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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Gwendolyn J. Alexander

Defendant-Appellant.

MSC No.

COA No. 364063

Wayne County Circuit Court
Case No. 20-001501-02 FC

Gwendolyn J. Alexander's Application for Leave to Appeal

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Statement of the Questions Presented

First Question

I. Did the Court of Appeals err in holding that the prosecution presented sufficient evidence to prove Ms. Alexander guilty beyond a reasonable doubt of Torture?

Ms. Alexander answers: Yes.

The Court of Appeals answered: No.

Second Question

II. Did the Court of Appeals err in holding that an expert's "diagnosis" of "medical torture" did not improperly invade the province of the jury, contrary to this Court's decisions, including *People v Harbison*, and the Court of Appeals' decision in *People v McFarlane I*? Did the Court of Appeals further err in holding that the expert's opinion, which was based on facts not in evidence contrary to MRE 703, had been properly admitted? Alternatively, did trial counsel render constitutionally ineffective assistance in failing to object to the improper opinion testimony?

Ms. Alexander answers: Yes.

The Court of Appeals answered: No.

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Judgment Appealed from and Relief Sought

Gwendolyn J. Alexander seeks leave to appeal or peremptory reversal of the Court of Appeals' published decision affirming her conviction for Torture under MCL 750.85. The conviction arises out of Ms. Alexander's alleged mistreatment of her young son, specifically, her admission that on two occasions she bound his hands and/or feet with a belt or zip ties to immobilize him. Ms. Alexander challenges the sufficiency of the evidence to support the conviction and the admission of expert testimony that "diagnosed" the alleged victim with "Medical Torture," which improperly invaded the province of the jury and violated MRE 703.

The conviction fails a sufficiency challenge for two reasons. First, the prosecution failed to prove the *mens rea* element of Torture, which requires proof of a specific intent to: 1) cause great bodily injury to the victim; *and* 2) to inflict "cruel or extreme physical or mental pain and suffering." MCL 750.85. Ms. Alexander conceded her actions were wrong and that she deserved some sort of punishment for them. She was separately convicted of two child abuse counts for the mistreatment, but Torture is a distinct and far more-serous crime, and the evidence shows that the binding was not intended to inflict pain or misery or even to injure, but was merely the misplaced desperate effort by an overwhelmed pregnant mother of three who was living in poverty to protect her young son from harming himself and his siblings. Her son had begun acting out in harmful, sexual, and disturbing ways, and Ms. Alexander believed she had no choice but to take such extreme measures, as she could not turn her back on him, even momentarily. It was wrong and it may have been child abuse, but it was not the crime of Torture.

Additionally, the documented wounds to the child's wrists and ankles caused by the binding did not rise to the level of "serious visible disfigurement," the level of harm necessary to sustain a torture conviction as charged. Under settled rules of statutory construction, the term "serious visible disfigurement" means an injury that alters the

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victim's appearance in a clear and distinct fashion, and that is dangerous and potentially resulting in death or other severe consequences. The injuries sustained by the alleged victim here, variously described as "ligature marks", "scars", or "hyperpigmentation" with some swelling, all of which were gone by the time of trial, do not rise to the level of serious visible disfigurement so as to sustain a conviction for Torture, a Class A Life offense.

This sufficiency challenge involves legal principles of major significance to the state's jurisprudence. Since the Torture statute's enactment in 2006, this Court has not addressed its scope nor attempted to define its various terms. The dearth of judicial guidance reaches down to the Court of Appeals, where, aside from this case, only three published opinions have endeavored to do so; only this case has addressed the specific alternatives of the crime in this type of context.[1] This case presents a good opportunity for this Court to provide much-needed guidance and make clear delineation between the crimes of Child Abuse and Torture. MCR 7.305(B)(3).

Moreover, the Court of Appeals' application of the Torture statute, which lowered the level of injury below that which the plain language of the statute requires, is inconsistent with firmly-rooted statutory

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[1] *See People v Schaw*, 288 Mich App 231 (2010) (addressing whether defendant inflicted "severe mental pain or suffering" upon the victim under MCL 750.85(1); *People v Lymon*, 342 Mich App 46 (2022) (addressing defendant's specific intent and whether victims suffered "severe mental pain or suffering."), *reversed on other grounds* ___ Mich ___, 2024 WL 3573528 (7/29/24); *People v Thomas*, 263 Mich App 70, 76 (2004)(finding that sprained leg and broken neck vertebrae met definition of "serious impairment of a bodily function" under MCL 257.58c, and noting that injuries need not be permanent or long lasting).

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construction rules. And a material injustice will result in the form of an excessive prison sentence for a capital offense if the Court of Appeals' erroneous decision is left to stand. Review is required under MCR 7.305(B)(5)(a) & (b).

Plain reversible error occurred when the key expert witness for the State improperly testified that she had "diagnosed" Ms. Alexander's son with "Medical Torture". Alternatively, defense counsel unreasonably failed to object. Contrary to the Court of Appeals assertion, such "diagnosis" testimony invaded the province of the jury by directly addressing Ms. Alexander's guilt and the *mens rea* required for the crime of Torture. Such opinion testimony falls squarely within the prohibitions articulated by this Court and the Court of Appeals in several decisions. *See People v People v McGillen #2*, 392 Mich 278, 285 (1974), *People v Peterson*, 450 Mich 349, 352 (1995); *People v Thorpe & Harbison,* 504 Mich 230 (2019); *People v Christel*, 449 Mich 578, 580 (1995); *People v Heft*, 299 Mich App 69, 81 (2012); *People v McFarlane ("McFarlane I")*, 325 Mich App 507, 517 (2018), *lv den after argument on application* 505 Mich 1020 (2020) ("*McFarlane II")*; *People v Ackley ("Ackley IV"),* 336 Mich App 586 (2021).

On analogous facts, the Court of Appeals has held that an expert witness may not diagnose an alleged child abuse victim with "abusive head trauma" because it invades the jury's exclusive province under the above precedent. *McFarlane I,* 325 Mich App at 523-524; *Ackley IV,* 336 Mich App at 592-593. This Court has signaled agreement with that rule. *See People v Ackley* (*"Ackley III"),* 506 Mich 948, 948-949 (2020) (order remanding matter back to Court of Appeals in light of *McFarlane I's* holding prohibiting "abusive head trauma" expert diagnosis testimony). This case will give the Court the opportunity to further clarify its rule in this area and apply it to a similar fact-pattern to better guide Michigan courts on the limitations of such opinion testimony. Review is required under MCR 7.305(B)(3) and (B)(5)(a)-(b).

The Court of Appeals also erred and misconstrued the record in holding that the expert's opinion was based on facts that had been admitted at trial, as MRE 703 requires. See *People v Fackelman,* 489

Mich 515, 534-535 (2011). The record unambiguously shows that a significant basis for the expert's opinion testimony came from sources that provided far more information than the jury heard from other witnesses at trial -- at least two of those sources were individuals who never even testified. The decision below directly conflicts with both the letter of the rule as well as *Fackelman, supra,* to endorse damaging testimony in support of an unjust conviction. Review is appropriate under MCR 7.305(B)(5).

In 2003, this Court amended MRE 703 to correct a common misreading of the rule by clarifying that an expert's opinion is admissible only if it is based exclusively on facts or data that had been introduced into evidence in some way other than through the expert's hearsay testimony. Since then, this Court has addressed the scope and application of the rule only once in *Fackelman, supra.* Lower courts and members of the bar require both a reminder about the limits of MRE 703 and additional direction as to the manner in which experts, who routinely rely on a broad range of information and data, can give opinions in compliance with the amended rule. Michigan Court Rule 7.305(B)(3) calls for this Court to take up and contribute to the body of caselaw on the issue.

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Statement of Facts

Gwendolyn Alexander was found guilty by a Wayne County jury of Torture, Second Degree Child Abuse, Second Degree Child Abuse Committed in the Presence of Another Child, and Third Degree Child Abuse.[2] The case arises out of the allegation that Ms. Alexander and codefendant Erron "Rob" Scott restrained, physically, abused, and neglected Ms. Alexander's six-year-old son, and abused her three-year-old daughter. This appeal focuses on the conviction for Torture.

