STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

Supreme Court No. 158259
Court of Appeals No. 336187
Circuit Court No. 14-018862-FC

v

ANTHONY RAY MCFARLANE, JR.,
Defendant-Appellant

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK

COUNSEL FOR *AMICUS CURIAE* THE INNOCENCE NETWORK:

Counsel of Record
Wolfgang Mueller (P43728)
Mueller Law Firm
34405 W 12 Mile Rd, Ste 200A
Farmington Hills, MI 48331
(248) 489-9653
wolf@wolfmuellerlaw.com

Of Counsel
Z.W. Julius Chen (DC Bar No. 1002635)
Zara H. Shore (DC Bar No. 1602523)
Alexandra E. Boyd (DC Bar No. 1644548)
Akin Gump Strauss Hauer & Feld LLP
2001 K St., NW
Washington, DC 20006
(202) 887-4000
chenj@akingump.com
zshore@akingump.com
alexandra.boyd@akingump.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

INTEREST OF *AMICUS CURIAE*

The Innocence Network is an international affiliation of organizations dedicated to redressing the causes of wrongful convictions; providing pro bono legal and investigative services to individuals seeking to prove their innocence of crimes for which they have been convicted; and improving the accuracy and reliability of the criminal justice system to prevent future wrongful convictions. The Innocence Network is currently comprised of 55 U.S.-based organizations that represent clients in all 50 states, as well as 12 non-U.S.-based organizations that represent clients around the world.

In response to the growing number of cases dealing with abusive head trauma ("AHT") and the changing medical understanding of its diagnosis, the Innocence Network and its affiliated members have investigated and litigated numerous AHT convictions over the past years and provided their considerable expertise and perspective on such matters as *amicus curiae*. *See, e.g.*, *People v Ackley*, 497 Mich 381, 870 NW2d 858 (2015). Certain Innocence Network affiliates focus on AHT cases; for example, in 2016, the U.S. Department of Justice awarded the Michigan Innocence Clinic at the University of Michigan Law School a $250,000 grant to represent clients who were wrongfully convicted in AHT cases.

Recognizing the profound persuasive effect an expert witness may have on a jury, the Innocence Network filed an *amicus curiae* brief in support of the application for leave to appeal the Court of Appeals' judgment. In ordering argument on the application, the Court invited the Innocence Network to file an *amicus curiae* brief. The Innocence Network does so to ensure that medical experts are precluded under longstanding evidentiary principles from invading the jury's province of determining a defendant's innocence or guilt.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the Court of Appeals' recognition of the effect that the word "abusive" has on a jury's verdict in so-called abusive head trauma ("AHT") prosecutions. Specifically, the Court of Appeals held that "in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as 'abusive head trauma' or opines that the inflicted trauma amounted to child abuse." *People v McFarlane*, 325 Mich App 507, 523, 926 NW2d 339, 350 (2018). In ordering argument on the application, this Court instructed the parties to address "whether the prosecution's medical expert invaded the province of the jury by using phrases like 'abusive head trauma' and 'definite pediatric physical abuse" to label her [AHT] diagnosis." Order No 158259 & (61) (Oct. 17, 2019). Drawing on extensive involvement in increasingly common AHT cases, the Innocence Network submits this *amicus curiae* brief to underscore not only that use of terms like "abuse" are legally impermissible, but also to bring to the Court's attention the broad scholarly consensus warning against the use of such testimony.

Longstanding Michigan precedent limits expert witness testimony couched in terms that convey an opinion as to a defendant's guilt. In opining that a victim has been "abused," an expert witness invades the province of the jury by testifying to a legal conclusion, well beyond the expertise of the witness, that a person intentionally inflicted an injury upon the child. Barring such testimony in AHT prosecutions follows unexceptionally from Michigan precedent applying the same basic rule to testimony regarding Battered Women's Syndrome and child sexual abuse. In addition, the Court of Appeals' ruling in no way prevents expert witnesses in AHT cases from testifying completely and accurately. Medical experts remain free to testify regarding a child's injuries. They may not, however, testify by using language that turns a medical opinion into a legal conclusion.

The reality that terms like AHT are problematic is thus well-grounded in both law and logic. But it should not be lost on this Court that the testimony at issue here was no mere reference to AHT. The prosecution's expert medical witness testified that AHT amounted to "child abuse." That is an opinion as to the guilt of the defendant, not an opinion that provides a medical diagnosis.

Accordingly, this Court should uphold the Court of Appeals' judgment that an expert medical witness invades the province of the jury in using terms like "abuse" (including as part of "AHT")—particularly where, as here, the expert expressly links a "diagnosis" of AHT to "child abuse" and opines that injuries were the product of "definite pediatric child abuse."

