NO. 18-____

In the Supreme Court of the United States

LLOYD GENE BEAM,

Petitioner,

–v–

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the new standard from *People v. Stevens*, 498 Mich. 162, 869 N.W.2d 233 (2015), for determining whether a trial judge exhibited improper partiality, a decision by the Michigan Supreme Court interpreting the federal Constitution?

2. When a state court of last resort interprets the federal Constitution and, later, in a collateral review of a state conviction, has cause to determine whether that interpretation is a "new rule" deserving retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989), must that state court follow the guidelines set by the United States Supreme Court in *Teague* and its progeny for applying the new rule retroactively?

3. Should this Court extend the holding in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) and require, as a matter of constitutional law, state collateral review courts to give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding?

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PETITION FOR WRIT OF CERTIORARI

Petitioner requests that this Court issue a writ of certiorari to reverse and remand the decisions below.

OPINIONS BELOW

The Order of the Michigan Supreme Court, dated October 30, 2018, denying a petition for review is included below at App.1a. The Order of the Michigan Court of Appeals, dated January 25, 2018 is included below at App.2a. The Order and Opinion of the Michigan Third Circuit Court, Criminal Division, dated February 27, 2017, denying Defendant's Motion for Relief from Judgment is included below at App.3a.

JURISDICTION

This Court has jurisdiction to entertain this Petition for Writ of Certiorari under 28 U.S.C. § 1257(a). On October 30, 2018, the Michigan Supreme Court denied leave to appeal.

CONSTITUTIONAL PROVISIONS

Petitioner seeks a writ of certiorari under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

- **U.S. Const. amend. V**

  > No person shall be . . . deprived of life, liberty, or property, without due process of law.

- **U.S. Const. amend. XIV**

  > [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

- **MCR 6.508(D)(2)**

Michigan Court Rule 6.508(D)(2), which applies to collateral appeals filed under Michigan procedural law, is also implicated in Beam's case:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion [for relief from judgment] . . . (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision.

STATEMENT OF THE CASE

A. Introduction

In 1987, Petitioner Lloyd Beam (Beam) was charged with first degree murder and assault with intent to commit murder, and committing a felony with a firearm under Michigan law. After two trials, he was convicted of all three offenses and sentenced to prison where he still is incarcerated.

On direct appeal to the Michigan Court of Appeals, Beam argued that the trial judge at the second trial injected himself into the proceedings to the extent that the jury clearly understood the judge was not impartial. Beam argued that the trial judge denied his right to a fair trial by improperly assisting the prosecution. Under the then-existing standard for measuring improper judicial partiality, the Michigan appeals courts denied relief on that issue.

In 2017, Beam sought collateral relief from his convictions also on the basis of improper judicial partiality. But by this time the Michigan Supreme Court had set a different standard for determining whether a judge's participation at trial denied a defendant due process. The Michigan Supreme Court set this new standard as its interpretation of the due process clauses in the federal Constitution.

The lower state court denied relief on Beams motion for collateral relief, flatly claiming that, based upon federal law, "newly promulgated rules of criminal procedure do not apply retroactively to cases on collat-

eral review." (App.5a). With form orders that did not reveal the courts' analyses, the Michigan appellate courts denied leave to appeal. (App.2a) (App.1a).

Beam seeks a writ of certiorari from those decisions.

B. Statements of Facts

On April 3, 1987, three men were shot at a drug house on Hazlett Street in Detroit. Mennen Hollenquest died. Michael McAdory and John Frazier were wounded. Ultimately, the prosecutor charged Lloyd Beam and his brother Richard Beam with First Degree Murder, two counts of Assault with Intent to Commit Murder and Felony Firearm. Preliminary Exam (Lloyd Beam), 3. Richard Beam went into hiding, but the police apprehended Lloyd. On June 20, 1988, in Recorder's Court for the City of Detroit, Judge George Crockett presiding, a jury found Lloyd Beam guilty as charged. But Judge Crockett granted a motion for new trial based upon juror tampering. Trial Transcript (TT), 10/13/88, 5. Therefore, in October 1988, after Judge Crockett recused himself, Judge Terrance Boyle conducted a second trial. *Id.*, 4-5.[1] The jury convicted Lloyd Beam as charged. TT, 10/21/88, 888.

Before trial, the prosecutor said, if Beam did not testify, the prosecutor intended to introduce Beam's testimony from his first trial as substantive evidence at his second trial. Judge Boyle ruled Beam's prior testimony would be admissible and the transcripts self-authenticating. TT. 10/13/88, 9-12. But the pros-

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[1] The facts stated below are from the second trial unless otherwise indicated.

ecutor agreed not to present one part of Beam's former testimony.

At the first trial, the prosecutor had asked Beam whether he had been aware of the pending charges before his arrest. In response, Beam had stated that his parole officer told him he was wanted and told Beam to turn himself into police. Before the second trial, the prosecutor agreed to redact Beam's reference to his parole officer advising him he was wanted. And the judge said he would order the prosecutor to redact that part. *Id.*, 12-15.

Also before trial, the judge ruled that defense counsel could not impeach complainant McAdory by eliciting that he was currently on probation for two drug crimes. *Id.*, 120; TT. 10/14/88, 257-260.

