STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS TRAVON SAMMONS,

Defendant-Appellant.
/

Supreme Court No. 156189

Court of Appeals No. 332190

Saginaw County Circuit Court
No. 15-041848-FC

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APPELLANT TRAVIS TRAVON SAMMONS' SUPPLEMENTAL BRIEF

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Klobuchar, Mehrkens Steblay & Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub L Pol'y & Ethics J 381 (2006) 13

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to review the Court of Appeals' opinion and judgment under MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

1. Four to five hours after taking Appellant-Defendant Sammons into custody, law enforcement elicited an identification of Mr. Sammons as the shooter by cornering the 16-year-old murder witness Dyjuan Jones alone in the stationhouse hallway after he left his mother to use the restroom, having him peer at Sammons alone in an interrogation room, and asking him if he recognized him. Was this "showup" identification procedure impermissibly suggestive?

The Saginaw County Circuit Court answered: No.

The Court of Appeals answered: No.

Appellant answers: Yes.

2. Jones witnessed the shooting from the backseat of a moving car before his mother fearfully sped away. Later, he described two men and a vehicle license plate that did not match Mr. Sammons, his co-defendant, or their vehicle. He then testified it all happened too fast to identify the shooter or the driver, and denied ever making an identification in the first place. Was Jones's ability to identify the shooter so reliable that there is no substantial likelihood of misidentification?

The Saginaw County Circuit Court answered: Yes.

The Court of Appeals answered: Yes.

Appellant answers: No.

3. Under this Court's precedents, when a defendant alleges preserved constitutional error—as Mr. Sammons did here—the error is only harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. Otherwise, the question is "whether it is more probable than not that the erroneous admission of the identification through the detective's testimony affected the outcome of the trial," as stated in this Court's order. Was the constitutional error of admitting Jones's identification into evidence harmless?

The Saginaw County Circuit Court did not answer this question.

The Court of Appeals did not answer this question.

Appellant answers: No.

INTRODUCTION

For nearly half a century, courts have recognized that "showups"—where law enforcement singles out a suspect for identification by the witness—are highly suggestive and should not be used absent exigent circumstances. Such a procedure inherently suggests that law enforcement suspects the person shown is guilty, tempts the witness to assent despite uncertainty, and provides no test of the accuracy of the identification or safeguard against guessing. All of this creates a substantial risk of misidentification. A lineup, by contrast, avoids suggesting that any particular person in the lineup is a suspect and requires the witness to demonstrate he can accurately identify the culprit among others who share common features, minimizing the risk of a misidentification.

This Court has never sanctioned showups as an acceptable routine practice. And some courts have found showups to be so inherently suggestive that identifications obtained using that procedure are always deemed inadmissible absent exigent circumstances—regardless of how reliable the witness's identification may otherwise be. E.g., *State v Dubose*, 699 NW2d 582, 594 (Wis, 2005). Even the Prosecuting Attorneys Association of Michigan advises law enforcement to minimize suggestive influences on a witness by providing the witness an array of options in a lineup, rather than singling out the suspect through a showup.

Here, law enforcement ignored this universal preference for lineups and used a showup for no apparent reason. After having Mr. Sammons in custody 4 to 5 hours, Detective Rivard cornered a juvenile murder witness, Dyjuan Jones, in the stationhouse hallway when he left his mother to use the restroom, and asked Jones to tell him whether he recognized Mr. Sammons or his co-defendant after having Jones peer into their respective interrogation rooms. Since he was brought in specifically to help law enforcement solve the case, it would be natural for Jones to

infer that Detective Rivard suspected one or both men and sought assent from Jones. The detective testified that Jones identified Mr. Sammons as the shooter. Jones, on the other hand, denied ever making such an identification at all, casting even greater doubt upon the procedure's reliability given its suggestiveness and lack of documentation.

The Court should denounce the use of this procedure at stationhouses. Studies have consistently shown that eyewitness testimony is the most fallible and prejudicial form of identification evidence that can be offered in a criminal case. Eyewitness misidentification is, on the one hand, the greatest contributing factor to wrongful convictions, and at the same time is extraordinarily influential with a jury, even when the identification evidence is completely unreliable. The additional risk of misidentification created by a showup's suggestive nature, its incompetence to test the accuracy of identification, and its lack of safeguards against misidentification, is unacceptable when no exigency exists.

Given the suggestive procedure and lack of exigency, the proper course under federal due-process law is to analyze whether Jones's identification was nonetheless so reliable that there is no substantial risk of misidentification. Both the trial court and the Court of Appeals paid lip service to the multifactor test for reliability established in *Neil v Biggers*, 409 US 188, 198 (1972), but neither one actually applied it the facts, including: (1) that Jones was sitting in the backseat of a moving vehicle with only seconds to view the crime before his mother sped away, (2) that he was focused on the driver of the vehicle at the time rather than the shooter the detective claims he identified, (3) that he described the driver as weighing 320 pounds with a long goatee and the shooter as wearing black cargo pants while the driver of Mr. Sammons' vehicle weighed 150 pounds and Mr. Sammons was wearing shorts, and (4) that he clearly was uncertain about the identification given that he denied making any identification at all. A true

examination of the totality of the circumstances confirms that a substantial likelihood of misidentification does indeed exist.

