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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Gleicher, C.J., Markey, and Patel, JJ

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff—Appellant,

vs.

Supreme Court No. _____

Court of Appeals No. 353052
Lower Court No. 19-002078-FH

LANTZ HOWARD WASHINGTON

Defendant—Appellee.
_____/

PLAINTIFF--APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Plaintiff-Appellant appeals the December 1, 2022 published opinion and order of the Court of Appeals vacating Defendant's conviction and remanding for a new trial. (Gleicher, C.J., Markey and Patel, JJ.)(Published Opinion - Appendix A). The opinion was not unanimous – Judge Markey writing a dissent. (Dissent – Appendix B). The People filed a timely motion for reconsideration on December 14, 2022 (Appendix C), denied by Order dated January 12, 2023 (Motion - Appendix D) (Judge Markey would grant motion for reconsideration). This application is filed within 56 days of the Court of Appeals' Order as required by MCR 7.305(C)(2)(c).

The People file this application, requesting this Court correct two significant errors. While this Court is not an "error correcting Court," the errors here are jurisprudentially significant. First, the majority for the first time ever recognized and applied a theory of "implied testimonial hearsay." In so doing, the majority rejected *People v Jones*, 228 Mich App 191; 579 NW2d 82 (1998) and *People v Propp* (on remand), ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 343255), creating a new "implied testimonial hearsay" theory.

The second, and perhaps even more legally significant error, is the majority's erroneous view of the corpus delicti rule. The majority determined Defendant's statements to a booking officer (overheard by the officer in charge) and statements to his mother (during a recorded phone call) were admitted in violation of the corpus delicti rule. In reaching its decision, the majority wrongly conflated admissions of

fact with confessions of guilt. The majority's view of the corpus delicti rule conflicts with this Court's holding in *People v Konrad*, 449 Mich 263; 536 NW2d 517 (1995). Because the Court of Appeals decision is clearly erroneous, will cause material injustice, and conflicts with Supreme Court and Court of Appeals decisions, relief is sought under MCR 7.305(B)(5)(a) and (b). Plaintiff-Appellant, therefore, respectfully requests this Court grant their Application for Leave to Appeal, reverse the decision of the Court of Appeals, and affirm the conviction and sentence of the Defendant-Appellee.

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STATEMENT OF ORDER APPEALED FROM

Plaintiff-Appellant seeks review of the published opinion and order vacating Defendant's conviction dated December 1, 2022. (Gleicher, C.J., Markey and Patel, JJ.) Judge Markey issued a separate opinion, dissenting from the majority. The Court of Appeals denied Plaintiff-Appellant's motion for reconsideration by Order dated January 12, 2023. (Judge Markey would grant motion for reconsideration.)

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STATEMENT OF QUESTIONS PRESENTED

The Plaintiff-Appellant states the questions presented as follows:

I. Did the Court of Appeals clearly err by finding the trial court abused its discretion by admitting "implied testimonial hearsay" against him in violation of the Confrontation Clause, Sixth Amendment of the United States Constitution and Article 1, § 20 of the Michigan Constitution?

The trial court was not presented with this question.
The Court of Appeals answered: NO
The Plaintiff-Appellant answers: YES
The Defendant-Appellee answers: NO

II. Did the Court of Appeals clearly error by holding the error was not "harmless beyond a reasonable doubt," excluding Defendant's incriminating statements of fact based on the corpus delicti rule?

The trial court was not presented with this question.
The Court of Appeals answered: NO
The Plaintiff-Appellant answers: YES
The Defendant-Appellee answers: NO

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STATEMENT OF FACTS

Defendant, Lantz Howard Washington, was arrested on April 8, 2019, on the Canadian side of the Blue Water Bridge after he drove his red truck through the toll lane on the American side without stopping at the booth to pay the toll. The Canadian authorities returned Defendant, truck, and body armor to the American authorities. There are no places for travelers to stop and obtain body armor between the United States and Canada – including on the Blue Water Bridge.[1]

A. **The Blue Water Bridge**.

The Blue Water Bridge is built over the St. Clair River, connecting the United States and Canada. Michigan Department of Transportation Bridge Safety Officers in Port Huron Michigan, working in booths collecting tolls from vehicles travelling over the Blue Water Bridge from the United States to Canada.[2] The toll booth area has a stop sign and lift gate, requiring vehicles to stop and pay tolls before the lift gate raises, enabling vehicles to proceed through to the Bridge over to Canada. The gate returns to its original position after a vehicle passes through, preventing the next vehicle from proceeding through without paying a fare.[3]

