

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

JAMAL DEVONTA BENNETT

Defendant-Appellant

Supreme Court No.

Court of Appeals No. 328759

Lower Court No. 15-00869-FC

KENT COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

CHRISTINE A. PAGAC P 67095

Attorney for Defendant-Appellant

APPLICATION FOR LEAVE TO APPEAL (AFTER REMAND)

STATE APPELLATE DEFENDER OFFICE

BY: CHRISTINE A. PAGAC P 67095

Assistant Defender

3300 Penobscot Building

645 Griswold

Detroit, Michigan 48226

(313) 256-9833

TABLE OF CONTENTS

Table Of Authorities ii

Judgment Appealed From And Relief Sought.....iv

Statement of Questions Presented v

Introduction: Why Relief Should Be Granted 1

Statement Of Facts 4

I. The Admission Of Irrelevant Music Videos Containing Violent And Profane Lyrics Were Inadmissible Prejudicial Hearsay Which Violated Mr. Bennett’s Right To A Fair Trial 15

ii. The Admissions Of Irrelevant Testimony Regarding Mr. Bennett And His Friends’ Gang Affiliations Were Inadmissible, Prejudicial Hearsay Under Michigan Rules Of Evidence 24

Summary And Relief And Request For Oral Argument 30

Table Of Authorities

Cases

<i>Bruton v United States</i> , 391 US 123 (1968)	15
<i>Hannah v State</i> , 420 Md 339; 23 A3d 192 (2011).....	18
<i>Michelson v United States</i> , 335 US 469, 69 S Ct 213, 93 L Ed 168 (1948)	22
<i>Napuche v Liquor Control Comm</i> , 336 Mich 398 (1953)	15
<i>People v Burns</i> , 494 Mich 104 (2013)	13
<i>People v Bynum</i> , 496 Mich 610; 852 NW2d 570 (2014)	25
<i>People v Lukity</i> , 460 Mich 484 (1999)	15
<i>People v Sierb</i> , 456 Mich 519 (1998)	15
<i>People v Snyder</i> , 462 Mich 38 (2000)	15
<i>People v Starr</i> , 457 Mich 490 (1998)	15
<i>People v Wells</i> , 102 Mich App 122; 302 NW2d 196 (1980)	26
<i>State v Cheeseboro</i> , 346 SC 526; 552 SE2d 300 (2001).....	18, 19
<i>United States v Hendrix</i> , 52 F3d 326 (CA 6 1995)	26
<i>United States v Irvin</i> , 87 F3d 860 (CA 7 1996)	26
<i>United States v Newsom</i> , 452 F3d 593 (CA 6 2006)	27
<i>United States v Stuckey</i> , 253 Fed Appx 468 (CA 6 2007).....	18
<i>Utz v Commonwealth</i> , 28 Va App 411; 505 SE2d 380 (1998).....	25

Constitutions

Const 1963, art 1, § 20	15
US Const amends VI; XIV	15

Rules

MRE 401	16, 25
MRE 403	16, 25

MRE 404(a) 13, 22, 23, 29

Judgment Appealed From And Relief Sought

Defendant-Appellant Jamal Bennett appeals from the April 17, 2018, per curiam Court of Appeals decision affirming his conviction. (Appendix A) This application is being filed within 56 days of the Court of Appeals' decision as required by MCR 7.305(C)(2). The opinion was rendered in Mr. Bennett's timely appeal of right from his jury trial, after this Court's January 24, 2018 opinion in case number 155115 remanding the case to the Court of Appeals after his appeal from the Court of Appeals November 27, 2016 opinion.

Mr. Bennett seeks review because the decision is clearly erroneous, will cause material injustice, and conflicts with a Supreme Court decision and other Michigan Court of Appeals decisions, MCR 7.305(B)(5). The issues raised also involve legal principles of major significance to the state's jurisprudence, MCR 7.305(B)(3). Mr. Bennett asks this Court to grant this application for leave to appeal or order other appropriate relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Christine A. Pagac
CHRISTINE A. PAGAC (P67095)
Assistant Defender
Suite 3300 Penobscot Building
645 Griswold
Detroit, MI 48226
1 (313) 256 9833

Date: June 12, 2018

Statement of Questions Presented

- I. Was The Admission Of Irrelevant Music Videos Containing Violent And Profane Lyrics Inadmissible Prejudicial Hearsay Which Violated Mr. Bennett's Right To A Fair Trial?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- II. Were The Admissions, Over Defendant's Objection, Of Irrelevant Testimony Regarding Mr. Bennett And His Friends' Gang Affiliations Inadmissible, Prejudicial Hearsay Under Michigan Rules Of Evidence That Violated His Right To A Fair Trial?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

Introduction: Why Relief Should Be Granted

Defendant-Appellant Jamal Devonta Bennett appeals from his convictions for murder in the second degree and felony firearm after a jury trial before Judge Trusock of the Kent County Circuit Court. (Judgment of Sentence) Mr. Bennett was convicted of shooting and killing Derecko Martin after a large fight broke out at a birthday party both men were attending. Numerous witnesses testified that Mr. Bennett only joined the fight after learning that his friends were being severely beat up by a group of individuals led by Derecko Martin and Mr. Martin's uncle, Donnell Martin. As such, Mr. Bennett argued in trial that he honestly, and reasonably, believed that the use of deadly force was required to counter the threat posed by Mr. Martin, and the jury was so instructed.

In order to disprove Mr. Bennett's self-defense claims, the Government placed enormous emphasis on two issues throughout trial – first, Mr. Bennett's presence in two rap videos that had been posted on YouTube, and second, Mr. Bennett's past affiliation with the Bloods criminal gang. The prosecution never once claimed that the rap lyrics were written in relation or reference to the fight. In the music videos, Mr. Bennett and his friends rapped extensively about drugs, sex, and gun violence. The court also admitted testimony detailing Mr. Bennett's affiliation with the Bloods criminal gang. The prosecutor initially claimed that he needed to solicit gang affiliation testimony to explain how the Bloods' "no snitching" policy might have affected the truthfulness of certain witnesses' testimony, the Government failed to introduce any testimony related to the Bloods' "no snitching policy" or its internal gang culture.

The Court of Appeals agreed that the admission of both the rap videos and the gang membership evidence was error, but found both errors to be harmless. Mr. Bennett appealed, and this Court remanded to the Court of Appeals to adequately explain why it found the errors to be

harmless, and directed the lower court to pay particular attention to particular facts. On remand the Court of Appeals again found the errors to be harmless.

