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February 24, 2021

Adrienne N. Young (P77803)
State Appellate Defender Office
3031 W. Grand Blvd., Suite 450
Detroit, Michigan 48202

Re: People v. Dametrius Posey
Court of Appeals No. 345491
Supreme Court No.: _____

Dear Ms. Young:

Please find enclosed Mr. Posey's Standard 4 Brief to be filed as a supplement to the brief you filed in the Michigan Supreme Court on 12/17/20. Mr. Posey told me that you said he can file a Standard 4 Brief, and he asked for my help to draft it. While you did not give him a deadline by which to send the brief to you, I assume that it is still timely since it is being submitted with the 84 day time limit normally treated for the filing of Standard 4 Briefs.

I am mailing the brief to you on Posey's behalf because prison officials moved him before I completed drafting the brief. I have tried everything I could muster to get the material to him for mailing to you, but was unable to do so. Therefore, I am mailing it on his behalf.

Of course, you may want to contact Mr. Posey to confirm that the enclosed is what he wants filed, albeit I can assure you that he does. We apologize for any inconvenience that this may have caused.

Very truly yours,


Michael A. Kitchen

cc: D. Posey #594477

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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

DAMETRIUS BENJAMIN POSEY,
Defendant-Appellant.

Supreme Court No.:
Court of Appeals No. 345491
Lower Court No. 18-000074-01-FC

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DEFENDANT-APPELLANT'S
STANDARD 4 BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

Defendant-Appellant accepts the facts as set forth in the application for leave to appeal that was filed on December 17, 2020, by his attorney, Adrienne N. Young.

STATEMENT OF QUESTIONS PRESENTED

1. Should the Michigan Michigan Michigan Supreme Court grant leave to appeal in order to consider the question of whether the Due Process Clause under the Michigan Constitution provides greater and more broader protection than the U.S. Constitution against in-court identifications that were not the result of prior suggestive circumstances arranged by law enforcement but instead occurred as a result of suggestive pretrial encounters and/or occurred simply as a result of a person sitting at the defense table?

Defendant-Appellant answers, "Yes".

The People have not responded.

2. Should the Michigan Supreme Court grant leave to appeal in order to consider the question of whether the Due Process Clause of the Michigan Constitution requires the Michigan Court of Appeals to reverse a conviction obtained by an unconstitutional in-court identification even though the trial court was not asked pre-trial to screen the evidence surrounding the in-court identification for reliability and the issue was not argued on appeal?

Defendant-Appellant answer, "Yes".

The People have not yet responded.

3. Should the Michigan Supreme Court grant leave to appeal in order to consider the question of whether an appellate counsel can be ineffective for failing to argue in the Court of Appeals that a constitutional violation can be so corrosive to the basic right to a fair trial that it requires reversal even if trial counsel did not object to the error in the trial court or appellate counsel fails to raise the argument on appeal?

Defendant-Appellant answers, "Yes".

The People have not yet responded.

I N T R O D U C T I O N

This is an application for leave to appeal filed under the Standard 4 procedure by Defendant-Appellant Dametrius Benjamin Posey (Posey) following a denial by the Michigan Court of Appeals to reverse his conviction of two counts of assault with intent to commit murder (AWIM), two counts of assault with intent to do great bodily harm less than murder (AWIGBH), carrying a concealed weapon (CCW), arming oneself with a weapon with unlawful intent, felon in possession of a firearm, and six counts of possession of a firearm during the commission of a felony. Posey was sentenced as a third-offense habitual offender to 22-40 years for AWIM convictions, 9-20 years for the AWIGBH convictions, and 4-10 years for the remaining convictions, which do not include the sentences imposed for the six felony firearm convictions. These sentences were ordered to be served concurrently to the 22-40 year sentence, but consecutively to concurrent five year terms for each of the six felony firearm convictions.

