STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

Supreme Court No. 158259
Court of Appeals No. 336187
Circuit Court No. 14-018862-FC

v

ANTHONY RAY MCFARLANE, JR.,
Defendant-Appellant

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK

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INTEREST OF *AMICUS CURIAE*

The Innocence Network is an international affiliation of organizations dedicated to redressing the causes of wrongful convictions; providing pro bono legal and investigative services to individuals seeking to prove their innocence of crimes for which they have been convicted; and improving the accuracy and reliability of the criminal justice system to prevent future wrongful convictions. The Innocence Network is currently comprised of 55 U.S.-based organizations that represent clients in all 50 states, as well as 13 non-U.S.-based organizations that represent clients around the world.

In response to the growing number of cases dealing with abusive head trauma ("AHT") and the changing medical understanding of its diagnosis, the Innocence Network and its affiliated members have investigated and litigated several AHT convictions over the past years and provided their considerable expertise and perspective on such matters as *amicus curiae*. *See, e.g.*, *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015). Certain Innocence Network affiliates focus on AHT cases; for example, in 2016, the U.S. Department of Justice awarded the Michigan Innocence Clinic at the University of Michigan Law School a $250,000 grant to support the defense of clients who were wrongfully convicted in AHT cases. Recognizing the profound persuasive effect an expert witness may have on a jury, the Innocence Network seeks to participate as *amicus* in this case to ensure that medical experts are precluded under longstanding evidentiary principles from invading the jury's province of determining a defendant's innocence or guilt.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Application for discretionary review in this case concerns the Court of Appeals' recognition of the effect that the word "abusive" has on a jury's verdict in so-called abusive head trauma ("AHT") prosecutions. Specifically, the Court of Appeals held that "in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as 'abusive head trauma' or opines that the inflicted trauma amounted to child abuse." *People v Mcfarlane*, ___ Mich App ___ (2018) (Docket No. 336187); slip op at 6. The Innocence Network takes no position on whether this Court should exercise its discretionary jurisdiction and grant leave to appeal on the issues raised in the Application, none of which concern the Court of Appeals' application of the expert-testimony rule to this case. But in light of the Prosecuting Attorneys' Association of Michigan's (the "Association") *amicus* brief requesting extraordinary relief—*i.e.*, de-publishing and vacating the Court of Appeals opinion, or effectively reversing an evidentiary ruling that the Application does not even challenge, all while *denying* leave to appeal—the Innocence Network is compelled to submit this *amicus* brief in response.

This Court should reject the Association's requests for two reasons. First, the Association's principal argument that the Court of Appeals acted inappropriately is wrong. No authority precludes a court from answering the threshold question whether an evidentiary error occurred if that error is ultimately deemed harmless. In such a situation, the initial finding of an error is not relegated to dictum. Second, although (as the Association recognizes) this case provides the Court with no occasion to consider the merits of the Court of Appeals' finding of error, the Association's arguments are meritless in any event. Longstanding Michigan precedent limits expert witness testimony couched in terms that convey an opinion as to a defendant's guilt,

and the Court of Appeals' ruling in no way prevents expert witnesses in AHT cases from testifying completely and accurately.

Accordingly, the Innocence Network respectfully requests that this Court reject the Association's requests as *amicus* for relief in this case.

ARGUMENT

I. The Court of Appeals' Holding That An Evidentiary Error Occurred Was Procedurally Proper Notwithstanding Its Harmless-Error Finding.

