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 REPLY IN SUPPORT OF SUPPLEMENTAL BRIEF

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INTRODUCTION

Just three years ago, this Court considered and unanimously rejected the same nebulous formulation for reviewing claims of judicial bias for which the prosecution's response now advocates. *See* Argument I in Prosecution Supplemental Response. In *People v Stevens*, 498 Mich 162 (2015), this Court instead articulated a clear, workable and fair standard for weighing such claims. And again, it did so unanimously, with full consideration of the alternatives.

The prosecution's invitation to return to the pre-*Stevens* state of uncertainty, described by this Court in *Stevens*, 498 Mich at 168-70, should be declined. The advocated distinction between actual and apparent bias is of no real consequence in this context. Even if one were to credit the prosecution's root assertion—that pure structural error analysis is inappropriate where a well-meaning judge inadvertently may have given the appearance of bias—*Stevens* has already resolved that hypothetical problem. In counseling reversal only if "it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party," *id.* at 164, *Stevens* appropriately tempered pure structural error review with consideration of the jury's perceptions of the judicial conduct at issue.

As fully explained in the Supplemental Brief, Mr. Swilley is clearly entitled to relief under *Stevens*. And even if he were required to show prejudice/ lack of harmlessness, he can easily do so. *See* Supplemental Brief at Argument II. The Court should thus reverse Mr. Swilley's conviction and remand for a new trial.

ARGUMENT

I. *Stevens* Already Considered And Rejected The Apparent Distinction That The Prosecution Now Seeks To Re-litigate: There Is No Reason To Revisit The Issue, And Many Reasons To Conclude That *Stevens* Decided It Correctly.

The prosecution's criticism of the *Stevens* opinion ignores one important fact: *Stevens*

already considered at length and rejected the apparent distinction the prosecution now makes. In discussing the preceding state of this area of law, *Stevens* considered two categories of cases:

A. Cases like *Simpson v Burton,* 328 Mich 557 (1950), *People v Cole*, 349 Mich 175 (1957) and six others (mentioned in footnote 2 of *Stevens*), which all advocated a judicial bias standard that turned on when judicial conduct "may well have" influenced the jury's regard of the evidence/testimony/witness. *Stevens*, 498 Mich at 169. The "may well have" standard is, of course, the functional equivalent of apparent bias.

B. Cases like *People v Young*, 364 Mich 554 (1961) and *People v Wilson*, 21 Mich App 36 (1969), which embraced instead the actual bias standard. *Stevens*, 498 Mich at 169-70 (noting that *Young* and *Wilson* turned on whether the judge's actions actually influenced the jury).

It made sense that this Court considered those two categories of cases in its *Stevens* opinion: the distinction between them was the source of the disagreement between the Court of Appeals majority and dissent, 498 Mich at 167-68, and thus the precise issue this Court was attempting to resolve.

Given that this issue was clearly considered and addressed by this Court only three years ago in a unanimous opinion, it is not one that should be re-litigated now—especially not in this case and at this stage, where the Court specifically ordered argument on whether relief is warranted under *Stevens*. *People v Swilley*, 917 NW2d 405 (Mem) (September 27, 2018).

In any case, this Court was correct to embrace in *Stevens* the line of cases in category A above. For one thing, as this Court noted, the cases in category B appeared to concoct a stricter standard out of thin air. *Stevens*, 498 Mich at 170 (noting misapplication of *Cole* in *Wilson*).

Second, there would be no workable or uniform way to distinguish between actual and apparent bias in this context. Such a distinction may work in other forms of judicial misconduct (i.e. actual bias where the judge openly professes that all defendants are guilty, but apparent bias when

the judge's previous writings indicate his personal position on a disputed issue being addressed by his court). But in the context of judicial questioning, it is unrealistic in most instances to expect a reviewing court to discern whether a question was asked because the judge was really and truly biased in his heart, or simply because she momentarily and unwittingly lost sense of her role.

