STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

ERIC LAMONTEE BECK **No. 152934**
Defendant-Appellant.

L.C. 13-039031-FC
COA No. 321806

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

A sentencing court must calculate the guidelines and consider the resulting range as a relevant factor in reaching a proportionate sentence, but the range is only advisory. An out-of-guidelines sentence is reviewed for an abuse of discretion under a standard of reasonableness informed by the principle of proportionality, but there is no presumption that such a sentence is unreasonable. Did the trial judge abuse his discretion in considering conduct for which defendant had been acquitted in determining a proportionate sentence for the offense of conviction?

Amicus answers NO

Statement of Facts

Amicus concurs in the facts as stated by the People of the State of Michigan.

Argument

I.

A sentencing court must calculate the guidelines and consider the resulting range as a relevant factor in reaching a proportionate sentence, but the range is only advisory. An out-of-guidelines sentence is reviewed for an abuse of discretion under a standard of reasonableness informed by the principle of proportionality, but there is no presumption that such a sentence is unreasonable. The trial judge did not abuse his discretion in considering conduct for which defendant had been acquitted in determining a proportionate sentence for the offense of conviction.

Introduction

A. The Court's questions and the answers of amicus

This Court in its order directing supplemental briefing and oral argument on the application specified that to be addressed are

- the appropriate basis for distinguishing between permissible trial court consideration of acquitted conduct, and an impermissible "independent finding of defendant's guilt" by a trial court on an acquitted charge; and

- whether the trial court abused its discretion by departing from the guidelines range, where the jury acquitted the defendant of murder, but the court departed based on its finding by a preponderance of the evidence that the defendant had perpetrated the killing.[1]

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[1] *People v. Beck*, __Mich.__, 2018 WL 2089626 (2018). As to the first question, the Court cited to several authorities: to be addressed is "the appropriate basis for distinguishing between permissible trial court consideration of acquitted conduct, see *People v Ewing (After Remand)*, 435 Mich 443, 451-452 (1990) (opinion by BRICKLEY, J.); *id.* at 473 (opinion by BOYLE, J.); see also *United States v Watts*, 519 US 148 (1997), and an impermissible "independent finding of defendant's guilt" by a trial court on an acquitted charge, see *People v Grimmett*, 388 Mich 590, 608 (1972), overruled on other grounds by *People v White*, 390 Mich 245, 258 (1973); see also *People v Fortson*, 202 Mich App 13, 21 (1993)."

Amicus answers that:

- There is no basis to distinguish between permissible trial court consideration of acquitted conduct, and an impermissible "independent finding of defendant's guilt" by a trial court on an acquitted charge. The trial judge *necessarily* makes an "independent finding of guilt," though by a lesser standard of proof, when considering acquitted conduct in establishing an appropriate sentence; this is also true as to conduct that is the subject of a pending charge or has never been charged criminally. What is prohibited is an independent *assumption* of guilt without proof or a finding.

- Whether a trial court abused its discretion in determining a reasonable sentence, one "proportionate *to the seriousness of the circumstances surrounding the offense and the offender,*" "is not measured by reference to deviation from the guidelines," and so it can never be said that a trial court "abused its discretion by departing from the guidelines range."[2] Rather, an appellate court is to "engage in reasonableness review for an abuse of discretion informed by the 'principle of proportionality'" standard. The question is whether the sentence imposed, for the reasons stated, which here include the trial judge's finding by a preponderance of the evidence that the defendant had perpetrated the killing, constitutes an abuse of discretion; that is, whether it is a sentence outside the range of principled outcomes, one which "no reasonable sentencing court would have imposed on that particular defendant for the reasons the sentencing court provided."

B. Some issues of terminology: "departure sentences," and "enhanced sentences"

1. A sentence that is not within the legislative guidelines is best described as an "out-of-guidelines sentence" rather than a "departure sentence"

This Court has altered the legislative sentencing scheme so that the guidelines are now advisory rather than mandatory. It remains the case that they must be scored, and are to be taken

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[2] Amicus continues to believe that *People v. Lockridge*, infra, was wrongly decided, and that stability in sentencing review would be enhanced, and disparity in sentencing reduced, by its reconsideration, particularly given that the Court of Appeals continues to review out-of-guidelines sentences by reference to deviation from the guidelines and whether the out-of-guidelines sentence is "more proportionate" than would be a guidelines sentence, see infra. And even this Court's reference here not to whether the sentence is within the range of principled outcomes—that is, reasonable given the offense and offender—but whether the trial court "abused its discretion by departing from the guidelines" does not demonstrate complete commitment to *Lockridge* and *People v. Steanhouse*, infra.

