IN THE SUPREME COURT FOR THE STATE OF MICHIGAN
Appeal from the Michigan Court of Appeals

People of the State of Michigan,
Plaintiff-Appellee and Cross-Appellant,

v.

Daniel Albert Loew,
Defendant-Appellant and Cross-Appellee.

On Appeal from the Michigan Court of Appeals
Docket No. 352056

On Appeal from the 48th Circuit Court for
County of Allegan
Case No. 18-021709-FC

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED FROM

Defendant-Appellant Daniel Loew seeks leave to appeal the Michigan Court of Appeals' January 13, 2022 order granting cross-appellee's appeal, and reversing the trial court's decision to grant Mr. Loew a new trial. Mr. Loew also seeks leave to appeal the Court of Appeals' denial of his appeal.

Following a jury trial, Mr. Loew was found guilty of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f), one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(f), one count of third-degree criminal sexual conduct (CSC-III), MCL 750.520b(1)(a), and one count of CSC-III, MCL 750.520d(1)(b). Approximately one year after his trial, Mr. Loew discovered that, during his trial, the trial judge and elected prosecutor exchanged several e-mails regarding Mr. Loew's trial. Neither Mr. Loew nor his counsel were included on those e-mails or made aware of them by the trial judge or any prosecutor during or following trial, and only learned of them through successor counsel while his appeal was pending. Mr. Loew filed a motion for new trial, which the trial court granted. Cross-appellee appealed the trial court's decision, and the Court of Appeals reversed the trial court's decision to grant Mr. Loew a new trial.

The Court of Appeals' opinion is attached as Exhibit A, and the dissent is attached as Exhibit B. The trial court's order granting a new trial is attached as Exhibit C. The transcript of the hearing on Mr. Loew's motion for new trial is attached as Exhibit D.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear the instant appeal pursuant to MCR 7.303(B)(1), which provides that the Michigan Supreme Court may grant leave to hear an appeal from a final order of the Court of Appeals. The instant application for leave to appeal is timely. The final order from which Mr. Loew seeks leave to appeal was entered on January 13, 2022. Under MCR 7.305(C)(2)(a), an application for leave to appeal must be filed within 56 days after entry of a Court of Appeals order in a criminal case; thus, the instant application for leave to appeal is timely because it is being filed within 56 days of January 13, 2022.

QUESTIONS PRESENTED

I. Do the issues litigated in this appeal involve significant public interest?

Defendant-Appellant: Yes

II. Was the Court of Appeals' reversal of the trial court's order granting Defendant-Appellant a new trial clearly erroneous and will it cause material injustice?

Defendant-Appellant: Yes

Plaintiff-Appellee: No

III. Was the Court of Appeals' finding that Defendant-Appellant's trial counsel was not ineffective clearly erroneous and will cause material injustice?

Defendant-Appellant: Yes

Plaintiff-Appellee: No

IV. Was the Court of Appeals' finding that no prosecutorial misconduct occurred clearly erroneous and will cause material injustice?

Defendant-Appellant: Yes

Plaintiff-Appellee: No

STATEMENT OF FACTS

1. The Allegations and Law Enforcement Investigation

On January 13, 2018, Michigan State Police (MSP) officers responded to a report of sexual assault in Allegan County, Michigan. J.B., a 15-year-old female, claimed that Mr. Loew repeatedly sexually assaulted her from 2015 to 2018. After hearing J.B.'s allegations, a family member contacted MSP to report the alleged sexual assaults.

J.B. advised law enforcement that Mr. Loew assaulted her for the first time on December 19, 2015, during her father's wedding reception. The reception occurred at the home of J.B.'s aunt, when J.B. was 13 years old and Mr. Loew was 21 years old. J.B. claimed that, while numerous friends and family members were enjoying the wedding reception in the adjacent garage, she entered the main house to help Mr. Loew put away groceries. At the time, Mr. Loew was engaged to be married to Brouke Heppe, J.B.'s cousin. According to J.B., Mr. Loew entered the "orange" bathroom in the hallway of the otherwise unoccupied main house, called J.B. to join him, locked her in, and forced her to have sexual intercourse with him on the floor of the bathroom. J.B. claimed Mr. Loew had taken her virginity that day.

J.B. further claimed that Mr. Loew continuously assaulted her throughout the next two years. J.B. claimed that most of the alleged assaults occurred in the same bathroom as the original assault (the "orange" bathroom in her aunt and uncle's house, where Mr. Loew and Brouke - by then Mr. Loew's wife - resided). She also claimed Mr. Loew assaulted her in his truck, and at the home of J.B.'s father.

According to J.B., the assaults at the home of J.B.'s aunt and uncle allegedly occurred on Friday or Saturday nights, when J.B. and her younger sister spent the night before visiting the prison facility where their father is incarcerated. J.B. and her sister needed an adult to drive and

accompany them to the prison. On those occasions, J.B. and her sister (and sometimes her friends) would spend the night on the couches or floor in the living room of her aunt and uncle's house. Her aunt and uncle slept in one bedroom, and Mr. Loew slept in another bedroom with Brouke. Initially, Brouke and Mr. Loew's infant son stayed in the same room as them; later, their infant son began sleeping in a bedroom of his own. Regardless of where their son slept, Brouke often had to get up at night to nurse or otherwise tend to him. There were three dogs also present in the home, known to bark frequently.

J.B. alleged that Mr. Loew usually began his assaults by entering the living room while she slept and waking her by touching her—sometimes forcefully or by inflicting pain—as she laid on the couch or floor, always surrounded by at least one other sister and always attended by the dogs. She alleged he would then lead her to the bathroom by the hand, where he would perform or require her to perform sex acts. No witness ever reported seeing or hearing J.B. awaken or walk to the bathroom with Mr. Loew. No one ever awoke to see Mr. Loew in the living room near J.B. or any of the other sleeping young women. No one ever saw or heard the dogs react to a late-night trip to the bathroom by J.B. and Mr. Loew.

J.B. never told anyone about the alleged assaults, and explained – and later testified at Mr. Loew's trial – that the assaults continued because she did not know who to tell and expected that no one would believe her if she disclosed them. J.B. claimed that the abuse happened enough times that she could not remember all the occasions, but the most memorable was the first occasion, in December 2015, in the distinctive bathroom with orange walls and an orange area rug—the rug J.B. distinctly remembered because she purportedly was forced to look at it as Mr. Loew forcibly took her virginity.

J.B. told police and testified at trial that, in addition to experiencing pain and bleeding on the first occasion, she also began experiencing anxiety, sleeplessness, burning in her chest, depression, and developed self-harming behavior, such as cutting. Her sisters and mother testified that J.B.'s mood and personality changed after the alleged abuse began, and that they improved once she began seeing a therapist in early 2018.

J.B. first disclosed the alleged abuse to her father while visiting him at the prison on January 6, 2018. She purportedly spelled out Mr. Loew's name for her father by pointing to letters on a beverage bottle she had brought with her into the facility. J.B.'s father responded that no one would believe her. J.B.'s aunt learned about the alleged abuse shortly thereafter, and also told J.B. that no one would believe her. Nevertheless, J.B.'s father and aunt concocted a plan to use J.B. as bait in a trap that was to involve J.B.'s aunt walking in on Mr. Loew committing a sexual assault on J.B.

Eventually, J.B's sister also learned of J.B.'s allegations, and she contacted MSP on January 13, 2018. MSP investigated the claims against Mr. Loew by interviewing J.B., family members, and friends. J.B. also underwent a forensic interview at a county facility known as "Safe Harbor" but was not subjected to a physical exam. J.B's aunt provided bathmats from the bathroom to MSP as evidence. In doing so, J.B.'s aunt met an MSP officer at 1:15 a.m. on or about January 19, 2018, and handed him a white plastic bag full of blue bathmats (not orange like J.B. testified). The MSP officer who collected the bathmats testified during trial that it was abnormal for someone to provide evidence, and that he usually would have collected the evidence himself.