B. **Defendant jumps the toll.**

On April 8, 2019, at approximately 5:00 p.m., Officer Fenner witnessed a truck "[blow] through [her] lane" without paying a toll.[4] The arm of the gate was raised at

[1] Jury Trial, dated 1/28/20, p. 159-160
[2] Jury Trial, dated 1/28/20, p. 122, 128
[3] Jury Trial, dated 1/28/20, p. 124
[4] Jury Trial, dated 1/28/20, p. 130, 135

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the time due to a van in front of the truck paying the bridge fare. Officer Fenner notified her supervisor that someone had "jumped the toll."[5] The toll booth was equipped with a video camera that captured the truck toll jumping, although the high speed of the truck made specific identification of Defendant impossible.[6] Still photographs from the video show a red object in the truck's cabin. Officer Fenner testified she saw red clothing in the cabin of the truck.[7] She could not specifically identify the driver based on the truck's speed.[8] The trial prosecutor admitted these still photographs from the video into evidence.

C. After Defendant jumps the toll, he crosses into Canada failing to stop at Canadian Customs.

The truck drove over the Blue Water Bridge into Canada without stopping at Canadian Customs. The truck finally stopped in an area designated for secondary inspections. Canadian Border Services Agency (CBSA) Officers observed Defendant exit the truck and attempt to run away on foot. CBSA officers saw Defendant wearing body armor under his red t-shirt. CBSA officers apprehended Defendant, who physically resisted CBSA Officers' efforts to detain Defendant, place him in a CBSA vehicle, and return him to the United States. CBSA Officers removed the body armor from Defendant prior to returning him to the United States.[9]

---

[5] Jury Trial, dated 1/28/20, p. 130 - 131
[6] Jury Trial, dated 1/28/20, p. 132
[7] Jury Trial, dated 1/28/20, p. 139-140
[8] Jury Trial, dated 1/28/20, p. 136, 140
[9] The trial prosecutor admitted a U.S. Customs and Border Protection Record bearing these facts at preliminary examination.

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Despite the trial prosecutor's efforts to obtain permission from the Canadian government to produce CBSA Officer Lavers for trial, his request was denied by official response from the Canadian government received January 24, 2020 – the Friday before trial.[10]

D. CBP Officer Stockwell takes custody of Defendant from CBSA Officer Lavers.

CBP Officer Stockwell worked at the passenger processing building at the Blue Water Bridge.[11] His job responsibilities included inspecting individuals re-entering the United States.[12] On April 9, 2019, he received information from CBSA about a border-crossing incident involving Defendant. CBP Officer Stockwell saw Defendant in the backseat of one of their cruisers when he met with CBSA Officers. He also saw CBSA Officers had returned with a Ford pick-up truck.[13] CBP Officer Stockwell took custody of Defendant.[14] CBSA Officer Lavers also turned over body armor to CBP Officer Stockwell.[15] CBP Officer Stockwell turned over Defendant, the body armor, and truck to Port Huron Police Department (PHPD) Officer Kyle Whitten.[16] A tow truck company impounded Defendant's truck.[17] Defendant had on a red shirt.[18]

[10] Motion Hearing, dated 1/27/20, p. 8
[11] Jury Trial, dated 1/28/20, p. 147
[12] Jury Trial, dated 1/28/20, p. 147
[13] Jury Trial, dated 1/28/20, p. 149
[14] Jury Trial, dated 1/28/20, p. 151
[15] Jury Trial, dated 1/28/20, p. 152
[16] Jury Trial, dated 1/28/20, p. 153-154
[17] Jury Trial, dated 1/28/20, p. 157
[18] Jury Trial, dated 1/28/20, p. 157

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There are no places for travelers to stop and obtain body armor between the United States and Canada – including on the Blue Water Bridge.[19]

