

ORIGINAL

No. \_\_\_\_\_

24-5145

FILED

JUL 15 2024

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Antonio Tyree Gaskin — PETITIONER  
(Your Name)

vs.

Commonwealth of Kentucky — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Kentucky  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Antonio Tyree Gaskin  
(Your Name)

Eastern Kentucky Correctional Complex  
200 Road to Justice  
(Address)

West Liberty, Ky. 41472  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

QUESTION(S) PRESENTED

1.

whether the 14<sup>th</sup> Amendment of the U.S. Constitution have guaranteed Protection that safeguard against law enforcement showing a single photograph of a suspect to an eye witness as an identification procedure, or a line up?

2.

whether the 6<sup>th</sup> Amendment Right to Counsel is a Right to Effective Assistance of Counsel?

### LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

### RELATED CASES

Gaskin v. Commonwealth of Kentucky 2023-SC-0098-MR  
Judgement Entered April 18, 2024.

# TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	
STATEMENT OF THE CASE .....	
REASONS FOR GRANTING THE WRIT .....	
CONCLUSION.....	

## INDEX TO APPENDICES

- APPENDIX A Copy of the Commonwealth of Kentucky Supreme Court Decision Affirming Gaskin Conviction.
- APPENDIX B Copy of the trial court's Ruling After A Hearing to Suppress Eyewitness identification.
- APPENDIX C Copy of Joshua Powell interview with George Heard (witness) <sup>EYE</sup>
- APPENDIX D Copy of Detective Gibbs statements to Lt. Boyles attesting to what he was told by two Prosecuting Attorneys on Gaskin's Case.
- APPENDIX E Lexington, Kentucky Police Department General Order 2015-11A For Eyewitness Identification.
- APPENDIX F Case Supplement Cell brite report. - by J. M. Sisson  
Gaskin PHONE Records updated by Gibbs
- Appendix G Commonwealth's response to defendant's renewed Motion for a New Trial.

## TABLE OF AUTHORITIES CITED

### CASES

### PAGE NUMBER

Perry v. New Hampshire, 132 S.Ct. 716 181 L.Ed. 2d 694 565 U.S. 228 (2012)	
Manson v. Brathwaite, 432 U.S. 98 97 S.Ct. 2243 53 L.Ed. 2d 140 (1977) Page. 11. 13. 14.	
Neil v. Biggers, 409 U.S. 188, 201 (1972) Page 8. 9. 10. 11.	
Roof v. Maass, 976 F.2d 737 (9th Cir. 1992) Page. 11	
U.S. v. Cueto, 611 F.2d 1056 (5th Cir. 1980) Page 11.	
Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed. 2d 402 (1969) Page 13.	
Simmons v. U.S., 390 U.S. 377 384 (1968) Page 13.	
Garvey v. Duncan, 485 F.3d 709 (2nd Cir. 2007) Page 14.	
Berghuis v. Thompson, 130 S.Ct. 2250, 176 L.Ed. 2d 1098, 560 U.S. 370 (2010) Page. 17	
Torrence v. Commonwealth, 603 S.W. 3d. 214 (Ky. 2020) Page. 20	
Strickland v. Washington, 466 U.S. 668 104 S.Ct. 2052, L.Ed 2d 674. Page. 24	
Lynch v. Commonwealth, 642 S.W. 3d 647 (Ky. 2022) page. 19	

### STATUTES AND RULES

#### Kentucky Rules of Criminal Procedures

Rcr. 7.24 Discovery, and inspection.

Rcr. 7.26 Demands for Production of statement, and reports.

#### Kentucky Rules of Evidence

KRE 410 (4)

### OTHER

Lexington, Kentucky Police Policy and Procedures Governing Eye-witness identification.

IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the Kentucky Supreme court appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.  
appe

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was April 18, 2024.  
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.  
appe

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6<sup>th</sup> Amendment of the U.S. Constitution, States...

"In all criminal prosecutions, the accused shall enjoy the Right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

14<sup>th</sup> Amendment of the U.S. Constitution, States... Section 1.

"All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the Privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws."



## Statement of the Case

On July 22, 2022 defendant Antonio Tyree Gaskin was found guilty of two counts of Murder, and two counts of Failure to report a death by a jury in the City of Lexington, Fayette County Kentucky, and was sentenced to life in Prison.

Prior to trial the defense filed a Motion to Suppress Eyewitness identification do to the fact that A Single Photo Presentation of a suspect to A so called Eye witness is irreparable, and unreliable. I ask this Court to determine if A suspect has a right to due Process, or any Constitutional Protection that safeguard from Highly Suggestive, and Unnecessary identification Procedures.

This is a case that has only one Sole So called Eye witness, who, in fact, is not an Eye witness to a crime. But through ~~An~~ Unnecessarily Suggestive Process, he made what is called "A Positive identification", by simply saying, "i think that looks like Him".

### Question 1.

whether the 14<sup>th</sup> Amendment of the U.S. Constitution have guaranteed Protections that Prevents Law Enforcement from Presenting A Single Photograph of A Suspect to an Eyewitness?