After investigating J.B.'s allegations, the prosecution charged Mr. Loew with three counts of CSC on or about March 13, 2018. The court appointed attorney Matthew W. Antkoviak (P59449) to represent Mr. Loew. On May 23, 2018, Mr. Loew waived his preliminary

examination, and the case was bound over to circuit court. On July 2, 2019, upon motion by Mr. Loew, attorney Ryan A. Maesen (P70246) substituted in for Mr. Antkoviak. The prosecution amended the charges against Mr. Loew on two occasions, resulting in Mr. Loew proceeding to trial on five counts of CSC: two counts of CSC-first degree (MCL 750.520B(1)(f)), one count of CSC-Second Degree (MCL 750.520C(1)(f)), and two counts of CSC-Third Degree (MCL 750.520D(1)(a) and MCL 750.520D(1)(b)).

2. Ex Parte Communications During Trial

a. Day One of Trial

Mr. Loew's trial began on August 27, 2019. The Honorable Margaret Zuzich Bakker of the 48th Circuit Court in Allegan County, Michigan, presided over Mr. Loew's trial. Assistant Prosecuting Attorney (APA) Emily Jipp represented the People. During her opening statement, APA Jipp briefly informed the jury that a key piece of evidence – the bathmats – were devoid of any DNA evidence and they were collected in an unconventional manner. She primarily brought up the bathmats in her opening statement to explain why the jury would not be presented any DNA evidence. She stated:

> And we will hear, unfortunately, that there is no D.N.A. [The victim] will testify that she made her aunt aware, she made law enforcement aware of blue bath mats that she last remembered the Defendant ejaculating on. And you will hear from Trooper Desch that aunt met him in the middle of the night at a gas station with a garbage bag full of bath mats that were green, white, and blue. Those bath mats were never taken and shown to the victim. Those bath mats were not seized personally by law enforcement. But Aunt Jane turned those over and those obviously didn't have any DNA on them.

(Ex. E, Day 1 Trial Tr., 102:13-24).

After delivering her opening statement, APA Jipp called J.B. as the People's first witness. MSP Trooper Eric Desch was the second witness. Trooper Desch took the stand at 3:11 p.m. (Ex. E, Day 1 Trial Tr., 192:1). Judge Bakker excused Trooper Desch after cross-examination

concluded, and immediately after excusing Trooper Desch, Judge Bakker called J.B. back to the witness stand at 3:47 p.m. to address a question from a juror. (*Id.* at 215:1-2).

At 3:41 p.m. during the first day of trial, Judge Bakker sent the following e-mail to the elected Allegan County Prosecutor, Myrene Koch: "This trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?" (Ex. F, E-mail Communications). Because the transcript does not reflect exactly when Trooper Desch stepped down, it is unclear whether Judge Bakker sent the e-mail during Trooper Desch's testimony or after she excused him. Either way, Judge Bakker sent that e-mail to Ms. Koch, another elected official, in the middle of Mr. Loew's trial.

Judge Bakker called for a bench conference at 3:50 p.m. to address a juror question. The bench conference concluded at 3:51 p.m. (Ex. E, Day 1 Trial Tr., 217:14-16). At approximately 3:51 p.m., Trooper Todd Workman took the stand. During his testimony, APA Jipp elicited testimony addressing the lack of a medical examination on J.B. (Ex. E, Day 1 Trial Tr., 224:16-225:11). The first day of Mr. Loew's trial ended at 4:39 p.m.

b. Day Two of Trial

On the second day of trial, at 8:47 a.m., Ms. Koch replied to Judge Bakker's e-mail from the previous day, concerning Judge Bakker's opinion of the MSP trooper's investigation of the case: "They do but not typically for CSC's. This trooper has been given additional personal training since this investigation." (Ex. F, E-mail Communications). Judge Bakker responded at 8:50 a.m.: "One more question….this victim was not referred for a medical, do you know why?" (*Id.*) Two minutes later, at 8:52 a.m., Judge Bakker took the bench and began the second day of Mr. Loew's trial.

While the trial progressed, Judge Bakker -- from the bench -- and Ms. Koch continued their ongoing email conversation. Ms. Koch replied to Judge Bakker's e-mail at 9:02 a.m., stating: "Yes, because the prior APA assigned to the case did not catch that it was missed nor did anyone else who touched the file. As a result, there will now be a checklist for CSC's in files." (*Id.*) While J.B.'s older sister, Taylor Bluhm testified, Judge Bakker replied from the bench at 9:03 a.m.: "I thought Safe Harbor would catch it." (*Id.*) The second day of Mr. Loew's trial adjourned at 4:08 p.m. Ms. Koch responded to Judge Bakker's last e-mail at 4:49 p.m. by answering: "Unfortunately, no. The forensic interviewer is supposed to check that before case review but the list often is given to interns. I noticed it after the fact at case review but by then not clear on if the victim had much support." (*Id.*)

c. Day Three of Trial

The third day of Mr. Loew's trial began with closing arguments. In its closing argument, the prosecution addressed Trooper Desch's testimony by admitting that he obtained "the minimal facts" during his initial investigation. (Ex. G, Day 3 Trial Tr., 19:6). The prosecution then spent a substantial amount of time admitting to the shortcomings of the investigation, arguing:

> Do we know where these bath mats came from? Probably a bathroom, I mean they are bath mats. Do we know, did they come from Brooke's bathroom? Are they the light blue bath mats described to Trooper Desch the night that he first went to their home? No. Should Trooper Desch have opened this bag and looked at these bath mats and investigated it? Yes. Should Trooper Desch have -- have -- have taken these bath mats, these blue, white, and green bath mats to Jenna and said, "Are these the bath mats you remember being sexually assaulted on?" Yes. If he didn't do that, should he have taken a photograph of these bath mats and sent that to Jenna and said, "Are these green, white, light blue, dark blue bath mats the blue bath mats you described?" Yes. But we didn't do that. Did he go that night to Aunt Janie's home where the Defendant resides and take photographs of the inside of the home? You know, at this point, the Defendant knows. So let's just go ahead and deal with it. Should he have gone and done that? Yes. He could have gone in and he could have seen the bathroom that these -- these mats had been taken from…And we don't have any way to verify where these rugs came from."

(Ex. G, Day 3 Trial Tr., 20:2-21:6).

3. Evidence Rebutting J.B.'s Testimony Regarding Color of the Bathroom

J.B. told police and testified during trial that Mr. Loew first assaulted her in December 2015 in the hallway bathroom in her aunt and uncle's house. She alleged that she "lost her virginity" in that first assault, and remembered that the walls, shower curtain, and bathmats were "orange." (Ex. E, Day 1 Trial Tr., 130:11-19).

Despite J.B.'s assertion that the bathroom decoration was mostly orange, Brouke and Mr. Loew informed his trial attorney, Mr. Maesen, that the bathroom was not and could not have been orange in December 2015. To prove that J.B.'s recollection was inaccurate, Brouke showed Mr. Maesen digital photographs, complete with electronic data and time stamp, to establish that the bathroom was not orange in December 2015. The photographs establish that the bathroom was orange but changed to teal blue in November 2013, long before any alleged assault occurred. Mr. Loew never saw the bathroom when it was orange, and always knew it as blue. Without looking at the photographs, Mr. Maesen told Mr. Loew that the photographs would not be helpful for his trial.

The color of the bathroom proved to be an important aspect of Mr. Loew's trial. In fact, the prosecution argued that, despite discrepancies between different witness' recollections about the color of the bathroom or bathmats, J.B.'s recollection about the color being orange *must* be correct since that's where J.B. allegedly lost her virginity to Mr. Loew. Indeed, in her closing the prosecution argued:

> So what do you think is more believable? That in 2013, [J.B.] would have been 11, depending on what time of year, 10 or 11. And that décor changes and she somehow remembers that and accidentally puts that into this-this fake memory that she makes up of this like, this traumatic rape. Okay. Or is it more believable that on the night you lost your virginity, that you are sexually assaulted, that you remember what the room looked like that this happened in?