At trial, Michael McAdory testified: He worked at the Hazlett house as a lookout (looking for police) for John Frazier who was the drug dealer there. TT. 10/13/88, 139. But other residents at the house said McAdory was the one dealing drugs. TT., 10/17/88, 356-357 (Judy Glenn), 400 (Johnny Frazier). McAdory said that, two weeks before the shooting, Richard Beam, Lloyd Beam, and another black male came to the Hazlett house. They told Hollenquest, Frazier, and McAdory that only they (the Beams) would sell drugs out of the house. And they said, "Leave. If you are still here in two weeks, we will blow your mickey off." The Beams took a shotgun and a .22 caliber rifle from the house. There were no other guns in the house and McAdory never saw a 9mm semi-automatic pistol in the house. TT. 10/13/88, 164-175.

Two weeks later, on April 3, 1987, at 9:30 pm, Mennen Hollenquest, Michael McAdory, and John

Frazier, together with Julie Glenn and a woman named Cynthia, were at the Hazlett Street house. The front door of the house was nailed shut. The only way to enter the house was from the side door and, then, one had to pass through a metal gate that was kept locked. *Id.*, 145-151. The layout of the first floor is depicted in a police sketch. *Id.*, 231; Trial Exhibit 1.

McAdory was upstairs serving as a lookout. He heard the metal gate open and Hollenquest called him and Frazier downstairs. Both went downstairs. McAdory saw Richard Beam and Hollenquest standing in the living room. He saw Lloyd Beam (whose nickname was "Peanut") standing in the dining room with a revolver. McAdory saw a third black man with a gun in the kitchen. Richard Beam said to McAdory, "What are you doing here, bitch?" and shot Hollenquest in the head with a .357 revolver. As McAdory was ducking towards the floor, Richard Beam shot him in the side of the head. As McAdory was ducking he saw Lloyd Beam shoot Frazier in the jaw. McAdory heard five or more shots. He claimed that no one else had gun. TT. 10/13/88, 150-164, 168.[2]

Ten minutes later, the police arrived and took McAdory to the hospital. TT. 10/14/88, 178. The police found a 9 mm semi-automatic pistol under a jacket on the couch. It contained a live round but apparently had not been fired. (The court elicited from the evidence technician that the 9 mm gun was found fully loaded. TT., 10/14/88, 223.) The police found a .22 caliber rifle under a mattress upstairs. The rifle had a round

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[2] McAdory absconded from the trial before the defense could cross exam him. Later, he returned for cross examination. TT. 10/13/88, 254, 256.

in the chamber ready to fire and an ejected casing was found. *Id.*, 198-202. The police found shot gun shells. But they found no spent rounds from the rifle. TT., 10/17/88, 198-224. The first responding police officer found spent casings near Hollenquest's body. Only an automatic or semi-automatic weapon could have produced the spent casings.[3] TT., 10/18/88, 506-507, 509-510, 542-543. And yet, McAdory had testified that the Beams and the third man with them had only revolvers. TT., 10/13/88, 158, 160.

The police found 7 suspected bullet holes in the walls and ceiling of the living room. TT. 10/14/88, 210-213. On the wall, they found a pattern of holes apparently from a shotgun. *Id.*, 213. The shotgun pattern appeared to be fresh. *Id.*, 249. Julie Glenn who regularly cleaned the house did not remember seeing that damage to the wall before April 3, 1988. TT., 10/17/88, 355. Yet, McAdory and Frazier both testified that Lloyd Beam, Richard Beam, and the alleged other black male only used pistols and no one had a shotgun. TT., 10/13/88, 152-163; TT., 10/17/88, 384-387.

Either in a statement to police or at hearings before trial, McAdory had either denied the presence of the rifle in the house or left the rifle out of his statement. He admitted his denial of the presence of the rifle was false. TT., 10/17/88, 267-272.

The policeman, who first came to the scene after the shooting, testified that McAdory said that "Richie

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[3] A firearms expert testified that the 9 mm gun ejects casings, but that it was found with 26 cartridges in the magazine and was inoperable. TT., 10/18/88, 535-537.

and Peanut" shot him. The policeman said Frazier told him that "Richard and his brother" shot him. But the policeman did not put that in his police report. TT., 10/18/88, 479, 484, 491.

JUDY GLENN testified: She was upstairs at the Hazlett house during the shooting. She said that McAdory was not a lookout for Frazier's drug business. It was McAdory's drug business. She said that, before the day of the shooting, Hollenquest and McAdory had put guns in the attic. TT., 10/17/88, 356-358.

On the day of the shooting, Glenn only heard Richard Beam's voice downstairs. She did not see or hear Lloyd Beam. *Id.* 375.

Glenn testified that, after she heard shots, Frazier came upstairs and told her he had been shot. She said he was not excited or upset. But, then, the court took over questioning, purported to lay a foundation, and, over defense objection, ruled Frazier's statement to Glenn was permitted as an excited utterance. Frazier told Glen that "Peanut and Richie Rich" shot him, *id.*, 339, 347-350, and, then, Glenn left the house to call the police. *Id.*, 340.

After the shooting, Barbara Hicks came to the house to buy drugs. After talking with Frazier, Hicks went to a payphone to call the police. The police arrived about 15 minutes later. *Id.*, 323-325.

JOHNNY FRAZIER testified: Before the shooting, he was upstairs and heard Richard Beam downstairs calling him a "bitch." Frazier went downstairs and saw Hollenquest, McAdory, and Richard Beam. (Frazier said McAdory was not upstairs. And Frazier never saw a third black male.) Richard shot at the ceiling and

told them all to lie down. Frazier lay down; McAdory sat down. Richard motioned for McAdory to open the gate. McAdory went towards the kitchen and Lloyd Beam came out of the kitchen and moved towards his brother. Lloyd Beam shot Hollenquest in the head and then shot Frazier in the arm. (But that night in the hospital, Frazier told the police that "Rick" (Richard Beam) shot him. He mentioned no other names. TT., 10/19/88, 578-580.) Frazier heard another shot and McAdory fell on him. McAdory was shot in the eye. Frazier then lost consciousness. He heard only three shots. TT., 10/17/88, 382-387, 397, 428, 430. At the first trial, Frazier testified that Lloyd shot all three persons. He admitted that was false, because he did not know who shot McAdory. *Id.*, 416.

