STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No.
Plaintiff-Appellant,	Court of Appeals No. 354487
v	Ingham County Circuit Court No. 18-000825-FH
KATHIE ANN KLAGES,	
Defendant-Appellee. _____/	

PEOPLE OF THE STATE OF MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

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Dated: February 14, 2022

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STATEMENT OF JURISDICTION

On December 21, 2021, the Michigan Court of Appeals issued a published opinion, reversing the convictions of former Michigan State University Coach Kathie Klages ruling that there was insufficient evidence that she made a false or misleading statement to the police that was material to its investigation. This Court has jurisdiction over this timely filed application. See MCR 7.305(C)(2).

STATEMENT OF QUESTION PRESENTED

It is a crime in Michigan for a person to knowingly make a false or misleading statement to a police officer regarding a material fact related to the criminal investigation. The Department of Attorney General conducted a criminal investigation into the response of Michigan State University and its employees to the serial criminal sexual conduct of Larry Nassar.

1. When told by investigators that they were engaged in a criminal investigation regarding MSU's response to Larry Nassar, Kathie Klages claimed that she did not remember that two of the survivors, LB and RF, told her of Nassar's sexual abuse, but she said she would have remembered if they had. But both LB and RF testified that they did confide in Klages regarding Nassar's abuse. Where the Attorney General investigator testified that he would have conducted his investigation differently had Klages told him the truth, did the People present sufficient evidence that Klages' false statements were material to the investigation?

   Klages' answer: No.

   The People's answer: Yes.

   Trial court's answer: Yes.

STATUTE INVOLVED

MCL 750.479c

(1) Except as provided in this section, a person who is informed by a peace officer that he or she is conducting a criminal investigation shall not do any of the following:

* * *

(b) Knowingly and willfully make any statement to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation.

(2) A person who violates this section is guilty of a crime as follows:

* * *

(c) If the crime being investigated is a felony punishable by imprisonment for 4 years or more, the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $5,000.00, or both

(d) If the crime being investigated is any of the following, the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both: . . .

(iii) A violation of section 520b (first degree criminal sexual conduct).

(3) This section does not apply to either of the following:

(a) Any statement made or action taken by an alleged victim of the crime being investigated by the peace officer.

(b) A person who was acting under duress or out of a reasonable fear of physical harm to himself or herself or another person from a spouse or former spouse, a person with whom he or she has or has had a dating relationship, a person with whom he or she has had a child in common, or a resident or former resident of his or her household.

(4) This section does not prohibit a person from doing either of the following:

(a) Invoking the person's rights under the Fifth Amendment of the constitution of the United States or section 17 of article I of the state constitution of 1963.

(b) Declining to speak to or otherwise communicate with a peace officer concerning the criminal investigation.

(5) As used in this section:

* * *

(b) "Peace officer" means any of the following: . . .

(xii) An investigator of the state department of attorney general.

INTRODUCTION

In Michigan, it is a crime for a person knowingly and willingly to make a statement to a police officer that is false regarding a material fact in that investigation. Under the standard criminal jury instructions, a material fact is one that would "influence an officer's decision how to proceed with an investigation," M Crim JI 13.20(7). But according to the majority decision of the Court of Appeals below, that is no longer a correct statement of the law. Now the Court of Appeals has added a requirement – not in the statute – that the prosecution must show that the false or misleading statement affected the charging decision, not just the investigation. This Court's review is necessary. This mistake will affect all future police investigations, and it affects the outcome of this case.

In 2018, the Department of Attorney General investigated Michigan State University and the response of its employees to the sexual predatory conduct of Larry Nassar against hundreds of female athletes. The issues were whether any public officials engaged in misconduct (misconduct in office) or protected Nassar, enabling him to continue to prey on young athletes (first-degree criminal sexual conduct). One of the key figures in this investigation was the close friend of Nassar, Coach Kathie Klages, who stood in an important position at the University: she was the coach of the women's gymnastics team and oversaw the Spartan Youth program. During this investigation, when confronted with the fact that two teenage athletes, LB and RF, confided to her that they were sexually abused by Nassar in 1997, Klages asserted that she would remember if they told her such a thing, but claimed that she did not remember. For these lies, she was convicted of two counts of lying to a police officer.

The testimony was clear at trial that these lies hindered the investigation in two ways: (1) by blocking further questions of Klages and the Department's investigation into the actions she took based on these 1997 disclosures, and (2) by hindering the investigation of others to whom she confided the abuse. But given Klages' false statements, the Department's investigation into whether she or other officials or employees helped Nassar and shielded him from detection was stymied. Nassar's conduct harming young women continued for another 20 years before it finally was identified by law enforcement officials and stopped. The jury rightly convicted Klages of making false statements that were material to the Attorney General's investigation conducted by its special agents.

The majority below concluded otherwise by ruling that the lie was not material because it did not influence the "charging decision" of the prosecution. Slip op, p 14. But this is a fundamental misreading of the statute. It prohibits false statements that materially hinder the *police* in their *investigations*. The point is plain that a false statement may well derail a police officer's investigation. Such a lie then prevents the prosecution from knowing what specific crimes could have been charged because the relevant information was hidden by the false statements to investigators, just like Klages' here. The dissent below persuasively rebuts the majority on all points. See slip op, pp 7–11 (Borrello, J.). Insofar as the majority relies on federal law, it misapplies it. If anything, federal law only confirms that false statements that interfere with the officer's investigation are material and subject to prosecution. This Court should grant leave and reverse.

STATEMENT OF FACTS AND PROCEEDINGS

In a four-day jury trial, Kathie Klages was convicted of two counts of lying to a police officer. In the complaint, each count was predicated on the same "false or misleading" statement of Kathie Klages to investigators regarding a material fact under MCL 750.479c, i.e., that after being informed by Attorney General Special Agent David Dwyre that he was conducting a criminal investigation, "she lied when she denied that she was told by witnesses that they were sexually assaulted by Larry Nassar." (Information filed on Nov 8, 2018.) The language for count 2 was identical. (*Id*.)

The first count was a four-year felony for lying about a criminal investigation related to first-degree criminal sexual conduct, MCL 750.479c(2)(d), and the second was a two-year high court misdemeanor for an investigation into the crime of misconduct of office, MCL 750.479c(2)(c). The People presented four witnesses at trial, two detectives (including Attorney General Investigator David Dwyre), and two gymnastic athletes who confided in Klages. Klages presented twelve witnesses, including herself. The jury found Klages guilty as charged of both counts. (Vol IV, pp 149–154.)

A. The Department of Attorney General initiates an investigation against Michigan State University in relation to Larry Nassar who was convicted of multiple counts of first-degree criminal sexual misconduct while serving a sports doctor for the school.

In January 2018, the Department of Attorney General and the Michigan State Police began a joint investigation into MSU in relation to Larry Nassar and his sexual crimes committed over a long period of time at MSU. (Vol II, pp 140, 157.)

The investigation team for the Department consisted of approximately ten investigators. (*Id.*) Investigator David Dwyre was the lead investigator for the Department, and he explained the purpose of this investigation:

> [W]e wanted to know who knew about Larry Nassar, when did you know it, and what was done about it, essentially. [Vol II, p 141.]

