

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

DENNIS LEE TOMASIK,

Defendant-Appellant.

Court of Appeals No. 279161

Circuit Court No. 06-003485-FC

~~Supreme Court No. 140636~~

Hon. DONALD A. JOHNSTON, III

*Opu 4-22-14*

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**APPLICATION FOR LEAVE TO APPEAL**

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## **JUDGMENT APPEALED FROM AND RELIEF SOUGHT**

Defendant-Appellant Dennis L. Tomasik applies for leave to appeal from the April 22, 2014 decision of the Michigan Court of Appeals affirming his convictions and sentences for two counts of first degree criminal sexual conduct (MCL 750.520b[1])(attached as Appendix B), and asks this Court to grant leave to appeal and reverse his convictions and order a new trial.

## **STATEMENT OF JURISDICTION/PROCEDURAL HISTORY**

Appellant Dennis Lee Tomasik was convicted in the Kent County Circuit Court after jury trial, and a Judgment of Sentence was entered June 5, 2007. Appellant, through his first appellate attorney, Christopher P. Yates, filed a Brief on Appeal in the Michigan Court of Appeals on October 10, 2007. Appellant then, through current appellate counsel, filed both a Supplemental Brief on Appeal (October 30, 2008) and a Motion to Remand (October 8, 2008) in which he asked the Court of Appeals to remand to the trial court for an evidentiary hearing on ineffective assistance of counsel. In addition, Appellant asked that all treatment and educational records of the complainant in this case be turned over to current appellate defense counsel, or minimally, be inspected by the trial court in an *in camera* review, and that the records reviewed be sealed by the trial court and sent to the Court of Appeals for review under *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

On November 6, 2008 the Court of Appeals partially granted Mr. Tomasik's motion to remand, and ordered an evidentiary hearing on ineffective assistance of counsel pertaining to Appellant's trial counsel's failure to "produce expert evidence to rebut the

prosecutor's experts." This court also allowed Mr. Tomasik to move for an *in camera* review of complainant's counseling records.

Appellant then filed a Motion for New Trial and Motion for Discovery with the trial court on November 11, 2008. The evidentiary hearing was held in the Kent County Circuit Court before the Honorable Donald A. Johnston, III on Thursday, December 18, 2008, and continued on Thursday, February 12, 2009. Judge Johnston denied the Motion for New Trial from the bench on February 12, 2009 (MT 2/12/2009 65).

That day the trial court promised to conduct a review of all available counseling records, and asked counsel to provide assistance and information (*Id.* at 28, 50-52). The very next day this attorney sent a four page letter providing all information known to the defense regarding any counselors treating the complainant, and asked the trial court to look for evidence of deceit, lying, manipulation, previous false accusations, and the consistency of various clinician's observations with respect to the complainant's behavioral problems.

After waiting nearly five months, the trial court issued an order stating, essentially, that no *Stanaway* review would be conducted, despite what was earlier promised. Indeed, the trial court's July 6, 2009 order simply indicates that it conducted the same time-limited review it conducted prior to trial. Appellant filed a Supplemental Brief after Evidentiary Hearing with the Michigan Court of Appeals on July 13, 2009. That Court affirmed Appellant's conviction in an Opinion dated January 26, 2010.

Appellant then filed an Application for Leave to Appeal in this Court on February 24, 2010. In an Order dated March 9, 2011, this Court vacated the judgment of the Court of Appeals and remanded this case back to the trial court after reviewing documents

never before turned over to defendant. This Court directed the trial court to “disclose to the defendant the March 26, 2003 report authored by Timothy Zwart of Pine Rest Christian Mental Health Services and the March 1, 2003 form authored by Denise Joseph-Enders.” This Court then added that, “after disclosing these documents to the defendant, the trial court shall permit the defendant to argue that a new trial should be granted.”

On June 8, 2011 Appellant filed a Renewed Motion for New Trial in the Kent County Circuit Court. The Motion was argued before the trial court on July 29, 2011 and, on August 10, 2011, the trial court issued an order denying a new trial.

Appellant then timely filed a Supplemental Brief with the Michigan Court of Appeals, along with motions to re-open the case and allow Appellant to file the supplemental brief on September 7, 2011. That Court again affirmed Appellant’s conviction in an Opinion dated November 29, 2011.

Appellant next filed his second Application for Leave to Appeal in this Court on January 12, 2012. On April 3, 2013, this Court issued an Order holding this case in abeyance pending the decision in *People v Musser*, 494 Mich 337 (2013). Then, in an Order dated November 6, 2013, this Court again vacated portions of the Michigan Court of Appeals November 29, 2011 opinion, and remanded this case back to the Court of Appeals. This Court directed the Court of Appeals to reconsider the following four issues:

“(1) whether the Kent Circuit Court erred by admitting the entire recording of the defendant’s interrogation; (2) whether the circuit court erred in admitting Thomas Cottrell’s expert testimony regarding Child Sexually Abusive Accommodation Syndrome under current MRE 702, and, if so, whether the error was harmless; (3) whether the circuit

court erred in denying the defendant's motion for a new trial based on the newly disclosed impeachment evidence of the March 26, 2003 report authored by Timothy Zwart and the March 1, 2003 form completed by Denise Joseph-Enders; and (4) whether the defendant's trial counsel was ineffective by failing to object to the admission of the defendant's entire interrogation, by failing to object to Thomas Cottrell's testimony, and by failing to procure the expert testimony of Jeffrey Kieliszewski to challenge the testimony of Thomas Cottrell."

On December 9, 2013 Appellant timely filed a Supplemental Brief in the Court of Appeals. Also on that date, Appellant filed motions to re-open the original case and allow Appellant to file the supplemental brief. On December 13, 2013, the Court of Appeals ordered the parties to file supplemental briefing on the four above-mentioned issues, and allowed Appellant's Supplemental Brief. On December 27, 2013 the prosecution filed a supplemental brief. On April 22, 2014 the Court of Appeals again affirmed Appellant's convictions. *People v Tomasik*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket No. 279161, 2014 WL 1614469).