Since Mr. Sammons preserved this claim of constitutional error below, the only remaining question is whether the error was harmless. But contrary to what this Court's order directing oral argument suggests, the question is not whether it is more probable than not that the error affected the outcome of the trial. The proper question is whether it is clear beyond a reasonable doubt that a rational jury would have convicted Mr. Sammons without the identification evidence. Regardless, Mr. Sammons should prevail under either standard because the inadmissible evidence of an eyewitness identification was the only substantial evidence implicating him.

STATEMENT OF FACTS

On June 21, 2015, Humberto Casas was murdered. Two eyewitnesses, who were traveling in separate vehicles near the crime scene, informed police about what they witnessed.[1] Dyjuan Jones, who was 16 years old at the time of the shooting, testified that while riding in the backseat of his mother's car he heard what he believed to be firecrackers. (01/21/2016 Trial Tr 118:16, App 35a; 09/25/15 Prelim Exam 20:24, App 7a.) At that point he turned to see an African-American male get out of a gray Jeep about 20-25 feet away and shoot a Hispanic male. (01/21/2016 Trial Tr 120:17-18, App 36; 09/25/2015 Prelim Exam 21:14, 23:23-24:2, 37:6-8, App 8a, 10a-11a, 18a.) The Jeep's driver remained in the car. (09/25/2015 Prelim Exam 24:11, App 11a.) After the shooting, Jones and his mom sped away from the scene. (09/25/2015

[1] Witness Rosei Watkins was driving northbound on Cumberland Road, when she observed a man shoot another man, get into a vehicle, which she believed to be a gray or silver Jeep, with a third man, and leave the scene. (01/21/2016 Trial Tr 163:13-14, 164:20-165:5, App 41a, 42a.) Ms. Watkins did not get a good look at the perpetrators (01/21/2016 Trial Tr 167:6-7, App 42a) nor did she see a license number of the Jeep (01/21/2016 Trial Tr 174:20-21, App 43a).

Prelim Exam 25:12, App 12a.) The individuals in the Jeep took off in the opposite direction traveling around 60MPH. (09/25/2015 Prelim Exam 25:10, App 12a.) Eventually, Jones and his mother returned to the scene so that his mother—who was training to become a nurse—could assist the victim. (09/25/2015 Prelim Exam 25:12-17, App 12a.)

Jones and his mother were at the scene when the police officers arrived. (09/25/2015 Prelim Exam 26:12-14, App 13a.) Jones gave police officers his name and described what he saw. (09/25/2015 Prelim Exam 26:16-17, App 13a.) According to Jones, a black man with a shaved head wearing a white T-shirt and black cargo pants shot Mr. Casas. (09/25/2015 Prelim Exam 22:16-22; 24:1-3; 38:6-15, App 9a, 11a, 19a.) He had "seen someone in [the Jeep]" who he described as a 320-pound male with a long goatee, but "[he] wasn't paying attention to who was outside of it." (09/25/2015 Preliminary Exam 22:2-3, App 9a.) Jones never saw the shooter get into the Jeep, but he witnessed the vehicle speed off after the shooting. (09/25/2015 Prelim Exam 32:15-20, App 17a.) When asked about the Jeep's license plate, Jones reported that it included the letters "CE" or "GE." (01/21/2016 Trial Tr 143:2-9, App 39a.)

Just 11 minutes after police received a call about the shooting, they pulled over a silver Jeep Commander that generally matched the description of the vehicle at the scene of the crime, citing a defective tail light. (01/21/2016 Trial Tr 57:17, App 33a; 49:5, App 31a; 09/25/2015 Prelim Exam 18:10, App 6a.) In the Jeep were defendant Travis Sammons and co-defendant Dominique Ramsey. Both are black males and both wore white T-shirts. Beyond that, they bore no resemblance to Jones's description. Neither Sammons nor Ramsey was heavyset, neither had a goatee, and neither had a shaved head. (09/25/2015 Prelim Exam 40:2-24, App 20a.) Both Sammons and Ramsey, the driver, weighed around 150 pounds. (10/26/2015 Prelim Exam

84:24, App 27a.)[2] The vehicle's license plate was DFQ9593—no "CE" or "GE." (01/21/2016 Trial Tr 49:23, App 31a.) Ramsey allowed officers to search his car, but the police found no gun. (01/21/2016 Trial Tr 61:7-8, App 34a.)

Because Ramsey did not present proper identification, the police arrested Sammons and Ramsey and brought them back to the police station. (01/21/2016 Trial Tr 52:3-17, App 32a.) Four to five hours later, Jones and his mother went to the police station to be interviewed. (01/21/2016 Trial Tr 138:13-20, App 38a.) During the interview, Sammons sat in the same clothes he was wearing when he was arrested—a white T-shirt and shorts—alone in interrogation room #2 down the hall from his co-defendant Ramsey, who sat alone in interrogation room #3. (01/26/2016 Trial Tr 42:8-9, App 48a; 09/25/2015 Prelim Exam 64:17-23, App 21a.)

