No. 20-7422

ORIGINAL

FILED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

ANTUAN V. LITTLE — PETITIONER
(Your Name)

vs.

WARDEN DAN CROMWELL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT WISCONSIN
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANTUAN V. LITTLE
(Your Name)

200 SOUTH MADISON STREET P.O.BOX 351
(Address)

WAUPUN WISCONSIN 53963
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

WAS LITTLE'S TRIAL COUNSEL INEFFECTIVE IN HIS FAILURE TO CALL MICHAEL C. FOR HIS TESTIMONY ON THE PRIOR UNTRUTHFUL ALLEGATIONS OF SEXUAL ASSAULT.

WAS LITTLE DENIED DUE PROCESS WHERE THE WITNESS'S STATEMENTS AND TESTIMONY ARE UNRELIABLE AND PRODUCT OF COERCION.

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:

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OTHER

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

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

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. WRITTEN DECISION DATED 10/7/2020

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at 2017 WL 5495689; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; 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[ ] is unpublished.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 October 7, 2020.

[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 following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was N/A. A copy of that decision appears at Appendix N/A.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

STATUTES

28 U.S.C. § 2253(c)(2)

28 U.S.C. § 2254

28 U.S.C. § 2254(e)(1)

WIS. STATS. §948.02(1)

WIS. STATS. § 948.11 (2)(d)

WIS. STATS. § 972.11(2)(b)

WIS. STATS. § 922.11(2)(b) 3

RULES

UNITED STATES SUPREME COURT RULE 10(c)

Statement of the case

a. Prior history before trial.

On June 19, 2007, Detective Karla E. Lehmann interviewed J.B. the complainant at the Child Protection Center. During detective Lehmann's interview, J.B. made allegations of sexual assault against Antuan V. Little the petitioner J.B. alleged that Little called her into a bedroom where he put a bag over his penis and made her masturbate him to ejaculation. J.B. stated there were no other types of contact. During the interview, J.B. also accused Little's stepfather Michael C. of sexual assault

About one month later on Monday July 30, 2007, Detective Greg Jackson submitted a "Clearance Report." In the report, Detective Jackson indicated, he had reviewed the case with Assistant District Attorney Pattie Wabitsch. Together, they considered the police reports and the forensic interview tape. They also met with all parties involved and ADA Pattie Wabitsch decided not to issue charges because:

> "She indicated to me that the victim had several inconsistencies in her story that she is now reporting. She went on to tell me that the victim is now admitting she intentionally lied to the Sensitive Crimes Division female officer when she reported that she was sexually assaulted by Antuan Valentino Little..... She indicated to me that while meeting privately with the victim and the sexual assault advocate the victim admitted she lied on Antuan Valentino Little because she was angry with him."

About two years later August 03, 2009, Officer Joyce Johnson was dispatched to a walk-in sexual assault complaint. The walk in complaint was by J.B. and Humberto Rangel ("Rangel"). Rangel is the biological father of J.B.. Officer Johnson spoke with J.B. and Rangel individually. In the interview with Rangel Officer Johnson found that sometime after Rangel's release from prison, J.B. accused Little and Michael C. of molesting her. He stated he wanted

"those guys that molested his daughter put in jail." He revealed he does not know a lot of the details and he doesn't want to know.

In J.B's interview, she again accused Little of sexual assault. In this report, she added that she was 9 years old at the time and Little had her watch porno movies in a living room. J.B. states there were several movies and described three in the interview. In one, she states she saw a guy having sex with a girl on a couch. In another she states, people were engaging in sexual acts on a table. In the third, a "girl sucked a guy's dick" (penis). J.B. then alleges the story of masturbation again but alters it a bit. In this report, she states that she was 9 years old and Little called her *now* into a living room where he had a plastic sandwich bag over his penis. J.B. adds that Little then has her perform oral sex on him pushing her head towards his penis, telling her to open her mouth and she did. After a few minutes, J.B. alleges Little said it wasn't working. She then states Little had her put her hand on his penis and masturbate him to ejaculation J.B. adds another story where she states on a weekend in September of 2006 Little in a bedroom, pushed her on her back and attempted to lay on her.

About 2 weeks later on August 18, 2009, Officer Lehmann met with Rangel and J.B. at the Child Protection Center for an interview. Before J.B's interview, Lehmann spoke with Rangel alone. Rangel informed Officer Lehmann of how he became aware of the sexual assault allegations. He revealed that he was in prison when the allegations first arose, but did learn of the other sexual allegations against Michael C. (Little's stepfather). Rangel informs he was unaware of contact by Little at that time. Rangel states J.B. did not reveal details and was clear that she did not want to talk about it. He did not push because he did not want to know the details because he is not sure how he would react to it.

J.B. then accompanied Officer Lehmann into interview room B at the Child Protection Center. Where she accuses Little of sexual assault. J.B. in this interview, adds Little tried to kiss her to her allegations. She also adds other commentary to her story stating Little has told her that he can't do things with her mom because she is too chubby. She states Little has also told her that he has three girl friends, herself, her mom Crystalee B., and Melissa A. (Little's other son's mother). She modifies the allegation of Little trying to get on top of her. She adds, Little got her pants down and his clothes were off and Little tried to get on top of her and his private almost touched her private, but she did not let him. J.B. also spoke of what Michael C. allegedly done to her during the course of this interview

b. Trial

About 5 months later on Jan 28, 2010, a jury trial was held in the Milwaukee County Circuit Court. J.B.'s trial testimony consisted of a story of masturbation now back to happening in a bedroom, and a porn movie now only one movie with more stuff on it. J.B. testified about one act with people having sex on a couch. Stating, "a woman had a white shirt on and that was pretty much it", then remembering her interviews with the detectives, contradicts the statement, and changes the shirt color to red. Then instead of admitting that she was wrong, or simply mistaken, J.B. lied during her testimony stating, "I didn't say white". The District Attorney led on a question about J.B's oral sex allegation. The defense objected to the question seeing the state was leading (also actively using head motions simulating oral sex). The trial court sustained the objection and asked the jury to disregard the question and whatever part of the answer that J.B. gave. Little notes that J.B. did answer the question before the objection, loud and clear enough for the court, and J.B.'s answer was: "I don't remember."

The state pursued for a while but J.B. could not remember the

attorney Hans P. Koesser appealed the trial court's decision on all claims presented in the motion for post-conviction relief.

d. State appellate procedure

On direct appeal represented by attorney Hans P. Koesser, Little asserted his trial attorney was ineffective for failing to present evidence at trial that J.B. made prior false accusations against Little's stepfather Michael C.. Little should be granted a new trial in the interest of justice because the real controversy of credibility of the state's primary witness was not fully tried and it's probable that justice has miscarried. And that Little was denied effective assistance of counsel because the jury was given inaccurate, incomplete and false information about J.B.'s recantation and other inconsistencies in her various accounts of sexual assault.

