STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Court of Appeals No.: 325806
Supreme Court No.: 154684

v

KAREEM SWILLEY JR.,
Defendant.

DEFENDANT-APPELLANT'S AMENDED APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM, GROUNDS FOR RELIEF AND RELIEF SOUGHT

Defendant-Appellant Kareem Swilley Jr. appeals from the September 13, 2016 Court of Appeals Opinion affirming his convictions, including a life sentence. Appendix A. Mr. Swilley, who was 16 years old when this crime occurred, is actually innocent, and has been convicted based on guilt-by-association with his co-defendants (against whom there was physical evidence) through highly-improper gang-expert testimony. Indeed, not only was there no physical evidence tying him to the scene, Mr. Swilley actually has an alibi involving a notarized City Hall document, and text messages establish that Mr. Swilley was not at the crime scene. The trial judge's prosecutorial questioning of witnesses favorable to Mr. Swilley also contributed to a conviction in this case—where even the one witness who initially implicated Mr. Swilley has now recanted.

The Court should either summarily reverse or grant leave to appeal because this case presents issues of great public importance and the decision below was clearly erroneous and will cause material injustice. MCR 7.305(B)(2); MCR 7.305 (B)(5). The questions presented here are clearly significant, as this Court has seen fit to address them in recent cases. This case presents a crucial opportunity to clarify the applications of those two prior decisions.

In *People v Stevens*, 498 Mich 162 (2015), this Court addressed the issue of judicial conduct piercing the veil of impartiality, sufficient to warrant a reversal of a conviction. *Stevens* presented an unusually overt instance of judicial bias, but the rules it relied on apply much more broadly. This case presents an ideal opportunity for the Court to clarify the scope of *Stevens*, given that the trial judge subjected defense-friendly witnesses to prosecutorial questioning, engendering suspicion of these witnesses in the jury's mind, and thus contributing to the wrongful conviction of an innocent young man—yet the Court of Appeals affirmed.

In *People v Bynum*, 496 Mich 640 (2014), this Court laid out a careful standard for the

admission of gang-expert testimony. That standard was clearly violated in this case, where gang-expert testimony was admitted without any independent evidence that the crime in question was gang-related. The Court of Appeals affirmed this clear violation of *Bynum*, and this Court should grant leave or summarily reverse, both so as to ensure justice in this case, and to ensure that the *Bynum* rule survives as this Court intended.

This is a case where a juvenile was convicted and sentenced to life in prison despite strong evidence that he was not at the scene of the murder. Unwarranted and irrelevant expert testimony, and a judge bent on being the second prosecutor in the case contributed to this wrongful conviction. This Court should either summarily reverse or grant leave to appeal.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this application for leave to appeal pursuant to MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

I. Where The Trial Judge Repeatedly Questioned Defense-Friendly Witnesses In A Prosecutorial Manner, Expressing Disbelief And Implying Before The Jury That Their Testimony Was Lacking Without Further Proof, Did The Court Of Appeals Clearly Err In Affirming The Conviction Despite A Violation Of Mr. Swilley's Sixth Amendment Right To A Fair An Impartial Trial?

The Court of Appeals answered, "No."
The Defendant-Appellant answers, "Yes."

II. Where Gang-Expert Testimony Was Admitted Without Any Independent Evidence That The Shooting In Question Was Gang-Related, Did The Court Of Appeals Clearly Err In Affirming The Conviction Despite A Violation Of Mr. Swilley's Right To A Fair Trial Free Of Irrelevant And Highly Prejudicial Expert Gang Association Testimony?

The Court of Appeals answered, "No."
The Defendant-Appellant answers, "Yes."

III. Did The Court Of Appeals Clearly Err In Affirming Mr. Swilley's Sentence Without Properly Applying *Miller* Factors, And Was Trial Counsel Ineffective For Failing To Investigate And Present Mitigating Evidence?

The Court of Appeals answered, "No."
The Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Kareem Swilley, Jr. appeals his convictions and sentences for one count each of alleged conspiracy to commit first degree murder and premeditated murder, three counts of assault with intent to murder, one count of carrying a dangerous weapon with unlawful intent, and six counts of felony firearm, following a jury trial in Saginaw County before Judge Fred L. Borchard.

a. Crime

This case stems from the November 21, 2012 murder of DaVarion Galvin. That afternoon, at approximately 2:30 p.m., Galvin and two friends, Joshua Colley, Marcus Lively, and his cousin, Willie Youngblood, were walking down York Street in the Bloomfield neighborhood of Saginaw. T. V, 62-63, 74-75.[1] A dark-colored sedan approached and assailants inside the car opened fire on the group. . T. V, 76, 82, 158.

Youngblood was struck in the stomach, dove to the ground, and stayed down as more shots were fired. T. V, 73, 84-85. Colley and Lively took cover behind a nearby pickup truck. T. X, 107. Galvin ran to avoid the gun fire, but was shot in his chest, lower abdomen, and legs. T. IV, 124-126. After scattering the street with gunfire, the shooters' drove off, leaving behind thirty bullet casings of two different calibers. T. IV, 157-173, T. V, 6-11.

After the shooting, Youngblood ran to his mother's house and was taken to the hospital. T. V, 72-73, 76, 84-88, 116-117, 121. Galvin was taken to the hospital, where he ultimately died.

b. Investigation

1. Eyewitness accounts

Of Galvin's companions, only Lively remained on the scene when responding officers

[1] Trial transcripts are referenced by the volume followed by the page number. P refers to the preliminary hearing transcripts, and will be referenced by the volume followed by the page number. S refers to the sentencing hearing transcripts, and will be referenced by the volume followed by the page number. R refers to the remand hearing transcript.

arrived. T. IV, 94-95. Lively reported that the attackers approached in a black or blue Saturn. T. IV, 95. Galvin was able to tell officers that there were four men in the car, but he was not able to provide any descriptions. T. IV, 113-114. Although told to stay for more questioning, Lively slipped away from the scene. T. IV, 118-120. He could not be located thereafter. T. XIII, 138.

Youngblood was interviewed by officers and detectives several times the day of the shooting and the days that followed. T. XIII, 132, 133-135, 138-140; T. XIV, 37. Youngblood also described the car as a black or blue mid-size vehicle. T. V, 158. He also was able to tell detectives that the car was filled with four black males. P., 4. He indicated to officers and detectives that although he did not recognize any of the four attackers, he would be able to make identifications if he saw them again. T. XIII, 133. He also expressed his suspicions that men from the south side of Saginaw might be responsible for the shooting. P. 141, 1-5. In the days immediately following the shooting, Youngblood was also shown a photo array by Detective Oberle containing images of Mr. Swilley and his co-defendants; **Youngblood was unable to pick out any of the images as the shooters**. T. XIII, 135.

Colley was located and interviewed on January 31, 2013. T. XIV, 131. Colley described the assailants' car as a black Saturn, occupied by four black men. T. XIII, 136. Detective Ryan Oberle, the lead detective, showed Colley a photographic lineup, containing images of Kareem Swilley and his co-defendants, but, Colley was unable to make a selection. T. XIII, 136.

Other scene witnesses gave conflicting accounts and did not identify the shooters.

2. Youngblood's arrest and changing story

Almost a year after the York Street shooting, Youngblood found himself speaking to detectives once again; this time, he was the suspected perpetrator of a September 11, 2013 shooting in Spaulding Township (the Cass River Market Shooting). T. XI, 102. On September

18, 2012, while jailed for an unrelated assault, Youngblood was questioned by the lead detective on the Cass River case, Randy Kahn, about his involvement in the shooting; of particular interest to the detectives were Youngblood's distinctive tattoos, which matched the description given of the shooter. T. XI, 102-105. While questioned, Youngblood offered Det. Kahn information about two murders: a 2013 homicide, and the DaVarion Galvin murder from November of 2012. T. XI, 102-105. Youngblood named two people he believed responsible for the 2013 murder, T. XII, 6; **he did not name Mr. Swilley or any of the co-defendants from this case as the shooters in the Galvin case**. T. XI, 102-112; T. XII, 6-15. Youngblood was arrested and charged for his involvement in the Cass River Market Shooting, and faced charges for carjacking, assault with intent to murder, and several firearm charges.

Det. Oberle, the lead detective on the Galvin murder, interviewed Youngblood several times in the weeks following his arrest. T. XIII, 138-140, T. XIV, 37, 73. In the days right after the Galvin shooting, Youngblood had told officers that he did not recognize any of the shooters and also failed to pick out Mr. Swilley or any of his co-defendants in a photo lineup. T. XIII, 133-135. But a year later, while incarcerated and facing a possible life sentence, Youngblood gave a dramatically different account. Youngblood claimed that when he and his companions were approached by the dark colored sedan, he believed the car to be filled with girls. P. I., 50. He told Det. Oberle that he walked very close to the car to say hello and saw four men inside—whom he suddenly was able to identify by name: Little Jeez (Swilley), T. Jordan (Thomas), Arab (Granderson), and Ruger Rell (Derrell Martin). P. I, 45, 142.

Youngblood gave different explanations for how he recognized the men inside the car. During a proffer, Youngblood cited "word on the streets" as the reason he knew or suspected the four men he named as the men responsible for the shooting. P. I, 122. At the preliminary hearing,

he claimed to have instantly recognized one person in the car, Mr. Swilley, and was able to learn the names of the other three occupants by going through Swilley's Facebook page. P. I, 159, 193. Youngblood was confronted at the preliminary hearing with the discrepancy:

> Q: Why did you tell your lawyer and--and the prosecutor or the police . . . when you were giving this proffer, why did you tell them because you knew it was him, because of word on the street?
> A: I don't know why I told him that.
> Q: Were you lying at that time?
> A: Yeah.

P. I, 122. Prior to Youngblood's conversations with detectives following the Cass River Market Shooting, Mr. Swilley had not been seriously considered as a suspect in the Galvin murder. R. 60. After those conversations, Youngblood became the key witness in the state's case against Mr. Swilley and his co-defendants, identifying them during a proffer and at their preliminary hearing. P. I, 138, 145. At trial, Youngblood was noncommittal about those identifications, but the state still heavily depended on Youngblood's prior statements in its case against Mr. Swilley, Jordan, Granderson, and Martin. T. V, 77-78. For his cooperation and testimony in the Galvin matter, Youngblood received a plea agreement for his involvement in the Cass River Market Shooting, with a minimum sentence of 17 years, with sentencing held out until after Youngblood's testified at Mr. Swilley's trial. T. V, 171.

3. The continuing investigation into the Galvin murder

The black car, a Saturn, involved in shooting was discovered by officers shortly after the incident. The owner of the car, Teresa Jurdem, had loaned it to Ricky Holmes, who falsely told Jurdem his name was James or Jay Jones. T.VI, 8-13, 29-30. In exchange for the use of her car, Holmes provided Jurdem with "money or drugs." T. VI, 13. Jurdem testified that prior to November 21, 2012, she had rented her car out for drugs on several occasions, including to Terrence Thomas "four, five times." T. VI, 13.

Holmes returned the car to Jurdem approximately five hours later, with bullet holes across the side of the vehicle. T. VI, 30. Holmes, acting frantic, refused to tell Jurdem how the bullet holes got there, which prompted Jurdem to call 911. T.VI, 14-22, 30-31. Holmes left in a different car with three or four other people before officers arrived, despite Jurdem's efforts to get him to stay to speak to the police. T. VI, 30-33, 35.