"into account when imposing a sentence,"[3] but they do not form a "baseline"—a presumptive sentence range from which a sentencing court must justify departure—or else the guidelines are not truly advisory; rather, *Lockridge* and *Steanhouse* would simply have changed the standard of review for an out-of-guidelines sentence from review of the substantial and compelling reasons for the departure given by the sentencing court, to review of the reasons given by the trial judge for the departure under a standard of reasonableness informed by the principle of proportionality. But this Court has explicitly disclaimed any presumption that a sentence that is outside the guidelines is unreasonable, and rightly so. That the fact that the guidelines are advisory means that there *is no* presumption against an out-of-guidelines sentence was made clear by this Court in meeting concerns expressed by the *Masroor*[4] panel in the Court of Appeals, a companion to *Steanhouse* in this Court, that a "proportionality test cannot be reconciled with *Gall v. United States*."[5] In *Gall*, the United States Supreme Court rejected any requirement that deviations from the guidelines range be justified in proportion to the extent of the deviation, or that the sentencing court must justify a sentence outside the guidelines by articulating "extraordinary" circumstances, as these approaches would "'come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.'"[6] This Court found no such problem in the principle of proportionality that informs the appellate court's review of the trial judge's exercise of sentencing

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[3] *People v. Lockridge*, 498 Mich. 358, 392 (2015).

[4] *People v. Masroor*, 313 Mich. App. 358 (2015).

[5] *People v. Steanhouse*, 500 Mich. at 473. *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

[6] Id.

discretion to sentence outside the guidelines in Michigan, because the "Michigan principle of proportionality . . . *does not create such an impermissible presumption*."[7] And it does not precisely because "[r]ather than *impermissibly measuring proportionality by reference to deviations from the guidelines*, our principle of proportionality requires 'sentences imposed by the trial court to be proportionate *to the seriousness of the circumstances surrounding the offense and the offender*.'"[8] The concern of the *Masroor* panel that "dicta in our proportionality cases could be read to have 'urg[ed] that the guidelines should almost always control,' thus creating a problem similar to that identified in *Gall,*"[9] was thus obviated. Dicta so suggesting was consequently disavowed, including the notion that "departure sentences should 'alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme'" as "inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness for out-of-guidelines sentences."[10] The bottom line for this Court was that, as it had said in *Lockridge*, "the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion' that trial courts "'must consult'" and "'take . . . into account when sentencing,'" but the "'the key test is whether the sentence is proportionate to the

[7] Id. (emphasis supplied).

[8] Id. (emphasis supplied).

[9] Id.

[10] Id.

seriousness of the matter, *not whether it departs from or adheres to the guidelines, 'recommended range*.'"[11]

Because, then, the reasonableness of a sentence that is not within the guidelines is not measured "by reference to deviations from the guidelines," to call a sentence that is not within the guidelines a "departure sentence," though understandable, is misleading, as, the guidelines being but a highly relevant consideration in sentencing, a sentence that is not within them is not a departure from a norm. The reason to distinguish a sentence that falls within the guidelines range from one that falls without it is because the former is not subject to review for its length for reasonableness, the legislature having set these sentences beyond appellate review for other than consideration of inappropriate material,[12] and this Court in *Lockridge* having specifically limited reasonableness review to sentences not within the guidelines.[13] To avoid the suggestion that a sentencing judge who takes into account the guidelines as a factor in sentencing, and then imposes a sentence that is not within the guidelines range, has therefore departed from a presumptive norm, and that an appellate

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[11] Id. (emphasis supplied). The Court of Appeals has fallen into the error of treating an out-of-guidelines sentence as presumptively unreasonable, as that court requires a showing that an out-of-guidelines sentence is "more proportionate" than would be a guidelines sentence, and thus *"impermissibly measur[es] proportionality by reference to deviations from the guidelines*." See *People v. Dixon-Bey*, 321 Mich. App 490 (2017) ("the trial court did not adequately explain why a minimum sentence of 35 years was more proportionate than a different sentence within the guidelines would have been"), MOA grtd, *People v. Dixon-Bey*, No. 156746, 2018 WL 2089665 (2018); *People v. Steanhouse (On Remand)*, 322 Mich. App. 323 (2017), application held in abeyance, *People v. Steanhouse*, No. 156900, 2018 WL 2089661 (2018).