On January 3, 2013, the Wisconsin Court of Appeals entered a decision affirming the conviction and order of the trial court. Little represented by attorney Hans P. Koesser, petitioned the Wisconsin Supreme Court for review of the Wisconsin Court of Appeal's decision. The Supreme Court denied review of the petition June 12, 2013

e. Pro se motions and appellate procedure

On about August 5, 2013, Rangel contacted Little by mail and disclosed that *he*, wanted Little locked up, so *he* made sure Little got charged, and when trial came up, J.B. was not going to testify against Little. Rangel writes that J.B. never said why, but *he* (Rangel) coerced and forced her to do it. Further, Rangel did provide an affidavit in support of this, stating under oath, he did coerce J.B. to testify against Little.

On April 24, 2014, Little filed a pro se motion for new trial based on newly discovered evidence. The defendant's motion was denied April 30, 2014. In the trial court's decision, the court held that the defendant's evidence does not satisfy two requirements: (1) Little has not

shown that such evidence would be reasonably probable to obtain a different result at a new trial, and (2) he has not submitted any corroborating evidence for his claim that the victim's testimony was false.

On May 23, 2014, Little filed a pro se motion for reconsideration of the court's April 30, 2014 decision denying his motion for a new trial based on newly discovered evidence In support of reconsideration, Little asserted the trial court's legal standard had been misapplied to his claim as Rangel's affidavit is not a recanting affidavit in need of corroborating evidence. That it's an admission of Rangel's actions admissible pursuant to penal interest 908.045(4), because clearly he stated In the affidavit that he coerced J.B. into testifying against Little, in which charges were filed when the District Attorney originally decided not to charged Little because, of JB's inconsistencies and recantation. However, Little still submitted a Facebook post from the victim with a new and proven to be false allegation in it, and Little requested the admission of photographs that were introduced at the defendant's sentencing hearing all to corroborate with his claim of coercion. In the Facebook post J.B. had a new allegation that the Little raped her which contrasts the fact the rape kit showed her to be a virgin. Little argued the inconsistency of that to the rest of the inconsistencies throughout the case. Little argued the 3 photographs as evidence of J.B's inconsistent character to be viewed aside of all the rest.

The defendant's motion was denied May 27, 2014.

In that denial, the circuit court held whether J.B. was forced to testify or not does not establish that her testimony was false consequently her testimony is presumed to be true. Under the circumstances Little has not met the standard of demonstrating there is a reasonable probability of a different result at a new trial.

f. FEDERAL DISTRICT COURT PROCEEDINGS.

ON JUNE 24, 2016 LITTLE FILED A HABEAS CORPUS PETITION UNDER 28 U.S.C. §2254. LITTLE ALLEGED THREE GROUNDS FOR RELIEF HOWEVER ONLY TWO MADE REVIEW BY THE COURT. LITTLE ALLEGED HIS CONVICTION WAS IMPOSED IN VIOLATION OF THE UNITED STATES CONSTITUTION, IN GROUND ONE HE ALLEGED HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN COUNSEL FAILD TO SEEK INTRODUCTION OF TESTIMONY OF PRIOR UNTRUTHFUL ALLEGATIONS OF SEXUAL ASSAULT.

IN GROUND TWO THAT HE WAS DENIED HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT WHERE A MEANINGFUL OPPORTUNITY FOR CONSIDERATION WAS NOT HAD AND OR EFFECTIVE CROSS EXAMINATION WHERE THE COERCED AND INVOLUNTARY TESTIMONY WAS ADMITTED INTO EVIDENCE.

ON NOVEMBER 15, 2017 HONORABLE JUDGE J. P. STADTMUELLER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN ENTERED AN ORDER DENYING LITTLE'S PETITION AND CERTIFICATE OF APPEALABILITY. LITTLE FILED NOTICE OF APPEAL JANUARY 11, 2018 AND REQUESTED CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. § 2253(C)(2) ON ALL CLAIMS AND NEW CLAIMS IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. ON OCTOBER 7, 2020 THE COURT OF APPEALS DENIED LITTLE'S REQUEST FOR CERTIFICATE OF APPEALABILITY.

LITTLE NOW REQUESTS CERTIORARI REVIEW IN THE UNITED STATES SUPREME COURT.

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REASONS FOR GRANTING THE PETITION

UNDER RULE 10 IN THE UNITED STATES SUPREME COURT THE CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI STATES UNDER PART (C) A STATE COURT OR UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, OR HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

ON GROUND ONE OF LITTLE'S INEFFECTIVE ASSISTANCE CLAIM, TRIAL COUNSEL FAILED TO SEEK ADMISSION OF PRIOR UNTRUTHFUL ALLEGATIONS OF SEXUAL ASSAULT AGAINST MICHAEL C. (LITTLE'S STEPFATHER). THE FAILURE CRIPPLED THE DEFENSE AND ALLOWED THE SAME INFORMATION TO BE ADMITTED ANYWAY IN A WAY THAT PREJUDICED THE CASE AGAINST LITTLE. TRIAL COUNSELS FAILURE WAS A DENIAL OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT.

ACCORDING TO THE DISTRICT COURT LITTLE FAILED TO SHOW THAT MICHAEL C.'S TESTIMONY WAS ADMISSIBLE UNDER WISCONSIN'S RAPE SHIELD LAW, WIS. STAT. §972.11(2)(b) AND A MOTION BY TRIAL COUNSEL WOULD HAVE FAILED FOR SEEKING SUCH. THE DISTRICT COURT FOUND THAT BECAUSE LITTLE'S CLAIM HAS NO MERIT, HIS COUNSEL CANNOT HAVE BEEN INEFFECTIVE FOR FAILING TO RAISE IT. (SEE DECISION AT P. 8)

IN WISCONSIN UNDER SEC. 972.11(2)(b) WIS. STATS., IF A DEFENDANT IS ACCUSED OF A CRIME UNDER SEC. 940.225, 948.02, 948.025, 948.05, 948.06 OR 948.095, ANY EVIDENCE CONCERNING THE COMPLAINING WITNESS'S PRIOR SEXUAL CONDUCT OR OPINIONS OF THE WITNESS'S PRIOR SEXUAL CONDUCT SHALL NOT BE ADMITTED INTO EVIDENCE DURING THE COURSE OF THE HEARING OR TRIAL, NOR SHALL ANY REFERENCE TO SUCH CONDUCT BE MADE MADE IN THE PRESENCE OF THE JURY.

THE WISCONSIN RAPE SHIELD LAW BARS ANY EVIDENCE OF THE COMPLAINING WITNESS'S SEXUAL HISTORY. HOWEVER, THERE ARE EXCEPTIONS TO THE LAW. ALL PARTIES HAVE ACKNOWLEDGED THAT LETTRE IS RELIANT UPON THE THIRD EXCEPTION WHERE PRIOR UNTRUTHFUL

allegations of sexual assault may be admitted, so long as there is a reason in which a reasonable person could infer falsity exists. Wis. Stat. § 972.11(2)(b) 3.