The Saturn was processed by Saginaw Police and dusted for prints. T. V, 11-16, 41-45. A latent fingerprint found on the car was run through an FBI software database, and was matched to John Granderson, Mr. Swilley's co-defendant. T. X, 14-16.

A weapon linked to the Galvin shooting was discovered in December of 2012. At approximately 10:00 p.m. on Christmas Day, 2012, Mr. Swilley was at his home on Fenton Street with his family when the house was struck with gun fire from a passing vehicle. T. VII, 85-87. Later that evening, Saginaw Police responded to a report of several armed black males carrying long guns walking in the street near Third and Lapeer Streets in Saginaw. T. VIII, 10. Officers investigating the incident approached a group of four young men near the reported location; three of the young men, Mr. Swilley, Thomas, and Mr. Swilley's younger brother Jamar, were detained and questioned without incident. T. VIII, 10-12. The fourth man fled the approaching officers on foot and escaped; during the chase, officers saw the man discard a loaded Glock .9mm handgun, which was confiscated. T. VIII, 21-23. Two long guns were found underneath the porch of a nearby vacant house. T. VIII, 14. A green Pontiac registered to Shontrell Harris, Mr. Swilley's sister, was found nearby; further investigation revealed Mr. Swilley had been using the car that evening. T. IX, 119. Officers seized three cell phones found in the glove compartment of the Pontiac. T. VIII, 37. One cell phone, a Coolpad, was linked to Thomas, T. XII, 34; another, a Huawei brand phone, was linked to Mr. Swilley. T. XII, 32-33.

Bullets test-fired from the recovered Glock were compared by the State Police to .9mm bullets found at the scene of Galvin's shooting. T. VIII, 98. Toolmark analysis determined that both sets of bullets were fired from the same weapon. T. VIII, 98.

Kareem Swilley, Jamar Swilley, and Terrence Thomas submitted DNA swabs for forensic analysis to compare with swabs taken from the discarded Glock handgun. T. IX, 173. Testing conclusively excluded Kareem Swilley as the source of the DNA found on the weapon; Terrence Thomas, however, was a match. T. IX 197-201.

c. Trial

1. State case

A year and a half after the Galvin shooting, Mr. Swilley was arrested and charged for offenses relating to that murder; Terrence Demon-Jordan Thomas, Jr., Derrell Demont Martin, and John Henry Granderson were charged as well. They faced trial beginning on September 9, 2014, appearing together before a single jury. T. I-XVIII.

A heavy focus of the trial was the testimony of Willie Youngblood, whose eyewitness identification of the four defendants was central to the prosecution's case. During his testimony, Youngblood was often combative and offered testimony inconsistent with the information he provided during his proffer and the preliminary hearing.

On direct examination, Youngblood described the shooting. He stated that he was walking with Galvin and the others when they were approached by a black car. T. V, 76. Youngblood stated that he believed the car was a "chick car," and that he walked up to the passenger side of the car to greet the people inside. T. V, 76. Contrary to his preliminary hearing testimony, Youngblood denied recognizing Mr. Swilley, saying instead that "all [he] saw was dreads and a gun" before turning around to run away. T. V, 77-78. After being reminded of his preliminary hearing testimony, Youngblood acknowledged that he had previously identified the

men he saw inside the car as T. Jordan (Thomas), Little Jeez (Swilley), Arab (Granderson), and Ruger Rell (Martin). T. V, 77-82. Youngblood acknowledged identifying Mr. Swilley, Thomas, Martin and Granderson at the preliminary hearing. T. V, 77, 79, 81-84. Youngblood qualified how certain he was of his identification, saying of Thomas: "I thought I saw him, you know. I got a glance, I ain't, you know, get like eye contact and just stare at the person…" T. V, 79.

Of Mr. Swilley, Youngblood's trial testimony was especially equivocal:

Q: …[W]ho did you say was sitting behind T. Jordan?
A: Somebody that looked like Jeez, you know. I ain't know. Thought I saw him.

T. V, 79. He also was unclear on how many guns he saw, stating: "You know, my mind wasn't focused on everybody man. Just focused on one person man," referring to Thomas. T. V, 83.

On cross, Youngblood was even less confident in his identifications. He acknowledged that in the days following the shooting, he did not know who was responsible, and agreed with questioning that characterized the source of his identifications as "word on the street." T. V, 123. **He stated that his identifications "could be right and could be wrong, man."** T. V, 146.

Of Mr. Swilley in particular, Youngblood was particularly noncommittal:

Q: So the truth is that you can't positively identify Mr. Swilley as being in that car, correct?
A: Correct."

T. V, 147 (emphasis added).

Youngblood acknowledged that he would not be testifying if he weren't facing a life sentence in his own case. T. V, 136-7. He also denied helping police with cases other than the Galvin murder, but when confronted with his interviews with Det. Oberle, Youngblood admitted to offering information on various other cases. T. V, 140-141.

Youngblood's testimony contrasted heavily with the testimony of Joshua Colley. Colley, who was Youngblood's co-defendant in the Cass River Market Shooting case, made no

identifications in the case. T. X, 91. Colley testified that he was texting on his phone when the car pulled up on the group, that he hit the ground when the shooting began, and that he remembered nothing but running from the scene. T. X, 77-87. On defense questioning, Colley described his conversations with Youngblood (who he knew as "Bounce") after the shooting; **Colley was adamant that Youngblood was as clueless as he was as to who was responsible for the Galvin shooting**. T. X, 96-97. Of Youngblood's identifications, Colley stated:

> **He never knew who it was. He never knew.** You know, after the fact, after he came from the hospital, you know, **we sit down and talked about like who did it. He never knew.** He was just throwing names out there. . . trying to get a time when we caught this case we on right now , so he never knew who did it at all. . . **He never seen no faces**, man.

T. 10, 97 (emphasis added). Colley also challenged Youngblood's claim that he got close to the vehicle, stating that Galvin had been standing closest to the car. T. X, 98.

On the sixth day of trial, Teresa Jurdem testified for the state regarding Ricky Holmes and the black Saturn involved in the York Street shooting. During her testimony, the state attempted to identify one of the men Jurdem saw Holmes leave with as Mr. Swilley. T. VI, 37-38. Jurdem claimed the man, who she described as thin and tall, resembled Mr. Swilley. T. VI 37-39. On cross, Mr. Swilley's defense attorney challenged Ms. Jurdem on this point:

> Q: Ma'am, how tall are you?
> A: Five, eight.
> …
> Q: Would you be surprised to find that my client is five, six?
> A: I am surprised.
> Q: Yeah, you are, because the person you said you saw was taller than you, correct?
> A: That's what I believed. [T. VI, 51.]

Ricky Holmes proved just as evasive at trial as he was with police the day of the shooting. Holmes had resisted efforts by trial attorneys to secure his presence in court, ripping up a subpoena when served. T. IX, 128. He only appeared at trial after being arrested on a material

witness warrant. T. IX, 125. Holmes, however, provided no substantive testimony; after consulting with an attorney, he invoked his Fifth Amendment right to remain silent. T. IX, 125-6.

The state also offered the testimony of Verquisha Montgomery, who knew the defendants through her boyfriend, Colburn Wicker. T. XI, 6-12, 17. Montgomery testified that she encountered Mr. Swilley, Thomas, and Granderson riding in a black car a little past noon on November 21, 2012, the day of the murder. T. XI, 30. However, Montgomery testified that the car was driven by person not named in the case, Jemarcus Watkins, and that the car had a fifth person inside who she did not recognize. T. XI, 30-36, 54-57.

Defense attorneys for the defendants questioned the Montgomery's credibility, pointing out that she benefited from her testimony in her own criminal proceedings. On cross-examination, Montgomery testified that in 2013, she had been pulled over in a car with Wicker and Thomas; two guns were found in Montgomery's purse, and she was arrested. T. XI, 58-59. While in Saginaw County Jail, Montgomery, through her lawyer, set up an interview with law enforcement, during which she informed officers of what she had allegedly witnessed on November 21, 2012. T. XI, 59. Montgomery acknowledged on cross that after providing that information in 2013, she was released. T. XI, 59. In return for her cooperation, she received a plea bargain for her gun charges that ensured she would not return to jail. T. XI, 59.

The state presented testimony from an expert on cell phone data extraction to provide information taken from Mr. Swilley and Thomas's cell phones. T. XII. The expert, Trooper Randy Kahn, testified at length about the information extracted from Mr. Swilley's cell phone, including pictures, contacts, and texts. T. XII, 73-125.

Of particular note were text messages from Mr. Swilley's phone that were sent and received on November 21, 2012, between 1:57 p.m. and 2:54 p.m.—the timeframe during which

the Galvin murder occurred. T. XII 113-115. At 1:57 p.m., Mr. Swilley's phone received a text message from Thomas, who was listed in Mr. Swilley's phone as "RBBG Lil Tee," asking Mr. Swilley to call. T. XII, 56, 109. At 2:48 p.m. Mr. Swilley received another text from co-defendant Thomas stating, "bekupp". T. XII, 115. At 2:49 p.m., Mr. Swilley's phone replied to Thomas asking how many people had been shot. T. XII, 115. Thomas replied "about three." T. XII, 115. On cross-examination, Mr. Swilley's defense attorney seized on this exchange:

> Q: In your experience, when people are together. Do they ask one another to call them?
> A: You mean together, like next to each other? . . . **I don't know why you would call each other if you're next to each other.**

T. XIII, 62-63 (emphasis added).

Also within this timeframe, Mr. Swilley's phone sent a 2:44 p.m. text to a contact listed as "Boosie/my Luv," stating: "[N]uttin' going down here to put the house in my sister name", T. XII 114-11, referencing the City Hall trip with his family that Mr. Swilley would assert in his alibi defense, discussed *infra*.

Throughout the trial, the state placed heavy emphasis on gang affiliation. The prosecution asked every civilian witness that personally knew the defendants about Saginaw gang culture, allegedly gang-related murders, and to identify alleged "gang signals" and "gang symbols" in dozens of photographs the state had gathered from the defendants' cell phones and Facebook pages. T. V, 101; T. VII, 44-57; T. IX 109-113; T. XI, 6-12, 15-17, 23, 25, 28.

The prosecution characterized the murder as gang-motivated; Youngblood, Galvin, Lively, and Colley, it alleged, were members of the Gnarly Boys or Bloomy Boys Gang, and Mr. Swilley, Thomas, Martin, Granderson, and Ricky Holmes were members of the East Side or Blood Gang. T. XIII, 156-164, 166-169, 177-178, 180-184; T. XIV, 10. The state cast the East Side and Bloomfield as rival neighborhoods. T. XIII, 156-7. Two witnesses, Det. Oberle and

Joseph Grigg, a former Saginaw Police Detective and investigator for the prosecutor's office, were qualified as experts in Saginaw gangs over defense objections, and testified at length about gang geography, the meaning of hand gestures, the gang affiliations of the defendants and victims, and the alleged rivalry between the East Side and Bloomy Boys gang. T. X, 28-30, 39; T. XI, 78-79; T. XIII, 154, 156-164, 166-169, 177-178, 180-184; T. XIV: 10. The bad blood between the two groups was cast as part of a larger, long-standing conflict between the East Side and North Side neighborhoods of Saginaw. T. X, 29-30.

