STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

DAMETRIUS BENJAMIN POSEY

Defendant-Appellant
_____/

Supreme Court No. _____

Court of Appeals No. 345491

Lower Court No. 18-000074-01-FC

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

ADRIENNE N. YOUNG (P77803)
Attorney for Mr. Posey
_____

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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Statement of Jurisdiction

Dametrius Benjamin Posey was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on August 28, 2018. A Claim of Appeal was filed on September 14, 2018 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated September 4, 2018, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

Statement of Questions Presented

I. Was Mr. Posey denied due process of law by an in-court identification that had no independent basis? Was trial counsel ineffective for failing to object to or suppress the in-court identification of Mr. Posey by Terrence Byrd? Additionally, was counsel ineffective for failing to call an eyewitness or memory expert to impeach both key prosecutor witnesses?

Court of Appeals answers, "No."

Dametrius Benjamin Posey answers, "Yes."

II. Was Mr. Posey's sentence, while within the guidelines range, disproportionate to the offense and thus, unreasonable? Is he entitled to resentencing before a different judge?

Court of Appeals answers, "No."

Dametrius Benjamin Posey answers, "Yes."

Judgment Appealed From And Relief Sought

In a published opinion, the Court of Appeals affirmed Dametrius Posey's within-guidelines sentence, stating that *People v Lockridge*, 498 Mich 358 (2015) did not alter or diminish MCL 769.34(10), which states that the court of appeals "shall affirm" a sentence within the guidelines absent a scoring error, inaccurate information, or a constitutional concern. *People v Posey*, ____ Mich App ___ (2020); slip op, 8. In supporting its rationale, the Court of Appeals cited to *People v Ames*, 501 Mich 1026 (2018) and *People v Schrauben*, 500 Mich 360 (2016) the former wherein this Court granted leave on this issue but ultimately in both cases denied leave.

It is time for this Court to provide guidance to trial court judges following *Lockridge*. "The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty." *People v Heller*, 316 Mich App 318, 320–21 (2016) (internal citation omitted). "Sentencing is more than a rote or mechanical application of numbers to a page. It involves a careful and thoughtful assessment of the true moral fiber of another. . ." *Id.* at 318 (internal citation omitted).

The portion of MCL 769.34(10) that requires the court of appeals to affirm any and all minimum sentences imposed within the appropriately scored guideline range, regardless of proportionality or reasonableness, upsets this principle. *Lockridge* necessarily invalidates MCL 769.34(10).

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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Dated: December 17, 2020

Statement of Facts

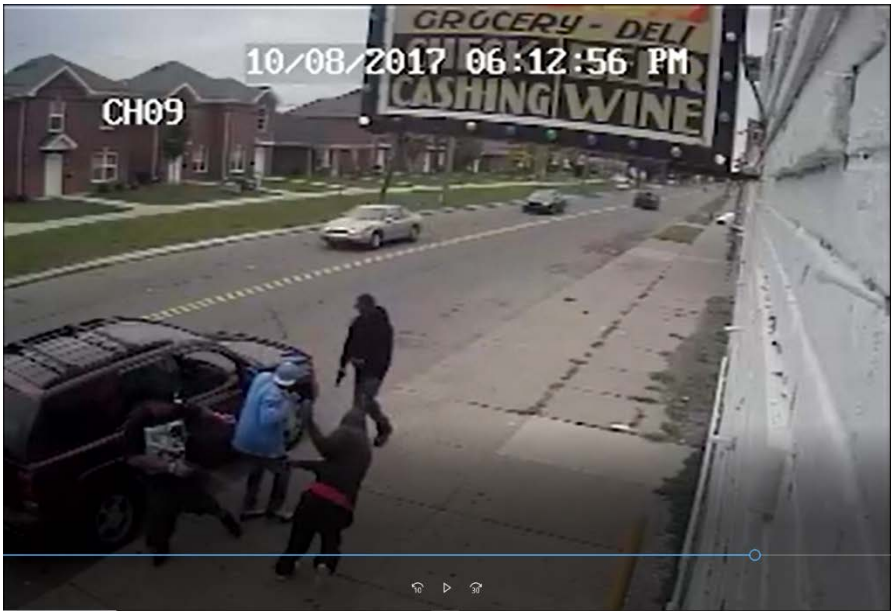
Terrence Byrd and his cousin, Dwayne Scott, went to the Super X Market on the corner of Charles Street and Spalding Street in Detroit following a Detroit Lions tailgate. 7/25/18 TT, 45. They arrived at "around five or six o'clock in the afternoon." 7/25/18 TT, 92. Mr. Scott had previously had some tequila shots. 7/25/18 TT, 46. Mr. Byrd does not drink and has a CPL and carries a gun on him regularly. 7/25/18 TT, 101, 125. The two cousins passed the time together near Mr. Byrd's car, occasionally entering the market to play the lotto. 7/25/18 TT, 92.

At one point, Mr. Byrd and Mr. Scott saw two men walk from down the block and enter the store. These two men stood out to Mr. Byrd because they were in jeans and hooded sweatshirts (hoodies) with the hoods up, but it was over 70 degrees that day. 7/25/18 TT, 94. The two men in hoodies exited the store and approached Mr. Byrd and Mr. Scott. Mr. Scott could not describe them in any detail. 7/25/18 TT, 48. He only recalled that one of the two guys pulled a gun and said something to him. 7/25/18 TT, 49, 56. He did not see what the other guy did. 7/25/18 TT, 54.

