STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LOU-ANNA K. SIMON,

Defendant-Appellee.

FOR PUBLICATION
December 21, 2021

No. 354013
Eaton Circuit Court
LC No. 19-020329-FH

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

GLEICHER. J. (*concurring*).

The Michigan Attorney General charged Lou-Anna K. Simon with making two false statements to police officers investigating Michigan State University's (MSU) handling of the horrific sexual abuse perpetrated by Dr. Larry Nassar. The majority opinion correctly holds that the prosecution failed to produce any evidence supporting that Dr. Simon's statements were false or misleading and affirms the circuit court's decision to quash the bind-over. There are additional reasons to affirm the circuit court. Dr. Simon's allegedly false statements were immaterial to the prosecution's sham investigation, and her literally true answers cannot be subject to prosecution. Furthermore, the record reveals that Dr. Simon was charged for reasons that have nothing to do with bringing justice to Nassar's victims or to vindicating legal principles. On those added bases, I concur with the majority.

Sixty years ago, then-United States Attorney General Robert Jackson, later a Justice of the United States Supreme Court, declared that "the most dangerous power of the prosecutor [is] that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." Jackson, *The Federal Prosecutor*, 24 J of American Judicature Soc 18, 19 (1940). This prosecution imbues Justice Jackson's words with life. Multiple institutions—including the Federal Bureau of Investigation, the Ingham County Prosecutor's office, USA Gymnastics, and MSU—failed Nassar's victims. By readily accepting that Nassar engaged in a recognized medical treatment rather than flagrant sexual abuse, people who could and should have stopped Nassar lost the opportunity to protect hundreds of women. Dr. Simon was not one of those people. Despite her periphery to the abysmal decisions made by her institution, Dr. Simon was a high-profile target, selected to assuage public anger rather than to protect the integrity of the law.

I. THE SHAM INVESTIGATION BY MSU

By mid-January 2018, Larry Nassar had been convicted of multiple crimes and sentenced to the equivalent of life in prison. That same month, the then-Michigan Attorney General Bill Schuette launched the criminal investigation that yielded this prosecution.

There can be no debate about one central fact: MSU grossly mishandled complaints about Nassar beginning as early as 1997, and continuing until 2016. MSU's malfeasance allowed an unconstrained Nasser to molest hundreds of young victims. As a partial recompense MSU created a $500 million fund to compensate victims, and the civil justice system continues to consider claims.

Several detailed examinations of the widespread institutional failures contributing to Nassar's success in deceiving authorities have been published and are discussed below. MSU has scrutinized its failures and publicly admitted to many of them. So why did the Attorney General get involved in a criminal investigation of MSU *after* Nassar had been sentenced and the civil litigation commenced? The historical background supports that the goal was to exact retribution for MSU's failure to stop Nassar rather than to pursue justice for criminal wrongdoing. Dr. Simon was the one of the scapegoats selected to justify that effort.

A. THE 2014 INVESTIGATION

In 2014, Amanda Thomashow contacted Dr. Jeffrey Kovan, a physician in the MSU Sports Medicine Clinic, to report that she had been sexually assaulted by Dr. Nassar during a March 2014 medical examination.[1] Dr. Kovan met with Ms. Thomashow and immediately brought her concerns about the exam to MSU's Office for Institutional Equity (OIE). At the time, the OIE was charged with investigating potential violations of Title IX, which prohibits sex discrimination in education, including investigations of sexual assault.

Thomashow spoke by phone with Kristine Moore, an attorney and an investigator for the OIE. Moore testified at Dr. Simon's preliminary examination that she understood that Thomashow had reported a sexual assault. This was not a difficult conclusion to reach, as Thomashow described that in response to her complaint of hip pain Nassar had "massaged" her breasts, buttocks and vaginal area with an ungloved hand in a manner that seemed sexual in nature. Moore notified MSU's Office of the General Counsel, the MSU police department, and her superior, Paulette Grandberry-Russell. Moore then met with Thomashow and a detective in the MSU police department. An investigation ensued in which Moore interviewed Nassar and several other physicians. Nassar told Moore that "touching in the vaginal area" was an appropriate treatment of the "sacrotuberous ligament," and that he had been performing that procedure "for a long time" and on hundreds of young women.

