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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 163939
Court of Appeals No. 348277
Trial Court No. 06-004818-01-FC

-v-

MILTON LEE LEMONS,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* THE INNOCENCE PROJECT IN SUPPORT OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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INTEREST OF AMICUS CURIAE

The Innocence Project, Inc. ("Innocence Project") was established nearly 30 years ago, in 1992, to provide *pro bono* representation to individuals who may be able to prove their actual innocence through the development of a post-conviction record. To date, the Innocence Project, together with affiliated organizations, has exonerated 375 people who never committed the offenses for which they had been convicted. In addition to providing *pro bono* post-conviction legal services, the Innocence Project works to prevent future miscarriages of justice. Relying on data compiled over nearly three decades of exonerations, the Innocence Project has identified the chief risk factors for wrongful convictions and advocates to legislatively or administratively remediate those risk factors. The Innocence Project also participates in cases in various stages of litigation—on a consult or co-counsel basis or, as here, as amicus curiae—where the outcome of an issue in dispute may create precedent that either significantly aggravates or significantly mitigates one or more risks of wrongful conviction.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 2006, Milton Lemons[1] was convicted of felony murder for allegedly causing her infant daughter's death by Shaken Baby Syndrome (hereinafter "SBS")—a diagnosis that, today, has been significantly undermined by relevant scientific advances. *See* Keith A Findley, *Examining Shaken Baby Syndrome Convictions in Light of New Medical Scientific Research*, 37 Okla City U L Rev 221 (2012) at 230. Significantly, as of the date of this writing, there have been twenty-six exonerations of innocent caregivers who were wrongfully convicted of causing the death of a child by "shaking." *See* Detailed View, *National Registry of Exonerations (NRE)*

[1] Milton Lemons now identifies as female and will accordingly be referred to as "Ms. Lemons" with pronouns reflecting her gender identity.

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<https://www.law.umich.edu/special/exoneration/ Pages/detaillist.aspx> (accessed March 5, 2022). A substantial portion (one-fifth) of those twenty-six exonerations occurred in the state of Michigan. *Id.* And in twelve percent of those twenty-six cases, the caregivers had, like Ms. Lemons, purportedly "confessed" to having shaken the child victims. *Id.*

At a trial that resembled the prosecutions of the twenty-six exonerated caregivers noted above, Ms. Lemons was convicted primarily upon the *now-retracted* testimony of the medical examiner, Dr. Bader Cassin, and a confession that was elicited during an unrecorded interrogation that, as discussed below, placed Ms. Lemons at risk of falsely confessing. Despite Dr. Cassin's retraction and the proffered expert testimony demonstrating the serious doubt regarding SBS—thereby placing the very theory of Ms. Lemons's alleged guilt in doubt—the trial court denied Ms. Lemon's motion for relief from judgment and, subsequently, the Court of Appeals affirmed.

Review by this Court is necessary to address the Court of Appeals' improper reliance on the potentially unreliable, unrecorded confession evidence to affirm the denial of Ms. Lemons's motion for relief from judgment. Allowing the Court of Appeals' decision to stand would risk shielding wrongful convictions based on unreliable SBS diagnoses and potentially false confessions from sufficient post-conviction scrutiny. Further, Amicus urges this Court to address the Court of Appeals' improper preclusion of expert biomechanical testimony, which would have demonstrated that the shaking of an infant is unlikely to cause the symptoms that have historically been associated with an SBS diagnosis. The admission of such testimony in relevant hearings is critical to ensure that innocent people who may have been wrongfully convicted based upon unscientific, outdated medical testimony, have a means to challenge their conviction with reliable scientific research.

