STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Sawyer, P.J., Murphy, C.J., and O'Connell, J.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

JOHN M. MUSSER,

Defendant-Appellant.
_____/

Supreme Court Docket No. 145237
COA Docket No. 301765
LC Docket No. 10-05943-FH

BRIEF ON APPEAL – APPELLANT

Oral Argument Requested

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STATEMENT OF JURISDICTION

John M. Musser, appellant herein, was convicted on October 21, 2010, by a jury in the Kent County Circuit Court of two counts of criminal sexual conduct in the second degree, and one count of assault and battery (5a, Entry 43).* He was sentenced on November 29, 2010, to concurrent prison terms of 2-15 years on the felony counts and to "time-served" on the misdemeanor count. A judgment of sentence was entered that same day (12a).

Mr. Musser filed a claim of appeal with the Court of Appeals on December 21, 2010 (8a). That claim of appeal was not due until January 11, 2011. See MCR 7.204(A)(2)(c). Hence, because the claim of appeal was timely filed, and was otherwise fully compliant, the Court of Appeals acquired jurisdiction to review Mr. Musser's convictions and sentences. See MCR 7.202(6)(b)(ii), 7.203(A)(1), and 7.204(A)(2)(c).

In an unpublished opinion issued on February 21, 2012, the Court of Appeals affirmed Mr. Musser's convictions (13a). He had not separately challenged any of his three sentences. Reconsideration was denied on April 13, 2012 (20a). Mr. Musser had filed a motion for reconsideration on March 13, 2012 (10a), which was within the 21 days allowed by MCR 7.215(I)(1); in other words, the motion for reconsideration was timely.

On June 8, 2012, the fifty-sixth day after the Court of Appeals denied reconsideration, Mr. Musser filed with this Court an application for leave to appeal that Court's decision (11a). Because his motion for reconsideration had been filed timely, his application to this Court was also timely. See MCR 7.302(C)(2)(c). Consequently, Mr. Musser properly invoked this Court's jurisdiction. MCR 7.201(A)(2).

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* All parenthetical references herein to "____a" are to the Joint Appendix to which the parties have agreed and which was filed with this brief.

QUESTION PRESENTED

Was it error for the trial court to permit the jury to view and listen to a DVD of a police interrogation of the defendant without first redacting multiple statements by the interrogating officers vouching for the credibility of the complaining witness, which statements would plainly have been inadmissible if made by those officers while testifying at trial?

The Court of Appeals answered, "No."

The trial court answered, "No."

Mr. Musser answers, "Yes."

Presumably, the prosecution will answer, "No."

STATEMENT OF FACTS AND PROCEEDINGS[1]

In late April, 2010 -- the exact date is unknown -- [redacted], who was then [redacted] years old, told a school friend that, at some unspecified time when she was [redacted] years old -- [redacted] had turned [redacted] back on [redacted] 2009 (Vol II, p 26) -- "she was touch[ed]" by someone at some kind of a get-together (Vol II, p 68). [redacted] did not state any specifics about how she was touched, where or by whom (*Id.*), although whatever she said prompted her friend to tell [redacted] that "she needed to tell someone" (*Id.*). [redacted] did not follow her friend's advice.

On May 6, 2010, [redacted] got into a heated argument with her mother. When her mother took from her papers she was using to study for a spelling test at school and "play[fully]" teased her with them (Vol II, p 79), [redacted] "grabbed" her mother's hands, "claw[ed]" at her, took back the papers, and ran into the kitchen yelling, "I just need to go study" (Vol II, p 80; Vol III, p 23). Her mother followed her into the kitchen, demanding to know, "What is wrong with you?" (Vol II, p 79). [redacted] responded, "Stop, leave me alone," and "I just need to go to bed" (Vol II, p 79; Vol III, pp 23-24).

[redacted] went to her bedroom. Rejecting her husband's advice to leave the child alone, [redacted]'s mother followed (Vol IV, p 24). [redacted]'s father thought that she was just tired and annoyed with her mother's teasing (Vol II, p 104). "I'm getting to the bottom of this," the

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[1] Combined, MCR 7.306(A)'s adoption by reference of MCR 7.212(C)(6) with its requirement of a statement of facts containing "specific page references to the transcript," and the former subrule's statement that "references in MCR 7.212(C) … to the 'record' should be read as referring to the appendix" seem to require including the entire transcript in the appendix. But, that would make the appendix awkwardly large. Fortunately, what those rules mean need not be resolved in this case because this brief's statement of facts is the same as the statements in Mr. Musser's brief in the Court of Appeals and in his application to this Court, neither of which were challenged by the prosecution, thereby conceding their accuracy. *People v Albert Smith*, 190 Mich App 352, 356, fn 2; 475 NW2d 875 (1991), *vacated in part on other grounds, lv den on this ground* 439 Mich 954; 480 NW2d 908 (1992). Still, for ease of reference, this brief contains specific references to the trial transcript.

mother insisted (*Id.*). [redacted] was on her bed "crying hysterically" (Vol II, p 80). Again, the mother demanded to know, "What's going on?" (Vol III, p 25). [redacted] said nothing (*Id.*) Thereupon, her mother began to quiz her more specifically: "Are you fighting with somebody at school?;" "Are you and one of your friends fighting?;" "Did one of your friends hurt you at school?;" "Did one of your friends hurt you in the neighborhood?" (Vol III, pp 25-26) To each of those questions [redacted] either said, or shook her head, "No" (*Id.*).

[redacted]'s mother persisted. Eventually, she got a response other than a "No." When asked if "a boy" had "hurt" her, [redacted] answered, "Not really" (Vol III, p 25). Encouraged by that response, the mother pressed on. After more "No's," [redacted] nodded affirmatively when asked, "[W]as it a grown up?" (Vol III, p 26). Then, her mother started naming adult men whom the family knew: neighbors, friends, acquaintances. More "No's" followed (*Id.*). Finally, [redacted] was asked, "Was it John?" This time, [redacted] shook her head, "Yes," and "started crying even more" (*Id.*). The interrogation ended when [redacted] refused to say more (Vol III, pp 26-27).

The next day, [redacted]'s mother telephoned a physician. He referred her to a colleague (Vol II, p 81). [redacted] met with that colleague (Vol II, pp 81-82), but what she said is unknown; that physician did not testify. Then, [redacted]'s mother called the police (Vol II, p 82), the Kent County Sheriff's Department (KCSD), in particular. (The Musser and [redacted] families live in a township served by that Department.) She was referred by them to the Children's Assessment Center (CAC) in Grand Rapids, where [redacted] was taken on Tuesday, May 11, 2010. During a police interrogation, Mr. Musser was told that [redacted] had been interviewed there by a specially-trained counselor, but that was "a lie," the police would admit at trial (Vol II, p 211); [redacted] never was so interviewed (Vol II, pp 210-211).