On November 14, 2019, Lexington Kentucky Law Enforcement Personnel, Detective Fugate was investigating a double Homicide when He received a call from a Lyft driver by the name of George Heard, stating that He drove the deceased to the Apartment Complex the night of October 15<sup>th</sup> 2019. Through Detective Fugate's own admission, and testimony we

learn that he interviewed George Heard More than once, and there is no body Cam footage, recordings, Memo, or documentation of any other interview. During a recorded audio interview with DPA investigator Joshua Powell, Heard admitted that he Met with Law enforcement Detective Fugate Several times. Heard also stated in this interview with DPA investigator Josh Powell "They told Me He did it". That statement shed light on the things that George Heard said after He is aware that He picked the wrong person (Misidentifying Gaskin) from a photo array of 6 photos presented to Heard by Josh Powell. Heard picked No.#5. while Gaskin was No.#4. (Copy of the interview with Josh Powell and George Heard located at Appendix C) Although investigator Josh Powell never mention to Heard that He identified the wrong Man, Josh Powell simply ask George Heard "How sure are you", and Heard stated, "Here's the thing. I don't want to say anything that's going to set some guy that Murdered some body Free. if I can Help put one away, thats one less who will come looking for Me."

It makes sense that the Commonwealth Attorney on this case Expressed to Detective Gibbs, who is Detective Fugate's Partner, that she hope they lose the Hearing. The Prosecuting Attorney's review of George Heard's interview before the Suppression Hearing on Eye witness identification disturb them Both, Kathy Phillips, and Tressa Root; Deeply, to not wanting to win, And verbalizing it to a Detective who is set to testify in the Hearing, on Detective Fugates behalf. (Copy of Detective Gibbs statements to Lt. Boyles regarding the Suppression Hearing, Located at Appendix D.)

During Heard's recorded interview with Detective Fugate, Fugate ask Heard do he think he could Reconize the Suspect if he showed him A picture. which can be suggestive, indicating that he have A picture of the Suspect. Heard replied, "i think i could Reconize Him". Not asking for A description, or any details, Detective Fugate leaves the room and returns

with A Case File. He open the File revealing A 9X12 inch photo of Gaskin's face. A Head shot. Extending the File completely wide open, Detective Fugate is Exposing to Heard, A Single photograph of Gaskin on the right side of the File, and written information on the left side of the File Accompanying the the Photo; as he reinterate, "You say you think you can Reconize the guy if you saw Him again." Then he ask Heard, "do you reconize this guy Here"? And as he is asking this question in a very Suggestive way, He is also tapping the Photo with his right index finger as an indication that this is the guy. As Heard looks at the photo, he slowly reply in Mannerism, and in Speech as he say, "i think that looks like Him." Detective Fugate then lay the single photo flat, face up, and taps on it three more times and say "You think thats him". And without Affirmation, Fugate don't even try to establish or determine Heard's confidence, or A level of Certainty. In this same interview Fugate asked Heard to identify the female victim who he believes to be the Sister of the deceased, who Heard drove from Lexington, Ky to Detroit, Mi. And vice versa, which is six plus Hours one way, and twelve plus Hours round trip; And in the exact Manner and Speech as in the identification of Gaskin, Heard is unsure, and hesitant as he states "She looks familiar if her hair was pulled back". Upon showing this photo to Heard Fugate covers the visible written information with his hand. Heard gave No Positive identifications. Both attempts share the same Equivalence "She looks familiar, if"... And, "i think that looks like Him." when Fugate Finally did ask Heard for A discription, it was after he showed him the 9X12 in. single photo, and Heard responded, "it was dark".

On August 11, 2021 A Hearing was held on Motion to Exclude Eye-witness identification. Fayette County Circuit Court Judge Thomas Travis Over Ruled the Motion by finding that the identification was sufficiently reliable under the totality of the Circumstances, Even though the initial Procedure used - the single photo "show up" - was unnecessarily Suggestive. Judge Travis also acknowledge that ~~The~~ Police Policy and Procedures Mandates

that A Photo Array be employed on this occasion, And Detective Fugate failed to do so. Eventhough he is aware of the Approved Methods for securing An Eye-witness identification, He willfully violated the Process that's set out, outlining Policy Procedures, and Police (law enforcement conduct) while performing An identification Procedure, or Examination. (A Copy of the Lexington Police Department Policy, and Procedures Governing Eyewitness identification located at Appendix E)

In this Suppression Hearing the Judge utilized the five factors in *Neil v. Biggers* to determine that the identification was Reliable, under the totality of the circumstances. Judge Analyzed All five factors in eight typed sentences in His Ruling. He never weighed the totality of the corrupting effect. Due Process is violated when improper Police conduct create a substantial likelihood of Misidentification.

violating the Policy, and Procedures of Lexington Police Department willfully, is improper Police Conduct. Demonstrating Conducive Actions and Behaviors during an Eyewitness Examination or Procedure is improper Police Conduct, Especially when the Behavior is used to influence an Eye witness into identifying A Suspect. in this case, identifying the only one person that is shown.