In 2019 Ms. Alexander was raising three young children, including six-year-old MA, and his two half-sisters; three-year-old RA and MS, who was an infant. T4 30. Ms. Alexander was pregnant with another child and living with Mr. Scott, her-then boyfriend and the father of RA and MS. T4 30-31.

Having recently been evicted during the summer of that year, Ms. Alexander and Mr. Scott moved into a trailer parked next to the house occupied by Renia Scott, Mr. Scott's mother. T4 29-31, 39. Ms. Scott primarily cared for the children. T4 31-33. According to Ms. Scott, the children would sleep most nights in the house with her while Mr. Scott and Ms. Alexander slept in the trailer. T4 32-34. While the children would spend stretches in the trailer and occasionally overnighted there, they spent the majority of the time at Ms. Scott's house because, although it did have water, the trailer had no working toilet or bathing facilities. T4 40-41. When Ms. Scott's health worsened toward the end of 2019, her son and Ms. Alexander assumed larger childcare roles; however, the children still spent most nights with Ms. Scott. T4 41-43.

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[2] The record of the five-day trial actually comprises six volumes of transcripts, which will be cited herein as follows:

T1: 9/19/22
T2: 9/20/22 (Preliminary jury instructions)
T3: 9/20/22 (Opening statements and testimony)
T4: 9/21/22
T5: 9/22/22
T6: 9/23/22 (Verdict)

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In early January of 2020, Ms. Alexander contacted Ranisha Bowden, MA's godmother, to ask whether she would take custody of MA because she was having trouble caring for him along with the other children. T3 126-127; PX 38 at 5:40-5:48. In response, Ms. Bowden called the police to request a "wellness check" on MA. T3 128.

The afternoon of January 22, 2020, Detroit Police officers went to Ms. Scott's property where they encountered Mr. Scott and the three children. T3 156-158. According to one officer, the trailer was filthy, with rotting food in bags on the floor and water bottles containing urine elsewhere. *Id.* at 157-158, 161. Pieces of "zip ties" were found on the ground near a lawn chair in front of the trailer, while at least one other zip tie was found beneath the sofa inside the trailer. *Id.* at 159, 169-170.

One of the responding officers claimed MA had bruises on the side of his face and swelling on his neck. T3 158. There were raised, thick scarring or ligature marks on his wrists. *Id.* at 157-159. The officer also recalled seeing swelling and bruising on RA's body, although she could not recall where those injuries were located. *Id.* at 159.

The children were removed from the premises and Mr. Scott and Ms. Alexander were taken into custody. T3 159-160. Later that afternoon, a physician examined the children and, after spending about three hours total at the emergency room, the children were released to the custody of a temporary guardian. T4 104-128; PX 31.

Later that evening, Ms. Alexander gave a police statement admitting that she played a role in physically disciplining MA, and that on two occasions, she had bound MA's hands together to keep him from getting into trouble when he could not be closely supervised. PX 38.

The prosecution charged Ms. Alexender and Mr. Scott as follows:

Count 1:	Torture involving MA;
Count 2:	Second degree child abuse involving MA;
Count 3:	Second degree child abuse against MA while in the presence of RA.

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Count 4: Third degree child abuse involving MA;

Count 5: Third degree child abuse involving RA.

Information

Ms. Alexender and Mr. Scott were tried jointly before separate juries. MA, who was then eight years old, testified that when he was six, he lived with his mother and "Rob" in a trailer. T3 22-23, 41-42. According to MA, Rob "zip tied" his hands together between five and ten times at various points. *Id.* at 23-24, 29-30. Rob also tied his waist to the leg of a sofa to keep him from moving around. *Id.* at 24-25.

MA denied that his mother did any of the zip-tying, although he acknowledged she was sometimes in the trailer asleep when it occurred. T3 24-25, 37. MA did recall one time when Rob zip-tied him and then left for work. *Id.* at 51-52.

MA explained that he "got a scar" on his hands from being zip tied, but it healed, and he no longer had it. T3 26. It hurt when Rob zip-tied MA, which MA told Rob and his mother, but the binding did not stop. *Id.* at 27-28. According to MA, Rob also hit him on the hands with a sandal. T3 27. That also hurt but it did not leave any marks. *Id.* at 27-28.

MA also testified that when he stayed in the trailer with his mother and Rob, he slept on the floor while his sister slept on the couch. T3 27-28. When he needed to use the bathroom, he would go to his grandmother's house. *Id.* at 28. At other times, he would go "outside." *Id.* at 46.

RA, who was six years old, recalled living in a trailer with her mother, father and brother. T3 60-61. She testified that, while nothing happened to her, her brother got into trouble and once got "zip tied" as a result. *Id.* at 61-62. Only his wrists got zip-tied, and it was "Dad" who did it, although her mother was home when it happened. *Id* at 63-64.

Ranisha Bowden, MA's godmother, testified that she accompanied police officers on their wellness check of the trailer the afternoon of

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January 22, 2020. T3 126-129. According to Ms. Bowden, MA "didn't look normal" to her. *Id.* at 129, 135-136. She claimed MA seemed underweight, his hair was unkempt, he appeared to have two black eyes, and he had lacerations, or "scabs" around his wrists and ankles. *Id.*

Renia Scott testified to the living arrangements on her property as described above. T4 29-35. At some point she noticed that all three children were breaking out in rashes, so she applied cortisone cream for them. *Id.* at 32-36, 43. Around Thanksgiving, she noticed that MA had a ring around the skin of his wrists, so she again applied cream to it for him. *Id.* at 37-38. She saw no other signs of bruises or marks on either MA or his siblings. *Id.*

Gwendolyn Douglas, Ms. Alexander's cousin, testified that she regularly visited Ms. Scott's property during the latter half of 2019, but she rarely ever went inside the trailer. T3 108-109. At some point, Ms. Alexander told her she needed help taking care of the children because MA had begun acting out in troubling ways. T3 110. Ms. Douglas testified that she never saw MA with marks or bruises on him, nor did she actually see him "tied up." T3 110-112, 114, 121; T4 84-85. She did, however, notice a scar or bruise near MA's eye and felt that he had lost weight. *Id.* Although she could not recall what she had told police investigators about the children, she acknowledged previously mentioning to police that she had heard about MA once being tied to a couch, and another time being denied food, but she could not remember the source of that information. T4 87-90.

One of the paramedics who transported the children to the hospital after their removal testified that he observed ligature marks or abrasions on both of MA's wrists and ankles that were slightly swollen, as well as a bruising on each side of his eyes. T3 75-77. He gave MA an ice pack to reduce the swelling and ease any pain and irritation. *Id.* at 78, 94.

Dr. Shazia Maqbool of the Detroit Children's Hospital Emergency Room testified that she examined the three children the afternoon of January 22, 2020. T4 104-105. She observed no signs of trauma to RA's eyes, head, or nose. *Id.* at 106. There were some "linear scars" on the

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skin of RA's wrists and ankles, and some swelling and tenderness around both ankles. *Id.* at 106-107. X-rays showed no fractures or sprains. He had some minor marks or lesions on his buttocks and knees. *Id.* at 113-114.

Photographs of RA's wrists, ankles, arms, buttocks, and torso area taken by police and medical providers were admitted. PX 20-30, 40-50. T3 176-181; T4 108-110. Based on the tone and color of the marks on MA's wrists and ankles, Dr. Maqbool believed they were older than 24 hours, and that they did not appear to have been the result of accidents. T4 109-110. The doctor found nothing else of significance in her physical examination of MA. *Id.* at 109-112, 124-125, PX 31. After spending a total of three hours at the emergency room, including check-in, triage, a visit to radiology, and a physical examination by the same physician, the three children were released to a temporary guardian. T4 120-121.

A redacted recording of Ms. Alexander's police interview was played for the jury. T4 74; PX 38. In the interview, she described the living arrangements at Ms. Scott's property consistently with Ms. Scott's testimony; the children would spend most nights in the house and would regularly spend time during the day in the trailer with her and Mr. Scott. *Id.* at 24:05, 32:40-32:50, 33:50-34:10, 39:14-39:20, 58:14-58:17, 58:44. Ms. Alexander also talked about the struggles she faced with raising children while in poverty and pregnant, with little support from her own family. PX 38 at 23:35-23:42, 1:12:04. She acknowledged the dirty conditions in the trailer when police arrived and explained that she was working to get things cleaned up before giving birth. *Id.* at 23:40.