At some point during his interview, Jones excused himself and left his mother to find the restroom. (01/26/2016 Trial Tr 39:22, App 47a.) Detective David Rivard intercepted the 16-year-old alone in the hallway. (01/26/2016 Trial Tr 39:17-21, App 47a; 10/26/2015 Prelim Exam 80:10-12 App 25a.) He then asked Jones to walk down the hallway past interrogation rooms #2 and #3, look into the rooms, see if he recognized anyone, and, if so, explain how he knew them. (01/26/2016 Trial Tr 40:8-9, 44:23-45:2, App 48a, 49a; 10/26/2015 Prelim Exam 81:2-6, App 26a.)

At the preliminary examination for Mr. Sammons, Jones testified that he made no identification during this "showup" procedure (09/25/2015 Prelim Exam 29:22-30:13, App 15a-16a), and he repeated that testimony at trial, again testifying under oath that he never identified either Sammons or Ramsey (01/21/2016 Trial Tr 130:23-25, App 37a). On cross examination by Mr.

[2] The Court should take judicial notice of the fact that, according to MDOC OTIS, Mr. Sammons weighed 150 pounds. Available at: https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=675508.

Sammons' trial counsel, Jones conceded that everything happened so quickly that he could not identify the shooter or the driver. (09/25/2015 Prelim Exam 37:9-13, App 18a.) Jones said that there were similarities between Mr. Sammons and the shooter, but he did not identify anyone as the shooter. (01/21/2016 Trial Tr 146:13-14, App 40a.)

Detective Rivard, on the other hand, testified that Jones identified the individual in interrogation room #2, Mr. Sammons, as the shooter. (01/26/2016 Trial Tr 46:24-25, App 49a; 10/26/2015 Prelim Exam 81:20-21, App 26a.) The prosecution produced no written report or recording documenting Jones's identification—only the testimony of Detective Rivard. Neither Detective Rivard nor any other law enforcement official had Jones participate in a photographic or a corporeal lineup.

Sammons and Ramsey were charged with Conspiracy, Open Murder, and other weapons offenses in connection with the murder. During the preliminary examination, Sammons' trial counsel objected to the admission of Detective Rivard's testimony and filed a motion to suppress the identification on the grounds that the identification procedure used was impermissibly suggestive. On January 15, 2016, the trial court issued an opinion regarding Sammons' motion to suppress the identification. (01/15/2016 Trial Ct Op 4, App 52a.) The court explained that it must examine the totality of the circumstances in determining whether "the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification." (01/15/2016 Trial Ct Op 5, App 53a.) The court outlined five reliability factors it should consider and conceded that the procedure was suggestive. However, the court denied the motion to suppress on the basis of only one reliability factor—that because the identification procedure occurred within hours of the homicide and "details of the crime were still fresh in the witness'

mind" that there was no substantial likelihood of misidentification. (*Id*.) The court did not address any of the other reliability factors in its analysis.

Sammons and Ramsey were tried together. Both were found guilty of conspiracy to commit murder, but were acquitted on all other charges including the weapons offenses and the underlying murder charge. Both defendants moved for a judgment notwithstanding the verdict. The court set aside the verdict in Ramsey's case but refused to set aside the verdict against Mr. Sammons and sentenced him to life in prison.

The Court of Appeals affirmed the denial of judgment notwithstanding the verdict in Sammons' case and reversed the grant in Ramsey's case and reinstated the conviction. The Court of Appeals reasoned that although Sammons was "singled out to the extent that he was alone in an interview room, he was unrestrained and wearing street clothes, and there were no improper suggestions from Rivard." (COA Op 4, App 64a.) In weighing the reliability factors, the Court of Appeals parroted the trial court's analysis, asserting that because Jones witnessed the shooting and the identification took place within hours of the shooting, Jones was not "influenced by the suggestiveness of the procedure" and there was no substantial likelihood of misidentification. (COA Op 5, App 65a.) The Court of Appeals did not weigh any other reliability factors.

STANDARD OF REVIEW

"This Court reviews a trial court's factual findings in a suppression hearing for clear error." *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). "But the '[a]pplication of constitutional standards by the trial court is not entitled to the same deference as factual findings.' " *Id*. (quoting *People v Nelson*, 443 Mich 626, 631 n 7; 505 NW2d 266 (1993)). The application of due-process standards to the facts is reviewed de novo. See *id*.