E. The trial court admitted the body armor into evidence over Defendant's objection.

At the January 28, 2019 jury trial, Defendant's counsel objected to the admission of the bulletproof vest, arguing a lack of foundation for its admissibility without CBSA Officer Lavers.[20] The trial court overruled trial counsel's objection, allowing the body armor into evidence, but concluded any statements made by CBSA Officer Lavers to CBP Officer Stockwell constituted inadmissible hearsay. The following colloquy between CBP Officer Stockwell and the trial prosecutor regarding CBP Officer Stockwell's contact with CBSA occurred during Defendant's trial:

> Q And that, that Defendant's name, do you recall his name?
>
> A Mr. Washington.
>
> Q Okay. And you were able to identify him?
>
> A Yes, sir.
>
> Q Okay. Who gave you custody of the Defendant at that location?
>
> A I, I don't know which specific CBSA officer turned him over to us. We actually, me and the guys that work with me, took him out of the cruiser. So, he was in the back.
>
> Q Okay, so a collective group of you?
>
> A There was.
>
> Q Okay.

[19] Jury Trial, dated 1/28/20, p. 159-160
[20] Jury Trial, dated 1/28/20, p. 87-89

A There was about six of us.

Q And you were a part of that process?

A I was.

Q At some point did Officer Lavers from the Canadian services hand you any other evidence?

A Yes, he did.

Q What did he hand you?

A He handed –

Q Just specifically related to any armor.

A A body armor.

Q Yes, sir.

A A piece of body armor that you would –

Q And so that was turned over to you, as well?

A It was, yes, sir.

Q Now, without saying anything about what was said, the only question I have for you is were there communications between you and Officer Lavers?

A There were.

Q Okay. And, and, and based on those communications you took custody of the Defendant?

A Yes, we did.

Q And you took possession of the body armor that was turned over at the same time?

A Yes, sir.

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> Q Did you take, you said you took possession I'm sorry, you said there was a truck that was returned?
>
> A There was.
>
> Q What type of truck was returned?
>
> A It was a Ford pick up truck.[21]

The body armor was entered into evidence over trial counsel's objection.[22] During cross-examination, CBP Officer Stockwell admitted that he did not see Defendant wearing or possessing the body armor prior to collecting it from CBSA Officer Lavers.[23]

F. Defendant's statements of fact connected him to the body armor.

PHPD Officer Kyle Whitten placed Defendant under arrest.[24] He took possession of evidence, including the body armor.[25] PHPD Officer Whitten transported Defendant to the St. Clair County Intervention Center (Jail). During the booking process, Officer Whitten overheard Defendant say "he was wearing the body armor because he was afraid people were going to kill him" as he completed the Defendant's paperwork. [26]

Defendant admitted to wearing body armor during a recorded phone call with his mother on April 27, 2019. [27] The trial prosecutor played the recording for the jury:

> BY MR. SODERBERG:

[21] Jury Trial, dated 1/28/20, p. 151-153
[22] Jury Trial, dated 1/28/20, p. 155.
[23] Jury Trial, dated 1/28/20, p. 158
[24] Jury Trial, dated 1/28/20, p. 161
[25] Jury Trial, dated 1/28/20, p. 163
[26] Jury Trial, dated 1/28/20, p. 167, 169
[27] Motion Hearing, dated 1/27/20, p. 4-5

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Q And again, Detective Fantin, this is only an audio recording; is that correct?

A That's correct.

Q There's no visual component to it, correct?

A Correct.

"Hello. This is a collect call from Lantz, an inmate at St. Clair County Jail. You may reject this call. To use your credit or debit card, please press one. To decline this call press four. If you would like to permanently block your number from receiving calls from this facility press six. If you do not want to connect this call, but elect to fund an account to pay for future calls please hang up and dial 800 -- this call will cost 21 cents per minute, plus any applicable federal, state and local taxes and the one-time transaction fee of $3.00. You will only be charged the per minute rate for the amount of time you were on the phone. If you do not want to connect this call, but would like to fund the account to pay for future calls please hang up and dial 800-844-6591. This call is subject to recording and monitoring. To continue press one. To disconnect press two. Thank you for using Securus. You may start the conversation now.

"Mother."

"What is it?"

"I don't mean to bother you, but- - "

"Well, you are."

"I know. I know. I know. But all deeds are in my name and I can't do nothing without James Griffin because his name is on the title too. And what I need is for him to get Dr. Buzzard (phonetic). He can get it from Johnny. Dr. Buzzard will give him the money to get me out and I, we can, we intend to go get the money or whatever. I can't do nothing without him."

