No. 24-5082

IN THE

SUPREME COURT OF THE UNITED STATES

BENIGNO PEREZ-AGUILAR — PETITIONER

vs.

JEFF HOWARD WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Benigno Perez-Aguilar #609503
(Your Name)

In Pro Se

4533 W Industrial Park Dr.
(Address)

Kincheloe, MI 49788
(City, State, Zip Code)

QUESTION(S) PRESENTED

I. Expert testimony from Thomas Cottrell did nothing more than bolster Clarisse and Genesis. Did the trial court abuse its discretion in letting Dr. Cottrell testify?

II. Trial counsel's errors permitted the state to bolster its case with inadmissible hearsay and improper character evidence. Did trial counsel violate Benigno's Sixth Amendment right to counsel?

III. Did plain error occurr when the state elicited inadmissible hearsay from three witnesses?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

STATEMENT OF THE CASE

CASES PAGES

CONSTITUTION, STATUTE AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix **A** to the petition and is

[**A**] reported at 2024 US App LEXIS 20414 ; or

[ ] has been designated for publication but is not yet reported; or,

[**A**] is unpublished.

The opinion of the United States district court appears at Appendix **B** to

[B] reported at 2024 US DIST LEXIS 46952 ; or

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case

was August 13, 2024 .

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the

was , and a copy of the order denying rehearing appears at Appendix .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Const. Amend VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Mich. Const. 1963, art 1 sec. 20: In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have a n appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

MCL 768.27a (1) Notwithstanding section 27 in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it offer evidence MRE under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses of a summary of the substance of any testimony that is expected to be offered.

MCL 769.26 Sec 29 It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.

MRE 702 A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

MRE 803(4) Statement Made for Purpose of Medical Treatment or Diagnosis in Connection with Treatment. A statement that: (A) is made for ---and is reasonably necessary to medical treatment or diagnosis in connection with treatment; and (B) describes medical history, past or present symptoms or sensations, their inception, or their general cause.

MRE 803A(1) Hearsay Exception; Child's Statement About a Sexual Act (1) the declarant was under the age of ten when the statement was made;

MRE 803A Hearsay Exception; Child's Statement About a Sexual Act (a) Scope. This rule applies in criminal and delinquency proceedings only. (b) Conditions. A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding if: (1) the declarant was under the age of ten when the statement was made; (2) the statement is shown to have been spontaneous and without indication of manufacture; (3) either the declarant made the statement immediately after the incident or ay delay is excusable as having been caused by fear or other equally effective circumstance; (4) the statement is introduced through the testimony of someone other than the declarant; and (5) the proponent of the statement makes known to the adverse party the intent of offer it and its particulars sufficiently before the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it.

If the declarant made more than one corroborative statement about the incident only the first is admissible under this rule.

STATEMENT OF THE CASE

In the early 2000s, Benigno Perez-Aguilar had two serious relationships. (T3, 190-194, 201.) First, Benigno dated Pierina. (T3, 190-191.) They had a son together, and Pierina had a daughter, Genesis, from a prior relationship. (T3, 191.) Pierina developed a drug habit and, around 2004, the relationship soured. (T3, 192-193.)

Soon after, Benigno started seeing Yolanda. (T3, 193.) For the next four or five years, Yolanda and Benigno had an on-again, off-again relationship. (T3, 128, 194, 203-204.) Yolanda had one daughter in her twenties, a second in college, and Clarisse. (T3, 94.) Clarisse was about two when Yolanda started dating Benigno, and about eight when they broke up for good. (T3, 98.)

During the relationship, Yolanda, Benigno, and Yolanda's three daughters bounced from apartment to apartment. (T3, 92-96, 195, 196-200.) Yolanda rarely left Clarisse alone with Benigno. She recalled asking Benigno to babysit a few times when she went to the grocery store. (T3, 100.)

Benigno and Yolanda often fought over money, and sometime in 2009 Yolanda broke up with Benigno. (T2, 149, 158; T3, 120.) In 2015, Benigno and Yolanda tried to rekindle things. (T2, 149, 158.) That summer, Benigno met up with Yolanda's family at the beach. (T2, 149; T3, 102.) Yolanda brought Clarisse, who was then 11. (T2, 115, 149.) Clarisse's cousin, Zamara, came too. (T2, 149.)