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ARGUMENT

I. TO SAFEGUARD AGAINST AND RECTIFY WRONGFUL CONVICTIONS, THIS COURT SHOULD ADDRESS THE COURT OF APPEALS' IMPROPER RELIANCE ON POTENTIALLY UNRELIABLE CONFESSION EVIDENCE

In its denial of relief, the Court of Appeals acknowledged that Dr. Cassin's retraction arose due to a change in emerging scientific research regarding SBS and that this "evidence is obviously favorable to defendant." *People v Lemons*, No. 348277 (Mich App Nov 18, 2021) at 10-11. Indeed, an ever-growing body of experts has recognized that SBS is a mere "hypothesis," meaning that SBS remains unproven by medical evidence-based standards. Findley, *Examining Shaken Baby Syndrome,* at 222-224. Despite acknowledging this significant doubt surrounding the State's theory of the case, the Court of Appeals relied on the unrecorded confession evidence as well as testimony regarding Ms. Lemons's purportedly "suspicious behavior" in hesitating to call 911 to find that it was "improbable" that Dr. Cassin's retraction and the evidence regarding the invalidity of SBS would cause a different outcome on retrial. *Lemons*, No. 348277 at 11.

Preliminarily, the Court of Appeals' opinion fails to recognize that Ms. Lemons's confession to "shaking" her child and the SBS diagnosis are inextricable from one another. The Court of Appeals paradoxically accepted the "genuine dispute" surrounding the validity of the SBS diagnosis,[2] yet relied primarily on Ms. Lemons's confession to "shaking"—a cause of death that the Court acknowledged may be scientifically insupportable based on the symptoms that Ms. Lemons's child exhibited—to uphold her conviction. *Id*. at 7. Because there is crucial doubt in the medical and biomechanical community as to whether "shaking" can even cause the symptoms traditionally associated with SBS, there *must* be grave doubt as to whether Ms. Lemons's

[2] As the Court of Appeals correctly acknowledged, "[t]he extensive expert testimony offered in this case and plethora of authority cited below make it clear that there is a genuine dispute regarding SBS and the diagnostic significance" of the three symptoms historically associated with SBS—known as the "triad." *Lemons*, No. 348277 at 7.

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confession to "shaking" her child is a reliable, truthful admission, and whether it can even be fairly characterized as a "confession" to the murder charge.

Moreover, Ms. Lemons's interrogation involved various risk factors for false confession, further calling into question the reliability of her statements. False confessions are a leading cause of wrongful convictions, accounting for nearly one-third of all known DNA exonerations, *see* Innocence Project, *DNA Exonerations in the United States* <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed February 16, 2022), and approximately twelve percent of all known exonerations nationwide, *see* National Registry of Exonerations (NRE), *Exoneration Detail List* <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> (accessed February 16, 2022). As many experts caution, the proven false confessions "most surely represent the tip of an iceberg." Saul M Kassin et al, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law and Hum Behav 3, 3 (2009).

A robust canon of research has identified the relevant risk factors of false confession, categorized broadly into "dispositional" characteristics of the confessor (such as youth or cognitive disability), and the "situational" circumstances of the interrogation itself (such as the police conduct and the environment in which the interrogation occurred). *See generally id*. One such "situational" risk factor, and perhaps the most "controversial" of police interrogation tactics—due largely to its outsized role in producing known false confessions—is the "false-evidence ploy." *Id.* at 12; Brandon L Garrett, *The Substance of False Confessions*, 62 Stan L Rev 1051 (2010) at 1097-99 (detailing examples of proven false confessions procured by false-evidence ploys). The tactic exacerbates the stress of the interrogators' accusations of guilt by lying to the suspect about evidence, which leaves the suspect feeling "trapped" based on the perceived "inevitability of

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evidence against them" and, consequently, viewing compliance with officers' suggestions and admission of guilt as the only option. Kassin, *Police-Induced Confessions* at 28. Alternatively, the false-evidence ploy may persuade innocent suspects to wrongfully question their own innocence. *Id*. at 16.

