25-5020

ORIGINAL

In The United States Supreme Court

Dan Larkin Bozeman II,
Petitioner,

V.

James Schiebner,
Respondent.
_____/

Case no.:

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Dan Bozeman II
Dan L. Bozeman II
#959477
2400 S. Sheridan Drive
Muskegon, MI 49442

Questions Presented To The Court

Issue I:

Is A Defendant Considered To Be Given A Full And Fair Consideration Of A 4th Amendment Claim At Both "Trial" And "Direct Appeal" As Required By Stone V. Powell, 428 U.S. 465 (1976) If Trail And Appellate Counsel Failed To Raise The Issue, Forcing A Defendant To Raise The Issue For The First Time Pro Se In A Post Appeal Relief From Judgment Motion That Was Ruled On The Merits Only Once By Trial Court And Then Denied Leave Or Denied A Review Of The Merits In Every Following State And Federal Court?

Was There Probable Cause To Arrest The Defendant Without A Warrant; And Was The Identification Evidence And Testimony Given By The Victim Thomas Jackson At Trial Fruits Of A Poisonous Tree?

Issue II:

Was The Defendant Denied Effective Assistance Of Counsel When:
Defense Counsel Failed To Move For Suppression Of Pretrial Photographic Identification From Complainant Thomas Jackson On Grounds Of The Identification Being Direct "Fruit" Of An Illegal Arrest In Violation Of Defendant's State And Federal Constitutional Protections?

Appellate Counsel Failed To Bring The Above Issues Forth On Direct Appeal; As They Are Stronger Than The Claims Raised?

Issue III:

Was Petitioner Denied His State And Federal Constitutional Rights To Fair Trial By The Trial Judge, Who Permitted Witness Against Co-defendant Lepper Only To Testify In The Presence Of Petitioners Separate Jury?

Parties To The Proceedings

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Dan Larkin Bozeman II, an inmate. The Respondent is James Schiebner, a Warden of a Michigan Correctional Facility.

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Case Law:

Introduction

Reference To Opinions Below

*note: all attachments(appendix's) of this Writ are positioned in the order they are mentioned in this petition.

Concerning Issue I, The Mar. 5, 2020 opinion of the 3rd Judicial Trial Court appears at Appendix A, both the Appeal and Supreme courts of Michigan opinions denying leave appear at Appendices B & C. The Sep. 18, 2024 opinion of U.S District Court declining to rule on the merits appears at Appendix D, and the opinion of the U.S. 6th Circuit Court of Appeals upholding the decline of review appears at Appendix E.

Issue I:

Both the U.S. District and 6th Circuit Court of Appeals declined to rule on the merits of this issue. District Court contends that Appellant's 4th Amendment claim is "unreviewable" and declined to rule on the merits, essentially insulating from Federal review-the errors in trial court's ruling, a ruling that happens to be the ONE AND ONLY time this 4th Amendment issue was entertained (in Appellant's post conviction Relief from Judgment motion). Essentially Stone V. Powell, 428 U.S. 465 (1976) applies only to that class of those cases where the Defendant has already been given the opportunity for full and fair consideration of his 4th Amendment claim at "trial" and on "direct appeal". It is also noted that the Supreme Court, in Stone found the sought suppressed evidence to be harmless in the grand scheme of his case. In Appellant's case, if granted, it would be the suppression of Photo Array identification evidence by Thomas Jackson and his in-court identifications of Appellant - and these could never be viewed as harmless pieces of evidence. Supreme Court stated further in Stone (concerning entertaining 4th Amendment claims), "Our decision does not mean that the Federal Court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been such a showing [denied full/fair opportunity] and a Fourth Amendment violation." Appellant was simply not allotted this "full and fair opportunity" because both trial and appellate counsel (on direct appeal) failed to raise the claim. Furthermore, upon the filing of Appellant's Application for Habeas Corpus, the District Court accepted this 4th Amendment claim implying that it was NOT

subject to being procedurally barred (because appellant has properly exhausted this claim on the State level) and now is attempting to place a procedural bar amid review. see District Court's record: "Order Requiring Responsive Pleading", (dated: June 8, 2021).

If one can demonstrate that counsel was ineffective by failing to take advantage of Michigan's "full and fair" procedural mechanism used to litigate 4th amendment claims (as demonstrated in Appellant's Brief filed at the District Court in "Issue I" and in it's accompanied Ineffective Assistance of Counsel "Issue IV A)"), then that opportunity was never extended to Appellant-Bozeman. This 4th Amendment claim was raised for the first time, Pro Se, by Appellant in his Relief From Judgment post conviction motion (and denied leave at both the Court of Appeals and Supreme Court of Michigan). This is well after Appellant's Direct Appeal (with counsel). As known by this Court, Relief from Judgment proceedings/appeals are all treated through the lens of extreme scrutiny, assumed procedural bar and requested leave to appeal (very hard to prevail on a issue at this post conviction stage once trial and appellate counsel has failed to raise the issue prior to a Pro Se Relief from Judgment motion being filed). Likewise, this claim has been subjected to leave to appeal (after the trial court ruled on the merits of Appellant's 6.500 Relief from Judgment) with no real/fair consideration of the facts of the claim (or consideration of the error of the trial court's ruling by leave). The District Court has done the same in attempting to preclude the ability to appeal their decision to refuse to review this 4th Amendment claim. If this Court also refuses to rule on the merits of this issue, it would further the insulation of this error that Trial and Appellate counsel failed to litigate.

Concerning Issue II, The Mar. 5, 2020 opinion of the 3rd Judicial Trial Court appears at Appendix A, both the Appeal and Supreme courts of Michigan opinions denying leave appear at Appendices B & C. The Sep. 18, 2024 opinion of U.S District Court denying the claim appears at Appendix D, and the opinion of the U.S. 6th Circuit Court of Appeals denying the claim appears at Appendix E.

