STATE OF WISCONSIN

IN SUPREME COURT

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NO. 2021AP001346-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOBERT L. MOLDE,

Defendant-Appellant.

RESPONSE TO PETITION FOR REVIEW

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This Court should deny the State of Wisconsin's petition for review because it does not meet the criteria for review. The court of appeals' judge-authored decision in ***State v. Jobert L. Molde***, No. 2021AP1346-CR (Wis. Ct. App. May 21, 2024) (not recommended for publication), agreed with Molde that his trial counsel was constitutionally ineffective for not objecting to an expert's statistical testimony at the jury trial regarding the truthfulness of alleged child sexual assault victims, and therefore reversed Molde's convictions for first-degree sexual assault of a child under the age of 12 and incest with a child.

On appeal, Molde asserted that the expert's statistical testimony about the frequency of false child sexual assault reports provided an opinion on the complainant's credibility and constituted impermissible vouching testimony in violation of ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). He further asserted that the trial was one in which the evidence for and against guilt was nearly in equipoise and in which external endorsements of credibility carried significant weight; therefore, the expert's impermissible vouching testimony prejudicially deprived him of his right to have his fate determined by a jury making the credibility determinations, so clearly crucial in these cases, without guidance from an expert, in stark mathematical terms, bolstering the credibility of the complainant and thereby impugning his credibility in a case where credibility was the only contested issue.

The court of appeals agreed with Molde that his trial counsel performed deficiently by failing to object to the expert's statistical testimony because the law on impermissible vouching testimony was well-settled, and Molde's trial counsel should have known to object to the expert's testimony for two reasons. First, the expert was directly

involved in the complainant's examination following her sexual assault accusation against Molde, and the expert's answer to the juror's question regarding a child's propensity to tell the truth when reporting sexual assault would inevitably be seen by the jury as a personal or particularized endorsement of the complainant's credibility. Second, the expert's testimony—which effectively stated to the jury that 99 percent of all child sexual assault reports are true—provided a mathematical statement approaching near certainty that false reporting simply does not occur. The court of appeals further agreed that as a result of counsel's deficient performance, there is a reasonable probability, that absent counsel's error, the result of the proceeding would have been different.

The State now asks this Court to accept review to decide whether statistical evidence of the prevalence of false reports of abuse in sexual assault prosecutions violates the ***Haseltine*** rule and to clarify the state of the law at the time of Molde's jury trial. (Pet. 7–8) (citing Wis. Stat. § (Rule) 809.62(lr)(c)). The State urges this Court to accept review to "correct ***Mader***'s mistaken treatment of statistical testimony as ***Haseltine*** testimony." (Pet. 7) (citing Wis. Stat. § (Rule) 809.62(lr)(c)). The State's petition additionally argues that the court of appeals erred in concluding that counsel's alleged error in not objecting to the expert's statistical testimony was prejudicial. (Pet. 24.)

This case does not warrant review for at least three reasons. First, the State's position that an expert's statistical testimony of near mathematical certainty as to the infrequency of false reporting does not have the effect of vouching for the credibility of the complainant when presented at a jury trial in which the evidence for and against guilt was nearly in equipoise defies logic. The expert's testimony

provided a mathematical statement approaching near certainty that false reporting simply does not occur. There's no possibility the jury could have interpreted the expert's statistical testimony as something other than a comment on complainant's credibility. She was the only person in the courtroom to whom the percentage would have applied. Simply put, if the jury believed the expert, it would believe that the likelihood of the complainant falsely alleging sexual assault was virtually impossible.

Second, the rule on impermissible vouching testimony set forth in ***Haseltine*** and its progeny was well-established at the time of Molde's jury trial.

Third, and finally, all Wisconsin cases that have addressed whether the admission of impermissible vouching testimony is prejudicial to a defendant whose trial is a pure credibility contest have held that such testimony undermines confidence in the reliability of the outcome of the trial and thus its admission prejudices the defendant.