In this Case there is no detailed descriptions or previous descriptions of A Suspect, or the person Heard claim to have seen before to determine in fact, if the person He saw was Gaskin. There is no accounts to Gaskin's or the Suspects Height, Age, weight, build, skin complexion, Hair color, Hair texture, etc. There was no level of Confidence or Certainty while making the identification. Nor was any asked of him. Any logical, uncompromised law enforcement representative would've had some concern with Heard's low, Poor level of Certainty. But Detective Fugate encourage Mr Heard. The Corrupting Effect in this case outweigh the witness Ability to make an Accurate identification. In No way is this identification Reliable under

the standards set out in Neil v. Biggers... The Biggers factors, five factors that represent the totality of the Circumstances, and the reliability under the totality of the circumstances... Are,

- ① The 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's prior description of the criminal.
- ④ The level of Certainty demonstrated by the witness at the time of the identification.
- ⑤ The length of time between the crime and the confrontation.

During Judge Travis Biggers Analysis of the five factors, He determined in His Rulings...

"First the witness Mr. Heard was in a position to see the defendant clearly, because Gaskin approached his vehicle to pay him in cash. it was night time, street lights and other lighting provided some visibility."

"Second, it can be reasonably assumed that Heard was attentive because Gaskin was the individual who stepped forward to tender payment for his services."

"Third, Heard's description of Gaskin was accurate."

"Fourth, Heard was certain of his description due to the minimal distance between himself and Gaskin."

"Fifth, there was little passage of time between when Heard saw Gaskin and when Heard identified him from the photograph presented by Detective Fugate. In total, less than forty-eight hours elapsed between the two events."

Judge Travis also stated that the presence of corroborating evidence of Gaskin being present at the time is cell phone data. The victim Mother told Police Gaskin said He was there when the victim arrived.

Finally the Defendant's finger print found on A Soda can puts him in the apartment where heard dropped off the victim.

Graskin urges the Supreme Court to review Heard's audio interview with Joshua Powell, and the video account of the deceased being dropped off by George Heard.

In Judge Travis Biggers Analysis, the corroborating evidence is not Factual. Cell phone data doesn't Place anyone in any exact location from a Tower Ping. The Mother stating, Graskin said "He was there" is untrue, and it's Hear say. Graskin's finger print on a Soda Can inside an apartment where he was living at the time, is not Evidence. Also, there is no testimony to support Judge Travis Findings. Factor ③ The accuracy of the witness prior descriptions. Factor ④ The level of Certainty demonstrated by the witness at the time of the confrontation ⑤ The length of time between the crime and the Confrontation. As it relates to factor ③ George Heard never gave Police or or any law enforcement personnel, a description of a Suspect, or a description Graskin at any time, and he had plenty of opportunities to do so. Nor do he provide a description of the person he claim he saw to Detective Fugate. Furthermore, Heard doesn't provide the Courts with a description of a Suspect or Mr. Graskin at the Suppression hearing, or at trial. Factor ④ The level of certainty demonstrated by the witness at the time of the Confrontation. There is no direct adumance or Surety in Heard's identification or in his actions, or reaction to the photo of some one who he believe Killed some body. Heard's actions demonstrates uncertainty, and a High level of reluctance. Heard didn't demonstrate any level of Confidence. Any observer looking at this recorded interview can easily determine that Heard's certainty, and Confidence level is Zero. Any reasonable, logical thinking person can look at this interview, and easily determine that Detective Fugate's actions during the presentation of the single photo is truly

unacceptable. And it's Evident that Fugate's Agenda, as well as his actions; is to Assist, and influence Heard into making an identification. *Manson v Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed 2d 140 (1977) "Reliability is the linchpin in determining the admissibility of identification testimony." (Brathwaite make clear, The Constitutional assessment of Reliability require a balancing of the factors outlined in *Biggers*, against the degree of Suggestiveness in the impermissible procedure.)

In regards to factor ⑤ The length of time between the crime and the confrontation, Judge Travis Ruled, "in total, less than forty-eight Hours between the two events. which is totally false, and clear Error. The crime was deemed October 15, 2019. Heard's unnecessarily Suggestive identification procedure was recorded on November 14, 2019. Thirty days later. which is significant because Heard is a Lyft driver who provide transportation services to the inner city of Lexington, where he would've encountered countless African Americans, and Random African American faces in a thirty day period. This is a cross racial identification with George Heard, an elderly white man identifying Gaskin, an African American man; who, at Heard's own admission - Doesn't know Gaskin, Never talked to him, Never gave him ride, Never interacted, And is uncertain if he saw him once, or two times in the past; when in fact, Gaskin doesn't know Heard, never had any dealings with him, and never even saw Heard before. In Heard's testimony, and in his recorded interview with Detective Fugate, Heard stated that he use to be a State Trooper in Louisiana... And in his recorded interview with DPA investigator Joshua Powell, George Heard stated, "State Government in Kentucky does things crookedly in this state". Upon reviewing the shocking information that Manifest from Josh Powell's interview of George Heard, Commonwealth's Prosecuting Attorneys Kathy Phillips, And Tressa Root didn't want to win the Hearing (Suppression Hearing regarding George