"What is Johnny's number?"

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"248-636-6338."

"I already called that number and they, they, they said I have the wrong number."

"It's 248."

"I got 248-636-6368."

"No, no, 6338."

"Then why did you give me 6368?"

"I don't know if I gave you 6 -- 248 --"

“638."

"Nope. 248-636."

"Yep."

“6338"

"That's not enough numbers."

"What else you got?"

“248"

"Yep."

“636"

"Yep."

“6338."

"Yeah. That's enough numbers."

"Okay, I'll call him."

"Okay."

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> "I want to know what the hell is going on because I, I can't keep paying for these calls. What the hell--"
>
> "I'll pay for it. I'll pay for all the calls." (Inaudible).
>
> "What did you do? What happened?"
>
> "What happened is I was getting threats, right, and James gave me a bulletproof vest. I put on the bulletproof vest."
>
> "That's what I heard, you had a bulletproof vest on."
>
> "And I went to the police with it on. I was fear for my life, they was threatening me."
>
> "Why you in Port Huron?"
>
> "I went to Port Huron because Tamika was looking up the property and the lawyer's in Port Huron that I had for the property."
>
> "So what are you being charged with?"
>
> "Possession of body armor, which is no charge. They're just holding me to protect me, mother."
>
> "So how come you can't tell them you want to go?"
>
> "Ma, it's a long story, I can't explain it all. It's, it's a whole lot to it."[28]

G. Defendant's trial testimony.

Defendant testified at trial, denying that he told corrections deputies that he was wearing body armor. He admitted calling his mother on April 27, 2019, but explained that his conversation related to a different incident.[29] Defendant told his mother that "James gave him a bulletproof vest" and "I put on the bulletproof vest,"

[28] Jury Trial, dated 1/28/20, p. 174-177
[29] Jury Trial, dated 1/28/20, p. 180-182

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but alleged he was unable to identify whether the vest introduced into evidence was the same vest that "James" had given him.[30] Defendant evaded the trial prosecutor's questions, at one point even feigning memory about whether he ever received body armor, what he was wearing the day of his arrest, and what vehicle he drove over the bridge.[31]

H. Jury instruction for possession of body armor and guilty verdict.

The trial court instructed the jury on the law, including giving an instruction on possession of body armor by a felon and the meaning of possession as used in the criminal jury instructions:

> The defendant is charged with possession, possessing or using body armor while convicted of a violent felony. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant has been convicted of a violent felony. The defendant has stipulated to having been convicted of a violent felony that prohibited the defendant from possessing body armor.
>
> Second, that on April 8, 2019 the defendant possessed or used body armor. Body armor means clothing or a device designed or intended to protect the individual's body or a portion of the individual's body from injury caused by a firearm.
>
> Possession does not necessarily mean ownership. Possession means that either the person has actual physical control of the thing, as I do with the pen I'm now holding. I'm not holding a pen. Or that the person has the right to control the thing, even though it is in a different place or room.

[30] Jury Trial, dated 1/28/20, p. 186
[31] Jury Trial, dated 1/28/20, p. 183-187

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> Possession may be sole where one person alone possesses the thing. Possession may be joint where two or more people have shared possession. It is not enough that the defendant merely knew about the body armor. The defendant must, the defendant possessed the body armor only if he had control of it or the right to control it, either alone or together with someone else.[32]

The jury convicted Defendant of Possession of Body Armor by a Felon. The trial court sentenced Defendant to 365 days in jail with credit for 329 days served.[33] The jail released Defendant from custody on March 2, 2020.

I. Post-conviction motion and appeal.

The trial court denied Defendant's Motion for a New Trial by opinion and order dated September 27, 2021. On December 1, 2022, the Court of Appeals vacated his conviction and remanded the case for a new trial, finding the trial court abused its discretion by admitting "implied testimonial hearsay" from CBP Officer Stockwell about his interaction with CBSA Officer Lavers. The Court of Appeals found the error was not harmless beyond a reasonable doubt because the only other evidence connecting Defendant to the body armor were statements admitted in violation of the corpus delicti rule. *People v Washington*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 353052). Judge Markey's dissenting opinion refused to adopt the "implied assertion" theory, relying on established Michigan precedent. Judge Markey also declined to characterize the "implied assertion" as testimonial in nature, concluding it was not intended to be used as evidence against defendant at the time

