STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

HAROLD LAMONT WALKER

Defendant-Appellant
_____/

Supreme Court No. 155198

Court of Appeals No. 327063

Lower Court No. 14-007222-01-FC

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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Court of Appeals majority answered, "No".

Court of Appeals dissent answered, “Yes”.

Defendant-Appellant answers, "Yes".

II. IS MR. WALKER IS ENTITLED TO RESENTENCING BEFORE A DIFFERENT JUDGE?

Court of Appeals majority answered, "No".

Court of Appeals dissent answered, “Yes”.

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

On August 5, 2014, two Detroit Police squad cars were patrolling a residential area in Detroit. Two newer officers— Officers Marek and Fjolla— drove one squad car and two supervising sergeants— Sergeants Jackson and Gnatek— drove the other squad car. Marek and Fjolla stopped their car in front of 3486 Algonquin after seeing four people drinking on or near the sidewalk in front of the home and hearing music coming from a car parked outside. Jackson and Gnatek, who had been following behind, also stopped. Testimony at trial differed as to what happened next.

Harold Walker testified that as the officers were pulling up, he was headed toward the front door of 3486 Algonquin, intending to go inside and get cups for the beverages he and his three neighbors were sharing.[1] When he reached the porch, Mr. Walker could see two police officers "run up on [him] aggressively."[2] Mr. Walker then turned to his side and tossed a beer bottle from his pocket into the bushes; he was on parole and was not supposed to be drinking alcohol.[3]

The officers' testimony varied regarding Mr. Walker's actions, drinking at the residence, and lighting at the home and on the street.[4] Marek testified that he and Fjolla pursued Mr.

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[1] 02/25/15 jury trial transcript, 135 (Appendix 159a). Hereinafter, jury trial transcripts will be abbreviated with their date and "TT."
[2] 02/25/15 TT, 137 (Appendix 161a)
[3] 02/25/15 TT, 137 (Appendix 161a)
[4] 02/25/15 TT,

- Mr. Walker's actions: p 38 (Appendix 62a) (OFFICER MAREK: "He threw [the gun] as soon as he pulled it out, it was one quick motion."); p 89-90 (Appendix 113a-114a) (SERGEANT GNATEK: "…I don't know what the rationale was here, but the trajectory [of the gun] was extremely high…")
- Drinking: p 46 (Appendix 70a) (MS. ROLPH: Okay, but you could see that Mr. Walker is drinking? OFFICER MAREK: "Like I said, I don't know, I think he dropped it as he was running—walking, I'm sorry."); p.88 (Appendix 112a) (MS. ROLPH: "Were there bottles on the ground, like scattered about? SERGEANT GNATEK: I know there was one or two bottles."… MS. ROLPH: "Okay, and were all the individuals drinking that day?" SERGEANT GNATEK: "That I don't know.").

Walker at a "fast walk"[5] and observed him pull a "large frame revolver"[6] out of his pants pocket and throw it in the bush on the side of the porch. Jackson[7] and Gnatek[8] also testified that they saw Mr. Walker toss a gun into the bush next to the porch.

Fjolla arrested Mr. Walker and Marek placed Mr. Walker in the squad car. Gnatek recovered a gun from a bush in front of 3486 Algonquin.

The defense argued that the discovery of a gun by the police officers was not without explanation. Darryl Williams, a witness for the defense and one of the people present at 3486 Algonquin the evening of August 5, 2014, testified it was *his* gun that was discovered in the bushes. Mr. Williams explained that he hid his own gun in the bushes prior to Mr. Walker's arrival, knowing that Mr. Walker could not be around guns because he was on parole.[9]

After closing arguments and instructions, jurors in Mr. Walker's case deliberated for over an hour, and at one point requested to see the gun, the only exhibit in the case.[10] Later, the jurors sent a note to the judge stating, "We are hung, and I don't believe there will [be] an agreement with more time."[11]

- Lighting: p 77 (Appendix 101a) (SERGEANT JACKSON: "I don't recall if all of [the street lights were working], but there was some artificial lighting…."); Jurors asked both Officer Marek and Sergeant Jackson about the presence/quality of the lighting that evening.

[5] 02/25/15 TT, 36 (Appendix 60a).
[6] 02/25/15 TT, 38 (Appendix 62a).
[7] 02/25/15 TT, 62 (Appendix 86a).
[8] 02/25/15 TT, 82-83 (Appendix 106a-107a).
[9] 02/25/15 TT, 109 (Appendix 133a) (MS. ROLPH: Okay. And there's something—an action you take before he [Mr. Walker] comes to the house? MR. WILLIAMS: I put a gun behind the bushes.) From the street view of the Google Maps, there appears to be one or two small bushes in which items could effectively be tossed or hid. https://www.google.com/maps/place/3486+Algonquin+St,+Detroit,+MI+48215/@42.3821783,-82.9642822,3a,15y,43.07h,82.83t/data=!3m6!1e1!3m4!1sPcxdnw845zIDIgMSCuscAw!2e0!7i13312!8i6656!4m2!3m1!1s0x8824d45b0364c0d1:0xa12e847d72534706!6m1!1e1
[10] 02/26/15 TT, 42 (Appendix 227a).
[11] 02/26/15 TT, 47 (Appendix 232a).

Judge Lillard informed counsel that she was "not prepared to read [the jury] the deadlock instruction, because I don't believe that they've even attempted to deliberate at this point."[12] Instead, she intended to tell the jury "[t]hat's not the way this works, they can't deliberate for a [sic] hour and give up."[13] She told counsel that "if there's someone back there, a member of the jury, any member of the jury who's not following the instructions, they can send a note and let us know that, too."[14] Before calling the jury back in, Judge Lillard asked counsel "Is there anything else?"[15] When counsels answered no,[16] Judge Lillard called the jury back to the courtroom and gave the following comments:

> Well, that's not the way this works. Your [sic] all heard a full day of testimony, and you deliberated for what an hour and fifteen minutes, and now you just give up. That's not the way it works, I'm sending you all to lunch, maybe what you need is some nourishment, other than candy, to help you all, you know, have clear heads and review the evidence that you heard.
>
> Now, if there's someone among you who's failing to follow the instructions or there's someone who's refusing to participate in the process, you can send us a note and let us know that and we can address that, but at this point I'm not inclined to end your deliberations at this point because you had a full day of testimony and you've only been at this, discussing it, for one hour.
>
> So, I'm going to send you to lunch, maybe some time apart will help you all to think about things, and then you'll come back in one hour and resume your deliberations. If you have any questions, if there is anything that you don't understand or need clarification on send a note. And again, if there's one among you or two among you, three among you, who are refusing to follow instructions or participate in the process you can let us know that, too.
>
> Remember you are not to discuss this case, when you are anywhere other than in the jury room cause you're still a juror. So even if you go to lunch together some of you, you can not [sic] discuss this case cause you can only discuss it when you're all together and when you're in the jury room.[17]

[12] 02/26/15 TT, 46 (Appendix 231a).
[13] 02/26/15 TT, 45 (Appendix 230a)
[14] 02/26/15 TT, 45 (Appendix 230a).
[15] 02/26/15 TT, 46. (Appendix 231a).
[16] 02/26/15 TT, 46. (Appendix 231a).
[17] 02/26/15 TT, 47-48 (Appendix 232a-233a).