Not long after the beach day, Zamara received a cryptic text from Clarisse. (T2, 132, 140.) The text showed a photograph of a leg and a knife with the question: "should I do it." (T2, 140.) Worried, Zamara texted back, and Clarisse eventually told Zamara that Benigno had sexually abused her. (T2, 145-147.)

According to Zamara, Clarisse said Benigno abused her for years, beginning around the time he started dating her mom. (T2, 146-147.) Clarisse texted that Benigno made her perform reciprocal oral sex, referred to as 69. (T2, 147.)

Zamara told her family, who relayed the information to Yolanda. (T2, 150, 156-157; T3, 75.) Yolanda then contacted a cousin with a social work background. (T3, 101.) The cousin sat down with Yolanda and Clarisse, and Clarisse disclosed to Yolanda. (T3, 101-102.) Clarisse's disclosure reminded Yolanda of a night about two weeks prior when Benigno spent the night. (T2, 131) Clarisse had a nightmare and climbed into bed with her mom and Benigno. (T2, 63) In the morning, Clarisse told her mom she thought Benigno touched her buttocks. (T2, 63, 133; T3, 116.) At that time, Yolanda did not think much of Clarisse's story. (T3, 131.) This time, however, Yolanda went to the police (T3, 101-102.)

In early August 2015, the police investigated Clarisse's account. Grand Rapids police reached out to Benigno. (T2, 117.) Benigno spoke with the officers, learned of the allegations, and told them he was working in the Cleveland area. (T3, 203.) During the investigation, police learned that Pierina's daughter, Genesis, had levelled allegations against Benigno a few years earlier. (T2, 55.) Benigno was never charged with any crimes related to Genesis. (T2, 57-59.)

In late August 2015, Grand Rapids police obtained an arrest warrant that charged Benigno with one count of first-degree criminal sexual conduct ("CSC") for allegedly engaging in oral sex with Clarisse and one count of second-degree CSC for allegedly touching her buttocks. (See Information, Lower Court Record.)

Four years later, police arrested Benigno in his Grand Rapids neighborhood. (T2, 118, 119, 210-211.) In November 2019, a jury trial was held before the Honorable Paul J. Sullivan in the Kent County Circuit Court.

At trial, Genesis' allegations were introduced under both 404b and MCL 768.27a. (T2, 4.) Genesis, now in her 20s, told the jury about events from the early 2000s. She came to court because the police told her Benigno had sexually assaulted another young lady and she felt she needed to tell her story. (T2, 90.) She said one night Benigno called her into the bedroom he shared with Pierina. (T2, 69, 91.) She was about five, alone in the house except for her infant brother, (T2, 70-71, 91), and remembered seeing pornography on the television. (T2, 69.) Benigno asked Genesis to do to him what she saw on the TV. (T2, 69-70.) She said Benigno removed her pants and penetrated her vagina with his penis. (T2, 70.) After the prosecutor told Genesis to explain more and tell the "absolute truth," Genesis said Benigno also asked her to perform a 69. (T2, 72-73.) Genesis said the sexual abuse went on for about five years, until she went to live with an aunt. (T2, 74.)

Genesis did not disclose the abuse until years later and offered a few reasons for the delay. First, she said she was scared and confused. (T2, 71.) Then she said she did not think her mother would believe her. (T2, 71.) Later, she said Benigno asked her not to tell or he would be separated from Pierina and his son. (T2, 71.) Not wanting her brother to grow up without a dad, Genesis kept quiet. (T2, 71.) Finally, Genesis said she never told anyone because she did not understand what had happened to her until she started therapy as a teenager. (T2, 93-94.)

Genesis acknowledged that she had previously made other accusations of sexual assault. She made similar claims of sexual abuse against one of her mother's previous boyfriends. (T2, 81.) She accused her father of sexual abuse. (T2, 81.) And she accused Benigno of sexually abusing his biological son, Christopher. (T2, 82, 83-84.)

On cross, defense counsel told Genesis, on the whole, she told a "compelling" story. (T2, 95.) And when he pushed her to describe why she came to testify, Genesis said she wanted to put a "monster" behind bars. (T2, 103.)