(Ex. G, Day 3 Trial Tr., 27:11-19).

4. Prior Sexual Assault of J.B. by J.S.

In January 2015 – only 11 months prior to the first alleged assault by Mr. Loew, and approximately three years prior to J.B.'s disclosure – MSP and the Allegan County Prosecutor's Office began investigating J.S., a juvenile accused of having sexually penetrated J.B. J.B. was 12-years old when J.S. assaulted her. At the completion of the investigation, the prosecution charged J.S. in a juvenile proceeding with three counts of CSC-First Degree (pertaining to penis-vaginal penetration, digital-vaginal penetration, and oral-vaginal penetration (fellatio)) and one count of CSC-Second Degree. In exchange for his guilty plea, J.S. entered a guilty plea to one count of CSC-Second Degree on August 4, 2015.

Mr. Loew was aware of J.B.'s general accusations against J.S., so Mr. Loew asked Mr. Antkoviak – his attorney at that time – to obtain a copy of the prosecutor's case file on J.S. Neither Mr. Loew nor Brouke knew the details of the allegations, investigation, charges, resolution of the case, or the facts related to J.B.'s sexual, medical, and mental health history that were contained in that file. Mr. Antkoviak followed up with the prosecution who told Mr. Antkoviak that the documents would be of no value or relevance to Mr. Loew's case. Brouke reiterated her request that Mr. Antkoviak attempt to determine what happened between J.B. and J.S. Eventually, the prosecutor provided a heavily redacted copy of the J.S. police report to Mr. Antkoviak.

According to Mr. Antkoviak, he gave a copy of the police report to Mr. Maesen when Mr. Maesen replaced Mr. Antkoviak. As far as Mr. Loew and Brouke know, and as the record suggests, Mr. Maesen did not request records, interview any witnesses, or otherwise investigate J.S.'s case. Mr. Maesen did not move to introduce evidence of the victim's prior sexual conduct admitted as an exception to Michigan's "rape shield" statute under MCL 750.520j. It does not appear Mr.

Maesen did anything to further determine the potential relevance or materiality of the J.S. case facts.

In 2020, a third-party filed a Freedom of Information Act (FOIA) request to MSP for records related to J.S. and provided the results of that request to Mr. Loew. The documents, incomplete and redacted as they are, provide a wealth of information that would have been valuable to Mr. Loew's trial defense. The documents provided in response to the FOIA suggested that J.B. may not have been a virgin before the instant alleged abuse; that she had been sexually assaulted by a different male (as demonstrated and confirmed by J.S.'s guilty plea) shortly before she alleged Mr. Loew assaulted her; that J.B. had displayed anxiety, depression, and engaged in self-harm *before* the alleged assault by Mr. Loew; that she had known before the instant alleged abuse what to report and to whom to report it; and that she had made strikingly similar claims regarding how the first incident of abuse occurred in both cases. In fact, according to J.B., J.S. first sexually assaulted her by calling her into the bathroom and telling her to retrieve toilet paper.

In Mr. Loew's trial, the prosecution argued that J.B. sustained personal injury from Mr. Loew's alleged assaults due to "mental anguish." (Ex. G, Day 3 Trial Tr., 7:10; 50:7-24; 54:6-21). Specifically, the prosecution argued that J.B. began exhibiting "personality changes" as a direct result of Mr. Loew's abuse, and suffered from "nightmares, extreme anxiety, engaging in self-harming behaviors." (Ex. E, Day 1 Trial Tr., 101:22-23). To support this assertion, APA Jipp called Thomas Cottrell, who testified as an expert in the treatment of victims of sexual assault. (Ex. H, Day 2 Trial Tr., 64:16). Mr. Cottrell's testimony focused on two primary areas: (1) why a victim of sexual assault may delay reporting the incidents, and (2) what types of behavior or mood changes can be attributable to being a victim of sexual assault. (*Id.* at 67-75). Mr. Cottrell testified that, prior to testifying, he had not met J.B. or Mr. Loew, and did not read any police reports in the

case. Despite not knowing J.B. or the facts of this case Mr. Cottrell confirmed that J.B.'s alleged behaviors and mood disorders could be attributed to sexual abuse. (*Id.* at 72:16-20).

5. Postconviction Proceedings

On August 29, 2019, following a three-day trial, a jury convicted Mr. Loew of all five counts. On November 4, 2019, Judge Bakker sentenced Mr. Loew to serve 240 to 480 months' incarceration on the CSC-first degree counts, and 240 to 360 months' incarceration on the CSC-second degree and CSC-third degree counts. (Ex. I, Judgment of Sentence). On December 20, 2019, Mr. Loew, through his appointed appellate attorney, Arthur H. Landau (P16381), filed a timely claim of appeal in the Court of Appeals. On May 12, 2020, undersigned counsel replaced Mr. Landau as the attorney of record for Mr. Loew.

On August 3, 2020, Mr. Loew filed a motion for new trial pursuant to MCR 7.208(B). In his motion for new trial, Mr. Loew argued that he was entitled to a new trial for the following reasons: (1) judicial misconduct; (2) ineffective assistance of counsel; and (3) prosecutorial misconduct. Prior to arguing his motion for new trial, Mr. Loew moved to disqualify Judge Bakker from hearing his motion on the ground that Judge Bakker participated in substantive ex parte communications with the elected Allegan County Prosecutor during his trial, and those ex parte communications were the basis for Mr. Loew's judicial misconduct claim. Judge Bakker disqualified herself from hearing Mr. Loew's motion for new trial and assigned the matter to Judge Kengis. Mr. Loew then filed a motion to disqualify Judge Kengis because Judge Kengis had authorized the original charges against Mr. Loew when Judge Kengis was the Allegan County Prosecutor, prior to his appointment to the Circuit Court. The motion was then assigned to Allegan County District Judge William A. Baillargeon.

On October 29, 2020, following the disqualification of Judge Bakker and Judge Kengis, Judge Baillargeon heard oral argument on Mr. Loew's motion for a new trial. (Ex. D, Motion Hearing Tr.). On November 2, 2020, the trial court entered an order granting Mr. Loew's motion for a new trial due to the ex parte communications between Judge Bakker and Ms. Koch. Judge Baillargeon denied Mr. Loew's claims of ineffective assistance of counsel and prosecutorial misconduct, noting that those claims were "easily viewed as second guessing, you know, trial strategy of going over, you know, if you make a determination that you're not going to ask questions about certain aspects or a certain photograph." (*Id.* at 30:1-4).

The ex parte communications, however, concerned Judge Baillargeon. He stated that the communications "create[d] that appearance that you have this coaching situation or, at the very least, flagging as to boy, you better address this." (Ex. D, Motion Hearing Tr., 30:19-21). He further noted that "the Judicial Tenure Commission would be interested in something like this . . . because it's a matter of the public perception of the ethical obligations entailed with the judicial office and I worry that as unintentional as this may be, it could do damage to that." (*Id.* at 30:22-31:1). Judge Baillargeon emphasized the importance of individuals' right to a full and fair hearing and expressed concern about the possibility of the occurrence of other, unrecorded, ex parte communications. Indeed, he stated: "[o]ne of the things that I think that goes – that ties into the whole idea and that – this whole current atmosphere of conspiratorial theories is exactly what the – what defense counsel brought up in saying he doesn't know were these other conversations. The office is just down the hall from the courthouse. He doesn't know if there were text messages that explore different lines of questioning or aspects of the case that have not been discussed or disclosed here." (*Id.* at 31:9-16). Judge Baillargeon also mentioned the collaborative atmosphere of law offices, and noted that "we see people communicating with their offices, prosecutors with

Prosecutor's office, and defense counsel with their home offices." (*Id.* 31:21-23). Judge Baillargeon granted Mr. Loew's motion for new trial with "a heavy heart" due to the "appearance – bre[a]ch of the appearance" of impartiality. (*Id.* at 32:5).