An example from this case shows how difficult and pointless inquiry into such a distinction would be. During the prosecutor's direct examination of Mr. Swilley's 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). Did he do this because he held actual bias against Mr. Swilley and his family in his heart? Or did he do it because, despite really liking Mr. Swilley, he momentarily forgot his role as neutral arbiter and took on a classic prosecutorial impeachment role? How can this Court ever know? And just as importantly, how can it possibly matter? To the jury, the judge would come across in such an instance as skeptical of the witness. And that is actual harm, even no harm was actually meant by the judge.

In a footnote, the prosecution makes an attempt at clarifying: "Of course, if a judge is intentionally asking questions that knowingly demonstrate bias, then the judge is actually biased." Prosecution Response at 16. In that formulation, inquiry into the judge's mental state is invoked not once, but twice, and creates an impossible inquiry. (Aren't all questions intentional? Could a judge ever *unintentionally* ask questions that knowingly demonstrate bias? And if he did, isn't knowingly demonstrating bias enough to have actual bias?) Simply put, for this Court to adopt such an apparent/actual bias distinction would be to hopelessly confuse future reviewing courts. The focus of the inquiry would be what is in the judge's mind—consciously, but maybe also subconsciously. In the context of ineffective assistance claims, attorneys are put on the stand to testify to their mindset and strategy. Surely no one would suggest doing a similar under oath

examination of a trial judge when judicial bias claims are made. But short of that, reviewing courts would be left to just guess whether a judge meant harm or not.

Moreover, in addition to advocating this difficult and unwarranted distinction, the prosecution also repudiates in this case the one mode that a defendant has of demonstrating bias to a reviewing court: objections based on tone. Mr. Swilley's trial counsel created a sufficient record through his objections to show that the trial court used an improper tone on several occasions. *Stevens* counseled that such objections are one way of properly gauging whether certain judicial conduct pierced the veil of judicial impartiality. 498 Mich at 176. But here, when trial counsel did exactly what the *Stevens* standard anticipates he would do, the prosecution blames him for having an improper tone: "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." Prosecution Response at 34. Pointing out judicial bias with an objection can hardly be deemed unnecessarily accusative. Even less so when counsel's objections specifically pointed out judicial conduct that is relevant to the *Stevens* inquiry. *See* 181a (127) ("Your Honor, . . . I've got to object. I think you're being very prosecutorial in this.").[1]

II. Federal Authority Is Not Uniformly Supportive Of The Actual/Apparent Bias Distinction, And Certainly Does Not Present Sufficient Ground To Rewrite This Court's Unanimous *Stevens* Decision From Just Three Years Ago.

The prosecution cites to a handful of federal cases to argue that federal courts find structural error only in cases of actual bias, and they subject apparent bias cases to harmless error review. But the federal cases are actually all over the map.

[1] In speaking to counsel's objections, the prosecution writes: "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. . . ." Prosecution Response at 40. But there is nothing notable about this whatsoever. Trial counsel, like all advocates in an adversarial system, only objected when it was necessary to protect his own case.

First, the apparent/ actual bias distinction is not always clear. There are examples where a court refers to certain conduct as "apparent bias," when it would surely constitute "actual bias" under the prosecution's own formulation. In *Elias v Gonzales*, 490 F3d 444 (CA 6 2007), for example, the Sixth Circuit remanded the case for reconsideration by different judge, writing: "This is the rare case where remand is required because of the [judge's] **apparent bias** and hostility toward [a party]." *Id.* at 450 (emphasis added). The judge's conduct in question included:

a. "repeatedly address[ing] petitioner in an **argumentative, sarcastic, and sometimes arguably insulting** manner";

b. "repetitive **verbally abusive** comments and questions";

c. "**accus[ing] the petitioner of trying to confuse him** when there was nothing in the record to support that accusation";

d. [upon learning that petitioner was "just not comfortable" with the judge's hostile attitude] "the judge **sarcastically** replied, 'He's not comfortable. Well, can we get him a pillow or something?' ";

e. "**accus[ing] petitioner of either making up his own questions and then answering them** or having a prepared response and [telling] petitioner that **he 'would lose his case for sure'** if he continued to answer the questions in a manner the judge did not like".

490 F3d at 451-52 (emphasis added). Surely, such egregious conduct would satisfy the formulation of actual bias stated in the prosecution's response (which includes instances where the judge explicitly comments on "the credibility of the defendant, his evidence or his guilt"). Prosecution Response at 15 n2. Yet, the Sixth Circuit used the term "apparent bias."