Moore then consulted with Dr. Brooke Lemmen, a physician board certified in family and sports medicine who worked as a full-time physician at MSU. Dr. Lemmen was also a friend and

[1] I use Ms. Thomashow's name because she has on several occasions publicly—and courageously—described her encounter with Nassar.

colleague of Nassar. Dr. Lemmen advised that Nassar's manipulation of "areas very close to the vaginal area" was medically appropriate. Similarly, Dr. Lisa DeStafano (another board-certified physician and a friend and colleague of Nassar) told Moore that the "treatment" administered by Nassar, described by the physicians as a manipulation of areas close to the vagina, was medically appropriate. Dr. Jennifer Gilmore, who told Moore that she and Nassar had known each other since their residencies and that Nassar treated her daughter, echoed those opinions. None of these physicians knew that Nassar's "treatment" went far beyond that which they recognized as a legitimate osteopathic therapy, and the inaccuracy of their understanding of Nassar's actual conduct emerged during the criminal proceedings. But given the united front of expert opinion exculpating Nassar at the time, Moore's report concluded that Nassar's conduct was medically appropriate and not sexual in nature. MSU's general counsel approved the report. Dr. Simon was never provided with a copy of the investigative report nor informed of the result.

Nevertheless, the MSU police department referred Nassar to the Ingham County prosecutor. The prosecutor declined to bring any charges.

Of course, Nassar's "treatment technique" was *not* a recognized or appropriate medical procedure; it was sexual abuse. As others have opined, Moore's investigation should have sought input from physicians outside of MSU rather than from Nassar's colleagues and friends. The 2014 MSU investigation was deeply flawed.[2] The physicians and others who vouched for Nassar—including Nassar himself—led the investigation astray.

The OIE was not the only entity that failed to pursue evidence that Nassar's "treatments" of his victims were sexual assaults. Thanks to a comprehensive report issued by the Inspector General of the United States in 2021, we know that the Federal Bureau of Investigation received detailed and highly specific allegations of sexual assault involving Nassar in 2015, yet failed to open a formal investigation "and did not advise state or local authorities about the allegations and did not take any action to mitigate the risk to gymnasts that Nassar continued to treat." Department of Justice, Office of the Inspector General, *Investigation and Review of the Federal Bureau of Investigation's Handling of Allegations of Sexual Abuse by Former USA Gymnastics Physician Lawrence Gerard Nassar*, p ii (July 2021), available at <https://oig.justice.gov/sites/default/files/reports/21-093.pdf> (accessed October 19, 2021). The failures of USA Gymnastics, Inc., to meaningfully follow up on reports of sexual abuse are also well documented in after-the-fact reports. See McPhee & Dowden, *Report of the Independent Investigation: The Constellation of Factors Underlying Larry Nassar's Abuse of Athletes* (December 10, 2018), available at <https://www.nassarinvestigation.com/en> (accessed October 19, 2021).

[2] Multiple additional deficiencies in the handling of Thomashow's complaint against Nassar were identified by the United States Department of Education Office for Civil Rights in a lengthy report prepared. See United States Department of Education, Office for Civil Rights, *Report Re: OCR Docket No. 15-18-6901: Michigan State University*, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15186901-a.pdf> (accessed October 19, 2021).

B. FAST-FORWARD FOUR YEARS, TO 2018

Against an inexcusable backdrop of multi-institutional malpractice characterized by the minimization of sexual assault complaints, disbelief of the young women, and countless missed opportunities to stop the abuse, then-Attorney General Bill Schuette undertook his own criminal investigation of MSU. William Arndt, a Michigan State Police detective sergeant and a lead investigator in this effort, testified at the preliminary hearing, "We were investigating not so much Nassar's CSC [criminal sexual conduct], because he had already been convicted. We were investigating the CSC as it relates to the aiding and abetting by other employees at the university; not specifically including Ms. Simon, but other or any employee at the university and/or misconduct in office."

This "explanation" of the basis for a criminal investigation of an entire university is difficult to take seriously. To establish that anyone aided or abetted Nassar in the perpetration of criminal sexual assaults, the prosecution would have to prove that the person "performed acts or gave encouragement" that assisted Nassar in committing the crime, and that the person *intended* the commission of the crime at the time he or she gave the aid or encouragement. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). None of the young women reported that others had "performed acts or given encouragement" to Nassar. By the time the Attorney General's investigation commenced, hundreds of young women had given statements or testimony that during the assaults only Nassar, and occasionally parents, were in the room. Further, the investigators knew that the medical "culture" at MSU condoned Nassar's "treatment" of the "sacrotuberous ligament" and that physicians were on record as attesting to its usefulness. It defies reason (and the extensive factual record available in January 2018) that before 2016, anyone at the university believed that Nassar was routinely penetrating the vaginas of his patients or understood that the treatment he claimed to be performing was actually sexual assault. Searching for evidence of "aiding and abetting" was a complete waste of time, and no evidence supports that the detectives believed they would stumble on an "aider and abetter."

