ORIGINAL

23-6058

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

LIBERTY ANNE WALDEN-PETITIONER

VS.

JEREMY HOWARD-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LIBERTY ANNE WALDEN INMATE NO. 586865
HURON VALLEY CORRECTIONAL FACILITY
3201 BEMIS ROAD
YPSILANTI, MICHIGAN 48197

NO PHONE

QUESTION(S) PRESENTED

I. Did the trial court plainly error by allowing Dr. Mohr to testify outside the realm of her expertise thereby providing testimony to the ultimate issue of fact?

II. Did the prosecutor commit misconduct by denying Defendant a fair trial by vouching for the witness's credibility?

LIST OF PARTIES

[✓] 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

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 19

INDEX TO APPENDICES

APPENDIX A
***Liberty Anne Walden v Jeremy Howard*, No. 23-1279 (6th Cir. 2021) Order Denying Petitioner's Application for Certificate of Appealability.**

APPENDIX B
***Liberty Anne Walden v Jeremy Howard*, No. 2:22-cv-10341 United States District Court Eastern District of Michigan Judgment Denying Petitioner's Writ of Habeas Corpus.**

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

Cases

Berger v United States, 295 U.S. 78, 88 (1935) 17, 18
People v Bynum, 496 Mich 610 12
People v Lemmon, 456 Mich 625 16
Lisenba v California, 314 U.S. 219, 236 (1941) 17
People v Beckley, 434 Mich 691 (1990) 12
People v Buckey, 424 Mich 1, 7 (1985) 13, 14, 16
People v Dobek, 274 Mich App 58, 70-71 (2007) 14, 15
People v Draper, 150 Mich App 481 (1986) 12
People v Farrar, 36 Mich App 294, 299 (1971) 17
People v Harbinson, 504 Mich 230, 235; 934 NW2d 693 (2019) 8, 9
People v Izzo, 90 Mich App 272 (1979) 14
People v Juan Del Cid, Mich COA Docket 342402 (For Publication February 27, 2020) 9
People v McGillen, #2, 392 Mich 278, 285 (1975) 14
People v Mitchell, 131 Mich App 69, 73 (1983) 17, 18
People v Musser, Mich 337, 349 (2013) (quoting *People v Smith*, 425 Mich 98, 109 (1986)) 16
People v Peterson, 450 Mich, 352 (1995), *mod* 450 Mich 1212 (1995) 12, 13, 14, 16
People v Richardson, 489 Mich 940 (2011) 17
People v Smith, 425 Mich 98, 112-113 (1986) 14, 15, 16
People v Thorpe, 504 Mich 230 (2019) 8
People v Williams, 114 Mich App 186, 198 (1982) 17
United States v Dockery, 943 F2d 152, 157 (CA 1, 1991) 16
United States v Young, 470 U.S. 1, 18-19 (1985) 17

Statutes

28 U.S.C. §1254(1) 2
28 USC § 2254 ..... 5, 6

Rules

MCR 7.212 (A) (2)(a) 4
MRE 403 12
MRE 803(4) 7

Constitutional Provisions

U.S. Const, Ams V, XIV 3, 6, 17
United States Constitution VI and XIV Amendment 3, 6
United States Constitution, Ams XIV 3, 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[✓] 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,
[✓] is unpublished.

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

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

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

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 as 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 August 23, 2023

[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: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. 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 _____. A copy of that decision appears at Appendix _____.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTUION V AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, wen in actual service in time or War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process or law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION XIV AMENDMENT § I

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant - Appellant Liberty Anne Walden was found guilty on June 24, 2019 of Count I, Criminal Sexual Conduct (CSC), 2nd Degree; 1 and Criminal Sexual Conduct 1st Degree2 The proceeding was a jury trial.3 Defendant-Appellant was sentenced by the Honorable David S. Swartz of Washtenaw County, on August 5, 2019 to a term of 25 years to 40 years sentence for case no. 18-000660-FC and 2 years 5 months to 5 years sentence for case no. 18-000644-FC.4 The trial Court consolidated both cases into one (1) trial as did the Michigan Court of Appeals.