In sum, the State's petition does not meet this Court's criteria for review. The State asks this Court to accept an argument that defies logic, and which has been almost universally rejected by all courts that have considered it. Because the case calls for the application of well-settled principles to the factual situation, review is unnecessary and unwarranted. Simply put, the court of appeals' decision creates no conflict or need for this Court to clarify the law. Wis. Stat. § (Rule) 809.62(lr)(c). The State's petition also does not demonstrate a need for this Court to "consider establishing, implementing or changing a policy within its authority." Wis. Stat. § (Rule) 809.62(lr)(b). Similarly, the State's petition does not demonstrate a need to reexamine current law. Wis. Stat. § (Rule) 809.62(lr)(e). Further,

because the court of appeals' application of ***Haseltine*** and its progeny were neither novel nor a deviation from well-settled law, the State's petition presents no significant question of state or federal constitutional law. Wis. Stat. § (Rule) 809.62(lr)(a). Finally, to the extent the State disagrees with the court of appeals' assessment of prejudice, mere error correction is not a basis for this Court's review. *See* ***State v. Minued***, 141 Wis. 2d 325, 328, 415 N.W.2d 515 (1987) (it is not the supreme court's institutional role to perform error-correcting functions); ***State ex rel. Swan v. Elections Bd.***, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986) (the supreme court is not an error-correcting court but a court "intended to make final determinations affecting state law, to supervise the development of the common law, and to assure uniformity of precedent throughout the state."); Wis. Stat. § (Rule) 809.62(1r). The petition for review should therefore be denied.

ARGUMENT

NONE OF THE ISSUES THAT THE STATE RAISES WARRANTS THIS COURT'S REIVEW.

A. The court of appeals correctly concluded that the expert's statistical testimony of near mathematical certainty as to the infrequency of false child sexual assault reporting is barred by *Haseltine* and its progeny.

A witness may not testify to the credibility of another competent witness. ***Haseltine***, 120 Wis. 2d at 96. In the context of a child sexual assault case, that means an expert witness may not present testimony with the purpose or *effect* of conveying to the jury whether he or she believes the child complainant. *See* ***id.***; *see also* ***State v. Tutlewski***, 231 Wis. 2d 379, 388, 605 N.W.2d 561 (Ct. App. 1999) (explaining that courts review the "purpose and effect" of

expert testimony to determine whether it violates ***Haseltine***). The court of appeals correctly concluded that Dr. Alice Swenson's expert testimony that child sexual assault "[f]alse disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures," falls squarely within the meaning of impermissible vouching testimony prohibited by ***Haseltine*** and its progeny.

The State's petition contends that the court of appeals erred in treating Swenson's expert testimony that only 1% percentage of all child sexual assault reports are false as ***Haseltine*** testimony because "[s]uch testimony is *not* testimony about whether the victim in a particular case is being truthful: by its very nature, testimony about statistics says little about whether a particular individual is telling the truth." (Pet. 5) (emphasis in original). The State further argues that "Swenson did not link her statistical testimony to Lauren[1] by suggesting that her report was in some way like that of the 99% of reports that are truthful." (Pet. 21.)

The State's position defies logic. There's no possibility the jury could have interpreted Swenson's statistical testimony as something other than a comment on Lauren's credibility. She was the only person in the courtroom to whom the percentage would have applied.

Swenson also gave her opinion after lengthy testimony concerning Lauren's examination. As noted by the court of appeals, while Swenson did not personally interview Lauren, she supervised, in real time, Lauren's interview as the nurse practitioner's supervising physician at the children's advocacy center, as well as Lauren's physical examination, and she testified to these facts at trial. (Pet-App. 17.)

[1] Lauren is the pseudonym the court of appeals used for the complainant.

The State twice relied upon Swenson's 1% claim in its closing argument, clearly implying Lauren was, as a sexual assault complainant, highly unlikely to be lying. (Pet-App. 5.) The near mathematical certainty (99%) that all child sexual assault reports are truthful *is* the functional equivalent of an opinion on Lauren's veracity.

The ***Haseltine*** rule focuses on the *effect* of the expert's testimony. Swenson's answer improperly vouched for Lauren allegation by suggesting a mathematical certainty that sexual abuse reports from children were not false. Simply put, if the jury believed Swenson, it would believe that the likelihood of Lauren falsely alleging sexual assault was virtually impossible.

