STATE OF MICHIGAN
IN THE 53RD CIRCUIT COURT FOR THE COUNTY OF PRESQUE ISLE

STATE OF MICHIGAN,

Plaintiff,

Case No. 21-93191-FH

v.

HON. AARON J. GAUTHIER

ERIN JO CHASKEY,

Defendant.

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REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via regular mail, first class, postage prepaid, to the following on this 9th of March 2022:

Kenneth A. Radzibon, Esq.
Presque Isle County Prosecutor
PO Box 110
Rogers City, MI 49779

Daren A. Wiseley

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ARGUMENT

The State begins its brief implying that Ms. Chaskey was somehow not allowed to be in the school building immediately after the instructional school day. Many people come and go after school through the entrance for sporting events, practices, health clinic, and the before and after program. Parents that pick up their children or need to talk to school officials typically enter after school hours, since many work during the day. Ms. Chaskey **had even been specifically requested to come inside the school that day and pick up a School Board application by Mr. Fullerton, who had no issue with this until after the incidents occurred.** The proposition that Ms. Chaskey wasn't supposed to be in the school building, at that day and time. is absurd on its face.

There is not a single published or non-published case in Michigan where a defendant was charged with, or convicted of, felony eavesdropping in circumstances resembling this one. To be sure, if there was a case, the Prosecutor almost certainly would have cited it. Instead, he claims to have found a new, never-before-discovered application of this crime that was unknown to all prosecutors and courts before him. Despite his personal opinion that Ms. Chaskey committed a crime, "[n]othing can be a crime until it has been recognized as such by the law of the land." *People v. Thomas*, 438 Mich. 448,456; 475 N.W.2d 288 (1991).

I. THE STATE HAS NOT ALLEGED THE ELEMENTS OF AN EAVESDROPPING CRIME.

The State has not asserted facts sufficient to allege the elements of any crime, nor does its Response overcome that. Instead, the State relies on bare assertions of legal conclusions and then states, *ipso facto*, that it has met its burden. It has not. A simple review of the Complaint will quickly reveal that the State does not even allege the elements of the crime. Nor does it allege

any expectation of privacy. Instead, the State relies on conclusory statements that something unlawful "is believed" to have happened. Its Charge should be dismissed.

The Prosecutor's assertion that "defendant's conclusory theory of facts in her motion" is quite ironic, considering the Prosecutor provided not a single example of why he believes said facts are "conclusory." The State, in fact, relied on a conclusory complaint, failing to even mention a reasonable expectation of privacy. It now attempts to save its Charge from dismissal by asserting there was a reasonable expectation of privacy, even though this was not even mentioned until the preliminary examination and the State's Response.

"Private Conversation" depends on the reasonable expectation of the plaintiff. *Dickerson v. Raphael*, 222 Mich. App. 185 (1999); *People v. Stone*, 463 Mich. 558, 621 N.W.2d 702 (2001).[1] Just because Fullerton and Benson testified that they had a reasonable expectation of privacy, does not make it true, from a legal perspective. All the State has to offer in support is that the conversation had a reasonable expectation of privacy because the parties involved "said so." Under the State's logic then, two people could go to a crowded rock concert, and their conversation would be private, regardless of how loud they were, or how nearby others were, so long as they stated they "had a reasonable expectation of privacy." The State's argument leads to arbitrary results and totally undermines the purpose of the eavesdropping statute.

The Eastern District's approach makes much more sense, holding that where a party simply asserts that it "had an expectation that their conversation would be private, but fail to provide any facts, legal authority, or analysis to support their conclusion," then such statements

[1] In order to prevail on a claim under the eavesdropping statute, a plaintiff must be able to show that it had a "reasonable expectation of privacy in the recorded conversation" at issue. *Bowens v. Ary, Inc.,*489 Mich 851(2011).

are 'underdeveloped' and 'sounds in speculation.'" *Dearborn Tree Serv., Inc. . Gray's Outdoorservices, LLC*, 2014 WL 6886330 (E.D. Mich. 2014). The state fails to provide facts, legal authority, or analysis in support of its conclusion. Its only reference to legal authority correctly acknowledges that a reasonable expectation of privacy is necessary, but the State fails to provide any law applicable to even allege that Fullerton and Benson had a reasonable expectation of privacy.

The State even admits in its response that Ms. Chaskey was out of sight from the conversation in Fullerton's office as she waited in the foyer. Likewise, she couldn't see them. She was only alerted to the conversation because they were so loud from down the hall and mentioning her specifically. Had they not been so loud, she wouldn't have ever known the conversation had taken place. All it would have taken was some minimal step to ensure the conversation was private. A private conversation may occur within the sight but not the hearing of others. *See, e.g., People v. Camak*, 5 Mich.App. 655, 658–660, 147 N.W.2d 746 (1967); *Dickerson v. Raphael* 222 Mich. App. 185 (1999). Ms. Chaskey could hear this conversation clearly down the hall and out in the foyer. For these reasons, it is therefore a factual impossibility Ms. Chaskey could have eavesdropped.

