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**STATE OF MICHIGAN**
**IN THE MICHIGAN SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN,**

*Plaintiff-Appellee*,

**v.**

**DAMETRIUS BENJAMIN POSEY,**

*Defendant-Appellant*.

Michigan Supreme Court No. 162373
Court of Appeals No. 345491
Wayne County Case No. 18-000074-01-FC

**BRIEF OF *AMICI CURIAE* ERIC ANDERSON AND THE INNOCENCE PROJECT**

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## INTERESTS OF *AMICI CURIAE*[1]

Eric Anderson is a Michigan resident who spent nine years in prison after being wrongfully convicted of armed robbery and related charges. Although no physical evidence connected Mr. Anderson to the crime scene, the jury in his November 2010 trial was allowed to hear unreliable eyewitness testimony in which he was misidentified as the perpetrator. On April 30, 2019, the trial court vacated Mr. Anderson's conviction after the actual perpetrator swore under oath that Mr. Anderson had nothing to do with the crime. New evidence also established that the clothing the actual perpetrator wore on the night of the crime matched the description given by an eyewitness at trial, while Mr. Anderson's clothing did not.

The Innocence Project is an organization dedicated to providing pro bono legal services to incarcerated people whose innocence may be established through post-conviction DNA testing. The Innocence Project has served as counsel or provided assistance in hundreds of successful post-conviction exonerations of innocent persons nationwide. The Innocence Project also seeks to prevent wrongful convictions by researching the causes of wrongful conviction and pursuing legislative, administrative, and judicial reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Such reforms include those designed to prevent wrongful convictions based on mistaken eyewitness identifications—a leading cause of wrongful convictions.

This case involves an unduly suggestive, first-time in-court identification wherein the eyewitness first positively identified Appellant Dametrius Posey during trial, while he was on the witness stand and Mr. Posey was seated at the defense table. Prior to trial, this eyewitness failed

[1] Affirmations pursuant to MCR 7.312(H)(5): Neither party in this case, nor either party's counsel, authored any part of this *amici* brief. Neither party, nor either party's counsel, made any monetary contributions to the preparation or submission of this *amici* brief. This *amici* brief was entirely drafted, funded, and filed by undersigned counsel for *amici curiae*.



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to identify Mr. Posey on two separate occasions, and in fact *identified another man as the perpetrator* during a photo lineup procedure the day after the incident in question. Similarly unreliable eyewitness identification evidence has led to the wrongful conviction and unjust imprisonment of hundreds of innocent people around the nation and 40 innocent people in Michigan—including Eric Anderson.[2] *Amici* thus have a strong interest in the outcome of this case and in advocating for the adoption of a legal framework that guards against the admission of unreliable eyewitness testimony, so as to help safeguard against future wrongful convictions.

**INTRODUCTION**

Unreliable eyewitness identifications are a leading cause of wrongful convictions. In Michigan, approximately one in four of all exonerations have involved wrongful convictions that were due, at least in part, to unreliable eyewitness identification evidence. *See supra*, note 2. This case—which asks whether the admission of a highly suggestive first-time in-court eyewitness identification violates due process—presents an ideal opportunity to bring Michigan jurisprudence on eyewitness identification evidence into step with the overwhelming scientific consensus about the fallibility of memory—which in turn will safeguard against wrongful convictions based on misidentifications. To help prevent the tragic injustice of wrongful conviction, *amici* urge this Court to grant Mr. Posey's request for a new trial and, in so doing, adopt a rule prohibiting first-time in-court identifications, which are categorically suggestive and unreliable. Additionally, *amici* propose that this Court develop clear, scientifically sound guidelines that trial judges may use to properly analyze the reliability and admissibility of eyewitness identification evidence, as the current legal framework is misaligned with the relevant science.

In this case, complainant Terrence Byrd first identified Mr. Posey as one of his attackers

[2] *See* National Registry of Exonerations Database, *available at:* https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

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during trial, more than nine months after the incident in question—which was a seconds-long shoot-out in which Mr. Byrd was injured—after failing to identify him twice before. In fact, Mr. Byrd previously failed to identify Mr. Posey in a police-arranged photo lineup the day after the incident—affirmatively identifying another man in the photographic array instead—and again neglected to identify Mr. Posey at the preliminary examination before trial. At the time of Mr. Byrd's first affirmative identification of Mr. Posey, Mr. Byrd was testifying on the witness stand and Mr. Posey was seated at the defense table next to defense counsel. Significantly, during cross-examination at trial, Mr. Byrd conceded that he "decided . . . it must be [Mr. Posey]" based on where Mr. Posey was seated in the courtroom, and that he called Mr. Posey by his name based on his review of legal documents provided to him by the prosecution. Tr. 7/25/18, 116–17.

This Court has already recognized the dangers and constitutional infirmity of suggestive identification procedures that, like the identification at issue here, effectively present to the witness a single person who, based on the context of the identification procedure, is clearly the person that state actors believe to be the perpetrator. *People v Sammons*, 505 Mich 31, 42–43; 949 NW2d 36 (2020) (reasoning, in the analogous context of a station-house "showup,"[3] that, in such contexts, "the nature of the suggestion is apparent [] . . . [and] conveys a clear message that the police suspect this man.") (internal citations omitted). A first-time confrontation in court is just as, if not more, suggestive than the one-on-one confrontation at a police station that this Court has found impermissibly suggestive, *id.*, and it necessarily involves state action, thus implicating the accused's due process rights. *Accord State v Dickson*, 322 Conn 410, 426; 141 A3d 310 (2016);

[3] A "showup" consists of a one-on-one confrontation where police present an eyewitness with a single person, either live or photographically for purposes of identification. Typically, a showup is conducted in close spatial and temporal proximity to the crime. National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification*, (2014), *available at:* https://www.nap.edu/read/18891/ at 14.