[32] Jury Trial, dated 1/28/20, p. 219-220
[33] Disposition Hearing, dated 3/2/20

it was made. Finally, Judge Markey determined that even if the contested testimony was improperly admitted, the violation was harmless beyond a reasonable doubt in light of the Defendant's admissions to wearing the body armor. *Washington*, ___ Mich App ___ ; ___ NW2d ___ (2022) (Docket No. 353052) (MARKEY, J., dissenting). A motion for reconsideration was denied, again Judge Markey stating she would grant the motion for reconsideration. This timely application for leave to appeal follows based on MCR 7.305(B)(5)(a) and (b), because the decision of the Court of Appeals was clearly erroneous, will cause material injustice, and conflicts with cases issued by the Michigan Supreme Court and Court of Appeals.

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ARGUMENT

I. The Court of Appeals decision that CBP Officer Stockwell's testimony was inadmissible under a theory of "implied testimonial hearsay" is clearly erroneous.

A. Standard of Review and Preservation of Error

Questions of law are reviewed de novo. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013); *People v Likine*, 492 Mich 367, 387; 823 NW2d 50 (2012). A preserved error requires proof that the error was harmless beyond a reasonable doubt. *People v Sammons*, 505 Mich 31, 56; 949 NW2d 36 (2020). When evaluating whether erroneously admitted evidence was harmless beyond a reasonable doubt, the Court must determine the probable effect of that testimony on the minds of an average jury. *Id*. (internal citations omitted).

B. Analysis

1. Hearsay

Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801 (c). "Statement" as used in the definition of hearsay means an assertion: A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion. MRE 801 (a).

The trial prosecutor avoided questioning CBP Officer Stockwell about the substance of the communications, relying on other evidence to connect Defendant to the body armor:

> Q What did he hand you?

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A He handed –

Q Just specifically related to any armor.

A A body armor.

Q Yes, sir.

A A piece of body armor that you would –

Q And so that was turned over to you, as well?

A It was, yes, sir.

Q Now, without saying anything about what was said, the only question I have for you is were there communications between you and Officer Lavers?

A There were.

Q Okay. And, and, and based on those communications you took custody of the Defendant?

A Yes, we did.

Q And you took possession of the body armor that was turned over at the same time?

A Yes, sir. [34]

* * * *

Q What did you do after taking possession of those things?

A We contacted Port Huron Police Department.

Q Okay. Did anyone from the Port Huron Police Department make their way to the bridge –

A They did.

Q -- at that point? A Yes, sir.

[34] Jury Trial, dated 1/28/20, p. 152-153

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> Q And would that have been around 6:40 p.m. if you know?
>
> A Yes, it probably -- 6:40, seven o'clock.
>
> Q Okay.
>
> A Ballpark.
>
> Q And then do you recall which officer came from Port Huron at that point?
>
> A Officer, I believe his name is Whitten.
>
> Q Okay. And was, was anything done with Officer Whitten at that time?
>
> A We transferred custody of the body armor that we received and of Mr. Washington.[35]

2. Michigan Courts have never recognized a theory of "implied testimonial hearsay" by assertion until now.

The Court of Appeals soundly rejected the "implied assertion theory" in *People v Jones*, 228 Mich App 191; 579 NW2d 637 (1998), stating:

> While a number of decisions over the years have regarded 'implied' assertions as hearsay, we believe that the theory had a questionable origin, that it has never achieved general recognition in decided cases, that it is expressly negated by the modern rules of evidence, and that it is contrary to Michigan precedent [*Jones* at 207].

Despite this strong repudiation, the majority concludes *Jones* is not binding precedent under MCR 7.215(C)(2). In its analysis of *Jones*, the majority finds that the statements only addressed statements that "conveyed the speaker's state of mind, rather than an accusation." *Washington* at ___; slip op at 9. The majority's conclusion

[35] Jury Trial, dated 1/28/20, p. 153-154

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is incorrect, mischaracterizing the challenged statements in *Jones*, including the assertions, "I'm gonna kick your ass. And Alphonzo don't want you, Alphonzo don't love you." While it is agreed the statements in *Jones* were not "accusatory," they went beyond the speaker's state of mind, offered as an "integral part of the series of events that led to the shooting of the victim." *Jones*, 228 Mich App at 205.

