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 REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

Defendant-Appellant Kareem Swilley submits this reply brief in support of his application for leave to appeal, under MCR 7.305(E). This Court should reverse Mr. Swilley's conviction both because Willie Youngblood's hearsay statements were admitted in clear violation of controlling precedent, and because the trial court's improper questioning of Mr. Swilley's alibi witnesses in particular pierced the veil of judicial impartiality.

ARGUMENT

I. Willie Youngblood's Hearsay Statements To Police Were Absolutely Inadmissible As Prior Consistent Statements: The Prosecution And The Court Of Appeals Greatly Misinterpreted Controlling Authority To Arrive At The Opposite Conclusion.

Willie Youngblood had the chance to implicate Mr. Swilley immediately after the shooting (which occurred on 11/21/2012), but when he was questioned at the hospital by Det. Oberle and shown photos, Youngblood did not implicate anyone. Tr. Vol. 5 at 131-32. Only after Youngblood himself was arrested after committing another shooting, in September of 2013, did he claim to police that he could name the perpetrators of the November 2012 shooting. *Id.* at 134. Youngblood admitted at trial that his motive in implicating someone for the November 2012 shooting was to protect himself by minimizing the amount of time he would do for his own 2013 crime. *Id.* at 137-39 (Youngblood admitting that he said to police: "I'm talking about is this gonna help me out. They talking about life. . . . [I]f I get on the stand and do what they—do what they—do what they—drop my charges, drop some of these charges? . . . . [W]ould this be able to help me, man, because I don't want to do nothing if it ain't gonna help me, bro.").

At Mr. Swilley's trial, Youngblood's testimony wavered: though he did inculpate the defendants, he was hardly unequivocal. *See e.g. id.* at 147 (Q: "So the truth is that you can't positively identify Mr. Swilley as being in that car, correct?" A: "Correct."); 151 (Q: "So it

wouldn't surprise you to find out that Kareem Swilley wasn't there that day, would it? Wouldn't surprise you, would it?" A: "Naw it wouldn't."). The prosecutor thus introduced a recording of Youngblood's prior police interview, where he had implicated Mr. Swilley. Tr. Vol. 11 at 95-96.

Under controlling authority, there can be no doubt that Youngblood's statements from the recorded interview were inadmissible as prior consistent statements. The prosecutor and the Court of Appeals arrived at the opposite conclusion only by highly misunderstanding and misconstruing controlling case law.

The argument now proposed by the prosecution—that Youngblood's motive to lie at trial was different than his motive to lie previously to police—is a hair-splitting ruse that finds no support in the case law, not even the one case that the prosecution and Court of Appeals rely on *People v Jones*, 240 Mich App 704 (2000). *Jones* is certainly relevant, but it does not stand for the proposition the prosecution now espouses. While *Jones* did find the prior consistent statement in that case to be admissible, it relied on a critical distinguishing factor that is not present in the case at bar.

Jones's discussion of two prior cases, *People v Lewis* 160 Mich App 20 (1987) and *People v Fisher*, 220 Mich App 133 (1996) is illustrative. *See Jones*, 240 Mich App at 708-09. *Jones* concluded that the facts at hand in that case were comparable to *Fisher* and not to *Lewis*—so the prior consistent statement was deemed admissible in *Jones* (as it had been in *Fisher*), even though the statement in *Lewis* had been deemed inadmissible. *See Jones*, 240 Mich App at 709. The similarity between *Jones* and *Fisher* is key to understanding why Youngblood's statements in the case at bar should not have been admissible as prior consistent statements.

In *Jones* and *Fisher*, the prior consistent statement in question was made to a non-law enforcement figure. *Jones* 240 Mich App at 709 (noting that "In *Fisher*, the declarant made a statement to a friend before the declarant had contact with the prosecutor," and also that:

"Similarly, in [*Jones*]. Oliver made a statement to Irvin (i.e. a person whom Oliver did not suspect of having any involvement with the police) over two-and-a-half years before Oliver had contact with the prosecutor."). In both *Jones* and *Fisher*, the prior statement was made to a non-law enforcement figure, and thus it had a very different motive than any in court statement could have had. *See Jones*, 24 Mich App at 710 (noting that the prior statements to non-law enforcement figures would have been motivated by something other than the alleged motive to fabricate the in-court testimony). Because the motive in speaking to these non-law enforcement figures was obviously different than whatever motive to fabricate existed at the time of the in-court testimony, those prior consistent statements were admissible in *Jones* and in *Fisher*—as those prior statements were made before the existence of the particular alleged motive to fabricate the courtroom testimony.

