RECEIVED by MSC 11/19/2018 11:49:29 AM

STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
TALBOT, C.J., AND O'CONNELL, AND OWENS JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

KAREEM AMID SWILLEY,

Defendant-Appellant.
/

Supreme Court
No. 154684

Court of Appeals
No. 325806

Circuit Court
No. 14-039758-FJ

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

JOHN A. McCOLGAN, Jr. (P37168)
PROSECUTING ATTORNEY
SAGINAW COUNTY

BY: JOSEPH F. SAWKA (P74197)
Assistant Prosecuting Attorney
Saginaw County Prosecutor's Office
111 S. Michigan Avenue
Saginaw, Michigan 48602-2019
(989) 790-5330

RECEIVED by MSC 11/19/2018 11:49:29 AM

TABLE OF CONTENTS

RECEIVED by MSC 11/19/2018 11:49:29 AM

RECEIVED by MSC 11/19/2018 11:49:29 AM

INDEX OF AUTHORITIES

CASES

FEDERAL COURTS

RULES

RECEIVED by MSC 11/19/2018 11:49:29 AM

RECEIVED by MSC 11/19/2018 11:49:29 AM

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. This Court's decision in *People v Stevens*, 498 Mich 162 (2015), does not appreciate the legal difference between actual bias and apparent bias. The federal standard is most appropriate, recognizing that apparent judicial bias in the questioning of witnesses is a non-constitutional, evidentiary error subject to harmless-error review. Should this Court reconsider its decision in *Stevens*?

Defendant-Appellant:	would likely answer this question, "No."
Plaintiff-Appellee:	answers this question, "Yes."
The Court of Appeals:	was not asked to answer this question.
The trial court:	was not asked to answer this question.

II. Where a claim of judicial bias rests on the questioning of witnesses, the standard is: In the totality of the circumstances, whether the judge demonstrated the appearance of partiality such that there is a reasonable likelihood that the judge's conduct improperly influenced the jury, where no single factor is controlling. Were the trial judge's questions proper in context, where they sought to develop unclear, underdeveloped, and at times confusing testimony, thus demonstrating no apparent bias?

Defendant-Appellant:	answers this question, "No."
Plaintiff-Appellee:	answers this question, "Yes."
The Court of Appeals:	answered this question, "Yes."
The trial court:	implicitly answered this question, "Yes."

RECEIVED by MSC 11/19/2018 11:49:29 AM

INTRODUCTION

Rejecting his alibi defense, and in the face of eyewitness identification and corroborating evidence, a jury convicted Defendant, Kareem Amid Swilley, of first-degree premeditated murder, conspiracy to commit murder, three counts of assault with intent to murder, one count of carrying a dangerous weapon with unlawful intent, and six counts of felony-firearm. The jury likewise convicted his co-defendants, John Henry Granderson and Terrance Demon–Jordan Thomas, Jr., of multiple offenses, while acquitting co-defendant Derell Martin of all charges due to a lack of sufficient evidence.

This Court granted oral argument on application and asked for supplemental briefing on the question, "[W]hether 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 a party. *People v Stevens*, 498 Mich 162 (2015)." This Court has articulated that when reviewing such a question, "the reviewing court must determine whether the judge's conduct improperly influenced the jury without considering the weight of the evidence presented against the aggrieved party or whether the conduct *actually* contributed to the jury's verdict." *People v Stevens*, 498 Mich 162, 171 n 3; 869 NW2d 233 (2015) (emphasis in original). Hence, the trial facts leading to Defendant's convictions are largely irrelevant, except to the extent that they provide context for the trial court's questions.

Here, the totality of the circumstances indicates no reasonable likelihood that the judge's questions to three witnesses improperly influenced the jury. The judge did

not use sarcasm or ridicule, nor did he impugn the credibility of the witnesses. The judge did not make any verbal foray, nor were Defendant or his attorney the butt of any such foray. The judge did not interrupt defense counsel to ask questions, nor was the judge hostile to witnesses, Defendant, or his attorney. The judge's questions developed unclear, undeveloped, and at times inconsistent testimony. The judge asked questions of many witnesses, demonstrating his attention to the trial facts. In sum, the evidence does not show judicial impartiality, nor does the record show that the jury was improperly influenced, or that Defendant was prevented from having a fair trial. The record shows that he had a fair trial.

RECEIVED by MSC 11/19/2018 11:49:29 AM

RECEIVED by MSC 11/19/2018 11:49:29 AM

COUNTERSTATEMENT OF MATERIAL FACTS AND PROCEEDINGS[1]

a. Arrival of police to the scene of the homicide

On November 21, 2012, around 2:30 p.m., Officer Bradley Holp of the Saginaw Police Department responded to the area of York Drive in the City of Saginaw, Michigan to reports of a shooting. (Tr IV, 90; 44a.) He arrived at the scene to find the decedent DaVarion Galvin laying in the front yard of 3274 York Drive and found Marcus Lively standing next to him. (Tr IV, 90, 91, 95, 98; 44a–45a.) Galvin suffered a number of gunshot wounds. (Tr IV, 92; 44a.) Lively said a blue or black Saturn occupied by four males shot at them. (Tr IV, 94; 45a.) Officer Holp noticed that the street was littered with shell casings, that the home at 3729 York had bullet damage, and that a truck in front of 3724 York had been riddled with bullets. (Tr IV, 92, 105, 108, 109; 44a, 48a–49a.) From the scene, Detective Rabideau collected twenty 9-mm cartridge casings and ten .40-caliber casings from the street. (Tr V, 19–26; 18b–20b.)

b. Eyewitness testimony identify defendants as the shooters

---

[1] The People, Plaintiff-Appellee, stipulate to use the Appendix submitted by Defendant-Appellant in conjunction with his Supplemental Brief. In addition to Defendant's Appendix, the People provide additional citations to the record, and as Defendant uses the citation "a" following the page number when citing his Appendix, we use the citation "b" following the appendix page number in relation to our Appendix.

The People abbreviate and cite to the trial transcripts within this Brief in the following manner: "Tr [Volume Number], [page number]; [Appendix page number]."

We cite to the preliminary examination transcript as: "PE [Volume Number], [page number]; [Appendix page number]."

RECEIVED by MSC 11/19/2018 11:49:29 AM

Willie Youngblood, a victim and eyewitness, testified that he, Marcus Lively, Joshua Colley, and DaVarion Galvin were walking on the sidewalk of York Drive when a car pulled up to them. (Tr V, 62–63, 72; 57a, 59a.) Youngblood approached the front passenger side of the car because he thought there were females in the car. (Tr V, 76–77; 60a.) He was close to the car and saw "dreads and a gun" in the car. (Tr V, 77; 60a.) He refused to testify about *who* he saw, only giving a description of dreads, a ponytail, and a gun. (Tr V, 78; 61a.) The prosecutor then impeached Youngblood with substantive evidence of his prior testimony from the preliminary examination and prior statements of identification to police. (Tr V, 78, 93; 61a, 64a.) Youngblood then admitted he saw "T. Jordan" (co-defendant Thomas) in the front passenger seat. (Tr V, 78–79; 61a.) Co-defendant Granderson was the driver and co-defendant Martin was behind Granderson. (Tr V, 81–82; 61a–62a.)

He then admitted he saw Defendant Swilley, whom he knew as "Jeez," behind co-defendant Thomas in the backseat, although he said he was not sure. (Tr V, 79; 61a.) But, when asked again whom he saw, he did not equivocate and answered "Jeez" (Defendant Swilley). (Tr V, 79; 61a.) Yet, then he did equivocate when asked once more. (Tr V, 79; 61a.) Finally, the prosecution used Youngblood's testimony from the preliminary examination to impeach him with substantive evidence that he had routinely identified Defendant Swilley as the person behind co-defendant Thomas in the car. (Tr V, 80–81; 61a; PE, 45–47; 28a–29a.) Youngblood continued to equivocate on cross-examination whether Defendant Swilley was present or not. (Tr V, 150–51; 79a.) And on re-direct, Youngblood affirmed his prior statements of identification,

identifying Defendant Swilley and his co-defendants. (Tr V, 175–77; 85a.) Youngblood had seen these men in the past. (Tr V, 63, 90, 180; 57a, 64a; 86a.) He eventually looked them up on Facebook and confirmed their names and faces. (Tr V, 91, 64a.)