Clarisse, now 15, also testified against Benigno. Clarisse relayed details from about a decade prior. (T3, 58.) When she was about five, she recalled Benigno watching pornography. (T3, 58, 74.) She said Benigno would frequently digitally penetrate her. (T3, 54-55.) One time he touched her vagina with his penis. (T3, 56-57.) Most of the time, he made her perform 69. (T3, 59-60.) A few times Clarisse saw Benigno ejaculate. (T3, 60-61.)

Clarisse, too, did not tell anyone at the time and she did not know why. (T3, 62.) But she added Benigno told her not to tell. (T3, 62-63.) When she did disclose, to Zamara years later, she said she hoped to prevent Benigno from moving back in. (T3, 64-65.)

On cross, defense counsel went over the details covered on direct. (See T3, 68-71.) Then he went beyond the scope of the direct. He asked Clarisse about self-harming behaviors, including times she cut herself. (T3, 72-73.) He asked Clarisse about her time in therapy. (T3, 72, 73.)

Then defense counsel helped Clarisse add details to her story. He had Clarisse explain that Benigno taught her to 69. (T3, 77-78.) And he asked her to describe Benigno's penis, which she remembered as not that big and not that long. (T3, 80, 81-82.)

The remainder of the state's witnesses either repeated the details of Clarisse's allegations or provided support for them.

Zamara told the jury about Clarisse's disclosure and in the process covered much of the same ground as Clarisse's testimony, including details about the 69. (T2, 147, 148.)

Yolanda agreed Benigno watched pornography, (T3, 114), described Benigno as a monster, (T3, 118, 121, 122, 129), and said her daughter had been in therapy for two years. (T3, 104). Later, she implied Benigno evaded arrest for four years because he lacked legal status in the country (T3, 105-106). She also said she did not know Pierina outside of hearing her name. (T3, 136-137.) But she had met Genesis. (T3, 190-191.)

Two employees from the Children's Advocacy Center ("CAC") explained their role in the case. Allie Rauser conducted Clarisse's forensic interview. (T3, 149, 149.) Amy Minton worked as a medical social worker; in that role, she, too, interviewed Clarisse. (T3, 163, 165.) Rauser told the jury much of what Clarisse disclosed during the forensic interview, including details about the 69. (T3, 149-150.) On cross, defense counsel elicited more of Clarisse's graphic, out-of-court statements about the sexual abuse. (T3, 152, 154, 155.)

Rauser recounted that Clarisse described the pornography as "girls sucking penises." (T3, 154.) In response to defense counsel's question" "[a]ny other allegations of sexual abuse [Clarisse] tell you about?" Rauser described instances when Clarisse told of manually stimulating Benigno including times when "shampoo" came out of his penis. (T3, 155-156.) Likewise, Minton relayed Clarisse's out-of-court statements, including a description of shampoo coming out of Benigno's penis. (T3, 167-171.) Once again, on cross, defense counsel had Minton testify to even more of Clarisse's graphic, out-of-court statements. (T3, 175-178.)

The state also presented expert testimony from Thomas Cottrell, qualified over defense objection, as an expert in "child sexual abuse dynamics." (T3, 10.) Thomas Cottrell told the jury about "the dynamics of sex offending behavior." (T3, 7.) Cottrell described grooming, defining it as "activities that . . . essentially groom" a child to accept sexual abuse. (T3, 14.) And he said having children watch pornography counts as grooming. (T3, 15.) He said most children delay disclosure, (T3, 17), most child sexual abuse is not disclosed until the victim reaches adulthood, (T3, 17), and the majority of children do not disclose because they think negative consequences will result from telling (T3, 18-19). To explain delayed disclosures, Cottrell said some children experience the sexual abuse as traumatic, while others do not. (T3, 18, 20.) When the sexual abuse is non-traumatic, a person's retelling of the story can change over time, depending on how they filter details for their

current audience. (T3, 21.) When the sexual abuse causes trauma, the person's memory ends up fragmented and non-linear, leading to a disjointed disclosure that brings back all the fear of the initial trauma and leaves pieces of the story out. (T3, 21-22.) In all, Cottrell warned about identical retellings of the story, which he considered a marker of fabrication. (T3, 22.) But he insisted fabricated allegations of abuse happened "very rarely." (T3, 22.)