Nassar had pled guilty to seven counts of first-degree CSC in Ingham County and three counts of first-degree CSC in Eaton County. (Vol II, p 19.) While the investigation did not look to bring new prosecutions against Nassar for his sexual abuse against LB and RF, the investigation did intend to find out what individuals from MSU did in relation to Nassar's crimes:

> Not as it pertained to criminal prosecution of Larry Nassar [for the sexual assaults against LB and RF], because he had already been prosecuted by that point. But was anyone else in – did anyone else know about it and did they do anything to notify – notify Michigan State University, because it was important. That was, kind of, like one of the main reasons of the investigation. [Vol II, p 141.]

Regarding the scope of the Attorney General investigation, Investigator Dwyre explained that the Department's investigation included criminal sexual misconduct:

> Q: And you weren't investigating Criminal Sexual Conduct because –
>
> A: No, no, no. I'll stop you right there. We were definitely interviewing [sic] sexual misconduct. [Vol II, p 160.]

In particular, Investigator Dwyre further explained that it was "possible" that Klages herself might have been involved in "aiding and abetting" criminal sexual misconduct, which was one of the subjects of the investigation:

Q. You didn't believe Ms. Klages was involved in Criminal Sexual Conduct?

A. Well, that was – that was a point of contention. Now if she is – is it possible that she is an aider and abettor to sexual misconduct if she knows that Larry Nassar is preying on children and then encouraging her students to go to him. I know that's a legal question, but – [Vol II, p 161.]

On this point, he was cross-examined regarding his prior testimony that did not have an "active" criminal sexual conduct investigation against her, as he clarified that she was not suspected of "directly sexually assaulting a child." (Vol II, p 163.)

And in relation to the investigation of misconduct in office, Investigator Dwyre explained that the person who commits the offense must be a public official. (Vol II, p 170.) And while Investigator Dwyre did not identify any conversations between Klages and MSU public officers (Vol II, pp 170–171), he explained that if Klages had honestly admitted that LB and RF had confided in her, he could have followed up with any other person with whom Klages shared this. (Vol II, p 152.)

The genesis of the Department's investigation arose from the original investigation by the MSU Police Department of Larry Nassar that had begun in August 2016 against Nassar, which corresponded to the time in which Nassar's conduct was disclosed by the *Indystar* (the Indianapolis Star newspaper). (Vol II, p 14.) Nassar was hired by MSU in August 1, 1997, but volunteered for MSU before that time. (Vol II, p 31.) Lt. Andrea Munford of the MSU Police Department explained that the culmination of its investigation resulted in his conviction for multiple counts from Ingham and Eaton County of first-degree CSC and his sentence to at least 40 years in prison for these crimes in early 2018. (Vol II, p 21.)

B. The prosecution presents evidence at trial that LB and RF told Klages that they were sexually abused by Larry Nassar,

Both LB and RF were gymnastic athletes in the Spartan Youth Gymnastics Program in 1997. (Vol II, pp 34, 85.) Klages was the one of the organizers who helped run the program. (Vol II, p 34; Vol IV, p 27.)

LB started in the program in 1993, when she was 13 years old. (Vol II, p 34.) The participation of the youth gymnasts was intense, as they practiced four hours a day, five days a week. (Vol II, pp 34–35.) It was like a "second home" to LB. (Vol II, p 35.) When she was 16 years old, LB suffered from a back injury, and Klages had recommended that she see Nassar. (Vol II, p 38.) LB would see him at the MSU Sports Clinic at the lower level of the Jenison Field House. (Vol II, p 38.) She had a high regard for him – "we really loved him honestly" – when she visited him with her parents, as he was the Olympic doctor for gymnasts. (Vol II, pp 39–40.) She explained that it changed when her parents stopped coming to the appointments:

> It changed when my parents stopped coming into the room with me. And I – I still felt – I still looked up to him. But he started sexually abusing me.
>
> * * *
>
> He was sticking his fingers inside of me and it felt like he was fingering me. [Vol II, p 40.]

It happened more than a dozen times. (Vol II, p 40.)

At that time in 1997, LB approached Klages about Nassar. The conversation occurred in Klages' office. (Vol II, p 37.) LB explained that she told Klages that Nassar had been sexually assaulting her:

> I remember telling Kathie that Larry was sticking his fingers inside of me, and it felt like he was fingering me. [Vol II, p 37.]

In response, she said that Klages told her that "I've known Larry for years and years." "There's no way that he would do anything inappropriate." (Vol II, p 41.) LB responded to the contrary. (*Id.*) At this point, Klages invited other gymnasts into the office, two or three college-age gymnasts, asking them if Nassar's conduct made them feel "uncomfortable." (Vol II, pp 37, 45.) They said no. (Vol II, p 41.) LB was "mortified," made to feel as if she was "dirty" and a "liar." (*Id.*) She said RF had the same experience, and then that RF then confirmed it: "[RF] was called into the room and she verified that yes, this was happening to her." (Vol II, pp, 42–43, 44.) Klages "just couldn't believe us, or didn't want to believe us." (*Id.*)

Klages then went out into the hallway and spoke with the older gymnasts, and she came back into the office, where LB reiterated the point that "[i]t feels like he's fingering me." (Vol II, p 46.) LB then explained that Klages challenged her:

> [Klages] said she would – she raised a piece of paper and said, "I can file this, but there's going to be very serious consequences for you and Larry Nassar." [Vol II, p 46.]

LB felt "defeated" as she was "trying to do the right thing," thinking that she must have "a dirty mind," and then ran out of the room, and "went to the bathroom, and I think I cried for the rest of practice." (Vol II, pp 46, 47.)

Not for its truth but to explain why she took no action, LB said that she still saw Nassar, and the next time she saw him he said, "I talked to Kathie," and LB said that "I'm so sorry . . . [i]t's all my fault . . . [i]t's a big misunderstanding." (Vol II, pp 47–48.) LB said that she "hopped back up on his table continued to be abused by him because I wanted to prove that . . . I didn't have a dirty mind." (Vol II, p 48.) Later, after the news broke, LB spoke with Lt. Munford. (Vol II, pp 48–49.)

Like LB, RF was also extremely active in the youth gymnastic program at MSU, attending practice virtually every weeknight. (Vol II, p 85.) Also like LB, RF started when she was 12 or 13 and then later hurt her back. (Vol II, p 86.) RF went to see Nassar for these lower back injuries. (Vol II, p 89.) She explained that Klages "had referred to me to him because my low back chronic pain." (Vol II, pp 89–90.)

Regarding the meeting with Klages about LB's accusations against Nassar, RF remembered that day in 1997 – she would have been 14 or 15 years old – when she was called to the meeting:

> I was practicing and we were doing conditioning. I remember I was at the beam, with our feet underneath the beam. We were doing, like, sit ups. And someone from another team, I think an older team, a girl came and got me and said that I needed to come to Kathie's office to have a little meeting. [Vol II, p 91.]

