STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
BOONSTRA (PRESIDING), HOEKSTRA, SAAD

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ERIC BECK,
Defendant-Appellant.

MSC No.
COA No. 321806

Circuit Court No. 13-039031-FC

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Table of Contents

Index of Authorities

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

I. Order Appealed From

Appellant, Eric Beck, appeals from a judgment of sentence for felony firearm and felon in possession entered in the Saginaw County Circuit Court, the Honorable James T. Borchard presiding, on May 1, 2014. Mr. Beck timely requested an appeal on May 1, 2014. A claim of appeal was filed on May 15, 2014.

The Court of Appeals remanded for resentencing but otherwise affirmed in an Opinion dated November 17, 2015. *See* COA Opinion.

II. Relief Sought

Mr. Beck prays that this Court remand for resentencing within the applicable guidelines range, with direction to not consider acquitted conduct.

III. Questions Presented for Review

1. Were Mr. Beck's Sixth Amendment jury trial rights violated when the judge erroneously found that Mr. Beck had committed the crime for which he had been acquitted, where the evidence did not satisfy even the preponderance of the evidence standard.

2. Did the trial court err in not identifying sufficient reasons for departure.

3. Mr. Beck's Sixth and Fourteenth Amendment rights were violated by judicial fact finding that increased the floor of the permissible sentence by using acquitted conduct to justify the sentence.

4. Whether this case should be reassigned to a different judge because the sentencing judge cannot reasonably be expected to set aside previously expressed views.

IV. Reasons to Grant Leave

The court rules state that this Court should consider granting leave where "the issue involves a legal principle of major significance to the state's jurisprudence " and "in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice". MCR 7.305(B)(3) & (5).

Mr. Beck was charged with murder and acquitted. Nevertheless, the trial court expressly sentenced Mr. Beck for the murder, departing from the guidelines by finding that Mr. Beck committed the murder that the jury acquitted him of.

There is a long line of Michigan cases that hold that sentencing contrary to a jury's finding is improper. The Court of Appeals did not address these cases in its Opinion but cited to other cases that permit such sentencing. In other words, there is some conflict in the case law (although Mr. Beck suggests that the majori8ty and better line of reasoning is in his favor) but the Court of Appeals did not acknowledge or address it.

Further, as discussed in a footnote below, federal case law has a similar split in its treatment of this issue – a line of cases pemitting the practice, and many cases criticizing it.

Given the recent case law in *Blakely* and *Alleyne* (among others) and this Court's holding in *Lockridge* all putting certain boundaries on judicial fact-finding, it is important

for this Court to consider and decide how these limits on judicial fact-finding, the sentencing guidelines, and a defendant's right to a jury trial intersect when a defendant is acquitted of one or more charges by a jury.

V. Statement of Facts

Mr. Beck was convicted by jury trial in Saginaw County Circuit Court of Felon in Possession and Felony Firearm 2nd, the Hon. James T. Borchard presiding. Mr. Beck was acquitted of Open Murder and some lesser offenses, including associated Felony Firearm charges.

Despite the acquittal, the trial court sentenced Mr. Beck to an upward departure sentence based on its finding that Mr. Beck, in fact, committed the murder in question.

The case against Mr. Beck was based on (1) the fact of the death by criminal agency (gunshot wound) of Hoshea Pruitt. There was substantial testimony about, for instance, the autopsy and the crime scene investigation, although none of it provided any forensic evidence that linked Mr. Beck to the crime and none of it was really in dispute. (2) The testimony of Jamira Calais, who testified to driving by the crime scene, where she witnessed a group of men on the street, a shooting, and a man fleeing the scene. But she could not identify anyone involved. (3) Because she died prior to trial, the preliminary examination testimony of Mary Loyd Deal, in which Ms. Deal testified from a gurney, in substantial pain. She identified Mr. Beck as the shooter, but had multiple problems with her testimony: she had limited prior contact with Mr. Beck (she was able to identify him because she saw his picture on her niece's phone); she claimed to have seen Mr. Beck do the shooting, but at other times denied it and testified that she was in the kitchen and

only heard the shots. The case rested, then, on the fac t of the death and the shaky identification of a witness who was ill at the time of her testimony and had died by the time of trial. The jury acquitted of the murder charge.