The Court of Appeals erred in its determination that these errors did not require the grant of a new trial. The Kent County court is repeatedly, and consistently, permitting the admission of rap videos and will continue to do so as long as it keeps being told the error is “harmless” in unpublished, non-binding decisions. Leave should be granted for this reason alone, but this evidence was not harmless. This highly prejudicial evidence was improperly admitted to simply remind the jury, at every opportunity, that Mr. Bennett was nothing more than a violent gangbanger who could not possibly act in self-defense or defense of others. Witnesses were asked if they were in gangs. The rap videos were highlighted, and lyrics extensively relied on in the prosecution closing to show that Mr. Bennett was not acting to protect his friend who was being beaten by multiple men, but rather a violent gangbanger who could not possibly be acting within the law. As the prosecutor told the jury in closing arguments, “[Mr. Bennett and his friends] c[a]me over with the mentality that you saw in those videos [...] I’m using [the videos] to show what the defendant’s intentions were [...]”. (T IV, p 39) The jury was then instructed that it could use the rap videos as 404(b) evidence to prove “motive, opportunity, intent, preparation, plan, scheme, system of doing an act, knowledge, identity or absence of a mistake or accident or *modus operandi*.”

The evidentiary errors deprived Mr. Bennett of his constitutional right to a fair trial, resulting in his conviction and sentence to a minimum of 30 years in prison. Mr. Bennett seeks review because the decision is clearly erroneous, will cause material injustice, and conflicts with a Supreme Court decision and other Michigan Court of Appeals decisions, MCR 7.305(B)(5). The issues raised also involve legal principles of major significance to the state’s jurisprudence, MCR 7.305(B)(3). This Court should grant leave and order that he be given a new trial during which he

will have the opportunity to prove to the jury that he acted in defense of others without the prosecution being allowed to rely upon highly prejudicial and inadmissible evidence.

Mr. Bennett asks this Court to grant this application for leave to appeal or order other appropriate relief.

Statement Of Facts

On March 16, 2013, a birthday party for Phillip Williams and his younger cousin Tayvonne Williams was held at an apartment in Grand Rapids, Michigan. (T II, p 192) Phillip Williams invited his father, Phillip Williams, his cousin, Jo Harris, his brother, Derecko Martin, as well as his uncle, Donnell Martin, among others. (T II, pp 192-198) Tayvonne Williams, in turn, invited Jamal Bennett, also known as ‘K.O’, Anthony Bennett, Jolan Hines, Juan Colon, Omar Lyons, Sammie Butler-Coleman, and other friends to the party. (T III, p 42)

Many of the friends Tayvonne Williams invited to the party – including Jamal Bennett – were known to be affiliated with the Bloods criminal gang. (T III, p 19) Jolan Hines, Juan Colon, and Omar Lyons were all carrying firearms on their person when they arrived at the party. (T III, p 44) Some of the guests invited by Phillip Williams – referred to in trial as the “older group” – were also reputed to be members of the Gangster Disciples criminal gang. (T III, p 18) Despite this, in the initial period of the party, the two groups of invitees celebrated peacefully. (T III, p 59) Marijuana and alcohol were used by multiple attendees. (T III, p 59)

During the celebration, some of Tayvonne Williams’ friends – referred to as the “younger group” in trial – started flashing firearms while posing for photographs. (T III, p 59) Upon seeing these firearms, Donnell Martin spoke to his nephew, Phillip Williams, about the firearms and expressed his concern about having them at the party. (T II, p 165) In response, Phillip Williams told Donnell Martin that he would have his cousin, Tayvonne Williams, speak with the younger group about the issue. (T II, p 165) Tayvonne Williams testified that he told his friends that “my people see y’all with these guns [...] ya’ll gotta put ‘em up, or y’all gonna have to leave.” (T III, p 60) Tayvonne indicated that after this warning his friends stopped flashing their guns. (T III, p 60)

Despite the younger men agreeing to put away their guns, Donnell Martin pulled Tayvonne Williams into the hall and demanded he and his friends leave the apartment. (T III, p 60) After

Donnell Martin asked Tayvonne Williams and his friends to leave, Tayvonne recounted that Juan Colon told Tayvonne, “look, bro we [go]nna go. I ain’t tryin’ to – we ain’t gonna disrespect your fam.” (T III, p 60) Donnell, Tayvonne testified, “took it the wrong way.” (T III, p 47) Over the next few minutes, Donnell and Juan engaged in a heated argument, during which Donnell claimed Juan held and threatened him with his gun. (T II, p 166) This account was corroborated by Donnell Martin’s nephew, Phillip Williams. (T II, p 204) Other witnesses did not recall Juan holding his gun during the confrontation, however. Anthony Bennett testified that he “didn’t see a gun” during Donnell and Juan’s argument. (T III, p 24) Likewise, Tayvonne Williams, who testified that he “was right there” during the initial disagreement, denied that Juan was holding a gun at this point. (T III, p 47)

According to Donnell Martin and Phillip Williams, at a certain point in the altercation, Juan Colon raised his gun up and pointed it at Donnell Martin. (T II, pp 166, 204) Both Anthony Bennett and Tayvonne Williams, however, testified that Juan never raised his gun at Donnell. (T III, pp 24, 47) Everyone agreed, however, that Donnell Martin punched Juan Colon “ass in the face” with his right that sent Colon “through the wall.” (T II, pp 166, 205; T III, p 104)

After Donnell Martin punched Juan Colon, a shot was fired from Juan Colon’s gun, which caused many of the party goers to scatter across the apartment. (T II, p 197) Jolan Hines, in response to Donnell Martin’s physical altercation with Juan Colon, began to pistol whip and fight Donnell Martin. (T III, p 72) It was at this point that Derecko Martin began to fight Juan Colon and Jolan Hines with his uncle, Donnell. (T III, p 79) Donnell Martin claims that both he and Derecko were trying to take the guns away from the two younger men. (T II, p 187) During this period, another shot was fired. (T III, p 108) Jolan Hines, Sammy Butler-Coleman noticed, was “in the corner [...] getting just beat up, Beat up crazy.” (T III, p 109)