Issue II:
Reconsideration of this issue on appeal is actually in support of the first issue. So if this

Court finds merit in the first issue, this Ineffective Assistance of Counsel issue shows case law where appellants have prevailed in similar circumstances that support the "cause" and "prejudice" prongs that attach to the first issue of this appeal considering trial and appellate counsel failed to raise the issue.

Concerning Issue III, The Dec. 13, 2016 opinion of the Michigan Court Of Appeals is cited at People V. Lepper, 2016 Mich. App. Lexis 2258 and the June 27, 2017 Supreme Court Of Michigan's opinion denying leave is citied at People V. Bozeman, 2017 Mich. Lexis 1314. The Sep. 18, 2024 opinion of U.S District Court denying the claim appears at Appendix D, and the opinion of the U.S. 6th Circuit Court of Appeals denying the claim appears at Appendix E.

Issue III:
The prosecution's motion to admit testimony was brought under 404(b). This issue was preserved by objection of all three defense counsels. Appellant was tried simultaneously with co-defendants Lepper and Diepenhorst. Appellant and Diepenhorst were tried before one jury,

Lepper was tried before a separate jury. On the first day of trial the People brought the 404(b) motion to endorse John Wilkinson, who is Lepper's uncle. Wilkinson was the owner of a desert eagle handgun, one of the weapons believed to have been used in the commission of the offenses and which was found near the area where Lepper was arrested. The People requested and were permitted to introduce evidence that the weapon was reported stolen or was taken without permission, that Lepper is Wilkinson's nephew and that Lepper has a reputation within his family of being known to steal. Although separate juries were seated, and Lepper was tried by a separate jury, Wilkinson testified before both juries.

Statement Of Jurisdiction

The United States Court of Appeals for the Sixth Circuit ruled, IN PART, on the merits of this petition on April 2, 2025. The claims therein are properly presented to this Court, as they have been presented to every lower court required for exhaustion on both State and Federal levels. The jurisdiction of this Court of Appellant's Writ for Certiorari review lies in USCS Supreme Ct. R. 10(c); 28 USCS 1251; 28 USCS 1254 & 28 USCS 1257.

STATEMENT OF FACTS

Parenthetical notations "T1"-"T5" and "S" refer to transcripts of the April 13, 14, 15, 16, 17, 2015 jury trial and May 4, 2015 sentencing, conducted in the Wayne Circuit Court before the Hon. Dana M. Hathaway. Numbers following are transcript pages.

In an eleven count amended felony information, Defendant-Appellant Dan Larkin Bozeman ("Appellant") and co-defendants Steven Joseph Lepper ("Lepper") and Roger Raymond Diepenhorst ("Diepenhorst") were all charged with carjacking a Ford from Thomas Jackson and a Chrysler from Lana Stanton [MCL 750.529a], assault with intent to murder [MCL 750.83], assault with intent to do great bodily harm [MCL 750.84] and felonious assault [MCL 750.82] as to Lana Stanton, assault with intent to murder, assault with intent to do great bodily harm and felonious assault as to Starkeisha West, felonious assault as to Jackson, discharging a firearm at a building [MCL 750.234b] and felony firearm [MCL 750.227b] in the commission or attempted commission of the carjackings and assaults. The offenses were all alleged to have occurred on November 30, 2014 at 12310 Maiden in the City of Detroit. (See preliminary examination at pp 7, 174-176. See also T1 10-12).

On April 13, 2015, Appellant, Lepper and Diepenhorst appeared together for a single trial. Appellant and Diepenhorst were tried before one jury. Lepper was tried before a separate jury. After preliminary matters ,(T1 3-13), selection of Appellant's jury, (T1 14-90; T2 3-8), preliminary jury instructions (T2 8-20) and opening statements, (T2 20-41), the following evidence was presented:

Thomas Jackson stated that on November 30, 2014 he resided at 12310 Maiden. At about 2:00 a.m. he went to a corner gas station in his 1997 burgundy Ford van to get a cup of coffee. As he was returning home he noticed three white males walking in the same direction he was driving. They all wore dark colored clothing with hoodies. As he parked in front of his home and exited his vehicle one of the men, whom he identified as Appellant, ran up to him, pointed an automatic handgun and told him to get on the ground. The other two men, also armed, went to the other side of his van. Jackson ran. As he ran he heard two or three gunshots. He then hear his van start. When he returned to his house it was gone. He went to a neighbor's house and called 911. Later that morning he made a statement and identified Appellant in a photo array. (T2 42-56, 60-79, 81-83).

Lana Stanton stated that at 2:30 a.m. November 30, 2014 she was alone in her white 2014 Chrysler at 13106 Hampshire. Her friend Starkeisha was in the house. Three white males walked toward her. A person she identified as Lepper darted behind her car. As he reached for her car she drove off. That person and the two others, whom she identified as Appellant and Diepenhorst all drew handguns and fired shots in her direction. She identified the handgun held by Appellant as a Desert Eagle. Fifteen to twenty short were fired. Her door and gas tank were struck. (T2 86-97, 101-104, 111-117). She drove to the police station and reported that the persons all wore black pants and hoodies, and they all wore gloves. (T2 99-100). She later returned to the police station and viewed photographs from which she failed to identify any of the defendants, and instead identified another person because although snitching is not prohibited, she was scared. (T2 105-108, 119-120, 126, 141-144). She described the three as a white male, 5'11" to 6 feet tall, weighing 200-250 pounds with a goatee or beard wearing all dark clothing with a dark handgun; an Hispanic male weighing 220 pounds with sandy brown hair; and a person 6'1" tall and weighing 150-250 pounds. (T2 139).