For a motion seeking the introduction of testimony from Michael C. to be meritless, there must be *no* reason from which a reasonable person could infer that falsity exists in the allegations against Michael C.. However, the District Court's decision simply repeats the error made by the lower state courts, as the District Court only recognizes part of Littles argument. But upon closer attention, it is *not* conclusively that the non-prosecution of a complainant's prior allegation of sexual assault, or even the dismissal of a charge for lack of evidence should be *sufficient* to support falsity of the prior allegations. Nor is it that the inconsistencies would be the key evidence for the defense, even if the case were prosecuted. Or beyond that, that the lack of evidence is only on the side of the prosecution but Michael C.'s defense would have evidence. Although the above are certainly factors that should also be considered among others, the issue *is* that reasonable inferences can be drawn from the *only* evidence against Michael C. And because inconsistencies can form the basis of an adverse credibility finding, *See Hamilton v. Colvin,* 525 Fed. Appx. 433 Id. at 437, Little has met the standard and the motion would have been meritorious. Further, to have merit only means that the motion contains an issue that has substance or is worthy of argument. It is worth arguing either that J.B. made false allegations against Little's stepfather, or that any information regarding the allegations against Michael C. be excluded from Little's trial. The evidence could only be either material, showing J.B. has a history of making serial false accusations in order to get her way, or irrelevant to Little's case. The probability of its success does not invade its substance, as judges can be wrongfully partial, bias, and abuse their discretion. Also, lawyers can have primitive unskilled arguments.

A decision absent a consideration of what evidence would be in front of a reasonable person to review and make the determination is unreasonable. One of the primary ways to determine if another is being untruthful is through inconsistencies in the allegations. So here the main way a juror would determine the untruthfulness in the allegations (by reviewing the allegations and witnessing the inconsistencies themselves), was ignored by the District Court. The critical issue here is whether there is a reasonable probability a reasonable person could reasonably infer J.B. made prior untruthful allegations, and whether there is a reasonable probability of a different outcome at a new trial.

Michael C's testimony would have provided evidence critical for the defense to correct any assumptions that the prior allegations are true, and attempt to cure the prejudice incurred from the information being admitted in the first instance.

Little referenced to the District Court at least three instances where the information had been admitted anyway with no regard for prejudice to Little. The District Court recognized the instances but could not find that it supported Little's position that it prejudiced him. And this is because there was no discussion on the truthfulness of the priors allegations at trial, and that there is no suggestion whether the jury believed these other allegations, or that they had any effect on Little's case. (See Decision at p.12 fn. 3).

However, reasonable judges could find these instances do support Little's position. D.A. Falk's opening statement, ".... There had been other information that had been given by Jasmine *that related to other events...*" And the testimony of Crystalee B. (J.B's mother) ".... because there *was two different incidents.* I wanted to know which *incident occurred first, in which house.* So--...."

Here counsel not only had an argument for introduction but opportunities that a motion for introduction of the testimony of Michael C. would have succeeded, as the door had been opened for it. However, the true definition of ineffective assistance is shown when instead of defending his client he participated in prejudicing him. The cross-examination of detective Karla E. Lehmann by trial attorney Stephen A. Sargent:

Q "Detective, a few moments ago you made a statement about *another incident involving another sexual assault,* correct, a few moments ago when we approached, correct? Another investigation, correct?"

A "Correct."

Q "That involved a person by the name, I believe, of Mr. Green, is that correct?" [1]

A "that is true."

Q "It did not involve my client, correct?"

[1] The Mr. Green referred to is Michael Cramer, the petitioner's stepfather.

A "Correct."

(Emphasis added)

This information presented to the jury that there *"was two different incidents"*, one *"another incident involving another sexual assault"*, by *"Mr. Green"* *"that did not involve"* Little, then (obviously) another sexual assault by Little, and that these *"events"* or *"incidents"*, took place in two different *"houses"*. Were this effective assistance of counsel, there'd be no such thing as an acquittal. Counsel's duty under the Sixth Amendment is to defend his client. Here counsel *participated* in the prejudice and thus also in the conviction. Michael C's testimony was absolutely critical to correct this information, and at the very least, clarify these were only allegations and *not* to be determined as the actual events that they were left to be determined.

It actually has been Little's argument all throughout, that this information had been admitted but the truth or falsity of it was never discussed. If the District Court really looked at the submitted indications, a reasonable judge could see each admitted indication shows that the allegations against Michael C. was submitted as the truth, as an actual sexual assault had occurred, and not just unsubstantiated allegations. Such information could only negatively influence the outcome by an improper means, appeal to the juries sympathies, arouse a sense of horror, or provoke the juries instinct to punish or otherwise cause a jury to base its decision on something other than the established propositions in the case. *State v. Sullivan,* 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998).

And even as a lesser conclusion, ambiguity on the issue of truth or falsity within the context of sexual assault of a child, is still injurious to Little's case. Improper suggestions, insinuations, and, especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. See *Berger v. United States,* 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935), (holding "In these circumstances prejudice to the accused is so highly probable that we are not justified in assuming its non-existence".) Id. at 89.

Moreover, Wis. Stats. Sec. 972.11(2) (b) cuts both ways because "... nor shall any reference to such conduct be made in the presence of the jury". See Wis. Stats. sec. 972.11(2) (b). When crafting the rape shield law, legislature determined that evidence of prior sexual conduct has a highly prejudical effect. One must assume, absent an evidentiary showing to the contrary, that the evidence is more prejudical than probative, which is the very reason there are *only three exceptions* for the introduction of such evidence. Therefore, if trial counsel's motion

HAD BEEN DENIED, WHEN THE DOOR OPENED DURING THE TRIAL, THE MOTION WOULD HAVE SUCCEEDED. THERE IS NO LAW THAT FORBIDS TRIAL COUNSEL FROM MOTIONING THE COURT DURING TRIAL SEEKING TESTIMONY OF A NEW WITNESS WHEN THE SIGNIFICANCE OF THAT WITNESS APPEARS DURING TRIAL AFTER CERTAIN EVIDENCE IS WRONGFULLY ADMITTED. SURELY A COURT'S RULING BARRING THE ADMISSION OF THE TESTIMONY, THEN ALLOWING ADMISSION OF THE INFORMATION, THEN AGAIN BARRING A DEFENSE AGAINST IT IS A SIXTH AMENDMENT DEPRIVATION.

ON GROUND TWO OF LITTLE'S DUE PROCESS GROUND FOR RELIEF, THE DISTRICT COURT HELD THAT RANGEL'S AFFIDAVIT DOES NOT MOVE THE EVIDENTIARY MARK DUE TO RANGEL'S NEGLECT TO WRITE HIS BELIEF THAT THE ALLEGATIONS ARE FALSE.