Appellate counsel, Wendy Barnwell filed and was granted the "motion to extend time to file brief on appeal and/or trial count motions", February 6, 2020, in the Michigan Court of Appeals. (ATTACHMENT A).

The Michigan Court of Appeals remanded to the trial court for the appointment of substitute (appellate) counsel, March 24, 2020, due to "current counsel having failed to timely file the brief on appeal". And court costs in the sum of $250.00 for allowing this appeal to appear on the involuntary dismissal docket. (ATTACHMENT B).

April 14, 2020, the Michigan Court of Appeals ordered motion for reconsideration of this Court's March 24, 2020 order is granted. The Court VACATES its order of March 24, 2020. The Court further orders that the time for filing the appellee's brief under MCR 7.212 (A) (2)(a) shall be calculated from the date of the Clerk's certification of this order. (ATTACHMENT C).

---

1 Case no. 18-644-FH.

2 Case no. 18-660-FC

3 September 10, 2019, the Michigan Court of Appeals consolidated defendant's two appeals to advance the efficient administration of the appellate process.

4 A jury trial for case no. 18-000644-FH, was held earlier, commencing on April 15, 2019, and ending on April 17, 2019, in a mistrial. A jury trial for case no 18-000660-FC was held on November 13, 2018, November 14, 2018 and ended in a mistrial on November 15, 2018.

January 22, 2021, the Michigan Court of Appeals granted oral arguments and for Defendant-appellate counsel to file a supplemental brief. (ATTACHMENT D).

An Application for Leave to Appeal was filed on Ms. Walden's behalf in the Michigan Court of Appeals which was denied raising the following issues:

ISSUE I

THE TRIAL COURT PLAINLY ERRED BY ALLOWING DR. MOHR TO TESTIFY OUTSIDE THE REALM OF HER EXPERTISE THEREBY PROVIDING TESTIMONY TO THE ULTIMATE ISSUE OF FACT.

ISSUE II

THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED DEFENDANT A FAIR TRIAL BY VOUCHING FOR THE WITNESS'S CREDIBILITY.

The Michigan Court of Appeals denied the application on February 18, 2021.

Petitioner filed Leave to Appeal to the Michigan Supreme Court raising the above issues. On August 5, 2021, the Michigan Supreme Court denied Petitioner's Application for Leave to Appeal in a standard order.

Petitioner filed a Petition under 28 USC § 2254 for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan and presented the following grounds:

Ground one: THE TRIAL COURT PLAINLY ERRED BY ALLOWING DR. MOHR TO TESTIFY OUTSIDE THE REALM OF HER EXPERTISE THEREBY PROVIDING TESTIMONY TO THE ULTIMATE ISSUE OF FACT.
Ground two: THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED DEFENDANT A FAIR TRIAL BY VOUCHING FOR THE WITNESS'S CREDIBILITY.

On September 27, 2022, United States District Judge Denise Page Hood issued an Order Denying Appellant's petition for writ of habeas corpus and certificate of appealability under 28

U.S.C. § 2254, case no. 2:22-cv-10341. (ATTACHMENT B).

On or about February 17, 2023, Petitioner timely filed a Notice of Appeal in the United States District Court Eastern District of Michigan. On April 4, 2023 the motion for Certificate of Appealability was transferred from the United States District Court Eastern District of Michigan to the United States Court of Appeals for the Sixth Circuit. On August 23, 2023, a panel of the United States Court of Appeals for the Sixth Circuit denied Petitioner's COA application.

Petitioner's constitutional rights have been violated under the United States Constitution VI and XIV Amendment where she was convicted of CSC 1st degree and CSC 2nd degree.

REASONS FOR GRANTING THE PETITION

This petition should be granted because the United States District Court for the Eastern District of Michigan issued an Order denying Ms. Walden's petition under 28§ 2254 for Writ of Habeas Corpus which was in error. The Petitioner has shown that her United States Constitutional rights have been violated and the decisions of the state courts resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court of the United States in their interpretation of the United States Constitution for fair and impartial, due process and equal protection in criminal trials.

