STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND CHARLES PIERSON,

Defendant-Appellant.

Supreme Court No. 156720

Court of Appeals No. 332500

Circuit Court No. 10-001241 FH

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant Raymond Pierson filed a motion for relief from judgment under MCR 6.500 *et seq*. in the trial court, which that court denied. Pierson then applied for leave to appeal in the Court of Appeals, which that court granted in part. The court subsequently issued an opinion affirming Pierson's convictions. *People v Pierson*, 321 Mich App 288; 909 NW2d 274 (2017). Pierson applied for leave to appeal in this Court, which, in lieu of granting leave, ordered further briefing and oral argument. *People v Pierson*, ___ Mich ___; 913 NW2d 661 (2018). This brief is being timely filed in accordance with the Court's order. *Id*.

STATEMENT OF QUESTIONS INVOLVED

I. The trial court held a pretrial hearing and ruled that the prosecution could present testimony from police officers about alleged confessions made by Defendant. At trial, the judge told the jury about the hearing and that he had ruled that Defendant's statements were admissible. Considered within the full context of the trial, did the judge's comments create the appearance that he had discredited Defendant, and was Defendant consequently deprived of his right to a fair trial by an impartial judge?

The trial court answered, "No."

The Court of Appeals answered, "Yes."

The prosecution answers, "No."

The defense answers, "Yes."

II. Is Defendant automatically entitled to a new trial given the error in this case?

The trial court answered, "No."

The Court of Appeals answered, "No."

The prosecution answers, "No."

The defense answers, "Yes."

INTRODUCTION

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

Starr v United States, 153 US 614, 626; 14 S Ct 919; 38 L Ed 841 (1894).

"Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge."

Brown v Walter, 62 F2d 798, 800 (CA 2, 1933) (opinion by LEARNED HAND, J.).

On July 24, 2010, at about 4:00 a.m., a police officer patrolling the Bryn Mawr apartment complex in Ypsilanti came upon a startling scene. Defendant Raymond Pierson and another man, Corey Taylor, were fighting outside the complex. Between them lay an AK-47. Fortunately, the officer was able to defuse the situation, and he and other officers set about to sussing out exactly how Pierson and Taylor had found themselves fighting over an AK-47. In a statement to police, Pierson said that Taylor had asked him for a ride and that he confronted Taylor after Taylor left the AK-47 in his car. But another witness claimed that Pierson had entered Taylor's apartment with the gun, apparently intending to burglarize it.

Police, though, alleged that Pierson gave a different account immediately after he was arrested. Officers claimed that Pierson admitted to trying to break into Taylor's apartment and later admitted that he had been carrying the gun.

At trial, the defense argued that Pierson's confessions were never made. At one point, though, the trial court judge told the jurors that he had held a pretrial hearing on the confessions and that he had "ruled that the defendant was properly advised of his rights and that the statements that have been introduced are admissible." When defense counsel objected, the judge retorted, "Fine. Go ahead. It's true. Have a seat."

In a long line of cases, our Court of Appeals has held that a trial court judge commits reversible error when he tells jurors about the existence, nature, and result of a pretrial hearing on the voluntariness of a defendant's alleged confession. The rationale of this rule is that such a comment likely establishes in the minds of the jurors that the confession was in fact made, something the defendant is entitled to contest and have the jury pass on. In other words, the concern is that once the judge has intimated his personal opinion about the defendant's credibility, the jury is unlikely to disagree with him. The Court of Appeals' caselaw on this score is sound and can be harmonized with this Court's precedent on a defendant's right to a fair trial by an impartial judge.

In this case, the trial court judge erred by telling the jury that he had ruled that Pierson was "properly advised of his rights" and that "the statements" were "admissible." The judge's comments communicated to the jurors that in his opinion, the defendant's confessions were true and valid. This error, in concert with a series of other intemperate remarks by the trial court judge that were aimed at the defense, deprived Pierson of a fair trial by an impartial judge. Since such an error can never be deemed harmless, reversal is required.

STATEMENT OF FACTS

Raymond Pierson was convicted at a jury trial in the Washtenaw Circuit Court, Judge Donald E. Shelton presiding, of first-degree home invasion, MCL 750.110a; felon in possession of a firearm, MCL 750.224f; felony-firearm, MCL 750.227b; and resisting and obstructing a police officer, MCL 750.81d.

The scene

On July 25, 2010, at about 4:00 a.m., Deputy Sean Urban of the Washtenaw County Sherrif's Department was patrolling the Bryn Mawr apartment complex in Ypsilanti. (99a). He had information from a confidential informant that Corey Taylor, a resident of the complex, was involved in drug dealing. (107a, 115a).

At some point, Urban "heard a commotion in the center of the complex" and a man's voice "say something about I'm going to beat your ass." (99a-100a). He drove toward the noise to check it out. (99a-100a). As he got closer, he heard "some kind of solid ruckus" and then saw two men fighting on the ground. (100a). It's undisputed that one of the men was Raymond Pierson and the other man was Corey Taylor. Taylor did not have a shirt on. (100a). Urban saw that Pierson and Taylor both had one hand on what he could tell was a gun. (100a). Urban radioed dispatch for backup. (100a).

Urban testified that thereafter, both men got off the ground and Taylor put his hands in the air and said that the gun was Pierson's. (100a). Urban claimed that Pierson began to walk away, contrary to the orders he was giving him. (100a-101a).

Eventually, according to Urban, he pulled out his taser and threatened Pierson, after which Pierson complied and put his hands behind his back. (101a). Urban testified that he holstered his taser and went to handcuff Pierson, but then Pierson "jerked and resisted away and took off running." (101a). Urban testified that he ran after Pierson and tased him, and Pierson fell to the ground. (101a). Urban then handcuffed him. (102a).

Ronald Chambers, a security guard at the complex, testified that he arrived on the scene after Pierson had been tased. (120a). He testified that Urban directed him to stand by the gun so that no one moved it. (121a).

Thereafter, other officers began to arrive. Urban claimed that he was getting ready to hand Pierson off to Deputy Daniel Buffa when Pierson said, "I broke into his house but the guy had the gun." (102a). Buffa then took custody of Pierson. (102a).