Mr. Byrd also saw this same guy pull a gun on his cousin, but he never saw the gun above the man's midsection or waist. 7/25/18 TT, 97. Mr. Byrd described this guy as 6'3". The other guy, who confronted Mr. Byrd, was 5'7" and light-skinned. 7/25/18 TT, 94, 98.

Gunfire erupted. 7/25/18 TT, 99. Mr. Byrd does not know who shot first but he testified to firing 17 shots from his own gun. 7/26/18 TT, 28. Mr. Scott estimated he heard 30 shots as he was running away. 7/25/18 TT, 53.

Two Detroit Police officers reported to the scene and collected casings, a weapon, and identified some blood spatter. 7/30.18 TT, 47. The recovered casings were determined to come from at least two types of guns: Mr. Byrd's 40-caliber Glock and a Smith and Wesson. 7/30/18 TT, 56-58. The weapon recovered at the scene was not tested for fingerprints; no blood was tested. 7/30/18 TT, 45, 121. The police obtained Green Light footage and store footage from the Super X Market. 7/26/18 TT, 52. The shooting, which lasted approximately a minute, was captured on tape (video included as *Appendix G*):



Following the shooting, Mr. Byrd took his cousin to Detroit Receiving Hospital. As he pulled up, he noticed a car behind him with three individuals. He

believed those people to be the shooters, but he never told that to police. 7/26/18 TT, 30.

That same night, Dametrius Posey ended up at Oakwood Hospital in Dearborn. He was admitted at about 7:12 PM and he, too, had suffered gunshot wound injuries. 7/30/18 TT, 81.

Mr. Posey was interviewed by police at Oakwood; he initially identified himself as Devone Posey. 7/30/18 TT, 74. He told police that he was shot at about 7:45PM that evening near Rosemont and Warren Streets, the opposite side of the city as the market. 7/30/18 TT, 74-75. Police took his clothes into evidence but it is unclear what happened to the clothes after that. 7/30/18 TT, 75-76, 125. Officers never went to the area described by Mr. Posey to investigate. 7/30/18 TT, 79, 97.

Back at Detroit Receiving, Mr. Byrd was visited by two officers who retrieved his weapon. 7/30/18 TT, 69-70. Mr. Scott required an operation as he suffered a broken bone and nerve damage in his left arm from the shooting. 7/25/18 TT, 60-61.

The next day, Mr. Byrd and Mr. Scott gave statements to the police, wherein Mr. Scott described the shooter as a "dark-skinned brother, five-nine." 7/25/18 TT, 51. Mr. Byrd described both men. One, as being approximately 6'3" with dark skin and the other as light-skinned with reddish-blonde hair. 7/26/18 TT, 24. That same day, Mr. Byrd viewed two six-pack photo arrays and identified one individual in each array as the people he believed to have been involved in the shooting. He was told by the Detroit Police Department detectives that he did not pick the individuals they had in custody. 7/26/18 TT, 37.

Two days after the shooting, Mr. Scott was also presented with two six-pack photo arrays. In one photo array, he did not select anyone. In another, he selected Dametrius Posey as the individual he believed to be involved in the shooting. Mr. Scott described the process of selecting Mr. Posey as "just pick[ing] out who I thought looked like the person." 7/25/18 TT, 58. He was "unsure" and "didn't really know" if the person he picked was "out there that day." 7/25/18 TT, 75. At the time of the shooting, he was preoccupied "getting out of the way of the bullets." 7/25/18 TT, 76.

Almost a year after the shooting, two individuals—Sanchez Quinn and Dametrius Posey—were tried jointly on counts of assault with intent to murder Mr. Boyd and Mr. Scott, assault with intent to commit great bodily harm against Mr. Byrd and Mr. Scott, carrying a weapon with unlawful intent, felon-in-possession, and multiple counts of felony-firearm.

Mr. Byrd, who did not identify Mr. Posey as involved in the shooting in the photo array or at the preliminary examination, did for the first time at trial identify Mr. Posey by name as a shooter at the Super X Market. 7/25/18 TT, 95. Mr. Scott, who had previously picked Mr. Posey out of a line up, did not identify Mr. Posey at trial as being present at the shooting. 7/25/18 TT, 76. Neither man had any prior knowledge of or familiarity with Mr. Posey. 7/25/18 TT, 76, 124.

Faulty identification was the primary theory of the defense: "There's no DNA. There's no fingerprint evidence…There is nothing else to confirm or corroborate identification…I want to impress upon you that the very first hurdle that the

Prosecutor has to get over is identification, and I don't think they've got over that hurdle." 8/1/18 TT, 50. Defense counsel's closing cited Mr. Scott's choosing Mr. Posey's picture from the photo array and Mr. Byrd's failure to do the same. 8/1/18 TT, 44-48. He emphasized Mr. Scott's failure to identify Mr. Posey as the shooter in court. 8/1/18 TT, 44. He asked the jurors to look at the still pictures and video and "see if it looks like Mr. Posey." 8/1/18 TT, 49.

In her closing, too, the prosecutor emphasized identification. She observed that Mr. Scott identified Mr. Posey in a lineup "two days after the shooting while it was fresh in his mind and while he was aware what was going on." 8/1/18 TT, 13. Nevertheless, she acknowledged that Mr. Scott was "focused on not getting shot." 8/1/18 TT, 14. She observed that Mr. Byrd did not have an opportunity to "sit with Mr. Posey for hours" but the jury did. 8/1/18 TT, 14-15. The prosecutor asked the jury to note that Mr. Posey was wearing glasses during trial "to hide his face from you." 8/1/18 TT, 17.

