STATE OF MICHIGAN

IN THE SUPREME COURT

The People of the State of Michigan,

Plaintiff-Appellee.

SC No. 150994

COA No. 314564
Calhoun CC: 2001-004547-FC

VS.

Lorinda Irene Swain,

Defendant-Appellant.

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AMICUS CURIAE BRIEF ON BEHALF OF DEFENDANT-APPELLANT LORINDA IRENE SWAIN.

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TABLE OF CONTENTS

	PAGE NO.
Index of Authorities ----------	(i)-(ii)
Statement of Basis of Jurisdiction ----------	(iii)
Statement of Questions Involved ----------	(iv)
Statement of Facts ----------	(v)
ISSUE NO. (1): ----------	1
ISSUE NO. (2): ----------	6
ISSUE NO. (3): ----------	9
ISSUE NO. (4): ----------	11
ISSUE NO. (5): ----------	11
ISSUE NO. (6): ----------	16
CONCLUSION AND RELIEF SOUGHT AS TO ALL (6) ISSUES: -	18-20

STATE CASES: INDEX OF AUTHORITIES Page NO.

People Vs Burstein, 261 Mich 534 (1933) ---------- 17,
People Vs Terry Burton , 74 Mich App 215 (1977) ---------- 2,3,4
People Vs Cross , 468 Mich at 692 (2003) ---------- 1,5,6,19
Bay Co. Pros. VS District Judge , 109 Mich App at 486 (1981) -- 7,
ExParte Palm , 255 Mich _____ ---------- 13,
People VS Hampton , 407 Mich at 373 (1979) ---------- 18,
People Vs Harrison , 44 Mich App 578 (1973) ---------- 7,
People Vs Harwich , 259 Mich 361 (1932) ---------- 17,
People VS Alvin Johnson , 396 Mich at 440 and 442 (1976) ----- 16,
People Vs Kayne , 268 Mich at 194 (1934) ---------- 7,
People Vs Kincade , 206 Mich App 482 (1994) ---------- 18,
People Vs Parker , 393 Mich at 541 (1975) ----------17,
People Vs Ruo , 491 Mich at 281-282 (2012) ---------- 4,
People Vs Taylor , 159 Mich App 468 (1987) ---------- 7,
People Vs White , 401 Mich 482 (1977) ---------- 7,

FEDERAL CASES:

Brady VS Maryland , 373 U.S. 83 (1963) ---------- 6,7,8,9,19
ExParte Siebold , 100 U.S. (10 Otto) at 376 (1879) ---------- 16,
Schledwitz VS U.S. , 169 F 3d 1003 (6th Cir, 1999) ---------- 8,
U.S. VS Bagley , 473 U.S. at 675-676 (1988) ---------- 8,
U.S. VS McKinley , 519 F 3d at 814 (8th Cir, 2008) ---------- 8,
U.S. VS Presser , 844 F 2d at 1286 (6th Cir, 1988) ---------- 8,

MICHIGAN (1963) CONSTITUTION:

ART (4) § (36) ---------- 14,15,19,
PREAMBLE [Citing ExParte Palm 255 Mich ___] ---------- 13,
ART (5) § (14) ---------- 12,
ART (XI) § (1) ---------- 13

MICHIGAN CONSTITUTION **(1908)**:

Art (5) § (40) ---------- 13,

PAGE NO.

MICHIGAN COURT RULES:

6.201 (B) ---------- 9,10,11,19,
6.431 (B) ---------- 18,
6500 et. seq. ---------- 7,
6.502 (G)(2) ---------- 1,2,3,4,5,9,10,12,16,19,
6.508 (D)(3)(a) ---------- 10,
6.508 (E) ---------- 2,
7.302 (B)(1) ---------- 13,
7.302 (B)(3) ---------- 13,

MICHIGAN STATUTORY LAW:

750.520 et. seq. ---------- 12,15,16,
767.40 (a)(1) ---------- 7,
767.40 (a)(5) ---------- 7,
767.94 (a) ; MSA 28.1033 ---------- 7,
770.1 ---------- 9,10,16,17,18,19,
770.16 ---------- 9,
791.243 ---------- 12,

MICHIGAN PUBLIC ACTS:

(328) of (1931) ---------- 13,14,
(266) of (1974) ---------- 14,15,

SENATE JOURNAL:

(1207) of (1974) ---------- 14,

Statement of Basis of Jurisdiction

This Honorable Michigan Supreme Court has Jurisdiction over this Case on Appeal pursuant to MCR 7.301 (A)(2) and this Amicus Curiae Brief pursuant to MCR 7.306 (C).

STATEMENT OF QUESTIONS INVOLVED

Upon this Honorable Court GRANTING LEAVE TO APPEAL in this Case and the Court Granting Petitioners right to file this Amicus Curiae Brief , this Court asked to Brief the following Questions:

ISSUE NO. (1): Whether the Test set-forth in Cress , for determining whether a Defendant is entitled to a New Trial, based on Newly Discovered Evidence (applies) in determining whether a Second or Subsequent Motion for Relief from Judgment is based on a claim of New Evidence that was not discovered before the First such Motion under MCR 6.502 (G)(2) ?

ISSUE NO. (2): Whether the Defendant is entitled to a New Trial premised on the Prosecutors Violation of the rules set-forth in Brady VS Maryland ?

ISSUE NO. (3): By what standards Michigan Courts consider a Defendants assertion that the evidence demonstrates a significant possibility of 'Actual Innocence' in the context of a Motion brought pursuant to MCR 6.502 (G)(2) and whether Defendant in this Case qualifies under that standard ?

ISSUE NO. (4): Whether Michigan Court Rules , MCR 6500 et. seq (or) another provision provides a basis for Relief , where a Defendant demonstrates a significant possibility of Actual Innocence ?