Urban turned his attention to the gun. (102a). He saw that it was an AK-47. (102a). He removed the magazine, which was fully loaded. (102a). Another fully loaded magazine was laying on the ground nearby. (102a).

Urban then took a statement from Cassandra Jackson, who had been in Taylor's apartment. (102a). Urban claimed that he found no drugs or drug paraphernalia in the apartment. (105a, 115a).[1]

Meanwhile, Buffa walked Pierson to his patrol car and put him in the back seat. (122a). He claimed that he read Pierson the *Miranda*[2] warnings and that

[1] As stated below, Taylor did not testify at trial.
[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Pierson agreed to talk to him. (122a). According to Buffa, Pierson said that someone had dropped him off near the complex and that he had planned to rob Taylor. (123a). Buffa testified that Pierson said that when he entered Taylor's apartment, he saw that Taylor had a gun, and the fight ensued. (123a). Buffa allegedly told Pierson that his story didn't make sense, because Taylor and Jackson both said that Pierson had brought the gun. (123a). Buffa then left to confer with the other officers. (123a).

By that time, police had discovered a car in the complex's parking lot that they learned was registered to a woman with the same address as Pierson. (103a). They found a book bag in the car, which contained two more magazines, one empty and one with about 17 bullets. (103a).

According to Buffa, when he found out about the car, he went back to talk to Pierson. (124a). He testified that he told Pierson about the car and the magazines and that Pierson then changed his story. (124a). Buffa claimed that Pierson said that he knew a woman who was in a relationship with Taylor and that she had tipped him off that Taylor had a lot of money in his apartment. (124a). Pierson allegedly admitted that he had brought the gun and had intended to rob Taylor. (124a). Buffa admitted that Pierson's statements to him had not been recorded. (125a). He claimed that he didn't have his recording equipment with him at the time. (125a). Buffa also admitted that he could have taken Pierson somewhere to record his statement, but he neglected to do so. (125a).

Urban testified that even though he did not find any drugs or drug paraphernalia in Taylor's apartment, he contacted narcotics officers to investigate Taylor for drug dealing. (115a).

Jackson's account

Jackson testified that she is a friend of Taylor's and that she had been up with him at about 4:00 a.m. on the night at issue "just having like idle conversation." (87a-88a). She claimed that at some point, Pierson unannouncedly began to open the patio door from the outside and enter the apartment with the gun. (88a). She testified that Taylor jumped up, grabbed Pierson, and threw him out the door. (89a). The pair then began fighting. (89a).

Jackson admitted that Taylor was a drug dealer (91a-92a), although she denied that she herself had been involved in dealing drugs (90a). She denied knowing Pierson. (92a).

Urban testified that Jackson's trial testimony was not entirely consistent with what she had told him. (108a, 113a). For instance, Urban testified that Jackson had told him that she saw "two subjects run by" at one point (113a), which Jackson had denied (93a).

Pierson's account

Detective Grant Toth—who works for the Washtenaw County Sheriff's Department but is assigned to the Drug Enforcement Agency (129a)—interviewed Pierson

later in the afternoon on the same day. (132a). The statement given by Pierson, which he does not contest making, was much different from what Buffa claimed he said.

According to Pierson, his girlfriend, Elisha, who lived in the Bryn Mawr apartment complex, had introduced him to Taylor the day before the incident at hand. (133a-134a).[3] Pierson bought marijuana from Taylor. (134a). The next day, at about 3:00 a.m., Taylor called Pierson and asked for a ride to the store. (134a). Taylor told him that a headlight was out on his car and he didn't want to drive it. (134a). Pierson drove to Bryn Mawr, and Taylor came out of his apartment without a shirt on and carrying a duffel bag. (134a). Taylor put the duffel bag in Pierson's car, and Pierson heard a "metallic clank." (134a). Taylor then went back to his apartment to get dressed. (134a). Pierson opened the bag and saw the AK-47. (134a-135a). He was angry that Taylor had left it in his car, so he took it out of the bag and went to confront Taylor. (135a). That's when the two began to fight outside the complex, later to be discovered by Urban. (135a).

Toth testified that after taking Pierson's statement, he checked the headlights on Taylor's car and found them both to be in working order. (135a). Toth admitted, though, that Taylor could have been trying to trick Pierson. (139a).

Toth testified that based on Pierson's statement, he obtained a search warrant for Taylor's apartment. (130a). Police found drugs, drug paraphernalia, and a large amount of money. (130a-131a). Again, Urban testified he saw nothing of the sort when he was in the apartment earlier the same day. (105a, 115a).

[3] Toth confirmed that Elisha is a real person. (133a).

Notably, Taylor did not testify at trial given that, as stated by his attorney, he intended to invoke his Fifth Amendment privilege. (81a).

Police later examined the magazines for fingerprints, and they did not discover any prints belonging to Pierson. (115a).

The improper judicial comment

Urban testified on cross-examination that he had not read Pierson his *Miranda* rights. (114a). On redirect, the prosecution apparently wanted to explore this further, which led to the exchange that brings this case before this Court:

> Q. . . . Now, can you explain when you give Miranda rights?
>
> A. Anytime someone's not free to leave.
>
> [Defense counsel]: Foundation.
>
> The Court: You know what, I'm going to cut that part of it off here. The Court already held a hearing on this matter[4] and I have ruled that the defendant was properly advised of his rights and that the statements that have been introduced are admissible. Go ahead.
>
> [Defense counsel]: I'll object to that.
>
> The Court: Fine. Go ahead. It's true. Have a seat. [119a.]

Shortly thereafter, on re-cross-examination, the trial court demeaned defense counsel again:

> Q. You appreciate the Court has ruled that statements by my client are admissible, correct?
>
> A. I don't—
>
> Q. He just said it. The Judge just said it.

[4] At a pretrial hearing, the court ruled that testimony from police officers about Pierson's alleged confessions would be admissible at trial.

> A. The Judge said it. I don't know if I appreciate it.
>
> A. Okay. So my client gave a statement to you—
>
> The Court: You know what, that doesn't matter either. So go ahead.

As stated further below, this was not the only time that the judge and defense counsel faced off during the course of the trial.