Youngblood then testified he saw one gun raised at him and he ran. (Tr V, 83; 62a.) The prosecutor then substantively impeached him with his prior preliminary examination testimony and he confirmed that Defendant Swilley, co-defendant Thomas, and co-defendant Granderson raised guns at him. (Tr V, 84; 62a.) As he ran, he was hit by a bullet in the stomach. (Tr V, 88; 63a.) He saw Galvin on the ground. (Tr V, 72; 59a.) He testified that the motive for them to shoot him and his friends would be because they belonged to, "the Coast," a gang that was not welcome in Youngblood's neighborhood. (Tr V, 103; 67a.)

Youngblood was questioned about his failure to report the incident and his refusal to identify the individuals involved, and his response was that talking to the police is not something that is accepted in his community. (Tr V, 95–96; 65a.) He testified he did not want to identify these defendants, and he still was not sure if he wanted to identify them. (Tr V, 178; 86a.) He is worried about his family being the victims of retaliation. (Tr V, 190; 87a.) The reason he finally came forward after so long was because he was involved in a shooting in Cass River, and he figured that if he gave up the defendants who shot him, he could get a deal, but he felt the seventeen-year sentence he received in his case was not much of a deal. (Tr V, 106–08, 135, 139–41; 68a, 75a–76a.) Nevertheless, Youngblood testified, "I wanted the right people convicted, you feel me." (Tr V, 108; 68a.)

RECEIVED by MSC 11/19/2018 11:49:29 AM

RECEIVED by MSC 11/19/2018 11:49:29 AM

c. Evidence linking defendants to the homicide and corroborating eyewitness testimony

At about noon on November 21, 2012, Teresa Jurdem loaned her dark gray Saturn Aura to James Jones for a couple of hours. (Tr VI, 8, 9–10; 26b–27b.) She eventually learned James's real name was Ricky Holmes. (Tr VI, 31; 32b.) Ricky was only supposed to have her car for a few hours. (Tr VI, 13–14; 27b–28b.) Between 12:00 p.m. and 12:30 p.m., Verquisha Montgomery was riding in a car with her boyfriend, Colburn Wicker, who was the driver, and saw Defendant Swilley, co-defendant Granderson, co-defendant Thomas, and another male in a black car flagging her car down in the City of Saginaw. (Tr XI, 6, 30–31, 33, 34; 104b, 106b–107b.) The defendants were friends of Colburn. (Tr XI, 35; 107b.) Ricky returned Teresa's car with bullet holes in it around five to six hours later. (Tr VI, 14; 28b.) Teresa called 911 while Ricky was present. (Tr VI, 14–15; 28b.) A fingerprint lifted from the car was later determined to belong to Granderson's left ring finger. (Tr X, 16; 98b.) On March 19, 2013, Teresa's boyfriend, Michael Hoffman, bought Teresa's Saturn. (Tr VI, 56; 38b.) While cleaning the car's interior, he found a shell casing under the front passenger seat. (Tr VI, 57–58, 63-64; 38b–40b.) The 9-mm casing was also collected by police. (Tr V, 20; 18b; Tr VI, 65; 40b)

On Christmas Day of 2012, at about 10:34 p.m., someone shot at Defendant Swilley's house while he was present inside. (Tr VII, 22, 23, 38, 86, 87; 46b–48b.) As a result, Defendant Swilley was upset. (Tr VII, 89; 48b.) At about 11:30 p.m., Connie Stark called 911 because she saw three boys with a long gun outside her home, which was on the north side of Saginaw. (Tr VII, 132, 133; 50b.) Officers Hildebrant and

RECEIVED by MSC 11/19/2018 11:49:29 AM

Beyerlein responded. (Tr VIII, 10–11; 57b.) The officers saw four subjects running. (Tr VIII, 20–21; 59b; Tr XI, 10; 105b.) Three of them stopped while the fourth continued fleeing. (Tr VIII, 21; 59b; Tr IX, 10; 80b.) The three subjects were Defendant Swilley, Terrance Thomas, and Jamar Swilley. (Tr VIII, 12; 57b; Tr IX, 11–12, 27; 80b–81b.) The fourth subject ran while holding his waist area. As he got to the rear of a house, he made a throwing motion. (Tr VIII, 21–22; 59b–60b.) Near that area in a parking lot, Hildebrant found the thrown item: a Glock handgun with an extended magazine. (Tr VIII, 14, 25; 58b, 60b.) Beyerlein followed Defendant, Thomas, and Defendant Swilley's path and found two assault rifles under a porch. (Tr IX, 10–11; 80b.)

Also within that area, Hildebrant found a car registered to Defendant's sister, Shontrell Harris. (Tr VIII, 14; 58b; Tr IX, 80; 82b.) He performed an inventory search and found three cell phones in the glovebox. (Tr VIII, 37; 63b.) Shontrell initially told police that her aunt had borrowed her car and had abandoned it after it had run out of gas. (Tr IX, 97; 109a.) But she finally admitted Defendant had her car after she left it and the car's keys at Defendant's house. (Tr IX, 93–94, 111, 177; 83b, 85b, 88b.)

The 21 9-mm casings taken from York Drive and from with the Saturn were determined to have been fired from the firearm seized by Hildebrant on Christmas Day, and all of the .40-caliber casings were fired from one firearm. (Tr VIII, 80–83, 96–98; 66b–67b; 80b–81b.) Two .40-caliber bullets taken from Galvin's body were fired from one firearm, but they could not be matched to any of the .40-caliber casings. (Tr VIII, 84-85, 89; 67b, 68b.) The bullet taken from Galvin's shoulder was a 9-mm.

RECEIVED by MSC 11/19/2018 11:49:29 AM

(Tr VIII, 86, 87; 68b.) The firearm collected by Hildebrant was tested for DNA. (Tr IX, 187–88; 89b.) Along with known DNA samples from Defendant and from Thomas (Tr IX, 173; 87b), a DNA analysis was able to exclude Defendant as one of the donors of the DNA found on the firearm. (Tr IX, 200; 90b.) However, Thomas was most likely a primary donor. (Tr IX, 199, 204; 90b–91b.)

Detective Khan testified as an expert in cell phone data analysis. (Tr XII, 23; 118b.) He analyzed the phones taken from Shontrell Harris's car. (Tr XII, 17, 23–24, 25; 117b–119b.) One phone belonged to Thomas. (Tr XII, 31, 33–34, 38; 120b–122b.) Another phone belonged to Defendant. (Tr XII, 32–33; 120b–121b.) In Defendant's contacts list were Thomas, Granderson, and Martin's phone numbers. (Tr XII, 55, 56, 57; 123b–124b.) On August 24, 2012, Thomas texted Defendant about a 9-mm gun. (Tr XII, 103–104; 125b.) On August 25, 2012, Defendant texted Thomas about a .40-caliber gun. (Tr XII, 104–105; 125b–126b.) Thomas responded that he had a .380-caliber. (Tr XII, 105; 125b.) On November 21, 2012, at 2:49 p.m., Defendant texted Thomas and asked "how many down?" (Tr XII, 115; 143a). Thomas responded, "[A]bout three." Defendant texted, "[W]oo whoo." (Tr XII, 116; 143a) A video taken on Defendant's phone on October 6, 2012, showed a 9-mm Glock pistol with an extended magazine. (Tr XIII, 23–24, 25-26; 134b–135b.) The pistol appeared to be the same firearm seized by Officer Hildebrant. (Tr XIII, 26; 135b.)

d. Defendant's alibi defense

Defendant Swilley asserted an alibi defense at trial, presenting one witness on his behalf: Phillip Taylor, his grandfather. Mr. Taylor testified that on the afternoon

RECEIVED by MSC 11/19/2018 11:49:29 AM

of the shooting, he, his wife, Alesha Lee (who testified in the prosecution's case-in-chief, but who was also favorable to Defendant), Defendant, and Defendant's sister left their home at about 2:00 p.m. and went to the water department and to City Hall to transfer some property to Defendant and to Defendant's sister. (Tr XIV, 90, 91, 92, 95; 172a–173a). Ms. Lee testified similarly. (Tr VII, 97, 112; 96a; 70b.) At that time, Defendant received a phone call about the shooting, and he told his grandfather, "I'm glad I'm with you all, because something just went down, and they probably would try to blame it on me." (Tr XIV, 93; 173a.) On cross-examination by the prosecution, Mr. Taylor had some apparent memory issues because he could not recall if they were inside or outside of City Hall, or if they were inside or outside of their car on their way to City Hall, or if Defendant's phone even rang. (Tr XIV, 101, 104; 175a.) According to his testimony, Mr. Taylor was not even aware he was with Defendant on the date of the shooting until "they" told him about it a year later. (Tr XIV, 105, 131; 176a, 182a.) He testified he was not sure who "they" were; he guessed his wife or his kids. (Tr XIV, 105; 175a.)