[12] MCL § 769.34(10). See amicus brief of the Prosecuting Attorneys Association of Michigan in *People v. Ames*, 908 N.W.2d 303, 304 (2018), order granting MOA, arguing that unless a sentence within the guidelines somehow constitutes cruel and unusual punishment under the Constitution, the legislature is free to preclude appellate review of a guidelines sentence.

[13] "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v. Lockridge*, 498 Mich. at 392.

court reviews for appropriate justifications for the departure rather than the reasonableness of the sentence under an abuse of discretion standard[14] informed by the principle of proportionality, amicus suggests that these sentences be denominated "out-of-guidelines sentences," whether above or below the guidelines, rather than "departure sentences," and will use that description here. And after all, this Court used that term in *Steanhouse*.[15]

2. A judge making findings of fact in determining what minimum sentence to impose within a statutory range is not "enhancing" the sentence, but *determining* it, considering matters of mitigation and aggravation as to the offense and the offender

There is no question that in determining the appropriate sentence *within* a legislatively-authorized range a trial court may find facts in aggravation, and that these are not elements that must be submitted to a jury for a finding beyond a reasonable doubt. *Alleyne* itself, on which this Court's decision in *Lockridge* is founded, makes the point pellucidly clear:

> [W]e take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad

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[14] See e.g. *People v. Smith*, 482 Mich. 292, 316 (2008) under the mandatory-guidelines scheme ("When a trial court renders a departure sentence, Michigan appellate courts must review whether the court abused its discretion in concluding that extraordinary circumstances justified it"), and "the judge abused his discretion because he imposed a departure sentence without adequately justifying the extent of the departure," 482 Mich. at 317. But justifying the extent of the departure is no longer the test, though *Smith* and this language continues to be cited by the Court of Appeals as it disregards *Steanhouse* and *"impermissibly measur[es] proportionality by reference to deviations from the guidelines*." See e.g. *People v. Steanhouse (On Remand)*, supra ("the trial court's articulation of the reasons for imposing a departure sentence must explain how the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *People v. Smith*.").

[15] "We agree that such dicta [that dicta from *Milbourn* being disavowed by the Court] are inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness *for out-of-guidelines sentences*. . . and so we disavow those dicta." *People v. Steanhouse*, 500 Mich. at 474 (emphasis supplied).

> sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, e.g., *Dillon v. United States*, 560 U.S. ——, ——, 130 S.Ct. 2683, 2692, 177 L.Ed.2d 271 (2010) ("[W]ithin established limits[,] . . . the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi*, 530 U.S., at 481, 120 S.Ct. 2348 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute"). This position has firm historical roots as well. As Bishop explained:
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> > "[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be *influenced by matter shown in aggravation or mitigation*, not covered by the allegations of the indictment." Bishop § 85, at 54.[16]

"Enhancement" of a sentence is a legal term of art for when the statutorily authorized sentence it itself increased, and this may only be accomplished by the fact of a prior conviction,[17] or by a fact concerning the offense found by a jury, or judge at a bench trial, beyond a reasonable doubt, which is the teaching of the cases from the United States Supreme Court.[18]

Because the guidelines are not mandatory, judicial fact-finding in consideration of a sentence "proportionate to the seriousness of the circumstances surrounding the offense and the offender"

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[16] *Alleyne v. United States*, 570 U.S. 99, 116–117, 133 S. Ct. 2151, 2163, 186 L. Ed. 2d 314 (2013) (emphasis supplied).

[17] *Almendarez–Torres v. United States*, 523 U.S. 224, 246–247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). See e.g. *People v. Wilson*, 500 Mich. 521 (2017).

[18] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Booker v. United States*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Alleyne.*

does not "enhance" the sentence; rather, these facts are aggravating facts when the sentencing court makes the sentencing decision, and amicus will employ that term.