Jamal Bennett was not involved in the initial altercation between Donnell Martin and Juan Colon. (T III, p 117) After Donnell Martin punched Juan Colon's head into the wall, Sammy Butler-Coleman testified that he told Mr. Bennett, "Juan's in the hallway, and somethin' may happen to him. Check your boy, or your boy's in the hallway about to get beat up or some - - something like that." (T III, p 119) In response, Jamal Bennett "and some people rushed into the hallway" where the fight was taking place. (T III, p 119) A few minutes later, while the fight continued, Mr. Butler-Coleman attempted to get Jamal to leave with him. (T III, p 109) Mr. Butler-Coleman recollected, "he [Jamal] like 'naw, naw, they on Juju. they on Juju.' And they just beating him, beating him, beating him, beating him." (T III, p 109)

According to Sammy Butler-Coleman, Derecko Martin was holding a pistol at this point in the altercation. (T III, pp 108, 130) Anthony Bennett likewise testified that one of the older party goers was holding a gun. (T III, p 27) Donnell Martin's testimony indicated that he and Derecko Martin initially were "tussling with [Juan Colon] to get the gun away from him" before Donnell starting fighting with someone else who "hit [him] from behind" (T II, p 167). Sammy Butler-Coleman additionally testified that Derecko Martin, while fighting Juan Colon, dropped the gun onto the floor. (T III, p 108)

It was at this point that Jamal Bennett picked up the stray weapon and warned Mr. Martin to, "get 'em off. Get 'em off. Or I'm gonna shoot." (T III, p 109). Numerous witnesses testified that they either saw or heard multiple gunshots go off in the room. (T II, pp 167, 207; T III, p 110) Some testified that the shooter was wearing a red jacket or hoodie. (T II, pp 29, 85) Others testified that they saw Jamal Bennett shoot Derecko Martin multiple times. (T II, p 143; T III, p 57) After the shooting, Clarence Berry testified that Jamal Bennett entered his car before both drove away. (T II, p 149)

Gang Affiliation Evidence

Both the prosecution and the defense anticipated testimony related to the gang affiliations of Jamal Bennett and his friends to be introduced during trial. (T I, pp 100-101). After jury selection, defense counsel preemptively objected to the introduction of testimony related to the younger group's gang affiliations on the basis that the testimony was irrelevant. (T I, pp 100-101). In response, the prosecution argued the gang testimony evidence was relevant, in part, because:

The defense of others claim is going to be made, defending a guy named Jolan Hines who is also a Blood member. It's going to be important for jurors to understand the relation that those two individuals had, and the relationship that the defendant, Mr. Bennett had with a number of the witness who can only be categorized as adverse to the prosecutor's case who are Bloods Gang members, because they - they've - forsworn snitching, for lack of a better word, and assisting police officers in the investigation of a crime.

(T I, pp 100-102).

Throughout the trial, the prosecution repeatedly inquired into the gang affiliations of Jamal Bennett and his friends. During Anthony Bennett's direct examination, the prosecutor solicited testimony that Jamal Bennett, Juan Colon, Javarius Johnson were affiliated with the Bloods gang. (T III, pp 19-20). While Anthony Bennett, upon the prosecutor's insistence, speculated other individuals at the party were also members of the Bloods gang, he admitted that he was only "guessing [that] they're with the same gang or a similar gang." (T III, p 20) Anthony Bennett also testified that, to the best of his knowledge, members of the Bloods traditionally wore the color red. (T III, p 21) Later in questioning, Anthony Bennett affirmed the defense counsel's assertion that "nothing ever developed between" the older members at the party, who Mr. Bennett claimed were associated with the Gangster Disciples, and the Bloods members. (T III, p 23)

After Anthony Bennett's examination ended, the trial judge asked the jurors if they had any questions for the witness. (T III, p 30) The following exchange ensued:

THE COURT: All right. Questions from the jurors?

UNIDENTIFIED JUROR: Yes, Your Honor.

THE COURT: All right. Tracy? Do you recall what other people were wearing at the party?

[Anthony Bennett]: No.

THE COURT: Were – were there a lot of people wearing red, associated with the Bloods, that you were talking about?

[Anthony Bennett]: No. It wasn't like a obvious connection that everybody that was with the Bloods were wearing red, because I'm pretty sure they weren't.

(T III, p 30). Soon after, the prosecution again revisited the gang affiliations of Jamal Bennett and his friends during Tayvonne Williams' direct examination. (T III, pp 45-47). During questioning, Tayvonne Williams identified that Jamal Bennett, Jolan Hines, Clarence Berry, and Javarius Johnson were members of the Bloods. (T III, p 46-47). Later on, Mr. Williams, looking at photos from the party, explained that Jamal Bennett and his friends were making hand gestures in certain photos that resembled gang signs traditionally used by the Bloods. (T III, pp 52-53). Despite this, during cross examination, Tayvonne Williams flatly rejected the notion that the fight had anything to do with gangs:

[Q] This was not a gang thing, was it?

[A] Nope

[Q] It wasn't a gang fight, gang confrontation, nothing. Right?

[A] Nope.

[Q] And all these pictures that they showed you earlier, they were all taken before the fight happened, correct?

[A] Right.

(T III, p 66)

During Sammie Butler-Coleman's direct examination, the prosecution again elicited testimony that identified Jamal Bennet, Jolan Hines, and Javarius Johnson as members of the Bloods. (T III, pp 106-107). Likewise, while questioning Jolan Hines, the prosecutor again solicited testimony indicating that Jolan Hines and Juan Colon were members of the Bloods gang.

(T III, pp 134, 135, 158, 159). In one exchange, the prosecutor and Jolan Hines sparred over the activities of the Bloods.

[Q] Okay. And you were affiliated with the Bloods.

[A] Yes, I was. I didn't deny that, no.

[Q] Okay. And what do you guys do as members of the bloods? I mean, do you guys take- take up charitable donations or something like that?

[A] Yeah. Why you's givin' one?

(T III, p 159). Lastly, during Juan Colon's direct examination, the prosecution once more solicited testimony regarding the younger group's gang affiliations. (T III, p 163) While Juan Colon refused to testify to Mr. Bennett's gang affiliation, he did admit that he, personally, was a member of the Bloods. (T III, p 163)

Despite soliciting numerous admissions by various individuals that Jamal Bennett and many of his friends were affiliated with the Bloods, the prosecution, at no point, argued to the jury that these affiliations made certain witnesses' statements less credible. No reference was made, as the prosecutor previously claimed would be, to the Bloods' no snitching policy. Likewise, no argument was made to the jury suggesting Mr. Bennett's motive for the shooting had anything to do with his gang loyalties.

