her 18-year-old uncle – Brandon Harbison – babysit her. Once in foster care, TH disclosed that Harbison had sexually abused her in various ways during this time. As a result, Harbison was charged with two counts of CSC 1<sup>st</sup> Degree, one count of Attempted CSC 1<sup>st</sup> Degree, two counts of CSC 2<sup>nd</sup> Degree, and one count of Accosting a Child for Immoral Purposes.<sup>112</sup>

TH testified to the abuse.

TH's mother testified that Harbison lived with them – confirming Harbison had watched TH. TH's mother also testified she and Harbison had used methamphetamine at the time, and when confronted with the allegations – Harbison admitted the assaults.<sup>113</sup>

Dr. N. Debra Simms testified as a pediatrician and expert for child sexual abuse diagnostics. Dr. Simms had examined TH prior to trial, and diagnosed TH with “probable pediatric sexual abuse.”<sup>114</sup> Dr. Simms' examination involved the collection of historical information, and a head-to-toe physical examination. The results of the physical examination were “non-specific,” in which Dr. Simms' did not see any trauma to TH's vagina, but noted a small “notch” on her hymen. This finding was consistent

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<sup>112</sup> *Thorpe, supra* 1, at slip op 4. The Supreme Court consolidated *Thorpe* and *Harbison*, issuing a single decision for both.

<sup>113</sup> *Id.*, at slip op 4-5.

<sup>114</sup> *Id.*, at slip op 5. Since there was no objection to Dr. Simms' testimony, its admission was reviewed for plain error. *Id.*, at slip op 8, and 11; *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

with the sexual abuse TH described.<sup>115</sup>

While other witnesses gave conflicting testimony – including Harbison’s probation officer who testified he was in jail during the alleged offenses – the jury found Harbison guilty of all counts. On appeal, the Court of Appeals affirmed – determining it was not a clear or obvious error for Dr. Simms to testify about her diagnosis because her testimony did not “vouch for the veracity of the victim or testify that the sexual abuse occurred or that the defendant is guilty.”<sup>116</sup> On review, this court determined Dr. Simms’ testimony violated its decision in *People v Smith*, because Dr. Simms’ diagnosis was solely based on TH’s description of sexual abuse.<sup>117</sup>

### ***Uribe distinguished***

In this case, Dr. Guertin’s testimony regarding his diagnosis was struck from the record, and the jury was given a specific instruction for the jury to ignore the testimony. Dr. Guertin initially did not provide a diagnosis, and only provided one after Pawluk attempted to impeach him with a report that did not contain a diagnosis.<sup>118</sup> In contrast, Dr. Simms’ diagnosis was permitted to be considered by the jury, in violation of *Smith*.<sup>119</sup>

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<sup>115</sup> *Thorpe, supra* 1, at slip op 5-6.

<sup>116</sup> *Id.*, at 7-8; quoting *People v Harbison (On Remand)*, Unpublished per curiam opinion of the Court of Appeals, issued January 23, 2018 (Docket No. 326105), at 8; Exhibit C. *Harbison* is referenced to provide context for the evolution of the rationale for the decision. MCR 7.215(C)(1).

<sup>117</sup> *Thorpe, supra* 1, at 11-12; *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986).

<sup>118</sup> Jury Trial Transcript, Volume II of IV, at 236-245, and 293-295; Jury Trial Transcript, Volume III of IV, at 3-20, and 24; Jury Trial Transcript, Volume IV of IV, at 12.

<sup>119</sup> *Thorpe, supra* 1, at 11-12.

A further distinction is that TH's case was built completely on credibility. In contrast, the case against Uribe contained physical evidence that supported the abuse. This physical evidence was the observation by Dr. Guertin that VG had stretches in her anus caused by either constipation or sexual abuse. In addition to the observation, Dr. Luginbill had previously testified VG had never been seen or treated for constipation.<sup>120</sup> As a result, contrary to Uribe's post-conviction claims, Dr. Guertin's examination did produced physical evidence of abuse.

Further, evidence of abuse came in the form of Dr. Luginbill's testimony that he had diagnosed VG with Attention Deficit Disorder, at the same time Uribe began raping her. At trial, Dr. Henry, and Uribe's expert – Dr. Hobbs – both testified that sexual abuse is often misdiagnosed as ADHD.<sup>121</sup> This, added to the information that VG no longer had ADHD-type symptoms now that she was no longer being sexually abused, provides strong circumstantial medical evidence refuting Uribe's claim his trial was merely a credibility battle.

### **Uribe's grounds do not justify granting application**

Uribe alleges this issue is worthy of review by the Supreme Court because it "is of major significance to the state's jurisprudence," the Court of appeals decision conflicts with its published decision in *Shaw*, and Uribe will suffer "material injustice" if the Court does not intervene.<sup>122</sup>

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<sup>120</sup> Jury Trial Transcript, Volume II of IV, at 157-158, and 224-225; Jury Trial Transcript, Volume IV of IV, at 28, and 31.

