RECEIVED by MSC 11/4/2018 11:00:45 PM

**STATE OF MICHIGAN**
**IN THE MICHIGAN SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

KAREEM SWILLEY JR.,
Defendant-Appellant.

Supreme Court No.: 154684
Court of Appeals No.: 325806
Trial Court No.: 14-039759-FC

# DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

Imran J. Syed (P75415)
Clinical Assistant Professor of Law
University of Michigan Law School
ATTORNEY FOR DEFENDANT-APPELLANT
701 S. State Street
Ann Arbor, MI 48109
(734) 763-0577

RECEIVED by MSC 11/4/2018 11:00:45 PM

## TABLE OF CONTENTS

**TABLE OF CONTENTS** ........ i

**TABLE OF AUTHORITIES** ........ iv

**STATEMENT OF QUESTION PRESENTED** ........ v

**INTRODUCTION** ........ 1

**STATEMENT OF FACTS AND PROCEDURE** ........ 1

1. Galvin, Lively and Colley's Eyewitness Accounts ........ 2
2. Youngblood's Initial Account, Arrest and Changing Story ........ 2
3. The Continuing Investigation Into the Galvin Murder ........ 5
4. State Case at Trial ........ 5
5. Defense Case at Trial ........ 8
6. Conviction and Sentence ........ 10
7. Post-Conviction Hearing For New Trial ........ 10
8. Court of Appeals Opinion ........ 11

**ARGUMENT** ........ 13

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 Defense Witnesses In A Manner That Was Reasonably Likely To Improperly Influence The Jury By Creating The Appearance Of Advocacy Or Partiality Against Mr. Swilley. ........ 13

Standard of Review and Issue Preservation ........ 13

Discussion ........ 13

A. The Nature of the Judicial Conduct ........ 15

1. The Questions Posed to Mr. Swilley's Grandparents ........ 15
2. The Questions Posed to Joshua Colley ........ 23

B. The Trial Court's Tone and Demeanor ........ 27

C. The Scope of the Judicial Intervention ........ 29

D. The One-sidedness of the Judicial Intervention ........ 29

E. The Presence of Curative Instructions ........ 31

F. Conclusion Under *Stevens* .......... 31

II. Because The Issue Presented In Argument I Is Preserved And Thus Constitutes Structural Error, Reversal Is Warranted Without Inquiry Into Prejudice: Nevertheless, Even If The Court Were To Conduct A Materiality-Based Review, Reversal Would Still Be Warranted. .......... 32

**CONCLUSION AND RELIEF REQUESTED .......... 36**

**APPENDIX TABLE OF CONTENTS**

Trial Court Register of Actions ---------- 1a- 17a

Excerpt From Preliminary Examination- Volume 1 ---------- 18a- 38a
Testimony of Willie Youngblood ---------- 24a- 38a

Trial Transcript Excerpt- Volume 4 ---------- 39a- 50a
Testimony of Bradley Holp ---------- 44a- 49a
Testimony of Kanu Virani ---------- 49a- 50a

Trial Transcript Excerpt- Volume 5 ---------- 51a- 90a
Testimony of Willie Youngblood ---------- 56a- 90a

Trial Transcript Excerpt- Volume 7 ---------- 91a- 102a
Testimony of Alesha Lee ---------- 96a- 102a

Trial Transcript Excerpt- Volume 9 ---------- 103a- 110a
Testimony of Shontrell Harris ---------- 109a- 110a

Trial Transcript Excerpt- Volume 10 ---------- 111a- 126a
Testimony of Joshua Colley ---------- 116a- 126a

Trial Transcript Excerpt- Volume 11 ---------- 127a- 135a
Testimony of Randy Kahn ---------- 133a- 135a

Trial Transcript Excerpt- Volume 12 ---------- 136a- 143a
Testimony of Randy Kahn ---------- 141a- 143a

Trial Transcript Excerpt- Volume 13 ---------- 144a- 163a
Testimony of Randy Kahn ---------- 149a
Testimony of Lori Diana Brown ---------- 150a- 152a
Testimony of Mary Malocha ---------- 153a- 157a
Testimony of Lynette Hagen ---------- 157a- 158a
Testimony of Ryan Oberle ---------- 159a- 163a



RECEIVED by MSC 11/4/2018 11:00:45 PM

Trial Transcript Excerpt- Volume 14 -------- 164a- 184a
Testimony of Ryan Oberle -------- 169a- 171a
Testimony of Phillip Taylor-------- 172a- 184a

Trial Transcript Excerpt- Volume 16 -------- 185a- 190a
Jury Instructions -------- 189a- 190a

Trial Transcript Excerpt- Volume 18 -------- 191a- 196a
Verdicts -------- 195- 196a

Defense Exhibit 281- Signed/ Notarized Deed -------- 197a- 198a

Remand Hearing Transcript Excerpt-------- 199a- 215a
Testimony of Willie Youngblood -------- 203a- 206a
Testimony of Joshua Colley -------- 207a- 210a
Testimony of Kareem Swilley -------- 210a- 211a
Testimony of Randy Kahn -------- 212a
Decision of the Court -------- 213a- 215a

Court of Appeals Docket Sheet -------- 216a- 224a

Court of Appeals Opinion -------- 225a- 260a


RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

## TABLE OF AUTHORITIES

*In re Parkside Housing Project,* 290 Mich 582 (1939)---------------------------------------------- 31

*People v Carines*, 460 Mich 750 (1999)------------------------------------------------------------- 36

*People v Cheeks,* 216 Mich App 470 (1996)------------------------------------------------------ 14

*People v Cole*, 349 Mich 175 (1957)------------------------------------------------------ 17, 18, 30

*People v Conley,* 270 Mich App 301 (2006)------------------------------------------------------ 14

*People v Douglas*, 496 Mich 557 (2014) -------------------------------------------------------------5

*People v Redfern*, 71 Mich App 452 (1976) ----------------------------------------------------- 20

*People v Stevens*, 498 Mich 162 (2015) --------------------1, 13, 14, 15, 20, 22, 27, 29, 30, 31, 32

*People v Young,* 364 Mich 554 (1961)----------------------------------------------------------- 15

*Simpson v Burton,* 328 Mich 557 (1950) -------------------------------------------------------- 30

RECEIVED by MSC 11/4/2018 11:00:45 PM

## STATEMENT OF QUESTION PRESENTED

1. Where The Trial Court Repeatedly Questioned Defense-Friendly Witnesses In A Prosecutorial Manner, Expressing Disbelief And Implying Before The Jury That Their Testimony Was Not Credible Without Further Proof, Is It Reasonably Likely That The Trial Court's Conduct Improperly Influenced The Jury By Creating The Appearance Of Advocacy Or Partiality Against A Party?

