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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.

Case No. 162373
Court of Appeals No. 345491

Wayne County Circuit Court
Case No. 18-000074-01-FC

Filed under AO 2019-6

Supplemental Brief on Appeal

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Statement of Jurisdiction

Dametrius Benjamin Posey was convicted in the Wayne County Circuit Court by jury trial, and following a resentencing, a new 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).

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Statement of Questions Presented

I. In-court identifications are unnecessarily suggestive and per se unreliable. Was Mr. Posey denied his right to due process when Mr. Byrd was allowed to identify him at trial? Was Mr. Posey denied the effective assistance of counsel when trial counsel failed to object to the witness' in-court identification testimony?

Court of Appeals answers, "No."

Dametrius Benjamin Posey answers, "Yes."

II. Is the provision of MCL 769.34(10) requiring appellate courts to affirm within guideline sentences, whether they are reasonable or not, unconstitutional and inconsistent with *Lockridge*?

Court of Appeals answers, "No."

Dametrius Benjamin Posey answers, "Yes."

III. Because of MCL 769.34(10), judges impose disproportionate sentences that remain unreviewable because they fall within the guidelines range. Is Mr. Posey's sentence reviewable for reasonableness?

Court of Appeals answers, "No."

Dametrius Benjamin Posey answers, "Yes."

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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 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 men pulled a gun and said something to him. 7/25/18 TT, 49, 56. He did not see what the other man did. 7/25/18 TT, 54.

Mr. Byrd also saw a man 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 man as 6'3". The other man, who confronted Mr. Byrd, was 5'7" and a light-skinned Black man. 7/25/18 TT, 94, 98.

Gunfire erupted. 7/25/18 TT, 99. Mr. Byrd does not know who shot first, but he testified that he fired 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 came 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 footage from the Super X Market. 7/26/18 TT, 52. The shooting, which lasted

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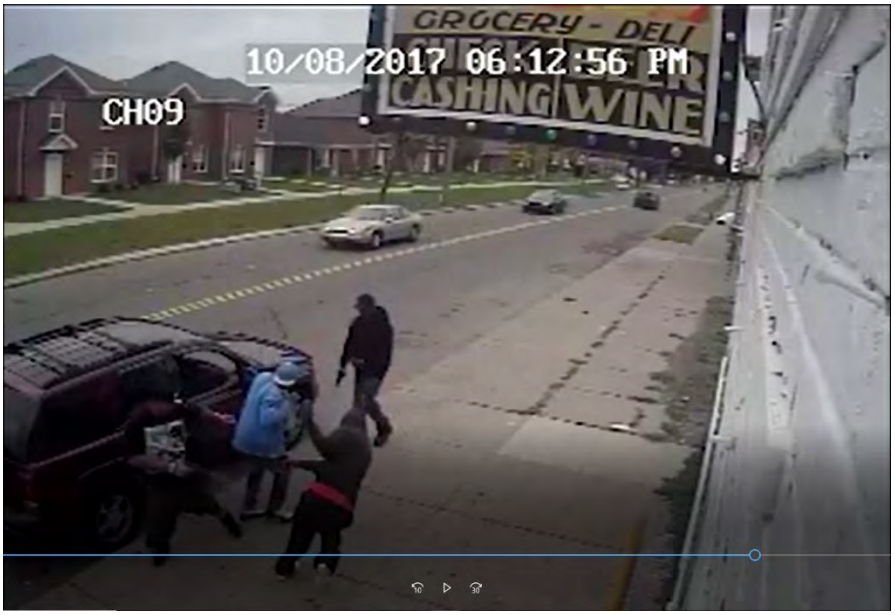
approximately a minute, was captured on tape (video previously sent to Court):



Following the shooting, Mr. Byrd took Mr. Scott 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. 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 from the Super X Market shooting. 7/30/18 TT, 74-75. Police took his clothes into evidence, but it is unclear what happened to them 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 surgery as he suffered a broken bone and nerve damage in his left arm from the shooting. 7/25/18 TT, 60-61.

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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. 7/26/18 TT, 35-36. Dametrius Posey was included in the second six-pack photo array and Mr. Byrd did not select Mr. Posey, he selected someone else. 7/26/18 TT, 35. Mr. Byrd was told by the Detroit Police Department detectives that he did not pick the individuals they had in custody. 7/26/18 TT, 36. Following the photo arrays, Mr. Byrd never told anyone that he had misidentified the individual involved in the shooting. 7/25/18 TT, 117.

Two days after the shooting, police presented Mr. Scott with two six-pack photo arrays. 7/25/18 TT, 57. In one photo array, Mr. Scott did not select anyone. 7/25/18 TT, 59. In another, he selected Dametrius Posey as an individual he believed to be involved in the shooting. 7/25/18 TT, 58. 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 with "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 (GBH) against Mr. Byrd and Mr. Scott, carrying a weapon with unlawful intent, felon-in-possession, and multiple counts of felony-firearm. ST, 11-13.

At the preliminary examination, when asked if he observed anyone in the courtroom from the October 8 shooting, Mr. Byrd only identified Mr. Quinn, as the "lighter-skinned" shooter. 7/26/18 TT, 43.

At trial, Mr. Byrd, who had never before identified Mr. Posey from either photo array or at the preliminary examination, identified Mr. Posey by name as one of the shooters at the Super X Market. 7/25/18 TT,

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95. Mr. Byrd testified to having seen Mr. Posey in a car behind him at the hospital but he did not report that information to the police or anyone else before trial. 7/26/18 TT, 30. Mr. Byrd estimated between the shooting and the hospital combined, he viewed both shooters for a total of 25 seconds. 7/26/18 TT, 32.

Mr. Byrd later clarified that he did not know Mr. Posey personally. 7/25/18 TT, 124. Mr. Byrd only "learned his name through the documents that were sent to my home through the subpoena." 7/25/18 TT, 117.

Mr. Scott, who had previously picked Mr. Posey out of a photo array, 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 defense's primary theory: "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 argument 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, the prosecutor emphasized identification. She observed that Mr. Scott identified Mr. Posey in a photo array "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

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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 citing *People v Brown*, 267 Mich App 141 (2005). The Court of Appeals retained jurisdiction.

Mr. Posey's GBH convictions and the corresponding felony-firearm convictions were vacated. His guidelines were rescored, reflecting a new range that spanned 21 years. Mr. Posey received the same sentence. RST, 31-32. The Court of Appeals affirmed his convictions and sentences in a published opinion. *People v Posey*, 334 Mich App 338 (2020).

On September 24, 2021, this Court directed the Clerk to schedule oral argument on the application. This Court requested briefing on three issues:

> (1) whether the appellant was denied his right to due process when witness T. B. was allowed to identify him at trial, or denied the effective assistance of counsel when trial counsel failed to object to the witness' in-court identification testimony; (2) whether the requirement in MCL 769.34(10) that the Court of Appeals affirm any sentence within the guidelines range, absent a scoring error or reliance on inaccurate information, is consistent with the Sixth Amendment, the due-process right to appellate review, and *People v Lockridge*, 498 Mich 358 (2015); and, if not, (3) whether the appellant's sentence is reasonable and proportionate.

Mr. Posey now files this supplemental brief and asks this Court to grant leave or remand for a new trial or for resentencing.

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Arguments

I. In-court identifications are unnecessarily suggestive and per se unreliable. Mr. Posey was denied his right to due process when Mr. Byrd was allowed to identify him at trial. Mr. Posey was denied the effective assistance of counsel when trial counsel failed to object to the witness' in-court identification testimony.

Standard of Review and Issue Preservation

Trial counsel did not object to the in-court identification or move to suppress it. The issue is 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.*

Discussion

The only person to positively identify Mr. Posey at trial was Terrence Byrd. Having heard and seen the complainant positively identify Mr. Posey as his assailant, the jury convicted Mr. Posey on all counts. The identification of Mr. Posey in court was suggestive, unnecessary, and by any standard unreliable.

Nevertheless, the Court of Appeals held that because "there was no improper law enforcement activity and no pretrial identification by Byrd" there was no due process concern. *People v Posey*, 334 Mich App 338, 350 (2020). For this conclusion, the Court relied on the United States Supreme Court decision in *Perry v New Hampshire*, 565 US 228 (2012).

In *Perry*, the United States Supreme Court considered a complainant-victim's pretrial identification of Mr. Perry. Having received calls about car break-ins in an apartment complex parking lot, the police arrived and detained and questioned Mr. Perry while also

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questioning some residents. While the police were asking one resident to describe the person she saw in the parking lot looking into cars, the resident looked out her kitchen window and pointed to Mr. Perry, a tall African American man who was then standing next to a police officer. Mr. Perry moved to suppress this identification, arguing that it was a highly suggestive, pretrial, one-person show up.

The issue in *Perry* was whether "an identification that was result of suggestive private conduct triggered due process protections." *State v Dickson*, 322 Conn 410, 432 (2016). The New Hampshire Supreme Court held that the pre-trial identification of Mr. Perry was admissible because this was not a suggestive identification procedure "manufactured by the police." *Perry*, 565 US at 234. The United States Supreme Court agreed. *Perry v New Hampshire*, 565 US 228 (2012).

The United States Supreme Court held that an identification that was the result of private conduct did not trigger due process concerns because "[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the Court said, is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place." *Perry* at 241. Thus, the *Perry* court refrained from applying the five-part reliability test (from *Neil v Biggers*, 409 US 188, 198 (1972)) the Court uses on unnecessarily suggestive state-arranged identifications. The Court of Appeals erroneously relied on *Perry* in the present case.