<sup>121</sup> Jury Trial Transcript, Volume II of IV, at 130, 152-153, 158-161, and 253-254; Jury Trial Transcript, Volume III of IV, at 55, 69-71, 225, and 238.

<sup>122</sup> Uribe's brief, iv-v; MCR 7.305(B)(3), (5)(b), and (5)(a); *Shaw*, *supra* 1.

As discussed above, this unpublished decision does not conflict with *Shaw*. Further, since “[a]n unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision,” the Court of Appeals decision in *Uribe* does not interfere with *Shaw*, or create any confusion over the rule.<sup>123</sup> Since there is no conflict, and this case is not published, it does not create a new rule and is not “of major significance to the state’s jurisprudence.”

Finally, as the Court of Appeals determined, any error was harmless, and does not amount to a “material injustice.” While *Uribe* claims Dr. Guertin’s testimony effectively repeated VG’s testimony, a review of all of the testimony demonstrates otherwise. While Pawluk had already reinforced VG’s testimony, Dr. Guertin’s statements were only provided to support his testimony regarding medical treatment and findings. Dr. Guertin’s testimony was the third-presentation of the VG’s story, and minimal fashion

As the Court of Appeals noted, the testimony – at best – was cumulative. It did not focus on the significance of the detail, or dramatize the abuse to develop sympathy, but instead was a description of information used by a medical professional for purposes of treatment. It was not an abuse of discretion for Judge Cunningham to allow VG’s hearsay statements through Dr. Guertin, and the

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<sup>123</sup> *Hart v Massanari*, 266 F3d 1155, 1178 (9<sup>th</sup> Cir 2001). Non-binding opinions are not binding unless they contain a concise statement of facts, and reasons for the decision. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012); citing *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993); *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001).

admission of any repeated statements was harmless. This case does not present a significant enough legal conflict to warrant the granting of Uribe's application.

## Issue II

A mistrial may only be granted when a curative instruction cannot correct the error. In response to Pawluk's questions about his report and diagnosis, Dr. Guertin testified he diagnosed VG as a victim of sexual abuse. Judge Cunningham – concerned about the testimony caused by Pawluk's questions – struck Dr. Guertin's testimony and gave the jury a curative instruction. Uribe requested a mistrial – claiming the instruction was insufficient. Judge Cunningham denied the mistrial. Did Judge Cunningham abuse her discretion by denying the mistrial?

**Prosecutor's answer: No.**

### **Counter-statement of standard of review**

To declare a mistrial, the trial judge must find “manifest necessity” requiring the termination of the trial.<sup>124</sup> This necessity does not have to be absolute, but it must be of “high degree.”<sup>125</sup> A judge's decision to declare a mistrial is reviewed for an abuse of discretion. Trial judges must refrain from declaring a mistrial unless “a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.”<sup>126</sup>

A trial court may only grant a mistrial “for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.”<sup>127</sup> “A trial

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<sup>124</sup> *People v Hicks*, 447 Mich 819, 828-829; 528 NW2d 136 (1994); *People v Ackah-Essien*, 311 Mich App 13, 31; 874 NW2d 172 (2015).

<sup>125</sup> *People v Lett*, 466 Mich 206, 218; 644 NW2d 743 (2002); *citing Arizona v Washington*, 434 US 497, 506-507; 98 S Ct 824; 54 L Ed2d 717 (1978).

<sup>126</sup> *Hicks*, *supra* 124, at 829; *quoting US v Jorn*, 400 US 470, 485; 91 S Ct 547; 27 L Ed2d 543 (1971).

<sup>127</sup> *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999); *citing People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way.”<sup>128</sup> A jury instruction is sufficient to cure such a defect because jurors are presumed to follow instructions from the trial judge.<sup>129</sup> The remedy when a trial judge abuses her discretion, incorrectly declaring a mistrial, is retrial.<sup>130</sup>

### **Invited error doctrine**

“[A] party waives the right to seek appellate review when the party’s own conduct directly causes the error.”<sup>131</sup> On appeal, Uribe argues Pawluk did not invite error in Dr. Guertin’s testimony, because Pawluk “never asked the witness if he had a diagnosis or had reached a conclusion about whether anything actually happened to the complainant.”<sup>132</sup> This claim is without credibility.

### **Dr. Guertin’s testimony**

The question about Dr. Guertin’s diagnosis of sexual abuse was first raised by Pawluk prior to the exchange quoted in Uribe’s brief.<sup>133</sup> During his first cross-examination, Pawluk questioned Dr. Guertin about the diagnosis of VG as a “victim of sexual abuse.”

Pawluk:	Now, Dr. Guertin, I believe in prior times we’ve had hearings, and I believe you mentioned that sexual abuse can be a diagnosis.
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<sup>128</sup> *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008); citing *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

<sup>129</sup> *Horn*, *supra* 128, at 36; citing *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

<sup>130</sup> *Persichini v William Beaumont Hosp*, 238 Mich App 626, 637 n 5; 607 NW2d 100 (1999).