   Trial Court Would Answer, "No."

   Court of Appeals Answered, "No."

   Defendant-Appellant Answers, "Yes."

RECEIVED by MSC 11/4/2018 11:00:45 PM

## INTRODUCTION

Defendant-Appellant Kareem Swilley Jr. was wrongfully convicted of shooting and killing DaVarion Galvin, due in large part to the trial judge's improper questioning of defense witnesses. Mr. Swilley presented compelling alibi evidence—including sworn testimony of multiple witnesses and an official notarized/time-stamped City Hall document—showing that the State's star witness was mistaken in his identification. However, the judge's prosecutorial questioning of key defense witnesses, which pierced the veil of judicial impartiality, led the jury to convict Mr. Swilley despite the extremely thin evidence of his involvement in the crime. And even that thin evidence has now evaporated, as the State's star witness recanted under oath at a post-conviction evidentiary hearing.

It is reasonably likely that the trial court's questioning of witnesses improperly influenced the jury by creating the appearance of advocacy or partiality against Mr. Swilley. The factors discussed in this Court's opinion in *People v Stevens*, 498 Mich 162 (2015) warrant a reversal of Mr. Swilley's conviction, and the court below erred in holding otherwise.[1]

Mr. Swilley was a 16-year-old high school student when he was wrongfully convicted and sentenced to life in prison. The Court should overturn his unconstitutional conviction and remand this case for a new trial.

## STATEMENT OF FACTS AND PROCEDURE

Following a jury trial in Saginaw County before Judge Fred Borchard, Mr. Swilley was convicted of one count each of conspiracy to commit first degree murder, premeditated murder and carrying a dangerous weapon with unlawful intent; three counts of assault with intent to murder; and six counts of felony firearms.

---

[1] Mr. Swilley's Application for Leave to Appeal presented several additional grounds for reversal. Because this Court's September 27, 2018, Order limited the parties to the *Stevens* issue, this supplemental brief does not discuss the other grounds for relief.

RECEIVED by MSC 11/4/2018 11:00:45 PM

This case stems from the November 21, 2012, murder of DaVarion Galvin. That afternoon, at approximately 2:30 p.m., Galvin and three companions—Joshua Colley, Marcus Lively and Willie Youngblood—were walking down York Street in the Bloomfield neighborhood of Saginaw. 57a (62-63), 60a (74-75).[2] A dark-colored sedan approached and assailants inside the car opened fire on the group. 60a (76), 62a (82), 81a (158). Colley and Lively took cover and were not shot, while Youngblood was struck once in the stomach. 123a (107); 59a (72-73), 62a (84-85). Galvin, however, was struck by multiple bullets, and died in the hospital shortly thereafter. 50a (124-26).

### 1. *Galvin, Lively and Colley's Eyewitness Accounts*

Galvin himself was able to tell police that there were four men in the car, but he was not able to provide any descriptions before he passed away. 47a (113-14).

Lively told police at the scene that the shooters approached in a black or blue Saturn. 45a-46a (94-95). Although told to stay for more questioning, Lively left the scene and was never again found or interviewed. 48a-49a (118-20); 161a (138).

Colley was located and interviewed on January 31, 2013. 160a (135). He described the assailants' car as a black Saturn, occupied by four black men. 160a (136-37). Detective Oberle showed Colley a photo array, containing images of Kareem Swilley and his co-defendants, but Colley was also unable to make an identification. 160a (136).

### 2. *Youngblood's Initial Account, Arrest and Changing Story*

Youngblood, who was wounded but survived, was interviewed by police several times on the day of the shooting and in the days that followed. 159a-160a (130-35). He also described the car as a black or blue midsize vehicle. 81a (158). He indicated that although he did not recognize

[2] Most of the transcripts in this case were created with four pages printed per page. Thus, the parentheses following the appendix citations refer to the specific transcript pages within the noted appendix page.

any of the four men in the car, he would recognize them if he saw them again. 159a (133). He variously stated that the perpetrators may have been from the North Side, the South Side, or the East Side of Saginaw. 162a-163a (148-50). In the days immediately following the shooting, Youngblood was also shown a photo array by Detective Ryan Oberle, which contained images of Mr. Swilley and his co-defendants; **Youngblood did not indicate that any of the photos was that of the perpetrators.** 159a-160a (133-35).

Almost a year after the Galvin shooting, Youngblood was interrogated as a suspect in a September 11, 2013 shooting at Cass River Market. 134a (102). On September 18, while jailed for an unrelated assault, Youngblood was questioned by Det. Randy Kahn about the Cass River shooting, in part because Youngblood's tattoos matched those of the Cass River shooter. 134a-135a (102-06). Around September 18, 2013, Youngblood was arrested and charged for his involvement in the Cass River shooting, and faced charges for carjacking, assault with intent to murder, and several firearm charges. 149a (63-64). Det. Oberle, the lead detective on the Galvin murder, interviewed Youngblood several times in the weeks following his arrest. 171a (73-75).

Although he had previously failed to implicate anyone in the Galvin shooting, and had failed to pick out Mr. Swilley or any of his co-defendants in a photo lineup, 159a-160a (133-35), Youngblood suddenly had much more information to give a year later—when he was incarcerated and facing a possible life sentence. Youngblood admitted at trial that his motive in eventually implicating someone for the Galvin shooting was to protect himself by minimizing the amount of time he would do for his own 2013 crime. 75a-76a (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.").



RECEIVED by MSC 11/4/2018 11:00:45 PM

In his new motivated state, Youngblood claimed that, on the day Galvin was killed, he and his companions were approached by a dark-colored sedan, and he believed there were girls in the car. 24a-25a, 30a-31a. He said that he walked very close to the car to say hello and saw four men inside—whom he suddenly could identify by their nicknames: Little Jeez (Swilley), T. Jordan (Thomas), Arab (Granderson), and Ruger Rell (Derrell Martin). 25a, 27a-28a.

Youngblood gave varying explanations for how he recognized the men inside the car. During a proffer, Youngblood cited "word on the streets" as his basis for suspecting that these specific four men were the assailants. 32a-33a. At the preliminary examination however, he claimed to have instantly recognized one person in the car, Mr. Swilley, 37a, and was able to learn the names of the other three occupants by going through Mr. Swilley's Facebook page. 35a-36a, 38a. Youngblood was confronted at the preliminary examination with the discrepancy, and he had no explanation for it:

> 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.**

33a. (Emphasis added).