Discussion

A. Properly understood, *People v. Grimmett* disallows consideration of acquitted or uncharged conduct based on a sentencing judge's *assumption* of the defendant's guilt of that conduct, but conduct for which a defendant was acquitted may be considered as an aggravating fact in setting the sentence within the statutory range for the offense of conviction if found by the sentencing court by a preponderance of the evidence

In *People v. Grimmett*,[19] the owner of a small grocery store was killed during a robbery, and a customer wounded. Grimmett was convicted of manslaughter for the homicide, and at a separate trial was found guilty of assault with intent to murder for the shooting of the customer. He was sentenced to 14 years and 14 months[20] to 15 years for the homicide and life for the assault with intent to murder. The trial and sentencing for the assault took place before the conviction and sentence for the manslaughter, and at sentencing the trial judge took into account the homicide, saying that defendant was "certainly the same person who murdered the other grocer, Mr. Shaker Aubrey at the same time,"[21] though that case had not yet been tried. This Court found this improper because it constituted an "independent finding of defendant's guilt on the murder charge" where the trial judge had simply "assumed" defendant was guilty of the murder.[22] The Court cited no statute,

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[19] *People v. Grimmett*, 388 Mich. 590 (1972).

[20] The opinion so reads, but it appears likely it was meant to read "14 years, 11 months," as otherwise the minimum is not only greater than the maximum, but greater than that—15 years—allowed by law. *People v. Tanner*, limiting the minimum to 2/3 of the maximum, had not yet been decided.

[21] Id., at 607-608.

[22] "We believe the trial judge acted improperly in assuming defendant was guilty of the murder charge when he sentenced defendant on the assault charge." Id., at 608.

constitutional provision, or case authority for the proposition that the trial judge's consideration of the homicide of the grocer was improper, but appeared possibly to limit consideration at sentencing to "public records concerning the defendant, or even defendant's admissions to the court."[23] Justice Brennan dissented from the order for resentencing, saying that "The suggestion that a sentencing court may not delve beyond public records, previous convictions and open-court admissions, is a pernicious departure from our established practice."[24]

Then in *People v. Lee*[25] the defendant was convicted of robbery of a dry-cleaning store. The presentence report contained the fact that defendant had pending two indictments for armed robbery, and conspiracy to commit armed robbery; as in *Grimmett*, then, the defendant had not been convicted of these charges at the time of sentencing. In setting sentence, the trial judge took note of the pending indictments, sentencing defendant to 6-20 years. The Court held this proper, distinguishing *Grimmett* on the basis that "there is no evidence that the court *drew false inferences* from the presentence report, as in *People v. Grimmett* . . . .where the trial judge made an independent finding of defendant's guilt on another charge, in stating at the sentencing hearing that 'while (Grimmett) was tried for the shooting of Mr. Kubon, he is certainly the same person who murdered the other grocer . . . at the same time.' We will not sanction a judge's making *an assumption of guilt* of other

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[23] Id.

[24] Id., at 609-610.

[25] *People v. Lee*, 391 Mich. 618 (1974). See also *People v. Henry*, 395 Mich. 367, 378, (1975), where the Court said that "Of course, the defendant has the right to challenge or explain these pending charges," and again distinguished *Grimmett* on the ground that "There is no evidence on the record that . . . the court drew false inferences from the presentence report as in *People v. Grimmett*."

crimes on the basis of the presentence report."[26] It is difficult to discern the "false inference" drawn by the judge in *Grimmett*, or how the consideration of pending charges is not in some sense a belief that the defendant has in those matters engaged in criminal misconduct.[27] Then came *People v. Ewing*.[28]

In *Ewing* a pretrial hearing on the admissibility of other acts was held. Defendant was charged with the sexual assault of a seventeen-year old woman, and four other women testified at the hearing that Ewing had assaulted them in a similar manner. Their testimony was held admissible, and the trial judge took it into account at sentencing—though defendant had not been charged or convicted of those assaults—saying "it's obvious to me you have carried on a course of conduct involving attacks on young women over a period[] of five years." The Court of Appeals held that this constituted an independent finding of guilt of the other assaults, in violation of *Grimmett*.[29] Though this Court granted leave to appeal to determine whether the Court of Appeals misapplied *Grimmett*, the result was fractured, with four opinions issuing.