The Rap Videos

Detective Mike Nagel, a detective with the Grand Rapids Police Department, testified that while investigating the shootings at 3241 Marshall Avenue he discovered two rap music videos featuring Jamal Bennett and his friends. The first video, titled "Shooters," had been uploaded to video-sharing website YouTube on January 6, 2013. (T III, p 87). Detective Nagel testified that he did not know when "Shooters" was made, who had directed it, or who had written the lyrics the boys were singing in the video. (T III, p 95). The second video, titled "Cherry Bandana," had been uploaded on March 13, 2014. (T III, 91) Similarly, Detective Nagel testified that he did not know

when “Cherry Bandana” was made, who had directed it, or who had written the lyrics the boys were singing in the videos. (T III, p 95) Based upon Detective Nagel’s testimony, the Government moved to introduce both videos into evidence. Despite defense counsel’s repeated objections, the trial court referred to its pre-trial motion ruling on the videos and entered the videos as exhibits 58 and 59. (T I, p 102; T III, pp 87, 92; 4/24/15 Tr, p 11)

During questioning, testimony suggested that the “Shooters” video likely was made as early as two or three years before the shooting occurred on March 16, 2013. (T III, p 149) Whereas the prosecutor attempted to claim the “Shooters” video was made months before the shooting, the witness upon whose testimony that claim was supported admitted in trial that he “couldn’t honestly say” if that recollection was correct. (T III, p 190) No witnesses offered testimony regarding when the “Cherry Bandana” video was filmed. In both videos, many of the young boys present at the March 16, 2013, party, including Jamal Bennett, rapped about “drinking and smoking”, along with possessing and using firearms. (T III, p 140) At no point in the trial did the prosecution allege that any of the lyrics in “Shooters” or “Cherry Bandana” were referential to the shooting that occurred on March 16, 2013. In closing, the prosecution highlighted the following lyrics from “Shooters” and “Cherry Bandana” to demonstrate the “gang banger,” shoot first ask questions later, lifestyle Jamal Bennett and his friends lived.

- “Posted in this wall with this pistol in my draws. Pistol in his pants. All my n-words are convicts ‘cuz we’re known to break the law. We’re some shooters. We’ll shoot ya. We got guns longer than rulers. We got n-words running like pumas. Chop’s up like tuna. (T IV, p 39)
- All my n-words are shooters. We’ll flat line your starting five. Fuck what you came with, I came with a baby nine. Don’t fuck around with fuck arounds. If you fuck around in my state, we’ll bust you and touch you, get found in the Great Lakes. I hit my n-word Juju like, let me hold the .38. I’m reckless and ruthless. Run in your house when you think

you're safe. Murder case. That's a murder case. Bet I won't make no mistake. (T IV, p 40)

- I ain't with that hoe shit, so stop lookin' like you're on something. I'll pull out that big thing and start bustin'. Don't fuck around with dumb- dumb- dumb 'cuz I'll come with that whole drum. (T IV, p 40)
- I walk slow with a little wobble 'cuz I got this .40 on my hip. Fuck around and get duct tape, that AK will stop your heart, make you free up in that one place, with a dumbass look on your face. Red flag in my pocket, guns shoot up like rockets, East side my n-words, are all violent. One call to my riders. It'll get ugly. Got my bottle, got my burner. (T IV, p 42)

The last three lyrics were all attributed to Jamal Bennett by the prosecution. (T III, p 93)

According to Jolan Hines, one of the young men featured in the rap videos, the videos were mere imitations of music videos that they had seen popular rappers produce. (T III, pp 146-148) As Mr. Hines testified in the trial:

Basically what I'm saying - - we was kids. This was — this was not even close to before [the shooting] went down [...] what kids our age don't rap about having guns and smokin' weed and all that. Like, come on, now. That's — that's common, so you can't say that's out of character for us to rap about things like that even before that. You know what I'm sayin'?

Later on in his testimony, Mr. Hines further explained the exaggerated nature of the lyrics in the rap videos.

[Q] Okay. So if you repeat a rapper's verse, are you doing — does that mean you're doing it?

[A] No, not at all.

[...]

[Q] You don't have to commit the act before you sing about it, do you? [A] No. You don't. That just imitating 'em [rappers].

[...]

[Q] Now, in the second video [...] there are lyrics attributed to you saying something about a 100 round drum for a gun. Right?

[A] Yes.

[Q] Do you have a gun with a hundred rounds in it? [A] I never seen a gun with a hundred rounds in it. [...]

[Q] Did you own one?

[A] No.

[Q] Did you ever shoot one?

[A] No.

[...]

[Q] None of [the raps] are based on truth, is it? [A] No.

(T III, 146-150)

The Government extensively relied on the rap videos to make its case against Jamal Bennett. In his closing statement, the prosecutor told the jury that they could infer the defendant's intentions as it related to his self-defense claim from the videos. "Objectively, the defendant and his buddies came over with three guns", the prosecutor remarked. "They come over with the mentality that you saw in those videos [...] I'm using [the videos] to show what the defendant's intentions were [...]". (T IV, p 39) The prosecutor subsequently read through the lyrics of both videos while offering his interpretations of the lyrics to the jury. (T IV, pp 38-42) After this, excerpts from the rap videos were played for the jury. (T IV, pp 46-47). In his closing rebuttal, the prosecutor again revisited this theme, arguing "the people in these videos, they are living that lifestyle [portrayed in the videos.]" (T IV, p 57)

Jury Instructions & Verdict

After closing arguments, the trial judge instructed the jury about the law of defense of others and self-defense. (T IV, p 67) A handout with those instructions was also distributed to the jurors. (T IV, p 67). As part of the instructions, the fourth element of lawful defense of another - "the defendant must have honestly and reasonably believed [...] that what he did was immediately necessary" - was properly given. (T IV, pp 68-69). A separate instruction was given by the judge to the jury regarding how they should evaluate the rap videos. The instruction, in part, read, "you have heard evidence through a couple of videos, that was introduced to show the defendant committed inappropriate behavior or conduct of which he is not on trial." (T IV, p 63) Continuing on, the judge explained that the rap videos could only be used by the jury as proof of "motive,

opportunity, intent, preparation, plan, scheme, system of doing an act, knowledge, identity or absence of a mistake or accident or *modus operandi*.” (T IV, p 63)

The jury found Jamal Bennett guilty of second degree murder and felony firearm possession. (T IV, p 77) The trial court sentenced him to a minimum of 360 months in prison, maximum of 100 years in prison for the second degree homicide murder charge, plus a mandatory two years for felony firearm. (Judgment of Sentence)

Procedural History

The Court of Appeals affirmed Mr. Bennett’s convictions in a November 17, 2016, which Mr. Bennett appealed to this Court. In an order dated January 24, 2016, this Court vacated that part of the opinion addressing whether the erroneous admission of the music video and gang-affiliation evidence was harmless and remanded to the Court of Appeals for reconsideration of those issues.