At the conclusion of the trial, the judge gave the standard instruction to the jury about disregarding any perceived opinion he had in the case:

> My comments, my rulings, indeed these instructions are also not evidence. It's been my duty to see to it that the trial was conducted according to the law and to tell you the law that applies to this case. But when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. Indeed, if you believe I have an opinion about how you should decide this case, pay no attention to it. You are the judges of the facts in this case, not me. [151a.]

6.500 motion

Pierson's direct appeal in the Court of Appeals was unsuccessful, *People v Pierson*, unpublished per curiam opinion of the Court of Appeals, issued December 10, 2013 (Docket No. 309315), and this Court denied his application for leave to appeal, *People v Pierson*, 495 Mich 1008; 846 NW2d 568 (2014).

In 2015, Pierson filed a motion for relief from judgment. He argued, among other things, that the trial court had erred by telling the jury about the existence and result of the pretrial hearing regarding his alleged confessions. (16a).[5] The court, with

[5] Pierson's other arguments need not be addressed.

a successor judge presiding, denied the motion, explaining that the trial court judge had told the jury that the statements were "admissible" rather than "voluntary," only the latter word being rebuked by caselaw, at least according to the court. (22a-23a).

Pierson applied for leave to appeal in the Court of Appeals, which that court granted to consider the judge's comment. *People v Pierson*, unpublished order of the Court of Appeals, entered August 29, 2016 (Docket No. 332500).[6]

In the lead published opinion, JUDGE RONAYNE KRAUSE found that the trial court's comment was erroneous. *People v Pierson*, 321 Mich App 288, 292-293; 909 NW2d 274 (2017) (32a). She relied on longstanding Court of Appeals precedent holding that a trial court judge errs by telling jurors that he determined at a pretrial hearing that the defendant's confession was "voluntary." *Id*. (32a). JUDGE RONAYNE KRAUSE found the use of "admissible" in this case rather than "voluntary" to be of no moment:

> It is no particular stretch to further extrapolate that there is little substantive difference between advising the jury that a confession had previously been ruled voluntary after a hearing and advising the jury that the confession had previously been ruled admissible after a hearing. I decline to presume that lay jurors would appreciate the distinction. The practical effect of such a line of commentary is simply to impress upon the jury that the trial court had already engaged in some manner of extraordinary analysis of the propriety of the confession and arrived at a conclusion unfavorable to the defendant. It would be splitting semantic hairs for us to find otherwise. [*Id*. (32a).]

[6] The court denied leave to consider any other issues raised by Pierson. *Id*. This Court denied Pierson's subsequent application for leave to appeal regarding those issues. *People v Pierson*, 500 Mich 960; 892 NW2d 360 (2017).

Nonetheless, JUDGE RONAYNE KRAUSE found the error harmless. *Id.* at 293. (32a). First, she believed that the exchange about whether Urban "appreciated" the trial court's ruling "blunted" the effect of the judge's improper comment. *Id.* (32a). Second, she found that because the judge had cut off the prosecutor's questioning, the jury wouldn't necessarily have taken the comment to favor the prosecution. *Id.* (32a). Third, she believed that the curative instruction at the end of trial alleviated any effect the comment had on the jury, which she believed would have been "fairly mild." *Id.* (33a). Fourth, and "[s]ignificantly" to JUDGE RONAYNE KRAUSE, "ample other evidence was properly admitted establishing both the content of defendant's statement and the fact that he had not been advised of his *Miranda* rights when he allegedly made it." *Id.* (33a). Finally, she relied on her interpretation of the defense's theory of the case, which "was that the other people ostensibly involved in the alleged crimes were unreliable or absent, and possibly that the police officers were incompetent." *Id.* (33a).

"The overwhelming likelihood," JUDGE RONAYNE KRAUSE, concluded, "is that the trial court's erroneous remark, although clearly intemperate and unwise, had little to no effect on the outcome of the case." *Id.* at 293-294 (33a). She "expressly decline[d] to craft a bright-line rule regarding reversal, or whether a similar error would be harmless or outcome-determinative in any other case." *Id.* at 294 (33a). In a two-sentence opinion, JUDGE MARKEY concurred "in result only in respect to the evidentiary issue" and joined the lead opinion "in respect to all the other issues." *People v Pierson*, 321 Mich App 288, 294; 909 NW2d 274 (MARKEY, J., concurring). (34a).

JUDGE BOONSTRA, though, dissented in part, finding no error in the trial court judge's comment. *People v Pierson*, 321 Mich App 288, 298; 909 NW2d 274 (BOONSTRA, J., concurring in part and dissenting in part). (38a). He seized on the use of "admissible" rather than "voluntary," finding this distinction crucial. *Id*. at 300-302. (39a-40a). That is, he did not believe that an average juror would take the judge's comment to mean that the judge had discredited Pierson. *Id*. (39a-40a). Further, JUDGE BOONSTRA relied on the jury instructions, which informed the jurors that they were to determine the credibility of the witnesses. *Id*. (39a-40a).

Pierson applied for leave to appeal in this Court, which, in lieu of granting leave, ordered further briefing and oral argument to consider

> whether: (1) defendant was denied the right to a fair trial when the trial court informed the jury that his confession to police had already been reviewed by the court and had been held admissible, see *People v Kincaid*, 136 Mich App 209, 215-216 (1984); *People v Gilbert*, 55 Mich App 168, 172-173 (1974); and (2) to the extent that the trial court erred, whether that error was harmless, *People v Corbett*, 97 Mich App 438, 442 (1980); *People v Mathis*, 75 Mich App 320, 324 (1977). [*People v Pierson*, ___ Mich ___; 913 NW2d 661 (2018).]

ARGUMENT

I. The trial court's comment on the *Walker* hearing deprived Pierson of his right to a fair trial by an impartial judge.

A. Our Court of Appeals has repeatedly held that the trial court judge should not inform the jury about the nature, existence, and result of a *Walker* hearing.

