

20-6866

IN THE  
SUPREME COURT OF THE UNITED STATES

KEVIN C. SUTHERBY - Petitioner

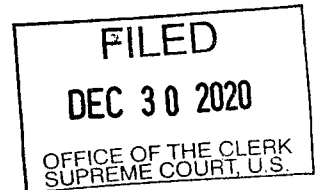
-VS-


SHERMAN CAMPBELL - Respondent

ORIGINAL

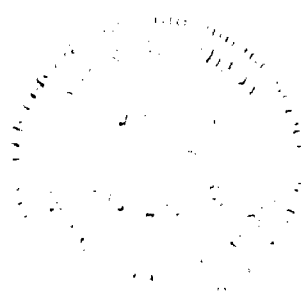
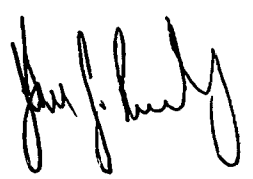
ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI



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Respectfully Submitted  
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JOHN J. LUNDY  
NOTARY PUBLIC, STATE OF MI  
COUNTY OF WAYNE  
MY COMMISSION EXPIRES Jun 25, 2023  
ACTING IN COUNTY OF Lenawee

### Questions Presented

1. Whether, Mr. Sutherby is entitled to a new trial, based on Newly Discovered Evidence, Ineffective Assistance of Counsel at trial, and appeals, and the admission and use of Illegal Evidence.
2. Whether, Mr. Sutherby is entitled to a reversal of conviction, based on the prosecution at district court, and circuit court never "proving", the petitioner to be the perpetrator, by the voice on the illegal recording, and also never proving the 3rd element of penetration, by "disallowing the Medical Exam".  
(Brady Violation)
3. Whether, Mr. Sutherby is entitled to a reversal, based upon the Constitutional Rights Violation at Preliminary Examination, and at Trial: 4th Amendment, and 6th Amendment violations. Also violations of MCL 750.539 sec. c.f., MRE 901 sec. 51b, Contrary to Michigan Statutes.
4. Whether, Mr. Sutherby is entitled to proceed with the Habeas Corpus Appeal, due to his ineffective retained, appellate counsel who failed to file an application for leave to appeal in the Michigan Supreme Court, and retained Habeas Corpus attorney, who failed to respond to stipulated orders of District Court Judge: Honorable Stephen J. Murphy.
5. Whether, Mr. Sutherby is entitled to a reversal of conviction based on "Warrantless Arrest" by Southgate Michigan/Taylor Michigan police department.

6. Whether, Mr. Sutherby was deprived of a fair trial, and is entitled to new trial, due to prosecutorial misconduct, when prosecutor bolstered testimony of witness, offered expert testimony, without objection from trial counsel, or objection from trial court.

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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue  
to review the Judgment below.

OPINIONS BELOW

The orders and opinion of the United States Court of Appeals for the Sixth Circuit appear at: 2020 US App Lexis 31374

The order and opinion of the United States District Court for the Eastern District of Michigan Southern Division appear at: 2019 US Dist. Lexis 181223

The orders of the highest state court to review appear at: Michigan Supreme Court 501 Mich 878.

The orders and opinion of the Michigan Court of Appeals appear at: 2016 Mich App Lexis 2700 334983

The order and opinion of the trial court appear at:  
Order regarding Motion No. 08-013482  
also all of the trial transcripts proving wrongful conviction.

List of Parties

## STATEMENT OF JURISDICTION

Petitioner, Kevin C. Sutherby, files for Writ of Certiorari pursuant to 28 U.S.C.A. & 1254(1) and 28 U.S.C.A. & 1257(a), as a State Prisoner convicted in the Wayne County Circuit Court, in the State of Michigan on July 23<sup>rd</sup>, 2009 where his convictions of CSC 1st violate his Constitutional rights. Mr. Sutherby was found guilty by a jury.