Given Swenson's testimony that she supervised Lauren's sexual assault evaluation, her statistical testimony regarding a child's propensity to tell the truth when reporting a sexual assault would inevitably be seen by the jury as a personal or particularized endorsement of Lauren's credibility.

As recently stated by the California Court of Appeals, "the clear weight of authority in our sister states, the federal courts, and the military courts finds such evidence inadmissible." ***People v. Wilson***, 33 Cal. App. 5th 559, 570, 245 Cal. Rptr. 3d 256, 265 (2019).[2] The vast majority of other jurisdictions have reached the same conclusion as the court of appeals when addressing whether similar rates of

[2] The court of appeals decision in ***State v. Morales-Pedrosa***, 2016 WI App 38, 369 Wis. 2d 75, 879 N.W.2d 772, is one of the many cases cited by the ***Wilson*** court. The California Court of Appeals summarizes this Court's decision in ***Morales-Pedrosa*** as "distinguishing ***Brooks*** and ***Snowden*** on ground that generalized statement that 90 percent of children claiming to have been abused are telling the truth was 'less obviously objectionable than testimony that "99.5%," "98%," or even "92–98%" are telling the truth.'" 33 Cal. App. 5th at 570, 245 Cal. Rptr. 3d at 265.

statistical testimony of near mathematical certainty (99% and higher) is the functional equivalent of a witness vouching for the credibility of the complainant. *See* ***United States v. Brooks***, 64 M.J. 325, 326–27, 329–30 (C.A.A.F. 2007) (expert testimony given by clinical psychologist who examined the victim that only 2% of all sexual assault allegations are false "invaded the province of the [jury] members" and was "plain[ly] and obvious[ly]" prejudicial error because "[t]his testimony provided a mathematical statement approaching certainty about the reliability of the victim's testimony."); ***Snowden v. Singletary***, 135 F.3d 732, 737–739 (11th Cir. 1998) ("[C]onsidering the lack of other evidence of guilt" and the fact that the government repeatedly "stressed the significance" of this testimony during its closing argument to the jury, expert testimony that "99.5% of children tell the truth" in sexual abuse cases "violated [defendant]'s right to due process by making his criminal trial fundamentally unfair" and the impropriety of this type of numerical credibility-bolstering evidence, "in both state and federal trials, can hardly be disputed."); ***Powell v. State***, 527 A.2d 276, 278 (Del. 1987) (expert testimony that "ninety-nine percent of the alleged victims involved in sexual abuse treatment programs in which she was also involved 'have told the truth'" deprived defendant of his "substantial right" to have "his fate determined by a jury making the credibility determinations,…."); ***State v. Lindsey***, 149 Ariz. 472, 476–77, 720 P.2d 73 (1986) (expert testimony that "99 percent of [child] victims tell the truth" was prejudicial error because "[q]uantification of the percentage of witnesses who tell the truth is nothing more than the expert's overall impression of truthfulness" and "goes beyond 'ultimate issues' and usurps the function of the jury."); ***State v. Myers***, 382 N.W.2d 91, 92–98 (Iowa 1986) (reversing admission of expert

testimony that included a statement that "out of about … 75 cases, there was only one … where the child was not telling the truth" and "one in 2500 children … did not tell the truth, which would make it exceedingly rare" because "the effect of the opinion testimony was to improperly suggest the complainant was telling the truth, and consequently, the defendant was guilty" and such opinion testimony "crossed that 'fine but essential' line between an 'opinion which would be truly helpful to the jury and that which merely conveys a conclusion concerning defendant's legal guilty'"); ***People v. Julian***, 34 Cal. App. 5th 878, 246 Cal. Rptr. 3d 517, 522–526 (2019) (expert testimony that rate of false allegations "is as low as one percent" was highly prejudicial and deprived defendant of his right to a fair trial).

To support its argument that the court of appeals erred in treating such statistical testimony of near mathematical certainty as ***Haseltine*** testimony, the State's petition cites *one* foreign case, ***State v. Harrison***, 267 Or. App. 571, 340 P.3d 777 (2014),[3] in which the Court of Appeals of Oregon concluded that an expert's statistical testimony about the percentage of false child sexual abuse accusations did not run afoul of the prohibition on vouching. The State, however, grossly overvalues the strength of ***Harrison***.