The origins of the issue in this case go back to *Jackson v Denno*, 378 US 368; 84 S Ct 1774; 12 L Ed 2d 908 (1964). There, the Court held that when a defendant contends that a confession he gave to police was involuntary, he is entitled to a pretrial hearing at which the trial court must initially determine whether the confession was in fact voluntary. *Jackson*, 378 US at 376-377. Only once the court has found that the confession was voluntary can it be admitted at trial and considered by the jury. *Id.* at 377-378. The Court approved of two different methods for admitting such statements. First is the "orthodox" rule, where the trial court "solely and finally determines the voluntariness of the confession." *Id.* at 378. Second is the "Massachusetts" rule, where the trial court still makes an initial voluntariness determination but the issue can also be submitted to the jury. *Id.*

In *People v Walker*, 374 Mich 331, 337-338; 132 NW2d 87 (1965), this Court adopted the orthodox rule. Thus, when the trial court finds at a pretrial hearing that the defendant's confession was voluntary, the jury's consideration is limited to credibility and weight—i.e., was the confession made and was it truthful. *Id.* at 338.

What, then, should a jury be told about a *Walker* hearing? Nothing. At least that's what the Court of Appeals has said in a line of cases going back to the early

1970s. See, e.g., *People v Williams*, 46 Mich App 165, 169-170; 207 NW2d 480 (1973); *People v Gilbert*, 55 Mich App 168, 172-173; 222 NW2d 305 (1974); *People v Skowronski*, 61 Mich App 71, 77-78; 232 NW2d 306 (1975); *People v Mosley*, 72 Mich App 289, 293-294; 249 NW2d 393 (1976); *People v Mathis*, 75 Mich App 320, 324; 255 NW2d 214 (1977); *People v Corbett*, 97 Mich App 438, 442-443; 296 NW2d 64 (1980); *People v Kincaid*, 136 Mich App 209, 215-216; 356 NW2d 4 (1984).

The clearest pronouncement came in *Gilbert*. There, the trial court told the jury that there had been a pretrial hearing and that it had determined that the defendant's confession was voluntary. *Gilbert*, 55 Mich App at 171-172. As an initial matter, the court explained that when a trial court deems a confession admissible after a *Walker* hearing, such a determination "merely place[s] the confession on an equal footing with all other properly admitted evidence." *Id.* at 172. That is, the defendant is still entitled to contest the voluntariness and credibility of the confession as well as whether it was even made in the first place. *Id.* A trial court can instruct the jury "that they should determine, on the basis of all the relevant evidence, 1) if the confession was made, and 2) if they so find, they should decide if the statement is true." *Id.* at 172-173. "The trial court should not," the court warned, "go on to discuss anything more." *Id.* at 173. The rationale for this rule is commonsensical: "[T]o inform the jury of the existence, nature, and results of a *Walker* hearing not only makes it unlikely that the jury will thereafter decide the confession was never made, but it tends to unfairly discount the credibility of defendant's impeaching evidence . . . ." *Id.* (internal citation omitted). This "would improperly impinge upon the province of the

jury." *Id.* Finally, the court held that given the importance of a defendant's confession in a criminal trial, such an error, which "cripple[s] the defendant's ability to challenge a confession, cannot . . . be deemed harmless." *Id.*[7] *Gilbert* has now been precedent for the better part of 50 years.

And although this Court has never explicitly affirmed the rule from *Gilbert*, the concept "don't say things that might sway the jury" is hardly novel. In fact, its provenance is venerable. JUSTICE COOLEY, in a case involving improper comments by a trial court judge, warned:

> "[I]t is possible for a judge to deprive a party of a fair trial, even without intending to do so, by the manner in which he conducts the case, and by a plain exhibition to the jury of his own opinions in respect to the parties, or to their case; and when it is apparent that a fair trial has not been had, a court of review should give relief as soon for that cause as for any other." [*Wheeler v Wallace*, 53 Mich 355, 357–358; 19 NW 33 (1884).]

Slightly more recently, this Court echoed JUSTICE COOLEY, admonishing trial courts that it "has not hesitated to reverse for new trial when the trial judge's questions or comments were such as to place his great influence on one side or the other in relation

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[7] The court in *Mathis* similarly explained:

> It is senseless to ask the jury whether a statement has been made after informing them that the statement was voluntary. The jury is thus left to wonder whether it is being asked, on the one hand, to side with the judge's conclusion and proceed to determine the truth of the statement, or on the other, to overrule the judge and conclude on their own that the statement (no matter how voluntary) was never made. We cannot and do not expect a jury, so perplexed, to render a fair and impartial verdict. [*Mathis*, 75 Mich App at 324.]

to issues which our law leaves to jury verdict." *People v Young*, 364 Mich 554, 558; 111 NW2d 870 (1961).

In a similar vein, this Court has recognized that trial court judges have an enormous potential to influence a jury. "[J]urors are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge." *Schwanz v Wujek*, 163 Mich 492, 495; 128 NW 731(1910). This danger is especially prevalent in criminal cases: "It is well known that jurors in a criminal case may be impressed by any conclusion reached by the judge as to the guilt of the accused." *People v Bigge*, 297 Mich 58, 70; 297 NW 70 (1941).

Cases from other jurisdictions likewise hold that trial court judges must be extraordinarily careful in what they communicate to a jury, whether intentionally or unintentionally. Anything the judge says or does during trial can have an outsized effect on jurors. As one court aptly put it:

> The trial judge occupies a high position. He presides over the trial. The jury has great respect for him. They can be easily influenced by the slightest suggestion coming from the court, whether it be a nod of the head, a smile, a frown, or a spoken word. It is therefore imperative that the trial judge shall conduct himself with the utmost caution in order that the unusual power he possesses shall not be abused. [*State v Hamilton*, 240 Kan 539, 545; 731 P2d 863 (1987) (quotation marks and citation omitted).]

