

State of Michigan
Supreme Court

In re CERTIFIED QUESTION FROM THE
UNITED STATES DISTRICT COURT, EASTERN
DISTRICT OF MICHIGAN, SOUTHERN
DIVISION.

Supreme Court No. 162121
USDC-ED: 17-13292

AFT MICHIGAN,
Plaintiff,

v

PROJECT VERITAS, MARISA L. JORGE,
Defendants,

and

MICHIGAN ATTORNEY GENERAL,
Intervening Defendant.

**Brief Amicus Curiae on Behalf of Michigan Chapter of American
Academy of Matrimonial Lawyers (AAML) and State Bar of Michigan
Family Law Section (FLS) in Support of Project Veritas' Interpretation**

Submitted by:

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Statement of Jurisdiction

As a certified question, this Court has jurisdiction over this by court rule. See MCR 7.308(A)(2).

Statement of Question Presented

Under *Sullivan v Gray*, 117 Mich App 476 (1982), *lv den* 417 Mich 1051 (1983), Michigan defines eavesdropping as intercepting or recording the “discourse of others.” A party to a conversation may record the conversation without consent of the other parties.

The certified question is:

Whether Mich. Comp. Laws §§ 750.539a and 750.539c prohibit a party to a conversation from recording the conversation absent the consent of all other participants?

AAML/FLS answer this question: “No”

Statement of Interest of Amicus Curiae, AAML/FLS¹

The Michigan Chapter of the American Academy of Matrimonial Lawyers (AAML) consists of 38 leading family law attorneys in Michigan. The purpose of the AAML is “To encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected.” The AAML is a national organization headquartered in Chicago, IL. There are over 1650 “Fellows” of the AAML nationwide, with Fellows in all 50 states.

The Michigan Chapter of the AAML is governed by a Board of Managers. The Board sets policy for the Chapter. The Board of Managers approved filing a joint amicus brief with the State Bar of Michigan Family Law Section (FLS) to support the interpretation of the eavesdropping statute advanced by Defendant Project Veritas that Michigan is a one-party consent state.

The State Bar of Michigan Family Law Section (FLS) has 2651 members. The FLS provides education, information, and analysis regarding significant issues of concern through meetings, seminars, the FLS website part of www.michbar.org, public service programs, and publication of a journal. Membership in the Section is open to all members of the State Bar of Michigan.

The FLS, because of its active involvement in family law, has an interest in developing and supporting sound legal principals in all areas that affect families and children in our court system. The FLS is governed by an elected Council consisting of 21

¹ No counsel for a party authored this amicus brief for these parties, in whole or in part, and no person other than the amicus curiae, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this amicus brief.

members. The Council voted 17 in favor, 0 opposed, and 4 not voting, to submit a joint amicus brief with the Michigan Chapter of the AAML to support the interpretation of the eavesdropping statute advanced by Defendant Project Veritas that Michigan is a one-party consent state.

For decades and continuing to the present, based on the plain language of MCL 750.539c, as we believe was correctly interpreted in *Sullivan v Gray*, 117 Mich App 476 (1982), *lv den* 417 Mich 1051 (1983), AAML and FLS members advised clients they could make audio or video recordings of conversations and incidents to which they are a participating party. The recordings are often the only evidence of domestic violence, child abuse, or other issues relevant in family law matters taking place within the family home.

Most incidents of spousal or child abuse or other conduct endangering adult or minor family members, or relevant to the best interest of the child in custody and parenting time disputes, take place in the privacy of our clients' homes. Third-party witnesses are rarely present. Even if incidents of abuse take place in a public forum, it may be difficult to convince third-party witnesses to testify no matter how egregious the observed conduct. Often the only evidence of such troubling conduct is obtained through audio and video recordings made by parties to family law litigation or their children using smart phones and other mobile recording devices.

These recordings, subject to the sound discretion of experienced judges and referees are regularly used in contested court proceedings and considered by the Friend of the Court and judges in the Family Division of our Circuit Courts. The recordings are essential to reaching a just and safe result, including the protection of minor children, in many

family law matters every year. Criminalizing making or use of these recordings would be contrary to the interests of Michigan's families and children. If the Friend of the Court and judges in the Family Division of Circuit Court were deprived of this type of recorded evidence, they would be less able to reach reasonable and just decisions to protect family members, including children, in the family law matters before them.

Statement of Facts

AAML/FLS agree with the Attorney General team supporting Defendant Veritas' interpretation of Michigan's eavesdropping statute ("AG Defendant Team") that "the facts of the underlying case are not relevant to the interpretation of Michigan's Eavesdropping Statutes." This is purely a question of law.

Argument

Introduction: AAML/FLS adopts and incorporates by reference the statutory construction arguments made by the AG Defendant Team and amici Prosecuting Attorneys Association of Michigan (PAAM). We also adopt and incorporate by reference the policy arguments made by amici Michigan Coalition to End Domestic Violence and Sexual Violence (MCEDSV).