On November 2, 2020, Judge Baillargeon entered an order vacating Mr. Loew's conviction and ordering that he be released from the custody of the Michigan Department of Corrections (MDOC) to the Allegan County Jail pending a hearing on the issue of bond. (Ex. C, 11/2/20 Order). Judge Baillargeon also ordered that the case be set for further proceedings consistent with his order. (*Id.*) Following the circuit court's order granting Mr. Loew's motion for new trial, the prosecution filed a claim of cross appeal on November 12, 2020. The prosecution then filed its cross-appellant brief on December 29, 2020.

On January 13, 2022, the Court of Appeals issued its opinion reversing the trial court's decision to grant Mr. Loew a new trial. (Ex. A, COA Opinion). In addition, the Court of Appeals upheld the trial court's findings that Mr. Loew's trial counsel was not ineffective and that the prosecutor's actions did not amount to prosecutorial misconduct. (*Id.*) One judge also issued a dissenting opinion. (Ex. B, COA Dissent).

ARGUMENT

I. This Court Should Grant Mr. Loew's Application for Leave to Appeal Because the Issues Presented have Significant Public Interest.

As the French philosopher Michel Foucault once wrote, "[j]ustice must always question itself, just as society can exist only by means of the work it does on itself and on its institutions."[1] Here, the responsibility to question justice in Mr. Loew's case rests solely with this Court. While this Court has addressed issues pertaining to ex parte communications between judges and juries, the issues presented in this application have not been addressed by this Court.

A. The Court of Appeals' Decision Threatens the Public's Trust in the Judiciary.

An appellant may file an application for leave to appeal if the issue has "significant public interest." MCR 7.305(B)(2). Judge Bakker and Ms. Koch's conduct was indisputably improper. The ex parte e-mails exchanged by those officials, and the January 13, 2022 Court of Appeals' opinion that entirely failed to recognize the gravity of those communications and the circumstances under which they occurred, erode the public's confidence in the judiciary and the criminal justice system. See *In re Chumra*, 461 Mich 517, 535; 608 NW2d 31 (2000) (explaining that the state has a "compelling interest in preserving the integrity of the judiciary . . . The state's interest in the integrity of the judiciary extends to preserving public confidence in the judiciary. The appearance of fairness and impartiality is necessary to foster the people's willingness to accept and follow court orders"); *Landmark Communications, Inc v Virginia*, 435 U.S. 829, 848; 98 S Ct 1535 (1978) (Stewart, J., concurring) (Justice Stewart writing that "[t]here could hardly be a higher governmental interest that a State's interest in the quality of its judiciary.").

[1] Michel Foucault, "Vous Etes Dangereux," in Liberation (Paris, June 30, 1983).

There is far more at issue in this case than the constitutional rights and future of one litigant, as critically important as those matters are. Indeed, it is no exaggeration that the integrity of the judicial system in Michigan, and the public's interest in fair and transparent judicial proceedings, are at stake. By straining to the breaking point the respective meanings of "administrative" and "substantive," and then concluding that in-trial communications about witness testimony and the quality of the very law enforcement investigation that led to Mr. Loew's trial were "administrative," the Court of Appeals' decision threatens the underpinnings of our criminal justice system, which presumes fairness and impartiality, and depends on judges who operate at a remove from the interests and objectives of any particular party to a case.

Here, Judge Bakker initiated an ex parte e-mail correspondence during Mr. Loew's trial, and gave the e-mail chain the subject title "trial," indicating that the contents of her e-mail were specific to Mr. Loew's case. She then offered her candid observations regarding the trooper's investigation into the sexual assault allegations against Mr. Loew. Judge Bakker's observation was not about the process of investigating sexual assaults generally, but was specific to the prosecution's case against Mr. Loew. The dialogue continued as the trial progressed. After Ms. Koch responded to Judge Bakker's inquiry, Judge Bakker followed up with an additional observation regarding the lack of a medical examination in Mr. Loew's case. Again, her e-mail was not about the general process involved with medical examinations of sexual assault victims, but was specific to Mr. Loew's trial. Nevertheless, the Court of Appeals found that the e-mails were "administrative" rather than substantive in nature.

Additionally, the public has a significant interest in ensuring that the judiciary complies with *all* the canons of judicial conduct, including maintaining an appearance of propriety. In his dissent, Judge Riordan opined that the trial court's decision to grant Mr. Loew a new trial should

be affirmed because the trial judge "violated the Canon 2 prohibition against an appearance of impropriety, and by logical extension violated MCR 2.003(C)(1)(b)[2] because she failed to disqualify herself for that reason." (Ex. B, COA Dissent). Pursuant to Canon 2 of the Michigan Code of Judicial Conduct (the Code), "[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Code of Judicial Conduct, Canon (2)(A). As the dissenting opinion reasoned, the trial judge here violated this prohibition against the appearance of impropriety because "a reasonable mind, upon reviewing the e-mails, may conclude that the trial judge was partial in favor of the prosecution, did not want to see weaknesses in its case exploited, and was actively attempting to assist the prosecution's case. Moreover, because the e-mail communications occurred during the trial, a reasonable mind could conclude that the trial judge would not, and could not, otherwise set aside her partiality until the proceedings were concluded." (*Id.*) In essence, the trial judge here was not impartial.

In a January 20, 2022 hearing to address Mr. Loew's bond following the Court of Appeals' decision, the trial court expressed its concern over the Court of Appeals' decision. Although the trial court's view on this matter is not binding on this Court, its concern is notable for purposes of this application and the public's interest in the outcome of this matter. The trial court stated that the "Court of Appeals opinion, in my opinion, leads – lends further credence to the proposition

[2] MCR 2.003(C)(1)(b) provides, "[d]isqualification of a judge is warranted for reasons that included, but are not limited to . . . [t]he judge, based on objective and reasonable perceptions . . . has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

that the courts should not and cannot police themselves from misconduct or, at the very least, the appearance of misconduct on the part of the judiciary." (Ex. J, Bond Hr'g Tr., 11:17-21). The trial court further expounded on that idea and stated that "with decisions like this, it provides more fuel for the argument that the courts are unwilling to hold their own accountable. This Court will not attempt to undertake the ethical or intellectual gymnastics employed by the majority when they discuss the case as administrative." (*Id.* at 11:25-12:3). The trial court also staunchly disagreed with the Court of Appeals' conclusion that the ex parte communications were administrative. Indeed, the trial court provided:

> First of all, I disagree with that in that these conversations did not take place in the hallway, but they took place from the courtroom while this specific case was being tried and specific testimony about this specific case was being heard. Even if those conversations were being held in the hallway, I still consider specific conversations about specific aspects of a specific case to be ex parte communication. Failure to embrace this, you know, creates a very worry concern that the judiciary does not hold itself to the highest standards and casts a very real doubt, at least, to the appearance of impropriety as to whether or not the[y] are going to enforce[e] anything pertaining to that. The judiciary espouses holding itself to the highest standards and with this opinion, I fear they undermine that proposition.

(Ex. J, Bond Hearing Hr'g Tr., 11:7-21).

B. The Court of Appeals Improperly Applied the Abuse of Discretion Standard.

Additionally, the Court of Appeals' opinion failed to properly apply the abuse of discretion standard. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269 (2003). Likewise, "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* The Court of Appeals may "find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief." *People v Jones*, 236 Mich App 396, 404; 600

NW2d 652 (1999). Here, the Court of Appeals ignored the fact that the trial court came to a different decision; a decision that was equally likely considering the substance and context behind the ex parte communications. Thus, the trial court did not abuse its discretion simply by reaching an outcome the Court of Appeals disagreed with. It reasonably found that the ex parte communications were substantive, and the Court of Appeals did not.[3] By reversing the trial court's decision to grant Mr. Loew a new trial, the Court of Appeals encouraged the public perception that elected officials may act with impunity, without fear of recourse, and encouraged the perception that criminal defendants' constitutional due process rights are not a priority to our judiciary or criminal justice system.