Other courts throughout the country agree—every word said or action taken by the judge, whether intentional or unintentional, can influence the jury. *Moody v United States*, 377 F2d 175, 179 (CA 5, 1967) ("That a jury is highly sensitive to every judicial utterance is axiomatic."); *Bursten v United States*, 395 F2d 976, 983 (CA 5, 1968) ("It is well known, as a matter of judicial notice, that juries are highly sensitive to every

utterance by the trial judge . . . ."); *United States v Hickman*, 592 F2d 931, 933 (CA 6, 1979) ("[P]otential prejudice lurks behind every intrusion into a trial made by a presiding judge."); *United States v Bland*, 697 F2d 262, 265-266 (CA 8, 1983) ("A judge's slightest indication that he favors the government's case can have an immeasurable effect upon a jury."); *Abrams v State*, 326 So 2d 211, 212 (Fla Dist Ct App, 1976) ("[G]reat care should always be observed by the judge to avoid the use of any remark in the hearing of the jury that is capable, directly or indirectly, expressly, inferentially, or by innuendo, of conveying any intimation as to what view he takes of the case, or that intimates his opinion as to the weight, character or credibility of any evidence adduced.") (quotation marks and citation omitted); *State v Jenkins*, 115 NC App 520, 524; 445 SE2d 622 (1994) ("Trial judges must be careful in what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion.") (quotation marks and citation omitted).

Even judges themselves, when they've gone on record, have recognized their power to influence a jury. One federal district court judge perhaps said it best:

> Because the parties and counsel control the gathering and presentation of evidence, we have made no fixed, routine, expected place for the judge's contributions. It is not a regular thing for the trial judge to present or meaningfully to "comment upon" the evidence. As a result, his interruptions are just that—interruptions; occasional, unexpected, sporadic, unprogrammed, and unduly dramatic because they are dissonant and out of character. The result—to focus upon the jury trial, the model for our system, including, of course, its rules of evidence—is that the judge's participation, whether in the form of questions or of comments, is likely to have a disproportionate and distorting impact. The jury is likely to discern hints, a point of view, a suggested direction, even if none is intended and quite without

> regard to the judge's efforts to modulate and minimize his role. Whether the jury follows the seeming lead or recoils from it is not critical. The point is that there has been a deviant influence, justified neither in adversary principles nor in the rational competence of the trial judge to exert it. [Frankel, *The Search for Truth: An Umpireal View*, 123 U Penn L Rev 1031, 1042-1043 (1975) (footnote omitted).]

Similarly, one trial court judge from California, reflecting on her experience presiding over criminal trials, wrote, ". . . I no longer wonder about whether or not we judges influence juries, but rather how much and in what way we influence them." Cordell & Keller, *Pay No Attention to the Woman Behind the Bench: Musings of a Trial Court Judge*, 68 Ind LJ 1199, 1207 (1993). She explained, "The jury attends carefully to the judge, searching out each of her behaviors and imbuing them with meaning." *Id.* "[I]t is no wonder," she added, "that jurors and judges agree on verdicts seventy-five percent of the time. It is difficult to imagine any other two bodies that would agree so well." *Id.*, citing Kalven & Zeisel, *The American Jury*, p 56 (1966).

In short, every comment a judge makes during trial carries with it the danger that the jury will be unduly influenced. And our Court of Appeals has recognized that comments about *Walker* hearings, as a class, are simply intolerable given that they create the appearance that the judge has discredited the defendant. This line of cases is correct, and this Court should harmonize it with its current caselaw on judicial impartiality.

B. The trial court judge's comments should be evaluated under *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015), which announced the standard for assessing judicial impartiality.

Four terms ago, in *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015), this Court announced a comprehensive standard for assessing whether a trial court judge's conduct deprived the defendant of a fair trial. The Court held that a defendant is so deprived when the judge's conduct "pierces the veil of judicial impartiality." *Stevens*, 498 Mich at 170. The Court laid out the following test: "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." *Id.* at 171. Note that *Stevens* requires only the *appearance* of advocacy or partiality. In other words, the defendant does not have to show that the trial court judge was actually biased against him. What matters is the effect of the judge's conduct on the jury, whether that effect was intended or not.

Fleshing out the standard, the Court stated that each case will require "a fact-specific analysis." *Id.* at 171. A single instance of improper judicial conduct may be so egregious that it creates the appearance of advocacy or partiality. *Id.* If there are multiple instances of such conduct, a reviewing court must evaluate them together, considering their cumulative effect. *Id.* at 171-172. The reviewing court must also consider the judge's conduct within the context of the case. *Id.* at 172. This Court provided five factors to guide the analysis. *Id.*

First is the nature of the judicial conduct. As the Court explained, "Judicial misconduct may come in myriad forms, including belittling of counsel, inappropriate questioning of witnesses, providing improper strategic advice to a particular side, biased commentary in front of the jury, or a variety of other inappropriate actions." *Id.* at 172-173.

Second, the Court should consider the tone and demeanor of the trial court judge. *Id.* at 172. In line with caselaw cited above, the Court recognized that jurors are wont to follow the smallest hint of bias emanating from the judge. *Id.* at 174. It's inconsequential that any such hints were unintentional. *Id.* at 174-175. Again, it's the appearance of bias and its effect on the jury that matters. *Id.* at 175. But how can a reviewing court glean the tone and demeanor of a trial court judge from the cold page? Sometimes, "the very nature of the words used by the judge can exhibit hostility, bias, or incredulity." *Id.* at 176. Otherwise, the fact that a comment drew an objection may reveal the judge's tone and demeanor. *Id.*

Third, the Court must assess "the scope of judicial intervention within the context of the length and complexity of the trial." *Id.* For example, in a lengthy trial that deals with complex scientific evidence, it may be appropriate for the judge to intervene more often to clarify certain points that might otherwise confuse the jurors. *Id.*

Fourth, and in combination with the third factor, the Court must consider the extent that the judge's conduct was aimed at one side more so than the other. *Id.* at 176-177. A judge may display partiality when the frequency and manner of his interventions are one-sided. *Id.* at 177.

Fifth, the Court must consider whether a curative instruction was given. *Id.* Curative instructions will reduce the effect of minor or brief instances of inappropriate conduct. *Id.* And a contemporaneous instruction is likely to be more effective than the standard instruction given at the end of the trial. *Id.* But some conduct may be so egregious that no instruction can cure it. *Id.* at 177-178.

Stevens provides the correct framework for assessing the judge's comments in this case. As explained above, the concern here is that the jury interpreted the judge's comments about the *Walker* hearing as his personal opinion about Pierson's credibility. When a judge intimates—or appears to intimate—his opinion about the case to the jury, a defendant's right to a fair trial by an impartial judge is violated. *Id.* at 174-175.