A. The Court of Appeals erroneously relied on *Perry* to preclude a reliability assessment for in-court identifications.

In *Perry*, the Court did not address whether the *Biggers* reliability assessment would apply to a state-arranged identification that happens in court. See, *Garner v People*, 436 P 3d 1107, 1115 (2019) ("*Perry* did not directly answer whether *Biggers* applies to a first-time in-court identification."); *State v Dickson*, 322 Conn 410, 422 (2016) ("[t]he United States Supreme 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.") Still, the Court of Appeals relied on *Perry* to conclude that the state-arranged in-court identification of Mr. Posey was not a due

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process concern.[1] This was error for several reasons. Each will be discussed in turn.

> Due process hinges on "state action," not a specific state actor. Prosecutors are state actors. If a prosecutor-arranged identification is unduly suggestive and unreliable, it violates due process.

Perry stated its reliability screening turned on "the presence of state action," and specific to that case's facts, "improper law enforcement activity." *Perry,* 565 US at 233. In Michigan, prosecutors work hand in glove with the police; both are law enforcement actors.[2] County prosecutors and the Attorney General possess broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings. *Fieger v Cox*, 274 Mich App 449, 451-452, 465-466 (2007); MCL 49.153; MCL 14.28. This Court has acknowledged that the prosecutor and police are both "acting on the government's behalf" in criminal cases. *People v Chenault*, 495 Mich 142, 254 (2014).[3] Thus, an in-court identification

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[1] Other cases have concluded that the due process clause is implicated during in-court identifications but "the requirements of due process are satisfied in the ordinary protections of trial." *Garner v People*, 436 P 3d 1107, 1117 (2019) (citing the 11th Circuit, 10th Circuit, 6th Circuit as federal courts deciding the same and Kentucky, Mississippi, Oregon, and New Mexico as states deciding the same). Iowa has since joined that list, although analyzing the first-time, in-court identification for both "pretrial suggestive identification arranged by police *and* independent origin." *State v Doolin*, 942 NW 2d 500, 508 (2020)(emphasis added).

[2] *See, for example,* Attorney General Dana Nessel's biography on the State of Michigan website, wherein she is referred to as "the State's Chief Law Enforcement Officer." https://www.michigan.gov/ag/0,4534,7-359--486357--,00.html. The Court of Appeals has likewise referred to the Attorney General as the chief law enforcement officer of Michigan. *Fieger v Cox*, 274 Mich App 449, 451 (2007).

[3] In fact, a prosecutor's presentation of perjured testimony is a violation of due process because it is the *prosecutor's* actions that "depriv[e] a defendant of liberty through a deliberate deception of court and jury." *Brady v Maryland*, 373 US 83, 86 (1963) (citing *Mooney v Holohan*, 294 US 103, 112 (1935)).

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procedure arranged by a prosecutor is an identification procedure arranged by a state actor, one who is law enforcement.

The Supreme Court of Connecticut "[could] not perceive why, 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." *State v Dickson*, 322 Conn 410, 426 (2016). The United States District Court for the District of Columbia read "law enforcement" broadly, as many jurisdictions have[4], to include prosecutors. *United States v Morgan*, 248 F Supp 3d 208, 213 (DDC, 2017) ("An in-court identification of defendant would be "arranged by law enforcement," *Perry,* 565 US at 248, because the government chose to bring this particular defendant to trial and would be choosing to ask the witness for an identification at trial.")

The prosecutor here, a state actor, violated Mr. Posey's due process rights.

ii. In-court identifications, whether it is tainted by previous exposure or not, are an unnecessarily suggestive procedure.

This Court should state explicitly that an in-court identification is always unnecessarily suggestive.

An in-court identification is an extreme version of a show up, one done where the full imprimatur of the government is pointing at an individual as the perpetrator. A show up, particularly one in this

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[4] See, e.g., *Lee v Foster,* 750 F 3d 687, 691–92 (7th Cir 2014); *United States v Greene*, 704 F 3d 298, 305–06 (4th Cir 2013); *United States v Morgan*, 248 F Supp 3d 208, 211–15 (DDC 2017); *State v Dickson*, 322 Conn 410, 141 A.3d 810, 822–27 (2016); *City of Billings v Nolan*, 385 Mont 190, 383 P 3d 219, 224–25 (2016). The *Garner* opinion uses the terms "state action" and "law enforcement" interchangeably, sometimes in the same paragraph. *Garner v People,* 436 P3d 1107, 1119 (Colo, 2019).

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environment, is per se suggestive.[5] *People v Sammons,* 505 Mich 31, 44 (2020) ("In this case, all we need to observe in order to conclude that the procedure was suggestive is that defendant was shown singly to the witness.")

In-court identification is always unnecessary. *See, e.g.*, *United States v Lugo-Lopez*, 833 F 3d 453, 458 (2016) ("An in-court identification is not necessary for conviction.") In-court identification is "unnecessary…since the prosecution could easily have arranged a pretrial lineup." *Morgan*, 248 F Supp 3d at 213. The prosecutor can meet its burden of proof as to identity with direct or circumstantial evidence. *1A Gillespie Mich Crim L and Proc* 18:43 *Identity of persons* (April 2021). The myriad ways to prove identity have only grown in the centuries since eyewitness identification became tradition. Gayla, Marella, *When a Witness Confronts the Accused: Is a Courtroom ID fair?*, March 13, 2017 available at (https://www.themarshallproject.org/2017/07/13/when-a-witness-confronts-the-accused-is-a-courtroom-i-d-fair#.DDXuvJnXu) (last accessed on March 30, 2022) ("The procedure became tradition when litigants might have traveled on horseback: long before the advent of DNA testing, fingerprint technology, or the large body of research on the limitations of memory.")

The way the prosecutor arranged the in-court identification of Mr. Posey is particularly suggestive and wholly unnecessary. The day after the shooting, Mr. Byrd spent "fifteen minutes" looking at the photo array that contained Mr. Posey's mugshot. 7/25/18 TT, 115. He chose a different individual. Nevertheless, he had been exposed to Mr. Posey's mugshot in the six-pack photo array *and* was told the person he chose was not the person the police had in custody. 7/26/18 TT, 37. Mr. Byrd had "a memory trace of the faces in the lineup, including that of the suspect." Loftus, Elizabeth et al, *Test a Witness' Memory of a Suspect Only Once*, Psychological Science in the Public Interest, Vl 22, Issue I

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[5] The Court of Appeals observed that undersigned counsel did not argue that Mr. Byrd's in-court identification was suggestive because of pretrial media exposure. *People v Posey,* 334 Mich App 338, 351 n 4 (2020). That is true. It is also true that the circumstances of in-court identifications are suggestive regardless of what occurs before trial.

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December 2021 (available at https://doi.org/10.1177/15291006211026259), 1a-18a. But also, between the photo array and the trial, Mr. Byrd watched video of the incident in the prosecutor's office and watched coverage of the case on the news. 7/26/18 TT, 17, 18. Mr. Byrd testified that his in-court identification was different than his lineup choice because he saw that the people on the TV were not the person that he picked out from the lineup. 7/26/18 TT, 36. Mr. Byrd testified that while the news report did not expressly name Mr. Posey, when he saw Mr. Posey in court, he knew he had previously picked the wrong person. 7/26/18 TT, 37.

After all the pretrial exposure to Mr. Posey, the prosecutor arranged an in-court identification of Mr. Posey. In so doing, the prosecutor arranged for a scientifically unsound and unreliable identification in front of the jury. *See*, Lin, W., Strube, M.J. & Roediger, H.L. The effects of repeated lineups and delay on eyewitness identification. *Cogn Research* 4, 16 (2019). https://doi.org/10.1186/s41235-019-0168-1 (concluding that repeated exposure to a suspect in photo or in person "should be avoided."), 41a-59a. The Supreme Court of Alaska cited to a study on mugshot exposure and transference when it concluded that:

> The reliability of an identification may suffer if the witness has viewed the suspect more than once during the investigation. This concern arises in part because witnesses struggle to determine whether their memory comes from their original observation of the perpetrator or a later one.

Young v State, 374 P 3d 395, 421 (2016) (citing Deffenbacher, Kenneth et al, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 289 (2006)), 19a-40a.

Mr. Byrd then acted in the manner experts predict—a later in time but more confident identification of a familiar face. Loftus, Elizabeth et al, *Test a Witness' Memory of a Suspect Only Once*, *infra*. Mr. Byrd identified Mr. Posey by name at trial, after exposure to his mugshot,

learning his name through court paperwork, and observing him sitting at counsel table during trial.

iii. This Court should create a per se exclusionary rule for in-court identifications. Alternatively, this Court's reliability assessment for unnecessarily suggestive identifications should be clarified and applied to in-court identifications.

At least one justice on this Court has observed that the present test for due process with respect to identification is the constitutional "floor". *People v Moore*, ___ NW2d ___ (2022) ("Other jurisdictions have charted different courses than the constitutional floor set by *Manson* [v *Brathwaite*, 432 US 93 (1977)].") (Cavanaugh, J, dissenting) (internal citations omitted). Justice Cavanaugh does not stand alone in her critique of due process protections as it relates to eyewitness identification. *See, e.g.* Garrett, Brandon, *Eyewitnesses and exclusion*, 65 VNLR 451, 452 (2012) ("…the Court's test, as interpreted under a well-established line of cases, encourages the judge to admit the least reliable evidence: an eyewitness identification in the courtroom.") Given that in-court identifications are always suggestive and unnecessary, in-court identifications should always be excluded.

Should this court refrain from adopting a bright line rule for in-court identifications, this Court has previously applied the five-factor test from *Neil v Biggers*, 409 US 188, 199-200 (1972):

1. Opportunity of the witness to view the criminal at the time of the crime
2. The witness' degree of attention
3. The accuracy of the witness' prior description of the criminal
4. The level of certainty demonstrated by the witness at the confrontation
5. The length of time between the crime and confrontation.