On August 13th 2009, the trial court sentenced Mr. Sutherby to 25yrs to 50yrs. Mr. Sutherby seeks relief from such unconstitutional detention. As such, this petition for Writ of Certiorari was filed within the 90-day period of the final decision from the United States Sixth Circuit Court of Appeals denying his petition for rehearing that was entered on October 1st 2020.

## STATEMENT OF THE CASE

### A. FACTUAL BACKGROUND

Mr. Sutherby was arrested charged and convicted by the illegal evidence of the recording, which was not proven to be Mr. Sutherbys voice, nor by phone records, was not his cellphone number that plaintiff called during illegal recordings.

Trial Prosecutor suppressed the Plaintiffs "Medical Exam" which caused - misconduct, ineffective counsel and also a "Brady Violation"

The Medical Exam proved Mr. Sutherby's INNOCENCE!

### B. TRIALS

1st Trial -- Mistrial - No "Manifest Necessity"

2nd Trial - Guilty by Jury - Mislead/Perjured, impeachment testimony, miscarriage of justice -- Jury Instructions, Constitutional Right Violations, MCL 750.539 - MRE 901 Violations

### C. Direct Appeals

1st Appeal Attorney - Dec. 7th. 2009 - Court of Appeals - Affirmed.

2nd Defense Appellate Attorney - Failed to submit Leave to Appeal in the Michigan Supreme Court.

3rd Defense Appellate Attorney - Relief of Judgement 2016

2nd C.O.A. - (2nd decision) Court of Appeals - 2016 - Affirmed - 2016

(no establishment) Supreme Court 2016 - Denied - 2017

(Habeas Corpus) - United States District 2018 - Denied - 2019 (reconsidered)

(Motion for C.O.A.) United States Court of Appeals - 2020 - Dismissed

Reconsidering pending as of 10/20/20

Trial transcripts have never been seen by any Appeals



Court/Judges, defense counsel never submitted the transcripts with any motions? ineffective counsel

The transcripts "prove the innocence of Mr. Sutherby, they prove miscarriage of justice/Prosecution Misconduct ineffective counsel, and 100% fact proves the corruption that caused the conviction of an Innocent Man!

Please read the transcripts.

## PROCEDURAL DEFAULT

The procedural default doctrine, like the exhaustion doctrine, the untimely doctrine, is grounded in principles of comity, federalism, and judicial efficiency Dretke -v- Haley, 541 US 386, 124 SCt 1847, 1851-52 (2004) normally will preclude a federal court from reaching the merits of a habeas claim when either (1) that claim was presented to the state courts and the state court ruling against the petitioner, rests on adequate and independent state-law procedural grounds, or (2) the claim was not presented to the state courts and it is clear that those courts would now hold the claim procedurally barred. Coleman -v- Thompson, 511 U.S. 722, 111 SCt 254, 2557 & n. 1 (1999)

Thus, when the habeas petitioner has failed to fairly present to the state courts the claim on which he seeks relief in federal court and the opportunity to raise that claim in state court has passed, the petitioner has procedurally defaulted that claim Boerckel, 526 U.S. at 853-54, 119 Sct at 1736.

A procedural default will bar a federal court from granting relief on a habeas claim unless the petitioner demonstrates "Cause" for the default and prejudice resulting therefrom, Wainwright -v- Sykes 433 U.S. 72, 87-88, 97 St.Ct 2497 (1977), or alternatively, he convinces the court that a miscarriage of justice would result if his claim were not entertained on the merits. Murray v Carrier, 477 US 478, 495-96, 106 S.Ct 2639 (1996). To establish prejudice, he "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his

actual and substantial disadvantage, infecting this entire trial with error of Constitutional Dimensions. United States -v- Frady, 456 U.S. 152, 170, 102 Sct 1584, 1586 (1982).