First, ***Harrison*** is readily distinguishable from the case at bar in the following critical respect: the expert in ***Harrison*** provided a percentage range between 96 and 98 percent and the state told the jury in its closing argument that, "statistically," there was a 95 percent chance that the victims were telling the truth. 340 P.3d at 779.

Second, the ***Harrison*** court's holding is at odds with every other foreign court decision. The vast majority of other jurisdictions

[3] ***Harrison*** was cited by the court of appeals in ***Morales-Pedrosa***.

have rejected the admission of expert testimony that expresses an opinion with respect to the credibility or truthfulness of sexually abused children as a class even at lower rates than 99 percent. *See* ***Wilson v. State***, 90 S.W.3d 391, 392–93 (Tex. Ct. App. 2002) (expert testimony that "only two to eight percent of children lie" about being sexually assaulted "did not aid, but supplanted, the jury in its decision on whether the child complainant's testimony was credible," and was error); ***State v. Williams***, 858 S.W.2d 796, 801 (Mo. Ct. App. 1993) (doctor's testimony that incidents of children lying about sexual abuse is "less than three percent" was inadmissible as an "improper quantification of the probability of the complaining witness'[s] credibility."); ***State v. Vidrine***, 9 So. 3d 1095, 1111 (La. Ct. App. 2009) (expert testimony that "ninety-five to ninety-eight percent" of allegations of sexual abuse are valid impermissibly bolstered the complainant's testimony and was prejudicial error); ***State v. W.B.***, 205 N.J. 588, 613–14, 17 A.3d 187 (2011) ("[s]tatistical information quantifying the number or percentage of abuse victims who lie deprives the jury of its right and duty to decide the question of credibility of the victim based on evidence relating to the particular victim and the particular facts of the case."); ***State v. MacRae***, 141 N.H. 106, 110, 677 A.2d 698 (1996) (expert testimony was inadmissible "because it improperly provided statistical evidence that the victim more probably than not had been abused.").

Accordingly, the court of appeals correctly concluded that the expert's statistical testimony of near mathematical certainty as to the infrequency of false child sexual assault reporting is barred by ***Haseltine*** and its progeny. (Pet-App. 16–17.)

B. The court of appeals correctly concluded that the rule on impermissible vouching testimony set forth in *Haseltine* and its progeny was well-established at the time of Molde's jury trial.

The rule on impermissible vouching testimony was well-established at the time of Molde's jury trial. The foundational case governing impermissible vouching testimony is ***Haseltine***. In ***Haseltine***, the court of appeals held that an expert witness may not present testimony that has the *effect* of commenting on the complainant's credibility. 120 Wis. 2d at 96. The court of appeals reasoned that admitting such expert opinion testimony that has the effect of commenting on a witness's credibility, "with its aura of scientific reliability, creates too great a possibility that the jury [will] abdicate[] its fact-finding role …." ***Id.*** Crucially, ***Haseltine***'s governing principle was not limited to the particular facts of the case. Rather, ***Haseltine*** established a broad prohibition on *all* witness opinion testimony that has the *effect* of commenting on a witness's credibility. ***Haseltine*** was further decided 30 years before Molde's jury trial.

Subsequent case law has consistently reiterated both the substance of the anti-vouching rule set forth in ***Haseltine*** and the importance of leaving credibility determinations to the jury. Both ***State v. Morales-Pedrosa***, 2016 WI App 38, 369 Wis. 2d 75, 879 N.W.2d 772, and ***State v. Mader***, 2023 WI App 35, 408 Wis. 2d 632, 993 N.W.2d 761, *review denied* (WI Sept. 26, 2023) (No. 2022AP382-CR), were decided on ***Haseltine*** grounds. As such, while ***Morales-Pedrosa*** and ***Mader*** addressed a new manner of commenting on witness's veracity, both cases applied ***Haseltine***'s well-established rule on impermissible vouching testimony.