ARGUMENT

I. The Court of Appeals Properly Determined That An Expert Invades The Province Of The Jury In Testifying That An Injury Was "Abusive" Or Amounted To Child Abuse.

The Court of Appeals was correct to hold that, "in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as 'abusive head trauma' or opines that the inflicted trauma amounted to child abuse." *McFarlane*, 325 Mich App at 523, 926 NW2d at 350. Applying settled precedent, the Court of Appeals properly drew a line between acceptable and unacceptable expert testimony, explaining that "it is important that the expert witness not be permitted to . . . phrase his opinion in terms of a legal conclusion." *Id.* at 519 (quoting *People v Drossart*, 99 Mich App 66, 75, 297 NW2d 863, 868 (1980)).

A. An Expert Witness Has No Right To Phrase An Opinion In Terms Of A Legal Conclusion.

Michigan law has long-recognized limitations on expert testimony that invades the province of the jury. For example, an expert (or, for that matter, any witness) "is prohibited from opining on the issue of a party's negligence or nonnegligence, capacity or noncapacity to execute a will or deed, simple versus gross negligence, the criminal responsibility of an accused, or [the

accused's] guilt or innocence." *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 123, 559 NW2d 54, 57 (1996). "[D]oing so would invade the province of the jury" by telling the jury how to decide the case. *Id.*

That bedrock evidentiary principle has particular force when it comes to expert medical testimony because diagnoses can carry significant weight in the mind of the jury. In those circumstances, this Court has recognized the need to be hyper-vigilant in guarding against the risk that a medical expert will stray into the territory of *mens rea* and guilt when offering a medical diagnosis. In *People v Christel*, for example, this Court considered the admissibility of expert testimony regarding Battered Woman Syndrome. 449 Mich 578, 537 NW2d 194 (1995). The Court found that "the expert may, when appropriate, explain the generalities or characteristics of the syndrome." *Id.* at 591. But the Court explained that "the expert cannot opine that the complainant was a battered woman." *Id.* The same is true for child sexual abuse cases. In *People v Beckley*, the Court considered whether expert testimony regarding Rape Trauma Syndrome is admissible, with seven justices agreeing that syndrome evidence is not admissible to demonstrate that abuse occurred. 434 Mich 691, 456 NW2d 391 (1990). This result was upheld in *People v Peterson*, where the Court determined that an expert may not testify that the sexual abuse occurred, vouch for the veracity of a victim, or testify as to whether the defendant is guilty. 450 Mich 349, 352, 537 NW2d 857, 859 (1995).

The common legal thread in these cases is that the expert diagnosis necessarily strayed into the province of the jury. An expert may clinically determine that a victim is suffering from Battered Woman's Syndrome. But if the expert opines that the victim is a battered woman, the expert has improperly testified that the woman was battered and that a crime was committed. That is because one cannot be *accidentally* battered and the use of that term carries with it an opinion

regarding the requisite *mens rea*. Such determinations are exclusively, and properly, left to the jury.

B. The Court of Appeals' Holding Regarding Expert Testimony On Abusive Head Trauma In Child Abuse Cases Properly Follows From Controlling Precedent.

AHT cases—which depend heavily on expert testimony that is "often . . . determinative," Keith A. Findley et al., *Feigned Consensus: Usurping the Law in Shaken Baby Syndrome/Abusive Head Trauma Prosecutions*, 2019 WIS. L. REV. 1211, 1247 (2019)—are no different.[1] Just as in the cases described above, when a medical expert testifies that "abuse" occurred, the expert invades the province of the jury by opining as to the defendant's *mens rea* and guilt. The Court of Appeals rejected that result in this case, based on a rule that is anything but "novel." *Contra* Prosecuting Attorneys' Association of Michigan ("PAAM") *Amicus* Brief on Application at 2.

Even if based on a medical diagnosis, an expert who testifies that "abuse" has occurred *necessarily* testifies that the party in question had the mental state legally required to make the injury abusive, rather than accidental. The term "abusive" (and similar terms) thus implies that expert testimony has established that a crime occurred. Some have argued that such testimony is no different than a medical determination that a victim was poisoned, claiming that it is still for a jury to determine how the poison was ingested and if the victim's poisoning was accidental, negligent, reckless, or intentional. *See, e.g.*, Arabinda Kumar Choudhary et al., *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, 48 PEDIATRIC RADIOLOGY

[1] In an article analyzing science-dependent prosecutions, Deborah Tuerkheimer found that, "[w]ith rare exception, [AHT] prosecutions rest entirely on the testimony of medical experts." Deborah Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 515 (2011). "While a portion of cases present medical corroboration of some type of abuse (e.g., long bone fractures and grip marks), the classic formulation of [AHT] is based exclusively on the diagnostic "triad"— cerebral edema, subdural hematomas, and retinal hemorrhages." *Id.*

1048 (2018). The poisoning analogy is not only inapt, but also proves the Court of Appeals' point. In a poisoning case, the expert merely concludes that there was poison involved, but does not make any determination that the poisoning was *intentionally* (as opposed to accidentally) carried out *by a third party* (as opposed to self-administered). Thus, the expert appropriately leaves questions about timing, intent, and method for the jury to decide. On the other hand, testimony regarding AHT often leaves no such room for debate.