The Court of Appeals had jurisdiction in this appeal as of right provided for by Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2). This Court has jurisdiction to consider this third application for leave to appeal from the Court of Appeals judgment issued on April 22, 2014 pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2)(b).

## STATEMENT OF QUESTIONS PRESENTED

**In addition to the following questions presented, Mr. Tomasik incorporates by reference the four questions presented, included in his original Application for Leave to Appeal, filed in this Court on February 24, 2010.**

- I. WHETHER THE KENT COUNTY CIRCUIT COURT ERRED BY ADMITTING THE ENTIRE RECORDING OF APPELLANT'S INTERROGATION.

Defendant-Appellant answers, "Yes."  
Trial court answered, "No."

- II. WHETHER THE KENT COUNTY CIRCUIT COURT ERRED IN ADMITTING THOMAS COTTRELL'S EXPERT TESTIMONY REGARDING CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME UNDER CURRENT MRE 702.

Defendant-Appellant answers, "Yes."  
Trial court answered, "No."

- III. WHETHER THE KENT COUNTY CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

Defendant-Appellant answers, "Yes."  
Trial court answered, "No."

## **REASONS FOR GRANTING LEAVE**

Mr. Tomasik filed a claim of appeal in this case in the Michigan Court of Appeals on July 9, 2007. Appellant filed his first Application for Leave to Appeal with this Court on February 24, 2010. That Application contained the following four issues:

I. WHETHER APPELLANT TOMASIK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS (US CONST, AM VI; CONST 1963, ART 1, § 20) WHERE TRIAL COUNSEL FAILED TO: INVESTIGATE AND PRESENT A PSYCHOLOGICAL EXPERT ON KEY ISSUES SUPPORTING THE DEFENSE; INVESTIGATE, INTERVIEW OR CALL POTENTIAL DEFENSE WITNESSES; PROPERLY INITIATE AND CONCLUDE REVIEW OF REPORTS AND RECORDS; PROPERLY CROSS-EXAMINE COMPLAINANT ON PRIOR INCONSISTENT STATEMENTS; AND OBJECT TO PROSECUTORIAL MISSTATEMENTS OF EVIDENCE AND THE INTRODUCTION OF INADMISSIBLE AND HIGHLY PREJUDICIAL EVIDENCE.

II. WHETHER APPELLANT TOMASIK WAS DENIED A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS (US CONST, AM V; CONST 1963, ART 1, § 17) WHERE THE PROSECUTOR INTRODUCED INTO EVIDENCE A CD OF AN INTERVIEW THE POLICE CONDUCTED WITH MR. TOMASIK WHICH CONTAINED INADMISSIBLE AND HIGHLY PREJUDICIAL STATEMENTS; WHERE THE CD WAS SO OBVIOUSLY INADMISSIBLE THAT IT WAS PROSECUTORIAL MISCONDUCT TO MOVE TO ADMIT THE CD; AND WHERE THE TRIAL COURT FAILED TO GIVE APPROPRIATE CAUTIONARY/LIMITING INSTRUCTIONS REGARDING THOSE STATEMENTS.

III. WHETHER APPELLANT TOMASIK WAS DENIED A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS (US CONST, AM V; CONST 1963, ART 1, § 17) WHERE THE STANAWAY PROCEDURES WITH RESPECT TO SCHOOL RECORDS AND PRIOR PSYCHIATRIC REPORTS IN RELATION TO COMPLAINANT THEO JENSEN WERE NOT PROPERLY COMPLIED WITH BY THE TRIAL COURT AND WHERE OTHER DISCOVERY

IV. WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN PERMITTING THE PROSECUTION TO PRESENT EXPERT TESTIMONY ABOUT THE CHARACTERISTICS OF VICTIMS OF SEXUAL ABUSE AND SEXUAL OFFENDERS.

As noted in the Statement of Jurisdiction, this Court has twice vacated decisions of the Michigan Court of Appeals. While this pleading will focus solely on issues this Court most recently remanded back to the Court of Appeals, Appellant incorporates by reference all of the issues raised in his first Application for Leave to Appeal with this Court. Not all of these issues were addressed by this Court in the prior Orders.

This is an innocence case. Dennis Tomasik, now 45, was a hardworking tool technician who lived in a tiny house in Grand Rapids, Michigan, with his loving, stay-at-home wife and two accomplished teenage children, when, in 2006, he got the call that would ultimately destroy his entire family. A teenage neighbor, who had a longstanding reputation in the community as a trouble-maker and a liar, had gotten into some serious trouble with thefts in school, and had made up a fantastic, uncorroborated claim that Dennis Tomasik, who had no prior criminal record, and no history of pedophilia, had molested him a decade earlier. The accusation proved to be highly inconsistent over time.

The teenage neighbor, though the numbers changed constantly, claimed he was brutally raped as much as 300 times over a two-year period in the tiny Tomasik home, screaming a lot, while the rest of the Tomasik family did nothing, even suggesting that the entire Tomasik family “knew what was going on” (T III 69). However, in addition to being willing to testify to Dennis Tomasik’s good character, and his accuser’s reputation for lying, many in the neighborhood would have testified that 1) the accuser was almost never at the Tomasik home during the period in question and 2) Dennis Tomasik was almost never home during the relevant time frames. Work records corroborate this. And a Ph.D. forensic psychologist has laid out a strong case of false allegation, and has shown

why “experts” for the prosecution were unqualified, conflicted, and just plain wrong when they testified that the troubled teenager had “all the markings” of an abused child.

