**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN,**
**Plaintiff-Appellee,**

**v**

**ERIC LAMONTEE BECK,**
**Defendant-Appellant.**

_____/

**SUPREME COURT**
**No. 152934**

**COURT OF APPEALS**
**No. 321806**

**CIRCUIT COURT**
**No. 13-039031-FC**

# PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF PURSUANT TO MCR 7.305(H)(1)

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**II.** **In the case at bar, did the trial court permissibly consider relevant factors including acquitted conduct and find that a preponderance of the evidence supported its determination that the defendant-appellant was responsible for the victim's death, thereby justifying the sentence imposed? Did the trial court's imposition of sentence constitute a reasonable and principled outcome, and did the trial judge abuse his discretion?**

## KEY TO ABBREVIATIONS

The People use the following abbreviations in this brief:

1. "ST" refers to the Sentencing Transcript dated May 1, 2014.

## STATEMENT OF FACTS

On November 17, 2015, the Michigan Court of Appeals issued *People v Beck*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2015, (Docket No. 321806), Appendix #63a, affirming defendant's convictions, but for a hearing pursuant to *United States v Crosby*, 397 F3d 103 (CA 2 2005).

The Beck panel summarized the facts and trial court proceedings as follows:

> On June 11, 2013, Hoshea Pruitt was shot to death. Mary Loyd–Deal, a witness who died before trial, saw the shooting and identified defendant as the shooter in her preliminary examination testimony, which was presented to the jury. Loyd–Deal explained that defendant shot Pruitt after a verbal altercation about a woman named Rajeana Drain. The shooting was also witnessed by Jamira Calais. Although Calais could not identify defendant, she testified that she saw a man in a black shirt run across the street after a man in a white shirt was shot three or four times. She saw the man with the black shirt with a gun. The prosecution also presented testimony from Aaron Fuse, who testified that defendant called him a couple of days after Pruitt's death and told Fuse that he had done "something stupid" and shot someone while arguing about a woman.
>
> Defendant was charged with murder, carrying a dangerous weapon with unlawful intent, felon in possession of a firearm, and three counts of felony-firearm. As noted, the jury convicted defendant of felon in possession of a firearm and one count of felony-firearm, but returned a verdict of not guilty with respect to murder, carrying a dangerous weapon with unlawful intent, and the remaining two counts of felony-firearm. Defendant's recommended minimum sentencing range under the legislative guidelines as a fourth-habitual offender, MCL 769.12, was 22 to 76 months for felon in possession of a firearm. The trial court departed upward from this range and sentenced defendant to 240 to 400 months' imprisonment for felon in possession of a firearm, which was to be served consecutively to a 5 year sentence for felony-firearm. [*Beck*, unpub op at 1, Appendix #63a.]

On or about January 4, 2016, the defendant-appellant filed his application to this Honorable Court for leave to appeal the Michigan Court of Appeals decision. On or about September 6, 2016, this Court this matter be held in abeyance due to, "it appearing to this Court that the cases of *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8) are pending on appeal before this Court and that the decisions in those cases may

resolve an issue raised in the present application for leave to appeal." *People v Beck*, 884 NW2d 283 (Mich 2016).

On or about May 4, 2018, this Court ordered the parties to file supplemental briefs pursuant to MCR 7.305(H)(1). In that order, this Court instructed the parties to address:

> (1) the appropriate basis for distinguishing between permissible trial court consideration of acquitted conduct, see *People v. Ewing* (After Remand), 435 Mich. 443, 451-452, 458 N.W.2d 880 (1990) (opinion by Brickley, J.); *id*. at 473, 458 N.W.2d 880 (opinion by Boyle, J.); see also *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (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, 202 N.W.2d 278 (1972), overruled on other grounds by *People v. White*, 390 Mich. 245, 258, 212 N.W.2d 222 (1973); see also *People v. Fortson*, 202 Mich. App. 13, 21, 507 N.W.2d 763 (1993); and (2) 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. [*People v Beck*, 910 NW2d 298, 299 (Mich 2018).]

This supplemental brief follows, along with a stipulation to the use of the defendant-appellant's previously filed appendix.