Lori Brown and Mary Malocha worked at the City of Saginaw Assessor's Office. (Tr XIII, 76, 96; 136b, 137b.) They were working on November 21, 2012, but she could not recall seeing Defendant on that day. (Tr XIII, 79, 96, 101; 136b, 137b, 153a.) While the grantor was required to sign a quitclaim deed, the grantee was not, and the grantee was not required to appear in person. (Tr XIII, 77, 101; 136b, 153a.) However, the grantee was required to sign an affidavit. (Tr XIII, 85–86; 150a–151a.) In this

RECEIVED by MSC 11/19/2018 11:49:29 AM

case, the grantees were Defendant and Marcel Swilley, but the only signature on the affidavit was Marcel's. (Tr XIII, 88, 102; 151a, 154a)

e. Trial courts discretionary questioning of witnesses

The trial court was thoroughly engaged with the trial, demonstrating that it was paying attention. It sought to clarify facts and understand evidence through its own questioning of witnesses, including Teresa Jurdem, Susan Hicks, Pamela Green, Alesha Lee, Connie Stark, Jonathan Beyerlein, Shontrell Harris, Lis Ramos, Joshua Colley, and Phillip Taylor.

Pertaining to Defendant's arguments on appeal, the trial questioned Joshua Colley after the parties finished their questioning. The court inquired about Mr. Colley's memory, since he claimed he could not recall anything he said during his interview with police officers because he was high. (Tr X, 120–21; 124a–125a.) The court asked counsel for assistance in determining whether Mr. Colley ever told the police he was high, utilizing the transcribed interview. (Tr X, 122–23; 125a.) The court then inquired about a picture admitted as an exhibit in which the prosecution alleged people were showing gang signs with their hands. (Tr X, 123; 125a.) The court asked Mr. Colley if he knew what the hand signs meant, to which Mr. Colley responded that he did not know. (Tr X, 125; 126a.) The court then ceased questioning. (Tr X, 125; 126a.)

With respect to Alesha Lee, Defendant Swilley's grandmother, the court asked her questions, interrupting the prosecution's redirect examination. (Tr VII, 127; 102a.) The court inquired further into the piece of property Ms. Lee transferred to

RECEIVED by MSC 11/19/2018 11:49:29 AM

Defendant Swilley on the day of the shooting, asking if she had the documentation. (Tr VII, 127; 102a.)

Finally, with respect to Defendant's allegations of judicial bias, the trial court questioned Defendant's grandfather, Phillip Taylor, after the parties finished all of their examinations of him. (Tr XIV, 118; 179a.) The court questioned Mr. Taylor about the timeline of events, clarifying where he was and at what time. (Tr XIV, 118–32; 179a–182a.) The court also questioned Mr. Taylor about the piece of property he transferred to Defendant at the time of the shooting. (Tr XIV, 120–21; 179a–180a.)

f. Conviction and appeal

A jury convicted each defendant of multiple charges, except co-defendant Martin was acquitted of all charges. The jury convicted Defendant Swilley of first-degree premeditated murder, conspiracy to commit murder, three counts of AWIM, one count of carrying a dangerous weapon with unlawful intent, and six counts of felony-firearm.

In the Court of Appeals, Defendant Swilley argued, *inter alia*, that the trial court denied him a fair trial by exhibiting bias when it questioned Joshua Colley, Alesha Lee, and Phillip Taylor. *People v Swilley*, unpublished per curiam opinion of the Court of Appeals, issued September 13, 2016 (Docket No. 325806), p 19. The Court of Appeals disagreed with Defendant. Applying this Court's decision in *Stevens*, the Court of Appeals found that the trial court's questioning of these witness did not demonstrate judicial bias when considering the totality of the circumstances. *Id.* at 19–20. Defendant now seeks leave to appeal.

RECEIVED by MSC 11/19/2018 11:49:29 AM

ARGUMENTS

I. This Court's decision in *People v Stevens*, 498 Mich 162 (2015), does not appreciate the legal difference between actual bias and apparent bias, and the decision should be reconsidered. The federal standard is most appropriate, recognizing that apparent judicial bias in the questioning of witnesses is a non-constitutional, evidentiary error subject to harmless-error review.

a. Introduction

The People do not make the following argument lightly. In *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015), this Court held that all findings of judicial bias, *actual* or *apparent*, constitute constitutional, structural error. In so holding, this Court has labeled *all* claims of judicial bias as "misconduct." We are of the position that this holding incorrectly and dangerously conflates a judge's innocent, albeit erroneous, actions (i.e., "judicial errors") with those of a judge's corrupt actions (i.e., "judicial misconduct"). We assert that it is more legally accurate to classify judicial errors—those actions which do not demonstrate actual bias, but rather apparent bias—as non-constitutional, evidentiary error, thus subject to harmless-error review. And it is more legally accurate to classify judicial misconduct—those actions which do demonstrate actual bias—as constitutional, structural error. The People urge this Court reconsider *Stevens* by granting leave in this case on this issue alone. This case presents the proper vehicle to do so because the trial judge's actions in this case are neither error or misconduct as discussed *infra*. Even if the judge overstepped, which we do not accept, his actions do not constitute "misconduct," but rather error, subject to harmless-error review, through which Defendant's convictions should be affirmed in light of the evidence against him.

RECEIVED by MSC 11/19/2018 11:49:29 AM

b. Issue Preservation/Standard of Review

The United States Supreme Court has said that "Once a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v City of Escondido, Cal*, 503 US 519, 534; 112 S Ct 1522; 118 L Ed 2d 153 (1992); see also *Dewey v Des Moines*, 173 US 193, 197–98; 19 S Ct 379; 43 L Ed 665 (1899). Michigan Courts likewise recognize that an appellee can argue on appeal for alternative grounds of affirmance that were not raised in a lower court. See *Vanslembrouck v Halperin*, 277 Mich App 558, 565; 747 NW2d 311 (2008), citing *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

Whether precedent should be overturned or modified is a pure question of law that this Court reviews de novo. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

c. Argument

All courts reviewing claims of judicial bias should initially presume that a judge is impartial. Otherwise, our judicial system is in serious doubt. Where, as here, a claim of judicial bias stems from the trial judge's questioning of witnesses, this Court must begin with the recognition that questioning of witnesses by a trial judge is permissible. Indeed, Michigan Rule of Evidence 614, "Calling and Interrogation of Witnesses by Court," allows such action. In addition, our rule of evidence is identical to Federal Rule of Evidence 614. MRE 614 (staff comment).

RECEIVED by MSC 11/19/2018 11:49:29 AM

MRE 614	**FRE 614**
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	(b) Examining. The court may examine a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Of importance is the Advisory Committee Note to section (b) of the Federal Rule of Evidence 614, which states,

> The authority of the judge to question witnesses is also well established. . . . The authority is, of course, *abused* when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for *abuse*. [Alteration and emphasis added.]

Federal courts thus review a judge's questioning of witnesses for an abuse of discretion. *SEC v Levin*, 849 F2d 995, 1001 (CA 11, 2017); *Chainey v Street*, 523 F3d 200, 221–22 (CA 3, 2008); *United States v Seeright*, 978 F2d 842, 846–47 (CA 4, 1992). If an abuse of discretion exists, federal courts then determine whether the complaining party can show "serious prejudice." *United States v Cruz-Feliciano*, 786

RECEIVED by MSC 11/19/2018 11:49:29 AM

F3d 78 (CA 1, 2015). In addition, resulting prejudice is still subject to the harmless-error rule in federal courts. *United States v Paiva*, 892 F2d 148, 159 (CA 1, 1989) (applying harmless error analysis where the judge erred by "adding to the evidence"). Thus, federal courts do not classify judicial bias stemming from questioning of witnesses as constitutional, structural error.[2] Rather, it is non-constitutional, evidentiary error as Rule 614 so suggests. Because Michigan's evidentiary rule is identical to the federal rule, this Court's inquiry should follow the same line of inquiry.

Instead of following the federal precedent, in *Stevens*, this Court determined that a judge is bias when, "considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influences the jury by creating the appearance of advocacy or partiality against a party." 498 Mich at 171. The Court only looked to determine bias, not the mode through which bias was demonstrated; that is, actual or apparent. Then, this Court deemed all such errors constitutional, structural errors. *Id.* at 179–80. The People believe this holding is unduly restrictive, refusing to appreciate the difference between actual bias and apparent bias, each of which are different in nature.