<sup>131</sup> *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004); citing *People v Jones*, 468 Mich 345, 352; 662 NW2d 376 (2003).

<sup>132</sup> Application for Leave to Appeal, Michigan Supreme Court, at 23.

<sup>133</sup> *Id.*, at 21-22.

Dr. Guertin: Sexual abuse, physical abuse, child abuse is a diagnosis, a medical diagnosis.

Pawluk: Which causes my next question, is that, in your evaluations, under your Assessment portion of your report, you never diagnose [VG] as being a victim of sexual abuse.

Dr. Guertin: Well, I feel that the report, pretty much, speaks for itself in that regard. But if you're asking me do I consider to – her to be a victim, I do.

Pawluk: Well, you didn't put that in your report, Doctor.

Dr. Guertin: Well, it says:

“She gave a very clear history of being sexually molested between the ages of five and nine. She indicates that the person who did this was a man . . .”

Et cetera.

Pawluk: Is it – is it true, doctor, you did not specifically say, and diagnose her specifically in your report, that she's a victim of sexual abuse?

Dr. Guertin: Right. There's no portion in this assessment where it says diagnosis is sexual abuse, that's true.

Pawluk: Dr. Guertin, thank you.

Dr. Guertin: You're welcome.<sup>134</sup>

Upon hearing this exchange, Assistant Prosecutor Morton clarified that this was his diagnosis – which Dr. Guertin had expressed during cross-examination.<sup>135</sup>

Then, upon conclusion of redirect examination, having obtained a concession that Dr.

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<sup>134</sup> Jury Trial Transcript, Volume II of IV, March 27, 2017, at 236-237.

<sup>135</sup> *Id.*

Guertin's report lacked a specific diagnosis, Pawluk returned to his attack of Dr. Guertin's report and diagnosis.<sup>136</sup>

In order to further draw-out Dr. Guertin's diagnosis, Pawluk asked,

- 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?
- 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**.
- 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 –<sup>137</sup>

Each of these questions challenges the content of Dr. Guertin's report, and an alleged lack of timely diagnosis. Since Dr. Guertin's first response on recross-examination was that Dr. Guertin believed his "report speaks for itself," Pawluk's line of questioning was not just for impeachment, but instead was geared toward an analysis of Dr. Guertin's report and his medical diagnosis.

### **Judge Cunningham's concern**

Following Pawluk's badgering of Dr. Guertin, the jury was removed. Judge Cunningham expressed her concern about Dr. Guertin's responses to Pawluk's questions in the last minute of questioning – ignoring Pawluk had raised the issue on his initial cross-examination. Prior to ending the day, Judge Cunningham

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<sup>136</sup> *Id.*, at 238-240.

<sup>137</sup> *Id.*, at 238-240; *emphasis added*.

expressed her opinion that Dr. Guertin's testimony was in error, but that a curative instruction would cure any defect.<sup>138</sup>

Judge Cunningham instructed the jury,

Ladies and gentlemen, yesterday, you heard the testimony of Dr. Guertin. Dr. Guertin's report is not evidence because it is not admis – not admissible, not because of the prosecutor or the defense attorney, but because this Court has ruled that it is not admissible under the Rules of Evidence. You are not to consider the report or any statements made by Dr. Guertin regarding the report. You are the trier of fact and shall only consider evidence that has been admitted during these proceedings.

Yesterday, you heard the testimony of Dr. Guertin. And 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.<sup>139</sup>

While Pawluk requested a mistrial, he agreed with the language, and timing, of the special instruction.<sup>140</sup>

### **Pawluk's questioning strategy**

Pawluk knew what he was doing, and it was clear trial strategy to use the content of Dr. Guertin's report – lacking a formal "diagnosis" section – to bring into question Dr. Guertin's diagnosis and credibility. If Pawluk only wanted to get a concession that Dr. Guertin did not include a "diagnosis" section – which he achieved

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<sup>138</sup> Jury Trial Transcript, Volume II of IV, at 236-237, 241-245, and 293-295; Jury Trial Transcript, Volume III of IV, at 3-19.

<sup>139</sup> Jury Trial Transcript, Volume III of IV, at 24. This instruction was emphasized by the prosecutor in her closing arguments. Jury Trial Transcript, Volume IV of IV, at 12.