The Court of Appeals' holding that a medical expert may not opine that trauma amounted to abuse was procedurally permissible, despite the additional finding that McFarlane was not prejudiced by this error in his trial. Harmless-error analysis does not require a court to presume error in that circumstance. *See, e.g.*, *People v Denson*, 500 Mich 385, 409; 902 NW2d 306, 321 (2017) ("Although we find error in the admission of the other-acts evidence under MRE 404(b), we apply harmless-error review . . . ."). For example, in *People v Lukity*, this Court "concluded that the trial court erred in admitting . . . evidence," before stating that it "must next determine whether this error requires reversal of [the] defendant's conviction." 460 Mich 484, 491; 596 NW2d 607, 611 (1999). The Court ultimately determined the error was not likely to have altered the outcome of the case, and thus explained: "We find error in the admission of evidence bolstering complainant's character for truthfulness before defendant attacked it, but conclude that this error was harmless." *Id.* at 487. Tellingly, the Association fails to cite a single example in which a court has taken the position that it is prohibited from finding an error if that error turns out to be harmless. For good reason: accepting the Association's sweeping argument would fundamentally alter harmless-error analysis.

The Association's insistence that the Court of Appeals' finding of error must be obiter dictum because McFarlane was not prejudiced is groundless. Here, the Court of Appeals

rendered a holding. It relied on the Michigan Rules of Evidence and binding case law to come to its conclusion that there was an error in McFarlane's trial and that expert witnesses may not make the same mistake in the future. *See McFarlane*, ___ Mich App ___; slip op at 4-6. That predicate error remains irrespective of the harmlessness finding.

Significantly, not even the Association fully believes the Court of Appeals' statement is dictum. Its view is that the rule is "arguably" dictum, and in the end, it admits that "[a] ruling that an error occurred is typically considered the holding and is binding." Ass'n Br. 5 & n. 8. Those statements are unsurprising, given that courts have long recognized that a considered ruling rendered en route to the ultimate disposition of the case may be "[n]o mere dictum." *Camreta v Greene*, 563 US 692, 708; 131 S Ct 2020, 2032 (2011) ("[A] constitutional ruling preparatory to a grant of immunity creates law that governs the official's behavior."); *see, e.g.*, *People v Higuera*, 244 Mich App 429, 437-38; 625 NW2d 444, 449 (2001) ("A decision of the Supreme Court is authoritative with regard to any point decided if the Court's opinion demonstrates 'application of the judicial mind the precise question adjudged, regardless of whether it was necessary to decide the question to decide in the case.'" (quoting *People v Bonoite*, 112 Mich App 167, 171; 315 NW2d 884, 886 (1982))); *see also Seminole Tribe of Fla v Florida*, 517 US 44, 67; 116 S Ct 1114, 1129 (1996) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law[.]" (citation and quotation marks omitted)).

In its brief, the Association cites *Roberts v Auto-Owners Ins Co*, 422 Mich 594; 374 NW2d 905 (1985), to support its contrary position. *See* Ass'n Br. 5. But that case is inapposite. The issue in *Roberts* was whether Michigan jurisprudence should adopt the tort of intentional infliction of emotional distress. There, the plaintiff had not stated a valid claim for this tort, and

the Court therefore decided to leave the broader adoption issue for another day. Here, by contrast, an error was squarely alleged and found, thus necessitating the further inquiry of whether the error was harmless. *Roberts* has nothing to say about that subject, and certainly does not stand for the proposition that it is improper to resolve the question of error before deciding whether the error requires reversal.

The extraordinary nature of the Association's request reinforces the reality that the Court of Appeals issued a holding. If its statement that the prosecution expert rendered inadmissible testimony were so clearly dictum, the Association would not have gone to the lengths of filing an *amicus* brief making the representation that "the rule will cause significant prejudice to future prosecutions throughout Michigan," and seeking de-publication and/or vacatur of the opinion, among other relief. *Id.* at iii.

Moreover, although the Association complains that the People have no ability to appeal the Court of Appeals' evidentiary ruling, the Association cannot accomplish the same through an *amicus* brief. Because the People defeated McFarlane's attempt to overturn his conviction on the expert-testimony ground, only McFarlane is entitled to seek further review (*i.e.*, on the harmless-error ruling adverse to him). Indeed, the Association's attempt to end-run the prevailing-party rule is particularly indefensible, given that the Association is asking the Court to *deny* leave to appeal, while at the same time seeking a merits ruling from this Court "disapproving of the Court of Appeals rule" and "replac[ing] that rule with" a new one. *Id*. at 13. That robs even the appellant in this Court, who had no reason to defend the Court of Appeals' evidentiary ruling in his Application, of the chance to address the Association's arguments. Accordingly, it is the Association—not the Court of Appeals or any of the parties—that seek to deprive others of "a chance to respond." *Id.* at 3.