We have no disagreement that a defendant—and the prosecution—is entitled to an impartial judge. It is for this reason that trial by an *actually* biased judge

---

[2] We do not mean to suggest that all judicial questioning of witnesses is immune from constitutional, structural error. The People can envision a case where a judge's question(s) might *explicitly* comment on the credibility of a defendant, his evidence, or his guilt. In such an instance, *actual* bias may be established, thus constituting constitutional, structural error.

RECEIVED by MSC 11/19/2018 11:49:29 AM

constitutes constitutional, structural error. "Structural error occurs when a judge with *actual* bias against a defendant presides at his trial." *Norris v United States*, 820 F3d 1261, 1266 (CA 11, 2016) (emphasis added), citing *Arizona v Fulminante*, 499 US 279, 309–10; 111 S Ct 1246; 113 L Ed 2d 302 (1991) (REHNQUIST, C.J., majority opinion). The Supreme Court has defined structural errors as those where the reviewing court "can only engage in pure speculation" about what the jury might have done; their consequences are "necessarily unquantifiable and indeterminate." *Sullivan v Louisiana*, 508 US 275, 281–82; 113 S Ct 2078; 124 L Ed 2d 182 (1993). Structural errors are "markedly different" from trial errors (which can be "quantitatively assessed"), and thus, structural errors "defy analysis by harmless-error standards." *Fulminante*, 499 US at 308–09 (internal quotation marks omitted). Where a judge is *actually* biased, faith in the judicial system is undermined and constitutional, structural error has occurred.

On the other hand, where a judge exercises his or her discretion to question witnesses, resulting in *apparent* bias, such discretion does not defy the harmless-error standard of review, for it is a discretionary action. This is the distinction that *Stevens* fails to appreciate. An *actually* biased judge knowingly commits misconduct. An *apparently* biased judge—a determination that is made through analysis of various factors—does so unintentionally.[3] A reviewing court can analyze the questioning that was done by the accused judge to determine the prejudicial effect

[3] Of course, if a judge is intentionally asking questions that knowingly demonstrate bias, then the judge is actually biased.

RECEIVED by MSC 11/19/2018 11:49:29 AM

upon the jury in light of the evidence presented. Federal courts equate this burden to demonstrating prejudice under plain error review. *Cruz-Feliciano*, 786 F3d at 84. This is so because the error stems from rule of evidence 614, permitting judicial questioning of witnesses. And it is *the nature and extent* to which the questioning occurs that gives rise to an allegation of judicial bias, which is apparent rather than actual, not the mere fact of *the existence* of the questions. For if courts are permitted to question witnesses for proper purposes, structural error cannot exist if the court unintentionally demonstrates apparent bias. Whereas, the existence of actual bias is sufficient to conclude judicial bias warrants reversal.

This leads to the People's final concern with *Stevens*: all judges who are deemed to exhibit bias, whether actual or apparent, are now subject to misconduct claims. Throughout the *Stevens* opinion, the Court generally referred to or classified a judge's bias in this context as "misconduct." 498 Mich at 168, 171, 172. The Court also used the term "partiality," but it ultimately equated the term with "misconduct." *Id.* at 168, 171, 172, 178. As recognized in *People v Cooper*, 309 Mich App 74, 87–88; 867 NW2d 452 (2015), with respect to the phrases "prosecutorial misconduct" and "prosecutorial error," the

> concern for the proper phrase is not a case of mere political correctness, for the term misconduct has a specific legal meaning and connotation when it comes to attorney conduct, and is in general limited to instances of illegal conduct, fraud, misrepresentation, or violation of the rules of professional misconduct. See MRPC 8.4. . . . [T]he term "misconduct" is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct. See, e.g., MRPC 8.4.

RECEIVED by MSC 11/19/2018 11:49:29 AM

> . . . Therefore, we agree that these claims of error might be better and more fairly presented as claims of "prosecutorial error," with only the most extreme cases rising to the level of "prosecutorial misconduct."

For the same reasons, labeling all instances of judicial bias as "misconduct" seriously conflates the legal meaning of error and misconduct. The Michigan Code of Judicial Conduct, Canon 2(A) states, "A judge must avoid all impropriety and appearance of impropriety." Accordingly, every time a reviewing court determines judicial bias was present, actual or apparent, that judge is now subject to judicial misconduct sanctions. The People do not believe that this Court meant for the *Stevens* opinion to encompass such a conclusion, yet it has done so.

In order to cure this situation, this Court should revisit the *Stevens* opinion. In doing so, it should clarify that where a judge's actions demonstrate *actual* bias, such conduct is "misconduct," for the faith in our judicial system cannot withstand such impropriety. In such instances, constitutional, structural error occurs. Such instances should be rare. On the other side, where a judge's actions demonstrate *apparent* bias, which would encompass unintentional, evidentiary errors, the judge's actions do not constitute "misconduct." In such instances, which may be more prevalent, non-constitutional, evidentiary error has most likely occurred, thus the error is subject to a prejudice analysis.

RECEIVED by MSC 11/19/2018 11:49:29 AM

II. Viewing the totality of the circumstances, the trial judge did not demonstrate the appearance of partiality such that there is a reasonable likelihood that the judge's questioning of witnesses improperly influenced the jury. The judge's questioning was restrained, yet comprehensive and meant to clarify unclear and underdeveloped testimony.

a. Introduction

The standard is: In the totality of the circumstances, whether the judge demonstrated the appearance of partiality such that there is a *reasonable* likelihood that the judge's conduct improperly influenced the jury, where no single factor is controlling. *Stevens*, 498 Mich at 171. Here, the trial judge's questions were not asked to discredit witnesses, but to develop their unclear, underdeveloped, and at times confusing testimony. From this record, it can be determined that there is not a reasonable likelihood that the judge's questions improperly influenced the jury.

b. Issue Preservation / Standard of Review

During trial, defense counsel objected to the trial court's questioning of certain witnesses, thus preserving his argument of judicial bias for appeal.[4] *Stevens*, 498 Mich at 170. Whether a claim of judicial bias rises to the level of judicial misconduct constituting constitutional, structural error is a question of law that this Court reviews de novo. *Id.* at 168.

---

[4] The People note that this Court previously had the opportunity to determine if preservation is even necessary for a claim of judicial bias in *People v Chatman*, 500 Mich 1011; 907 NW2d 600 (2018). This Court denied the prosecution's application for leave to appeal after oral argument in *Chatman*, thus leaving this question open, but seemingly suggesting that issue preservation does not matter for such a claim in Michigan. See *Id.* (MARKMAN, C.J., dissenting).

RECEIVED by MSC 11/19/2018 11:49:29 AM

c. Argument

The Court of Appeals recognized *Stevens* as controlling precedent. *Swilley*, unpub op at 13. According to *Stevens*, where an objection to judicial bias is preserved, as it was here, a trial judge's conduct deprives a party of a fair trial if a trial judge's conduct pierces the veil of judicial impartiality. *Stevens*, 498 Mich at 170 (citation omitted). "A judge's conduct pierces this veil 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."

"The inquiry requires a fact-specific analysis." *Id.* at 171.

> In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including [(1)] the nature of the judicial conduct, [(2)] the tone and demeanor of the trial judge, [(3)] the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, [(4)] the extent to which the judge's conduct was directed at one side more than the other, and [(5)] the presence of any curative instructions. [*Id.* at 172 (citation omitted).]

This list is non-exhaustive. *Id.* "The reviewing court must consider the relevance and weigh the significance of each factor under the totality of the circumstances of the case." *Id.* Reviewing courts must analyze the judge's conduct on the whole, not in isolation. *Id.*

The Court of Appeals applied this law correctly, discussing each factor in connection with the challenged actions of the trial judge, ultimately rejecting Defendant's argument of judicial bias. *Swilley*, unpub op at 27–28. For the same

RECEIVED by MSC 11/19/2018 11:49:29 AM

reasons, this Court should reject Defendant's argument of judicial bias and affirm his convictions. The trial court's actions did not pierce the veil of judicial impartiality, and the Court of Appeals' decision is not clearly erroneous.

i. The nature of the judicial conduct does not demonstrate bias

The nature of the alleged judicial bias here is the trial court's questioning of certain witnesses, those being Mr. Colley, Ms. Lee, and Mr. Taylor. In this context, "a reviewing court must first bear in mind that such interrogation is generally appropriate under MRE 614(b)." *Stevens*, 498 Mich at 173. "[T]he central object of judicial questioning should be to clarify." *Id.* "Therefore, it is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional relevant information." *Id.* This does not mean a judge cannot have other valid objectives when questioning witnesses. Indeed, "[a] primary function of the judiciary is to discover the truth." *In re Nettles-Nickerson*, 481 Mich 321, 338; 750 NW2d 560 (2008). Nonetheless, "[i]t is essential that the judge not permit his own views on disputed issues of fact to become apparent to the jury." *Stevens*, 498 Mich at 174 (citation omitted).