The first witness was Saginaw Ofc. Lamar Kashat. 1/29/14 T 139. Around 11:30 pm on June 11, 2013, he responded to the shooting of Hoshea Pruitt. 1/29/14 T 140-42. Mr. Pruitt was taken away by medical personnel. 1/29/14 T 142. There were bystanders, but no one he identified as a suspect. 1/29/14 T 142-43. Therte was a bicycle at the scene, but he was not sure if it had a motor. 1/29/14 T 144.

The next witness was Saginaw Ofc. Michael Schrems. 1/29/14 T 145. He also responded to the scene. 1/29/14 T 146. He taped off the area, and then followed the ambulance to the morgue, where the Mr. Pruitt died. 1/29/14 T 147-78.He did not see a woman named Loyd Deal at the scene. 1/29/14 T 148.

The next witness was James Vondette, who was a Saginaw crime scene tech. 1/29/14 T 149. He described processing the scene. One item in particular at the scene was a smashed cell phone. 1/29/14 T 153. He did not try to identify the cel phone; he just bagged it. 1/29/14 T 156. He also seized a non-motorized dirt bike. 1/29/14 T 154. There was no identification on the bike. 1/29/14 T 156. He seized a t-shirt that was in a pool of blood. 1/29/14 T 155. He also seized a bullet that was smashed a little. 1/29/14 T 144. He did not find a weapon or shell casings. 1/29/14 T 155.

The next witness was Saginaw Officer Anthony Teneyuque. 1/29/14 T 158. He met with a potential witness the night of the shooting, Janira Calais. 1/29/14 T 159. Later, he took her to the police station to give a statement to the detectives. 1/29/14 T 160.

The next witness was Kanu Virani, the medical examinaer for Saginawe County. 1/29/14 T 161. Mr. Pruitt dies of multiplem gunshot wounds. 1/29/14 T 163.

The next witness was Jamira Calais. 1/29/14 T 177. She was driving by the scene when it happened. 1/29/14 T 177-79. She saw a man in a white shirt get shot three or four times and a man in a black shirt run across the street afterwards. 1/29/14 T 182. She did not know either man. 1/29/14 T 182. She saw the man in the black shirt with a gun. 1/29/14 T 182. As the man in the balck shirt ran by, she ducked and backed up her car, then she called the police. 1/29/14 T 184. She did not get a good look at the person in the black shirt and could not identify him. 1/29/14 T 185.She described him as African-American, late 30's. medium hiehgt, and well built. 1/29/14 T`186.

When she was stopped and witnessed the shooting, she was behind a turquoise car with both its reverse lights and brake lights on. 1/29/14 T 189. Nut the car was backing up a bit, enough that she honked the horn at it because she thought it was going to hit her. 1/29/14 T 189. She did not see anyone get into or out of the car. 1/29/14 T 190. There were more than just the men in the white and black shirts outside; including them, there were at least three to four people. 1/29/14 T 191. The shots happened with three seconds,

and she believed they came from one person. 1/29/14 T 191-92. She described the shooter as a darker-skinner African American man. 1/29/14 T 193.

The next witness was Saginaw Ofc. Dan Hernandez. 1/29/14 T 194. He was one of the first officers on the scene. 1/29/14 T 196. He did not see Mr. Beck at the scene. 1/29/14 T 199. He found a broken cell phone and a bike. 1/29/14 T 198. He did not find any weapons. 1/29/14 T 198. He did not determine who owned either item. 1/29/14 T 200. He found no evidence tying Br. Beck to the scene. 1/29/14 T 200. He spoke to Ms. Deal at the scene (whose house the incident happened in front of) and she said she heard three or four shots, looked out the window, and saw the decedent on the ground. 1/29/14 T 200-01.

The next witness was the Deputy Director for the 911 system, Barry Nelson. 1/30/14 T 5. The call was played. 1/30/14 T 8. He identified the 911 call from that night as coming from Jamira Calais. 1/30/14 T 8. Ms. Deal also made two calls to 911 that night. 1/30/14 T 9-19. There was a stipulation that asll the 911 calls came in at about the same time (11:39 pm). 1/30/14 T 19-20.