Similarly, in this case, CBSA Officer Lavers' non-verbal "communications" at the Blue Water Bridge were not *accusatory*. Far from accusatory, his non-verbal "communications" explained the series of events and had a clear, chain-of-custody evidentiary purpose, limited to confirmation of CBP Officer Stockwell's receipt of Defendant, a pick-up truck, and body armor.[36] Yet, the majority is unwilling to consider whether the "implied assertion" is anything other than an accusation against Defendant that he was wearing body armor - inexplicably concluding, "[w]hen Lavers handed over Washington and the vest to Stockwell, Lavers made a statement that he intended as accusatory." *Washington* at ___; slip op at 5. That speculative assumption about non-verbal conduct is precisely what makes the theory of "implied testimonial hearsay" so *dangerous* – the majority basing its conclusions on its own interpretation of a non-verbal act.

The majority also did not consider that CBP Officer Stockwell, whose supervisor duties include inspecting individuals re-entering the United States, would have taken custody of Defendant, his pick-up truck, and any other property for

[36] During cross-examination, CBP Officer Stockwell admitted that he never saw Defendant wearing the body armor nor did he see anyone remove the body armor from Defendant.

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inspection with or without body armor. The dissent correctly views CBP Officer Stockwell's "communication" with CBSA Officer Lavers as ministerial, finding:

> [t]he purpose of the communication was simply to provide Officer Stockwell with the information necessary for Officer Stockwell to formally take defendant into custody from the Canadian authorities and proceed with the charging process under Michigan law. The implied statement explained Officer Stockwell's actions and his involvement in the case, including taking control of the bulletproof vest. [*Washington*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 353052)(MARKEY, J., dissenting); slip op at 5.]

A statement offered to show why a police officer acted the way he did is not hearsay. *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). This testimony was not offered to establish that Defendant wore the body armor – an element not part of the offense – but was offered for non-hearsay purposes – to explain CBP Officer Stockwell's involvement in the case and provide chain-of-custody testimony regarding the body armor.

The majority concludes that CBSA Officer Lavers affirmed through non-verbal conduct precisely the same information he would have conveyed verbally: "[t]hat Washington had been wearing the body armor when caught by the Canadian authorities." *Washington* at ___; slip op at 5. This assumption is incorrectly predicated on what the majority believes the trial prosecutor intended instead of the intent of the CBSA Officer Lavers; specifically, returning Defendant and his property to the United States. In doing so, the majority ignores the *Jones* holding, which, in

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defining the "implied assertion" concept, focused on the "actor's intent" to communicate the matter to be proved in court, and not the trial prosecutor.

Finding no authority in Michigan to support the creation of the "implied testimonial hearsay" theory, the majority relies on federal cases from other circuits that have no precedential value, lack persuasiveness, and are factually distinguishable. One of these cases, *United States v. Kizzee*, 877 F3d 650 (CA 5, 2017), highlights both the factual differences from this case and why the "implied testimonial hearsay" theory should not be adopted in Michigan.

In *Kizzee*, defendant objected to the lead detective's testimony at trial, arguing it violated the rules of hearsay and right to confront witnesses. The detective was the only witness called by the prosecution. A review of the questioning by the prosecutor in *Kizzee* compared to the questioning by the trial prosecutor in this case establishes key factual differences.

Specifically, the prosecutor's questions identified Kizzee by name, linking him to the substance of the detective's interrogation of another suspect, Brown. At trial, the lead detective was allowed to testify about his interview with Brown. After conviction at trial, Kizzee appealed, challenging the admissibility of the detective's testimony regarding the interview of Brown. Although the prosecutor never introduced Brown's statement, defendant Kizzee argued that the detective's testimony and prosecutor's questioning "implicitly" introduced substantive,

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testimonial statements against him. *Kizzee*, 877 F3d at 656. The Court agreed with defendant, concluding:

> "[t]his Court has recognized that police testimony about the content of statements given to them by witnesses are testimonial under *Crawford*; officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant. Where an officer's testimony leads to the clear and logical inference that out-of-court declarants believed and said that [the defendant] was guilty of the crime charged, Confrontation Clause protections are triggered. . . . .Similarly a prosecutor's questioning may introduce a testimonial statement by a nontestifying witness, thus implicating the Confrontation Clause. [*Kizzee* at 657.][internal quotation marks and citations omitted.]