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Sammons, 505 Mich at 41 n 2; *See also, People v Gray*, 457 Mich 107, 116 n 10 (1998) ("We find these factors substantially similar to those listed in *Kachar*.")[6]

This Court has recognized that the *Biggers* factors are "nonexclusive" and should take this opportunity to express other factors that are relevant and more closely tied to the science of eyewitness identification. *Sammons*, 505 Mich at 50; *State v Henderson*, 208 NJ 208, 293 (2011) ("We recognize that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now.")

Of particular concern[7] is the *Biggers* factor that considers "the level of certainty demonstrated by the witness." "Unfortunately, although a witness' level of certainty or confidence in her identification is one of the most powerful factors judges and juries consider when assessing eye-witness accuracy, a witness' high level of confidence in an identification does not necessarily mean that the identification is more accurate. In fact, oftentimes the opposite is true." *Eyewitness Identification: A Policy Review*, The Justice Project, p. 9, 68a. No one knows this quite as well as exoneree[8] and former SADO client, Derrick Bunkley. Mr. Bunkley

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[6] In his brief on appeal and application for leave to this Court, Mr. Posey applied the eight-factor test from *People v Kachar*, 400 Mich 78 (1977). The Court of Appeals also applied the eight-factor *Kachar* test. *People v Posey*, 334 Mich App 338, 348 (2020). This Court adopted the *Kachar* test with a majority of justices in *People v Gray*, 457 Mich 107, 116 n. 11 (1998). This Court did not explain why it chose the *Biggers* analysis over the *Kachar* factors in *Sammons*.

[7] For a full critique of each of the five factors, *see,* Mandery, Evan, *Due Process Considerations of In-Court Identifications*, 60 ALBLR 390, 418-419 (1996).

[8] https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4840

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was exonerated following an attempted murder conviction. The complainant-witness identified Mr. Bunkley in Court at trial:

> Q In that very fast period of time of seeing Mr. Bunkley's face how sure are you that Mr. Bunkley is the man who shot you?
>
> A I am a hundred percent sure. I see this man in my dreams when I go to sleep at night.

September 16, 2014 Trial Transcript in *People v Bunkley*, Case No. 14-4438, available upon request.

An innocent Mr. Bunkley went to prison for years while complainant-witness was heralded a hero.[9]

In addition to acknowledging the limitations of the existing *Biggers* factors, this Court should recognize additional factors as relevant to determining whether an in-court identification is reliable. The Supreme Court of New Jersey recognized several additional factors as relevant to reliability beyond the *Biggers* factors: stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of perpetrator, memory decay, race bias. *State v Henderson*, 208 NJ at 291-292.[10] This Court should adopt the same.

Whether under a bright line rule or by considering the totality of the circumstances, the in-court identification of Mr. Posey was unreliable.

iv. Jury instructions and cross-examination do not sufficiently protect Mr. Posey's infringed-upon due process rights.

In its opinion below, the Court of Appeals concluded: "[w]hen no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at post-indictment

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[9] https://www.nydailynews.com/news/crime/detroit-grandma-shoots-gunman-wounded-times-article-1.1786258

[10] See also, *State v Lawson*, 352 Or 724, 755-758 (2012).

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lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Posey*, 334 Mich App at 350 (citing *Perry* at 231-233).

Jury instructions, particularly those in Michigan Courts are insufficient to counter an identification that is suggestive, unnecessary, and unreliable. The United States Supreme Court itself has said as much:

> The driving force behind *United States v. Wade, Gilbert v. California* (right to counsel at a post-indictment line-up), and *Stovall*, all decided on the same day, was the Court's concern with the problems of eyewitness identification…*Wade* and its companion cases *reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability*.

Manson v Brathwaite, 432 US 98, 111–12 (1977) (emphasis added) (cleaned up).

Due process requires the exclusion of unreliable in-court identification because an identification—even if unreliable—is uniquely convincing for jurors. "[W]hile science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge, and often contradicts jurors' commonsense understandings. To a jury, there 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!" *United States v Brownlee,* 454 F3d 131, 142 (CA 3, 2006) (quotation marks and citations omitted).

At Mr. Posey's trial, the jury was instructed on identification specifically:

> In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the

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> offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, whether the area was well-lighted, and the witness' state of mind at the time.
>
> Also, think about the circumstances at the time of the identification such as how much time had passed since the crime, how sure the witness was about the identification, and the witness' state of mind during the identification.
>
> You may also consider any times the witness failed to identify the Defendant, or made an identification, or gave a description that did not agree with his identification of the Defendant during trial.
>
> You should examine the witness' identification testimony carefully. You may consider whether other evidence supports the identification because then it may be more reliable. However, **you may use the identification testimony alone to convict the Defendant** as long as you believe the testimony and find that it proves beyond a reasonable doubt that the Defendant was the person who committed the crime.

8/1/18 TT, 95-96 (emphasis added).

"Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *People v Mahone*, 294 Mich App 208, 213 (2011). Here, though, the instruction exacerbates the error, because jurors were instructed to consider a variety of factors, but when they do, jurors reach a conclusion opposite that of the scientific community. Benton, et al. *Eyewitness memory is still not common sense: comparing*

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jurors, judges, and law enforcement to eyewitness experts. Applied Cognitive Psychology 20(1), 114-129, 88a.

For the same reasons jury instructions fail to protect Mr. Posey's due process rights, so too does cross examination, even when done "aggressively." *Posey*, 334 Mich App at 351. To the extent Mr. Posey's trial counsel addressed the weaknesses of eyewitness identification, the jury was instructed that arguments and questions by counsel are not evidence. 8/1/18 TT, 82. In any event, the cross-examination did not indicate that trial counsel understood the science behind eyewitness identification. For example, trial counsel observed "if it's just like the same day or the next day, I might have a better memory. Is that the same with you?" 7/25/18 TT, 126. That question reflects a misunderstanding. In eyewitness identification studies of memory retention, a "delay" in a lineup is defined as a "retention interval greater than 24 hours."[11] Memory loss starts to occur within minutes of an event. Orenstein, Aviva, *My God! A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CA LR 159, 179 n 70 (1997).

"The major flaw with relying on cross-examination is that many eyewitnesses believe they are telling the truth, even if they are mistaken."[12] The ineffectiveness of cross-examination was on full display at Mr. Posey's trial when one of trial counsel's first questions of Mr. Byrd was, "I don't believe we had a discussion about the lineups before. But, at any rate, today you said that this gentleman right here, Mr. Posey, was a person who was out there when the shooting was going on?" Mr. Byrd answered, "yes." 7/25/18 TT, 110. Mr. Posey's trial counsel again asked Mr. Byrd whether he was "telling the truth when you made this identification [of Mr. Posey at trial]?" "Yes," Mr. Byrd responded. 7/25/18 TT, 116.

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[11] Neuschatz, et al. *A Comprehensive Evaluation of Showups*, Advances in Psychology and Law, 1, 49.

[12] Oden, Samantha, *Limiting First Time In-Court Eyewitness Identifications: An Analysis of State v Dickson*, 36 WUINLR 327, 353-354 (2018).

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Even if cross-examination had been the effective advocacy the Court of Appeals imagined it to be, Mr. Byrd's testimony had a particular air of confidence because he continually referred to Mr. Posey by name. For example, in detailing the events of the day, Mr. Byrd stated he saw "Mr. Posey exit[] the store…walked past us…produced a handgun." 7/25/18 TT, 97. Additionally, Mr. Byrd rehabilitated his prior "incorrect" identification. The prosecutor admitted the six-pack photo array in which Mr. Byrd had chosen someone other than Mr. Posey. Mr. Byrd justified that selection by saying he chose the other person because they "resembled" Mr. Posey. Mr. Byrd told the jury that he knows now that the person he chose in the photo array was not his shooter, Mr. Posey was. 7/25/18 TT, 106.

Contrary to the conclusion reached by the Court of Appeals, Michigan does not adequately protect an accused's due process rights enough to overcome the reliability concerns associated with in-court identifications. This Court should apply a reliability assessment to in-court identification because they are always unnecessarily suggestive.

If this Court should find that the absence of vigorous cross-examination and instructions on fallibility of eyewitness testimony but presence of "counsel…protective rules of evidence…and the requirement that guilt be proved beyond a reasonable doubt" is sufficient, then counsel was ineffective for failing to avail himself of the same and use an expert. See, *Infra* and Mr. Posey's Application For Leave, 16-22 (raising Ineffective Assistance of Counsel for failing to call an eyewitness identification expert).

B. The trial court's failure to exclude Mr. Posey's in-court identification was plain error.

In-court identification is unnecessarily suggestive. It is also unreliable. That is particularly true here. Mr. Byrd had no prior experience with or knowledge of Mr. Posey. He observed *two* perpetrators of a violent shooting against him for a matter of seconds and while suffering injury. Mr. Byrd identified someone else in a closer-in-time photo array. At trial, almost a full year after the incident, the prosecutor used a show up procedure having previously showed Mr. Byrd an image of Mr. Posey in the photo array, after Mr. Byrd knew

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Posey was arrested and the suspect, and where Mr. Posey was sitting at the defense table in the courtroom. This Court should find that this is plain error as in-court identifications are always unnecessarily suggestive and unreliable.