<sup>140</sup> Jury Trial Transcript, Volume III of IV, at 18-20.

on cross-examination – he would not have returned to the attack on recross-examination. While legitimate trial strategy, this line of questioning invited the impermissible response, which Pawluk attempted to capitalize-on by requesting a mistrial.<sup>141</sup>

### **Mistrial denial proper**

A mistrial may only be granted when there is no way the trial can be concluded.<sup>142</sup> If a curative instruction can cure the defect, then a mistrial is unnecessary.<sup>143</sup> This is because juror's are presumed to follow instructions.<sup>144</sup> An improperly granted mistrial violates the constitutional rights of victims by fostering harassment and delay of timely disposition.<sup>145</sup> It was not an abuse of discretion for Judge Cunningham to deny Pawluk's request for a mistrial and give a curative instruction to the jury agreed-to by Pawluk.<sup>146</sup>

Knowing the previous rulings of Judge Cunningham, Pawluk intentionally asked direct questions about Dr. Guertin's diagnosis and the content of his report. Although an attempt to discredit Dr. Guertin, which was effective assistance, it created an issue that needed to be cleared-up through a special jury instruction.

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<sup>141</sup> "A particular trial strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004); citing *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001).

<sup>142</sup> *People v Johnson*, 396 Mich 424, 438; 240 NW2d 729 (1976); *repudiated on other grounds People v New*, 427 Mich 482; 398 NW2d 358 (1986).

<sup>143</sup> *Horn*, *supra* 128, at 36; citing *Abraham*, *supra* 129, at 279.

<sup>144</sup> *Graves*, *supra* 109, at 485; citing *Hana*, *supra* 109, at 351.

<sup>145</sup> 1963 Const, art I, § 24; *Persichini*, *supra* 130, at 637 n 5.

<sup>146</sup> *Lett*, *supra* 125, at 218-219.

A mistrial would have been improper in this case because the error was corrected when Judge Cunningham struck portions of Dr. Guertin's testimony and gave the jury instructions to ignore the comments.<sup>147</sup> It was not an abuse of discretion to choose this outcome, because Dr. Guertin did not testify Uribe had sexually abused VG. Rather, at the prompting of Pawluk, Dr. Guertin indicated his diagnosis was that VG had been sexually abused.

### **Mistrial would have been improper**

The purpose of a mistrial is to terminate a trial that is so-prejudicial that there is no way for Uribe to receive a fair trial. It is intended to be a rare, and extreme, remedy. It is not intended to permit defense counsel to open-the-door to impermissible testimony, then gain advantage as a result of a failed strategy.<sup>148</sup>

The extent of Dr. Guertin's testimony would have proceeded unnoticed had Pawluk stopped with the initial concession on cross-examination, however Pawluk chose to press his point by extensively returning to the issue on recross-examination. To grant a mistrial under such circumstances would be to reward a failed trial strategy – encouraging trial counsel to commit seemingly incompetent representation to gain advantage.

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<sup>147</sup> Jury Trial Transcript, Volume III of IV, at 24.

<sup>148</sup> *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007); *Horn, supra* 128, at 35; *citing People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Verbug*, 170 Mich App 490, 498-499; 430 NW2d 775 (1988). "Counsel may not harbor error as an appellate parachute." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

## Court of Appeals

Upon review, the Court of Appeals rejected Uribe's claim of error determining that the denial of Uribe's request for a mistrial was not an abuse of discretion. Rather, the curative instruction was "lengthy" and "approved by both parties." There was no indication that the jury ignored the instruction. Further, the improper testimony was elicited by defense counsel, and the jury was reminded of the limiting instruction just prior to deliberations.<sup>149</sup>

## Application must be DENIED

Uribe's application should not be granted on this issue. The situation in which a defense attorney commits error and then wants to use that error to force a mistrial is not unique, and this unpublished opinion does not involve a case of such significance warranting review.<sup>150</sup> Further, since the denial of the mistrial was not an abuse of discretion by Judge Cunningham, it is not a clearly erroneous decision.<sup>151</sup>

## Issue III

A defendant is entitled to present a defense based on admissible evidence. Uribe wanted to present that Latunski had been convicted of attempted CSC. Uribe had no information about the incident leading to the conviction, nor did VG allege sexual abuse during a time when Latunski lived with her. Uribe's expert indicated information about the

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<sup>149</sup> *Uribe, supra* 86, at slip op 7-8; Exhibit A. Jury was also reminded about the special instruction regarding Dr. Guertin by Assistant Prosecutor Morton in her closing. Jury Trial Transcript, Volume IV of IV, at 12.

<sup>150</sup> "An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision." *Hart, supra* 123, at 1178. Non-binding opinions are not binding unless they contain a concise statement of facts, and reasons for the decision. *DeFrain, supra* 123, at 369; *citing Crall, supra* 123, at 464 n 8; *Dykes, supra* 123, at 483. "Counsel may not harbor error as an appellate parachute." *Carter, supra* 148, at 214; MCR 7.305(B)(3).

<sup>151</sup> MCR 7.305(B)(5)(a).

incident was necessary before she could give an opinion. Judge Cunningham denied admission of the information. Did Judge Cunningham abuse her discretion in excluding the evidence?