## ARGUMENT I

**A trial court's permissible consideration of acquitted conduct at sentencing is predicated on the premise that, while the jury may not have been able to find a criminal defendant guilty beyond a reasonable doubt, an acquittal does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. Accordingly, a jury verdict in a criminal action does not exclude the possibility that a preponderance of the evidence could show that a defendant was engaged in the criminal conduct at issue. Conversely, a trial court makes an impermissible "independent finding of defendant's guilt" on an acquitted charge when, as in *People v Grimmett*, 388 Mich 590; 202 NW2d 278 (1972), that finding does not meet the preponderance of the evidence threshold where a defendant has been arrested and charged with a crime but, because those charges remain pending, has not been afforded his constitutional rights to a trial by jury, to confront his accusers, or to effective assistance of counsel and consequently has not been convicted or acquitted of that crime. See *Grimmett*, 388 Mich at 595-596. Therefore, the two scenarios presented by this Court are readily distinguishable inasmuch as the former is one of evidentiary distinction and the latter is one of constitutional protection.**

### A. STANDARD OF REVIEW

"A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). The trial court's findings of fact are reviewed for clear error, including "whether they are supported by a preponderance of the evidence." *People v Ackah–Essien*, 311 Mich App 13, 36; 874 NW2d 172 (2015). A court commits clear error "when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Appellate courts review de novo whether "the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute." *People v Hutcheson*, 308 Mich App 10, 13; 865 NW2d 44 (2014).

Currently, this Court reviews a trial court's imposition of sentence for a determination of reasonability. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015), cert den sub nom

*Michigan v Lockridge*, 136 S Ct 590; 193 L Ed 2d 487 (2015). In *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017), this Court, "reaffirm[ed] *Lockridge*'s remedial holding rendering the guidelines advisory in all applications." *Steanhouse*, 500 Mich at 466. However, "'Sentencing courts must . . . continue to consult the applicable guidelines range and take it into account when imposing a sentence . . . [and] justify the sentence imposed in order to facilitate appellate review.'" *Steanhouse*, 500 Mich at 470, quoting *Lockridge*, 498 Mich at 392.

This Court reviews the reasonableness of a trial court's sentencing decision using the abuse of discretion standard. *Steanhouse*, 500 Mich at 471. "'At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment.'" *People v Anderson*, 501 Mich 175, 189; 912 NW2d 503 (2018), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

This Court affirmed, "the *Steanhouse* panel's adoption of the *Milbourn* principle-of-proportionality test in light of its history in our jurisprudence." *Steanhouse*, 500 Mich at 471. Accordingly, under this standard of review, "'a given sentence [could] be said to constitute an abuse of discretion if that sentence violate[d] the principle of proportionality, which require[d] sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *People v Steanhouse*, 313 Mich App 1, 45; 880 NW2d 297 (2015), quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990) (bracketed alterations in *Steanhouse*).

## B. LEGAL STANDARDS

"'Acquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant.'" *United States v Bernard*, 757 F 2d 1439, 1444 (4th Cir 1985) (quoting *United States v Sweig*, 454 F 2d 181, 184 (2d Cir 1972). Even where guilt or acquittal hinges on the jury's decision on one element of the crime, it does not necessarily mean that the jury, as a whole, based the acquittal on a factual finding. *United States v Isom*, 886 F 2d 736, 738 (4th Cir 1989). "A verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence." *Id*. Accordingly, a jury needs only a reasonable doubt to acquit or it may have even returned its favorable verdict because of lenity. *Id*. See also *United States v Harris*, 701 F 2d 1095, 1103 (4th Cir), cert. denied, 463 US 1214, 103 S Ct 3554, 77 L Ed 2d 1400 (1983) (juries return inconsistent verdicts because they do not always speak their real conclusion).

A defendant has a "due process right to the use of accurate information at sentencing." *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991); MCL 771.14. However, MCR 6.425(A)(1)(b) provides that, "[p]rior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include . . . a complete description of the offense *and the circumstances surrounding it.*" MCR 6.425(A)(1)(b)(emphasis added).

"Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This, "court is not limited in determining sentence to consideration of only prior convictions, matters of public record, and admissions." *People v*

*Ewing*, 435 Mich 443, 473; 458 NW2d 880 (1990). "Uncharged criminal activity, and activity for which criminal charges are still pending, may be considered by the court, as may 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." *Id*.