Ms. Alexander admitted that at some point in January of 2020, she felt compelled to ask Renisha Bowden to become MA's guardian because it was becoming impossible to care for him. PX 38 at 5:40-5:48. This was because, beginning about a month before, MA had begun acting out in serious and concerning ways. *Id.* at 5:40-6:00, 8:00-8:57, 9:15-10:00, 21:00. He was having inappropriate sexual contact with other children, including RA and his cousins. *Id.* at 4:55-5:40, 8:00-8:55. He would sneak and steal food and hide it around the trailer, even though he was adequately fed at appropriate times. *Id.* at 17:20-17:54, 21:00 27:25-

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28:10. Once, she discovered he had stolen some candy from a local market, which was particularly humiliating because she was a regular customer there and was friends with the owner. *Id.* at 18:12-19:05. Additionally, MA was expressing his anger in disturbing ways – recently he had deliberately defecated on himself after being told he could not have more candy. *Id.* at 9:15-10:00.

Both Ms. Alexander and Mr. Scott tried disciplining MA when he acted out. After being caught stealing or inappropriately touching someone, he would receive "whoopings" on his bare bottom with a ruler or a belt, mostly from Mr. Scott but occasionally from Ms. Alexander. PX 38 at 16:45-16:53, 20:26-20:30, 47:05-47:15. One time, Ms. Alexander tried to give MA a "smack" on the back of the head to stop him from getting into something, but MA jerked his head away at the last instant, causing her to strike the side of his face and leave a mark. *Id.* at 47:29-47:38.

Ms. Alexander explained that things got to the point that adults did not feel comfortable turning their backs on MA – even momentarily – for fear that he would act out and endanger himself or his siblings. PX 38 at 21:00-21:20. MA's hands were occasionally bound together in front of his body with a belt or a strap when an adult could not closely supervise him – such as when they had to prepare meals or would begin to doze off. PX 38 at 17:53-17:67, 27:42-27:46. 34:23-34:26. Ms. Alexander did it twice, Mr. Scott did it other times; three times at her request. *Id.* at 17:53-17:57. She estimated that MA was bound for up to two hours at a time, but never during the night and only when an adult could not give him their full attention. *Id.* at 31:55, 33:12-33:35. The marks on MA's wrists were caused by him trying to squeeze or wrench his hands free from the strap or belt that was used to bind his hands. *Id.* at 20:50, 33:45-33:48. One of the marks, however, was caused when MA grabbed a hot iron while she had her back turned. *Id.* at 27:38-27:52.

At all times, Ms. Alexander maintained that MA was bound, not to punish or hurt him, but to protect him and the other children from harm. PX 38, at 21:00 27:25-28:10, 33:16-33:30, 33:50-33:53, 59:52. She expressed regret that this was done and admitted that a parent who did

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something like this to a child should spend time in jail. *Id.* at 50:40-50:47.

Dr. Dena Nazer, Medical Director at Kids-TALK, was presented as an expert on child abuse pediatrics. T5 15-19. She testified that she conducted an evaluation of MA on March 30, 2020. *Id.* at 19-20. As part of her evaluation, she reviewed the records of Dr. Maqbool's examination of MA, personally interviewed and examined MA, gathered information from his aunt, Monisha Bowden (Renisha Bowden's mother), and reviewed information provided to her by the individuals involved in forensically interviewing MA. *Id.* 23-25. A physical examination revealed slight marks or scars around MA's wrists and ankles, but nothing else of significance. *Id.* at 25-26.

Based on the information described above, Dr. Nazer testified that she made a "diagnosis of medical torture" with regard to MA. T5 27-28; PX 32. She described medical torture as a "clinical diagnosis" given to children:

> who have been exposed to at least two different physical assaults, so two physical assaults at two different times. And it's not just the physical assaults. To qualify for the diagnosis of medical torture, it has to be accompanied by at least two psychological maltreatments or two forms of psychological abuse.

T5 28-29.

As to the marks on MA's ankles and wrists, Dr. Nazer clarified that they were actually "hyperpigmented," or darker in color compared to the surrounding skin. T5 72. Because they had healed, the doctor could not say whether the marks were cuts, abrasions, or bruises. *Id.* at 73-74.

Dr. Nazer conducted a similar evaluation of RA. T5 30-31. Although she saw no evidence of physical injury on RA, the doctor concluded that she too was a victim of "medical torture" based on the information she obtained outside of any physical examination. *Id.* at 31-32, 37; PX 33.

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At the close of the evidence the two juries were instructed together as to the elements of the charges. T5 220-243. The court did not instruct the juries on the requirements for convicting either defendant of aiding and abetting Torture. *Id.*

Mr. Scott's jury acquitted him of Torture and of Third Degree Child Abuse involving RA but convicted him of the remaining counts. TR Scott Verdict 10-14.

Ms. Alexander was convicted of Torture and the Child Abuse counts involving MA but acquitted of the Third Degree Child Abuse count involving RA. T6 9-11.

At sentencing, the trial court calculated a Total PRV score of 20-Level C and a Total OV score of 130-Level VI for Ms. Alexander. SIR. In reaching that score, the court included fifteen points for OV 5 and 50 points for OV 7. *Id.* The defense objected to the scoring of OV 5 but did not object to the other OV scores. ST 5-6. Based on a calculated guideline range of 135-225 months, the court sentenced Ms. Alexander to 204 to 600 months in prison for the Torture conviction, to run concurrently with shorter sentences for the other counts. Judgment of Sentence.

Ms. Alexander appealed of right, contending that her Torture conviction was not supported by sufficient proof beyond a reasonable doubt, that plain reversible error was committed by the admission of expert testimony "diagnosing" RA with "Medical Torture", that trial counsel was constitutionally ineffective in failing to object to the improper testimony, and that resentencing was required because the trial court erred in scoring 50 points for OV 7.

In a published opinion dated November 20, 2024, the Court of Appeals rejected the sufficiency and evidentiary challenges to the conviction, but agreed that OV 7 had been improperly scored and remanded for resentencing. *People v Alexander*, ___ Mich App ___, 2024 WL 4846088 (2024) (attached as Appendix A).

Ms. Alexander now seeks leave to appeal in this Court to further challenge her Torture conviction.

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Arguments

I. The Court of Appeals erred in holding that the prosecution presented sufficient evidence to prove Ms. Alexander guilty beyond a reasonable doubt of Torture.

Issue Preservation & Standard of Review

The sufficiency of the evidence to support a conviction may be raised for the first time on appeal. *People v Patterson*, 428 Mich 502, 514-15 (1987). Sufficiency claims are reviewed *de novo*. *People v Cline*, 276 Mich App 634, 642 (2007). This Court must construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hill*, 257 Mich App 126, 140-41 (2003).

Discussion

The Due Process Clauses of the state and federal constitutions prohibit a criminal conviction unless the prosecution proves all elements of the crime beyond a reasonable doubt. US Const, Amends V, XIV; Mich Const 1963, art 1 § 17; *In re Winship*, 397 US 358, 361-62 (1970); *People v Rosales*, 160 Mich App 304, 312 (1987). The reasonable doubt requirement represents a safeguard designed to protect citizens from "dubious and unjust convictions, which result in improper forfeitures of life, liberty and property." *Winship, supra* at 362. On appeal, due process requires reversal if, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact would conclude there was insufficient evidence to establish each element of the offense beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 316 (1979).

The Torture statute, MCL 750.85(1) provides:

> A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture

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> and is guilty of a felony punishable by imprisonment for life or any term of years.

The prosecutor argued both defendants inflicted great bodily injury based on the marks found on MA's wrists and ankles, which were attributed to him being bound. T5 143-145, 194-196, 198-199. Thus, to convict Ms. Alexander as charged here, the jury was required to find that: (1) she had custody or physical control over MA, (2) she did so without MA's consent or without lawful authority, (3) she intentionally caused great bodily injury to MA, and (4) she specifically intended for MA to suffer cruel or extreme physical pain or mental pain and suffering. M. Crim. JI 17.36. The prosecutor did not argue, and the jury was never instructed on, the requirements for convicting either defendant of aiding and abetting Torture.