No further instructions were provided to the jurors. At 3:07 p.m., a little over an hour after returning from lunch, the jury sent a note indicating they had reached a verdict.[18] Mr. Walker was found guilty of felon in possession of a firearm, felony-firearm, and carrying a concealed weapon.[19]

At sentencing, the prosecutor argued that OV-19 should be scored 10 points for "interfer[ence] with the administration of justice"[20] because Mr. Walker "refused to provide his name to the police officers."[21] Defense counsel disagreed.[22] Judge Lillard adopted the prosecutor's rationale for the 10-point score:

> …I mean he does have a right to remain silent to a certain extent but, you know, I think he was intentionally not giving his name because he knew what kind of trouble he was in.[23]

The judge gave two additional reasons for the score: (1) that Mr. Walker interfered with the administration of justice with "that sham of a testimony he put forth;" and (2) that Mr. Walker interfered with the administration of justice when "he conspired with Mr. Williams while Mr. Williams was in custody in the Wayne County jail awaiting trial, and they trumped up that phony, bogus testimony." [24]

The 10-point OV-19 score increased Mr. Walker's guidelines range from 7 to 46 months to 10 months to 46 months.

During his sentencing hearing, Mr. Walker asserted his innocence. He also informed the court that he had never seen Mr. Williams in the Wayne County jail. Judge Lillard responded

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[18] Judge Michael Hathaway, not Judge Lillard, took the verdict.
[19] 02/26/15 TT, 50 (Appendix 235a).
[20] MCL 777.49(c).
[21] 03/12/15 Sentencing Transcript, 5. Hereinafter the sentencing transcript will be abbreviated as "ST."
[22] 03/12/15 ST, 6 (Appendix 245a).
[23] Appendix 245a.
[24] Appendix 245a.

that she thought Mr. Walker "made up that whole story, because it didn't make any sense."[25] Mr. Walker requested that Judge Lillard "do what you goin' to do" and sentence him so he could move on to his appeal:

> *Defendant*: Man, whatever, I'm thew (sic) talking, do what you goin' (sic) do.
>
> *The Court*: You think you can tell me what to do?
>
> *Defendant*: Do what you goin' to do. You telling me what to do, I'm grown.
>
> *The Court*: We can stay here all day, you realize that?
>
> *Defendant*: I'm grown, I'm grown, I don't talk.
>
> *The Court*: Do you realize that? You don't talk, what is that a threat?
>
> *Defendant*: I'm thew (sic) talking.
>
> *The Court*: Is that a threat, clown?
>
> *Defendant*: I'm thew (sic) talking.
>
> *The Court*: Is that a threat, clown?
>
> *Defendant*: I'm thew [sic] talking.
>
> *The Court*: Is that a threat, clown?
>
> *Defendant*: Clown.
>
> *The Court*: That's what you acting like.
>
> *Defendant*: Okay.
>
> *The Court*: That's what you're acting like, a clown.
> I have done nothing, but be courteous to you. When they suggested that you might have some history of mental illness, I made sure that you went and got your evaluation. When your lawyer was sick, and she was willing to try your case, even though she was sick, and vomiting and asking for a basket so that she could throw up. I said that wouldn't be fair to you…

[25] ST, 11 (Appendix 250a).

> *Defendant*: How about when you threatened my mother?
>
> *The Court*: … I'm talking now. I'm talking now, clown.[26]

The Court acknowledged that this exchange, and Mr. Walker's failure to admit guilt would affect his sentence:

> I've done nothing but be fair to you, but you know what cowards do, when cowards don't want to accept responsibility for their own foolish behavior, they make threats, they try to act like they're tough, and they wanna shift blame. And that's what you did and, you know, I'm [sic] don't blame you, but that's why you're getting maximum time because you acted like a clown today.
>
> I was inclined to give you the middle of the road, which is what Ms. Standford [the prosecutor] was asking for, but because you're so disrespectful and you just seem to want to go back to prison….[27]

Ultimately, Judge Lillard asked her deputies to remove Mr. Walker from the courtroom and said to him, "Goodbye, clown." Mr. Walker responded "fuck you," to which Judge Lillard replied, twice, "Oh, you wish you could."[28] In Mr. Walker's absence, Judge Lillard sentenced him at the top of the guidelines range to a sentence of 46 months to 75 years for felon-in-possession and CCW, to be served consecutively to a mandatory 10-year prison term for felony-firearm.

In a 2-1 decision, the Court of Appeals affirmed Mr. Walker's convictions and sentence.[29] The majority dedicated an entire section of the opinion to the trial court's "certainly inappropriate…name calling, taunting, and other inappropriate innuendos," but found that Mr. Walker's convictions and sentences should stand.[30] In a dissent, Judge Elizabeth Gleicher would

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[26] ST, 14-15 (Appendix 253a-254a)
[27] ST, 16 (Appendix 255a).
[28] ST, 19 (Appendix 258a).
[29] On appeal, the Court of Appeals agreed that the "felony-firearm conviction should run consecutive to his felon-in-possession conviction only, not his CCW conviction." *People v Walker*, unpublished opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063) 6 (Appendix 6a).
[30] *Walker*, unpub op of the Court of Appeals, 12 (Appendix 12a).

have reversed the jury's verdict, finding the jury instruction coercive.[31] Mr. Walker sought leave to appeal to this Court.

On June 1, 2018, this Court requested oral argument in this case on whether to grant the application or take other action. This Court requested briefing on:

> (1) whether the defendant is entitled to a new trial based on the trial judges comments to the jury in lieu of the standard deadlocked jury instruction, M Crim JI 3.12; (2) whether Offense Variable 19 (OV 19), MCL 777.49, was improperly assigned 10 points for interference with the administration of justice, see *People v Hardy*, 494 Mich 430, 438 (2013), and *People v Adams*, 430 Mich 679, 689 (1988); and (3) if OV 19 was misscored, whether the defendant is entitled to resentencing before a different judge based on the judges verbal exchange with the defendant at sentencing.

On August 14, 2018, Mr. Walker filed a motion to expand the grounds for review to include whether the defendant is entitled to resentencing before a different judge, regardless of whether OV-19 was misscored. This Court granted that motion on September 5, 2018 ordering the parties to brief whether Mr. Walker "is entitled to resentencing irrespective of the scoring of Offense Variable 19, MCL 777.49. See e.g., *People v Pennington*, ____ Mich App ____ (Docket No. 323231, decided March 22, 2018)."

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Mr. Walker incorporates the arguments from his previously filed Application. He supplements them as follows.

[31] *Walker*, (Gleicher, J., *dissenting*) unpub op at 6 (Appendix 18a).

I. JUDGE LILLARD ERRED WHERE THE JURY DECLARED IT WAS HUNG AND SHE RESPONDED WITH HER OWN COMMENTS THAT WERE NOT ONLY MATERIALLY DIFFERENT FROM THE REQUIRED DEADLOCKED JURY INSTRUCTION, BUT WERE ALSO COERCIVE.

Standard of Review and Issue Preservation:

After receiving the jury note, Judge Lillard informed counsel for the parites that the jury believed themselves to be deadlocked, and that she was going to give her own comments rather than the M Crim JI 3.12 instruction (hereinafter, "the deadlock instruction" or "the *Allen* instruction/charge.").[32] Since trial counsel answered "no," to Judge Lillard's "anything else?" and the prosecution agrees that, absent a specific objection to the instruction, the plain error standard of review applies[33], Mr. Walker will argue this issue under a more limited review. Claims of unpreserved instructional error are reviewed for plain error under the standards set forth in *People v Carines*, 460 Mich 750, 774 (1999).[34]

Discussion:

Judge Lillard created and maintained an environment wherein she "would brook no dissent, would not hesitate to humiliate those who broke [her] rules."[35] In that context, she delivered a deadlocked-jury instruction that substantially departed from M Crim JI 3.12. Further, the differences between Judge Lillard's instruction and M Crim JI 3.12 were more than merely cosmetic. Judge Lillard both omitted elements of the model jury instruction designed to reemphasize that the jurors should not abandon their conscientiously held beliefs, and added language encouraging them to report dissent, so that she could "address" it. The instruction Judge Lillard gave and the context in which she gave it "could…cause a juror to abandon his

[32] 2/26/15 TT, 47 (Appendix, 232a).
[33] Appellee's Answer, 8.
[34] *People v Hawthorne*, 474 Mich 174, 176 n1; 713 NW2d 724 (2006).
[35] *Walker*, (Gleicher, J., dissenting) unpub op at 5 (Appendix 17a).

conscientious dissent and defer to the majority solely for the sake of reaching agreement."[36] A new trial is required.