Justice Boyle, for herself and Justices Riley and Griffin, found that *Grimmett* unduly limited that which the trial court can consider in setting sentence: "In reaching the proper sentence, the court's inquiry is broad in scope, largely unlimited either by the kind of information that may be considered or the source from which it comes. To the extent that *Grimmett* appears to limit the trial

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[26] Id., at 638 (emphasis added).

[27] Later, this Court, citing *Grimmett*, said that a sentence may be invalid where the trial judge "improperly assumes a defendant's guilt of a charge which has not yet come to trial." *People v. Whalen*, 412 Mich. 166, 169–170 (1981).

[28] *People v. Ewing (After Remand)*, 435 Mich. 443 (1990).

[29] Id., at 467.

court's considerations in sentencing to 'previous convictions, public records concerning the defendant, or even defendant's admissions to the court,' it conflicts with both the general rule and the Court's own explanation that the sentencing judge has 'wide latitude' in imposing sentence."[30] Further, Justice Boyle took note of the "difficulty in drawing a distinction between *Lee* (the trial court may 'notice the existence of pending charges') and *Grimmett* (the trial court may not 'use unsupported assumption of guilt of other crimes as a factor' at sentencing)" that had "created a lack of consistency in the Court of Appeals decisions on this issue."[31] Justice Boyle "clarified" *Grimmett* and said that "any circumstance which aids the sentencing court's construction of a more complete and accurate picture of a defendant's background, history, or behavior is properly considered in individualizing the sentence to fit 'the offender and not merely the crime,'" and that properly understood *Grimmett* stood for "the general proposition that a sentence must be based on accurate information."[32] Justice Boyle also affirmed the rule that a sentencing factor need be proved only by a preponderance of the evidence, which encompasses facts regarding criminal acts, including "criminal activity of which the defendant has been acquitted, whether prior or subsequent to sentencing, so long as it satisfies the preponderance of the evidence test."[33]

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[30] Id., at 470.

[31] Id., at 471.

[32] Id., at 472. Justice Boyle repeatedly referred to *Grimmett* as having established that "unsupported assumptions of guilt cannot be made at sentencing." See id., at 462. See also id., at 467, 471.

[33] Id., at 473. Justice Boyle summed up: "In sum, a prior prosecution which does not result in a conviction, as well as criminal activity for which the defendant has not been prosecuted, may nevertheless reflect wrongful conduct that can be a proper consideration at sentencing, provided the defendant is given an adequate opportunity to rebut or explain. . . . Where the record of the trial or of the plea proceeding or the sentencing report contains evidence

Justice Brickley, writing for himself, supplied a fourth vote for the bulk of Justice Boyle's opinion, but disagreed with that opinion's conclusion that no remand was required to provide defendant a further opportunity to challenge the uncharged conduct:

> I believe that the trial judge was entitled to base his sentence not only on the defendant's prior conviction, but also on testimony concerning the underlying facts of the prior conviction, a pending charge, and an uncharged offense. The defendant, however, was denied his right to test the accuracy of these allegations regarding his conduct.[34]

Ewing is consistent with decisions from the federal courts, including the United States Supreme Court. In *United States v. Watts*[35] two panels of the 9th Circuit Court of Appeals had held that "sentencing courts could not consider conduct of the defendants underlying charges of which they had been acquitted."[36] In the case of Watts, he was convicted of a drug offense but acquitted of the offense of using a firearm in relation to a drug offense. In sentencing on the drug offense, the trial judge found by a preponderance of the evidence that defendant had in fact used the gun during the drug offense, and considered that conduct in sentencing on the drug offense. In the second consolidated case, the defendant was charged with two drug offenses, and acquitted of one, but the trial judge found that offense established by a preponderance of the evidence and considered it in sentencing on the offense of conviction.

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supporting a sentencing factor, 'the sentencing judge shall exercise discretion in deciding whether to entertain further proofs.'" Id., at 474-475. And in her view, "the testimony of each of the victims satisfied the preponderance of the evidence test." Id., at 476.

[34] Id., at 446.

[35] *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997).

[36] Id., 117 S. Ct. at 634.