If the petitioner cannot show cause and prejudice but instead seeks to overcome his procedural default by establishing the prospect of Miscarriage of Justice, then he must demonstrate that he is Actually Innocent of the crime for which he was convicted -- that is, he must convince the court that no reasonable juror would have found him guilty but for the errors allegedly committed by the State. Schlup -v- Delo, 513 US 298, 327-329, 115 Sct. 851, 867-68 (1995).

If the jurors would of been told that the voice was never proven to be the defendant, the number the plaintiff called was not the defendant's number, and the results of the Medical exam were "negative" to an assault to victim, for a "fact any juror on this planet, would of found defendant "not guilty"!

With the federal court not knowing these same issues, the errors are keeping Mr. Sutherby from getting relief.

If Judge Steven Whalen, was notified about how the evidence was obtained, and tampered with, over and over. And most importantly, withholding the results of "Medical Exam", that conclusively proved that no penetration is detected. This withholding of key exonerating evidence deprived defendant of his substantial rights.

I believe that, had The Honorable Judge Whalen, been aware of these errors committed by trial court, trial counsel, appellate counsels, and prosecutor he would have overturned my conviction or in the least ordered a "Evidentiary Hearing."

Participant monitoring through the use of an electronic device by

a participant in a conversation which transmits the exchange to a third-party, and the recording of a conversation by a participant in the conversation on recording instead of transmitting it are both "Searches and Seizures", which comply with the "search warrant requirements". "Participant monitoring", refers to the use of an device by a participant of a conversation which transmits the exchange to a third-party, which make it "illegal, and inadmissible."

In U.S. v White, 40 U.S. 745 (1971) Justice Harlan stated: "It is one thing to subject the average citizen to the risk that participants in a conversation with him will subsequently divulge its contents to another, but quite a different matter to foist upon the risk that "unknown third-parties may be simultaneously listening in."

Federal Constitutional law recognizes a distinction between third-party monitoring and participant monitoring. Third-party monitoring involves police monitoring of a conversation without consent or knowledge of either participant, whereas participant monitoring involves monitoring with the consent of one of the parties to the conversation between two people. When police engage in third party monitoring, a search occurs for 4th amendment purposes, and police must procure a search warrant prior to eavesdropping. People v Taylor, 93 Mich App. 292 Michigan Const. 1963 Art 1 sec. 11

The Michigan Court of Appeals ruled in People v Hall, that trial court erred in admitting a tape recording obtained without a warrant of his conversation with a police informant. The court reversed defendant's conviction, it held that the police had to obtain a warrant before lawfully taping a conversation between a individual and

a police informant and that recording was therefore "inadmissible" as the result of an illegal search and seizure. The court reversed the conviction. People v Hall, 88 Mich App 324.

Petitioner Sutherby, asks this court to settle this Constitutional violation, surely the United States Supreme Court will take a clear stance against: "Inconclusive parties, telephone recorded conversation being allowed as admissible evidence, when a voice analysis wasn't conducted to determine who was talking on the recording. This is of extreme importance since societal reliance on technology is paramount for our success as a nation. If this court allows this miscarriage of justice to stand, then a landside effect shall take course across our nation. Any and every unidentified phone recording can and will be used as instruments of injustice.

The Michigan Court of Appeals has a clear standard for admittance of recording into evidence, yet this standard was not adhered to as described in People v Berkley, 437 Mich 40, 467 NW2d 6 (1990) and People v Taylor 18 Mich App 381, 171 N.W. 2d 249 (1969), which lists the proper foundation, for admission of recordings, into evidence as:

1. Showing that the recording device was capable of taking testimony.
2. Showing that the operator of the device was competent.
3. Must show establishment of the authenticity and correctness of the recording.
4. Must show that "no changes," additions, or deletions have been made to the recording.
5. Must show the manner of the preservation of the recording.
6. Must prove the identification of the speakers voices'.
7. Must show that the testimony elicited was voluntarily made without any inducement.