Because the jury never heard these critical facts, Mr. Tomasik was wrongly convicted and sentenced to 12-50 years in prison. They never heard any of this because trial defense counsel did absolutely no pre-trial investigation or preparation. He never contacted a single one of a long list of witnesses provided by Mr. Tomasik and his family, despite the fact that he filed their names on a defense witness list, and despite the fact that he had a report, prepared by the investigating detective at the request of the prosecutor, outlining the valuable testimony of many of these individuals. Shockingly, he **never even spoke to the few witnesses he did put on the stand.** He never investigated use of a psychological expert. He never cross-examined the troubled teenage accuser about the wild inconsistencies in his claims over time. He never objected when the prosecutor played an audio-taped interrogation session where the investigating detective tells the jury that she “investigated the heck out of the case” and knows Mr. Tomasik did it.

In a close case which hinged completely on the credibility of a troubled teenager, the errors in this case have caused material injustice, resulting in an unwarranted lengthy sentence of imprisonment.

### **STATEMENT OF FACTS**

Appellant relies on the statement of facts from two previous filings with this Court which both resulted in this Court vacating Court of Appeals opinions. The first Application for Leave to Appeal was filed with this Court on February 24, 2010. The Second Application was filed on January 12, 2012.

## ARGUMENTS

### I. THE KENT COUNTY CIRCUIT COURT ERRED BY ADMITTING THE ENTIRE RECORDING OF APPELLANT'S INTERROGATION.

At trial, the prosecution introduced into evidence the CD, along with a transcript, of an interview conducted by the investigating detective with Mr. Tomasik. The interview did not merely consist of questions and answers. During the course of the interview, Detective Martin made numerous statements/representations which the jury was able to hear and read including, inter alia, the following:

1). That she would not lie to him (This supported everything else she told Appellant). "The cases that I work, um, are pretty sensitive cases, ok. And, again I'm telling you Dennis no matter what I say to you is going to be honest, **I'm not going to lie to you about anything...**" (Transcript of February 23, 2006 interrogation of Appellant at pg 17) (Transcript is attached as Appendix A).

2). That Martin was a very good detective who had been working in the detective bureau for several years and this case "wasn't the first case that [she had] looked at" so that "you feel confident enough to know that ...my investigation skills are there." She went on to explain that she is very "thorough" about what she does, and that is why Appellant was there being interrogated (*Id.* at 22).

3). That she had "**investigated the heck out of it [the case] and knows everything thats gone on**" (*Id.* at 20).

4). That "I know a lot of things about this, ok. **Everything that I know, with [sic] this family has provided me with, that can be backed up,** everything that I know, I know happened, so my question to you today are not, hey did this happen or didn't happen, because...**I know, it happened,** ok" (*Id.* at 22)

5). “So my whole, thought about today, and to be up front and honest because I said that’s what I was going to do, is to tell you that there’s not going to be a yes or no, because I already know, there’s no reason ta (sic), to beat the door down on that one, **because I already know, that the answer is yes, things happened, ok. And you know what I’m talking about.**” (*Id.*) After Mr. Tomasik indicated that he did not know what she was talking about, Detective Martin again stated “You know what I’m talking about” and then added “Ok. I already know what I need to know. An (sic) I, and I’m not, hope your (sic) not thinking that I’m kinda (sic) of playing a game here...”(*Id.*)

6). That “All right. Well let me tell you this, Dennis I **know things happen when Theo, their boy came over to your house** years ago, ok, I know that, there’s no if’s, and no butts about it, none. I’m not going to ask if things happened between Theo and you, because **I know that they did happen between you and Theo**, ok. What I need to determine” is “how things started, between you and Theo” (*Id.* at 23).

7). That there was no possible reason why Theo would come up with this story. “Is there a reason why this family out of the blue, not just the family but, Theo in particular, **there’s no reason why he could come up with a conjured up story, about you**, I mean, what would he get from that” (*Id.* at 25).

These statements/representations, both individually and collectively, were inadmissible and highly prejudicial. Their introduction denied Mr. Tomasik a fair trial. Indeed, the inadmissibility and the prejudicial impact of this evidence are so obvious that it was both prosecutorial misconduct for the prosecutor to have introduced this CD into evidence and ineffective assistance of counsel not to object. Even if this Court holds that the CD was admissible, in the absence of cautionary/limiting instructions, these

statements were clearly more prejudicial than probative. And there can be no doubt that the improper introduction of these statements undermined the reliability of the verdict in this case.

This Court, in an Order dated April 3, 2013, held this case in abeyance pending a decision in *People v Musser*, 494 Mich 337, 835 NW 2d 319 (2013), a similar case which dealt with this issue. In that case, this Court held that the trial court abused its discretion by allowing the detectives' statements commenting on the claimant's credibility to be presented to the jury. Because the errors in that case undermined the reliability of the verdict, this Court vacated the defendant's convictions. The errors in this case were more egregious than those presented in the *Musser* case, and therefore Appellant's convictions must also be vacated.

Just like in this case, the detective in *Musser* repeatedly announced that the complainant was telling the truth about the incident, and that there was no reason for the complainant to make up a story. "[I]t's pretty credible when she tells us, 'Hey, he touched ... me here' ... That's pretty credible; that's pretty detailed. Again, if there's no reason for her to make this crap up, why would she say it?" *Musser* at 344. In this case Detective Martin was allowed to tell the jury: "All right. Well let me tell you this, Dennis I **know things happened when Theo, their boy came over to your house** years ago, ok, I know that, there's no if's, and no butts about it, none. I'm not going to ask if things happened between Theo and you, because **I know that they did happen between you and Theo**, ok. What I need to determine" is "how things started, between you and Theo" (*Id.* at 23). She added "Is there a reason why this family out of the blue, not just

the family but, Theo in particular, **there's no reason why he could come up with a conjured up story, about you**, I mean, what would he get from that (*Id.* at 25).