Starkeisha West stated that at about 2:40 a.m. November 30, 2014 she was at 13106 Hampshire. She received a call from Stanton, looked out the window and saw three men walking toward Stanton's car. She went outside to warn Stanton. A black male standing by the rear car door wearing black clothes and a hoodie told her to go away and shot at her. The bullet broke the glass door and lodged in the living room wall. She closed the door, returned inside and heard several more shots. Only the upper part of that person's face was visible. In court she identified him as Appellant, recalling that the person was cross eyed.. She was unable to identify Appellant in a lineup and never mentioned the person's eyes. (T2 145-159, 170, 174-180). She looked out the window and saw a heavy set man on the lawn, whom she identified in court as Lepper. He looked at her and fire two shots at her, striking walls inside the house. (T2 161-164). After the shooting stopped, police arrived. She told them "It was some white guys" wearing white gloves, (T2 165-166), describing them as "one short white man, one short fat white man and one tall white man". (T2 183). She was able to identify Lepper in a lineup, (T2 171), and never got a good look at the third person. (T2 173).

Detroit Police Officer Ernest Harris stated that between 2:00 a.m. and 3:00 a.m. November 30, 2014 he and his partner, Officer Kim Rata, were in plain clothes in an unmarked vehicle. Hearing reports of a carjacking and shots fired, they proceeded to the area to attempt to locate three white males in dark clothing. (T3 6-7). He saw three persons running back and forth in an alley and set up a perimeter. Marked police vehicles arrived within a minute. Appellant was located in a tree in a yard. He was wearing a black skull cap, a dark hoodie and blue jeans. He was sweating profusely and had a burr stuck to his clothing. Appellant was taken into custody by uniformed officers. Harris continued to search, finding Lepper hiding behind a trash can, also sweating, wearing a grey hooded sweatshirt and blue jean with a skull cap in his pocket and burr stuck to his clothing. He saw Diepenhorst removed from the house next door by Rata, also sweating. (T3 9-24, 27-43). Harris and his partner canvassed the area, finding two pairs of gloves in the alley where Appellant was located and four firearms in a garbage can in a backyard in the same area. (T3 25-26).

Detroit Police Officer Kimberly Rata was working with Officer Harris, searching for three white males. She saw some black objects in the alley. (T3 46-47). She notified other units to set up a perimeter and saw one jump over a fence. After waiting five or ten minutes they went into the yard she had seen the suspect enter and saw Appellant in a tree. He was taken into custody by Officer Metcalf. She continued to search for the others. At the next house she saw her partner place Lepper under arrest. She proceeded to a nearby vacant house and arrested Diepenhorst. (T3 48-55). Next they searched the area for handguns. She found two pairs of gloves under the tree where Appellant was located and two revolvers and two automatic pistols in a garbage can. (T3 56, 58-61).

Detroit Police Officer Lawrence Blackburn and his partner, Officer Glenn Bynes, went to 12310 Maiden on a report of shots fired, and later as an armed robbery. He spoke with complainant Jackson. (T3 84-86). He saw broken glass and spent shell casings in the street and received a description from Jackson of three white males, which he broadcast to other officers. (T3 87-89).

Detroit Police Officer Gregory Barrett and his partner, Officer Renee Forte, responded to Dickerson and Elmdale on a report of an armed robbery. He saw a red van. (T3 91-92). The engine

was running and the doors were open. (T3 94). Blackburn and Bynes arrived and told him it was involved in a carjacking. (T3 95). Waiting for a tow truck, he heard ten to twelve gunshots. (T3 96).

Detroit Police Officer Dwayne Toney was near 13106 Hampshire when he heard gunshots. Proceeding in that direction, he was flagged down by West. She stated her house was shot by three white males. He broadcast the description and observed casings in the street and bullet holes in the door and walls of the house. (T3 98-100). He collected and placed the casings on evidence. (T3 101).

Detroit Police Officer Derrick Metcalf stated that he and his partner, Officer Michael Holman, heard the dispatch, went to the area and backed up the search by setting up a perimeter on Evanston, Dickerson and Harper. As they were walking toward the alley he heard movement and saw three males run from a backyard into the alley and then into another yard and notified other officers. (T3 105-110). As he headed eastbound he looked up and observed a male in a tree. The person, whom he identified as Appellant, was ordered down and arrested by Holman. (T3 110-114).

Michelle Douglas is a civilian employed by the Detroit Police Department as an evidence technician. (T3 120). On November 30, 2012 she processed a white Chrysler at Gene's Tow Garage. Douglas photographed suspected bullet impacts on the driver's side and damage to the rear windshield, rearview mirror and headlight. She recovered bullet fragments from under the front passenger seat, the rear windshield deck, the driver's side rear door frame and inside the trunk. (T3 121-130). She dusted for fingerprints with negative results and swabbed for DNA. (T3 131-134).

Detroit Police Officer Deborah Stinson is also an evidence technician. (T3 141). She and Officer Mary Gross were called to the Maiden and Hampshire scenes. (T3 142). She photographed both locations, including suspected bullet holes at the house on Hampshire, (T3 143-150), as well as a bandana and four handguns recovered from inside a trash can on Evanston, two pairs of white gloves found in the alley and a pair of black and grey gloves found under a tree. (T3 150-159). At the Maiden and Hampshire Street locations she photographed spent bullet casings. (T3 165-168).

Officer Gross recovered the four handguns, identified as an empty .45 in a holster, a .50 Desert Eagle with one round in the chamber and two in the magazine, a rusty .38 revolver with five

live rounds and a .38 Smith & Wesson with three live rounds and two spent casings. (T3 190-197).

Detroit Police Sergeant Robert Wellman stated that on November 30, 2014 he interviewed Diepenhorst, who said he was trying to get money to hire an attorney to represent him in a child custody matter. Diepenhorst identified Lepper as his half-brother and Appellant as his girlfriend's baby's daddy. (T3 177-181). Also on November 30, 2014 Wellman conducted a live lineup for Stanton. She failed to identify Diepenhorst and instead identified a person other than Appellant, Diepenhorst and Lepper. (T4 39-41). According to Wellman, she was argumentative, told him she did not want to be there, and later told him she deliberately selected the wrong person. (T4 41-42).