Alternatively, and as argued in his application, Mr. Byrd's in-court identification is unreliable when assessed for reliability under the *Kachar/Biggers* factors, and thus amounts to plain error.[13] This Court is to consider "the entire record to determine whether erroneously admitted evidence was prejudicial in light of the strength and weight of the untainted evidence." *People v Ackley*, 336 Mich App 586 (2021) (quotation marks and citation omitted). This error was prejudicial because of how impactful eyewitness identification is on the jury. "Courts have widely acknowledged that juries place disproportionate weight on eyewitness identifications, even if they lack indicia of reliability." *People v Sammons*, 505 Mich 31, 57 (2020). Further, after Mr. Byrd has positively identified Mr. Posey, there is almost no evidence at trial that is untainted by that perspective. The still images, the store video, rather than showing two individuals who resemble the defendants are now evidence of Mr. Posey himself. The only evidence that was untainted by Mr. Byrd's in-court identification of Mr. Posey was Mr. Scott's pretrial identification of Mr. Posey, which itself was fraught with concerning conditions. 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. This is in keeping with the science around presenting photos as a group as opposed to the sequential presentation recommendation. The photo array Mr. Scott was shown "encourages an eyewitness to comparison shop or judge the lineup members against each other through a process of elimination." The Justice Project, 8 (67a). It leads to more false identifications. *Id.* Mr. Scott 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 with "getting out of the way of the bullets." 7/25/18 TT, 76. Mr. Scott did not identify Mr. Posey at trial. Simply put, this admission of an unnecessarily suggestive and unreliable identification was prejudicial

[13] Mr. Posey's Application for Leave to Appeal, 11-13.

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and plain error. *People v Carines,* 460 Mich 750, 765 (1999). It also affected Mr. Posey's substantial due process rights.

This error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* The fairness and integrity of the proceedings are implicated because the prosecutor asked a witness to identify Mr. Posey in court without an independent basis for the identification, and with pre-trial exposure to Mr. Posey's mugshot and full knowledge that the authorities believed Mr. Posey was the guilty party. This procedure is at odds with this Court and the United States Supreme Court mandate that juries only hear reliable evidence. Beyond the individualized impact here for Mr. Posey, a rule on reliability that recognizes the science of eyewitness identification is necessary to preserve the public reputation of judicial proceedings. The fallibility of eyewitness identification is not common knowledge, but it is all too familiar to defense attorneys who watch on repeat a witness "who takes the stand, points a finger at [our client] and says[,] 'That's the one!'" *Watkins v. Sowders,* 449 US 341, 352 (1981) (Brennan, J., dissenting). And the results are catastrophic, as evidenced by the National Registry of Exonerations and how many wrongful convictions have Mistaken Witness ID as a contributing factor.[14]

C. Counsel's failure to object to the in-court identification was ineffective assistance of counsel and but for that, there was a reasonable likelihood of a different outcome at trial.

Mr. Posey proposes that this Court clarify and refine Michigan law to ensure it effectively protects the accused's due process rights when they are subject to a prosecutor-arranged in-court identification, but existing law and court rules make the identification here unreliable and inadmissible. Failure to object to evidence can constitute ineffective assistance of counsel where the evidence was inadmissible, and its introduction was so prejudicial that it could have affected the outcome of the case. *People v Ullah*, 216 Mich App 669, 685-686(1996). Additionally, "[a]n attorney's ignorance of a point of law that is

[14] https://www.law.umich.edu/special/exoneration/Pages/about.aspx

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fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v Alabama*, 571 US 263, 274 (2014); *See also, People v Ceasor*, 507 Mich 884 (2021) (finding ineffective assistance of counsel where counsel "failed to request public funds for an expert based on a mistaken belief that the defendant did not qualify for those funds…").

Faulty identification was Mr. Posey's theory of 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.

There was no strategic reason to permit the single in-court identification of Mr. Posey to go to the jury. In addition to the due process arguments raised above, trial counsel could have objected under the Michigan Rules of Evidence. MRE 403 provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." For the reasons argued above and presented by scientific evidence, there is the danger of unfair prejudice with a show-up procedure. The identification testimony is misleading to the jury, particularly here, where the instructions inadequately inform them of the fallibility of eyewitness testimony.

Strickland holds that Mr. Posey "must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 694 (1984). A reasonable probability is *less than* "more likely than not." *Id.* The standard is *less than* "a preponderance of the evidence." *Id.* at 694 ("The result of a proceeding

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can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").

In determining prejudice, this Court must consider the totality of the evidence presented to Mr. Posey's jury. "Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways." *Strickland*, 466 US at 695. This Court is then to take the remaining findings to determine if Mr. Posey has met his burden of showing a different result would be reasonably likely but for counsel's errors. *Strickland*, 466 US at 696.

Defense counsel called no witnesses and Mr. Posey did not testify. Calling identification into question was the crux of his case. And yet, trial counsel did not object to the one in-court identification of Mr. Posey. It is improbable that Mr. Posey would have been convicted in the absence of any testimony identifying him as the shooter. Accepting the evidence of Mr. Scott identifying Mr. Posey in a pre-trial photo array, Mr. Scott's own testimony called 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 shooter, a 5'9" Black male, is a far cry from Mr. Posey's 6'2" frame.

Without Mr. Byrd's identification, 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). That 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. Some footage has clearer images but this is only of individuals entering the Super X Store. The video of the shooting itself does not clearly show identifiable characteristics of the shooters.

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.[15] The inadmissible identification evidence tipped the scales against Mr. Posey.[16]

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 (1973).

[15] 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/

[16] In his leave application, Mr. Posey raised an additional ground for ineffective assistance of counsel: failure to call an expert. Mr. Posey's Application For Leave, 16-22 (raising Ineffective Assistance of Counsel for failing to call an eyewitness identification expert).

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II. The provision of MCL 769.34(10) requiring appellate courts to affirm within guideline sentences, whether they are reasonable or not, is unconstitutional and inconsistent with Lockridge.

Issue Preservation and Standard of Review

This issue has no preservation requirement.

This Court reviews questions of law de novo, including constitutional questions and questions concerning the interpretation and application of statutes. *People v Kennedy,* 502 Mich 206, 213 (2018).

Discussion

The provision of MCL 769.34(10) requiring appellate courts to affirm within guideline sentences must be struck down. First, this provision violates the Sixth Amendment as it is a feature of a mandatory—not advisory—sentencing guideline scheme. *People v Lockridge*, 498 Mich 358 (2015). Second, certain unique features of Michigan's sentencing guideline scheme provide no reassurance that the guideline ranges provide a proportionate sentencing option. Third, MCL 769.34(10) violates due process, the right to appeal, and the separation of powers doctrine. MCL 769.34(10) acts as an improper amendment to Article 1, § 20 of Michigan's Constitution by limiting the right to appeal a sentencing outcome, which is part and parcel of an appeal. Such a limitation must be done by constitutional amendment, not by statute.

A. MCL 769.34(10) is a feature that cannot exist in an advisory system and violates the Sixth Amendment and the remedy intended by *Lockridge*.

In *People v Lockridge*, 498 Mich 358 (2015), this Court declared that Michigan's legislative guidelines were no longer mandatory—they were now advisory. "This remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court's discretion." *Id.* at 392. This Court severed the portion of MCL 769.34(2) that required a within-guideline sentence and MCL 769.34(3) that required the sentencing court to state a "substantial and compelling reason" to depart from the guideline range. *Lockridge,* 498 Mich 358,

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364. This Court warned that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Id.* at 365, n 1.

But nearly seven years after *Lockridge*, MCL 769.34(10) remains intact. It provides: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." The continued adherence to the mandatory affirmance language of MCL 769.34(10) has led to unreviewable disproportionate sentences based on judicially-found facts. Michigan's sentencing scheme is not yet a system that adequately safeguards Mr. Posey's rights under the Sixth and Fourteenth Amendments. Truly advisory sentencing systems allow a non-binding appellate presumption of reasonableness for within guideline sentences and prohibit any presumption of unreasonableness for outside of guideline sentences. Michigan's system does the opposite.

To be true to the remedy of advisory guidelines this Court adopted in *Lockridge*, a within-guidelines sentence must be subject to appellate review for proportionality and reasonableness in the same way a sentence outside of the guidelines is reviewable. See *People v Milbourn*, 435 Mich 360, 661 (1990) and *Rita v US*, 551 US 338, 351 (2007). This approach is consistent with post-*Booker* US Supreme Court and federal precedent.

In *Rita v US*, 551 US 338, 347 (2007), the Court found no Sixth Amendment violation where appellate courts apply a rebuttable presumption of reasonableness when reviewing sentences within the properly scored guidelines. The court reasoned that a "nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence." *Id.* at 353.

But there is no mere presumption of reasonableness for within-guideline sentences in Michigan because MCL 769.34(10) is a mandate, not a presumption. A presumption, by definition, is rebuttable. A presumption is an inference that shall or may be drawn "unless and

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until the truth of such inference is disproved." Black's Law Dictionary (11th ed. 2019), "presumption." (citing John D. Lawson, The Law of Presumptive Evidence 639 (2d ed 1899). A presumption of law is "a [required] legal assumption" valid until "contradictory evidence is produced." *Id* at "presumption of law." MCL 769.34(10) requires a mandatory affirmation of all within-Guidelines sentences without any form of review and regardless of evidence of the unreasonableness of the chosen sentence.

In other jurisdictions that operate with a presumption of reasonableness for within guidelines sentences, it is a true legal presumption for the appellate court. Consider the federal system. In *Gall v United States*, 552 US 38 (2007), the Supreme Court of the United States held that "if the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness." *Gall*, 552 US at 51. The Seventh Circuit employs that presumption but makes clear it is a rebuttable one:

> The defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in §3553(a). While we fully expect that it will be a rare Guidelines sentence that is unreasonable, the Court's charge that we measure each defendant's sentence against the factors set forth in §3553(a) requires the door be left open to this possibility. [*US v Mykytiuk*, 415 F3d 606, 608 (7th Cir, 2005)].

And further, *Gall* held that "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard." *Gall*, 552 US at 51. In Michigan, only sentences outside the correctly-scored guidelines are afforded such a review.

Without the ability to review within-guideline sentences, no presumption of reasonableness exists for the appellate courts in Michigan. MCL 769.34(10) is not a presumption, it is a mandate.