This Court held the statements in *Musser* were improper, and unanimously reversed Musser's conviction. The impropriety of Detective Martin's assertions made in this case were more egregious. While the detective in the *Musser* case stated that the defendant **probably** did the acts in the case based simply on the interview with the complainant, Detective Martin repeatedly stated that she **knew** that Appellant had committed the crime. She went on to explain to the jury that, through her expert investigation skills, and after investigating the heck out of the case, she was able verify with proof that Theo was telling the truth about everything he said Appellant did to him.

These statements were not admissible because they demonstrated not only a belief that the complainant was telling the truth and that Mr. Tomasik had, in fact, committed the sexual acts alleged, but that there was substantial proof of the crime – proof known by Detective Martin but unknown to the jury. Had the prosecution elicited the statements/representations at issue during the direct examination of a police officer witness, there can be little dispute that this would have constituted reversible error<sup>1</sup>. The fact that these improper and highly prejudicial statements were made during a police interview does not lessen their prejudicial impact or make their presentation to the jury proper.

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<sup>1</sup> “In evaluating a statement's probative value against its prejudicial effect, a trial court should be particularly mindful that when a statement is not being offered for the truth of the matter asserted and would otherwise be inadmissible if a witness testified to the same at trial, there is a “danger that the jury might have difficulty limiting its consideration of the material to [its] proper purpose[ ].” *Musser* at 357 quoting *Stachowiak v Subczynski*, 411 Mich 459, 464–465, 307 NW2d 677 (1981).

“[T]here is “no meaningful difference” between allowing an officer to comment on another person's credibility while testifying at trial and allowing the officer to make the same comments on a tape recording in the context of an interrogation interview. See, e.g., *Washington v. Jones*, 117 Wash.App. 89, 92, 68 P.3d 1153 (2003). **The logic behind this approach is that, in either case, the jury hears the police officer's opinion and “clothing the opinion in the garb of an interviewing technique does not help.”** *Id.* See also, *Washington v. Demery*, 144 Wash.2d 753, 765, 30 P.3d 1278 (2001) (Alexander, C.J., concurring); *id.* at 767, 30 P.3d 1278 (Sanders, J., dissenting); *Kansas v. Elnicki*, 279 Kan. 47, 57, 105 P.3d 1222 (2005) (“A jury is clearly prohibited from hearing such statements from the witness stand ... and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics.”); *Commonwealth v. Kitchen*, 730 A.2d 513, 521 (Pa.Super., 1999) (explaining that accusing a defendant of lying during an interrogation is “akin to a prosecutor offering his or her opinion on the truth or falsity of the evidence presented by a criminal defendant” or his or her opinion regarding the guilt of the defendant, neither of which is admissible at trial). Accordingly, under this rationale, such statements must be redacted from a recording before it is submitted to a jury. *Id.* at 522.” *Musser* at 351-352, emphasis added.

These statements indeed should have been redacted from the interrogation recording before it was presented to the jury because the statements improperly vouched for the complainant's credibility.

The Court of Appeals, in their latest opinion dated April 22, 2014, ignored this Court's reasoning in the *Musser* case when concluding that the trial court did not err in allowing the jury to hear these highly prejudicial statements<sup>2</sup>. *People v Tomasik*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket No. 279161, 2014 WL 1614469). The Court of Appeals held, without any explanation,

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<sup>2</sup> The Court did at least acknowledge that “this issue presents a close question.” *Id.* at pg 6.

that the improper statements made by Detective Martin were needed to provide context to Defendant's answers during the interrogation. *Id* at 6. This is simply not the case. Detective Martin's prejudicial statements are mainly found between pp. 20-25 of the transcript of the interrogation (Appendix A). During this portion of the interview, Detective Martin barely even bothers to get a response from Mr. Tomasik before moving on to another false statement of how sure she is that the complainant is telling the truth in this case. During this portion of the interview Mr. Tomasik answered in mainly one-word denials to Martin's highly prejudicial statements. No context was needed as there was nothing of substance said by Mr. Tomasik during this part of the interview.

The Court of Appeals concluded that this case differs from the *Musser* case in "several aspects." *Tomasik, supra* at 6. These aspects are so arbitrary that the Court of Appeals is essentially announcing that a defendant must have the same exact facts as *Musser* for that case to apply. First, the court indicated that Mr. Tomasik was "not told why he was being interviewed, whereas in *Musser* the detectives told the defendant at the outset the purpose of the interview." *Id*. This has absolutely no bearing on whether the jury should have heard the improper statements at issue in both this case and *Musser*.

The Court of Appeals also stated that *Musser* differs from this case because Detective Martin testified that the statement that she "investigated the heck" out of the case was merely a "figure of speech." *Id*. This was stated twice in their opinion. *Id*. at 4, 6. This is completely irrelevant. First, Detective Martin made the comment about it being a "figure of speech" well after the jury had already heard the interview<sup>3</sup>.

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<sup>3</sup> The interview was played at T V 36 and that comment was made at T V 60.

Furthermore, while she does say it was a figure of speech, she quickly added that “obviously I investigate my cases **thoroughly...**” (T V 60, emphasis added). There is no difference between a detective explaining to a jury that she “investigated the heck” out of a case and therefore she knows the defendant is guilty or that she “thoroughly investigated the case” and she knows that the defendant is guilty. The bottom line is that Detective Martin repeatedly represented that what she found during her “investigation” provided conclusive evidence that the complainant was telling the truth and that Mr. Tomasik was guilty. This is precisely the type of statement that this Court held was improper in the *Musser* case.

Finally, the Court of Appeals claims that this case differs from *Musser* because “Martin did not testify that she had received special training in interviewing techniques or that children of the age of the complainant knew the difference between telling the truth and telling a lie.” *Tomasik, supra at 6*. While Detective Martin did not testify at trial that she had special training in interview techniques, this fact was made very clear during the recording played for the jury. Indeed, the jury heard that Detective Martin was a very good detective who had been working in the detective bureau for several years and this case “wasn’t the first case that [she had] looked at” so that “you feel confident enough to know that ...**my investigation skills are there.**” She went on to explain that she is very “thorough” about what she does, and that is why Appellant was being interrogated (*Id.* at 22, emphasis added).