Lewis, and Youngblood's statements in the case at bar, presents a much different scenario. In *Lewis*, the trial court admitted "a prior consistent statement made to the police by prosecution witness Victor Hamler. Defendant assert[ed] that such admission amounted to an improper bolstering of Hamler's credibility and should not have been admitted." *Lewis*, 160 Mich App at 29. The *Lewis* court agreed that the prior statement of Hamler to police should have been inadmissible under MRE 801(d)(1)(B), because Hamler's statement to police was given at a time when he had a strong motive to implicate someone else so as to save himself. *See Lewis*, 160 Mich App at 29-30. In other words, under *Lewis*, the motive in speaking to police to save your own skin, and then later testifying in court to also help yourself, is one and the same.

Youngblood's prior recorded police statement presents the same scenario as the statements at issue in *Lewis*. At the time Youngblood made his prior statement, he had been arrested and knew he was facing up to life in prison—we know that from his own contemporaneous words to the police. Tr. Vol. 5 at 137-39. Just like the declarant in *Lewis*,

Youngblood had a motive to say something that the police found useful, so as to help himself in his own case. Youngblood's statements are therefore just like the statements of the declarant in *Lewis*, and *Lewis* and *Jones* make clear that Youngblood's statements absolutely cannot be admissible as prior consistent statements under MRE 801(d)(1)(B).

Once this broad distinction is understood—statements made to non-law enforcement obviously carry completely different motives than the motive that Youngblood (and the declarant in *Lewis*) had when talking to police—the false distinction that the prosecutor and Court of Appeals relied on in the case at bar, Pros. Resp. at 10-11, is exposed as irrational hair-splitting.

From the moment he was arrested for the 2013 shooting, Youngblood had the same general motive for implicating people in the 2012 shooting: Youngblood had been a victim/ witness to the 2012 shooting, police wanted to solve the 2012 shooting, and by implicating people, Youngblood could bargain for more favorable treatment in the 2013 crime he himself committed. Youngblood knew this, and clearly tried to use it to his advantage from the moment he was arrested. Tr. Vol. 5 at 136 (Youngblood admitting he said he wanted to speak with Det. Oberle right from the point when he was placed in the police car on his way to county jail). It makes no difference whatsoever that Youngblood's police statements were made before he was charged or before there was a proffer. Regardless of those things, **Youngblood's motive—to do all he could to lessen his own upcoming jail time—was the same from the moment he was arrested through the time of Mr. Swilley's trial.**

If *Jones*, *Lewis* and *Fisher* are read correctly, the admissibility of Youngblood's prior statements is not even a close issue: They clearly were inadmissible under MRE 801(d)(1)(B). And the error obviously cannot be considered harmless in this case, as Youngblood was the State's star witness, and while on the stand, he made clear that he could not positively implicate the shooters and specifically was not sure if Mr. Swilley was among them.

Tr. Vol. 5 at 78 ("All I saw was some dreads and a ponytail and a gun. That's all I saw.); *id.* 147, 151. And there was nothing upon which the jury could convict Mr. Swilley, aside from Youngblood's account (no physical evidence implicates Mr. Swilley—unlike his co-defendants). Without the improper bolstering provided by the video of Youngblood's prior police statement, no reasonable jury would have convicted Mr. Swilley.

II. The Trial Court's Improper Prosecutorial Questioning Of Certain Witnesses Affected Mr. Swilley Significantly More Than The Prosecutor's Response Acknowledges: The Most Egregious Of The Trial Court's Improper Conduct Was Directed Toward Mr. Swilley's Alibi Witnesses.