Mr. Posey was convicted on all counts and sentenced to 22 to 40 years for the controlling sentence of assault with intent to murder, to run consecutively to his five-year mandatory sentence for felony-firearm second.

Mr. Posey appealed his convictions and sentence. The Court of Appeals remanded for resentencing after Mr. Posey, together with the prosecutor's office, filed a motion for remand. The Court of Appeals retained jurisdiction.

Mr. Posey's GBH convictions and the corresponding felony-firearm convictions were vacated. His guidelines were rescored, but he was resentenced to

the same sentence. The Court of Appeals affirmed his convictions and sentences in a published opinion. Mr. Posey now asks this Court to grant leave.

I. Mr. Posey was denied due process of law by an in-court identification that had no independent basis. Trial counsel was ineffective for failing to object to or suppress the in-court identification of Mr. Posey by Terrence Byrd. Additionally, counsel was ineffective for failing to call an eyewitness or memory expert to impeach both key prosecutor witnesses.

Issue Preservation and Standard of Review

Trial counsel did not object to the in-court identification or move to suppress it. The issue is therefore reviewed for plain error. *People v Carines*, 460 Mich 750, 773-74 (1999).

In the alternative, whether an attorney failed to provide effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579 (2002). Findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.*

Argument

The only witness to positively identify Mr. Posey at trial was Terrence Byrd, one of two complainant-witnesses involved in the October 8, 2017 shooting at the Super X Market in Detroit, MI. Mr. Byrd transported his cousin and the second complainant-witness, Mr. Scott, to the hospital following the shooting. A bone in Mr. Scott's left arm had been shattered in the shooting and he endured some nerve damage. 7/25/18 TT, 60-61. The injury required an operation. 7/25/18 TT, 60.

After his operation, Mr. Scott gave a statement to police and described a shooter as a "dark-skinned brother, five-nine." 7/25/18 TT, 51. He could not recall any facial hair.[1] 7/25/18 TT, 50.

Two days after the shooting, officers visited Mr. Scott at the hospital again and showed him two six-pack photo arrays—one containing Mr. Posey's mugshot and one containing Mr. Quinn's mugshot. Mr. Scott did not identify anyone in the photo array containing Mr. Quinn. Mr. Scott identified Mr. Posey in the photo array containing his photo as "the shooter on Charles Street." He described the process as "just pick[ing] out who I thought looked like the person." 7/25/18 TT, 58. He was "unsure" and "didn't really know" if the person he picked was "out there that day." 7/25/18 TT, 75. At the time of the shooting, he was preoccupied "getting out of the way of the bullets." 7/25/18 TT, 76.

At trial, defense counsel pointed directly to Mr. Posey and asked Mr. Scott if he knew him or had seen him before. Mr. Scott answered "no" to both questions. 7/25//18 TT, 77.

Mr. Byrd was also interviewed by police the evening of the shooting. He described two guys with black hoodies and jeans. 7/25/18 TT, 93-94. One he guessed was 6'3" and the other he guessed was 5'7". 7/25/18 TT, 94. The following day, he was shown two six-pack photo array, one containing a mugshot of Mr. Quinn, the other containing a mugshot of Mr. Posey. Mr. Byrd took the line-up seriously and

[1] Mr. Scott testified at trial that he wrote in his statement that he described the shooter's hair as "a long haircut." 7/25/19 TT, 51. His statement, which was not admitted into evidence, says "low cut hair."

picked out who he thought was there. 7/25/18 TT, 112. In the line-up containing Mr. Posey's picture, Mr. Byrd selected someone else, Individual #2, as the person he recognized "from the store shooting." 7/25/18 TT, 121. At trial, he observed that Mr. Posey's picture was in slot number one. 7/25/18 TT, 121.

Following the photo arrays, Mr. Byrd never told anyone that he had misidentified the individual involved in the shooting. 7/25/18 TT, 117. At trial, Mr. Byrd testified to having seen Mr. Posey at the hospital following the shooting but he did not report that information to the police or anyone else before trial. He estimated between the shooting and the hospital, he viewed both shooters for a total of 25 seconds. 7/26/18 TT, 32. He did not identify Mr. Posey at any court proceeding prior to trial. 7/26/18 TT, 15.

At trial, when asked by the prosecutor if he saw either of the two men who ultimately confronted him and Mr. Scott, Mr. Byrd identified Mr. Posey and Mr. Quinn by name. 7/25/18 TT, 95.

Q	And, Mr. Byrd, do you see either of the two men that went into this store that day in the courtroom today?
A	Yes.
Q	Could you please point to whomever you recognize and describe something that he's wearing?
A	Mr. Posey, in the white shirt.
Q	Okay?
A	And, Mr. Sanchez.
Q	And when you say Mr. Sanchez, what is he wearing?
A	He's in the tan jumper or --

He later clarified that, actually, he does not know Mr. Posey. 7/25/18 TT, 124. At preliminary examination, when asked if he observed anyone in the courtroom from the October 8 shooting, he only identified Mr. Quinn, as the "lighter-skinned" shooter. 7/26/18 TT, 43. And, unlike Mr. Quinn, Mr. Byrd had never encountered Mr. Posey's image on the news or on Facebook. 7/26/28 TT, 49. Mr. Byrd never had any "beef" with Mr. Posey. 7/25/18 TT, 124. Mr. Byrd only "learned his name through the documents that were to my home through the subpoena." 7/25/18 TT, 117.