A. Judge Lillard substantially departed from M Crim JI 3.12, excluding the assurance that each juror may adhere to his/her own beliefs. That omission is per se coercive.

Judge Lillard's off-the-cuff departure from M Crim JI 3.12 omitted a key aspect every deadlock jury instruction should include the reminder to hold on to honestly-held convictions. Our Model Criminal Jury Instruction 3.12 contains this admonishment at paragraph (7), but many jurisdictions require an honest conviction reminder in any deadlock jury instruction. Giving the instruction without an honest conviction reminder should be per se reversible error.

M Crim JI 3.12 (re-printed in full at Appendix 262a) provides:

> (1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.
>
> (2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.
>
> (3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.
>
> (4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach an agreement.
>
> (5) If you think it would be helpful, you may submit to the bailiff a written list of issues that are dividing or confusing you. It will then be submitted to me. I will attempt to clarify or amplify the instructions in order to assist you in your further deliberations.

[36] *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984)

> (6) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.
>
> (7) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

The prosecutor concedes that the "words themselves" usedby Judge Lillard "substantially differed from the accepted jury instruction."[37] While M Crim JI 3.12 need not be read verbatim, if a "modified *Allen* charge []is to avoid becoming unconstitutionally coercive," it should contain the following five components:

> (1) [T]he charge must include "the reminder that no juror should merely acquiesce in the majority opinion."[38]
>
> (2) [T]he judge may not instruct the jury that it is required to agree.[39]
>
> (3) [T]he instruction must "direct [ ] both majority and minority jurors to reconsider their positions ...."[40]
>
> (4) [T]he judge cannot tell the jury that they are the only ones who can decide the case.[41]
>
> (5) [T]he judge may not ask the jury to consider the external effects of their inability to reach a verdict, e.g., delay to other litigants caused by having to retry the case.[42]

United States v Brika, 416 F3d 514, 521-522 (CA 6, 2005) (internal citations footnoted).

In her comments, Judge Lillard failed to acknowledge that differences of opinion are part of the deliberation process. Instead the judge referred to jurors' disagreement as "giving up" and stated "that's not the way it works." She failed to encourage the jurors to "talk things over in a

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[37] Appellee's Answer, 13.
[38] *United States v Scott*, 547 F2d 334, 337 (CA 6, 1977).
[39] *Williams v Parke*, 741 F2d 847, 850 (CA 6, 1984); *Jenkins v United States*, 380 US 445; 85 S Ct 1059 (1965).
[40] *United States v Frost*, 125 F3d 346, 374–75 (CA 6, 1997) (calling this "language which this circuit has identified as critical to any Allen charge"); *United States v Tines*, 70 F3d 891, 896 (CA 6, 1995).
[41] *Jones v Norvell*, 472 F2d 1185, 1185 (CA 6, 1973).
[42] *Scott*, 547 F2d at 337.

spirit of fairness and frankness."[43] Critically, Judge Lillard failed to emphasize that no juror should give up his or her honestly held beliefs—the honest conviction reminder. The absence of this assurance should render an instruction per se coercive.[44] For that conclusion, dissenting Judge Gleicher relied on *State v Figueroa*, 190 NJ 219, 240; 919 A2d 826, 838–39 (2007), a New Jersey Supreme Court case with which "Michigan law is entirely consistent."" *In Figueroa, the New Jersey Supreme Court held that a supplemental jury instruction given to a deadlocked jury was reversible error where "the judge erred in failing to repeat that aspect of the charge that reminded the jurors "not [to] surrender your honest conviction as to the weight or effect on the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict." A supplemental charge that directs a jury to continue deliberating but does not remind them of their obligation in this regard poses a grave risk of being misunderstood by the jurors and therefore, of being coercive."*"" This Court has only upheld verdicts following an instruction that includes the honest convictions reminder. *In People v Hardin, 421 Mich 296, 318; 365 NW2d 101 (1984), this Court reversed the Court of Appeals and affirmed Mr. Hardin's convictions because the trial court had initially read the standard jury instruction in full, including the honest convictions reminder, and then supplemented it with additional comments. In People v Rouse, 477 Mich 1063; 728 NW2d 457 (2007), this Court adopted the dissent of the Court of Appeals which noted "the trial court emphasized that no juror should change his or her honest beliefs simply for the sake of reaching a verdict."*The trial court then read the instructions in full so the honest conviction reminder came again during that instruction.

Federal case law likewise emphasizes the importance of the honest conviction reminder. In the Sixth Circuit, an Allen instruction must remind the jury that no one should surrender

[43] M Crim JI 3.12 (3) (Appendix 262a).
[44] *Walker*, (Gleicher, J., *dissenting*) unpub op at 4 (citing *State v Figueroa*, 190 NJ 219, 240; 919 A2d 826 (2007)) (Appendix 16a).

honest beliefs simply because others disagree.The honest convictions reminder is "critical to any Allen charge.""[45] Likewise, the Tenth Circuit case law indicates that "[t]he instruction. . . should emphasize that 'no jurors should surrender his or her conscientious convictions[;] . . ."[46] In *United States v Berroa*, 46 F3d 1195, 1196 (DC Cir, 1995), the DC Circuit held it was reversible error where the trial court's instruction omitted "that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict."[47] That Court further held that "the jury here reached its guilty verdict just [90] minutes after the court's instructions, which tends to show coercive effect."[48]

Even in cases where serious departures from the recommended instruction have occurred, if a juror is reminded to be true to his or her beliefs, the coercive effect may be mitigated.[49] But t]he basic principle that a defendant has the right to have the jury speak without being coerced" is the heart of *Allen* instruction jurisprudence.[50]

B. Not only did Judge Lillard's instruction omit crucial "honest conviction" language, but she added language that was inherently coercive.

Even if this Court finds that the exclusion of the honest conviction reminder by itself is not per se coercive, its absence coupled with Judge Lillard's added language and her courtroom

[45] *Id.ited StatUnited States v Scott, 547 F2d 334, 337 (CA 6, 1977); see also United States v Clinton, 339 F3d 483, 490 (CA 6, 2003).*tions and it cautioned all jurors not to surrender their personal convictions merely in order to achieve consensus by acquiescing in the majority opinion.").
[46] *United States v Rivera*, 554 Fed Appx 735, 741-742 (CA 10, 2014).
[47] *Berroa*, 46 F3d at 1197-1198.
[48] *Berroa*, 46 F3d at 1198 (citing *Lowenfield v Phelps*, 484 US 231, 240 (1988)).
[49] *United States v Nguyen*, 28 F3d 477, 483 (CA 5, 1994); *United States v Bonam*, 772 F2d 1449, 1450 (CA 9, 1985) ("When the portion of the instruction that asks the minority to re-examine its views is counterbalanced by the caution that a juror should not abandon his conscientiously held views, [the 9th Circuit] has generally upheld the instruction as not coercive.*)*
[50] *United States v Sawyers*, 423 F2d 1335, 1341 (CA 4, 1970).

environment certainly rendered the deadlock comments "unduly coercive."[51] Undue coercion occurs where the instruction could "cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement."[52] Put differently:

> If the charge has the effect of forcing a juror to surrender an honest conviction, it is coercive and constitutes reversible error. In order to determine whether the Allen instruction has such an influence on the jury, the charge must be examined in the factual context in which it is given.