The misconduct in office statute, MCL 750.505, addresses "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999) (quotation marks and citation omitted). The Supreme Court has set forth five factors for establishing a "public office" under the statute:

> (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. [*Id*. at 354 (citation omitted).]

Dr. Simon likely qualified as a "public officer," as did a handful of other MSU officials.

Arndt claimed that he was specifically investigating Dr. Simon regarding a possible charge of misconduct in office based on a "potential coverup of the CSC with Mr. Nasser." Superficially, this makes sense. But Arndt's explanation dissolves in the light of his awareness that the MSU police had referred Nassar to the Ingham County prosecutor in 2014 with a recommendation that he be charged. It is inconceivable that Simon intended to corruptly cover up Nassar's "crimes" given the opinions of three physicians exculpating him from criminal activity, and the conclusions of the university's OIE and legal counsel that no sexual assault had occurred. What was Dr. Simon allegedly covering up?

Unsurprisingly, the Attorney General's "investigation" yielded no evidence of aiding or abetting. The Dean of the College of Osteopathic Medicine (COM), William Strampel, was convicted of two misdemeanor counts of willful neglect of duty by a public officer, MCL 750.478, "for failing to properly oversee" Nassar "and for permitting Nassar to return to work before completion of the Title IX investigation of an allegation that Nassar engaged in sexual misconduct." *People v Strampel*, unpublished opinion of the Court of Appeals, issued January, 14, 2021 (Docket No. 350527), p 1 n 1. But Strampel was charged with these crimes approximately six weeks *before* the detectives interviewed Dr. Simon.

As to Dr. Simon, the investigation revealed not even a shred of evidence of any crime. Absent evidence of "aiding or abetting" or misconduct in office, the investigators seized on the crime with which they charged Dr. Simon: lying to them.

II. THE 2018 INTERVIEW WITH DR. SIMON—FOUR YEARS AFTER THE UNDERLYING EVENTS

Dr. Simon told the investigators that she was aware of the 2014 OIE investigation, but that pursuant to university policy, she was not involved in it. Because no finding implicating an MSU employee was made, she was never informed of the result. Dr. Simon told the investigators that she did not know Larry Nassar personally and had no role whatsoever in the investigation after being apprised of its existence. These facts have never been refuted.

So why are we here? Why was Dr. Simon charged with four felony counts carrying a penalty of up to four years' imprisonment? As Justice Jackson warned in 1940, "With the lawbooks filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." Jackson, p 19. In such circumstances, "it is not a question of discovering the commission of a crime and then looking for the man who committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him." *Id*. That is precisely what happened here. This prosecution is designed to punish and humiliate Dr. Simon for the sins of MSU, not to provide justice for Nassar's victims or to vindicate the legitimate purposes of the law penalizing those who lie to the police.

The felony information charges that Dr. Simon lied to a peace office in violation of MCL 750.479c(1)(b) in two different respects: she made a statement during the 2018 interview that "she knew was false or misleading" related to "her knowledge of who was the subject of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint against Larry Nassar," and that she

falsely stated "that she was not aware of the nature and substance of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint against Larry Nassar."

The majority opinion elucidates the facts surrounding the voluntary interview conducted with Dr. Simon by Arndt and another Michigan State Police officer, William Cavanagh. And the majority accurately discerns that "the prosecution did not introduce any evidence that [Dr. Simon] was actually informed in 2014, or at any time prior to 2016 of Nassar's *name* or the details of the allegations against him." Accordingly, the majority holds that because there was no evidence that Dr. Simon was provided with Nassar's name or any details regarding the 2014 investigation, the prosecution failed to establish probable cause supporting a bind-over for lying to the police about these subjects.