The Michigan Court of Appeals denied relief on October 22, 2020, which includes shooting down Posey's argument that the in-court identification by one of the victims did not deny due process. Left without sufficient guidance on that topic, the Court of Appeals relied on People v. Kachar, 400 Mich 78; 252 NW2d 807 (1977), when it shot down Posey's argument. The arguments posed by Posey are unique. Here, Posey argues that the victim's in-court identification violated due process, notwithstanding the fact that suggestive circumstances were not arranged by law enforcement, because it was made for the first time in-court, occurred by the victim's own admission after he viewed a news broadcast of the incident which featured Posey, and was unreliable when considering the totality of the circumstances including, but not limited too, the fact that the same victim never identified Posey as the

alleged assailant before trial despite being shown photo line-ups and because the identification occurred after the victim saw a news broadcast. In fact, the victim told police that he never even knew what the assailants looked like.

Therefore, Posey now seeks leave because the Michigan Supreme Court has never answered the question of whether an in-court identification, such as that which occurred in this case, violates the U.S. Constitution, and especially whether the Due Process Clause under the Michigan Constitution provides far greater protection against in-court identifications than the U.S. Constitution. Moreover, Posey argues that the Michigan Supreme Court should grant leave to tackle the novel question of whether a trial and appellate lawyer would be ineffective for the failure to raise these arguments. With regard to trial counsel, the question is whether he/she would be ineffective for not seeking to suppress the in-court identification not just based on the grounds at issue in this case, but also on the grounds that it was inadmissible because of being impermissibly tainted after the victim viewed the news broadcast. As for appellate counsel, the question is whether an appeal lawyer would be ineffective for not arguing on appeal that trial counsel was ineffective for not seeking suppression on those grounds.

No other state or federal court has ever addressed the questions that are being posed in this application. Posey asks that the Michigan Supreme Court grant this application to answer these questions now.

A. THE SUPREME COURT SHOULD GRANT LEAVE TO APPEAL IN ORDER TO CONSIDER THE QUESTION OF WHETHER THE DUE PROCESS CLAUSE UNDER THE MICHIGAN CONSTITUTION PROVIDES GREATER AND MORE BROADER PROTECTION THAN THE U.S. CONSTITUTION AGAINST IN-COURT IDENTIFICATIONS THAT WERE NOT THE RESULT OF PRIOR SUGGESTIVE CIRCUMSTANCES ARRANGED BY LAW ENFORCEMENT BUT INSTEAD OCCURRED AS A RESULT OF SUGGESTIVE PRETRIAL ENCOUNTERS AND/OR OCCURRED SIMPLY AS A RESULT OF A PERSON SITTING AT THE DEFENSE TABLE

Although limited due to his incarceration, Posey's research indicates that the first time the Michigan Supreme Court addressed the issue of in-court indentifications was in 1973. In-court identifications always turn on the constitutionality of pretrial identification procedures used by law enforcement, so in People v. Franklin Anderson, 389 Mich 155; 205 NW2d 461 (1973), the Supreme Court tackled photographic identification procedures and established rules by which law enforcement were required to operate by. About a year later, the Michigan Supreme Court decided People v. Lee, 391 Mich 618; 218 NW2d 655 (1974) and People v. James Anderson, 391 Mich 419; 216 NW2d 780 (1974), which considered counsel at precustodial photographic lineups during ongoing police investigations.

In 1977, the Court directly considered in-court identifications. In Kachar, the court held that in-court identifications were permissible as long as the witness' identification satisfied eight factors, including: (a) the prior relationship or knowledge of the defendant; (b) 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; (c) length of time between the offense and the disputed identifications; (d) accuracy or discrepancies in the pre-lineup or show up description and defendant's actual description; (e) any previous proper identification or failure to identify the defendant; (f) any identification prior to the lineup or show up of another person as defendant; (g) the nature of the alleged offense and the physical and psychological state

of the victim; and (i) any idiosyncratic or special features of the defendant. Kachar, supra, 400 Mich at 95-96. In other words, Michigan focused on the reliability of in-court identifications.