Petitioner was denied due process under the United States Constitution, Ams V and XIV when she was convicted of CSC 1st and CSC 2nd based on Dr. Mohr testifying outside the realm of her expertise which provided testimony to the ultimate issue of fact and the prosecutor committing misconduct by vouching for a witness's credibility.

Bethany Mohr testified that she was a clinical associate professor at the University of

Michigan, (TR, Jury Trial, 06/26/2019, p. 4), as well as the Director of the Child Protection Team. (Id., p. 4). Mohr testified that she is licensed to practice medicine, in Michigan, as well as New York and Florida, her license being inactive in those two states. (Id., p. 5). She testified that she has been qualified as an expert in the field of pediatric medicine. (Id., p. 5). However, she testified that she had been qualified as an expert in child abuse pediatrics in the majority of cases. (Id., p. 5).

Mohr testified that their child protection team consisted of two child abuse pediatricians and two social workers. (TR, Jury Trial, 06/26/2019, p. 6). Mohr testified that Alexis Hawk was referred to their team for evaluation after she had a forensic interview at the Washtenaw Child Advocacy Center. (Id., p. 6). A history was obtained from Alexis' father, her caregiver, (Id., p. 7), and one was separately obtained from Alexis. (Id., pp. 7, 8). Alexis paternal grandmother was in the room during Mohr's physical examination of Alexis. (Id., pp. 8, 9).

Mohr testified that Alexis reported that she had been raped. (TR, Jury Trial, 06/26/2019, p. 9). Alexis stated that there had been digital/vaginal penetration and penetration and penile/vaginal penetration involving her mother Liberty Walden and James Hatfield. (Id., p. 9). Defense counsel objected to the testimony on the grounds of hearsay. (Id., p. 6). The court overruled the objection under MRE 803(4), as a statement made for purposes of medical treatment. (Id., p. 9). Defense counsel argued that the statements were being made for purposes of litigation, and not for medical treatment. (Id., p. 10).

Mohr testified that there was no physical evidence of sexual abuse. (TR, Jury Trial, 06/26/2019, p. 12). Following is an excerpt of her testimony regarding the lack of physical evidence of sexual abuse:

"Q. And, so did you find any physical evidence of a sexual assault?

A. S - - so there was **no evidence, no abnormalities with regard to her genital exam or her** - - we don't do an internal exam but sort of the perianal area, so around her anal opening, but did not note any scaring or old injuries or anything new.

Q. And, so would you expect to find evidence of a sexual assault in this particular case?

A. No.

Q. Based on the history, I'm sorry.

A. So, typically with regard to child abuse, it's very, very atypical to find anything on examination. So, when I perform an examination on any child regardless of the history, even if there's a history of penetration, I don't expect to find anything. It's very atypical for multiple reasons."

(TR, Jury Trial, 06/26/2019, pp. 12, lines 9-25).

She attributed the lack of evidence of injury to the elasticity of the vagina during puberty, (Id., p. 13); further stating that there would be no injury because of elasticity in puberty, even in the case of penetration. (Id., p. 13).

Mohr indicated that in child sexual abuse, the intent of the perpetrator is not to cause physical injury to the child, but to avoid injury, in order to continue the abuse without detection. (TR, Jury Trial, 06/26/2019, p. 13). She distinguished sexual assaults from sexual abuse, stating that the former would include violence. (Id., p. 13). In *People v Harbison*, the companion case to *People v Thorpe,* 504 Mich 230 (2019), the Michigan Supreme Court considered the testimony of a pediatrician, Dr. Simms, who informed the jury she had diagnosed the complainant with "probable pediatric sexual abuse," though the exam showed no physical evidence of assault. *Id.* at 235. The Court held "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates

the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury." *Id.* at 235. *People v Thorpe,* and *People v Harbinson*, 504 Mich 230, 235; 934 NW2d 693 (2019); *People v Juan Del Cid*, Mich COA Docket 342402 (For Publication February 27, 2020), on both issues discussed in minutia, as to the testimony of Dr. Bethany Mohr,, that: (a) There was no evidence of physical abuse in the complainant (TR, Jury Trial, 06/26/2019, pp. 5-12, 16, 17); (b) The intent of the perpetrator of sexual abuse is to avoid detection/not be caught (*Id.*, pp. 13, 14, 16, 17); (b) Improperly bolstered the testimony of the complainant as discussed in issue II. (TR, Jury Trial, 06/26/2019, pp. 18, 19).