Contrary to the Court of Appeals' conclusion, the prosecution failed to prove the elements of Torture beyond a reasonable doubt. Appendix A at 2-4. Specifically, there was insufficient evidence that MA suffered great bodily injury, or that Ms. Alexander acted with the level of intent required under the Torture statute.

There was insufficient evidence to prove Ms. Alexander acted with the intent required under the Torture statute.

MA's wrists and ankles were bound in an effort to keep him from moving while unsupervised. PX 38 at 15:53-17:57, 27:42-27:46, 34:23-34:26. But it is not enough for Ms. Alexander to have intentionally done the underlying act which led to MA's injuries. Rather the prosecution was required to prove that, when Ms. Alexander bound MA, she did so with the intent and purpose of inflicting both great bodily injury *and also* cruel or extreme physical pain or mental pain and suffering. MCL 750.85; M Crim JI 17. While circumstantial evidence can establish specific intent, *People v Stevens*, 306 Mich App 620, 629 (2014), the totality of the circumstances here fail to show that Ms. Alexander acted with the requisite intent to do either.

As she explained to police, MA had grown out of control and needed constant supervision. PX 38. He was acting out in disturbing ways and posed a threat to the young people he was around – due to his overly

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sexualized behavior with cousins and sisters. *Id.* at 4:55-5:40, 8:00-8:55, 21:00-21:20. In the late stages of her pregnancy and already overwhelmed by caring for all her children under impoverished conditions, Ms. Alexender felt could not turn her back on MA, even for a moment. *Id.* at 21:00-21:20.

This led to the adults binding MA; Ms. Alexander did it twice while Mr. Scott did it other times, some at her request. PX 38, at 17.53-17:57. Neither child recalled Ms. Alexander doing the binding at all, although they maintained she was around some of the times when Ms. Scott did it. T3 24-25, 37, 61-64. To sure, this was a bad decision that was callously and indifferently made. But at most it represented a misguided, reckless attempt to prevent future harm and misbehavior, rather than to cause harm or injury. PX 38, at 31:55, 733:12-33:35. It is readily apparent that the acts of binding were not punitive, done out of anger, or with a malicious purpose.

MA was stricken on the bare bottom with a belt and a ruler, and one time was "smacked" in the head. PX 38 at 16:35-16:53, 20:26-20:30, 47:05-47:15, 47.29-47:48. But those acts of corporal punishment were separate from the binding, supported the Child Abuse charges, and were only marginally relevant to the Torture charge. There was no evidence the spankings inflicted the marks on MA's wrists or ankles relied on by the prosecutor to argue Ms. Alexander was guilty of Torture. T5 198-199. While it was argued that those separate spankings crossed the line between reasonable and excessive corporal punishment, they were done in *response* to past perceived misconduct by MA, including theft and inappropriate sexual contact PX 38 at 16:35-16:53, 20:26-20:30, 47:05-47:15, 47.29-47:48. Unlike those punitive measures designed to punish and deter, the zip-tying was clearly intended to prevent MA from moving around, getting into trouble, and harming his siblings in the future, while an adult could not closely monitor him. It is readily apparent that while Ms. Alexander may have intended to perform the act of zip-tying, she did not intend for MA suffer physical injury or mental pain and suffering.

Indeed, the marks left on MA's hands and ankles were not within Ms. Alexander's consciousness when she twice bound his hands with the

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zip ties. As her statement made clear, she discovered that MA had hurt the skin on his wrists when he tried to wrench himself free of the zip ties. PX 38, at 20:50, 33:45-33:48. It was unclear whether this occurred as a result of one or both of the two occasions Ms. Alexander actually did the binding, or after the multiple times it was done by Mr. Scott, or if the injuries resulted from all the combined acts of binding. *Id.* The fact that MA suffered the abrasions, not as a direct result of Ms. Alexander zip tying him, but as he was (understandably) trying to wrench free of them, further supports that, while she intended do the binding, Ms. Alexander did not specifically intend to cause the injuries or suffering.

While not dispositive on the issue of another's subjective intent, MA's description of the misconduct and the resultant injuries is notable and relevant. At trial, MA barely mentioned his mother's involvement in the zip-tying other than to say that she didn't stop Rob from doing it. T3 24-25. While he described feeling pain, his description of Rob's actions was matter-of-fact and he qualified his testimony by mentioning that the marks had completely healed. He did not mention his mother screaming, yelling, behaving angrily or acting maliciously. Simply put, the prosecution failed to prove beyond a reasonable doubt that Ms. Alexander intended to cause great bodily injury to MA, or that she intended for MA to suffer cruel or extreme physical pain or mental pain and suffering. M. Crim. JI 17.36.

The evidence failed to establish that Ms. Alexander inflicted "great bodily injury".

Contrary to the Court of Appeals' assertion, the evidence did not establish beyond a reasonable doubt that MA suffered "great bodily injury" as a result of being bound by Ms. Alexander. Appendix A at 4-5. The Torture statute defines "great bodily injury" as either "internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds", or a "serious impairment of a body function" as defined by MCL 257.58c, the Motor Vehicle Code. Michigan Compiled Law 257.58c provides ten examples of "serious impairment of a body function", including "serious visible disfigurement." *Id.* at §(c). In this case, the jury was specifically instructed that "[g]reat bodily injury

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means causing a serious impairment of a body function, which includes the following: Serious visible disfigurement." T5 233-234.

Variously described at trial as "ligature marks", "scars", and "hyperpigmentation," the wounds to MA's wrists and ankles, accompanied by light swelling on one of his ankles, did not rise to the level of "serious visible disfigurement" when that term is given its appropriate meaning within the statutory context. T3 26, 75-76, 136, 158; T4 106, 108-109, 110; T5 26; PX 21, 23, 24, 25, 40-50. When construing the meaning of terms in a statute, "all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language." MCL 8.3a. A court may consult dictionary definitions to aid in interpreting the scope and breadth of terms. *McCormick v Carrier*, 487 Mich 180, 191–92 (2010).

Black's Law Dictionary (11th ed. 2019) defines the individual components of the phrase "serious physical disfigurement" as:

- **Serious:** "Dangerous; potentially resulting in death or other severe consequences <serious bodily harm>."
- **Visible**: "Perceptible to the eye; discernible by sight. . . Clear, distinct, and conspicuous."
- **Disfigurement:** "An impairment or injury to the appearance of a person or thing."

Thus, "serious visible disfigurement" plainly means an impairment or injury to a person's appearance that is perceptible, clear, or distinct and conspicuous. But because those things must be "serious," the visible impairment must be "dangerous" to the victim, or potentially resulting in death or other severe consequences. *Black's Law Dictionary, supra.*

While there may have been visible disfigurement, it did not meet the definition of "serious." Admittedly the marks to MA were unsightly, especially on a young child. PX 21, 23-25, 40, 41, 43, 46-49. But there was no evidence they were "dangerous" such that they could potentially lead to death or other "severe" health consequences. PX 31. MA was taken to the hospital for a physical examination. PX 31, T4 103-114.

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There he received little or no actual medical treatment for the marks on his wrists or ankles, nor was there evidence that any medical treatment was required beyond an icepack given to him by the paramedic to reduce some mild swelling and irritation. T3 94; T4 118-121; PX 31. There is no indication the marks created the danger of infection, resulted in significant pain, or affected MA's functioning in any way. In fact, once all three children were examined by the same doctor, they were released after spending merely three hours total at the emergency room. T4 118, 120-122. The marks were significantly healed and faded by the time of Dr. Nazer's examination on March 3, 2020, and they apparently were not visible and completely gone by the time of trial. T3 26; T5 26, 55.