Here, the interrogating officer, Sgt. Williams, apparently used this controversial tactic to elicit Ms. Lemons's confession. Prior to Ms. Lemons's interrogation, Sgt. Williams spoke over the phone to the medical examiner, Dr. Cassin, regarding the *preliminary* findings of his examination—the autopsy was not yet complete.[3] TT 08/07/06 at 71. At the time, Dr. Cassin's cause of death determination was "pending," and he told Sgt. Williams that the injuries that caused Ms. Lemons's daughter's death could have been intentional *or* accidental. TT 08/07/06 at 32, 71. Despite information that the child may have died due to an accident, during the interrogation, Sgt. Williams "confronted [Ms. Lemons]" with the purported "results of the autopsy . . . show[ing] that [her daughter] had died as a result of being shaken." *Id.* at 62. Thus, while Dr. Cassin had not yet excluded the possibility that the child's death was accidental—a possibility he now indicates is consistent with the evidence in this case[4]—Sgt. Williams falsely "confronted" Ms. Lemons with the conclusion that "shaking" was the medically-determined, incontrovertible cause of her daughter's death.[5]

[3] Dr. Cassin made his preliminary postmortem report on 10/11/05, the interrogation occurred on 10/12/05, and the formal autopsy report was completed and sent to Wayne Police Department on 10/13/05. Mot For Relief From Judg Appendix D March 2016 at 77.

[4] At the 2017 evidentiary hearing, Dr. Cassin testified that he would now characterize Nakita Lemons's cause of death as "indeterminate, meaning it's unable to be determined." EH 7/19/2017 at 33. He noted that choking on formula was a plausible explanation for her death. *Id*. at 34.

[5] Sgt. Williams's confrontation of Ms. Lemons with false evidence that "shaking" was the cause of death, despite his knowledge that the cause of death was still unknown, also reveals his presumption of Ms. Lemons's guilt—a bias that risks the misclassification of innocent people as guilty suspects. *See generally* Richard A Leo & Steven A Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, APA (2010) at 13-17.

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Moreover, even if Dr. Cassin had, at the time of interrogation, concluded that "shaking" was the cause of Ms. Lemons's child's death, due to the critical doubt surrounding SBS as a medical diagnosis, the act of confronting a subject of custodial interrogation with purportedly incontrovertible proof that the decedent's cause of death was shaking, has the same coercive impact of a false-evidence ploy—the officer confronts the suspect with incriminating, yet false,[6] evidence of guilt and, as a result, the suspect may feel compelled to acquiesce to the officer's insistence in guilt or may start to falsely believe in their own culpability.

Further reflecting possible coercion, at some point during the interrogation, Sgt. Williams gave Ms. Lemons a stuffed animal "to demonstrate how hard [s]he shook the victim"[7]—a tactic that has been repeatedly utilized in cases involving false confessions from innocent caregivers. Although the interrogation here was not recorded,[8] and thus it remains unknown precisely what Sgt. Williams instructed Ms. Lemons to do with the doll, Amicus has repeatedly seen this practice used to coercively coach an innocent caregiver into physically role-playing the conduct that the interrogating officer insists caused the child's death.[9]

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[6] *See e.g* Keith A Findley et al, *Feigned Consensus: Usurping the Law in Shaken Baby Syndrome/Abusive Head Trauma Prosecutions*, 4 Wis L Rev 1211 (2019) at 1224 (noting that today, even proponents of the SBS hypothesis acknowledge that "neither the triad nor any other specific findings can be relied upon conclusively to diagnose abuse."). And, as noted above, Dr. Cassin, the sole medical expert providing diagnostic testimony at Ms. Lemons's trial, retracted his trial testimony, indicating that he no longer stands by his SBS diagnosis and would no longer declare the death a homicide. *Lemons*, No. 348277 at 10.

[7] Mot For Relief From Judg Appendix D March 2016 at 80.

[8] Today, the interrogation would have been required to be recorded. In 2013, to "protect[] against wrongful convictions through coerced or misinterpreted statements[,]" Michigan lawmakers passed a law to require police to video-record custodial interrogations for certain felonies. *See* Jameson Cook, *Michigan law to require police to video record interviews*, The Oakland Press <https://www.theoaklandpress.com/2013/03/24/michigan-law-to-require-police-to-video-record-interviews/> (accessed March 7, 2022); *see also* 2012 PA 479. In 2005, no such law existed. Without a full recording of an interrogation, it is nearly impossible to fully analyze the reliability of the resulting custodial statement, as any police contamination will inevitably be "difficult to detect," thereby creating "a substantial risk of wrongful conviction that cannot be easily prevented unless an interrogation is electronically recorded in its entirety." Richard A Leo et al, *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 Temp L Rev 759, 770 (2013).