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*United States v Morgan*, 248 F Supp 3d 208, 213 (DDC, 2017). Indeed, a first-time in-court identification is, arguably, "the most suggestive situation of all." Davis Uviller, *The Role of the Defense Lawyer at a Lineup in Light of the* Wade*,* Gilbert *and* Stovall *Decisions*, 4 CRIM L BULL 273, 282 (1968); *see also* Shirley LaVarco & Karen Newirth, *Connecticut Supreme Court Limits In-Court Identification in Light of the Danger of Misidentification*, INNOCENCE PROJECT (Aug. 29, 2016), *available at:* http://www.innocenceproject.org/ct-supreme-court-limits-court-id ("[I]n-court identifications are highly suggestive. The defendant is often the only person in the courtroom who fits the witness's description, and is often the only person that the witness has been exposed to in prior identification procedures."). Because such highly suggestive procedures place innocent people at risk of wrongful conviction and violate the due process rights of the accused, this Court should hold that first-time in-court identifications are prohibited, *per se*.

In addition to the inherently unreliable nature of the first-time in-court identification here, several variables implicated in the instant case further undermine the reliability of Mr. Byrd's identification testimony. *State v Lawson*, 352 Or 724, 740; 291 P3d 673 (2012). Decades of peer-reviewed scientific literature have established that there are a variety of factors that impact the reliability of an eyewitness identification. Researchers divide these factors into two categories: *estimator variables* and *system variables*. Gary Wells, *Applied eyewitness-testimony research: System variables and estimator variables*. J PERS SOC PSYCHOL 36:1546–57 (1978). System variables "refer to the circumstances surrounding the identification procedure itself that are generally within the control of those administering the procedure." *Lawson*, 352 Or at 740. For example, an investigating officer's failure to use blind administration (i.e., having someone who knows the suspect's identity administer the identification procedure) is one such variable. Contrastingly, *estimator variables* "generally refer to characteristics of the witness, the alleged perpetrator, and the environmental conditions of the event that cannot be manipulated or adjusted

by state actors." *Id*. These include, but are not limited to, the presence of a weapon, witness stress, the duration of the witness's exposure to the culprit during the incident, and memory decay between the time of the event and the identification procedure.

Under current Michigan law, however, many of the system and estimator variables at issue here—that reveal the unreliability of the identification of Mr. Posey—would likely be overlooked by trial judges conducting an assessment of admissibility of eyewitness testimony, as they are not expressly part of the legal framework. In Michigan, courts assessing the admissibility of identification evidence must first determine whether an identification procedure was unnecessarily suggestive and, if so, whether the identification is nonetheless reliable, applying factors announced by the Supreme Court in *Neil v Biggers*, 409 US 188, 196–98; 93 S Ct 375; 34 L Ed 2d 401 (1972). *See People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993) (applying the *Biggers* test to determine admissibility of eyewitness evidence). If a pretrial identification is deemed unnecessarily suggestive and unreliable pursuant to the *Biggers* multi-factor test, an in-court identification by the witness would be inadmissible, unless there is an independent basis "sufficient to purge the taint" of the prior suggestive process. *People v Kachar*, 400 Mich 78, 97; 252 NW 2d 807 (1977); *People v Gray*, 457 Mich 107, 114–17; 577 NW2d 92 (1998). This framework, however, is primarily based upon decades-old judicial interpretation of legal precedent rather than current social science research regarding the myriad of system and estimator variables which implicate eyewitness memory. Indeed, as discussed below, scientific research has demonstrated that the *Biggers* factors are insufficiently diagnostic of reliability, and that the *Kachar* "independent basis" test regularly allows for the admission of eyewitness evidence which has been contaminated by a suggestive police procedure.

For these reasons, *amici* respectfully urge this Court to grant Mr. Posey a new trial and, in so doing, provide guidance to courts regarding the standards for admission of potentially unreliable



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eyewitness evidence, so as to safeguard against wrongful convictions caused by unreliable identifications. Specifically, *amici* encourage this Court to establish a standard whereby first-time in-court identifications are prohibited *per se*. Additionally, this Court should reassess and modify the legal framework for admitting eyewitness identification evidence more broadly, to ensure that people's due process rights are protected and to prevent against wrongful conviction. Lastly, for the reasons discussed below, this Court should find that Mr. Posey's trial counsel was ineffective for failing to object to an unreliable in-court identification and failing to call an expert to educate the jury about the limits of eyewitness identification testimony.

## ARGUMENT

### I. First-Time In-Court Identifications Necessarily Violate the Due Process Rights of the Accused and this Court Should Preclude them *Per Se.*

#### A. First-Time Courtroom Identifications are Dangerously Suggestive and Unreliable.

First-time in-court identifications are perhaps the most suggestive of all eyewitness identification procedures and, as such, are inherently unreliable. The physical setup of the courtroom creates the environment for a highly suggestive identification and cannot accurately test an eyewitness's memory because "the eyewitness can easily see where the defendant is sitting." NAS, *Identifying the Culprit*, *supra*, note 3 at 36. Scrutiny is never distributed equally across the courtroom. *See Dickson*, 322 Conn at 424 ("If this procedure is not suggestive, then *no* procedure is suggestive."). As one expert put it:

> The courtroom identification is obviously highly suggestive. The defendant is sitting at the counsel's table, perhaps in prison clothing. There are no fillers and there is no lineup. And the identification may follow emotionally charged testimony by the victim describing a crime—a victim who, in the conclusion of the testimony, points out the culprit to the jury.

Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND L REV 451, 460 (2012). Because of the inherent suggestion involved, it is effectively impossible to conduct a first-time, in-court

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identification fairly and without suggestion.

Indeed, first-time in-court procedures include none of the best practices that ensure a reliable identification. Among the circumstances that make an identification less reliable—all of which are implicated in a first-time in-court procedure—are:

- The failure to use blind administration (*i.e.*, having someone who knows the suspect's identity administer the identification procedure);
- The administrator's failure to give pre-identification instructions designed to prevent pressuring the witness, as well as the administrator's provision of feedback that suggests the witness correctly identified the suspect; and
- Lineups constructed in a way that makes the suspect stand out, including "showups," in which a single suspect is shown to the witness, and photo arrays in which the subject is distinctive or in which the "fillers" (persons other than the one police have concluded is a suspect) do not match the description of the perpetrator.