When she arrived at Klages' office, there were LB and Klages as well as "one or two from [LB's] team, and there were also some older girls that were on the college team." (Vol II, p 92.) Klages than asked RF about LB's accusation against Nassar: "[S]he said [LB] is telling her that Larry – Dr. Larry was touching her underneath her shorts and also underneath her shirt and that she did not like it." "And she asked me, 'Is the same thing happening to you when you go to see him for your treatments?" (Vol II, p 93.) RF confirmed, "yes." (Vol II, p 93.)

RF explained that Klages then defended Nassar:

> She said he's a really good doctor, and she said we're not going to talk about this anymore. And that we were really lucky to see him. [Vol II, p 93.]

Klages also stood up and "there was some sort of paper" that Klages held up, and RF described that Klages "was saying that a lot could go wrong if we continue to talk about it and there would be problems for everybody involved." (Vol II, pp 97, 98.) RF explained that she felt "disappointed," but also "relieved," because it would enable her to continue to compete in gymnastics. (Vol II, pp 97–99.) RF continued to see Nassar for many years, into her 30s and only stopped in 2012. (Vol II, p 99.) The medical examinations were unchanged: Nassar touched her "[u]nderneath my shirt, underneath my shorts, anywhere he wanted to that he said it was okay for him to do." (Vol II, p 99.) Like LB, RF spoke with Lt. Munford in March 2017 when the MSU Police Department moved forward with its investigation against Nassar. (Vol II, p 106.)

C. Investigator David Dwyre and Mary Sclabassi interview Klages, and she asserts that she would remember if LB and RF had told her about Nassar sexually assaulting them.

Regarding LB and RF, Investigator Dwyre indicated that the Attorney General investigative team reinterviewed them and that the Department then reached out to Kathie Klages to interview her. (Vol II, pp 142, 144.) Investigator Dwyre explained that he wanted to ask Klages about her response to the disclosure by LB and RF of Nassar's sexual abuse:

> Ms. Klages was a very important witness. We had information that two student athletes had disclosed being sexually abused by Larry Nassar to her. And so it was important to interview her to see what she was going to say about that. [Vol II, p 144.]

In specific, he wanted to know "what was told to her, and then what did she do with that information." (Vol II, p 145.) He explained that this information "potentially could change the course of my direction of my investigation." (Vol II, p 145.)

On June 21, 2018, Investigator Dwyre and Investigator Mary Sclabassi met with Klages and her attorneys at the Clark Hill firm offices in Lansing. (Vol II, pp 145, 148.)[1] Given his perception that Klages was a "fierce protector of Larry Nassar," Investigator Dwyre wanted to record the interview. (Vol II, p 146.) He asked Klages and her attorney whether they could record the interview, her attorney declined, and he turned his recorder off, but Investigator Sclabassi kept her recorder on consistent with Investigator Dwyre's wish to record the conversation. (Vol II, p 147.) As he explained, "it's so much easier just to have everything recorded . . . [t]here's no dispute about what was said." (Vol II, p 146.)

The tape recording of the interview was introduced as was the transcript of that interview, which were marked as exhibits 1 and 2.[2] (Vol II, p 149.)

At the beginning of the interview, Investigator Dwyre explained that the Department was conducting a criminal investigation: "We are police detectives so this is a criminal investigation." (Tape, p 4.) The description that Investigator Dwyre provided referenced Larry Nassar:

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[1] Investigator Sclabassi was scheduled to testify, but her husband died unexpectedly, and she was unavailable. (Vol II, p 137.)

[2] This brief refers to exhibit 2, the transcript, as "Tape," and it appears also as exhibit A. The page citations refer to the embedded page numbering, because the exhibit runs 13 pages, but the total transcript is 41 pages, four pages printed on each page.

> [I]t's a criminal investigation in that in the event that we found criminal misconduct by anyone involving the MSU allegations as – because we were tasked with investigating MSU as it pertains to Larry Nassar. But there's branches that go off, so we had a branch of Dean Strampel, you probably followed that a little bit in the media, so he got charged. So there is a – we don't know but if we find – if there's something that is criminal we will pursue it. [Tape, p 5.]

During the interview, Klages discussed her relationship with Nassar. She explained that she met him in the late 1980s when she was coaching at Great Lake Gymnastics, and he was a volunteer athletic trainer. (Tape, p 8.) And while she did not go out to dinner with him or visit his home, she described the relationship as a "friendship." (Tape, p 9) ("the friendship just had developed I think from the professional side of things"). She worked with him for 20 years. (Tape, p 10.)

When initially asked about the accusations of LB from 1997 regarding Nassar by Investigators Dwyre and Sclabassi, Klages said that she did not remember them:

> Q. All righty. Back in '97, back in '97 did [LB] – [L], I'm sorry, [B], make a complaint to you about Larry Nassar?
>
> A. I don't recall [LB].
>
> Q. You don't remember that?
>
> A. No. [Tape, p 10.]

When questioned further about this matter, Klages made clear that she would have remembered if a student athlete would have told her that she was sexually assaulted:

> Q. If a student athlete came to you and said they were sexually assaulted by a – would you –
>
> A. Absolutely.
>
> Q. You couldn't forget that, would you agree?
>
> A. Right. [Tape, p 12.]

Klages gave the same answers with regard to RF:

> Q. Back in '97, again, did [RF] tell you that Larry Nassar had penetrated her vaginally and anally?
>
> A. I do not remember that either. [Tape, p 14.]

And in the same way as LB's accusation, Klages explained that she would not have forgotten these accusations if RF had made them to her:

> Q. So you wouldn't have forgotten if she would have come to you about Larry Nassar and said somebody stuck his fingers inside of her, you wouldn't have forgotten that, correct?
>
> A. I do not believe I would have ever forgot that. [Tape, p 15.]

And Klages repeated that she did "not recall" that RF had ever told her about a sexual assault, nothing about her treatment from Nassar. (Tape, pp 16, 17.)

The questions then shifted to a time in which Klages did report an accusation made to her in January of 2017 (after the fact that Nassar had engaged in this conduct became public), and her role as with a duty to report crimes. Klages said that it was relayed to her that LL said she "was abused by Larry." (Tape, p 19.) Klages then said that "I believe I told [LL] the next day that I was a mandatory reporter and I was going to call the [Office of Institutional Equity]." (Tape, p 23.)

After the tape was played, Investigator Dwyre was asked how the investigation would have changed had Klages confirmed that LB and RF confided in her about the abuse, and he said he would have pursued whether she told others:

> [I]t would have changed the direction of my questioning. I would have immediately began questioning who did you tell. Recognizing that Ms. Klages potentially could become a Defendant. She had a duty to report. So I would have wanted to know who reported this information to, and it would have changed that type of direction of my questioning.

> Had she told me that she told other people, I would have wanted to know more about that. I would have questioned her more vigorously about that because I would have tried to obtain, if possible, search warrants about their two conversations, if they would have been in text or any type of social media or anything like that. [Vol II, p 152.]

And he went on to explain that if Klages had not told anyone else, he would have questioned her about her possible role in the crimes:

> I also would have – had she not – had she told me I never – I was given this information, but I never told anyone, I would have changed again my direction of questioning and I would have asked her why didn't you, and did – and knowing this, why did you continue to send athletes to Dr. Nassar? [Vol II, p 152.]