2. Defense case

While his co-defendants made arguments based largely on the sufficiency of the evidence, Mr. Swilley presented an alibi defense: He showed that on November 21, 2012, he had spent the hour between 2 and 3:00 p.m. at City Hall with his grandparents, Alesha Lee and Philip Taylor, and his sister, Marcel Swilley. T. VII, 96-98, 111-114, 125, 127-128; T. XIV, 90-93, 98-99, 117, 119-137. Alesha Lee testified that she and her husband had taken Mr. Swilley and his sister to City Hall in order to transfer her Fenton Street home into the names of her grandchildren. T. VII, 97. According to Ms. Lee, after filling out paperwork at City Hall, the family travelled to the bank, to Ms. Lee's doctor's office, to a Chinese restaurant, and then returned their home on Fenton Street in the evening. T. VII, 112. Ms. Lee said that Mr. Swilley remained home the rest of the evening, and was visited by his girlfriend. T. VII, 113.

Mr. Taylor echoed Ms. Lee's testimony, recalling that they had left the house around 2 p.m. to go to City Hall and execute a quitclaim claim deed to transfer their home to Mr. Swilley and his sister. T. XIV, 92-93. The notarized quitclaim deed, conveying the property to Mr. Swilley and his sister was introduced into evidence; the document was notarized and stamped with the date of November 21, 2012, the day of Galvin's murder. XIV, 85-88. Further, a Saginaw

City administrator testified that the deed was filed at City Hall at approximately 3:30 p.m. on November 21, 2012 and entered into the computer system a few minutes later at 3:42 p.m. T. XIII, 103, 106-107. Mr. Taylor recalled returning to their home after visiting City Hall, the bank, and the Chinese restaurant at around 4:30 or 5 pm. T. XIV, 92-93.

To rebut Ms. Lee and Mr. Taylor's testimony, the prosecution presented the testimony of several Saginaw City administrators who had handled the quitclaim deed that afternoon. The administrators testified that for a quitclaim deed to be valid, it required the signature of only one of the new grantees; in this case, that signature was not Mr. Swilley's but that of his sister. T. XIII 85-88. No one could remember specifically seeing Mr. Taylor or Mr. Swilley that day. T. XIII, 76-88, 92-94, 96, 96-110, 115-117. It was acknowledged, however, that due to the volume of people served at City Hall and the time that had passed, it was not unusual or notable that any specific memory of Mr. Taylor or Mr. Swilley had faded. T. XIII, 110, 119.

3. Conviction and sentence

After two days of deliberations, the jury convicted Mr. Swilley, Thomas, and Granderson on all counts except receiving and concealing a stolen firearm and the related charge of felony firearm. XVIII, 4-12. Martin was found not guilty of all charges. XVIII, 4-5.

Mr. Swilley appeared for sentencing on December 27, 2014. Even though he was 16 at the time of the shooting, Mr. Swilley was sentenced to life without parole for conspiracy to commit first degree murder and premeditated murder. He was also sentenced to 18-36 years for three counts of assault with intent to murder and 38 months to 5 years for carrying a dangerous weapon with unlawful intent—consecutive to 6 concurrent terms of 2 years for felony firearm. S. I., 6-9. At sentencing, Mr. Swilley's attorney argued that due to recent Supreme Court decisions, a mandatory life without parole sentence was not appropriate for Mr. Swilley, but Judge

Borchard ruled that he had no discretion to hand down any sentence but life without parole. S. I, 5-6. Notably, the Saginaw County Prosecutor had not filed a notice seeking a life without parole sentence for Mr. Swilley as required by court rule. See Lower Court Records.

On January 21, 2015, the Mr. Swilley returned to court for resentencing in compliance with the ruling of *Miller v Alabama*, 567 US __ (2012), and MCL 769.25. S. II, 3. Mr. Swilley's sentence as to premeditated murder was changed to 37-75 years. S. II, 8. Mr. Swilley's sentence as to the other counts remained unchanged.

d. Post-Conviction Proceedings

On September 16, 2015, Mr. Swilley's brief on appeal was filed. Mr. Swilley filed a proper Standard 4 brief and a Motion for New Trial on December 14, 2015. Attached to the Motion for New Trial were affidavits written and signed by Joshua Colley and Willie Youngblood. Youngblood's affidavit stated that he "intentionally lied on Kareem Swilley, hoping to get a deal from the Saginaw prosecutor's office." He also denied that he ever saw Kareem Swilley on November 21, 2012. MNT, ex. I.[2] Colley's affidavit detailed conversations he and Youngblood had after the shooting, and stated that, "Willie Youngblood told me that he doesn't know who the shooters was and stated multiple times he testified to get a deal . . ." MNT. ex. II. The motion for new trial was docketed as a motion to remand on December 23, 2015. On February 23, 2016, the Court of Appeals granted remand. An evidentiary hearing was conducted on May 12, 2016.

At the evidentiary hearing, Youngblood testified that he never got a good look inside the car on November 21, 2012, and that he lied at trial about the identifications that he made. R.,11-2. Youngblood said that he did so in order to take advantage of a 17-year plea offer in his own criminal case. R., 13. The state challenged Youngblood's recantation, alleging that he was

[2] Mr. Swilley's Motion for New Trial is referenced as "MNT."

motivated by fear for his safety, a charge that Youngblood denied. R., 16. The state presented the testimony of Det. Oberle to testify about Youngblood's extreme reluctance to testify at Mr. Swilley's preliminary examination. Det. Oberle recalled that Youngblood expressed fear for his safety and the safety of his family; in particular, Det. Oberle recalled that Youngblood was concerned about his safety while incarcerated. R. 53.

Colley testified about conversations he had with Youngblood after the shooting, during which they puzzled over who might have committed the murder; Colley stated that neither he nor Youngblood had any clue who was responsible. R. 33. Colley recalled a later conversation, after they had both been arrested for their involvement in the Cass River Market Shooting. Colley stated that while they shared a cell in county jail, Youngblood told Colley that he was going to "testify on them so they can get his time cut. . . . He kept saying the prosecution was saying they was going to give him 50 years if he ain't do so. . . And I'm telling him how you going to testify on them and you don't even know who he did." R. 35.

Colley also testified about running into Mr. Swilley while they were both incarcerated at Saginaw Correctional Facility. Colley stated that he told Mr. Swilley that he knew that he had nothing to do with the murder, and offered to submit an affidavit. R. 34. On cross, the state noted that Colley's testimony at the remand hearing was largely consistent with what he had said at trial, to which Colley agreed. R. 37. Before the close of the hearing, the court harshly scolded Colley, asking: "Why would you wait? Why would you let him get convicted and come in here now?" R. 42. To which Colley replied: "I did sir. I tried to tell you all." R. 42.

Mr. Swilley also testified at the evidentiary hearing, detailing his conversation with Colley and noting that he was sent the affidavits unsolicited. R. 45-48. He maintained his innocence, stating that he was not at the scene of the shooting, and that he had been with his

family at City Hall that afternoon. R. 50.

The prosecution then called Det. Kahn, the lead detective of the Cass River Market Shooting. The prosecution introduced the videotaped interview Det. Kahn conducted with Youngblood following his arrest in September of 2013. R. 76-80.

The trial court denied the motion for new trial immediately, reading prepared remarks. R. 95-101. In its ruling, the court noted that the jury heard and was able to consider Youngblood's ambivalence about the identifications. R. 97. The court also found Youngblood to be more credible in the videotaped statement than in his testimony at the remand hearing. R. 98.

A supplemental brief was filed after the remand hearing on July 27, 2016.

On September 13, 2016, after briefing by the parties and oral argument, the Court of Appeals issued a *per curiam* opinion affirming Mr. Swilley's convictions and remanding for a ministerial correction of the judgment of sentence. Appendix A.

ARGUMENT

I. Mr. Swilley Was Denied His Sixth Amendment Right To A Fair And Impartial Trial When The Trial Judge Acted As A Second Prosecutor And Cross-Examined The Defense Witnesses With Hostility And Incredulity, Thereby Communicating To The Jury His Opinion Of The Evidence And The Validity Of Mr. Swilley's Alibi Defense.

Standard of Review and Issue Preservation

Whether judicial misconduct denied a defendant a fair trial is a question of constitutional law that this Court reviews de novo. *People v Stevens*, 498 Mich 162 (2015).

This issue is preserved. Mr. Swilley objected to the court's misconduct on more than one occasion. T. X, 124 (with respect to questions posed Joshua Colley); T. VII, 128 (with respect to questions posed to Alesha Lee); XIV, 126 (with respect to questions posed to Philip Taylor).

When a reviewing court determines that the trial judge pierced the veil of judicial impartiality, a structural error is established and automatic reversal is required. *Id*. at 168.

Discussion

A fair and impartial trial by jury demands a display of impartiality on the part of the trial judge. It was not so here. In this circumstantial case where Mr. Swilley presented an alibi defense, the judge repeatedly took on a prosecutorial role by aggressively "cross-examining" the defense and defense-friendly witnesses, each time exhibiting disbelief and creating the appearance of partiality against the defendant. In particular, the court's examination of Phillip Taylor, Mr. Swilley's grandfather, unfairly and directly questioned Mr. Taylor's credibility and the validity of Mr. Swilley's alibi defense. Considering the totality of the circumstances, it is reasonably likely that the judge's conduct influenced the jury and resulted in the conviction of an actually innocent young man.

"The Sixth Amendment of the United States Constitution and article 1, § 20 of the Michigan Constitution guarantee a defendant the right to a fair and impartial trial," *People v Conley*, 270 Mich App 301, 307 (2006), which includes a neutral and detached magistrate, *People v Cheeks*, 216 Mich App 470, 480 (1996). "A judge's conduct pierces [the veil of judicial impartiality] and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *People v Stevens*, 498 Mich 162, 164 (2015).

In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including the nature of the judicial conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial

and issues therein, the extent to which the judge's conduct was one-sided, and the presence of any curative instructions. *Id.* at 172. The inquiry into judicial impropriety is fact-specific and "a single instance of misconduct may be so egregious that it pierces the pierces the veil of impartiality." *Id*. at 171. The reviewing court should also consider the cumulative effect of errors in determining whether the defendant was denied a fair trial. *Id.* at 171–172.

A. Nature of the Judicial Conduct

Here, the court exhibited bias through the improper questioning of witnesses. While a trial judge may participate in the questioning of a witness or witnesses, the central object of judicial questioning should be to clarify. *Stevens*, 498 Mich at 173. The Michigan Code of Judicial Conduct states:

> A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but the judge should bear in mind that undue interference, impatience or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses . . . may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto . . .

Id. at 174. Where judicial involvement is appropriate, a judge should avoid questions that are "intimidating, argumentative, or skeptical" so as not to "exhibit disbelief of a witness, intentionally or unintentionally." *Id*., citing *People v Young*, 364 Mich 554, 558–559 (1961).

1. Questions Posed to Mr. Swilley's Grandparents

At trial, Mr. Swilley presented evidence that at the time of the crime he was approximately seven miles away at the Saginaw City Hall with his grandmother Alesha Lee, his grandfather Philip Taylor, and his sister, Marcel Swilley. Ms. Lee and Mr. Taylor were executing a quitclaim deed and placing a piece of property into Mr. Swilley and his sister's names. Ms. Lee and Mr. Taylor were listed as witnesses for the defense.