Once a defendant has effectively challenged the scoring of a guideline, the prosecution must establish by a preponderance of the evidence that the facts are as the prosecution asserts. See *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987), abrogated on other grounds in *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997); *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), aff'd in part and vacated in part on other grounds, 469 Mich 415 (2003). If the record provides insufficient evidence for the trial court to base its decision supporting or opposing the scoring, the sentencing court must then decide whether to entertain further proofs. See *Perez*, 255 Mich App at 712. This decision lies within the discretion of the trial court. *Id*. The court may treat the contents of a presentence investigation report (PSIR) as presumptively accurate. *Walker*, 428 Mich at 267.

MRE 1101 provides, in relevant part, that:

> The rules other than those with respect to privileges do not apply in the following situations and proceedings:
>
> * * *
>
> (3) Miscellaneous Proceedings. Proceedings for extradition or rendition; sentencing or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. [MRE 1101(b)(3).]

## C. DISCUSSION

By way of this Court's May 4, 2018, Order the parties were instructed, in part, to address:

(1) the appropriate basis for distinguishing between permissible trial court

> consideration of acquitted conduct, see *People v. Ewing* (After Remand), 435 Mich. 443, 451-452, 458 N.W.2d 880 (1990) (opinion by Brickley, J.); *id*. at 473, 458 N.W.2d 880 (opinion by Boyle, J.); see also *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (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, 202 N.W.2d 278 (1972), overruled on other grounds by *People v. White*, 390 Mich. 245, 258, 212 N.W.2d 222 (1973); see also *People v. Fortson*, 202 Mich. App. 13, 21, 507 N.W.2d 763 (1993) . . .. [*Beck*, 910 NW2d at 299.]

It is well settled that the use of the preponderance of the evidence standard for sentencing decisions underpinning this Court's opinion in *Ewing* is a bedrock tenant of criminal juris prudence both in Michigan and throughout the country. Despite argument to the contrary, this principle is not been disavowed or otherwise overruled. Accordingly, to focus our analysis by simply relying on the longevity of *Ewing* would be to undertake the same endeavor as have so many before. Therefore, to truly elucidate the distinguishable nature of the question at hand, dwell therein we must not. Rather, light should be cast on the temporal vagaries of *Grimmett*, its misconstruction, its misconceptions, its constitutional significance, and the impetus underlying divergence from it.

In *People v Ewing* (After Remand), 435 Mich 443; 458 NW2d 880 (1990) (opinion by Brickley, J.), the defendant was charged with the sexual assault of a seventeen-year old woman. the trial court held a pretrial hearing pursuant to MRE 404(b). Four other women testified at the hearing that Ewing had assaulted them in a similar manner. Their testimony was deemed admissible and, despite the fact that the defendant had not been charged or convicted of those assaults, the trial judge considered those alleged assaults at sentencing. Specifically, the trial judge stated that "it's obvious to me you have carried on a course of conduct involving attacks on young women over a periods [sic] of five years." The Court of Appeals initially held that this constituted an independent finding of guilt of the other assaults, in violation of *People v*

*Grimmett*, 388 Mich 590; 202 NW2d 278 (1972), overruled on other grounds by *People v White*, 390 Mich 245, 258; 212 NW2d 222 (1973). *Ewing*, 435 Mich at 467. This Court granted leave to appeal to determine whether the Court of Appeals misapplied *Grimmett*. However, the bench split and issued four opinions.

Justice Boyle wrote for herself and Justices Riley and Griffin. She found that *Grimmett* excessively limited the information that the trial court can consider when sentencing a defendant, stating that:

> [i]n 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 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. [*Ewing*, 435 Mich at 470.]

Justice Boyle went on to note that 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)" had "created a lack of consistency in the Court of Appeals decisions on this issue." *Id*., at 471. Justice Boyle attempted to clarify *Grimmett* and wrote 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.'" *Id*., at 472, quoting *Williams v People of State of N.Y.*, 337 US 241, 247; 69 S Ct 1079, 1083; 93 L Ed 1337 (1949). Properly understood, Justice Boyle opined, *Grimmett* stood for "the general proposition that a sentence must be based on accurate information." *Ewing*, 435 Mich at 472. Justice Boyle also affirmed the rule that a sentencing factor must be established by a preponderance of the evidence, a standard that includes 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." *Id*., at 473.