II. The Court of Appeals' Reversal of the Trial Court's Decision to Grant Mr. Loew a New Trial was Clearly Erroneous and Will Cause Material Injustice.

A. Standard of Review

This Court has held that "[a] finding is 'clearly erroneous' if, after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Federated Publ'Ns v City of Lansing*, 467 Mich 98, 107; 649 NW2d 383 (2002). See also *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (a finding is "clearly erroneous" if, after

[3] The Court of Appeals opined that the trial court granted Mr. Loew a new trial on the "sole basis" of an appearance of impropriety. A review of the transcript from the motion for new trial, however, establishes that the trial court did indeed consider the substantive nature of the ex parte communications. During that hearing, the prosecution agreed with the trial court's position that the communications involved "actual commentary about the substance" of the investigation. (Ex. D, Motion Hearing Tr., 26:6). Indeed, the trial court asked:

THE COURT:	Well, we're talking about actually during a trial, where testimony –
MS. SCHIKORA:	I agree –
THE COURT:	-- is actually taking place at the time, and there's actual commentary about the substance and merit of the actual testimony provided and the investigation conducted, correct?
MS. SCHIKORA:	Absolutely.

reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made.").

B. The Court of Appeals' Decision was Clearly Erroneous and Will Cause Material Injustice.

The Court of Appeals erred when it reversed the trial court's decision to grant Mr. Loew a new trial, and that decision will cause material injustice to Mr. Loew. The Court of Appeals incorrectly found that the ex parte communications were administrative, and not substantive in nature. The Court of Appeals further erred when it found that the ex parte communications did not prejudice Mr. Loew.

1. The Court of Appeals Erred when it Found that the Ex Parte Communications Were Not Substantive in Nature or Prejudicial to Mr. Loew.

Contrary to the Court of Appeals' finding, the ex parte communications between Judge Bakker and Ms. Koch were substantive in nature, and therefore, presumptively prejudicial. See *People v Powell*, 303 Mich 271, 275; 842 NW2d 538 (2013) (explaining that substantive ex parte communications "result[] in a presumption of prejudice and place[] the burden to rebut the presumption on the prosecution."). Due process affords to a person "an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v Jerrico, Inc.,* 446 US 238, 242; 100 S Ct 1610; 64 L Ed 2d 182 (1980). The trial court "deprives a party of a fair trial if [its] conduct pierces the veil of judicial impartiality." *People v Stevens*, 498 Mich 162, 164; 869 NW2d 233 (2015). See also, *In re Del Rio*, 400 Mich 665, 721-726; 256 NW2d 727 (1977) ("[a] citizen's experience with the law is often confined to contact with the courts. Therefore, it is important not only that the integrity of the judiciary be preserved, but the appearance of that integrity be maintained"). Judicial misconduct takes many forms, including "belittling of counsel, inappropriate questioning of witnesses, providing improper strategic advice to a particular side, biased commentary in front of

the jury, or a variety of other inappropriate actions." *People v Swilley*, 504 Mich 350, 371-372; 934 NW2d 771 (2019). See also, Code of Judicial Conduct, Canon 2(A) (explaining that a judge has the duty to "avoid all impropriety and appearance of impropriety" to prevent public confidence in the judiciary from eroding).

Moreover, the Michigan Code of Judicial Conduct Canon 3(A)(4) (the Code) provides that judicial misconduct may also include a court's participation in ex parte communications. Indeed, the Code states:

> (4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:
>
> (a) A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:
>
> (i) The judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) The judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond.

Code of Judicial Conduct, Canon 3(A)(4). The Code, therefore, recognizes that some ex parte communications are appropriate, such as those concerning scheduling or administrative purposes, but condemns ex parte communications dealing with "substantive matters." *Id.* Substantive ex parte communications are forbidden because "*[e]x parte* communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. *Ex parte* conversations or correspondence can be misleading; the information given to the judge 'may be incomplete or inaccurate, the problem can be incorrectly stated.' At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, *ex parte* communication is an

invitation to improper influence if not outright corruption." *Grievance Adm'r v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000) quoting Shaman, Lubet & Alfini, Judicial Conduct and Ethics (3d ed), § 5.01, pp 159-160.

Lawyers are also prohibited from partaking in ex parte communications with a judge. The Michigan Rules of Professional Conduct (the MRPC) provided that "a lawyer shall not (a) seek to influence a judge . . . [or] (b) communicat[e] ex parte with such a person concerning a pending matter, unless authorized to do so by law or court order." MRPC 3.5(a)-(b). Neither the Code nor the MRPC defines the term "ex parte" communication. In its brief, the prosecution referred this Court to Black's Law Dictionary's definition of ex parte, which provides:

> On one side only; by or for one party, done for, in behalf of, or on the application of, one party only. A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to or contestation by, any person adversely interested . . .

Black's Law Dictionary (11th ed).

Here, the communications between Judge Bakker and Ms. Koch were ex parte because they were sent to "one party only." *Id.* In fact, Mr. Loew had no idea any communication occurred between Judge Bakker and Ms. Koch until almost a year after his trial concluded. Thus, the remaining issue in this case is whether the ex parte communications are substantive in nature. See *People v France*, 436 Mich 138, 163; 461 NW2d 621 (1990) (explaining that, in order to determine the prejudicial nature of an ex parte communication, the court must decide whether the communication's purpose was "substantive, administrative or housekeeping. This will necessarily lead to a decision regarding whether a party has demonstrated that the communication was prejudicial or that the communication lacked any reasonable prejudicial effect.").

a. The ex parte communications between Judge Bakker and Ms. Koch were substantive in nature.

In the context of substantive ex parte communications with a jury, "substantive communication encompasses supplemental instruction on the law given by the trial court to a deliberating jury." *France*, 436 Mich at 163-164. Michigan case law on substantive ex parte communications between a judge and attorney, however, is limited. In *Hereford v Warren*, 536 F3d 523, 530 (CA 6, 2008), the Sixth Circuit determined that an ex parte bench trial between the trial court and prosecution was an "administrative conference" because it dealt with the limited purpose of discussing the duration of a witness' testimony. The judge and prosecution did not discuss the content of the witness' testimony, but merely the duration due to the witness' cognitive disabilities. *Id.* Likewise, in *Girard v Montgomery*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2011 (Docket No. 299531), p 5, the court concluded that the plaintiff's ex parte letter to the court dealt with scheduling (i.e., administrative") issues rather than substantive issues because it merely explained that the plaintiff's absence from the hearing was due to a medical appointment.

Here, the Court of Appeals agreed that "the trial judge initiated ex parte communications with the elected prosecutor during defendant's trial," (Ex. A, COA Opinion), but held that the ex parte communications were administrative rather than substantive. (*Id.*) The Court of Appeals reasoned that the e-mails "involved matters of administrative process that did not concern defendant's trial." (*Id.*) The Court of Appeals' finding that the ex parte communications "did not concern defendant's trial" is patently incorrect. For example, had the ex parte communications expressed the trial judge's concern about the duration of a witness' testimony due to the court's docket, such an ex parte communication would likely be permitted. See *Hereford* 536 F3d at 530 (finding that ex parte bench conference was administrative because it dealt with the duration of a witness' testimony); *Adesanya v Novartis Pharmaceuticals Corp*, 755 Fed App'x 154, 158 (CA 3,

2018) (explaining that ex parte communications did not violate Code of Conduct for US Judges Canon 3 because "[t]he Magistrate Judge and Appellee's counsel were simply seeking a way to manage the numerous pro se discovery requests Appellants had filed"). Likewise, the e-mails may have been permissible ex parte communications had they dealt with a scheduling issue. See *Gerber v Veltri*, 702 Fed App'x 423, 432-433 (CA 6, 2017) (explaining that ex parte communications did not violate Code of Conduct for US Judges Canon 3 because "[t]heir discussion concerned when, and how, the court should reschedule the appearance of witnesses slated to testify that day, particularly defendant's expert."). However, none of the e-mails between them make mention of administrative or scheduling issues involved with the trial. Instead, Judge Bakker and Ms. Koch began their multi-day ex parte exchange by discussing the prosecution's witnesses and the facts of the case, including the quality of law enforcement's investigation and why J.B. did not undergo a medical examination, issues important enough that the trial prosecutor later addressed them directly during her closing argument, and not in her opening statement as the Court of Appeals contended in its opinion.