Mohr learned from Alexis Hawk's history that Alexis was hospitalized in the psychiatric hospital at the University of Michigan from May 12th through May 31, 2017, a year prior to her examination of Alexis. (Id., p. 14). She testified that there would possibly be no injury found with the lapse in time between the incident, the last occurrence being reportedly December 2016 or January 2017, and her examination of Alexis on March 7th. (Id., pp. 14, 16, 17). She also stated that there may or may not have been an injury. (Id., p. 15).

Defense counsel objected to the prosecutor's elicitation of testimony from Mohr regarding the suicidal ideations being prominent in child sexual assault victims, stating that it was invading the province of the jury. (TR, Jury Trial, 06/26/2019, pp. 15, 16, 17). The court overruled defense counsel's objection, and Mohr, not a psychiatrist, continued to testify about the psychiatric/psychological effects of sexual abuse, (Id, p. 15), as follows:

> "Q. Okay, Thank you. And, do you, in your experience, is it a common symptom for children sort of - - if they're a victim of sexual abuse, to have suicidal ideations? It is something common that you see?

MR. WHITE: I'm going to object. We're discussing a syndrome here which takes us out of the province of the jury.

THE COURT: Would you repeat the question that you just asked?

MS. REISER: I just asked if in her training and experience the children of sexual assault that she has treated, is suicidal ideation a common - -

THE COURT: I think she's qualified to answer it. Over-ruled. You may answer.

THE WITNESS (Mohr): "So, suicidal ideations are thoughts of suicide or mental health issue, diagnoses, in general can definitely be a result of past abuse and that's one of the things that are asked about if a child presents with suicidal ideation or mood disorder like depression. Those are the questions that are asked. A child may not necessarily disclose that information initially, it's not uncommon for that - - for that disclosures of sexual abuse not occur until later when they feel safe or more comfortable. But, definitely is a concern with any child that presents with suicidal ideation."

(TR, Jury Trial, 06/26/2019, p. 15, lines 1-25).

On cross-examination, Mohr again testified that there were no external signs of physical assault, (TR Jury Trial, 06/26/2019, pp. 16, 17), and that Alexis' genital examination was normal. (Id., p. 16).

Defense counsel objected to the prosecution's elicitation of testimony of Mohr with regard to the allegations as to fondling, on the basis that it was irrelevant to Mohr's physical examination and that it was bolstering the credibility of the complainant, and hearsay. (TR, Jury Trial, 06/26/2019, p. 18). The court overruled defense counsel's objections. (Id., pp. 18, 19). The prosecution then went on to question Mohr about the alleged fondling incident at Kroger, as follows:

"Q. So, Dr. Mohr, just to clarify, when you're saying the last contact for Alexis in December 2016, January 2017, that would be in regards to a penetration?

A. Correct. Or - - or in addition to fondling, but then to fast-forward to the incident of

fondling, I knew about that, but that would not obviously led to concern about sexual transmitted infection testing and things like that. Or need for that.

Q. And so you were aware of the incident at Kroger through history from Alexis or from her father"

A. From the father and also our social - - I should have mentioned this before, our social workers before the appointment contact the caregiver and get history and intake before the time of the appointment. And, in addition to getting history also explain how the evaluation works and what happens during the evaluation."

(TR, Jury Trial, 06/26/2019, p. 19, lines 14-19). The prosecutor then continued to bolster the testimony of the complainant by having the witness testify as if the fondling was an established fact, as follows:

"Q. Okay. And so your testimony regarding Alexis' last contact with the perpetrators in terms of testing and medical treatment of December 2016, January 2017, does not include when she had contact with her mother in December of 2017?