Before the Lepper jury only, (T3 198), Detroit Police Officer Terry Cross-Nelson stated that at 5:30 p.m. November 30, 2014 she interviewed Lepper, who initially stated that he, Diepenhorst and Appellant were just in the area, and did not commit any crimes. (T3 199-205). He then stated that he and Diepenhorst had revolvers with them for protection, and that they along with Appellant robbed one man and shot at someone else. According to Lepper, Appellant robbed a man in a red van and shot at t white Chrysler. Lepper denied participating in either of the offenses. (T3 207-209).

John Wilsenson stated that he is he owned a .44 Desert Eagle handgun; that the gun was stolen from his home; and that Lepper is his wife's nephew's son. (T4 6-8). He did not report the theft until December 17, 2014. (T4 18). The gun replaced another identical Desert Eagle he had reported stolen in 1995. (T4 14). He did not know the serial number of either weapon. (T4 13,15).

The parties stipulated that bucal swabs were taken from Appellant, Diepenhorst, Lepper and Jackson for DNA testing, and that maps used by the People accurately representat the area. (T4 4-5).

Jennifer Jones is a Forensic Scientist in the Biology Unit of the Michigan State Police Northville Forensic Lab, and an expert in Forensic Biology. (T4 19-20). She received the bucal swabs from a serologist, from which she obtained complete profiles, and swabs taken from the handguns and the bandana. (T4 25-28). Swabs of the four handguns each contained a complex mixture from which she could make no conclusions. (T4 29-30). A swab of the gearshift and steering wheel of Jackson's vehicle were consistent with a mixture of two individuals, including a

major male donor. Jackson matched the major male donor and excluded Appellant, Diepenhorst and Lepper. The low levels of the minor donor were insufficient for her to make any comparison. (T4 30-31). The bandana DNA profile was mixed and she was unable to make any comparisons. (T4 32).

Michigan State Police Detective Sargent Paul Flores works in the Firearms and Toolmark Unit of the Metropolitan Detroit Laboratory. He is an expert in firearms and tool mark identification. (T4 45-46). He examined the four weapons and various bullet fragments and fired cartridge cases recovered in this matter. Three of the firearms were operable. The fourth was made operable after the cylinder was oiled and cleaned. Three of the fired bullet jacket fragments were so damaged and mutilated, he could only determine that they were .44 caliber class or larger and had right twist rifling. All four were inconclusive as to the .45 caliber Springfield and eliminated as to the .44 Remington Desert Eagle pistol and both .38 special revolvers. (T4 55-68). Three .45 auto caliber cartridges were examined and found to have been fired by the Springfield. Two .38 special caliber fired cartridge cases could not be identified or eliminated as having been fired from either of the .38 special revolver. (T4 68-70). He determined that two rounds were determined to have been fired from the Desert Eagle. Three others were determined to have been fried from the .45. (T4 70-73).

Detroit Police Sergeant Christopher Staton is the officer in charge of the case. He stated that on November 30, 2014 he interviewed the complainants. (T4 80). The People then rested. (T4 84). Appellant, Lepper and Diepenhorst all waived their right to testify. (T4 87-91). After a review of jury instructions, (T4 92-105, 109-113), the defense rested. (T4 113). Following closing arguments, (T4 114-181) and final jury instructions (T4 181-201). Appellant was found guilty of carjacking both Jackson and Stanton, assault with intent to murder Stanton and West, felonious assault as to Stanton, Jackson and West, discharging a firearm at a building and felony firearm. (T5 9-12). From concurrent terms of 200-400 months for 2 counts of carjacking and 2 counts of assault with intent to murder, 5-10 years for discharging a firearm at a building and 2-4 years for three counts of felonious assault, consecutive to a term of 2 years for felony firearm, (S 15), he appeals as of right.

Timeline Of Investigation

The Complaint:

A) At approximately 2:00am (11/30/2014), Complainant Thomas Jackson places a 911 call with the Detroit Police Department reporting that he had been robbed for his van by 3 white males dressed in all black clothes. Review People's - Exhibit #2 (audio of 911 call placed by Thomas Jackson);(T2 64-65).

B) At approximately 2:45am (11/30/2014). Complainant Lana Stanton drives to the Detroit Police Department to report that she had been shot at by "3 white boys" that she believed were trying to kill her (T2 99-100, 124).

Responding To Dispatch:

A) In an under-cover vehicle and in plain civilian clothes, Detroit Police Officer Kimberly Rata and her partner Ernest Harris began to search for 3 white males in the area, located three suspects and called for a set up of a perimeter on the area.

i.) Officer Ernest Harris states he announced himself and his partner as police officers. (T3 38).

ii.) Officer Kimberly Rata states she never heard her partner say anything other than radio communication with other officers. (T3 66-67).

B) Officer Metcalf (a officer apart of the perimeter) finds Defendant Bozeman hiding in a tree and orders him down Defendant complies, as he states: "don't shoot me, I've been watching the news and you kill people."

C) The Defendant was then identified as a black male, placed under

arrest by officer Michael Holeman (Officer Metcalf's partner) and then he "pat down/searched the person of the Defendant; revealing no weapons or evidence of involvement in the crime at large. Still to be taken into detention for further investigation without probable cause. see attached Arrest Reports of Officer Kimberly Dewey-Rate and Office Michael Holeman.

Complainant's Statements:

A) Between 11:30am and 12:10pm (11/30/2014), all 3 Complainants of this case made statements with the Detroit Police Department with matching descriptions of the assailants that committed this crime: "3 white males, dressed in dark colored clothes". see attached Police Statements by Thomas Jackson, Lana Stanton and Starkeisha West.

i.) At trial identifying the Defendant, Starkeisha West changes her description of her assailants, states her assailant was a black male with crossed eyes. West never mentions this black male with crossed eyes in any of her previous testimony or statements with police, also was unable to identify Mr. Bozeman from the photo array of black males (T2 170,174-185). see also attached Interrogation Record, conducted by C.A.T.S Detective Dana Russell. (one-on-one evaluation of Defendant, [direct attention to "eye defects" Section]; confirming that Defendant is not cross eyed)).