Wells, et al, *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, LAW AND HUMAN BEHAVIOR, 44(1), 3–36 (2020).

The Prosecuting Attorneys Association of Michigan concurs that blind administration of lineups—where neither the administrator nor the witness knows the suspect's identity—mitigates against impermissible suggestiveness.[4] In an in-court identification, however, everyone in the room knows who the accused is, including the eyewitness on the stand. Witnesses are thus highly likely, essentially compelled, to identify the defendant even if they previously had doubts—or, as here, previously identified someone else—because witnesses regard the prosecution of the defendant as itself being a confirmation that the defendant is the true perpetrator. *Commonwealth v Collins*, 21 NE3d 528, 534–35 (Mass 2014) (noting that a first-time in-court identification may

[4] Prosecuting Attorneys Association of Michigan, *Best Practices Recommendation Eyewitness Identification and Procedures* (2015), *available at:* https://www.michiganprosecutor.org/files/PAAM_Best_Practices_Eyewitness_Identification.pdf ("To the extent practicable, considering the size of the agency as well as personnel and staffing issues, all law enforcement agencies should adopt blind or blinded administration of both photo arrays and live lineups as a preferred practice.").

be even more suggestive than a showup "because 'where the prosecutor asks the eyewitness if the person who committed the crime is in the court room, the eyewitness knows that the defendant has been charged and is being tried for that crime'") (internal citation omitted). Significantly, that is precisely what Mr. Byrd indicated happened here. *See* Tr. 7/25/18, 116–17 (Mr. Byrd conceding on cross-examination that he believed Mr. Posey "must" have been the culprit after seeing him in court, next to his defense attorney).

In-court identifications are thus similar to, but even more suggestive than, stationhouse showups, which this Court has recently recognized as inherently suggestive. *See Sammons*, 505 Mich at 41–44. In fact, first-time in-court identifications are less reliable than stationhouse showups because the latter typically occur soon after the crime, while in-court identifications often happen months, if not years, later. The many months or years it may take for a case to proceed to trial after the initial witnessed event necessarily decreases the reliability of the in-court identification, as memories dissipate over time. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 L. EXPERIMENTAL PSYCH.: APPLIED 139 (2008). Some short-term memories are distorted by other cognitive processes, while others are not encoded into long-term memories at all. NAS, *Identifying the Culprit* at 60-61. Here, more than nine months elapsed between Mr. Byrd's seconds-long encounter with the culprit and the in-court identification. The more time elapsed, the less reliable his eyewitness testimony became.

### B. Despite their Unreliability, First-time Courtroom Identifications have a Powerful Impact on Factfinders and thus Place Innocent People at Risk of Wrongful Conviction.

While memory fades over time, witnesses' confidence in their recollection is typically bolstered. Consequently, an eyewitness at trial—regardless of the accuracy of their identification testimony—is more likely to be unwavering in their identification of the accused, often insisting



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in the accuracy of their memory. Over the course of a criminal proceeding, witnesses learn more about evidence, participate in trial preparation, may receive positive feedback and coaching—even inadvertently—and are placed in the spotlight to testify. *See* Wells, Ferguson & Lindsay, *The tractability of eyewitness confidence and its implications for triers of fact*, JOURNAL OF APPLIED PSYCHOLOGY, 66, 688–96 (1981) ("Inflating eyewitness confidence requires nothing on the order of high-powered persuasion techniques. A simple instruction to rehearse the witnesses' account, sample questions that might be asked by a crossexaminer, and warnings that the cross-examiner will look for inconsistencies in the testimony are sufficient to inflate the witnesses' confidence in his or her memory"); *see also People v Blevins*, 314 Mich App 339, 368; 886 NW2d 456 (2016) (Shapiro, J., dissenting) ("Memories rapidly and continuously decay and may be covertly contaminated by suggestive influence . . . during interviewing and identification procedures."). Such inputs tend to inflate the witness's confidence that the defendant is the true perpetrator. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2012) at 63. By trial, then, Mr. Byrd's certainty was stronger than at the time when his memory actually would have been the most reliable—when he was *first* asked to identify the perpetrator, at which time he *identified someone other than Mr. Posey*. Consistent with the social science demonstrating the inverse correlation between the reliability of memories and a witness's confidence in such memories, after failing to identify Mr. Posey twice before, Mr. Byrd testified at trial that there was no "question in [his] mind that Mr. Posey [] w[as] [one of] the men out there on that day." Tr. 7/26/18, 33. To the jury, such a powerful identification will outweigh any uncertainty the witness may have expressed before trial. *See* Wells, et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL SCI IN PUB INT 45, 49-50 (2006) ("An eyewitness who has no motive to lie is a powerful form of evidence for jurors, especially if the eyewitness appears to be highly confident about his or her recollection. In the absence of definitive proof to the contrary, the eyewitness's



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account is generally accepted by police, prosecutors, judges, and juries.").

Particularly without expert testimony as a guide, factfinders are not equipped to properly evaluate the reliability of first-time in-court eyewitness evidence, because eyewitness testimony plays on our basic intuitions. "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v Sowders*, 449 US 341, 352; 101 S Ct 654; 66 L Ed 2d 549 (1981) (Brennan, J., dissenting). Scientific research confirms Justice Brennan's view: "[P]eople believe that witnesses are considerably more likely to be accurate than they actually are." Boyce et al., *Belief of Eyewitness Identification Evidence*, HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (Jan. 1, 2007) at 508–09.

