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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

MILTON LEE LEMONS,
Defendant-Appellant.

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

DEFENDANT-APPELLANT'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

As Ms. Lemons explained in her Application for Leave to Appeal, the Court of Appeals upheld the trial court's denial of relief despite the retraction of the Shaken Baby Syndrome (SBS) diagnosis by the physician who performed the autopsy and testified for the prosecution at trial and despite new testimony from five eminently qualified experts confirming that the child in this case likely died from choking on formula. This new evidence absolutely satisfies the *Cress* standard, and the Court of Appeals clearly erred in upholding the denial of relief from judgment.

The Court of Appeals acknowledged that the trial judge had abused his discretion by treating the pathologist's retraction as a lay witness recantation and by excluding the new expert testimony casting doubt on SBS diagnoses. Court of Appeals Opinion at 5, 9-10. Nevertheless, the Court of Appeals denied relief by over-relying on a statement the police extracted from the grieving Ms. Lemons and treating it as more probative than all of the new medical evidence indicating that the child died from accidental choking. *Id*. at 10-11. The Court below also upheld the trial court's decision to exclude Ms. Lemons' expert in biomechanics on the absurd ground that biomechanical models such as crash test dummies are not exact replicas of humans. *Id*. at 7.

Ms. Lemons now files this Reply Brief to respond to the prosecutor's Answer in Opposition to Leave to Appeal.

ARGUMENT

I. Ms. Lemons Properly Raised All Arguments In The Application And Is Entitled To Relief.

The prosecution's Answer ignores all of the arguments Ms. Lemons made in her pending Application and, instead, simply attaches the brief that it previously filed in the Court of Appeals.

The Answer asserts that the Application raises issues not presented to the Court of Appeals. Answer at 2. But there are no such issues, and the Answer does not identify any. Ms. Lemons

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properly raised all of the issues presented in her Application to the Court of Appeals.

Specifically, Ms. Lemons asks this Court to review two issues:

(1) that the new evidence (the retraction of the SBS diagnosis by the physician who conducted the autopsy and was the only expert to testify at her trial, and new opinions from multiple distinguished experts concluding that there is no evidence of shaking or abuse in this case) warrants relief as newly discovered evidence; and

(2) that the trial court erred in refusing to consider Ms. Lemons' alternative claim of ineffective assistance.

These issues were briefed and argued in the Court of Appeals, and the Court of Appeals then rendered a decision on each issue, from which Ms. Lemons now seeks leave to appeal.

After falsely asserting that Ms. Lemons is raising new issues before this Court, the Answer then contradicts itself and also asserts that the Application relies on the same arguments made in the Court of Appeals. Answer at 1. As stated above, the Application does raise the same issues that were presented to the Court of Appeals. In her Application, Ms. Lemons also responds to new errors the Court of Appeals committed in denying relief.

For example, the Court of Appeals' decision to exclude biomechanical testimony is impossible to square with this Court's decision in *People v Ackley*, 497 Mich 381, 391-92; 870 NW2d 858 (2015), which calls upon attorneys to "assess the reliability of the diagnoses under the standards of evidence-based medicine." (Internal quotation marks and citation omitted). Biomechanical testimony is essential to examining the prosecution's diagnosis through the lens of evidence-based medicine because it calls into question whether shaking can cause the symptoms used to diagnose SBS. Excluding biomechanical evidence on the ground that biofidelic dummies are not identical to humans, as the Court of Appeals did, would have significant ramifications for

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biomechanical testimony in other fields, including automotive litigation and products liability. So the Application properly discusses both the errors the trial court made and those found in the Court of Appeals' opinion.

RELIEF REQUESTED

For the reasons stated in her Application for Leave to Appeal, Ms. Lemons respectfully requests that this Court: 1) grant leave to appeal, or 2) summarily reverse and remand for a new trial.

Respectfully Submitted,

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Dated: February 23, 2022