C. In this case, the five factors from *Stevens* militate in favor of finding that the trial court judge's comment created an appearance of partiality against Pierson.

1. The comment at issue essentially told the jury that the judge had discredited Pierson.

The nature of the judicial conduct in this case is, of course, an improper comment. As outlined above, caselaw is clear that judges must avoid making comments that could influence jurors. Specific to this case, for nearly 50 years, precedent from the Court of Appeals has forbade trial court judges from informing jurors about the existence and result of a *Walker* hearing, the rationale being that it will likely appear to the jury that the judge doesn't believe the defendant. That caselaw is sound.

It's also in line with other jurisdictions. In the years after *Jackson v Denno* was decided, courts throughout the country addressed this issue. The decision in *United States v Inman*, 352 F2d 954 (CA 4, 1965), is typical. There, the court briefly stated—as if a contrary conclusion would be unthinkable—that a "judge's ruling [on a pretrial voluntariness hearing] should not be disclosed to the jury by the court or by counsel." *Id*. at 956. Other jurisdictions have held likewise. See, e.g., *United States v Fayette*, 388 F2d 728, 736 (CA 2, 1968) (stating that "the judge's finding that the oral or written confession or incriminating statement was voluntary and otherwise not in violation of constitutional requirements should not be disclosed to the jury by the trial judge or by counsel"); *State v Barber*, 268 NC 509, 510; 151 SE2d 51 (1966) (stating that a trial court's findings "should not be made or referred to in the jury's presence"); *State v Seal*, 83 SD 455, 461; 160 NW2d 643 (1968) (stating that the judge should not "disclos[e] his own finding to the jury"); *Kagebein v State*, 254 Ark 904, 912; 496 SW2d 435 (1973) ("The factual determination of voluntariness made by a court in a Denno hearing should not be disclosed to the jury by either the court or by counsel."); *Ex parte Singleton*, 465 So 2d 443, 446 (Ala, 1985) ("It is improper for a trial judge to disclose to the jury that he made a preliminary determination that a confession was voluntary and, therefore, admissible."); *Freeman v State*, 295 Ga 820, 821-822; 764 SE2d 390 (2014) (holding that the trial court judge's comment that the defendant's statement "was freely and voluntarily given as previously ruled" violated a state statute that prohibits judges from expressing their opinion about a case to the jury). Thus,

our Court of Appeals' jurisprudence on this issue is consistent with courts throughout the country.

Of course, a word should be said about the use of "admissible" in this case rather than "voluntary." Most of the reported decisions deal with cases where the trial court judge told the jury that the statement was "voluntary" rather than "admissible."[8] But this distinction is largely irrelevant. Rather than "voluntary" or "admissible" being critical, it's the usage of "the statement." "I have ruled that *the statement* is admissible" implicitly declares that the statement was in fact made, just as "I have ruled that *the statement* is voluntary" does. Both comments encourage the jurors to take the confession at face value. In short, it's the definitiveness with which the confession is treated that matters, not whether "voluntary" was said.

Also, our Court of Appeals has correctly held that the utterance of "voluntary" isn't crucial. *Kincaid*, 136 Mich App at 215, addressed a situation where defense counsel argued in his opening statement that a police officer had coerced the defendant into making a statement. In response to a prosecution objection, the trial court told the jury that he had already made a ruling that the officer's actions were not improper or unlawful. *Id*. The Court of Appeals found the comment erroneous even though the trial court had not used the word "voluntary," reasoning that the comment had "the

[8] It's worth noting that in one unpublished decision by a panel of the Court of Appeals, which included two future members of this Court, the court held that the trial court erred by telling the jury that the defendant's statement had been deemed "admissible." *People v Michaux*, unpublished per curiam opinion of the Court of Appeals, issued September 12, 1997 (Docket No. 183149) (CORRIGAN, C.J., and MARKEY and MARKMAN, JJ.), p 1.

same kind of prejudicial effect on invading the province of the jury." *Id.* at 215-216. This is the right analysis. The propriety of a judge's comments on a *Walker* hearing don't hinge on whether "voluntary" was said. Rather, it's whether the comments imply the judge's personal opinion about the defendant's credibility, regardless of the precise wording.

What's more, in this case, the trial court judge didn't just say that the statement was "admissible." He also said that the he had "ruled that the defendant was properly advised of his rights . . . ." (119a). Given the context, the jurors would have understood this to mean that the police had properly advised Pierson of his *Miranda* rights. From the judge's remark that he had "ruled" on the matter, the jurors could easily glean that there had been some dispute between the police and Pierson that necessitated a pretrial hearing and that the judge had come down on the side of the police. In other words, the judge believed the police over Pierson. This remark amplified the error.

And the judge's flippant response to the defense objection was the cherry on top. Again, after defense counsel objected, the judge replied, "Fine. Go ahead. It's true. Have a seat." (119a). Basically, sit down and shut up—even though defense counsel's objection was meritorious under Michigan law. Moreover, in the eyes of the jury, "It's true" could only have underscored the judge's comment about the result of the *Walker* hearing. It also implied to the jury that defense counsel was an impediment to them hearing "the truth." In short, the judge compounded the error with his curt response to the objection.

2. The tone of the comment—hostile to the defense—is apparent from the transcript as well as the fact that the comment drew an objection from defense counsel.

Let's first recap the buildup to the comment. The prosecutor was examining Urban on redirect, apparently trying to establish that Urban had not made a mistake by not reading Pierson his *Miranda* rights. (119a). The prosecutor asked Urban to "explain when you give Miranda rights" and Urban began to respond, "Anytime someone's not free to leave." (119a). Defense counsel apparently objected, saying, "Foundation." (119a). The judge then said the comments at issue.

The judge's comments as well as his response to the defense objection exhibited his antagonism toward the defense. It appears that the comments, made in response to a defense objection, were designed to assist the prosecutor, to save him the trouble of going through a particular line of questioning. Most tellingly, the comment drew a defense objection. *Stevens*, 498 Mich at 176. The trial court then only made matters worse with "Fine. Go ahead. It's true. Have a seat." As stated above, this response not only denigrated defense counsel in front of the jury but also suggested that he was obstructing the trial. The judge's exasperation with defense counsel is apparent even on the face of the transcript.