LITTLE MAINTAINS RANGEL'S OPINION IS INSIGNIFICANT AS RANGEL'S BELIEFS ARE REPRESENTED BY HIS ACTIONS. IN ADDITION, J.B. HAS ALREADY CONFESSED THAT THE ALLEGATIONS ARE FALSE. FURTHERMORE, WHETHER TRUE OR FALSE ONE CANNOT THREATEN OR FORCE ANOTHER TO CHANGE A PRIOR STATEMENT JUST TO TESTIFY FAVORABLY. COERCION AND VERACITY ARE TWO DIFFERENT THINGS, AND REASONABLE JUDGES HAVE AGREED. HOWEVER, COURTS HAVE REVERSED WHEN FINDING UNRELIABILITY.

BUT A DENIAL HERE WOULD MEAN IT IS LAWFUL FOR ANYONE TO FORCE ANY WITNESS TO CHANGE A PRIOR STATEMENT MADE UNDER OATH AND TESTIFY TO ANOTHER, EFFECTIVELY HANDCRAFTING FAVORABLE WITNESSES. LITTLE ASSERTS THIS IS WRONG AND BEGS THE COURT TO REVIEW THIS GROUND AND SET THE PRECEDENT.

The United States Supreme Court has yet to clearly establish the unconstitutionality of witness coercion. However, consistent with the holdings of the Seventh Circuit Court of Appeals, Little 's primary constitutional challenge on this claim is that his conviction rests on unreliable evidence contrary to the United States Supreme Court president in ***Jackson v. Virginia.***

Here may be a case of first impression for the United States Supreme Court but there have been holdings in Supreme Court cases agreeing with Little's argument on the issue of coercion. One concern of the Supreme Court is that statements that are product of coercion are more likely to be inherently untrustworthy than voluntary statements, ***Spano v. New York,*** 360 U.S. 315, 320, L.Ed. 2d 1265, 79 S. Ct. 1202 (1959). There have been holdings by the United State's Courts of Appeals as well that touch on this issue. In ***State v. Samuel,*** 2001 WI App 25, 240 Wis. 2d 756, 623 N.W.2d 565, the states argument was that coercion had to be "torture" or otherwise "extreme." Id. at 767. The appeals court disagreed and responded in full, a quote from ***United States v. Gonzales,*** 164 F. 3d 1285, 1289 (10th Cir. 1999):

> We reject the government's argument that non-defendant witness' statement that incriminates a defendant is subject to suppression only if the statement was the product of torture or extreme coercion beyond the level of coercion required for suppression of a defendant's own confession. As we noted in Clanton, "methods offensive when used against an accused do not magically become any less so when exerted against a witness...." Consequently, the standard for determining whether a statement was voluntary is the same whether we are dealing with a defendant or a third party witness.

United States v. Gonzales, 164 F.3d at 1289 n.1

The United States Court of Appeals for the 7th Circuit touched on the issue in ***Buckley v. Fitzsimmons,*** 20 F.3d 789, 794-95 (1994). Holding that it would however violate the due process clause by the actual use of that coerced statement against a defendant in a trial. "Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause. See ***Arizona v. Fulminante,*** 499 U.S. 279, 113 L. Ed. 2d. 302, 111 S. Ct. 1246 (1991)." Also the 7th Circuit Court touched on the issue in ***Samuel v. Frank,*** 525 F.3d 566. Honorable Judge Rovner concurring with the majority detailed that, "The touchstone of due process, for our purposes, is the reliability of Tisha's statement rather than the egregious of the state's actions." Id. at 574. This was in regards to an issue in that case of whether the coerced statements made by Tisha the young victim, which implicate Samuel the petitioner of sexual assaulting her in the state of Wisconsin, are so unreliable as to violate Samuel's right to due process of law.

The only challenge to the reliability of J.B's sexual assault allegations against Little was by the Wisconsin court of appeals. The lower court held that the coercion in and of it self does not "make her testimony any less reliable or any less credible than if she were a fully willing witness." The determination is in conflict with the United States Supreme Court president which holds, "statements that are product of coercion are more likely to be inherently untrustworthy than voluntary statements," ***Spano v. New York,*** 360 U.S. 315, 320, L. Ed. 2d 1265, 79 S. Ct. 1202 (1959). Its beyond any possibility of fairminded disagreement that the lower court's determination in this case was unreasonable.

But this is one instance where the Wisconsin Court of Appeal's decision is in error. Another error in the determination is

that clearly H.R's coercion forced J.B. to conjure up more of an already clashing story, and after the coercion even more inconsistencies evolved making the allegations even more unreliable. So in light of the evidence presented the state court's decision was purely wrong.

Warden Foster makes no challenge to this.

Warden Foster and the Wisconsin Court of Appeals for district I discarded Little's analogy applying ***Jackson v. Denno,*** 378 U.S. 368, 376, (1964)[6] as it is a case involving an accused's own involuntary confession in opposed to Little's claim where it is a witnesses testimony at issue. However, Little's parallel applying ***Jackson v. Denno,*** to the present case is the same used by the Wisconsin court of appeals for district II in ***State v. Samuel,*** 2001 WI App. 25, 240 Wis. 2d 756, 623 N.W.2d 565, 2000 Wisc. App. LEXIS 1202. The Wisconsin court of appeals in ***Samuel*** made it clear that ***Jackson v. Denno,*** involved the involuntary confession of a criminal defendant and not a witness but was cited for its authority showing the Fourteenth Amendment forbids the use of coerced confessions. The argument that due process only forbids the use of a defendant's involuntary statements was rejected by the court which agreed with the 10th Circuit Court of Appeals in ***Clanton v. Cooper,*** 129 F.3d 1147, 1157-58 (10th Cir. 1997), See ***Clanton*** 129 F.3d at 1158.

Another challenge to Little's claim by the opposing parties and Wisconsin Court of Appeals was that the newly discovered evidence would not create a reasonable probability of a

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[6] A defendant in a criminal case is deprived of due process of law if his conviction is founded in whole or in part up on an involuntary confession, with out regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction. ***Jackson v. Denno***, 378 U.S. 368, 376, (1964).

This legal theory is applicable to the defendant's situation, although different in foundation; it is the same in facts. The complainant was forced to make the statements against Little, and it's clear if one would need to be forced to complete a task one would be doing the task involuntarily. Thus, whether true or false (albeit Little avows her statement is false) it is tainted evidence because of the coercion by her father.

different outcome in a trial. This determination was based solely on the H.R's forgetfulness to write out his belief that the allegations against Little are false in an affidavit H.R. provided for Little. This is a total disregard for the clear and convincing weight of the evidence. Because there is no way that the father of a child victim of sexual assault would help the man who sexually assaulted his daughter, unless he knows for a fact that the allegations against that man are not true. The determination on this claim is in complete disregard for the magnitude of who H.R. is, and his actions helping Little. It's like H.R's coercion is not the only newly discovered evidence. H.R. himself is the newly discovered evidence. A decision 'involves an unreasonable determination of the facts if it rests upon factfinding that ignores the clear and convincing weight of the evidence. see ***Bailey v. Lemke***, 735 F.3d 945, Id. at 949-50

Further, 28 § 2254 (e)(1) provides a mechanism by which a Little can prove unreasonableness. If Little can show that the lower state court determined his underlying factual issue against the clear and convincing weight of the evidence, Little has not only established that the state court committed error in reaching a decision based on a faulty premise, but has also gone a long way towards proving that it committed unreasonable error. See ***Ward v. Sternes,*** 334 F.3d 696. Id at 704.