A. Correct."

(TR, Jury Trial, 06/26/2019, p. 19, lines 20-25).

Mohr testified that she was privy to the contents of the forensic interview before she conducted her medical examination. (Id., p 20).

Dr. Mohr's testimony about the history given to her, by Alexis and/or her father, by a social worker on her team, from the forensic interview of Alexis, and about suicidal ideations and delay in disclosure, was highly improper under MRE 702. (TR, Jury Trial, 06/26/2019, pp. 6-17). Under MRE 702, a witness can qualify as an expert, and thus be permitted to give opinion testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

> training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court must also ensure that the expert's testimony is relevant. *Bynum,* 496 Mich at 624. Even when an expert's testimony is relevant, it remains subject to the limits imposed by MRE 403. *Id.* at 635 n 43. While this rule gives a trial judge a significant breadth of discretion to allow expert testimony, it does not allow an expert, even if qualified, to render opinions as to the particular defendant absent a sufficient foundation of knowledge. Michigan law clearly recognizes, in a number of scenarios, that an expert may give testimony concerning the general characteristics of a specific group of people, but then cannot render an opinion as to whether the particular defendant fell within that grouping. The most obvious example concerns children who have allegedly been sexually assaulted. In a number of cases, Michigan appellate courts have held that while an expert may testify about the common characteristics of abused children, the expert cannot then render an opinion that the particular defendant in the case committed the charged sexual assault because the behavior of the alleged victim was consistent with those common characteristics. See, *People v Beckley*, 434 Mich 691 (1990); *People v Peterson*, 450 Mich 349 (1995); *People v Draper*, 150 Mich App 481 (1986).

The Michigan Supreme Court in *People v Peterson*, 450 Mich 349, 374; 537 NW2d 857 (1995), quoting *People v Beckley*, 434 Mich 691, 721-722; 456 NW2d 391 (1990), discussed the significant danger that the jury will give too much weight to an expert's testimony, where a jury has been confronted with one of society's most heinous offenses, as follows:

> "The use of expert testimony in the prosecution of criminal sexual conduct cases is not an ordinary situation. Given the nature of the offense and the terrible

> consequences of a miscalculation-the consequences when an individual, on many occasions a family member is falsely accused of one of society's most heinous offenses, or conversely, when one who commits such a crime would go unpunished and possible reoccurrence of the act would go un-prevented – appropriate safeguards are necessary. To a jury recognizing the awesome dilemma of whom to believe, and expert will often represent the only seemingly objective source, offering it as a much sought after hook on which to hang its hat." [Emphasis added by *Peterson*].

As a result of the danger that a jury might give too much weight to an expert's opinion on a matter involving an ultimate issue, the Michigan Supreme court has imposed strict limits on expert testimony that "comes too close" to findings that are left exclusively to the jury. *Peterson*, 450 Mich at 374. In *Beckley, supra* at 724, 725, 728, 729, the Supreme Court explained this limitation on expert testimony:

> Indeed, the evidence has a very limited use and should be admitted cautiously because of the danger of permitting an inference that as a result of certain behavior sexual abuse in fact occurred, when evidence of the syndrome is not a conclusive finding of abuse. Although **syndrome evidence may be appropriate as a tool for purposes of treatment, we would hold that it is unreliable as an indicator of sexual abuse**
>
> ***
>
> In keeping with the purpose for which the evidence is admissible (i.e., to provide background data relevant to an evaluation of this victim's behavior), the party offering the testimony must identify the specific behavior to statement at issue in the case. Further, because there is no
> Fixed syndrome that collectively defines the profile of the typical child who has been sexually abused, expert testimony must be tailored individually to each particular behavior at issue in the case. Expert testimony is only admissible to cast light on the individual behaviors observed in the complainant, therefore **the expert must not render an opinion that a particular behavior or a set of behaviors observed in the complainant indicates that sexual assault *in fact occurred.***
>
> We note that generally effective cross-examination will prevent the jury from drawing such a conclusion; however, a limiting instruction may also be necessary and should be given on request.
>
> ***
>
> Therefore, any testimony about the truthfulness of this victim's allegations

against the defendant would be improper because its underlying purpose would be to enhance the credibility of the witness. To hold otherwise would allow the expert to be seen not only as possessing specialized knowledge in terms of behavioral characteristics generally associated with the class of victims, **but to possess some specialized knowledge for *discerning the truth.*** "Psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patients' credibility."