[redacted] was questioned, twice, on May 11 at the CAC, but only by police (Vol II, pp 42). The first time was in the presence of her parents. When asked at trial, the interrogating officer agreed that [redacted]'s mother had done most of the talking; [redacted] just nodded her head (Vol II, pp 197-199). That interview was not recorded, nor were either [redacted]'s mother or father asked to write out a statement recounting it (Vol II, p 199). Then, relying on details obtained from her mother (Vol III, p 20), the same officer interviewed [redacted] a second time without anyone else present (Vol III, p 11). That interview, too, was not recorded (Vol II, pp 213-214). The only record of either interview is the officer's traditional report.

After interviewing [redacted], the detective telephoned Mr. Musser and asked him to come to the Sheriff's Department, which he did that same day (Vol III, pp 92-93). Upon his arrival, he was interrogated by two officers. He was told that [redacted] was accusing him of sexual abuse, specifically, "CSC-4,"[2] "not the crime of the century" (25a, line 24),[3] as the officer who took the lead during the subsequent interrogation would repeatedly state. The interrogation of Mr. Musser, what the officers said and asked and what he said, can be quoted verbatim because it was recorded, both visually and aurally (Vol II, p 215). Over objection, a DVD of it was played for the jury. KCSD interview rooms are "wired," although suspects are not told, and there are no visible indications, of that fact (Vol II, p 246).

Mr. Musser adamantly denied any improper conduct with [redacted] (35a, lines 24-25; 36a, line 11; 53a; lines 21-22; 58a, lines 14-15; 67a, lines 20-21; 68a, lines 5-8). He remembered an

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[2] Given her age at the time, which was eleven, what [redacted] was alleging could not have been CSC-4th. See MCL 750.520c(1)(a).

[3] All references herein to Mr. Musser's interrogation are to a transcript of it prepared by his counsel. Its accuracy has never been challenged. Referring to that transcript is easier for all concerned than would be using the DVD's time markers to find specific statements. Of course, the DVD itself is in the record.

evening when [redacted] and her family had visited his family and that he had hugged her, given her a kiss on the top of the head, and, when she appeared to fall asleep on a sofa, covered her with a blanket (27a, lines 24-25; 28a, lines 23-25; 29a, lines 5; 30a, lines 24-25; and 31a, lines 1-3), but nothing more. Despite a determined police effort to get him "to open up," Mr. Musser persisted in denying any misconduct (106a, p 202, lines 10-12).

The lead interrogator was the officer who had interviewed [redacted]. Both officers repeatedly told Mr. Musser that they believed [redacted], that she was credible, and that children of her age do not lie about sexual abuse.[4] During the interrogation, the lead interrogator touted his experience interviewing children and his use of "a forensic interview protocol" to question [redacted], and the other officer touted his own and his colleague's extensive experience interviewing child victims. Just before the DVD was played at trial, the prosecutor had the lead interrogator testify to his training and experience (102a, pp 117-120).

At the end of the interview, Mr. Musser was arrested. The next day, he was formally charged. Trial began on October 18, 2010. [redacted] was the lead-off witness. She testified that, on some unknown evening when she, her parents and a younger brother had visited the Musser family (Mr. Musser, his wife and their two children) to watch a National Hockey League (NHL) playoff game involving the Detroit Red Wings – both families are fans – Mr. Musser had, in the process of covering her with a blanket, "put his hand between my legs ... like on my thighs" (Vol II, p 32); put his hand "under my shirt and ... over my breasts" (Vol II, p 36); and put his thumb under the top button of her pants (Vol II, p 37). That all happened, she said, while she was on a sofa pretending, for some unstated reason, to be asleep.

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[4] To avoid repetition, the officers' statements are quoted below in full, with specific references to the record, when their inadmissibility is discussed.

[redacted] did not tell anyone for almost a year about Mr. Musser's touching of her. She did testify, "I asked my parents if we can leave" (Vol II, p 39), but neither of them were asked about any such statement. To the contrary, when asked if "everything is [sic] normal when you leave the [Mussers'] home that day?", her mother answered, "Yes" (Vol II, p 75). There were also internal inconsistencies in [redacted]'s trial testimony and inconsistencies between her police interview on May 11, what she said at the preliminary examination, and what she said at trial. Those inconsistencies were explored during trial (Vol II, pp 204-208; Vol III, pp 17-18) and were discussed in closing arguments (Vol IV, pp 61-63, 65, 70).

The two families continued seeing each other. They watched the NHL finals (Detroit vs Pittsburgh) together (Vol III, p 61). Then, they celebrated together the First Communion of the Mussers' daughter (Vol II, pp 40, 86). They also spent time together that summer at a cottage (Vol II, p 78); "went skiing" the next winter (Vol II, pp 40, 86); and celebrated the birthday of [redacted]'s younger brother (Vol II, p 86). While, according to her mother, she "was never very interested in going" (Vol II, p 78), [redacted] did not testify to any discomfort, and no one testified to her exhibiting any discomfort around Mr. Musser.

Two psychological experts also testified. The prosecution's expert supervises therapy programs at the Grand Rapids YWCA for victims of domestic assault and sexual abuse. He testified that it is common for victims of sexual abuse to delay reporting their allegations (Vol II, pp 150-151). The defense called a practicing psychologist with expertise in sexual abuse and memory. The trial court described him as a "very interesting individual, very well-educated, and probably one of the most well-published experts I've had testify..." (Vol III, p 33). That expert concurred that delay in reporting allegations of sexual abuse is not necessarily indicative of inaccuracy or dishonesty (Vol III, pp 167-168).

More significantly, the defense expert also testified that, while delay in reporting accusations can say little about their accuracy or inaccuracy, its impact becomes increasingly problematic. After just a month or so, not only do memories fade substantially, multiple recollections begin to conflate into one (Vol III, pp 171-172, 174). Specifically, multiple episodes involving different conduct and, sometimes, different individuals can be incorrectly recalled as one episode involving just one of those individuals (*Id.*). The expert also testified that children are especially susceptible to suggestion by others (Vol III, pp 175, 176, 178), with the greatest risk coming from their parents (Vol III, p 185).

The final witnesses were Mr. and Mrs. Musser. He again adamantly denied having touched [redacted] at all inappropriately (Vol III, p 117). Mrs. Musser testified that [redacted]'s recollection of the evening she was supposedly abused was flawed in several particulars. Because both Mussers had demanding jobs and their children are very active, they maintained written calendars to keep track of who needed to be where, for what, and when (Vol III, pp 60-61). Using those calendars, which she still had, Ms. Musser was able to identify the evening in question as May 8, 2009 (Vol III, pp 62-63, 65).