In its order, this Court stated that the Court of Appeals “failed to adequately explain why the erroneous admission of the music videos was harmless” under the standard in *People v Burns*, 494 Mich 104 (2013). This Court particularly directed the Court of Appeals to consider the prosecution’s admission that the killing was not gang-related, the defendant’s admission that he was the shooter, and the fact that the prosecution bore the burden of disproving the self-defense and defense of others beyond a reasonable doubt. The Court further ordered the Court of Appeals to consider, as unpreserved error, the evidence of gang-affiliation taking into account those same considerations. Finally, the Court directed the Court of Appeals to consider whether MRE 404(a) was violated.

Without requesting any additional briefing or argument, the Court of Appeals again affirmed Mr. Bennett’s convictions in its opinion dated April 17, 2018. The court’s analysis does

not include the fact that the jury was told that it could use the videos to decide, among other things, Mr. Bennett's intent that evening.

I. The Admission Of Irrelevant Music Videos Containing Violent And Profane Lyrics Were Inadmissible Prejudicial Hearsay Which Violated Mr. Bennett's Right To A Fair Trial

Issue Preservation/Standard of Review

Trial counsel repeatedly objected to the admission of the two rap music videos. (T I, p 102; T III, pp 87, 92; Motion, April 24, 2015) The decision whether to admit evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494 (1998). Whether a rule of evidence or statute precludes admissibility of the evidence, is a question of law which is reviewed de novo. *People v Sierb*, 456 Mich 519, 522 (1998). It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488 (1999). Whether viewed as a preserved nonconstitutional issue, or a nonpreserved constitutional issue, the defendant has the burden of establishing that it is more probable than not that the erroneous admission of this evidence undermines the reliability of the verdict, i.e. that it was outcome determinative error. See *People v Snyder*, 462 Mich 38, 45 (2000).

A. The Music Videos were Irrelevant, and therefore Inadmissible, under Michigan's Rules of Evidence

Mr. Bennett was denied his right to a fair trial when, over his objection, his jury watched inflammatory rap videos glorifying drug use, drinking, sex and violence, which the jury was instructed they could use to among other things consider to determine his intent. (Exhs 58, 59) All defendants enjoy a due process right to a fair trial undeterred by inadmissible and unfairly prejudicial evidence. US Const amends VI; XIV; Const 1963, art 1, § 20. An important element of a fair trial is that only relevant and competent evidence is introduced against the accused. *Bruton v United States*, 391 US 123, 131 (1968). This right requires a fair trial of the issues involved in the particular case and a determination of disputed questions of fact on the basis of only properly admitted evidence. *Napuche v Liquor Control Comm*, 336 Mich 398, 403 (1953).

Michigan law defines relevant evidence as evidence that has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Even if evidence is deemed relevant, it may still not be admitted if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” MRE 403.

Here, the rap videos presented by the prosecution were neither relevant nor adequately probative. Both videos showed Mr. Bennett and his friends rapping generally about guns, sex, and drug use. Neither video revealed any details about the shooting that occurred on March 16, 2013. (T IV, pp 39-42) The videos admitted in Mr. Bennett’s trial only referred to violence and gun use in a general manner, without any specific reference to this case. Indeed, multiple witnesses testified that “the films were made two years before the shooting, when the men featured in the video were between the ages of 13 and 15. (T III, pp 96, 140). Furthermore, numerous individuals testified that the lyrics in the video did not relate to any real events but were mere imitations of songs performed by famous rappers. Jolan Hines – who appeared in both videos – remarked, “basically what I’m saying - - we was kids. This was – this was not even close to before [the shooting] went down [...] what kids our age don’t rap about having guns and smokin’ weed and all that. Like, come on, now.” (T III, pp 146-150) In another exchange, Mr. Hines testified that he had never actually used, nor even seen, many of the guns he rapped about using in the music videos. (T III, pp 146-150)

Second, the videos featured many people other than the defendant singing. In Mr. Bennett’s trial, the prosecutor read lyrics rapped by individuals other than Mr. Bennett to the jury. (T IV, p 39) By doing so, the prosecutor, in effect, urged the jury to judge Mr. Bennett’s defense of others claim on the violent raps other individuals made rather than on his own actions. The jury

was instructed that it could consider the videos to determine, among other things, motive and intent. (T IV, p 63) Even accepting that the jury knew to only consider Mr. Bennett's verses in the videos when determining intent, the actual probative value of these verses were minimal. The only link the prosecutor attempted to draw between the rap videos and the events of March 16, 2013 was a reference Mr. Bennett made to having a "40" on his hip. (T IV, p 42) While the Government claimed this was a reference to a 40 caliber gun, testimony indicated Mr. Bennett may have been instead referring to 40 oz malt liquor bottle. (T III, p 142) Furthermore, testimony revealed that Mr. Bennett had not brought a gun to the party and had picked up the weapon he shot Mr. Martin with from the floor after it had been dropped by another person. (T III, p 109) The reference to the videos was not fleeting; the prosecutor argued the videos in closing and highlighted particularly lyrics to be sure the jury got his point.

While the rap videos offered little probative value to the jury, the prejudicial value of the videos was enormous. The videos presented in Mr. Bennett's trial showed young black men rapping about gun violence, sex, and drug use. For example, one portion of the videos highlighted by the prosecution featured the following rap:

Posted on this wall with this pistol in my draws. Pistol in his pants.
 All my n-words are convicts 'cuz we're known to break the law.
 We're some shooters. We'll shoot ya. We got guns longer than
 rulers. We got n-words running like pumas. Chop 'em up like tuna.