On the seventh day of trial, the prosecution called Ms. Lee as a witness, primarily to

provide testimony about the fact that shots were fired at her home on December 25, 2012.[3] On cross-examination defense counsel elicited information concerning Mr. Swilley's whereabouts on the afternoon in question. Following direct examination, cross-examination by all four defense attorneys, re-direct, re-cross, and an additional re-direct and re-cross, the court questioned Ms. Lee.

THE COURT:	What piece of property did you give Mr. Swilley?
MS. LEE:	I bought some property on 13th Street; the address is 521 South 13th
THE COURT:	Okay. And how old was he at that time, in November?
MS. LEE:	I think he was 16.
	***
THE COURT:	Okay. Do you have any paperwork at all?
MS. LEE:	Yes, I do.
MR. JOHNSON:	Your Honor, objection. That's for the defense's case. We have the case.
THE COURT:	I'm entitled to ask questions, I'm not taking any position one way or the other. I could care less. This is for you to decide. But if you're going cover [sic] it there, then I'll withdraw the question.

T. VII, 127-128. The judge's questions did not clarify any complicated issues or resolve anything left unclear from previous testimony. Ms. Lee had already provided testimony about the piece of property and why she was deeding it to her grandchildren. Rather, in this short exchange, the trial judge demonstrated his intent to participate in the prosecution of Mr. Swilley. In inquiring whether Ms. Lee had any "paperwork," he was essentially asking Ms. Lee whether she had proof to support her claims, conveying to the jury that he did not think her account to be credible without proof. The court continued its challenge of Mr. Swilley's alibis when the defense presented Mr. Swilley's grandfather, Philip Taylor. At that juncture, what began with Ms. Lee as

[3] This incident occurred approximately one month after the Galvin shooting. It was the prosecutor's theory that the Galvin shooting and the shots fired at Mr. Swilley's home were "tit for tat" in a gang war between the North and East sides of Saginaw. T. VII, 12. No actual evidence was presented that these two events were connected or that Galvin and his friends had connections to the North Side.

a line of questioning that looked like cross-examination rose to a level of overt hostility and disbelief comparable to the conduct this Court found objectionable in *Stevens, supra*.

Like Ms. Lee, Mr. Taylor testified[4] that on the afternoon of November 21, 2012, he was with his grandchildren Kareem and Marcel Swilley at the Saginaw City Hall in order to deed them a piece of property. Mr. Taylor recounted that he woke up around noon because he had worked late the night before, and that the family left the house together around 2:00 p.m. for City Hall[5]. There, he had a piece of property signed out of his name and over to his grandchildren. T. XIV, 90. He explained the steps involved in this process and specified that they all had to sign their names and show ID at the front desk and then left that area to get to the paperwork notarized. T. XIV, 90. Through Mr. Taylor, the defense entered into evidence the quitclaim deed that he filed that day. T. XIV, 91; Defense Exhibit 281. The deed is signed by the grantees (Mr. Swilley and his sister), as well as by the grantor (Mr. Taylor) and notarized. T. XIV, 91; see also Defense Exhibit 281.

When discussing what he did the afternoon of November 21, 2012, Mr. Taylor explained that there are "three departments down there" and that he "might have paid my water bill" before going to sign the paperwork for the property. T. XIV, 90. He also testified that after the family left City Hall they went by the bank and then picked up Chinese food at Panda House before returning home together around 5:00 p.m. T. XIV, 93.

On cross-examination, the prosecutor questioned Mr. Taylor in detail about his business at the bank and the water department. Mr. Taylor described his activity at the bank and again explained that he did not remember whether he paid a water bill that day, but believes that he

[4] After the prosecution rested, Mr. Swilley's trial counsel gave an opening statement and called Mr. Taylor as a witness.

[5] At times Mr. Taylor mistakenly refers to City Hall as "the courthouse."

may have paid a bill at City Hall while there to transfer the property. T. XIV, 97-99.

Following a brief redirect examination, the court embarked on a rigorous examination of Mr. Taylor, spanning 15 pages of the transcript. After a few preliminary questions, the court turned to Mr. Taylor's whereabouts on the day of the offense in question. XIV, 119-120. Next, the judge questioned Mr. Taylor about who 521 South 13th Street belonged to, and then spent nearly three pages of transcript quizzing him about his explanation that while the house was legally in his name, it really belonged to his partner of thirty years who, after being diagnosed with cancer, wanted it to be deeded over to her grandchildren. T. XIV, 120-123. Throughout this exchange, the judge's tone and language communicated distrust. T. XIV, 122 ("If you say it was her house . . ." and "And you're telling me that. . .").

The judge then indicated that he understood Mr. Taylor's previous testimony to be that upon arriving at City Hall he first went to pay the water bill. T. XIV, 124. Again, Mr. Taylor testified that he could not be certain whether he also paid a water bill that day. T. XIV, 124-125.

THE COURT:	All right. So you don't know whether you paid the water bill or not on November 21st?
MR. TAYLOR:	No, I ain't – no, I can't say if I did or not.
THE COURT:	All right. When you paid the water bill, when you would pay, how would you normally pay it?
MR. TAYLOR:	Cash.
THE COURT:	Would you get a receipt?
MR. TAYLOR:	Yes.
THE COURT:	Is the receipt timestamped or dated or signed?
MR. TAYLOR:	I don't know.
THE COURT:	Do you have a receipt from that date?
MR. TAYLOR:	I don't even know if I paid the water bill that day or not.

T. XIV, 125. Following the judge's request for proof of payment for a water bill that Mr. Taylor never confirmed he paid, the judge turned his attention to Mr. Taylor's previous testimony that after leaving City Hall he made a stop at the bank to obtain a printout of his account balance. See T. XIV, 91, 97-98. After asking Mr. Taylor a number of preliminary questions such as where the

bank was located, and what department he went to when he got there, the judge again sought proof that Mr. Taylor did what he said he did. T. XIV, 125-126.

THE COURT:	Do you have a copy of that printout with you?
MR. TAYLOR:	The printout?
THE COURT:	Yes sir.
MR. TAYLOR:	I got one one time before.
MR. JOHNSON:	Your Honor, I've got to object. It's –I don't know what you're doing here. I have documents that we've entered into evidence that shows that he was there.
THE COURT:	**You've alleged an alibi defense, and I want to – I'm going through – I want to know what this gentleman did. It's not clear in my mind whether he paid the bill that day. First he thought he paid it, now he didn't pay it, went to the bank, and I'm entitled to ask questions.**
MR. JOHNSON:	Your Honor, and I've got to object. I think you're being very prosecutorial in this–

T. XIV, 126 (emphasis added).

The judge then took note of counsel's objection and resumed his examination of Mr. Taylor, again asking for objective proof of Taylor's stop at the bank ("All right. Where is the sheet today?"), evidence that would have been marginally probative at best, but served to convey to the jury that the judge distrusted Mr. Taylor. T. XIV, 126. Mr. Taylor responded that he had provided the bank printout to his grandson's attorney and noted that it did not have a timestamp or date. T. XIV, 127. Questions about the minutia of Mr. Taylor's errands continued, many of which had been asked and answered during direct and cross-examination. T. XIV, 127-128.

Ultimately, after questioning Mr. Taylor in some detail about his memory of the phone call that Mr. Swilley received while they were all together that afternoon, the judge scrutinized Mr. Taylor about why he had not "come forward" sooner.

THE COURT:	Okay. At some point you learned that Kareem was a suspect, correct?
MR. TAYLOR:	About a year later or six months later or something when they send a warrant out for him. It was a long time after that.

THE COURT:	January of '13?
MR. TAYLOR:	It was—it wasn't the next two or three months, maybe a year went by before I found out.[6]
THE COURT:	All right. What did you do at that point? Anything?
MR. TAYLOR:	What do you mean what did I do?
THE COURT:	Go down and talk – did you go down and talk to Grigg?
MR. TAYLOR:	Who?
THE COURT:	Did you talk to [Det.] Oberle or Grigg at all and say, hey, you got the wrong guy, my grandson was with me?
MR. TAYLOR:	No, I didn't go down and talk to nobody.
THE COURT:	Why not?
MR. TAYLOR:	I ain't feel like I had to.
THE COURT:	Okay.
MR. TAYLOR:	They didn't call me and ask me nothing.
THE COURT:	How would they know to call you?
MR. TAYLOR:	Well, I figure when it's time for me to say what happened, I was gonna say what happened, like I'm doing right now.

T. XIV, 130-32. The majority of the court's 15-page examination of Mr. Taylor was not an attempt to clarify ambiguous testimony, but rather a clear usurpation of the prosecutorial role. *See People v Redfern*, 71 Mich App 452, 457 (1976). While the court may question witnesses to produce "fuller and more exact testimony or elicit additional relevant information," it is "inappropriate for a judge to exhibit disbelief of a witness, intentionally or unintentionally." *Stevens*, 498 Mich at 174. That is exactly what happened here.

At the outset, the judge asked about the minutia of Mr. Taylor's activities on November 12, 2012, nearly two years prior. Indeed, the judge repeated many of the same questions the prosecutor had already asked and received answers to, and upon receiving the same answers from Mr. Taylor, he went into more and more fine detail. These questions did not delve into unaddressed matters of importance, nor were Mr. Taylor's previous answers unclear. **Repeating and building upon the prosecutor's cross-examination suggested to the jury that Mr.**

[6] Mr. Swilley was charged in this matter in December, 2013. See Lower Court Records.

Taylor's previous testimony was somehow questionable and that they should be skeptical.

Likewise, after the court had completed questioning Mr. Taylor about the day in question, it engaged in a classic impeachment technique—asking a defense witness why he or she did not come forward sooner. T. XIV, 130-132. **The court thus communicated to the jury that Mr. Swilley's alibi evidence was manufactured because his grandfather had not personally approached the Saginaw Police Department or Prosecutor's Office with the information when Mr. Swilley was first charged.**

Even more egregious were the court's many requests that Mr. Taylor give paperwork to support his account of this routine trip nearly two years prior. T. XIV, 125-126. This manner of questioning insinuated that if Mr. Taylor was telling the truth, he would have some documentary proof, and thus clearly indicated to the jury that the judge was skeptical of Mr. Taylor's testimony and by Mr. Swilley's alibi. The likelihood that the judge's questions aroused suspicion in the jury's minds can also be seen by the jury's questions to Mr. Taylor which directly followed the court's examination: "Is there proof that you were at the bank?"; "[I]f you got something printed out there, do you have a copy of that printout?" T. XIV, 132-133.

When trial counsel objected to the tone and manner of the judge's questioning, the judge responded by erroneously intimating that the witness was being inconsistent. The record makes clear that there was no inconsistency. Indeed, the court's behavior with Mr. Taylor is particularly notable given the fact that Mr. Taylor was by all appearances a consistent, polite, and forthcoming witness. Stevens, 498 Mich at 175-76 ("Judicial questioning might be more necessary when a judge is confronted with a difficult witness. . . .").