The State provides no legal authority to show its conclusions are substantiated by relevant law. In desperation to survive dismissal, it hopes the Court will find a fact question to be tried by a jury. It is a sad state of affairs when the government essentially admits it has no legal authority on its side to prosecute a defendant with. Instead hoping it can survive to fight another day and can somehow cobble a case together to prove guilt beyond a reasonable doubt to a jury.

However, there is no factual question to be resolved by a trier of fact. The State has failed to even allege an Eavesdropping charge, and this case should be dismissed with prejudice.

II. THE STATE REDEFINES AND BROADENS THE EAVESDROPPING STATUTE

Ms. Chaskey certainly agrees with the State's assertion that the fact that cell phones capable of surreptitiously recording are in widespread use does not excuse the trampling on another person's rights and expectation of privacy. She also agrees that the Michigan eavesdropping statute protects citizens against such intrusions. These issues were never in dispute. The implication that she is arguing for unfettered access to record others is a complete strawman, and nowhere to be found in Her Brief.

The State next cites *Sullivan v. Gray*, 117 Mich. App. 476, 324 N.W.2d 58 (Mich. Ct. App. 1982). The issue in question being whether the statute requires one- or two-party consent. *Sullivan* held, that MCL 750.539a "unambiguously excludes participant recording from the definition of eavesdropping. . . ." This case is largely irrelevant here because Ms. Chaskey has never argued that she was a participant. A necessary element for application of the statute to *Sullivan*, or any other case, is that the conversation must be private. The State in its discussion of *Sullivan*, ignores the fact that if the conversation is not private to begin with, an individual cannot have eavesdropped. Which is exactly why Ms. Chaskey could not have.

The State also redefines the statute when it states, "the criminal eavesdropping statute prohibits the conduct of one private individual to record the discourse of another individual without that person's consent." If that were the case, ANY recording of another individual (without consent) would be a felony. The critical omission is that **the discourse must be**

private. The State is now redefining the statute and broadening it by magnitudes on its own assumptions and lacking any legal authority.

III. THE STATE MISUNDERSTANDS CONSTITUTIONAL ANALYSIS.

The United States Constitution protects an individual's right to privacy from government interference in several areas. The State's Response asserts "Defendant's claim that her civil liberties are being violated begs the question and ignores the fact that her actions violated the constitutionally protected right of privacy of Rod Fullerton and Michael Benson" is utterly preposterous. Ms. Chaskey is a private citizen; she could not be "violating constitutionally protected rights." Ms. Chaskey's rights were violated by this prosecution because it is by *state actors*, as the Fourteenth Amendment is explicitly applicable to. While there are limited circumstances in which the U. S. Constitution has been determined to restrain the behavior of private actors (such as racial discrimination), the Supreme Court has never done this within the context of "privacy." Privacy of information, specifically, is protected from other civilians by statute and tort law.

Likewise, *Griswold v. Connecticut,* involved the use of married couples to buy and use contraceptives without government restriction, holding a Connecticut statute unconstitutional. This argument is a red herring, completely irrelevant, and a desperate attempt at muddying the issues in this case. It is quite concerning a public official with the force of law behind him has such a misunderstanding of basic constitutional application.

IV. THE STATE FAILS TO ADDRESS THE FIRST AMENDMENT ISSUES RAISED BY MS. CHASKEY.

Ms. Chaskey's First Amendment Right to Gather, Receive, and Disseminate Information is completely infringed by the prosecution of her protected activity, as discussed in detail in Her Brief. While the First Amendment was raised in *Dickerson,* the facts of that case were wildly different, as are the other applications of the eavesdropping statute.[2] Which, again, shows that her actions were not the type contemplated by the act, and the actions she took did not violate it.

The State egregiously mischaracterizes Ms. Chaskey's argument in its discussions of *Dickerson*, *New York Times Co.* and *Bartnicki.* Her brief made abundantly clear she is not conceding to the State's unfounded argument that she did anything "illegal", but only cited these cases to illustrate the point that ***First Amendment protections extend even farther than required*** for Ms. Chaskey's actions to be protected by it.