Furthermore, Court of Appeals Judges stated, in People v Berkey :  
"For the above reasons, we conclude that the prosecution failed to

establish a proper foundation for the admission of the recordings. Accordingly, we conclude that the trial court erred in admitting the recordings into evidence and, therefore, defendant is entitled to a new trial."

Yet, this standard of admission of recordings of evidence, wasn't abided by The Trial Court, The Court of Appeals, The Michigan Supreme Court, thereby violating Petitioner's Due process rights.

It is nationally accepted that: "The simultaneous disclosure of a conversation to Third-Parties in participant monitoring and the recording of a conversation by a participant are equally intrusive or personal privacy; the fact that a recording of a conversation could be stored permanently and then produced long after the participants or their monitors forgot about the conversation, or re-recorded the recording makes participant recording just as intrusive of privacy as participant monitoring with its simultaneous transmission of a conversation and subject to the same restrictions on it's use. (INADMISSIBLE).

Defendant contended that a warrant authorizing recording of his telephone conversation with a Third-Party was defective under the Federal Constitution because it did not describe with particularity, the types of conversations to be monitored, did not state that there was probable cause to believe that a particular offense had been or was being committed by defendant, did not limit the number of telephone conversation to be monitored, and did not contain a termination date.

The court reversed defendants conviction. To pass muster under MCL 780.654, the search warrant was required to have sufficiently describe the conversation to be recorded. The warrant was deficient in that respect, the court had to reverse the judgement because the court was unable to say that admission of the evidence was harmless.

### THIRD-PARTY INADMISSIBLE

To focus on the risk of accurate reproduction would validate even the warrantless monitoring condemned in, Katz -v- United States, 389 U.S. 347; 88 Sct 507:19 LEd2d 576 (1967), because the conversation seized in that case was accurately "reproduced." The search and seizure clause is not directly concerned with whether the information is accurately "Reproduced" at trial but rather it is concerned with the procedures employed in acquiring the information.

### MRE 901 (5)(6)

5. VOICE IDENTIFICATION: Identification of a voice, whether heard firsthand or through a "recording", by opinion based upon hearing the voice at any time under circumstances "must" connect the voices with the alleged speaker.

6. TELEPHONE CONVERSATIONS: Telephone conversations, by evidence that a call was made to the "number assigned" at the time by the "Telephone Company", to a particular person"; In the case of a person including "Self-identification", "must" show the person answering "to be the one called,"

In People v Sutherby at the first trial, the prosecution witness Nick Larson tells the Jury/Court, under oath that "they did not know I was recording them, I tricked them both"! He also states: "I only re-

recorded," what I thought we needed." He also states: "I took my phone to Sherry Hall's house, and re-recorded the recording onto Sherry's cell phone"! Sherry took it to James Shears cellphone and re-recorded the taping, onto James cellphone." proper foundation reasons: #3, #4, and #7 violated!

#### EVIDENCE TO SUPPORT CHARGE

The sole evidence used in People v Sutherby, was a "Third-Party", warrantless secret non-consented phone taping of a private conversation that also never proved the authenticity, nor proved the identification of voices on the illegal recording! A proper motion for authentication of voices on recording was properly filed in trial court, however trial judge denied the motion, however the prosecutor didn't object to the motion. So, what we have here in People v Sutherby, was a "Due Process violation", 4th Amendment violation, a MCL 750.539(c)(e)(f) violation, a MCL 780.654 violation, a MRE 901 (5)(6) violation, and a Michigan Court of Appeals defined violation of "Proper Foundation Prong Violation of 7 Prong Test. These violations were not presented to the Michigan Court of Appeals nor The Michigan Supreme Court, due to Ineffective Assistance of Appellate Counsel.