ARGUMENT

The trial court clearly erred in admitting Detective Rivard's testimony that Jones identified Mr. Sammons at the stationhouse, and that error undoubtedly affected the outcome of this case. When the pretrial identification procedure is "so suggestive in light of the totality of the circumstances that it le[ads] to a substantial likelihood of misidentification," due process requires the identification to be suppressed. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). In determining whether this standard is met, the first question is whether the procedure used by law enforcement was "both suggestive and unnecessary." *Perry v New Hampshire*, 565 US 228, 238-239 (2012). If so, then the second question is whether the totality of the circumstances shows that the witness's ability to accurately identify the offender is so reliable that it "outweighs the corrupting effect of the police-arranged suggestive circumstances." *Id*. at 232.

The procedure used here to coax an identification from a 16-year-old witness has been widely condemned as highly suggestive. Directing Jones to view Mr. Sammons as he sat alone in an interrogation room and then asking the juvenile if he recognized Mr. Sammons inherently suggested that the detective suspected Mr. Sammons of the crime, had evidence sufficient to justify the interrogation, and sought assent. It also left Mr. Sammons no way to test of challenge the accuracy of the identification because (a) showups do not test the accuracy of the witness's memory and (b) Detective Rivard never documented the procedure. And it deprived Mr. Sammons of any safeguard against guessing by Jones. The procedure was not only suggestive, it was also entirely unnecessary; law enforcement had no justification for eschewing the well-established procedures of a photographic or corporeal lineup.

At the same time, it is hard to imagine a less reliable eyewitness identification. Jones's fleeting view of the crime was obscured by the frame of the car he rode in as his mother sped

away from the scene. His description of the driver and shooter at the scene failed to match Mr. Sammons, who wore jeans instead of black cargo pants, or his driver, who is 150-pounds lighter and had no long goatee. Moreover, Jones testified that the scene passed too quickly for him to identify the shooter and driver, and even *denied ever identifying Mr. Sammons at the station-house*. Jones's testimony was far too unreliable to outweigh the undue influence the suggestive showup procedure likely had on this 16-year-old juvenile.

Finally, the Court has asked the parties to address whether "it is more probable than not that the erroneous admission of the identification through the detective's testimony affected the outcome of trial," citing *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). (11/21/2018 MSC Order, App 74a.) Given the powerful prejudicial effect that identifications are known to have on juries, and the dearth of other substantial evidence connecting Mr. Sammons to the crime, it is more probable than not that this error affected the outcome. But the Court need not even reach this issue because that harmless-error standard only applies to preserved, *unconstitutional* error. *Id*. at 495 n 3 (holding that MCL 769.26, the statutory harmless-error standard at issue in *Lukity*, "does not apply to preserved, constitutional error"). Here we deal with preserved, *constitutional* error—a violation of due process. When the error is constitutional, it can only be deemed harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' " *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (quoting *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001)). No such showing can be made here.

I. The procedure of showing the witness Mr. Sammons alone in an interrogation room was unnecessarily suggestive.

The first issue to be resolved in this case—whether the showup procedure used was "impermissibly suggestive"—requires the Court to answer two questions: (1) was the procedure

arranged by law enforcement for identifying the witness suggestive, and (2) was this procedure unnecessary under the circumstances. *Perry*, 565 US at 238-239. Both of these questions are easily answered in the affirmative.

A. The "showup" identification procedure used to identify Sammons was suggestive.

The Supreme Court acknowledged in *Stovall v Denno* that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as a part of a lineup, has been widely condemned." 388 US 293, 302 (1967). Indeed, showups have been called "the most grossly suggestive identification procedure now or ever used by the police."[3] "Unlike lineups or photo arrays, which offer the witness 'fillers' to guard against guessing when the witness is unsure of the identification, a showup presents the witness with one choice, and the witness may feel compelled to make an identification." *State v Stetz*, No. 2011-A-0008, 2011 WL 6339844 at *5 (Ohio, 2011).

Accordingly, showup procedures have been widely criticized across several jurisdictions in both state and federal courts, including this one. As this Court said in *People v Gray* when "the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person." 457 Mich 107, 111,114; 577 NW2d 92 (1998) (internal quotations omitted) (holding that the procedure of a police officer displaying a

[3] One-man showups 2 Crim Proc § 7.4(g) (4th ed) citing P. Wall, Eye-Witness Identification in Criminal Cases 28 (1965). See also Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 Neb L Rev 515 (2008); Note, 33 Law & Psychol Rev 125, 127 (2009) ("there is much evidence to support that showup misidentifications are more prevalent than in any other pretrial misidentification procedure"). Consider, however, Gonzalez, Ellsworth & Pembroke, *Response Bias in Lineups and Show-ups*, 64 J Personality & Soc Psychol 525 (1993) (both laboratory and field studies show witness at lineup less likely to say "not there" than a witness at showup; authors hypothesize this is so because a showup leads to an absolute judgment whereas a lineup leads to a relative judgment, and that police pressures on witness are unlikely to be any greater for showup than lineup).

single photograph to the victim and informing her that they had arrested the defendant was an "invalid identification procedure"). "[T]he single photo or one-person showup implies that the police have their man and suggests that the witness give assent." *United States v Brown*, 471 F.3d 802, 804 (CA 7, 2006). Avoiding the use of showup procedures, where feasible, minimizes the risks of misidentification that are associated with asking a victim or witness to accurately remember and identify a stranger, who was observed only briefly, during a traumatic crime. *Id*. The most critical problem with showups is that they fail to provide a safeguard against witnesses inclined to guess when their memory fails them. See *State v Henderson*, 27 A3d 872, 903 (NJ, 2011).