***

Accordingly, we find that appropriate expert testimony is limited to providing the jury with background information, relevant to the specific aspect of the child's conduct at issue, which it could not otherwise bring to its evaluation of child's credibility. **We caution that to permit the expert witness to render a legal conclusion regarding whether abuse in fact occurred, exceeds the scope of the rule.** The conclusion whether abuse occurred is outside the scope of expertise, and therefore not a proper subject for expert testimony. The jury must make its own determination from the totality of the evidence whether the complainant was sexually abused. (Citations omitted) (Emphasis added).

Unequivocally, as stated above, witnesses, expert or otherwise, are not free to comment on the truthfulness of other witnesses, or, worse, to invade the jury's province by stating their opinion of the merits of the charges at issue. *People v Izzo,* 90 Mich App 727, 730 (1979); see *People v Buckey*, 424 Mich 1, 7 (1985); *People v Dobek*, 274 Mich App 58, 70-71 (2007). Testimony on the veracity of the complainant's accusations that comes from a governmental, or, as here, expert witness testimony is particularly harmful because a jury is all the more likely to defer. See *People v Smith,* 425 Mich 98, 112-113 (1986); *People v McGillen*, #2, 392 Mich 278, 285 (1975); *People v Izzo*, 90 Mich App 272 (1979). It is for the jury, not other witnesses, to determine witness credibility.

A child sex-abuse expert in a child sex-offense prosecution has a particular obligation to steer clear of stating an opinion that sexual abuse occurred or vouching for the complainant's credibility. *People v Peterson*, 450 Mich, 352 (1995), *mod* 450 Mich 1212 (1995);

Dobek, supra. Where the expert witness is the examining physician, as Dr. Mohr was here, in a sexual assault case against Mother, Liberty Walden, the witness is proper so long as her "testimony may assist the jury in their determination of the existence of either of two critical elements of the offense charged, (1) penetration itself and (2) penetration against the will of the victim." *People v Smith*, 425 Mich 98, 107 (1986) (quoting *People v McGillen* #2, 392 Mich 278, 284 (1974)). Further, an examining physician's opinion that sexual abuse in fact occurred shall be limited to "findings within the realm of [] medical capabilities or expertise" and not on "the emotional state of, and the history given by, complainant" because that is "in effect, an assessment of the victim's credibility." *Id.* at 112-113. In the instant case, Dr. Mohr testified about the emotional state of the complainant, commenting about suicidal ideations, lack of disclosure, and the history given by Alexis, her father, and the history from the forensic interview. (TR, Jury Trial, 06/26/2019, pp. 6-17. Her testimony was objected to by defense counsel (*Id.*, pp. 15-17).

Dr. Mohr, through questions elicited by the prosecutor, over the objection of defense counsel, did exactly what *Smith* forbids: she vouched for the complainant, Alexis Hawk's credibility and in the process implied that the charged abuse occurred and that the defendant was guilty. As defense counsel articulated in his objection, Dr. Mohr's testimony invaded the province of the jury and improperly bolstered the complainant's credibility. (TR, Jury Trial, 06/26/2019, pp. 10-15). The message was plain: Dr. Mohr thought the allegations truthful, and so should the jury. "Such statements are considered 'superfluous' and are 'inadmissible lay witness [] opinion on the believability of a [witness's] story' because the jury is 'in just as good a position to evaluate the [witness'] testimony.'" *People v Musser*, Mich 337, 349 (2013) (quoting *People v*

Smith, 425 Mich 98, 109 (1986)).