(T IV, p 39) Similarly, during Jolan Hines' direct examination, the prosecutor highlighted for the jury lyrics that Mr. Hines' allegedly rapped in the videos:

[Q] Is that your lyric, "Fuck around and I'll take you outta this shit?"

[A] Yeah.

[Q] And there you're — have both of your arms up, and it looks like you're making a motion like you're squeezing triggers.

[Q] I'll stop at 3:18 here. What did you say there?

[A] But like I said, I was drunk that day. I don't even know what I was sayin'. As you can see - like -

[Q] What - - what - - there, did you mention having a gun in a hundred round drum, and all you let it do is bang? Is that what you said?

[A] Yes, I did.

(T III, p 141). For a jury, the images of young black men threatening to “chop [their victims] up like tuna” or emptying hundred drum rounds into their victims was likely both upsetting and highly memorable. As such, the jury’s ability to fairly, and impartially, judge Mr. Bennett’s guilt was severely compromised.

In *United States v Stuckey*, the Sixth Circuit found a defendant’s rap lyrics relevant because the “lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the street—precisely what the Government accused [the defendant] of doing [...]” *Stuckey*, 253 Fed Appx 468, 482 (CA 6 2007). Because, as the *Stuckey* court noted, “a juror, after hearing profane, offensive, and violent rap lyrics written by a defendant, might conclude that the defendant is a bad person”, the prejudicial value of Mr. Bennett’s rap videos far outweighed any probative value they may have presented. *Stuckey*, 253 Fed Appx at 483.

Many courts across the country have drawn similar conclusions and reversed defendants’ prior convictions on the basis of rap lyrics being improperly admitted by trial courts. In *Hannah v State*, the Maryland Court of Appeals found the trial court’s admission of the defendant’s rap lyrics to be clear and harmful error because the rap lyrics “were not offered as evidence of his knowledge or intent” but instead “were probative of no issue other than the issue of whether he has a propensity for violence”. *Hannah*, 420 Md 339, 355; 23 A3d 192, 201 (2011). Likewise, in *State v Cheeseboro*, the Supreme Court of South Carolina ruled that the admission of the defendant’s rap lyrics was clear error due to the lyrics’ minimal probative value and highly prejudicial nature. *State*

v Cheeseboro, 346 SC 526; 552 SE2d 300 (2001). In *Cheeseboro*, the defendant's rap lyrics included the following passage:

Ruckus, I believe you're a perpetrator, gold and platinum hater,
cause me and J.D. is a force like Dark Vador. Who do you despise
a strong enterprise? Do the greed in your eyes lead you to tell lies?
Victimize me and Jermain Dupri, don't let me see or else there'll be
death in this industry. Want let go, set it fo' sho', I get hype like
Mike put yo' blood on the dance flo'. Blow fo' blow, toe to toe, with
that no mo'. Like the 4th of July, I spray fire in the sky. If I hear
your voice, better run like horses or like metamorphis, turn all y'all
to corpses. No fingerprints or evidence at *350 your residence.
Fools leave clues, all I leave is a blood pool. Ten murder cases, why
the sad faces? Cause when I skipped town, I left a trail [of] bodies
on the ground. Your whole click ain't nothing but tricks, bitch
pulling sticks, grown men sucking dicks. No one bring ruckus like
King Justice, but toughest the So So Def most corruptest.

Id. at 312. Despite the defendant being charged with shooting three victims, two of whom were killed, the rap lyrics were deemed irrelevant. Importantly, the Supreme Court of South Carolina noted:

We find these references too vague in context to support the admission of this evidence. The minimal probative value of this document is far outweighed by its unfair prejudicial impact as evidence of appellant's bad character, i.e. his propensity for violence in general ... [T]hese lyrics contain only general references glorifying violence. Accordingly, the Ruckus song should have been excluded.

Id. at 313.

The Court of Appeals stated that there was “no evidence” that Mr. Bennett was acting in self-defense or defense of others, and further asserts that there is no evidence that Mr. Bennett held that belief. That assertion is untrue. First, the record shows that Mr. Bennett only became involved in the fight after he heard his best friends were being beaten up. (T III, p 119) Multiple witnesses also testified that Mr. Bennett's two friends - Juan Colon and Jolan Hines - were losing their respective fights badly at the time Mr. Bennett joined the fight. (T II, p 205; T III, p 109) As

Sammy Butler-Coleman recalled, Jolan Hines was “in the corner [...] getting just beat up, Beat up crazy.” Furthermore, the record suggests that Derecko Martin had taken possession of a firearm during the fight. Both Sammy Butler-Coleman and Anthony Bennett testified that they remembered one of the older members of the group holding a gun. (T III, pp 27, 108, 130)

Combining those statements with Donnell Martin’s testimony that only he and Derecko Martin had stayed back to fight the youth, (T II, p 168), and that Derecko had been trying to get the gun away from Juan Colon, a reasonable inference could be made that Derecko had taken possession of the firearm for a brief period. Lastly, and perhaps most importantly, testimony from Sammy Butler-Coleman indicated that Mr. Bennett chose not to leave the premises and guarantee his own personal safety out of fear that his friends would be severely injured. (T III, p 109) In fact, Mr. Butler-Coleman testified that Mr. Bennett warned Mr. Martin to “get ‘em off [Jolan Hines]. Get ‘em off. Or I’m gonna shoot” before shooting. (T III, p 109) The Court of Appeals finds that this testimony does not establish an imminent threat to Mr. Hines because Mr. Bennett had managed to get the gun away from Mr. Martin, and because Mr. Bennett fired the gun more than once.

In so concluding, the Court does not appear to be applying the correct standard: that the prosecution must disprove the claim of self-defense or defense of others beyond a reasonable doubt. The evidence clearly established that one of the younger men was being beaten “like crazy,” that Mr. Bennett said he was acting to protect him, and that he was doing so with a gun he had gained temporary possession of from Mr. Martin. There was no evidence that the danger had ended – in fact, the testimony suggested that the beating and brawl was ongoing. The fact that multiple gunshots were fired is not proof that a person is not acting in self-defense (indeed, the media is rife with reports of police officers who have shot people multiple times when they are defending themselves or others).