People v. Sullivan, 392 Mich 324, 333-35, 220 NW2d 441, 445-47 (1974) (citations omitted).

Judge Lillard received a note from the jurors that declared "we are hung, and I don't believe there will [be] an agreement with more time."[53] Nothing on this note indicated that there was a lack of participation or confusion. Nevertheless, Judge Lillard chided the jurors for "giv[ing] up."[54] She asked twice for fellow jurors to provide her the names of those who "refus[e] to participate in the process" or "refus[e] to follow the instructions."[55] She expressly stated that the fact that there was not a consensus must be because they do not have "clear heads."[56]

A request to single-out individual jurors is precisely the type of language that contains "pressure, threats…or other wording that would cause this Court to feel that it constituted coercion."[57] This, taken together with the fact that Judge Lillard did not remind the jurors that they need not acquiesce to the majority and that they should hold on to their honest convictions, renders the comments coercive.

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[51] *Hardin*, 421 Mich at 316.
[52] *Id.* at 314.
[53] 2/26/15 TT, 47 (Appendix, 232a).
[54] 2/26/15 TT, 47 (Appendix, 232a).
[55] 2/26/15 TT, 47-48 (Appendix, 232a-233a).
[56] 2/26/15 TT, 47 (Appendix, 232a).
[57] *Hardin*, 421 Mich at 315 (citations omitted).

Even assuming the language used in her post-deadlock comments were not coercive on their face, Judge Lillard's comments to the jury must "be examined in the factual context in which it was given."[58] The United States Supreme Court has said likewise—the jury instruction must be examined "in its context and under all the circumstances" to determine if it was coercive.[59] At the center of this inquiry is the judge herself; not only is the judge the one who instructs the jury, but the judge is arguably the person with the greatest influence over the jury. "[J]urors look to the judge for guidance and instruction [and] they are very prone to follow the slightest indication of bias or prejudice on the part of the judge."[60] "[E]ven subtle behaviors of a trial judge," can affect the outcome at trial.[61] A broader review of the record provides context that unequivocally renders the comments coercion "as opposed to stress[ing] to the jury the importance of engaging in full-fledged deliberation."[62]

There is nothing on the record to support Judge Lillard's accusation that jurors were not adequately deliberating. The only information the judge received on jury decision-making was that, after over an hour[63] of considering the single issue of possession[64], the jury had failed to

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[58] *Hardin*, 421 Mich at 321.
[59] *Jenkins v United States*, 380 US 445, 446, 85 SCt 1059, 1060, 13 LEd2d 957 (1965) (per curiam); see *Jones v Norvell*, 472 F2d 1185, 1186 (CA 6, 1973) (per curiam), cert. denied, 411 US 986, 93 SCt 2275, 36 LEd2d 964 (1973).
[60] *People v Stevens*, 498 Mich 162, 175; 869 NW2d 233 (2015).
[61] *State v Figueroa*, 190 NJ 219, 238; 919 A2d 825 (2007).
[62] *Walker*, unpub op at 4 (Appendix 4a).
[63] Jurors initially deliberated from 11:19am to 12:36pm. 2/26/18 TT, 44 (Appendix 229a).
[64] Two things were already established during trial:

> 1. The element of concealment was established during trial. Mr. Walker concealed whatever item he had in his pocket. By his own testimony, Mr. Walker had a beer bottle in his pocket. 2/25/15 TT, 136 (Appendix 160a). According to officers, Mr. Walker had a revolver in his "right front pocket" that appeared to be just a "heavy object that was flopping around." 2/25/15 TT, 36, 48, 61 (Appendix 60a, 72a, 85a). In response to trial counsel's motion for directed verdict, Judge Lillard stated that "what first drew [the officers] to his attention was the fact that the object was concealed in his pocket." 2/25/15 TT, 94 (Appendix 118a).

reach a decision. In fact, the only other note Judge Lillard received—a request to see the gun—indicates that the jury was actively and thoughtfully participating and adhering to her instructions.[65]

As the dissent recognized, "Judge Lillard's short temper and inattentiveness" persisted throughout trial.[66] Judge Lillard began Mr. Walker's trial 55 minutes late, explaining that this was due to a missing juror; she told his fellow jurors, "I don't know, bad things might happen to that person."[67] She delivered on that threat. When the juror arrived at 10:05 AM, citing a flat tire, the juror was thrown into "the prisoner box for the duration of the proceedings."[68]

Oftentimes during the trial, the judge made comments that were likely to have misled or distracted jurors. When attempting to place a stipulation on the record, the prosecutor was silenced so that the court could determine whether she was "about to get a new iPhone 6."[69] Later, the Court interrupted defense counsel during cross-examination to accuse her of mischaracterizing testimony. Three times during direct examination, a witness testified that Mr. Walker and the officers that followed in pursuit were sprinting.[70] Nevertheless, the Court "ruled" that the witness did not say sprint.[71]

> 2. The prior conviction element was established during trial. Mr. Walker stipulated that he has a prior felony conviction that made it unlawful for him to possess or carry a firearm. 2/25/15 TT, 79 (Appendix 103a); 2/26/15 TT, 17-18 (Appendix 202a-203a).

[65] *People v Goldsmith*, 411 Mich 555, 560; 309 NW2d 182 (1981); 2/26/15 TT, 47; Jurors wrote a note requesting to see the gun after Judge Lillard had instructed them that the only exhibit is the gun, and if they want to see "just write a note and knock on the door…I'll have the gun brought in so it can be safely demonstrated to you." 2/26/18 TT, 42 (Appendix 227a).
[66] *Walker*, (Gleicher, J., *dissenting*) unpub op at 4 (Appendix 4a).
[67] 2/26/15 TT, 9 (Appendix 194a).
[68] 2/25/15 TT, 91 (Appendix 115a).
[69] 2/25/15 TT, 78 (Appendix 102a).
[70] 2/25/15 TT, 84 (Appendix 108a).
[71] 2/25/15 TT, 88-89 (Appendix 112a-113a).

This was not the first time defense counsel's cross-examination had been interrupted or stopped all together. Judge Lillard asked her "What's your point?" when counsel tried to impeach a different witness.[72] Later, defense counsel was interrupted again with the same witness.[73]

This continued once jurors began deliberating. When their stalemate was declared, the judge's reference to a failure to participate in the process could only be understood to mean a failure to acquiesce to the majority. Notably, the comments Judge Lillard gave the jury did not remind the jurors that an alternative to such acquiescence was even possible (see part A). A "reasonable juror hearing this instruction would believe that his or her obligation included publicly 'ratting out' any fellow jurors who disagreed with the majority's view of the case."[74]

C. This constitutes plain error.

As this Court explained in *People v Shafier*, 483 Mich 205, 219-20; 768 NW2d 305 (2009) (internal footnote omitted):

> There are four steps to determining whether an unpreserved claim of error warrants reversal under plain-error review. *Carines*, 460 Mich at 763. First, there must have been an error. *Id.* "Deviation from a legal rule is 'error' unless the rule has been waived." [*People v*] *Grant*, 445 Mich [535,] 548 [(1994)] (quotation marks and citation omitted). Second, the error must be plain, meaning clear or obvious. *Carines*, 460 Mich. at 763, 597 N.W.2d 130. Third, the error must have affected substantial rights. *Id.* This "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* The defendant bears the burden of establishing prejudice. *Id.* Fourth, if the first three requirements are met, reversal is only warranted if the error "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings...." *Id.* (quotation marks and brackets omitted).