Reversing the 9th Circuit, the Supreme Court found that consideration of the conduct for which the defendants had been acquitted was appropriate and permissible. The Court observed that before Congress had created the guidelines sentencing regime "it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,"[37] and that the "Guidelines did not alter this aspect of the sentencing court's discretion."[38] As a matter of constitutional law, the Court said,"consideration of information about the defendant's character and conduct at sentencing *does not result in 'punishment' for any offense other than the one of which the defendant was convicted*"; rather, the defendant is "punished only for the fact that the present offense was *carried out in a manner that warrants increased punishment*."[39] The 9th Circuit, the Court continued, had misunderstood the effect of an acquittal, because it had "failed to appreciate the significance of the different standards of proof that govern at trial and sentencing. We have explained that 'acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.' . . . Thus,. . . the jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty."[40] And so the Court concluded that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted

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[37] Id., at 635, citing *United States v. Donelson*, 695 F.2d 583, 590 (CA DC, 1982) (Scalia, J.).

[38] Id.

[39] Id., at 636 (emphasis added).

[40] Id., at 637.

charge, so long as that conduct has been proved by a preponderance of the evidence."[41] The federal circuits have, of course, followed *Watts*.[42]

There thus is no basis to distinguish between permissible trial court consideration of acquitted conduct, and an impermissible "independent finding of defendant's guilt" by a trial court on an acquitted charge. As said by Justice Boyle in *Ewing*, what *Grimmett* actually prohibits is an impermissible *assumption* of guilt. But the trial judge *necessarily* makes an "independent finding of guilt," though by a lesser standard of proof, when considering acquitted conduct in establishing an appropriate sentence; this is also true as to conduct that is the subject of a pending charge or has never been charged criminally, and this is perfectly permissible, and is what the trial judge did here.

B. The out-of-guidelines sentence here was within the range of principled outcomes when reviewed for reasonableness informed by the principle of proportionality, for the reasons given by the trial judge, including his finding by a preponderance of the evidence that defendant perpetrated the killing

1. The trial judge found, by a preponderance of the evidence, based on having heard the evidence at trial, that defendant committed the murder

The defendant here was acquitted of the most serious charge, murder, and convicted of felon in possession of a firearm, and felony-firearm. In determining an appropriate, proportionate, sentence for the offense of felon in possession, the trial judge said that "to sentence within the

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[41] Id., at 638.

[42] See e.g. *United States v. Alsante*, 812 F.3d 544, 550 (CA 6, 2016) ("our court, along with every other circuit to address the question, has approved the consideration of conduct for which a defendant was acquitted," citing cases); *United States v. Thurman*, 889 F.3d 356, 371 (CA 7, 2018). Defendant is simply incorrect in his argument that *Watts* is no longer good law; its statement that the defendant is *not* receiving punishment for any offense other than that of conviction when conduct for which defendant was acquitted is considered in sentencing on the offense of conviction forecloses that argument. And there is thus no basis under principles of stare decisis to reconsider *Ewing*.

guidelines would not be proportionate to the seriousness of the defendant's conduct or the seriousness of his criminal history":

> [The jury] could not find, beyond a reasonable doubt, that the defendant committed the homicide. But the Court certainly finds that there is a preponderance of the evidence that he did.
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> And I am not substituting my opinion for theirs. I am just bound by a different standard in this matter. And that is the reason for the Court's finding that, in fact, this gentleman, in my opinion, did kill the victim for no reason other than jealousy. But, at the very minimum, he was the only person seen at the scene with a weapon seconds prior. Two people hearing a shot, and another lady seeing a shoot by someone she couldn't identify. And, certainly, provided the weapon. But in the Court's opinion, he didn't just provide it, he actually was the person who perpetrated the killing. And I do find by a preponderance of the evidence that that has been shown. And I do consider that in going over the guidelines in this matter.
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> So for the fact that the guidelines don't properly—are so far out of scoring of 125, where 75 is the highest—but, more importantly, the fact that there was a death. And the Court finds by a preponderance of the evidence that this gentleman did shoot the victim.[43]

The court sentenced defendant to 20 to 33 1/3 years, or 240 to 400 months. The now advisory guidelines were calculated with a maximum-minimum of 72 months. Defendant, being sentenced as a fourth habitual offender, was subject under statute to a sentence of any term of years or life.[44]

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[43] ST, 11-14. The trial judge further discussed the evidence supporting the finding that defendant was responsible, by a preponderance of the evidence, for the homicide, and in determining the sentence noted also that the defendant "has a prior murder conviction on his record that he pled guilty to for which he served 13 years in prison. That was in 1991. He was discharged from parole in 2007. In 2010, only three years later, he pled no contest to a firearms, possession by a felon for which he received 252 days in jail. And then this charge, offense date was June 11, 2013 where, again, he is in possession of a firearm at a murder scene."