The phrase "serious physical disfigurement" requires more than non-permanent marks on the skin that photographs show was moderately visible when first observed by authorities and that did not significantly alter the shape, appearance, or movement of the victim or his limbs. The statutory context of that phrase further illustrates this point. In interpreting the meaning of a statutory term, the "entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker,* 219 Mich 178, 182-183 (1922), *accord, People v Feezel,* 486 Mich 184, 205 (2010). Under the canon of *noscitur a sociis*, "[a]ssociated words bear on one another's meaning" within a statute. Scalia and Garner*, Reading Law: The Interpretation of Legal* Texts (Thompson-West, 2012), pp. 195-198. "Words grouped in a list should be given related meanings."" *Atl Cas Ins Co v Gustafson*, 315 Mich App 533, 541 (2016) (citing Scalia and Garner, supra, p. 195). Put another way, the meaning of statutory terms is determined by "the company they keep." *Lagos v United States*, 584 US 577, 582 (2018).

"Serious physical disfigurement" finds itself in the company of some very drastic levels of harm. The ultimate element of "great bodily injury" is defined in the Torture statute itself to include "internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds." MCL 750.85(2)(c)(ii). None of MA's marks are on the level of seriousness with those types of injuries. Likewise, the types of "serious

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impairment of a body function" that MCL 257.58c incorporates into great bodily injury definition include:

> (a) Loss of a limb or loss of a use of a limb
>
> (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
>
> (c) Loss of an eye or ear or loss of use of an eye or ear.
>
> (d) Loss or substantial impairment of a bodily function.
>
> (e) Serious visible disfigurement.
>
> (f) A comatose state that lasts for more than 3 days.
>
> (g) Measurable brain or mental impairment.
>
> (h) A skull fracture or other serious bone fracture.
>
> (i) Subdural hemorrhage or subdural hematoma.
>
> (j) Loss of an organ.

MCL 257.58c.

The Court of Appeals is wrong in asserting that MA's marks, scars, or "hyperpigmentation" are of a similar level of seriousness as the loss of limb, internal bleeding, brain injury, bone fractures, subdural hematomas, comas, organ loss, or temporary or permanent blindness or deafness found in MCL 257.58c. Appendix A at 4-5. There was no evidence that the visual blemishes affected MA's ability to use his hands or feet, resulted in significant long-lasting pain, or threatened his overall health in the same manner as the other injuries listed in Section 85c. To be sure, the marks and discoloration were visible for at least six weeks, but far less so by March 3, 2020, and they were gone by the time of trial. But the duration of the marks, while a relevant consideration[3],

[3] Ms. Alexander acknowledges this Court has held that injuries need not be permanent to qualify as a "serious impairment of a bodily function" under MCL 257.58c. *See People v Thomas*, 263 Mich App at 70, 76-78 (2004). (holding that fractured leg that required victim use crutches for

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is overshadowed by the complete absence of anything to establish they were "dangerous; potentially resulting in death or other severe consequences," or that they were in any way similar in degree to the types of injuries contemplated by the Legislature in as revealed in MCL 750.85 and MCL 257.58c.

While MA was injured and no doubt suffered harm as a result of the actions of Ms. Alexander and/or Mr. Scott, the elements of Torture simply were not met.

This Court must reverse and vacate the Torture conviction with prejudice.

It is true that circumstantial evidence can be sufficient to prove guilt, *People v Nowack*, 462 Mich 392, 400 (2000), and that deference is due the fact finder in determining what inferences may be fairly drawn from the evidence. *People v Hardiman*, 466 Mich 417, 428 (2002). But while "appellate courts [must] exercise considerable restraint in overruling jury determinations, [this Court cannot] ignore [its] responsibility to insure that the quantum and sufficiency of direct and circumstantial evidence presented at trial permits juries to draw reasonable inferences which would support such determination." *Kupkowski v Avis Ford, Inc*, 395 Mich 155, 168 (1975).

No such reasonable inference could be made that Ms. Alexander intended to cause great bodily injury to MA, that she intended for MA to suffer cruel or extreme physical or mental pain or suffering, or that she actually inflicted great bodily injury. MCL 750.85. Absent sufficient evidence to prove her guilty beyond a reasonable doubt of that charge the conviction for Torture cannot stand and it must be reversed with prejudice. *Burks v United States*, 437 US 1, 18 (1978), *People v Murphy*, 416 Mich 453, 467 (1982).

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six weeks constituted a serious impairment of a bodily injury). Nonetheless, the fact an injury has fully healed after a limited duration during which there was no apparent impediment of the victim's ability to function certainly is relevant to whether the disfigurement was "serious."

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II. The Court of Appeals erred in holding that an expert's "diagnosis" of "medical torture" did not improperly invade the province of the jury, and that admission of the testimony, which was based on facts not in evidence, was consistent with MRE 703. Alternatively, trial counsel rendered constitutionally ineffective assistance in failing to object to the improper opinion testimony.

Issue Preservation/ Standard of Review

This Court reviews de novo whether the trial court properly interpreted and applied the rules of evidence. *See People v Duncan*, 494 Mich 713 (2013). The constitutional question of whether a witness invaded the province of the jury is reviewed *de novo*. *People v McFarlane ("McFarlane I"),* 325 Mich App 507, 517 (2018), *leave denied after argument on application*, 505 Mich 1020 (2020) ("McFarlane II"). The lack of objection to Dr. Nazer's opinion testimony on the specific grounds argued here requires application of the plain error standard of review. *People v Carines*, 460 Mich 750, 763 (1999).

Alternatively, Ms. Alexander contends that trial counsel was ineffective in allowing Dr. Nazer to give improper opinion testimony. A claim of ineffective assistance of counsel is reviewed de novo under the two-part test of *Strickland v Washington*, 466 US 668 (1984); *People v LeBlanc*, 465 Mich 575, 579 (2002). The performance and prejudice components of an ineffective assistance of counsel claim are mixed questions of fact and law. *Strickland, supra* at 698. Questions of law are reviewed de novo while questions of fact are reviewed for clear error. *LeBlanc*, supra.

Discussion

In her testimony, Dr. Nazer "diagnosed" MA as being a victim of "Medical Torture", which she explained was a "clinical diagnosis" given to children who have been exposed to "at least two different physical assaults at two different times, accompanied by at least two

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psychological maltreatements [*sic*] or two forms of psychological abuse." T5 27-30; PX 32.[4]

The due process guarantees the Fourteenth Amendment and our state constitution ensure every defendant a fair trial. US Const, Amend XIV; Const 1963, art 1, §17; *Cooper v Sowders*, 837 F2d 284 (CA 6, 1988). While the trial court is an impartial arbiter rather than advocate, judges nonetheless have a duty to correct errors that threaten to significantly impact those guarantees, even if the advocates fail to properly object at trial. *See generally, Carines, supra.*

The Court of Appeals got it wrong in holding that Dr. Nazer's "diagnosis" was not improper. To the contrary, it was plainly inadmissible because it invaded the province of the jury and directly addressed the ultimate questions of Ms. Alexander's guilt, mental state, and culpability on the Torture charge based on information beyond RA's medical condition. It was also improper under MRE 703 because it was based on facts and data that were never admitted at trial and that would, in and of themselves, have been inadmissible if offered into evidence.

Dr. Nazer's "diagnosis" of "Medical Torture" was an improper opinion on the ultimate issues of guilt and culpability, which invaded the province of the jury.

The ultimate issue of a defendant's guilt is solely for the jury to resolve, which places strict limits on the substance of witness testimony. *People v Row*, 135 Mich 505, 506-507 (1904). While MRE 704 gives

[4] Appellant counsel was provided only an unredacted version of Dr. Nazer's report, which was admitted as PX 32. T4 43-44. At trial, the prosecutor indicated that the agreed-to redactions were marked on the report with merely a line through them, with the understanding that in the version shown to the jury, those sections would be completely covered. *Id.* at 45-46. It appears that the version of the report provided to appellate counsel has the lines marking the sections to be redacted but not the version given to the jury. That version was submitted to the Court of Appeals under seal.

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experts some leeway to opine on issues related to the ultimate jury questions, no expert may "express[ ] an opinion regarding the defendant's guilt or whether the defendant had a state of mind" required to convict on the charged crime. *McFarlane I*, 325 Mich App at 523 (collecting cases). Nor may an expert testify about the requirements of the law which apply to the particular facts in the case or to phrase his opinion in terms of a legal conclusion. *People v McGillen #2*, 392 Mich 278, 285 (1974); *People v Peterson*, 450 Mich 349, 352 (1995); *People v Thorpe & Harbison*, 504 Mich 230 (2019); *People v Zitka*, 335 Mich App 324, 345–46 (2020) (cleaned up).