In *State v Dubose*, the Wisconsin Supreme Court determined that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless the procedure was necessary. 699 NW2d 582, 594 (Wis, 2005). The *Dubose* court elaborated that if and when a showup is deemed necessary, the police must take special care to minimize potential suggestiveness. This includes not conducting showups in squad cars, in handcuffs, or in *police stations*, i.e., any time the suspect could appear to be in custody. *Id*. (emphasis added).

Both the Department of Justice ("DOJ") and Prosecuting Attorneys Association of Michigan ("PAAM") have also recognized the inherent suggestiveness of showup procedures and for that reason have outlined safeguards to use when such an identification procedure is necessary. In 1999, the DOJ released an eyewitness evidence guide for law enforcement that discusses the possible problems that arise with eyewitness testimony and outlines procedures to which law enforcement should adhere in order to reduce the risk of misidentification. In the section discussing showup procedures, the suggested policy is to "employ procedures that avoid prejudicing the witness." The suggested procedures include: documenting the description of the

perpetrator, transporting the witness to the location of the detained suspect "to limit the legal impact of the suspect's detention," and cautioning the witness that "the person he/she is looking at may or may not be the perpetrator." The guide follows with procedures to employ when documenting the results of a showup identification. It states that "[w]hen conducting a showup, the investigator shall preserve the outcome of the procedure by documenting any identification or nonidentification results obtained by the witness." The procedure to obtain these results requires the officer to record both identification and nonidentification results in writing, "including the witness' own words regarding how certain he/she is."[4]

In 2015, PAAM also recognized the concerns associated with the unreliability of eyewitness identification and offered a Best Practices Recommendation for Eyewitness Identifications.[5] PAAM discussed procedures best implemented for photo arrays and lineups but not showups. It recommended that law enforcement agencies adopt blind or blinded administration of photo arrays and live lineups. It further stated that agencies should adopt and use a standard set of instructions during the identification procedure and document a witness's level of confidence verbatim at the time of identification. Lastly, PAAM recommended that the identification procedure should be documented and, to the extent practicable, recorded. PAAM stated that regardless of the agency's choice of which identification method to use, the agency should apply PAAM's recommendations so the procedures are conducted in a fair and reliable manner. PAAM also emphasized the need for law enforcement agencies to be consistent and decrease the likelihood of misidentifications, and recognized that law enforcement agencies today are still not consistent in their application of identification procedures.

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[4] Available at: https://www.ncjrs.gov/pdffiles1/nij/178240.pdf.

[5] Available at: https://www.michiganprosecutor.org/files/PAAM_Best_Practices_Eyewitness_Identification.pdf.

PAAM is right to call for these safeguards when using a suggestive procedure such as a showup. "[T]he annals of criminal law are rife with instances of mistaken identification." *Perry v New Hampshire*, 565 US 228, 244-245 (2012) (quoting *United States v Wade*, 388 US 218, 228 (1967)). Studies have shown that eyewitnesses identify a known wrong person (a "filler" or "foil") in at least 20% of all real criminal lineups.[6] At the same time, Jurors have a tendency to over believe eyewitnesses and have difficulty distinguishing between accurate and inaccurate witnesses.[7] It is not surprising to find, then, that erroneous eyewitness identifications are by far the leading cause of convicting the innocent.[8] Since 1989, 71% of the 358 people exonerated through DNA evidence were convicted through eyewitness testimony.[9]

Not only was an inherently suggestive showup procedure used in this instance, but Detective Rivard used none of the safeguards advised by PAAM or the DOJ. It is not reasonable to presume that Jones was so naïve that he had no idea why Detective Rivard asked him to look in

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[6] Thompson, *Beyond A Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 UC Davis L Rev 1487, 1489 (2008), citing Wells & Olson, *Eyewitness Testimony*, 54 Ann Rev Psychol 277, 291 (2003) (noting reports from two studies of actual cases of filler identification rates of 20% and 24% and observing that these rates may be underestimated because police often do not distinguish between witnesses who choose filler and those who make no choice); see also Klobuchar, Mehrkens Steblay & Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub L Pol'y & Ethics J 381, 396 (2006) (reporting 20% rate); Valentine, Pickering & Darling, *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups*, 17 Applied Cognitive Psychol 969, 973 (2003) (reporting 20% rate).

[7] O'Toole & Shay, *Manson v. Brathwaite Revisited: Towards A New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Val U L Rev 109, 134-135 (2006).

[8] Thompson, 41 UC Davis L Rev at 1490, citing the Innocence Project, Eyewitness Misidentification (numerous analyses over several decades that have consistently proved that mistaken eyewitness identification is the single largest source of wrongful convictions).