ISSUE NO. (5): Whether MCR 6.502 (G) does Bar Relief, there is an Independent basis on which a Defendant who demonstrates a 'significant possibility of Actual Innocence ?

ISSUE NO. (6): Whether Defendant Swain is entitled to a New Trial pursuant to MCL 770.1 ?

STATEMENT OF FACTS

Petitioners Kelvin David Moffit and Edward William Taylor rely on Defendent-Appellants Statement of facts for purposes of this Appeal cited in Her Application/and Brief on Appeal.

ISSUE No. (1): Whether the test set-forth in CRESS , for determining whether a Defendant is entitled to a New Trial, based on Newly Discovered Evidence (applies) in determining whether a Second or Subsequent Motion for Relief from Judgment is based on a claim of New Evidence that was not discovered before the First such Motion under MCR 6.502 (G)(2) ?

LEGAL ARGUEMENT:

The answer to this question is Yes as they both work in connection with the other for the following reasons.

As an initial inquire, the Trial Court must (first) see that the Defendant has met his/her burden under MCR 6.502 (G)(2) of to wit:

(1): Newly Discovered Evidence, (or)

(2): Retroactive change in the Law.

If this burden has been met by the Defendant for either two of these exceptions, then the matter proceeds to the CRESS Test set-forth in People Vs Cress , 468 Mich at 692 ; 664 N.W. 2d 174 (2003); that to wit:

(3): The evidence itself, not mery its materiality, was Newly Discovered.

(4): The Newly Discovered Evidence is not cummulative to any prior Trial Testimony ,

(5): Defendant could not using reasonable diligence have discovered and produced the evidence at Trial, and

(6): The New Evidence makes a different result probable on Retrial.

In this Case at Bar, Defendant-Appellant Swain sought to bring in 'Newly Discovered Evidence', the (first exception under MCR 6.502 (G)(2)), of the Testimony from the Trial Courts' Evidentiary Hearing of one Dennis Book.

The People argued on Appeal before the Michigan Court of Appeals that because Defendant-Appellant (knew) as well as Her Trial Counsel (Edwin Hettinger) of Dennis Books' presence in the Trailer during portion of the relevent period, that they knew that Dennis Book would be aware that abuse had not occurred in his presence in the Home during part of the relevent time. That therefore, Dennis Books testimony is not Newly Discovered Evidence.

This Writer would suggest that the Peoples' position because that Defendant-Appellant and her Attorney knew of Dennis Books' presence in the Trailer during the relevent time in question, that his Testimony is not Newly Discovered. However, neither Defendant-Appellant nor Trial Counsel (knew) what Dennis Book (knew), (Seen), in connection with this Case as he was a (hostile Witness) as the Michigan Court of Appeals so notibily pointed out. Therefore, this Writer would suggest to this Honorable Court that Dennis Books' Newly Discovered Evidence Exculpatory in nature did not come about until the Calhoun County Circuit Court Ordered a Evidenctiary Hearing pursuant to MCR 6.508 (E) , and Dennis Book testified to the same.

Further, this writer on this same point would point out that this same type of arguement was put before the Calhoun County Circuit Court back in (1977) in the Case of People Vs Terry Burton, 74 Mich App 215; 253 N.W. 2d 710 (1977).

In Burton Supra the Case on Appeal was about whether the Trial Court errored when it refused to Grant Burton's Motion for a New Trial based on Newly Discovered Evidence. On page no. 223 of the Court of Appeals Opinion, they held that:

> ' The Evidence is also Newly Discovered. The Trial Court held that the Evidence was not Newly Discovered since the Witnesses , particularly Defendants Sisters, had possessed their knowledge since the date of the offense. However, evidence is newly discovered if it can be shown to have been unknown to the Defendant or his/her Counsel at the time of Trial.
>
> The fact that the witnesses obtained their knowledge prior to Trial [is not a decisive factor]. In a practical sence to hold otherwise, would render futile virtually all future claims of Newly Discovered Evidence '. i.d.

In this Case at Bar, an Evidentiary Hearing was held, and Book had testified that he would have testified favorably to Defendant-Appellant that 'no sexual abuse occurred in his presence during the relevent times in question'.

In light of this Newly Discovered Evidence testimony of Dennis Book at the Evidentiary Hearing, this Court should come to the conclusion that Books' Testimony is 'Newly Discovered' within the meaning of MCR 6.502 (G)(2) after Trial. Further, this Court should conclude that the fact Dennis Book obtained his knowledge prior to Trial , is not a decisive factor as the People of the State of Michigan are arguing before this Court and whom the Court of Appeals agreed with in this Case. The Burton panel ruled in Defendant-Appellants favor as outlined above. This Court should come to that same conclusion.

Further, this Honorable Court should conclude as well that just because Defendant-Appellant and Her Trial Attorney 'knew of Dennis Books' [presents] in the Home during the relevent time in question , [does not mean] 'they knew what Dennis Book rightfully testified to at the Evidentiary Hearing'. Once that Evidentiary Hearing was held and the Trial Court of Calhoun County heard the same, that he would have testified favorably to Defendant-Appellant that 'No Sexual Abuse occurred in his presence during the relevent time in question', thats when it became Newly Discovered Evidence pursuant to MCR 6.502 (G)(2).

Thus, the People of the State of Michigan have no arguement then. This is because they knew, Detective Picketts and the Calhoun County Prosecuting Attorney because of the conversation Detective Pickett had with Dennis Book during Detective Pickett's Investigation on what He--- Dennis Book knew ; not Defendant-Appellant and Her Attorney, because it was ruled that it was hearsay evidence, although it was a Police Report that Detective Pickett was the author of. These facts were not disclosed to Defendant-Appellant or Her Attorney.