The Court of Appeals conclusion that the error in admitting the music videos was not outcome determinative based on the “strong evidence” of guilt is patently incorrect. No evidence other than the videos was presented by the Government demonstrating that Mr. Bennett did not subjectively believe that Derecko Martin posed a severe threat to his friends. The Government used these videos to fill the evidentiary gap and defeat Mr. Bennett’s defense of others claim, arguing that the music videos demonstrated that Mr. Bennett did not act defensively because his way of life glorified the use of violence and guns. As the prosecutor told the jury in closing arguments, “[Mr. Bennett and his friends] c[a]me over with the mentality that you saw in those videos [...] I’m using [the videos] to show what the defendant’s intentions were [...]”. (T IV, p 39) The videos, of course, did not speak to Mr. Bennett’s beliefs about self-defense, or to his recollections of the night of March 16, 2013. They simply did not offer the jury any insight into Mr. Bennett’s mental state at the time of the shooting or his appraisal of the risk Derecko Martin posed to himself and his friends that night. Unfortunately, the jury was specifically instructed otherwise.

What the videos did offer the jury was a glimpse into a lifestyle that many jurors likely found disturbing and inflammatory. By repeatedly making the jury listen to Mr. Bennett and his friends - all teenagers at the time - rap about gun use, gang life, and sexual violence, the prosecution effectively asked the jury to assess Mr. Bennett’s defense of others claim not on the events of March 16, 2013 but on whether or not they approved of his music. Without the videos, a reasonable jury easily could have found that Mr. Bennett honestly, and reasonably, believed he needed to use deadly force to protect his friends. Because the videos encouraged the jurors to substitute their judgements of events of March 16, 2013 for their own feelings about Mr. Bennett’s lifestyle, their admission into the trial should be viewed as reversible error.

Finally, in *Michelson v United States*, the Supreme Court of the United States wrote:

The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and **to so overpersuade them as to prejudge one with a bad general record** and deny him a fair opportunity to defend against a particular charge.

Michelson v United States, 335 US 469, 475-76, 69 S Ct 213, 218, 93 L Ed 168 (1948)(citations omitted)(emphasis added). Here, the admission of the music videos led to that exact type of prejudgement the Court warned about so many years ago. Accordingly, this Court should find the admissions of the music videos to have been unduly prejudicial and erroneous.

The Court of Appeals concluded that the admission of neither the videos nor the gang affiliation evidence addressed in the second issue violated MRE 404(a), applying both *Bynum* and *Michelson*. The Court seemed to tie that conclusion to the fact that no expert testified, because all the prosecutor did was to engage in “mere argument.” (Opn. p 9) The prosecutor, however, explicitly argued that Mr. Bennet came over “with the mentality that you saw in those videos,” that he was “living that lifestyle,” the type of lifestyle that someone in those videos who was a member of the Bloods might live. (T IV, pp 39, 57) The Court of Appeals asserts that this type of evidence is, somehow, less prejudicial if there is no expert testimony. The testimony here, however, was worse: it was not confined to a single witness, it permeated the case. The videos were played repeatedly. Many witnesses were asked whether they were in a gang. The prosecution’s entire theory of guilt, of intent, was premised specifically on the videos, and more insidiously on the utterly irrelevant gang affiliation.

In *Bynum*, this Court particularly cautioned on the limits with which a witness can opine about gang membership, due to the danger that it is being used as improper character evidence. What the prosecutor did here, by trying to tie the videos and gang membership to Mr. Bennett’s

conduct on this occasion - to show his intent -- is no different than what happened in *Bynum*: The videos and gang affiliation evidence were irrelevant, utterly unrelated to the shooting, and so could only be evidence of bad character used contrary to MRE 404(a). The jury, however, was instructed that they could use that irrelevant and inflammatory evidence to find Mr. Bennett's intent on that day.

II. The Admissions Of Irrelevant Testimony Regarding Mr. Bennett And His Friends' Gang Affiliations Were Inadmissible, Prejudicial Hearsay Under Michigan Rules Of Evidence

Issue Preservation/Standard of Review

This Court determined that the error of admitting gang affiliation evidence was unpreserved.

Summary of Argument

As multiple witnesses testified, the March 16, 2013 fight was not initiated, nor exacerbated, by the participants' gang affiliations or loyalties. (T III, pp 23, 52-53) Indeed, the Government's theory of the case did not characterize the events of March 16, 2013 as gang-related. No reference was made in the prosecutor's opening or closing statements to Mr. Bennett's affiliation with the Bloods. Likewise, no testimony was offered by the prosecutor alleging that Mr. Bennett's affiliation, or his friends' affiliation, with the Bloods gang played a role in the fight. Instead, the only justification proffered by the Government for the admission of gang affiliation testimony was that Mr. Bennett's affiliation with the Bloods gang helped explain his friends' reluctance to cooperate with, and testify for, the prosecution. (T I, p 100) Outside of the presence of the jury, the prosecutor argued that, "certain aspects of being a [B]lood" forbade Jamal Bennett and his friends from "snitching [...] and assisting police officers in the investigation of this crime." (T I, 101)

Under this pretense, the prosecution repeatedly asked multiple witnesses if they, and Jamal Bennett, were members of the Blood Gang. (T III, pp 19-21, 46, 52-53, 106, 134-135, 158, 159, 163-165). Upon receiving confirmation from each witness, however, the prosecution conveniently avoided the follow up inquiries- *e.g.* asking about the Bloods' culture regarding "snitches" – that it claimed required gang affiliation testimony in the first place. Not once, in opening statements, witness examination, or closing statements, did the prosecution allege that the gang affiliations of

Mr. Bennett's friends tainted their willingness to testify truthfully at trial. Similarly, the words "bloods", "gang", or "snitching" were not mentioned once in either opening or closing statements.

What the jury heard time and time again, without context or further development, was that Mr. Bennett and his friends were members of one of America's most notorious criminal gangs. (T III, pp 19-21, 46, 52-53, 106, 134-135, 158, 159, 163-165) The prejudicial impact of this testimony was enormous. While the jury learned nothing from knowing Mr. Bennett was a member of the Bloods – the prosecution did not, at any point, attempt to link the killing of Derecko Martin to Mr. Bennett's gang affiliation - the gang testimony served to remind the jury that Mr. Bennett was a member of a gang that many jurors' likely had negative feelings about.

The admission of this testimony was error. Michigan law defines relevant evidence as evidence that has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Even if the evidence is deemed relevant, it still should not be admitted under Michigan law if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403.