The next witness was a Aaron Fuse, an inmate with a current case and his brother is Mr. Beck's stepbrother. 1/30/14 T 21-23. He received a plea deal for his testimony. 1/30/14 T 22. A couple days after Pruitt was killed, he got a call froim Mr. Beck. 1/30/14 T 26. Mr. Beck said he had done something really stupid and wrong, but was never specific

about what he did. 1/30/14 T 26. Mr. Beck said he got into an argument over a girl and he did it. 1/30/14 T 27-28. Mr. Beck never said he murdered Pruitt. 1/30/14 T 32. Fuse has previous fraud convictions. 1/30/14 T 30. He was not friends with Mr. Beck and never did anything with him, yet Mr. Beck made this phone call to him. 1/30/14 T 31-32. He did not have his call history. 1/30/14 T 34-35. He at first denied that Mr. Beck admitted to shooting anyone, then agreed that he previously testified that he had. 1/30/14 T 35.

The next witness was Mary Loyd Deal, whose preliminary exam testimony was played because she had died by the time of trial. 1/30/14 T 50. On June 11, 2013, she was at home around 10:30 pm with Hoshea Pruitt, Rajeana Drain and her son. PE 8-9. Mr. Beck came over. PE 9. She did not know him. PE 9. Mr. Beck and Pruitt got into an argument, and Rajeana told Pruitt to leave. PE 9. They got into a fight, and she saw Mr. Beck shoot Pruitt. PE 10-11. She maintained that Mr. Beck shot Pruitt, but her testimony was inconsistent about the details of the night. PE 12-36.

The next witness was Saginaw Detective Brian Oberle. 1/30/14 T 69. The bicycle and cell phone at the scene were Pruitt's. 1/30/14 T 70. No weapon was recovered. 1/30/14 T 71. He interviewed Loyd Deal, and she said she was afraid to be seen talking to the police. 1/30/14 T 72-73. He met with her about noon the next day to take her statement. 1/30/14 T 74. She was a little bit better able to speak at that time than at the time of the preliminary exam. 1/30/14 T 74-76.

VI. Argument

VI.A Mr. Beck is entitled to be resentenced, where the reasons given for departing from the guidelines were not reasonable, were adequately accounted for in the scoring of the sentencing guidelines, where the evidence did not satisfy even the preponderance of the evidence standard, and where the purported reason for the departure was rejected by the jury in its verdict of acquittal. Additionally, reassignment is warranted upon remand, where the sentencing judge cannot reasonably be expected to set aside previously expressed views.

Standard of Review and Issue Preservation

There is no requirement that a defendant object to a sentence that does not fall within the sentencing guidelines range. *People v Smith*, 482 Mich 292, 300 (2008).

The trial court must consider the "highly relevant" sentencing guidelines range at the time of sentencing. *People v Lockridge,* ___ Mich ___ (Docket No. 149073, 7/29/15), slip op at 28. While the guidelines range is advisory and the court may sentence above or below the range, the trial court must "justify" the sentence imposed. *Id.* at 29. The advisory guidelines range helps to further the legislative goal of avoiding "excessive sentencing disparities while maintaining flexibility to individualize sentences where necessary." *Id.*

On appeal, the sentence is reviewed for "reasonableness." *Id.* at 2, 29. "Resentencing will be required when a sentence is determined to be unreasonable." *Id.* at 29.

In the federal system, review for reasonableness has two parts. There is review for

procedural reasonableness which considers whether the sentencing guidelines range was correctly determined, whether the trial court relied on inaccurate facts, whether the trial judge sufficiently explained the sentence, and whether the court properly considered the factors under 18 USC § 3553(a). *Gall v United States,* 552 US 38, 51 (2007). Review for substantive reasonableness encompasses review under the abuse of discretion standard where the totality of the circumstances is considered and the extent of the deviation is relevant. *Id.*

In Michigan, the abuse of discretion standard recognizes that there may be "more than one reasonable and principled outcome," but an abuse occurs "when the trial court chooses an outcome falling outside this principled range of outcomes." *People v Babcock,* 469 Mich 260, 269 (2006).

Mr. Beck also requests that resentencing take place before a different judge. This issue is properly raised for the first time before the appellate court. In general, legal questions are decided *de novo*. *People v Doxey*, 263 Mich App 115, 118; 687 NW2d 360 (2004).

Discussion

General Legal Principles. There is no question but that a defendant is entitled as a matter of due process to be sentenced on the basis of only legally and factually correct information. US Const, Am XIV; Const 1963, art 1, § 17; see *Townsend v Burke*, 334 US 736

(1948); *People v Lee*, 391 Mich 618 (1974); *People v Malkowski*, 385 Mich 244 (1971). Sentencing on the basis of inaccurate information results in an invalid sentence; a court may always correct an invalid sentence. *People v Miles*, 454 Mich 90, 96 (1997).