Next, Cottrell discussed coping mechanisms. (T3, 23-24.) Among the coping mechanisms, Cottrell highlighted self-harm. (T3, 24.) Cottrell described self-harming behaviors as someone "externalizing the pain that they are feeling by literally seeing blood come out of them, you know, validating for themselves that it's ok to be hurt." (T3, 25.) Later he returned to self-harm: "If they can make their body bleed, if they can make their body not eat, they are actually orchestrating some degree of control when they otherwise feel powerless to control what happens to them." (T3, 25.)

On cross, defense counsel asked Cottrell to "elaborate." (T3, 27.) Cottrell offered more explanation of traumatic memory, self-harm, and the need for therapy to recover from sexual abuse (T3, 27-33).

Lastly, Benigno testified in his own defense. Benigno never harmed the children and never abused his son. (T3, 189-190.) Clarisse and Genesis' allegations made him sick because he would never abuse a little girl. (T3, 189, 222-223.) Benigno took no interest in parenting any children, including his own. (T3, 218, 223-224.) As a result, Benigno did not have a relationship with Genesis, and was never left alone with Clarisse. (T3, (T3, 190-191, 200.) He never watched pornography or even had access to it. (T3, 216, 222.) He said Yolanda and Pierina knew each other, having met through family and at the club. (T3, 203-204.) He also knew Yolanda had a relationship with Genesis' grandmother. (T3, 220-221.)

He never hid from the police, and when the investigation started, he was living down the road

Yolanda's family with his new girlfriend, Lydia. (T3, 201-202.)

The jury convicted Benigno on both counts. He received concurrent sentences of 25 to 40 years for the first-degree CSC conviction and five to 15 years for the second-degree CSC conviction. (S, 4.) He now appeals of right.

REASONS FOR GRANTING THE PETITION

Argument

I. Expert testimony from Thomas Cottrell did nothing more than bolster Clarisse and Genesis. The trial court abused its discretion in letting Dr. Cottrell testify.

Issue Preservation and Standard of Review

This issue is preserved. Defense counsel objected to Mr. Cottrell's foundational reliability, arguing that Cottrell's expert testimony would be irrelevant and unhelpful because it did nothing more than "bolster the credibility of witnesses." (T3, 9.) Accordingly, this Court reviews the trial court's decision to admit the evidence for abuse of discretion. *People v Thorpe*, 504 Mich 230, 251-252 (2019).

Discussion

Expert testimony, especially in criminal sexual conduct cases, requires distinct safeguards. *See People v Peterson*, 450 Mich 349, 374 (1995) (citing *People v Beckley*, 434 Mich 691, 721–722 (1990)). An expert witness "assist[s] the trier of fact to understand the evidence or to determine a fact in issue[.]" MRE 702. In criminal sexual conduct cases, to ensure an expert assists the trier of fact, the expert may not bolster the complainant's credibility. *Thorpe*, 504 Mich at 255, 265–66; *People v Musser*, 494 Mich 337, 349 (2013). Additionally, the "expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child[]" unless defense counsel points to the complainant's behaviors and "alludes that the victim is incredible because of these behaviors." *Peterson*, 450 Mich at 373-374 & n 13.

Cottrell's expert testimony went beyond the safeguards. Much of Cottrell's testimony bolstered Genesis's and Clarisse's testimony by matching their behaviors to behaviors consistent with that of a sexually abused child. Later, he added that "very rarely" do people fabricate

allegations of sexual abuse. In total, Cottrell's testimony served only one purpose: prop up the credibility of Genesis and Clarisse.

A. Cottrell vouched for Genesis and Clarisse by connecting their behavior to the behavior of sexual abuse victims.

Defense counsel objected to Cottrell's testimony, arguing Cottrell would do little more than bolster Clarisse and Genesis. (T3, 9.) But the trial court agreed with the prosecutor, who argued Cottrell was "extremely" qualified as an expert and could thus provide helpful, general testimony. (T3, 9-10.)