The prosecution's claim that Dr. Simon made a false statement regarding her awareness of Nassar's name is utterly fallacious for several more reasons. First and foremost, everyone in the interview room knew—and openly acknowledged—that the subject of the discussion that day was Larry Nassar. Dr. Simon deceived no one by failing to utter Nassar's name. The whole point of the meeting was to discuss Nassar. At the very outset of the meeting the following interchange took place:

> BY MR. CAVANAGH:
>
> *Q*. We can get right into the meat and potatoes of what we'd like to ask today and I guess we'll start today with Larry Nassar.
>
> *A*. Okay.
>
> *Q*. Did you know Larry Nassar personally?
>
> *A*. No.
>
> *Q*. At all?
>
> *A*. No.

Cavanagh then presented Dr. Simon with Nassar's "personnel form," asked her a few questions about it, read aloud from it, and established that the "provost's office" and the dean had responsibility for overseeing the assignments given to tenured faculty such as Nassar. This conversation referenced Nassar's work for MSU Gymnastics and his volunteer work for USA Gymnastics. The discussion regarding Nassar triggered by his personnel form went on for 10 pages, concluding with Dr. Simon's explanation that the university did not independently keep track of the voluntary work faculty members provide to "outside entities." It then segued directly into one of the two answers that the prosecution alleges was false or misleading:

> MR. ARNDT: *So I mean specifically to Nassar*, were you aware of any prior investigation, you know, before the story broke in the news, were you aware of any prior investigation with Larry Nassar or, you know, misconduct for that matter, anything?

[DR.] SIMON. I was aware that in 2014 there . . . was a sports medicine doc who was subject to a review. But I was not aware of any of the substance of that review, the nature of the complaint, that was all learned in '16 after it became clear in the newspaper regarding the - -

MR. ARNDT: I think that's going to boil right into our next questions.

[DR.] SIMON. The national piece?

BY MR. CAVANAUGH:

Q. Sure. Well, how did you become aware of it in 2014? Is that something that's part of a briefing or - -

A. I was told by one of the staff members that there was a sports medicine - -

Q. I see.

A. - - physician who was going through OIE, none of the substance. And I don't involve myself in the OIE investigations.

Q. And that's a standard practice?

A. That's a standard practice. It has nothing to do with the substance of the case.

* * *

Standard practice is not to be involved because they need to be done in a straightforward way without any political pressure one way or the other.

Q. Sure, absolutely.

MR. ARNDT: So as part of the Title IX, . . . though, investigation do they report back to the provost, you, vice-president? Do they ever bring those findings back or is that confidential information? How does that work?

[DR.] SIMON: The process is such that if there are significant issues that arise as a result of that that implicate policy or education, those are typically brought forward. But in this case I can tell you straightforwardly that since there was no finding as I learned in 2016, not then, I had no knowledge of what happened in the Title IX investigation in 2014. [Emphasis added.]

The context of this discussion makes it abundantly clear that everyone in the room knew that Dr. Simon was talking about the OIE investigation into Larry Nassar. Nassar was the sole subject of the discussion preceding the interchange about the "sports medicine doc," the follow-up questions specifically focused on Nassar, and the prosecution has never contended that *another*

doctor was also sexually assaulting patients. Indeed, a few pages after the allegedly false or misleading answer, Dr. Simon reiterated that she first learned of the concerns about Nassar after the Indianapolis Star published an exposé implicating Nassar in 2016. She then learned the result of the 2014 investigation and its conclusion that "[i]t was a legitimate medical procedure[.]"

But regardless of whether Dr. Simon was or was not told Nassar's name in 2014, or knew or did not know the details of Thomashow's allegations at that time, her 2018 answers to the investigators' questions did not fall within the ambit of MCL 750.479c(1)(b) for two legal reasons. First, even if she somehow misled the investigators—a fanciful proposition at best—her answers were literally true. A literally true answer cannot sustain a prosecution for making a false or misleading statement. Second, Dr. Simon's answers were incapable of influencing the decision-making process, and therefore were immaterial.

A. LITERALLY TRUE STATEMENTS CANNOT SUPPORT A CONVICTION

In *Bronston v United States*, 409 US 352, 352-353; 93 S Ct 595; 34 L Ed 2d 568 (1973), the United States Supreme Court addressed "whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication."[3] Samuel Bronston owned a company that sought bankruptcy protection and he testified at a creditors' hearing as follows:

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, sir.

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks?