**Prosecutor's answer: No.**

**Counter-statement of issue preservation**

“To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal.”<sup>152</sup> Since the admission of this evidence was decided by Judge Cunningham in response to the People’s motion in limine, the issue is preserved for appellate review.<sup>153</sup>

**Counter-statement of standard of review**

The admission of evidence is reviewed for abuse of discretion. Such abuse occurs when the trial court “chooses an outcome that falls outside the range of principled outcomes.”<sup>154</sup> Whether a defendant was denied a right to raise a defense is reviewed de novo.<sup>155</sup>

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<sup>152</sup> *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); *citing* MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, and 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999).

<sup>153</sup> Motion in Limine Regarding VG’s Father, October 31, 2016; Defendant’s Response to the Prosecution Motion to Exclude VG’s Father’s Conviction of CSC 3<sup>rd</sup> and Michigan Sex Offender Registration, November 4, 2016; People’s Legal Memorandum Regarding *Daubert*, December 5, 2016; Defendant’s Memorandum in Response to the Prosecution Motion Addendum to Exclude VG’s Father-Latunski’s CSC 3<sup>rd</sup> Conviction and Michigan Sex Offender’s Registration Record, November, 21, 2016; People’s Motion in Limine Regarding VG’s Father Transcript, November 9, 2016, at 35-77; *Daubert* Hearing Transcript, December 12, 2016, at 154-158.

<sup>154</sup> *Douglas*, *supra* 65, at 565; *quoting* *Musser*, *supra* 65, at 348.

<sup>155</sup> *People v Unger*, 278 Mich App 210, 247; 749 NW2d 2727 (2008); *citing* *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

### **Admissible evidence required**

A defendant has a right to offer witnesses to provide the jury with an alternate defense theory.<sup>156</sup> However, the right to present a defense is not absolute. Such theories must be based on admissible evidence.<sup>157</sup> While a defendant has a right to “put before a jury evidence that might influence the determination of guilt,” he does not have a right to present a defense based on no or inadmissible evidence.<sup>158</sup>

While Uribe claims he was denied the opportunity to present a defense, he fails to argue that the denial of his proffered evidence was an abuse of discretion. Having failed to argue this point, he “fails to rationalize the basis of his argument,” which results in abandonment of the claim.<sup>159</sup>

### **Uribe fails to provide admissible evidence**

Uribe wanted to pursue a defense theory that VG’s father, Jeremy Latunski, was an alternate perpetrator of Uribe’s sexual abuse. To do so, Uribe carried the burden to admit relevant evidence upon which the expert could provide an opinion.<sup>160</sup>

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<sup>156</sup> *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984); citing *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed2d 1019 (1967); US Const, Ams VI, and XIV; 1963 Const, art I, §§ 17, and 20.

<sup>157</sup> *Unger*, *supra* 155, at 250-251; citing *US v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed2d 413 (1998); *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed2d 636 (1986).

<sup>158</sup> *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006); quoting *Pennsylvania v Ritchie*, 480 US 39, 56; 107 S Ct 989; 94 L Ed2d 40 (1987); *Hayes*, *supra* 156, at 279; quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed2d 297 (1973).

<sup>159</sup> *Solloway*, *supra* 57, at 198; citing *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998); *People v King*, 297 Mich App 465, 473-474; 824 NW2d 258 (2012); citing *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

<sup>160</sup> *Unger*, *supra* 155, at 250-251; MRE 402; MRE 403; MRE 703.

However, Uribe had no admissible evidence to support his theory. Rather, he only offered,

- A printed page from the Michigan Public Sex Offender Registry internet site.<sup>161</sup>
- An Order amending probation indicating the Latunski is required to register as a sex offender.<sup>162</sup>
- A Register of Actions for *People v Latunski*, indicating that after being given a \$2,500.00 personal recognizance bond, Latunski plead no contest to a CSC-3<sup>rd</sup> for the dismissal of a CSC-1<sup>st</sup> – receiving 120-days jail and 3-years probation.<sup>163</sup>
- An incomplete transcript from a hearing for the termination of parental rights in which VG testified that Uribe was “always gone,” and “never at the house ever.” VG also testified her mom was “gone a lot.”<sup>164</sup>
- A redacted Lansing Police report related to VG’s allegation of sexual abuse.<sup>165</sup>
- A redacted CPS report of Cathleen Gomez, lodged by an anonymous source, in which VG states she had been sexually abused by Uribe.<sup>166</sup>
- A copy of the Information in which Latunski was charged with CSC 1<sup>st</sup>.<sup>167</sup>

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<sup>161</sup> Michigan State Police Offender Watch

<[www.icrimewatch.net/offenderdetails.php?OfndrID=2005896&AgencyID=55242](http://www.icrimewatch.net/offenderdetails.php?OfndrID=2005896&AgencyID=55242)> Accessed October 31, 2016, Exhibit A, Defendant’s Memorandum in Response to the Prosecution Motion Addendum to Exclude VG’s Father-Latunski’s CSC 3<sup>rd</sup> Conviction and Michigan Sex Offender’s Registration Record.

<sup>162</sup> Order for Amendment of Order of Probation, June 25, 1997; *Attached to Defendant’s Memorandum*.