Therefore, this Honorable Court rightfully held in People Vs Rua, 491 Mich at 281-282 (2012) [Quoting: Burton Supra said:

> ' [E]vidence is Newly Discovered (if) it can be shown to have been unkown to the Defendant or his/her Attorney at the Time of Trial'.

Indeed , this Honorable Court held that:

> "[D]ne does not discover evidence after Trial that one was aware of prior to Trial. This is the only practicale reasonable understanding of knewly discovered evidence'

Thus, this Honorable Court 'should conclude' that Defendant-Appellant and Her Trial Counsel 'did not know' of the knowledge that Dennis Book would testify to, that ' No Sexual Abuse occurred in his presence during the relevent time in question' at the Trial of this Exculpatory Evidence; but Detective Pickett and the Calhoun County Prosecuting Attorney 'did know'; as will be argued in Issue No. (2) Infra in this Brief.

In the same fasion, this Honorable Court should conclude that Defendant-Appellant Swain had therefore met Her burden under the CRESS TEST that runs in concert with MCR 6.502 (G)(2) of to wit:

[1]: The Evidence itself of Dennis Book, not merly its' materiality, was Newly Discovered at the time of the Trial Court conducting an Evidentiary Hearing,

[2]: This Newly Discovered Testimony Evidence of Dennis Book was not cummulative to any prior Trial Testimony,

[3]: Defendant-Appellant could not using reasonable diligence, could not have produced this Witness at Trial because she did not know what he knew,

[4]: The New Evidence of Dennis Book makes a different result probable on retrial, where this Case turns on a credibility contest between Ronnie Swain and Defendant-Appellant. Where Dennis Books' testimony Exculpatory in nature will produce a different result on retrial attacking Ronnie Swains' credibility.

Conclusion

For the foregoing reasons outlined in this Issue No. (1), this Honorable Court 'should conclude' that Defendant-Appellant Swain did produce Newly Discovered Exculpatory Evidence of Dennis Book 'after Trial' at the Calhoun County Circuit Courts conducting of an Evidentiary Hearing pursuant to MCR 6.502 (G)(2). Further, this Honorable Court 'should also conclude' that Defendant-Appellant Swain also met Her

burdon of proof as outlined above herein, under the CRESS TEST, that entitles Her to a New Trial, as the Trial Court had so rightfully Ordered. Therefore, as to this Issue, this Court should conclude that the Michigan Court of Appeals erred as a matter of Law and that this Honorable Court REVERSE the Court of Appeals decision as to this Issue No. (1) and that this Court REMAND this Case back to the Calhoun County Circuit Court for a New Trial.

ISSUE NO. (2): Whether the Defendant is entitled to a New Trial premised on the Prosecotoers Violation of the Rules set-forth in Brady Vs Maryland ?

LEGAL ARGUEMENT:

The Answer to this Question is Yes !

The Court of Appeals erred in Reversing the Trial Courts' Granting of a New Trial to Defendant-Appellant in this Case, where the Court of Appeals Decision held:

> " Given defendants firsthand knowledge of Books presence in the Trailor, she had available to her all the essential facts permitting her to take advantage of any 'exculpatory Information Book could have provided'. Defendants failure to avail herself of Books Evidence by not calling him as a witness at trial, despite the fact that she knew he had not witnessed any abuse , [does not establish the existence of a Brady Violation]."

HOWEVER, the Court of Appeals did rightfully 'NOTE' that Dennis Book had a conversation with Detective Pickett over the Telephone and then and there Dective Pickett 'KNEW of Dennis Books Exculpatory Evidence' that was material to Defendant-Appellants Defense because it went to 'GUILT' or 'Innocence' Brady Vs Maryland, 373 U.S. 83 ; MCR 6.201 (B) -- Mandatory Disclosure(1) ; MCL767.94a ; MSA 28.1023 . Detective Pickett was put on Notice of this Res Gestae Eye Witness that Dennis Book had first hand knowledge that 'No Crime of Criminal Sexual Conduct took place in his presence during the relevent time period in question'.

Therefore, at the time the Prosecution files their Felony Information, the Prosecutor is also statutorally required to attach a list of all Res Gestae Witnesses known to the Prosecution (or) Law Enforcement ; MCL 767.40 (a)(1). See Also : MCL 767.40 (a)(5), [The Prosecutors Statutory Duty to reasonably assist the Defendant in locating and serving process on the witness]. It is the Prosecutors Duty to produce Dennis Book as a Res Gestae Eye Witness.

The Res Gestae Witness rule encompasses not only 'eye witnesses' but also any witness whose Testimony may aid the making of a fair presentation of the Res Gestae of the Crime Charged and may be necessary to protect the accused, [e.g. Defendant-Appellant Swain] from being the Victim of a False Accusation. See: People VS Kayne, 268 Mich at 194 (1934) ; People Vs Harrison, 44 Mich App 578 (1973).

Because Dennis Book is a Res Gestae Eye Witness, whom the Prosecutinn was required by Law to produce at Trial; MCL 767.40 (a)(5) ; People Vs White, 401 Mich 482 ; 257 N.W. 2d 912 (1977).

(1) : MCR 6.201 (B) provides that Prosecutors MUST supply Defendants with: 'Any Exculpatory Evidence Information known to him or her'; People Vs Wimberly, 384 Mich 62 (1970) ; People Vs Taylor, 159 Mich App 468 (1987) and copies of Police Reports ; Bay County Prosecutor Vs District Judge , 109 Mich App at 486 (1981).