Ultimately, the Association's claim of "unfairness" is addressed by the simple fact that the People can challenge the rule in an appropriate case, *i.e.*, where an error is found to be not harmless. That is the normal appellate process, and there is no reason to depart from it here. The Court of Appeals' holding was procedurally proper, and this Court should decline to provide the Association any relief as part of its disposition of the Application.

II. The Court of Appeals Properly Determined That An Expert Invades The Province Of The Jury In Testifying That An Injury Was "Abusive" Or Amounted To Child Abuse.

Beyond procedure, the Court of Appeals was correct to hold that, "in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as 'abusive head trauma' or opines that the inflicted trauma amounted to child abuse." *McFarlane*, ___ Mich App ___; slip op at 6. Applying settled precedent, the Court of Appeals properly drew a line between acceptable and unacceptable expert testimony, explaining that "it is important that the expert not [be] permitted to . . . phrase his opinion in terms of a legal conclusion." *Id.* (quoting *People v Drossart*, 99 Mich App 66, 75; 297 NW2d 863, 868 (1980)).

A. An Expert Witness Has No Right To Phrase An Opinion In Terms Of A Legal Conclusion.

Michigan law has long-recognized limitations on expert testimony that invades the province of the jury. For example, in a negligence case, "an expert may not opine on legal conclusions, such as 'a party's negligence or non[-]negligence,' 'because doing so would invade the province of the jury' by telling the jury how to decide the case." *Zivku v James*, ___ Mich App ___ (2018); slip op at 9 (quoting *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 123; 559 NW2d 54, 57 (1996)).

That bedrock evidentiary principle has particular force when it comes to expert medical testimony because diagnoses can carry significant weight in the mind of the jury. In those

circumstances, this Court has recognized the need to be hyper-vigilant in guarding against the risk that a medical expert will stray into the territory of *mens rea* and guilt when offering a medical diagnosis. In *People v Christel*, for example, this Court considered the admissibility of expert testimony regarding Battered Woman Syndrome. 449 Mich 578; 537 NW2d 194 (1995). The Court found that "the expert may, when appropriate, explain the generalities or characteristics of the syndrome." *Id.* at 591. But the Court explained that "the expert cannot opine that the complainant was a battered woman." *Id.* The same is true for child sexual abuse cases. In *People v Beckley*, the Court considered whether expert testimony regarding Rape Trauma Syndrome is admissible, with seven justices agreeing that syndrome evidence is not admissible to demonstrate that abuse occurred. 434 Mich 691; 456 NW2d 391 (1990). This result was upheld in *People v Peterson*, where the Court determined that an expert may not testify that the sexual abuse occurred, vouch for the veracity of a victim, or testify as to whether the defendant is guilty. 450 Mich 349, 352; 537 NW2d 857, 859 (1995).

The common legal thread in these cases is that the expert diagnosis necessarily strayed into the province of the jury. An expert may clinically determine that a victim is suffering from Battered Woman's Syndrome. But if the expert opines that the victim is a battered woman, the expert has testified that the woman was battered and that a crime was committed. That is because one cannot be *accidentally* battered and the use of that term carries with it an opinion regarding the requisite *mens rea*. Such determinations are exclusively, and properly, left to the jury.

B. The Court of Appeals' Holding Regarding Expert Testimony On Abusive Head Trauma In Child Abuse Cases Properly Follows From Controlling Precedent.

AHT cases, which depend heavily on expert testimony, are no different.[1] Just as in the cases described above, when a medical expert testifies that "abuse" occurred, the expert invades the province of the jury by opining as to the defendant's *mens rea* and guilt. The Court of Appeals correctly eschewed that result in this case, based on a rule that is anything but "novel." *Contra* Ass'n Br. 2.