1. The judge's questioning of Joshua Colley

Joshua Colley was a named victim with respect to one of Defendant's assault-with-intent-to-murder convictions. The prosecution called Mr. Colley in its case-in-chief. Mr. Colley was a hostile witness almost from the inception of direct examination. He testified that when the shooting began, "[he] hit the ground. [He] blacked out." (Tr X, 77; 116a.) The prosecution then began impeaching him with his

RECEIVED by MSC 11/19/2018 11:49:29 AM

statements to police, in which he described various aspects of the shooting. (Tr X, 85–90; 118a–119a.) Mr. Colley gave an unsolicited comment that "[he] was on Promethazine, Codeine, [and] Xanax" at the time of the shooting. (Tr X, 90; 119a.)

After all questioning ended, the trial court asked Mr. Colley questions, focusing on two aspects of his testimony: his use of controlled substances at the time of his interview and what the hand signs within the admitted photographs meant to him.

> THE COURT: The Court has some questions. How long was the statement, Mr. Fehrman [(prosecutor)], or can the defense counsel tell me that he gave to the officers, how many pages?
> MR. FEHRMAN: Yes, I can tell you that.
> * * *
> [*Defense counsel for co-defendant Thomas*]: It's 38 pages. Your Honor.
> THE COURT: Thirty-eight pages. So you talked to the police officers for 38 pages, and they've asked you about all these questions and answers that you gave, and now none of that is correct?
> THE WITNESS: I don't remember none of that, sir. Like I said, I told you all what I remember. I was high from Promethazine, Codeine, marijuana and Xanax. That cause some blackouts.
> THE COURT: But one of your dear friends, your home boys as you called him, was murdered that day in front of you --
> THE WITNESS: 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?
> THE WITNESS: Right.
> THE COURT: And you did talk to them and you heard what you told them at that time.
> THE WITNESS: But I was going on what somebody else had told me.
> THE COURT: Did you at any time in that statement tell them, I don't -- that I don't know what happened?
> THE WITNESS: No.

RECEIVED by MSC 11/19/2018 11:49:29 AM

> 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?
> THE WITNESS: I told you, man. I was high off Promethazine, Codeine, marijuana and Xanax. [Tr X, 120–21; 124a–125a.]

The judge then attempted to understand if Mr. Colley told the police during his interview that he was under the influence of any controlled substances. (Tr X, 122; 125a.) Counsel for Defendant Swilley then interjected with an answer, but the answer was not responsive to what the court was asking.

> MR. JOHNSON: Your Honor, I'll say – I'll answer that. Yes, he said I don't know. He said I don't know who it was that was shooting at us.
> THE COURT: No, no, that isn't what I asked.
> MR. JOHNSON: You asked if at any time he said I don't know, and I'm answering your question.
> * * *
> THE COURT: Are you saying that when these questions were asked of you by the officer back at the time you gave the statement you said, I don't know, I was high?
> THE WITNESS: Listen, I -- picture.
> THE WITNESS: I can go anywhere. [Tr X, 122–24; 125a.]

After objection by Defendant Swilley's counsel as to the court's questions, the court responded, "I have no interest in this case and the outcome. I've instructed you on that before, I'm instructing you again, and the Court is entitled to ask questions. I'm entitled to summarize the evidence if I want, and I'm not doing that." (Tr X, 124; 125a.) The trial court continued onto its next line of questions, regarding the hand gestures of Mr. Colley and his friends in the pictures.

> THE COURT: Are these your friends or your buddies, homeboys, whatever you want to call them?
> THE WITNESS: Right.

RECEIVED by MSC 11/19/2018 11:49:29 AM

> THE COURT: Okay. And you agree, all of them are doing something with their hands, correct?
> THE WITNESS: Right.
> THE COURT: What are they doing with their hands?
> THE WITNESS: They just throwing up something. I don't know. They just, you know what I'm saying?
>
> * * *
>
> THE COURT: What are you doing with your hands? Some are up, some are down.
> THE WITNESS: Man, we just doing signals, man, that ain't --
> THE COURT: So you guys get around and take your pictures and hold your hands up in that direction.
> THE WITNESS: Yeah, yes.
> THE COURT: Okay. All right.
> THE WITNESS: That ain't --
> THE COURT: I don't have anything further. Any questions from the jury? We've got a couple questions. Do you want to grab those. [Tr X, 124–125; 125a–126a.]

The foregoing questioning is not problematic, contrary to Defendant's exaggerated assertions. Beginning with the questions about the photographs, the judge's questions were at most a reaffirmance of Mr. Colley's prior testimony. The judge did not repeatedly question Mr. Colley on these issues. Turning to the questions about Mr. Colley's memory and perception, the Court of Appeals properly recognized that Mr. Colley "was much more willing to answer questions posed by defense attorneys than by the prosecutor." *Swilley*, unpub op at 14. None of the *five* attorneys asked Mr. Colley about whether he informed the police of his alleged drug use during the night. Thus, it was proper for the trial court to inquire about this topic as it sought to clarify whether anyone was aware of Mr. Colley's memory or perception issues due to his alleged drug use, or why he did not tell anyone when the opportunity arose. The mere fact that the judge's questions may have elicited answers detrimental to

RECEIVED by MSC 11/19/2018 11:49:29 AM

the defense or helpful to the prosecution is not enough to demonstrate judicial bias. *Duckett v Godinez*, 67 F3d 734, 740 (CA 9, 1995).

Defendant takes issue with the trial court's request for assistance from the prosecution. There was nothing wrong with the trial court's request. First, the court wanted to know how long the police interview transcript was, which it could not know on its own. Second, the court wanted to know if Mr. Colley told the police he was high during his interview, another fact he could not know without someone assisting through review of the transcript. Finally, the court merely asked the prosecution to display one of the exhibits. In none of these instances did the court express or imply bias in favor of the prosecution.

Defendant also concludes that because the trial judge did not ask Mr. Youngblood any questions about his memory, the court displayed biased by asking Mr. Colley such questions. Defendant's argument stretches too far. Mr. Youngblood was called as the prosecution's first eyewitness on the second day of trial testimony, and he was examined for 135 pages, whereas Mr. Colley was called on the seventh day of trial testimony and examined by counsels for 43 pages. One reasonable and logical conclusion for the trial court's questioning of Mr. Colley was that his testimony was not fully developed in comparison to Mr. Youngblood. Yet, by Defendant's logic, anytime a witness cannot remember something and a trial court asks a question about his or her memory, then failure to ask *all* witnesses about their memory demonstrates bias, or vice versa. This would be an absurd legal rule. Nothing about

RECEIVED by MSC 11/19/2018 11:49:29 AM

the court's questions to Mr. Colley suggests that he believed Mr. Youngblood or disbelieved Mr. Colley.

2. The judge's questioning of Ms. Lee and Mr. Taylor

Alesha Lee and Phillip Taylor, Defendant's grandparents, assisted his defense by providing testimony that Defendant was with them at the time of the shooting. The prosecution called Ms. Lee. On cross-examination, Defendant's counsel asked Ms. Lee about Defendant being with her and Mr. Taylor at the time of the shooting, placing property in his name at City Hall. (Tr VII, 96–97; 96a.) The trial court interjected at the very end of the prosecution's redirect examination of Ms. Lee and briefly questioned her.

> THE COURT: What piece of property did you give Mr. Swilley?
> THE WITNESS: 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?
> THE WITNESS: I think he was 16.
> THE COURT: All right. And you gave him the piece of property?
> THE WITNESS: I gave it to him and his sister since I had cancer and I wanted to make sure that my kids had somewhere to stay if my cancer would've went farther than it did.
> THE COURT: Were they staying with your -- your boyfriend or fiancée?
> THE WITNESS: They was staying with me.
> THE COURT: Was you -- was your fiancée with you there also? I understood you were with him 30 years?
> THE WITNESS: Yes, sir.
> THE COURT: Okay. Do you have any paperwork at all?
> THE WITNESS: Yes, I do.
> MR. JOHNSON: Your Honor, objection. That's for the defense's case. We have the case.

RECEIVED by MSC 11/19/2018 11:49:29 AM

> THE COURT: I'm entitled to ask questions, I'm not taking any position one way or the other. I could care less. This is for you to decide. But if you're going cover it in there, then I'll withdraw the question. Anything further?
> MR. FEHRMAN: Not for this witness.
> THE COURT: All right. All right, thank you.
> MR. JOHNSON: Subject to recall, Your Honor?
> THE COURT: Yes. Absolutely. [Tr VII, 127–29; 102a.]