This is because the Prosecution rely so heavily on Police and other Law Enforcement Authorities, (e.g. Detective Pickett), that the obligation imposed under Brady Vs Maryland , would largely be ineffective if those other members of the Prosecution Team, [e.g. Detective Pickett], had no responsibility to inform the Calhoun County Prosecutor about this 'Res Gueste Eye Witness' [Dennis Book] and his Exculpatory Evidence that undermines the States theroy.

As a practicle matter then, BRADYS' ultimate concern for ensuring that this Defendant-Appellant Swain receives a 'fundamentally Fair Trial' ; U.S. VS Begley, 473 U.S. at 675-676 ; 105 S. Ct. 3375 ; 87 L Ed 2d 48 (1988) ; explaining that, the purpose of the BRADY RULE is to ensure that a Miscarriage of Justice does not occur, demands that BRADYS protection also extends to actions of Law Enforement, [e.g. Detective Pickett] ; U.S. VS McKinley, 519 F 3d 806 at 814 (8th Cir, 2008).

Defendant-appellant Swain therefore was Denied Due Process of Law in Violation of the United States Constitution Amendment (XIV) and Michigan Constitution(1963) Art 1 sec. (17), by the Calhoun County Prosecutors failure to produce , by Law, Res Gueste Eye Witness Dennis Book to the Trial to present his 'Exculpatory Evidence' that he seen no Sexual Abuse against Ronnie Swain during the relevent times in question' pertaining to this case that was Material , Schledwitz Vs U.S., 169 F3d 1003 (6th Cir, 1999).

The Remedy for this BRADY VIOLATION is a 'NEW TRIAL' ; SEE: U.S. VS Presser, 844 F 2d at 1286 (6th Cir, 1988).

CONCLUSION

For the foregoing reasons outlined above as to this Issue No. (2), this Honorable Court 'should conclude' that Defendant-Appellant Swain is Entitled to a New Trial premised on the Calhoun County Prosecutors' Violation of the rules set-forth in Brady Vs Maryland for failing to produce Dennis Book at Trial who is a Res Gueste Eye Witness who had Exculpatory Evidence of Defendant-Appellants Actual Innocence.

ISSUE NO. (3): By what standards Michigan Courts consider a Defendants assertion that the Evidence demonstrates a significant possibility of 'Actual Innocence' in the context of a Motion brought pursuant to MCR 6.502 (G)(2) and whether Defendant in this Case qualifies under that standard ?

LEGAL ARGUEMENT:

At the present time of filing of this Brief, Michigan (only) has (2)- Staderds to seek Relief with a Claim of Actual Innocence to wit:

[1]: MCR 6.500 et seq as outlines in Issue No. (1) and,

[2]: MCL 770.1 Petition to the Trial Court.

Upon a Defendant showing Newly Discovered Evidence of 'Actual Innocence'. as Defendant-Appellant Swain has in Issues (1),(2) Supra she can proceed under MCR 6.502 (G)(2) in this instant case with a claim of 'Newly Discovered Evidence of Actual Innocence' Res Gueste Eye Witness ; DNA Evidence Resolutes , (e.g. MCL 770.16) which implements MCR

6.500 et. seq. as Our Michigan Legislature has provided therein. The Process then proceeds through MCR 6.500 et. seq. Subchapter to the entitlment to Relief, where the Trial Court then in his/her Discretion can 'waiver' the 'Cause Prong' of MCR 6.508 (D)(3)(a), if the Court determines the Defendant is 'Actually Innocent of the Crime Charged' ; i.d.

Further, there is a Standard set-forth under MCL 770.1, NEW TRIAL REASONS FOR GRANTING:

> ' The Judge of a Court in which the Trial of an Offense is held may Grant a New Trial to the Defendant , 'any cause' for which by law a New Trial may be Granted or when it appears to the Court that Justice has not been done, and on the terms or conditions as the Court so directs '.

CONCLUSION

Defendant-Appellant Swain does qualify to seek Relief under MCR 6.500 et. seq. as well as MCL 770.1 as outlined in Issue No. (6) Infra, where the Newly Discovered Evidence of Dennis Book is Exculpatory in nature that entitles Defendant-Appellant a New Trial under Both Standards

ISSUE NO. (4): Whether Michigan Court Rules, MCR 6.500 et. seq. (or) another provision provides a basis for Relief , where a Defendant demonstrates a significant possibility of Actual Innocence ?

LEGAL ARGUEMENT:

At the present time of filing this Brief, MCR 6.502 (G)(2) does not provide for an 'exception' to Defendant demonstrating a significant possibility of 'Actual Innocence'. This Honorable Court could however AMEND the Court Rules under MCR 6.502 (G)(2) to Add ' Actual Innocence Exception'.

However, at the present time, MCR 6.502 (G)(2) allowes a Defendant to seek Relief from Judgment upon a claim of 'Newly Discovered Evidence' which a claim of Actual Innocence, would have to contain evidence that is 'Newly Discovered Evidence' allowing a Defendant to seek Relief and proceed under the Court Rule chapter 6500 et. seq. as outlined in Issue No. (1) supra.

ISSUE NO. (5): Whether MCR 6.502 (G) does Bar Relief, there is an Independant basis on which a Defendant who demonstrates a significant possibility of Actual Innocence ?

LEGAL ARGUEMENT:

In Michigan there is no set standard as to how a Defendant can seek relief who demonstrates a significant possibility of Actual Innocence in the Courts.

The Michigan Court of Appeals held in their Opinion that in such a situation, the appropriate avenue would be for Relief on Actual Innocence Grounds [rests] in an Application for Executive Clemency , Michigan Constitution (1963) Art 5 § 14 ; MCL 791.243 .

HOWEVER, this writer would suggest that, that is only one Avenue that the Law provides for in Michigan through the Governor.