The issue here is solely with the in-court identification. Unlike *People v Gray*, 457 Mich 107; 577 NW2d 92 (1998) and *Neil v Biggers*, 409 US 186, 93 S Ct 186 (1972), this faulty in-court identification was not preceded by a suggestive procedure. Mr. Byrd did not identify Mr. Posey in the six-pack photo array and did not identify Mr. Posey during preliminary examination. Here, the suggestive identification procedure is the in-court identification *itself*.

As our Supreme Court previously acknowledged, the viewing of a defendant at counsel table, like the exhibition of a single photograph, is one of the most suggestive photographic identification procedures that can be used. See *Gray*, 457 Mich at 111; Sobel, *Eyewitness Identification* (2d ed) §5.3(f), page 5-42.

Under the present circumstances, this Court should still apply the tests in *Gray* and *Biggers* to assess the validity of the in-court identification. *See, US v Hill*, 967 F2d 226, 232 (CA 6, 1992) (applying *Biggers* to an identification occurring for the first time at trial because "the threat to due process is no less applicable.");

State v Dickson, 141 A. 3d 810, 822 (Conn. 2016) (holding that courts must examine an identification's accuracy before allowing a witness who has not previously identified the defendant to make an identification in court because such in-court procedures are inherently suggestive…); *But see, Garner v People*, 436 P3d 1107 (Colorado Supreme Court, 2019) (due process does not require reliability assessment for in court-identification where that identification was not preceded by impermissibly suggestive pretrial identification procedure by law enforcement) (cert denied in SCOTUS on October 2019).

Validity of an in-court identification

The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the "totality of circumstances." *Biggers*, 409 US 188 (1972).

Mr. Posey submits that the prosecution would have been unable to prove an independent basis for the witness's in-court identification.

In *People v Kachar*, 400 Mich 78, 252 NW2d 807 (1977), the Michigan Supreme Court listed eight factors that a court should use in determining if an independent basis for identification exists:

1. Prior relationship with or knowledge of the defendant;
2. The opportunity to observe the offense, including such factors as length of time of observations, lighting, noise or other factors 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 show up description and defendant's actual description.
5. Any previous proper identification or failure to identify the defendant;
6. Any identification prior to the lineup or show up of another person as defendant;

7. The nature of the alleged offense and the physical and psychological state of the victim;
8. Any idiosyncratic or special features of the defendant.

Kachar, 400 Mich at 95-96.

As noted by the *Gray* court, because the independent basis inquiry is a factual one, not all eight factors will always be relevant to every case. Moreover, a court may put greater or lesser weight on any of the listed factors, depending on the circumstances of the case. Lastly, the eight factors listed are not exhaustive. There may be certain facts in a given case that the court considers relevant to the inquiry, yet do not fit neatly into any one of the eight factors. *People v Lee,* 434 Mich 59; 450 NW2d 883 (1990).

In the case before this Court:

1. There was nothing to indicate that Mr. Byrd knew Mr. Posey.
2. The shooting itself was quick, taking approximately a minute. In the video presented at trial, the shooting begins at the 6:12 mark and by 6:13 the parties have all fled the scene. Not only is the scene chaotic, as the below-provided still shots evidence, Mr. Byrd's primary focus was on the shorter, lighter-skinned shooter who initially confronted him. His back is to the taller, darker-skinned shooter.
3. Nearly a year had passed between the date of the shooting and the in-court identification.
4. Ms. Byrd's initial description of the shooter was general: black male, wearing hoodie, 6'2".
5. Mr. Byrd first encountered a picture of Mr. Posey in a photo array presented to him within 24 hours of the shooting. He did not identify Mr. Posey. At preliminary examination, Mr. Byrd was asked if anyone he recognized from the October 8 shooting was present in court and he identified only the "light-skinned guy", Sanchez Quinn. Prior to trial, Mr. Byrd had never identified Mr. Posey and he testified at trial to not knowing Mr. Posey.
6. See 5.
7. The circumstances were traumatic in that guns were pointed at Mr. Byrd and his cousin and he shot at least 17 times from his own weapon.
8. Mr. Posey does not have any idiosyncratic features of note. *See,* OTIS profile: https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=594477.

These factors fail to establish an independent basis. Nevertheless, the Court of Appeals held that it was for the jury to determine the reliability and credibility of Byrd's in-court identification. *Posey*, slip op, 6. Near absolute deference to the jury in the face of a denial of due process is not in keeping with our state and federal jurisprudence.

Ineffective Assistance of Counsel

Mr. Posey's attorney was ineffective for failing to seek suppression of Mr. Byrd's identification testimony and for failing to call an eyewitness identification expert. According to *Strickland v Washington*, 466 US 668, 692 (1984), the Sixth amendment recognizes the right to the assistance of counsel because it envisions the critical role that counsel plays in producing just results. This right includes the right to the effective assistance of counsel. *People v Pickens*, 446 Mich 298 (1994).

Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner. *Beasley v United States*, 491 F 2d 687, 696; 26 ALR Fed 204 (1974) (citing *Reece v Georgia*, 350 US 85 (1955)). In these circumstances trial counsel failed to raise a motion to suppress the in-court identification.

To determine whether Mr. Posey has received ineffective assistance of counsel, he must prove that his counsel's performance was deficient, that the performance prejudiced the defense, and that but for the errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 US at 687.