MRE 614 does not limit a judge's questioning witnesses to clarify "complicated" issues or misunderstandings. Rather, the rule is broad, and permits questioning of witnesses in general, which includes developing innocuous testimony that the court may feel was not fully developed in order to provide a full picture of events. That is what the court did here. As appropriately recognized by the Court of Appeals, the court questioned Ms. Lee to " 'produce fuller and more exact testimony or elicit additional relevant information.' " *Swilley*, unpub op at 19, quoting *Stevens*, 498 Mich at 173. As noted, the subject of the property transfer had been discussed, but details regarding the transaction were omitted. *Swilley*, unpub op at 19. "The trial court sought to elicit these details." *Id.* The trial court did not question the credibility of Ms. Lee. In fact, once defense counsel objected, the court stopped its questioning because counsel intimated that he was going to be producing more evidence on the issue. The court even stated, "[I]f you're going cover it in there, then I'll withdraw the question." The court did not abuse its discretion under MRE 614.

Defense counsel did not recall Ms. Lee, instead he called Mr. Taylor. Mr. Taylor's testimony was somewhat unclear, and perhaps inconsistent, particularly as to where he and Defendant were at the time Defendant received a phone call about the shooting and what they were doing. (Tr XIV, 101, 104–105, 131; 175a–176a,

RECEIVED by MSC 11/19/2018 11:49:29 AM

182a.) After each counsel finished their examination, the court had lingering questions for Mr. Taylor.

> THE COURT: I have some questions. I want to stress to the jury, I have no preference, again, on -- as a result of the questions I'm asking. I guess I want to start from the back. You mentioned on that -- the 25th when the house got shot up or there were shots fired, do you have any explanation as to the shots were fired in the direction of your house or your car?
> THE WITNESS: No. I know Danky was running down the street -- walking down the street and said somebody was shooting at him.
> THE COURT: Who did you say? I'm sorry.
> THE WITNESS: Danky.
> THE COURT: Who's Danky?
> THE WITNESS: That's Alesha's nephew.
> THE COURT: All right. You mentioned your truck got shot up, right?
> THE WITNESS: My truck?
> THE COURT: Didn't you say your truck?
> THE WITNESS: No, I said trunk, trunk of the car.
> THE COURT: Trunk. Were they shooting at your car or shooting at you?
> THE WITNESS: No, they was shooting at Danky walking down the sidewalk, and my car was right in the -- right in front of the house. When he was walking down the sidewalk, I guess they shot -- yeah, they shot the big picture -- the TV in front of the front door. We had blocked the front door, and the car was right there, and there was a bullet hole through the back of the trunk of the car.
> THE COURT: All right. And where was Danky living at that time?
> THE WITNESS: I think Danky was staying over on -- on the west side, south side, over here by the Self-Serve Lumber by Michigan Street somewhere.
> THE COURT: Was he coming to your house?
> THE WITNESS: Yes, uh-huh.
> THE COURT: Okay. Do you know why he was coming over that day?
> THE WITNESS: Probably because it was holiday. It was Christmas. He most of the time spent a lot of holidays with us. [Tr XIV, 118–19; 179a.]

RECEIVED by MSC 11/19/2018 11:49:29 AM

The court's questioning here was not bias. The record shows that the court misheard Mr. Taylor when he said his "trunk" was shot. The court heard the word "truck." The court also inquired who "Danky" was. These questions were meant to clarify, for the court, about what Mr. Taylor was testifying.

Then, the court moved on to the November 21st incident. The court asked Mr. Taylor: if he recalled on what day of the week November 21, 2012, fell; the time he woke up to City Hall; and why he decided to go to City Hall on that particular day. (Tr XIV, 120; 179a.) The court then progressed to questioning Mr. Taylor about the property he transferred. The court was confused about whose name the house was in and why so many parties needed to be present for the signing of the papers.

> THE COURT: But wait a minute. I'm getting confused. Legally, who had the title to that house?
> THE WITNESS: Kareem and Marcel got it right now.
> THE COURT: All right. Prior to November 21st, whose name was the house in?
> THE WITNESS: My name.
> THE COURT: All right. Back to my point. If she got sick, was she on the title at all at that point?
> THE WITNESS: No.
> THE COURT: When you say it was her house – I'm sorry. Are you married, or were you married to her at that time?
> THE WITNESS: No, we've just been going together.
> THE WITNESS: Because she was -- she had purchased the house.
> THE COURT: And give it to you?
> THE WITNESS: She gave it to me to fix up. I was gonna fix it up and stuff.
> THE COURT: All right. [Tr XIV, 122–23; 180a.]

Defense counsel then objected to the court's line of questioning. The court stated that it was confused about the testimony and overruled the objection. (Tr XIV, 126—27;

RECEIVED by MSC 11/19/2018 11:49:29 AM

181a.) The court continued to question Mr. Taylor about the legal title to the property because it was justifiably confused based on Mr. Taylor's shifting responses. Notably, the court tried to clarify what action Mr. Taylor did first while at City Hall.

> THE COURT: You got out, came in the back like you described, and you first went in, you thought, to pay the water bill, correct?
> THE WITNESS: I was gonna pay -- my main purpose going down there to get the house out of my name.
> THE COURT: No, no, I understand the purpose, but the first place you went, I understood, was to pay the water bill.
> THE WITNESS: All that in the same department. I don't know if I paid the water bill or not that day. I ain't even 100 percent sure, but I know it was -- when you first walk in through the back, you can pay the water bill right there. Across the counter that's where you get that quitclaim deed at.
> THE COURT: All right. So you don't know whether you paid the water bill or not on November 21st? [Tr XIV, 124–25; 180a–181a.]
> THE WITNESS: No, I ain't -- no, I can't say if I did or not.

Defense counsel objected when the trial court asked whether Mr. Taylor had documentation about his transactions. In response, the trial court stated,

> 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. [Tr XIV, 126–27; 181a.]

The court then continued its rightful questioning of Mr. Taylor in an attempt to understand where he was, what he was doing, and who was with him when Defendant received the phone call about the shooting.

> THE COURT: Okay. You don't remember the phone ringing -- and I'm not being critical of you. I just want to

RECEIVED by MSC 11/19/2018 11:49:29 AM

> understand what you're saying. You don't remember the phone ringing, you don't remember seeing Kareem with the phone, but you do remember Kareem saying he got a phone call and words to the effect, I'm glad I'm with you, because something happened or something went down? [Tr XIV, 129; 182a.]

Finally, the court questioned Mr. Taylor as to why he did not go the police with the exculpatory information when he learned his grandson was accused of these crimes, an issue that was not explored by any counsel. [Tr XIV, 130–31; 182a.]

At first blush, the length of the trial court's questioning may seem unusual, but a thorough contextual analysis reveals adept judicial attention, not judicial bias. At various times, the judge expressed his confusion about Mr. Taylor's testimony. (Tr XIV, 121, 122, 126, 129; 180a, 181a, 182a.) The judge's questions were not focused on "minutia," but points that the attorneys had failed to explore fully—i.e., the paperwork during Ms. Lee's testimony, and the reason Mr. Taylor did not report to the police after discovering his grandson was accused of a crime for which he could not have committed, allegedly. Furthermore, the judge's questions probed into issues which left the judge puzzled—i.e., the timeline of events, the location of events, and what details Mr. Taylor actually recalled, rather than those about which he speculated. While the judge may have repeated questions, there is no evidence he did so to show bias. Naturally, people do not hear and process the exact same information—i.e., "trunk" versus "truck" during Mr. Taylor's testimony.

Moreover, the judge's questions were not designed to "impeach" or "call into question" Ms. Lee or Mr. Taylor's testimony. The judge used a combination of open-ended and leading questions to gather information efficiently and to understand the

RECEIVED by MSC 11/19/2018 11:49:29 AM

testimony, and leading questions are not per se prohibited. The court did not communicate any bias or disbelief of Ms. Lee or Mr. Taylor through its chosen mode of questioning.