The prosecution's response accords just about a single page in answer to a central issue raised in Mr. Swilley's leave application: Did the judicial bias expressed by the trial court toward Mr. Swilley's grandparents (in addition to other defense-friendly witnesses) rise to a level warranting reversal under *People v Stevens*, 498 Mich 162 (2015)? Mr. Swilley's alibi was established by his grandparents' testimony, and his leave application details the highly improper cross-examination of those witnesses conducted by the trial court, which violated Mr. Swilley's Sixth Amendment right to a fair and impartial trial. But, just as the Court of Appeals did, the prosecution focuses on other elements of the case, and its addressing of the judicial bias issue is largely geared toward the trial court's questioning of other witnesses. This is despite the fact that Mr. Swilley's grandparents are central to his appeal: if they are deemed credible, Mr. Swilley simply could not be convicted. The trial court's heavy intrusion into the role of the prosecutor made Mr. Swilley's alibi appear weak in the eyes of the jury, and is the only conceivable explanation for Mr. Swilley's conviction—the lack of evidence against him being what it is.

The absence of any real rebuttal from the prosecution regarding the trial court's questioning of Mr. Swilley's grandparents is thus very telling: The most egregious instances of judicial misconduct affected only Mr. Swilley, given that his grandparents were attesting to

solely Mr. Swilley's alibi.

A. The fact that the quitclaim deed documents did not make a 100 percent airtight alibi for Mr. Swilley actually underscores the importance of his grandparents' testimony, and only makes the judge's improper prosecutorial questioning more inappropriate and critical to Mr. Swilley's case.

The prosecution states that the quitclaim deed, whose preparation Mr. Swilley asserted placed him at City Hall at the time of the shooting, did not require Mr. Swilley's signature as only the grantor was required to sign the quitclaim deed, not the grantee. Pros. Resp. at 5. Nevertheless, Mr. Swilley's signature is in fact on the document (something the prosecution misstates in its brief). Tr. Vol. 14 at 91; *see also* Defense Exhibit 281. However, because only the grantor's signature required notarization, it was theoretically possible that Mr. Swilley's signature was added to the document later (though before 3:42 pm on the same day, which is when the deed was filed, and it was not possible for Mr. Swilley's name to have been added later, Tr. Vol 13 at 103, 106-107; *id.* at 89).

These facts underscore the gravity of the trial court's improper questioning of Mr. Swilley's alibi witnesses—his grandparents, Alesha Lee and Philip Taylor. Mr. Taylor and Ms. Lee attested that Mr. Swilley was indeed with them when the deed documents were prepared and signed at City Hall. Their credibility is what would take Mr. Swilley's alibi from merely possible to airtight in the eyes of the jury. It simply cannot be denied that if Ms. Lee and Mr. Taylor's accounts are believed, Mr. Swilley could not possibly be convicted.

Thus, the trial judge's prosecutorial cross-examination of Ms. Lee and Mr. Taylor—addressed on pages 17-24 and 28 of the Leave Application (attorney supplement)—is all the more troubling: he undermined in the eyes of the jury the credibility of witnesses who, if believed, make Mr. Swilley's conviction reasonably impossible.

The prosecution barely addresses the questioning of Mr. Taylor and Ms. Lee. It simply

states in passing that Mr. Taylor's testimony lacked clarity. Pros. Resp. at 19. This assertion is made without any citation to the record. Mr. Swilley's leave application on the other hand includes citations and quotes from the record indicating that neither Mr. Taylor nor Ms. Lee's testimony had any such shortcoming to warrant the sort of adversarial treatment the judge provided them. Leave Application (attorney supplement) at 17-24. Mr. Swilley is confident that if this Court were to review the 29 pages of Mr. Taylor's direct and cross examination testimony in Volume 14 (pages 89-117) of the trial transcript, it will conclude that there was nothing wavering, evasive or unclear about Mr. Taylor's account. Certainly not to enough warrant 21 additional pages of cross-examination by the trial judge (Vol. 14 at 117-137).

III. The Trial Court's Unequal Treatment Of Colley And Youngblood Is Highly Indicative Of Improper Judicial Questioning Under *Stevens*.

As fully explained in Mr. Swilley's Leave Application, the trial court treated Colley and Youngblood very differently, even though the two witnesses were similarly situated and had similar strengths and weaknesses in their accounts—the one difference being that Colley's account favored the defense and Youngblood's favored the prosecution. *See* Leave Application (attorney supplement) at 24-29. As this Court has made clear, the extent to which the judge's questioning targeted witnesses favorable to one side over the other is relevant in determining whether judicial questioning pierced the veil of judicial impartiality. *Stevens*, 498 Mich at 172.