Cottrell vouched for Clarisse's and Genesis's credibility. Cottrell described many behaviors common among child sexual abuse victims. His descriptions mirrored details elicited during Clarisse's and Genesis's testimony. Cottrell said delayed disclosures are common among sexual assault victims; both Genesis and Clarisse waited years before telling anyone. Cottrell testified that grooming behaviors include abuse by family members and exposure to pornography; Genesis and Clarisse both testified to watching pornography with their mother's boyfriend who then abused them. Cottrell said some children process sexual abuse as a normal activity, causing confusion; Genesis said it took her years to understand what happened to her. Cottrell said some abusers threaten or play on sympathy to keep children from disclosing; Genesis said Benigno implored her not to tell so he would not lose his son. Cottrell explained self-harming behaviors as ways victims reclaim power over their bodies; Clarisse testified to cutting herself.

In all, the trial court permitted Cottrell to connect the behavior of typical sexual assault victims with behavior displayed by Clarisse and Genesis. That is bolstering. See *Peterson*, 450 Mich at 375-377. Such bolstering is only permissible if defense counsel argues "that the victim's behavior was inconsistent with that of a typical victim of child sexual abuse . . . ." *Peterson*, 450 Mich at 376-

377. Yet defense counsel never pointed to any of Genesis's or Clarisse's behaviors as a reason not to believe them. See *People v Douglas*, 496 Mich 557, 583, n 8 (2014) (emphasizing that the defendant must "put at issue" or "attack[]" the victim's credibility by pointing to the victim's behavior).

The jury should not have heard the portions of Cottrell's testimony about the behaviors of child sexual abuse victims. That testimony served only to vouch for Clarisse and Genesis. In admitting Cottrell's testimony, the trial court's decision falls "outside the range of principled outcomes." *Thorpe*, 504 Mich at 252.

B. Cottrell told the jury victims of sexual assault "very rarely" fabricate.

During direct, the prosecutor asked Cottrell if he had ever encountered situations "where a victim of sexual assault is telling or disclosing or giving their story and it's identical, you know, each time they tell it?" (T3, 22.) Cottrell warned that if "the rendition seems rote or very repetitive, I'd get concerned about coaching, I'd get concerned about fabrication." (T3, 22.) But he made clear: "I can tell you also it happens very rarely." (T3, 22.)

Just as above, Cottrell vouched. His assurance that evidence of coaching or fabrication occurs "very rarely" amounted to an expert opinion on the credibility of sexual abuse victims. See *Thorpe*, 504 Mich at 259 (finding Cottrell vouched where he said "children lie about sexual abuse 2% to 4% of the time"); *Peterson*, 450 Mich at 375-376 (finding impermissible vouching where expert said "children lie about sexual abuse at a rate of about two percent"). True, in this case Cottrell did not provide a percentage. But the numerical precision is irrelevant. Whether Cottrell said two percent or very rarely, the effect is the same: it is far more likely that Clarisse and Genesis are telling the truth.

C. Cottrell's testimony was not harmless.

Benigno establishes it is "more probable than not" that a different outcome would have occurred absent Cottrell's testimony. *People v Lukity*, 460 Mich 484, 495 (1995); MCL 769.26 (preserved non-constitutional error subject to harmless error). The jury had to decide who to believe: Clarisse and Genesis or Benigno. No medical evidence supported the allegations; and there were no witnesses to the alleged abuse. Benigno never incriminated himself. The prosecution relied on Cottrell to vouch for one side in the credibility contest. In that situation, inadmissible expert testimony can make all the difference, as it gives the jury and objective expert whose opinion they can rely on. See *Thorpe*, 504 Mich at 263-264.

Moreover, the state's closing leaned on Cottrell. The prosecutor asked the jury to credit Clarisse's because her demeanor "was very consistent with what Mr. Cottrell explained is very normal behavior for survivors of childhood sexual abuse." (T4, 10-11.)

Then the prosecutor reminded the jury that Clarisse testified to harming herself, "again something else that is consistent with Mr. Cottrell's experience" dealing with "victims of child sexual abuse." (T4, 11-12.) The prosecutor explicitly linked Clarisse's behavior with the behaviors Cottrell labeled as consistent of victims of sexual abuse.

In sum, Cottrell vouched for Clarisse and Genesis and the state relied on the vouching to carry their burden. The error was not harmless. Benigno is entitled to a new trial.

Id. And prejudice may result from the cumulative effect of counsel's multiple errors. See *LeBlanc*, 465 Mich at 591 (holding that the cumulative effect of counsel's errors can cause prejudice); *Strickland*, 466 US at 696 ("[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the *errors*." (emphasis added)).