A departure cannot be based on "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). Thus, if factors are already taken into account by the sentencing guidelines unless such a finding is placed on the record at sentencing. See also, *People v Jackson*, 474 Mich 996 (2006) [case remanded for resentencing where trial court did not make complete and proper findings pursuant to *Babcock*]. Defendant has correctly presented this claim by way of an application for leave to appeal. *People v Kimble*, 470 Mich 305, 310-311 (2004).

The federal guidelines have been advisory, pursuant to *United States v Booker*, *supra*, for several years, and the appellate courts accordingly review sentences for reasonableness. When imposing sentence, the federal district courts start by applying the factors delineated in 18 USC 3553(a). Those factors include the following:

> (a) Factors To Be Considered in Imposing a Sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994
(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any

> amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and
>
> (B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced. [1]
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

Subsection 3553(a)(6) is concerned with national disparities among the many defendants with similar criminal backgrounds convicted of similar criminal conduct. *See United States v Poynter*, 495 F3d 349, 351-56 (CA 6, 2007); *United States v LaSalle*, 948 F2d 215, 218 (CA 6, 1991); *United States v Parker*, 912 F2d 156, 158 (CA 6, 1990); *United States v Simmons*, 501 F3d 620, 623 (CA 6 2007).

In *Gall v United States, supra*, the Supreme Court made clear that reasonableness review is a two-step process in which the courts of appeals first consider procedural reasonableness by determining whether the sentencing court correctly determined the guideline range, properly considered the §3553(a) factors, and sufficiently explained the

sentence imposed; and then consider the substantive reasonableness of the sentence. The first step is "to ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." "Assuming that the district court's sentencing decision is procedurally sound, the appellate court," as a second step, should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard," taking into account "the totality of the circumstances."

The Court in *Gall* also addressed whether the standard of review is heightened depending on how far outside the guideline range the sentence falls. The Court stated that it is "clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." If a court chooses a sentence outside the guideline range, the court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance" and must provide an explanation sufficient "to allow for meaningful appellate review and to promote the perception of fair sentencing."

> If [the sentencing judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the

> deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. *Gall, supra* at 50.

Furthermore when a judge varies in a "mine-run case" based "solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations,'" closer review may be in order. As the Court acknowledged in *United States v Castillo*, 695 F3d 672 (CA 7, 2012), "the farther the judge's sentence departs from the guidelines . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer to enable the court of appeals to assess the reasonableness of the sentence imposed."

Some appellate courts have faulted sentencing courts for failing to explain why it is not imposing a certain sentence proposed by either the government or the defendant. For example, in *United States v Hall*, 610 F3d 727, 745 (DC Cir. 2010), the District of Columbia Circuit reversed a within range sentence where, among other things, "the district court did not explain why, in view of the factors in 18 U.S.C. § 3553(a), a sentence of 188 months was necessary, much less why the lower sentence that Hall requested would be insufficient.

Defendant's Sentence Is Unreasonable

The trial court made the following statements regarding the departure: (1) A sentence within the guidelines would not be proportionate to the seriousness of

Defendant's conduct or criminal history. 5/1/14 T 11. The trial court later in the hearing denied that he departed based on Defendant's previous conviction for murder or felon in possession, but reaffirmed the seriousness of the offense justification. 5/1/14 T 15. (2) Mr. Beck's total OV score was 125 points, which exceeded the maximum necessary for the highest range by 50 points. 5/1/14 T 11-12. (3) Mr. Beck had a prior murder conviction to which he pled guilty. He was discharged from parole in 2007. In 2010, he was convicted of felon in possession. And again in 2013, the current offense: possession of a firearm at a murder scene. 5/1/14 T 12. Again, later in the hearing, the trial court denied relying on Mr. Beck's criminal history. 5/1/14 T 15. (4) By a preponderance of the evidence, the trial court found that Mr. Beck committed the murder for which he had been acquitted. 5/1/14 T 12-13.

When these statements are reviewed closely, one realizes that there are really just two justifications identified by the court, explained in different ways: the seriousness of the offense and the seriousness of Mr. Beck's criminal history. Later, the trial court denies relying on Mr. Beck's criminal history (or at least his prior murder and felon in possession convictions, which are the significant convictions in Mr. Beck's history).