On cross-examination, Investigator Dwyre was asked whether he believed Klages when she said that she did not remember, and he answered that he did not. (Vol II, p 171.) He later explained that he did not believe her because she had a "greater motive to lie":

> She would have the fear of getting prosecuted, the fear of losing her identity and her career, the fear of losing respect, civil liability, and being prosecuted. So those – all of those things together, I felt that she had more motive to lie. [Vol II, p 173.]

D. Klages claims that she did not recall these accusations.

Other than the testimony of Klages herself, the eleven other witnesses she presented have little bearing on the issue raised here, and they will be digested in summary fashion:

- Rick Atkinson was the former gymnastics coach for men at Michigan State University from 1988 to 2001, and he testified that Klages operated essentially "behind the scenes" for Spartan Youth Group, dealing with the parents and the sign-up for the children. (Vol III, p 31.) He also knew LB and RF and they never raised any concerns regarding Nassar. (Vol III, pp 34, 35.)

- Kristina Linderliter was one of the coaches for Spartan Youth Group in the 1990s, and she testified that she knew RF and was unaware of any meeting between Spartan Youth group participants and MSU gymnasts. (Vol III, p 54.)

- ML was one of the gymnasts from Spartan Youth in the 1990s, and she testified that she did not remember any meetings that occurred between the Spartan Youth participants and the MSU gymnasts. (Vol III, p 68.)

- JB was another gymnast from Spartan Youth in the 1990s and served as a coach to the preschoolers in 1997 and 1998, and she testified that she knew LB and that in 2017 LB contacted her about an incident from 2002 in which JB had confided in her about sexual misconduct that JB experienced in 2002 from a coach. (Vol III, pp 77–78.) JB explained that it happened in 2002 in Orlando, Florida, and she told LB about it in 2017 to show "empathy" for LB. (Vol III, pp 79–80.) The testimony was related to the cross-examination of LB, in which LB was questioned about whether she asked JB questions to help her remember the events from the past. (Vol II, p 63).

- KY was another gymnast from Spartan Youth in the 1990s, and she testified that she did not attend any meetings where Larry Nassar's treatments were discussed. (Vol III, p 95.)

- Siri Garcia was a gymnast from MSU from 1992 to 1996, and she testified that there were no joint meetings between the youth participants in Spartan Youth and the female gymnasts at MSU that she recalled. (Vol III, p 107.)

- Cathy McIntosh was a volunteer who did office work for Klages from 1998 to 2011, and she testified that her daughter participated in gymnastics before 1998 and McIntosh knew of no complaints regarding Larry Nassar at that time. (Vol III, p 116.)

- Jennifer Jallo was a graduate assistant at MSU in the Athletic Training Department in 1997 and 1998, and she testified she was in charge of medical care for the athletes. (Vol III, p 118.) She testified that the youth participants in Spartan Youth would practice at different times than the MSU gymnasts and that she was unaware of any joint meetings that occurred. (Vol III, p 120). She did not hear of any complaints regarding Larry Nassar at that time either. (Vol III, pp 120–121.)

- MK is the son of Kathie Klages, and he testified that he was a youth participant in Spartan Youth from 1992 to 1996. (Vol III, p 126.) He explained that his mother was the "owner, operator" of the Spartan Youth program and "ran the program" but was not a coach. (Vol III, pp 128, 134.) He was treated by Larry Nassar, as was his two-year old daughter in 2010. (Vol III, pp 131–132.)

- RS is the daughter of Kathie Klages, and she testified she was a gymnast in the Spartan Youth program and stopped in 1998. (Vol III, p 143.) She was also treated by Larry Nassar for injuries, including those to her lower back. (Vol III, p 145.) The first treatment occurred in 2001 or 2002 and the last in 2013. (Vol III, p 146.) Her younger brother, D, as well as her niece, L, were also treated by Nassar. (Vol III, p 146.)

- Shirley Tranquill served as a volunteer coach for the MSU Gymnastics teams starting in 1996 through 1999. (Vol IV, pp 11–12.) She was aware that Larry Nassar provided treatments but had heard no complaints. (Vol IV, pp 14–15.)

For Klages, she explained that the Spartan Youth Gymnastics program started in 1992 or 1993. (Vol IV, p 22.) The participants trained nine hours a week, 6 pm to 9 pm, three nights a week. (Vol IV, p 22.) Some of the higher performing youth may have come to the gym at 5 pm when the MSU gymnastics team was lifting and not be on the floor mat. (Vol IV, p 29.) The MSU gymnasts did work out with the Spartan Youth participants. (Vol IV, p 29.) Klages "wr[o]te the program," prepared the weekly lesson plan for the participants, and would collect the fees from the parents. (Vol IV, p 23.) She did not recall serving as a coach, but said it was possible that she might have subbed once in a while. (Vol IV, p 25.) She "did the whole program running part of it," and Atkinson ran the business end. (Vol IV, p 27.)

Klages claimed that the first time she heard the accusation from LB against Nassar was during a television interview, and she said she was "shocked." (Vol IV, pp 29–30.) With regard to LB, she said that "I don't remember her." (Vol IV, p 30.) With regard to RF, Klages remembered her, because RF "was on my daughter's team." (Vol IV, p 30.) Just as for LB, she claimed that she did not "recall any conversation." (Vol IV, p 31.) Neither of them was a MSU gymnast. (Vol IV, p 31.) She also asserted that she was unaware that any of these athletes were seeing Nassar at the Jenison Field House. (Vol IV, pp 31–32.) She specifically denied that she remembered either LB or RF making comments to her. (Vol IV, p 37.) Klages also indicated that Nassar had treated her children for injuries after 1997. (Vol IV, p 37.) She told Investigators Dwyre and Sclabassi the same thing during her taped interview. (Tape, p 32.)

On cross examination, Klages admitted that she practiced her testimony three or four times as a kind of "mock trial." (Vol IV, p 43.) She also admitted that Nassar was a "very good friend" before 2016, confirming that they were "very close" (Vol IV, pp 44–45), and that when the *IndyStar* story first broke in late 2016, she was a "passionate" supporter of his and spoke with athletes about it. (Vol IV, p 46.) And she did not deny that she told her athletes that she could not believe that someone was "trying to take Larry out like this." (Vol IV, p 48.) Nassar contacted her the day before or the day the story broke from the Indianapolis newspaper. (Vol IV, p 49.) She also told her gymnasts not to text each other about Nassar. (Vol IV, p 52.) Klages also asked the gymnasts to sign a card for him. (Vol IV, p 56.)

E. The jury convicted Klages as charged in three hours.

The trial court finished the jury instructions at 1:11 pm on February 14, 2020, the fourth day of trial (including voir dire), and it came back with a verdict of guilty as charged at 4:12 pm that same day. (Vol IV, pp 149, 150.) Klages was sentenced to serve 90 days jail for her convictions. (Judgment of Sentence, p 1.)

F. The Court of Appeals reverses the conviction on sufficiency grounds finding that Klages' false statements were not material to the investigation under the statute.