Beyond this basic principle, "many factors that affect memory are counter-intuitive," *United States v Smithers*, 212 F3d 306, 316 (CA 6, 2000), and jurors routinely overestimate their own memory. Sarah L. & J. Don Read, *After 30 Years, What Do We Know about What Jurors Know? A Meta-Analytic Review of Lay Knowledge Regarding Eyewitness Factors*, 35(3) L & HUMAN BEHAVIOR, 200–10 (2011). Juries therefore afford eyewitness identifications undue weight, even where, as here, the identification was highly unreliable, and the jury was aware that the eyewitness had previously identified another person as the perpetrator. This Court long ago warned against jurors' inability to accurately evaluate eyewitness testimony, pointing to the "real prospects for error … completely separate of the subjective accuracy, completeness, or good faith of witnesses." *People v Anderson*, 389 Mich 155, 180; 205 NW2d 461 (1973).

In light of the highly prejudicial nature of courtroom identifications, and in consideration of the inherent suggestion involved, first-time courtroom identifications "unsurprisingly" place the wrongfully accused at an increased risk of wrongful conviction. *Accord Sammons*, 505 Mich at 44 (noting that the "empirical finding that innocent suspects are more often identified in showups than

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lineups is unsurprising" due to the inherent suggestiveness in an analogous single-witness procedure). Indeed, the dangers of first-time courtroom identification procedures are more than theoretical. For example, in 1996, Nathaniel Hatchett, an innocent teenager, was arrested for rape and related charges after a woman was sexually assaulted by a masked stranger in Sterling Heights, Michigan. *See* The National Registry of Exonerations, *Nathaniel Hatchett*, *available at:* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3288. After being coercively interrogated and providing a false confession, Mr. Hatchett proceeded to trial. *Id.* At his trial, the prosecution called the victim to the stand who, for the very first time, was asked to identify the person who committed the violent offenses against her. *See* Convicting the Innocent: DNA Exonerations Database, *Nathaniel Hatchett*, *available at:* https://convictingtheinnocent.com/exoneree/nathaniel-hatchett/ (noting that there was no "identification procedure conducted previous to" the victim's identification at trial). While on the witness stand—as Mr. Hatchett was seated at counsel table, next to his defense attorney, and was clearly the person the prosecution believed to be guilty of the crimes committed against her—the victim affirmatively identified Mr. Hatchett as the perpetrator. *Id.* Mr. Hatchett was then wrongfully convicted and spent the next *decade* in prison until he was ultimately exonerated. *Id.*

**C. Courtroom Identifications Implicate the Due Process Rights of the Accused.**

Like the United States Supreme Court, this Court "has not yet addressed the question of whether first time in-court identifications are in the category of unnecessarily suggestive procedures that trigger due process protections." *Dickson*, 141 A3d at 821. It is now time to address this question. There is no principled justification for distinguishing between unnecessarily suggestive procedures based on where they occur, particularly when ample social science research demonstrates the dangerous unreliability of such procedures. As one court observed, there is no reasoned basis to conclude that "if an in-court identification following an unduly suggestive

pretrial police procedure implicates the defendant's due process rights because it is the result of state action, the same would not be true when a prosecutor elicits a first time in-court identification." *Id*. at 824 (holding that "the rationale for the rule excluding identifications that are the result of unnecessarily suggestive procedures—deterrence of improper conduct by a state actor—applies equally to prosecutors"). The "due process concerns are identical in both cases and any attempt to draw a line based upon when the allegedly suggestive identification technique takes place seems arbitrary." *United States v Hill*, 967 F2d 226, 232 (CA 6, 1992); *see also Collins*, 21 NE3d at 536 ("[W]e shall not admit such an identification in evidence simply because it occurred in the court room rather than out of court.").

In sum, all first-time in-court identification procedures necessarily involve state action by prosecutors who create a dangerously suggestive identification procedure inherently involving a significant risk of misidentification and a persuasive impact on jurors—thus calling into question the reliability of any resulting guilty verdict. To safeguard against wrongful convictions caused by the admission of unreliable eyewitness testimony, this Court should hold that prosecutors create a categorically and unduly suggestive identification process that violates defendants' due process rights when, as here, they arrange a first-time in-court identification procedure. Stated simply, this Court should hold that first-time in-court identifications are *per se* inadmissible.

## II. Because the Current Tests for Excluding Unreliable Identification Evidence Do Not Comport with Scientific Consensus nor Adequately Safeguard Against Wrongful Conviction, This Court Should Modify the Relevant Legal Framework.

As discussed above, Mr. Byrd's first-time in-court identification of Mr. Posey placed him at significant risk of being misidentified and such first-time in-court identifications should be categorically precluded as a *per se* violation of the defendant's due process rights. In addition to the inherently suggestive and unconstitutional first-time in-court identification procedure that



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occurred, there are myriad variables implicated in this case that cast grave doubt upon the reliability of the identification—variables that are routinely at issue in wrongful convictions caused by misidentification, but which are not adequately accounted for in the current legal framework for determining the admissibility of eyewitness evidence. To prevent wrongful convictions, *amici* urge this Court to take the opportunity presented by this case to modify its decades-old precedent and align it with well-established social science on the issue.

As noted above, to determine the admissibility of eyewitness identification evidence in the face of a due process challenge, Michigan courts currently follow the legal framework of *Biggers*, 409 US 188 and *Manson v Brathwaite*, 432 US 98; 97 S Ct 2243; 53 L Ed 2d 140 (1977). *See e.g. Kurylczyk*, 443 Mich at 302. Under this test, the initial question for Michigan trial judges is whether, under the totality of the circumstances, a pretrial identification procedure employed by the state was impermissibly suggestive and unnecessary. If so, the court then considers whether the resulting identification is nonetheless reliable, as indicated by the factors outlined in *Biggers*, namely: the opportunity the witness had to view the perpetrator at the time of the incident; the witness's degree of attention; the accuracy of their prior description of the perpetrator; the witness's level of certainty at the time of the identification procedure; and the time between the incident and the procedure. *Sammons*, 505 Mich 31, 41 (*citing Perry v New Hampshire*, 565 US 228, 238–39 (2012); *Biggers*, 409 US at 199). If the pretrial identification procedure is deemed to be unduly suggestive, unnecessary, and unreliable, the evidence of the pretrial identification is inadmissible. *Kurylczyk*, 443 Mich at 303. However, an in-court identification derived from an impermissibly suggestive identification procedure may, nonetheless, be admitted into evidence where the witness has an "independent basis" for the identification that is untainted by the improper pretrial identification procedure. *Kachar*, 400 Mich at 95–96. To determine whether a witness has an independent basis that is sufficient to "purge the taint" of a suggestive procedure,