Prior to Youngblood's conversations with detectives following the Cass River shooting, Mr. Swilley had not been seriously considered a suspect in the Galvin shooting. 212a. 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 examination. At trial, Youngblood was noncommittal about those identifications. *See e.g.* 78a (147) (Q: "So the truth is that you can't positively identify Mr. Swilley as being in that car, correct?" A:



RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

"Correct."); 79a (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."). But the State still heavily depended on Youngblood's prior statements in its case. *E.g.* 60a-61a (77-78); 132a (95-96) (introduction of Youngblood's prior recorded police interview). In consideration of his cooperation and testimony in the Galvin matter, Youngblood received a plea agreement for his involvement in the Cass River shooting, and his sentencing was held off until after Youngblood's testimony at Mr. Swilley's trial. 68a (107-08), 84a (171).

### ***3. The Continuing Investigation Into the Galvin Murder***

As detailed in the Statement of Facts in the Application for Leave to Appeal, *see* pp. 4-6, continued investigation into the Galvin murder established the following:

- Co-defendant John Granderson's fingerprint was found in the car the suspects allegedly used in the Galvin shooting.
- Co-defendant Terrance Thomas's DNA was on a gun linked to Galvin's shooting.
- No physical evidence connected Mr. Swilley to the crime, the car or the gun.

### ***4. State Case at Trial***

Over a year after the Galvin shooting, Mr. Swilley was arrested and charged for offenses relating to that murder, along with three other men: Thomas, Granderson and Derrell Martin. They faced trial before a single jury, beginning on September 9, 2014. Youngblood's account, inculpating all four defendants, was the State's main evidence.[3] During his trial testimony, Youngblood was often combative and contradicted his prior testimony.

On direct examination, Youngblood stated that he was walking with Galvin and the

[3] The State also presented copious amounts of testimony regarding Saginaw's gangs, and the tendencies and norms of gangs in general. Mr. Swilley argued in his Application for Leave to Appeal that, under this Court's opinion in *People v Douglas*, 496 Mich 557 (2014), the gang evidence should not have been admitted. But this Court did not direct supplemental briefing on the gang issue, so discussion of testimony relevant to that issue is omitted here.

others when they were approached by a black car. 60a (76). Youngblood again said he walked up to the car because he thought there were girls in it, but now denied recognizing Mr. Swilley. 60a-61a (76-78). Instead, Youngblood testified "all I saw was dreads and a gun" before turning around to run away. 60a-61a (77-78). After being reminded of his preliminary examination testimony, Youngblood acknowledged that he had previously identified the men he saw inside the car as Thomas, Granderson, Martin and Mr. Swilley. 61a-62a (78-84).

Faced with the inconsistency, 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. . . ." 61a (79).

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

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

61a (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. 62a (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." 72a (122). **He stated that his identifications "could be right and could be wrong, man."** 78a (146). Of Mr. Swilley specifically, 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.**

76a (147) (emphasis added).

Youngblood acknowledged that he would not be testifying if he weren't facing a life



RECEIVED by MSC 11/4/2018 11:00:45 PM

sentence in his own case. 75a-76a (136-39). (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.**") (emphasis added). He 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. 76a (140-41).

Youngblood's testimony contrasted heavily with the that of Joshua Colley. Colley—who was with Youngblood and Galvin when Galvin was killed, and who was Youngblood's co-defendant in the Cass River shooting—could not identify the perpetrators of the Galvin shooting. 116a (77), 117a (84), 118a (86-87), 119a (89-91), 121a (97). Colley testified that when the car pulled up and the shooting began, he hit the ground, and he remembered nothing but running from the scene. 118a (85-87). Colley made clear that he was very close to Galvin, and that he wanted to see justice done for him, *e.g.* 121a (97-98), 122a (102), but asserted that neither he nor Youngblood knew who the shooters were.

On defense questioning, Colley described his conversations with Youngblood (whom he called "Bounce") after the shooting; Colley was adamant that Youngblood was as clueless as he was as to who was responsible for the Galvin shooting. 120a-121a (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**. . . . He never knew who did it at all. . . . **He never seen no faces, man.**

121a (97) (emphasis added).

The State also presented testimony regarding information (calls, texts, photos, etc.)



RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

extracted from Mr. Swilley's cell phone. 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 shooting occurred. 143a (113-15).

It was established that during the relevant timeframe, Mr. Swilley's phone received text messages from Thomas asking him to call Thomas, informing him that a shooting had occurred, and prompting Mr. Swilley to ask Thomas how many people had been shot. 142a (109), 143a (115). On cross-examination, Mr. Swilley's defense attorney emphasized the significance of the fact that the texts implied that Mr. Swilley and Thomas were not together at the time of the shooting. The following exchange occurred with the State's cell phone expert:

> 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.**

149a (62-63) (emphasis added).

### ***5. Defense Case at Trial***

While his co-defendants made arguments based largely on sufficiency of evidence, Mr. Swilley presented an alibi defense: He showed that on November 21, 2012, he had spent the hour between 2:00 and 3:00 p.m. on a trip to City Hall with his grandparents, Alesha Lee and Philip Taylor, and his sister, Marcel Swilley. 96a-97a (96-98), 99a-100a (111-14), 101a (124-25), 102a (127-28; 172a-173a (90-93), 174a (98-100), 179a-184a (119-37).

Alesha Lee (Mr. Swilley's grandmother), testified that she and her husband had taken Mr. Swilley and his sister to City Hall in order to transfer a property she owned (located at 521 S. 13th St.) into the names of her grandchildren, as she had recently been diagnosed with cancer.[4] 96a-97a (97-98), 102a (127-28). According to Ms. Lee, after completing the paperwork at City

[4] Ms. Lee has since passed away.

Hall, the family travelled to the bank, possibly to Ms. Lee's doctor's office (which was "next door" and had an aquarium that she wanted to show to her grandchildren), to a Chinese restaurant, and then returned home in the evening. 99a (112). Ms. Lee said that Mr. Swilley remained home the rest of the evening, and was visited by his girlfriend. 99a (112-13).

Philip Taylor (Mr. Swilley's grandfather), also recalled that the family had left the house around 2:00 p.m. to go to City Hall and execute a quitclaim claim deed to transfer the 13th Street house to Mr. Swilley and his sister. 172a-173a (90-93). The 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. 172a (91-92); *see also* Def. Exhibit 281 (Signed Deed), 198a. 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. 154a (103), 155a (106-07). Mr. Taylor recalled returning home after visiting City Hall, the bank, and a Chinese restaurant at around 4:30 or 5:00 p.m. 172a-173a (92-93).