Because May 8 was a Friday, [redacted] would have competed in a school track meet (Vol III, pp 61-62), which means that she and her family could not have arrived at the Musser home until after 9:00 p.m. (Vol III, pp 62-63, 65). The NHL schedule had two play-off games on May 8, but both were likely over by 9:00 p.m. (*Id.*). As noted earlier, [redacted] had told the police, and had consistently testified, that the reason for her family visiting the Mussers was to watch an NHL playoff game. In addition, [redacted] claimed that the playoff game they watched had involved the Detroit Red Wings. That team had not played on May 8 (Vol III, pp 64-65). Finally, coming

straight from a track meet, [redacted] would have been dressed incompatibly with her descriptions of Mr. Musser's touchings of her (Vol III, pp 65-66).

Ms. Musser's testimony was very significant, defense counsel contended in argument, because it undercut the accuracy of [redacted]'s memory and also because it suggests that she had, with the passage of time, and consistent with the defense expert's testimony, conflated events. She may have been recalling a different event involving someone else (Vol IV, p 56), or was putting herself into a remarkably similar episode in a novel which her mother had recently read and discussed with Ms. Musser (Vol III, p 68; Vol IV, pp 81-82).

After nearly four hours of deliberation, the jury found Mr. Musser guilty of both charges of CSC-2nd, but guilty of assault and battery with regard to the assault charge (5a, Entry 43). The latter conviction related to the allegation by [redacted] that Mr. Musser had placed his thumb under her pants' waistband. During its deliberations, the jury had asked for (147a) and been provided the DVD, and equipment to play it (146a), of the police interview of Mr. Musser, still inclusive of the interviewing officers vouching for [redacted]. The jury also asked for (147a) and was provided transcripts of [redacted]'s and Mr. Musser's trial testimony (146a).

Mr. Musser was sentenced to prison for 15 months-15 years (12a). The applicable sentencing guidelines range was 12-24 months. Mr. Musser must also register as a sex offender, MCL 28.723(1)(a); and he is subject to restrictions on where he can work, MCL 28.734(1)(a), reside, MCL 28.735(1), and on his movements, e.g., he cannot attend his children's school events, MCL 28.733(b) and 28.734(1)(b), all for the rest of his life, not just while on parole. He is also subject to lifetime electronic monitoring. MCL 792.285(1).

Mr. Musser appealed of right (8a). The Court of Appeals affirmed (13a). This Court granted Mr. Musser leave to appeal "limited to the issues:"

> "...(1) [W]hether statements in a recording of a police interview of a criminal defendant that vouch for the credibility of a witness, which would be inadmissible if stated by trial witness, must be redacted from the recording before the jury views it; or (2) if the jury is allowed to see such a recording without redacting the vouching statements, what circumstances must be present, and what, if any, protective measures must be in place" (148a).

STANDARD OF REVIEW

Although the issues now being considered arise out of a trial court's decision to admit evidence, which ordinarily is reviewed only for an abuse of discretion, *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010), those issues are subject to *de novo* review because their resolution requires answering a preliminary question of law. *Id.*

ARGUMENT

Answered consistently with logic, common sense and long-standing Michigan law, the questions which this Court wants addressed compel, as discussed below, the following conclusion. Only if those questions are answered inconsistently with Michigan law can other than the following conclusion be drawn:

I. It Was Error To Present To The Jury A DVD Of A Police Interrogation Of The Defendant Without First Redacting Statements By The Interrogating Officers Vouching For The Complaining Witness.

Just recently, this Court reiterated what has long been Michigan law. An expert "may not 'comment [when testifying at trial] on the ... truthfulness'" of a defendant or complainant, "vouch for the veracity" of a defendant or complainant, or "give an opinion as to whether [a] defendant [or complainant] was telling the truth when he [or she] made ... statements to the police." *People v Kowalski*, 492 Mich 106, 129; 821 NW2d 14 (2012). For the reasons discussed below, that prohibition should also apply to recorded, pre-trial vouching played at

trials, as happened in this case.[5] Not doing so would ignore multiple established principles of Michigan jurisprudence.

A. The Jury Was Allowed To See And Hear Two Police Officers Presented As Experts Repeatedly Vouch For The Complainant.

As noted above, Mr. Musser was interrogated by the police shortly after [redacted] had been interviewed. That police interrogation was not, however, a traditional exchange of questions and answers. The bulk of it were declamations by two police officers,[6] including multiple instances of both officers unmistakenly vouching for child victims and for [redacted]:

- *I don't have any reason to disbelieve what she says* just for the mere fact that you've been -- you corroborate what she says (46a, lines 6-7).

- *Kids have a hard time lying about this stuff* because they don't even want to talk about it, let alone they don't even want to talk about it to a mere, fucking stranger ... Especially a 12 year old (65a, lines 7-12).

- *You know there's a big difference when we interview 4, 5, 6 year olds and when they get up around 10, 11, 12, 13.* There's a big difference. Four, five, six year old kids, they're easy to manipulate by parents, aunts, uncles - they're easy to manipulate. They're terrible actors. They're terrible. When kids start getting a little bit older they're better actors. They're -- they're older, they're seeing more. She's 12. The big issue here is *if she wanted to get you in trouble -- she's smart enough, and she's only -- and she's 12 -- if, for whatever reason, she wanted to get you in trouble she would -- she would* -- [John Musser: ... She would say that I fucked her?] *Absolutely* (68a, lines 9-23).

- *But it's pretty credible when she tells us*, 'Hey, he touched -- and again, I don't know the details there -- but, "he touched me here' and 'he put his hand on my

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[5] The ban on vouching applies to all witnesses, lay and expert. *People v Buckey*, 424 Mich 1, 16-18; 378 NW2d 432 (1985); and *People v Row*, 135 Mich 505, 506-507; 98 NW 13 (1904). While Mr. Musser does not believe that *Kowalski* silently overruled those cases, limiting the ban to vouching by experts, this case involves the latter, so any change in the former is immaterial.

[6] The transcript of the interrogation, exclusive of a conversation Mr. Musser had with his wife (75a-77a), in which the police did not participate (74a, lines 19-22; 75a, lines 7-9), contains 1,463 lines. Of that total, 947 lines (66%) are the officers talking. But, since many of the lines of transcript attributable to Mr. Musser are one word or just a few words, while the police commonly went on at length, often for pages, the interrogation involved the police doing far more than two-thirds of the talking. The word "speechifying" comes to mind.

breasts' and 'he tried -- his hand started going down my pants but he couldn't.' *That's pretty credible*; that's pretty detailed (69a, lines 6-10).

- Why is she gonna put herself through that if it didn't happen? *We can't find anything.* (69a, lines 16-17).