B) At this point Defendant Bozeman had been in Detroit Police Department's custody for 9 hours without probable cause. Compare attached Arrest Report - Detainee Input Sheet (direct attention to "date/military time of arrest" Section) to time statements were given with police.

Photographic Array:

A) Between 4:42pm and 5:09pm (11/30/2014), Detroit Police Officer Terry Cross-Nelson produced and conducted a photographic array for all 3 Complaints made up of 6 **BLACK** males containing a picture of Defendant Bozeman: despite the detailed descriptions given to the police of: "3 **WHITE** males in dark colored cloths."

B) Thomas Jackson then identifies Defendant (a black male) as an assailant, inconsistent with his very detailed description he gave just hours before. see. attached Photo Array Report (Thomas Jackson).

C) Lana Stanton and Starkeisha West were unable to identify Defendant Bozeman in this array. see. attached Photo Array Report (Lana Stanton and Starkeisha West).

i.) Lana Stanton admits on top of being scared of the crime she also was scared of a particular officer at the photo array that made her not want to participate in the photographic procedure. see. attached Preliminary Exam Transcript pages 101 line: 15-25 and 102 line: 1-11.

ii.) Lana Stanton furthermore admits she was not scared enough to stop her from deliberately picking the wrong person in the photo array pertaining to Defendant's co-defendant (her only photo identification made). see. attached Preliminary Exam Transcript pg. 102 line: 12-19.

D) This photographic array procedure conducted on (11/30/2014) for all 3 Complainants was performed while Defendant was in-custody of the Detroit Police Department, 2 of the 3 without counsel present. see. attached Detainee Input Sheet,(direct attention to "date/military time of arrest" Section). see also. attached Photo Array Report for Thomas Jackson, Lana Stanton and Starkeisha West,

(direct attention to "date", "time" and "others present" Sections).

Preliminary Examination:

A) At Preliminary Lana Stanton admits she was shown photographs of the Defendant for a second time (the day of Preliminary) by an unknown officer before giving her Preliminary testimony. see attached Preliminary Exam Transcript pages 80 line: 11-25, and 81 line: 1-2. Stanton recants this admission at trial. (T2 121-122).

ISSUE I

Defendant - Bozeman was denied Constitutional protections when he was illegally arrested as it was warrantless and without probable cause; and the identification evidence and testimony presented at trial that stems from the arrest are fruits of a poisonous tree.

Standard Of Review:

Once a trial judge has found that the prosecutor has met the burden of establishing probable cause for a warrantless arrest, his decision will be reversed only if it constitutes an abuse of discretion. People V. Langston, 57 Mich. App. 666, at 673, 674 (1975). People V. Thatcher, 83 Mich. App. 527, 529, 269 NW2d 210 (1978).

This Court reviews de novo a question of constitutional law. People V. Smith, 498 Mich. 466, 475 (2015)("A due process violation presents a constitutional question that this Court reviews de novo").

Argument:

A) "A police officer who has received by radio the details of the commission of a felony, including a description of the perpetrators has probable cause to arrest persons MATCHING that description who are traveling on a possible escape route from the scene of the crime shortly after it's commission." People V. Knight, 41 Mich. App. 293 (1972), accord: People V. Scott, 23 Mich. App. 568, 570 (1970), MCL 764.15 (f).

Probable cause as defined by the 6th Circuit:

Reasonable grounds for belief, supported by less than

prima facie proof but more than mere Suspicion." United States V. Padro, 52 F. 3d 120, 122-123 (6th Cir. 1995)(quoting U.S. V. Bennett, 905 F. 2d 931, 934 (6th Cir. 1990)).

B)In Defendant-Bozeman's case, he did not fit the description of the assailants both by clothes and even a completely different race. People V. Davenport, 99 Mich. App. 687 (1980)(Court held no probable cause for the arrest due to a description given by phone to the police of a Suspicious man that did not exactly match defendant's appearance).

C)The only rise to Suspicion was Defendant's alleged flight from Officer Kimberly Rata and Ernest Harris who were both in plain clothes, traveling in an under-cover (civilian) vehicle.

i. Flight alone is insufficient probable cause for an arrest. People V. Dogans, 26 Mich. App. 411 (1970), United States V. Green, 670 F. 2d 1148 (1981).

ii. According to the arresting officer's reports, the most descriptive one, given by Officer Rata, is very clear on several very important points concerning the fact that probable cause was not established for the arrest of Defendant-Bozeman. 1. Once the Defendant was found in the yard, he was identified as a black male by Officer Rata and other arresting officers (not fitting the description of the perpetrators at large); 2. Defendant was then placed in hand cuffs and consequently searched without result/or evidence linking the Defendant to the crime (the terms "without incident" are used to describe the search and arrest in other police officer's reports/statement); 3. The yard the Defendant was found and arrested in was then searched, as well as the waste baskets therein, by Officer Rata, with no results of evidence linking the Defendant to the crime; 4. At that point the Defendant was taken to the detention center by arresting officer Holeman and his partner Officer Metcalf (See attached arrest report of Officer Michael Holeman); 5. Officer Rata then proceeds to the next house, searching the yard with no results, then proceeds to the next house, after searching the front and rear yard with no results, She then inters the abandoned home and finds a white male in the interior of the home and arrests him; 6. Officer Rata then returns to the yard the Defendant was found and arrested in and re-searches the yard and same waste baskets she did before, but this time She finds four hand held firearms placed inside the waste basket, on top of the trash inside, in plain sight (See People's exhibits of admitted photographs, showing location and position firearms where found), on this secondary search other officers of the team

find gloves in the yard (at this point the Defendant had been arrested and taken to the detention center approximately 30-45 minutes ago). See attached arrest report of Officer Kimberly Rata.

iii. Probable cause for an warrantless arrest can only be established on the information known to the peace officer or his office at the time of the arrest. People V. La Grange, 40 Mich. App. 342 (1972), People V. Stewart, 232 Mich. 670 (1925), United States V. Brown, 448 F. 3d 239 (2006), Terry V. Ohio, 392 U.S. 1 (1968)(When probable cause is the question, the Courts must consider only "the facts available to the officer at the moment of the seizure.")

iv. After the arrest a Terry "pat down" was proformed revealing no signs of criminal involvement or weapons of any kind. Terry V. Ohio, 392 U.S. 1 (1968). After evaluating the dual factor discrepency in description between the perpetrators at large and Mr. Bozeman (race and clothes), in addition to the fact that there were no firearms recovered to be used to establish probable cause for an arrest, if the officers involved were still dissatisfied the widely practiced procedure shown in United States V. Brown, 448 F. 3d at 243 (2006), being bring the victim to their location so he or she could identify Mr. Bozeman as a suspect or not; should have been the next step but this step was never taken by the Detroit Police force and Mr. Bozeman was still transported to the Detroit Detention Center.