A. No, sir.

Q. Have you ever?

A. No, sir. [*Id*. at 354.]

[3] The federal perjury statute, 18 USC § 1621(1), provides that one who takes an oath and "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true" commits perjury. Although textually different from MCL 750.479c(1)(b), both statutes require a false statement and an intent to mislead or deceive. *Bronston*'s reasoning and logic are equally applicable to a voluntary interview with police officers. Judge Alex Kozinski has observed that "due process calls for prudential limitations on the government's power to prosecute under" the perjury statute. *United States v Bonds*, 784 F3d 582, 585 (CA 9, 2015) (Kozinski, J., concurring). *Bronston* supplies one such limitation.

Bronston had, in fact, maintained a personal bank account in Switzerland but did not have the account at the time of inquiry. *Id*. The government contended that Bronston's answer to the second question, although literally true, "unresponsively addressed his answer to the company's assets and not to his own," "implying that he had no personal Swiss bank account." *Id*. at 355.

A unanimous Supreme Court acknowledged that Bronston's answer to the question posed to him was not responsive and could be interpreted as implying an untruth. The Court observed, however, that the perjury statute "does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true." *Id*. at 357-358. Moreover, the Court explained that "the drastic sanction of a perjury prosecution" could not have been intended "to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer." *Id*. at 358. In short, "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id*. at 360. A questioner who suspects that a witness has answered unresponsively should "press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury." *Id*. at 362.[4]

Dr. Simon was asked how she became aware of the 2014 investigation; no evidence refutes her answer that she "was told by one of the staff members that there was a sports medicine . . . physician who was going through OIE." And Dr. Simon was never asked whether she knew the name of the "sports medicine doc," because it was obvious to everyone in the room that the name was Nassar. Like the witness in *Bronston*, Dr. Simon gave answers that were literally true.[5] While in *Bronston* the answer at issue was not completely responsive to the question and was arguably misleading, Dr. Simon's answers *were* responsive. And even if a witness deliberately sidesteps answering a question, the duty falls on the inquisitor to detect the evasion and "to flush out the whole truth with the tools of adversary examination." *Id*. at 358-359.

If Arndt and Cavanagh wanted to know whether Dr. Simon was aware in 2014 of Nassar's name or the details of the OIE investigation, it was their obligation to probe more deeply. This prosecution is a legally improper vehicle for remedying the investigators' poor technique.

[4] That the investigators failed to ask precise questions, failed to follow up Dr. Simon's answers, and failed to follow the script that they had been handed by attorneys in the Attorney General's office also substantiates that none of the information they neglected to obtain was material, discussed in more detail below. The information was immaterial to the investigation because the investigators *knew* what the answers to their questions would be, and therefore they had no reason to question Dr. Simon with more acuity.

[5] Arndt admitted during his preliminary examination testimony that Dr. Simon's answers were true.

B. THE ALLEGEDLY FALSE OR MISLEADING STATEMENTS WERE IMMATERIAL AS A MATTER OF LAW

In *United States v Gaudin*, 515 US 506, 509; 115 S Ct 2310; 132 L Ed 2d 444 (1995), a case involving an allegedly false statement made on federal loan documents, the United States Supreme Court offered a now widely accepted definition of materiality: "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." (Quotation marks and citation omitted, brackets in original.)[6] Ordinarily, materiality is a jury question. *Id*. at 522-523. In the context of this case, however, the question presented is whether the prosecution presented *any* evidence of materiality. To warrant a bind-over, "there must be evidence on each element of the crime charged or evidence from which those elements may be inferred." *People v Doss*, 406 Mich 90, 101; 276 NW2d 9 (1979) (quotation marks, citation, and emphasis omitted).

The prosecution did not establish that Dr. Simon's statements were material to its investigation of MSU. Dr. Simon's failure to name Nassar as the person "who was the subject of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint" had not a shred of influence on any decision made in this case. Similarly, the prosecution brought forward no evidence that Dr. Simon's denial of her personal awareness "of the nature and substance of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint against Larry Nassar" impacted the decisions under consideration by the investigators.

The prosecution witnesses never put forward a plausible explanation of why Dr. Simon's failure to say Nassar's name aloud instead of referring to him as "a sports medicine physician who was going through the OIE" influenced or affected their investigation into "aiders and abetters" or officials guilty of misconduct in office. Instead, when asked this question the investigators offered a word salad suggesting that if Dr. Simon had said Nassar's name, the investigators would have had to do less work—to find the nothing that they ultimately found, presumably. As Arndt testified:

> *Q*. If the defendant would have told you in 2018 that she knew about the investigation regarding Larry Nassar in 2014, would it have materially affected the investigation you were conducting in 2018?
>
> *A*. Yes.
>
> *Q*. How?
>
> *A*. We would have been able to pinpoint the timeline to one, for her interview, but for others; more specifically, pinpoint that time line and the search warrants that we did were broad, and there were - - I don't even know how many - - hundreds of thousands of documents we would have, we went through or the

[6] Here is another definition: "Material information is information that, if believed, would tend to influence or affect the issue under determination." *United States v Crousore*, 1 F3d 382, 385 (CA 6, 1993).

attorney general went through. We could have pinpointed time lines, agendas, calendars. That information would have been, would have been useful to us as investigators so we didn't have to go through hundreds of thousands of documents, we could have obtained a calendar appointment for a specific day or conducted a search warrant for a specific day or person regarding a specific time line.

This answer is difficult to parse. I assume that Arndt's version of a "material" misstatement or falsehood is anything that allegedly makes his job more difficult—resulting from his own failure to ask follow-up questions. Any extra work involved in "pinpoint[ing] time lines, agendas, calendars" or "narrowing the focus" of the investigation resulted directly from poor questioning. But that is not the only legal impediment to prosecution. That the detectives had to work harder (in hindsight) than they felt was necessary to construct "time lines" or to review documents does not transform even a blatantly false statement into a material one.

According to the prosecution, the material "facts" about which Simon misled the investigators were (1) her 2014 knowledge of Nassar's name, and (2) her 2014 knowledge of the substance of the OIE investigation. Let's assume that Dr. Simon knew both things and deliberately failed to share that knowledge with the investigators. No evidence supports that her silence regarding these two "facts" influenced or could have influenced the pertinent *decisions* made during the investigation—that no one had aided or abetted Nassar, and that Dr. Simon had not obstructed justice. Statements that waste an investigator's time or result in more investigation may be material if the wasted time or the extra effort distract an investigator from the true culprit, lead to the destruction of evidence, or trigger the arrest of an innocent person. None of those things happened here, nothing even close.

During the preliminary examination, counsel for Dr. Simon repeatedly returned to the subject of materiality, laboring to elicit testimony from Arndt and Cavanagh that would illuminate the prosecution's argument for this essential element of the charges. Each time, they hit the same roadblock: elusive answers asserting, in essence, that the investigators would have had less work to do had Dr. Simon volunteered more information.

Here is another example:

> *Q.* . . . But . . . here's my question, Detective Arndt. And this is really important cause it's an element of the offense and I wanna make sure everybody understands this.
>
> When you say that she impeded a criminal investigation into CSC first degree by virtue of the fact that she said, 'I was aware that in 2014 there was a sports medicine doc who was subject to a review', you knew that the sports medicine doc that she was referring to was Larry Nassar; correct?
>
> *A.* I assumed that's who she was discussing, yes.
>
> *Q.* So then explain to us . . . how that answer given by Dr. Simon that she was aware in 2014 that there was a sports medicine doc who was subject to a review, which you already said was a true statement, but nonetheless, explain to us how that statement impeded a criminal investigation into CSC first degree.

A. Again, I think it's one of those where she, based on the interview and the comments made, what a month later, we then come across documents that contradict what we felt that, believed that she knew. And it would have been easier for us, or it did impede our investigation going through hundreds of thousands of documents produced by Michigan State. It would have been easier for us to, one, question Dr. Simon, Paulette Russell . . . and those other people about specific dates, times, even so far as search warrants to narrow the time line down.

Q. I don't understand at all. Are you suggesting to us, Detective Arndt, that if Lou-Anna Simon had said, 'Oh, and by the way, I knew that the sports medicine doctor's name was Larry Nassar', you wouldn't have reviewed all of those documents that you subpoenaed from Michigan State?

A. I think we would have been able to better focus the investigation to certain days, documents, calendar appointments, those types of things.

* * *

Q. And regardless of what Dr. Simon said or didn't say in her interview, you or somebody that was part of this team would have reviewed the documents produced by Michigan State in response to your subpoena; correct?

A. Eventually, yes.

Evidently, Arndt and the prosecution are unaware of the legal definition of materiality. As described above, a false statement is material when it has a natural tendency to influence, or is capable of influencing, the decision of a decision-making body. Decisions about when to issue a subpoena or which subpoenas to issue are simply not material in a legal sense. Arndt's belief that he had to work harder (to find no evidence of any actual crime) says nothing about whether Dr. Simon's answers influenced or were capable of influencing the relevant decision: whom to charge with a crime, and what to charge.