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this Court has identified eight factors—many of which overlap with the *Biggers* factors—that trial judges should evaluate to determine whether there is a sufficient "independent basis" for the admission of an in-court identification:

1. Prior relationship with or knowledge of the defendant.
2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise, or other factor affecting sensory perception and proximity to the alleged criminal act.
3. Length of time between the offense and the disputed identification. . . .
4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.
5. Any previous proper identification or failure to identify the defendant.
6. Any identification prior to lineup or showup of another person as defendant.
7. [T]he nature of the alleged offense and the physical and psychological state of the victim.
8. Any idiosyncratic or special features of defendant.

*Kachar*, 400 Mich at 95–96.

Social science research conducted since this Court's adoption of *Manson/Biggers* and articulation of the "independent basis" test in *Kachar* establishes that suggestive identification procedures can distort witness memory in a manner not accounted for in the current framework, and that several of the *Manson/Biggers* and *Kachar* factors—for example, witness certainty and degree of attention—are not diagnostic of reliability. *See generally* Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of the Eyewitness Science: 30 Years Later*, 33 LAW & HUM BEHAV 1, 9 (2008). As a result, (1) the *Manson/Biggers* test routinely allows for the admission of unreliable and possibly false identification evidence, risking wrongful conviction of innocent people who have been misidentified; and (2) the "independent basis" test, articulated in *Kachar*, allows for the admission of identification evidence that has been tainted by a prior suggestive procedure, is "scientifically unsound," and, likewise, places innocent people at risk of wrongful conviction. *State v Martinez*, 2021-NMSC-002, ¶ 73; 478 P3d 880, 904 (2020) (holding that an analogous New Mexico law

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regarding the "independent source" doctrine should be abandoned, in large part, due to the scientific research revealing that there is "nothing independent or reliable about an eyewitness's memory of events that has been reshaped and otherwise tainted by law enforcement's use of suggestive identification procedures"). The current legal analysis thus lags far behind four decades of advancements in scientific research regarding eyewitness identifications and should be addressed by this Court.

### A. The *Manson/Biggers* Tests Do Not Align with the Current Scientific Consensus About the Fallibility of Memory.

Michigan's legal framework inadequately safeguards against wrongful convictions: it fails to prevent unreliable—and potentially false—identification evidence from being presented to juries. This Court should take the opportunity here to update these outdated tests to reflect current science and to help protect people from wrongful conviction.

The *Manson/Biggers* test is inherently and critically flawed in at least four ways. First, and most significantly, research has shown that suggestive identification procedures can artificially inflate a witness's "self-reports" regarding three of the five *Manson* reliability factors—namely, (1) opportunity to view; (2) degree of attention; and (3) certainty. *See State v Henderson*, 208 NJ 208; 27 A3d 872 (2011) (holding modified by *State v Chen*, 208 NJ 307; 27 A3d 930 (2011) (holding modified by *State v Anthony*, 237 NJ 213, 204 A3d 229 (2019))) (noting that "research has shown that [t]hose reports can be skewed by the suggestive procedures themselves and thus may not be reliable"); *see also* Wells & Bradfield, "*Good, You Identified the Suspect": Feedback to eyewitnesses distorts their reports of the witnessing experience*, JOURNAL OF APPLIED PSYCHOLOGY (1998) 367; Wells & Quinlivan at 10-12 ("The reality of *Manson* is that the suggestive procedure can affect not only the identification decision, but also affect the witness' self-reports on the *Manson* factors."). Moreover, the inflation of one self-report may have

collateral effects on other self-reports. *See, e.g.*, Bradfield & Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria,* LAW & HUMAN BEHAVIOR (Oct., 2007) 587–91 (noting the surprising collateral effects that "manipulations of the *Biggers* criteria have . . . on perceptions of multiple criteria"). "Because the *Manson* reliability factors come into consideration once it is already determined that a procedure was suggestive, courts are using the *Manson/Biggers* reliability factors under precisely the conditions that make the *Manson* criteria questionable and likely misleading." Wells & Quinlivan at 12.

Thus, the ironic result of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts are, therefore, encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter. *Henderson*, 208 NJ at 286; *see* Wells & Quinlivan, at 18 (explaining that under *Manson,* trial courts are hamstrung because "the inflated certainty, statement of view, and statement of attention resulting from suggestive procedures effectively guards against exclusion, thereby undermining incentives to avoid suggestive procedures," and may actually "provide[ ] an incentive to use suggestive procedures.").

Second, the test erroneously assumes that a witness's honest testimony about three of the five reliability factors serves as probative evidence. However, research demonstrates that people who are not attempting to deceive triers of fact and believe they are being honest are, nonetheless, unlikely to provide accurate self-reports about their opportunity to view, degree of attention paid, or certainty in the identification, *even in the absence of suggestion*. *See, e.g.*, Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, LAW & HUMAN BEHAVIOR (2008) 526–35 (noting the poor ability of eyewitnesses to estimate distances); *see also,* Loftus et al., *Time Went by So Slowly: Overestimation of Event Duration by Males and Females*, APPLIED COGNITIVE PSYCHOLOGY, 3 (1987) (noting the tendency of eyewitnesses to overestimate



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duration of events).