- *Kids don't lie about this stuff*... (69a, lines 17-18).

- *They don't lie about this stuff* if maybe she's in trouble for something. *This is not the kind of stuff that kids make up to try to get out of some trouble that they're in.* That's why this is so disturbing (69a, lines 22-25; 70a, line 1).

- As I'm sure Ed already told you, it sounds like she's only talking about a touching ... It sounds like it didn't go any further ... That's – that's wonderful ... But, you are going to move on from here; she's gonna move on. But the best way for her to move on – 'cuz it's only gonna be through counseling ... one of the things she has to get outta this is that adults do make mistakes and they apologize for 'em, and they agree to get the help that they need, but that big thing is, is accepting responsibility ... (70a, lines 8-18).

- And again, if she's talking about 'his hand was on my breast', *she's not gonna make that crap up. She just isn't* (70a, lines 19-21).

- But if she is saying that you touched her breasts -- I wasn't there for the interview but *Ed's* [the other police officer] [who has] *done a lot of interviewing*, said, "*Bill* [the speaker], *there's no question this happened* and the stuff that I'm aware of he probably did" - we just need to know why (71a, lines 14-18).

Except for the first "bulleted" instance, the jury heard and saw all that vouching at least twice. A DVD of the interrogation was played during trial (103a, p 124; 122a, pp 127-128) shortly after [redacted] had testified. Then, two days later, the DVD was again watched by the jury, although how many times is unknown, during its deliberations (146a). Before trial, Mr. Musser's counsel had asked that all the above-quoted statements, plus others, be deleted from the DVD (84a). He complained that the police were "playing the human lie detector" and were "vouching for the veracity of the [complaining] witness[], in effect" (91a, lines 13-15).[7] The trial

[7] Unquestionably, counsel's objection, substantively right-on as it was, fully preserved for review the issue being addressed herein. MRE 103(a)(1). For some reason, the Court of Appeals found otherwise (13a-14a). That finding was one of the issues raised by Mr. Musser's application to this Court. Since the parties have not been directed to address that issue, and the

court excluded the first statement (95a, p 33, lines 1-9; 14a, fn 1), but only it; the jury was allowed to see and hear all the others (95a, p 34).

In addition, the jury heard, four times at least, the police officer who interviewed [redacted] extolled as an expert in interviewing children. What [redacted] told him was the source of the above-quoted vouching. Just before the DVD was played for the jury at trial, the prosecutor had the officer explain that he had been "specially trained" in use of "a forensic protocol" designed for effectively interviewing children, that he had used that protocol "hundreds" of times, and that he had "follow[ed] that specific process with [redacted]" (102a, pp 117-119).

When the DVD was played, the jury heard again about the "forensic protocol" and about both officers' extensive experience with child victims. During the interrogation recorded on it, one officer had told Mr. Musser of the former (65a, lines 14-20), while the other officer had touted both his colleague's extensive experience with victims of child sex abuse (71a, lines 15-16), and implicit in that other officer's vouching was a claim of considerable experience with and knowledge about child complainants (69a-73a). Finally, when the jury watched the DVD during its deliberations, it necessarily heard again about the forensic protocol and the officers' experience with child victims.

B. The Presentation To Juries Of Pre-Recorded Vouching Should Be Categorically Banned.

This Court's questions in its order granting leave recognize three ways to deal with what happened in this case: (a) categorically ban statements of vouching like those in this case, (b) categorically permit them, or (c) permit them in some circumstances, but not in others. While on first reading it appears that a few of the handful of courts to have addressed what happened in

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issues on which leave was granted presume preservation, Mr. Musser assumes this Court disagreed with the Court of Appeals. If the prosecution argues otherwise in its brief, the issue of preservation will be addressed in Mr. Musser's reply brief.

this case have taken the second position, a more careful reading reveals that no court has done so. Only the first and third positions have been adopted.

This Court can, of course, pioneer the second position, but it should not, nor should it adopt the third position. There is "no meaningful difference" between allowing police officers, in particular, officers touted as experts, to testify live in front of a jury that they believe a complainant, which plainly cannot be done, *Kowalski, supra*, and playing for the jury a recording made pre-trial of officers doing the very same thing. *State v Jones*, 117 Wn App 89, 92; 68 P3d 1153 (2003). Therefore, the same ban on vouching should apply in both situations. Treating comparable situations differently is anathema to the rule of law.

Several other courts concur. See *Sweet v State*, 2010 Wy 82; 234 P3d 1193 (2010); *State v Fewell*, 286 Kan 370, 388; 184 P2d 903 (2008); *Clark v Commonwealth*, unpublished opinion by the Kentucky Supreme Court issued on October 23, 2008, in Case 2006-SC-00379-MR; *State v Elnicki*, 279 Kan 47, 57; 105 P3d 1222 (2005); *Sparkman v State*, 902 So2d 253 (Fla App 2005); *State v Demery*, 144 Wash 2d 753; 30 P3d 1278 (2001); *Commonwealth v Kitchen*, 1999 Pa Super 100; 73 P3d 513 (1999); and *Holland v State*, 221 Ga App 821; 472 SE2d 711 (1996).

In each of those cases, recounting for a jury, as was done in this case, police comments about credibility during an interrogation of a defendant was held to violate the ban on allowing witnesses to so testify at trial, necessarily recognizing that there is no meaningful difference between the formats of presentation. Three of those cases are remarkably like this one. In *Clark*, a jury heard a tape of a police officer telling a defendant he was interrogating that he believed the [redacted]-year-old victim ([redacted] age); in *Holland*, *supra* at 715, a police officer was heard on tape telling a defendant, "I know your daughter is not going to just dream this up," and *Sweet, supra* at 1206, involved a recorded interview containing vouching for a child by a police officer

"presented ... as an expert 'forensic interviewer' ...".

Granted, none of the above-cited cases are from Michigan, but common sense and our law require the same conclusion. *Kowalski, supra* at 129. Recorded vouching is the functional equivalent of live vouching. *Rhode Island v Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980). In this era of cell phone cameras, skyping, video-conferencing, online college courses, etc., electronic images are no less immediate and communicate no less vividly than in-person presentations. That is especially so when, as in this case, the person vouching "on tape" also testifies in person at trial. Being one and the same, what was said was indistinguishable.

Necessarily, therefore, not applying *Kowalski* to this case would ignore that case's adamantly-reasserted strictures.[8] Not only did the jury see and hear two police officers repeatedly "comment on the truthfulness" of the complainant in this case, "vouch for [her] veracity," and "give an opinion as to whether [she] was telling the truth," both of those officers were touted as experts. Specifically, both claimed to have special training and extensive experience, which are claims of expertise. MRE 702. Therefore, since the only difference in the presentation of the vouching is no difference, the former is what the latter "may not" do, says *Kowalski*, *supra* at 129.