In *McFarlane I,* the Court of Appeals surveyed key decisions from this Court that concerned expert testimony invading the jury's province in their opinions and explained:

> 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, our 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, 537 N.W.2d 857. For example, in cases involving criminal sexual conduct, an expert may not offer an opinion that the alleged victim had in fact been sexually abused, may not offer testimony that vouches for the victim's veracity, and may not offer an opinion that the defendant is guilty. See *id*. at 352, 537 N.W.2d 857. The same is true for expert testimony on "battered woman syndrome": the expert may not opine that the complainant was in fact a battered woman, may not testify that the defendant is guilty, and may not comment on the complainant's veracity. See *People v Christel*, 449 Mich 578, 580, 537 N.W.2d 194 (1995). Although an expert may be necessary to explain characteristics of gang culture, the expert may not offer an opinion that a particular gang member acted in conformity with character traits commonly associated with gang members and may not offer an opinion on the defendant's intent when he acted. See [*People v Bynum*, 496 Mich 610, 630-634, 852 N.W.2d 570 (2014).]

Id. at 521-522.

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Applying these authorities, *McFarlane I* addressed testimony that was very similar to Dr. Nazer's. There the defendant was on trial for first degree child abuse for allegedly shaking the victim, causing brain and other various injuries. 325 Mich App at 515. A pediatric abuse expert testified that she diagnosed the victim with "definite pediatric physical abuse" and "abusive head trauma." *Id.* at 518-519. While acknowledging the term "abusive head trauma" is an accepted diagnosis in the medical community and that experts may opine on whether injuries are accidentally or intentionally inflicted, the court held that such testimony in that context invades the province of the jury:

> we conclude 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. The ordinary understanding of the term "abuse"—as opposed to neglect or carelessness—implies a level of willfulness and moral culpability that implicates the defendant's intent or knowledge when performing the act that caused the head trauma. An expert may not offer an opinion on the intent or criminal responsibility of the accused.
>
> * * *
>
> [The expert's] testimony that KM's injuries were caused by "abusive head trauma" or otherwise amounted to "child abuse" strongly suggested that it was her opinion that whoever inflicted the injuries on KM did so with culpable state of mind; that is, her testimony plainly implicated whether defendant "knowingly or intentionally" caused serious physical harm to KM within the meaning of MCL 750.136b(2). Because [the expert] as in no better position than the jury to assess the intent that defendant had when he acted, her belief that his actions were abusive or amounted to child abuse were irrelevant and inadmissible as a matter of law. . . .

Id. at 523–25 (cleaned up).

Leave to appeal was sought in *McFarlane I,* and this Court ordered briefing and oral argument on the issue of whether using the terms

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"abusive head trauma" and definite pediatric physical abuse" to label the expert's diagnosis invaded the province of the jury. *People v McFarlane ("McFarlane II")* ___ Mich ___, 933 NW2d 692 (2019). Following briefing and argument, however, this Court denied leave to appeal. *Id.* 505 Mich 1059 (2020).

Following the denial of leave in *McFarlane II,* this Court was again confronted with the issue of whether similar testimony invaded the province of the jury. In *People v Ackley ("Ackley III"),* 506 Mich 984 (2020), this Court held consideration of the application in abeyance pending the outcome of *McFarlane II.* But following the denial of leave to appeal in the *McFarlane* this Court vacated the opinion in *Ackley* and remanded the matter back to the Court of Appeals "for reconsideration of its analysis of the expert testimony presented at trial in light of *McFarlane*." *Ackley III, supra.*

On remand, the Court of Appeals wrote that it was construing this Court's remand order as agreeing with the rule and reasoning of *McFarlane I,* and an indication that this Court has "adopted a per se rule that the diagnostic term 'abusive head trauma' does indeed invade the province of the jury when used in cases involving allegations of abuse, even if it is medically possible to determine that a particular injury was not accidentally-inflicted and the term constitutes a formal diagnosis recognized in the medical community." *People v Ackley ("Ackley IV"),* 336 Mich App 586, 592 (2021), *lv denied* 508 Mich 967 (2021). Further:

> The expert may not call that manner of injury "abuse," because, even if that is a term used in the medical community, it is also a legal conclusion and would be understood by laypersons to connote something different from what another doctor might understand.

Ackley II, at 595. *Ackley II* recognized that other forms of diagnosis testimony could also invade the province of the jury and cautioned that, "in the future, the bench and bar must be mindful of any impermissible words used by experts, and experts should be cautioned that some words and phrases may be accepted medical terminology but are unacceptable in a Michigan courtroom." *Id.* at 593–94.

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Contrary to the Court of Appeals' assertion, Dr. Nazer's "diagnosis" of "Medical Torture" was improper in the same way that the expert testimony was *McFarlane I, Ackley II,* as well as *Peterson,* and *Harbison.* Like the phrases "abusive head trauma" and "child abuse" the term "torture" mirrors the very crime Ms. Alexander faced. And the term "torture" connoted "a level of willfulness and moral culpability" that was similar to the specific intent required by the MCL 750.85. *Id.* at 523. Common definitions of "torture" include:

- "[T]he infliction of intense pain. . . *to punish, coerce, or afford sadistic pleasure*." (emphasis added) *Webster's Online Dictionary*, found at https://www.merriam-webster.com/dictionary/torture.

- "[T]he act of causing great physical or mental pain in order to persuade someone to do something or to give information, *or to be cruel to a person or animal*." (emphasis added) *Cambridge Dictionary,* found at https://dictionary.cambridge.org/us/dictionary/english/torture

- "[T]o cause great physical or mental pain to someone *intentionally*." (emphasis added) *Id.*

Indeed, the foundational elements of the diagnosis explained by Dr. Nazer clearly connotes a state of mind by the actor that is similar if not identical to the specific intent required for a conviction of Torture under MCL 750.85:

> And it's not just the physical assaults. To qualify for the diagnosis of medical torture, it has to be accompanied by at least two psychological maltreatments or two forms of psychological abuse. So, for example, isolation, deprivation, intimidation. If we have two of those and then two physical assaults or one prolonged physical assault, then we can reach the diagnosis of medical torture.
>
> So it's beyond the examination or beyond the evaluation of just physical abuse. This is a child who is diagnosed with physical abuse and it's psychological maltreatment as well.

T5 29-30. Remarkably, the Court of Appeals appears to have considered this testimony as helping to distinguish the crime of "Torture" from the diagnosis of "Medical Torture" so as not to convey an opinion on the *mens*

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rea required to convict. Appendix A at 7. The above testimony reveals just the opposite. It is difficult to imagine how a lay juror could hear an expert explain that a child had suffered two instances of "psychological maltreatment" or "psychological abuse," leading to a diagnosis of "torture," and *not* interpret that as the expert telling them that the defendant "intended to cause cruel or extreme physical or mental pain and suffering." MCL 750.85. The dots are even more closely connected as those lay jurors were likely to have associated the term "torture" with the infliction of pain for "sadistic pleasure" or an act intended to be "cruel to a person or animal."

Moreover, the expert made clear that her diagnosis wasn't just based on the medical evidence but on what others told her about what went on in MA's life. T5 21-29; PX 32, page 1 of 7, 2 of 7, 3.[5] Based on that non-medical information, Dr. Nazer opined that MA suffered from a "condition" that mirrored the very crime with which Ms. Alexander was charged. In addition to barring expert testimony that embraces ultimate jury questions, this Court has also disproved of "diagnosis" testimony that is based, not on a physical examination of the complainant but on information given to them about the alleged crime by hearsay declarants. *See People v Thorpe & Harbison*, 504 Mich 230, 255-256 (2019); *People v Smith*, 425 Mich 98, 109-110 (1986) (holding that "diagnosis" of "probable pediatric sexual abuse" based on the complainant's statements was improper noting that such testimony is not permissible because a "jury [is] in just as good a position to evaluate the victim's testimony as" the doctor.)