As Keith Findley and D. Michael Risinger describe in a recent article on challenging AHT convictions:

> The experts opine as to the *actus reus*—violent shaking, or shaking with impact, had to have been employed to produce such injuries. The experts likewise opine as to *mens rea*—the shaking had to have been so violent that it could not have been accidental; it had to have been intentional, or at least reckless (the typical elements required for child abuse or homicide). And finally, the experts opine—erroneously—that because the child would have become immediately comatose and unresponsive, the last person with the child had to be the perpetrator, thereby establishing identity.

Keith A. Findley & D. Michael Risinger, *The Science and Law Underlying Post-Conviction Challenges to Shaken Baby Syndrome Convictions: A Response to Professor Imwinkelreid*, 48 SETON HALL L. REV. 1209, 1219 (2018). This has led some legal scholars to refer to AHT as a "medical diagnosis of murder." Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 5 (2009).

Testimony of this nature exceeds the bounds of an expert witness's medical expertise. There is no medical purpose to calling something "abusive" because the *underlying* medical conditions, such as subdural hematoma or retinal hemorrhaging, are the relevant facts. In attaching an "abuse" label to such facts, a testifying expert does not provide "a medical diagnosis in the true sense," but rather conducts "a causation inquiry that goes beyond diagnosis, and ventures into etiology." Findley, *Feigned Consensus*, *supra*, at 1238. Findley's comparison of AHT cases to

pneumonia illustrates the distinction. While a physician may conduct diagnostic testing, such as bloodwork or X-rays, to determine if the clinical signs and symptoms indicate that a patient has pneumonia, the physician does not need to delve into how or what introduced the pneumonia microorganisms into the patient's body in order to order treatment. *See id.* at 33-34. For AHT cases, however, "[c]hild abuse physicians…take that one extra step—by analogy to the pneumonia case, they assume they know how the patient acquired the pneumonia." *Id.*

For these reasons, one neurosurgeon whose research is considered foundational to the AHT diagnosis has since published an article sharply criticizing how the syndrome has been misapplied over the years, particularly as a means of determining a caretaker's intent to do harm. A.N. Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 HOUS. J. HEALTH L. & POL'Y 201 (2012). According to Guthkelch, "[w]e should not expect to find an exact retino-dural hemorrhage and the amount of force involved, let alone the state of mind of the perpetrator. Nor should we assume that these findings are caused by trauma rather than natural causes." *Id.* at 204. Because of this, Guthkelch concludes that the use of the term "abusive head trauma" inappropriately "implies both mechanism (trauma) and intent (abusive)," particularly in the context of court testimony. *Id.* at 202.

The American Law Institute agrees: Determining whether an individual "has physically abused a child is a legal determination to be made by the factfinder." American Law Institute, Children and the Law, Pt. I, Ch. 3, § 3.20, at 83 (2018). Any expert testimony that opines on whether or not a victim was abused necessarily exceeds the bounds of medical expertise and should be disallowed, and the role of an expert witness must be limited to "diagnos[ing] the child's medical conditions, including for example, broken bones, bruising, internal bleeding, and swelling, as well as the medical consequences of those conditions for the child." *Id.* For that reason,

Guthkelch recommends that the triad of symptoms that typically underlie a diagnosis of AHT, *see* note 1, *supra*, "would be better defined in terms of their medical features," which would "allow us to investigate causation without appearing to assume that we already know the answer." Guthkelch, *Problems*, *supra*, at 202.

C. The Court Of Appeals' Ruling In No Way Impedes The Jury's Truth-Seeking Function.

At an earlier stage of the appeal to this Court, PAAM raised concern as *amicus curiae* that the Court of Appeals' rule will impede the jury's truth-seeking function. In fact, PAAM went so far as to make the alarmist claim that experts will commit perjury if they are not allowed to refer to a diagnosis as AHT. PAAM *Amicus* Brief on Application at 7 n.9.