3. The trial court judge's quarrelsome interventions were directed entirely at defense counsel.

The relationship between the trial court judge and defense counsel in this case was, in a word, testy. It began during voir dire. At one point, defense counsel was

apparently probing the socioeconomic differences between one prospective juror and Pierson. Counsel began to ask, "Okay. You probably live in a different neighborhood, may have a different education—" (65a). The judge, though, cut him off: "Well, you know that's not—[defense counsel], you know that's not the law. Let's move on." (65a). It's unclear what "law" the court was referring to, as it seems an entirely appropriate line of inquiry. Later, defense counsel asked one prospective juror about her "general feeling about drugs in the community." (70a). The judge chided counsel: "Let's ask specific questions, okay." (70a). Shortly thereafter, defense counsel was apparently crafting a question about whether one prospective juror would hold it against Pierson if he didn't testify, and the judge again cut him off: "I already covered that." (70a). The judge did not make any similar interruptions during the prosecutor's voir dire.

Things only got worse from there. During his cross-examination of Jackson, defense counsel got her to deny that she had ever told police that Pierson had merely poked his head into the apartment. (91a).[9] On redirect, this sparked a confrontation between the judge and defense counsel:

> Q. You were asked repeatedly by defense counsel whether in your statement to the police you said to the police that Mr. Pierson just poked his head in. Do you remember defense counsel asking you that question repeatedly?
>
> A. Yes, I do.
>
> Q. Have you ever seen the police report?
>
> A. No.
>
> [Defense counsel]: Objection, that's hearsay.

[9] There was apparently some dispute about whether she had said this to police.

> The Court: Well, then I'll strike all of your questions about it.
>
> [Defense counsel]: You can do whatever you want to do but my objection is—
>
> The Court: Okay.
>
> [Defense counsel]: —hearsay.
>
> The Court: All right. Objection is sustained. All of the questions then about the police report and what was said or not said are not in evidence then and you should pay no regard to it.
>
> All right. Go ahead.
>
> [Defense counsel]: So you're instructing the jury to disregard the cross-examination? I'll ask for a mistrial then.
>
> The Court: Do what you want to do.
>
> Ask your next question.
>
> [Defense counsel]: Rule on that. That's my—
>
> The Court: Overruled. [98a.]

After the prosecutor had finished redirect examination, the judge asked if defense counsel had further cross-examination, which provoked another exchange:

> [Defense counsel]: No, you've instructed the jury that my questions—
>
> The Court: Do you have any further questions or not, sir?
>
> [Defense counsel]: I've got plenty of questions, Judge.
>
> The Court: All right. Then ask them but don't make speeches.
>
> [Defense counsel]: I beg your pardon?
>
> The Court: Don't make speeches, ask questions. [98a.]

The judge, though, seemed to later recognize his error. After the prosecutor had asked Urban questions about Jackson's statement (105a), the judge rescinded his previous instruction: "Before [defense counsel] begins his questioning, since the prosecutor has

now placed in evidence the issue of what Ms. Jackson has said to the officer at the scene, my instructions about disregarding those previous questions no longer—no longer applies." (106a).

But then the wheels came off again. Next was the interaction that brought this case before this Court. (119a). After that, the judge interrupted defense counsel's cross-examination of Buffa and chastised him for "niff gnawing":

> Q. So listen to my question because I'm not sure we're connecting here. After you had conversations with the police officers and you came back, you say the statement that Mr. Pierson gave you was consistent with the information that you received from the police officers?
>
> A. It was.
>
> Q. Okay. But before you went and talked to the police officers, you said the statement was inconsistent, correct?
>
> A. With what I had learned as soon as I arrived on the scene.
>
> Q. Is that correct or not? Just—you're not listening to my—am I correct?
>
> The Court: Yes, he is. He answered the question. You said inconsistent. You have to ask him inconsistent with what. So let's not niff-gnaw here. Let's go.
>
> [Defense counsel]: Let's not what? I didn't hear that?
>
> The Court: Niff gnaw. It means make something out of nothing.
>
> [Defense counsel]: Okay. I wasn't familiar with that. [125a-126a.]

Shortly thereafter, another similar interaction occurred. Defense counsel was cross-examining Buffa, asking him about the brevity of his police report:

> Q. So if I—we've talked maybe ten, fifteen minutes. So you could get what I—we've just communicated within a couple paragraphs?

> A. The answer—you asked me a series of questions and I've answered those questions. I don't know how long it would be.
>
> Q. But I just—I just asked you another question you completely ignored. Could you get—
>
> The Court: Stop. Don't do that. Just ask your questions.
>
> [Defense counsel]: Witness—well, would you direct the witness to respond to my question—
>
> The Court: When you stop doing it, I will. Answer his question directly. Don't instruct the witness. Okay. Let's go. [126a-127a.]

The judge's intrusions into the trial were entirely one-sided. The trial court repeatedly demeaned defense counsel in front of the jury, openly suggesting that he was delaying and obfuscating the trial. At no time was the prosecutor similarly treated by the judge.

Also worth noting, one comment by the judge, although perhaps not the smoking gun, is nonetheless telling. After the jury was discharged to begin deliberations at 12:56 p.m., the judge said, "Counsel, please return to the area by 2:00"—i.e., be back in an hour. (154a). "By 2:00?" defense counsel asked, likely with incredulity. (154a). In other words, the judge believed that this was an easy case that shouldn't bother the jury for too long. As the exchanges between the judge and defense counsel would seem to suggest, the judge's opinion colored the way he presided over the trial, leading him to continually scold and hurry defense counsel. The judge wasn't subtle, and undoubtedly the jurors picked up on it.

4. Considered within the context of the trial, the trial court judge's comment was significant.

Context is important in this case. This was a brief, two-day trial. The questions that the jurors were tasked with resolving came down to witness credibility—was Pierson telling the truth or were Jackson and the police? This, of course, is the sole province of the jury. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). This was not a long, complicated trial where the jury needed clarification on scientific testimony. The judge's comments were entirely unhelpful and unenlightening, and they could only have served to disrupt and usurp the function of the jury.