At a new trial, it would not only be the coercion that H.R. brings to the table. H.R. also brings the reasons he knows the allegations are false. Why he is testifying on behalf of a suspected child molester, especially one accused of inappropriate contact with *his* child. In fact, H.R. alone is sufficient to undermine confidence in the outcome because H.R. alone casts the reasonable doubt Little needed at trial. It says a lot when the father of a child victim accusing a man of sexual assault, comes forward to help to the man suspected of the sexual assault. But the state court ignores this in its determination on Little's claim. Little also has C.B. (J.B's mother)

to corroborate H.R's testimony. C.B. has known from the start that the allegations against Little are false and has been a supporter of Little's innocence throughout.

Little also has the photographs taken June of 2009 showing J.B. posing with two men she accused of sexually assaulting her. The opposing parties in the Wis. Court of Appeals did note that Little's asserted the photographs are not actually newly discovered evidence, but still applied a case based on newly discovered evidence to the photographs, *See* ***State v. Fosnow,*** 2001WI App 2, ¶ 9, 240 Wis. 2d 699, 624 N.W.2d 883 (Answer Ex. J., p.9-10). Warden Foster also argued that the photographs are not newly discovered evidence (Warden Foster Br. at p. 24). Little acknowledges the fact the opposing parties throughout have made no argument against the corroboration of the photographs, just that they are not newly discovered evidence. These photographs were asked to be introduced in Little's motion for reconsideration of his motion for new trial based on newly discovered evidence in the circuit court. Because it was the circuit court's decision that Little had not submitted any evidence to corroborate the claim of coercion. Since then Little has argued only that these pictures support his claim of coercion and never that they are newly discovered evidence and that fact remains undisputed. Unrefuted arguments are deemed conceded *see* ***Mercier v. Katia props., LLC.,*** 2014 WI App 38. See also ***Charolatis Breeding Ranches v. FDC sec. Corp.,*** 90 Wis. 2d 97. (MERCIER AT APPENDIX H)

However, Warden Foster does add another argument to the photographs. He suggest that J.B. posing with two men she accused of sexual assault "does not disprove the sexual abuse years earlier. It tends to show the helpless living situation J.B. found herself in and why she was so reluctant to report the abuse by both men." (Warden Foster Br. at p. 24 footnote 6). Warden Foster asks this court to seriously believe that J.B. had been *forced* to take pictures with two men she accused of sexual assault. With all the adults present, if J.B. who accused both men was

forced, then why not also force J.B's sister who accused one of the men also? Also it would be highly unreasonable to believe as Warden Foster suggests there was an actual "helpless living situation". He asks this Court to believe that all the adults in the picture; J.B's great grandma Mrs. Slaughter, J.B's grandma Ms. Lisa Buss (C.B's mother), C.B's auntie Ms. Jennifer Slaughter, J.B's grandma Neecee, and Sheniqua Little (Little's sister) are all irresponsible adults who would force girls to take photographs with the men they accused of sexual assault. The living situation couldn't have been helpless at all. Because she was living with her father H.R. at the time of these photographs. And H.R's sister even before that It was J.B. decision to take pictures with Little and M.C. because there was never any sexual assault, thus no painful memories, or any *real* animosities.

Another undisputed fact is Little's argument that J.B's inconsistencies also support that a different result would be reached at a new trial. Inconsistencies can form the bases of an adverse credibility finding, *See* ***Hamilton v. Colvin,*** 525 Fed. Appx. 433 Id. at 437(SEE APPENDIX C).

And on top of all this there is still the recantation which is actually sufficient to establish a ***Web*** violation see ***Web v. Texas,*** 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972). Also ***United States v. Dillon,*** 150 F.3d 754, 757 (7th Cir. 1998) although in ***Web*** it was the judges coercion which drove a witness from the stand here H.R's coercion forced the witness to testify against Little. This violated Little's due process rights.

Against all this, the determination of the Wis. Court of Appeals and Warden Foster's argument in opposition is that there is no reasonable probability of a different outcome at a trial. A different outcome is not just reasonably probable here it's actual. The only evidence against Little is flawed alone and has its own reasons it can be doubted due to the inconsistencies. Then Little receives help from a very unlikely witness. In a case like this, regarding allegations of

SEXUAL ASSAULT OF A CHILD, THE SUSPECT RECEIVING OUTSIDE HELP FROM THE FATHER OF THE CHILD WITNESS, JUST DOES NOT HAPPEN. INDEED THERE MAY NEVER BE A CASE LIKE THIS AGAIN.

CUMULATIVE ERROR.

EVEN WHEN NO INDIVIDUAL ERROR IS SUFFICIENTLY PREJUDICIAL TO WARRANT RELIEF, THE CUMULATIVE EFFECT OF THE ERRORS MAY REQUIRE REVERSAL. **CARGLE V. MULLIN**, 317 F.3d 1196, 1206-07 (10TH Cir. 2003); **MAK V. BLODGETT**, 970 F.2d 614, 624-25 (9TH C.I 1992), CERT. DENIED 507 U.S. 951 (993).

AS DISCUSSED ABOVE THIS CASE BLINDSIDED LITTLE WITH COERCED FAISE ALLEGATIONS. LITTLE'S TRIAL ATTORNEY WAS INEFFECTIVE IN HIS THEORY OF DEFENSE, HIS FAILURE TO CALL MICHAEL C. AS A DEFENSE WITNESS THEN REPEATEDLY ALLOWING THEM PARTICIPATING IN LITTLE BEING SUBSTANTIALLY PREJUDICED BY IRRELEVANT, INFAMMATORY PREMDICIAL INFORMATION LEAVING THE JURY NO REASON TO DOUBT IF LITTLE COMMITED THE CHARGED OFFENSE. IN COMBINATION, AT LEAST, THESE ERROR'S DEPRIVED LITTLE OF A FAIR TRIAL.

CONCLUSION

FOR THE REASONS ABOVE THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

DATE: 02/14/2021

RESPECTFULLY SUBMITTED,

Antuan V. Little

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APPENDIX A

the prescription medication Lyrica for her pain, the ALJ wrote that **Hamilton** testified at that hearing to taking no prescription pain medications.