Likewise, the Court of Appeals referenced the ex parte communications as having to deal with the "*process* for investigating allegations of sexual assault" and the "*process* of referring victims of sexual assault for medical examinations." (Ex. A, COA Opinion). The e-mails, however, were specific to the investigation that occurred *in Mr. Loew's case*, and the medical examination that did not occur *in Mr. Loew's case*. They were not about the general process followed by law enforcement in these types of cases, as the Court of Appeals described, but pertained specifically to Mr. Loew's case; that is, specifically about the investigating trooper's poor investigation and an inquiry into why J.B. was not referred for a medical examination. Moreover, the subject line in the e-mail conversation was "trial," further supporting that the ex parte communications contained

substantive inquiries and information specifically related to Mr. Loew's trial. As Judge Riordan reasoned in his dissent, "the trial judge's commentary . . . addressed the substance of the trial itself as the comments directly implicated the plausibility of the victim's allegations. In other words, the weaknesses of the investigation might tend to weigh against a guilty verdict." (Ex. B, COA Dissent).

Judge Bakker initiated the e-mail conversation during Mr. Loew's trial, and, in initiating the conversation, excluded Mr. Loew's attorney from the exchange. The prosecution has argued that there was "no tactical or procedural consequence," but Judge Bakker sent the first e-mail (i.e., commentary on the trooper's poor investigation) on the first day of Mr. Loew's trial, allowing ample time for the prosecutor's office to adjust its trial strategy and presentation of evidence to address concerns expressed in Judge Bakker's e-mails. Likewise, it is plausible the jury had concerns about law enforcement's poor investigation, an issue commonly brought up in criminal trials. Noting the trial judge's stated concern over the issue, the prosecution could have altered its theory of the case to assuage any concerns from the jury. Indeed, the record shows that APA Jipp addressed the issues raised by Judge Bakker after Ms. Koch received Judge Bakker's first e-mail. APA Jipp addressed the fact that J.B. did not receive a medical examination while eliciting testimony from Trooper Workman, and thoroughly addressed law enforcement's poor investigation in her closing argument, and not in her opening argument as the Court of Appeals contended in its opinion. The Court of Appeals concluded that APA Jipp addressed law enforcement's poor investigation in its opening statement when she stated:

> And we will hear, unfortunately, that there is no D.N.A. [The victim] will testify that she made her aunt aware, she made law enforcement aware of blue bath mats that she last remembered the Defendant ejaculating on. And you will hear from Trooper Desch that aunt met him in the middle of the night at a gas station with a garbage bag full of bath mats that were green, white, and blue. Those bath mats were never taken and shown to the victim. Those bath mats were not seized

> personally by law enforcement. But Aunt Jane turned those over and those obviously didn't have any DNA on them.

See Ex. A, COA Opinion, pg. 3; (Ex. E, Day 1 Trial Tr., 102:13-24). Contrary to the Court of Appeals' assertion that this statement's purpose was to draw the jury's attention to law enforcement's questionable investigation, its purpose was merely to explain why the jury will not be presented DNA evidence during the trial – evidence many jurors expect to be presented. Indeed, the prosecutor began by stating "[a]nd we will hear, unfortunately, that there is no D.N.A. evidence." ((Ex. E, Day 1 Trial Tr., 102:13-24). If the purpose had been to draw the jury's attention to law enforcement's lackluster investigation, the prosecution would have explicitly said so.

Under these circumstances, where the e-mails discuss substantive matters at issue in an ongoing trial, it can hardly be said that "no tactical or procedural consequence" resulted from the officials' email exchange. Receiving real-time critiques, questions, and observations from the presiding judge during a trial is tantamount to having a mock jury exercise for the attorney fortunate enough to receive that counsel.

Mr. Loew recognizes that Judge Bakker e-mailed Ms. Koch, the elected Prosecuting Attorney, and not APA Jipp, the prosecutor trying Mr. Loew's case. However, it is reasonable to infer that Ms. Koch, as the titular head of her office, would have been in regular and direct contact with APA Jipp during a serious felony trial involving multiple life offenses. See *People v Doyle*, 159 Mich App 632, 644; 406 NW2d 893 (1987) ("assistant prosecutors act on behalf of the elected county prosecutor and are supervised by him [or her]."). It is also reasonable to infer Ms. Koch observed portions of the trial, and was able to communicate with APA Jipp via e-mail or text messages during the trial or in the office they shared at the end of the trial days. The trial court, in granting Mr. Loew's motion for new trial, noted that "we see people communicating with their offices, prosecutors with Prosecutor's office, and defense counsel with their home offices." (Ex.

D, Motion Hearing Tr., 31:21-23). It is normal, and usually expected, for attorneys to collaborate with their colleagues when in trial. (Ex. G, Day 3 Trial Tr., 20:2-21:6).

The claim that there was definitively "no tactical or procedural consequence" from Judge Bakker and Ms. Koch's e-mails becomes even less plausible when the personal relationship between Judge Bakker and Ms. Koch is considered.[4] FOIA requests for records of telephone calls or text messages between Judge Bakker and Ms. Koch were denied on privacy grounds, despite the fact that Ms. Koch's personal cell phone is subsidized by Allegan County for her official use and is known to use her cell phone in the courtroom and courthouse. If Judge Bakker was willing to engage in ex parte communications with Ms. Koch over county e-mail, it strains credulity to suggest that other pertinent communications, undiscoverable to Mr. Loew, could not have occurred.

b. The Court of Appeals erred when it found that the ex parte communications did not prejudice Mr. Loew.

The Code prohibits substantive ex parte communications because they are patently unfair and prejudicial to the excluded party. See *Lopatin*, 462 Mich at 262-263 (explaining that ex parte communications are dangerous). Here, the ex parte communications were prejudicial to Mr. Loew because he did not know they existed and was not provided an opportunity during his trial to view and challenge the communications. See *Lopatin*, 462 Mich at 262-263 (finding that the potential prejudicial impact of the ex parte communication was cured when the parties engaged in a discussion on the record about the ex parte document at issue, which allowed the party not involved in the ex parte communication to challenge the information contained in the communication);

[4] The women are two elected officials from the same county and, upon information and belief, worked together in the Allegan County Prosecuting Attorney's Office prior to Judge Bakker being elected judge.

Cheesman v Williams, 311 Mich App 147, 162; 874 NW2d 385 (2015) (finding that the court found that the plaintiff was not prejudiced by the ex parte communications because the trial court disseminated the ex parte communication at issue and because the "plaintiff had the opportunity to challenge information in the ex parte communication, and, in fact, disputed its accuracy"); *Girard v Montgomery*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2011 (Docket No. 299531), p 5 (concluding that the defendant was not prejudiced by the plaintiff's ex parte letter to the court because the trial court immediately revealed the contents of the letter to the defendant, and the defendant never objected to the note as being inappropriate and never attempted to get a copy of it).