This is actually unsurprising, because there are a number of federal cases where the courts speak of actual and apparent bias as one or as interchangeable concepts. *In re Khadr*, 823 F3d 92, 97 (CA DC 2016) ("the existence of actual or apparent bias" by judge constitutes irreparable injury for purposes of interlocutory appeal); *Jensen v Santa Clara Co*, 32 Fed Appx 203, 206 (CA 9 2002) (speaking of actual or apparent bias interchangeably in judicial bias context); *In re Kemp*, 894 F3d 900, 909 (CA 8 2018) (speaking of actual or apparent bias interchangeably in context of judge's

conflict of interest, and noting that state code of judicial conduct embraces an apparent bias standard); *Robinson v Bd of Ed of City of Chicago*, 37 Fed Appx 805, 806 (CA 7 2002) ("there is no possible problem here of either actual or apparent bias. . .").

Moreover, in *Daye v Attorney Gen of State of NY*, 696 F2d 186, 196-97 (CA 2 1982), the Second Circuit cited to seven US Supreme Court cases in its discussion of a due process claim based on judicial bias. Its analysis shows no distinction between how actual and apparent judicial bias should be reviewed:

> Under the Due Process Clause, there is a well-developed right, established in a long line of cases, to a trial before an unbiased judge. The fundamental nature of this right is demonstrated by the fact that **not even the appearance of bias is tolerated**. "Fairness of course requires an absence of actual bias in the trial of cases. **But our system of law has always endeavored to prevent even the probability of unfairness. . . . Justice must satisfy the appearance of justice."**

Id. at 196 (*quoting In re Murchison*, 349 US 133, 136 (1955) (internal quotation omitted)) (emphasis added). *Murchison* is an interesting case in this discussion because it has apparently been relied on by different courts for opposite conclusions. The Second Circuit's quoting/discussion of it in *Daye* makes *Murchison* seem like a case where the US Supreme Court treated actual and apparent bias as the same for the purposes of evaluating due process claims based on judicial bias. Yet, *Murchison* is cited for seemingly the opposite conclusion in *Norris v United States*, 820 F3d 1261, 1266 (CA 11 2016), which the prosecution cites to argue that structural error is only warranted when there is actual bias.

A full reading of *Murchison* calls *Norris*'s characterization of that case into question. But perhaps other readers might conclude that it is *Daye*'s characterization of *Murchison* that is questionable. Either way, it is safe to say that federal law is far from uniform or clear in treating actual and apparent bias differently. Thus, there is even less reason for this Court to abandon the well-reasoned and structured standard it unanimously adopted in *Stevens* just three years ago.

III. In Any Case, The *Stevens* Standard Is Not Pure Structural Error; Rather, The Court Appropriately Tempered It By Mandating Consideration Of The Effect On The Jury Of The Judicial Conduct In Question.

As discussed in *United States v Cronic*, 466 US 648, 659 (1984), absence of counsel at trial is a structural error. Once it is established that counsel was missing for a critical stage of trial, the conviction is reversed—without any regard for what the jury's perception may have been about the absence of counsel. *Cronic*'s absence of counsel example is thus one of pure structural error.

Stevens is different in an important way: it states that a judge's conduct only pierces the veil of judicial impartiality and violates the right to 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." 498 Mich at 164. Where that happens, the conviction is to be reversed without inquiry into prejudice or harmless error review.

In incorporating effect on the jury into the very establishment of judicial misconduct, *Stevens* already moderated pure structural error into something more appropriate and workable for this specific context. *Stevens* thus correctly anticipated the interests to be balanced in judicial bias cases, and there is no reason to second-guess or revisit the standard it set.

IV. The Judge's Bias In This Case Was Not As Limited, Benign Or Untargeted As The Prosecution Posits.

As fully explained in Mr. Swilley's Supplemental Brief, the trial judge improperly questioned several witnesses who favored the defense, but did not subject the prosecution's very flawed star witness to the same scrutiny.