In addition to letting his own opinions become apparent to the jury, the judge's desire for documentation that had not been placed into evidence by defense counsel distracted the jury

from the real import of Mr. Taylor's testimony. **There was no question that Mr. Taylor was at City Hall on the afternoon of November 21, 2012.** T. XIII, 118. His signature on the quitclaim deed is notarized by the notary at that location and on that date. Defense Ex. 281; T. XIII, 101, 116, 118. And, as Mary Malocha of the Saginaw Assessor's Office testified, the deed was filed at City Hall at approximately 3:30 p.m. on November 21, 2012 and entered into the computer system a few minutes later at 3:42 p.m. T. XIII, 103, 106-107. The only purpose of asking those questions regarding the bank and the water bill was to attempt to make Mr. Taylor look like a liar. Even if Mr. Taylor was able to provide the documents the court asked for, they would have provided no information on the ultimate question: was Mr. Swilley, whose signature was on the quitclaim deed, present at City Hall on the afternoon of November 21, 2012?

2. Questions Posed to Joshua Colley

Willie Youngblood and Joshua Colley were close friends of the decedent DaVarion Galvin, and were walking with him on York Street at the time of the shooting. Both Colley and Youngblood were interviewed by police in the days after the incident; both provided information about the vehicle from which shots were fired but maintained that they were unable to identify the shooters. After being taken into police custody as suspects in another shooting nearly one year later, Mr. Youngblood provided the police with information about the perpetrators of the York Street shooting in exchange for a plea agreement. Mr. Colley did not and continued to assert that he and Youngblood never saw the men who shot at them.

Both young men were called as witnesses at trial. The prosecution called Mr. Youngblood early on in their presentation of the evidence. As discussed in more detail in the statement of facts, his testimony was at best inconsistent. Depending on who was questioning him, Mr. Youngblood asserted that he (a) saw and recognized the men in the black Saturn

including Mr. Swilley, or (b) does not know who shot at him and his friends and he only learned the names he gave police from what he was hearing on the street. **Despite these glaring inconsistencies in the account of the prosecution's star witness, whose testimony spanned 134 transcript pages, *the court asked no questions of Youngblood at all.***

A few days later Mr. Colley was called as a defense witness. On direct and redirectt[7] examination, the prosecutor asked Colley about the statement he gave to police a couple months after the shooting. Colley reiterated that he did not remember making the statement and asserted that the information he was alleged to have provided was not accurate.[8] After direct examination, cross examination by all four defense attorneys, redirect, recross, and a second redirect by the prosecutor, the court indicated that it had some questions.

First, the judge asked: "How long was the statement, Mr. Fehrman, or can the defense counsel tell me that he gave to the officers, how many pages?" T. X, 120. After ascertaining that the statement was 38 pages long, the court sought to impeach Mr. Colley with his previous statement: "Thirty-eight pages. **So you talked to these police officers for 38 pages, and they've asked you all about these questions and answers that you gave, and you're saying now none of that is correct?"** T. X, 120 (emphasis added). As he did when repeatedly asked variations of this question by the prosecutor,[9] Mr. Colley again asserted that he did not remember making the

[7] Despite being a defense witness, Colley was called during the prosecution's case and with the prosecutor conducting the direct examination.

[8] Colley testified that he never saw the car from which the shots were fired. He stated that when he heard shots the shots he immediately hit the ground and hid behind a truck that was parked there. T. X, 85-86. He further testified that when he got up he ran and did not look back. He did not remember telling police that a black Saturn pulled up behind them and that he thought there four people in the car, a driver and three shooters, but explained that he was "going on what somebody else told me." T. X, 90.

[9] "No, I don't remember that." (X, 85); "Man, listen, that was a whole year ago, but I don't remember none of that." (X, 89); "I just told you, man. That's what that say. I don't remember that, though." (X, 89); "Man, listen, I didn't remember nothing, man . . . " (X, 89);

statement and that he was high at the time of the shooting. T. X, 121. Thereafter, the following colloquy took place:

THE COURT:	But one of your dear friends, your home boys as you called him, was murdered that day in front of you –
MR. COLLEY:	Right.
THE COURT:	---laying on the ground bleeding to death, and you believe it's important to talk to the police after and let them know what you know happened?
MR. COLLEY:	Right.
THE COURT:	And you did talk to them and you heard what you told them at that time.
MR. COLLEY:	But I was going on what somebody else told me.
THE COURT:	Did you at any time in that statement tell them, I don't – that I don't know what happened?
MR. COLLEY:	No.
THE COURT:	You didn't say, hey, I don't know, I don't know, I don't know, I don't know. You gave these other answers, correct?
MR. COLLEY:	I told you, man. I was high off Promethazine, Codeine, marijuana, and Xanax.

T. X, 121.

Next, the judge asked the prosecutor, "Mr. Fehrman, did he – did he give a response, I don't know I was high?" T. X, 122. Counsel for co-defendant Granderson objected to the court asking questions of the prosecutor and the court's questioning of Mr. Colley resumed:

THE COURT:	Are you saying that when these questions were asked of you at the officer back at the time you gave the statement you said, I don't know, I was high?
MR. COLLEY:	Listen, I –
THE COURT:	That wasn't your answer, was it?
MR. COLLEY:	No, I was going on what somebody else told me.
THE COURT:	Did you tell them that? Did you say –
MR. COLLEY:	No, I didn't tell them that, no.
THE COURT:	Who told you that?
MR. COLLEY:	Man, it was just around, you know, people talk. Like I say, Your Honor, we sat around and talked about this every

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After being asked to look at the statement he gave police, "Man, that's the same thing you was just showing me . . . I don't remember none of that, man. I don't remember none of that. That was a whole year ago. . . I was on Promethazine, Codeine, Xanax, I don't remember." (X, 90); see also X, 91.

	single day, days later, months later, we never knew who it was.
THE COURT:	Are these guys your friends? (referring to the defendants)
MR. COLLEY:	No. It surprised me when they said somebody was getting charged because didn't nobody knew.
THE COURT:	So you have no problem if Ranger – excuse me, if Officer Shaft, excuse me, were to put you in cells with the East Side?
MR. COLLEY:	No, I ain't got no problem with that.
THE COURT:	Okay.

T. X, 122-123. After this prosecutorial exchange, the court asked for one of the prosecutor's exhibits—"the one where you got hand signals or whatever you want to call them"— to be put back up on the screen so that he could refer to it while questioning Mr. Colley. T. X, 124. Defense counsel objected, "Your Honor, with all respect, I've got to object to this. It appears to me as though the judge is taking the role of the prosecutor." T. X, 124. The court overruled the objection and continued to examine Mr. Colley. T. X, 124-5.

The trial judge's hostile questioning of Colley surrounding a matter of central importance to Mr. Swilley's defense—whether or not Colley and Youngblood ever saw the men who shot at them—allowed his own view of the evidence to be apparent to the jury. **None of the questions the court asked Mr. Colley can be fairly characterized as questions intended to clarify or elicit additional relevant information. Indeed, they had been asked and answered before and at length.** See T. X, 85-91; see also footnotes 8 & 9, *infra*. Rather, in examining Colley, the court acted as a second prosecutor who saw an opportunity to more fully impeach a witness. In particular, the judge's extended questioning displayed that he was incredulous of Colley's testimony that both he and Youngblood never saw the shooters. It intimated that Colley was lying about not remembering what he had previously told police and lying when he said that the information he did provide to police was based on what he heard from others and not what he saw. Moreover, in asking whether Officer Shaft could put Colley in a cell with "the East Side,"

the court suggested that Colley was afraid or had a reason to be afraid of the defendants, and that fear impacted the credibility of his testimony. Notably, this question came directly after Mr. Colley made an unprompted and powerful statement: "Your Honor, we sat around and talked about this every single day, days later, months later, we never knew who it was." T. X, 123. Yet the court ignored the import of this testimony and instead suggested that Mr. Colley had a motive to lie because he was afraid of being locked up with "the East Side." T. X, 123.

B. Tone and Demeanor

As a whole, the court's questioning of defense witnesses was intimidating, argumentative, or skeptical. *Stevens*, 498 Mich at 175. The judge actively sought to impeach witnesses by indicating a motive to lie or suggesting that a credible person would have behaved differently. He also asked witnesses about very specific immaterial details and repeatedly sought from them some form of objective proof to support their testimony.

Even on matters of little relevance, the substance of the judge's questions and the manner in which they were said indicated disbelief or hostility. For example, when asking Mr. Taylor about the home he and Ms. Lee deeded to Kareem and Marcel, the court used phrasing like, "If you say it was her house . . ." and "And you're telling me that . . ." T. XIV, 122. Likewise, in the middle of the prosecutor's direct examination of Mr. Swillley's older sister, as the prosecutor was eliciting her explanation for why she lied about who she loaned her car to on December 25, 2012, the judge interjected: **"How do we know you're telling the truth today?"** T. IX, 98 (emphasis added). Such a hostile, adversarial question was highly improper and prejudicial.

Trial counsel objected to the judicial intervention, and asserted that the judge was taking the role of the prosecutor. T. X, 124; XIV, 127. In response to one objection to the judge's insistence that Mr. Taylor produce proof, the tone and substance of the judge's response further

communicated his (unwarranted) disbelief in Mr. Taylor's testimony: "You've alleged an alibi defense, and I want to – I'm going through – I want to know what this gentleman did. It's not clear in my mind whether he paid the bill that day. First he thought he paid it, now he didn't pay it, went to the bank, and I'm entitled to ask questions." T. XIV, 126-127.

C. Scope and Direction of the Judicial Intervention

Although this was a somewhat lengthy trial, the issues were not complicated and the judicial intervention that occurred cannot fairly be characterized as an effort to shine light upon convoluted, technical, or complex subject matter. *Stevens*, 498 Mich at 176. Rather, each witness was comprehensively questioned by the prosecutor and up to four defense attorneys, and the testimony was well within the capacity of the jurors to weigh without judicial intervention. As in *Stevens*, the information presented did not warrant the degree to which the trial judge intervened.

Furthermore, the court's intervention was unbalanced. See *Stevens*, 498 Mich at 188 ("it is also important to consider whether this intervention was directed toward a particular party, so as to distinguish excessive but ultimately neutral questioning from biased judicial questioning."). The record reflects that the judge's questioning was directed against the defendant and in favor of the prosecution. The judge engaged in extensive and often times heated cross-examination of Mr. Swilley's two witnesses (Colley and Mr. Swilley's grandfather), as well as the two defense-friendly witnesses called by the prosecution (Mr. Swilley's older sister and his grandmother).

Remarkably, the record contains no similar examination of the prosecution's witnesses—not even Youngblood, who was similar in every way to Colley, except that he gave testimony favorable to the prosecution. The extent and nature of the court's questioning of Colley is thus particularly striking when compared to the court's complete lack of questioning of Youngblood. Unlike Colley, Youngblood's testimony was, as both parties acknowledged,

fundamentally inconsistent and unclear. In essence, Youngblood denied ever seeing the shooters when answering questions by the defense attorneys, and then reluctantly asserted that he had seen them when questioned by the prosecutor. T. V, 61-195. Given the principle that a judge's questions may serve to clarify points that are obscure or confusing, *Simpson v Burton*, 328 Mich 557, 564 (1950), one might expect that judicial involvement may have been more necessary here.

The fact that the judge heavily impeached all defense friendly witnesses but asked not a single question of this very shaky prosecution star witness speaks volumes about judicial bias.

D. Presence of Curative Instructions

At the close of trial, the judge provided the jury with a general curative instruction that his questions and comments were not evidence and any judicial intervention was not meant to reflect a personal opinion. T. XVI, 11-12. Additionally, when overruling defense counsel's objections to the court's questioning of Lee (VII, 128) and Colley (X, 124), the judge asserted that he was "entitled to ask questions" and "could care less" about the outcome of the case. Rather than "immediate curative instructions," these remarks read more like hostile retorts to defense counsel.