Youngblood and Colley were close friends of the decedent, DaVarion Galvin, and were walking with him 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 said that they were unable to identify the shooters. After being taken into police custody as suspects in another shooting nearly a year later, Youngblood implicated Mr. Swilley in exchange for a plea agreement. Colley did not implicate anyone 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 Youngblood early in its case. As discussed in more detail in the statement of facts in the leave application, his testimony was at best inconsistent. **Despite glaring inconsistencies in Youngblood's account, the trial judge asked no questions at the end of Youngblood's testimony.**

A few days later Colley was called as a defense witness. 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. After direct examination, cross examination by all four defense attorneys, redirect, recross, and a second redirect by the prosecutor, the Court went on to question Colley in an interrogation spanning nine transcript pages. Again, this is compared to precisely zero questions the Court asked at the end of Youngblood's testimony—which, whatever else it may have been, was certainly not clear or straightforward.

The prosecution's claim that Colley's testimony was evasive enough to warrant such differential treatment is an unsupportable proposition for which the prosecution includes no citations. A party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly*, 231 Mich App 627, 640-41 (1998). Indeed, nothing in the record indicates that Colley was markedly more evasive or unclear than Youngblood, yet the Court directed the full focus of its inquiries only toward Colley.

Nor are there any record citations for the prosecution's claim that the Court was merely clarifying, did not express disbelief, and that there were no objections to the Court's tone. Pros. Resp. at 15-16. On the other hand, Mr. Swilley's leave application details many instances of improper questioning and disparate treatment of the equally flawed Youngblood and Colley. Leave Application (attorney supplement) at 25-28.

IV. The Prosecution Cites To A Reasonable Juror Standard In Arguing That The Trial Court's Questioning Of Defense Friendly Witnesses Was Proper, But Such A Standard Has No Place In A Structural Error Inquiry.

In addressing Mr. Swilley's claims that the trial judge improperly questioned certain witnesses, the prosecution states on at least two occasions that there is no reversible error because "no reasonable juror would have found" the trial court's conduct unusual or surprising. Pros. Resp. at 17, 19. (The court below also stated something similar. Opinion Below at 22.). Such a "reasonable juror" analysis may be appropriate for errors requiring prejudice findings, but it has absolutely no place in the question of whether the judge's questioning pierced the veil of judicial impartiality. As this Court said in *Stevens*, the issue of judicial impartiality is a structural error, and no prejudice review is necessary or appropriate. 498 Mich at 178.

The average juror's surprise or comfort with the judge's questioning is irrelevant. It is the precedent of this Court (*Stevens*) that controls the issue in question, and not the expectations of lay jurors who certainly are not experts in the proper role of the judge.

CONCLUSION AND RELIEF REQUESTED

This case is now, and always has been, driven by the evidence that exists against the *other* defendants. If attention is appropriately narrowed to the evidence against Mr. Swilley, this conviction simply cannot be sustained. At trial, it was guilt by association from highly improper "expert" gang testimony, despite the fact that there was never any affirmative evidence of a gang connection for this shooting. On appeal, the unfortunate consolidation of cases again blurs the issue: These cases are simply not equal. **Physical evidence ties the other defendants to the crime; there is no such physical evidence against Mr. Swilley.**

Regardless of whether or not relief is warranted for the other defendants, Mr. Swilley's case for reversal is very clear. The only substantial evidence against Mr. Swilley, an out of court

statement by Willie Youngblood, was admitted in clear violation of controlling case law. Not only did Youngblood equivocate greatly about Mr. Swilley's guilt at trial, he actually recanted entirely at a post-conviction hearing. And the testimony of Mr. Swilley's grandparents as well as text messages on his phone establish that he was not at the scene of the crime.[1]

For the reasons explained above, and more fully explained in the Application for Leave to Appeal, this Court should either summarily reverse Mr. Swilley's conviction and remand for a new trial, or grant the Application for Leave to Appeal.

Respectfully Submitted, **Dated: July 18, 2017**

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[1] The prosecution's statement of facts misconstrues the nature and weight of the text messages. Mr. Swilley directs the Court to pages 9-10 and 33-34 of his leave application (attorney supplement) for a full account of the text messages. Importantly, the context and content of the conversations makes clear that Mr. Swilley could not have been present at the scene of the shooting.