It was not until 1993 that the Supreme Court took up the issue again. In People v. Kurylczyk, 443 Mich 289; 505 NW2d 528 (1993), the Court was confronted with a due process challenge to photographic lineups that led to an in-court identification, and reaffirmed its prior decisions on the topic. Five years later People v. Gray, 457 Mich 107; 577 NW2d 92 (1998), reaffirmed the standards announced in Kachar. After Gray, the Michigan Supreme Court tackled in-court identifications in People v. Sammons, 505 Mich 31; 949 NW2d 36 (2020), and reversed, finding that the motion to suppress the identifications at issue there should have been granted. While all of these cases tackled in-court identifications, none addressed questions similar to those posed in this case. But, other courts seem to have come close.

For example, in 1986, in a case that raised one issue somewhat similar to the one posed here, the Sixth Circuit addressed suggestive pretrial encounters that were not arranged by law enforcement. Thigpen v. Cory, 804 F.2d 893 (6th Cir.1986). The state court and district court denied Thigpen relief because law enforcement were not involved in the suggestive encounters which formed the basis of his claim. However, the Sixth Circuit reversed, holding that under the U.S. Constitution "the effects of, rather than the causes for, pre-identification encounters should be determinative of whether the confrontations were unduly suggestive." Id., at 895. In United States v. Hill, 967 F.2d 226 (6th Cir.1992), the Sixth Circuit again addressed the issue, and even the Eighth Circuit, in United States v. Rundell, 858 F.2d 425 (8th Cir.1988), decided a case with questions similar to those involved in this case.

Nonetheless, the Michigan Supreme Court has never addressed these

questions. In fact, this Court seems to have never come close, nor even determined whether the Michigan Constitution provides greater protection against in-court identifications than the U.S. Constitution.

As a result, the appeals and lower courts have been left without sufficient guidance. The confusion and harm occasioned by the silence of the Michigan Supreme Court on this topic becomes apparent from the decision of the Court of Appeals. When addressing Posey's argument, the appeals court never even relied on the Michigan Constitution or a state standard enunciated for Michigan. It quoted the Kachar standard, but relied only on the standard enunciated by the U.S. Supreme Court in Perry v. New Hampshire, 565 US 228 (2012), to decide Posey's claim (see, Court of Appeals' decision, at 3-6). As such, the court thought it best to submit the question of reliability to the jury after pointing out that there was no improper law enforcement activity and no pretrial identification by the victim. Id. This was extremely harmful to Michigan's jurisprudence.

The Michigan Supreme Court should take this opportunity and address this issue now. The thrust of Perry, just like that of Kachar and the Court's other decisions on the topic, is the reliability of in-court identifications. But, a review of all of those decisions does not seem to squarely address whether the Due Process Clause under the Michigan Constitution provides greater protection against in-court identifications than the U.S. Constitution, although Kachar indicates that it does.

Kachar indicates that under Michigan's state standard, the cause of a pretrial identification is not the relevant inquiry. Rather, the effects of it is. Hence, the Kachar standard seems to be more closely in line with Thigpen rather than Perry, because, unlike Thigpen, Perry held that suggestive circumstances must be arranged by law enforcement in order to violate the U.S.

Constitution.

Therefore, the Michigan Supreme Court should take up this most important issue in order to alleviate any further confusion.

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B. THE MICHIGAN SUPREME COURT SHOULD GRANT LEAVE TO APPEAL IN ORDER TO CONSIDER THE QUESTION OF WHETHER THE DUE PROCESS CLAUSE OF THE MICHIGAN CONSTITUTION REQUIRES THE MICHIGAN COURT OF APPEALS TO REVERSE A CONVICTION OBTAINED BY AN UNCONSTITUTIONAL IN-COURT IDENTIFICATION EVEN THOUGH THE TRIAL COURT WAS NOT ASKED PRE-TRIAL TO SCREEN THE EVIDENCE SURROUNDING THE IN-COURT IDENTIFICATION FOR RELIABILITY & THE ISSUE WAS NOT ARGUED ON APPEAL

Misidentification violates due process. For that reason, the standard of "fairness as required by the Due Process Clause", Manson v. Brathwaite, 432 US 98, 113 (1977), demands that the most unreliable identifications will be excluded at trial. Neil v. Biggers, 409 US 188, 198 (1972). As Justice Sotomayor aptly pointed out in her dissent in Perry v. New Hampshire, 565 US 228 (2012), "[a]t trial, an eyewitness' artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability[, in addition to impairing] the defendant's ability to attack the eyewitness' credibility. That in turn jeopardizes the defendant's basic right to subject his accuser to meaningful cross-examination". Id., at 252.