While curative instructions may ensure a fair trial despite minor or brief inappropriate conduct, *Stevens*, 498 Mich at 177, the conduct here was neither minor nor brief. On the contrary, the trial judge improperly and egregiously invaded the prosecutor's role at multiple points throughout the trial whenever evidence was presented that supported Mr. Swilley's defense. "[I]n some instances judicial conduct may so overstep its bounds that no instruction can erase the appearance of partiality." *Stevens*, 498 Mich at 177-178. This is one of those instances.

E. Conclusion and Analysis of Prejudice

It is essential that a judge not let permit his own opinions with respect to the parties become apparent to the jury. *Stevens*, 498 Mich at 174-175. "Because jurors look to the judge for

guidance and instruction, they are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge." *Id*. at 174, citing *In re Parkside Housing Project,* 290 Mich 582, 600 (1939). Here the trial judge's clear disbelief of the defendant is apparent from the record and undoubtedly permeated the atmosphere of the court room. *Stevens*, 498 Mich at 175. The nature of the judicial conduct, the judge's tone and demeanor, and the direction of the judge's intervention in light of the trial's complexity all indicate that he exhibited judicial bias in the presence of the jury. Although general curative instructions were given, these instructions were not enough to overcome the bias exhibited against the defense throughout trial.

Reversal is mandated even if structural error is not found.

This was a very close case. Mr. Swilley was one of four defendants charged with Galvin's murder. The prosecution's theory of motive was simply that the shooting was an act of gang violence, part of an ongoing feud between the North and East sides of Saginaw. To this end it portrayed the defendants as gang members feuding with the victims. At the time of the offense, Mr. Swilley was a 16-year-old high school student and his co-defendants were all several years older. While there was physical evidence that linked co-defendants Thomas and Granderson to the gun and car used in the shooting, the evidence against Mr. Swilley was far less substantial, hinging largely on his associations with Thomas and Granderson rather than any conclusive physical evidence. Mr. Swilley's third co-defendant, Martin, was acquitted of all charges.

The only evidence that placed Mr. Swilley at the scene of the crime was the testimony of Youngblood, whose identification of Mr. Swilley was incredible for a number of reasons. Although he was questioned shortly after the shooting, Mr. Youngblood did not name Mr. Swilley as a perpetrator until nearly one year later, when he was interviewed by police regarding his involvement in another shooting. Youngblood received a plea offer and sentence agreement

in exchange for his testimony against Mr. Swilley and his co-defendants. At trial, he flip-flopped between testifying that he saw Mr. Swilley in the car, and denying that he was ever able to see the shooters. Youngblood admitted that the names he provided to the police were just rumors he had heard. Since trial, Youngblood has further repudiated his testimony, and at a post-conviction evidentiary hearing stated conclusively that he never saw the shooters and lied when he testified otherwise. Furthermore, as previously discussed, the other victim-witness Colley, who did not testify in exchange for a benefit, maintained that he and Youngblood had never seen the perpetrators. He repeatedly acknowledged that Galvin was his close friend and that he wanted to see justice done for him, but asserted that he could not say what he did not see.

In addition to a lack of credible evidence that Mr. Swilley was more than just a neighborhood friend of the actual perpetrators, there was significant evidence that Mr. Swilley was with his grandparents and sister at the Saginaw City Hall when this murder occurred. First, both Ms. Lee and Mr. Taylor testified that on the afternoon in question they were with 16-year-old Mr. Swilley and his sister at City Hall in order to deed them a piece of property. T. VII, 98, 104; XIV, 90. Ms. Lee was undergoing cancer treatment and she wanted to make sure that her grandchildren had title to the home in case anything should happen to her. T. VII, 104; 128.

At City Hall they obtained, completed, and signed the document, went to another room in the building to have it notarized, and then filed it with the clerk. T. XIV, 90, 99-100. The record reflects that this deed was filed at approximately 3:30 p.m. that afternoon and is signed by the grantor, Philip Taylor, and the grantees, Mr. Swilley and his sister. T. XIII, 85, 90, 103, 106-107. The signatures do not appear to be written by the same hand and Mr. Swilley's signature on the document resembles his signature on other court papers.[10] The grantor's signature is notarized,

[10] T. XIII, 88 (different handwriting), 98 (grantees names not Ms. Malocha's writing),

and both Ms. Lee and Mr. Taylor testified that Mr. Swilley was with them and signed his named at the same time.[11] T. VII, 98, 104; T. XIV, 90, 99-100.

In addition to Ms. Lee and Mr. Taylor's testimony as well as the quitclaim deed itself, Mr. Swilley's phone records from the day of the offense, entered into evidence by the prosecution, support his alibi. The shooting occurred at approximately **2:30 p.m**. IV, 90. Mr. Taylor estimated that he, Ms. Lee, Mr. Swilley and his sister left the house for City Hall around **2:00 p.m.**, (XIV, 90) and that once they arrived there the entire process took 45 minutes to an hour to complete (XIV, 100). According to the clerk in the Saginaw County Assessor's Office, the quitclaim deed was filed at City Hall at approximately **3:30 p.m**. XIII, 103, 106-107. Mr. Swilley's phone activity during the relevant time period is as follows:

- At 1:57 p.m., Mr. Swilley received a text from co-defendant Thomas that said "call me." T. XII, 111.
- At 1:59 p.m., Mr. Swilley received a text from someone that said "aww." T. XII, 113.
- At 2:35 p.m., Mr. Swilley sent a text to someone, "you know, what's up?" T. XII, 114.
- At 2:44 p.m., Mr. Swilley sent a responsive text to "Boosie/my luv" which said, "**nuttin going down here to put the house in my sister name."** T. XII, 114.
- At 2:48 p.m. Mr. Swilley received another text from co-defendant Thomas stating, "bekupp". XII, 115.
- At 2:49 p.m. Mr. Swilley responded via text and asked how many people had been shot. XII, 115
- At 2:50 p.m. Mr. Thomas replied "about 3". XII, 116.

Three critical pieces of information can be derived from these text messages. First, Mr. Swilley was not with co-defendant Thomas at 1:57 p.m., roughly half an hour before the crime, or at 2:48 p.m., approximately 18 minutes afterward. Second, Mr. Swilley was informed by Thomas that shots had been fired and that people had been injured. Judging by the time of the

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109, 120-121 (advice of rights form).

[11] Mr. Swilley was not charged in this case until December, 2013. Surveillance video of the City Hall offices was not available as it is destroyed after 30 days (T. XIII, 92), nor was the cell phone location data as that was purged after six months of non-use (T. XII, 51).

text and their questions and answers, Thomas had firsthand knowledge of the homicide, but Mr. Swilley did not. Third, less than 14 minutes after the shooting, Mr. Swilley was on his way to somewhere, presumably City Hall, to put the house in his sister's name. **On balance, the phone evidence strongly supports Mr. Swilley's alibi evidence and controverts the prosecution's argument** at trial that he was present at the crime scene and that Mr. Swilley and his co-defendants had been together in Teresa Jurdem's black Saturn since at least noon that day.

In this close and circumstantial case, the judge improperly weighted the scale against Mr. Swilley by placing his great influence on the side of the prosecution. In particular, the length and nature of the court's questioning of Mr. Swilley's key witness, Mr. Taylor, suggested to the jury that Taylor was not to be trusted and greatly harmed Mr. Swilley's otherwise strong alibi defense. The misconduct seriously affected the fairness and integrity of this trial. *People v Carines*, 460 Mich 750, 763 (1999). Furthermore, Mr. Swilley is innocent, and notes that the court's errors resulted in the conviction of an actually innocent defendant. *Carines*, *supra* at 763.

Reversal is required.

II. Mr. Swilley Was Deprived Of His Right To A Fair Trial By The Introduction Of Irrelevant And Prejudicial Expert Testimony Regarding Gang Affiliation And Motive As Well As Extensive Other Irrelevant Gang-Related Testimony.

Standard of Review and Issue Preservation

The standard of review for a trial court's decision to admit or exclude evidence is abuse of discretion. *Elezovic v Ford Motor Co.*, 472 Mich 408, 419 (2005). A trial court abuses its discretion when it "chooses an outcome falling outside th[e] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269 (2003).

This issue was preserved by defense counsel through a pretrial motion and evidentiary hearing, T. III, 88-92, and multiple contemporaneous objections throughout trial. T. XIII, 148,

150, 155. A preserved non-constitutional error warrants reversal when the defendant establishes that it is more probable than not that the error was outcome determinative, i.e., that it undermined the reliability of the verdict. *People v Douglas*, 496 Mich 557, 565–566 (2014).

Discussion

Defendants have a due process right to a fair trial undeterred by inadmissible and unfairly prejudicial evidence. US Const amends VI; XIV; Const 1963, art 1, § 20. An important element of a fair trial is that only relevant and competent evidence is introduced against the accused. *Bruton v United States*, 391 US 123, 131 (1968). This right requires a fair trial of the issues involved in the particular case and a determination of disputed questions of fact on the basis of only properly admitted evidence. *Napuche v Liquor Control Comm*, 336 Mich 398, 403 (1953).

The Rules of Evidence prohibit the introduction of irrelevant evidence. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403. In determining whether evidence is relevant, a court must determine whether the evidence was "material" in determining the issue and, secondly, the court must assess the "probative force" of the evidence, or whether the evidence makes a fact of consequence more or less probable than it would be without the evidence. *People v Mills*, 450 Mich 61, 67 (1995).

Evidence must be suppressed if its probative value is substantially outweighed by the danger of unfair prejudice. *People* v *Blackston*, 481 Mich 451, 461 (2008). Unfair prejudice involves an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." MRE 403. It exists where there is a danger that the evidence will

be given undue or preemptive weight by the jury or where it would be unfair to allow use of the evidence. *People* v *Mills,* 450 Mich 61 (1995). Assessing the probative value of a piece of evidence calls for a court to balance factors such as the time required to present the evidence, how essential the evidence is to prove the case, and the potential for the evidence to confuse or to mislead the jury. *People* v *Oliphant,* 399 Mich 472, 490 (1976).

Mr. Swilley was denied his right to a fair trial when the prosecution presented expert testimony 1) regarding the conduct and organization of Saginaw gangs and alleging a gang-related motive for the crime—despite the lack of independent evidence that the crime was gang-related, and 2) concluding that Mr. Swilley was a gang member, which was mere unsupported conjecture. The improperly admitted evidence about unrelated gang activity was so ubiquitous and egregious that any probative value was substantially outweighed by unfair prejudice.

A. The inherent danger of gang-expert testimony, and the need for gatekeeping

It has long been recognized that evidence of gang affiliation must be treated cautiously because of its inherently prejudicial nature and jurors are likely to view a criminal defendant's gang membership with disfavor. See *People v Ho,* 231 Mich App 178, 183–184 (1998); *People v Wells,* 102 Mich App 122, 129–130 (1981); *see also United States v Jobson,* 102 F 3d 214, 219 n 4 (CA 6, 1996); *accord United States v Jernigan,* 341 F 3d 1273, 1285 (CA 11, 2003). The Seventh Circuit has explained:

> Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. **Guilt by association is a genuine concern whenever gang evidence is admitted.**

United States v Irvin, 87 F3d 860, 865 (CA 7, 1996) (emphasis added).