It is inconceivable that Mr. Loew's trial counsel, had he been aware of the ongoing conversation between the judge and his opponent, would not have objected; indeed, it is likely he would have moved immediately for a mistrial. The substantive nature of the ex parte communications between Judge Bakker and Ms. Koch, and the fact that Mr. Loew and his attorney were excluded on multiple substantive e-mails, is in and of itself prejudicial. These communications occurred during Mr. Loew's trial, so his attorney should have been involved in all discussions regarding the trial. By not being involved in these discussions or given an opportunity to object, Mr. Loew's Sixth Amendment Right to counsel was violated. See *Glasser v United States*, 315 U.S. 60, 76; 62 S Ct 457 (1941) ("[t]he right to have the assistance of counsel is too fundamental and absolute to indulge in nice calculations as to the amount of prejudice arising from its denial."). Judge Bakker's questions, critiques, and observations about the trial provided Ms. Koch invaluable knowledge about deficiencies in the prosecution's case; knowledge at least imputed, if not actually provided, to APA Jipp as she tried Mr. Loew's case.

C. Mr. Loew Is Entitled to a New Trial.

Because the ex parte communications between Judge Bakker and Ms. Koch were substantive and prejudicial, the appropriate remedy here is a new trial. See *People v Aceval*, 282 Mich App 379, 393; 764 NW2d 285 (2009) (providing that new trial is the appropriate remedy for judicial and prosecutorial misconduct during trial); *Stevens*, 498 Mich at 168 quoting *Arizona v Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991) ("once a reviewing court has concluded that judicial misconduct has denied the defendant a fair trial, a structural error has occurred and automatic reversal is required"). The trial court, therefore, did not abuse its discretion in granting Mr. Loew's motion for new trial, and the Court of Appeals' opinion should be reversed and the case remanded to the trial court for a new trial.

III. The Court of Appeals' Finding that Defendant-Appellant's Trial Counsel Was Not Ineffective was Clearly Erroneous and Will Cause Material Injustice.

Mr. Loew's trial counsel provided ineffective assistance of counsel due to his counsel's failure to investigation material aspects of Mr. Loew's case. Both the United States Constitution and the Michigan Constitution of 1963 guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, sec 20. The Supreme Court recognizes "that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Id*. The right to counsel includes the right to "the effective assistance of competent counsel." *McMann v Richardson*, 397 US 759, 771; 90 S Ct 1441; 25 L Ed 2d 763 (1970). To demonstrate ineffective assistance of counsel, a defendant must show (1) "that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness" and (2) that there is a reasonable probability that the outcome of the trial would

have been different but for counsel's performance." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Trial counsel must "prepar[e], investigat[e], and present[] all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) quoting *Kelly*, 186 Mich App at 526. Further, trial counsel must "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 690-691. A sound trial strategy exists when trial counsel conducts an investigation "that is adequately supported by reasonable professional judgments. Criminal defense counsel must make an independent examination of the facts and circumstances, pleadings, and laws involved." *Von Moltke v Gillies*, 332 US 708, 712; 68 S Ct 316; 92 L Ed 309 (1948). This includes pursuing "all leads relevant to the merits of the case." *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987). In further defining counsel's duty to investigate, the American Bar Association's standards provide:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Rompilla v Beard, 545 US 374, 387; 125 S Ct 2456; 162 L Ed 2d 360 (2005) (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). In light of this recognized duty to investigate, "a particular decision *not* to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 446 US at 690-691 (emphasis added).

A. Trial Counsel Failed to Investigate Bathroom Photographs and Use Readily Available Evidence for Impeachment Purposes.

In affirming the trial court's finding that Mr. Loew's trial counsel was not ineffective, the Court of Appeals incorrectly found that trial counsel's "actions neither fell below an objective standard of reasonableness, nor prejudiced defendant as a result of counsel's actions." (Ex. A, COA Opinion). First, Mr. Loew's trial counsel failed to investigate the bathroom photographs provided by Mr. Loew and his wife that established that the bathroom was nothing like J.B. described. He accordingly failed to use readily available evidence to impeach the prosecution's chief witness – J.B. – in Mr. Loew's case.

The bathroom color was no minor detail in Mr. Loew's trial. The prosecution made J.B.'s description of the bathroom the centerpiece of its case-in-chief, in part, to establish her credibility. By way of example, J.B. told police and later testified that she was certain the first time Mr. Loew had assaulted her was during her father's wedding reception in December 2015, in the hallway bathroom in her aunt and uncle's house. She alleged that she "lost her virginity" in an assault by Mr. Loew in the bathroom, and remembered that the walls, shower curtain, and bathmat were "orange." (Ex. E, Day 1 Trial Tr., 130:13-19).

J.B. testified to these facts and throughout the trial, the prosecutor reiterated that despite discrepancies between different witness' recollections about the color of the bathmats or walls, J.B.'s recollection about the bathroom being "orange" must be correct because she had lost her virginity there. In closing, the prosecutor argued:

> So what do you think is more believable? That in 2013, Jenna would have been 11, depending on what time of year, 10 or 11. And that décor changes and she somehow remembers that and accidentally puts that into this-this fake memory that she makes up of this like, this traumatic rape. Okay. Or is it more believable that on the night you lost your virginity, that you are sexually assaulted, that you remember what the room looked like that this happened in?

(Ex. G, Day 3 Trial Tr., 27:11-19).

Prior to trial, Mr. Loew and his wife, Brouke, informed Mr. Maesen that Brouke possessed digital photographs, complete with electronic date and time stamp, demonstrating that J.B.'s recollection about the bathroom color could not have been true. The bathroom had not been orange since 2013, approximately two years before Mr. Loew allegedly assaulted J.B. Mr. Maesen told Mr. Loew that he did not believe the photographs would be helpful.

Had Mr. Maesen fulfilled his duty to conduct even the most cursory investigation into the photographs, he could have impeached J.B's credibility, or at least foreclosed a central tenet of the prosecution's theory of the case. See *United States v. Agurs*, 427 US 97,112-113; 49 L Ed 2d 342; 96 S Ct 2392 (1976) ("the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before"); *People v Grant*, 470 Mich 477, 492; 684 NW2d 686 (2004) (holding that trial counsel's performance was ineffective because his defense theory – that the victim "was a liar and had falsely accused defendant" – should have "been fortified by adequate investigation [because] it would have shown the weakness in the prosecutor's case, and it could have made a difference in the verdict"); *People v Ballard*, unpublished opinion per curiam of the Court of Appeals, issued August 18, 2016 (Docket No. 325731), p 9 (finding that trial counsel's failure to use readily available evidence for impeachment purposes fell below an objective standard of reasonableness and was prejudicial to the defendant because impeachment would have touched on a central issue of the case).

Contrary to the trial court's finding, Mr. Maesen's decision not to pursue a line of questions concerning the color of the bathroom and the photographs was not "trial strategy." According to Mr. Loew, Mr. Maesen summarily dismissed the idea of impeaching J.B. based on the photographs because the photographs would be unhelpful for Mr. Loew's case. However, any evidence that

J.B. had fabricated an important detail of her testimony would have been helpful for Mr. Loew's case, and photographic evidence of her dishonesty would have bolstered the defense theory that she was a liar and falsely accused Mr. Loew. It is possible if not likely that the impeachment evidence, had it been pursued and presented by Mr. Maesen, would have changed the outcome of the trial. Thus, Mr. Maesen's failure to pursue the bathroom photographs fell below an objectively reasonable standard of performance for trial counsel.

B. Trial Counsel Failed to Investigate J.B.'s Prior Sexual Assault.

Likewise, Mr. Maesen's failure to investigate pivotal issues around the circumstances of J.B.'s prior sexual assault by J.S. and its relation to J.B.'s credibility – on which virtually the entire trial hinged – fell far below an objectively reasonable standard of performance. In determining that Mr. Maesen's decision not to investigate the circumstances surrounding J.B.'s prior sexual assault was merely "trial strategy," "[t]he trial court failed to appreciate that counsel's failure to investigate and substantiate the defendant's primary defense was a fundamental abdication of counsel's duty to conduct a complete investigation. It deprived his client of a substantial defense." *Grant*, 470 Mich at 497.