[72] 2/25/15 TT, 72 (Appendix, 96a).
[73] 2/25/15 TT, 75 (Appendix 99a).
[74] *Walker*, (Gleicher, J., *dissenting*) unpub op at 3 (Appendix 15a).

As already demonstrated, the first two requirements are met: there was error, and it was obvious.

The third requirement is also met. At the time the jury sent the note at least one juror, maybe more, harbored doubt about conviction. Further, the jury believed the doubt was so serious it could not be overcome by further discussion. After the judge's response, the jury returned a verdict in about an hour. The judge's instruction told the jury nothing that would aid their deliberations. Instead, she shamed any juror who, in the judge's words was refusing to participate or follow instructions, when there was no basis for that accusation whatsoever. Thus, it is all too likely that the jury's verdict was affected by the judge's coercive instruction. Ironically, the Committee on Model Jury Instructions was created to ensure that criminal jury instructions inform jurors in "an understandable, conversational, and unbiased way."[75] To achieve this end, these instructions are generally required by MCR 2.512(D). A court may depart from these instructions should the case call for that "so long as any changes to not alter an instruction's essential meaning."[76] Judge Lillard's departure from M Crim JI 3.12 was problematic for two reasons: (1) it was not warranted—the issue the jury faced was narrow and by all indications, they had thoughtfully deliberated and were genuinely deadlocked and (2) it was unduly coercive and thus, did alter the instruction's essential meaning.

This is exactly the sort of error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[77] This Court should reverse and remand for retrial.

[75] http://courts.mi.gov/courts/michigansupremecourt/criminal-jury-instructions/pages/default.aspx
[76] *Id*.
[77] *Shafier*, 483 Mich at 220.

II. MR. WALKER IS ENTITLED TO RESENTENCING BEFORE A DIFFERENT JUDGE.

Standard of Review and Issue Preservation:

Trial counsel objected to the 10-point score for Offense Variable 19 (OV-19) and asked instead for a 0-point score. The issue is preserved for review. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear errors and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo."[78]

Whether Mr. Walker is entitled to resentencing irrespective of the guidelines scoring error is a question that was only just asked on review in this Court. Thus, it should be treated as unpreserved and reviewed for plain error affecting substantial rights.[79] This is a constitutional issue that this Court reviews *de novo*.[80]

Discussion:

Mr. Walker is entitled to resentencing before a different judge because his guidelines were misscored and because Judge Lillard's sentence was vindictive. Each rationale will be addressed in turn.

Offense Variable 19 (OV-19) provides for a 10-point score for actual or attempted "interference with the administration of justice."[81] The court erred when it scored OV-19 at 10 points based on either Mr. Walker's lawful exercise of his right to remain silent or the court's supposition, unsupported in the record, that Mr. Walker and defense witness Darryl Williams colluded to present false testimony. Resentencing is required because, without 10 points for OV-

[78] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).
[79] See *People v. Carines*, 460 Mich. 750, 763; 597 NW2d 130 (1999).
[80] *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233, 240-241 (2015).
[81] MCL 777.49(c).

19, Mr. Walker's OV- Level would drop from II to I and his guidelines range would decrease from 10 to 46 months to 7 to 46 months.[82] Indeed, Mr. Walker conditions his request for resentencing upon reassignment to a different judge. He would rather not be resentenced than be resentenced by Judge Lillard.

A. Mr. Walker did not interfere with the administration of justice when he remained silent.

The trial prosecutor argued at sentencing that 10 points for OV-19 was appropriate where "the defendant refused to provide his name to the police officers[, n]ever gave them that information, and they only obtained his name after having fingerprinted him."[83] Trial counsel argued that those actions did not interfere with the administration of justice because the police were ultimately able to "ascertain who he was and book him properly."[84] The Court agreed with the prosecutor that Mr. Walker should be scored 10 points for OV-19 based on the reasoning provided by the prosecutor:

> *The Court*: …I mean he does have a right to remain silent to a certain extent but, you know, I think he was intentionally not giving his name because he knew what kind of trouble he was in.[85]

The appellate prosecutor concedes this was error.[86] Mr. Walker states his argument below for the benefit of this Court.

Mr. Walker has a Fifth Amendment right to remain silent that attached at the time of his arrest.[87] Mr. Walker was "handcuffed," and "walk[ed] back to [a] scout car and secured…in the

[82] *People v Francisco*, 474 Mich 82 (2006); MCL 769.34(10); *United States v Conaster*, 514 F3d 508, 520 (6th Cir 2008) ("A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.").
[83] ST, 5 (Appendix 244a).
[84] ST, 6 (Appendix 245a).
[85] Appendix 245a.
[86] Appellee's Answer, 18.

back of the vehicle."[88] Mr. Walker refused to answer any questions that Officer Marek asked of him after Mr. Walker was placed under arrest.[89] Mr. Walker did not flee[90] or provide false information;[91] he merely exercised his constitutional right to remain silent. Mr. Walker's silence upon arrest was not reason to conclude he either interfered or attempted to interfere with the administration of justice.

Erroneously, the Court of Appeals majority stated that "defendant[] claim[ed] that the scoring of OV-19 was based entirely on his refusal to provide a name."[92] However, this ignores the below argument that Mr. Walker also made plain in the Court of Appeals, OV-19 cannot be scored for perjury or collusion that is based on the jury verdict alone.

B. Mr. Walker did not interfere with the administration of justice when he testified in his defense. The record does not support that he perjured himself by a preponderance of the evidence.

Judge Lillard believed 10 points was proper "not only because of [Mr. Walker's] failure to provide his name…[b]ut, I think he also interfered with the administration of justice by that sham of a testimony that he put forth."[93] A sentence can be enhanced based on false testimony, but a judge may not "enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false."[94] The record must indicate "willful, material, and flagrant

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[87] *People v Wright*, 431 Mich 282, 291-2 (1988) (discussing the purpose of *Miranda* warnings).
[88] 2/25/15 TT, 39 (testimony of Officer Frank Marek) (Appendix 63a).
[89] 2/25/15 TT, 40 (Appendix 64a):
PROSECUTOR: Did he answer any questions that you asked him?
OFFICER MAREK: No.
[90] *See*, for example, *People v Ratcliff*, 299 Mich App 625 (2013), reversed on other grounds at 495 Mich 876 (2013).
[91] *See*, for example, *People v Barbee*, 470 Mich 283 (2004) (Trial court correctly assessed 10 points for OV19 on the basis that defendant had provided a false name to the officer arresting him.).
[92] *People v Walker*, unpublished opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063), p 5.
[93] ST, 6 (Appendix 245a).
[94] *United States v Grayson*, 438 US 41, 54; 98 S Ct 2610; 57 Led2d 582 (1978) (reasoning and logic adopted by this Court in *People v Adams*, 430 Mich 679, 691-692; 425 NW2d 437 (1988)).

perjury."[95] A defendant may not be found to have "obstructed justice" merely because he or she testifies at trial and the jury returns a guilty verdict.[96] As the Fourth Circuit has written:

> [S]entencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence.

United States v Moore, 484 F2d 1284, 1287-88 (4th Cir 1973).

The Sixth Circuit has specifically held that the court cannot simply defer to the jury, but must independently determine whether the defendant lied on the witness stand.[97] While there is little published case law on this point, it appears that Michigan courts are in agreement.[98]

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[95] *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988).