Detective Martin testified at trial that she had interviewed both the complainant and his parents **before** her interview with Mr. Tomasik (T V 60). Thus the jury would likely believe a detective when she asserts that she knows, based on her interviews and

investigation, that the complainant is telling the truth. Detective Martin also testified that, before interviewing Mr. Tomasik, she had “other information that [she] was looking for” which hinted that there was evidence that she was gathering against Appellant. *Id.* This substantiated for the jury her statements that she knows “a lot of things about this, ok. Everything that I know, with [sic] this family has provided me with, that can be backed up, everything that I know, I know happened, so my question to you today are not, hey did this happen or didn’t happen, because...I know, it happened, ok” (Appendix A at 22). She also indicated that she “knows everything thats gone on” (*Id.* at 20) and “I already know, that the answer is yes, things happened, ok. And you know what I’m talking about.” (*Id.*) After Mr. Tomasik indicated that he did not know what she was talking about, Detective Martin again stated “You know what I’m talking about” and then added “Ok. I already know what I need to know. An (sic) I, and I’m not, hope your (sic) not thinking that I’m kinda (sic) of playing a game here...”(*Id.*) She continued: “All right. Well let me tell you this, Dennis I know things happen when Theo, their boy came over to your house years ago, ok, I know that, there’s no if’s, and no butts about it, none. I’m not going to ask if things happened between Theo and you, because I know that they did happen between you and Theo, ok. What I need to determine” is “how things started, between you and Theo” (*Id.* at 23).

The points raised by the Court of Appeals do not distinguish this case from *Musser*. In fact, these point help show that the impropriety of the statements played for the jury are far greater in this case.

Even if this Court finds that the statements were somehow relevant, there is no doubt that whatever small amount of probative value they had was far outweighed by the

overwhelming prejudicial impact these statements had on the jury. Under MRE 403, a trial court has a “historic responsibility” to “always determine whether the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence sought to be introduced before admitting such evidence.” *People v Robinson*, 417 Mich. at 665, 666, 340 NW2d 631 (1983). And “[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398, 582 NW2d 785 (1998).

The *Musser* court explained that the danger of unfair prejudice against a defendant in a child-sexual-abuse case is heightened. Such a case needs to be given “special considerations” given “the reliability problems created by children’s suggestibility.” *Musser* at 358.

The *Musser* Court went on to add that “an out-of-court statement made by an investigating officer ‘may be given undue weight by the jury’ where the determination of a defendant’s guilt or innocence hinges on who the jury determines is more credible—the complainant or the defendant. *People v Prophet*, 101 MichApp. 618, 624; 300 NW2d 652 (1980).” *Musser* at 358. This is precisely the situation in this case. This case was a credibility contest, and the improper statements undoubtedly influenced the jury.

Other than repeating the pre-*Musser* stock reasoning of providing context for Defendant’s interview, the Court of Appeals provided no analysis as to what probative value these statements had in this case, and there was certainly no analysis on whether whatever probative value there was outweighed the clearly prejudicial nature of the statements. This is a clear case where the prejudicial nature of the statements

exceedingly outweighs any probative value. This case was a credibility contest between Mr. Tomasik and the complainant. The fact that jury heard the investigating officer, with years of experience and superb investigative skills, announce that she “investigated the heck out of the case” and knew for certain that the complainant was telling the truth undoubtedly, and wholly improperly, tipped the credibility contest in favor of the complainant. This Court announced in *Musser* that this very type of evidence should not, and cannot, be admitted.

At a minimum, even if the trial judge somehow had determined that the unedited CD was admissible and that it was not more prejudicial than probative, he should have given a strong limiting instruction telling the jury, *inter alia*, the statements made by the officer during the interview were not evidence, were not offered for the truth of the matter asserted, and could not be considered when determining Mr. Tomasik’s guilt or innocence. See MRE 105, *People v Moorer*, 262 Mich App 64; 683 NW2d 736 (2004).

This Court unanimously overturned the conviction in *Musser*, and the *Musser* Court **did** administer a limiting instruction, but this Court held that even that did not cure the error. *Musser* at 364. As noted, the jury in this case received no limiting instruction<sup>4</sup>.

The jury should have been instructed that it is not improper for police officers to lie to individuals they are interviewing, especially where they start the interview by claiming they are not lying, and that when police officers receive training about conducting interviews, one of the things they learn is how to use false or misleading statements to get the individual they are interviewing to make inculpatory admissions.

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<sup>4</sup> The Court of Appeals opinion stated that Defendant did not request one which, on these facts, is clearly ineffective assistance as argued in issue I of the previously filed Application for Leave to Appeal.

The jury should have been further instructed that they had to assume that all of the statements the interviewing officer made, inter alia, about believing the complainant and that Mr. Tomasik had done what the complainant said he had done were not supported, and that they must completely disregard all of those statements because giving them any weight would violate Mr. Tomasik's right to a fair trial. The jury should have been further instructed that to the extent they believed that the officer who interviewed Mr. Tomasik had formed an opinion as to either the complainant's credibility and/or Mr. Tomasik's guilt, they had to disregard that opinion because it was not evidence, it is improper for a police officer to express an opinion as to the credibility of witnesses and/or the defendant's guilt or innocence, police officers have no special ability to determine who is telling the truth or whether the defendant is guilty, and that it is the responsibility of the jury to determine guilt or innocence based on the evidence presented at trial.

The highly prejudicial nature of the statements/information improperly presented to the jury, when combined with the weakness of the prosecution's proofs and the complete failure on trial counsel's part to present a defense, compels a finding that Mr. Tomasik did not receive his due process right to a fair trial.