Therefore, when the trial court's justification is boiled down to its essence, it is a reliance on the "seriousness of the offense," which means, simply, that the trial court found that Mr. Beck committed the murder and departed because of this finding.

As explained in the summary paragraph at the beginning of the summary of facts,

this was a weak case that relied on two things: (1) bare evidence of the fact of a crime, and (2) a shaky identification from an ill witness who died before trial. **To fully understand and review this issue, Mr. Beck asks that this Court read in its entirety Ms. Loyd Deal's preliminary exam testimony.** *See* Attached Excerpt. It is only upon reviewing this testimony that this Court can make an educated review of the trial court's finding that this testimony met the standard for finding Mr. Beck guilty of murder.

For the reasons that seem apparent that the jury did not find Ms. Deal's testimony, sufficient under a reasonable doubt standard, the testimony is also insufficient under a preponderance standard. Ms. Deal did make the bare assertion that she saw Mr. Beck shoot the decedent. But her testimony, when taken as a whole, is not reliable, and this Court is tasked with assessing its reliability where the trial court made its own factual findings. This is not a situation where this Court is second-guessing *the jury*; rather, this Court is righting the evidentiary ship that the trial court overturned by interfering in the jury's fact-finding role.

The Trial Court's Reasons for Departing from the Guidelines Were Not Reasonable. The trial court based its departure on its opinion that Mr. Beck was guilty of more than the crime for which he was convicted.

"A trial judge is not entitled to make an independent finding of a defendant's guilt on another charge and assert that as a basis justifying sentence, especially where a defendant was found not guilty of that charge." *People v Glover*, 154 Mich App 22, 45

(1986) (*overruled on other grounds by People v Hawthorne,* 474 Mich 174 (2006)) (citing *People v Grimmett*, 388 Mich 590, 608 (1972)). Several Michigan courts have found that a trial court abuses its discretion when it departs from the guidelines for a manslaughter conviction based on its belief that the defendant was guilty of first- or second-degree murder. *See, e.g.*, *People v Fortson*, 202 Mich App 13, 21 (1993); *Glover*, 154 Mich App at 45.

The defendant in *People v Glover*, 154 Mich App 22 (1986), was charged with first-degree murder and convicted by a jury of voluntary manslaughter. The Court of Appeals held that the trial court's notation on the SIR that it was departing from the judicial guidelines and imposing a sentence of 10 to 15 years because the crime was "too cold and deliberate," amounted to an impermissible finding of guilt on an offense of which the jury had acquitted defendant. While other reasons for the sentence were stated on the record, the court found that they could not justify or override the improper explanation and granted resentencing.[1]

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[1] While federal case law has generally permitted the use of acquitted conduct, many cases have recognized the problem reconciling this rule with the jury trial right. *See*, *e.g.*, *United States v Ibanga*, 271 F App'x 298, 300 (CA4, 2008) (finding that the use of acquitted conduct at sentencing "makes the constitutional guarantee of a right to a jury trial quite hollow") (internal quotations omitted). While the Fourth Circuit did not disagree or question the analysis of the lower court, it emphasized that it was bound by Supreme Court precedent that this conduct may be used. Id. at 301; see also *United States v Settles*, 530 F3d 920, 924 (DC Cir 2008); *United States v Baylor*, 97 F3d 542, 549-50 (DC Cir 1996) ("As a result [of the sentence enhancement], [the defendant's] base offense level and his ultimate sentence were exactly the same as they would have been had the jury found him guilty, instead of acquitting him, on the [more serious charge]. There is something fundamentally wrong with such a result.... [T]o my mind the use of acquitted conduct in an identical fashion with convicted conduct in computing an offender's sentence leaves such a jagged scar on our

The court in *People v Spalla*, 147 Mich App 722 (1985), held that the defendant must be resentenced because, after the defendant's first-degree murder conviction was reduced to second-degree murder due to insufficient evidence, the trial court's imposition of a life sentence at resentencing and the judge's comments indicated that the court was sentencing defendant on the assumption he was actually guilty of first-degree murder.