B. The Bynum standard for gang-expert testimony

In *People v Bynum*, 496 Mich 640 (2014), this Court recognized the danger that gang-expert testimony, if not carefully limited, may serve as impermissible propensity or character evidence. This Court created a careful standard for gang-expert testimony, which unfortunately was not followed here.

Daubert's basic gatekeeping obligation applies to all expert testimony, not only "scientific" knowledge. *Kumho Tire Co, Ltd v Carmichael*, 526 US 137 (1999). As this Court stated in *People v Kowalski*, 492 Mich 106, 120 (2012), "[a] court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable." Building on that, *Bynum* concluded that the trial court may admit gang-expert testimony only when there is "evidence that the crime at issue is gang-related," and an expert "may not use a defendant's gang membership to prove specific instances of conduct in conformity with gang membership. . . ." *Id.* at 615, 635–636. Assuming the evidence is admissible under MRE 404(a), expert testimony properly may address "general characteristics of gang culture for an appropriate purpose, such as helping to elucidate a gang member's motive for committing a gang-related crime." *Id.* at 626–627.

C. The lack of sufficient basis for gang-expert testimony in this case

Importantly *Bynum* noted:

> The introduction of evidence regarding a defendant's gang membership is relevant and can assist the trier of fact to understand the evidence **when there is fact evidence that the crime at issue is gang-related**. Ordinarily, expert testimony about gang membership is of little value to a fact-finder unless there is a connection between gang membership and the crime at issue.

Bynum, 496 Mich at 625–26. The prerequisite this Court required in *Bynum* is simply not present here. Because there is no independent evidence that the shooting in question was gang-related,

there was no basis to admit gang-expert testimony. This point is rather obvious and necessary: Without such a threshold requirement, young men from certain neighborhoods could always be deemed to have acted along gang lines. That is exactly what happened here, as described below.

In this case, there was no basis for Oberle and Griggs's testimony, so, even without addressing the content of their testimony, reversal is required.

Attorneys for the four co-defendants challenged the introduction of this expert testimony arguing that there was no actual evidence that the incident involved a gang issue and not some other, personal motive. There is no tangible evidence of a rivalry between the young men; there was no evidence that the shooters or victims were displaying gang signs or wearing gang colors, and perhaps most importantly, **the theory was directly refuted by the prosecution's chief witness, Willie Youngblood** who testified at the preliminary exam that he was "cool" with Mr. Swilley. P. 45-46.

The court summarily concluded that the "gang evidence" was consistent with the prosecutor's theory of the case, relevant to motive, and admissible. T. IV, 37. The judge noted that the defense could challenge the evidence, joking "maybe we're going to hear from them they're members of a rap group . . . ." T. IV, 37.

At trial, little evidence was produced that the East Side-Bloomfield rivalry was genuine. Despite the sheer volume of "gang pictures" introduced, however, no photo directly referencing the alleged East Side-Bloomfield rivalry was produced. T. XIV, 60. Officer Jonathan Beyerlein, called by the state to testify about the Christmas Day incident, was asked on direct Bloomfield's relationship with the East Side, and replied: "The East Side and Bloomfield are kind of friendly more than North Side and East Side are friendly." T. IX, 61. On cross, Officer Beyerlein said of the neighborhoods: "[T]hey have been known to be cooperative at times, yeah." T. IX, 77. And

again, Youngblood, the prosecution's key witness and a surviving victim of the shooting, repeatedly denounced any kind of rivalry or conflict Mr. Swilley or his co-defendants or people associated with the "East Side" more generally. At trial he testified that he had friends from all over the city including the East Side, and that neither he nor any of his friends had ever "gotten into it" with the defendants. T. V, 102, 104.

D. The egregious nature of gang expert testimony in this case

At the evidentiary hearing held prior to the start of the proofs, Oberle was presented as an expert on Saginaw gangs based on his experience as a Saginaw Police Officer. Oberle opined that the defendants were gang members. In support of his claim he pointed to their booking sheets from the Saginaw County Jail. According to Oberle, at intake the jail questions inmates about who they "get along with" to avoid fights. The booking sheets for the defendants, generated by jail personnel, indicate that they have "east side affiliations." The record reflects that all four young men were born and raised on the east side of Saginaw. Oberle also testified that Mr. Swilley has a tattoo that reads "RIP Tay Darby" which he believed was significant because Darby was a "well known gang member for the East Side." Oberle was then shown pictures of Mr. Swilley and his co-defendants taken from their Facebook pages, in which the young men were flashing what Oberle deemed were gang signs. On this evidence, Oberle concluded that Mr. Swilley and his co-defendants were "East Side" gang members.

At trial, Oberle was qualified as an expert in the area of "Saginaw gang territory, gang membership, and indicia of gang affiliation," T. XIII, 151, 171, and testified before the jury that in his expert opinion Mr. Swilley and his co-defendants were gang members "based on people they hangout [sic] with, areas that they hangout, signs that they've flashed [gang signs] [t]hat's indicative of—where they live, who they affiliate with and who they are friendly with, which

would then show why some of this stuff could happen." T. XIII, 165.

The trial court's admission of expert testimony that 16-year-old Mr. Swilley was a gang member based on the criteria outlined by Oberle was clear abuse of discretion. Young men from neighborhoods like Mr. Swilley's cannot control where they were born or who they grew up with. NFL star and Stanford University graduate Richard Sherman wrote on this issue:

> I look at those words—*gang ties*—and I think about all the players I've met in the NFL and all of us who come from inner-city neighborhoods like mine in Los Angeles, and I wonder how many of us could honestly say we're not friends with guys doing the wrong things. I can't.[12]

Moreover, teenagers across the country embrace the silly practice of flashing real or made-up gang signs.s.[13] Without any independent evidence that the crime in question was gang-related at all, allowing an expert to claim that such innocuous ties are evidence of gang membership, and somehow probative to the question of identity in a crime, is very dangerous.

Even if Oberle's purported data was reliable, the sweeping nature of his conclusion was not. Although there is no actual evidence that any of the victims in this case were targeted because of a gang rivalry, Oberle opined that the teenagers, who were from the Bloomfield area, were members of the Bloomy Boys or Gnarly Boys gang which was affiliated with the North Side, a known rival of the East Side. T. III, 106. Given Oberle's largely unsupported belief that the victims were also gang members and presumption that a gang rivalry existed between them and the defendants, Oberle concluded that the motive was gang activity: "One gang sees another

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[12] *Stardom Doesn't Change Where You're From*, SPORTS ILLUSTRATED, April 2, 2014, *available at*: http://mmqb.si.com/2014/04/02/richard-sherman-desean-jackson.

[13] *Sheboygan Falls teens under fire for "gang signs" photo*, FOX 6 MILWAUKEE, January 16, 2014 ("The teens are adamant that they were not aware of the declared meaning of the symbols they showed.") *available at:* http://fox6now.com/2014/01/16/sheboygan-falls-teens-under-fire-for-gang-signs-photo/; *California cheer put on hiatus after 'gang' photo appears on social media*, THE DAILY MAIL UK, August 7, 2014 (" 'I think they're just being teenagers, having fun, being silly.") *available at*: https://goo.gl/1gm7jT.

person from a rival area walking, and it's an open shoot policy." T. IV, 15.

In addition, through Oberle the prosecution admitted a drawing found at the home of someone named Jalen Finch. T. XIII, 178; People's Exhibit 274. Finch was mentioned for the first and only time in relation to this document. Oberle asserted that Finch was associated with the East Side or Blood gang and that the drawing "has a bunch of names and information as it relates to [the Blood] gang." T. XIII, 176-177. Over objection, Oberle then read the defendants names from the document. T. XIII, 180. According to Detective Oberle, an individual "becomes" associated with the East Side gang by being born in that area or moving there at a very young age. T. XIV, 63. Again, such testimony is overbroad and obviously far more prejudicial than probative: **Oberle essentially told the jury that Mr. Swilley is in a particular gang simply because he was born in the neighborhood where they operate.**

Joseph Grigg, an investigator with the Saginaw County Prosecutor's Office at the time of trial who had previously worked as a police officer in Saginaw, also testified about gang activity in Saginaw based on his experience, though he was not qualified as an expert. T. X, 27-28. His testimony was mostly cumulative of Oberle's. Grigg testified that a number of violent crimes have been committed by North Side, East Side, and Bloomfield Gang members. T. X, 30-31. Notably, Grigg was asked by the prosecution whether he was familiar with the defendants and he stated that he was to varying degrees. T. X, 31. Thereafter the prosecutor requested that Grigg identify the co-defendants in the courtroom. T. X. 31. The only purpose for this line of questioning was to suggest to the jury that the defendants were individuals that were generally known to the Saginaw police. That improper purpose was further underscored when Grigg went on to testify at length about the entirely unrelated murders of alleged Saginaw gang members Tay Darby and Ronnie Clemmons based on his experience with the police force. T. X, 41-55

E. The prejudice of the irrelevant/unwarranted expert testimony in this case

Without any actual evidence that the crime was gang-related or that Mr. Swilley was involved in gang activity, Oberle and Griggs's testimony was irrelevant, prejudicial, and should have been excluded under MRE 402 and 702.

The improper expert testimony here was prejudicial on two levels. First, the motive testimony proved too much. Indeed, the prosecutor's theory of motive was, in his own words, "simply because they're associated with different neighborhoods." T. III, 28. Though the prosecutor warned the jury that the presentation of gang testimony was not to "say anybody who's ever been associated with a gang is a murder, is a bad person," it did exactly that. It functioned to suggest that anyone "associated" with a gang territory—i.e., anyone from East, North, South, or Bloomfield neighborhoods of Saginaw—has a motive for murder. As the prosecutor averred in closing argument, "It's because they're from the wrong side and it's enough, and it's enough." T. XV, 29. Indisputably, the victims and the defendants were from different Saginaw neighborhoods. **Yet, there was no actual evidence of a rivalry between the victims and the defendants, and nothing about the crime itself that indicated gang activity.** Further, the record established that Galvin and his friends were shot in their own neighborhood, not while walking through rival territory. Without more, the court should have exercised its gatekeeping role under MRE 702 and MRE 403 and excluded the expert testimony here because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Second, the gang testimony served to bolster the case against Mr. Swilley which was slim and countered by compelling alibi evidence as discussed in detail in Argument I(E). Mr. Swilley's two convicted co-defendants were connected to the shooting through physical

evidence. Mr. Swilley was, through alibi testimony and text messages on his phone shown to most likely have been somewhere else at the time of the shooting. Nevertheless, the line was blurred because of the guilt-by-association narrative that grew out the irrelevant and egregious gang-expert testimony. Expert testimony concluding that Mr. Swilley was an East Side gang member, combined with testimony about territorial violence and a gang-related motive, and compounded by dozens of photos of Mr. Swilley flashing gang signs with his co-defendants, made it impossible for the jury to consider him separately from his co-defendants.