As in *McFarlane I,* the opinion invaded the jury's province. As in *Thorpe* and *Harbison,* the opinion was based on information that went

[5] As this exhibit is a medical record of a minor patient that contains personal information, it was filed in the Court of Appeals as an appendix to the Brief on Appeal under separate cover and under seal. Furthermore, undersigned counsel had access to only the unredacted version of the medical record, with the sections the parties had agreed to redact crossed out by hand. While it is believed that the jury did not see those sections, they are relevant because they show that facts and date were relied on by the expert were not in evidence, as MRE 703 requires.

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far beyond an assessment of MA's physical condition. And like in those cases, the opinion testimony was improper.

The Court of Appeals erred in holding that admission of Dr. Nazer's opinion was consistent with MRE 703, as it was based on facts and data that were neither admitted nor admissible at trial.

Under MRE 702, a court may admit expert testimony if it determines that scientific, technical, or other specialized knowledge would help the trier of fact better understand matters pertaining to the expert's knowledge. *People v Kowals*ki, 492 Mich 106, 120 (2012). But opinion testimony must pass additional muster under MRE 703, which focuses on the underlying facts or data upon which the expert bases his or her opinion testimony. *See Fackelman,* 489 Mich at 534.

While MRE 703 allows experts to consider facts and data provided to them by third parties, the rule also requires that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference ***shall be in evidence***." (Emphasis added.) Under the rule, "an expert witness may not base his or her testimony on facts that are not in evidence." *People v Unger,* 278 Mich App 210, 248 (2008). As both the drafter's of MRE 703 as and our Supreme Court have explained, an expert may express an opinion:

> only if that opinion is based ***exclusively*** on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony [Emphasis added].

468 Mich xcv, xcvi (emphasis added). staff comment to the 2003 amendment of MRE 703), *accord Fackelman*, 489 Mich at 534. As one treatise explains,

> The 2003 amendment of the Rule represented a sea change in the procedure for admitting expert testimony in Michigan courts. **Unless the underlying facts are actually admitted in evidence, an expert may no longer offer an opinion based on facts supplied to him or her by others, even if such facts are of the kind normally relied upon by the expert in his or her everyday practice**. Instead, expert opinion must be

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> carefully prepared with a view to eliminating all inadmissible facts as its basis and to actually offering into evidence all facts relied on by the expert.

2 Mich Ct Rules Prac, Evid § 703.1 (4th ed.) (emphasis added).

The Court of Appeals asserted that Dr. Nazer's testimony was MRE 703-compliant because "[t]he facts and data underlying Dr. Nazer's testimony were fundamentally presented in testimony, documents, and photographs admitted during the five-day jury trial." Appendix A at 10. Again the Court of Appeals was wrong, as it ignored and misconstrued the record.

To be sure, Dr. Nazer's opinion was based in part on the medical records obtained from Dr. Maqbool's prior examination and her own examination of MA, both of which were in evidence. T5 21-78; PX 31. Also, the jury heard about "whoopings" and bindings of MA through Ms. Alexander's police statement and, to a lesser extent, the two child witnesses. PX 38; T3 18-70. But the expert also made clear that her diagnosis was based on other key, including: 1) MA's out of court statements to the expert; 2) information relayed to the expert by the individual or individuals involved in MA's forensic interview; and 3) statements made to her by *Monisha Bowden*, MA's aunt and guardian. T5 21-27.

The Court of Appeals claims that information from those sources matched or overlapped with the trial evidence simply is not borne out by the record. See PX 32, page 1 of 7, 2 of 7, 3 of 7 (unredacted version). The forensic interview allegedly supplied the expert with more information than was admitted at trial regarding the frequency of MA being bound, as well as claims that MA: had been forced to sleep on "the ground" with inadequate bedding; that he had been kept outside while bound, and that he had been "forced" to go to the bathroom outside. PX 32 p. 1 (unredacted version). That degree of mistreatment simply did not come out at trial, either through MA's testimony or through Ms. Alexander's police statement. Compare T2 18-53; PX 38.

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Also overlooked by the Court of Appeals is that a key source for the expert's diagnosis, Monisha Bowden, did not even testify at trial. PX 32, pp 2-4. Rather *Ranisha* Bowden, Monisha's daughter and MA's godmother, was a fact witness who testified to the reasons why she had called for a welfare check for the children. Compare PX 32, pp 2-4, *with* T3 125-127, 131. The unredacted version of Dr. Nazer's report reveals *Monisha* Bowden had no firsthand knowledge of the alleged binding and abuse; instead, nearly all of it was her relaying hearsay claims. PX 32, p. 2. And as with the forensic interview, Monisha Bowden supplied Dr. Nazer with different and additional information than was admitted at trial. She alleged that MA had: beaten "all the time;" isolated from family, including Ms. Bowden; left alone in the trailer overnight; singled out and actively denied access to modern bathroom facilities; denied Christmas gifts while his siblings received them; denied dental care; kept out of school "since November"; denied food while his siblings were better fed; denied adequate bedding; kept isolated outside the trailer; denied adequate clothing, and that he's had his mouth duct-taped shut. PX 32 (unredacted version) at pp 2.3. Again, few if any of those facts had been presented at trial and the degree of alleged mistreatment portrayed by the secondhand information relayed by Monisha Bowden was far greater than the other evidence presented at trial. See eg T3 18-53; PX 38; PX 32 (unredacted version) at pp 2-4.

And contrary to the Court of Appeals' assertion, much of the off-record facts that formed the basis for the expert's opinion would be inadmissible even if offered into evidence. MA's out-of-court statement to Dr. Nazer herself was hearsay and did not fit within the exception of MRE 803(4) as it was made for the purpose of investigation rather than treatment. MRE 801, MRE 802. The same goes for MA's forensic interview statements. See PX 32, p.1; T5 20-21; *see also People v Shaw*, 315 Mich App 668, 675 (2016); *People v Kosters*, 175 Mich App 748, 751 (1989). Furthermore, as discussed above, Monisha Bowden never testified at trial and made statements (that themselves were relayed hearsay) to an expert gathering information as part of a criminal investigations such that they clearly were "testimonial" and barred by the Sixth Amendment's Confrontation Clause. *See Crawford v Washington,* 541 US 36, 53-54 (2004); *Fackelman,* 489 Mich at 531-535.

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The Court of Appeals dismissed the problems with inadmissible hearsay being relied on by citing prior decisions indicating that "an expert is allowed to recount and rely on hearsay if it as used as a basis to form an opinion. Appendix A at 10, citing *People v Lonsby*, 268 Mich App 375 (2005). A fact unmentioned by the Court of Appeals is that the authority cited appeared to have interpreted an outdated version of MRE 703, which did *not require* the underlying facts relied on by an expert to be admitted at trial. *See People v Caulley*, 197 Mich App 177, 194-195 (1977*), accord Lonsby, supra* at 383. Rather, the former version of MRE 703 merely provided that the trial court *may* require the facts relied on by the expert to have been admitted. *Id. see also Wiley v Henry Ford Cottage Hosp*, 257 Mich App at 488, 495 (2003)[6]; MRE 703, Staff Comment to 1978 Adoption, Staff Comment to 2003 Amendment. Now, however, the requirement that the underlying facts be admitted or admissible is mandatory, and since much of the hearsay relied on by Dr. Nazer was not admitted and could not have been admitted even if offered, the Court of Appeals is simply wrong. Appendix A at 10.

Admission of Dr. Nazer's improper opinion testimony was plain outcome determinative error.

Allowing Dr. Nazer to give a diagnosis of "Medical Torture", which invaded the province of the jury and violated MRE 703, was plain, outcome determinative error that requires reversal. *Carines,* 460 Mich at 763.

As argued above, Ms. Alexander contends the prosecution failed to present sufficient evidence to prove she inflicted the degree of injury and acted with the requisite intent necessary to convict her of Torture. MCL

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[6] The version of MRE 703 interpreted by *Caulley* provided that "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made know to the expert at or before the hearing. *The court may require that underlying facts or data essential to an opinion or inference be in evidence."* (emphasis added). *Wiley*, 257 Mich app at 495.