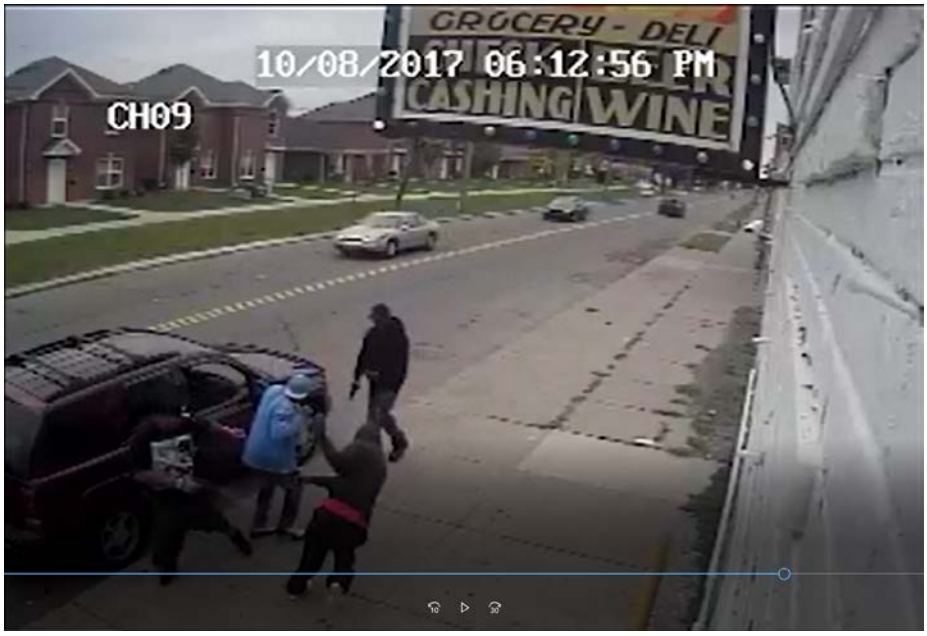
Failure to object to or suppress in-court identification

In the present case, Mr. Byrd was the only witness to positively identify Mr. Posey as the man who shot at him and his cousin and his in-court identification should have been suppressed.

It is improbable that Mr. Posey would have been convicted in the absence of any testimony identifying him as the shooter. Even accepting the evidence of Mr. Scott identifying Mr. Posey in a line-up, Mr. Scott's own testimony calls the strength of that ID into question; rightfully so, given the traumatic circumstances he was under and the limited description he could provide the police. Mr. Scott's description of the offender, a 5'9" black male, is a far cry from Mr. Posey's 6'2" frame.

The prosecution's case would have then been reduced to the Super X Store and Greenlight footage, combined in a single trial exhibit (7/26/18 TT, 59), which did not clearly identify Mr. Posey or Mr. Quinn. Officer Joseph Weekly did not recall any requests for facial recognition software to be employed and he was not asked to retrieve video from Detroit Receiving hospital, where Mr. Scott was treated. 7/26/18 TT, 88-89. What was recovered was submitted to

the jury as a video and a series of stills, none of which clearly evidence identifiable characteristics of the shooters. For example, these stills from the video are indicative of the minimal detail discernable:



Some store footage does provide a clearer look at the same individuals believed to be the shooters but there was no testimony connecting the individuals in this particular footage to the individuals doing the shooting. See, for example, the still provided below of an individual entering the Super X Market:

Mr. Posey was admitted to Oakwood Hospital in Dearborn at 7:12 PM on October 8, 2017 and treated for gunshot injuries, but that circumstantial evidence alone would not be enough to find him guilty beyond a reasonable doubt of the shooting that occurred at the Super X the same day.[2] It was that evidence *coupled with* the inadmissible identification evidence that tipped the scales against Mr. Posey.

Without the tainted testimony, it is reasonably probable that Mr. Posey would have been found not guilty. His conviction must be reversed on this ground alone, however, Mr. Posey's counsel was also ineffective for failing to call an eyewitness identification expert.

Failure to Call an Eyewitness Identification Expert

For the in-court identification issue alone, expert testimony has been relied upon by defense counsel to argue the fallibility of such identification. *See,* Amicus Brief from the American Psychological Association in *Garner v People*, 436 P3d 1107 (Colorado Supreme Court, 2019). But here, an expert would have been helpful to add additional context to Mr. Scott's identification of Mr. Posey in the October 10, 2017 photo array. This and Mr. Byrd's in-court identification were the most damning evidence against Mr. Posey.

[2] Defense counsel observed during closing that "people get shot in Detroit everyday." 8/1/18 TT, 50. This statement was made by defense counsel in closing argument. Its factual accuracy is unclear given the lack of data available. At the very least, there is on average more than one violent crime per day in Detroit according to FBI statistics. https://www.freep.com/story/news/2017/09/25/database-2016-fbi-crime-statistics-u-s-city/701445001/

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy. A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714, 722 (2009) (citing *People v Ackerman*, 257 Mich App 434, 455, 669 NW2d 818 (2003)). Nevertheless, the Michigan Supreme Court has established that a failure to call an expert witness can constitute ineffective assistance. *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858, 862–63 (2015). Likewise, the United States Supreme Court has stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Hinton v Alabama*, 134 S Ct 1081, 1088; 188 L Ed 2d 1 (2014).

One way in which defense counsel can fail to meet his investigative duty is by failing to consult an expert when an expert's assistance would be critical to the defense. *Harrington v Richter*, 562 US 86; 131 S Ct 770, 788 (2011) ("criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both"). In Michigan, trial counsel's failure to call an expert witness constitutes ineffective assistance when it deprives a defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714, 722 (2009). Michigan courts understand a substantial defense to mean one that might have made a difference in the trial's outcome. *Id.*

Faulty identification was the primary theory of the defense: "There's no DNA. There's no fingerprint evidence…There is nothing else to confirm or corroborate identification…I want to impress upon you that the very first hurdle that the Prosecutor has to get over is identification, and I don't think they've got over that hurdle." 8/1/18 TT, 50. Defense counsel's closing cited Mr. Scott's choosing Mr. Posey's picture from the photo array and Mr. Byrd's failure to do the same. 8/1/18 TT, 44-48. He emphasized Mr. Scott's failure to identify Mr. Posey as the shooter in court. 8/1/18 TT, 44. He asked the jurors to look at the still pictures and video and "see if it looks like Mr. Posey." 8/1/18 TT, 49.