On appeal, Klages raised five claims, the first of which was a sufficiency claim arguing that there was a lack of evidence that Klages made a false statement and that there was insufficient evidence that the falsity was material to the investigation. The Court of Appeals reversed on this ground in a 2-to-1 decision. For the controlling opinion, the majority appeared to accept that the evidence supported the jury's verdict about the fact that Klages made "false statements" during her interview with the police. See slip op, pp 12, 14 (referring to "Klages's false statements"). But the majority ruled that the statements were not "material" under the statute because they did not affect "a charging decision" even though there was evidence that the investigator "may have asked different questions":

> We emphasize that the "material fact" requirement incorporated within MCL 750.479c(1)(b) requires proof *of something more than an investigator's unsupported and speculative opinion that he may have asked different questions*, particularly absent evidence that the "material fact" had any reasonable possibility of influencing the decision that matters—a charging decision. As in *Kungys* [*v United States*, 485 US 759 (1988)], when presented with the question of whether a false statement constitutes a material fact, materiality is not determined by an investigator's belief that more investigation would have been helpful.

> Rather, as this Court described in *Williams*, 318 Mich App at 240, a lie or "a willful, knowing omission of pertinent information about a crime may lead the police down a fruitless path, permit the destruction of evidence while the police look in another direction, enable the escape of the actual culprit, or precipitate the arrest of an innocent person." In those examples, misleading statements prevent the police from solving a crime and qualify as material because they deprive the decision makers of the information necessary to make an accurate and informed charging decision. Here, the prosecution never presented evidence of any underlying crime or even suggested that someone "got away." Klages's false statements therefore did not represent or misrepresent any facts material to the Attorney General's investigation.
>
> [Slip op, p 14 (emphasis added; paragraph break added).]

This analysis was predicated on the majority's understanding that the relevant body to whom the lie was addressed was not the investigators themselves but to the prosecutor underlying the case, the Attorney General, and how the lies affected "the Attorney General's decisionmaking regarding whom to charge." Slip op, p 13; *id.* at 10 ("Dwyre supplied no information or explanation, however, evidencing that Klages's 2018 lie regarding her 1997 awareness of Nassar's conduct influenced the Attorney General's charging decision."). The majority opinion relied heavily on federal precedent, namely the U.S. Supreme Court decisions in *Kungys* and *United States v Gaudin*, 515 US 506 (1995). See slip op, pp 8–14. The majority also concluded that it was significant that the investigator from the Department did not "believe" Klages and cast doubt on whether the false statements actually affected the investigation. *Id.* at 13.

In dissent, Judge Borrello thoughtfully noted that Klages' false statements were material ("essential") to "the *investigation*" (emphasis in original):

> Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant's statements that she did not remember the disclosures made by [LB] and RF were false with respect to facts that were "material" because they were significant or essential to the criminal investigation Dwyre was conducting and influenced his decisions about how to proceed with the *investigation*.
>
> [Slip op, p 10 (Borrello, J., dissenting) (emphasis in original).]

Judge Borrello further noted that the majority's analysis requiring that the false statements affect the specific charging decision was not included within the statute:

> Contrary to the holding by the majority, the statutory language does not require the prosecution to prove that the false statement prevented a specific criminal charge from being filed. The statutory language also does not require that the criminal investigation at issue pertain to criminal activity by the person alleged to have made the false or misleading statement, nor does the statutory language require that the false or misleading statement be material to that person's own potential criminal liability. There is no requirement in the statute that the peace officer must be investigating a crime of which the person alleged to have provided the false or misleading statement could potentially be charged. [*Id.*]

He would have affirmed Klages' convictions. *Id.* at 11.

STANDARD OF REVIEW

This Court reviews a conviction on sufficiency grounds de novo. *People v Xun Wang*, 505 Mich 239, 251 (2020). And it also reviews issues of statutory construction, as issues of law, de novo. *People v Feeley*, 499 Mich 429, 434 (2016).

ARGUMENT

I. There was sufficient evidence to sustain Klages' conviction for lying to a police officer because her false statements to investigators were material to the Attorney General's criminal investigation.

The Department's chief investigator explained that he would have engaged in a different course of investigation against Kathie Klages if she had admitted to the fact that LB and RF had confided to her in 1997 that they had been abused by her friend, Larry Nassar. And the agent explained that he would also have investigated those to whom she shared these accusations to determine what if, anything, these others had done. The Department was investigating both misconduct in office and criminal sexual conduct, and thus these false statements were material to the investigation. The lies affected the course of the investigation. Under Michigan law, that is a crime. And for that reason, Klages' convictions should be affirmed.

The Court of Appeals' majority erred in ruling otherwise. It made a fundamental error in adding a requirement that the prosecution prove that the lie affected the *charging* decision as opposed to the *investigation* itself. The statute only requires that the lie be material to the investigation. The majority also contradicts the standard criminal jury instructions on this point. In relying on precedent from the U.S. Supreme Court, the majority misapplied that precedent. The key case on which it relied – *Kungys* – was applying a statute for which the decisionmaker was the federal agency itself, whereas here the law expressly references the "officer" and the "investigation." And under the federal law similar to Michigan's, those courts have upheld convictions where a false statement may have affected the investigation as here. This Court should grant leave and reverse.

A. Klages' false statements to Investigator Dwyre were material to the Department's criminal investigation.

The majority decision ruled that the evidence below was insufficient to support Kathie Klages' conviction for two counts of lying to a police officer concluding that her false statements were not "material" to the investigation. Slip op, p 14. This Court reviews the prosecution's evidence in a light most favorable to the prosecutor to determine whether "any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Xun Wang*, 505 Mich 239, 251 (2020). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622 (2008).

Klages was convicted for knowingly and willfully making a false statement to an investigator from the Department of Attorney General, Special Agent David Dwyre, regarding a "material fact" relating to that investigation:

> (1) Except as provided in this section, a person who is informed by a peace officer that he or she is conducting a criminal investigation shall not do any of the following:
>
> > (a) By any trick, scheme, or device, knowingly and willfully conceal from the peace officer any material fact relating to the criminal investigation.
> >
> > *(b) Knowingly and willfully make any statement to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation.*
> >
> > (c) Knowingly and willfully issue or otherwise provide any writing or document to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation. [Emphasis added.]

An investigator for the Department of the Attorney General is a peace officer. MCL 750.479c(5)(b)(xii).

In reviewing the statutory language of the charge here, the prosecution had to prove that (1) Klages was informed by Investigator Dwyre that he was conducting a criminal investigation, (2) Klages knowingly and willfully made a false statement when she denied that LB and RF confided in her that Larry Nassar sexually abused them, asserting that she did not remember that and would have if they had, and (3) that these false statements to Investigator Dwyre were regarding a material fact in that criminal investigation. See MCL 750.479c(1)(b). See also Mich Crim JI 13.20 ("Concealing Facts or Misleading the Police").

As an initial matter, Investigator Dwyre started the interview by telling Klages that the Attorney General's office was conducting a criminal investigation. (Tape, p 4) ("We are police detectives so this is a criminal investigation."); (*id.* at 5) ("[I]t's a criminal investigation in that in the event that we found criminal misconduct by anyone involving the MSU allegations as – because we were tasked with investigating MSU as it pertains to Larry Nassar."). That met the requirements of the statute, and majority decision below did not contest it.