Heard's identification of Gaskin) in Appendix C. in fact they were Hoping to lose. But due to Judge Travis Misapplications of His Biggers Analysis regarding factors ③ ④ and ⑤ They won, and the Motion to Suppress was Over Ruled. Factor 3. Judge Travis assumed what Heard's actions could've been. Factor 4. and 5. there is no information on the record, in the record, or anything in the testimony to support the remaining factors. Judge Travis Analysis of five factors set out in Neil is not drawn from facts, or Evidence from the record or testimony, Because there is no description, or Prior descriptions of the Suspect or Gaskin. Rendering the findings faulty. In Roof v. Maass, 976 F.2d 737 (9th Cir. 1992) U.S. Court of Appeals 9th Cir. determined the District Court misapplied the Biggers Analysis concerning factor four. This factor weigh in favor of admissibility the more certain a witness is in identifying a suspect. Manson v. Brathwaite, "Reliability is the linchpin."

In U.S. v. Cueto, 611 F.2d 1056 (5th Cir. 1980)

United States Court of Appeals fifth circuit Reversed; And found that the Judge Erred in admitting testimony about improper photographic identification.

The Court of Appeals in this case found that a photographic display is impermissibly suggestive, the factors that determine reliability are are the factors set out in Neil v Biggers factors. Manson, 432 U.S. at 114, 97 S.Ct. 2243. The reliability of the photographic identification in this case is very weak, especially with regard to the level of certainty demonstrated by the witness Kosiba. Kosiba never made an in court identification of Cueto. In cases such as Manson and Hudson courts have relied upon clear and positive in court identifications by the witnesses as an important factor to show the reliability of Suggestive photographic displays. In those cases the witnesses were exposed to suggestive displays only before the trial as a means of preparing for a later in-court identification. In this case the improper photo-



graphic display constituted the witness' only identification of the defendant at the trial itself. Even though the trial Judge expressly encouraged the Government to use in-court identification once a predicate was established, Kosiba was apparently so uncertain of his identification of Cueto that the Government elected not to have him Attempt an in-court identification of the defendant.

Kosiba's uncertainty is also revealed by the testimony of Agent Williamson, who showed him the photographs. Despite the Suggestiveness of the display Williamson testified that Kosiba correctly identified only one of the two photographs that Williamson showed to him. Kosiba incorrectly identified the photograph of Bavosa, whom Kosiba said he met on several previous occasions. Record at 136. Unlike the witnesses in Manson and Hudson Kosiba gave no detail description of the defendant and could not otherwise show the accuracy of his identification of Cueto. Because the photographic display was impermissibly Suggestive and the witness testimony does not reveal that his identification of the defendant was otherwise reliable, we conclude that Cueto's due process rights were violated when this Evidence was admitted against him.

U.S. v. Cueto, has identical elements to Gaskin's Case. An Eyewitness shown a photograph of a suspect. A Detective confirming a positive identification, from an impermissibly Suggestive identification procedure. No level of Certainty demonstrated by the witness. No in-court identification of the defendant by the witness at trial. The only identification of the defendant (Gaskin) at trial was the photo of Gaskin that was used in the unnecessarily Suggestive Confrontation. The Prosecuting Attorneys in Gaskin's case didn't Attempt to have the witness do an in-court identification of the defendant. Just as Kosiba in, U.S. v. Cueto incorrectly identified the photograph of Bavosa, whom Kosiba said he met on several previous occasions; George Heard Misidentified Gaskin

in a recorded interview with investigator Josh Powell. And according to Heard, Gaskin is someone he saw previously on another occasion but was unable to identify Gaskin from a 6 pack photographic array. Unlike Manson and Hudson, George Heard detailed description, or a prior description don't exist because he never gave one, or attempted to give one. Neither was he ever asked by law enforcement or the Court to provide one, to confirm the accuracy of his identification. And just as in Cueto, Heard's testimony does not reveal that his identification of Gaskin is reliable. Based on this dialog the Court of Appeals; U.S. Court of Appeals Reversed Cueto's Conviction, Determining that his rights, Due process Rights were violated.

In *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed. 2d 402 (1969) The Police permitted a one-to-one confrontation between Petitioner and the witness. This court pointed out in *Stovall* that (the Practice of showing suspects singly to persons for the purpose of identification, and not as part of a line up has been widely condemned; 388 U.S., at 302, 87 S.Ct., at 1972.

The suggestive elements in this identification procedure made it all but inevitable that David (the witness) would identify petitioner whether or not he was in fact the man.

In *Foster*, just as in Gaskin's case, The Pre-trial confrontation clearly were so arranged as to make the resulting identification virtually inevitable. A violation of Constitutional Rights.