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The current mechanics of Michigan's sentencing guidelines system, especially the lack of a requirement to justify a within guideline sentence combined with the lack of an appeal of the reasonableness of those sentences, are mechanisms that unconstitutionally encourage, if not ensure, that within-guideline sentences are imposed without regard to reasonableness. Trial courts *must* give a within guideline sentence—one they do not have to justify at all—*unless* they put on the record why they are imposing an outside of guideline sentence. Trial courts are *prohibited* from imposing outside of guideline sentences without articulating proper reasoning. That reasoning requires justification for the departure itself and the extent of the departure. *Milbourn,* 435 Mich at 660. The explanation provided must expressly reference why the sentence imposed is more proportionate than a guidelines sentence. *People v Dixon-Bey*, 321 Mich App 490, 525 (2017). Trial judges must work harder if they want to impose a sentence that varies from the sentencing guideline range, and they do this with the knowledge that the outside of guideline sentence they impose can be appealed while the sentences they impose within the guidelines cannot and do not have to be justified. The multi-layered differential treatment of within guideline and outside of guideline sentences for both trial courts and appellate courts creates a preference for within guideline sentences and a presumption of unreasonableness for outside of guideline sentences. This runs afoul of the Sixth Amendment.

Sentencing in Michigan presently operates with the exact system *Gall* cautioned against:

> a practice—common among courts that have adopted "proportional review"—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range. [*Gall v United States*, 552 US 38, 49 (2007)].

The Sixth Amendment problem in the federal sentencing guidelines was remedied not only by making the federal guidelines advisory on trial

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courts but also maintaining meaningful appellate review of within guidelines sentences, consistent with outside of guideline sentences. *US v Booker*, 543 US at 261.

Continuing to enforce the first sentence of MCL 769.34(10) perpetuates the constitutional problem this Court sought to solve in *Lockridge*. After *Lockridge*, the guidelines were replaced with the principle of proportionality, with the guidelines intended to serve as a reference point in a proportionality determination. This Court expressly cited *Milbourn* for that principle, the case wherein this Court acknowledged that "[c]onceivably, even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." *Milbourn*, 435 Mich at 661.[17] But, with MCL 769.34(10), a sentence within the guidelines being reviewed for an abuse of discretion is inconceivable.

In addition to impeding on the Sixth Amendment and neutralizing the *Lockridge* remedy, MCL 769.34(10) runs counter to this Court's historical reliance on appellate review to ensure individualized, proportionate and non-disparate sentences.

B. MCL 769.34(10) prohibits appellate courts from reviewing whether the imposition of a sentence within the Legislatively authorized guidelines is individualized, proportionate, and non-disparate.

Sentences imposed that are within statutory limitations "must be subject to judicial review in order to ensure" adherence to the constitution. *People v Coles,* 417 Mich 523, 529-530 (1983). Statutory sentencing limits provide "wide discretionary power to the trial court but it is up to the appellate courts to "determine[ ] whether the trial court judicially exercised its discretion in imposing a sentence within the statutory limitations or even whether the court imposed a sentence that was illegal and subject to appellate relief." *Id.* at 528-529. *Coles*

[17] While *Milbourn* was analyzing the judicial guidelines, this Court has revived *Milbourn* as the proportionality standard-bearer in this post-*Lockridge* sentencing landscape.

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recognized the importance of appellate review of sentences—even those within Legislatively authorized ranges—to provide integrity in appeals, increase public trust, and combat disparities. *Coles*, 417 Mich at 543-545.

At the time *Coles* was decided, there were no sentencing guidelines and no legislation prohibiting appellate review of sentences.

Shortly after *Coles* was decided, Michigan established the advisory judicial sentencing guideline system in 1983. In 1990, this Court established the principle of proportionality for appellate sentencing review of guideline sentences. *Milbourn*, 435 Mich 630. Mr. Milbourn was convicted of breaking and entering. The judicial sentencing guidelines recommended a minimum sentence of between 12 to 30 months. The trial court, however, imposed a 10-year minimum sentence, which was the statutory maximum penalty authorized by the Legislature. On appeal, Mr. Milbourn argued that the trial court abused its discretion in imposing such a sentence.

In deciding the issue, this Court did not have to grapple with whether within guideline sentences were reviewable because the sentence being challenged was outside the applicable judicial guidelines range. But it *was* within the range of sentencing permitted by the Legislature. Still, this Court found the trial court had abused its discretion because the sentence imposed was not proportionate to the facts of the case or to Mr. Milbourn. *Id.* at 667.

In *Milbourn,* this Court recognized that by setting a "range of allowable punishments for a single felony," the Legislature "intended persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record are less threatening to society." *Id.* at 651. The trial court satisfies legislative intent "by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of" the offense and the background of the individual being sentenced. *Id.*

The *Milbourn* Court reaffirmed the principle it recognized in *Coles* that "an appellate court must review the trial court's exercise of the

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sentencing discretion entrusted to it by the Legislature." *Id.* at 644. "Discretion . . . is a matter of degree, not an all or nothing proposition." *Id.* at 664. Appellate courts, by their very nature, exist to ensure that trial courts are functioning properly and legally. *Id.* Appellate courts must engage in sentencing review without "substitut[ing] their judgment for that of the trial court," and must "interpret the legislative will." *Id.* at 666. Sentencing discretion vested to the trial court by the Legislature is appropriately exercised only when the imposed sentence is proportionate. See *Coles, supra, Milbourn, supra and Lockridge, supra.* But MCL 769.34(10) operates to prohibit any assurance of proportionality of within guideline sentences.

i. Michigan's legislative sentencing guideline ranges do not incorporate principles of proportionality, which increases the need for appellate review of within guideline sentences.

In 1998, the Legislature enacted a mandatory legislative sentencing guideline scheme. See 317 PA 1998. Unlike under the judicial guidelines, trial courts were required to sentence individuals within the legislative sentencing guideline range. To enforce the mandatory nature of the sentencing guidelines, the Legislature required trial courts to justify any sentence imposed outside of the sentencing guideline range with "substantial and compelling reasons," required the trial court to advise individuals about the right to appeal a sentence that was more severe than the guideline range, and required appellate courts to automatically affirm within guideline sentences absent a sentencing guideline scoring error. MCL 769.34; See 317 PA 1998.

In *People v Babcock,* 469 Mich 247, 240-241 (2003), this Court held that the *Milbourn* principle of proportionality was incorporated into the legislative sentencing guideline ranges because the guidelines considered "the seriousness of the crime and of *the defendant's criminal history*." (Emphasis added.) Our legislative sentencing guidelines only consider those two things—the crime and the individual's criminal history. But this Court was wrong to characterize that as proportionality.

Pursuant to *Milbourn*, proportionality depends on two things—the seriousness of the crime and the *background and characteristics* of the

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offender. (Proportionality "must take into account the nature of the offense and *the background of the offender*," *Milbourn,* 435 Mich at 651, 658, 667 (emphasis added). These facts include more than a person's criminal history. They include one's "background" and "characteristics." *Id.* at 651, 658, 667). But our legislative sentencing guideline ranges do not take individual characteristics or backgrounds into account. There are no mitigating factors. The sentencing guideline ranges do not consider whether someone has a mental health issue, a medical condition, or a substance dependency. The ranges do not consider whether someone experienced childhood trauma, abuse, or neglect. The ranges do not consider age, maturity level, poverty, or work history. The ranges do not consider diminished culpability, acceptance of responsibility, or expressions of remorse. The ranges do not take into account anything meaningful about the individual being sentenced. The *Babcock* Court was wrong when it concluded that "the appropriate sentence range is determined by reference to the principle of proportionality." *Babcock,* 469 Mich at 264.

Proportionality principles were not intentionally incorporated into the legislative guideline ranges when they were enacted, and the lack of proportionality within the guidelines has worsened over the decades with no oversight. This makes the need for appellate review of sentences even more pressing.

ii. The legislative sentencing guidelines promote disparity and unreasonable sentences in Michigan, which increases the need for appellate review of within guideline sentences.

There is no historical evidence or current data to suggest that Michigan's sentencing guideline ranges are proportionate to the offense and to the background of the person being sentenced.

But there is real reason to believe that, even assuming the guideline ranges were proportionate when enacted in 1998, they are not proportionate now after decades of existence and amendments without sentencing commission review or oversight. Traditionally, sentencing commissions exist to monitor and revise the guidelines in response to legislation or appellate court rulings, collect and analyze data to examine issues of disparity and proportionality, develop analyses to

identify the impact of legislation or policy changes, examine the effectiveness of sentencing policies, and more.[18] "To its credit, the Michigan Legislature attempted comprehensive sentencing reform in 1998 when it enacted the statutory sentencing guidelines with the aid of a nineteen-member sentencing commission." Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U. MICH. J. L. REFORM 645, 648 (2014). But by 2002, the sentencing commission had been abandoned. *Id.* "This was done over public objection that the Legislature was ill-suited to conduct the continuing research and study necessary to support the guidelines and that legislatures often tend to reflect current public thought (or fears) when amending penal laws [rather] than . . . sound research in adopting a course of action most likely to deter crime and safely reduce prison overcrowding." *Id.* at 650-651 (internal citations omitted).

From 1999 to present, and without oversight from a sentencing commission, the guidelines and ranges lost any semblance of proportionality. The "Legislature passed dozens of laws that increased maximum penalties and increased the sentencing guidelines ranges, either through increased scoring of the variables or by moving offenses to higher crime classifications." Yantus, *supra* at 651. "[T]he increased penalties appear to have been made without reference to the proportionality principle that discrete crime classifications [should] make sense when matched against one another." *Id.* (internal citations omitted). "The result is that stealing from a store is now treated more seriously than assault with a dangerous weapon and obtaining money by false pretense is punished the same as breaking into a home while armed with a weapon. Several crimes that were mid-level offenses in the past are now punishable by up to life imprisonment, and several low-level offenses have moved to the mid-level category." *Id.* at 651-652 (internal citations omitted).