Frazier claimed that, two weeks before the shooting, Lloyd Beam and another black male came to the Hazlett house. Lloyd wanted to work with Frazier selling drugs out of the house. He wanted McAdory to stop selling drugs there. Lloyd took a shotgun, a carbine, and some money and left. Lloyd did not say he would kill them if they were not gone in two weeks. TT., 10/17/88, 399-403, 442.

Cross examining Frazier, the trial judge elicited from Frazier an alleged new motive for the alleged assault by the Beams: Before the shooting, Frazier did not know that the Beams held animosity towards him and the others at the house. The shooting was a surprise. Before he was shot, he asked the Beams why they were doing it. They said it was because Frazier, McAdory, and Hollenquest had shot up the Beams' mother's house. But Frazier testified that "Mark", the

drug supplier who was McAdory's boss[4], did that. *Id.*, 451-452.

Frazier said that, a week after Lloyd took the shotgun, "Mark" gave McAdory the 9 mm semi-automatic gun. On the day of the shooting, thirty minutes before Richard Beam arrived, someone said to bring the gun downstairs. Before the day of the shooting, someone brought over a .32 pistol for Hollenquest. There was an Uzi in the attic. TT., 10/1788, 409, 432-433, 437-438, 443.

The police had to arrest Frazier to force him to testify at the first trial. He did not want to testify, because he was afraid he would incriminate himself. TT., 10/17/88, 419.

A FORENSIC PATHOLOGIST in the Medical Examiner's office testified about the autopsy of Hollenquest. He said there was no evidence of close firing of 2 feet or less. He said the shooter could have been six or eight feet away. TT., 10/18/88, 470-472.

The prosecutor read various parts of Lloyd Beam's testimony from the first trial. In Beam's direct testimony, Beam stated as follows:

On April 3, 1988, his brother Richard asked Lloyd to drop Richard off at Richard's girlfriend's house on Northlawn Street, one street over from Hazlett. Lloyd had planned to pick up his own girlfriend, but agreed to drop Richard off. Lloyd had no weapon and he saw none on Richard. Near Richard's girlfriend's house, Richard told Lloyd to turn down Hazlett, because

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[4] McAdory denied he had worked for "Mark" or even seen or heard of him. TT., 10/19/88, 594.

Richard wanted to go to this guy's house. Richard told him to stop in front of the Hazlett house. Richard told Lloyd to wait in the car, because he would just be in and out. So, Lloyd waited in the car. TT., 10/18/88, 553-555 and trial exhibit 8 (Beam's testimony from first trial).

Lloyd waited in the car for about a half hour. Then, Lloyd got out of the car to learn why Richard was taking so long. Lloyd knocked on the door of the house and McAdory opened it. Lloyd went through the doorway and then through the gate which was open. He asked McAdory whether his brother was there and McAdory said, "Yeah. Come in." Suddenly, Lloyd heard shots. McAdory rushed into the house but Lloyd just stayed at the bottom of the steps before the kitchen. *Id.*, 555-558. (Lloyd saw a handle sticking out of McAdory's pants that looked like a gun. 10/19/88, 635, 672. Lloyd heard more than two gunshots after McAdory went back into the house. *Id.*, 675.) Lloyd never saw what went on in the house and does not know what happened during the shooting. TT., 10/18/88, 563-565.

After the gunshots stopped, Lloyd called for Richard. Richard said, "What's up?" Lloyd said, "Come on, man, let's get the fuck out of here." They both ran[5] to the car and left. (Richard told Lloyd that the other men in the house had tried to rush him with guns. Richard said he had to shoot his way out. TT., 10/19/88, 640-641.) Lloyd was not involved in the

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[5] Live at the trial, Lloyd testified that, at the first trial, he said he "went," not "ran," out of the house. TT., 10/19/88, 662.

shooting; he does not know what occurred in the house. *Id.*, 558-559.

Two weeks before April 3, 1988, Lloyd went to the Hazlett house alone to pick up his shotgun. Only Frazier and Lloyd Beam were there. About one month before that, Lloyd had loaned his shotgun to Frazier who was considering purchasing it. When Frazier did not buy it, Lloyd came over to pick it up. Frazier brought the gun out to Lloyd who was in his car. Lloyd never forcibly took the gun or made any threats. TT., 10/19/88, 656-660, 679.

Then, even though the prosecutor had agreed not to introduce the following testimony of Beam from his first trial, the prosecutor nonetheless did so. The prosecutor asked whether Beam moved his residence after the shooting. And the prosecutor read Beam's answer as:

> A. I had been staying with my father, you know, and when he told me that the police had went to my mother's house, I called someone and they told me about it. And he was telling me they was looking for me for triple homicide. Well, he instructed me to come in.

Then, the prosecutor read the follow-up: "Did you go where the police couldn't find 'ya?" The prosecutor read the answer in the transcript: "Yes." TT., 10/18/88 561-562.