[9] For example, before her wrongful conviction, Jasmine Eskew was interrogated about injuries sustained by her six-month-old daughter, and given a doll to demonstrate what she had purportedly done to the child, as an officer

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In addition to the high-risk interrogation tactics at issue here, at the time of interrogation, Ms. Lemons was presenting with "dispositional" factors that rendered her categorically more vulnerable to police coercion and, therefore, at a heightened risk of falsely confessing. *See Police-Induced Confessions*, *supra*, at 19–22. Specifically, Ms. Lemons had been suffering from depression at the time of her interrogation. TT 08/07/06 at 66. Those living with depression are particularly vulnerable to false confession because "[d]epression . . . frequently causes feelings of excessive or misplaced guilt, which may . . . facilitate internalization of inaccurate police narratives of events." Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard*, 47 NM L Rev 64, 70 (2017) (noting that "mental disabilities, such as . . . depressive[] . . . disorders, can . . . increase vulnerability to police interrogation").

In addition, individuals who have experienced trauma—such as trauma resulting from the death of a child—are more susceptible to coercion and therefore more likely to falsely incriminate themselves during police interrogation. *Police-Induced Confessions*, *supra*, at 22. Here, the same day her daughter died, Ms. Lemons was arrested, handcuffed, and transported to the police station, where she was isolated and held overnight in a jail cell for approximately twelve hours before Sgt. Williams began his guilt-presumptive interrogation. Mot For Relief From Judg Appendix D March

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insisted that she "make the doll's head rock[.]" Maurice Possley, *Jasmine Eskew*, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Page s/casedetail.aspx?caseid=5267> (accessed March 7, 2022). As a result of her compliance with officers' demands to demonstrate how she "shook" the baby, she was wrongfully convicted and spent approximately five years in prison before the Montana Supreme Court reversed her conviction, and prosecutors subsequently dismissed the case. *State v Eskew*, 386 Mont 324; 390 P3d 129, 136 (2017). Similarly, in the case of Adrian Thomas, officers interrogated Mr. Thomas about the circumstances of his three-year-old's fatal brain injury, and pressured him to demonstrate how, according to the officers, he threw his son down to cause the injuries. *People v Thomas*, 22 NY3d 629, 640 (2014). Ultimately, Mr. Thomas submitted and confessed to forcibly throwing his son, demonstrating how he did so in precisely the manner the officer suggested. *Id*. at 640-41. Mr. Thomas's wrongful conviction was eventually vacated by the New York Court of Appeals and he was subsequently acquitted on retrial. Maurice Possley, *Adrian Thomas*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Page s/casedetail.aspx?caseid=4449 (accessed March 7, 2022).

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2016 at 73-76. Because of her recent, acute trauma, Ms. Lemons was particularly susceptible to police coercion and manipulation. *See e.g.*, Kim E Drake, *Interrogative suggestibility: Life adversity, neuroticism, and compliance, 48 Personality and Individual Differences* 493 (2010). Indeed, when "interrogations occur immediately after a child's death . . . distraught parents . . . may be particularly vulnerable to suggestion, manipulation or memory lapses." Keith A Findley et al, *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right*, 12 Hous J Health L & Pol'y 209, 257–260 (2012) (explaining that "[c]onfessions are particularly problematic in the child abuse area").

In addition to the unrecorded, potentially unreliable confession evidence, the Court of Appeals also cited Ms. Lemons's failure to promptly call 911 when her daughter first exhibited signs of distress as a basis for denying relief. TT 08/07/06 at 11. Critically, the incorrect assumption that a person's hesitation to call 911 is necessarily indicative of guilt can have tragic consequences, as exemplified by the wrongful conviction of Clemente Aguirre-Jarquin.[10] Here, the Court of Appeals' assumption of guilt failed to acknowledge that Ms. Lemons immediately sought help as soon as her daughter's health was at risk and did so from three different sources: her neighbor, her wife, and her wife's mother. TT 08/03/06 at 100-101. Further, Ms. Lemons's initial hesitation to call 911 may be attributable to her lived experiences and interactions with institutions of authority as a Black person who identified as "transsexual" at the time.[11] Mot For