V. In Mr. Bozeman's detention he was photographed and this picture was used in a photo array procedure that was conducted the same day as Defendant's arrest, and complainant Thomas Jackson (one of the three complainants), identified Mr. Bozeman (a black male); inconsistent with his two previous descriptions given hours before this photo array procedure. (in particular pertaining to "race", his two prior descriptions matched, being "three white males"). United States, V. Crews, 445 U.S. 463 (1980) (Court granted motion for Suppression of pretrial photographic identification evidence on grounds of the photograph used in the pretrial photo array was a direct result of an unlawful detention because the arrest lacked probable cause).

Identifications must be "rationally based upon the preception of the witness;" [one of 4 points that must be met before admission]. State V. Lawson, 352 Or. 724, 291 P.3d 673 (2012). "The fairness of the identification procedure must be evaluated in the light of the totality of the circumstances. The test is the degree of suggestion inherent in the manner in which the suspect's photograph is presented to the witness for identification. See United States V. Zeiler, Supra, 1308" [U.S. V. Zeiler, 427 F.2d 1305, 1307 (CA. 3, 1970)]. People V. Lee, 391 Mich. 618 (1974); People V. Anderson, 389 Mich. 155, 215-220 (1973). "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." Simmons V. United States, 390 U.S. 377, 384 (1968).

"Moreover,'[i]t is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purpose be determined there and then, before the trial.' " United States V. Wade, 388 U.S. 218 (1967).

D) Defendant - Bozeman's arrest and consequent photographic array procedure violated Michigan Constitution of 1963 Article I Section 2 as it applies to "equal protection of the law" and discrimination "against... race, color", Article I Section 11 as it applies to "The person... shall be secure from unreasonable searches and seizures", Article I Section 17 as it applies to "due process of law"; and U.S. Constitution Amendment 4 as it applies to "The right of the people to be secure in their persons,... against unreasonable Searches and Seizures", Amendment 5 as it applies to "due process of law" [criminal actions], Amendment 14 as it applies to "due process of law" and "equal protection of the law" [privileges of citizens].

• All evidence obtained in violation of the U.S. Const. 4th Amendment is, by that same authority inadmissible in State court. Mapp V. Ohio, 367 U.S. 643 (1961), reh denied 368 U.S. 871 (The Court held that the due process clause of the fourteenth amendment extended to the State the fourth amendment right against unreasonable Searches and Seizures).

• If the identification was the fruit of a fourth Amendment violation, it must be suppressed. Dunaway V. New York, 442 U.S. 200; 99 S. Ct. 2248; 60 L. Ed. 2d 824 (1979).

• Beck V. Ohio, 379 U.S. 89; 85 S. Ct. 223 (1964), 'If good faith alone were the test, the protection of the 4th Amendment would evaporate, and the people would be "Secure in their person, houses, papers, and effects" only in the discretion of the police.' The probable cause test, then, is an objective one; for there to be probable cause, the facts must be such as would warrent a belief by a "reasonable man." [Emphasis Added].

•United States V. Green, 670 F.2d 1148 (1981), This Court has held that flight is not a "reliable indicator of guilt without other circumstances to make its import less ambiguous." Hinton V. United States, 137 U.S. App. D.C. 388; 424 F.2d 876, 879 (D.C. Cir. 1969)(Foot-note omitted). Of course, "when coupled with Specific knowledge on the part of the officer relating the Suspect to the evidence of the crime, (flight or evasion) may properly be considered in assessing probable cause," Hinton V. United States, 424 F.2d 879 (foot note omitted) (quoting Sibron V. New York, 392 U.S. 40, 66; 88 S.Ct. 1889, 1904; 20 L. Ed. 2d 917 (1968)), but flight alone is insufficient to give the police probable cause to arrest.

•An arrest for investigatory purposes illegal. People V. Martin, 94 Mich. App. 649 (1980); Also See Illinois, V. Brown, 422 U.S. 590 (1975)(If Miranda warning, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the 4th Amendment violation, the effect

of the "exclusionary rule" would be substantially diluted.

•Young V. Conway, 698 F.3d 69 (2d Cir. 2012), cert. denied, 134 S.Ct. 20 (2013) (in-court identification should have been suppressed along with lineup identification as fruits of unconstitutional arrest without probable cause).

•Silverthorne Lumber V. United States, 251 U.S. 385 (1920), relying upon the premise that the Government should not be able to reap the benefits of it's own wrongdoing, declared that once an impermissible police action is discovered and proven, the "exclusionary rule" will apply and will operate to suppress the primary evidence as well as all derivative evidence obtained as "fruits of a poisonous tree." * also applied by State courts. People V. Eckhardt, 761 N.Y.S.2d 338 (3d Dept. 2003).

ISSUE II

Both the Defense and Appellate counsels for Defendant-Bozeman were ineffective for failing to investigate and present in motion or brief to the courts the above claims.

Standard Of Review:

The performance of counsel claims are mixed questions of law and fact that are reviewed de novo. Strickland V. Washington, 466 U.S. 668 (1984)(defendant must show: (1.) counsel's performance was deficient, and (2.) the deficient performance prejudiced the defense.).