A few courts have distinguished in-trial vouching from during-interrogation vouching, but not convincingly; the distinction is "not grounded in [a] necessary commonsense inquiry and lack[ing] any legal basis." *Id.* Those courts held that interrogating officers' statements about others' credibility would be understood by jurors to be just exemplars of an interrogation technique, not opinions about veracity, *Huckeba v State*, 217 Ga App 472, 477; 458 SE2d 131

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[8] Although *Kowalski* was decided after trial in this case, it applies because it merely reiterated a rule announced years earlier. *Id.*, at 129, fns 52-54. See also *People v McGillen #2*, 392 Mich 278, 286; 220 NW2d 689 (1974).

(1995); and *Wurthmann v State*, 27 P3d 762 (Alas 2001), or are commonly understood to be mere descriptions of the give-and-take of interrogations, not opinions about veracity. See *State v O'Brien*, 857 SW2d 212, 221 (MO banc 1993); and *State v Palmes*, 946 SW2d 241, 244 (Mo App 1998). Those distinctions are sophistic, however, to put it bluntly, and, therefore, do not undermine the rationale for a ban on secondhand vouching, as well as an in-trial vouching.

First of all, the notion that statements presented to juries by police officers that they believe a complaining witness are not their opinion of that witness's veracity is counterintuitive. Similarly, that vouching during an interview is a legitimate investigative technique does not validate telling the jury about it. As this Court held in *People v Barbara*, 400 Mich 352, 403; 255 NW2d 171 (1977), what is acceptable as an investigative technique "may not be suitable" for use as evidence. That conclusion follows from another commonsense inquiry. How an item of evidence is unearthed is distinct from what is unearthed. Hence, the relevance of the latter does not translate into the relevance of the former, and no evidence is admissible unless it is relevant. MRE 402.

Other courts, but not many, have held that an interrogating officer's pre-trial vouching is admissible, not because different from testimonial vouching, because it provides context for inculpatory responses by a defendant elicited or provoked by the former. See, e.g., *State v Castaneda*, 715 SE2d 290, 295-296 (NC App 2011); *State v Enderle*, 745 NW2d 438, 443 (Iowa 2007); and *Lanham v Commonwealth*, 171 SW3d 14 (Ky 2005).[9] Then, the vouching is relevant, those courts have held, to help understand what a defendant said. While that distinction has

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[9] *Lanham* and *Clark* draw a potentially significant distinction. The former allows a jury to hear accusations by a police officer that a defendant is not telling the truth, while *Clark* says that a different rule, one unforgiving of vouching, should apply to police vouching during an interrogation for the credibility of a witness. More need not now be explored herein because this plainly involves the latter.

some surface appeal, it, too, fails for several reasons to withstand scrutiny.

The distinction is, first of all, unacceptable bootstrapping. See *United States v Winchell*, 793 F Supp 994, 998 (D Colo 1992). See also *Idaho v Wright*, 497 US 805, 823; 110 S Ct 3139; 111 L Ed 2d 638 (1990). In addition, the distinction ignores that evidence is not necessarily admissible because it is helpful and relevant. *People v Peterson*, 450 Mich 349, 374-375; 537 NW2d 857 (1995). It "must first be determined to be legally relevant," *id.*, at 363, and cannot be more prejudicial than probative. *Id.,* at 375. Vouching always fails those tests, even when done to explain something said by a defendant.

The prohibition on vouching is not just a rule of evidence giving structure to courtroom presentations, which is enough reason, obviously, to require adherence to it. That prohibition protects what is of "surpassing importance," *Apprendi v New Jersey,* 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and is "fundamental to our system of justice," *Duncan v Louisiano*, 381 US 145, 153; 88 S Ct 1444; 20 L Ed 2d 491 (1968), namely: trial by jury. "Therefore, because, "[f]undamentally, it is the province *of the jury* to assess the credibility of witnesses," *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005) [emphasis in original], vouching attacks "the very heart" of the right to jury trial. Cf., *Holland, supra* at 825-826. Hence, the value of disallowing vouching outweighs whatever gain might be acquired.

Also very significantly, allowing vouching, even when helpful to explaining a response prompted by it, would wreak evidentiary havoc. The police would be invited to seed interrogations with vouching for complainants and other witnesses, so that the restriction on its presentation by a testifying witness can be evaded. Police training sessions will come to include a lecture that vouching can be put before jurors, so long as interrogators have the foresight to preface their questions with vouching. Hence, allowing vouching would create a subterfuge

available to get before juries evidence which is not otherwise admissible.

But, the consequences will be even broader. Why should police interrogators stop with vouching? Why not ask suspects about supposed "prior bad acts," prior convictions, how they did on probation or parole, or how they are getting along on probation or parole? Such inquiries are as likely to provoke a response as is vouching for a witness. Then, and because it does provoke a response, such evidence can be put before juries without regard for the requirements of MRE 404(b) or MRE 609.

But, even more disruption would be possible, in fact, likely. Why shouldn't the police also recount for a suspect everything that they have been told by others? Then, at trial, the prosecution can avoid the restrictions ensconced in MRE 801-804. And, polygraph test results, voiceprint analyses, etc., can be revealed to a jury, so long as mentioned during interrogations. And, what would stop defendants, not just prosecutors, from engaging in comparable conduct to add now-inadmissible evidence to trials?

Civil trials, too, will be transformed. Depositions could include inquiries about hearsay, junk science, or whatever. Because "[i]t is not [a] ground for objection [at a deposition] that the information sought would be inadmissible at trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence," MCR 2.302(B)(1), opposing counsel cannot stop questions premised on inadmissible evidence. Now, the inadmissible gets stricken when the deposition is used. If what was done in this case is allowed, civil litigators can change the inadmissible, be it vouching, junk science, hearsay, etc., into the admissible by claiming that the jury needs to hear it to put in context what was said thereafter?

In sum, any rule other than a categorical prohibition on what was done at trial in this case will geld multiple rules of evidence, not just the ban on vouching, which is bad enough. To

paraphrase now-Chief Justice Young, sustaining, not overturning, the Court of Appeals decision in this case will begin the unraveling of generations of rules by giving birth to a devouring exception. *Tkachik v Mandeville*, 487 Mich 38, 100; 790 NW2d 260 (2010) (dissent per Young, J.). Tolerating avoidance of a rule invites its deliberate evasion. *Hearn v Schendel*, 355 Mich 648, 653; 95 NW2d 849 (1959). In sum, there is no principled basis to distinguish the *Kowalski*-type in-trial vouching, which is forbidden, from recorded pre-trial vouching displayed for a jury. It, too, must be forbidden.

C. Alternatively, Juries Should Be Allowed To Hear Recordings Of Pre-Trial Police Vouching Only In Limited Circumstances.