Simmons v. U.S. 390 U.S. 377 384 (1968). Right to Due Process includes the Right not to be the object of Suggestive Police identification procedures that create a very substantial likelihood of Misidentification, ~~and its~~ and its the likelihood that violates a defendant right to due process. *Manson v. Brathwaite*, 432 U.S. 98, 113 n.13 (1977) "And it is the admission of testimony carrying such a likelihood of Misidentification which violates a defendants rights to due process". *Manson v. Brathwaite*, 432 U.S. at 114 ("Re-

liability is the linchpin in determining the admissibility of identification testimony..." via *Wray v. Johnson*, 202 F.3d 515 (2nd Cir. 1998)

Misapplied Biggers factors amounts to an unreasonable application of Established Supreme Court Precedent. In *Garvey v. Duncan* 485 F.3d 709 (2nd Cir. 2007) it was stated "As we have pointed out before, one Biggers factor affects another - especially in cases where Victim fails to describe the perpetrator - and this interplay is not to be ignored. The District Court Erred by failing to weigh the Corrupting effect, or the Suggestive Confrontation against the Biggers factor. Especially the factor addressing the Certainty with which McKenzie later identified Garvey. Both Supreme Court and Second Circuit Precedent expressly requires this additional Analytical step, yet the district court simply did not undertake it. See *Brathwaite*, 432 U.S. at 114, 97 S.Ct. 2243 ("Against these Biggers factors is to be weighed the corrupting effect of the suggestive identification itself.") Correcting for the two Errors identified above it is apparent that there is no independent basis of reliability for McKenzie's identification.

On direct Appeal, The Supreme Court of Kentucky affirmed Gaskin's Conviction, Agreeing with All five Biggers factors Analysis presented by the Trial Judge Thomas Travis. Although All Concurred, Thompson .J wrote a separate opinion, and Conley .J Joins in.

whether the sixth Amendment Right to Counsel is A guaranteed right to Effective Assistance of Counsel... Trial Counsel

Through out the course of this case the commonwealth Attorney's constantly stated to the defense and to the Judge that the Bullets taken from the deceased were too damaged, and too deformed to test. This statement was reiterated on serveral status Hearing dates and the Judge asked the defense, "why are they interested in bullets when the Commonwealth don't have the Murder weapon". At this status Hearing the Commonwealth Prosecuting Attorney stated they have No interest in the bullet fragments, and they will not be testing the bullets.

The Counsel for the defense took it upon themselves to Submit the bullets to Kentucky State Police Lab for testing after being in possession of information determining that the bullets were in prestine condition to be tested. Not Honoring My thoughts, or reasons why we should not attempt to do such a foolish act, it was done anyway. Defense Counsel was under the impression that we were protected by the Kentucky state Police Lab Confidentiality Policy, But Some how the Prosecuting Attorney Katie webster at the time, was notified that the lawyers in Gaskin's Case submitted bullets for testing. At this time the Prosecuting Attorney called K.S.P. lab employee Pilcher to determine the findings. Pilcher Notified the C.W. Attorney that he would be a witness at trial for the defense, and he informed Her of the things that he would testify to; violating the K.S.P. lab Policies of Confidentiality.

### Question 2.

whether the sixth Amendment right to counsel is A guaranteed right to Effective Assistance of Counsel... Trial Counsel

Upon knowing that Pilcher had been compromised to the extent of being untrustworthy, Defense Counsel should have removed him from the witness list and prevented him from testifying; because his testimony didn't have any relevant information that would've been useful in the defendants case. This misstep by the defense gave the Commonwealth Prosecuting Attorney the opportunity to lay, and wait to cross examine Pilcher, due to defense counsel inexperience, (Error.) Unbeknown to defense counsel, Pilcher testified in favor of the Commonwealth because his testimony gave them a theory for closing Arguments, knowledge of what caliber of fire arm that was used in the crime, it also afforded the commonwealth the opportunity to say that both victims was shot by the same gun, and one person pulled the trigger. This is not Harmless Error.

By defense counsel being interested in evidence that the Prosecuting Attorney was unconcerned with was of grave consequence, and prejudice to the defendant, and the defense. The defense never should've put Pilcher on the stand knowing that Judge Travis told them they were prohibited from questioning him as to why he leaked confidential information, or why did he violate a Policy that he is very aware of, and gave confidential findings to the Prosecuting Attorney in a Criminal Case. Every attempt to get this information in front of the Jury should've been the only reason for questioning Pilcher on the stand; knowing that was not possible, He should've been removed from the defense witness list.

During the trial, the prosecutor showed Gaskin's recorded interview with detective which is five and a half minutes in

totality. During this interview Gaskin Repeatedly told Detective Fugate that he want to talk to them, But not in the form of making a statement, or saying anything that might be incriminating, and this was said to Detective Fugate several times, in five minutes.

Trial Counsel didn't object to the showing of this recorded interview at no time. Not before the showing, during, or After. Counsel made no attempt to argue that Gaskin invoked his fifth amendment rights. The Judge appeared to question why the Commonwealth showed the video; and there was still no objection by the defense.

In *Berghuis v. Thompson*, 130 S.Ct. 2250, 176 L.Ed. 2d 1098, 560 U.S. 370 (2010) United States Court of Appeals for the Sixth Circuit determined that a statement by the accused, Relied on at trial by the Prosecution had been elicited in violation of *Miranda v. Arizona* 384 U.S. 436 86 S.Ct. 1602 16 L.Ed. 2d 694 (1966)

The Prosecutor in Gaskin's case showed the interview to Mislead the Jury, as if Gaskin was guilty, and didn't want to admit it. By Counsel failing to object renders counsel Ineffective, because by a Juror or a Jury hearing Gaskin say "i don't want to make a statement, or say anything incriminating" Can be interpreted by someone unfamiliar with the process, as an admission of guilt, and would need explanation. without a simple objection, this act by the Prosecutor contributed to the verdict.