That MCR 6.502 (G)(2) provides that a Defendant 'can seek relief' from Judgment upon showing Evidence of 'Actual Innocence' , by producing 'Newly Discovered Evidence' , as what Defendant-Appellant Swain did in the Calhoun County Circuit Court after Trial, as outlined above in Issue No. (1) Supra. This Writer would therefore argue that MCR 6.502 (G)(2) ' would not Bar Relief' and that there is 'another way as well to obtain relief as argued in Issue No. (6) Infra.

INDEPENDANT BASIS ON WHICH A DEFENDANT WHO DEMONSTRATES A SIGNIFICANT POSSIBILITY OF ACTUAL INNOCENCE

This writer would like to take this opportunity to show the Court an Independent basis on which a Defendant who demonstrates a significant Possibility of Actual Innocence can obtain Relief under MCR 6.502 (G)(2) and MCR 6500 et. seq.

The Crime / Criminal Offense upon which Petitioner Kelvin David Moffit under pending Doc. No. [151044] ; Petitioner Edward William Taylor under pending Doc. No. [151089] and Defendant-Appellant Lorinda Irene Swain pending Appeal in this case at Bar in Doc. No. [150994] stand Imprisoned under a Unconstitutional Penal Statute MCL 750.520 et. seq. This therefore is independent basis on which a Defendant who demonstrates a significant possibility of Actual Innocence, upon which this Court is

obligated to address and declare ; where MCR 7.302 (B)(1) the Issue involves a substantial question as to the validity of a Legislative Act , and further, the issue involves Legal Principles of major significance to this States Jurisprudence, MCR 7.302 (B)(3).

LEGAL ARGUEMENT:

In (1908) , We the People of the State of Michigan RATIFIED Our (1908) Constitution. In Art (5) § (40, We gave the Power to the Michigan Legislature to provide by Law for 'REVISION OF THE LAWS'.

In (1931), Public Act (328), the Michigan Legislature did provide by Law the 'MICHIGAN PENAL CODE' with (568) enumerated Offenses. The Title of that Act holds:

> ' AN ACT to Revise, Consolidate, Codify and add to Statutes relating to Crimes, define Crimes and prescribe the penalties therefor ... and Repeal certain Acts and Parts of Acts inconsistent with or controvening any provisions of this Act '.

Art (5) § (40 of the (1908) Constitution allowed this Public Act (328) of (1931) to exist, providing for 'REVISION OF THE LAWS' , the Michigan Penal Code.

In (1963), We The People of the State of Michigan RATIFIED A NEW CONSTITUTION. In the (1963) Preamble of the New Constitution holds that ' NO PART OF A Old CONSTITUTION SERVIVES AN ADOPTION OF A NEW CONSTITUTION ' ; Ex Parte Palm, 255 Mich _____. ----------

Within the New (1963) Michigan Constitution is Art (4) § (36), which We The People of the State of Michigan RATIFIED THE FOLLOWING by taking away the Legislatures Power to 'REVISE' the laws in force or 'ALTER' the Compilation of that Law of the following:

> ' NO GENERAL REVISION OF THE LAWS SHALL BE MADE. The Legislature may provide for Compilation of the Laws in force, arranged without alteration under appropriate heads and titles '. i.d.

Therefore, upon the RATIFICATION OF OUR NEW (1963) MICHIGAN CONSTITUTION , We The People of the State of Michigan ' took away the Power from Our Michigan Legislature ' , holding that they could not ' REVISE ' the Laws in Force (or) 'Alter' the Compilation of those Laws in Force, [known as the Michigan (1970) Michigan Compiled Laws] during the time in question in this Case at bar.

In (1974) (11)- Years past the RATIFICATION OF OUR NEW (1963) MICHIGAN CONSTITUTION , Our Michigan Legislature took it upon them selves without Constitutional enumerated powers to Act off of the Old (1908) Constitution and Title of Public Act (328) of (1931) by 'REVISION' and 'ALTERATION' of the Compiled Laws of (1970), and in Violation of Michigan Constitution (1963) Art (4) § (36) in Public Act (266) of (1974), REPEALED Sections 85, 333, 3336, 3339, 340, 341, 342 and 520 of Public Act (328) of (1931) and 750.520 of the Compiled Laws of (1970) and REDRAFTED BY REVISION and 'ALTERATION' of the Compiled Laws and put in its place a whole NEW CRIME titled Criminal Sexual Conduct, i.d. attached Public Act (266) of (1974) and Senate Journal 1207 of (1974).

Therefore, this Honorable Michigan Supreme Court Justices are Bound under their Oath of Office of Our Michigan (1963) Constitution Art XI sec (1) of to wit:

> Sec. 1.' All Officers, Legislatures, Executive and [JUDICIAL] , before entering upon the duties of their respective Offices, shall take and subscribe the following Oath or Affirmation.: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of this State , and that I will faithfully discharge the duties of the Office of Justice of the Michigan Supreme Court according to the best of my ability. '

to up hold the Michigan (1963) Constitution Art (4) § (36) and 'DECLARE' that Public Act (266) of (1974) , being MCLA 750.520 et. seq. of the Compiled Laws of (1970), UNCONSTITUTIONALLY ENACTED past the Michigan Legislatures enumerated Powers in Violation of the Our Michigan Constitution (1963) Art (4) § (36).

Wherefore, Defendant-Appellant Swain ; Petitioners Moffit and Taylor, Moves this Court to up hold their Oaths of Office, Mich. Const. Art XI sec (1) ; and Declare Public Act (266) of (1974); being MCLA 750.520 et. seq. Unconstitutional and in Violation of Art (4) § (36) of Our Michigan (1963) Constitution.