A few of the handful of jurisdictions which have addressed the situation presented by this case – most jurisdictions, Michigan included, have not yet addressed the subject – have adopted an intermediate position. They allow leaving vouching statements on a recording of a police interrogation only in certain circumstances and with certain strict safeguards. For the reasons discussed above, a categorical ban is the best response. But, if this Court does not agree, the limitations and safeguards promulgated elsewhere should be required here, too.

MRE 402's "absolute" prohibition on irrelevant evidence, Wade, et al., *Michigan Courtroom Evidence* (4th ed), p 4-25, is "the most fundamental rule of evidence," 1 Robinson, *Michigan Court Rules Practice-Evidence* (3d ed), § 401.1, p 223. Only relevant evidence can aid the search for the truth, while irrelevant evidence impairs that search. At a minimum, therefore, vouching during an interrogation can be considered for admission only when it (a) genuinely provides (b) an explanatory context (c) to inculpatory responses (d) provoked or elicited by it. See, e.g., *Castaneda, supra* at 296; *Eugene v State*, 53 So3d 1104, 1112 (Fla App 2011); and *State v Boggs*, 218 Ariz 325, 335; 185 P3d 111, 121 (2008). Only then are the statements relevant beyond inadmissible vouching.

Those requirements should be adopted for another reason, as well. Only they can even arguably strike the balance required by *Peterson* in cases like this one, *id.*, 375, with their special considerations and concerns. *Id.*, at 371. Without them, vouching qua vouching will be allowed with all the detriment feared for decades.

It is also necessary that statements of vouching "not 'carry any special aura of reliability.'" *Demery v Waddington*, 141 Fed Appx 642 (9th Cir 2005), quoting *Dubria v Smith*, 224 F3d 995 (9th Cir 2000). Perhaps, jurors will not cede their responsibility to assess credibility to those with no greater expertise than they have. When, however, a voucher claims to have some special knowledge or expertise, the risk is too great that jurors will subordinate their evaluation to his or hers. *Kowalski, supra* at 129. That is especially likely, said this Court, when confronted with "the awesome dilemma" of having to decide whom to believe, complainant or defendant, when there is little upon which to make such a decision, *Peterson*, *supra* at 374. Then, the voucher is likely to become the "much sought-after hook ...". *Id.*

Finally, juries must be told (a) *immediately before,* not just after, they are presented with a recording of an interrogation unredacted of purportedly relevant vouching (b) that those statements *may not be considered as at all indicative of credibility*, but only for the purpose, no other, of putting in context what was said in response. *State v Craycraft*, 147 Ohio Misc 2d 5, 28; 889 NE2d 1100, 1109 (2008); *State v Running Bird*, 2002 SD 86; 649 NW2d 609, 616 (2002); and *State v Ferguson*, 581 NW2d 824, 835-836 (Minn 1998).

Again, Michigan law concurs. In *People v Jenkins*, 450 Mich 249, 263; 537 NW2d 828 (1995), this Court's conclusion that evidence was inappropriately used to impeach a witness was "reinforce[d]" by the lack of a limiting instruction given "when" the evidence was presented. An instruction was given later, but was considered insufficient because it was "belated." The trial

court should have told the jury of the limited usability of the evidence "at the time" it was presented. *Id.* In *Peterson, supra* at 378, a reversal was avoided because, among other things, the trial judge properly instructed the jury "throughout the trial" with respect to the questionable evidence and its limited usability.

D. The DVD Of The Police Interrogation Of Mr. Musser Did Not Satisfy The Alternative, Intermediate Rule.

Unless a gaping exception to the traditional ban on vouching is adopted, all of the requirements addressed above for presenting to juries evidence like that at issue herein must be satisfied. In this case, none of them were satisfied. Hence, even if this Court does not adopt a categorical ban on using interrogations as a subterfuge to slip vouching into a trial, error occurred in this case, unless this Court becomes the very first court to categorically allow vouching so long as garbed in questions.

1. Mr. Musser's Responses To The Vouching Were Not Incriminating Or Otherwise Pertinent.

All Mr. Musser said after being told, "Kids have a hard time lying about this stuff ..." (65a, lines 8-9), "[e]specially a 12-year old" (65a, line 12), was, "Sure" (66a, line 5). When put in the context of the questions which prompted it, that response is revealed to be irrelevant; surely, it is not the least bit incriminating. While the officers began with the declaration about kids not lying, Mr. Musser was asked, "You want to know what her concern [about your family] was? You want to know why she waited to tell? Do you want me to tell you? (66a, lines 2-4). As an answer to those questions, "Sure" says nothing even remotely pertinent. Hence, that answer is irrelevant, meaning that whatever prompted it is also irrelevant. Hence, both were inadmissible. MRE 402.

Even if what Mr. Musser said after the two subsequent soliloquys was provoked by

vouching, using those responses to justify revealing the vouching are additional instances of bootstrapping. Why [redacted] had waited a year "to tell" was patently inadmissible. *Peterson, supra*. Why children in general wait is something which could be explained, but, this Court held in *Peterson*, not even the most competent expert can explain why [redacted] waited. Besides, the police officers were never established to have that expertise. Necessarily, therefore, since the officers' inquiry of Mr. Musser was itself forbidden, any answer to it was irrelevant.

Likewise, when placed in context, Mr. Musser's answer about his motivation was not inculpatory. He was attempting to explain why he gave [redacted] "a peck" on the top of the head, not attempting to explain or justify having abused the child. The police cannot, because it is bootstrapping, use out of context a piece of what was said, when, in context, what was said was exculpatory, and what preceded it did nothing to undermine its exculpatory nature.

2. None of The Interrogating Officers' Vouching Was Relevant.

Ordinarily, Mr. Musser readily concedes, a statement made by an accused immediately after a statement of vouching by an interrogating police officer will have prompted it. Not necessarily, however, as demonstrated by this case. Assuming that what came after was necessarily caused by what preceded it is the very same error of logic as is conflating causation with correlation. If one statement was not produced by a preceding statement, the latter cannot be said to explain the former. The statements are unrelated.

Even if Mr. Musser's "Sure" is relevant, it is not explained by the statement, "Kids have a hard time lying about this stuff ...". That was said at the beginning of a page-long statement which changed subjects midway, with the answer responsive only to the new, different subject. Specifically, the vouching was followed by, "You want to know why she waited to tell? Do you want me to tell you?" (66a, lines 2-4). As a result, Mr. Musser's answer of "Sure" was provoked

by those questions, not by the vouching statement. It is unrealistic to conclude that an answer directly responsive to a particular question on one subject was really provoked by a different subject mentioned earlier. As a result, the vouching cannot have helped explain the response and, for that reason, was inadmissible.