When three prosecution witnesses testified, defense counsel failed to object to inadmissible hearsay and then compounded the error on cross. On direct, counsel let the witnesses testify to Clarisse's out-of-court disclosure. On cross, defense counsel asked open-ended questions, eliciting graphic details of the abuse. Later, still, defense counsel permitted the state to vilify Benigno. Both the individual and the cumulative effect of counsel's errors establishes *Strickland* prejudice.

A. Trial counsel's failure to object to inadmissible hearsay constituted deficient performance.

Trial counsel erred in letting the jury consider inadmissible hearsay, beginning with Zamara's testimony. Zamara told the jury Clarisse's story, even though Clarisse took the stand and told the same story. Zamara relayed Clarisse's out-of-court disclosure accusing Benigno of sexual abuse. (T2, 145-147.) Zamara testified to Clarisse disclosing that she watched pornography with Benigno and Benigno made her perform reciprocal oral sex. (T2, 147.) And Zamara testified about the text message in which Clarisse indicated an intent to harm herself. (T2, 140, 143.)

Defense counsel should have objected to Zamara's testimony. Zamara detailed Clarisse's out-of-court disclosure, which the prosecutor offered for its truth. But Clarisse, the declarant, told Zamara about the abuse in summer 2015, when Clarisse was 11. (T2, 115, 149.) To be sure, MRE 803A, the so-called "tender years" exception, permits the factfinder to consider hearsay evidence of a first disclosure. But the rule conditions admissibility on, among other things, whether "the

declarant was under the age of ten when the statement was made." MRE 803(A)(1) (emphasis added). Thus, Zamara's hearsay testimony should not have come in under MRE 803A.

Trial counsel also let Allie Rauser and Amy Minton recount more of Clarisse's graphic out-of-court statements. Rauser and Minton interviewed Clarisse at the Child Advocacy Center ("CAC"). During their testimony, defense counsel failed to object to hearsay statements and made things worse on cross. Counsel's questions elicited damaging testimony helpful to the state.

Consider, first, Rauser's testimony. Rauser said she conducted Clarisse's forensic interview, when Clarisse was 11. (T3, 152.) Rauser described the criminal justice context of her interview but characterized her process as "developmentally sensitive," "unbiased," and designed for "truth-seeking." (T3, 146.) After that, Rauser retold Clarisse's story, relying entirely on out-of-court statements offered for their truth. She told the jury Clarisse revealed ongoing sexual abuse over a period of years, occurring multiple times per week. (T3, 151.) She said Clarisse used the term "69" to describe the abuse. (T3, 150.) She said Clarisse described Benigno's humping and explained what Benigno asked Clarisse to do to his penis. (T3, 151.)

Defense counsel should have objected. None of the hearsay exceptions permit a forensic interviewer to replay the complaining witness's disclosures. See *Douglas*, 496 Mich at 576-578. Either because Clarisse was 11 when she met with Rauser, or because Clarisse had already told Zamara prior to telling Rauser, MRE 803A does not permit Rauser's hearsay. Additionally, the residual exception is no help because Rauser's recounting of Clarisse's disclosure covered the same ground as Clarisse's testimony, meaning Rauser's testimony was no more probative of the facts of the abuse than Clarisse's testimony. See *Douglas*, 496 Mich at 576-577 (citing *People v Katt*, 468 Mich 272, 290 (2003) (explaining that for testimony to come in under the residual exception it must, among other things, be "the most probative" evidence of "that fact" available)).

On cross, defense counsel made things worse. Defense counsel invited Rauser to emphasize how often Clarisse said the abuse occurred, what kind of abuse occurred, and where the abuse occurred. (T3, 152, 154, 155, 157.) Defense counsel had Rauser relay what Clarisse said about the pornography, specifically Clarisse's statement that it depicted "girls sucking penises." (T3, 154.) And defense counsel led Rauser to tell the jury that Clarisse described the 69 as lasting until "shampoo" came out of Benigno's penis. (T3, 156.) So cross let in more graphic, inadmissible hearsay.

Counsel made similar errors when Minton testified. Minton worked as a medical social worker for the CAC and interviewed Clarisse. (T3, 163.) Minton, too, testified to Clarisse's out-of-court allegations of abuse. (T3, 166-168.) And on cross, defense counsel once more elicited graphic, damaging details—including Clarisse's statement about shampoo coming from Benigno's penis. (T3, 175-177.)