Ms. Chaskey does not argue the statute is facially unconstitutional, she clearly recognizes, and has never called into question, the legitimate interests protected when one has a reasonable expectation of privacy. The cases the State cites where a defendant did not prevail on a First Amendment argument all involved legitimate privacy inteests of the plaintiffs, and facts much different from this one. The statute is unconstitutional ***as applied*** to Ms. Chaskey. The First Amendment is a shield that protects our most vital rights and should not be taken lightly. The statute is being wrongfully applied against her, but apparently the State asserts that this

[2] In *Dickerson,* Parent's conversation that was surreptitiously transmitted by hidden microphone on child remained "private," and, thus, talk show host, show's producer, and contractor, by covertly recording and then rebroadcasting conversation, violated eavesdropping statute prohibiting use of device to eavesdrop upon private conversation without consent of all parties, even though microphone broadcast conversation on public airwaves, and even though conversation occurred in public park; parent had no knowledge of air wave transmission of her words and expected private conversation with her daughter.

prosecution is within the statute. If a law in question violates the First Amendment, then that law does not apply. *See, e.g., Vance v. Universal Amusement Co., Inc*.,445 U.S. 308 (1980) (statute permitting overbroad prior restraint is unconstitutional); *Boddie v. ABC, Inc.*, 881 F.2d 267. (6th Cir.1989) (dismissing claim under wiretapping statute under the void-for-vagueness test because it conflicted with First Amendment rights).

Instead of addressing the arguments Ms. Chaskey raised in her Motion, the Prosecutor erects a straw man argument that Ms. Chaskey believes the First Amendment gives her the absolute ability to record wherever and whenever (which she never claims) then cites cases that the protection is not absolute (a proposition which no one disputes), and then concludes he possesses the power to charge a felony against a parent waiting in a public foyer immediately after the instructional school day tin which she was told by the superintendent to be there, that overhears a conversation from around the corner and down the hall that is so loud she can receive it with her phone While the conversation in question may not be of much interest to the prosecutor, there are many parents with minor children in the community who it would be of great public importance to. To say that the State's brief lacks proper constitutional analysis of Ms. Chaskey's rights would be a massive understatement. Indeed, the State completely ignores the required analysis when First Amendment constitutional rights are at stake.

The State has failed to provide analysis or response to the following critical First Amendment issues Ms. Chaskey raised in Her Brief:

- Ms. Chaskey's actions were of public concern and thus receives the highest level of protection.
- The First Amendment protects the right to record public officials doing their jobs in public places.

- Recording is the only way Ms. Chaskey or another similarly situated person could provide critical information related to misconduct that would otherwise be denied.
- There were no reasonable "time, place, manner" restrictions.
- The State has no compelling interest to prohibit Ms. Chaskey's actions.
- The restrictions on Ms. Chaskey were not narrowly tailored.
- Ms. Chaskey was not left with alternative channels.
- The least restrictive means were not used.
- The censorship was not content-neutral.
- The censorship was not viewpoint neutral.

It is axiomatic that legal briefs should identify the issue, state the rule, and then conduct an analysis applying the rule to the facts to reach a conclusion. However, in this case, the State misses the issue, provides no proper analysis, and yet demands that this Court accept its conclusion regarding First Amendment jurisprudence.

V. THE STATE FAILS TO ADDRESS THE ISSUE OF VINDICTIVE PROSECUTION.

The State failed to provide any argument to rebut the fact that Ms. Chaskey's Right to Due Process of Law guaranteed by the 14th Amendment to the United States Constitution was violated by this Vindictive Prosecution, for all of the reasons detailed in Her Brief.

The State provides only one sentence that can be construed as a response to this, "This writer takes great offense to this ridiculous charge, especially when based only on the charging decision made which is within my statutory discretion." First off, if anyone should be offended it is Ms. Chaskey. She and her family have been put through the ringer by these ridiculous allegations. She is facing the stress of a felony court case, associated costs, humiliation in the community, and ***up to two years in prison.*** Not to mention, as this Court and the Prosecutor are

well aware, missed time being involved in her son's life such as school, sports, etc., that she will never get back.

Also, Her Brief made abundantly clear there were more factors than just the charging decision to show the vindictive prosecution. New additional factors can be cited in the State's response – including the assertions that she somehow "violated the constitutional rights" of Fullerton and Benson.

CONCLUSION

What is most apparent in the State's Response is the failure to substantiate its conclusions with relevant facts or legal authority. When the proper law is cited appropriately, it typically is over an issue not in dispute, or at the least, doesn't advance its cause. The Response is plagued with misapplication of law, and at times, just getting it completely incorrect. The State also failed to address numerous significant issues and arguments raised by Ms. Chaskey. For all the reasons stated above and, in Her Brief, Erin Chaskey respectfully requests this Honorable Court dismiss the Charge against her with prejudice and grant such other and further relief as is just and appropriate.

Respectfully Submitted,

Dated: May 9, 2022

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