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[18] The Role of Sentencing Commissions, ROBINA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE, (2015), last accessed on April 5, 2022 at https://sentencing.umn.edu/content/role-sentencing-commissions.

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In November 2021, Safe & Just Michigan published a comprehensive report titled, "Do Michigan's Sentencing Guidelines Meet the Legislature's Goals?" (116a-345a).[19] The short answer is no. The report provides a detailed history of the legislative guidelines and makes several findings that tend to show the disproportionality of our sentencing guideline system:

- "Points are scored for facts that are actually required elements of the offense." P. 71 (191a).
- "No mitigating characteristics are scored." P. 157 (277a).
- The guideline ranges are "very broad" and "extremely wide." P. 77 (197a).
- "[T]he guidelines themselves do a great deal of double-counting." P. 160 (300a).
- The guidelines were enacted under the "assum[ption] that the Sentencing Commission would review how the guidelines were working in practice and make periodic recommendations for modification," but that did not happen. P. 15 (136a).

Levine et al, *Do Michigan's Sentencing Guidelines Meet the Legislature's Goals?*, Safe & Just Michigan (2021).

Michigan trial court judges have broad discretion within a wide range to impose guideline sentences that are not guaranteed to be proportionate and that do not consider individual characteristics—including mitigating factors—of the person being sentenced. Neither the Legislature nor the appellate courts have provided direction or guidance on how to select an appropriate sentence within expansive guideline ranges. This broad discretion to choose a sentence anywhere within a massive range without articulating the reason for imposing the sentence

[19] The report is also available online at: Do_Michigans_Sentencing_Guidelines_Meet_The_Legislatures_Goals.pdf (safeandjustmi.org), last accessed April 5, 2022.

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and without the possibility of appellate review does not ensure proportionality or non-disparity.

This has been proven true in at least Washtenaw County where a statistical analysis revealed racial disparities in sentencing decisions that was unchecked, in part, because "[t]here appears to be no effective mechanism for appellate review of overall patterns of racial disparities that could indicated discriminatory or racially biased rulings." *Race to Justice,* Citizens for Racial Equity in Washtenaw (CREW), August 2020, p. 14 (360a).

It has further been proven true in Mr. Posey's case. Mr. Posey's guideline range was originally scored at 225 to 532 months. This range represents a difference of over 25 years from the bottom to the top. He was given a minimum sentence of 225 months. This was a sentence within the range, one that the trial court did not have to justify, and one that was unappealable. After resentencing, where errors to the scoring of the guidelines were corrected, his new guideline range was reduced to 171 to 427 months. This range represents a difference of over 21 years from the bottom to the top. Mr. Posey received the same sentence of 225 months. Mr. Posey could have received a 14.25 year sentence at the bottom end of the range, or a 35.5 year sentence at the high end of the range.

Another case pending in this Court paints an even starker picture. Jamar Terrelle Purdle was sentenced for second-degree murder as a fourth habitual offender using a guidelines range of 270 to 900 months. *People v Purdle*, unpublished per curiam opinion of the Court of Appeals, issued February 1, 2022 (Docket No. 353821), cert pending (Docket No. 164218). A sentence of 22.5 years or a sentence of 75 years, for the same offense, occurring in the same circumstances, by a person with the same criminal background, is unreviewable by the appellate courts with continued adherence to MCL 769.34(10). This result is illogical, inconsistent with Michigan case law, and/or unconstitutional.

C. MCL 769.34(10) violates Mr. Posey's due process rights, right to appeal, and the separation of powers clause. The Legislature's authority to set sentencing penalties does not authorize it to limit the constitutional right to appeal a

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sentence or to usurp the appellate court's ability to ensure just sentencing outcomes.

In *Lockridge*, this Court recognized that mandatory sentencing guidelines implicated Mr. Lockridge's Sixth Amendment right to a jury trial *and* his due process right. *Lockridge*, 498 Mich at 384 n 22. The Michigan Constitution provides that "no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." Article 1, §17. In § 20, the Michigan Constitution supplies a right to appeal "in every criminal prosecution" with one exception, effectuated by constitutional amendment: "except as provided by law, an appeal by an accused who pleas guilty or nolo contendere shall be by leave of the court…." The Michigan Constitution later states that "[t]he jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." Const 1963, art 6, §10.

MCL 770.12 establishes an appeal by right from a "final judgment or final order from the circuit court." MCL 770.12(a). "A sentence imposed in a criminal case is part of the final judgment of the trial court." *People v Reynolds*, 181 Mich App 185, 188 (1989) (citing *Coles*, 417 Mich at 535; overruled in part on other grounds by *Milbourn*, 435 Mich at 644). "Appellate courts are vested with the jurisdiction to review all sentencing issues." *People v Brown*, 184 Mich App 722, 725 (1990) (citing *Coles*, 417 Mich at 535; overruled in part on other grounds by *Milbourn*, 435 Mich at 644).

MCL 769.34(10) requires the appellate court to affirm all sentences that are "within the appropriate guidelines sentence range." An exception is made where there is "an error in scoring the sentencing guidelines or inaccurate information [was] relied upon in determining the defendant's sentence." MCL 769.34(10). But otherwise, "the court of

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appeals shall affirm that sentence and shall not remand for resentencing…" MCL 769.34(10).[20]

This statutory language, removing the right to appeal following a final sentencing order with enumerated exceptions, regardless of whether guilt was found by plea or by trial, violates the constitutional right to appeal under Mich. Const. 1963, art 1, §20. Any change in the scope of a right to appeal must come through constitutional amendment, not through the Legislature.

i. MCL 769.34(10) removes a right to appeal that is guaranteed by Michigan's Constitution.

The United States Supreme Court has not recognized a federal constitutional right to appeal, *McKane v Durston*, 153 US 684, 687 (1894), but when a state provides a right to appeal it must do so in a way that is fair and accords with due process principles. See *Griffin v Illinois,* 351 US 12 (1956)*; Douglas v California,* 372 US 353 (1963)*; Halbert v Michigan*, 545 US 605 (2005). "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." *Evitts v Lucey*, 469 US 387, 401 (1985).

Generally speaking, "[a] defendant's exercise of the right to appeal must be free and unfettered." *North Carolina v Pearce*, 395 US 711, 724 (1969) (internal citations omitted).

Both the United States Supreme Court and this Court have found a denial of due process when a state, through its actions, effectively precludes the appeal, precludes meaningful appellate review, or chills the exercise of the right to appeal. *Douglas v California, supra* (denial of counsel on appeal leaves a meaningless ritual); *Griffin v Illinois, supra* (transcript requirement effectively precludes adequate appellate review for indigents); *Evitts v Lucey*, *supra* (denial of effective assistance

[20] MCL 769.34(10) has not been read to preclude issues with respect to the constitutionality of a sentence. *People v Conley*, 270 Mich App 301 (2006).

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of counsel precludes meaningful review); *North Carolina v Pearce*, *supra* (right to appeal chilled); *Blackledge v Perry*, 417 US 21 (1974) (right to appeal via trial de novo chilled); *Thigpen v Roberts*, 468 US 27; (1984) (right to appeal chilled by prosecutor's filing of higher charge during pendency of appeal); *People v Harrison*, 386 Mich 269, 275 (1991) (adjournment of one case with notice it would be dismissed if defendant did not pursue appeal in second case is "constitutionally obnoxious" and chills the constitutional right to appeal); *People v Mazzie*, 429 Mich 29 (1987) (increased sentence following appeal, if imposed by same judge, creates presumption of vindictiveness for exercise of right to appeal).

It goes without saying that a state Legislature may not remove a right to appeal guaranteed by a state constitution. A unanimous Michigan Supreme Court held that where the Michigan Constitution[21] provides for "direct review by the courts as provided by law" of a final administrative decision of a quasi-judicial nature that affects private rights, the Legislature could not pass a law that precluded appeal of a state tax commission classification decision.[22] *Midland Cogeneration Venture LTD. Partnership v Naftaly,* 489 Mich 83 674 (2011), As the *Midland* Court explained, "The Legislature lacks the authority to abolish the [constitutional] right to judicial review by enacting a statute." 489 Mich at 87.

The *Midland* Court took pains to differentiate between the Legislature's authority to set procedural limits and its lack of authority to preclude the appeal. "There is a significant difference between

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[21] Mich. Const. 1963, art 6, §28 reads in relevant part: "All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law."

[22] MCL 211.34c(6), the statutory language in question in *Midland*, provided: "An appeal may not be taken from the decision of the state tax commission regarding classification complaint petitions and the state tax commission's determination is final and binding for the year of the petition."

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dictating the mechanics of an appeal and preventing an appeal altogether." *Id.*, at 94. The "mechanics" of the appeal include the "time frames for filing an appeal . . . whether a party may obtain a stay pending appeal, and . . . the controlling standard of review." *Id.* Control over the mechanics of an appeal does not include "limit[ing] the jurisdiction of the circuit courts." *Id.*

What the Legislature has done in MCL 769.34(10) is to preclude appellate review of a within-guideline sentence, with limited exceptions. The statute says that the Court of Appeals "shall affirm" a guidelines sentence, and this effectively precludes appellate review. Opposing counsel in a companion case acknowledges this: "Sentences within the guidelines . . . are not subject to review under the legislative scheme…" (Prosecutor's Answer in Opposition to Application for Leave to Appeal in *People v Stewart* (Docket No. 343755, p. 15, filed June 14, 2021).

By precluding appellate review of a within guideline sentence, the Legislature has reduced the scope of the constitutional right to appeal. Appellate review has nearly always included appellate review of the sentence. This Court recognized the existence of appellate sentence review dating back to at least 1879. *Coles*, 417 Mich at 528, relying on *Cummins v People*, 42 Mich 142 (1879). While the scope of that review has evolved over the years, there is no question that the sentence "is as much a part of the final judgment of the trial court as the conviction itself." *Coles,* 417 Mich at 535. In other words, sentence review has been part of the appeal process for more than a century, and it has been an accepted component of the constitutional right to appeal since 1963.