This Court has explained that "a willful, knowing omission of pertinent information about a crime may lead the police down a fruitless path, permit the destruction of evidence while the police look in another direction, enable the escape of the actual culprit, or precipitate the arrest of an innocent person." *People v Williams*, 318 Mich App 232, 240; 899 NW2d 53 (2016). In those examples, misleading statements prevented the police from solving a crime, and qualified as material because they deprived the decision makers of the information necessary to make an accurate and informed charging decision. Here, there is no crime, no evidence of aiding and abetting, and no evidence of misconduct in office on the part of Dr. Simon. Her statements had no bearing on the decision not to charge anyone with aiding and abetting, or (other than Strampel who had already been charged) with misconduct in office.

The prosecution's concept of materiality would fling open the door to prosecuting every trivial misstatement (or trivial falsehood) offered during a police interrogation that in an officer's subjective calculation, caused extra work—even those that had no impact on any decision-making. According to the prosecution's reasoning, despite that a witness deceives no one and her statement bears no importance whatsoever to the ultimate outcome of the investigation, she may be

prosecuted if an investigator feels aggrieved. Such a rule counsels strongly against voluntary cooperation. And surely the materiality requirement incorporated within MCL 750.479c(1)(b) requires proof of something more than an investigator's opinion that he had to work harder to find no evidence of a crime.

United States v Fiala, 929 F2d 285, 289 (CA 7, 1991), involving a challenge to a federal sentencing enhancement for impeding or obstructing justice, is somewhat analogous and makes the same point. Under Note 3(g) to the federal sentencing guidelines commentary, a sentence enhancement was deemed appropriate "if a defendant made a 'materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation.' " *Id*. at 290. Fiala was stopped by the police and asked if he had anything illegal in the car. He responded that he did not. *Id*. at 289. The police decided to search the car anyway, and called for a K–9 unit. It took 1 ½ hours for the unit to arrive. *Id*. at 286. The dog alerted to the possible presence of drugs and the police found two large bags of marijuana and two handguns in the car. *Id*. at 286-287. The prosecution sought enhancement based on Fiala's denial that he had drugs in the car, arguing that the statement impeded the investigation. The United States Court of Appeals for the Seventh Circuit held that "Fiala's statement clearly does not meet the standards of Note 3(g): his denial of guilt was neither material nor could it possibly be said to have significantly obstructed the troopers' investigation." *Id*. at 290. In other words, the extra time and effort expended by the officers to find the contraband did not transform a denial of guilt into a materially false statement.

III. WHY ARE WE HERE?

From its inception, the investigation culminating in the charges against Dr. Simon was a hunt for someone at MSU on whom the Attorney General could pin blame for Nassar's crimes. In an opening statement at the preliminary examination, the assistant attorney general handling this case repeatedly betrayed the true object of this prosecution. "Great institutions like great people have to do more than just look good," he declared, "they have to be good." Later he expounded, "our theory of the case is that from 2011 through 2014, under the defendant's control, . . . Michigan State University had a culture of protect the brand. From 2005 to 2018, as president, her mission was for MSU to look good." "The truth," he continued, was that "MSU had an extremely poor record in handling sexual misconduct and sexual assault, and that's been well established."

Throughout the preliminary examination, the assistant attorney general accused Dr. Simon of having lied to "the media," "the victims," "Congress," and countless others. Vilifying Dr. Simon was the centerpiece of the assistant attorney general's strategy to achieve a bind-over, and he succeeded in the district court. What got lost, however, was that this is a *criminal* prosecution, not a civil lawsuit. Dr. Simon's negligence, if any, and her efforts to shield MSU from blame, if any, are not crimes.

Justice Jackson taught us that when a prosecutor "picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies." Jackson, p 19. Foreshadowing this case, Jackson explained, "It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group[.]" *Id*. The danger of abuse is greatest when the times "cry for the scalps of individuals or groups" because those in

power dislike their views. *Id*. While Justice Jackson was specifically referencing those targeted for political reasons, the point resonates here, as well.

There can be no doubt but that MSU and many others betrayed Nassar's victims and caused incalculable harm. MSU and other institutions failed to do their jobs and failed to protect vulnerable young women from a vicious predator. The question facing this Court is whether Dr. Lou-Anna Simon should bear *criminal* responsibility for this tragedy. The answer, directly and unevasively stated, is no.

/s/ Elizabeth L. Gleicher