In People v Sutherby, at the second trial, double jeopardy took place against Mr. Sutherby, when trial judge allowed a second trial to take place without proving, "manifest necessity," a miscarriage of justice also occurred when trial judge refused to allow the re-reading of witness testimony to jury, when it was requested to judge, by letter on the record, that statement be re-read to jury, in compliance



~~With~~ People -v- Howe 392 Mich. 620 (1974) and People v Smith, 396 Mich 109 (1976). Also, during second trial, "transcript of phone recording" was used that never subjected to authentication testing, nor voice confirmation was attained by expert, therefore according to Federal and State standards of admissible evidence, this admission was a clear major error, by trial court. This admittance of disputed recording, violated Mr.Sutherby's constitutional rights. While transcripts of alleged recording was read at second trial, it would've been only proper to compare the written transcripts with the recordings that were in evidence to confirm a verbatim transcription, along with a voice analysis to truly confirm, if the voice on the recording was indeed Mr. Sutherby. Yet, in the first trial, and in the second trial the voice of the recording wasn't verified as Mr.Sutherby, thus the transcript version of the recording is also impermissibly allowed as evidence.

These accounts are verifiable by the record, thus the state did not prove Mr. Sutherby guilty, "beyond a reasonable doubt!"

## ARGUMENT I

Whether Mr. Sutherby is entitled to a New Trial, based on Newly Discovered Evidence of affidavits, testifying to prove the plaintiff lied about washing the sheets, and also ineffective counsel by not calling these witnesses to support the proof.

In Jury Volume II Page #16 the question is asked to the so-called plaintiff on line #8: Q. What did you do about the bloody sheets?

A: I threw them in the washer.

Q. Wheres the washer?

A. In the basement.

Q. And what did you do in the basement?

A. I put the sheets in the washer.

Q. And did you start the washer?

A. Yes.

Q. Okay, what did you do after you did that?

A. I think I went on the couch and fell back asleep.

In the same Jury Volume II page #91 Jon Sutherby is being examined under-oath, when the following questions were asked.

Line #7 Q. Do you recall straightening that room up after this particular morning?

A. As a matter of fact after Kevin's reception and the party afterwards, everybody came back to my house. As a matter of fact, I did make that bed for somebody else to sleep in that night.

Line #13 Same page #91 Jon Sutherby on the stand under oath.

Q. Okay, When you made that bed or began to make it how did you find the mattress and the mattress pad, the sheets, if it was there, the pillow?

A. It looked like everything was there as I made it the day before.

Q. Was the sheets still there?

A. Yes

Q. Was the mattress pad still there?

A. Yes

Q. Was the blanket still there?

A. Yes

Q. And was the pillow still there?

A. Yes

Q. Did you see any, did you see any blood on the sheets?

A. No, not at all.

Cross Examination by Prosecutor:

Q. Sir, the only men who spent the night in your home were yourself, Kevin, Brian, who was on the love seat and Dean, your out of town brother, is that fair to say?

A. Joe Kirby was there also, but not in the morning.

Q. So you don't know whether or not he spent the night?

A. I said he was there when I went to sleep, He wasn't there when I woke up in the morning.

Q. Alright, now you don't know if someone washed the bed sheet in Janel's room and replaced them that morning, do you?

A. That couldn't have happened.

Q. Well why not?

A. Cause I got up at 7:30 in the morning.

Q. Now your brother is the person who's on trial today, right?

A. Yes

Q. And you're here today in part to protect him from anything that could happen to him is that fair to say?

A. I'm here to tell the truth of any questions you ask me.

The real sad part is, that Jon Sutherby was called as the States Witness. The other sad thin was, that the defense counsel didn't go back one witness to Janel's statements, and tell the jury that she stated she washed the sheets, and never asked the question if the

washer was broken, which everyone knew at the party that it was. Then also later during appeal, the defendant's attorneys did not submit the signed and solemnly sworn affidavits about the broken washer, the trial and appellant attorneys all together denied Mr. Sutherby a fair trial, and a perfect leave of appeal, for these reasons alone, among all of other reason, Mr. Sutherby's conviction shall be reversed and he shall be released from said confinement.