[96] *See United States v Martinez*, 922 F2d 914, 926 (CA 1, 1991) ("to hold that a jury's verdict of guilty beyond a reasonable doubt on the basis of evidence which was in direct conflict with a defendant's testimony signals perjury would in effect amount to punishing a defendant for exercising his right to take the witness stand in his own defense"); *United States v Buchannan*, 115 F3d 445, 451 (CA 7, 1997) ("To the extent that …cases affirmed sentencing enhancements merely on the basis of a verdict that was inconsistent with the defendant's testimony, they are no longer authoritative after *Dunnigan*….an enhancement for obstruction of justice cannot be upheld merely on the presumption that the jury disbelieved the defendant's testimony). *United States v Willis*, 940 F2d 1136, 1140 (CA 8, 1991) ("The [obstruction of justice] adjustment cannot be given simply because a defendant testified in his own behalf and the jury disbelieves him.").

[97] See *Mathews v United States*, 11 F.3d 583, 587 (CA 6, 1993); *see also United States v Sassanelli*, 118 F3d 495, 501 (CA 6, 1997) (holding that in the context of a defendant's perjury "the sentencing judge must identify for the record at least some specific instances of conflicting testimony and specify which portions of the defendant's testimony he finds materially perjurious.").

In *Adams*, Defendant Adams was charged with breaking and entering an occupied dwelling with intent to commit larceny. Mr. Adams testified at trial contrary to circumstantial physical evidence—similar tire tracks and boot prints to Mr. Adams' truck and boots found at the scene of the break-in. He also faced additional more damning physical evidence: "a toolbox taken from the victim's residence was found locked in a shed on the defendant's property."[99] In the *Stitt* case (the case joined with *Adams*) the officer testimony contradicted the defense testimony. Mr. Stitt testified to telling the officer something entirely different than what the officer testified to having heard from the defendant. Mr. Stitt's testimony was elaborate—that he named a suspect to police and went on a field investigation with the police—all of which was categorically denied by the testifying sergeant.[100]

Here, like in *Adams*, Mr. Walker's testimony was material to his defense and he offered another witness to substantiate it.[101] However, for Mr. Walker, there was *only* testimony. There was no physical evidence to contradict Mr. Walker's and Mr. Williams' testimonies. Further, the contradictions between officer and defense testimony did not rise to the level of incompatibility seen in Mr. Stitts' case.

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[98] *People v Nana Kwasi Acquaah*, unpublished opinion of the Court of Appeals, issued November 13, 2008 (Docket No. 279368), p 4 (Appendix 265a) (the "prosecution does not persuade us that the jury's verdict standing alone establishes that defendant committed perjury"); *People v Baiz*, unpublished opinion of the Court of Appeals, issued January 9, 2007 (Docket No. 262912 ("The jury in this case was presented with two differing versions of the event that led to defendant's arrest. By finding defendant guilty, the jury presumably found the testimony of the victim to be more credible than that of defendant and his stepdaughter. This does not necessarily equate, though, with a finding that defendant did, in fact, lie, when he testified at trial. We have no way of knowing the jury's thought process or reasoning behind finding defendant guilty, and that the jury chose to believe one version does not necessarily make that version the truth-it simply makes that version more believable.") (Appendix 270a); *People v Matthews*, unpublished opinion of the Court of Appeals, issued September 13, 2016 (Docket No. 327632) ("[T]he scoring of OV 19 is by no means automatic in every case where a defendant testifies; rather, it is dependent on a finding that the defendant in fact committed perjury.") (Appendix 284a).

[99] *Adams* at 682.

[100] *Adams* at 685.

[101] *Adams*, 430 Mich at 699.

Gnatek recovered a gun from the bush next to the porch.[102] He did not search for very long and collected only the weapon.[103] Mr. Walker testified, contrary to officer testimony, that he threw a beer bottle, not a gun, into the bush next to the house. The prosecution surmises that "the police would have found the bottle when the firearm was recovered; this did not occur."[104] However, police never testify to looking for anything else other than a weapon. Gnatek, who recovered the weapon, could not recall if any other evidence was collected.[105] Gnatek testified that he did see Mr. Walker toss a beer bottle to the ground.[106] Marek does not recall how many beer bottles he saw that day and does not testify as to where, specifically, he saw any.[107] All witnesses testified to seeing something leave Mr. Walker's hands and fly through the air into a bush. All witnesses testified there was a gun in the bush.

The jury believed the officers' version of events. That alone is not enough to enhance Mr. Walker's sentence based on perjury. This case presents this Court with the opportunity to clarify that when it held in *Adams* that the perjury must be "willful, material, and flagrant," this Court meant that the jury verdict alone was not enough justify a sentencing enhancement based on presumed false testimony.[108]

C. Mr. Walker did not interfere with the administration of justice when Mr. Williams testified on Mr. Walker's behalf. The record does not support that Mr. Walker and Mr. Williams colluded to create false testimony.

The Court gave one additional justification for scoring OV-19 at 10 points:

> I think he conspired with Mr. Williams, while Mr. Williams was in custody in the Wayne County jail awaiting trial, and they trumped up that phony, bogus testimony. I don't think it's a coincidence that lo[]-

[102] 2/25/15 TT, 75 (Appendix 99a).
[103] 2/25/15 TT, 86 (Appendix 110a).
[104] Appellee's Answer, 21.
[105] 2/25/15 TT, 86-87 (Appendix 110a-111a).
[106] 2/25/15 TT, 74 (Appendix 98a).
[107] 2/25/15 TT, 47 (Appendix 71a).
[108] *Adams*, 430 Mich at 693.

> and-behold after that young man spent some time in the Wayne County Jail, all of a sudden he decided he wanted to come to court and tell a ridiculous version of events. And I think that that was nothing more than a conspiracy between Mr. Walker and – using his influence over a young man from the neighborhood, who looked up to him, to try to get him to take the rap for him. [109]

The record provides no support for the judge's finding.

Testimony from police officers verified that Mr. Darryl Jevon Williams was an eyewitness on the day of Mr. Walker's arrest. [110] He was one of the individuals drinking on the front lawn the night of August 5, 2014.[111] The officers "couldn't recall" a relationship between any of the individuals they questioned and Mr. Walker.[112] There was no police testimony regarding any interaction between Mr. Walker and Mr. Williams. Mr. Williams testified that he was not related to Mr. Walker and he never spoke with any of Mr. Walker's family members or friends.[113]

The record indicates that Mr. Walker and Mr. Williams did not communicate prior to trial. Mr. Williams testified that the last time he saw Mr. Walker before his testimony at trial was August 5, 2014, the day he was incarcerated.[114] Mr. Walker testified that at one point, while he was in Wayne County Jail, he learned of Mr. Williams "catching a case," but that Mr. Williams was not anywhere near him during their time in Wayne County Jail.[115] There was no evidence of phone calls, exchanged notes, or any communication between Mr. Walker and Mr. Williams. At the time defense counsel subpoenaed Mr. Williams, Mr. Williams had already been convicted of

[109] ST, 6-7 (Appendix 245a-246a).
[110] 2/25/15 TT, 63 (Appendix 87a).
[111] 2/25/15 TT, 63 (Appendix 87a).
[112] 2/25/15 TT, 64 (Appendix 88a).
[113] 2/25/15 TT, 123-124 (Appendix 147a-148a).
[114] 2/25/15 TT, 110 (Appendix 134a).
[115] Mr. Walker testified that he learned Mr. Williams had caught a case but "never seen him." 2/25/15 TT, 152 (Appendix 176a). Mr. Williams testified that he never had any contact with Mr. Walker while he was in Wayne County Jail. 2/25/15 TT, 124 (Appendix 148a).

armed robbery and was awaiting prison placement at Charles Egeler Reception and Guidance Center in Jackson, Michigan.[116] Mr. Walker was in Wayne County Jail in Detroit, Michigan.