Justice Brickley wrote for himself and delivered a fourth vote for the bulk of Justice Boyle's opinion. However, he disagreed with Justice Boyle's conclusion that no remand was required to provide defendant a further opportunity to challenge the uncharged conduct, stating that:

> 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. [*Ewing*, 435 Mich at 446.]

*Ewing* is also consistent with decisions from the federal courts. In *United States v Sweig*, 454 F 2d 181 (2d Cir 1972), the defendant was convicted on one count of perjury after a jury had acquitted him on fifteen counts. When sentencing the defendant, the district judge indicated that his decision was influenced in part by evidence admitted at trial on counts of which the defendant was acquitted. The Second Circuit upheld the sentence and stated that:

> A sentencing judge has very broad discretion in imposing any sentence within the statutory limits, and in exercising that discretion he may and should consider matters that would not be admissible at a trial.... However, just as the sentencing judge may rely upon information as to crimes with which the defendant has been charged but not tried, so here the judge could properly refer to the evidence introduced with respect to crimes of which defendant was acquitted. Acquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant. For all that appears in the record of the present case, the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved. In fact the kind of evidence here objected to may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn, since unlike hearsay, the evidence involved here was given under oath and was subject to cross-examination and the judge had the opportunity for personal observation of the witness. [*Sweig*, 454 F 2d at 183-184 (citations omitted).]

*Sweig* has been cited as controlling on this issue in every Federal Circuit where it has

been considered, including the 6th Circuit: See *United States v Salemi*, 46 F 3d 207, 210 (2d Cir 1995); *United States ex rel Goldberg v. Warden, Allenwood Fed*., 622 F 2d 60 (3d Cir.), cert. denied, 449 U S 871, 101 S Ct 210, 66 L Ed 2d 91 (1980); *United States v Isom*, 886 F 2d 736, 738 (4th Cir 1989); *United States v Bowdach*, 561 F 2d 1160, 1175–76 (5th Cir 1977); *United States v Martin*, 972 F 2d 349 (6th Cir 1992); *United States v Cardi*, 519 F 2d 309, 314 n. 3 (7th Cir 1975); *Briggs v U.S. Parole Comm'n*, 736 F 2d 446, 449 (8th Cir 1984); *United States v Atkins*, 480 F 2d 1223, 1224 (9th Cir 1973); *United States v Bryant*, 892 F 2d 1466, 1471 (10th Cir 1989); *United States v Funt*, 896 F 2d 1288, 1300 (11th Cir 1990); *United States v Campbell*, 684 F 2d 141, 152–55 (DC Cir 1982).

The issue has also been addressed by the United States Supreme Court. In *United States v Watts*, 519 U S 148; 117 S Ct 633; 136 L Ed2d 554 (1997), 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." In *Watts*, the defendant was convicted of a drug offense but acquitted of the related firearm offense. In sentencing on the drug offense, the trial judge found by a preponderance of the evidence that defendant had 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. However, the trial judge found that the acquitted offense had been established by a preponderance of the evidence and considered it in sentencing on the convicted offense.

Reversing the 9th Circuit, the Supreme Court found that the trial court's consideration of the acquitted conduct was appropriate and permissible. The Court observed that before Congress created the guidelines sentencing scheme 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," *Watts*, 519 U S at 152; 117 S Ct 633, citing *United States v Donelson*, 695 F 2d 583, 590 (CA DC, 1982) (Scalia, J.), and that the "[g]uidelines did not alter this aspect of the sentencing court's discretion." *Watts*, 519 U S at 152.

Addressing the constitutional concerns, the Court stated that, "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*." *Watts*, 519 U S at 155; 117 S Ct at 633 (emphasis added). The Court went on to hold that the 9th circuit 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." *Id*. Accordingly, the Court concluded that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id*., at 157.