In *People v Forston*, 202 Mich App 13 (1993), the court held that the defendant was entitled to a resentencing where the trial court erred in making an independent finding that he was guilty of first-degree premeditated murder, in order to justify a ten- to fifteen-year sentence, in direct contravention of the jury's verdict of voluntary manslaughter. *See also People v Massenburg*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 22, 1998 (Docket No. 199244) (trial court improperly made an independent finding

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constitutional complexion that periodically its presence must be highlighted and reevaluated in the hopes that someone will eventually pay attention, either through a grant of certiorari to resolve the circuit split, or a revision of the guidelines by the Sentencing Commission, or a legislation to bar such a result ...."). Megan Sterback, Getting Time For An Acquitted Crime: The Unconstitutional Use Of Acquitted Conduct At Sentencing And New York's Call For Change, 26 Touro L Rev 1223, 1249 (2011)

United States v Watts, 519 US 148 (1997) acknowledged that there is some disagreement among circuit courts about whether a sentence, like this one, that is based almost entirely on acquitted conduct, violates due process when the district court applies a preponderance of the evidence standard rather than requiring clear and convincing evidence. Compare, e.g., *United States v Hopper*, 177 F3d 824, 833 (CA9, 1999) (requiring clear and convincing proof where the use of acquitted conduct results in a seven-level adjustment to the defendant's Guidelines range), with *United States v Ward*, 190 F3d 483, 492 (CA6, 1999) (holding that a district court may find acquitted conduct by a preponderance of the evidence).

of guilt of murder and erred in sentencing defendant based on that finding after defendant acquitted of murder); *People v Prince*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 28, 1997 (Docket No. 186979) (judge improperly considered defendant guilty of first-degree murder where jury acquitted of first-degree and found defendant guilty of second-degree murder); *People v Rivers*, 147 Mich App 56 (1985) (resentencing required where trial court's comments came "dangerously close" to suggesting that defendant was being sentenced for the CSC counts of which he had been acquitted); *People v Gendron*, 144 Mich App 509 (1985) (where defendant acquitted of armed robbery and convicted only of unarmed robbery, judge's characterization of offense as armed robbery amounted to an independent finding of guilt which entitled defendant to resentencing).

The trial court's comments in the instant case, and its intentional imposition of a long term-of-years' sentence, make it clear that the court considered Mr. Beck guilty of murder, an offense for which he was acquitted. In the instant case, the jury specifically considered and rejected the charge of open murder. By substituting its own judgment about the appropriate verdict for that of the jury, the trial court impermissibly based its departure on findings rejected by the jury. Resentencing is required.

Second, the facts of the case do not justify a departure under the rule of *Lockridge*. The loss of a life is always a tragedy. But the evidence linking Mr. Beck to the death was whisper-thin and insufficient, as the jury recognized. There were no aggravating factors

to the death, as this Court has seen in so many other criminal death cases; it was a distressing shooting, to be sure, but did not have any hallmarks of the sort of predatory conduct or torture seen in other criminal assaults that come before this Court. The conduct of the shooter (not Mr. Beck) is not extraordinary within the continuum of conduct encompassed by that offense. The law already accounts for Mr. Beck's crime by establishing a sentencing guidelines range for an enhanced sentence for a 2nd Felony Firearm sentence and the habitualization of his Felon in Possession guidelines range. If these two convictions were exceptional and would justify a "reasonable" departure, then "reasonableness" "acquire[s] a meaning that would allow trial judges to regularly use broad discretion to deviate from the statutory minimum," exactly what the Michigan legislature sought to avoid by enacting the sentencing guidelines and what this Court sought to avoid by "*Booker*-izing" the guidelines. *People v Fields*, 448 Mich 58, 68 (1995).

Mr. Beck's sentencing violated the Sixth and Fourteenth Amendments to the United States Constitution because the Court engaged in judicial fact-finding that increased the floor of the range of permissible sentence in violation of the rule of *Alleyne v United States*, 133 S Ct 2151 (2013); US Const Amends VI & XIV and related case law by using conduct for which Mr. Beck had been acquitted.

The Sixth and Fourteenth Amendments constrain judges from finding facts which increase either the floor or the ceiling of the range of permissible sentences based on acquitted conduct.

Because none of the trial court's reasons for departure are reasonable and because they violate his constitutional rights regarding sentencing and jury trial rights, Mr. Beck is entitled to resentencing without the use of acquitted conduct. Additionally, the error here requires resentencing before a different judge. *People v Evans*, 156 Mich App 68, 71-72 (1986).

VII. Relief Requested

Mr. Beck prays that this Court remand for resentencing within the applicable guidelines range, with direction to not consider acquitted conduct. Mr. Beck further requests remand to a different judge.

Respectfully submitted,
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Dated: January 3, 2016