Mr. Posey acknowledges that there is some language suggesting there is no constitutional right of sentence review, or at least review of sentencing discretion, in *People v Coles, supra.* In *Coles,* this Court concluded that the constitutional right to appeal did not mandate appellate review of sentencing discretion:

> We do not agree that the constitutionally guaranteed right of appeal mandates review of the trial court's exercise of discretion in sentencing in order to comport with due process of law. The expansion of the scope of

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> appellate review is a matter of public policy within this Court's power to adopt; it is not constitutionally required. [*Coles*, 417 Mich at 542.]

That conclusion, however, is dependent on the context in which it was made. This Court recognized in *Coles* that it was venturing into new territory, with arguments both for and against expanded appellate review. *Id.* at 532-533. In support of its decision, the Court pointed to the evolving nature of sentence review and to the "far-reaching powers" of the Supreme Court in the area of appellate review. *Id.* at 529-532, 534-535. The Court additionally noted the need for discretion in a system of indeterminate sentencing (a voter-approved system that directs the Legislature to provide for a "flexible law" that necessarily entails discretion). *Id.* at 539. The Court further reflected on the reality that "a sentence following a conviction is as much a part of the final judgment of the trial court as is the conviction itself." *Id.* at 535, 539.

Building on these arguments and acknowledging no constitutional or legislative impediment to appellate review of sentences, 417 Mich at 534-535, the Court took the next logical step of authorizing appellate review of a trial judge's sentencing discretion. The Court cautioned, however, that it was not grounding its decision in the constitutional right to appeal because that right does not "mandate" such review. *Id.* at 542.

The difference between pre-*Coles* and now is that appellate review of sentencing discretion has existed for forty years, making it an accepted component of appellate review. It logically follows that if the sentence is part of the conviction, and the constitution authorizes appellate review of the conviction, it necessarily authorizes appellate review of the

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sentence, including post-*Coles* appellate review of sentencing discretion.[23]

Moreover, in *Coles* the Court was not grappling with *infringement* of the right to appeal. Although the Court was not prepared to find a right of appellate review of sentencing discretion in Article 1, § 20, once it recognized that right via case law it was constrained by due process principles. The state may not afford a right of appeal and then render it meaningless. See *Douglas v California, supra*; *Griffin v Illinois, supra; Evitts v Lucey*, *supra*. By precluding appellate review of a within guideline sentence, the Legislature effectively precludes appellate sentence review for an extraordinary number of individuals.

In many ways, this appeal boils down to the question of whether the Legislature has authority to eliminate appellate review of sentencing discretion as part of its constitutional authority to determine the penalty for crime. The *Coles* Court addressed this in passing by recognizing that it was not dealing with a system of presumptive sentencing (which might lead to a different result) and by highlighting the need for an exercise of discretion within a system of indeterminate sentencing. 417 Mich at 538, 539. The Court offered the view that appellate review of sentencing discretion in a non-mandatory setting "will in no way interfere with the Legislature's ability to maintain or change the method of sentencing in this state." *Id.* at 538, 539. In other words, appellate review of sentencing discretion that is exercised within a *discretionary* sentencing scheme does not impair the Legislature's constitutional sentencing power.

This last point—that the Legislature's sentencing power extends only so far—may have been obscured during the 2018 appeal on this

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[23] Care should be taken to differentiate between a constitutional right to appeal and one that is provided solely by statute. The Legislature may determine "what cases, under what circumstances, and from what courts, appeals may be taken," 417 Mich at 533, but that statement appears to relate to statutory appeals. See *Moore v Spangler*, 401 Mich 360, 368-369 (1977) (appeals are generally a creation of statute and the Legislature may prescribe what cases and under what circumstances the appeal may be taken).

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same issue in *People v Ames,* Docket No. 337878. In *Ames*, Amicus PAAM argued that "Now, as before, a sentence within properly scored guidelines – now advisory guidelines – is not subject to appellate review, and this raises no constitutional issue whatever." (Brief by Prosecuting Attorneys Association of Michigan as Amicus Curiae, Docket No. 337878, p. 13, filed July 18, 2018). Amicus PAAM asserted, without support, that "Appellate review is only permissible within the *statutory* scheme if the legislature so allows, it has not done so for guidelines sentences, and there is no reason why its prohibition on review is unconstitutional." *Id.* at p. 15 (emphasis in original). Amicus PAAM further argued, again without support, that "[s]o long as the guidelines are advisory, there being no requirement to sentence within them, no problem can arise from the legislative choice." *Id.* Amicus PAAM finally concluded, albeit with some effort to support the assertion that "The statute [MCL 769.34(10)] is simply a form of or analogue to a jurisdiction-stripping statute, and is constitutional," relying on a Washington Supreme Court decision[24] that approved a Washington state statute that precluded appellate review of a within-guidelines sentence. *Id.*

The problem with the above assertions is two-fold. First, while there can be no doubt that the Michigan Legislature has authority to determine the appropriate penalty for a crime, it has chosen to delegate a degree of discretion to the sentencing judge. This is especially true in an advisory guideline system, where judges have discretion to sentence within or beyond the guidelines range. See *Lockridge, supra*. This Court has previously concluded that where there is judicial discretion, review of that discretion exists in a non-mandatory-guidelines setting. *Coles, supra; Milbourn*, *supra.*

More importantly, Amicus PAAM in *Ames* failed to grasp the context of the Washington Supreme Court case upon which it relied. Washington State has presumptive (what we might call mandatory) sentencing guidelines with departures for substantial and compelling reasons. See *State v Fletcher*, 19 Wash App 2d 566, 576; 497 P3d 886

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[24] *State v Williams*, 149 Wash 2d 143; 65 P3d 1214 (Wash, 2003).

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(WA App, 2021). Within that scheme, a sentence is not considered an abuse of discretion if it falls within the guidelines range. This is so because the Washington Legislature has determined that a sentence within the standard range is presumptively appropriate: "This provision of the SRA [Washington Sentence Reform Act] does not violate the constitutional right to appeal because '[w]hen the sentence given is within the presumptive sentence range then as a matter of law there can be no abuse of discretion.'" *State v Delbosque*, 195 Wash 2d 106, 126, 456 P3d 806, 817 (WA, 2020), citing *State v Ammons*, 105 Wash 2d 175, 183; 713 P2d 719, 718 P2d 796 (1986). In effect, the Washington statute sets forth a principle that could just as easily be set forth by an appellate court: there is no abuse of discretion when a judge sentences within a *mandatory* range (or to a *mandatory* term) that has been set by the Legislature.

It may be, consistent with the Washington decision, that the Michigan Legislature has some claim of constitutional authority to restrict appellate review of a sentence falling within a *mandatory* sentencing guidelines scheme in light of its constitutional authority to determine the penalty for a crime, *People v Hegwood*, 465 Mich 432, 436 (2001) (recognizing Legislature's constitutional authority to determine the penalty for crime), but that argument falls when applied to advisory sentencing guidelines. Where there is discretion, there is generally review. "There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property[.]" *Jones v Barnes*, 463 US 745, 756 n 1 (1983) (Brennan, J., dissenting). This Court has previously recognized the appropriateness of appellate review of sentencing discretion in *Coles* and *Milbourn*.

In sum, the Michigan Legislature has attempted to limit appellate review of sentencing discretion under MCL 769.34(10). Due process emphasizes fairness between the state and the individual, *Evitts v Lucey*, 469 US at 405, citing *Ross v Moffitt*, 417 US 600, 619 (1974), and a long line of cases protect the right to appeal from state interference. A statute that precludes exercise of a constitutional right to appeal, an appeal that includes both conviction and sentence, cannot stand.

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ii. MCL 769.34(10) acts as an improper amendment of Article 1, § 20 of Michigan's Constitution.

It is a basic principle of law that the Legislature may exercise its law-making authority except when it contradicts the will of the people as expressed in a state or federal constitution. "A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution." *Carmichael v Southern Coal & Coke Co*, 301 US 495, 510 (1937). "The legislative power is the authority to make, alter, amend, and repeal laws . . . , save as limited and restrained by the state and federal Constitutions." *Harsha v City of Detroit*, 261 Mich 586, 590 (1933).

The Michigan Constitution of 1963 provides a right to appeal in Article 1, § 20, as previously indicated. This right was not explicitly recognized in earlier constitutions, but the right was enshrined and guaranteed in 1963. See *People v Bulger*, 462 Mich 495, 503 (2000), abrogated by *Halbert v Michigan, supra* (1908 Constitution provided for assistance of counsel to pursue appeal when trial court so ordered, but there was no recognized right of appeal).

In 1994, the voters limited the right to appeal when an individual pleads guilty or no contest: "In every criminal prosecution, the accused shall have . . . an appeal as a matter of right, except as provided by law an appeal for an accused who pleads guilty or nolo contendere shall be by leave of the court." Const 1963, art 1, §20. The 1994 constitutional amendment, prompted by a desire to reduce the caseload of the Court of Appeals, did not eliminate the right to file a first appeal in a plea case but made that first appeal one of leave rather than right. *Halbert v Michigan*, 545 US at 612, 617-619.

With reference to the 1994 amendment, the Legislature apparently recognized that it could not restrict the right to appeal in a plea case on its own. Legislative analysis reflects a Joint Resolution of both chambers that necessitated submission to the electorate:

> The joint resolution proposes an amendment of Article 1, Section 20 of the State Constitution of 1963, which enumerates the

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> rights of the accused in a criminal prosecution, to specify that an appeal by an accused who had pleaded guilty or *nolo contendere* would be by leave of the court, rather than as a matter of right.
>
> The joint resolution would have to be submitted to the electorate of the State at the next general election. [Senate Fiscal Agency, First Analysis, Senate Joint Resolution D (Feb. 18, 1993), p 1.]