Regarding the falsity of Klages' statements, there was direct evidence contradicting her claim that she did not remember LB and RF confiding in her and that she would have remembered if they had. The key evidence here came from LB and RF, who provided interlocking testimony that they confided in Klages about the fact that they were sexually abused by Larry Nassar. (Vol II, pp 37, 44, 91, 93.)

And LB used graphic language in describing what Nassar did to her: "it felt like he was fingering me." (Vol II, p 37.) And this was not a passing conversation. Klages brought in RF when LB first raised the accusation, and then she took the unusual step, as LB explained, of asking the college gymnasts from MSU to speak with two teenage Spartan Youth participants to disabuse them of the idea that Nassar could be harming them in some way. (Vol II, pp 37, 45, 92.)

Klages' reaction was swift and dramatic. She strongly denounced the accusation, effectively threatening LB and RF if they pressed them:

> [Klages] raised a piece of paper and said, "I can file this, but there's going to be very serious consequences for you and Larry Nassar." [Vol II, p 46.]

RF confirmed the point. (Vol II, pp 97, 98) ("there was some sort of paper" that Klages held up, and Klages "was saying that a lot could go wrong if we continue to talk about it and there would be problems for everybody involved."). As a close friend and strong defender of Nassar, these accusations were a serious matter for Klages given her role as she described as a mandatory reporter for any violations under Title IX. (Tape, p 23.) Her assertion that she did not remember these events and that she would have remembered if they happened were not well taken.

Instead, the evidence was compelling that Klages in fact recalled this exchange based on the significant and extraordinary nature of the event itself, i.e., that she threatened the teenage students – holding up the documents – and then took what by all accounts was the unusual step of asking college-age gymnasts to contradict their accusations. And Nassar was her close friend, someone for whom Klages was a "passionate" defender. (Vol IV, p 46.) And to add, moreover, these

two teenage students were accusing him of raping them (Vol II, pp 37, 93), when Klages herself referred them to him. (Vol II, pp 38, 89.) This was not a minor, inconsequential conversation. As Klages herself stated, these were not the kinds of events that she would ever forget. (Tape, pp 12, 15.) This is strong, objective evidence that she intentionally lied. The majority below also appeared to agree that the element was met. See slip op, pp 12, 14 ("Klages's false statements").

The appeal here addresses the issue of materiality. The key language of the statute requires that the false statements to the police officer relate to "a material fact in that criminal investigation." MCL 750.479c(1)(b). The statute is unambiguous that the false statements must implicate the investigation itself. The model criminal jury instruction confirm that the actionable lie relates to the "officer's decision how to proceed with an investigation":

> A material fact is information that a reasonable person would use to decide whether to do or not do something. A fact is material if it has the capacity or natural tendency *to influence an officer's decision how to proceed with an investigation*. [Mich Crim JI 13.20(7) (emphasis added).]

As noted by Judge Borrello in his dissent, see slip op, p 8, this definition comports with the definition of "material" this Court has employed: a "material fact is one that is significant or essential to the issue or matter at hand." *McCormick v Carrier*, 487 Mich 180, 194 (2010) (cleaned up), quoting Black's Law Dictionary (8th ed). And the model criminal jury instructions further provide that the false statements are still criminal even if the investigator did not "rely" on the false statement or concealment:

> (8) You may consider whether the officer relied on the information in deciding whether it was a material fact. However, it is not a defense to the charge that *the officer did not* ***rely*** *on the information* if you determine beyond a reasonable doubt that the defendant intended to [conceal the information from the officer by trick, scheme, or device / provide false information].
>
> [*Id.* (emphasis added).]

By court rule, these instructions must be given if applicable, accurate, and if they are requested. See MCR 2.512(D)(2). See also *People v Lyles*, 501 Mich 107, 122, n 8 (2017) (standard instructions must be given "if they are applicable, they accurately state the applicable law, and they are requested by a party."). While not binding, based on this court rule this Court apparently expects the trial courts to rely on them in the absence of an objection by a party or a determination that they are inaccurate. These instructions here are accurate.

In this case, consistent with the statute and the instructions Investigator Dwyre explained that the false statements from Klages were material in two respects, as they blocked his further investigation (1) into her conduct and (2) into the conduct of any person to whom she shared these accusations. The Department was investigating the response of MSU and its employees to the serial criminal sexual conduct of Larry Nassar. (Vol II, pp 140, 157.) And Nassar's conduct led to convictions of many counts of first-degree CSC, (Vol II, p 19), for which anyone who assisted him, including Kathie Klages, could be subject to a possible first-degree criminal sexual conduct charge as an aider and abettor. (Vol II, pp 160–161.) The investigation also included misconduct in office, for the public officers of the University. (Vol II, p 170.)

Once Klages lied and refused to confirm to Investigator Dwyre that LB and RF confided in her about these accusations, his further investigation of Klages was stymied. He explained that he could not take further action against her, but if she had honestly admitted it, he would have pursued the matter with her:

> I also would have – had she not – had she told me I never – I was given this information, but I never told anyone, I would have changed again my direction of questioning and I would have asked her why didn't you, and did – and knowing this, *why did you continue to send athletes to Dr. Nassar*? [Vol II, p 152 (emphasis added).]

For this reason, he testified about the possible theory of aiding and abetting for sending athletes to a person known to be engaging in criminal sexual conduct. (Vol II, pp 160–161.)

The fact that Klages lied about these accusations also blocked the Department's further investigation for those MSU officials, if any, who Klages told about these accusations:

> *[I]t would have changed the direction of my questioning. I would have immediately began questioning who did you tell.*
>
> * * *
>
> I would have wanted to know who reported this information to, and it would have changed that type of direction of my questioning. *Had she told me that she told other people, I would have wanted to know more about that.* I would have questioned her more vigorously about that because I would have tried to obtain, if possible, search warrants about their two conversations, if they would have been in text or any type of social media or anything like that. [Vol II, p 152 (emphasis added).]

But without any honest admission that she knew in 1997 about allegations against Nassar, this line of inquiry came to an end because there was no information Investigator Dwyre could pursue.

In specific, each of these lines of inquiry was relevant to the particular investigation that the Department's special agents were conducting. The lies cut to the heart of the investigation and were not about some unrelated matter.

For the MSU officials with knowledge of Nassar's conduct, other than those with whom she confided these accusations, only Klages herself knows who these people are. But she did not admit to Investigator Dwyer that she knew about the accusations in 1997. Rather, she lied about this conversation with LB and RF. Thus, Investigator Dwyre had no ability to ask Klages whether she talked with public officers at MSU about the claims. (Vol II, p 171.) And the people with whom she may have shared these accusations did not come forward, because they may well be complicit in the failure to root out a serial sexual offender. Thus, Investigator Dwyre was not able to confront them with any statements from Klages.

For the investigation against Klages herself, the same is true. It is not a mystery why she denied it, as he explained. (Vol II, p 173) ("the fear of getting prosecuted, the fear of losing her identity and her career"). It is also clear, as Agent Dwyre explained, that any assistance she might have provided to her close friend, a person for whom she was admittedly a "passionate" defender (Vol IV, p 46), either before or after his crimes would be very significant. (Vol II, pp 152, 160–161.)