At the second trial, Lloyd Beam testified live that he did not go to the police, because, since he had done nothing wrong, he saw no need to talk to the police. TT. 10/19/88, 642-644. He testified that he had answered, "No" at the first trial to the question,

"Did you go where the police couldn't find 'ya?" *Id.*, 645-647.

At the conclusion of the prosecutor's case in chief, the defense moved for a directed verdict on the charge of first degree murder. The court denied the motion. TT., 10/19/88, 572-573.

PATRICIA MARSHALL was a friend of Richard Beam, McAdory, Frazier and Hollenquest. All of the latter persons were friendly with each other. Before the shooting, Marshall would go the Hazeltt house about twice a week and talk to McAdory, Frazier and Hollenquest. (McAdory testified that he only knew Marshall's face, not her personally, and never saw Marshall inside the house. TT., 10/19/16, 623.) About three or four days before the shooting she had been with all those persons and with Richard Beam, at the Hazlett house. They all acted friendly towards each other. McAdory told Marshall that "Peanut" had been to the house. "Peanut" had said, he was going to let them "roll this little bit of whatever, but when I come back y'all gotta leave." McAdory did not say that "Peanut" or anyone else had threatened him. TT., 10/19/88, 587-590. (McAdory testified that he never told Marshall about the incident with "Peanut" and that Richard Beam never came to the house between the incident two weeks before the shooting and the day of the shooting. TT., 10/19/16, 624.)

The jury found Lloyd Beam guilty of first degree murder, two counts of assault with intent to murder, and felony firearm. *Id.*, 888.

Beam filed a Motion for New Trial which included the following arguments: (1) the judge improperly assisted the prosecution by questioning witnesses to

bring out damaging testimony, (2) the judge improperly prohibited defense counsel from cross examining McAdory about the three drug charges lodged against him (and the dismissal and plea bargains that resolved them) after Lloyd Beam was charged but before McAdory gave his statement to police incriminating Lloyd Beam, (3) the judge improperly allowed the prosecution to introduce as substantive evidence Beam's testimony from the first trial without establishing the foundation required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Motion for New Trial. The judge denied the motion. Sentencing Transcript (ST), 909.

The judge sentenced Beam to natural life for first degree murder, 30-50 years for each count of assault with intent to murder, all concurrent with each other but consecutive to the 2-year sentence imposed for felony firearm. ST, 914-915.

C. Procedural History

1. Direct Appeal

After his second trial, Lloyd Beam filed an appeal of right to the Michigan Court of Appeals which included the following arguments: (1) the trial judge violated Beam's right to confront witnesses by precluding cross examination of McAdory regarding his three drug charges to show his bias; (2) the trial judge denied Beam a fair trial by repeatedly interjecting himself into the trial and showing partiality towards the prosecution; (3) the prosecutor violated due process by eliciting that Beam was identified by a mug shot from a prior conviction; (4) the court erred by instructing the jury they could communicate with the court officer without Beam or his attorney present; (5) the prosecutor

told the jury their verdict need not be unanimous on the facts; (6) the court allowed the prosecutor to put on a rebuttal witness on a collateral matter, (7) defense counsel was ineffective by not objecting to the errors in issues 3, 5, and 6 above and by eliciting from Frazier inadmissible hearsay that the Beams supposedly planned to murder the complainants, and; (8) the prosecutor's failure to inform the defense of the existence and location of res gestae witnesses denied Beam a fair trial. Appellant's Brief on Appeal.

In his direct appeal, Beam raised the issue of the trial judge's improper partiality. But Beam raised the issue under the then-existing vague standard for determining judicial partiality: "The test for reversal is the following, from *People v. Smith*, 64 Mich. App. 263, 267, 235 N.W.2d 754 (1975) . . . A new trial has been ordered where a judge's questions and comments 'may well have unjustifiably aroused suspicion in the mind of the jury' as to a witness' credibility." Appellant's Brief on direct appeal to COA, 23; *see also People v. Stevens*, 498 Mich. 162, 169, 869 N.W.2d 233, 241 (2015). Without any specific reason, the Court of Appeals rejected Beam's argument: "We . . . see no instance of improper questions or comments." (App.14a). On November 17, 1993, the Court of Appeals affirmed the conviction. Opinion, 11/17/93. (App.17a).

Beam applied for leave to appeal to the Michigan Supreme Court. His arguments for reversal included the arguments noted above. Delayed Application for Leave to Appeal. On October 18, 1994, in a form order without explanation the Michigan Supreme Court denied leave to appeal. Order, 10/18/94. (App.12a).

2. Collateral Appeal

On September 30, 2016, Beam filed a Motion for Relief from Judgment in the trial court. He sought a new trial because he was denied an impartial judge because the judge repeated injected himself into the trial and unfairly aided the prosecution. He also sought a new trial because of ineffective assistance of counsel, newly discovered evidence, and a free-standing claim of actual innocence. Finally, he sought a ruling that the "miscarriage of justice" exception, to the statute of limitations for filing federal habeas petitions, applied. Motion for Relief from Judgment.

On February 27, 2017, Judge Talon denied Beam's motion. Opinion and Order, 2/27/17. (App.3a).

On August 23, 2017, Beam filed an application for leave to appeal to the Michigan Court of Appeals seeking permission to appeal the trial court's Opinion and Order. Again, Beam raised the issue of judicial partiality. Application for Leave to Appeal. to Michigan Court of Appeals. On January 25, 2018, the Court of Appeals denied leave to appeal. COA Order, 1/25/18. (App.2a).