**II. THE KENT COUNTY CIRCUIT COURT ERRED IN ADMITTING THOMAS COTTRELL'S EXPERT TESTIMONY REGARDING CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME UNDER CURRENT MRE 702.**

On October 10, 2007, before current counsel took over this case, the Honorable Christopher P. Yates<sup>5</sup> filed the original Brief on Appeal. The first issue he raised was that the trial court committed plain error in permitting the prosecution to present expert testimony about the characteristics of victims of sexual abuse and sexual offenders. Appellant argued that Mr. Cottrell's testimony was improper because he was allowed to go into great detail explaining that many traits displayed by the complainant in this case were consistent with victims of sexual abuse.

In conducting the direct examination of Thomas Cottrell, the prosecutor posed a hypothetical question that contained a myriad of acts and traits identified with Theo and ended with the query: "Can you tell us if that's consistent or inconsistent with a child who has been sexually abused?" (T IV 6-8). After a brief discussion of delayed reporting, the prosecutor asked questions about the significance of "a child act[ing] out sexually on another child," see *Id.* at 11, and the relevance of "suicide or drug use ... as it relates to child sexual abuse." (*Id.* at 12). The prosecutor followed those questions with inquiries about why a child of age six to eight "would continue to visit at that home" where he was being abused (see *Id.* at 12), and why a child who had been subjected to painful anal intercourse would go "outside and rid[e] his bike with his friend." (*Id.* at 13). Each of these questions caused Thomas Cottrell to explain that the behavior identified by the prosecutor was consistent with a child who had been sexually abused.

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<sup>5</sup> Judge Christopher P. Yates was appointed to the 17th Circuit Court in April of 2008, and successfully defended his seat in the November 2008 election.

In Appellant's case, the charges rested entirely upon the testimony of Theo. The importance of Thomas Cottrell's expert testimony in bolstering Theo's story is evident from the centrality of that expert testimony in the prosecutor's closing argument. Time and time again, the prosecutor relied upon Thomas Cottrell's expert opinions to explain to the jury why Theo was a victim of sexual abuse and that Appellant was his abuser (T V 147, 150, 153). Indeed, the prosecutor relied solely upon Thomas Cottrell in asserting that Appellant's behavior was "very consistent with a child - a person who molests a child" (T V 150).

As argued before, much of Thomas Cottrell's testimony was plainly impermissible under *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), and it led to the conviction of a man whose guilt manifestly was in doubt based upon the evidence presented at his trial. Appellant asserts that this type of expert testimony is also impermissible under the current and revised version of MRE 702 because it does not pass the test recently announced in *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012), holding that a qualified expert may only provide expert testimony in the form of an opinion or otherwise "if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

This Court's November 6, 2013 order required the Court of Appeals to review this case to determine whether error was committed under *Kowalski* and current MRE 702. For the reasons stated in the brief on appeal filed by Judge Yates in October of 2007 it clearly was – the myriad of detail claimed by Cottrell to be consistent with child abuse victims was plain and simply improper bolstering as opposed to proper testimony

regarding specific behavior, such as delayed reporting, that might explain attacked behavior of a sexual abuse complainant.

The credibility of a child sexual abuse complainant is attacked in every such case that goes to trial. It is reversible error to allow a claimed expert to point to all of a sexual abuse complainant's behavior and state that it is consistent with victimization in a particular case. In its recent opinion the Court of Appeals stated that Appellant "points to no evidence that would call into question Cottrell's expertise in the field of behavior of victims of child sexual abuse, or whether Cottrell's testimony was based on sufficient facts and data and was the product of reliable principles and methods." However, it is the proponent of the evidence in question that bears the burden of showing why the evidence comes in under MRE 702. Ineffective trial defense counsel's failure to object does not obviate the plain error here. And Appellant has pointed out through the course of this litigation why Cottrell's testimony was not reliable under sound principles of psychology. See the analysis of Dr. Jeffery T. Kieliszewski's evidentiary hearing testimony in the supplemental brief filed after remand in July of 2009, and analysis of the same in the first application for leave filed in this Court in February of 2010. For all of these reasons this Court should vacate Appellant Tomasik's conviction.

**III. The Kent County Circuit Court erred in denying Appellant's motion for a new trial based on newly discovered impeachment evidence.**

Appellant, on October 8, 2008, first requested of the Michigan Court of Appeals that **all** treatment and educational records of the complainant in this case be turned over to current appellate defense counsel, or minimally, be inspected by the trial court in an *in camera* review, and that the records reviewed be sealed by the trial court and sent to the Court of Appeals for review under *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

On November 6, 2008 the Court of Appeals partially granted Mr. Tomasik's motion to remand, and ordered an evidentiary hearing on ineffective assistance of counsel pertaining to Appellant's trial counsel's failure to "produce expert evidence to rebut the prosecutor's experts." That court also allowed Mr. Tomasik to move for an *in camera* review of complainant's counseling records.

Appellant filed a Motion for Discovery with the trial court on November 11, 2008. The evidentiary hearing was held on Thursday, December 18, 2008, and continued on Thursday, February 12, 2009. The trial court denied the Motion for New Trial from the bench on February 12, 2009 (MT 2/12/2009 65). On that day, the trial court indicated on the record his intent with respect to the defense request under *Stanaway*:

"With respect to the *Stanaway* question, the Court will take steps necessary to acquire the documents that constitute the counseling records of the complaining witness going back some years and involving, I believe, several different counselors, and examine them in camera; and having done so, will then convene some kind of a session with counsel" (MT 2/23/2009 65).