And in this way, these lies were directly relevant for both the investigation into first-degree CSC (aiding and abetting) for Klages and others and for misconduct in office for MSU officials. There was sufficient evidence on all of the elements for MCL 750.479c(1)(b). The jury rightly found her guilty as charged.

B. The majority decision of the Court of Appeals erred in ruling otherwise and in adding requirements to Michigan law.

The majority decision of the Court of Appeals ruled on one issue, materiality. As noted, the majority did not question whether there was sufficient evidence of the falsity of her statements that Klages did not remember LB and RF making these allegations and that she would have remember if they had. See slip op, pp 12, 14 ("Klages's false statements"). But on the issue of materiality, the majority issued a published decision that significantly alters what the prosecution must prove, now requiring that it must show how it affected its charging decision, not just its effect on the police and their investigation. But the statute expressly relates to the conduct of the police and their investigative actions.

The overarching error of the majority's analysis is its failure to apply the term "material" in the context of the statute's phrase, "any statement to the *peace officer* . . . regarding a material fact in that criminal *investigation*." MCL 750.479c(1)(b) (emphasis added). Just as the standard criminal instructions provide, the entire focus of the crime is on the relation of the false statement to the police investigators, and how it affects their conduct, rather than on the prosecutors and their charging decision. Cf. Mich Crim JI 13.20(7). In fact, the language of "capacity" or "natural tendency" to affect the investigation provides that the false statement is material where it might have the ability to affect the investigation even where in a specific instance it does not. *Id.* ("has the capacity or natural tendency to influence an officer's decision"). And importantly the false statement is made to the "peace officer," not to the prosecuting attorney. MCL 750.479c(1)(b).

The majority misconstrues the statute's plain language, adding an element, in part based on its misunderstanding of the role that the requirement of materiality plays in the law. The false statement – given to the peace officer – must be material to "*that* investigation" and not another. But the phrase "that criminal investigation" only appears once in the majority opinion, when it quotes the statute. See slip op, p 7. It is telling that when it reiterates the statute, the majority replaces the word "that" with "a," which betrays a misunderstanding of the purpose of the law. *Id.* ("Because the plain text of MCL 750.479c(1)(b) requires the prosecution to prove that the accused made a false 'statement' 'regarding a material fact' in ***a*** *criminal investigation*.") (emphasis added). The point is that the false statement must relate to the specific investigation and be relevant (i.e., material) to it, here the response of MSU to Larry Nassar, which includes possible criminal sexual conduct charges and misconduct-in-office charges related to Nassar. If Klages had lied about other things – even subjects that were criminal, such as tax fraud – those lies would be irrelevant (and immaterial) to the specific investigation.

And there is no reference in the statute to the prosecuting agency or to criminal charges, but instead to "peace officers" and their "investigation." MCL 750.479c(1)(b). The majority opinion fails to apply the statute's own language.

Rather, given the lack of precedent here, see *People v Williams*, 318 Mich App 232, 240 (2016), the majority opinion relies on two U.S. Supreme Court cases, *Kungys* and *Gaudin*, one of which it misapplies and the other it misunderstands. Indeed, federal law only supports Klages' conviction and contradicts the majority.

For *Kungys,* the majority cites it for the proposition that the lie must relate not to the investigators themselves, but it asserts to the ultimate decisionmaker, here the prosecution agency, which is the Attorney General, or in other cases the county prosecutor. Slip op, p 10. But the statute here identifies the "decisionmaker" as the "peace officer" conducting a criminal investigation, MCL 750.479c(1)(b), ordinarily a police officer or here an investigator of the Department of Attorney General. The statute at issue in *Kungys* related to the Immigration and Naturalization Service and Immigration, see 8 USC 1451(a), which makes it a crime for a person to procure an "order and certificate of naturalization" from INS based on a "concealment of a material fact or by willful misrepresentation."

In other words, in *Kungys* the issue was a review of false statements to INS, whereas Michigan makes it a crime to lie to a police officer, not the prosecutor. The "decisionmaker" identified in each of the statutes is different, making the majority's reliance on *Kungys* a curious one. Michigan's law governs false statements to "peace officers." MCL 750.479c(1)(b). *Kungys* does not somehow change Michigan's statute or limit its application here. The same has been said in response to reject an effort to somehow limit the definition of "materiality" in a law similar to Michigan's law, the False Claims Act, 18 USC 1001(a)(2). See *United States v. Tantillo*, 686 Fed App'x 257, 262 (CA 5, 2017) ("The Court's focus on one official decision in *Kungys* is unsurprising given the limited scope of the statute under which the case arose. However, [this] case arises under 18 USC § 1001(a)(2), which does not limit the materiality analysis to a specific agency decision.") (cleaned up).

For the *Gaudin* case, the U.S. Supreme Court was reviewing the False Claims Act, when it held that the parties also agree on the definition of "materiality": the statement must have "a natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, 515 US 506, 509 (1995). See also slip op, pp 8–9. But just like *Kungys,* this case cuts the exact other way and supports the convictions here. That is because the False Claims Act requires the person who falsifies a "material fact" to do so for "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government." 18 USC 1001(a). Thus, for the federal law, the federal courts determine whether the statement affected the decision-making body, whether in the executive, legislative, or judicial. In *Gaudin,* the criminal defendant made false statements in his loan documents submitted to the Department of Housing and Urban Development and to the Federal Housing Administration for a federal loan. *Gaudin,* 515 US at 508, 509. As a result, the agency was the relevant point of reference about whether the false statements were material to its decisionmaking. By comparison, the relevant "decisionmaker" in MCL 750.479c(1)(b) is the police officer conducting the investigation, here Agent Dwyre.

Moreover, for the federal law that identifies a governmental agency as the decisionmaker, 18 USC 1001, the federal appellate courts have still applied the definition of materiality in the False Claims Act to circumstances in which the false statements have affected – or could have affected – the course of the investigation or the actions of the investigators acting on behalf of the relevant agency. See, e.g.,

United States v Mehanna, 735 F3d 32, 55 (CA 1, 2013) ("[T]he proper inquiry is not whether the tendency to influence bears upon a particular aspect of the actual investigation but, rather, whether *it would bear upon the investigation in the abstract or in the normal course*"; "where a defendant's statements are intended to misdirect government investigators, they may satisfy the materiality requirement of [§] 1001 even if they stand no chance of accomplishing their objective."); *United States v Adekanbi*, 675 F3d 178, 182 (CA 2, 2012) ("Under § 1001, a statement is material if it has 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed,' [*Gaudin*, 515 US [at] 509], or if it is *'capable of distracting government investigators' attention away from' a critical matter*.") (citation omitted); *United States v McBane*, 433 F3d 344, 352 (CA 3, 2005) ("Such misrepresentations, under normal circumstances, *could cause FBI agents to re-direct their investigation* to another suspect, question their informant differently or more fully, *or perhaps close the investigation altogether*."); *United States v Newton*, 452 Fed App'x 288, 292 (CA 4, 2011) ("The evidence adduced at trial demonstrated that the statements were false, and both of the false representations made by [the criminal defendant] had the capacity *to influence [the agent's] ongoing investigation*."); *United States v White*, 270 F3d 356, 366 (CA 6, 2001) ("Because Taylor's statements *influenced the course of an investigation*, which, apparently, still could result in an agency enforcement action, they were materially false for purposes of her prosecution.") (Emphases added). There are similar statements in cases in the Seventh, Eighth, Ninth, and Eleventh Circuits.