Defendant characterizes the judge's questions to Mr. Taylor about whether he had paperwork from that day as "egregious." The People believe the judge's questions were fair and comprehensive. The judge was understandably inquisitive about the paperwork because Defendant admitted one document into evidence from City Hall. (197a.) Yet, there was no paperwork from the Water Department or Citizen's Bank, places Defendant allegedly visited with Mr. Taylor and Ms. Lee at the time of the shooting. While Defendant claims this indicated to the jury that the judge was skeptical of Mr. Taylor's testimony and Defendant's alibi, the People believe that the jury could reasonably construe this line of questioning as a way to assist Defendant by explaining why he did not have additional documentary evidence. Mr. Taylor did, in fact, explain that. While the jury questioned Mr. Taylor about similar issues, this is of no consequence. This court, nor anyone, can infer that because of the judge's questions the jury was skeptical of Mr. Taylor. It could have been equally true that the lawyers' questions caused the jury to ask these questions, and the jury could have already had the questions prepared before the judge asked any questions. The jury was not permitted to ask questions until the end. In sum, the questions by the court of Mr. Taylor did not directly or indirectly suggest bias against Defendant or disbelief of his defense theory.

RECEIVED by MSC 11/19/2018 11:49:29 AM

This factor should be accorded fair weight. Yet, the nature of the conduct does not lean in favor of Defendant or the People. While lengthy, the questions by the judge were not bias just because they occurred in the context "defense friendly" witnesses. The questions were reasonably designed to clarify and fully develop witness testimony. This factor has a neutral tint in the People's view, just as judicial questioning does in general.

ii. The judge's tone and demeanor were professional

"To ensure an appearance of impartiality, a judge should not only be mindful of the substance of his or her words, but also the manner in which they are said." *Stevens*, 498 Mich at 175 (citation omitted). "Judicial questioning might be more necessary when a judge is confronted with a difficult witness who refuses to answer questions posed by attorneys or repeatedly responds to those questions with unclear answers, although the manner of judicial involvement remains at the center of the examination by a reviewing court." *Id.* at 175–76.

The Court of Appeals was correct when it recognized that there was *a possibility* that the jury could have viewed the trial court's questioning of Mr. Taylor as having expressed an opinion on his veracity. *Swilley*, unpub op at 19. Yet, a possibility is *not* a reasonably probability. As the Court of Appeals said, "nothing in the record indicates that the trial court's tone with Taylor was argumentative or skeptical." *Id.* Likewise, the court's tone and demeanor with Mr. Colley and Ms. Lee were equally moderate and respectful. Just because the court questioned witnesses on the most unclear or most disputed aspects of their testimony does not mean the

RECEIVED by MSC 11/19/2018 11:49:29 AM

judge demonstrated bias. Naturally, the contested issues will be the area where questions will most likely arise.

When responding to one of defense counsel's objections, the court said, "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." (Tr XIV, 126–27; 181a.) We do not deny that the court's response may have had a negative tone to it, but that was reasonable because counsel's tone was unnecessarily accusative. Defense counsel had said, "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." (Tr XIV, 126; 181a.) The judge's response was not out of bounds as Defendant suggests; the court restrained itself. In sum, the judge's tone and demeanor were respectful, except for one instance when the judge responded to defense counsel's accusations with an explanation of why it was questioning Mr. Taylor.

As it is difficult to determine tone and demeanor from transcripts, this factor should be given minimal weight. In doing so, there is nothing in the record that indicates the judge's tone or demeanor was unprofessional or biased. Thus, this factor weighs against Defendant.

iii. The scope of the judge's conduct was proper in a trial involving four co-defendants, thirty-six witnesses, and lasting one month

"In a long trial, or one with several complicated issues posed to the jury, for instance, it may be more appropriate for a judge to intervene a greater number of

RECEIVED by MSC 11/19/2018 11:49:29 AM

times than in a shorter or more straightforward trial." *Stevens*, 498 Mich at 176 (citation omitted). The nature of this case is highly relevant. This was a four co-defendant trial with multiple murder, assault, and gun charges for each defendant. The trial was a lengthy one, beginning with jury selection on September 9, 2014, continuing to verdict on October 9, 2014. Trial testimony spanned eleven non-consecutive days over the course of a month, with a total of thirty-six witnesses. Thus, good note-taking was a must. Yet, even with exceptional note-taking, it is human nature to forget or pass over testimony without recognition. While the trial court's questioning of Mr. Colley, Ms. Lee, or Mr. Taylor was not focused on scientific or technical issues, it was a main focal point of the trial. Counsels for each defendant and the prosecutor did not always develop the testimony fully. Some issues were covered in a cursory aspect, such as Mr. Colley's alleged intoxication from controlled substances during his police interview. Other issues were simply confusing because of testimony, such as Mr. Taylor's testimony about where he was when Defendant received a phone call, whether Defendant's phone rang, and the timeline of events. Finally, some issues were not covered at all, such as why Mr. Taylor did not report his information to police. Therefore, the trial court's questioning was valid to explore fully and clarify many issues.[5]

---

[5] We do not deny that some of the questions may have been repetitive. We think the trial court repeated some questions to provide a backdrop to the line of questioning to follow, such as when the trial court initially asked Mr. Taylor, "All right. And what was the property that was being transferred?" (Tr XIV, 120; 179a.) Thereafter, the court began to ask Mr. Taylor about whose name the property was in, and why he needed to be present if it was not in his name, and when the transferred occurred. This seems to be how the court set up its topic areas.

RECEIVED by MSC 11/19/2018 11:49:29 AM

This trial was procedurally complex. There were five attorneys asking questions, four defense counsel and one prosecutor. The trial spanned a month, testimony was taken non-consecutively, three dozen witnesses testified, and hundreds of exhibits were admitted. The judge's questions were appropriate in this context. This factor is to be given more weight and also weighs against Defendant.

iv. The judge questioned numerous witnesses throughout the trial with equal inquisitiveness, demonstrating no bias

"In tandem with assessing the judge's conduct in light of the trial's length and complexity, it is also important to consider whether this intervention was directed toward a particular party, so as to distinguish excessive but ultimately neutral questioning from biased judicial questioning." *Id.* at 188. Contrary to Defendant's contention, the People see multiple instances where the trial court questioned witnesses on various matters, demonstrating that it was not exhibiting judicial bias or hostility toward Defendant's case, but rather judicial care with respect to the facts.

Defendant classifies Mr. Colley, Ms. Lee, and Mr. Taylor as "defense friendly" witnesses, in order to magnify his argument. There were, however, many non-defense friendly witnesses that the court questioned. The trial court's first instance of questioning occurred on the first day of testimony when it questioned Dr. Kanu Virani, the forensic pathologist (a prosecution friendly witness). The court asked:

> THE COURT: Doctor, on the one exhibit, which is exhibit 10, there's – the stomach area is opened up, and would you us again, what – is that how that was when you – when the gentleman arrived –
> THE WITNESS: Yes.
> THE COURT: -- for your services?

RECEIVED by MSC 11/19/2018 11:49:29 AM

> THE WITNESS: Yes. It was, although I can tell you that that was covered by transparent plastic, so you can see through, but that plastic is to keep from drying those intestines, but otherwise it was visible as you can see.
> THE COURT: And your understanding of why that area was opened up was what?
> THE WITNESS: Because bullet went through the abdominal area, [. . . .] [Tr IV, 155–56; 11.5b.]

The court then interjected during the prosecution's direct examination of the next witness, Allen Rabideau, who processed the shooting scene, asking him, "Are you able to tell when – whether – when the bullet strikes the truck, is it pushing the metal in or coming the other way and blowing out." (Tr IV, 170; 12b.) The court followed up, asking, "Can you tell from the photograph or do you recall?" (Tr IV, 170; 12b.)

On the third day of testimony, the trial court questioned Teresa Jurdem, the woman whose car was used in the shooting. The court asked her:

> THE COURT: When you loaned your car that day to – to Jay or – what was his name, Jimmy?
> THE WITNESS: Ricky, I believe.
> THE COURT: Ricky, I'm sorry.
> THE WITNESS: Uh-huh.
> THE COURT: At the point he came over to pick that car up, had you done any drugs that day, any marijuana?
> THE WITNESS: Oh, no, sir, not yet.
> THE COURT: And I understand he gave you some money and marijuana.
> THE WITNESs: Yes, sir.
> THE COURT: Do you remember how much marijuana you got from him that day?
> THE WITNESS: Just enough for a joint.
> THE COURT: And a joint being one cigarette?
> THE WITNEE: Yes, sir.
> THE COURT: And do you remember, did you smoke that cigarette that day?

RECEIVED by MSC 11/19/2018 11:49:29 AM

> THE WITNESS: Yeah, throughout that time, yes, sir, I did.
> [Tr VI, 52–53; 37b.]