The content of Brown's statements to the detective during the interrogation could be "readily inferred" from the prosecutor's questions and detective's testimony. *Id*. at 658. The Court in *Kizzee* distinguished the testimony in *Kizzee* from testimony that would be admissible for non-hearsay purposes:

> Testifiying officers may provide context for their investigation or explain background facts. Such out-of-court statements are not offered for the truth of the matter asserted therein, but instead for another purpose: to explain an officer's actions. [*Kizzee* at 659.]

The Court found that the exchange between the detective and prosecutor exceeded the scope of what was needed to explain the detective's actions. *Id*. at 660. The prosecutor's failure to call Brown as a witness violated the defendant's right to confront witnesses because he could not cross-examine Brown about Brown's ***statements*** to the detective.

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In this case, the trial prosecutor did not elicit CBSA Officer Lavers' statements through CBP Officer Stockwell. Moreover, *Kizzee* recognized that testifying officers can provide context to the investigation or explain background facts without violating the hearsay rules or implicating the Confrontation Clause. Unlike *Kizzee*, the majority would reject that proposition, finding that if the officer's testimony was offered to prove *something* – even if the *something* was not the truth of the matter—it would be inadmissible.

The Court of Appeals recently re-affirmed its position in *People v Propp* (On Remand), ___ Mich App ___; ___ NW2d ___ (2022)(Docket No. 343255), stating "Michigan does not recognize the implied assertion theory that has been adopted in some other jurisdictions." *Id.* at 8. Again, the majority rejects legal precedent, attempting to distinguish this case factually in order to create new precedent that categorizes all non-verbal, assertive conduct inadmissible if it is offered to prove *something*.

If affirmed, this novel theory of "implied testimonial hearsay" will change the legal landscape. If the mere act of handing over body armor is now considered "accusatory," every witness who touches potential evidence will be required to provide trial testimony – regardless of how ministerial or cumulative the testimony may be. This theory will also result in reviewing courts actively interpreting the meaning of a speaker's non-verbal conduct – inevitably reaching the same conclusion – if it is offered to prove something, it is inadmissible "implied testimonial hearsay" even if not offered to prove the truth of the matter asserted. Non-hearsay will become a

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"thing of the past" because all conduct – whether verbal or not – is now inadmissible testimonial hearsay, violating the Confrontation Clause of the Sixth Amendment.

For these reasons, the People request this Court grant its Application for Leave to Appeal.

II. The Court of Appeals determination that the alleged error was not "harmless beyond a reasonable doubt" is based on an erroneous view of the Corpus Delicti rule.

The Court of Appeals vacated Defendant's conviction, concluding that the prosecution could not prove that a crime was committed because though Defendant admitted – including in a jail call – that he possessed the body armor, under the corpus deliciti rule, "Without direct or circumstantial evidence that Washington possessed the vest, the prosecution had no evidence that any crime had been committed." *Washington* at ___; slip op at 11. This is a mistaken view of the corpus delicti rule, which exists not to free the patently guilty, but protect the innocent where no crime was actually committed.

As set forth by Judge Markey in her dissent, the United States Supreme Court has addressed the corpus delicti rule and its purpose, stating:

> The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court, and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts, Its purpose is to prevent errors in convictions based upon untrue confessions alone; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions

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> may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be involuntary within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made. [*Washington*, ___ Mich App at ___ (MARKEY, J., dissenting); slip op at 5 quoting *Smith v United States*, 348 US 147, 152-153; 75 S Ct 194 (1954).][Internal citations and quotation marks omitted.]

The majority opinion is inconsistent with Michigan Supreme Court authority, which in a case involving the possession of cocaine, held:

> [T]he corpus delicti was satisfied by evidence independent of defendant's confession that (1) the cocaine *existed* and (2) was *possessed by someone*. . . .The defendant's contention that proof of the corpus delicti requires evidence *that the cocaine was constructively possessed by the defendant is incorrect.* "Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." . . . It is sufficient to show that the crime was committed by someone. . . .In the words of a noted authority, the position that *the corpus delicti of a crime includes the identity of the perpetrator is "too absurd indeed to be argued with,"* because it would require that the entire crime be proved before a confession could ever be admitted. [*People v Konrad*, 449 Mich 263, 270; 536 NW2d 517 (1995)] [numbering and emphasis supplied.]