The prosecution presented testimony from several Saginaw City Hall employees who had handled the quitclaim deed that afternoon. They testified that for a deed to be valid, it required the notarized signature of only the grantor, so the notarization on the document pertained only to Mr. Taylor's signature. 150a-152a (85-90), 153a (101). Although Mr. Swilley's signature, and that of his sister, are also on the document, because only the grantor's signature needed to be notarized, 151a-152a (89-90), Mr. Swilley's is not notarized. *See* Deed, 198a. Mr. Swilley's signature on the deed does appear to be written in his own handwriting. 151a (88), 155a (109) (Kareem Swilley signature is in different handwriting from other signatures on the document); 158a (120-21) (signature resembles Mr. Swilley's signature on advice of rights form).

While the testifying City Hall employees could not recall specifically seeing Mr. Taylor or



RECEIVED by MSC 11/4/2018 11:00:45 PM

Mr. Swilley on the day in question, they acknowledged 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. 156a (110), 158a (119). In fact, the City Hall employees acknowledged that the notarized document indicated that Mr. Taylor at least had definitely been present at City Hall on November 21, despite the fact that they could not recall seeing him. 156a (110), 158a (118).

### *6. 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. 195a-196a (4-9). Martin was found not guilty of all charges. 195a (4-5).

Mr. Swilley, who was 16 at the time of the Galvin shooting, stands sentenced to:

- Life in prison with the possibility of parole for first-degree murder (conspiracy);
- 37-75 years for first degree premeditated murder;
- 18-36 years for three counts of assault with intent to murder;
- 38 months to 5 years for carrying a dangerous weapon with unlawful intent, and;
- 6 terms of 2 years for felony firearms (to run consecutive to the other sentences).

Court of Appeals Opinion; 227a, 253a-255a.

### *7. Post-Conviction Hearing For New Trial*

As detailed fully in the Statement of Facts in the Application for Leave to Appeal, pp. 13-15, Willie Youngblood recanted after trial. Youngblood testified to the recantation under oath at an evidentiary hearing on remand, stating that he falsely implicated the defendants to obtain a better plea deal in his own criminal case. 204a-205a (11-13). The State claimed that Youngblood's recantation was motivated by fear, but Youngblood denied that charge. 206a (16).

Colley testified at the remand hearing about conversations he had with Youngblood after



RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

the shooting, during which they puzzled over who might have committed the murder; Colley stated, as he had at trial, that neither he nor Youngblood had any idea who was responsible. 207a-208a (31-33). Colley recalled a later conversation, after they had both been arrested for their involvement in the Cass River shooting. Colley stated that while they shared a cell in the county jail, Youngblood told Colley that he was going to "testify on them so they can get his time cut," testimony that Youngblood admitted "was going to be a lie." 208a (35).

On cross, the State noted that Colley's testimony at the remand hearing was largely consistent with what he had said at trial, with which Colley agreed. 209a (37-38). Following cross-examination, the trial court, apparently forgetting Colley's prior testimony from trial, harshly scolded Colley, asking: "Why would you wait? Why would you let him get convicted and come in here now?" 210a (42). Colley defended himself and noted: "I did sir. I tried to tell you all." 210a (42).

The trial court denied the motion for new trial immediately after the May 12, 2016 evidentiary hearing on remand. 213a-215a (93-102).

### *8. Court of Appeals Opinion*

On September 13, 2016, after briefing by the parties and oral argument, the Court of Appeals issued a *per curiam* joint opinion addressing the appeals of Mr. Swilley and his two convicted co-defendants, Granderson and Thomas. The Court of Appeals affirmed Mr. Swilley's convictions and remanded for a ministerial correction of the judgment of sentence. *People v Swilley*, No. 325313 (Mich Ct App, September 13, 2016). 227a, 258a.

The Court of Appeals addressed the *Stevens* claim now at issue in two separate places: it addressed the trial court's questioning of Colley in the part of its opinion concerning co-defendant Thomas, and addressed the court's questioning of Mr. Swilley's grandparents in the portion of the opinion pertaining to Mr. Swilley. 244a-247a, 252a-253a. Regarding Colley, the

Court of Appeals stated that he "was much more willing to answer questions posed by defense attorneys than by the prosecutor," and thus the trial court was entitled to "clarify certain parts." 246a. Even though the Court of Appeals found that "the trial court may have unintentionally exhibited some disbelief of Colley's testimony," it determined that the defendants were not denied a fair trial by the trial court's conduct pertaining to Colley. 247a.

In its later analysis pertaining to the trial court's questioning of Mr. Swilley's grandparents, the Court of Appeals summarily stated, without citation or examples, that Ms. Lee's testimony had lacked details and Mr. Taylor's testimony had been confusing. 252a-253a.

The Court of Appeals noted that the trial court had questioned several other witnesses, but **it failed to note the stark difference between the trial court's treatment of Colley (who was closely questioned by the judge) and Youngblood (of whom the trial court asked not a single question at the conclusion of his direct/cross examinations)**—who were two similarly-situated witnesses, with the chief difference being that Colley favored the defense, and Youngblood favored the State.

The Court of Appeals did note that some of the trial court's questions of Mr. Taylor could have been seen by the jury as undermining his veracity. 253a. Nevertheless, the court found no reversible error, because it assumed that the trial court's tone was not argumentative or skeptical and because curative instructions were given. 253a.

RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

## 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 Defense Witnesses In A Manner That Was Reasonably Likely To Improperly Influence The Jury By Creating The Appearance Of Advocacy Or Partiality Against Mr. Swilley.

#### *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). 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.

This issue is preserved. Mr. Swilley's trial counsel objected to the trial court's misconduct on each relevant occasion.

1. With respect to trial court's questioning of Colley: "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.**" 125a (124) (emphasis added).

2. With respect to trial court's questioning of Ms. Lee: "Your Honor, objection. That's for the defense's case. We have the case." 102a (128).

3. With respect to trial court's questioning of Mr. Taylor:

    a. "Your Honor, I've got to object. That's been asked and answered." 180a (122);

    b. "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." 181a (126) (emphasis added);

    c. "Your Honor, and I've got to object. **I think you're being very prosecutorial in this.**" 181a (127) (emphasis added).

#### *Discussion*

A fair and impartial trial by jury demands a display of impartiality on the part of the trial judge. The conduct of the trial court here failed to live up to that standard. In this circumstantial

RECEIVED by MSC 11/4/2018 11:00:45 PM

case where Mr. Swilley presented an alibi defense, the judge repeatedly took on a prosecutorial role by aggressively "cross-examining" defense and defense-friendly witnesses, each time exhibiting disbelief and creating the appearance of partiality against the defendant. In particular, the trial 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 a factually 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)—including a neutral/detached judge, *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." *Stevens,* 498 Mich at 164.