Argument:

Both counsel's performances fell below an objective Standard of reasonableness; this performance was crippling to the Defendant, and highly prejudicial. Strickland V. Washington, 466 U.S. 668, 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984)(Counsel has a duty to investigate all leads relevant to the merits of the case). Dickerson V. Bagley, 453 F. 3d 690 (6th Cir. 2006)(Court held Strategic decisions made after less than

complete investigation did not pass muster as an excuse since a full investigation would have revealed a large body of mitigating evidence); Wiggens V. Smith, 539 U.S. 510, 537; 123 S. Ct. 2527; 156 L.Ed. 2d 471 (2003)(The prejudice prong is Stisfied if "there is reasonable probability that at least one juror would have struck a different Ballance" if the errors in question were excluded from trial). The ineffective assistance of both counsels Defendant-Bozeman received deprived him of his Michigan Constitution of 1963 Article I Section 20 rights as it applies to "the right to... assistance of counsel for his or her defense" and "to have Such reasonable assistance as may be necessary to perfect and prosecute an appeal."; and U.S. Constitution Amendment 6 right as it applies to "the right to... have the assistance of counsel for his defense."

A) Defense counsel was ineffective for failure to move for Suppression of pretrial photographic identification from complainant Thomas Jackson on grounds of the identification being a direct "fruit" of an illegal arrest in violation of Defendant's State and Federal Constitution protections.

•Gentry V. Sevier, 597 F. 3d 838 (7th Cir. 2010)(Courts held counsel ineffective in "failing to move to Suppress or object to the admission of evidence" on 4th Amendment grounds).

•Grumbley V. Burt, 591 Fed. Appx. 488 (6th Cir. 2015)(trial counsel was "ineffective for failing to move to Suppress evidence illegally Seized from Grumbley's home"; "we cannot know what Grumbley's trial counsel's reasons were for not filing a motion to Suppress... [but] it is difficult to conceive of a legitimate trial Strategy or tactical advantage to be gained by not filing a motion to Suppress").

B) Appellate counsel was ineffective for failure to bring the above issues forth on direct appeal; as they are stronger than the claims raised.

• Showers V. Beard, 635 F. 3d 625 (3d Cir. 2011)(Appellate counsel failed to raise meritorious chellenge of trial counsel's ineffectiveness, thereby "ignoring an argument going directly to the issue of guilt that is 'clearly stronger than those presented.'")

• Joshua V. Dewitt, 341 F. 3d 430 (6th Cir. 2003)(Appellant's counsel was ineffective in failing to raise 4th Amendment issue which, although not litigated at trial level, could have been raised on appeal as plain error).

•White-V. Roper, 2004 U.S. Dist. lexis 29076 (Trial counsel was ineffective for failing to chellenge a suggestive pretrial identification, appellate counsel was ineffective for failing to appeal in-court identifications of Defendant).

•Henderson V. Palmer, 730 F.3d 554 (2013)(Courts held where habeas petitioner's appellate counsel was ineffective for failing to raise errors of trial counsel on direct appeal a "petitioner has cause for his error [of failing to raise claims on direct appeal] because it was a direct result of ineffective assistance of appellate counsel." quoting Williams V. Anderson, 460 F.3d 789, 799-800 (6th Cir. 2006).

ISSUE III

Petitioner was denied his State and Federal constitutional rights to a fair trial by the trial judge, who permitted witness against co-defendant Lepper only to testify in the presence of Petitioner's separate jury.

Issue Presevation and Standard of Review

The prosecutor's motion was brought under MRE 404(b) (which is identical to FRE 404(b)), and the issue was preserved by the objection of all three counsel to the admission of the testimony. (T1 5-10). The 6th Circuit Courts generally reviews evidentiary issues for abuse of discretion but there is an "on going dispute in this circuit concerning the proper standard of review of rule 404(b) evidence." United States v. Carter, 779 F.3d 623, 625 (6th Cir. 2015). Sometimes, this court will: (1) review for clear error the district court's determination that prior acts took place; (2) apply de novo review to a district court's determination that the evidence was offered for a permissible purpose; (3) and review for abuse of discretion the determination that the probative value of 404(b) evidence is not substantially outweighed by unfair prejudice. See, e.g. United States v. Mack, 729 F.3d 594, 601 (6th Cir. 2013); United States v. Clay, 667 F.3d 689, 693 (6th Cir. 2012); United States v. Geisen, 612 F.3d 471, 495 (6th Cir. 2010). Other times this court has applied a single-tier abuse of discretion standard. See, e.g., United States v. Jenkins, 593 F.3d 480, 484 (6th Cir. 2010); United States v. Allen, 619 F.3d 518, 524 n.2 (6th

Cir. 2010) (noting that this circuit has "repudiated the threetiered standard if review for 404(b) determinations in light of Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); United States v. Haywood, 280 F.3d 715, 720 (6th Cir. 2002).

Discussion

Petitioner was tried simultaneously with co-defendant Lepper and Diepenhost. Petitioner and Diepenhorst were tried before one jury. Lepper was tried before a separate jury. On the first day if trial, before selection of the Petitioner/Diepenhorst jury, the People brought a motion to endorse John Wikenson, who is Lepper's uncle. Wilkenson was the owner of the Desert Eagle handgun, one of the weapons believed to have been used in the commission of the offenses and which was found near the area where Lepper was arrested. Although the People did not seek to admit evidence that Wilkinson suspected Lepper as the person who stole the weapon, they did request and were permitted to introduce evidence that the weapon was reported stolen or was taken without permission and that Lepper is Wilkinson's nephew. (T1 5-10). The record also reflects that Lepper has a reputation within his family of being known to steal. Although separate juries were seated, and Lepper was tried by a separate jury, Wilkinson testified before both juries. (T4 5-19).

As a result, Lepper's prior bad act was introduced in the presence of Petitioner's jury, and the trial judge deprived Petitioner of his due process right to a fair trial by failing to completely sever Petitioner's trial from Lepper's trial.

Wilkinson never states he knows or has ever seen Petitioner before. Furthermore, there is nothing that supports Petitioner had knowledge of or access to Wilkinson's home at any point, where the gun was stored. This deprivation entitles Petitioner to a new trial.