These allegations are unfounded. The diagnostic language surrounding this syndrome is constantly evolving. Even the syndrome's staunchest defenders acknowledge that AHT has been known by many other terms over the years, including "Whiplash Shaken Infant Syndrome," "Shaken Impact Syndrome," "Inflicted Childhood Neurotrauma," "Non-Accidental Trauma," and perhaps most familiarly, "Shaken Baby Syndrome." Dr. Sandeep Narang, J.D., *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, 11 HOUS. J. HEALTH L. & POL'Y 505, 505 (2011). To be clear, many (if not all) of these terms are no less problematic than "abusive"; for example, "inflicted" or "nonaccidental," *McFarlane*, 325 Mich App at 525, 926 NW2d at 351, present the same issue as "abusive" because they too imply fault and intent, and thus impart conclusions about *mens rea*, *actus reus*, and guilt. As one recent article underscores about this very case, allowing an expert to "opine that a child's injuries were 'inflicted' . . . makes little sense." Findley, *Feigned Consensus*, *supra*, at n.161. That is "because calling an injury 'inflicted' is effectively equivalent to calling it 'abusive.'" *Id.* Thus, the Court of Appeals should have gone

further in disallowing the use of such terms. But for present purposes, the point remains that "abusive head trauma" is by no means the only diagnostic term available for use in court.

As the American Law Institute underscores, medical experts remain free to testify regarding a child's injuries, so long as their testimony does not also offer the view that abuse occurred:

> In addition to allowing a medical expert to render opinions regarding diagnoses of the child's bodily condition, a court may also allow a medical expert to render opinions regarding the external forces that may have caused the child's conditions. A medical expert may testify, for example, about whether a child's injuries are consistent with a parent's testimony that the child was injured while playing or whether the injuries are consistent with blunt force trauma inflicted by the parent.

American Law Institute, *Children*, *supra*, at 83. This distinction properly safeguards the jury's function to serve as the fact-finder in the case, free of any improper expert influence, while at the same time permitting experts to testify fully and accurately. Yet even if an expert were somehow constrained, the fact that the medical field chooses to use certain terminology for its own purposes would not provide medical experts license to violate evidentiary rules that protect defendants against wrongful conviction when those physicians venture into the courtroom.

II. The Testimony In This Case Far Exceeded The Bounds Of Permissible Expert Opinion.

In any event, whether the testimony in this case invaded the province of the jury is not a close call. The prosecution's medical expert did not merely use the term "abusive head trauma"; she went much further by making it clear "that abusive head trauma *meant child abuse*." *McFarlane*, 325 Mich App at 524, 926 NW2d at 351 (emphasis added) (internal quotation marks omitted). As the Court of Appeals recounted, "[s]he repeatedly told the jury that KM's injuries were 'caused by *definite pediatric physical abuse*,' and she stated that 'we know that abusive head trauma' causes these injuries because people confess to hospital staff and investigators or other

family members after inflicting the injuries." *Id.* (emphasis added). Worse still, she "further told the prosecutor that she was correct when the prosecutor noted that [the expert] looked at the totality of circumstances before concluding that this case involved 'child abuse.'" *Id.* Whether Mr. McFarlane "inflict[ed]" "child abuse," however, is not the subject of medical science, but rather the ultimate question that is reserved to the jury.

This case is therefore indistinguishable from *People v Peterson*, 450 Mich 349, 537 NW2d 857 (1995), and *People v Bynum*, 496 Mich 610, 852 NW2d 570 (2014). Those cases stand for the proposition that "speculat[ion] in [expert] testimony as to whether someone's behavior suggested the perpetration of a crime" is "impermissible." PAAM *Amicus* Brief on Application at 4. That reasoning squarely applies here: by directly suggesting that Mr. McFarlane's alleged actions must have constituted "child abuse," the prosecution's expert strayed beyond her medical expertise and declared that the charged crime had in fact been committed.

Accordingly, regardless of whether terms like AHT in isolation invade the province of the jury—and to be clear, the Innocence Network firmly believes that such practice should be prohibited for the reasons set forth in Part I—at the very least, equating AHT with "child abuse" goes too far. In reaching that unexceptionable conclusion and holding the testimony proffered in this case to be inadmissible, the Court of Appeals did not err.

CONCLUSION

This Court should affirm the conclusion of the Court of Appeals that an expert witness exceeds the bounds of permissible opinion testimony by testifying that a child suffered, or that a defendant inflicted, "abusive head trauma," "definite pediatric physical abuse," or "child abuse."

Respectfully Submitted,

Dated: January 3, 2020

s/Wolfgang Mueller
Wolfgang Mueller (P43728)
Counsel for *Amicus Curiae* The Innocence Network

s/Z.W. Julius Chen
Z.W. Julius Chen (DC Bar No. 1002635)

s/Zara H. Shore
Zara H. Shore (DC Bar No. 1602523)

s/Alexandra E. Boyd
Alexandra E. Boyd (DC Bar No. 1644548)

Of Counsel