While *Watts* considered this issue within a double-jeopardy framework, *Watts* "regarded acquitted conduct as providing the sentencing court with '[h]ighly relevant-if not essential ... information.'" *United States v White*, 551 F 3d 381, 383 (6th Cir 2008), quoting *Watts*, 519 U S at 151-152, 117 S Ct 633 (internal quotation marks omitted in *Watts*). The Court will note that "*Watts* preceded *United States v Booker*, 543 U S 220, 125 S Ct 738, 160 L Ed2d 621 (2005), but the *Booker* majority, which held that the mandatory guideline system was unconstitutional,

viewed the two decisions as not inconsistent." *White*, 551 F 3d at 383, citing *Booker*, 543 U S at 240-41, 125 S Ct 738. The 6th Circuit, "likewise recognizes *Watts's* continued vitality post-*Booker*, repeatedly holding 'that sentencing courts may still find facts using the preponderance-of-the-evidence standard.'" *White*, 551 F 3d at 383, quoting *United States v Mendez*, 498 F 3d 426-427 (6th Cir 2007). See also *United States v Brika*, 487 F 3d 450, 458-60 (6th Cir).

"In the post-Booker world, the relevant statutory ceiling is no longer the Guidelines range *but the maximum penalty authorized by the United States Code*." *White*, 551 F 3d at 384(emphasis added), citing *United States v Sexton*, 512 F 3d 326, 330 (6th Cir) ("Since defendants were sentenced under an advisory Guidelines scheme, the maximum statutory penalty that the district court could impose was determined by the statute of conviction, rather than by a Guidelines range calculated using only jury findings.") See also *United States v Settles*, 530 F 3d 920, 923 (DC Cir 2008) ("For Sixth Amendment purposes, the relevant upper sentencing limit established by the jury's finding of guilt is thus the statutory maximum, not the advisory Guidelines maximum . . .") "So long as the defendant receives a sentence at or below the statutory ceiling set by the jury's verdict, the district court does not abridge the defendant's right to a jury trial by looking to other facts, including acquitted conduct, when selecting a sentence within that statutory range." *White*, 551 F 3d at 385.

As noted above, this Court ordered supplemental briefing to address "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 . . ." *Beck*, 910 NW2d at 299. To that end, the legal principles extolled in the preceding cases stand in stark contrast to the principles underlying the impermissible "independent finding

of defendant's guilt" by a trial court on an acquitted charge as held in *People v Grimmett*, 388 Mich 590; 202 NW2d 278 (1972).

In *Grimmett*, the defendant killed the owner of a grocery store, Shaker Aubrey, and wounded a customer, John Kubon, while robbing it on December 22, 1966. *Grimmett*, 388 Mich at 594. The defendant was arrested on December 26, 1966, and charged with the murder of Aubrey on December 27, 1966. *Id*. The homicide trial commenced on January 22, 1968, but due to procedural confusion the trial court discharged the jury after allowing the prosecution to amend the information. *Id*. at 595.

On August 1, 1968, the defendant was arraigned on the charge of assault with intent to murder John Kubon. *Id*. at 596. It is important to note that this trial occurred after the jury in the first trial for the murder of Aubrey had been discharged, but prior to the retrial of the murder charge. On December 17, 1968, defendant's trial on the charge of assault with intent to murder Kubon began before another jury in Recorder's Court. *Id*. "On December 20, 1968, defendant was found guilty of assault with intent to commit murder and was sentenced to life imprisonment." *Id*.

"A new trial on the first degree murder charge was commenced on September 29, 1969. On October 4, 1969, a jury found defendant guilty of manslaughter. He was sentenced to 14 years, 14 months to 15 years, with no recommendation." *Id*. at 595-596.

Essential here is the fact that the trial and sentencing for the assault took place before the trial, conviction, and sentence for the manslaughter. However, at the defendant's sentencing for the assault, 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." *Id*., at 607-608. Again, the trial judge came to this conclusion even though that case had not yet been

tried. This Court held that this was improper, stating that, "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.

Justice Brennan dissented, stating that "[t]he 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." *Id*., at 609-610.

Topically the rules derived from these cases seem irreconcilably inapposite, but when one engages in a deeper analysis they are readily distinguishable. The People agree with the *Grimmett* dissent, and this result is certainly contemplated by *Ewing*, *Watts*, and the overwhelming body of long-standing jurisprudence. Nevertheless, the distinction between *Ewing/Watts* and *Grimmett* lies in the evidentiary standards at sentencing versus protection of a convicted defendant's constitutional rights.