The Constitutional rights to a jury trial and to due process entitle the accused to fair trial. US Const. Am. V, VI, XIV: Mich. Const. 1963, art. 1 Sec. 17, 20. An accused may be denied his Constitutional right to a fair trial where his case is not severed from that of a co-defendant who seeks to exculpate himself or herself by incriminating the accused. United States v. Potashnik, 2008 U.S. Dist. Lexis 102299. While the decision to sever or join defendants for trial rest within trial court's discretion, severance is mandated when a defendant's "substantial rights will be prejudiced" and that severance is necessary to rectify the potential prejudice. Wright v. Jamrog, 2005 U.S. Dist. Lexis 35902. Although inconsistency among the co-defendants' defenses is insufficient to justify severance, severance is required where the defenses are mutually exclusive or irrecocilable. United States v. Turner, 860 F. Supp. 1216 (1994).

Examples of reversible prejudice from severance include situations in which evidence is admitted against a co-defendant that the defendant's jury should not consider against him and which would not be admissible if he were tried separately. Evidence of a co-defendant's wrongdoing is an example of information the defendant's jury should not hear. It can

erroneously lead the accused's jury to conclude that he was guilty. Zafiro v. United States, 506 U.S. 534 (1993). Where defendants with markedly different degrees of culpability are tried together, the risk of unfair prejudice is greater. Zafiro, supra.

Admission of evidence which is probative of defendant's guilt, but is admissible only against a co-defendant or exclusion of exculpatory evidence which could have been admitted at a separate trial are also examples of reversible prejudice resulting from improper denial of a severance request. Bruton v. United States, 391 U.S. 123 (1968). Another consequence of the partially-joined trials was that Lepper's unchanged bad acts involving his uncle's gun were admitted before Petitioner's jury, and Petitioner's jurors were thus exposed to evidence which had absolutely no relevance to Petitioner. The other acts evidence, which involved Lepper's possession of his uncle's stolen handgun, completely undermined the whole reason for granting separate juries in the first place. Had Wilkinson testified only before the Lepper jury, Petitioner would not have been judged by the independent acts of his co-defendant, which were completely irrelevant to the disposition of the charges as they related to Petitioner.

Improper evidentiary rulings may deprive the accused of his State and Federal due process rights. Walker v. Engle, 703 F.2d 959, 962-963 (C.A. 6, 1983). In Holly v. Straub, 2004 U.S. Dist. Lexis 15646 (6th Eastern Dist.), the court for the Eastern District of Michigan recognizes the test in People v.

Golochowicz, 413 Mich. 298 (1982) as "principle of justice so rooted in the tradition and conscience for our people as to be ranked as fundamental"; Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (quoting Patterson v. New York, 432 U.S. 197 (1997)). In other words, a violation of principles of justice that are rooted in tradition to the point that they are ranked fundamental, rises to the level of a due process violation. The very first requirement of the Golochowicz four prong test is: "(1) there is substantial evidence that the defendant committed the similar act." Here in Petitioner's case, there is nothing on the record that even hints at Petitioner participating in stealing Wilkinson's gun or having knowledge of the theft.

The Supreme Court, in Huddleston v. United States, 485 U.S. 681, 689 (1988), while articulating it's view on the "Similar act" and "other" rule 404(b), concluded that the government may not "parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo". Proof connecting the defendant to the prior bad acts is required for the evidence to be relevant. United States v. Mihm, 13 F.3d 1200, 1205, (8th Cir. 1994), United States v. Midkiff, 614 F.3d 431 (2010).

The 6th Circuit Court of Appeals reversed with instructions for a new trial, relying on the ruling of the Supreme Court in Huddleston, supra., holding that the "first step that the district court must engage in under the Fed. R. Evid. 404(b)

analysis is to determine whether there is sufficient evidence to show that the defendant committed the other acts ... In the rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor". United States v. Bell, 516 F.3d 432 (2008).

In United States v. Sheppard, 2020 U.S. Dist. Lexis 111524, (granting relief): the court found even if the evidence was probative of a material issue, the probative value is substantially outweighed by the potential prejudicial effect. "Unfair prejudice does not mean the damage to defendant's case that results from legitimate probative force of the evidence; rather it refers to evidence which tends to suggest 'a' decision on an improper basis." United States v. Newsom, 452 F.3d 593, 603 (6th Cir. 2006) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). "Such improper grounds include generalizing a defendant's earlier bad acts into bad character and taking that as raising the odds that he did the latter bad act now charged ..." United States v. Bell, 516 F.3d 432, 445 (6th Cir. 2008) (quoting Old Chief v. United States, 519 U.S. 172, 180-182 (1997)).

Unfortunately at Petitioner's trial, the prosecutor was permitted to admit acts by co-defendant Lepper, which implicated Petitioner by association with Lepper. This evidence was absolutely irrelevant to Petitioner's guilt or innocence and was therefore, inadmissible. The evidence which was permitted despite the partial severance and completely prejudiced

Petitioner's defense. Its devastatingly incriminating impact can hardly be ignored. Because Petitioner's jury heard of Lepper's other bad acts, and they were destined to convict Petitioner without a properly objective view of the evidence. Its prejudicial impact on the trial's outcome cannot be disregarded. The irrelevant evidence undoubtedly had a great influence on Petitioner's jury. Because the evidence only related to acts by Lepper it was improperly admitted. Its admission requires reversal of Petitioner's conviction and a new trial.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant Dan Larkin Bozeman II prays this Honorable Court reverse and vacate his convictions based on the multiple law enforcement misconducts displayed on the face of, and throughout this case that violated his constitutional rights and ultimately tainted the only evidence used against him (misidentification evidence). Alternatively reverse and remand for new trial, with instruction to exclude all photographic and in-court identifications, that a justfying independant recollection is lacking, and/or has been illegally tainted, on retrial.

Dan Bozeman II

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Dated: 6/20/25