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750.85. See Issue I, supra. Even if this Court determines the evidence was sufficient to pass the sufficiency threshold on appeal, it cannot be disputed that this was a close case. Any jury could find that, while Ms. Alexander acted wrongfully, she did not specifically intend to cause the level of injury or suffering required by the statute. Additionally, any rational factfinder could have examined the photographs and listened to the properly-admitted medical testimony and concluded that the unsightly wounds on MA's extremities did not rise to the level of great bodily injury or "serious visible disfigurement."

Dr. Nazer's diagnosis likely pushed an otherwise hesitant and skeptical jury across the line separating a reasonable doubt from a conviction. The expert all but told the lay jurors how to decide the case by diagnosing MA with being the victim of "torture." While she attempted to distinguish between the legal and medical ramifications of the term "Medical Torture", the prosecutor leaned on Dr. Nazer's diagnosis as key evidence the jury should rely on to find MA was indeed "Tortured" in the legal sense as well. T5 195, 198. Surely, the improper testimony was the difference maker in this close case and the error was outcome determinative.

The Court of Appeals reasoned that any error was harmless because Ms. Alexander admitted doing things that may have harmed MA, Dr. Nazer would still have been able to tell the jury that MA's injuries were not accidentally inflicted, and because the emergency room doctor had concluded there was "possible child abuse." Appendix A at 8-9. This misses the point and reflects a fundamentally flawed prejudice analysis. In determining prejudice "the reviewing court should not focus alone on the sufficiency of the evidence that supports the verdict," nor may it affirm "simply because it concludes the jury reached the right result." *People v Mateo*, 453 Mich 203, 241 (1996). Thus, the mere fact that the remaining properly-admitted evidence *may* survive a sufficiency challenge when the improper evidence is removed from the picture does not render an evidentiary error harmless. Rather, the reviewing court must "determine how the improper evidence might have affected the jury's decision. *People v Young*, 425 Mich 470, 505 (1986), citing *Kotteakos v United States,* 328 US 750, 763 (1946). "Where the error

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asserted is the erroneous admission of evidence, the court engages in a comparative analysis of the likely effect of the error in light of the other evidence." *Id*. at 241 (emphasis added).

Here, while many of MA's injuries and Ms. Alexander's actions were not in dispute, the pivotal question for the jury was whether those actions and injuries amounted to the crime of Torture (not "child abuse) which, as discussed above, hinged on whether Ms. Alexender specifically intended to cause cruel or extreme physical or mental pain and suffering to MA and whether the injuries he suffered amounted to a serious visible disfigurement. MCL 750.85. Dr. Nazer distilled all of the facts down and packaged it up for the jury to explain to them, as a doctor and expert in the field, that all the evidence presented met the definition of "torture" inflicted with an intent that mirrored that of the charged crime.

The Court of Appeals also concluded any error was harmless because the jury heard the same improper opinion with regard to RA and acquitted Ms. Alexander of the child abuse charge involving her. Appendix A at 9. The court below also cited the fact that Mr. Scott was acquitted of the Torture charge after hearing the same testimony from Dr. Nazer. *Id*. There are two glaring flaws in this reasoning. First, Ms. Alexender was not on trial for Torture with regard to RA, only third degree child abuse. As the improper testimony addressed a different charge than the jury was called upon to deliberate with regard to RA, the fact it acquitted Ms. Alexander is beside the point.

Moreover, unmentioned by the Court of Appeals was that a *different* jury acquitted Mr. Scott, and while some of the evidence did overlap, his jury heard only Mr. Scott's police statement while Ms. Alexander's jury did not. Thus, it is impossible to assess how the improper evidence might have affected Mr. Scott's jury when the court did not have access to "all the evidence in the whole record" from that separate case to examine. That includes the "untainted evidence tending to show [Mr. Scott's] guilt" or "the evidence tending to create a doubt concerning [Mr. Scott's] guilt." *Mateo,* 453 Mich at 241,

The Court of Appeals was wrong in asserting the plain error from Dr. Nazer's testimony was not outcome-determinative.

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And the significant role that the improper opinion played in this close case rendered Ms. Alexander's trial fundamentally unfair, in both effect and appearance. *Carines*, 460 Mich at 772-773; *cf Ackley IV*, 336 Mich at 593. It is well-known that juries must decide cases based on facts and proof beyond a reasonable doubt, not on how some "expert" tells them to vote, which occurred here. Dr. Nazer's opinion testimony represents a blatant and serious violation of the rule against invading the province of the jury most recently mapped out in *McFarlane* and *Ackley,* but that has been around for decades.[7] As such, the error undermined the fairness, integrity, and public reputation of this trial, and reversal is required.

Reversal is Required under *Strickland v Washington.*

Alternatively, reversal is required because trial counsel's failure to object to the improper opinion testimony deprived Ms. Alexander of her constitutional right to the effective assistance of counsel. US Const, Amend VI; Mich Const 1963, art 1, § 20. *Strickland*, 466 US at 686; *People v Trakhtenberg,* 493 Mich 338 (2012). A successful ineffective assistance of counsel claim requires the defendant to show that: (1) that trial counsel performed deficiently and (2) that he or she suffered prejudice as a result of counsel's missteps. *Strickland*, 466 US at 687.

The first *Strickland* prong is met when defense "counsel's representation fell below an objective standard of reasonableness…. considering all the circumstances." *Strickland*, 466 US at 688. To establish the second prong, the defendant "must show that there is a

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[7] In *Ackley IV,* the Court of Appeals noted that "a deliberately or intentionally created error may constitute an affront to the integrity of the proceedings that precludes a finding of harmlessness irrespective of the error's practical effect on the outcome." 336 Mich at 593, *citing People v Robinson*, 386 Mich 551, 562-564 (1972). Ms. Alexander makes no claim that the prosecutor or the court maliciously or intentionally violated her rights by allowing the improper testimony. However, given the stark similarities between Dr. Nazer's testimony and that in the *McFarlane* and *Ackley* line of cases, the improper opinion certainly undermines the fairness, integrity, and public reputation of this closely-contested trial.

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reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id* at 694.

Defense counsel's failure to object to Dr. Nazer's diagnosis fell below the objective standard of reasonableness. Knowledge of the law applicable to the defendant's case is of course essential to a rendering of effective assistance. *People v Carrick*, 220 Mich App 17, 22 (1996). Defense counsel's apparent failure to understand MRE 703 and heed the guidance of *People v McFarlane* was unreasonable. In circumstantial cases, expert testimony regarding the nature, level, and source of harm suffered by child complainants can be key. When confronted with allegations of a heinous offense like the "torture" of a young child, there is a significant danger that the jury will pay much deference to an expert's testimony. *Cf, People v Beckley,* 434 Mich 691, 721-722 (1990); *People v Peterson,* 450 Mich 349, 374 (1995). An expert's supposed objective view offers jurors "a much sought-after hook on which to hang its hat" to help it reach the difficult decision of whether the defendant is guilty of such a crime. *Peterson,* 450 Mich at 374. Where, as here, an expert far exceeds what the law permits by phrasing her opinion in terms of the legal requirements for a conviction, it is incumbent upon any reasonable defense attorney to prevent the lay jurors from hearing it. In light of clear authority barring Dr. Nazer's opinion and obvious factors pointing to its devastating prejudicial impact, the lack of an objection was unreasonable.

Prejudice is established as well because the error undermined confidence in the outcome of the trial. *Strickland*, 466 US at 687. To establish *Strickland* prejudice, "[t]he defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case," *Id.* at 694, nor must she show by a preponderance of the evidence that the outcome was affected by the error. Instead, she need only show a reasonable probability that, but for the error, the result of the proceedings would have been different. *Id.* at 693-694.

Here, for many of the reasons the plain error was outcome determinative under the *Carines* test, counsel's failure to prevent Dr.

Nazer's improper testimony was prejudicial under *Strickland*. In a close circumstantial case such as this, failing to prevent the jury from hearing a respected expert "diagnose" the complainant of being the victim of the very crime with which Ms. Alexander charged undermines all confidence in the trial's outcome. *Strickland*, 466 US at 687. This Court should grant leave to appeal or peremptory relief.

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Conclusion and Relief Requested

For the reasons discussed above, Ms. Alexander respectfully requests that this Honorable Court grant leave to appeal or any other peremptory relief it deems just and appropriate.

Respectfully submitted,

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Respectfully submitted,

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