Counsel for defense was also ineffective by informing the Judge that I wouldn't be testifying, and by not allowing Me to testify to the facts that was Highly revelant to My Case. I wasn't advised by the Judge conducting the trial, or by My Attorney that by not testifying, I give up the right to present evidence that weigh in My favor. I was

not informed of any risk, dangers, or Hazards of not testifying. After the trial concluded, I asked My Attorney, Sarah Langar why she didn't Present the Police report that I made to Police regarding the assault and the Robbery of the lyft driver that was mistaken for Me on 10-12-2019. October 12, 2019 which would be the same day that I left the apartment and checked into a room at the Motel 6. I asked My Attorney why she didn't present the evidence of the attempted break-in where the locks and the door frame was damaged, And why she didn't present the text message of the Male deceased asking why did I tell the female to come to the Motel 6; and My Attorney stated "it couldn't be presented because I didn't Testify". I asked Her why she didn't tell Me this before she informed the Judge that I wasn't going to testify? And Her reply was "I don't know, i'm sorry," "I made a Mistake". Trial Counsel didn't want me to testify because they fear that the Prosecutor would frustrate Me enough to provoke a negative response to being questioned, and make me look Bad in front of the Jury. At the Bench with Counsel, I wasn't advised or informed about any factors, negative or positive in regards to not testifying. If I had known that favorable evidence was being Sacrificed by me not testifying, I would've testified on my behalf. Trial Counsel didn't ask not one question from the notes that I Presented in My defense, neither was anything I said acknowledged during trial. I wasn't wasn't allowed to participate in My own defense at all due to fact that My Attorney change the trial strategy without informing Me. when things appeared to be different and confusing, I asked My Defense Counsel, "what's going on", and she replied, to Me, "Just trust Me". And Although I wanted to testify, after trying to prepare Me for the stand, My Attorney decided No.

In cases like *Curtis*, *Supra*, 681 P.2d at 514, and *Milton*, *Supra*,  
Outlining an advisement for a Trial Judge to inform a defendant. Mis-  
informing A defendant, or not informing a defendant of *Curtis* Advisory  
in regards to testifying, and a defendant's right to testify; and the dangers  
or consequences associate with the Right to testify, May be Reversible.  
Who bare the Responsibility to inform the defendant of the danger, and  
Consequences of not testifying, and the Harm that comes with utilizing  
that Right? which is also critical, and can be very damaging if the  
defendant is not informed or misinformed.

In *Lynch v. Commonwealth of Kentucky*, 642 S.W. 3d 647 (Ky.  
2022) Kentucky Supreme Court stated - The Higher duty to protect a defend-  
ant's rights including the inverse rights to testify or not testify rests with  
defense counsel. As the United Supreme Court stated:

"The sixth amendment recognizes the right to the assist-  
ance of Counsel, it envision's Counsel's playing a role that is critical to  
the ability of the adversarial system to produce just results. An accused  
is entitled to be assisted by an attorney, whether retained or appointed,  
who plays the role necessary to ensure that the trial is fair."

The role that defense counsel has in ensuring the fairness of trial, in our  
view, includes taking appropriate action when defense counsel believes  
the defendants rights are not respected. In *Pennycooke*, the third circuit  
Court of Appeals made clear that the duty of providing such advice  
and of ensuring that any waiver is knowing and intelligent rests with  
defense counsel, not with the trial court.

By trial Counsels failure to disclose the facts, and the  
potential Hazards of not testifying in a case of this Magnitude is ineffective



assistance of Counsel.

Futhermore, at a pretrial hearing on Motions concerns were raised concerning Historical cell phone location evidence, and its use at trial. The recent decision in Torrence v. Commonwealth, 603 S.W. 3d 214 (Ky. 2020) prohibit a police officer from testifying about a cell phone's specific location based solely on Historical cell tower data. Gaskin argued officers could plot the location of cell towers but go no further. The trial Court agreed, and Ruled that all Sgt. Carroll could testify to. The Judge also stated its expectations that the Commonwealth would stay within the bounds of binding case law. In His Ruling stated, it was the province of the Jury to draw inferences from any testimony regarding the generalized and approximate location of Gaskin's phone based on a ping to cell tower site. Officers could only testify to which tower his phone communicated with and the location of the tower itself. At trial, the trial Court reminded the Commonwealth of its earlier Ruling when the Historical cell tower data testimony began. The Commonwealth ensured the testimony conformed to the trial court's rulings. Exhibits provided to the Jury showed the dates and times Gaskin's phone was communicating with a tower, and where the particular tower was located.