Even if based on a medical diagnosis, an expert who testifies that "abuse" has occurred *necessarily* testifies that the party in question had the mental state required to make something abusive, rather than accidental. The term "abusive" (and other terms like it) thus implies that a crime occurred. Some have argued that such testimony is no different than a medical determination that a victim was poisoned, claiming that it is still for a jury to determine how the poison was ingested and if the victim's poisoning was accidental, negligent, reckless, or intentional. *See, e.g.*, Arabinda Kumar Choudhary et. al., *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, 48 PEDIATRIC RADIOLOGY 1048 (2018). The poisoning analogy is not only inapt, but also proves the Court of Appeals' point. In a poisoning case, the expert merely concludes that there was poison involved, but does not make any determination that the poisoning was *intentionally* (as opposed to accidentally) carried out *by a third party* (as opposed to self-administered). Thus, the expert appropriately leaves questions about timing, intent, and method for the jury to decide. On the other hand, testimony regarding AHT leaves no

[1] In an article analyzing science-dependent prosecutions, Deborah Tuerkheimer found that, "[w]ith rare exception, [AHT] prosecutions rest entirely on the testimony of medical experts." Deborah Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 515 (2011). "While a portion of cases present medical corroboration of some type of abuse (e.g., long bone fractures and grip marks), the classic formulation of [AHT] is based exclusively on the diagnostic "triad"—again, cerebral edema, subdural hematomas, and retinal hemorrhages." *Id.*

such room for debate. As Keith Findley and D. Michael Risinger describe in a recent article on challenging AHT convictions:

> The experts opine as to the *actus reus*—violent shaking, or shaking with impact, had to have been employed to produce such injuries. The experts likewise opine as to *mens rea*—the shaking had to have been so violent that it could not have been accidental; it had to have been intentional, or at least reckless (the typical elements required for child abuse or homicide). And finally, the experts opine—erroneously—that because the child would have become immediately comatose and unresponsive, the last person with the child had to be the perpetrator, thereby establishing identity.

Keith A. Findley and D. Michael Risinger, *The Science and Law Underlying Post-Conviction Challenges to Shaken Baby Syndrome Convictions: A Response to Professor Imwinkelreid*, 48 SETON HALL L. REV. 1209, 1219 (2018). This has led some to refer to AHT as a "medical diagnosis of murder." Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 5 (2009).

Testimony of this nature exceeds the bounds of an expert witness's medical expertise. There is no medical purpose to calling something "abusive" because the *underlying* medical conditions, such as subdural hematoma or retinal hemorrhaging, are the relevant facts. In attaching an "abuse" label to such facts, a testifying expert does not provide "a medical diagnosis in the true sense," but rather conducts "a causation inquiry that goes beyond, and ventures into etiology." Findley, *Science*, *supra*, at 1219.

Indeed, one neurosurgeon whose research is considered foundational to the AHT diagnosis has since published an article sharply criticizing how the syndrome has been misapplied over the years, particularly as a means of determining a caretaker's intent to do harm. A.N. Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 HOUS. J. HEALTH L. & POL'Y 201 (2012). According to Guthkelch, "[w]e should not expect to find an exact retino-dural hemorrhage and the amount of force involved, let alone the state of

mind of the perpetrator. Nor should we assume that these findings are caused by trauma rather than natural causes." *Id.* at 204. Because of this, Guthkelch concludes that the use of the term "abusive head trauma" inappropriately "implies both mechanism (trauma) and intent (abusive)," particularly in the context of court testimony. *Id.* at 202.

The American Law Institute agrees: Determining whether an individual "has physically abused a child is a legal determination to be made by the factfinder." American Law Institute, Children and the Law, Pt. I, Ch. 3, § 3.20, at 83 (2018). Any expert testimony that opines on whether or not a victim was abused necessarily exceeds the bounds of medical expertise and should be disallowed, and the role of an expert witness must be limited to "diagnos[ing] the child's medical conditions, including for example, broken bones, bruising, internal bleeding, and swelling, as well as the medical consequences of those conditions for the child." *Id.* For that reason, Guthkelch recommends that the triad of symptoms that typically underlie a diagnosis of AHT, *see* note 1, *supra*, "would be better defined in terms of their medical features," which would "allow us to investigate causation without appearing to assume that we already know the answer." Guthkelch, *Problems*, *supra*, at 202.