Moreover, ***Morales-Pedrosa*** provided clear and compelling authority that statistical testimony that approaches near mathematical certainty is the functional equivalent of a witness improperly vouching for the credibility of the complainant. 2016 WI App 38 at ¶¶ 24–26. Because ***Morales-Pedrosa*** was published in 2016—several years before Molde's trial—and applied the well-established and long-standing ***Haseltine*** rule against vouching for the credibility of the complainant, ***Morales-Pedrosa***'s observation that a "90 percent" probability the complainant is telling the truth is "less obviously objectionable" than testimony of a 98 or 99.5% probability, clearly implies that a probability of 99% as testified by Swenson *is* obviously objectionable and violates ***Haseltine***. Molde's trial counsel should have been aware of the issue presented in ***Morales-Pedrosa*** and recognized that an expert's statement that "99.5%" or "98%" of children claiming to have been abused are telling the truth is the functional equivalent of saying that the victim in a given case is truthful or should be believed. ***Id.*** at ¶ 25.

Accordingly, the court of appeals correctly concluded that the rule on impermissible vouching testimony set forth in ***Haseltine*** and its progeny was well-established at the time of Molde's jury trial. (Pet-App. 4–5, 16–18.)

C. The court of appeals correctly concluded that Swenson's expert statistical testimony was prejudicial.

This Court should further reject the State's request for fact-driven error-correction of this well-supported court of appeals decision.

As the court of appeals observed, the evidence at trial "for and against guilt was nearly in equipoise." (Pet-App. 5.) Indeed, other than Lauren's testimony, there was no direct evidence to support the allegation that Molde had sexually assaulted her. (Pet-App. 21.) There was no confession, no eyewitness testimony, no physical evidence, no biological evidence, and no medical evidence corroborating Lauren's testimony. (*Id.*) During the interview with law enforcement, Molde repeatedly and vehemently denied Lauren's accusations. (Pet-App. 24.) Moreover, Molde maintained his innocence throughout the circuit court proceedings, including at trial. (Pet-App. 24–25.)

Moreover, Lauren provided differing and inconsistent accounts of the alleged incident. (Pet-App. 21–25.) All six testifying members of Molde's family also expressed doubts about Lauren's allegations, (Pet-App. 20–24), with Lauren's cousin testifying that Lauren had provided her with inconsistent accounts of the alleged incident, (Pet-App. 24).

Additionally, Molde offered a theory as to why Lauren would falsely accuse him. (Pet-App. 25.) Molde suggested that Lauren had a discernable motive to make up the allegation, that being her immense dissatisfaction with living at her grandparents' residence and all the rules and restrictions that came with living there, as well as her documented hunger for attention and status. (Pet-App. 25–26.) This theory was supported by Stephanie's testimony that Lauren wrote in her diary how self-injurious behavior was getting a lot of attention

amongst her group of friends. (Pet-App. 25.) Molde's theory was also supported by Lauren's cousin's testimony that Lauren wanted to run away because she was mad at her parents. (Pet-App. 26.)

Finally, the State's assertion that "the effect of any error in admission of the [improper vouching testimony] was blunted by the jury being properly instructed that it was not bound by such testimony," was rejected by the court of appeals who concluded that "the presumption that the jury followed these instructions has been rebutted, given the foregoing discussion." (Pet-App. 26–27.)

Several Wisconsin cases have similarly addressed whether the admission of impermissible vouching testimony is prejudicial to a defendant whose trial is a pure credibility contest. Some have addressed that question in the context of harmless error review (*see, e.g.*, ***State v. Romero***, 147 Wis. 2d 264, 279, 432 N.W.2d 899 (1988); ***Haseltine***, 120 Wis. 2d at 96), and some have addressed it in determining whether the defendant received ineffective assistance of counsel (*see, e.g.*, ***State v. Krueger***, 2008 WI App 162, ¶¶ 17–19, 314 Wis. 2d 605, 762 N.W.2d 114). All have held that such testimony "undermines [] confidence in the reliability of the outcome" of the trial and thus that its admission prejudices the defendant. *See* ***id.***, ¶ 20. These cases further support the court of appeals' prejudice determination in the present case.

For the reasons stated above, the State's petition does not meet the criteria for review. *See* Wis. Stat. § (Rule) 809.62(lr).

CONCLUSION

This Court should deny the petition for review.

Dated this 1st day of July, 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 3,581 words.

Dated this 1st day of July, 2024.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 1st day of July, 2024.

Electronically signed by:

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