Several times in its brief, the prosecution accuses defense-friendly witnesses, including Phillip Taylor and Joshua Colley of giving unclear, shifting, contradictory or confusing testimony. Prosecution Brief at 21-22, 27, 29-30, 40, 41. In doing so, the prosecution, as the trial court before it, purports confusion or evasiveness where, Mr. Swilley is confident this Court will agree, there

was none on any material points.[2] Mr. Swilley's supplemental brief features examples of questions and answers given by both Taylor and Colley that demonstrate that both witnesses answered questions as best as they could. Sometimes, of course, they were unsure or gave answers that disagreed with the prosecution's premise. But that is hardly grounds to justify the sort of cross-examination the trial judge conducted with those witnesses.

The prosecution's statement that other witnesses besides those most helpful to Mr. Swilley were also questioned by the judge, Prosecution Response at 36-38, is insufficient. Surely the judge did question some other witnesses. But relevant to this inquiry is the manner of his questioning of witnesses like Colley and Taylor—who were key witnesses to the defense, but treated with more skepticism than was warranted—and his entire lack of questioning of Youngblood. The prosecution notes that Youngblood's testimony was already long, so that might be a reason the trial judge asked nothing more of him. Prosecution Response at 25.[3] But a review of Youngblood's testimony makes clear that it was vague, wandering and contradictory. The judge's purported reasons for questioning Taylor (to clarify confusing parts) would apply exponentially more to Youngblood. Yet the trial court chose not to ask Youngblood any questions after his direct and cross exams. Doing so would have emphasized Youngblood's inconsistencies to the jury, and it is telling that **the trial court chose not to subject the prosecution's very flawed star witness to that sort of scrutiny**—while fully subjecting a cooperative and consistent witness like Taylor to that scrutiny and skepticism instead. Moreover, the prosecution asked Taylor, and Alesha Lee (Mr. Swilley's grandmother) for

[2] The prosecution points to Mr. Taylor's failure to recall when precisely during his family's trip (to City Hall, the bank and a restaurant) Mr. Swilley got a phone call. Prosecution Response at 27. Even if that side issue warranted clarification by the judge, it hardly justifies the sort of cross examination about the water bill and bank statement that the trial court engaged in.

[3] In its discussion of Youngblood, the prosecution misconstrues Mr. Swilley's argument to claim he is proposing "an absurd legal rule" that all witnesses be questioned the same and equally. Prosecution Response at 25. This is not what Mr. Swilley has advocated. Instead, he has said that Youngblood specifically would have been more deserving of the judge's skepticism and scrutiny simply because of how inconsistent and weak his direct and cross testimony was.

"proof" of their accounts—a classic impeachment tactic he did not use with other witnesses.

Finally, the prosecution's statement that "it is easy to classify *any* judge's questions, whether at trial or on appeal, as demonstrating bias," Prosecution Response at 41 (emphasis in original), is baffling and not well taken. First, since *Stevens* is about the impact of judicial conduct on a jury, the issue of appellate judges asking questions is completely irrelevant. Second, trial judges in the presence of a jury routinely do (and should) ask questions. And on the vast majority of occasions, they are perfectly capable of doing so in a manner that is appropriate for their role in a courtroom. Where a trial judge fails on this front, however—and veers into rank impeachment and cross-examination, asking for documentary proof of a witness's account, asking why the witness did not come forward earlier if he is so truthful, and literally asking "how do we know you are telling the truth today?"—in those rare instances, appellate courts should not hesitate to reverse, in accordance with *Stevens*. The general right of trial (or appellate) judges to ask questions is not at issue or even remotely under fire.

V. The Evidence Against Mr. Swilley Was Weak And Questionable: Reversal Is Warranted Even If Materiality-Based Review Applied.

As fully stated in Argument II of the Supplemental Brief, even if this Court were to apply materiality/ harmless error review in this case, reversal is warranted.

Mr. Swilley's text messages, on balance, supported his alibi and controverted the prosecution's argument at trial that he was present at the crime scene and had been in the company of his co-defendants since at least noon that day.

Admittedly, 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.

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. Thus, even if this Court were to conduct a materiality-based review, Mr. Swilley's conviction should be reversed.

CONCLUSION AND RELIEF REQUESTED

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

RESPECTFULLY SUBMITTED

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