In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including:

A. the nature of the judicial conduct;

B. the tone and demeanor of the judge;

C. the scope of the judicial conduct, in context of the length and complexity of the trial;

D. the extent to which the judge's conduct was one-sided; and

E. 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

RECEIVED by MSC 11/4/2018 11:00:45 PM

the defendant was denied a fair trial. *Id.* at 171-72. Finally, a defendant need not satisfy each listed factor to warrant relief. *Id.*

The factors listed in *Stevens* all strongly affected this case and counsel reversal of Mr. Swilley's conviction.

### A. The Nature of the Judicial Conduct

Here, the trial court exhibited bias through the improper questioning of witnesses at least three defense-friendly witnesses. While a 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. Judges must avoid questions that are "intimidating, argumentative, or skeptical" because such conduct may "exhibit disbelief of a witness, intentionally or unintentionally." *Id*. at 174, *citing People v Young,* 364 Mich 554, 558-59 (1961).

#### *1. The 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 defense witnesses, but on the seventh day of trial, the prosecution called Ms. Lee to testify to an unrelated issue. On cross-examination, defense counsel elicited information concerning Mr. Swilley's whereabouts on the afternoon of the Galvin shooting. Following direct examination, cross-examination by all four defense attorneys, re-direct, re-cross, and an additional re-direct and re-cross, the trial 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. |
| **Defense Counsel**: | 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 [sic] cover it there, then I'll withdraw the question. |

102a (127-28) (emphasis added). 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," the judge 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.

**Such proof is, of course, for the opposing party to elicit in an adversarial system,** and it is highly improper for a trial judge to do the prosecutor's job in this manner.

The trial court continued its challenge of Mr. Swilley's alibi when the defense presented Mr. Swilley's grandfather, Philip Taylor. At that juncture, what began with Ms. Lee as a line of questioning resembling cross-examination devolved into even more adversarial conduct, comparable to what this Court found objectionable in *Stevens*.

Like Ms. Lee, Mr. Taylor testified that on the afternoon of November 21, 2012, he was with his grandchildren, Kareem and Marcel Swilley, at 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] 172a-173a (90-93). There, he had a piece of property signed out of his name and over to his

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



RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

grandchildren. *Id.* He explained the steps involved in this process and specified that they all had to sign their names and show identification at the front desk and then left that area to get to the paperwork notarized. 172a (90). Through Mr. Taylor, the defense entered into evidence the quitclaim deed that he filed that day. 172a (91); Defense Exhibit 281 (Signed Deed), 198a. The deed is signed by the grantees (Mr. Swilley and his sister), as well as by the grantor (Mr. Taylor) and the grantor's signature is notarized. 172a (91); 198a.

When discussing what he did the afternoon of November 21, 2012, Mr. Taylor explained that there are "about three departments down there" and that he "might have paid my water bill" before going to sign the paperwork for the property transfer. 172a (90). He also testified that after the family left City Hall they went to the bank and then picked up Chinese food at Panda House before returning home together around 5:00 p.m. 173a (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 his water bill that day, but believes that he may have paid it while he was at there to transfer the property. 174a (97-99) ("I don't know if I paid my water bill that day, but may –"). 174a (100) ("I ***may*** have even paid my water bill that day.) (emphasis added).

Following a brief redirect examination, the trial court embarked on a rigorous examination of Mr. Taylor, spanning 15 pages of the transcript.[6] After a few preliminary questions, the trial court turned to Mr. Taylor's whereabouts on the day of the offense in question. 179a (119-20). Next, the judge questioned Mr. Taylor about who 521 South 13th Street

[6] While the length of the court's examination of a witness is not itself determinative, it must be considered at least somewhat probative to the question of whether the trial court played too great a role in examining a certain witness. Thus, it is important to note that the 15 pages here is nearly identical to the 16 pages of examination by the court that was deemed excessive/improper in *People v Cole*, 349 Mich 175, 188 (1957).

belonged to, and then spent nearly three pages quizzing him about his explanation that while the house was legally in his name, it really belonged to his partner of 30 years (Ms. Lee) who, after being diagnosed with cancer, wanted it to be deeded over to her grandchildren. 179a-180a (120-23). Throughout this exchange, the judge's tone and language communicated distrust. 180a (122) ("If you say it was her house . . ." "Well, that isn't what I'm hearing. . ." and "And you're telling me that. . ."). This sort of repeated questioning, with phrasing and tone generally reserved for cross-examination, is improper for a judge to use. *See Cole*, 349 Mich at 196 ("hostile cross-examination of a defendant in a criminal prosecution is a function of the prosecuting attorney" and to be avoided by the judge).

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. 180a (124). Again, Mr. Taylor testified that he could not be certain whether he paid a water bill that day. 180a-181a (124-25).

> **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.

181a (125). Following the judge's request for proof of payment of the water bill—which is again a classic component of cross-examination by an adverse party—the judge turned his attention to Mr. Taylor's testimony that he made a stop at the bank after leaving City Hall and obtained a printout of his account balance. 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



RECEIVED by MSC 11/4/2018 11:00:45 PM

again sought proof from Mr. Taylor to support his testimony:

| | |
|---|---|
| **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. |
| **Defense Counsel**: | 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.** |
| **Defense Counsel**: | Your Honor, and I've got to object. **I think you're being very prosecutorial in this–** |

181a (126) (emphasis added).

**Here, the Court implied evasiveness or lack of clarity where there was none, and again took a tone more appropriate for an adversarial party.** Although trial counsel's objection made clear that the judge's tone and the substance of his questioning was out of order, the trial court merely noted the objection and continued.[7] The judge again asked for objective proof of Mr. Taylor's bank visit ("All right. Where is the sheet today?" 181a (126).)—evidence that would have been marginally probative at best, **but served to convey to the jury that the judge distrusted Mr. Taylor.** Mr. Taylor responded that he had provided the bank printout to defense counsel, but it did not have a timestamp or date. 181a (127). Questions about the minutia of Mr. Taylor's errands continued, many of which had been asked and answered during direct and cross-examination. 181a (127-28).

Ultimately, the judge moved on to scrutinizing Mr. Taylor about why he had not *come*

---

[7] Although it stated at one point that an attorney's objection can be used to determine from a cold record if the trial court's tone was improper, 246a (*citing Stevens*, 498 Mich at 176), the Court of Appeals seems to have missed or ignored this particular objection for improper tone when it simply assumed that the trial court's tone was not argumentative or skeptical when examining Mr. Taylor. 253a.



RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

*forward* sooner.

| | |
|---|---|
| **The Court**: | 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.[8] |
| **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. |

182a (130-32).

The majority of the trial 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

[8] Mr. Swilley was charged in this matter in December 2013. Trial Court Docket, 2a. Mr. Taylor's memory was thus correct, as the Galvin shooting had occurred in November 2012.

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 jurors that Mr. Taylor's previous testimony was somehow questionable and that they should be skeptical.** Likewise, after the trial judge had completed questioning Mr. Taylor about the day in question, **he engaged in a classic impeachment technique—asking a defense witness why he or she did not come forward sooner.** 182a (130-32). The judge 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 the prosecutor's office with the information when Mr. Swilley was first charged.

Even more egregious were the trial court's many requests that Mr. Taylor give paperwork to support his account of this routine trip nearly two years prior. 181a (125-26). This manner of questioning insinuated that if Mr. Taylor was telling the truth, he would have some documentary proof. It thus indicated to the jury that the judge was skeptical of Mr. Taylor's testimony, and thereby the whole of 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?" 182a-183a (132-33).

When trial counsel objected to the tone and manner of the judge's questioning, **the judge responded by erroneously stating that the witness was being inconsistent.** This statement by the judge was highly improper, as it would lower Mr. Taylor's credibility in the jury's eyes—but even worse, it was entirely contrary to reality. The record makes clear that there was no inconsistency. For example, Mr. Taylor consistently said he was not sure if he paid his water bill



RECEIVED by MSC 11/4/2018 11:00:45 PM

on the day in question, but he thought he might have. 172a (90), 174a (97-99), 174a (100), 181a (125). It was highly improper for the trial judge to incorrectly characterize this testimony as "first he thought he paid it, now he didn't pay it. . . ." 181a (126).

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. . . ."). Mr. Swilley is confident that if this Court were to review the 29 pages of Mr. Taylor's direct and cross examination testimony, 172a-179a (89-117), it will conclude that there was nothing wavering, evasive or unclear about Mr. Taylor's account. Certainly not to enough warrant 15 additional pages of cross-examination by the trial judge 179a-182a (117-32).

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, in fact, no question that Mr. Taylor was at City Hall on the afternoon of November 21, 2012.** 155a (110), 158a (118). His signature on the quitclaim deed is notarized by the notary at that location and on that date. Signed Deed, 198a; 153a (101), 157a (116), 158a (118). And, as an employee 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. 154a (103), 155a (106-07). The only purpose of asking those questions regarding the bank and the water bill was to make Mr. Taylor look like a liar. Even if Mr. Taylor was able to hand over 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, but is not notarized, present at City Hall on the afternoon of November 21, 2012? Mr. Taylor's credibility was central to the jury's determination of that ultimate question, and the trial judge's conduct inappropriately



RECEIVED by MSC 11/4/2018 11:00:45 PM

served to lower his credibility in the eyes of the jury.

### *2. The Questions Posed to Joshua Colley*

Willie Youngblood and Joshua 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 maintained that they were unable to identify the shooters. After being taken into police custody as suspects in another shooting nearly one year later, Youngblood provided the police with information about the perpetrators of the Galvin shooting in exchange for a plea agreement. Colley continued to assert that neither he nor Youngblood ever saw the men who shot at them.

Both young men were called as witnesses at trial. The prosecution called Youngblood early on in its case. As discussed in the statement of facts, his testimony was at best inconsistent. Depending on who was questioning him, Youngblood asserted that he, a) saw and recognized the men in the black car, including Mr. Swilley, or b) does not know who shot at him and he only learned the names he gave police from what he was hearing on the streets. Despite these glaring inconsistencies in the account of the prosecution's star witness, whose testimony spanned 134 transcript pages, 56a-90a (61-196) ***the trial court asked no questions of Youngblood at all after his direct and cross examinations.***

Colley was called to the stand a few days later.[9] The prosecutor asked Colley about the statement he gave to police a couple of months after the shooting. Colley reiterated that he did not remember making the statement and asserted that the information he was alleged to have

[9] Despite being a defense-friendly witness, Colley was called by the prosecution and the prosecutor conducted the direct examination.



RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

provided was not accurate.[10] After direct examination, cross examination by all four defense attorneys, redirect, recross, and a second redirect by the prosecutor, the trial 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?" 124a (120). After ascertaining that the statement was 38 pages long, the trial court sought to impeach 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?**" 124a (120) (emphasis added). As he did when repeatedly asked variations of this question by the prosecutor,[11] Colley again asserted that he did not remember making the statement and that he was high at the time of the shooting. 125a (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 – |
| **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? |
| **Colley**: | Right. |
| **The Court**: | And you did talk to them and you heard what you told them at that time. |

[10] Colley testified that he never saw the car from which the shots were fired. He stated that when he heard shots, he immediately hit the ground and hid behind a truck. 118a (85-87). He further testified that when he got up, he ran and did not look back. He explained that anything additional he may have said in the past was just based "on what somebody else told me." 119a (90); 118a (85).

[11] "No, I don't remember that." 118a (85); "Man, listen, didn't I just say that I never . . . saw nothing, man." 118a (86); "Man, listen, that was a whole year ago, but I don't remember none of that." 119a (89); "I just told you, man. That's what that say. I don't remember that, though." 119a (89); "Man, listen, I didn't remember nothing, man . . . " 119a (89); "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." 119a (90); "No, I don't remember none of that, man . . . I never seen nobody; didn't nobody see nobody, man." 119a (91).

| | |
|---|---|
| **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? |
| **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? |
| **Colley**: | I told you, man. I was high off Promethazine, Codeine, marijuana, and Xanax. |

125a (121).

Next, the judge oddly tried to tag the prosecutor into his own questioning, asking the prosecutor, "Mr. Fehrman, did he – did he give a response, I don't know I was high?" 125a (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? |
| **Colley**: | Listen, I – |
| **The Court**: | That wasn't your answer, was it? |
| **Colley**: | No, I was going on what somebody else told me. |
| **The Court**: | Did you tell them that? Did you say – |
| **Colley**: | No, I didn't tell them that, no. |
| **The Court**: | Who told you that? |
| **Colley**: | Man, it was just around, you know, people talk. Like I say, Your Honor, **we sat around and talked about this every single day, days later, months later, we never knew who it was.** |
| **The Court**: | Are these guys your friends? [referring to the defendants] |
| **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? |
| **Colley**: | No, I ain't got no problem with that. |

125a (122-23) (emphasis added).