During closing arguments the prosecutor directly stated, "its a gap of an hour 19:57 to 20:58 (7:57pm to 8:58pm) where the defendant is not using the devices". She then say they know i'm at the apartment because they can see My phone there. Her exact words are "we know he is at the apartment because we can see his phone there", and five minutes later She say at 9:18pm My phone Hit that tower, you can see that im still there. Forty five seconds after that statement the prosecutor say "the phone show the defendant was there when the deceased was killed. At

no time did Counsel for the defense object. This is clear violation of the court order, and the court Ruling when the Judge Ruled " it is the province of the Jury to draw inferences from any testimony regarding the generalized and approximate location of Craskin's phone based on a ping to a cell tower site". The Prosecutor is fully aware that there is no testimony, and there was no testimony to exact location based on cell tower ping. Therefore, the Prosecution in this case made improper inferences that exceeded the bounds of witness testimony, and argued facts not in evidence as to exact location, Because any testimony to exact location would violate binding case law, and Court orders, Rulings. Failure to object to the Prosecutor's Misconduct demonstrated ineffective assistance of Counsel, and it also changes the standards in which a claim is reviewed on direct appeal.

Counsel didn't object to the Prosecutor saying that My probably pinging off other towers because im trafficking drugs, and there was no evidence or testimony to support this claim. This statement from the Prosecutor was a way to present a Faulty bad act to the Jury to Prejudice the defendant, during closing arguments.

Counsel didn't object to the Prosecutor saying the only DNA evidence thats in the apartment on the day of Murders is the two victims and the defendant's. Counsel for the defendant, and the Prosecutor is fully aware that there was finger print, palm print, and D.N.A. at the scene that don't belong to Me, or the victims. The testimony of a Forensic expert had to be corrected in this case because He Mis-testified, or testified incorrectly that My finger print was on the red Solo cup that held an unknown finger print, and unknown D.N.A. And the testimony was corrected during direct examination by the Prosecutor, by defense counsel. For the prosecution

to make such a statement they are willfully presenting false information to the Jury, and this behavior should've been objected to, and admonished.

Counsel didn't object the prosecutor saying Gaskin didn't live there, and my D.N.A. got there because I committed A Murder. On the first day of the investigation the property Manager told Police that the deceased lived in the apartment with his roommate. The Mother and the Sister told Police and Detective Fugate in a recorded interview that i lived at the apartment. The Anonymous tipster told Police and detective Fugate that Gaskin lived at the apartment.

Counsel didn't object when the prosecutor held up a picture of an empty gun holster, a said I used the gun that was in that holster to Kill them and I took it with me when I left, thats why it was never Recoverd. There was no direct testimony of that holster belonging to the Murder weapon. For Counsel of the defendant to allow a statement of that Magnitude to go to the Jury uncontested or uncorrected rendered defendant trial Counsel ineffective.

Counsel also demonstrated ineffective assistance when they failed to impeach Detective Fugate for lying under oath Committing PerJury. PerJury occurs when a witness testifying under Oath or Affirmation gives false testimony concerning a material matter with the willful intent to provide false testimony. Detective Fugate testified under oath that he was made aware that the phones were process and the information abstractions was available, but he's not sure what date and time. ( Fugate looks at the Prosecuting Attorney, He Feign a look at his notes and stated June.) He testified that Sharmaine and Marquis cell brites wasn't made available until June 2022. But we know for a fact that the cell brite information for all the phones was completed and available in August 2021 (Cellbrite Case Supplement signed electronically by J.M. Sisson 37230 located at Appendix F)

J. Sissons sent reports for all five phones in August 2021. Fugate testified that they didn't have the technology to get into the phones at the time of the incident, and they didn't get the information off the two phones until later. Fugate testified that he seen the reports concerning the phones in June 2022. He reviewed the cellbrite reports in June 2022. The Prosecuting Attorney know that the Commonwealth, and the Detectives on this Case who are Fugate and Gibbs been in possession of Material and information Since August 2021. At a hearing right before trial we asked the Commonwealth of Kentucky to abide by the court order to provide All discovery in possession of the Commonwealth to the defense. It wasn't until the Judge Mandated the Commonwealth Prosecuting Attorney's to provide the court with an affidavit from the Agency that have the phones stating that they haven't been able to receive any information from the phones. **The very** next day the Commonwealth produced information stating they had cell brites for all five phones that were in the Commonwealth's possession for a year, and not given to the defense. Therefore, for Fugate to testify that Sharmaine and Marquis cell brite information wasn't made available until June 2022 is untruthful. Fugate also testified that he don't know that experts and officials create the procedures for witness identification. He also stated under oath that the department stance and policy is to do a line up for witness identification. Fugate is also the detective that conducted the unnecessarily suggestive single photo identification procedure with George Heard. Fugate also left the court house after being advised by the Judge that he would be called back to the stand by the defense. During an objection at the bench, the Prosecutor notified defense counsel that Fugate was unavailable, and if we want to question it'll have to be done through another detective.

Strickland v. Washington, 466 U.S. 668 104 S.Ct. 2052, L.Ed 2d 674.)

Counsel performance is considered deficient if it falls below an objective Standard of Reasonableness.

Counsel's repetative Failures to Object to improper closing arguments by the Prosecutor falls below an objective standard, Reasonableness, due to the fact that Counsel is fully aware the courts rulings considering exact location.