[9] Chew, *Myth: Eyewitness Testimony is the Best Kind of Evidence* available at: https://www.psychologicalscience.org/uncategorized/myth-eyewitness-testimony-is-the-best-kind-of-evidence.html.

the interrogation rooms and asked if he recognized the men sitting there alone. Jones was called into the police station for one and only one reason—to help police find the perpetrators. Given that Jones knew there were two men involved at the scene and that Detective Rivard directed Jones to view only two individuals, Jones would naturally infer that Sammons and Ramsey were suspects and that Detective Rivard sought confirmation of his suspicions. The singling out of these suspects in custody for identification created a temptation to confirm one or both could be the perpetrators, robbing Mr. Sammons and our justice system of a potentially critical opportunity to test the witness's ability to accurately identify the perpetrators using a lineup procedure.

The Court of Appeals made much of the fact that Messrs. Sammons and Ramsey were "unrestrained and wearing street clothes" and that the detective made no improper suggestions that police had arrested anyone or that these two were suspects. (COA Op 4-5, App 64a-65a.) Though such suggestions would certainly be improper and make the procedure even more suggestive than it already was, there is no rule that such suggestions must be explicitly made for the procedure itself to be suggestive. As demonstrated above, it is universally understood that the suggestiveness of singling out the suspect itself is suggestive and enhances the risk of misidentification. Compared to a lineup, this showup procedure is suggestive and too detrimental to the administration of justice to be allowed when the opportunity for a lineup is reasonably available. As explained below, such exigency did not exist here.

B. The showup procedure was unnecessary.

"Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Neil v Biggers*, 409 US 188, 198 (1972). Not only was the showup procedure used to obtain an identification from Jones highly suggestive, it was entirely gratuitous here.

Courts have been particularly critical of police station showups because there is usually no justification for showing a suspect to a witness in this fashion. See *State v Gordon*, 441 A2d 119, 126 (Conn, 1981) (stating that "circumstances of the stationhouse show-up unnecessarily suggested to the victim that she should positively identify the defendant"); *Sanchell v Parratt*, 530 F2d 286, 294-295 (CA 8, 1976) (noting that the police did not need to resort to the showup in question because there was no emergency); *Amador v Quarterman*, 458 F3d 397 (CA 5, 2006) (holding that a showup in the sheriff's office in which the witness viewed the defendant through a piece of cardboard with holes was unnecessarily suggestive because the procedure encouraged the witness to identify the person she was viewing as a suspect and there was no exigency or urgent need that precluded a lineup); see also *State v Kennedy*, 249 SE2d 188, 190 (W Va, 1978) (holding showup at police station was unnecessarily suggestive when suspect was presented alone and wearing manacles); *Wray v Johnson*, 202 F3d 515 (CA 2, 2000) (holding admission of evidence of identification violated due process as the identification was a product of suggestive procedure when the witness was shown only one person at the police precinct).

The showup occurred at a police station 4 to 5 hours after Sammons was taken into police custody. The police who pulled over Ramsey and Sammons knew the vehicle that they rode in matched the model and color of the vehicle described in the APB that the officers had received moments earlier. (09/25/2015 Prelim Exam 6:19-7:19, App 4a-5a.) They therefore knew Sammons was a suspect in the shooting when they brought him back to the station. Beforehand or at around the same time, law enforcement also learned that they had Jones as a witness to the crime, since Jones identified himself as such to officers at the scene. Thus, law enforcement had a full 4 to 5 hours to arrange a corporeal or photographic lineup before administering the suggestive showup procedure on Jones. And law enforcement officials could have taken much longer

than that to prepare the lineup if they desired to. Nothing in the record indicates that law enforcement lacked the time or resources to perform a corporeal lineup, or at least a photographic one. Accordingly, the Court should conclude that the showup procedure in this instance was impermissibly suggestive.

II. Jones's identification was not sufficiently reliable to be admitted in spite of the showup's suggestive nature; a substantial likelihood of misidentification exists.

Given the improper identification procedure used on Jones, his identification of Mr. Sammons violated due process, unless the Court concludes that "under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." *Biggers*, 409 US at 199. This approach is designed to serve three important interests: (1) preventing juries from hearing eyewitness testimony unless that evidence has aspects of reliability; (2) deterring police officers from engaging in unnecessarily suggestive procedures; and (3) administering justice. *Manson v Brathwaite*, 432 US 98, 110-112 (1977). The factors to be considered under this totality-of-circumstances test include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*, 409 US at 199-200. Ultimately, the purpose of weighing these factors is to determine whether there remains a "substantial likelihood of misidentification." *Kurylczyk*, 443 Mich at 302.

Given the real danger that an unreliable identification will result in a miscarriage of justice, the Court should exercise an abundance of caution in determining whether an eyewitness's testimony is sufficiently reliable to eliminate the substantial likelihood of misidentification

created by a suggestive police procedure. Considering this and the totality of circumstances in Jones's particular case—including his testimony that he could not and never did identify Mr. Sammons as the shooter—the Court should conclude that a substantial likelihood of misidentification does still exist here.

