

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Court of Appeals No.

Lower Court No. 15-376-FC

-vs

SIERRA TANKERSLEY

Defendant-Appellant.

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**MOTION FOR STAY AND FOR IMMEDIATE CONSIDERATION
(TRIAL TESTIMONY SET FOR TOMORROW, February 16, 2016)
(APPENDIX FILED UNDER SEPARATE COVER)**

NOW COMES SIERRA TANKERSLEY, through her attorneys Wendy H. Barnwell and Kathy H. Murphy, and moves this Honorable Court to grant her Motion for Stay and for Immediate Consideration and states the following:

1. Testimony is set to begin tomorrow, February 16, 2016, in the retrial of a matter that ended in a mistrial in November of 2015 due to the jury's inability to reach a verdict. Jury selection began on February 10, 2016, and was completed on February 11, 2016 (*See* docket entries, attached hereto as Appendix A, "Docket Entries") Counsel has concurrently submitted an emergency application for leave to appeal the grant of the

prosecutor's motion to preclude the defendant's expert witness from testifying, issued on February 12, 2016.

2. Defendant Sierra Tankersley is charged with felony murder and first degree child abuse in the death of her 13-month-old daughter on November 2, 2014, and faces a mandatory life sentence without eligibility for parole if convicted. Defense counsel sought and was denied funds for an expert witness in a ruling issued on January 15, 2016. (Docket Entries) Despite the judge's refusal to grant the motion for funds, defense counsel was able to procure the services of an expert in biomechanical engineering, Steven Rundell, Ph.D. ("Dr. Rundell"), who offered his services *pro bono* when he learned of the nature of the case.
3. The defense in this case is accident and Dr. Rundell was prepared to testify that Ms. Tankersley's explanation of the decedent's injuries was consistent with a short-height fall.
4. On January 26, 2016, defense counsel filed a motion seeking adjournment of the trial due to a scheduling order from the U.S. Court of Appeals for the Sixth Circuit causing a conflict for lead counsel. (Docket Entries) Defendant consented to the adjournment. No other continuances had been sought previously in the retrial. The prosecutor did not file an opposition to the motion, or take any position on the record with respect to the adjournment. Then presiding judge Dalton Roberson denied the motion to adjourn on January 29, 2016, stating that he had to move his docket. (Docket Entries.)
5. On February 5, 2016, the prosecutor filed a motion to preclude the defense expert from testifying (Docket Entries), averring that Dr. Rundell cited no literature having to do with human infant skulls. On February 8, 2016, the defense filed a response, as well as a

motion to preclude the prosecutor's expert witnesses (Wayne County medical examiners Leigh Hlavaty, M.D., and Carl Schmidt, M.D.) from testifying about the magnitude of force necessary to likely to have caused the decedent's injuries, because they are not experts in biomechanical engineering.

6. On February 8, 2016, then presiding judge Dalton Roberson denied both motions, but stated on the record that the trial judge would deal with the motion and that the defense expert witness would be subject to cross examination.
7. On February 10, 2016, current president judge Michael Callahan ordered a *Daubert*¹hearing regarding defense expert Dr. Rundell. On February 11, 2016, the evidentiary portion of the *Daubert* hearing was held. On February 12, 2016, defense counsel renewed the motion to preclude the prosecutor's witnesses from testifying about force, which was denied by Judge Callahan, who then granted the prosecutor's motion. Defense counsel moved for a stay in order to bring an interlocutory appeal and that motion was denied on the record. (See *Daubert* Hearing Transcripts)
8. Judge Callahan cited a civil medical malpractice case in granting the prosecutor's motion. That case, *Elher v Misra*, ___ Mich ___; ___ NW2d ___ (2016) (Docket No. 150824), is completely inapposite to this case, as is discussed in the emergency application for leave to appeal accompanying this motion. In addition, in granting the motion, Judge Callahan relied on only one of more than 14 scholarly articles cited by Dr. Rundell in his examination of this case. (See *Daubert* Hearing Transcripts)
9. In addition, Ljubisa Dragovic, M.D., who testified as an expert witness for the defense in the first trial and who is expected to testify in the retrial, is only available this week to

¹ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

testify on February 16, 2016, from noon to 4 p.m., meaning that the only expert the defense is allowed to present must testify before the relevant prosecution testimony is presented. When told that Dr. Dragovic would not be available until the end of February, Judge Callahan said he would not wait for him and that the defense would have to read Dr. Dragovic's previous testimony into the record if Dr. Dragovic were not available to testify in person.

10. Proceeding to trial under these circumstances, *i.e.*, without Dr. Rundell and forcing Dr. Dragovic to testify before the prosecution even presents its case, would deprive Defendant of her rights under the federal and state constitutions to due process, effective assistance of counsel, and to confront witnesses against her and to compel witnesses to testify for her. U.S. Const Amends VI, XIV; Mich Const 1963, art 1, § 17, 20.

Defendant's right to present a defense, derived from these same rights, will also be fully compromised under these circumstances.

11. As explained in the accompanying application for leave to appeal, Judge Callahan erred in granting the prosecutor's motion to preclude Dr. Rundell from testifying and he also erred in stating that he would not wait for Dr. Dragovic. The first trial in this case lasted 11 days and spanned three weeks.² Judge Callahan has indicated that he thinks this trial will last only three days, which is unreasonable given the length of the previous trial.
12. Forcing Defendant to go to trial immediately under these circumstances is unreasonable, and will result in an unjustifiable deprivation of Defendant's constitutional rights.

Defendant's statements to the police and her video interrogation suggest that her daughter

² Early in the first trial, Judge Ulysses S. Boykin suffered a stroke. The trial was stopped for four days before Judge Roberson was brought on to complete it. There were 11 days of proceedings over a course of three weeks. (See Docket Entries)

died as the result of accidental falls. Without the assistance of the expert, and forcing Dr. Dragovic to testify out of order, will completely gut Defendant's defense. If testimony begins on February 16, 2016, as scheduled, defense counsel will be unable to cross-examine the prosecution's witnesses effectively, or to present a defense fully. Defense counsel has already stated in response to the prosecutor's motion that Dr. Rundell's testimony is necessary in this case to afford Defendant her constitutional rights.

13. Absent this Court's intervention to stay the proceedings pending appeal of the grant of the motion to preclude the defense expert from testifying, this charade of a trial will proceed on Tuesday, in clear violation of Defendant's Sixth and Fourteenth Amendment rights, as well as her rights under the Michigan Constitution. A short delay of the trial will harm nothing other than the trial court's docket; no delay will result in the deprivation of Defendant's fundamental constitutional rights as a citizen of this country and this state. Under these circumstances, the choice is clear. A stay is warranted and permitted under MCR 7.209(D).
14. Accordingly, Defendant requests that this Court grant a stay of proceedings pending appeal of the grant of the prosecutor's motion. Moreover, because testimony in this trial on felony murder and first degree child abuse charges is currently set for tomorrow, February 16, 2016, counsel respectfully requests that this Court immediately consider this Motion, as well as the accompanying Application for Leave to Appeal.

WHEREFORE, for the reasons stated above, Defendant-Appellant respectfully asks that this Court grant her Motion for Stay and for Immediate Consideration.

Respectfully submitted,

/S/ Wendy Barnwell
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Attorneys for Defendant

February 15, 2016