On March 22, 2018, Beam filed an application for leave to appeal to the Michigan Supreme Court. Again, Beam raised the issue of judicial partiality. Application for Leave to Appeal to Michigan Supreme Court. On October 30, 2018, the Michigan Supreme Court denied leave to appeal. MSC Order, 10/30/18. (App.1a).

REASONS FOR GRANTING THE PETITION

I. WHETHER THE STATE COURTS MUST APPLY RETROACTIVELY A NEW RULE OF CRIMINAL PROCEDURE CONCERNING JUDICIAL IMPARTIALITY IS CENTRAL TO BEAM'S COLLATERAL APPEAL

In his direct appeal, Beam raised the issue of improper judicial impartiality. Appellant's Brief on direct appeal to Michigan Court of Appeals (COA); Brief in Support of Delayed Application for Leave to Appeal MSC. But Beam raised the issue under the then-existing vague standard for determining judicial partiality: "The test for reversal is the following, from *People v. Smith*, 64 Mich. App. 263, 267 (1975) . . . A new trial has been ordered where a judge's questions and comments 'may well have unjustifiably aroused suspicion in the mind of the jury' as to a witness credibility." Appellant's Brief on direct appeal to COA, 23; *see also People v. Stevens*, 498 Mich. 162, 169, 869 N.W.2d 233, 241 (2015). Without any specific reason, the Court of Appeals rejected Beam's argument. *People v. Lloyd Beam*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 1993 (Docket No. 111109). (App.14a).

Under Michigan Court Rules 6.500 et seq., in a motion for relief from judgment (motion for collateral review) a court may not grant relief to a defendant who alleges grounds for relief which were decided against him in a prior appeal unless the defendant establishes that a retroactive change in the law has undermined the prior decision Michigan Court Rule

(MCR) 6.508(D)(2). In his collateral appeal, Beam argued that a retroactive change in the law regarding judicial partiality has undermined the prior decision of the Court of Appeals on direct appeal in his case. But the lower state court refused to consider the merits of Beam's argument about improper judicial partiality, because that court ruled that MCR 6.508(D)(2) procedurally barred Beam because the new rule in *Stevens* is not retroactive. Order (App.5a). The state appellate courts just issued form orders denying leave to appeal. Thus, whether the state courts must apply the new rule in *Stevens* retroactively to Beam is central to Beam's successful collateral appeal of his convictions.

In denying relief to Beam on direct appeal in 1993, the Court of Appeals merely stated: "We disagree with defendant's characterization of the trial court's conduct, and see no instance of improper questions or comments. *Cf. People v. Conyers*, 194 Mich. App. 395, 404-405, 487 N.W.2d 787 (1992).[6]" *People v. Lloyd Beam*. (App.14a).

The court gave no reasoned analysis of why the court believed the trial court's conduct was beyond reproach. The court was able to dispose of the issue without analysis, because the mandate to consider specific factors did not exist. The specific factors mandated for consideration by *Stevens* have undermined the

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[6] In *Conyers*, cited in the Court of Appeals' opinion, the court utilized the prior rule for determining judicial partiality: "The test is whether the judge's questions and comments 'may well have unjustifiably aroused suspicion in the mind of the jury' as to a witness' credibility, . . . and whether partiality 'quite possibly could have influenced the jury to the detriment of defendant's case.'" *Conyers*, 194 Mich. App. at 405.

prior decision. *Stevens*, 498 Mich. at 171-72 ("This inquiry requires a fact-specific analysis. . . . ").

In denying Beam's recent motion for collateral review, the trial judge admitted that "*Stevens* establishes a new rule of criminal procedure." Opinion and Order. (App.5a). But the judge erred in stating, flatly, that "newly promulgated rules of criminal procedure do not apply retroactively to cases on collateral review." *Id.* The trial judge cited *Dorchy v. Jones*, 398 F.3d 783 (6th Cir. 2005) for that proposition. But the court in *Dorchy* stated, "Under most circumstances, however, newly promulgated rules of criminal procedure do not apply retroactively to cases on collateral review. *Teague v. Lane*, 489 U.S. 288, 305-11 (1989)." *Dorchy v. Jones*, 398 F.3d at 788. (emphasis added) Even though *Dorchy* itself cites *Teague v. Lane*, the trial judge here ignored *Teague*'s standard. Beam's case satisfies that standard.

II. IN *PEOPLE V. STEVENS*, THE MICHIGAN SUPREME COURT CREATED A WATERSHED RULE OF CRIMINAL PROCEDURE ABOUT JUDICIAL IMPARTIALITY BY INTERPRETING THE FEDERAL CONSTITUTION

The federal Constitution bestows the right of due process upon a criminal defendant who is entitled to a fair trial:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

U.S. Const. Am. V.

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

U.S. Const. Amen XIV, § 1.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). The Due Process Clause of the Fourteenth Amendment includes the right to a fair trial in a fair tribunal before a judge with no actual bias against the defendant." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (internal quotation marks omitted) *quoted in Lyell v. Renico*, 470 F.3d 1177, 1186 (6th Cir. 2006).

> A judge's misconduct at trial may be "characterized as bias or prejudice" if "it is so extreme as to display clear inability to render fair judgment," so extreme in other words that it "display[s] a deep-seated favoritism or antagonism that would make fair judgment impossible."

Liteky v. United States, 510 U.S. 540, 551, 555 (1994) *quoted in Lyell*, 470 F.3d at 1186; *see also Norris v. United States*, 820 F.3d 1261, 1266 (11th Cir. 2016) ("[D]enial of an impartial judge is structural error that demands reversal. 'The entire conduct of the trial from beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial.' *Fulminante*, [*Arizona v. Fulminante*,] 499 U.S. 279, 309-10 (1991))."