The ALJ also explained how much weight she gave to the medical opinions in the record, characterizing the opinions of **Hamilton's** treating physicians, Dr. Luken and Dr. Dugan, as "generally consistent" with the objective medical evidence and thus entitled to "appropriate weight." To the opinion of the medical expert, Dr. Slodki, she gave "great weight," describing it as "generally consistent with the evidence ***437*** of record and the opinions of Dr. Luken, Dr. Dugan, and Ms. Spanberg." But the ALJ gave "no weight" to the 2007 letter where Dr. Luken opined that **Hamilton** is "disabled"; that determination, the ALJ explained, is reserved to the Commissioner. *See* 20 C.F.R. § 416.927(e)(2). She also patly dismissed the finding of Ms. Spanberg, the physical therapist, that **Hamilton** can sit for no more than 20 minutes: "Based on my review of the evidence, as discussed above, I find that the record does not support a finding that the claimant requires a sit/stand option more frequently than every 45 to 60 minutes."

After determining **Hamilton's** RFC to be sedentary work with an option to stand every 45 minutes, the ALJ completed step 4 by explaining that **Hamilton** is unable to return to her previous work as a nurse's aid because it was not sedentary work. At the fifth and final step, the ALJ concluded that **Hamilton** is not disabled because sedentary jobs that accommodate her limitations exist in the national economy in significant numbers.

This time around the Appeals Council declined to review the ALJ's decision, making it the Commissioner's final decision. **Hamilton** filed suit in the district court, but the court granted summary judgment to the Commissioner after concluding that substantial evidence supports the ALJ's decision. The court acknowledged that the ALJ's decision is flawed and at places even "misleading," but it did not think these problems called for remand.

1On appeal, **Hamilton** challenges the ALJ's finding that she can regularly sit for 45 to 60 uninterrupted minutes. According to **Hamilton**, the record shows that 20 minutes is generally her limit. She contends that the ALJ should have found her disabled given the vocational expert's testimony that an insignificant number of jobs accommodate this limitation.

In particular, **Hamilton** first argues that the adverse credibility finding was improper because the ALJ misrepresented her testimony as inconsistent. An ALJ's credibility determination is entitled to great deference, but it must be justified with specific reasons and have support in the record. *See* SSR 96–7p; *Shauger v. Astrue,* 675 F.3d 690, 696 (7th Cir.2012); *Villano v. Astrue,* 556 F.3d 558, 562 (7th Cir.2009); *Steele v. Barnhart,* 290 F.3d 936, 941–42 (7th Cir.2002). The ALJ wrote that **Hamilton** testified at the first hearing to being able to "sit for 15 minutes to one hour" but at the second hearing to being "capable of sitting for 20 minutes."

Testimonial inconsistencies can indeed form the basis of an adverse credibility finding, *see* SSR 96–7p, but **Hamilton** convincingly argues that she did not contradict herself. Her testimony at the first hearing was that the amount of time she can sit depends on the chair: She can tolerate a "straight back" chair for about 20 minutes but a "lazy boy" recliner for up to an hour and a half. She did not testify, as the ALJ represented, that she could sit in any chair for up to an hour. **Hamilton's** testimony at the first hearing thus is consistent with her testimony at the second hearing, where she said that she can sit for "20 minutes, and that's pushing it," unless she is in her recliner. We also note that the ALJ made another misrepresentation about **Hamilton's** testimony when she wrote that **Hamilton** denied taking prescription pain medication at her first hearing. **Hamilton** actually testified that she was taking Lyrica for pain.

The ALJ's mistakes about **Hamilton's** testimony are problematic on their own, but they are compounded by the ALJ's resort to the boilerplate passage about credibility that we quoted earlier. In that ***438*** passage, the ALJ deems **Hamilton's** asserted limitations not credible "to the extent" they are inconsistent with the RFC findings. As we have stressed repeatedly, the passage implies that the ALJ may permissibly settle on an RFC *before* assessing the claimant's credibility when in fact credibility must be assessed first. *Shauger,* 675 F.3d at 696; *Bjornson v. Astrue,* 671 F.3d 640, 644–45 (7th Cir.2012).

The Commissioner responds that ALJs who employ this objectionable boilerplate can salvage their credibility findings by providing sufficient additional analysis of the claimant's credibility. *See Filus v. Astrue,* 694 F.3d 863, 868 (7th Cir.2012). We conclude, however, that the rest of the ALJ's credibility analysis, fails to efface the impression given by the boilerplate. One problem is found in the ALJ's primary justification for not fully crediting **Hamilton**: "The claimant has described activities of daily living which are not limited to the extent one would expect given the complaints of disabling symptoms and limitations." This view of **Hamilton's** daily activities improperly and inexplicably ignores her testimony that completing activities takes her much longer since the accident and that she must spend half an hour lying in bed four to five times a day. We have admonished ALJs to appreciate that, unlike full-time work, the "activities of daily living" can be flexibly scheduled, *Bjornson,* 671 F.3d at 647, and we have criticized "the naiveté of the Social Security Administration's administrative law judges in equating household chores to employment," *Hughes v. Astrue,* 705 F.3d 276, 278 (7th Cir.2013). We have also recognized that a person who needs to spend much of the day lying down cannot work. *See Roddy v. Astrue,* 705 F.3d 631, 639 (7th Cir.2013); *Bjornson,* 671 F.3d at 646, 648. What is more, the activities the ALJ characterizes as inconsistent with **Hamilton's** limitations do not necessarily involve sitting for longer than 20 minutes. (The single exception is **Hamilton's** one-time drive to Kentucky, where she managed to drive for two-hour stretches before taking breaks, but the record contains no evidence of the length of her breaks or whether she needed to lie down during them, and the ALJ did not explain how this isolated recreational event means that **Hamilton** can do the same thing on a full-time basis. Simply mentioning the drive as the ALJ did is insufficient; as this circuit puts it, the ALJ must build a "logical bridge" between the evidence and her conclusions. *See Scott v. Astrue,* 647 F.3d 734, 740 (7th Cir.2011); *Terry v. Astrue,* 580 F.3d 471, 475 (7th Cir.2009).)

2Turning to the medical testimony, **Hamilton** next argues that the ALJ, in assessing her RFC, should have given her treating physicians' opinions controlling weight but did not. A treating physician's opinion is entitled to controlling weight unless it is not supported by the physician's records or is inconsistent with the reports of other sources. 20 C.F.R. § 404.1527(d)(2); *Scott,* 647 F.3d at 739. An ALJ who concludes that such an opinion is not entitled to controlling weight must give good reasons for that conclusion. *Martinez v. Astrue,* 630 F.3d 693, 698 (7th Cir.2011); *Punzio v. Astrue,* 630 F.3d 704, 710 (7th Cir.2011); *Larson v. Astrue,* 615 F.3d 744, 749 (7th Cir.2010).