Then, came a four-page police soliloquy (68a-71a) which included, "[I]t's pretty credible what she tells us;" "We can't find anything [why she would lie];" "Kids don't lie about this stuff;" "They don't lie about this stuff;" "[S]he's not going to make that crap up;" and, finally, "[T]here's no question this happened." While Mr. Musser spoke after that soliloquy, what he said was not in response to any of that vouching. Again, the interrogating officers changed subjects, and, again, he was responding to the new, different subject. His "I don't know what motivated me" (71a, line 25; 72a, line 1) was in response to inquiries of "[W]hy?"[10] The statements about the truthfulness of [redacted] were utterly unrelated to, and, for that reason, cannot be said to have provoked, the answer. Therefore, even if Mr. Musser's answer was a relevant statement, it did not open the door to the vouching which preceded it.

Similarly, Mr. Musser's answer, "I don't know what motivated me," is not made any more or less understandable or any more or less inculpatory by telling the jury that the police officers wanted to know, "Why?" because that was all that was unknown to them, having decided that Alicia was telling the truth about being assaulted. Telling the jury that the answer was preceded by a "Why" told them everything they needed to know to fully and accurately decipher the answer.

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[10] Actually, Mr. Musser's initial statement after the vouching was an unadorned "No" (71a, line 22) to the question, "Were you ever molested as a child?" (71a, lines 20-21). But, the interrogation resumed in a way ("Help us out here") which continued exploring why, so Mr. Musser accepts that his response was more than "No." Still, however, the response was unrelated to the preceding vouching.

Even Mr. Musser's preface of "You asked a lot of different questions right there" (71a, lines 24-25), to his answer is not illuminated, rebutted, or explained by the earlier vouching. To fully and accurately assess his statement about "a lot of questions," all the jury needed to be told was that the officers asked "Why" and suggested alcohol, an unsatisfactory sex life, and abuse as a child as explanations. That they believed [redacted] did not help in the least understand the response above "a lot of different questions ...".

3. The Officers' Vouching Was Put Forward As Particularly Reliable.

The vouching on the DVD was presented by both the prosecution and the police as having a "special aura of reliability," not only what *Demery* and *Dubria* explicitly disallow, but what *Kowalski* also forbids. Hence, it was inadmissible for another, stand-alone reason. First of all, police officers tend to be seen by juries as "'figure[s] of authority,'" whose testimony is "credited with more weight." *People v Munoz*, 398 Ill App 3d 455, 489; 923 NE2d 898 (2010). Presumably, Michigan police officers are not held in lesser regard by Michigan jurors than are Illinois police officers by Illinois jurors.

Furthermore, the vouching officers claimed a special reliability. Before the DVD was played, the jury heard the lead investigator, in response to a question put to him by the prosecutor at trial, described the "total[ly] different type of interview" conducted of children designed to ensure the reliability of what they said, that he had been trained in that interview process, that he had used it "hundreds" of times, and that he "follow[ed] that specific process with [redacted]" (102a, pp 118-120). Whatever the prosecutor's purpose, the officer's answers constituted a claim that there was special reason to accept as reliable their assessment of [redacted]'s credibility.

Then, the jury heard the same officer talk on the DVD about the "special way that kids have to be interviewed" (65a, lines 18-21). The jury also heard the officer tell Mr. Musser that he had handled child sexual abuse cases for years (26a, line 17). Those were all claims of special knowledge derived from expertise about the credibility of children in general and [redacted] in particular. Finally, the other detective interrogating Mr. Musser used his colleague's experience, specifically, "Ed's [the other officer] done a lot of interviewing," as the basis for believing [redacted] (71a, lines 15-18), and he also repeatedly explained to Mr. Musser why [redacted] was credible by comparing what she had told him to what he had learned in other cases (68a-52a).

4. No Cautionary Instruction Was Given.

The DVD of Mr. Musser's interrogation was played for the jury just before noon on the first day of proofs (122a, p 182, line 22). The jury was not then cautioned about its use. It was cautioned only that the transcript being provided was just an aid to following the DVD (122a, p 128, lines 1-12). Only after the DVD was played and after a break for lunch (122a, pp 127-128), was the following instruction given to the jury:

> "Ladies and Gentlemen of the Jury, at the close of proofs, I will be giving you a detailed set of written jury instructions about the law that will govern the case in addition to the instructions I've already given and the one I'm giving right now. Among the instructions that I will give you at closing is 1 -- it is an instruction about what is and is not evidence. One of things I will instruct you at that time is that the questions of the lawyers are not evidence, only the answers of a witness are evidence. The questions only serve to give meaning and context to the answers of the witness.
>
> Similarly as it relates to Prosecution Exhibit 2 [the DVD], which before the lunch recess was played for you, there are many statements and questions by one or more law enforcement officers. Those questions and statements, no matter how short or how long, are not evidence and you must not consider them as such. Only the answers of Mr. Musser are evidence. The questions and statements of the law enforcement officers are only provided to you to put into

> context the answers of Mr. Musser. It is only the answers of Mr. Musser that are evidence in this case" (123a, pp 142-143).

Nothing comparable was ever said again. In its oral instructions two days later, the trial court said only that "the lawyers' statements and arguments are not evidence" (126a, p 11, lines 6-13), and that the testimony of the two experts on the behavior of sexually abused children cannot to be considered opinions that [redacted] "is telling the truth" (127a, p 17, lines 1-10). Nothing at all was said about police officers' "questions and statements," let alone that they, too, cannot be considered opinions about [redacted]'s veracity. The jury was told only that the police officers' testimony was "to be judged by the same standards you use to evaluate the testimony of any other witness" (127a, p 7, lines 11-14).

After closing arguments, the court gave the jury written instructions (132a). The jury was reminded not to consider the testimony of the psychological experts as an opinion that [redacted] is telling the truth (140a), and that police testimony "is to be judged by the same standards you use to evaluate the testimony of any other witness" (140a). But, the post-evidence, mid-trial cautionary instruction about the police witnesses' questions and answers was not repeated. Finally, when, during deliberations, it gave the jury the DVD, which it had requested (147a), of Mr. Musser's interrogation, the trial court did not renew any of its cautions from days earlier about "questions and statements of the law enforcement officers ..." (146a).

Given their timing and content, the instructions were inadequate. First of all, the initial instruction came too late. It was not given before the DVD was played for the jury, but more than an hour later, and only after a significant break. As a result, the jury did not receive the officers' statements aware that it should not use them as the vouching for [redacted] they sure sounded like. Instead, the jury had heard [redacted] testify and had been told, without any limiting

words from the court, by the police that she was being truthful. Later, only after things had settled in mind, the jury was told to reprocess what it had heard to ignore its substance.