The court's questioning continued on the same topic, Ms. Jurdem's use of controlled substances. (Tr VI, 53–54; 37b–38b.) No objections were made, apparently Ms. Jurdem was not "defense friendly" enough. Ms. Jurdem provided favorable testimony to the prosecution, linking the defendants with the crime. Yet, the court saw fit to question her memory, just as it would later do with Mr. Colley and Mr. Taylor.

Then, on the fourth day of testimony, the court engaged in light questioning of Connie Stark, the witness who called police on December 25, 2012, about the males near her house with guns. The court inquired about the physical description of the males, including their race and hair style, and jokingly asked if the parties had drained her memory. (Tr VII, 136; 50.5b.) The next time the court questioned a witness was on the sixth day of testimony, questioning Shontrell Harris, Defendant's sister. The trial court only asked Ms. Harris if she knew why her brother would have been in the area where he was arrested on December 25, 2012. (Tr IX, 164–65; 107.25b.) Ms. Harris stated she did not know and did not remember that date well. (Tr IX, 165; 107.25b.) On the same day, the court also questioned the prosecution's DNA expert, Lisa Ramos, about DNA and the probability of leaving DNA if a person handled a gun with gloves. (Tr IX, 214–15; 107.5b.)

In light of the foregoing, it is not as one-sided as Defendant asserts. The trial court questioned multiple witnesses, not just those considered by Defendant to be friendly to his cause. It is true that the questions posed to Mr. Colley and Mr. Taylor were the most extensive, but that is because they had the most confusing testimony

RECEIVED by MSC 11/19/2018 11:49:29 AM

necessitating more clarification. This is evident from their testimony. The People agree that the record shows that the trial court did not question Mr. Youngblood. That is because the parties fully exhausted all of the issues through their questions, *135 pages worth* of direct, cross, redirect, re-cross, and re-redirect examinations.

This is an important factor. While the trial court more extensively questioned Mr. Taylor and Mr. Colley than other witnesses, it nonetheless questioned other witnesses with equal inquisitiveness. The difference in the questioning was that Mr. Taylor and Mr. Colley had faulty memories making their testimony less than clear, at times contradicting themselves. The trial court's questioning can reasonably be interpreted as trying to clarify their testimony. Thus, this factor also weighs against Defendant, or at most should be given neutral tint.

v. The judge gave appropriate curative instructions to the jury during opening instructions, during trial, and at closing, alleviating alleged bias

One of the more important factors for consideration is the court's preamble to some of its questions, which operated as curative instructions. "Jurors are presumed to follow their instructions, and 'a curative instruction will often ensure a fair trial despite minor or brief inappropriate conduct. Depending on the circumstances, an immediate curative instruction may further alleviate any appearance of advocacy or partiality by the judge.' " *Swilley*, unpub op at 14, quoting *Stevens*, 498 Mich at 177.

The Court of Appeals correctly recognized that "the trial court repeatedly instructed the jury not to consider its questions as providing any sort of indication of the court's opinion of the evidence." *Swilley*, unpub op at 15. During Mr. Colley's

RECEIVED by MSC 11/19/2018 11:49:29 AM

questioning, the judge responded to defense counsel's objection, stating, "I have no interest in this case and the outcome. I've you instructed you on that before, I'm instructing you again, and the Court is entitled to ask questions." (Tr X, 124; 125a.) Before questioning Mr. Taylor, the court said to the jury, "I want to stress to the jury, I have no preference, again, on – as a result of the questions I'm asking." (Tr XIV, 118; 179a.) In addition to the preamble curative instructions, the court did instruct the jury as follows prior to opening statements: "Nothing I say is meant to reflect my opinions about the facts of the case," (Tr III, 77; 6b), "I may ask some questions of the witnesses. These questions are not meant to reflect my opinion about the evidence. If I ask a question my only reason would be to ask about things that may not have been fully explored," (Tr III, 79; 6b). Then, the court provided similar instructions after closing arguments. (Tr XVI, 11; 142b.)

Rather than "hostile retorts" toward defense counsel, the statements were proper responses to an otherwise hostile defense counsel who could not accept the court's proper discretionary questioning of witnesses. Notably, defense counsel only objected to the questions that the judge asked to "defense friendly" witnesses, but apparently had no issue with the judge questioning non-defense friendly witnesses, such as Ms. Ramos and Ms. Jurdem. Here, these instructions to the jury were more than those provided to the jury in *Stevens*. 498 Mich at 190. In *Stevens*, the trial court only provided the general jury instruction at the close of evidence that the court's questions were not meant to reflect its opinions. *Id.* The *Stevens* Court found that the "single" instruction was insufficient based on a totality of the circumstances. *Id.*

RECEIVED by MSC 11/19/2018 11:49:29 AM

Unlike *Stevens*, the trial court in the present case provided multiple curative instructions—but not an overabundance so as to draw attention to its questions.

This is an important factor that is to be given heavy wait. Our judicial system is premised on the confidence that jurors follow instructions. The trial court gave valid, cautious, and curative instructions where appropriate. There is no indication that the jury ignored the court's instructions or misinterpreted them as bias. This factor weighs heavily against Defendant.

vi. Conclusion – The judge's conduct did not pierce the veil of judicial impartiality, and Defendant was afforded a *fair* trial

The standard is: In the totality of the circumstances, whether the judge demonstrated the appearance of partiality such that there is a *reasonable* likelihood that the judge's conduct improperly influenced the jury, where no single factor is controlling. *Stevens*, 498 Mich at 171. In light of the objective evidence in relation to each factor, this Court need not guess at the potential influence of the judge's questioning because the evidence does not indicate bias. Here the trial judge's questions were not asked to discredit Mr. Colley, Ms. Lee, or Mr. Taylor, but to develop their unclear, underdeveloped, and at times confusing testimony. While it is easy to classify *any* judge's questions, whether at trial or on appeal, as demonstrating bias, the underlying context guides the ultimate determination.

The record shows that, from time to time during the trial, the judge questioned witnesses, but it does not show that he used sarcasm or ridicule, or that he made any verbal foray, or that Defendant or his trial attorney were the butt of any such foray, or that the trial court interrupted defense counsel to ask questions, or that the judge

was necessarily hostile to witnesses, Defendant, or his attorney, or that the judge lacked impartiality, or that the jury was improperly influenced, or that Defendant was prevented from having a fair trial. The record shows that he had a *fair* trial. From this record, it can be determined that there is *not* a *reasonable* likelihood that the judge's questions improperly influenced the jury.

RECEIVED by MSC 11/19/2018 11:49:29 AM

RECEIVED by MSC 11/19/2018 11:49:29 AM

CONCLUSION AND RELIEF REQUESTED

Any judge may err, for to err is human, but not every judicial error constitutes misconduct. Likewise, not every instance of apparent judicial bias based on the questioning of witnesses should constitute constitutional, structural error. Rather, the federal standard is most appropriate, recognizing that apparent judicial bias in the questioning of witnesses is a non-constitutional, evidentiary error subject to harmless-error review. The *Stevens* opinion should be reconsidered for these reasons as it does not appreciate the legal difference between actual bias and apparent bias.

Nonetheless, under *Stevens*, viewing the totality of the circumstances, the trial judge did not demonstrate the appearance of partiality such that there is a reasonable likelihood that the judge's conduct improperly influenced the jury. The judge's questioning was restrained, yet comprehensive and meant to clarify unclear and underdeveloped testimony.

WHEREFORE, the People of the State of Michigan respectfully request that this Honorable Court DENY Defendant-Appellant's Application for Leave to Appeal in all respects because it does not present a legal principle of major significance to the state's jurisprudence, nor is the Court of Appeals decision clearly erroneous.

Should this Court decide to grant leave, the People respectfully request that the Court grant leave for the sole purpose of modifying its decision in *People v Stevens*, 498 Mich 162 (2015), which does present a legal principle of major significance to the state's jurisprudence, and this case presents the appropriate vehicle to do so because the judge's actions do not rise to the level of actual or apparent bias.

RECEIVED by MSC 11/19/2018 11:49:29 AM

Finally, should this Court decide to grant Defendant-Appellant's Application for Leave to Appeal, the People respectfully request that the Court likewise grant leave for the purpose of modifying its decision in *People v Stevens*, 498 Mich 162 (2015).

Respectfully Submitted,

JOHN A. McCOLGAN, JR.
PROSECUTING ATTORNEY
SAGINAW COUNTY

/s/ Joseph F. Sawka
Joseph F. Sawka (P74197)
Assistant Prosecuting Attorney
Saginaw County Prosecutor's Office
111 S. Michigan Avenue
Saginaw, Michigan 48602-2019
(989) 790-5330

DATED: November 19, 2018