The prosecutor recognized this and in her closing, too, emphasized identification. She observed that Mr. Scott identified Mr. Posey in a lineup "two days after the shooting while it was fresh in his mind and while he was aware what was going on." 8/1/18 TT, 13. Nevertheless, she acknowledged that Mr. Scott was "focused on not getting shot." 8/1/18 TT, 14. She observed that Mr. Byrd did not have an opportunity to "sit with Mr. Posey for hours" but the jury did. 8/1/18 TT, 14-15. The prosecutor asked the jury to note that Mr. Posey was wearing glasses during trial "to hide his face from you." 8/1/18 TT, 17.

Defense counsel called no witnesses and Mr. Posey did not testify. Clearly, this was the crux of his case. And yet, trial counsel did not present an expert to explain to the jury that Mr. Scott and Mr. Byrd, under the circumstances, very likely could have identified the wrong person as the assailant. This unreasonable misstep by trial counsel creates a reasonable likelihood of a different outcome for Mr. Posey at trial.

***

"The vagaries of identification evidence are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v Wade*, 388 US 218, 228; 87 S Ct 1926 (1967). "Eyewitness error is the most prevalent cause of wrongful convictions." *State v Cheatam*, 150 Wash 2d 626, 664; 81 P3d 830, 849 (2003) (citations omitted). It is a "historical and legal fact that a significant number of innocent people have been convicted of crimes they did not commit" based on eyewitness identifications. *People v Anderson*, 389 Mich 155, 172; 205 NW2d 461, 468 (1973); see also *Perry v New Hampshire,* ___ US ___; 132 S Ct 716, 728 (2012). Michigan is not immune from the miscarriages of justice that result from of eyewitness misidentification. No fewer than *nineteen innocent people* have been wrongfully convicted in Michigan on the bases of faulty eyewitness identification testimony.

The United States Supreme Court identified safeguards against eyewitness misidentification available to criminal defendants, including "expert testimony on the hazards of eyewitness identification evidence." *Perry,* 132 S Ct at 717. SCOTUS cited with approval the holding of *State v Clopten*, 223 P3d 1103, 1113 (Utah 2009), "We expect ... that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence]."

Therefore, trial counsel's failure to present an expert on eyewitness identification may constitute deficient performance, especially in cases where the

identity of the perpetrator is a central issue at trial and there is no other evidence implicating the defendant. See *Ferensic v Birkett*, 501 F3d 469, 482–84 (CA 6 2007); *US v Smithers*, 212 F3d 306, 315–16 (CA 6 2000). According to the Sixth Circuit, experts on eyewitness identification provide a scientific perspective unavailable to the jury through other means, and are thus extremely useful in explaining why eyewitness identifications are "inherently unreliable." *US v Smead*, 317 F.App'x 457, 464–65 (CA 6 2008).

Here, Mr. Posey was identified by one victim after a catastrophic shoot-out during he which he endured broken bones and nerve damage. The other witness-complainant never identified Mr. Posey, despite multiple opportunities, until he faced him in Court.

Nevertheless, the jury accepted the victims' after-the-fact identification as credible and convicted Mr. Posey. In critically evaluating the accuracy of the eyewitness' identification, jurors would have benefited from expert testimony which could have been provided by Dr. Colleen Siefert, an expert used by the State Appellate Defender Office in previous cases, or a different eyewitness expert, as evidenced by the American Psychological Association brief in *Garner*. There are documented discrepancies between a lay understanding of factors affecting eyewitness accuracy and the findings from decades of empirical research. An expert in this field of study would have educated the jury about the counterintuitive reasons and circumstances that contribute to the unreliability of eyewitness identifications. Those circumstances were present here.

For example, the time period between the shooting and Mr. Scott's identification of Mr. Posey, two days, is seemingly limited. It was emphasized by the prosecutor a timeframe so limited that the event and perpetrator were "fresh" in Mr. Scott's mind. This is scientifically inaccurate. An eyewitness identification becomes less reliable within **20 minutes** of the exposure and the accuracy is "dramatically reduced" the day after exposure. This was a high-stress encounter where at least multiple guns were involved. Memories are malleable, stress decreases the accuracy of our memories, and there is no significant correlation between certainty and accuracy of facial recognition.[3] Furthermore, exposure to information post-event, just as Mr. Byrd testified to, can also affect a witness' memory.[4]

In *Anderson*, the Michigan Supreme Court observed that misidentifications often occur even when the eyewitness is absolutely positive about his/her choice. *Anderson,* 389 Mich at 175, 197. The Court documented that misidentification is often caused because recognition, *i.e.,* discussing with neighbors, viewing news coverage, viewing a video and seeing Mr. Posey at the preliminary examination, encourages positive identification of things merely similar:

> When we see something out there, the original mental record consists of an attitude or sensation composed of the various items in the object perceived. This attitude or sensation is preserved in the memory (more or less imperfectly) in the combination of the various perceived items by a process sometimes called association. What occurs during the recognition process is that a subconscious attitude of sameness

[3] Deffenbacher et al, *A meta-analytic review of the effects of high stress on eyewitness memory*, 28 Law & Hum Behav 687, 699 (2004).
[4] Ross, *Unconscious Transference and Mistaken Identity*, 79 J Applied Psychol 918.