Third, the *Manson* test is premised on the assumption that two factors—a witness's confidence in their identification and a witness's ability to describe the perpetrator—are indicators of the witness's accuracy, despite decades of scientific research that has disproven the strength of these correlations. Current scientific literature consistently demonstrates that the correlation between confidence and accuracy occurs only in limited circumstances, and is otherwise weak to nonexistent. *See Lawson,* 352 Or at 777–78 (summarizing scientific findings on this factor); *see also Ramirez*, 817 P2d at 889 (rejecting certainty as a relevant factor). Indeed, there is vast consensus among this nation's leading scientists that "eyewitness confidence is malleable and influenced by factors unrelated to accuracy." Kassin, et al., *On the "General Acceptance" of Eyewitness Testimony Research*, AMERICAN PSYCHOLOGIST at 410 (2001). Research has also demonstrated that there is "little correlation between a witness's ability to describe a person and the witness's ability to later identify that person." *Lawson* at 774 (citing Meissner et al., *Person Descriptions as Eyewitness Evidence*, THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (Jul. 22, 2007); *see also* Wells, et al, *Policy and Procedure* at 9 (noting that several variables, including the "manner in which a witness is interviewed by an investigator[,] can undermine the accuracy of a witness's [description] statement.").

Fourth, although the test directs courts to consider the "totality of the circumstances," in practice, courts generally only analyze the five enumerated factors, and no other circumstances. *See Henderson,* 208 NJ 208, 27 A3d 872. Scientific literature has indisputably shown that many other "system" and "estimator" variables significantly affect the reliability of eyewitness identifications. *See generally* Wells, et al, *Policy and Procedure* at 6, 10 (discussing a variety of factors that impact eyewitness reliability that are not accounted for in the *Manson* test).

These problems warrant a reevaluation and reformation of the *Manson/Biggers* test in order

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to ensure the suppression of the most unreliable and prejudicial identifications. State high courts across the country have modified their standards to correspond with the latest developments in the science underlying eyewitness identification. In *Henderson*, the New Jersey Supreme Court appointed a Special Master to evaluate the relevant science relating to eyewitness identifications. 208 NJ at 303–04. Based on the Special Master's report, which included an in-depth analysis of system and estimator variables, the court found that the *Manson* test "does not adequately meet its stated goals: it does not provide a sufficient measure for reliability; it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony." *Id.* at 285.

Accordingly, the New Jersey Supreme Court discontinued that state's use of the *Manson/Biggers* framework. Instead, once a defendant presents some evidence of suggestive law enforcement procedures, the trial court is to consider all of the relevant system and estimator variables. The identification must be suppressed if the defendant shows a very substantial likelihood of misidentification under the totality of circumstances. *Id.* at 288–92. Likewise, the Oregon Supreme Court looked to the *Henderson* opinion and the New Jersey Special Master's report "to inquire into the factors affecting the reliability of eyewitness identification evidence," and also revised that state's legal framework for the admission of eyewitness testimony in light of relevant estimator and system variables at play. *Lawson*, 352 Or at 740 n3. Furthermore, in 2015, the Supreme Court of Massachusetts convened a Study Group on Eyewitness Evidence and, in *Commonwealth v Gomes*, 470 Mass 352; 22 NE3d 897 (2015), adopted its findings on the "scientific principles regarding eyewitness identification" (closely tracking those in *Henderson*).

Justice Marshall's dissent in *Manson* was prescient, predicting that "the Court's totality test [would] allow seriously unreliable and misleading evidence to be put before juries[.]" 432 US at 128 (Marshall, J., dissenting). Although the *Manson/Biggers* test—in particular, the separate, consecutive treatment of suggestive police procedures, followed by the consideration of certain

"reliability" factors, many of which are likely to be skewed by the suggestive procedure itself—may have seemed reasonable at the time of its adoption, science and experience in the intervening decades have exposed its flaws.[5]

This Court should follow in the footsteps of other states and revise state rules for admitting eyewitness identification evidence by incorporating scientific and evidentiary advancements into gatekeeping judicial appraisals of the admissibility. The prospective framework should be a true totality-of-the-circumstances test that is informed by—rather than at odds with—scientific research. Likewise, the new framework should be flexible enough to accommodate future scientific advances to help courts better weigh the accuracy of eyewitness identification evidence.

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[5] In addition to New Jersey, Oregon, and Massachusetts, numerous other courts have embraced the science and revised their rules relating to the treatment of eyewitness identifications. *See, e.g., State v Kaneaiakala*, 145 Haw'i 231, 242–47; 450 P3d 761 (2019) (revising the factors a judge should consider in addressing whether an impermissibly suggestive eyewitness identification is nonetheless reliable, based on a "robust body of scholarship and empirical research"); *State v Harris*, 330 Conn 91, 129–31; 191 A3d 119 (2018) (following New Jersey's *Henderson* framework using estimator variables in evaluating the reliability of an identification; noting that "courts in Alaska, Kansas, Massachusetts, New Jersey, New York, Utah and Wisconsin have held as a matter of state constitutional law that the *Biggers* framework insufficiently protects against the risk of misidentification" and that "the courts of Georgia and Oregon have reached the same conclusion as a matter of state evidentiary law"); *Young v State*, 374 P3d 395, 417 (Alaska 2016) (replacing the *Biggers* factors with a list that takes into account system variables and estimator variables); *State v Almaraz*, 154 Idaho 584, 595; 301 P3d 242 (2013) (adding system and estimator variables to its own test determining whether an out-of-court-identification violates due process rights because the "research has convincingly shown [the variables] impact the reliability of eye-witness identification"); *see also People v Lemcke*, 11 Cal 5th 644, 647; 486 P3d 1077 (2021) (prohibiting the use of a jury instruction on witness certainty because "there is now unanimity in the empirical research" that eyewitness confidence is an unreliable indicator of accuracy); *State v Carpenter*, 605 SW3d 355, 361 (Mo 2020) (allowing expert testimony about the factors that affect the reliability of an eyewitness's identification partly because the "scientific community, and its findings and conclusions are as nearly unanimous as it is possible to be"); *Martinez*, 478 P3d at 895–06 (requiring law enforcement agencies "to adopt and follow scientifically supported protocols and practices to minimize mistaken identification, and also mentioning a "near consensus among experts" that certain system and estimator variables "inherently impair the ability of witnesses to accurately process what they observe"); *State v Discola*, 207 Vt 216, 231; 184 A3d 1177 (2018) (formally abandoning witness certainty as a factor in the reliability determination of eyewitness identifications citing scientific evidence and numerous other state courts that have done so).