<sup>163</sup> Register of Actions, 96-006117-FC, *Attached to Defendant’s Memorandum*.

<sup>164</sup> Excerpt from Termination of Parental Rights Trial Testimony of VG Transcript, Incomplete, August 26, 2013, Exhibit C, Defendant’s Memorandum.

<sup>165</sup> Redacted Lansing Police Department Incident Report, printed November 29, 2012; Exhibit D, Defendant’s Memorandum.

<sup>166</sup> Children’s Protective Services Investigation Report, September 27, 2012; Exhibit E, Defendant’s Memorandum.

<sup>167</sup> People’s Motion in Limine Regarding VG’s Father Transcript, November 9, 2016, at 49-50. The document was shown to Judge Cunningham, but was never submitted as an exhibit.

- A copy of a CPS Report alleging improper sexual conduct by VG.<sup>168</sup>

Uribe had no information about the incident involving Latunski, the reason for the reduction in charges, or the bases for the nolle contendre plea. Only that Latunski had a prior CSC conviction, and was required to register as a sex offender.<sup>169</sup>

While Pawluk argued it was significant that the CPS investigation failed to consider Latunski, Judge Cunningham noted the report indicated an anonymous complaint was made and no investigation occurred.<sup>170</sup>

### **Experts need information**

As part of his attempt to offer an alternate perpetrator defense, blaming Latunski, Uribe offered Dr. Sharon Hobbs as an expert. During a *Daubert* hearing, Dr. Hobbs testified she was not familiar with the theory of “perpetrator substitution.” While the People’s expert, Dr. James Henry, indicated he had heard of the theory, but there had been no research to support it. Dr. Hobbs also testified that while she would be comfortable testifying about “displacement,” she would not testify about “perpetrator displacement.” Both Dr. Hobbs and Dr. Henry agreed that “false accusations” is recognized in the scientific community of psychology.<sup>171</sup>

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<sup>168</sup> People’s Motion in Limine Regarding VG’s Father Transcript, at 49-53, and 56-66. The document was shown to Judge Cunningham and opposing counsel, but never was never submitted as an exhibit.

<sup>169</sup> Defendant’s Memorandum, at 4; People’s Motion in Limine Regarding VG’s Father Transcript, at 49-50.

<sup>170</sup> People’s Motion in Limine Regarding VG’s Father Transcript, at 49-53, and 56-66.

<sup>171</sup> *Daubert* Hearing Transcript, December 12, 2016, at 32-37, 44-46, 72-79, and 86-91; *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed2d 469 (1993).

Recognizing psychology is not a “hard science,” similar to the cases supporting the *Daubert* standard, Judge Cunningham ruled Dr. Hobbs could be qualified as an expert and testify about “false accusations,” and “displacement.”<sup>172</sup>

However, since Uribe had provided no information about the underlying acts leading to Latunski’s CSC conviction – information needed for the experts to be able to provide relevant testimony – that information was excluded from admission at trial. In excluding the evidence, Judge Cunningham also noted the allegations of sexual abuse by Uribe all occurred in VG’s home during a time when Latunski no longer lived with VG.<sup>173</sup>

#### **Exclusion not abuse of discretion**

Since Uribe was unable to provide any information about Latunski’s behavior leading to his attempted-CSC conviction, and the experts indicated such information was essential for their opinion, it was not an abuse of discretion to deny Uribe the opportunity to admit information about the prior conviction. There was no error by Judge Cunningham in excluding evidence that would have improperly confused and misdirected the jury.<sup>174</sup>

#### **Uribe permitted to present defense**

The right to present a defense does not extend to permit admission of irrelevant, unreliable, and substantially more prejudicial than probative evidence to

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<sup>172</sup> *Daubert* Hearing Transcript, at 124-126, and 133-135.

<sup>173</sup> *Id.*, at 103-105, 122, and 157-158.

<sup>174</sup> MRE 401; MRE 403;

a jury.<sup>175</sup> The right to present a defense does not eliminate the need “to assure both fairness and reliability in the ascertainment of guilt and innocence.”<sup>176</sup> Since Uribe’s proffered evidence was insufficient to be admitted for consideration by the jury, he was not improperly denied the opportunity to present a defense.

Further, Uribe did present a defense in which Dr. Hobbs testified about false allegations and displacement at trial.<sup>177</sup> Merely because that testimony is unsuccessful does not mean that Uribe was denied an ability to raise a defense.<sup>178</sup>

### **Court of Appeals**

Upon review, the Court of Appeals rejected Uribe’s claim of error determining that it was not an abuse of discretion for Judge Cunningham to exclude that VG’s biological father had previously been convicted of a sex offense, and had to register as such. The Court determined the proposed evidence was not relevant.

Even if marginally relevant, Judge Cunningham’s determination that any relevance was substantially outweighed by the risk of confusing the issue or misleading the jury, was not in error.<sup>179</sup> Since the exclusion of the evidence was not an abuse of discretion, Uribe’s claim is not clearly erroneous warranting review.<sup>180</sup>

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<sup>175</sup> *Id.*; MRE 402.