In addition to simply being in Wayne County Jail at the same time, Judge Lillard claimed she could discern collusion because Mr. Williams was an impressionable "little boy."[117] Mr. Williams described Mr. Walker as "role model in the neighborhood, [who] tried to keep us out of trouble and a lot of things."[118] Mr. Walker did not have the influence over this "young man"[119] Judge Lillard and the prosecutors would have this Court believe. Prior to Mr. Walker's trial, then 21-year-old Mr. Williams pled guilty to an unrelated armed robbery for which he was serving a lengthy prison sentence, including an enhancement for using a firearm in that robbery.[120] Is it so "ridiculous"[121] that Mr. Williams and not Mr. Walker would have been armed the day of Mr. Walker's arrest, and no the other way around?

Further, Mr. Walker testified that he made sure "everybody" was aware of the fact that he was on parole and could not be around guns, even Mr. Williams, whom he did not consider a close friend.[122] At sentencing Mr. Walker said:

> [T]his young man [Mr. Williams] don't have no reason to me – lie for me. I never seen this man in here, none of that, I don't even really deal with that guy. Me and him will never talk again because of the situation I'm in here for, you feel me? I just didn't wanna tell on nobody, that's all that was. A good guy is a good guy.[123]

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[116] 2/25/15 TT, 124 (Appendix 148a). Mr. Williams testified he was at 3855 Cooper Street in Jackson, MI. That is the location of Charles Egeler Reception, where prisoners go before they receive their initial prison placement.
[117] ST, 18 (Appendix 257a).
[118] 2/25/15 TT, 106 (Appendix 130a).
[119] ST, 6 (Appendix 245a).
[120] 2/25/15 TT, 112 (Appendix 136a).
[121] ST, 6 (Appendix 245a).
[122] 2/25/15 TT, 155-157 (Appendix 179a-181a).
[123] ST, 9 (Appendix 248a).

In sum, both Mr. Williams and Mr. Walker testified that they never spoke in Wayne County Jail. The prosecutor presented no evidence of proximity[124], let alone communication rising to the level of collusion. There is no record evidence of opportunity or motive. The court erred in scoring Mr. Walker 10 points for OV-19.

Mr. Walker has a right to remain silent that he lawfully exercised without interfering with the administration of justice, and the record was devoid of evidence that Mr. Walker perjured himself or colluded with defense witness, Mr. Williams. The jury's guilty verdict is insufficient by itself to show that Mr. Walker lied when he testified or that he coerced a defense witness to lie on the stand.

This mistake warrants resentencing. When Mr. Walker's OV-19 score is reduced by 10 points, his OV-Level decreases from II to I, and his guidelines range from 10 to 46 months to 7 to 46 months. He is entitled to be resentenced.[125] However, should this Court find record evidence to support the scoring of OV-19 by a preponderance of the evidence, Mr. Walker is nonetheless still entitled to a resentencing, based solely on Judge Lillard's conduct at sentencing.

[124] Of course, there had to have been *some* overlap of time between Mr. Walker's arrest on August 5, 2014 and Mr. Williams' departure to MDOC custody in January 2015. However, that alone is not sufficient to prove by a preponderance of the evidence the collusion Judge Lillard believed them to have effectuated. This is particularly true in Wayne County where the jail includes multiple buildings (Divisions I, II, and III).

[125] *People v Francisco*, 474 Mich 82 (2006); *People v Thompson*, 314 Mich App 703, 887 NW 2d 650, 653 n 4 (2016) ("When a defendant properly preserves a claim that a scoring error was made, and if a guidelines range is altered in any way because a scoring error was actually made by the sentencing court, remand for resentencing is ordinarily required, even when the minimum sentence falls within the altered guidelines range. *People v. Francisco*, 474 Mich. 82, 89–91; 711 NW2d 44 (2006).").

D. Even if this Court finds Mr. Walker's guidelines were correctly scored, he has a due process right to an individualized sentence determined by an unbiased judge. Thus, he is still entitled to resentencing.

Given the lack of record evidence to support the score for OV-19, it appears that Mr. Walker's sentence was instead enhanced for presenting a defense. Here, Mr. Walker went to trial, presented a defense, frustrated Judge Lillard in doing so, and was sentenced for failing to "accept responsibility for [his] own foolish behavior."[126] "A court cannot base its sentence even in part on a defendant's refusal to admit guilt."[127] However, Judge Lillard has stated on the record that she does just that. In *Pennington*, Judge Lillard sentenced Mr. Pennington on July 30, 2014 to the top of guidelines range after he elected to go to trial.[128] In a post-trial hearing, nearly two years later on July 20, 2016, Judge Lillard confirmed it was her practice to sentence defendants who exercise their right to trial to a top-of-the guidelines sentence:

> *Defense Counsel:* As your Honor knows, it's the practice of this Court to sentence to the top of the guidelines after a defendant goes to trial—
> *The Court*: Sometimes higher.[129]

Unlike *Pennington*, Judge Lillard never expressly stated her sentencing policy on the record here, or that she was adhering to it. However, she makes it clear that she was frustrated by Mr. Walker's failure to admit guilt:

> I've done nothing but be fair to you, but you know what cowards do, when cowards don't want to accept responsibility for their own foolish behavior, they make threats, they try to act like they're tough, and they wanna shift the blame. And that's what you did and, you know, I[] don't blame you but that's why you're getting the maximum time, because you acted like a clown today.[130]

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[126] ST, 16 (Appendix 255a)
[127] *People v Pennington*, ____Mich App ____; _____ NW2d_____ (2018) (citing *People v Hatchett*, 477 Mich 1061; 728 NW2d 462 (2007) (Appendix 292a)
[128] *Pennington*, Slip Op 7 (Appendix 291a)
[129] *Pennington*, Slip Op 8 n 8 (Appendix 292a).
[130] ST, 16 (Appendix 255a).

Mr. Walker seemed to have the option of a lower sentence dangled in front of him and then stripped away—

> *The Court:* I was inclined to give you the middle of the road, which is what Ms. Stanford was asking for, but because you're so disrespectful and you just seem to want to go back to prison…
>
> ***
>
> So anyway, I will sentence him to the top the guidelines which is 46 months…fourth offender, so that makes the maximum penalty for that offense up to –
> *Ms. Stanford*: He could do life.
> *The Court*: Which he deserves, so it'll be 3.833 years, but I don't know if I can say life…Oh, well, I'll say 75.

Judge Lillard paying lip service to the discretion she possessed within the context of her taunting of Mr. Walker cannot overshadow her presumed adherence to her unwritten policy. Mr. Walker was sentenced on March 12, 2015, well within Judge Lillard's pronounced practice of sentencing individuals to the top of the guidelines for going to trial. "[A]n improper policy can only be cured by a change in practice, not a change of words."[131]

Even if this Court finds that there is inadequate record evidence to support that Judge Lillard sentenced Mr. Walker for going to trial, this is a case where the judge's "intemperance and bias mandate[e] a new sentencing hearing before a different judge."[132] The Court of Appeals' dissenting judge was "deprive[d] of confidence in the integrity of Judge Lillard's sentencing decision."[133] This Court should be as well.