The trial court noted that he would, after reviewing the extensive records requested, make decisions with respect to disclosure and/or a new trial, and make efforts to "see to it that

the appellate judges can obtain the necessary documents” (*Id.*). The court then asked “counsel to help the Court staff identify treaters or counselors, so that we can get the material we need for that purpose, then act accordingly” (*Id.* at 66). The next day this attorney, in compliance with the trial court’s request, compiled a four page letter (dated February 13, 2009), and copied that letter to the Court of Appeals. This trial court’s order of July 6, 2009 clearly indicates that the expanded review of records was never done. Indeed, the order simply indicates that it conducted the same time-limited review it conducted prior to trial.

Appellant then filed a Supplemental Brief after Evidentiary Hearing with the Court of Appeals on July 13, 2009. That court affirmed Appellant’s conviction in an Opinion dated January 26, 2010.

Appellant filed an Application for Leave to Appeal in this Court on February 24, 2010. This Court, in an Order dated March 9, 2011, vacated the judgment of the Court of Appeals and remanded this case back to the trial court after reviewing documents never before turned over to defendant. This Court directed the trial court to “disclose to the defendant the March 26, 2003 report authored by Timothy Zwart of Pine Rest Christian Mental Health Services and the March 1, 2003 form authored by Denise Joseph-Enders.” This Court then added that, “after disclosing these documents to the defendant, the trial court shall permit the defendant to argue that a new trial should be granted.”

The trial court complied with this Order by providing the defense the two documents on March 18, 2011. Each of these documents provided critical evidence of Theo’s propensity for lying and deceit.

**A. March 26, 2003 report authored by Dr. Timothy Zwart.**

Dr. Timothy Zwart was working at Pine Rest Christian Health Services. The report indicates that Theo was referred to Pine Rest by Tim Zielinski, at North Kent Guidance Services. Dr. Zwart administered a number of tests on Theo, including: developmental history questionnaire, school history questionnaire, child attention profile (CAP), behavior assessment system for children (BASC). Dr. Zwart also conducted clinical interviews with Mrs. Jansen (Theo's mother) and Theo.

Dr. Zwart provided background on Theo, including the death of Theo's grandfather when Theo was 6 years old. Dr. Zwart labeled this event as a "stressor," and noted that Theo struggled with the death of his grandfather. Dr. Zwart also pointed out that Mrs. Jansen "remembered Theo making statements at that point about wanting to die. Theo did receive some school social work services at that time."

Throughout school, Theo tested high for intelligence, but Dr. Zwart noted that one area of weakness was his memory. Theo was diagnosed with learning disabilities and Attention Deficit/Hyperactivity Disorder.

Dr. Zwart's report was conducted when Theo was in the 6<sup>th</sup> grade. As part of Dr. Zwart's analysis he received input from Nancy Jenson, Theo's guidance counselor at school, and Denise Joseph-Enders, Theo's resource room teacher. Dr. Zwart noted that both expressed significant concerns for Theo. Part of the concern was based on Theo's behavior during school. Theo could not be trusted alone in the hallways, and required constant supervision. Theo also had "extreme difficulty concentrating on the task before him."

More importantly to this case, Dr. Zwart's report indicates that Theo consistently engaged in deceitful behavior. Theo would lie to teachers so often that it was hard to distinguish when he was telling the truth and when he was lying. "He [Theo] has the teacher team rather baffled. **He will lie and it becomes difficult to know truth from fiction.**" Emphasis added.

Furthermore, Theo seemed to relish in his deceitful behavior. He was "quick to blame the adult in charge when asked to take responsibility for his actions." And Dr. Zwart noted that, when explaining his aberrant behavior, Theo's "overall energy level and affect became much brighter and he almost appears to revel in this type of mischief."

Dr. Zwart described many of the lies Theo had created and stated that "this all adds to the sense that he does not know truth from fiction himself." Dr. Zwart also stated that Theo has difficulty with "impulse control and self regulation" as measured by the GDS Delay Task.

**B. March 1, 2003 form and questionnaire authored by Denise Joseph-Enders.**

Denise Joseph-Enders was Theo's resource room teacher. In March of 2003 she filled out a CAP form evaluating Theo's behavior. She described a young man who consistently lied. "Theo has been lying to parents and teachers for so long he distorts reality. His is offended that we don't trust him, but he has repeatedly broken our collective trust."

Also important to this case is that Theo was "quick to blame the adult in charge when asked to 'own' his actions." Ms. Joseph-Enders indicated that Theo sought the attention of his peers, and usually sought it with negative behavior.

Other teachers were involved in filling out this form. While the handwriting is unclear, it appears the other staff members involved were Nancy Jansen, Stacy Kenelty and Lisa Ear. These women also found Theo to be dishonest and deceitful. They wrote that Theo “lies very often, so no one knows truth from fiction. The problems have been prevalent since he was very young...”

They also found that “Theo seems to be attracted to situations that cause trouble for himself. He has been caught in the middle of telling lies so often that it’s difficult to know when he is telling the truth.” They wrote about specific lies Theo had told about having a parole officer and shooting at targets shaped like people.

Even more disturbing, they found that “Theo’s sense of what is real does not match what the majority of us see as reality. He seems to really believe some of his untruthful statements.”

On June 8, 2011 Appellant filed a Renewed Motion for New Trial in the Kent County Circuit Court. The Motion was argued before the trial court on July 29, 2011 and, on August 10, 2011, the trial court issued an order denying a new trial. The Michigan Court of Appeals affirmed the trial court’s determination in an Opinion dated November 29, 2011. This Court again vacated that portion of this Court’s opinion, and remanded to the Court of Appeals for reconsideration.

In Appellant’s Supplemental Brief After Remand filed with the Court of Appeals on September 19, 2011, Appellant discussed at length how the newly discovered impeachment evidence in this case required a new trial based on the test announced in *Pennsylvania v Ritchie*, 480 US 39; 107 S Ct 989; 94 L Ed 2d 40 (1987); See also *People v Fink*, 456 Mich 449, 574 NW2d 28 (1998). The threshold questions on whether newly

released evidence would require retrial are whether the documents are favorable to the defense and material to the case. If any of the documents are favorable to defendant and material to the case, a new trial should be granted. *Id.* This remains true today, and this Court should grant leave and reverse Appellant Tomasik's conviction.