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While this Court should not ignore *Manson*'s fundamental defects, in no way does its regime prevent the implementation of scientifically sound protocols that would help to avoid misidentification. Encouraging courts to be conversant with generally accepted findings within the field of eyewitness identification research is, in fact, consistent with the *Manson* Court's objective that "reliability" is the "linchpin" for judicial analysis. *Manson*, 432 US at 114. And clearly this Court can implement a remedial legal framework for the admission of identification evidence by exercising its administrative supervisory power over all of Michigan's courts. A reform of the *Manson/Biggers* framework, coupled with an abandonment of the *Kachar* "independent basis" test, discussed directly below, would go a long way to ensure that only reliable eyewitness identifications are admissible at trial. As the New Mexico Supreme Court has aptly stated, "[i]n the face of emergent scientific consensus on a given issue, blind adherence to outdated precedent is a failing. This is particularly the case in the constitutional realm and is no less so in the context of eyewitness evidence where the risks of misidentification are great and the stakes including wrongful convictions are high." *Martinez*, 478 P3d at 903.

### B. The *Kachar* "Independent Basis" Rule Allows for the Admission of Unreliable Identification Evidence That Science Proves has been Contaminated by a Prior Unreliable Procedure: This Court Should Thus Abandon the *Kachar* Rule.

In addition to amending the *Manson/Biggers* test, this Court should take this opportunity to reassess its current "independent basis" test for the admission of in-court identifications that are preceded by unconstitutionally suggestive and inadmissible pretrial procedures. *See Kachar*, 400 Mich 78. The *Kachar* "independent basis" test provides for the admission of in-court identifications—despite the witness having participated previously in an unduly suggestive procedure that produced an unreliable identification of the defendant—so long as the court identifies facts suggesting the witness had sufficient "opportunity to observe" the perpetrator and

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is "credib[le]." *Kachar*, 400 Mich at 95. Like the *Manson/Biggers* test before it, while this test may have seemed reasonable at the time of adoption, it is clear today—after decades of scientific research regarding eyewitness misidentification—that this test invites the introduction of unreliable, and possibly false, eyewitness identification evidence and places innocent people at risk of wrongful conviction, because the balance of its factors do not, and could not, ameliorate the harm of the prior contamination. Additionally, the test, like *Manson/Biggers*, relies on factors that are not diagnostic of reliability. Accordingly, to prevent against wrongful conviction, this Court should abandon the independent basis test, as the test allows for the admission of eyewitness testimony that has been contaminated by prior suggestive procedures and is "scientifically unsound." *Martinez*, 478 P3d at 904.

Multiple exposures to a police suspect before an in-court identification—like what happened in the instant case[6]—adds to the suggestiveness of the in-court procedure. Because memory is extremely malleable, repeatedly testing it on an event or identification can lead to "memory contamination." Wixted, et al, *Test a Witness's Memory of a Suspect Only Once*, 22 PSYCH SCI PUB INT, 1, 2–3. Contamination occurs when a witness initially views a set of photographs and makes no identification, but then during a later procedure, selects an individual who was depicted in the earlier photos, conflating the memory of the face depicted in a photograph with the memory of the face of the perpetrator. Thereafter, gaps in the witness's memories reshape to include the earlier viewed individuals. *Id.* at 10, 13. An innocent target is thus more likely to be selected at a second identification, especially one that occurs in a courtroom. Lin, Strube &

[6] Mr. Byrd was exposed to Mr. Posey by state actors more than once: first during a police photo identification procedure which contained his mugshot, but did not result in his identification, and again at the preliminary hearing, when the trial judge denied Mr. Posey's lawyer's motion to waive his presence during the eyewitness's testimony. At trial, after having been exposed to Mr. Posey twice, Mr. Byrd then entered the courtroom and decided in that instant that the person seated next to counsel with a similar complexion as the culprit "must be" Mr. Posey. *Id.*

Roediger, *The Effects of Repeated Lineups and Delay on Eyewitness Identification*, 4:16 COGNITIVE R 1, 2. The consequences are permanent: once memory "has been tested and contaminated, it is not possible to perform a second independent test of the memory of a stranger's face that was formed during the commission of the crime." Wixted, Wells, Loftus, & Garret, *Test a Witness's Memory of a Suspect Only Once*, PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST Vol 22(1S) (2021) at 15S.

Social science researchers warn that courts' failures to adequately consider memory contamination may account for many of the wrongful convictions overturned by DNA evidence. *See* Garrett, *Convicting the innocent*. The problem of witness contamination is not new to this Court. For almost thirty years, justices have expressed concern about the potential for biasing information to alter witness memory, especially in the context of photo identifications. *See e.g.*, *Kurylczyk*, 443 Mich at 320–21 (Brickley, J., concurring) ("A witness . . . may be likely to base later identifications of the suspect upon that photograph").[7]

Moreover, many of the *Kachar* factors that courts rely on to establish an "independent basis" fall prey to the same problems as the *Manson/Bigger* test. For example, courts are instructed to consider the witness' "opportunity to observe the offense"—a factor which generally relies on a witness's self-report, which is likely to be impacted by the unduly suggestive identification procedure. *See* Wells & Quinlivan at 18. Additionally, under *Kachar*, courts consider the "accuracy . . . in the pre-lineup or showup description and defendant's actual description," despite a demonstrated lack of correlation between a witness's ability to accurately describe the person

[7] *See also People v Gray*, 457 Mich 107, 113–14, n6; 577 NW2d 92 (1998) ("A prior tentative identification . . . does not eliminate the potential influence that a second, suggestive procedure may have on a subsequent in-court identification."); *Blevins*, 314 Mich App at 368 (Shapiro, J., dissenting) ("[M]emory can be changed over time, particularly when there are repeated retrieval attempts as a result of prompting.").



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and the reliability of the identification. *Lawson* at 774 (citing Meissner, et al.).