The Court also noted that defendant's own statements or actions may determine or influence the reasonableness of counsel's actions: "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* 466 US 691. The court continued:

For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's other litigation decisions." *Id.*

A defendant must establish that counsel provided representation that was constitutionally deficient, and must also "affirmatively prove prejudice." *Id.* 466 US at 693. It is insufficient to show that "the errors had some conceivable effect on the outcome of the proceeding." *Id.* The standard, then is "whether there is a reasonable probability that, absent the errors the factfinder would have had a reasonable doubt respecting guilt." *Id.* 466 US at 695. In making this determination, the trial court must consider all evidence presented. *Id.*

The Strickland standard was adopted in Michigan in *People v Dalessandro*, 165 Mich App 569, 575 (1987). The Michigan Supreme Court, in *People v Pickens*, 446 Mich 298 (1994), formally adopted the Strickland standard for Michigan. Under Michigan law, "counsel's ineffective assistance must be found to have been prejudicial in order to reverse an otherwise valid conviction." *Pickens*, 446 Mich at 314.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The Court noted that there is a strong presumption that counsel was effective, and defendant must overcome that presumption: "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance..." *Id.*, 466 US at 689. The Court noted that effective representation can be provided in "countless ways," and further noted that judicial scrutiny must be "highly deferential" and held that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's performance at the time." Strickland, 455 US at 689.

In making the determination, trial courts were also instructed to determine whether

...in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep

in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional norms.

Outside the law-enforcement context, the key provision regarding tape recordings of communication is 18 USC 2511 (d), which permits a person who is not acting under color of law to intercept wire or oral communication where such person is a party to the communication or where one of the parties to the communication or where one of the parties to the communication has given prior consent to such interception unless such communications is intercepted for the purpose of committing and criminal or tortuous act under state or federal law. Thus, any party to a conversation may record it or lawfully authorize someone else to record it so long as his purpose is not criminal or tortuous.

The Michigan statute thus seemingly bars both consensual and participant monitoring, as it twice expressly forbids recording without the permission of all parties. However, in Sullivan v. Gray, 117 Mich App 476 (1982), the Michigan Court of Appeals interpreted the statute as permitting participant monitoring. The Sullivan court stated: "The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on. Had the legislature desired to include participants within the definition, the phrase 'of others' might have been excluded or changed to 'of others or with others'.

The anomaly is that the Michigan statute permits participant monitoring, but prohibits consensual monitoring:

While a participant may record a conversation with apparent impunity, His sole consent is insufficient to make permissible the eavesdropping of a third party. Thus, while a participant may record a conversation, he or (she) may not employ parties to do so for him or (her).

As long as Sullivan, supra, remains valid, participant recordings

are lawful and thus necessarily admissible. However, if a participant authorizes a third party to record the conversations, both have violated the Michigan Statute, but not Title III. The Michigan statute, unlike Title III, contains no statutory exclusionary rule.

As such, the recording of a telephone conversation between the victim Janel Spears and allegedly with Defendant, by Nicholas Larsen is illegal. Based upon the forgoing analysis, that illegal recording was improperly admitted at trial and now requires overturning of conviction.

The prosecution provided testimony from Nicholas Larson in which Mr. Larson described how he taped a telephone conversation allegedly between Defendant and Janel Shears. The use of this testimony by the prosecution over objection by defense counsel allowed illegally obtained evidence to mislead the jury.

Of course this court will view MCLA 750.539c of the Michigan statute that governs eavesdropping upon a private conversation. The statute states: "Any person who is present or who is not present during a private Conversation and who willfully uses any device to eavesdrop upon The conversation without the cones of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony.

Prosecutor violated the State's statute by not providing the entire recording, which was contrary to Michigan court rules thereby causing prejudice to the Defendant at the time of trial.