Any probative value of the gang testimony was substantially outweighed by its prejudicial effect. Even assuming the crime was gang-related and some expert testimony was proper, the majority of the "gang evidence" introduced in this case was not relevant evidence or helpful to the jury. First, the extent of the "gang evidence" in this case was excessive, and with the same images and questions were presented to multiple witnesses, much of it was cumulative.[14] The jury, to use the prosecutor's own words, was "tortured and inundated" with photographs of Mr. Swilley and his co-defendants flashing gang signs. T. XV, 29. However, none of these photographs had any real connection to the crime in this case. There is not a single photo that indicates any kind of gang animosity between Mr. Swilley and the victims or the Bloomy Boys (Gnarly Boys) more generally.

In addition to the prosecution's repeated use of the same marginally relevant and yet extremely prejudicial images throughout trial, the prosecutor's direct examination of Mr. Swilley's grandmother and guardian Alesha Lee illustrates the way in which irrelevant "gang-related" evidence dominated the trial. First, the prosecutor asked Ms. Lee whether she was

[14] The same photographs were shown over and over to both the law enforcement and civilian witnesses. T. VII, 49-73 (Lee); T. IX, 107-117, 148-157 (Harris); T. XI, 10-25 (Montgomery); T. XIII, 167-169, 183-184 (Oberle); T. XIV, 12-13 (Oberle).

familiar with numerous people, who had *zero* connection to the Galvin shooting, frequently using street names. The implication was that the individuals she was being questioned about were gang members. The prosecutor also questioned Ms. Lee about Mr. Swilley's biological father who had never been a part of his life or upbringing. Upon objections for relevance from the defense, the prosecutor asserted that Mr. Swilley's father had something to do with the underlying motive. T7, 40.

Finally, the prosecution presented extensive evidence through multiple witnesses (and photographic exhibits) about the 2011 murder of Tay Darby, a purported East Side gang member and the 2012 murder of Ronnie Clemmons, a purported North Side gang member. T. IX, 109-110, 113-114 (Harris); T. X, 41-55 (Grigg); T. XI, 17-22; T. XIII, 179, 181 (Oberle); T. XIV, 10, 13 (Oberle). It further presented the jury with pictures of Mr. Swilley at the Darby memorial site, T. X, 48-49, as well as another photograph of Mr. Swilley with Darby where Mr. Swilley appears to have a handgun in his waistband. T7, 117-118; T. IX, 109. The introduction and repetition of this evidence served no purpose other than to present the jury with the prosecution's interpretation of the history of gang violence in Saginaw and link Mr. Swilley to unrelated violent behavior with the suggestion that he was acting in conformity with gang membership.

Given the inherently prejudicial nature of evidence of gang affiliation, the court had a responsibility to limit excessive, cumulative, and irrelevant evidence. The photographs showing Mr. Swilley making gang signs with other young men including his co-defendants Thomas and Granderson did not need to be presented to multiple witnesses. Considering that the court permitted an expert witness to provide testimony regarding the meaning of the gestures in these photographs, the prosecution did not need to continually question civilian witnesses such as Mr. Swilley's grandmother and sister about the images. Moreover, the testimony of Det. Grigg, an

employee of the prosecutor's office, simply reiterated Oberle's expert testimony about gang territories, and added to it only irrelevant and prejudicial information concerning long dead gang members and his personal recognition of the defendants.

The testimony and evidence presented intended to establish Mr. Swilley's alleged gang-affiliation was prejudicial because it functioned to cast the character of Mr. Swilley in an extremely negative light, suggesting a propensity to engage in criminal conduct. More importantly, the highly-charged gang affiliation evidence served as a substitute for direct evidence against Mr. Swilley. Especially where concrete evidence existed linking co-defendants Thomas and Granderson to the shooting, it increased the chance of guilt-by-association. As such, the irrelevant information was likely accorded undue or preemptive weight by the jury. The only evidence presented against Mr. Swilley apart from the gang evidence was the equivocal, shifting, and incredible testimony of Youngblood who testified at trial in exchange for relief in his own case and who has since completely recanted.

Given the lack of legitimate evidence presented at trial and the probability that the jury used the inadmissible evidence to conclude that Mr. Swilley is a bad person, or that he is the type of person who commits crimes, reversal is required.

III. The Court Erred And Violated Mr. Swilley's Constitutional Right To Due Process By Failing To Properly Apply The *Miller* Sentencing Factors, And Trial Counsel Was Ineffective In Failing To Investigate And Present Mitigating Evidence.

Standard of Review

The application of *Miller* is an 8th amendment constitutional question, reviewed *de novo*. *See, generally, People v LeBlanc*, 465 Mich 575, 579 (2002).

"Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *LeBlanc, supra*. Findings of fact are reviewed for clear error and questions of constitutional law are reviewed *de novo. Id*.

Discussion

In Issue IV of his Standard 4 Brief on Appeal, Mr. Swilley argued that the trial court erred in failing to adhere to the sentencing procedure required under MCL 769.25 and set forth in *Miller v Alabama*, 567 US __; 132 S Ct 2455 (2012). In particular, Mr. Swilley asserted that the court erred in sentencing him to life without parole on the conspiracy count and resentencing him to 37 to 75 years in prison for first degree murder without consideration of the *Miller* factors.

The Court of Appeals addressed this issue and held that (1) Mr. Swilley's sentence for first-degree murder complied with *Miller* and MCL 769.25; and (2) the court erred in sentencing him to life without parole for conspiracy given the recent amendments to MCL 769.25, but amending the judgment of sentence to life *with* the possibility of parole alleviated any error under *Miller* or the court rule. Appendix A at 28-29.

Mr. Swilley agrees that the penalty for conspiracy to commit murder is not life without the possibility of parole. He disagrees, however, that the relief required pursuant to *Miller* and *Montgomery v Louisiana*, 136 S Ct 718 (2016) is not applicable to his conviction for conspiracy to commit murder as he received the same unconstitutional sentence as a juvenile for that count. The conspiracy statute, MCL 750.157a, requires that a defendant be sentenced to a penalty "equal to that which could be imposed" for the crime he or she conspired to commit. The statute does not allow a harsher sentence for conspiracy than would be allowed for the crime the defendant conspired to commit. MCL 750.157a(a). In light of the Michigan Parole Board's philosophy that a life sentence means life in prison ("life means life") as demonstrated through

its official statements and actual practices, a life with parole sentence is for all practical purposes a longer sentence than any term of years sentence contemplated by MCL 769.25. See *People v Hill*, 267 Mich App 345 (2005); *Foster v Booker*, 595 F 3d 353 (CA 6, 2010).

Mr. Swilley could not have been sentenced to a penalty of life *with* parole for first-degree murder. MCL 769.25 establishes that if the prosecutor does not seek a life without parole sentence, or if the court after conducting a *Miller* hearing decides not to sentence the individual to life without parole, the court shall sentence the individual to a term of imprisonment to which the maximum sentence is not less than 60 years and the minimum sentence not less than 25 years. MCL 769.25(9). The statute does not permit a sentence of life *with* parole. Indeed, compliance with *Miller* and *Graham* requires providing a meaningful opportunity for release to juvenile offenders. *Graham v Florida*, 560 US 48, 75 (2010).

Because life *with* parole is an unconstitutional sentence as applied to Mr. Swilley for first-degree murder, it is also unconstitutional for conspiracy to commit murder. The appropriate remedy is resentencing to a term of years.

Resentencing is also required on the first-degree murder count. In *Miller* the United States Supreme Court reiterated that "youth is more than a chronological fact" and required lower courts to take into consideration "how children are different" before sentencing juvenile homicide offenders. *Miller*, 132 S Ct at 2469. To that end, the *Miller* Court set forth factors for the sentencing court to consider. *Miller* and *Montgomery* stand for the principle that juveniles are a distinct class entitled to individualized sentencing. *People v Carp*, 496 Mich 440, 458 (2014). The *Miller* factors ensure meaningful review and consideration and are equally relevant when sentencing a juvenile for first degree murder when a life without parole sentence is off the table as when it is available. See *State v Riley*, 110 A.3d 1205 (Conn. 2015) (rationale in *Miller*

extends beyond mandatory schemes); see also *State v Ronquillo*, 361 P. 3d 779 (Wash Ct. App. 2012) (before imposing a term of years sentence that is the functional equivalent of a life sentence the court must take into account how children are different); see also *Bear Cloud v State*, 334 P.3d 132 (Wyo. 2014) (*Roper*, *Graham*, and *Miller* require sentencing courts to provide an individualized sentencing hearing and to weigh factors concerning a juvenile's diminished culpability and greater prospects for reform, before imposing an aggregate sentence that is the functional equivalent of life without parole).

Pursuant to *Miller*'s core proportionality principles, an offender's age has special relevance to his culpability and necessarily factors prominently in a sentencing calculation. *Miller*, 132 S Ct at 2469. *Miller* cited youthful offenders' less developed capacities for reasoned judgment and decision-making in finding that they were less culpable for their actions. At the same time, the Court recognized that these same features of malleability and potential for growth rendered them more amenable to rehabilitative efforts and interventions. Additionally, *Miller* instructs that in determining an appropriate sentence, sentencing courts must consider "the background and mental and emotional development" of each youthful offender before passing sentence. *Id*. at 2465. In other words, *Miller* requires a sentencing court to tailor punishment to the individual juvenile, utilizing these factors to determine the individual's level of responsibility, guilt, and amenability for growth.

For the same reasons that the *Miller* factors must guide the court when sentencing a juvenile homicide offender, trial counsel has an obligation to investigate and present mitigating evidence that educates the court on the individual juvenile before it. The constitutional right to the effective assistance of counsel extends to the sentencing process. *Strickland*, *supra*; *People v Harris*, 185 Mich App 100 (1990). Defense counsel must act diligently in investigating matters

that may affect the outcome of sentencing. *Wiggins v Smith*, 539 US 510 (2003); *Rompilla v Beard*, 545 US 374 (2005) (defendant's lawyers were deficient in failing to examine the court file and in failing to conduct sufficient investigation in preparation for the sentencing hearing).

At Mr. Swilley's resentencing for first degree murder, trial counsel presented no mitigating evidence. It does not appear that he conducted any mitigation investigation, sought to present any evidence at sentencing, or even filed a sentencing memorandum in order to educate the court on Mr. Swilley's "background and mental and emotional development." *Miller*, *supra*. The whole of his advocacy for a child convicted of first-degree murder and facing a minimum sentence of up to 40 years in prison was captured in two pages of transcript. RS, 5-6. Unsurprisingly, the trial court did not give any reasons in support of the sentence it chose—37 to 75 years in prison. The entire resentencing lasted only six pages. RS, 3-9.

In sum, the sentencing court erred in failing to conduct an individualized sentencing hearing to weigh the *Miller* factors before imposing a sentence that "take[s] into account how children are different." *Miller*, 132 S Ct at 2469. Likewise, trial counsel performed deficiently in failing to investigate and present mitigating evidence to the court.

The court's overarching duty is to "impose a sentence sufficient, but not greater than necessary" to serve the purposes of sentencing. *Pepper v United States*, 562 US 476, 491 (2011). In Mr. Swilley's case, those purposes could have been met with a considerably shorter sentence. Defense counsel performed deficiently in not adequately making that argument to the court.

This Court should remand for resentencing on both counts or grant Mr. Swilley's application for leave to appeal.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Mr. Swilley respectfully requests that this Court either summarily reverse and remand this case for a new trial, or grant this application for leave to appeal.

RESPECTFULLY SUBMITTED

s/ Imran J. Syed (P74515)
Attorney for Defendant **November 8, 2016**