For these reasons, this Court should abandon the *Kachar* "independent basis" test and categorically disallow the introduction of in-court identifications that have been preceded by pretrial identifications of the defendant which present a "very substantial likelihood of misidentification" under a scientifically-sound totality-of-circumstances test, proposed by *amici* in section II(A) above. *Accord Martinez*, 478 P3d at 905 (abandoning the "independent source" doctrine—the equivalent of an independent basis doctrine—holding that "[t]he independent source doctrine in the context of due process and disputed eyewitness identification evidence lacks legal justification and is contrary to the existing science"). Such a *per se* rule would not apply "in cases where the eyewitness, such as a domestic violence victim, is personally familiar with the perpetrator of the crime. In such instances, therefore, the identification is admissible." *Id.* (noting also "that in such cases, it is highly unlikely either that the identity of the perpetrator will be in dispute or that a photo array or similar eyewitness identification procedure will be used by law enforcement to identify the perpetrator in the first place.").

## III. Defense Counsel's Failure To Object To The Unreliable In-Court Identification and Failure to Proffer Relevant Expert Testimony Constituted Ineffective Assistance Of Counsel.

Effective assistance of counsel is a necessary condition to a fair trial. *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Mr. Posey was deprived of this constitutional right because of two key failures committed by defense counsel:

(1) the failure to object to Mr. Byrd's in-court identification of Mr. Posey; and

(2) the failure to call an expert witness who could testify to the vulnerabilities of eyewitness identification testimony.

The in-court identification was the linchpin of the prosecution's case against Mr. Posey: counsel could not have had any strategic reason to fail to make a proper objection to that

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identification. *People v Schumacher*, 384 Mich 831; 186 NW2d 562 (1971); *see also People v Karasek*, 63 Mich App 706, 715; 234 NW2d 761 (1975). Mr. Posey's trial counsel should have reasonably known that his failure to object to the in-court identification of his client would leave that issue unpreserved on appeal.

The failure to call an expert witness in a case that warrants it also cannot be regarded as trial strategy. *People v Ackley*, 497 Mich 381, 390; 870 NW2d 858 (2015). Courts widely recognize that eyewitness identification experts are often helpful to jurors evaluating such testimony. *See, e.g., Ferensic v Birkett*, 501 F3d 469, 481–83 (CA 6, 2007) (discussing the "near-universal acceptance of the reliability of expert testimony regarding eyewitness identification").[8] While counsel did conduct cross-examination, he did not possess the education necessary to edify the jury on eyewitness identification to the benefit of his client. *Ackley*, 497 Mich at 391, 394.[9] Further, lay witnesses in the instant case were obviously not equipped to answer important questions on cross examination about the relevant variables bearing upon the accuracy of Mr. Byrd's memory. Cross-examination—one of trial counsel's most powerful tools—is not absolute in its power, *Wade*, 388 US at 235. This is even more true when challenging a sincere eyewitness who is simply mistaken in their identification of a defendant. *Kurylczyk*, 443 Mich at 320; *Dickson*, 332 Conn at 440.[10] Cross-examination cannot balance out the prejudicial effects of an in-court identification.

The remedial effect of jury instructions also falls short. In New Jersey, for example, after

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[8] *See also United States v Bunke*, 412 F App'x 760, 768 (CA 6, 2011) (citing *Ferensic*, 501 F3d at 481–83); *Thomas v Heidle*, 615 F App'x 271, 281 (CA 6, 2015) (when the government relies on eyewitness evidence, a criminal defendant has a "weighty" interest is having an eyewitness identification expert testify at trial).

[9] *See also Richey v Bradshaw*, 498 F3d 344, 364 (CA 6, 2007); *Dugas v Coplan*, 428 F3d 317, 331 (CA 1, 2005); *Elmore v Ozmint*, 661 F3d 783 (CA 4, 2011); *Miller v Anderson*, 255 F3d 455 (CA 7, 2001).

[10] *See also* Wells, et al, *Eyewitness Identification Procedures: Recommendations for Lineups & Photospreads*, LAW AND HUMAN BEHAVIOR, 6 (1998).

state courts reformed eyewitness jury instructions, social scientists still found jurors to be indiscriminate, poor arbiters of whether eyewitness identification testimony was "weak" or "strong," discounting both in equal measure. Papapiliou, et al, *The Novel New Jersey Eyewitness Instruction Induces Skepticism but Not Sensitivity*, PLOS ONE, (2015); NAS Report, 110–11 (2014).

In the instant case, the jury had no chance to hear credible testimony that would have tempered the prejudicial effect of Mr. Byrd's unreliable in-court identification. Counsel thus did not afford Mr. Posey a real chance to combat the prosecution's case, *United States v Downing*, 753 F2d 1224 (CA 3, 1985), nor did he achieve the minimal level of competency required by the Sixth Amendment.

## CONCLUSION

Without the proper procedural guardrails, unreliable identifications will continue to threaten the integrity of the criminal legal system and result in wrongful convictions. This Court can and should take steps to prevent such miscarriages of justice.

*Amici* respectfully urge the Court to find that the flawed eyewitness identification testimony in this case should not have been admitted at trial. Allowing this first-time, in-court identification evidence at trial violated Mr. Posey's due process rights. Furthermore, to guard against unreliable misidentifications that lead to wrongful convictions, this Court should: 1) hold first-time courtroom identifications to be *per se* inadmissible; 2) rework the *Manson*/*Biggers* analysis to accurately reflect the current scientific consensus regarding factors that implicate the reliability of eyewitness testimony; 3) abandon the *Kachar* "independent basis" test and announce a *per se* rule that prohibits the admission of in-court identifications that have been preceded by unconstitutionally suggestive and unreliable pretrial identification procedures; and (4) find that Mr. Posey's trial counsel was constitutionally ineffective for failing to object to an unreliable in-



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court identification and for failing to call an expert to educate the jury about the limits of eyewitness identification testimony.

Respectfully Submitted,

**MICHIGAN INNOCENCE CLINIC**

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**DATED: August 16, 2022**



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