The Legislature's enactment of MCL 769.34(10) effectively limits the right to appeal, much like the 1994 constitutional amendment. The statute functionally amends the Michigan Constitution to provide: "In every criminal prosecution, the accused shall have the right to . . . have an appeal as a matter of right, except as provided by law an appeal for an accused who pleads guilty or nolo contendere shall be by leave of the court, *and further there shall be no appeal of a sentence falling within the recommended range of the legislative sentencing guidelines absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."*

The Legislature cannot amend the Michigan Constitution without voter approval. "It is hardly necessary to say that a provision of the Constitution cannot be repealed or amended directly or indirectly by the Legislature[.]" *Board of Education of City of Detroit v Fuller*, 242 Mich 186, 191, 218 N W 764, 765 (1928). According to Article 12, § 1 of the Michigan Constitution, voter approval is required when the Legislature seeks to amend the constitution:

> Sec. 1. Amendments to this constitution may be proposed in the senate or house of representatives. Proposed amendments agreed to by two-thirds of the members elected to and serving in each house on a vote with the names and vote of those voting entered in the respective journals shall be submitted, not less than 60 days thereafter, to the electors at the

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> next general election as the legislature shall direct. If a majority of electors voting on a proposed amendment approve the same, it shall become part of the constitution and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. [Const of 1963, art 12, §1.]

MCL 769.34(10) operates as a functional amendment of the Michigan Constitution and acts to eliminate part of the right to appeal. It would appear the voters desired something to the contrary when Article 1, § 20 was ratified in 1963. According to Convention Comment, the Legislature may afford greater appeal rights, but it cannot eliminate the right to appeal: "The clause, 'to have an appeal as a matter of right,' is added as a guarantee of the right of a defendant to at least one appeal in a criminal case. The provision is not intended to restrict the Legislature in its power to provide by law for additional appeals." 2 Official Record, Constitutional Convention 1961, p 3365.

Here, Mr. Posey's right to appeal has been excised by statute, not constitutional amendment. MCL 769.34(10) does not "define the scope" of a criminal appeal, it excludes a huge swath of sentences from being appealable at all. *People v Mulier*, 12 Mich App 28, 34 (1968) ("Since the State has granted the universal right of appeal, standards of procedural fairness forbid cutting down the right."). The Legislature's constitutionally provided role is "provid[ing] for penalties for criminal offenses." *People v Cameron,* 319 Mich App 215, 234 (2017). Delegating some of that authority to trial courts is constitutionally sound. *Id.* But MCL 769.34(10) is not a delegation of authority; it is a contraction of a constitutional right to appeal and is therefore unconstitutional.

iii. MCL 769.34(10) violates the separation of powers by usurping the appellate court's judicial power and jurisdiction over sentencing review.

"The Michigan Constitution provides for the separation of powers between the legislative, judicial, and executive branches and vests the courts with the judicial power." *Lansing Sch Educ Ass'n v Lansing Bd*

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of Educ, 487 Mich 349, 362 (2010), citing Const 1963, art 3, § 2. While the branches of government are part of a comprehensive system, each branch of government must be able to perform its constitutionally assigned functions without interference from other branches. To determine whether a law disrupts the separation of powers, "the proper inquiry focuses on the extent to which it prevents [one] branch from accomplishing its constitutionally assigned functions." *Nixon v Adm'r of Gen Servs*, 433 US 425, 443 (1977).

In *People v Garza*, 469 Mich 431 (2003), this Court considered the issue of whether MCL 769.34(10) violated the separation of powers doctrine and held that it did not. Mr. Garza represented himself in propria persona in this case and presented the court with no "persuasive argument that the constitution of this state or of this nation bars the Legislature from enacting [MCL 769.34(10)]." *Id.* at 435. *Garza* was also considered at a time when the guidelines were mandatory, and many of the features of MCL 769.34 this Court relied upon to reach its holding have since been struck down as unconstitutional. *Lockridge,* 498 Mich at 364. The playing field today is very different than it was in *Garza.*

The separation of powers issue was also addressed in passing in *Ames*. At that time, Amicus PAAM categorized MCL 769.34(10) as lawful "jurisdiction-stripping," which, was, to PAAM, constitutionally unproblematic. (Brief by PAAM as Amicus Curiae, Docket No. 337878, pp. 14-15, filed July 18, 2018). As addressed by Amicus CDAM, this is an unpersuasive characterization:

> Had § 34(10) been passed post-*Lockridge*, this might be a relevant consideration. But that is not the case. Rather, § 34(10) was a part of the very statutory scheme invalidated in *Lockridge*, and there is no indication that the Legislature ever intended that it operate outside that scheme. The prosecution and PAAM would have the Court ignore *Booker*'s warning that the Legislature would not presumably leave some elements of the sentencing scheme in place without others. The Court refused to assume as much in *Lockridge*,

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> and should avoid the same assumption here. To truly *Booker*-ize Michigan's sentencing guidelines, the Court must strike down the first sentence of § 34(10). [Brief by Criminal Defense Attorneys of Michigan as Amicus Curiae, Docket No. 337878, pp. 11-12, filed August 9, 2018, internal footnotes omitted].

MCL 769.34(10) is not a lawful exercise of the Legislature's power to curtail the jurisdiction of the appellate courts. *See*, Kaufman, Risa "Access to the Courts as a Privilege or Immunity of National Citizenship", 40 CTLR 1477, 1516 (2008) ("There is a general agreement that Congress cannot curtail the power of the federal courts in a way that violates other provisions of the Constitution.") Article 6, § 1 of the Michigan Constitution provides "the judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court…" MCL 769.34(10) usurps the appellate court's power; it is the Legislature telling the appellate courts how to rule in certain cases. This is a separation of powers violation.

The Legislature has the power to enact laws and penalties. Const 1963, art 4, § 45. The appellate courts have the power to oversee appeals "as provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." Const 1963, art 6, §10. As previously discussed, the rules of the supreme court authorize appellate court jurisdiction over criminal appeals, which include final judgments, which include sentences. MCL 769.34(10) may have had a role within a mandatory sentencing scheme, but it cannot stand in an advisory scheme, as Amicus CDAM noted in *Ames*:

> Indeed, this and other courts have acknowledged that § 34(10) was meant to play a specific role within the mandatory sentencing scheme. See, e.g., *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003) (describing § 34(10) as part of the "structure and content of the sentencing guidelines" that balanced the trial court's discretion in light of the mandatory

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> guidelines); *People v Garza*, 469 Mich 431, 434-435; 670 NW2d 662 (2003) (describing § 34(10) as "part of" "comprehensive sentencing reform" contained elsewhere in § 34); *People v Payne*, No. 232863, 2003 WL 21186606, at *2 (Mich Ct App, May 20, 2003) (describing § 34(10) as "merely limit[ing] the circumstances in which a defendant can challenge a sentence that adheres to legislatively prescribed requirements"). [Brief by CDAM as Amicus Curiae, Docket No. 337878, p. 12, n 3, filed August 9, 2018, internal footnotes omitted].

MCL 769.34(10) violates the separation of powers as it interferes with the judiciary's obligation to ensure justice under our advisory sentencing guideline scheme. Heeding *Lockridge's* warning, MCL 769.34(10) should be severed or struck down as an unnecessary relic of a mandatory sentencing guideline scheme that is a thing of the past. *Lockridge,* 498 Mich at 365, n 1.

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III. Because of MCL 769.34(10), judges impose disproportionate sentences that remain unreviewable because they fall within the guidelines range. Mr. Posey's sentence is one such example.

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. While still within the guidelines range, Mr. Posey's original sentence "st[ood] differently in relationship to the correct guidelines range than may have been the court's intention." *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006). And further, as argued above, proportionality depends on two things—the seriousness of the crime and the *background and characteristics* of the offender. (Proportionality "must take into account the nature of the offense and *the background of the offender*," *Milbourn,* 435 Mich at 651, 658, 667 (emphasis added). These facts include more than a person's criminal history. They include one's "background" and "characteristics." *Id.* at 651, 658, 667. Mr. Posey's 22-year minimum sentence is not proportionate to him or his offense.

At resentencing, undersigned counsel argued that a 10-year minimum sentence was more proportionate to Mr. Posey and the offense. 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 and expressed sympathy toward the victims. 11/7/19 RST, 25, 29, 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

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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. Just as indicated above, the guidelines are not mere guideposts, they are an anchor.

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. Much of the programming within the MDOC is presently unavailable due to waitlists thousands of people long,[25] massive staffing shortages,[26] and COVID outbreaks.[27]

"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 one of the sentences the *Milbourn* court foresaw: within the guidelines but disproportionate and unreasonable. This sentence was not tailored to the particular circumstances of the case and the offender. Mr. Posey is entitled to resentencing.

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[25]https://static.prisonpolicy.org/scans/cappsmi/Penny%20Wise%20Report%20for%20Web.pdf

[26]https://www.freep.com/story/news/local/michigan/2022/01/18/michigan-covid-positive-prison-officers-work/6561428001/

[27]
https://www.detroitnews.com/story/news/local/michigan/2022/01/13/michigan-prisons-covid-19-infections-among-highest-nation-surge-omicron/9131453002/?gnt-cfr=1

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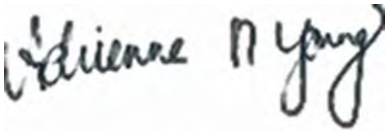
Conclusion and Relief Requested

For the reasons set forth above, Dametrius Posey respectfully requests that this Honorable Court grant leave and remand for a new trial or resentencing in the Wayne County Circuit Court.

Respectfully submitted,

State Appellate Defender Office



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CERTIFICATE OF COMPLIANCE

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