After Beam's direct appeal concluded, the Michigan Supreme Court created a new standard for determining judicial partiality under federal constitutional law:

> In order to provide clarity going forward, we thus propose a new articulation of the appropriate test, grounded in a criminal defendant's right to a fair and impartial jury trial. . . . A trial judge's conduct deprives a party of a fair trial if a trial judge's conduct pierces the veil of judicial impartiality. . . . 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.

Stevens, 498 Mich. at 170-71; U.S. Const. Am V, XIV. When considering the totality of the circumstances, a reviewing court must consider certain definite factors. *Stevens*, 498 Mich. at 171-72. The new standard is retroactive and governs the decision on the issue raised in Beam's case.

III. THE APPLICATION OF THE FACTORS IN *STEVENS* SHOWS THAT THE TRIAL JUDGE'S CONDUCT PIERCED THE VEIL OF JUDICIAL IMPARTIALITY

The following analysis of the trial judge's injection into Beam's trial in light of the factors announced by the new procedural rule of *Stevens*, shows that the judge's conduct pierced the veil of judicial impartiality.

1. **"As an Initial Matter, a Reviewing Court Should Consider the Nature or Type of Judicial Conduct Itself."** ***People v. Stevens*****, 498 Mich. at 172-73**

In Beam's case, the improper judicial conduct was overzealous questioning of witnesses to assist the prosecution proving its case. Here the court repeatedly usurped the role of the prosecutor in questioning of witnesses.

Initially the court assisted the prosecutor by questioning police officer Gernand extensively about the semi-automatic pistol and other firearms found at the scene. (App.18a-23a). Beam's primary defense was that he was not present during the shooting and had no knowledge that it would occur. But his other defense was that, if his brother shot the complainants, he must have fired in self-defense. The semi-automatic 9mm pistol and .22 semi-automatic rifle belonging to the victims and the numerous bullet holes, both found at the scene, supported that defense. After the direct examination of officer Gernand, through leading questions, the court elicited from him that the police found the gun fully loaded. The court also elicited that a semi-automatic weapon ejects a casing when fired. (App.20a-21a). Thus, the court assisted the prosecution by bringing out testimony suggesting that the semi-automatic weapons were never fired.

Later, the prosecutor wanted Julie Glenn, who was upstairs when the shooting happened, to lay a foundation for admission of a hearsay statement (Frazier's accusation that Lloyd Beam shot him) as an excited utterance. But the prosecutor could not do it, because Glenn stated that, although wounded,

Frazier "wasn't really upset . . . wasn't hollering or all excited or anything." (App.24a-25a). After the prosecutor tried again, defense counsel objected to the prosecutor's leading questions. Then, the court, stating it was "gonna save some time," entirely took over for the prosecutor and, through leading questions, elicited that Frazier, bleeding, came into Glenn's presence two minutes after the shots. The court then ruled that the court had laid the proper foundation and told the jury directly that this testimony was trustworthy. Defense counsel objected. (App. 25a-27a).

This was similar to the judicial partiality shown in *Lyell v. Renico*:

> Making matters worse, the trial judge's interruptions ran in one direction. While the trial judge frequently interrupted Lyell's presentation of his case in an unhelpful way, she rarely interrupted the prosecution's presentation of the case, save when doing so helped the government. At one point the judge urged the prosecutor to ask a question even after the prosecutor explained that it would elicit inadmissible hearsay, and at another point she sought an answer to a question that the prosecutor had voluntarily withdrawn.
>
> Altogether, then, we have a case in which the judge *sua sponte* interrupted the prosecution to assist it, *sua sponte* interrupted Hart's questioning in a way that undermined his presentation of the case (frequently during the cross-examination of the central witness in the case), failed to interrupt in a like manner during the prosecution's question-

> ing (at least in a way that undermined its case), stated or implied her disapproval of Lyell's theory of the case (evidenced by her statements to the effect that Nimeth's proclivity for lying to police was not an issue in the case or that she "didn't get" the point of Hart's motive-questioning) and made clear her disapproval of Lyell's defense counsel (calling him an actor, a child, silly and a smart aleck).

Lyell v. Renico, 470 F.3d 1177, 1187 (6th Cir. 2006); *see also United States v. Karnes*, 531 F.2d 214, 216-217 (4th Cir. 1976) ("This impartiality is destroyed when the court assumes the role of prosecutor and undertakes to produce evidence, essential to overcome the defendant's presumption of innocence, which the government has declined to present.")

The court here then extensively cross-examined Frazier bringing out a completely new alleged motive for the offense—that the Beams sought revenge for a shooting at their mother's house which the Beams thought that the victims at the Hazlett house had perpetrated. (App.29a-31a). Bringing out the alleged additional motive was a prosecutorial function. *Karnes*, 531 F.2d at 216-217. The judge usurped the prosecutor's role.

The court realized it had gone too far this time, but made no effort to cure the error. The court stated:

> THE COURT: Yeah, I think I'm gonna keep my mouth shut too. We don't want to get into a whole history of transactions here, it'll take us even further afield.

(App.33a).