Mr. Walker has a due process right to a fair and impartial jurist.[134] This right should not end upon conviction but should continue through sentencing because Mr. Walker has a right to

[131] *Pennington*, Slip Op, 8 n. 8 (Appendix 292a).
[132] *Walker*, (Gleicher, J., *dissenting*) unpub op at 6 (Appendix 18a).
[133] *Walker*, (Gleicher, J., *dissenting*) unpub op at 12 (Appendix 24a).
[134] *Crampton v Michigan Dept of State*, 395 Mich 347; 235 NW2d 352 (1975).

an individualized sentence, free from "personal bias and attitude" of a sentencing judge.[135] This was canonized in the Michigan Code of Judicial Conduct, Canon 3 which states, in relevant part:

> (9) A judge should adopt the usual and accepted methods of doing justice; avoid the imposition of humiliating acts or disciple, not authorized by law in sentencing and endeavor to conform to a reasonable standard of punishment…

Recently, Justice McCormack, joined by Justice Bernstein, addressed this issue in her dissent from a denial of leave in *People v Mitchell*, 501 Mich 1076; 911 NW2d 458 (2018) (citations footnoted)[136]:

> The first principle of our justice system is that judges are impartial and independent.[137] When a judge expresses his personal wish that the defendant had suffered a violent death instead of being arrested and convicted, the public's confidence in the rule of law is undermined.[138] This is not to say that there is no role for emotion (including anger, and even vengeance) at a sentencing hearing. But that is for the people personally affected by the defendant's crime and their representatives (such as the prosecutor) to express, not the person in the courtroom charged with ensuring the proceeding's evenhandedness.
>
> I would remand the defendant's case for a sentencing hearing before a different judge, because "the importance of preserving the appearance of justice and fairness outweigh[s] considerations of waste and duplication."[139]
>
> Especially in these times, when our norms of public discourse appear under stress, judges, perhaps of all officials, should discharge their

[135] *People v Coles*, 417 Mich 523, 546; 339 NW2d 440, 451 (1983).
[136] People v Mitchell, 501 Mich 1076; 911 NW2d 458, 458-459 (2018) (Mem).
[137] *In re Bennett*, 403 Mich. 178, 199, 267 N.W.2d 914 (1978) ("[A] judge, whether on or off the bench, is bound to strive toward creating and preserving the image of the justice system as an independent, impartial source of reasoned actions and decisions."); *In re Haley*, 476 Mich. 180, 196, 720 N.W.2d 246 (2006) (stating that the court is "an institution that the people of this state must be able to hold in the highest regard").
[138] *In re Hocking*, 451 Mich 1, 13, 546 NW2d 234 (1996) ("A judge's mode of articulating a basis for decision may exhibit such a degree of antagonism or other offensive conduct that a single incident would indicate that impartial judgment is not reasonably possible."); *In re Simpson*, 500 Mich 533, 543 n 6, 902 NW2d 383 (2017) ("Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges."), quoting Michigan Code of Judicial Conduct Canon 2(A).
[139] *People v Garvin*, 159 Mich App 38, 47, 406 NW2d 469 (1987). See also *In re Disqualification of Winkler*, 135 Ohio St. 3d 1271, 1276, 986 NE2d 996 (2013); *United States v Navarro-Flores*, 628 F2d 1178, 1185 (CA 9, 1980).

> duties of office without rhetoric that would validly call into question judicial impartiality. I dissent from the court's denial because there is a ready remedy for the trial court's transgression—resentencing before a different judge. The stakes here are too great and the corrective step too easy.

It is time for this entire Court to join this chorus and make clear a defendant's right to an impartial jurist at sentencing.

This would be a cogent extension of the expectation of decency and respect this Court has had for judges and citizens alike:

> Citizens are bound to observe a certain line of conduct in exchange for the protections of the law, and judges, no less than other officers of government, are bound to conduct themselves with honor and dignity. Thus, the ideal judge is a person who has by habit and practice achieved self-control and acquired the virtue of being able to will and act as a just person ought to act.

In re Hocking, 451 Mich 1, 6; 546 NW2d 234 (1996).

Honor, dignity, and reciprocal respect were muted at Mr. Walker's sentencing. Judge Lillard's conduct was, according to the Court of Appeals, "certainly inappropriate", particularly the "name calling, taunting, and other inappropriate innuendos."[140] Dissenting Judge Gleicher described Judge Lillard as "bait[ing]" Mr. Walker in "an utterly childish fashion."[141] Mr. Walker asked Judge Lillard to "do what you goin' do" choosing to conclude allocution, as was his right. ST, 13-14. Judge Lillard would not have it. She misstated the law to motivate Mr. Walker to speak his grievances on the record: "I want to make sure you outline it all for appellant review, all the times I've disrespected you…you need it on the record for your appeal."[142] Mr. Walker continued to express that he was not interested in allocuting, rotating between "Do what you're going to do" (stated at least seven times at sentencing) and "I'm through talking" (stated at least

[140] *Walker*, unpub op at 11-12 (Appendix 11a-12a).
[141] *Walker*, (Gleicher, J., *dissenting*) unpub op at 11 (Appendix 23a).
[142] ST, 13-14 (Appendix 252a-253a).

three times at sentencing). Judge Lillard refused to efficiently administer a sentence, instead accusing Mr. Walker of threatening her (after he said "I'm grown, I don't talk."[143]) and calling him a "clown" six times. She assured him that this could last "all day."[144]

It is clear from "the very nature of the words used by the judge [that she] exhibit[ed] hostility, bias, or incredulity."[145] This behavior alone warrants a resentencing before a different judge.

E. Mr. Walker is entitled to a different judge on resentencing and conditions his resentencing on assignment of a new judge.

Judge Lillard's "intemperate remarks" warrant a resentencing before a different judge.[146] The Michigan Court of Appeals has employed a three-part test when considering whether a resentencing should occur before a different judge:

> The three considerations may be stated as follows: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.[147]

In light of these considerations, Mr. Walker is entitled to resentencing before a different judge. "It would be unreasonable to expect [her] to be able to put out of [her] mind previously expressed views and findings without substantial difficulty."[148]Judge Lillard would have substantial difficulty setting aside her prejudices or improper attitudes regarding Mr. Walker's

[143] ST, 14-15 (Appendix 253a-254a).
[144] ST, 14 (Appendix 253a).
[145] *Stevens* at 176.
[146] *People v Cobbs*, 445 Mich 922; 521 NW2d 6 (1994).
[147] *People v Evans*, 156 Mich App 68, 71-73, 401 NW2d 312, 314 (1986) (citing *United States v Sears, Roebuck & Company, Inc*, 785 F2d 777, 780 (CA 9, 1986). Adopted by this Court in *People v Hicks*, 485 Mich 1060; 777 NW2d 412 (2010).
[148] *People v Evans*, 156 Mich App 68, 71-73, 401 NW2d 312, 314 (1986) (citing *Bercheny v Johnson*, 633 F3d 473 (CA 6, 1980).

testimony and him as a person.[149] The trial court's sentencing errors are not solely questions of law,[150] but rather "prejudices or improper attitudes regarding this particular defendant."[151] Reassignment is advisable to preserve the appearance of justice.

Finally, the evidentiary phase of Mr. Walker's trial took one day. The testimony of all witnesses comprises 129 transcript pages. Therefore, "the advancement of the interests of preserving the appearance of justice and fairness outweigh considerations of waste and duplication, neither of which will result" from a resentencing before a different judge.[152]

Whether due to a guidelines scoring error or Judge Lillard's behavior generally, Mr. Walker is entitled to resentencing. That resentencing should take place before a different judge.

[149] *See* ST, generally (Appendix 240a-261a).
[150] *Compare*, *Evans, supra,* and *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862, 865 (1997), *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127, 132 (2001).
[151] *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127, 132 (2001).
[152] *People v Evans*, 156 Mich App 68, 71-73; 401 NW2d 312, 314 (1986).

Summary and Request for Relief

Defendant-Appellant Harold Walker asks this Honorable Court to either grant his Application for Leave to Appeal or, in the alternative, reverse the decision below and remand to the Wayne County Circuit Court for a new trial before a different judge.

Respectfully submitted,

/S/ Adrienne N. Young

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