<sup>176</sup> *Hayes, supra* 156, at 279; *quoting Chambers, supra* 158, at 302.

<sup>177</sup> Jury Trial Transcript, Volume III of IV, at 237-238, 243-245, and 246-251, and 253.

<sup>178</sup> “A particular trial strategy does not constitute ineffective assistance of counsel simply because it does not work.” *Matuszak, supra* 141, at 61; *citing Kevorkian, supra* 141, at 414.

<sup>179</sup> *Uribe, supra* 86, at 4-5; MRE 401; MRE 402; MRE 403.

<sup>180</sup> MCR 7.305(B)(5)(a).

## Issue IV

A defendant is entitled to effective assistance of counsel during plea negotiations. Uribe claims Pawluk never informed him, and he did not know, about a 25-year mandatory sentence. Uribe claims denial of this information caused him to reject a plea offer. Pawluk testified he discussed the mandatory minimum several times, gave Uribe charging documents including the notice, and Uribe was not surprised by the requirement at sentencing. Pawluk also testified Uribe was unwilling to plead to any offer. Lab supported Pawluk's testimony. At arraignment, Judge Reincke informed Uribe of the mandatory minimum. At the conclusion of a *Ginther* hearing, Judge Cunningham ruled Uribe knew of the mandatory minimum, Pawluk was effective, and Uribe was not prejudiced – denying Uribe's claim of ineffectiveness. Did Judge Cunningham abuse her discretion by denying Uribe's motion?

**Prosecutor's answer: No.**

### **Counter-statement of issue preservation**

“In order to preserve an issue for appellate review, it must be raised before and considered by the trial court.”<sup>181</sup> Uribe's claim of ineffective assistance of counsel was considered, and denied, by the trial court after remand from the Court of Appeals. This claim is preserved for appellate review.

### **Counter-statement of standard of review**

The determination whether someone has been deprived effective assistance of counsel, presents a mixed question of fact and constitutional law.<sup>182</sup> The court “must first find the facts, and then decide whether those facts constitute a violation of defendant's constitutional right to effective assistance of counsel.”<sup>183</sup> The trial court's factual findings, after a *Ginther* hearing, are reviewed for clear error, while its

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<sup>181</sup> *Solloway, supra* 57, at 197; *Connor, supra* 57, at 422.

<sup>182</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

<sup>183</sup> *Id.*

constitutional determinations are reviewed de novo.<sup>184</sup> A trial court's factual findings are clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made.<sup>185</sup> In making this determination, the reviewing Court "is limited to facts on the record."<sup>186</sup>

Effective assistance of counsel is presumed, and the party claiming ineffectiveness must overcome a strong presumption that counsel's assistance was sound trial strategy.<sup>187</sup> To establish an ineffective assistance of counsel claim, the claimant must show (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.<sup>188</sup> Such performance must be measured without the benefit of hindsight.<sup>189</sup>

When defendant claims ineffectiveness caused plea offer rejection, he must show,

(1) he would have accepted the plea were it not for his counsel's ineffective advice, (2) the prosecution would not have withdrawn it, (3) the court would have accepted its terms, and (4) the conviction or sentence or both would have been less severe than the sentence that defendant received after trial.<sup>190</sup>

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<sup>184</sup> *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012); quoting *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010).

<sup>185</sup> *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

<sup>186</sup> *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000); citing *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

<sup>187</sup> *Horn*, supra 128, at 37-38 n 2.

<sup>188</sup> *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

<sup>189</sup> *Bell*, supra 188, at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

<sup>190</sup> *Uribe*, supra 86, at slip op 4; citing *Douglas*, supra 65, at 592.

### Uribe claims ignorance

Uribe claimed he never knew he was facing a 25-year mandatory minimum if convicted at trial. He further claimed ineffectiveness by Pawluk – alleging Pawluk “never informed me” of that risk.<sup>191</sup> Based on this assertion, the Court of Appeals remanded the matter for a *Ginther* Hearing.<sup>192</sup>

### Testimony demonstrates Uribe was warned

During the hearing, Pawluk testified he had discussed the mandatory minimum requirement at least three times.<sup>193</sup> Two of the instances were memorable because one was while Pawluk gave Uribe a ride to Lansing, and the other was during a meeting with his mother and fiancé in which the mother was very upset about the extent of incarceration.<sup>194</sup> Pawluk also testified he had provided Uribe with charging documents containing the mandatory minimum notice, and Uribe was not surprised when Pawluk and he discussed the mandatory minimum during PSIR-review.<sup>195</sup>

Uribe’s investigator, Chad Lab, also testified. He indicated he and Uribe discussed the mandatory minimum sentence during their first meeting, and confirmed being present at a meeting with Pawluk, Uribe’s mother, and Uribe’s fiancé.<sup>196</sup>

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<sup>191</sup> Uribe Affidavit, February 7, 2018; Exhibit D.