> or resemblance is aroused. This attitude or sensation of sameness is accompanied by a subjective feeling of familiarity when there are elements of similarity between the new and the previous situation.

Anderson, 389 Mich at 205-206 [footnote omitted].

The existence of factors that would affect memory were evident prior to trial, alerting trial counsel of the need for an expert and giving trial counsel ample time to obtain an eyewitness identification expert. Indeed, defense counsel haphazardly argued some of these points in closing. But his argument is not evidence, as the jury was instructed. The jury needed to hear expert testimony validating these points. Had defense counsel presented this testimony, there is a reasonable probability the jury would have acquitted.

Because there is at least a reasonable probability that the jury would have returned a not guilty verdict if the jury had heard expert testimony, prejudice is demonstrated and Mr. Posey is entitled to a new trial. At minimum, this Court should remand for an evidentiary hearing to further develop the record to support this ineffective assistance of counsel claim. See *People v Ginther,* 390 Mich 436, 442-443; 212NW2d 922 (1973). Mr. Posey has concurrently filed a motion to remand requesting this relief.

Alternatively, an evidentiary hearing is not required because the record, with two eyewitness-related errors, is already sufficient to show Counsel's ineffectiveness. Because there is at least a reasonable probability that the jury would have returned a not guilty verdict if the jury had received expert testimony to

support defense witnesses, prejudice is demonstrated and Mr. Posey is entitled to a new trial.

II. Mr. Posey's sentence, while within the guidelines range, was disproportionate to the offense and thus, unreasonable. He is entitled to resentencing before a different judge.

Standard of Review

"[A]ppellate review of departure sentences for reasonableness requires review of whether the trial court abused its discretion by violating the principle of proportionality set forth in our decision in *Milbourn*."[5] *People v Steanhouse,* 500 Mich 453; 902 NW2d 327, 338 (2017).

Discussion

Sentences must be proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003); *Milbourn*, 435 Mich at 636. Mr. Posey's 22-year minimum term of imprisonment is disproportionate. *Milbourn* recognized that "[c]onceivably, even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." *Milbourn*, 435 Mich at 661. Defendants could therefore overcome the presumption of proportionality by presenting evidence of "uncommon" or "rare" circumstances. *People v Sharp*, 192 Mich App 501, 505; 482 NW2d 773 (1992) (citing *Milbourn*, 435 Mich at 661). To apply the aforementioned case law to Mr. Posey's case would first require this Court to revisit the Court of Appeals' published decision in *People v Schrauben* and overturn the portion of the opinion that holds where no inaccurate information has been relied upon, a sentence within

[5] *People v Milbourn*, 435 Mich 630 (1990)

the guidelines must be affirmed. *Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). This Court should given its inconsistency with *Milbourn* and *Lockridge*.

In *Lockridge*, the Court severed certain portions of the sentencing guidelines statute, such as MCL 769.34(2), which required trial courts to sentence individuals within the sentencing guidelines, and MCL 769.34(3), which required the articulation of a substantial and compelling reason to depart from the guidelines. *People v Lockridge,* 498 Mich 398, 391 (2015). The Court also struck down "any part of MCL 769.34 or another statute that refers to the use of the sentencing guidelines as mandatory or refers to departures from the guidelines." *Id.* at 365, n.1.

In *Schrauben*, without analysis, the Court of Appeals summarily concluded that a sentence imposed within the minimum sentencing guidelines range must be affirmed, citing MCL 769.34(10). *Id.* In support of this statement, the court noted that this provision had not been expressly altered or diminished by *Lockridge*. *Id.* The Court of Appeals failed to note, however, that the defendant in *Lockridge* had been sentenced to a term *outside* of the sentencing guideline range, which would not have invoked MCL 769.34(10)—a statute addressing sentences *within* the sentencing guideline range. To the extent the *Schrauben* court relied on the failure of *Lockridge* to invalidate MCL 769.34(10), that cursory holding is flawed.

MCL 769.34(10) does not *just* create an appellate presumption that within-guidelines sentences are reasonable as authorized in the federal system by *Rita*. Instead, it completely insulates from appellate review any challenge that a within-guideline sentence is unreasonable or disproportionate and requires the Court of

Appeals to affirm sentences without consideration. MCL 769.34(10) violates the Sixth Amendment by prohibiting appellate courts from reviewing a trial court's exercise of sentencing discretion, thereby creating an incentive to impose a within-guideline sentence that is appeal-proof regardless of whether that sentence is reasonable or proportionate. Within-guideline sentences cannot be immune from appellate review under an advisory sentencing scheme. *Rita,* 551 US at 351.

When a sentencing court imposes a within-guideline sentence, the question is not whether that court understood the guidelines were advisory and that it was not required to impose a guideline sentence. The question is whether the sentencing court understood that it could not presume the sentencing guideline range was reasonable before imposing sentence. *Nelson v United States*, 555 US 350, 351 (2009).

In *Nelson*, the Court remanded for resentencing where the appellate court affirmed the sentence of the district court after finding only that the district court "did not treat the Guidelines as 'mandatory' but rather understood that they were only advisory." 555 US at 351. The Court explained that it is "beside the point" whether a sentencing court understands the advisory nature of the guidelines. *Id.* at 352. What is important is that the sentencing court may not impose a sentence within the guidelines while believing the guidelines are presumed reasonable. "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Id.*

"[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Id.* citing *Rita,* 551 US at 351. Here, however, under

MCL 769.34(10), there is no doubt that Michigan's trial courts are enjoying the benefit of a legal presumption it should not have. Any and all sentences imposed within the sentencing guidelines will be automatically affirmed. This scheme violates the Sixth Amendment and can only be remedied by appellate review of reasonableness and proportionality of all sentences, including those within the guidelines.