Starting with the first *Biggers* factor, Jones's opportunity to view the shooter was poor. He was riding in the backseat of a moving vehicle when the gunshots caught his attention on the opposite side of the car. Fearing for their safety, his mother soon sped away from the Jeep, only returning to the scene once the suspects fled. The record indicates that Jones was at best 20 to 25 feet away at one point as they drove past, and only had a few seconds to look out the rear window across the street at the vehicle stopped on the other side.

Jones also "wasn't paying attention to who was outside of [the Jeep]," i.e., the shooter. (09/25/2015 Prelim Exam 6:13-14, App 4a.) He was instead focused on the driver. (*Id*.)

Further, Jones's description of the suspects did not match Sammons or Ramsey. Jones described the Jeep's driver as weighing around 320 pounds with a long goatee. Jones also described the suspects as wearing white T-shirts and the shooter as wearing black cargo pants. Neither Sammons nor Ramsey come anywhere close to 320 pounds; they each weigh 150 pounds. (10/26/2015 Prelim Exam 84:24, App 27a.)[10] Neither man had a goatee either. (09/25/2015 Prelim Exam 40:23-24, App 20a.) Moreover, at the time of the showup, Sammons was not wearing black cargo pants but instead was clothed in shorts. (09/25/2015 Prelim Exam 64:17-23, App 21a.)

[10] The Court should take judicial notice of the fact that, according to MDOC OTIS, Mr. Sammons weighed 150 pounds. Available at: https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=675508.

Finally, it is hard to imagine a witness less certain of his identification than one who denies he ever made an identification in the first place. (09/25/2015 Prelim Exam 28:25, App 14a.) Jones testified that he "didn't even get a good description [of] the people." (09/25/2015 Prelim Exam 21:8-9, App 8a.) According to him, everything happened so quickly that he could not identify the shooter or the driver. (09/25/2015 Prelim Exam 37:9-11, App 18a.)

Both the trial court and the Court of Appeals reasoned that in declining to identify Ramsey as the getaway driver, Jones somehow demonstrated the reliability of his identification of Mr. Sammons as the shooter. On the contrary, it points to the precise problem with showup procedures: they facilitate the conviction of suspects who share common features of the perpetrator rather than ensuring the accurate identification of the perpetrator himself.

Ramsey in no way resembled the getaway driver that Jones described—he was 150 pounds lighter and had no goatee. So it is not surprising that Jones did not identify him as such. Where the showup procedure becomes dangerous and adds a significant risk of misidentification is when the suspect that law enforcement officials have singled out shares enough common features with the actual perpetrator, and the witness's observation or recollection of the perpetrator's features is sufficiently poor, that the witness cannot say the singled-out suspect in custody is *not* the culprit. At that point, there is a substantial risk that the witness will place more stock in law enforcement's suggestion than in his own memory and confirm the identification because the suspect resembles the offender, rather than truly identify the suspect as the offender.

In this case, Jones did believe Mr. Sammons shared common features with the shooter. (01/21/2016 Trial Tr 146:13-14, App 40a.) And we even have evidence in this case—unlike most cases—that Jones's identification—if it even occurred—was just assent that Mr. Sammons had some features similar to the shooter, not based on true identification: Jones conceded that

everything happened so quickly that he could not truly identify the shooter. (09/25/2015 Prelim Exam 37:9-13, App 18a.) This case illustrates why it is critical to use a lineup procedure when possible to test the accuracy and basis for the identification. When such a procedure is not used, it is critical to consider fully the witness's ability to accurately identify the culprit by applying the *Biggers* reliability factors—something both lower courts failed to do here.

Based on the totality of the circumstances, there is no reasonable argument that Jones's identification was so reliable as to show there is no substantial likelihood of misidentification. Jones's poor vantage point, fleeting observation, and lack of attention to the shooter is enough to question the reliability of his identification. Add to that the wildly disparate description of the driver and recollection of a different vehicle license plate, and one should have serious concerns that a misidentification could have occurred. Topping it off with Jones's insistence that he could not have identified the shooter and never did should leave the Court with a chilling sense that a misidentification was almost inevitable.

III. The admission of Jones's out-of-court identification was not harmless.

In its order directing oral argument on Mr. Sammons's application, the Court instructed the parties to file supplemental briefing that addressed "whether it is more probable than not that the erroneous admission of the identification through the detective's testimony affected the outcome of the trial." (11/21/2018 MSC Order, App 74a.) This issue is addressed below, as requested. But the Court should first reconsider whether it has asked the right question.

The court cites *Lukity*, 460 Mich at 496, for the harmless-error standard, but *Lukity* makes it clear that it does not apply to preserved, constitutional error. *Id*. at 495 n 3. Jones asserts that his rights were violated under the Due Process Clause of the United States and Michigan Constitutions in admitting identification evidence at issue. Indeed, the first two questions the Court has

asked the parties to address are aimed at "determin[ing] whether due process prohibits the introduction of an out-of-court identification at trial." *Perry*, 565 US at 235. *Lukity*'s standard for harmless error does not apply here.