As this court consistently reminds this nation's litigator; "each state has their own sovereignty", clearly this Michigan statute governing eavesdropping is contradictory to Federal laws that permit



both participant and consensual monitoring. Petitioner asks this court to intervene in this expressed deviation of Michigan statute. It is of constitutional magnitude to say the least, for to allow this; violation of due process to continue, it will be a blemish on the record of this Honorable Court, as well as keep an actually innocent man incarcerated.

In addition, Defense counsel had the Defendant submit to a polygraph examination which counsel informed Defendant that he had passed. Trial counsel didn't inform the prosecutor of test results nor did he make a demand for the polygraph examination pursuant to statute on behalf of Defendant, needless to say that this is clearly ineffective assistance of counsel according to Strickland v Washington, and standards of decency that this court prides itself of.

During District Court Preliminary Examination, the prosecutor never proved the voice on the illegal recording to be the defendant, and the phone number called by plaintiff was not listed to the defendant by phone carrier. These are two of Michigan statutorily mandated "Seven Factors", needed to use the phone recording, and also to lay the proper foundation which the prosecutor did neither. During trial, defense counsel motioned to the court to prove the authenticity and "voice" of the illegal recording. Trial court denied the motion, thereby allowing the use of illegal recording, violating due process and causing a miscarriage of justice.

#### Exclusion of exonerating evidence

At trial, just after the 1st selection of jurors, the prosecutor put in a motion to the court to suppress the Medical Exam of the

plaintiff, trial counsel stipulated to this motion. Trial counsel, sabotage Defendant's defense by not objecting to the motion, when the Medical Examination conclusively shown no abuse, as reported by U of M Doctor. The report detailed: "no sign of physical abuse, nor any signs of sexual abuse", it further stated: 7-2 x 10-4 Webs still intact. This evidence was intentionally suppressed to deny Defendant a fair trial.

## CONCLUSION

To be clear about this case, never does either prosecutor "prove" Mr. Sutherby guilty of this accusation , I call it an accusation due to the prosecution never introduces a crime. The entire case is about the illegal phone recording, the prosecutor at district court failed to lay the foundation, to use the recording. The states two witnesses, Janel Shears and Nick Larson were children at the time of this accusation, they didn't know they were committing felonies, pursuant to MCL 750.539 Sec. C,E,and F, they were influenced by James Shears, he convinced them to lie on Defendant Kevin Sutherby. Neither of these two witnesses knew Kevin Sutherby, at the time of this accusation.

By this being said, the prosecution didn't authenticate, this illegal recording by the two witnesses, there is a "Seven Prong Test" that the prosecutor must adhere to in order, to use the recording pursuant to People v Taylor, 18 Mich App 381 (1969), and People v Berkey, 437 Mich 40. The Michigan Court of Appeals adopted from an ALR article a "seven-part-test" to determine the admissibility of sound recordings, The Court of Appeals said in People v Taylor: "...that there must be:

1. A showing that the recording device was capable of taking testimony.
2. A showing that the operator of the device was competent.
3. Establishment of the Authenticity and Correctness of the recording.
4. A showing that changes, additions, or deletions have not been made.
5. A showing of the manner of the preservation of the recording.
6. "Identification" of the speakers involved, and
7. A showing that the testimony elicited was voluntarily made.

The recording of the phone conversation had been foreseen by the defense, and a written motion to suppress admission was filed before the case tried. During the course of the trial, and at the end of trial, defense counsel made sure the objection of the use of recording was on the record. Judge noted.

Of the "seven part test", only number two would of been noted, the detective states, "Nick Larsons phone was broken, no number one would be no good. Number three would not of passed, due to it was not authenticated and we know there were corrections during transferring by detectives onto the C.D. Number four would of been no good, due to Nick Larson telling the court/Jury that he re-recorded the taping onto two other cellphones, this caused deleting, editing, missing parts of the conversation. Number five proved wrong by Nick Larson stating, "he didn't preserve the recording, and took it to detectives, he re-recorded it on to Sherry Halls cellphone, and then she re-recorded it onto Mr. James Shear's cellphone." Lastly, and most importantly, Number Six; was not substantiated, a voice expert was never used by prosecution, nor was defense counsel's motion for expert and voice analysis granted by trial judge. In such a critical case, there is not valid reason why the motion for voice analysis not to granted, this clearly prejudiced defendant.