Furthermore, the instruction was substantively inadequate. The jury was never admonished to not let the police comments affect its assessment of witness credibility. The jury was told only that the officers' comments "are not evidence" and are provided only "to put into context [Mr. Musser's] answers ...". From this, the jury had to deduce that it could not take at face value the officers' proclamations of [redacted]'s credibility as evidence of her veracity. Perhaps, lawyers can be expected to understand that such an elliptical statement also included the former. Not so lay jurors. They need to be told plainly. Cf., *People v Anstey*, 476 Mich 436, 457; 719 NW2d 579 (2006). Mr. Musser's jury was not. Besides, the lack of such a specific admonition when one had been stated about the experts suggested that no comparable admonition applied to the police.

Then, the trial court withdrew the curative instruction, for all practical purposes. Twice, once orally before closing argument, and, thereafter, in writing after argument, the jury was reminded that lawyers' questions are not evidence, but it was not reminded that police officers' questions are not evidence. Perhaps, the former reminder prompted the jurors to recall what they had been told by the court two days earlier about something "similar[]" (123a, p 143, line 4). But, so concluding is unrealistic. Jurors are perceptive, but they are not that well versed in the analyses of the law.

Worse, the trial court then told the jury, again twice, that, while the psychological experts' testimony was not evidence that [redacted] was truthful (127a, p 17, lines 9-10), the police officers' testimony was to be evaluated like any other witness (127a, p 17, lines 11-14). At a minimum, those instructions distracted the jury from the earlier caution about police officers'

questions. More likely, the juxtaposition of the instructions about the experts and the police told the jury that the police testimony was not limited like the experts' testimony; otherwise, the court would have said so. The law has long drawn deductions from what is not said by comparison to what is said. In sum, not only did the jury never get an actual caution to not use the police officers' comments about [redacted]'s credibility as evidence of her credibility, it got confusing signals, at best.

II. The Error In Allowing Mr. Musser's Jury To See And Hear The Police Officer's Repeated Vouching For The Complaining Witness Cannot Be Sidestepped As Harmless.

Except for structural ones, all trial errors, including constitutional errors, can be harmless either because corrected or at least significant minimized, or because factually inconsequential, and, if so, are not reversible. *People v Anderson (aft rem)*, 446 Mich 392, 404-407; 521 NW2d 538 (1994). While allowing the police to vouch for a complaining witness has not yet been held to be a "structural error," *id.*, at 405, intruding into a jury's exclusive province truly implicates the essence of the trial mechanism, not just the presentation of information. Fortunately, this Court need not now determine whether allowing vouching is a structural error or a more traditional trial error. Even if it is just the latter, what happened in this case was not harmless.

A. The Error Was Not Cured.

The Court of Appeals ruled that a mid-trial instruction "was sufficient to cure any possible prejudice that defendant may have suffered" (16a). Mr. Musser respectfully disagrees, as should this Court, as in fact has this Court when presented with a situation indistinguishable from what happened in this case:

> "While a limiting instruction will often suffice to enable the jury to compartmentalize evidence and consider it only for its proper purpose, we note that absence of a proper purpose in this case to which the jury could limit its use of the evidence." *People v*

Crawford, 458 Mich 376, 399, fn 16; 582 NW2d 785 (1998).

In this case, the vouching left on the DVD of Mr. Musser's interrogation should have been redacted. Either because always to be excluded, as Mr. Musser believes should be the rule, or because not admissible under the circumstances of this case, it had no proper use, even limited. Accordingly, a limiting instruction, even if timely given and substantively sufficient, neither of which this case's instruction was, did not cure, offset, etc., the error, said this Court in *Crawford.*

B. The Error Was Factually Significant.

Because no court of this State has, until now, had occasion to address the inadmissibility of vouching like that which occurred in this case, no court here has had occasion to address the prejudice and harmlessness of inappropriately allowing such vouching. Other courts have, however, and have commonly found such error to be prejudicial, given its nature and the nature of the cases in which it typically occurs. Where the prosecution "relied heavily" on a complainant's testimony, allowing the jury to see and hear a police interview of the defendant which included vouching for that complainant "cannot be deemed harmless ...". *Clark, supra.* See also *Sweet, supra* at 1206; and *Holland, supra.*

Michigan concurs. When a case is primarily a credibility contest, the erroneous admission of corroborating testimony on either side results in harmful error because it "could tip the scales." *Anderson, supra*, at 407, fn 37, quoting *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (2004). See also *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010). Any error "closely linked to the complainant's believability," which vouching for him or her plainly does, has, by its nature, "a high probability of influencing the verdict." *People v Krueger*, 466 Mich 50, 55; 643 NW2d 223 (2002); *People v Straight*, 430 Mich 418, 427-428; 424 NW2d 257 (1988); *People v Smith*, 425 Mich 98, 113; 387 NW2d 814 (1986).

This case was a classic one-on-one credibility contest. [redacted] said that Mr. Musser had touched her in various inappropriate ways. He adamantly denied having done anything of the sort. Given the nature of her allegations, there was no physical evidence corroborating [redacted]; but that lack of physical evidence did not corroborate Mr. Musser. While its absence did not undermine her testimony, it did not support his. Given her allegations, no physical evidence was expected. Similarly, no other witness saw or heard anything which backed up either her or him. Repeated police vouching for [redacted] not only might have tipped the scales, it very likely did.

CONCLUSION

Key to the credibility, integrity and effectiveness of our legal system is the principled development and analysis of its various rules. But, care must be taken to not over-intellectualize that analysis. As this Court made clear in *Kowalski*, commonsense is at the heart of our rules of law, especially, the precepts governing evidence. As a result, while fine lines can sometimes be drawn, our rules must always be practicable and based on the human experience, not on analytical abstractions.

This is a case in which to heed that warning. Here in Michigan, as is common throughout a nation insistent on legal proceedings which fairly seek the truth decided by juries, witnesses, especially, police officers and purported experts, may not vouch for the credibility of others. That ban is violated no less when out-of-court vouching is recounted electronically. Ergo, what was done in this case was fundamental error. No more need be said.

PRAYER FOR RELIEF

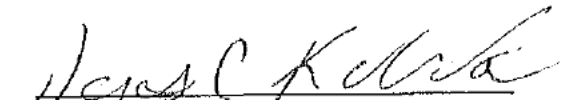
NOW, WHEREFORE, John M. Musser, the defendant-appellant in this case, prays this Honorable Court reverse his convictions in this case and remand to the Kent County Circuit Court for a new trial at which the DVD of his interrogation by the police on May 11, 2010 has redacted from it all instances of the interrogating police officers vouching for the credibility in

general of children complaining of sexual abuse and vouching in particular for the complaining witness in this case.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

Dated: November 21, 2012

By: 

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