Here, as in *Konrad*, the majority's decision that the People must, to establish the corpus delicti,, prove that Defendant possessed the body armor by direct or circumstantial evidence *independent* of these statements – which were not to the

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police, and do not constitute confessions[37] – "is incorrect." To paraphrase *Konrad*, the People must show "(1) that the body armor existed and (2) was possessed by someone." And, here, the People must also show that Defendant was a felon. The People established that the body armor existed, that it was possessed by someone, and that Defendant was a felon, all independent of Defendant's statements admitting that he possessed the body armor. His statements were then admissible to prove that *he* possessed the body armor.

The majority is also mistaken in its conclusion that "Absent Stockwell's testimony regarding the substance of his 'communications' with Lavers, the prosecution would have lacked any testimony that could serve as a foundation for the vest's admissibility." *Washington,* ___ Mich App at ___; slip op at 11. The statements made by Defendant, while admissions, are also substantively admissible as Statements Against Interest pursuant to MRE 804(b)(3),[38] which provides:

> [A] statement which was at the time of its making so far contrary to the declarant's pecuniary or propriety interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless

[37] The People agree with the dissent (Appendix C – MARKEY, J., dissenting) that the statements were admissible to show the corpus delicti, and, for purposes of preservation, submit that *People v McMahan*, 451 Mich 543; 548 NW2d 199 (1996) was wrongly decided; see the dissent by Justice Boyle.

[38] MRE 804 relates to hearsay exceptions where the declarant is unavailable. Clearly, the Defendant's pre-conviction status as the accused, and his Fifth Amendment privilege, rendered him unavailable as a witness for the prosecution's case-in-chief.

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> corroborating circumstances clearly indicate the trustworthiness of the statement.

The application of this rule has been modified greatly where it concerns the statements of co-defendants or accomplices in cases implicating a defendant's right of Confrontation. Obviously, that is not a consideration in the present case. In *People v Taylor*, 482 Mich 368; 759 NW2d 361 (2008), this Court evaluated whether a statement against penal interest that inculpates the declarant – here, the Defendant – is sufficiently reliable to allow it to be used as substantive evidence. *Taylor*, 482 Mich at 376. The Court stated:

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth. [*Id*. at 376 quoting *People v Poole*, 444 Mich 151, 165; 506 NW2d 505.]

The circumstances surrounding Defendant's telephone call to his mother establish sufficient reliability that favor the statements admissibility as substantive evidence. That particular communication, initiated by Defendant, was voluntarily made because he needed his mother to contact "Johnny." While his mother asked

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"what did you do?" and "what happened," Defendant voluntarily told her that "he was given a bulletproof vest. I put on the bulletproof vest." These statements are not testimonial because Defendant made them to his mother, not during a police investigation or other formal proceeding. Non-testimonial statements do not implicate the Confrontation Clause. *Taylor*, 482 Mich at 377-378; 759 NW2d 361 (2008). These indicia of reliability establish that Defendant's statements about wearing the body armor possess the guarantees of trustworthiness that provide the rationale for the admission of statements pursuant to a delineated exception to the general hearsay rule. Contrary to the majority's opinion, this substantive evidence "could serve as a foundation for the vest's admission" and "prove that a crime was committed" because it connects Defendant to the body armor. Accordingly, the majority's finding that the error was not harmless beyond a reasonable doubt is also erroneous.

For these reasons, this Court should grant the People's Application for Leave to Appeal.

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RELIEF REQUESTED

WHEREFORE, for the reasons state above, the Plaintiff-Appellant requests this Honorable Court grant this Application for Leave to Appeal, or reverse the decision of the Court of Appeals, and affirm the conviction and the sentence of the trial court.

Respectfully Submitted,

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Prosecuting Attorney

By: */s/ Melissa J. Keyes*
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Dated: February 1, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212(B)(1) and contains 5,905 countable words. The document is set in Century Schoolbook and the text is in 12-point type, double spaced.

Respectfully Submitted,

Michael D. Wendling
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Dated: February 1, 2023