This Court most recently directed the Court of Appeals to consider the recent ruling in *People v Grissom*, 492 Mich 296, 821 NW2d 50 (2012). This was another case where a defendant was granted a new trial based solely on newly discovered impeachment evidence. The *Grissom* court held that, in order for a new trial to be granted, the defendant must show "that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the newly discovered evidence is not cumulative, (3) using reasonable diligence, the party could not have discovered and produced the evidence at trial, and (4) the new evidence makes a different result probable on retrial." *Grissom* at 320.

This test, while worded differently, still boils down to the heart of the issue which was previously briefed. That is, whether the newly discovered evidence would have made a difference at trial. This case was reduced to a credibility contest between Appellant and Theo. This information would have directly attacked Theo's credibility, clearly putting the whole case in a much different light.

The Court of Appeals, in their most recent opinion, agreed that "[t]his case came down to a credibility contest between defendant and T.J." *Tomasik, supra* at 12. However the Court simply repeated their reasoning from their prior opinion that "the reports at issue present additional evidence that T.J. was a **habitual** liar, but the jury received ample evidence to that effect and still chose to find T.J.'s allegations against

defendant credible. We hold that the newly discovered evidence did not entitle defendant to a new trial.” *Id*, emphasis added. While there were a few isolated references during trial testimony that Theo lied on occasion, the jury did not hear that Theo was a habitual liar who did not understand the difference between the truth and a lie. Or that he somehow got joy out of creating fictions to get what he wanted. Or that he would lie and blame the first adult he could think of when his actions got him into trouble<sup>6</sup>. Or that his teachers and his counselors never knew when Theo was lying or when he was telling the truth. This evidence was not cumulative. It is powerful evidence in a credibility contest. The newly discovered information concerning Theo’s inability to understand the difference between his own lies and the truth, coupled with his propensity to blame nearby adult figures for his own mistakes, clearly undermines confidence in the outcome of Mr. Tomasik’s trial.

In *People v Armstrong*, 490 Mich 281, 806 NW2d 676 (2011), this Court considered the significance of impeachment evidence and its use as grounds for granting a new trial. The *Armstrong* court concluded that a defense attorney's failure to introduce telephone records that contradicted the complainant's trial testimony amounted to ineffective assistance of counsel and was sufficient for a new trial. This Court specifically noted the importance of evidence attacking the complainant's credibility because “[t]he defense's whole theory of the case was that the complainant had falsely accused defendant of rape. The attacks on the complainant's credibility at trial were inconclusive, providing mere ‘he said, she said’ testimony contradicting the

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<sup>6</sup> In the original Application for Leave to Appeal filed with this Court on February 24, 2010 at pp 36-38, Appellant presented numerous character witnesses who would have testified that Theo would lie to get out of trouble and to get attention.

complainant's version of the events.” *Id.* at 291. Thus, the impeachment evidence was found to be sufficiently important to the determination of guilt or innocence that it could change the result on retrial. In these circumstances, the *Armstrong* Court held that a defendant is entitled to a new trial.

Similarly, this case was a straight-up credibility contest. A determination of Theo’s credibility was the main function of the jury in this case. And the newly discovered evidence in this case surely would have had a dramatic impact on that determination. And the verdict in this case was already of questionable validity. Theo had gotten into some serious trouble with thefts in school, and had made up a fantastic, uncorroborated claim that Dennis Tomasik, who had no prior criminal record, and no history of pedophilia, had molested him a decade earlier. The accusation proved to be highly inconsistent over time. Theo, though the numbers changed constantly, claimed he was brutally raped as much as 300 times over a two-year period in the tiny Tomasik home, screaming a lot, while the rest of the Tomasik family did nothing, even suggesting that the entire Tomasik family “knew what was going on” (T III 69). However, many in the neighborhood would have testified that 1) the accuser was almost never at the Tomasik home during the period in question and 2) Dennis Tomasik was almost never home during the relevant time frames. Work records corroborate this. And a Ph.D. forensic psychologist has laid out a strong case of false allegation, and has shown why “experts” for the prosecution were unqualified, conflicted, and just plain wrong when they testified that the troubled teenager had “all the markings” of an abused child.

There can be no doubt that the addition psychological reports showing Theo's inability to tell the difference between the truth and a lie is enough to clearly demonstrate that there is more than a reasonable probability of a different result at trial.

It is clear that the information in the recently released records are favorable to the defense and material to the case. The records directly attacked Theo's credibility, clearly putting the whole case in such a different light so as to undermine confidence in the verdict and make a different result probable on retrial. It was constitutional error that Mr. Tomasik was not provided these documents before trial, and, as such, "it cannot be considered harmless."

This new evidence, when looked at cumulatively in context of a verdict which was already of questionable validity, compels a finding that Mr. Tomasik did not receive his due process right to a fair trial.

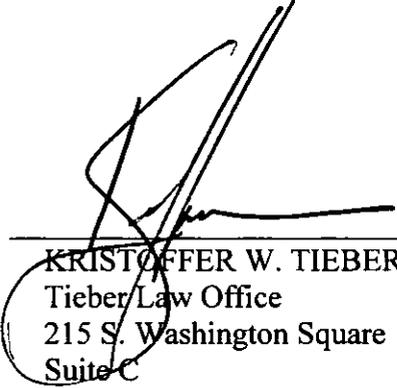
**RELIEF REQUESTED**

For the foregoing reasons, and for the reasons presented in his previous pleadings, Appellant Dennis Tomasik respectfully urges this Court to reverse his convictions for criminal sexual conduct.

Respectfully submitted,

BY: 

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