C. The Association's Policy Arguments Are Overblown.

The Association raises the concern that the Court of Appeals' rule will impede the jury's truth-seeking function. In fact, the Association goes so far as to make the alarmist claim (albeit in a footnote) that experts will commit perjury if they are not allowed to refer to a diagnosis as AHT. Ass'n Br. 7 n. 9. These allegations are unfounded. The diagnostic language surrounding this syndrome is constantly evolving. Even the syndrome's staunchest defenders acknowledge that AHT has been known by many other terms over the years, including "Whiplash Shaken Infant Syndrome," "Shaken Impact Syndrome," "Inflicted Childhood Neurotrauma," "Non-

Accidental Trauma," and perhaps most familiarly, "Shaken Baby Syndrome." Dr. Sandeep Narang, J.D., *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, 11 HOUS. J. HEALTH L. & POL'Y 505, 505 (2011). To be clear, many (if not all) of these terms are no less problematic than "abusive"; for example, "inflicted" or "non-accidental," *McFarlane*, __ Mich __; slip op at 7, present the same issue as "abusive" because they too imply fault and intent, and thus impart conclusions about *mens rea*, *actus reus*, and guilt. The Court of Appeals should have gone further in disallowing the use of such terms. But for present purposes, the point remains that "abusive head trauma" is by no means the only diagnostic term available for use in court.

As the American Law Institute underscores, medical experts remain free to testify regarding a child's injuries, so long as their testimony does not also offer the view that abuse occurred:

> In addition to allowing a medical expert to render opinions regarding diagnoses of the child's bodily condition, a court may also allow a medical expert to render opinions regarding the external forces that may have caused the child's conditions. A medical expert may testify, for example, about whether a child's injuries are consistent with a parent's testimony that the child was injured while playing or whether the injuries are consistent with blunt force trauma inflicted by the parent.

American Law Institute, *Children*, *supra*, at 83. This distinction properly safeguards the jury's function to serve as the fact-finder in the case, free of any improper expert influence, while at the same time permitting experts to testify fully and accurately. Yet even if an expert were somehow constrained, the fact that the medical field chooses to use certain terminology for its own purposes would not provide medical experts license to violate evidentiary rules that protect defendants against wrongful conviction when those physicians venture into the courtroom.

Notably, assuming *arguendo* that the Association were correct that medical experts should be permitted to use medical terminology of their own choosing in court, the Association

fails to address the fact that the prosecution's expert in this case proffered an opinion "that abusive head trauma meant child abuse." *McFarlane*, ___ Mich App ___; slip op at 7. In particular, "[s]he repeatedly told the jury that KM's injuries were 'caused by definite pediatric physical abuse,' and she stated that 'we know that abusive head trauma' causes these injuries because people confess to hospital staff and investigators or other family members after inflicting the injuries." *Id.* Worse still, she "further told the prosecutor that she was correct when the prosecutor noted that [the expert] looked at the totality of circumstances before concluding that this case involved 'child abuse.'" *Id.*

This case is therefore indistinguishable from *Peterson* and *People v Bynum*, 496 Mich 610; 852 NW2d 570 (2014), even as characterized by the Association. *See* Ass'n Br. 3-4 (asserting that Court of Appeals misapplied cases). To quote the Association, those cases stand for the proposition that "speculat[ion] in [expert] testimony as to whether someone's behavior suggested the perpetration of a crime" is "impermissible." *Id.* at 4. That reasoning squarely applies in this case, and the Court of Appeals was correct to hold such testimony to be inadmissible.

CONCLUSION

Regardless of the disposition of the Application for discretionary review, this Court should deny the Association's request for relief in all respects.

Respectfully Submitted,

Dated: January 25, 2019

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