To the hearsay admitted on direct, defense counsel should have objected. To be sure, MRE 803(4) establishes a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." MRE 803(4). Statements made for the purpose of medical treatment are admissible "if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care." *People v Mahone*, 294 Mich App 208, 214–15 (2011).

But Clarisse's statements to Minton were not statements made to seek medical treatment or diagnosis. Most importantly, Minton made clear she did not perform a medical exam, as she was a social worker, not a medical professional, (T3, 173), eliminating any likelihood that Clarisse's

statements were tied to medical diagnosis or treatment. At most, Minton met with Clarisse to develop a safety plan, (T3, 170), but even that discussion would not come in under 803(4). See *People v Lalone*, 432 Mich 103, 114 (1989) (reasoning that hearsay statements about a safety plan do not fall within 803(4)). Even more, Minton saw Clarisse in 2015 but the alleged sexual abuse Clarisse occurred in 2009, also cutting against any connection between Clarisse's statements and medical diagnosis or treatment. And Clarisse made the statements as part of a police investigation, undercutting the reliability of the statements. See *Lalone*, 432 Mich at 115 (explaining that hearsay statements to psychologist as part of a criminal investigation do not fall within 803(4)). Given the circumstances, Minton's statements should not have come in under 803(4). *People v Shaw*, 315 Mich App 668, 675 (2016) (finding statements to doctor seven years after abuse and in the course of a police investigation fell outside the 803(4) exception).

No reasonable strategy accounts for the failure to object or the open-ended questions on cross. In a conversation with appellate counsel, defense counsel's acknowledged that his failure to object was not strategic. He did not realize Zamara, Rauser, and Minton's hearsay testimony was inadmissible. However, defense counsel would not sign an affidavit to that effect. At first, defense counsel refused to agree to appellate counsel's summary of their conversation without explanation. Then defense counsel suggested, in an email, that he "may" have had a strategic reason to failing to object.

But defense counsel never explained what that strategy might have been. Indeed, how could he? Defense counsel allowed the CAC witnesses to testify to graphic details of sexual abuse all in the form of inadmissible hearsay and then compounded the error on cross. Counsels errors let the CAC witnesses bolster Clarisse by highlighting her consistency. And the graphic details gave the jury a "much fuller, clearer, and more inculpatory account" of the alleged sexual abuse. *People v*

Douglas, 496 Mich 557, 601 (2014). Given that the state's case turned on Clarisse's credibility, defense counsel had no strategic reason to make her more believable. Thus, Counsel performed deficiently and merely labeling the deficient performance as strategy does not "insulate" counsel's errors from review. *People v Trakhtenberg*, 492 Mich 38, 52 (2012).

B. Trial counsel performed deficiently in failing to object to improper character evidence.

Multiple times the jury heard Genesis and Yolanda call Benigno a monster. (T2,103; T3, 118, 121, 122, 129.) Likewise, the prosecutor's closing labeled Benigno a monster. (T4, 47.) Defense counsel should have objected. Casting Benigno as a monster vilified him, permitting the jury to sympathize with Clarisse and Genesis. See *People v Unger*, 278 Mich App 210, 237 (2008). Thus, the repeated references to Benigno as monster were designed to have the jury "decide on an improper basis" by appealing to their emotions. *People v Vasher*, 449 Mich 494, 501 (1995).

C. Either individually or cumulatively, the effect of counsel's errors bolstered the complaining witness and vilified Benigno. Benigno establishes a reasonable probability of a different outcome absent the errors.

Defense counsel's errors allowed the jury to hear inadmissible hearsay bolstering the complaining witness. And defense counsel's errors allowed the jury to consider improper character evidence, vilifying Benigno. In a credibility contest, counsel's errors allowed inadmissible hearsay to bolster one side and character evidence to weaken the other.

As to the hearsay, a timely objection would have limited the state's case to Clarisse telling the jury her story, coupled with Rauser explaining the forensic protocols. Minton and Zamara may not have testified at all.

Moreover, the inadmissible hearsay allowed the prosecutor to repeat and legitimize Clarisse's allegations. In testifying to Clarisse's disclosure, Zamara covered the same ground as Clarisse.