When the defendant raises a question of preserved, constitutional error—as Jones has—the harmless-error standard is much more stringent. The constitutional error can be considered harmless only "if it can be shown beyond a reasonable doubt that the testimony did not affect the jury's verdict." *Kurylczyk*, 443 Mich at 315-316. Making this determination (or any harmless error determination) always requires the Court to "determine the probable effect of th[e] testimony on the 'minds of an average jury.' " *Id*. at 315 (quoting *People v Banks*, 438 Mich 408, 430; 475 NW2d 769 (1991)). But for the constitutional error, "[r]eversal is required if the minds of an average jury would have found the prosecution's case 'significantly less persuasive' without the erroneously admitted testimony." *Id*.

Nevertheless, the error could not be considered harmless under either standard given "[t]he powerful impact that much eyewitness identification evidence has on juries," *Watkins v Sowders*, 449 US 341, 349 (1981) (Brennan, J, dissenting), and the lack of other substantial evidence to support a conviction.

Consider first how overwhelming even a discredited eyewitness identification can be on a jury. In one experiment, three sets of jurors listened to the same facts of a robbery-murder. The only factor that changed was the eyewitness testimony. In Group 1, jurors received circumstantial evidence and no eyewitness testimony: 18% voted to convict. In Group 2, jurors received the same circumstantial evidence and one eyewitness: 72% voted to convict. In Group 3, jurors received the same circumstantial evidence, one eyewitness, and the defense discredited the witness

by saying he was legally blind: 68% voted to convict.[11] This is a shocking and dismaying result. Other studies have also shown that "jurors have a poor understanding of factors that can undermine the reliability of eyewitness identification." O'Toole, 41 Val U L Rev 109, 134-135 (2006). It is not credible to say that identification testimony is harmless if there was evidence showing the jury that the identification was unreliable. Such a ruling would effectively vitiate the reliability test required under *Biggers*. And it cannot be considered harmless in this particular case, given the lack of other substantial evidence implicating Mr. Sammons.

This case is a prime example of jurors seemingly putting all undeserved faith in an eyewitness identification that is unreliable. One can be confident that the jury relied heavily upon this identification because there was no other direct evidence tying Mr. Sammons to the crime scene besides the circumstantial evidence that he was riding in the same make and model vehicle. And that evidence was highly suspect given the mismatch in license plate and driver descriptions. Ramsey's Jeep did not contain a either the CE or a GE described by Jones, and the driver was 150-pounds lighter than what Jones described. (10/26/2015 Prelim Exam 84:24, App 27a; 09/25/2015 Prelim Exam 32:6-10, App 17a; 01/21/2016 Trial Tr 49:23, App 31a.)

In fact, this evidence was so inadequate to support a conviction that Mr. Sammons's co-defendant Ramsey, the driver of their Jeep, received a directed verdict from the trial court. *People v Ramsey*, No. 158154 (Mich Sup Ct, Jan 23, 2019). After the Court of Appeals reversed that decision, this Court partially vacated the Court of Appeals' decision because the reasons for reversal did not show the trial court abused its discretion in granting the directed verdict. *Id*. The only difference between the evidence introduced against Mr. Sammons and the evidence

[11] Available at: https://pdfs.semanticscholar.org/1e9c/a8d0d5952953e72f5656e9cd7286a4243f54.pdf; see also http://crab.rutgers.edu/~roseman/soc10law.pdf.

introduced against Ramsey is that there was no evidence of an eyewitness identifying Ramsey. It is certainly not clear beyond a reasonable doubt that a rational jury would have still convicted Mr. Sammons without that evidence, and it is probable that a rational jury would have acquitted him. Moreover, he would have been entitled to the same directed verdict as Ramsey.

CONCLUSION AND REQUESTED RELIEF

A ruling that the procedure used was not "impermissibly suggestive" is tantamount to sanctioning this showup procedure as routine practice in police stations across the state, as there was no reason for not preparing a lineup. No court has ever condoned showups as a routine identification tool; instead, showups are universally disapproved as *per se* suggestive, regardless of how they are conducted. This Court should disapprove of the procedure as well. Because the procedure was unnecessary in this case and because Jones's identification was far too unreliable to say that no substantial likelihood of misidentification exists, the Court should hold that admission of Jones's identification through the detective's testimony violated Mr. Sammons's due-process rights and reverse the Court of Appeals.

Alternatively, the Court should grant leave to appeal so that these issues can be ventilated further. This case requires the Court to make a monumental decision one way or the other. If the Court somehow concludes that the federal rules are not sufficient to prevent conviction of those who should be presumed innocent in a case such as this, then it is time to consider other alternatives similar to what Wisconsin has done, see *Dubose*, 699 NW2d at 594, such as banning showups except in exigent circumstances under Michigan's Due Process Clause.

Respectfully submitted,

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