In this state's history, the Michigan Supreme Court has never been called upon to determine whether in-court identifications can be so corrosive and violative of a defendant's right to a fair trial, that its admissibility requires automatic reversal even if the defendant did not object or argue the issue on appeal. Posey is asking this Court to do so now. Posey argues that because that type of testimony, more so than any other type of testimony, is so corrosive and offensive to the basic right of a fair trial that an objection to its admission is not needed to invalidate a conviction. As such, Posey argues that the Court of Appeals should have reversed the conviction in this case.

In particular, as pointed out previously, one of the victim's identified Posey as one of his assailants at trial only after seeing a news broadcast of the incident, even though that victim acknowledged that he never identified

Posey at a police photo line-up before trial and, in fact, conceded that he did not even know what the assailants looked like (see, Court of Appeals' decision, at p 6). There was no other evidence presented at trial showing that Posey was one of the assailants or even connected Posey to the incident. Therefore, the in-court identification made here was extremely faulty.

Trial counsel never objected to admission of the in-court identification, and appellate counsel never argued on appeal that trial counsel was ineffective for not objecting even though he knew that the in-court identification occurred only after the victim saw Posey before trial on a news broadcast. Even the Court of Appeals made note of Posey's lawyers' failure to argue against the in-court identification. Id.

Yet, the Court of Appeals did not reverse the conviction based on that error, even after it recognized its highly questionable reliability and Posey's lawyers' failure to argue against its admissibility under the circumstances. Posey argues that this was a serious mistake and the Court of Appeals should have reversed, notwithstanding the failure by Posey's lawyers to argue against the admissibility of the in-court identification. In other words, Posey argues that under the facts of this case as previously pointed out, the Court of Appeals should have reversed the conviction in light of the in-court identification.

This Court has never had an opportunity to consider whether a constitutional violation committed during the admissibility of evidence at trial can be so corrosive as to require automatic reversal, even though neither the trial court or a defendant's trial and appellate lawyers raised the claim. This Court should do so now.

C. THE MICHIGAN SUPREME COURT SHOULD GRANT LEAVE TO APPEAL IN ORDER TO CONSIDER THE QUESTION OF WHETHER AN APPELLATE COUNSEL CAN BE INEFFECTIVE FOR FAILING TO ARGUE IN THE COURT OF APPEALS THAT A CONSTITUTIONAL VIOLATION CAN BE SO CORROSIVE AND OFFENSIVE TO THE BASIC RIGHT TO A FAIR TRIAL THAT IT REQUIRES REVERSAL EVEN IF TRIAL COUNSEL DID NOT OBJECT TO THE ERROR IN THE TRIAL COURT OR APPELLATE COUNSEL FAILS TO RAISE THE ARGUMENT ON APPEAL

Last, Posey argues that this Court should grant this application to consider the novel question of whether a constitutional violation can be so corrosive and offensive to the basic right to a fair trial as to require reversal, even if the error is not objected to by trial counsel or raised on appeal by appellate counsel. As previously explained, Posey argued that the Court of Appeals noted a constitutional violation in connection with a victim's in-court identification, and the evidence demonstrates that as well. Yet, the court took no action because appellate counsel failed to argue that trial counsel was ineffective for failing to object to the admissibility to the in-court identification.

However, Posey argues that appellate counsel's failure to raise the issue should be of no consequence, and the Court should consider this argument. In this Court's history, it has never determined whether errors of this nature should be considered so offensive to a fair trial that it should result in reversal. Posey asks that the Court do so now.

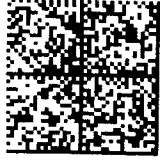
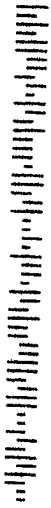
RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Posey requests that this Court grant him leave to appeal the Court of Appeals' October 22nd decision in order to consider the novel issues posed by this application.

Respectfully Submitted,

Dametrious B. Posey #594477
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Dated: February __, 2021



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