This Court has held that "the introduction of evidence regarding a defendant's gang membership is relevant and can assist the trier of fact to understand the evidence when there is **fact evidence that the crime at issue is gang-related.**" *People v Bynum*, 496 Mich 610, 625-26; 852 NW2d 570, 579 (2014)(emphasis added)(internal quotations omitted).

This requirement of a close nexus between the crime at hand and gang activity exists largely out of recognition that "a juror might associate a defendant with such an affiliation as a person or bad character or someone prone to aggressive or violent behavior." *Utz v Commonwealth*, 28 Va App 411, 420; 505 SE2d 380, 384 (1998). As the United State Court of Appeals for the Seventh Circuit explained:

“Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. Guilt by association is a genuine concern whenever gang evidence is admitted.”

United States v Irvin, 87 F3d 860, 865-66 (CA 7 1996). Other courts have similarly expressed concern that gang testimony may be introduced “to appeal to jurors' prejudices about the young black men, rather than to their disinterested judgment of [the defendant's] guilt or innocence of the charged crimes.” *United States v Hendrix*, 52 F3d 326 (CA 6 1995); *see also Irvin*, 87 F3d at 865.

In *Michigan v Wells*, the Court of Appeals held that gang affiliation evidence was irrelevant because the Government had failed to prove, in part, that the defendant's actions were related to his putative affiliation with a gang. *People v Wells*, 102 Mich App 122; 302 NW2d 196 (1980). In *Wells*, the defendant had been accused of murdering three victims of a rival gang. Assessing the credibility of the Government's claim that gang affiliation testimony was relevant, the court first noted that the evidence did not sufficiently demonstrate the defendant was a member of one of the two warring gangs. *Id.* at 129. Assuming, however, that the evidence demonstrated the defendant's affiliation with one of the gangs, the court found that there was no proof that the gangs' past conflicts “had any bearing whatsoever on his conduct on the morning of [the alleged murder].” *Id.* As such, the court held that the gang evidence was irrelevant.

In *United States v Newsom*, the Court of Appeals for the Sixth Circuit found a defendant's gang tattoos offered no probative value and therefore were irrelevant. As the court noted:

The details of Newsom's tattoos were simply not probative regarding the sole issue in this case—whether Newsom possessed the firearm found under the driver's seat of the SUV on November 23, 2003. Simply put, the fact that Newsom had a tattoo of a gun-wielding man or the words “thug life” on his arm did not make it any more likely that he possessed the particular gun charged in the indictment on the day in question.

US v Newsom, 452 F3d 593, 603 (CA 6 2006).

The testimony related to Mr. Bennett and his friends' gang affiliations was irrelevant. While the prosecution, in response to defense counsel's objection, claimed the gang affiliations of Mr. Bennett and his friends would help explain why Mr. Bennett's friends were reluctant to testify in court, the prosecution never once addressed that issue to the jury during trial. (T I, p 100) No testimony was solicited - nor argument presented - by the Government explaining what the Bloods gang was, what it believed, what its purported no snitchin policy meant, or how it might have influenced the testimony of certain witnesses. Even when the prosecutor broached the issue of witness credibility, he avoided mentioning those witnesses' affiliation with the Bloods, instead arguing that Mr. Bennett's friends were "only worried about protecting their own skin and their buddies' skin." (T IV, p 32) No mention of the Bloods' "no snitchin" policy was made by the prosecution during opening statements, witness examination, or closing statements. Similarly, no link was drawn between Mr. Bennett's gang affiliation and his friends' purportedly biased testimony throughout the trial. Simply put, Mr. Bennett's gang affiliation was never constructively used by the Government to further the legal case against Mr. Bennett.

Furthermore, the prosecution presented no evidence linking the shooting on March 16, 2013 to any type of gang activity. Instead, the trial record reflects multiple witnesses denying any the events that night had anything to do with gang violence. (T III, p 23, T III, p 66) Most importantly, no evidence was presented at trial demonstrating that Jamal Bennett shot Derecko Martin out of gang loyalty or a gang animus he had against anyone at the party. As such, Michigan's Rules of Evidence, this Court's jurisprudence, and basic notions of fairness dictate the gang affiliation testimony solicited by the prosecution be deemed erroneous and irrelevant.

While the prosecution did not use the gang affiliation testimony to advance, or strengthen, any of its legal arguments, it skillfully relied on the testimony to bias the jury against Mr. Bennett and his friends. Central to the outcome of Mr. Bennett's trial was the jury's determination of the objective reasonability and subjective honesty of his use of deadly force against Derecko Martin in defense of his friends.

Multiple witnesses testified that the period during which Derecko Martin was shot was highly chaotic. (T I, p 172; T III, p 122) Multiple witnesses also testified that Derecko Martin, while fighting with Mr. Bennett's friends, at one point gained possession of a handgun. (T I, p187; T III, p 129) Testimony also clearly indicated that Jamal Bennett only joined the altercation after being told his best friends were being beaten up by Derecko Martin and Donnell Martin, and that Jamal Bennett did not enter the room with a gun. (T III, pp 72, 119, 122)

Without hearing the gang affiliation testimony, a reasonable jury could have easily found that Jamal Bennett - walking into a fight where his best friends was being badly beaten up by a man with a gun - had a reasonable reason to believe his friends' lives were in danger and that the use of deadly force was required. Likewise, without the gang affiliation testimony, a reasonable jury easily could have concluded that Jamal Bennett honestly believed deadly force was required to protect his friends. At minimum, a reasonable jury certainly could have concluded that the prosecution had not eliminated both possibilities beyond a reasonable doubt. Michigan law, along with basic notions of fairness and due process, prohibits such character assassination in the criminal justice system. Because the prosecution's presentation of gang affiliation testimony caused undue prejudice to Mr. Bennett without offering any meaningful probative value to the jury, this Court should find its admission to have been reversible error and grant a new trial. The Court of Appeals failure to do so rests on the same faulty conclusion: that there is no evidence to support a claim of

self-defense or defense of others. Likewise, the conclusion that this evidence did not violate MRE 404(a) is error for the same reason identified above, in connection with the discussion of Issue I.

Summary And Relief And Request For Oral Argument

For the reasons stated above, Defendant-Appellant asks this Honorable Court to either grant this application for leave to appeal, or any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Christine A. Pagac

BY: _____

CHRISTINE A. PAGAC (P67095)

Assistant Defender

3300 Penobscot Building

645 Griswold

Detroit, Michigan 48226

(313) 256-9833

Date: June 12, 2018