<sup>192</sup> *People v Uribe*, Order of the Court of Appeals, Issued March 2, 2018 (Docket No. 338586); *Ginther*, *supra* 74.

<sup>193</sup> Defendant’s Motion for New Trial Transcript, June 13, 2018, at 21, 39-40, 45-48, and 58-59.

<sup>194</sup> *Id.*, at 45-48. Uribe did not call either his mother or fiancé to testify at the *Ginther* hearing.

<sup>195</sup> Defendant’s Motion for New Trial Transcript, at 50-52, and 55-56.

<sup>196</sup> *Id.*, at 85-89, and 92.

In contrast, Uribe claimed he never knew about the mandatory minimum, but if he had known he would have taken the 5-year plea deal, “[c]ause five years sounds way better than 25 years.”<sup>197</sup> When confronted with his arraignment transcript in which Judge Julie Reincke informed him of the mandatory minimum, Uribe indicated he did not remember.<sup>198</sup> He did not remember ever receiving any charging documents.<sup>199</sup> He did not remember reviewing the PSIR with Pawluk prior to sentencing. And he did not remember his sentencing during which he did not disagree with Pawluk’s request to sentence him only to the mandatory 25-year minimum.<sup>200</sup> Ultimately, Uribe conceded that Pawluk may have advised him of the 25-year mandatory minimum, but he did not remember.<sup>201</sup>

#### **Uribe could not enter guilty plea**

Uribe also continued to deny his sexual abuse of VG. Uribe conceded he never wanted to plead guilty to any allegations he sexually abused VG – consistent with Pawluk’s and Lab’s testimony. When pressed, Uribe admitted he did not know how he would enter an honest plea to any charge of sexual abuse.<sup>202</sup>

#### **Judge Cunningham denies motion**

Judge Cunningham found Pawluk and Lab more credible than Uribe. Particularly in light of Uribe’s past behavior in which he lied during his PSIR

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<sup>197</sup> *Id.*, at 64.

<sup>198</sup> *Id.*, at 68, and 75-78.

<sup>199</sup> *Id.*, at 79.

<sup>200</sup> *Id.*, at 77-79.

<sup>201</sup> *Id.*, at 79.

<sup>202</sup> *Id.*, at 69-75.

interview. As a result of their testimony, and the record, Judge Cunningham determined Uribe did know about the 25-year mandatory minimum. This finding was not in clear error.<sup>203</sup>

Judge Cunningham then continued to find that Pawluk was an effective advocate for Uribe, and despite one instance in which Uribe and Pawluk had disagreed, Uribe wanted Pawluk to represent him.<sup>204</sup> Based on this record, it was not clearly erroneous for Judge Cunningham to find Uribe failed to establish the first prong of ineffectiveness.<sup>205</sup>

Judge Cunningham continued by finding Uribe was not prejudiced by Pawluk's performance. Judge Cunningham found Uribe incapable of entering a voluntary and honest guilty plea to any plea offer, and she indicated there was no basis for her to accept a no contest plea. While Uribe's appellate counsel suggested Pawluk should have counseled Uribe on lying to the court to get the plea deal, Judge Cunningham determined Uribe was "never taking a deal."<sup>206</sup> This finding was not clearly erroneous.

### **Court of Appeals**

The Court of Appeals rejected Uribe's claim of error by giving deference to the trial court's credibility determination in which Pawluk testified about discussing the

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<sup>203</sup> *Id.*, at 105-108.

<sup>204</sup> *Id.*, at 106-107.

<sup>205</sup> *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011); *citing Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed2d 674 (1984).

<sup>206</sup> Defendant's Motion for a New Trial Transcript, at 98-100, and 108-113; Response Opposing Motion for New Trial, April 5, 2018, at 8-12.

25-year mandatory minimum with Uribe several times. The Court further explained that even if Uribe had established ineffectiveness assistance, he was not prejudiced. This was because Uribe continued to maintain his innocence even after trial, there was no indication that Uribe was willing to plead guilty to sexually abusing VG, a no contest plea was never offered, and it was not established that Judge Cunningham would have accepted a no contest plea.<sup>207</sup> This decision was not in clear error, and the issue does not warrant review.<sup>208</sup>

### Conclusion

Following a thorough review of the record, and a better understanding of the many distinctions between Uribe's case and established law, Uribe's application does not warrant further review.<sup>209</sup> Having failed to establish his claims of error merit review by our state's highest Court, Uribe's application must be DENIED.

Respectfully submitted,

**Brent E.  
Morton**

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October 28, 2019

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Brent E. Morton

<sup>207</sup> *Uribe, supra* 86, at slip op 3-4 n 4; Exhibit A; Defendant's Motion for a New Trial Transcript, at 98-100, and 108-113.

<sup>208</sup> MCR 7.305(B)(5)(a).

<sup>209</sup> MCR 7.302(G)