Further, 'Declare' that each Defendant-Appellant Swain, Petitioners Kelvin David Moffit and Edward William Taylor are 'Actually Innocent' as an Independent basis of the Crime of Criminal Sexual Conduct, because Our United States Supreme Court has held:

" An Unconstitutional Statute Law is Void and is No Law. An Offense created by it is not a Crime. A Conviction under it is not merly erroneous, but Illegal and Void and can not be a Legal Cause of Imprisonment ". Ex Parte Siebold, [100 U.S. (10 Otto) at 376 (1879)].

CONCLUSION

MCR 6.502 (G)(2) therefore 'does not Barr Relief' where in this Instance Defendant-Appellant Swain and Petitioners Moffit and Taylor all have provided ' NEWLY DISCOVERED EVIDENCE ' of a UNCONSTITUTIONAL Statute, MCLA 750.520 et. seq. and "CLAIM OF INNOCENCE THEREFORE".

Therefore, this Honorable Michigan Supreme Court has held that a 'Defendant may always challenge whether the State had a right to bring the Prosecution in the first place, this including the right to - - *** challenge as Defendant-Appellant Swain and Petitioners Moffit and Taylor are herein, as whether the Statute MCLA 750.520 et. seq. under which He/she is accused is Constitutional or not ; People Vs Alvin Johnson, 396 Mich at 440 and 442 (1976).

ISSUE NO. (6): Whether Defendant Swain is entitled to a New Trial pursuant to MCL 770.1 ?

The Answer to this Question is Yes !!!!

Our Michigan Legislature provided for under MCLA 770.1 NEW TRIAL, REASONS FOR GRANTING:

Sec. (1). The Judge of a Court in which the Trial of an Offense is held, may Grant a New Trial to the Defendant for any cause for which by law a New Trial may be Granted ; or when it appears to the Court that Justice has not been done on the terms or conditions as the Court directs.

In Three prior Cases by this Michigan Supreme Court, this Court ruled that:

> ' A Circuit Court Judge has "discretion" to Grant a Motion for a New Trial "Without limitation of time", despite the Statute, which directs that such Motion shall be made within (30) days after Verdict.'

SEE: People VS Hurwich, 259 Mich 361 (1932).
People VS Burnstein, 261 Mich 534 (1933).
People VS Parker, 393 Mich at 541 (1975).

This Honorable Michigan Supreme Court went on to hold that:

> ' The Statute merly imposed a time limet on Motions of Right, that it did not [restrict] the Courts "Inherent Power" to entertain Motions filed after that deadline '. i.d.

Further, MCR 6.431 (B), substantially modifies the the Statutory standards for Granting a New Trial set-forth in MCL 770.1 ; See People VS Hampton, 407 Mich 354 at 373 (1979).

Although the Court Rule MCR 6.431 (B) repeats in stylistically revised language, the first standard under MCL 770.1 , the Court Rule substitutes a New Standard , (e.g. because the Trial Court believes the verdict has resulted in a Miscarriage of Justice).

Thus, the Court Rule under MCR 6.431 (B) 'did not' as well take the Trial Courts' 'Inherent Power' [away], and that MCL 770.1, the Trial Court has discretion without time limits to Grant Defendant-Appellant Swain a New Trial as the Calhoun County Circuit Court so Ordered.

CONCLUSION

Therefore, the Court of Appeals erred in its Opinion, because Defendant-Appellant is not 'limited to relief' available through MCR 6500 et. seq., as outlined above. That this Honorable Michigan Supreme Court should therefore Overrule the Court of Appeals Case of People Vs Kincade , 206 Mich App. 482 ; 522 N.W. 2d 880 (1994), that the the Michigan Court of Appeals quoted in its Opnion.

CONCLUSION AS TO ALL (6) ISSUES

Therefore, for the foregoing reasons outlined above herein , Petitioners Kelvin David Moffit and Edward William Taylor respectfully requests that this Court should conclude and Grant the following Relief in this Case:

ISSUE NO. (1): MCR 6.502 (G)(2) and CRESS Test apply equally in concert with one another as indicated above herein.

Issue No. (2): Defendant-Appellant Swain is entitled to a New Trial based on BRADY VIOLATION as indicated above herein.

Issue No. (3): Defendant-Appellant Swain does qualify to seek Relief under both MCR 6.502 (G)(2) , 6500 et. seq. and MCL 770.1 as indicated above herein, where the Newly Discovered Exculpatory Evidence of Dennis Book possesses entitles Defendant-Appellant to a New Trial under both stadards.

Issue No. (4): MCR 6.502 (G)(2) , 6500 et. seq. provides as well as MCL 770.1 a basis for relief, where Defendant-Appellant demonstrates through Dennis Book a significant possibility of Her Actual Innocence herein.

Issue No. (5): MCR 6.502 (G)(2) , 6500 et. seq. does not bar relief in this case and there is a Independent Basis raised in this Case that the Statute upon which Defendant-Appellant Swain and Petitioners Moffit and Taylor stand Imprisoned under is Unconstitutional and demonstrates a significant possibility of Claim of Actual Innocence indicated above herein and support by attached Public Act Evidence and the Michigan (1963) Constitution Art (4) § (36).

ISSUE NO. (6): Defendant-Appellant Swain is entitled to a new Trial Under MCL 770.1 ; where the Calhoun County Circuit Court under this Statute has 'inherent power' to Grant a New Trial as the trial Court so rightfully did.