[44] MCL § 769.12(1)(b).

The Court of Appeals held that consideration of the acquitted conduct was proper, but remanded for a so-called "Crosby hearing," as the sentence given here was before this Court's decision in *Lockridge*. This Court ordered supplemental briefing and oral argument on defendant's application.

2. The out-of-guidelines sentence here was within the range of principled outcomes, and thus not an abuse of discretion

The rule of decision for a trial court in setting the sentence is that the trial court, taking into consideration all relevant material, including properly scored guidelines, is to set a proportionate sentence, one taking into account the seriousness of the offense and the characteristics of the offender.[45] The trial judge said here that "to sentence within the guidelines would not be proportionate to the seriousness of the defendant's conduct or the seriousness of his criminal history." There is no one proportionate sentence[46]; a reviewing court is to review an out-of-guidelines sentence "for an abuse of discretion, i.e., engage[] in reasonableness review for an abuse of discretion informed by the 'principle of proportionality' standard."[47] This Court has said that the Michigan standard of review for abuse of discretion in sentencing is identical to the federal

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[45] "The sticking point is the *rule of decision to be applied by the trial courts*: the principle of proportionality adopted by our opinion in *Milbourn*, or the federal statutory factors listed in 18 USC 3553(a). . . . little likely separates the two approaches in terms of the outcomes they would produce in a given case. But we affirm the *Steanhouse* panel's adoption of the *Milbourn* principle-of-proportionality test in light of its history in our jurisprudence." *People v. Steanhouse*, 500 Mich. 453, 471 (2017) (emphasis supplied).

[46] See *People v. Babcock*, 469 Mich. 247, 267 (2003) ("At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome").

[47] *People v. Steanhouse*, 500 Mich. at 476.

standard.[48] Both systems refer to a range of principled outcomes, which is further described by federal cases as meaning that the sentence imposed must be affirmed "unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the [sentencing] court provided."[49] An appellate court in Michigan, then, reviews for an abuse of discretion, applying the standard of reasonableness informed by the principle of proportionality, to determine whether no reasonable sentencing court would have imposed the sentence given for the reasons stated by the sentencing judge, understanding that "it is clear that the Legislature has imposed on the trial court the responsibility of making difficult decisions concerning criminal sentencing, largely on the basis of what has taken place in its direct observation."[50] If the review standard is not truly deferential, then the guidelines are also not genuinely advisory.[51]

The Court has asked whether the trial court "abused its discretion by departing from the guidelines range" where the court "departed based on its finding by a preponderance of the evidence that the defendant had perpetrated the killing." As amicus has argued, post-*Lockridge* it is not the departure that is reviewed but the sentence,[52] and for an abuse of discretion, applying the standard

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[48] See id., at 471, referring to the "the identical standard of review for appellate courts" in the two systems.

[49] *United States v. Tomko*, 562 F.3d 558, 568 (CA 3, 2009) (en banc).

[50] *People v. Babcock*, 469 Mich. at 268.

[51] See *United States v. Feemster*, 572 F.3d 455, 464 (CA 8, 2009) ("we agree with the D.C. Circuit that because the Guidelines are now advisory only, 'substantive appellate review in sentencing cases is narrow and deferential. As the case law in the courts of appeals since *Gall* demonstrates, it will be the unusual case when we reverse a district court sentence—whether within, above, or below the applicable Guidelines range—as substantively unreasonable.'" See also *United States v. Gardellini*, 545 F.3d 1089, 1090 (CA DC, 2008).