AAML/FLS agree with the AG Defendant Team there is a difference between a person recording a conversation to which she is a party and a person recording a conversation in which she is not a party. Michigan is in the majority of states adopting the traditional understanding of eavesdropping. One cannot eavesdrop on one's own conversation.

As family law attorneys, AAML/FLS recognize in the private family or household setting, abusive conduct that may endanger a spouse or child rarely has third-party witnesses. For their protection, threatened and abused family members must record conversations and interactions with their abusers. These recordings, usually on a smart phone or other mobile device, are often the only evidence available to a court when deciding how to protect a spouse or child from further abuse.

Statutory Construction: Interpreting the eavesdropping statute to criminalize legitimate and necessary efforts by victims of spousal or child abuse to document their attacker's actions places vulnerable spouses and children in even greater danger. Based on this concern, the Legislature did not intend to make such recording a criminal act when it defined eavesdropping in MCL 750.539a(2):

(2) “Eavesdrop” or “eavesdropping” means to overhear, record, amplify or transmit any part of the private discourse *of others* without the permission of all persons engaged in the discourse. Neither this definition or any other provision of this act shall modify or affect any law or regulation concerning interception, divulgence or recording of messages transmitted by communications common carriers. [Emphasis added.]

Use of the term “of others” requires no interpretation. A person eavesdrops only when overhearing or recording the private discourse “of others.” Recording one’s own conversations, even without permission of the others in the conversation, is not eavesdropping.

The reply brief of the AG Plaintiff Team arguing for all-party consent incorrectly asserts that the “any person who is present or not present” language of MCL 750.539c cannot be reconciled with a one-party consent interpretation. The AG Plaintiff Team erroneously equates being “present” with being a “participant” in discourse. Presence and participation are different concepts. “Present” is an adjective as used in the statute. It means being *at* a particular physical or geographic location during the *private discourse of others*. One may be present at a location where private discourse of others occurs without being a party to the discourse.

For example, a couple sits in a booth at Starbucks. They engage in private conversation. Because of the ambient noise in the café, they speak at a level where each can hear the other. The café is crowded. All booths are in use.

To converse across the table in their booth, the couple’s voices are just loud enough to be heard in the adjacent booths. A customer “present” in the next booth, only inches away from the couple behind a half-height frosted glass partition, hears the couple’s conversation and sees their heads silhouetted through the frosted glass.

The customer is “present” at the location of the conversation mere inches from where it is taking place. Although back-to-back, the customer is closer to one member of the couple than the couple is to one another. The customer “overhears” the “discourse of others” without being a party to the couple’s conversation. Despite being present, the customer is prohibited by MCL 750.539a(2) from using his smart phone or other device to record the couple’s conversation. there is no inconsistency between the phrase “any person who is present or is not present” in MCL 750.539c and the phrase “the private discourse of others” in MCL 750.539a(2).

If that is not sufficiently “present” for purposes of the statute, alter the scenario so the couple is engaged in private discourse while standing in line to order food and beverages. The other customer (in this era of social distancing) is six feet behind them. The customer can hear the couple’s conversation. As in the booth scenario, the customer is present at the location of the private discourse of others but is not a party to that discourse. The statute prohibits the customer from recording the couple’s conversation. Again, there is no inconsistency between use of the phrase “any person who is present or is not present” in MCL 750.539c and the phrase “the private discourse of others” in MCL 750.539a(2).

AAML/FLS agrees with the AG Defendant Team and several amici this is a question of statutory construction. It need not be resolved based on policy. The plain language of the statute provides a participant in a conversation cannot be an eavesdropper on his/her own conversation. Eavesdropping requires overhearing or recording the private discourse *of others* as asserted by the AG Defendant Team at pp 3-10 of its brief.

Policy Considerations: That the language is clear does not mean public policy should be ignored. Considering policy bolsters confidence that the Legislature, when enacting the eavesdropping statute, intended Michigan be a one-party consent state.

As technology advances, abusive conduct within a family or household that previously went undocumented or unrecorded can now be preserved for court review in family proceedings, proceedings to obtain or enforce a Personal Protection Order, or in a criminal prosecution of the abuser. Victims (and sometimes perpetrators) use smart phones and other mobile devices to record communication and conduct to which they are a party. Family and juvenile courts routinely receive such evidence and weigh it, along with other testimony, when fashioning remedies to prevent further abuse, make child custody decisions in the best interests of children, and make an equitable disposition of assets and income. Recordings of private discourse within the home affecting the best interests of the children, sometimes made by the children themselves, is useful to the family courts. Our family courts have discretion to exclude such records where they are not appropriate. However, interpreting the statute to criminalize making such recordings will rob spousal and child victims of a tool to document abuse and seek the exercise of court discretion to prevent future abuse.