Continuing to enforce the first sentence of MCL 769.34(10) perpetuates the constitutional harm the Michigan Supreme Court sought to cure in *Lockridge*. Even though the guideline range is "advisory" according to *Lockridge*, it maintains its mandatory directive in MCL 769.34(10). Without appellate review of within-guideline sentences, Michigan's sentencing guidelines cannot truly be advisory.

This is precisely the analysis the US Supreme Court confronted in *US v Booker,* 543 US 220 (2005) when it invalidated the federal sentencing guidelines after concluding they were mandatory. The Court noted, the "Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." *Id.* at 233–234 (internal citations omitted).

Similarly here, while *Lockridge* held that the guidelines are only advisory and one factor to be consulted when imposing sentence, albeit an important factor, MCL 769.34(10) directs that the appellate court "shall affirm" all sentences within the

guidelines. As a result, the guidelines still have the effect of creating a binding and unreviewable sentence, and so the Sixth Amendment violation persists.

If an appellate court applies a presumption of proportionality to sentences within the sentencing guidelines range, individuals must have the ability to rebut that presumption of proportionality. *Rita v US*, 551 US 338, 351 (2007) (an appellate court presumption of reasonableness is constitutional only if it is rebuttable).

In this case, Mr. Posey could rebut that presumption as his present sentence is disproportionate to Mr. Posey and his offense. Undersigned counsel advocated for a new sentence for Mr. Posey at a resentencing that occurred pursuant to the Court of Appeals' remand order. The Court of Appeals retained jurisdiction. Now, Mr. Posey again asks for resentencing, given that his current sentence is disproportionate to him as it fails to account for his rehabilitative potential and other mitigating factors.

On November 7, 2019, Mr. Posey's guidelines were rescored from 225-562 months to 171-427 months. Undersigned counsel observed at that hearing that Mr. Posey's original controlling sentence, 22 years to 40 years in prison for assault with intent to murder, was 11% of the total possible range (that is 11% of the 310 months between 225 month minimum and 562 month guidelines maximum). Eleven percent of the correctly-scored guidelines range is 189 months or about 15 years. This sort of math is typically relevant to a trial court, even where the original sentence falls within the correctly-scored guidelines range, as is the case here. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006) (declining to recognize a de minimus

violation of a defendant's rights and instead recognizing that with a new guidelines range, defendant's sentence "stands differently in relationship to the correct guidelines range than may have been the court's intention.").

Undersigned counsel went further and instead asked the trial court to consider a 10-year minimum sentence. In so advocating, undersigned counsel observed Mr. Posey's young age when he first offended and recognized his growth since the time of this incarceration. 11/7/19 RST, 24. Further, Mr. Posey takes accountability for his actions. 11/7/19 RST, 25. At his resentencing, he stated that he is "not putting the blame on my actions to anyone. I take full responsibility for all of the things that I have done." 11/7/19 RST, 29. He recognized that the things he has done "caused harm mentally and physically to people." 11/7/19 RST, 30.

Mr. Posey has a wealth of family support and a strong faith in God. 11/7/19 RST, 26. He acknowledged and thanked all of the support he has received—from the court, from his attorney, and his family .11/7/19 RST, 29. He is dedicated to continuing to grow and learn. 11/7/19 RST, 29. He asked for mercy from the Court. 11/7/19 RST, 30. Instead, he received the exact same sentence that was originally imposed because "the prior sentences were well within the guidelines" and Mr. Posey "committed these offenses while he was on parole after previously served time for a similar offense." 11/7/19 RST, 31.

A reasonable sentence, one shorter by several years, would ensure access to rehabilitative resources sooner for Mr. Posey. MDOC policy is such that access to resources is dependent on proximity to one's early release date. "We should punish

only to the extent that the punishment causes people – both the person punished and others who may be deterred—to behave better." Davis, Kevin, *The Brain Defense* (New York: Penguin Press, 2017), p 278. Right now, Mr. Posey faces a sentence that makes it harder for him to address the underlying causes of his actions, and extends beyond what is needed to deter others. "Punishment that makes it harder for people to return to society as law-abiding, productive citizens should be [avoided]—even if it feels good and right." *Id.*

The sentence imposed against Mr. Posey was disproportionate and unreasonable. Given the trial court's very brief statement before imposing an identical sentence, there is simply no way to argue on based on the record that this sentence was tailored to the particular circumstances of the case and the offender. This runs contrary to the purpose of our sentencing scheme. "The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty." *People v Heller*, 316 Mich App 318, 320–21 (2016) (internal citation omitted). "Sentencing is more than a rote or mechanical application of numbers to a page. It involves a careful and thoughtful assessment of the true moral fiber of another. . ." *Id.* at 318 (internal citation omitted).

The portion of MCL 769.34(10) that requires the court of appeals to affirm any and all minimum sentences imposed within the appropriately scored guideline range, regardless of proportionality or reasonableness, upsets this principle. *Lockridge* necessarily invalidates MCL 769.34(10).

This Court must remand for resentencing before a different judge.

Summary And Relief And Request For Oral Argument

WHEREFORE, for the foregoing reasons, Mr. Posey asks that this Honorable Court to grant leave or peremptorily reverse his convictions and remand for a new trial or in the alternative, remand this case for resentencing before a different judge.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Adrienne N. Young

BY:_____

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