Rauser and Minton, too, replayed Clarisse's disclosure, but in more graphic detail. Those graphic details, offered by two witnesses familiar with child victims of sexual abuse, made Clarisse's story more legitimate and thus more believable. See *Douglas*, 496 Mich at 581, 601 (forensic interviewer's retelling of victim's out-of-court disclosure added legitimacy to victim's account). Plus, Rauser introduced her interview as an unbiased, truth-seeking process. Having thus framed the purpose of her interview, when Rauser articulated every detail Clarisse said during the interview, she gave the jury reason to lend credibility to Clarisse's account. *Douglas*, 496 Mich at 585-586. In total, all the inadmissible hearsay added weight to Clarisse's side of the credibility contest, making a different result reasonably probable absent the error. See *Id.* at 579 (quoting *Gursky*, 486 Mich at 620-621) (in a "credibility contest," inadmissible hearsay "may tip the scales against the defendant, which means that the error is more harmful. This may be even more likely when the hearsay statement was made by a young child, as opposed to an older child or adult").

Added together, Benigno establishes that the cumulative effect of counsel's errors gives rise to a reasonable probability of a different outcome. In a case without forensic evidence or eyewitnesses, counsel's errors tended to bolster the only witnesses he needed to discredit. Moreover, counsel permitted the state to enter evidence vilifying Benigno, thereby playing to the jury's emotions.

III. Plain error occurred when the state elicited inadmissible hearsay from three witnesses.

Issue Preservation and Standard of Review

Defense counsel did not object to the inadmissible hearsay statements offered by Zamara, Rauser, and Minton. Thus, the issue is unpreserved and this Court reviews for plain error. *Thorpe*, 504 Mich at 705. Plain errors are "clear or obvious" and "affect[] the outcome of the lower court

proceedings." *Carines*, 460 Mich at 763. If Benigno establishes plain error, then this Court has discretion to reverse if the error resulted in the conviction of an innocent person or "otherwise undermined the fairness and integrity of the process to such a degree that [this Court] cannot countenance that error." *People v Cain*, 498 Mich 108, 119 (2015) (citing *United States v Olano*, 507 US 725, 736 (1993)).

Discussion

For the reasons explained in Issue II, *supra*, Benigno carries his burden on plain error. The errors were clear—Zamara, Minton, and Rauser offered inadmissible hearsay. And the errors affected the outcome. The state's case boiled down to credibility. Minton, Rauser, and Zamara each offered testimony that bolstered Clarisse's account. When inadmissible hearsay bolsters one side in a credibility contest, the inadmissible hearsay can "tip the scales." *Douglas*, 496 Mich 557, 579 (quoting *Gursky*, 486 Mich at 620-621). That happened here. Some of the inadmissible hearsay came from Minton and Rauser, two objective witnesses with professional experience in sexual abuse cases. Minton and Rauser's repetition of the Clarisse's disclosure added legitimacy to Clarisse's account. *People v Douglas*, 496 Mich 557, 581 (2014) (quoting *Gursky*, 486 Mich at 620-621). More inadmissible hearsay came from Zamara. In all, their testimony was outcome determinative. Clarisse was a child, but adults repeated her allegation of abuse by way of inadmissible hearsay, making the error even more harmful. See *Douglas*, 496 Mich at 579.

Letting the jury hear outcome-determinative, inadmissible testimony from three witnesses affected the fairness and integrity of the trial process. This Court should reverse. Proper application of the rules of evidence safeguards a fair trial and produces just verdicts. See MRE 102. But here the rules of evidence gave way. The jury heard inadmissible testimony that bolstered the complaining witness in a credibility contest involving serious allegations but little in the way of corroboration.

When that happens, the inadmissible evidence crowds out the admissible evidence, allowing the jury to settle the credibility contest without regard for the stories told by the contestants, thereby undermining confidence in the verdict. See *Thorpe*, 504 Mich at 265-266.

Based upon the foregoing points and authorities, the Petitioner respectfully requests this Honorable Court to grant the within writ and reverse the judgment of the court below. The petition for a writ of certiorari should be granted as Petitioner was denied his federal constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Benigno Perez-Aguilar
Benigno Perez-Aguilar 10/10/24