Respectfully Submitted and Prayed For,

Mr. Kelvin David Moffit [# 271355]
Cooper Street Correctional Facility
3100 Cooper Street
Jackson, Michigan 49201

Mr. Edward William Taylor [# 262453]
Cooper Street Correctional Facility
3100 Cooper Street
Jackson, Michigan 49201

— 20 and last —

Order

150994
at Lansing

Michigan Supreme Court
Lansing, Michigan

November 25, 2015

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

150994(61)(62)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

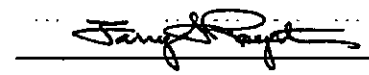
LORINDA IRENE SWAIN,
Defendant-Appellant.

SC: 150994
COA: 314564
Calhoun CC: 2001-004547-FC

On order of the Chief Justice, the joint motion of Kelvin David Moffit and Edward William Taylor to file a brief amicus curiae on behalf of defendant-appellant is GRANTED. The amicus brief will be accepted for filing if submitted on or before December 16, 2015. On further order of the Chief Justice, the separate motion of Michael Ward for leave to file a brief amicus curiae on behalf of defendant-appellant is GRANTED. The amicus brief submitted by Michael Ward on November 20, 2015, is accepted for filing.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 25, 2015



EXHIBIT

appropriation by the superintendent of public instruction provided for by this section shall be conclusive as to the authority to borrow under this section, which certificate may be signed by the superintendent of public instruction or his authorized representative. A school district shall not make a new borrowing under sections 131 to 135 of Act No. 258 of the Public Acts of 1972, being sections 388.1231 to 388.1235 of the Michigan Compiled Laws, while this section is in effect.

This act is ordered to take immediate effect.
Approved August 12, 1974.

[No. 266.]

AN ACT to amend Act No. 328 of the Public Acts of 1931, entitled "An act to revise, consolidate, codify and add to the statutes relating to crimes; to define crimes and prescribe the penalties therefor; to provide for the competency of evidence at the trial of persons accused of crime; to provide immunity from prosecution for certain witnesses appearing at such trials; and to repeal certain acts and parts of acts inconsistent with or contravening any of the provisions of this act," as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, by adding sections 520a, 520b, 520c, 520d, 520e, 520f, 520g, 520h, 520i 520j, 520k and 5201; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

Sections added; penal code.

Section 1. Act No. 328 of the Public Acts of 1931, as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, is amended by adding sections 520a, 520b, 520c, 520d, 520e, 520f, 520g, 520h, 520i, 520j, 520k and 520l to read as follows:

750.520a Definitions. [M.S.A. 28.788(1)]

Sec. 520a. As used in sections 520a to 520l:

(a) "Actor" means a person accused of criminal sexual conduct.

(b) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.

(c) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

(d) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

(e) "Physically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.

(f) "Personal injury" means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.

(g) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the

EXHIBIT

immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

(h) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

(i) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

750.520b Criminal sexual conduct in the first degree; felony. [M.S.A. 28.788(2)]

Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f) (i) to (v).

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

Exhibit

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years.

750.520c Criminal sexual conduct in the second degree; felony. [M.S.A. 28.788(3)]

Sec. 520c. (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) That other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, or is related by blood or affinity to the fourth degree to the victim, or is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

(c) Sexual contact occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in sections 520b(1) (f) (i) to (v).

(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1) (f) (i) to (v).

(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.

750.520d Criminal sexual conduct in the third degree; felony. [M.S.A. 28.788(4)]

Sec. 520d. (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is at least 13 years of age and under 16 years of age.

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1) (f) (i) to (v).

(c) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.

EXHIBIT

750.520e Criminal sexual conduct in the fourth degree; misdemeanor. [M.S.A. 28.788(5)]

Sec. 520e. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if either of the following circumstances exists:

(a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1) (f) (i) to (iv).

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years, or by a fine of not more than $500.00, or both.

750.520f Second or subsequent offense; penalty. [M.S.A. 28.788(6)]

Sec. 520f. (1) If a person is convicted of a second or subsequent offense under section 520b, 520c, or 520d, the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years.

(2) For purposes of this section, an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under section 520b, 520c, or 520d or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense.

750.520g Assault with intent to commit criminal sexual conduct; felony. [M.S.A. 28.788(7)]

Sec. 520g. (1) Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than 10 years.

(2) Assault with intent to commit criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 5 years.

750.520h Corroboration of victim's testimony not required. [M.S.A. 28.788(8)]

Sec. 520h. The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g.

750.520i Resistance by victim not required. [M.S.A. 28.788(9)]

Sec. 520i. A victim need not resist the actor in prosecution under sections 520b to 520g.

750.520j Evidence of victim's sexual conduct. [M.S.A. 28.788(10)]

Sec. 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1) (a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1) (a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

750.520k Suppression of names and details. [M.S.A. 28.788(11)]

Sec. 520k. Upon the request of the counsel or the victim or actor in a prosecution under sections 520b to 520g the magistrate before whom any person is brought on a charge of having committed an offense under sections 520b to 520g shall order that the names of the victim and actor and details of the alleged offense be suppressed until such time as the actor is arraigned on the information, the charge is dismissed, or the case is otherwise concluded, whichever occurs first.

750.520l Sexual assault on legal spouse. [M.S.A. 28.788(12)]

Sec. 520l. A person does not commit sexual assault under this act if the victim is his or her legal spouse, unless the couple are living apart and one of them has filed for separate maintenance or divorce.

Saving clause.

Section 2. All proceedings pending and all rights and liabilities existing, acquired, or incurred at the time this amendatory act takes effect are saved and may be consummated according to the law in force when they are commenced. This amendatory act shall not be construed to affect any prosecution pending or begun before the effective date of this amendatory act.

Repeal.