After this prosecutorial exchange, again replete with a tone of skepticism, the judge again tried to tag-team with the prosecutor, asking for one of the prosecutor's exhibits—"the one where you got hand signals or whatever you want to call them," 125a (124)— to be put back up



RECEIVED by MSC 11/4/2018 11:00:45 PM

on the screen so that he could refer to it while questioning Colley. 125a (123). 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." 125a (124). The judge overruled the objection and continued to examine Colley. 125a-126a (124-25).

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 skepticism about the evidence to be apparent to the jury. None of the questions the trial court asked 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* 118a-119a (85-91); *see also* footnotes 10 & 11 above.

Instead, in examining Colley, **the judge 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 neither he nor Youngblood ever 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 only on what he heard from others. Moreover, in asking whether the police could put Colley in a cell with "the East Side," the trial court was suggesting 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 Colley made a powerful unprompted statement: **"Your Honor, we sat around and talked about this every single day, days later, months later, we never knew who it was."** 125a (123) (emphasis added). The judge simply ignored the import of this testimony and instead suggested that Colley had a motive to lie because he was afraid of being locked up with "the East Side." 125a (123).



RECEIVED by MSC 11/4/2018 11:00:45 PM

### B. The Trial Court's Tone and Demeanor

As a whole, the trial court's questioning of defense witnesses was argumentative and 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. Overall, the judge's repetitiveness, insistent cross-examination tone and implicit tag-teaming with the prosecutor were comparable to the conduct deemed objectionable in *Stevens* and other cases cited in *Stevens*, including *Cole*.

This Court noted in *Stevens* that "an objection by trial counsel may specifically note the inappropriateness of the judge's demeanor in the courtroom, further aiding the appellate court in understanding the tenor of judicial involvement." 498 Mich at 176. Trial counsel made several objections that should lead this Court to find the trial court's tone inappropriate:

- "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.**" 125a (124) (emphasis added).

- "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." 181a (126) (emphasis added);

- Your Honor, and I've got to object. **I think you're being very prosecutorial in this.**" 181a (127) (emphasis added).

As stated in footnote 7, the Court of Appeals seems to have missed or ignored these objections for tone that trial counsel made, despite the fact that it noted *Stevens*'s admonition that such objections are probative for an appellate court trying to ascertain tone from a cold record.

Even on matters of little relevance, the substance of the judge's questions and the manner in which they were asked indicated disbelief or hostility. For example, when asking Mr. Taylor about the house he and Ms. Lee deeded to Kareem and Marcel Swilley, the trial court used phrasing like, "If you say it was her house . . ." "Well, that isn't what I'm hearing. . ." and "And



RECEIVED by MSC 11/4/2018 11:00:45 PM

you're telling me that . . ." 180a (122). Likewise, in the middle of the prosecutor's direct examination of Mr. Swilley's older sister (Shontrell Harris), as the prosecutor was eliciting her explanation for why she lied about who she loaned her car to (on a day that was about six weeks after the shooting), **the judge interjected: "How do we know you're telling the truth today?"** 109a (98) (emphasis added). Such a hostile, adversarial question was highly improper and prejudicial—especially as it was directed at a member of Mr. Swilley's family, and the credibility of his family was critical to his alibi.

Trial counsel objected to the judicial intervention, and asserted that the judge was taking the role of the prosecutor. 125a (124); 181a (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." 181a (126-27). **Again, this question and the court's subsequent justification for it was highly improper, as it implied the existence of evasiveness/inconsistency where there truly was none.**

Finally, another indication that the trial judge's tone and demeanor may have crossed the line comes from the judge feeling the need, in the middle of his examination of Mr. Taylor, to say "I'm not being critical of you." 182a (129). This statement is at least a clue that the exchanges preceding that statement may have been perceived as hostile in some way, and so the judge felt the need to remedy that feeling. Also, moments afterward, Mr. Taylor, nearing the end of the Court's 15-page examination, pauses to say "wait a minute, you trying to confuse me." 182a (129). This statement is yet another clue in the cold record for this Court to conclude that the trial judge's examination bore the improper tone of cross-examination.



RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

### C. The Scope of the Judicial Intervention

The Court of Appeals noted that this was a lengthy trial, 247a, but it seems to have misunderstood the relevance of that factor. In *Stevens*, this Court held that the relevant inquiry was "the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein." 498 Mich at 164. Thus, where the Court of Appeals justified the trial judge's excessive questioning by noting that the trial featured complicated DNA and bullet comparison testimony, 247a, the court missed the point entirely. The relevant *context* of the trial court's 15-page examination of Mr. Taylor is his 29 pages of direct and cross examination testimony. Did Mr. Taylor say anything in those 29 pages that warranted an additional 15 pages of questioning by the Court? Certainly not; his testimony was very un-technical and easy to grasp.

Thus, although this was a somewhat lengthy trial, the issues upon which the judge intervened were not complicated and the intervention 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.

### D. The One-sidedness of the Judicial Intervention

Furthermore, the trial court's intervention was unbalanced. *See Stevens*, 498 Mich at 188 ("[I]t 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 defense and in favor of the prosecution. The judge engaged in extensive and often times heated cross-examination of two of Mr. Swilley's witnesses (Colley and Mr. Swilley's grandfather), as well as

the two defense-friendly witnesses called by the prosecution (Mr. Swilley's older sister, Shontrell, and his grandmother).

Remarkably, the record contains no similar examination of the prosecution's witnesses—not even Youngblood, who was extremely inconsistent and evasive. Youngblood's account shared many of the problems that the trial court alleged and criticized in Colley's account—with the chief difference being that Colley favored the defense, whereas Youngblood favored the prosecution. The nature of the trial 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. 56a-90a (61-196). 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 defense-friendly witnesses but asked not a single question of this very shaky prosecution star witness at the end of his direct and cross examinations speaks volumes about judicial bias.** *See e.g. Stevens*, 498 Mich at 177 (*citing Cole*, 349 Mich at 188-89 ("finding judicial intervention unacceptable when the record contained 16 pages of both extensive and heated cross-examination by the trial judge of the defendant's witnesses, but no similar examination of the prosecution's witnesses")).

**And the Court of Appeals clearly erred in its analysis of this factor.** Although the Court of Appeals noted that the trial court had questioned several other witnesses, 247a, it failed to note the stark difference between the trial court's treatment of the two similarly-situated



RECEIVED by MSC 11/4/2018 11:00:45 PM

witnesses Colley (who favored the defense) and Youngblood (who favored the prosecution).

### E. The Presence of Curative Instructions

At the close of trial, the judge gave a general curative instruction that his questions and comments were not evidence and any judicial intervention was not meant to reflect a personal opinion. 189a-190a (11-12). Additionally, when overruling some of defense counsel's objections, the judge asserted that he was "entitled to ask questions" and "could care less" about the outcome of the case. 102a (128). 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 177-78. This is one of those instances.