We agree with **Hamilton** that the ALJ did not properly evaluate the medical opinions in this case. The most obvious problem is that the ALJ said she was giving the doctors' opinions "appropriate weight" without specifying how much weight is appropriate. But even if we put that issue aside, the ALJ's analysis falls short because she erroneously called the opinions of **Hamilton's** doctors and her physical ***439*** therapist "generally consistent" with an RFC limited to sedentary work with the option to stand every 45 minutes. The ALJ's announced RFC conflicts with the medical opinions of **Hamilton's** medical providers on the pivotal question of how long **Hamilton** can sit in a standard chair. Dr. Dugan's opinion was that **Hamilton** can sit in a firm chair for no more than 20 to 30 minutes, and the physical therapist, Ms. Spanberg, in a report signed on to by Dr. Luken, opined that **Hamilton** has a maximum sitting time of

20 minutes. The vocational expert testified that a person must be able to sit for at least 45 minutes—presumably in whatever kind of chair the employer chooses to provide—in order to hold a full-time, sedentary job. Therefore, the physicians' opinions that she can sit at most for only 30–minute intervals cannot be glossed over as "generally consistent" with a conclusion that she can work full time. (Although Dr. Dugan agreed that **Hamilton** can sit for up to two hours in a "soft" chair, nothing in the record suggests that something equivalent to **Hamilton's** "lazy boy" recliner, which she uses for sittings that exceed 20 minutes, is typically available in the work settings that the vocational expert considered.)

Another problem with calling the physicians' opinions "generally consistent" with the RFC finding is that Dr. Luken opined that **Hamilton** is "disabled." This opinion, too, conflicts with the RFC finding that she can keep working. While the ALJ is right that the ultimate question of disability is reserved to the Commissioner, *see* 20 C.F.R. § 416.927(e)(2), a treating physician's opinion that a claimant is disabled "must not be disregarded," SSR 96–5p; *see also Roddy v. Astrue,* 705 F.3d 631, 636 (7th Cir.2013) (explaining that ALJ must address treating physician's opinion that claimant cannot "handle a full-time job"). Here, the ALJ's description of Dr. Luken's opinion as "generally consistent" with her RFC determination disregards his opinion that **Hamilton** is disabled.

3Finally, the ALJ also inadequately justified rejecting the conclusion of the physical therapist, Ms. Spanberg, that **Hamilton** can sit for only 20 minutes. Even if Ms. Spanberg's report cannot be attributed to Dr. Luken (who signed it but did not write it) and thus cannot be given the controlling weight of a treating physician's opinion, a physical therapist's report is entitled to consideration and cannot be arbitrarily rejected. *See Barrett v. Barnhart,* 355 F.3d 1065,1067 (7th Cir.2004). The ALJ gave no explanation for rejecting Ms. Spanberg's opinion other than to say that "the record does not support [her] finding...." This is an empty explanation, and it is in tension with the testimony of Dr. Slodki, the medical expert, who repeated Ms. Spanberg's opinion that **Hamilton** can sit for only 20 minutes without suggesting that he disagreed or that the opinion was unsupported by the medical record. Last, although Dr. Slodki assessed **Hamilton's** RFC to be "sedentary" (an opinion to which the ALJ gave "great weight"), this means that **Hamilton** can work only while seated; it is not an opinion about how long she can sit.

Thus neither the medical nor non-medical evidence in the record supports the ALJ's conclusion that **Hamilton** exaggerated her limitations and that she actually can sit regularly for 45–minute stretches. In fact the *only* reference to "45 minutes" in the record is from the vocational expert who informed the ALJ that jobs are not available for people who cannot sit for at least that long. Because the ALJ's key findings were not supported by substantial evidence, we **VACATE** the judgment of the district court and **REMAND** this case to the agency for proceedings consistent with this opinion. In those proceedings, ***440*** the agency shall award benefits unless it determines that additional findings and conclusions still need to be made.

All Citations525 Fed.Appx. 433, 2013 WL 1855725

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APPENDIX H

H

353 Wis.2d 306

Unpublished Disposition

Court of Appeals of Wisconsin.

Pete **MERCIER** and Barb **Mercier**, Plaintiffs–Appellants,

v.

KATIA PROPERTIES, **LLC**, Defendant–Respondent.

No. 2013AP2246.

Feb. 25, 2014.

Appeal from a judgment of the circuit court for Outagamie County: Dee R. Dyer, Judge. *Affirmed.*

Opinion

¶ 1 MANGERSON, J.[1]

*1 Pete and Barb **Mercier** appeal a summary judgment dismissing their small claims action against **Katia** Properties, **LLC**, for failing to return a security deposit or provide an accounting of the deposit. The circuit court granted summary judgment in favor of **Katia** because the **Merciers** expressly agreed in their lease that the deposit would be returned to ALE Solutions, Inc., which was the entity that paid the deposit. We conclude the **Merciers** lack standing to maintain their claim against **Katia**, and we affirm.

BACKGROUND

¶ 2 In early 2012, the **Merciers**' house was damaged by a fire. Their homeowner's insurer, Liberty Mutual Insurance Company, hired ALE to locate and provide temporary housing for the **Merciers** while their house was being repaired. ALE found a house for the **Merciers** to rent that was owned by **Katia**.

¶ 3 The **Merciers** and **Katia** entered into a lease for the property. As relevant to this appeal, the lease provided the security deposit "shall be returned to ALE Solutions, interest state sensitive, and less any set off for damages to the Premises upon the termination of this Agreement."

¶ 4 Separately, ALE and **Katia** entered into an agreement whereby ALE agreed to pay the security deposit and the monthly rent on behalf of the **Merciers**. ALE then paid the $3400 security deposit as well as monthly rent to **Katia**.

¶ 5 On June 4, 2012, ALE notified **Katia** the **Merciers** intended to vacate the property, and thereby terminate the tenancy, on July 9, 2012. The notice advised **Katia** that "within 30 days of termination," it needed to return the security deposit to ALE along with an accounting for any deduction. The **Merciers** vacated the property on July 9.

¶ 6 On August 3, 2012, **Katia** provided ALE with a security deposit accounting, which outlined the amounts **Katia** was going to withhold from the deposit. **Katia** then sent the balance of the deposit to ALE.

¶ 7 In March 2013, the **Merciers** brought a small claims action against **Katia**, arguing **Katia** violated WIS. ADMIN. CODE § ATCP 134.06 by failing to return their security deposit or an accounting of the deposit within twenty-one days after they vacated the property. The **Merciers** sought double damages, or $6800, attorney's fees, and costs.

¶ 8 **Katia** answered, and then filed a motion to dismiss/motion for summary judgment. **Katia** argued the **Merciers** lacked standing to assert their claim because the **Merciers** "sustained no injury tangible or otherwise." **Katia** emphasized that ALE, not the **Merciers**, paid the security deposit and that the lease between **Katia** and the **Merciers** provided **Katia** needed to return the security deposit to ALE.