[52] And see the brief of amicus in *People v. Dixon-Bey*, supra, pending before the Court.

of reasonableness that is informed by the principle of proportionality. The trial judge properly and appropriately considered defendant's conduct in the homicide, finding, by a preponderance of the evidence, that he was responsible for it. The trial judge did not "enhance" the sentence by this finding beyond what otherwise would have been the statutory maximum, but considered it as an aggravating fact in setting sentence within the statutory range, and the trial judge was authorized by the fact of conviction to impose a sentence of any term of years up to life, given defendant's status as a fourth felony offender. The guidelines range is only a "highly relevant consideration" under *Lockridge* and *Steanhouse* because the guidelines are advisory only, and not a baseline or norm the departure from which the sentencing court must justify. The question is not whether the substantial departure from the top end of the guidelines was justified here, but whether the sentence of 240-400 months was within the range of principled outcomes, reviewing for its reasonableness informed by the principle of proportionality. Put another way, is the sentence one no other reasonable judge would impose for the reasons given? Amicus leaves explication of the exercise of discretion by the trial judge largely to the People, but would point out that the defendant was a fourth felony offender, and that the trial judge considered not only that he was, as found by a preponderance of evidence by the trial judge, responsible for his *second* homicide, but that defendant was "way over" the maximum of guidelines points at 125; that within 3 years of his release from prison for murder he was convicted of being a felon in possession of a firearm; that within another 3 years he committed the conduct for which he was convicted, again illegally possessing a firearm; and that the guidelines

were inadequate here to provide a proportionate sentence. The sentence given was not an abuse of discretion.[53]

[53] See *People v. Masroor (On Remand),* No. 322280, 2017 WL 5503777 (2018), where a sentence of 35 -50 years was found reasonable, and the guidelines top end was 15 years. Leave was denied by this Court. *People v. Masroor*, No. 157024-6, 2018 WL 2067499 (2018). Amicus must continue to emphasize that review is not for whether the deviation from the guidelines range was justified, as the guidelines are a highly relevant consideration, not a baseline or norm, with a sentence outside the guidelines presumed to be unreasonable, but for whether the sentence given was an abuse of discretion, reviewed for reasonableness informed by the principle of proportionality.

Coda

Justice Scalia's dissent from the denial of certiorari in *Jones v. United States*[54] has been cited in at least one unpublished Michigan Court of Appeals opinion,[55] though one pre-dating *Lockridge*. Justice Scalia took the view that a sentence that is only substantively reasonable on review *because* of a judge-found fact or facts is a violation of the Sixth Amendment. But the preferred remedy of Justice Scalia for his difficulty, a difficulty which has never been embraced by the Court,[56] and thus is not followed by the federal circuits,[57] is not to preclude judges from judicial fact-finding in sentencing, including considering conduct for which the defendant was acquitted, but to "eliminate the Sixth Amendment difficulty by acknowledging that *all sentences below the statutory maximum are substantively reasonable*." See *Marlowe v. United States*,[58] where Justice Scalia said, dissenting from the denial of certiorari, said that "For the reasons set forth in my separate opinion in *Rita v. United States* . . . (concurring in part and concurring in judgment), I believe that it is improper for courts to review for substantive reasonableness sentences that are within the statutory limits." In *Rita* Justice Scalia expressed the view that he "would limit reasonableness review to the sentencing procedures mandated by statute," eliminating what is known as review for "substantive

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[54] *Jones v. United States*, 574 U.S. —, 135 S.Ct. 8, 190 L. Ed. 2d 279 (2014) (Scalia, J., dissenting from denial of certiorari).

[55] *People v. Schwander*, No. 320768, 2015 WL 4488556, at 9 (2015), vacated, 501 Mich. 918, 903 N.W.2d 190, 2017 WL 5505881 (2017) (remanded for reconsideration in light of *Lockridge* and *Steanhouse*).

[56] See e.g. *United States v. Holton*, 873 F.3d 589, 591 (CA 7, 2017).

[57] *Jones v. United States*, supra (emphasis supplied).

[58] *Marlowe v. United States*, 555 U.S. 963, 129 S. Ct. 450, 451, 172 L. Ed. 2d 320 (2008) (Scalia, J., dissenting from denial of certiorari).

reasonableness" entirely, but leaving judges free to make findings of fact in determining an appropriate sentence.[59]

[59] *Rita v. United States*, 551 U.S. 338, 381, 127 S. Ct. 2456, 2482, 168 L. Ed. 2d 203 (2007) (Scalia, J., concurring in part).

Relief

Wherefore, amicus requests that this Court affirm that a trial judge may consider at sentencing conduct for which the defendant has been acquitted, and find that the sentence here was not an abuse of discretion.

Respectfully submitted,

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