[10] Aguirre-Jarquin was wrongfully convicted in 2004 for the murder of two women, whose bodies he found after walking inside his neighbor's home, shortly after the true perpetrator committed the violent attack. National Registry of Exonerations (NRE), *Clemente Aguirre-Jarquin* <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5406> (accessed February 16, 2022). Fearing the killer, he picked up a knife to arm himself, confirmed no one else was there, then sprinted back to his house where he could have, but did not, call 911. *Id.* Aguirre-Jarquin later explained that he did not call for emergency assistance because he was undocumented and feared deportation from the United States. *Id.* Fourteen years after his wrongful conviction for the double homicide, DNA evidence exculpated him and, ultimately, the prosecution dismissed all charges. *Id.*

[11] People of color who identify as LGBTQ+—and particularly Black transgender women—suffer disproportionately from structural issues in law enforcement. *See e.g.*, National Center for Transgender Equality, *The*

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Relief From Judg Appendix D March 2016 at 80. *Accord* Munseok Seo et al, *Barriers and disparities in emergency medical services 911 calls for stroke symptoms in the United States adult population: 2009 BRFSS Survey*" 15(2) West J Emerg Med, 251, 259, (2014) ("individually, socio-economically, or financially vulnerable populations might encounter more barriers to calling 911 for EMS services").

In sum, in light of the various risk factors for false confession involved in this unrecorded interrogation, which resulted in a "confession" to an implausible cause of death, as well as the ambiguous nature of the circumstantial evidence regarding the call to 911, the Court of Appeals should not have relied on this evidence to deny Ms. Lemons relief.

II. TO PREVENT THE WRONGFUL CONVICTION OF CAREGIVERS, IT IS CRITICAL THAT THIS COURT TAKE UP THIS CASE TO ENSURE THAT DEFENDANTS CHALLENGING AN SBS DIAGNOSIS BE PERMITTED TO ADMIT EXPERT TESTIMONY ON RELEVANT BIOMECHANICAL STUDIES

The Court of Appeals held that because biomechanical studies are premised upon the use of biomechanical models—as opposed to real babies—to test the forces of shaking, the biomechanical expert testimony proffered by Ms. Lemons to demonstrate that shaking was not the cause of her daughter's death, was "too tenuous" to be admissible. *Lemons*, No. 348277 at 7. The Court's concern, however, is unfounded. Indeed, biomechanical models are grounded in established scientific techniques, and no alternative scientific models have produced conflicting data. Findley et al, *Feigned Consensus* at 10-11. Moreover, the results of such studies have been routinely accepted as reliable research methods in various arenas that are essential to everyday life—for example, in automobile, playground, and sports equipment safety testing. *Id*. Courts would benefit from relying on scientific research that can be reliably measured and tested, such as

Report of the 2015 U.S. Transgender Survey <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (accessed March 7, 2022) (finding that 58 percent of transgender people reported in a 2015 survey having experienced some form of mistreatment in their encounters with law enforcement").

a biomechanical study, rather than a medical examiner's mere "hypothesis" of a cause of death. Findley, *Examining Shaken Baby Syndrome*, at 222-224.

As this Court has recognized, there is "prominent controversy within the medical community regarding the reliability of SBS/AHT diagnoses." *People v Ackley*, 497 Mich 381, 391-92; 870 NW2d 858 (2015). Thus, it is critical that those accused of causing a child's death by SBS be permitted to present relevant biomechanical evidence to educate factfinders and courts about the absence of evidence-based medical standards involved in an SBS diagnosis.

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CONCLUSION

To ensure adequate remedies for wrongful convictions based on unreliable forensic evidence regarding SBS diagnoses and false confessions, Amicus respectfully urges this Court to take up this case and provide guidance to courts in this state regarding the critical issues raised in this matter.

Date: March 15, 2022

Respectfully submitted,

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