Counsel should be fully aware that its improper for the prosecutor to argue facts that's not in evidence. The trial Counsel's performance fell below an objective standard of reasonableness when defense counsel allowed the Prosecution to present false, untruthful arguments to the Jury by not simply objecting to the inconsistency of the facts where the evidence proved different; such as Me and the deceased being roommates when this happened, which is a proven fact. The presence of DNA and finger prints at the scene of the crime that are documented as not belonging to Gaskin or the victims. For defense counsels to fall asleep at the wheel, and allow the prosecutor to to Misrepresent the facts, had a tremendouse impact and weighed Heavily towards the verdict. Defense counsel's actions, and lack of actions is not the performance of competent counsel, because My Attorney's are well aware of those facts and Much More. Therefore, to be absent at such a crucial time is deficient, and falls below an objective standard of Reasonableness, rendering defense counsel ineffective.

In Miles v. Commonwealth of Kentucky

The Strickland standard apply to prosecution Misconduct. Under this standard defendant Must demonstrate his trial Counsel was deficient in failing to object to the prosecutorial misconduct during closing arguments, Move for an admonition, or request a Mistrial, and but for that failure there is a reasonable probability that the result of the trial would have been different.

### REASONS FOR GRANTING THE PETITION

The Petition in this case should be granted because the whole Process was unfair from the beginning to the end. Starting with a detective showing a so called eye witness a picture of me to make a positive identification, "in a very Suggestive unnecessary procedure" that calls into question the actions and behavior of the detective presenting the single photo as a one man line up; to George Heard, who is very reluctant to make an identification regardless of the indications and suggestive influence. George Heard use to be a state trooper and a correction officer, He full well knows what a positive identification is, and he didn't make one despite every attempt of detective Fugate to assist him. In the interview with DPA investigator Josh Powell George Heard stated "they told me he killed them". He also misidentify Gaskin from a six pack photo array line up. In this interview George Heard stated, "the state of Kentucky do things Crookedly. . George Heard knows that I never gave or paid him anything. I don't know him, and I never saw him before.

The prosecutors in this case with held all the evidence in favor of the defendant. From the cellbrite information that was with held for a year in violation of several court orders demanding the Commonwealth to turn over all information regarding cell phones extractions, cell brites, etc. The Prosecutor in this case solicited confidential information from a defense witness, and used that information in closing arguments against the defendant even though it was illegally obtained or obtain through unethical practices. And the Judge Abused his discretion by not allowing the defense to question the prosecutor about it at a Hearing, and by not allowing the defense to question the witness about the breach while he was on the stand. The prosecutor also did a second investigation and with held the information and Most of the discovery. The prosecutor introduced information from a pretrial conference into trial violating K.R.E 410 (4) There is also a violation of RCr. 7.24 and RCr. 7.26 (Commonwealth response to defendant's renewed Motion for a New Trial page 7 and page 8 Appendix G)

## Reason for Granting Petition cont.

The prosecutor violated several court orders during closing arguments with zero consequences. The prosecutor blocked our Alternative Perp by lying to the Judge saying the Alternative wasn't a suspect "when his name is on the page that listed two other suspects "Curtis Thompson".

In this case all the evidence against me is manufactured and twisted. The Commonwealth didn't produce anyone who saw the actual perpetrator. The Commonwealth didn't produce a witness to the crime. The Commonwealth withheld Gaskin phone records, and used charts because the times on Gaskin's CDR phone record conflict with the case that's presented by the Commonwealth, that's why they didn't use the actual time line from the phone records. The phone records from Lexington Police department have the cell tower call time and location. And this record, conflictive to to the prosecutions case. That's why the prosecutor made charts instead of using the original documented phone information of Gaskin CDR. All the prosecution have in this case is a bogus theory that's unsupported. The Commonwealth couldn't even establish a Motive. The Commonwealth, in this case took My DNA from a Sprite can in an apartment where i lived and said that place me at the scene of the crime.

In this case an improper closing argument is what convicted Me of this crime, and the ineffective assistance of Counsel is what secured the conviction. The prosecutor painted me as an intruder, and she told the Jury that I didn't live there, and My DNA is there because I committed a Murder. A simple objection changes the whole narrative. Referencing facts not in evidence and violating pre trial rulings in regards to exact location, objections, would've put the defendant in a better position on direct appeal. Competent Counsel would've fought for a Mistrial; upon several violations of improper arguments, and court orders.

Counsel for the defendant was helping the Judge with the Jury instructions, but failed to consider any instructions for Manslaughter reckless, or Facilitation, due to the fact that I was offer a plea deal for five years. Defense counsel also erred by allowing A Mediation Specialist to make Jury selections, and pick who the members of the Jury will be. Potential Jurors who may have been favorable participants was struck because they knew her.

In no way did Gaskin receive a fair trial. Gaskin is asking the Honorable Supreme Court for Mercy, with Hope that a New trial will be Granted. Prosecution Misconduct, and defense counsel's ineffectiveness ~~and~~ Made this trial unfair in totality.



### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Antonio T. Gaskin

Date: July 12<sup>th</sup> 2024