In 2010, Mr. Kevin Sutherby retained counsel; James A. Waske. Attorney Waske, told Mr. Sutherby that he would put in his supplemental motion to the Michigan Supreme Court, attorney Waske didn't submit the supplemental motion as agreed upon. Mr. Waske, was informed that prosecution's key witness Nick Larson, had contacted Mr. Sutherby, and offered to help him attain his freedom. This is one of

hundreds or possibly thousands of cases of actually innocent people convicted in the State of Michigan. My assertions is substantiated by the numerous exonerations in Michigan. Any defect in pleading, or any perceived defaults, are not due to Defendant's negligence. Upon a severe inquiry, you will see the obvious sabotage.

After attorney Waske was informed that Key Witness Nick Larson offered to assist Defendant Sutherby attain his exoneration, attorney Waske showed signs of hesitancy, when it came to preparing the proper motions to expedite Defendant's release. After several weeks of stalling to submit motion, to Mich. Supreme Court, attorney Waske quit representing Defendant Sutherby. Defendant being a novice to the court system failed to file timely, based upon the ineffectiveness and intentional sabotage by Attorney Waske.

Defendant subsequently, sought the representation of Attorney Ben Gonek, who like previous attorney failed Defendant in every way deemed possible. Attorney Gonek, from the beginning assured Defendant and Defendant's family, that freedom was on the horizon for defendant. Yet, all of a sudden Attorney Gonek's demeanor changed via telephone calls, since Mr. Gonek never visited Defendant, nor did he send letters in response to Defendant's numerous letters sent. These were red flags, but Defendant couldn't see that something sinister was in play. After composing, a self imploding motion of relief from judgement, expectantly denial arrived. Attorney Gonek's, attempts of appeals were denied, and after receiving five crucial orders from Federal District Judge Steven Murphy III, Attorney failed to respond to Judge Murphy, causing the judge to deny any relief to Mr. Sutherby. This behavior in the least, must inspire a intense inquiry of all the

attested facts relayed in this motion, and in all previous litigation. A bonafide miscarriage of justice is taking place. As a Man, I don't know how louder to scream for help in this situation.

After Judge Murphy denied motion, Defendant to the reigns, and proceeded in pro per, seeking a reconsideration, of which a denial was issued 8 months later.

Mr. Sutherby applied for COA in the Sixth Circuit Court of Appeals, which was denied by Judge Guy, for failing to prove why he was defaulted on his tolling time. Attorney Gonek, assured Defendant and Family that he informed the court about all perceived defaults, and assured us that we would receive justice in the Federal Courts. Attorney Gonek, didn't inform the court of why Mr. Sutherby was time barred, or why they should waive the tolling time.

Now Mr. Sutherby is telling this Honorable Supreme Court why he was time barred and that he is actually innocent, and any scrutiny you give to my pleas, you will see that I am factually, and actually innocent of the crime convicted of.

These errors of Trial, and appealate counsels, caused illegal evidence to get binded over for trial, a mistrial to ensue, then another trial to take place of which illegal evidence was used to convict Mr. Sutherby. I plead with this court to not discard this plea, for lack of proper articulation, or lack of proper adherence to filing. I call upon you, with the earnest cry for justice, for I've only received treachery thus far. Please hear my plea, do a cursory or an in depth look at transcripts, and filings to see for your self the justifiable reasons to grant: Motion to vacate conviction and sentence.

JOHN J. LUNDY  
NOTARY PUBLIC, STATE OF MI.  
COUNTY OF WAYNE  
MY COMMISSION EXPIRES Jun 25, 2023  
ACTING IN COUNTY OF Lenawee

*John J. Lundy*

*John J. Lundy*

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