For example, in *Dubin v Fincher*, MI COA Nos. 318076, 319177, decided 6/13/2014, unpublished (**Appendix 1**), the trial court relied on an audio recording made by the father of his conversation with the mother in awarding the father sole legal and sole physical custody of the parties' child. In that recording, the mother admitted "tossing" the parties' young child at the father, injuring the child's shoulder. There were no third-

party witnesses to this incident. Absent the father's ability to record his conversation without fear of criminal prosecution, there may have been no way to substantiate the mother's abuse of the child.

In *Gates v Kadoguchi*, MI COA No. 330778, decided 2/7/2017, unpublished (**Appendix 2**), the trial court awarded the mother sole legal and sole physical custody of the parties three minor children and suspended the father's parenting time pending counseling. The trial court relied on a video recording made by one of the three children showing the father physically abusing the children. There were no adult witnesses to the abuse. Only the father and the three minor children were present. But for the child's ability, without fear of criminal prosecution, to make a video recording of the abuse, the trial court may have been deprived of evidence it needed to protect all three children.

Joslyn v Scott, MI COA No. 337809, decided 11/21/2017, unpublished (**Appendix 3**), involved an audio recording made by the mother of her conversation with the father. In the recording, the father was yelling at the mother and telling her to remove the children from the room because "you know you got it coming." The trial court used the recording in its best interests findings on child custody. There were no third-party witnesses to the father's conduct, and it would have been a "he said, she said" situation, which is particularly difficult for the trier of fact to resolve, but for the mother's ability to make the recording without fear of criminal charges.

In *Mansfield v Mansfield*, MI COA No. 347408, decided 8/22/2019, unpublished (**Appendix 4**), an audio recording made by the father of an outburst by the mother was used by the trial court to support its finding on a crucial best interest factor in a child

custody dispute. Under MCL 722.23(j), the willingness and ability of a parent to facilitate a close and continuing relationship between the child and the other parent must be considered. The recording of the mother's verbal attack on the father assisted the trial court making a finding on this critical factor.

A trial court matter from the Oakland County Family Division, *Jibrini v Abuali*, Michigan Sixth Circuit No. 17-855468-DM, decided 6/29/18 (2018 Mich. Cir. LEXIS 4863) (**Appendix 5**), included the mother's video recording of the father's conversation with her and the children. During the recorded conversation, the father told the mother and children he hired a private investigator to follow the mother and would show the children the results of the investigation, and also accused her of having an affair. The video also shows the father accusing the mother of failing to financially support the children. When the older of the two children attempted to push the father away to close the door to the car in which the children were sitting, the father slapped the older child. The trial court relied on this video in making its best interests findings. There were no third-party witnesses to this emotional and physical abuse by the father. Had the mother believed she would face criminal prosecution for making this recording, and was fearful of recording this conduct, the court would have been deprived of this crucial evidence.

The ability of a child or spouse to record abusive discourse or conduct without fear of criminal prosecution may also deter an abuser from engaging in abusive conduct. No one has a "right" to abuse a spouse or children. A ubiquitous device like a smart phone, in the hands of a spouse or child may deter abuse before it occurs.

Similarly, no one has a "right" to perjure themselves to gain advantage in a high-

conflict family law dispute. Actual words or incidents, as recorded on a smart phone or other device, provide a more detailed record for the family court to consider. As part of their defense/denial system, abusers often lie and perjure themselves when attempting to avoid the consequences of their actions. Recordings of the threats and abuse prevent the abuser from revictimizing the battered spouse and child by denying that the abuse occurred or by blaming the victim. Reversing the victim roles is a classic abuse strategy, and widely acknowledged as an operative dynamic in abuse incidents.

Experienced family law attorneys, referees, and judges understand the “power and control” dynamics associated with spousal and child abuse. Part of this dynamic is the abuser “minimizing, denying, and blaming” the victim. This may include: (a) making light of the abuse, (b) saying the abuse didn't happen; (c) shifting responsibility for abusive behavior; and (d) saying (she) caused it. Understanding the Power and Control Wheel, Domestic Abuse Intervention Programs, Duluth Model. <https://www.theduluthmodel.org/wheels/understanding-power-control-wheel>, accessed 03/01/2021. No tool could be more targeted to combatting domestic violence and abuse than the ability of a parent or a child to record the abuse in real time, without fear of criminal prosecution.

Conclusion/Relief Requested

AAML/FLS adopts and incorporates by reference the statutory construction arguments made by the AG Defendant Team and amici Prosecuting Attorneys Association of Michigan (PAAM). We also adopt and incorporate by reference the policy arguments made by amici Michigan Coalition to End Domestic Violence and Sexual Violence (MCEDSV).

The traditional interpretation of Michigan's eavesdropping statute as set out in *Sullivan v Gray*, 117 Mich App 476 (1982), lv den 417 Mich 1051 (1983), with Michigan standing with the majority of states as a one-party consent state should be confirmed by this Court.

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Dated: March 3, 2021