The prosecutor's witnesses failed to testify to the dimensions of the living room where the complainants received their wounds. To help the prosecutor, the court took over examination of the police officer who first entered the house after the shooting. The court left the bench and paced off the dimensions of the living room at the Hazlett house and had the officer estimate the dimensions—a prosecutorial function (App.35a-39a). The court's examination stressed how close to Hollenquest's head a spent bullet was found. Defense counsel objected and stated that the court's hypothesis of how Hollenquest's body laid was the opposite of what the complainants had said. But the court rationalized by stating he just wanted to give the jury an idea of the dimensions of the living room. *Id.*

The defense attempted to cross examine McAdory to impeach his testimony that, after the shooting, he merely was around drug activity but did not sell drugs. Counsel was leading up to the introduction of McAdory's drug charges from incidents arising after the shooting. In opposing the prosecutor's objection, defense counsel told the court, "We have evidence to show that [McAdory's testimony that he merely was around the drug trade was] false." The court stated, "No, you don't." Defense counsel asked to approach and the court called the attorneys into chambers. (App. 41a-43a). The court may have meant that the defense would not be allowed to introduce McAdory's subsequent drug convictions. But the court's statement implied that defense counsel was lying and had no evidence of the convictions. That statement gave the jury the wrong impression of counsel's veracity.

The second time he was on the stand, Frazier testified that two weeks before the shooting the Beams came over and took a 30-30 rifle in addition to a shotgun. Defense counsel thoroughly impeached him by establishing that neither in Frazier's statement to police nor at any prior hearing did Frazier ever accuse the Beams of taking a rifle that day. (App.46a-49a). But after both counsel finished examining Frazier, the court rehabilitated him by establishing that he had mentioned the theft of the rifle during his first appearance on the stand at the second trial. (App.51a).

2. "Second, a Reviewing Court Should Consider the Tone and Demeanor the Trial Judge Displayed in Front of the Jury." *People v. Stevens*, 498 Mich. at 174

The court's comment when defense counsel said he had evidence that McAdory's testimony was false ("No, you don't") was pejorative. (App.41a-43a). Besides that, there was no indication from the written record that the judge used a derogatory tone or demeanor towards the witnesses of either party. But, "the aggrieved party need not establish that each factor weighs in favor of the conclusion that the judge demonstrated the appearance of partiality for the reviewing court to hold that there is a reasonable likelihood that the judge's conduct improperly influenced the jury." *Stevens*, 498 Mich. at 172.

3. **"Third, a Reviewing Court Should Consider the Scope of Judicial Intervention Within the Context of the Length and Complexity of the Trial, or Any Given Issue Therein."** ***People v. Stevens*****, 498 Mich. at 176.**

Neither the length nor complexity of the trial justified the judicial assistance to the prosecutor. "In a long trial, or one with several complicated issues posed to the jury . . . it may be more appropriate for a judge to intervene a greater number of times than in a shorter or more straightforward trial." *Id.*, at 162. Eight times during the six-day trial, the judge assisted the prosecutor by examining witnesses to elicit facts supportive of the prosecution's case. In only one instance, did the questioning concern a technical issue regarding ballistics. But the prior testimony of the expert, Officer Gernard, was not confusing; it needed no clarification. Each time he intervened, the judge acted to bring out a point that the prosecutor had neglected to elicit.

4. **"Fourth, and in Conjunction with the Third Factor, a Reviewing Court Should Consider the Extent to Which a Judge's Comments or Questions Were Directed at One Side More than the Other."** ***Stevens*****, 498 Mich. at 176-77.**

The judge only helped the prosecutor.

5. "Lastly, the Presence or Absence of a Curative Instruction Is a Factor in Determining Whether a Court Displayed the Appearance of Advocacy or Partiality. . . . That Said, in Some Instances Judicial Conduct May So Overstep Its Bounds That No Instruction Can Erase the Appearance of Partiality." *Stevens*, 498 Mich. at 177-78.

The judge gave the instruction that, if the jury believed he had an opinion about the case, the jury should disregard it. (App.53a-54a). But the court gave no curative instructions immediately after the court's questions that bolstered the prosecutor's case. As in *Steven*s, the single instruction at the conclusion of the evidence does not erase the taint of the partiality shown by the totality of the circumstances. *Stevens*, 498 Mich. at 190.

In the trial court, defense counsel preserved the issue of the judge's partiality. Defense counsel objected on two occasions. TT. 10/17/88, 349-350; TT., 10/18/88, 492-495. "The fact that defense counsel made no objection to some of these comments and questions does not alter the result since defense counsel may have been understandably reluctant to challenge the judge's own behavior on the bench." *People v. Sterling*, 154 Mich. App. 223, 231, 397 N.W.2d 182 (1986). Also, the defense made a motion for new trial on this issue: "That the Court improperly assisted the prosecution by unnecessarily questioning witnesses and bringing out damaging testimony which not designed to clear up any question in the minds of the jurors." Motion for New Trial. The trial court denied the motion. T., 11/1/88, 909.

The jury had no doubt that the court favored the prosecution since the court repeatedly aided the pro-

secutor in presenting his case. Here the court clearly invaded the province of the prosecutor, repeatedly exploring new matters and not merely clarifying prior testimony. He asked leading questions and repeatedly aided the prosecutor's case. And, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. *People v. Stevens*, 498 Mich. at 170-71.

The judge's conduct constituted structural error. No harmless error analysis is permitted. *Id.*, at 162; *Arizona v. Fulminante*, 499 U.S. at 309-310.

IV. THE DECISION IN *PEOPLE V. STEVENS* IS PREMISED UPON FEDERAL CONSTITUTIONAL LAW.

A state court may interpret the federal Constitution provided the state does not impose greater restrictions on the government as a matter of federal constitutional law when the United States Supreme Court has specifically refrained from imposing such restrictions. *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215 (1975); *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001).