### F. Conclusion Under *Stevens*

It is essential that a judge not permit his own opinions with respect to the parties to become apparent to the jury. *Stevens*, 498 Mich at 174-75. "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 defense witnesses is apparent from the record and undoubtedly permeated the atmosphere of the courtroom. *Stevens*, 498 Mich at 175. The nature of the judicial conduct, the judge's tone and demeanor, and the scope and direction of the judge's intervention all indicate that he exhibited judicial bias in the presence of the jury. Although general curative instructions were given, these instructions were not enough



RECEIVED by MSC 11/4/2018 11:00:45 PM

to overcome the bias exhibited against the defense throughout trial.

Therefore, "it is reasonably likely that the trial court's questioning of witnesses improperly influenced the jury by creating the appearance of advocacy or partiality against Mr. Swilley. This Court should reverse and remand for a new trial.

## II. <u>Because The Issue Presented In Argument I Is Preserved And Thus Constitutes Structural Error, Reversal Is Warranted Without Inquiry Into Prejudice: Nevertheless, Even If The Court Were To Conduct A Materiality-Based Review, Reversal Would Still Be Warranted.</u>

As this Court said in *Stevens*: "When the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review. Rather, the judgment must be reversed and the case remanded for a new trial." 498 Mich 164. In this case, the issue was in fact preserved with objections at trial, *see* pp. 13 above, However, even if this Court were to apply harmless-error review, reversal would still be warranted.

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 (which was itself problematic under *People v Douglas*, *see* Argument II in Application for Leave to Appeal). 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 association with Granderson and Thomas.

A third co-defendant, Martin, was acquitted of all charges, meaning that the jury clearly did not fully believe the prosecution's star witness, Youngblood.



RECEIVED by MSC 11/4/2018 11:00:45 PM

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, Youngblood did not name Mr. Swilley as a perpetrator until nearly one year later, when Youngblood was facing prison time for a shooting he committed. 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 from rumors he had heard.

Since trial, Youngblood has further repudiated his testimony, and at a post-conviction evidentiary hearing, he 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 neither he nor Youngblood saw the perpetrators. He repeatedly acknowledged that Galvin was his close friend and that he wanted to see justice done for him, *e.g.* 121a (97-98), 122a (102), but asserted that neither he nor Youngblood knew who the shooters were.

There was also significant evidence that Mr. Swilley was with his grandparents and sister at the Saginaw City Hall when this murder occurred. First, as discussed above, both Ms. Lee and Mr. Taylor testified that on the afternoon in question, they were with Mr. Swilley and his sister at City Hall in order to deed them a piece of property. 96a-97a (97-98), 99a (112-13), 102a (127-28); 172a-173a (90-93). Ms. Lee was undergoing cancer treatment and she wanted to make sure that her grandchildren had title to the 13th Street house in case anything should happen to her. 96a-97a (97-98), 102a (127-28).

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. 172a (90), 174a (99-100). The



RECEIVED by MSC 11/4/2018 11:00:45 PM

record reflects that this deed was filed at approximately 3:30 p.m. that afternoon and is signed by the grantor, Philip Taylor (whose signature is notarized), and the grantees, Kareem and Marcel Swilley. 151a-152a (89-90), 154a (103), 155a (106-07); 198a. Mr. Swilley's signature on the deed appears to be written in his own handwriting. 151a (88), 155a (109) (Swilley signature writing is different from other signatures); 158a (120-21) (signature resembles Mr. Swilley's signature on advice of rights form). Mr. Taylor's signature is notarized, and both Ms. Lee and Mr. Taylor testified that Mr. Swilley was with them and signed his name at the same time.[12] 96a-97a (97-98), 98a (104); 172a-173a (90-93), 174a (99-100).

In addition to Ms. Lee and Mr. Taylor's testimony and 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. 44a (90). Mr. Taylor estimated that he, Ms. Lee, Mr. Swilley and his sister left the house for City Hall around 2:00 p.m., 172a (90), and that once they arrived there the entire process took 45 to 60 minutes to complete, 174a (100). According to employees from the Saginaw County Assessor's Office, the quitclaim deed was filed at City Hall at approximately 3:30 p.m. 154a (103), 155a (106-07). 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." 142a (111).
At 2:35 p.m., Mr. Swilley sent a text to someone asking what was up. 143a (114).
At 2:44 p.m., Mr. Swilley sent a responsive text to someone stating that he was "going down here to put the house in my sister name." 143a (114).
At 2:48 p.m., Mr. Swilley received another text from co-defendant Thomas stating, "bekupp." 143a (115).
At 2:49 p.m., Mr. Swilley responded via text to Thomas and asked how many people had been shot. 143a (115).
At 2:50 p.m., Thomas replied "about 3." 143a (116).

[12] Mr. Swilley was not charged in this case until December 2013. 2a. Surveillance video of the City Hall offices was not available as it is destroyed after 30 days, 152a (92), nor was cell phone location data available, as that was purged after six months of non-use, 141a (51).



RECEIVED by MSC 11/4/2018 11:00:45 PM

RECEIVED by MSC 11/4/2018 11:00:45 PM

**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 learned second-hand that shots had been fired and that people had been injured. Judging by the time of the texts 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 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 since at least noon that day. Indeed, the prosecution's own cell phone expert admitted that it would be strange for Thomas to be asking Mr. Swilley by text to call him if they were in fact already together. 149a (62-63).

Certainly, it must be admitted that the phone records and texts alone, while helpful, do not deem it *absolutely impossible* for Mr. Swilley to have been involved in the shooting. **But that is precisely why Mr. Swilley's grandparents' accounts were so crucial, and why the trial court's improper questioning of Mr. Swilley's alibi witnesses was so material an error.** Mr. Taylor and Ms. Lee attested that Mr. Swilley was indeed with them when the deed documents were prepared, signed and filed at City Hall. Their credibility is what would take Mr. Swilley's alibi from 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 is all the more troubling and a central part of this case: He undermined in the eyes of the jury the credibility of witnesses who, if believed, make Mr. Swilley's conviction reasonably impossible.

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 trial 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, and resulted in the conviction of a factually innocent defendant. *People v Carines*, 460 Mich 750, 763 (1999).

Therefore, the Court should reverse the conviction even if it concludes that the error is unpreserved.

## 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*

Clinical Assistant Professor of Law
University of Michigan Law School
701 S. State St.
Ann Arbor, MI 48109
(734) 763-9353

November 3, 2018



RECEIVED by MSC 11/4/2018 11:00:45 PM