Beckley supra at 724, 275, 728, and 729, stated that the expert must not render an opinion that a particular behavior or a set of behaviors observed in the complainant indicates that sexual assault in fact occurred. In the instant case, over the objection of defense counsel Mohr testified about allegations outside the scope of her physical examination, that is, fondling. Not only was fondling irrelevant to Mohr's physical examination of the complainant, but the prosecutor elicited testimony from Mohr to establish a timeline that the digital and penile penetration had in fact occurred before the fondling, contrary to the mandate of *Beckley*. Mohr also testified about suicidal ideations and about the delay in disclosure of abuse. (TR, Jury Trial, 06/26/2019, pp. 12-17). Mohr was not a psychiatrist or psychologist. Not only was her testimony outside the scope of her expertise and contrary to MRE 702, but she was also invading the province of the jury, contrary to *Smith supra.*

Dr. Mohr's testimony about her qualifications itself is powerful to lay people, jurors. Yet, by law, the limits imposed on expert testimony, discussed above in *Peterson supra*, are especially material to Dr. Mohr's testimony in the case against Liberty Walden

The jury gave too much weight to Mohr's testimony as the jurors were confronted with one of society's most heinous offenses, child sexual abuse, contrary to the mandate of *Peterson supra* and *Beckley supra.*

If "the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result," a new trial can be granted on this basis. *Lemmon*, 456 Mich at 642. See also *United States v Dockery*, 943 F2d 152, 157 (CA 1, 1991).

A defendant has a due process right to a fair trial; this right is infringed when the

prosecutor engages in unfair tactics to gain an advantage. U.S. Const, Ams V, XIV; *Lisenba v California,* 314 U.S. 219, 236 (1941). The Supreme Court has recognized that a prosecutor owes an allegiance to the government, the accused, and society at large. *Berger v United States*, 295 U.S. 78, 88 (1935). Indeed, a prosecutor's duty is "to see to it that the defendant receives a fair trial." *People v Farrar,* 36 Mich App 294, 299 (1971); *People v Williams*, 114 Mich App 186, 198 (1982). Performing this duty, a prosecutor must "exhibit a high ethical standard when presenting a case to the jury," *People v Richardson*, 489 Mich 940 (2011) and refrain from using improper methods or injecting prejudicial innuendo to obtain a conviction. *Berger v United States, supra* at 88; *People v Mitchell*, 131 Mich App 69, 73 (1983).

The Supreme Court instructed in *Berger, supra* at 88:

> "The United States Attorney is re representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The Supreme Court has frequently reminded that a prosecutor's comment "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v Young*, 470 U.S. 1, 18-19 (1985).

The prosecutor in the instant case violated his duty to ensure a fair trial by using improper methods to obtain Liberty Walden's convictions.

In the case sub judice, defense counsel objected to the prosecutor's elicitation of testimony from Dr. Mohr regarding allegations of fondling and the timeline that establish that the fondling was subsequent to the alleged acts of sexual penetration, and suicidal ideations as a by-

product of child sexual abuse, on the basis that Mohr's testimony was bolstering the testimony of the complainant. (TR, Jury Trial, 06/26/2019, pp. 14, 15, 16, 17, p. 18, lines 1-21). Over objection of defense counsel, Mohr testified about learning about the fondling incident at Kroger through questioning of Alexis, and being present while history was being obtained. (*Id.*, pp. 18, 19).

Defendant-Appellant Liberty Walden was denied due process when the prosecutor bolstered the testimony of the complainant by eliciting testimony from Dr. Mohr. The prosecutor employed improper methods and injected prejudicial innuendo to obtain Liberty Walden's convictions, warranting reversal. *Berger v United States, supra* at 88; *People v Mitchell,* 131 Mich App 69, 73 (1983).

The court should view the entire record and conclude that such a strong potential exists that an innocent person was convicted of these charges, that in fairness a new trial should be held, at which it will been seen if a second jury will reach the same result. It would be a miscarriage of justice to allow the verdict to stand and a new trial is required.

Petitioner has shown a substantial showing of the denial of a constitutional right and has demonstrated that reasonable jurists could debate whether the petition should have been resolved in a different manner and that the issues presented were adequate to deserve encouragement to proceed further.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Liberty Anne Walden

Liberty Anne Walden-Petitioner

Date: October 31, 2023