This would be a different case if Pierson had never contested that he had made the confessions. For instance, in *Corbett*, 97 Mich App at 441, the trial court told the jury that it had determined that the defendant's statement was voluntary and therefore admissible. The defendant, though, did not dispute that he had made the statement. *Id*. at 442. The court acknowledged *Gilbert* and its progeny and held that the comment was erroneous, but it concluded that reversal was not required since it was undisputed that the defendant had in fact made the statement. *Id*. at 443. This reasoning is sensible. Although it's certainly better to leave any such comments unsaid, in a case where the defendant does not dispute making the confession, the potential for creating an appearance of partiality is likely to be minimal.

5. The "curative" instruction was not a cure-all.

United States Supreme Court Justice Robert Jackson's take on curative instructions is as true today as it was 70 years ago: "The naive assumption that

prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction." *Krulewitch v United States*, 336 US 440, 453; 69 S Ct 716; 93 L Ed 790 (1949) (JACKSON, J., concurring) (internal citation omitted). In this case, in the instructions read to the jury at the end of the trial, the judge of course included the standard instruction imploring the jury not to pay attention to him. (151a). But this instruction was far from a panacea. The judge did not give the jury a contemporaneous curative instruction, which, is preferred. *Stevens*, 498 Mich at 177. Instead, the standard instruction, packed in the middle of a litany of other instructions, was given roughly four hours after the comments at issue. (119a, 150a-151a).[10] The instruction was in no way explicitly connected to the comments. And a generic instruction given at the end of trial will not cure the appearance of judicial partiality where the judge's conduct has been particularly egregious. *Stevens*, 498 Mich at 190. Here, as stated above, courts have repeatedly recognized that comments about a *Walker* hearing are extremely prejudicial. And the judge in this case aggravated his error through his ill-tempered response to defense counsel's objection. Simply put, the standard instruction could not fix the problems the judge created in this case. See also *Skowronski*, 61 Mich App at 78 (holding that an improper comment about a *Walker* hearing "is not cured by a later charge that the jury is the sole arbiter of the credibility and weight to be assigned to the statements").

[10] Also worth noting, the judge entreated the jurors to stay awake during his reading of the instructions, recognizing that "[w]hen we're read to, pretty soon our eyes get heavy and we drop off to sleep . . . ." (150a).

What's more, the judge's instructions at the end of trial did not specifically tell the jurors how they should consider the testimony on Pierson's alleged confessions. As stated in *Gilbert*, 55 Mich App at 172-173, the jury should have been instructed that it was up to them to decide whether the confessions were made and whether they were true. See also M Crim JI 4.1.[11] Without such instructions, the jurors were not explicitly informed that they were empowered to find—contrary to the findings of the judge—that "the statements" had not in fact been made.

D. Considering the totality of the circumstances, the trial court's comment likely created the appearance of partiality against Pierson.

Looking at the totality of the circumstances in this case, the comment at issue likely created the appearance of partiality against Pierson. Our Court of Appeals, as well as courts throughout the country, have correctly recognized that when a judge tells the jury about the existence and result of a *Walker* hearing, the average juror will reasonably interpret this as the judge's personal opinion about the defendant's

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[11] That instruction states:

> (1) The prosecution has introduced evidence of a statement that it claims the defendant made.
>
> (2) Before you may consider such an out-of-court statement against the defendant, you must first find that the defendant actually made the statement as given to you.
>
> (3) If you find that the defendant did make the statement, you may give the statement whatever weight you think it deserves. In deciding this, you should think about how and when the statement was made, and about all the other evidence in the case. You may consider the statement in deciding the facts of the case . . . .

credibility. And here, the judge's tone and demeanor seemed to indicate exasperation with the defense, which only heightened the effect of the error. In concert with the judge's other ill-considered remarks, which he reserved exclusively for defense counsel, the judge's hostility toward the defense is palpable from the transcripts. Further, given that this case presented a credibility contest between Pierson and the prosecution witnesses, the comment was especially prejudicial. The "curative" instruction—given at the very end of the trial and not explicitly connected to the comment at issue—was anything but. Pierson was denied his right to a fair trial by an impartial judge, and this Court must reverse.

II. The error in this case cannot be deemed harmless because it was structural.

When a trial court judge pierces the veil of impartiality, the error is structural and requires automatic reversal. *Stevens*, 498 Mich at 178. "The right to an impartial judge is so fundamental that without this basic protection, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id*. at 179 (quotation marks, alterations, and citation omitted). Therefore, this Court must reverse and remand this case for a new trial.

RELIEF REQUESTED

The Court should issue an opinion in this case. As stated above, this Court's recent decision in *Stevens* governs how trial court judges must comport themselves during trial in order to avoid creating the appearance of partiality. The conduct at issue in *Stevens*, though—the trial court judge aggressively questioning and denigrating defense witnesses, 498 Mich at 180-190—was outrageous. As explored above, however, even less egregious or even unintentional conduct can have a profound effect on jurors. There needs to be another data point in this Court's judicial-impartiality jurisprudence. That is, trial court judges need to be cautioned that all their conduct is subject to review, not only conduct as egregious as the judge's in *Stevens*.

And based on undersigned counsel's experience, instances of partiality are, unfortunately, not rare. It's all too common to hear attorneys joke about certain judges as the "second prosecutor" or complain that a trial was "2 on 1." This Court needs to send a clear message that any conduct that creates an appearance of partiality—not only conduct as bad as in *Stevens*—is subject to review, and reversal is on the table.

Moreover, with the published opinions of the Court of Appeals in this case, the law in this area has become muddled. For instance, *Gilbert* established a rule of automatic reversal. The lead opinion here, though, endorses harmless error analysis. Further, as explained above, the issue in this case needs to be examined in accordance with *Stevens*, which the Court of Appeals made no mention of. Perhaps most importantly, given JUDGE MARKEY's brief and opaque concurrence, it's not at all clear

exactly what propositions garnered a 2-1 majority. This Court needs to clarify this issue as well as expand its judicial-impartiality jurisprudence.

Therefore, the defense respectfully requests that this Court issue an opinion reversing and remanding this case for a new trial.

Respectfully submitted,

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