Here, Mr. Antkoviak provided Mr. Maesen a copy of the police report documenting J.B.'s allegations against J.S. when Maesen substituted in as counsel for Mr. Loew. Mr. Maesen, therefore, had the information he needed to attack J.B.'s credibility at trial based on her prior accusations against J.S., and Mr. Maesen could have easily investigated J.B.'s prior sexual assault by requesting more information via a FOIA request. Despite having the information and resources, Mr. Maesen elected not to investigate further.

Had Mr. Maesen investigated the J.S. incident in any fashion he would have learned that contrary to J.B.'s assertions to law enforcement and testimony during trial, J.B. did not "lose her

virginity" to Mr. Loew in December 2015. Mr. Maesen would have observed that J.B.'s claims regarding her onset of anxiety, depression, and engaging in self-harm actually began after being assaulted by *J.S.*, and, therefore, existed prior to any alleged assaults by Mr. Loew. Furthermore, by the time J.B. alleged that Mr. Loew assaulted her, she learned what to report and to whom to report it based on her experience reporting a similar accusation against J.S. Lastly, J.B.'s accusations against J.S. were strikingly similar to those she made against Mr. Loew. Namely, J.B. claimed that the first assault by J.S. -- reported in or about January 2015 -- took place in a bathroom, into which J.S. had lured her. J.B. also alleged that Mr. Loew first assaulted her by luring her into a bathroom. It strains credulity to believe that a preteen who had survived a sexual assault by an older male after having been called into a bathroom would repeat that scenario by willingly entering a bathroom alone when called by another older male, merely months after the first male pled guilty of that assault. This evidence, had Mr. Maesen pursued it and presented it during trial, could have changed the outcome of the trial.

Due to Mr. Maesen's failure to reasonably investigate or pursue J.B.'s prior sexual assault or impeach her with the information that Mr. Antkoviak provided to Mr. Maesen prior to trial, Mr. Loew was deprived of another avenue to impeach J.B.'s credibility. His failure to investigate also could have foreclosed potential avenues to impeach other witnesses. See *People v Trakhtenberg*, 493 Mich 38, 54-55; 826 NW2d 136 (2012) (finding that defense counsel's performance was constitutionally deficient because the case hinged solely on the complainant's credibility, and defense counsel failed to adequately impeach the complainant due to "counsel's unreasonable decision to forgo any investigation in the case.").

IV. The Court of Appeals' Holding that No Prosecutorial Misconduct Occurred Was Clearly Erroneous and Will Cause Material Injustice.

Mr. Loew did not receive a fair and impartial trial when the prosecution knowingly elicited false testimony. Both the United States Constitution and the Michigan Constitution of 1963 guarantee the right to a fair trial. US Const, Am XIV; Const 1963, art 1, sec 17. Prosecutorial misconduct occurred where defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982). A finding of prosecutorial misconduct requires that a defendant be granted a new trial. See *Aceval*, 282 Mich App at 391 (explaining that "[t]he remedy when a defendant receives an unfair trial because of prosecutorial misconduct is a new and, presumably, fair trial).

A prosecutor, like any attorney, has a duty of candor to the court and to opposing parties, and thus, may not knowingly use false testimony to obtain a conviction. See *Aceval*, 282 Mich App at 389-390 (explaining that "it is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. If a conviction is obtained through the knowing use of perjured testimony, it must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"); *Giglio v United States*, 405 US 150, 153-154; 92 S Ct 763; 31 L Ed 2d 104 (1972) (noting that due process is offended when a prosecutor, although not having solicited false testimony from a state witness, allows it to stand uncorrected when it appears, and requires reversal if the false testimony could in any reasonable likelihood affect the judgment of the jury). Both the prosecution and law enforcement officer should be aware of evidence in the prosecution's file or investigator's file. See *People v Cassell*, 63 Mich App 226, 228-229; 234 NW2d 460 (1975)

("the prosecution must be imputed with knowledge of facts which are known to its chief investigative officer.").

During Mr. Loew's trial, APA Jipp elicited testimony from witnesses that was false and misleading. She later offered arguments based on that false and misleading evidence. For example, law enforcement reports indicate that Trooper Workman (who investigated Mr. Loew and testified at his trial) and the elected prosecuting attorney in Allegan County, Myrene Koch, were personally involved in J.S.' investigation and prosecution. Thus, while APA Jipp may not have been personally involved in the investigation or prosecution of J.S., under *Cassell*, the information in Allegan County Prosecutor's Office and MSP's files regarding J.S. was imputed to her.

Specifically, one of the central tenets of the prosecution's theory of the case against Mr. Loew was that J.B. was a virgin whose naivete about sexual matters and ignorance as to how to report a crime justified her delayed disclosure, and allowed Mr. Loew to victimize her repeatedly over the course of roughly two years. The Allegan County Prosecutor's Office and MSP had evidence in J.S.'s case files that directly undercut this theory and invalidated the witness testimony aimed at supporting it. The prosecution's theory that J.B. lost her virginity to Mr. Loew in December 2015, which it argued directly to the jury, was implausible. In fact, the trial prosecutor argued that J.B. claimed to have lost her virginity to Mr. Loew in both her opening and closing statements. Indeed, in her opening statement, APA Jipp argued to the jury that "[J.B.] will testify that he took her virginity and that there was pain and blood." (Ex. E, Day 1 Trial Tr., 103:15). In her closing statement, APA Jipp instructed the jury to weigh J.B.'s credibility based on the fact that losing her virginity was a memorable event. See (Ex. G, Day 3 Trial Tr., 27:11-19) ("[o]r is it more believable that on the night you lost your virginity, that you are sexually assaulted, that you remember what the room looked like that this happened in").

J.B.'s claim that she delayed disclosing Mr. Loew's alleged assault because her word "wasn't enough," (Ex. E, Day 1 Trial Tr., 169:5-12), or that no one would believe her, was demonstrably false. Only a few months had passed between J.S.' guilty plea to having sexually assaulted J.B. She had a first-hand understanding of CSC investigations as well as direct access to the prosecution's office and MSP. J.B. had every reason to believe her word mattered because it had resulted in J.S.' guilty plea. Under *Cassell*, knowledge of J.B.'s false claims gained through Allegan County's investigation of J.S. was imputed to APA Jipp; it was misconduct for her to make those arguments to the jury.

Lastly, the prosecution's claim that J.B. began experiencing mental anguish after being assaulted by Mr. Loew is false. The prosecution's use of Mr. Cottrell's expert testimony to support her assertion was equally misleading. Prior to testifying, Mr. Cottrell did not know that J.B. reported being sexually abused by J.S. in 2015. He did not know she was *already* exhibiting anxiety, depression, and/or self-harm before the alleged assaults by Mr. Loew. He also did not that J.B. was already undergoing counseling before the assaults allegedly began with Mr. Loew. The prosecution, however, knew all of this information before calling Mr. Cottrell to testify, but asked him to render an opinion.

Where the prosecutor's office possessed information, before trial, that directly contradicted the testimony of its most important witness, it is misconduct for the trial prosecutor -- even if she was not personally aware of such information -- to present the false testimony, and to attempt to persuade the trial jury to rely on it in reaching its decisions. On central issues that touch directly on the credibility of the prosecution's most important witness, such conduct is patently unfair to the defendant, and deprived Mr. Loew of a fair trial.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Mr. Loew respectfully requests that this Court grant this application for leave to appeal. The issues in Mr. Loew's case concern significant public interest, namely, the integrity of the judiciary, the duties of elected officials, and the public's confidence in the judiciary and criminal justice system. Likewise, Mr. Loew asks this Court to grant this application for leave to appeal because the Court of Appeals' decision was clearly erroneous and will cause material injustice.

Respectfully submitted,

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/s/ *Heath M. Lynch*

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INDEX OF EXHIBITS