¶ 9 The **Merciers** responded to **Katia's** motion, arguing they had standing and were entitled to the security deposit because Liberty Mutual paid their insurance benefits to ALE, who in turn, used the benefits to pay the security deposit to **Katia**.

¶ 10 The circuit court granted summary judgment in favor of **Katia**. It reasoned the issue in the case was "simple contract interpretation, not one of standing, insurance benefits, or landlord/tenant law." The court reasoned **Katia** was entitled to summary judgment "because the **Merciers** agreed to the lease provisions stating that the security deposit would be returned to ALE[.]" It concluded the **Merciers** "waived any claim to the security deposit under landlord/tenant law when they agreed to the terms of the lease[.]" The **Merciers** appeal.

DISCUSSION

*2 ¶ 11 The **Merciers** argue the circuit court erred by granting summary judgment in favor of **Katia** based on the provision in their lease. They assert they never "waive[d] their right to a written statement accounting for any withholding from their security deposit and have certainly not waived the protection of the requirement that the landlord provided either the itemization or return of the security deposit within twenty-one days." The **Merciers** renew their argument that **Katia** violated WIS. ADMIN. CODE § ATCP 134.06 by failing to return their security deposit and provide them with an accounting of the deposit. They argue that, even if **Katia** has a valid defense for returning the security deposit to ALE instead of the **Merciers**, **Katia** failed to provide them with an accounting of the security deposit and, as a result, the **Merciers** "suffered pecuniary damage in the amount of the security deposit." Finally, the **Merciers** argue the lease between the **Merciers** and **Katia** is unenforceable due to a prohibited, but unrelated, provision in the lease.

¶ 12 **Katia** responds the circuit court properly granted summary judgment in its favor based on the lease provision that provided the security deposit would be returned to ALE. **Katia** argues that, given the language in the lease, **Katia** owed no duty to return the deposit or provide any accounting of the deposit to the **Merciers**. **Katia** contends any duties under the administrative code with regard to the security deposit were to ALE. **Katia** also renews its argument that the **Merciers** lack standing to bring their claim. **Katia** asserts the **Merciers** suffered no loss and have no personal stake in whether **Katia** properly returned the security deposit to ALE. **Katia** emphasizes ALE paid the security deposit, the **Merciers** agreed in their lease the security deposit would be returned to ALE, and **Katia** returned the security deposit to ALE. Finally, **Katia** argues the **Merciers** are precluded from asserting the lease as a whole is unenforceable because the **Merciers** never made that argument in the circuit court.

¶ 13 The circuit court granted summary judgment in favor of **Katia** based simply on the language in the **Merciers'** lease directing **Katia** to return the security deposit to ALE. We, however, conclude the lease between **Katia** and the **Merciers** prevents the **Merciers** from having standing to maintain this action against **Katia**. *See Mercado v. GE Money Bank,* 2009 WI App 73, ¶ 2, 318 Wis.2d 216, 768 N.W.2d 53 (appellate court may affirm on different grounds).

¶ 14 "In order to have standing to sue, a party must have a personal stake in the outcome ... and must be directly affected by the issues in controversy." *Village of Slinger v. City of Hartford,* 2002 WI App 187, ¶ 9, 256 Wis.2d 859, 650 N.W.2d 81 (internal citation omitted).

*3 [S]tanding depends on (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged.

Foley–Ciccantelli v. Bishop's Grove Condo. Ass'n, 2011 WI 36, ¶ 40, 333 Wis.2d 402, 797 N.W.2d 789 (footnotes omitted). Whether a party has standing is a question of law, which we review de novo. *Chenequa Land Conservancy, Inc. v. Village of Hartland,* 2004 WI App 144, ¶ 12, 275 Wis.2d 533, 685 N.W.2d 573.

¶ 15 The **Merciers** argue that, irrespective of what they agreed to in the lease, they have standing to sue **Katia** for failing to return the security deposit or provide them with an accounting because ALE used their insurance money to pay the security deposit. However, even assuming the **Merciers'** allegation is true, the **Merciers** only have standing if they have a personal stake in the outcome and will be directly affected by the issue in controversy. *See Village of Slinger,* 256 Wis.2d 859, ¶ 9, 650 N.W.2d 81.

¶ 16 Here, ALE posted the security deposit, the lease between the **Merciers** and **Katia** provided the security deposit would be returned to ALE, and **Katia** returned the security deposit and an accounting of the deposit to ALE. Given these undisputed facts, the **Merciers** have no personal stake in whether **Katia** returned the security deposit or an accounting of the deposit in compliance with the administrative code. Rather, **Katia** performed pursuant to the lease and returned the security deposit to ALE instead of the **Merciers**. Any claim that **Katia** violated the administrative code in regard to the security deposit can be brought only by ALE. Further, because only ALE was entitled to the return of the security deposit, only ALE would be entitled to any damages for **Katia's** alleged violation of the administrative code. The **Merciers** lack standing to sue **Katia** for any violation of the administrative code in regard to the security deposit.

¶ 17 The **Merciers**, nevertheless, argue that, even if they waived their right to the security deposit under the lease, they never waived their right to receive an accounting of the security deposit. They argue that, because they never received an accounting of the security deposit from **Katia**, they were harmed and are therefore entitled to damages in the amount of double the security deposit. We disagree. The **Merciers'** argument ignores the fact that the **Merciers** have no interest in the security deposit. Accordingly, they cannot claim they were harmed when they did not receive an accounting of the deposit.[2]

¶ 18 Finally, we reject the **Merciers'** argument that the lease as a whole is unenforceable due to a rent acceleration clause. The **Merciers** never made this argument in the circuit court. We will not consider it. *See State v. Huebner,* 2000 WI 59, ¶¶ 10–12, 235 Wis.2d 486, 611 N.W.2d 727 (arguments raised for the first time on appeal

need not be considered). Moreover, the **Merciers** do not respond to **Katia's** argument that they have forfeited this argument by failing to raise it earlier. *Charolais Breeding Ranches v. FPC Secs. Corp.*, 90 Wis.2d 97, 279 N.W.2d 493 (Ct.App.1979) (unrefuted arguments deemed conceded).

*4 ¶ 19 In short, pursuant to the lease, the **Merciers** have no personal stake in whether **Katia** complied with the administrative code when it returned the deposit to ALE. The only party with standing to sue **Katia** for any violation of the administrative code in regard to the security deposit is ALE.

Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULEE 809.23(1)(b)4.

All Citations

353 Wis.2d 306, 844 N.W.2d 667 (Table), 2014 WL 700441, 2014 WI App 38

Footnotes

1

This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

2

Because we conclude the **Merciers** lack standing, we need not determine whether **Katia** violated the administrative code in regard to the security deposit. *See State v. Blalock,* 150 Wis.2d 688, 442 N.W.2d 514 (Ct.App.1989) (cases should be decided on narrowest possible ground).

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