Section 3. Sections 85, 333, 336, 339, 340, 341, 342 and 520 of Act No. 328 of the Public Acts of 1931, being sections 750.85, 750.333, 750.336, 750.339, 750.340, 750.341, 750.342 and 750.520 of the Compiled Laws of 1970, and section 82 of chapter 7 of Act No. 175 of the Public Acts of 1927, being section 767.82 of the Compiled Laws of 1970, are repealed.

Effective date.

Section 4. This amendatory act shall take effect November 1, 1974.

Approved August 12, 1974.

[No. 267.]

AN ACT to amend the title and section 2 of Act No. 50 of the Public Acts of 1969, entitled "An act to authorize the state administrative board to convey certain land located in Calhoun county, Michigan," and to add sections 3, 4 and 5

EXHIBIT

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amendatory act takes effect are saved and may be consummated according to the law in force when they are commenced. This amendatory act shall not be construed to affect any prosecution pending or begun before the effective date of this amendatory act.

Section 3. Sections 85, 333, 338, 339, 340, 341, 342 and 520 of Act No. 328 of the Public Acts of 1931, being sections 750.85, 750.333, 750.338, 750.339, 750.340, 750.341, 750.342 and 750.520 of the Compiled Laws of 1970, and section 82 of chapter 7 of Act No. 175 of the Public Acts of 1927, being section 767.82 of the Compiled Laws of 1970, are repealed.

Section 4. This amendatory act shall take effect November 1, 1974.

The House of Representatives had passed the bill as substituted.

The House of Representatives had amended the title of the bill to read as follows:

A bill to amend Act No. 328 of the Public Acts of 1931, entitled "An act to revise, consolidate, codify and add to the statutes relating to crimes; to define crimes and prescribe the penalties therefor; to provide for the competency of evidence at the trial of persons accused of crime; to provide immunity from prosecution for certain witnesses appearing at such trials; and to repeal certain acts and parts of acts inconsistent with or contravening any of the provisions of this act," as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, by adding sections 520a, 520b, 520c, 520d, 520e, 520f, 520g, 520h, 520i, 520j, 520k and 520l; and to repeal certain acts and parts of acts.

The message further informed the Senate that Reps. Vaughn and Elliott were named co-sponsors.

Pending the order that, under clause 8 of rule 18, the bill be laid over one day,

Senator Byker moved that the rule be suspended.

The motion prevailed, a majority of the Senators serving having voted therefor.

The question being on concurring in the substitute made to the bill by the House, the Senators voted as follows:

Roll Call No. 503

Yeas—30

Ballenger	DeMaso	Mack	Rockwell
Bouwsma	Frost	McCollough	Rozycki
Bowman	Faron	Novak	Toepp
Bursley	Gray	Pittenger	VandeLaan
Byker	Hart	Plawecki	Welborn
Cartwright	Holmes	Purcell	Zaagman
Davis	Lane	Richardson	Zollar
DeCrow	Lodge		

Nays—4

Bishop	Brown	Cooper	Fleming

The substitute was concurred in, a majority of the Senators serving voting therefor.

The Senate agreed to the title as amended.

The bill was referred to the Secretary for enrollment printing and presentation to the Governor.

Senator Hertel entered the Senate Chamber, the time being 10:45 a.m.

Protests

Senators Fleming, Brown and Cooper protested against the concurring in the House substitute to Senate Bill No. 1207 and asked that their reasons be printed in the Journal.

Senator Fleming's statement is as follows:

Mr. President and members of the Senate, I voted "no" against concurring with the House amendments to Senate Bill No. 1207 b...

STATE OF MICHIGAN

IN THE SUPREME COURT

The People of the State of Michigan,

Plaintiff-Appellee.

SC NO. 150994

VS

Lorinda Irene Swain,

Defendant-Appellant.

RECEIVED
DEC 11 2015
LARRY S. ROYSTER
CLERK SUPREME COURT

_____/

' PROOF OF SERVICE '

I Edward William Taylor certifies that he served Via United States mail postage pre paid a copy of the following:

[1]: Amicus Curiae Brief with attachements.

[2]: Proof of Service.

[3]: Letter to Supreme Court Clerk.

UPON:

Ms. Caitlin Plummer
Attorney for Defendant-Appellant
701 South State Street
Ann Arbor, Michigan 48109

Ms. Jennifer Kay Clark
Calhoun County Prosecuting Attorney
161 East Michigan Ave.
Battle Creek, Michigan 49014

The undersigned certifies that the above stated is true and is correct, executed on this 8th day of December, 2015.

Edward W. Taylor

Edward William Taylor

- 1 and last -

Mr. Kelvin David Moffit [# 271355] (and)
Mr. Edward William Taylor [# 262453]
Cooper Street Correctional Facility
3100 Cooper Street
Jackson, Michigan 49201

Attn: Ms. Inger Z. Meyer DEPUTY COURT CLERK
Michigan Supreme Court
Michigan Hall of Justice
P.O. BOX 30052
Lansing, Michigan 48909

RECEIVED
DEC 11 2015
LARRY S. ROYSTER
CLERK SUPREME COURT

RE: People VS Swain
S.C. Doc. No. [150994]

Dear Ms. Meyer ,

Enclosed please find for filing and recording in this Honorable Court within the (21)- day time limet set-forth in Chief Justice Robert P. Youngs Order dated November 25, 2015 as reflected attached to this letter that of the following:

[1]: (1)- Original Amicus Curiae Brief from Kelvin David Moffit and Edward William Taylor.

[2]: (1)- Original PROOF OF SERVICE.

Please file and record accordingly. I thank you in advance for your prompt time and your assistance in this ergent matter. THANK YOU !!!!

Very Truly Yours',

Kelvin David Moffit
Mr. Kelvin David Moffit [# 271355]

Edward W. Taylor
Mr. Edward William Taylor [# 262453]

C.C. [file].

- 1 and last -