In deciding *People v. Stevens*, the Michigan Supreme Court interpreted the Fourteenth Amendment's due process clause in a way permitted by the above principle. In describing the basis for its opinion, the Michigan Supreme Court stated:

> The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo. **People v. Pipes*, 475 Mich. 267, 274, 715 N.W.2d 290 (2006); *In re Susser Estate*,

> 254 Mich. App. 232, 236-237, 657 N.W.2d 147 (2002). As discussed in greater detail later in this opinion, once a reviewing court has concluded that judicial misconduct has denied the defendant a fair trial, a structural error has occurred and automatic reversal is required. *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

People v. Stevens, 498 Mich. at 168.

The state court in *Stevens* cited *Arizona v. Fulminante* in which the majority cited *Tumey v. Ohio*, 273 U.S. 510 (1927) for the holding that a judge who is not impartial creates structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. *Arizona v. Fulminante*, 499 U.S. at 309. That citation to *Arizona v. Fulminante* indicates that the *Stevens* court was interpreting the federal constitutional guarantee of due process.

The state court cases cited by *Stevens* lead to the same conclusion. In the *Sussex* case, cited in *Stevens* above, the state court described the basis for its decision as the "constitutional right to a hearing before an unbiased and impartial decisionmaker. *See Cain v. Dep't of Corrections*, 451 Mich. 470, 497, 548 N.W.2d 210 (1996)." *In re Susser Estate*, 254 Mich. App. at 236. And in *Cain*, cited in *Sussex*, the state court specifically quoted federal law for the proposition that "a "fair trial in a fair tribunal is a basic requirement of due process." *Cain v. Michigan Dep't of Corr.*, 451 Mich. 470, 498-501, 548 N.W.2d 210, 223-24 (1996) *quoting Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). Thus, the Michigan Supreme Court in *Stevens* was interpreting the federal Constitution.

V. THE NEW RULE ANNOUNCED IN *STEVENS* IS RETROACTIVE UNDER FEDERAL LAW

Under *Teague v. Lane*, 489 U.S. 288, 307 (1989), there is a general rule of nonretroactivity for cases on collateral review with respect to applying new constitutional rules to cases that became final before the new rule was announced. The first inquiry when determining whether a rule applies retroactively to cases presented on collateral review is whether it constitutes a new constitutional rule as defined by *Teague*.

Generally speaking, a rule is "new" if the rule announces a principle of law not previously articulated or recognized by the courts and therefore "falls outside [the] universe of federal law" in place at the time defendant's conviction became final. "A rule that 'breaks new ground or imposes a new obligation on the States or the Federal Government,' . . . falls outside this universe of federal law." *Williams v. Taylor*, 529 U.S. 362, 381 (2000) (opinion by Stevens, J.). "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. at 301.

Stevens created a new rule for determining judicial partiality and the Court based its decision on the constitutional right to a fair trial and a jury trial. *People v. Stevens*, 498 Mich. at 170; U.S. Const. amend. VI, XIV. In denying the Motion for Relief from Judgment, the trial judge Talon admitted that "*Stevens* establishes a new rule of criminal procedure." Opinion and Order. (App.5a).

If the rule is deemed a new rule, however, the general rule of nonretroactivity applies and the court

must engage in the second *Teague* inquiry: whether the new rule satisfies one of the two exceptions to the general rule, in which case the rule will be applied retroactively.

The *Teague* exceptions provide that a new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague*, 489 U.S. at 311.

A new 'substantive due process' rule is one that places, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. *People v. Carp*, 496 Mich. 440, 476, 852 N.W.2d 801 (2014), *cert. granted, judgment vacated sub nom. Carp v. Michigan*, 136 S.Ct. 1355 (2016). Because the rule in *Stevens* is not substantive, that *Teague e*xception to nonretroactivity does not apply.

But the new rule in *Stevens* is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague*, 489 U.S. at 311. There can be no more important area affecting the fundamental fairness and accuracy of a criminal proceeding than the impartial conduct of the judge. "The concept of fundamental fairness includes the right to an impartial decision maker. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ('an impartial decision maker is essential'"); *Girard v. Klopfenstein*, 930 F.2d 738, 743 (9th Cir. 1991). Therefore, under federal law, the state courts should apply the *Stevens* rule retroactively to Beam's case.

VI. THIS COURT SHOULD DECIDE WHETHER STATE COURTS ON COLLATERAL REVIEW MUST COMPLY WITH *TEAGUE*'S MANDATE TO GIVE RETROACTIVE EFFECT TO NEW WATERSHED RULES OF CRIMINAL PROCEDURE

This Court has held that a state court engaged in collateral review of a criminal conviction under state law must give effect to *Teague*'s first exception to the general rule of nonretroactivity on collateral review, the exception for a new rule of substantive law.

> [W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague*'s first exception for substantive rules; the constitutional status of *Teague*'s exception for watershed rules of procedure need not be addressed here.

Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016), *as revised* (Jan. 27, 2016).

Beam now asks this Court address the question left unaddressed in *Montgomery v. Alabama*. Beam asks this Court to grant certiorari on whether a state court on collateral review of a conviction must, as a constitutional mandate, apply *Teague*'s second exception to the general rule of nonretroactivity on collateral appeal. That second exception is for "a watershed

rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Teague*, 489 U.S. at 311. And, Beam further asks this Court to decide whether a state court interpreting the United States Constitution on collateral review must also give effect to Teague's second exception to the general rule of nonretroactivity. This case is an ideal vehicle to decide the foregoing questions.

Also, the lower courts have made a grievous error which this Court should correct.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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