Also contradicting these federal cases, the majority relied on the fact that Investigator Dwyre knew that these statements were lies to reach the conclusion that they were not material. See slip op, p 13 ("And as Dwyre admitted, Klages's denials did not throw the investigators off the trail of possible offenders for another reason: *Dwyre never believed her*.") (Emphasis added.) But like Michigan's model criminal standard jury instructions, the federal courts find the statement is material merely if it had the "capacity" to influence the investigators, finding the conduct criminal even where the investigators knew the statement was a lie. See, e.g., *United States v Turner*, 551 F3d 657, 664 (7th Cir. 2008) (finding that the false statements were material even though "[t]he agents were not likely swayed by [the criminal defendant's] false statements because he was on tape saying precisely the opposite").

On this point, the majority below also erroneously reasoned that if it did not actually affect the outcome, it was not material. See slip op, p 13 ("The materiality of those omissions depends on whether they made a difference in the final product."). This contradicts the standard criminal instruction. See Mich Crim JI 13.20(7). And federal caselaw provides the exact contrary, again supporting Klages' convictions. See, e.g., *McBane*, 433 F3d at 350, 352 ("It is also clear that a statement may be material even if no agency actually relied on the statement in making a decision.") See also 32 Am Jur 2d False Pretenses § 80 ("Generally, a 'material' fact need not actually influence or have been actually relied upon by, the government.") The federal cases only undercut the majority's analysis.

Furthermore, the nature of the majority's error in its understanding of this law is perhaps most obvious in its review of the "personal" nature of the investigative decisions of Investigator Dwyre. See slip op, pp 10, 13 ("Dwyre's testimony on this score focused entirely on his personal 'decisions' regarding 'the direction of my questioning"; "Dwyre offered only conjecture and supposition about his personal investigative methods"). The opinion below ruled that Klages' false statements did not hinder the investigation because somehow the decisions were not related to the investigation but only related to Investigator Dwyre's "personal" decisions. This contention is wrong and conflicts with the statute.

Agent Dwyre was the chief investigating officer for the Department of Attorney General for the MSU matter. He testified that Klages' false statements blocked him from taking further investigative actions against her and others. His investigative actions were not "personal" in any way. They were professional ones seeking to identify possible criminality. They all were based on his official role. The majority below fails to apply the statute's plain language that bars a person from making false statements to a police officer "material" to "that [officer's] investigation." MCL 750.479c(1)(b). Thus, if Klages' lies were about another matter, such as her taxes, they would not relate to Agent Dwyre's MSU investigation. And false statements that did not have the capacity or natural tendency to "influence an officer's decision how to proceed," Mich Crim JI 13.20(7), would not be material. But Klages' false statements were material to Agent Dwyre's investigation here because her lies "changed the direction" of his questioning and investigation. (Vol II, p 152.)

Aside from its erroneous construction of the statute, the majority apparently also refused to credit the testimony of Investigator Dwyre on how Klages's false statements affected his investigation, noting that no one had admitted to having been informed of Nassar's abuse of LB and RF from Klages. See slip op, p 12 ("After sifting through a vast amount of information the investigators never found any evidence that Klages had told anyone about the conversations she denied having with [LB] and RF"). For that reason, the majority reasoned that "no evidence was presented that Klages's false statements could have misled, misdirected, deflected, or otherwise hindered the Attorney General's investigation." Slip op, p 12. But this fights with the factual statements of the officer and fails to review the evidence in a light most favorable to the prosecution. The expert on investigative tools is the police officer, and the court cannot interpose itself and sit as the trier of fact. See, e.g., *People v Miller*, 326 Mich App 719, 735 (2019) ("Conflicting evidence and disputed facts are to be resolved by the trier of fact."). Insofar as the court refused to accept Investigator Dwyre's testimony, it was a legal error.

Indeed, the majority's own characterization of Agent Dwyre's explanation here – affecting the "direction of my questioning" and his "investigative methods" (slip op, pp 10, 13) – fit squarely within parameters of Michigan's law. The model criminal instructions support the point. As do the federal courts' application of the similar law federal law only confirms as well. See, e.g., *Mehanna*, 735 F3d at 55 (CA 1, 2013) ("where *a defendant's statements are intended to misdirect government investigators*, they may satisfy the materiality requirement") (emphasis added).

The dissent properly evaluated this issue. See slip op, p 10 (Borrello, J.) ("defendant's statements that she did not remember the disclosures made by [LB] and RF were false with respect to facts that were 'material' because *they were significant or essential to the criminal investigation Dwyre was conducting and influenced his decisions about how to proceed with the investigation*").[3]

And one more matter. Even applying the majority's erroneous standard, its analysis is still wrong. The very conclusion that there was no competent evidence to support the conclusion that Klages' false statements had "any reasonable possibility of influencing the decision that matters—a charging decision," slip op, p 14, prejudices the question. The point of Investigator Dwyre's testimony about further investigation is that it may have yielded a basis to find Klages' own criminality – aiding and abetting Nassar – or the criminality of others in whom she confided,

[3] Although not relevant to the issue raised here, the majority also contended that Investigator Dywre's testimony that Klages had a "duty to report" allegations of sexual abuse (Vol II, p 152) was "untrue." Slip op, p 11, n 7. The majority opinion said that she was not a "mandatory reporter" under Michigan law, citing MCL 722.623. *Id.* There was no briefing on Michigan law on this point below.

But the majority misunderstands Investigator Dwyre's statement. Klages' duty to report arose under federal law, not state law, consistent with the Clery Act, 20 USC 1092(f), which requires that institutions participating in the Title IV, Higher Education Act (HEA) programs, to compile and disclose crimes in its reporting to the Department of Education for crimes reported to campus security authority that occur on public property, including rape. 34 CFR 668.46(c)(1). The regulations defining "campus security authority" include "an official of an institution who has significant responsibility for student and campus activities[.]" *Id.* at (a)(1). In responding to questions later in her interview about her knowledges of Nassar's abuse in 2017, Klages also confirmed that she was a "mandatory reporter" under Title IX (20 USC 1681). (Tape, p 23) ("I was a mandatory reporter and I was going to have to call the Office of . . . Institutional Equity.")

either because that person was a public official and protected Nassar from inquiry, which may be misconduct in office, or that this person may have assisted him knowing of his criminal action (again, aiding and abetting criminal sexual conduct). Whether this investigation would have resulted in a criminal charge cannot be known with exact precision because Klages refused to tell the truth and disclose what she knew. She willfully blocked the investigation by intentionally lying. That was the crime. This Court should grant leave and reverse.

CONCLUSION AND RELIEF REQUESTED

This Court should grant leave, reverse the decision below, and reinstate Kathie Klages' conviction of two counts of lying to a police officer under Michigan law, MCL 750.479c, or, alternatively, grant peremptorily relief by adopting the dissent of Judge Borrello as the correct analysis of the law.

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Dated: February 14, 2022