As noted above, the defendant in *Ewing* came before the trial court for sentencing having been convicted of first degree murder. However, when imposing sentence, the trial court considered the other acts of sexual violence that were testified to at an evidentiary hearing pursuant to MRE 404(b) and at his trial. *Ewing*, in a separate trial, was subsequently acquitted of raping the woman who testified against him. It is undisputed that the defendant in *Ewing* was properly tried nor is there any allegation that he was deprived any of the rights and protections afforded him under the Michigan or United States constitutions. The record also reflects that extensive evidentiary hearings were held, the witnesses gave ample testimony, and that both the jury and the trial judge had the opportunity to review that evidence and consider that testimony. It was only after the jury was properly instructed and charged with deliberation that they returned their verdict based on that evidence. Similarly, it was only after the jury's verdict was returned

and the trial judge was provided with a presentence report that he administered *Ewing's* sentence. The record reflects that the trial judge then used this body of information defined by a preponderance of the evidence that defendant had attacked other women. See *Daniels*, 192 Mich App at 675. See also MCR 6.425(A)(1)(b) and MRE 1101(b)(3).

Conversely, in *Grimmett* the defendant was tried and convicted of assault with intent to commit murder. Presumably, he received all the rights and protections of the United States and Michigan constitutions. During that process, the trial judge and the jury also had the opportunity to consider testimony of witnesses and review the evidence admitted. At sentencing on the assault conviction, the trial judge made a finding that the defendant was also responsible for the murder that occurred contemporaneously with the assault. Of particular importance here is the fact that the defendant had not been tried to conviction or acquittal on the murder charge. The trial judge in *Grimmett* made a finding of defendant's guilt regarding the murder without having had the opportunity to review the evidence and consider the testimony of the witnesses relative to that murder. In fact, the defendant would later be tried for murder, but the found guilty of the lesser included offense.

To be clear, the trial judge's improper finding of guilt regarding the murder charge had nothing to do with the defendant's later acquittal of that charge. The impropriety of the trial judge's actions lies in the fact that the court's findings were unsupported by the body of record evidence and arguably did not meet the preponderance of the evidence threshold. Further, it was reached independent of the defendant being afforded right to trial by jury, the right to confront his accusers, and the right to effective assistance of counsel. In effect, the trial judge in *Grimmett* deprived the defendant of his right to due process. Therein lies the fundamental misunderstanding of the holding in *Grimmett*. The "independent finding of guilt" at play in

*Grimmett* is not one made independent of or contrary to the jury's verdict, it is one made independent of or contrary to the preponderance of the evidence.

While the argument can be made that the scenarios presented by *Ewing/Watts* and *Grimmett* are, topically, strikingly similar inasmuch as both defendants were sentenced based, in part, on findings of culpability for crimes for which they would later be found not guilty, there is one glaring distinction. In *Ewing* the trial court presided over an evidentiary hearing pursuant to MRE 404(b). At that hearing witnesses testified that the defendant had committed acts of sexual violence against them. It was this testimony upon which the trial judge relied, in part, to find by a preponderance of the evidence that the defendant committed the act of sexual violence that he would later be acquitted of when sentencing *Ewing*. See *Daniels*, 192 Mich App at 675. See also MCR 6.425(A)(1)(b) and MRE 1101(b)(3).

The record in *Grimmett*, however, does not reflect that any testimony was elicited, or evidence was presented at trial that would serve as the basis for the trial judge to conclude that the defendant committed the murder of which he was subsequently acquitted. Further, it is unclear whether the trial judge had any other evidence that the defendant committed the crime of murder. Simply put, the argument can be made that the trial judge *Grimmett* did not have sufficient basis upon which to find by a preponderance of the evidence that the defendant committed murder, thereby rendering is finding "independent."

The Court will note that this interpretation is supported by *Ewing*, wherein Justice Boyle wrote, "[a]n individualized sentence must be premised on the facts and circumstances of the crime itself, as well as the background of the individual convicted of committing the crime. The rule of *Grimmett*, properly understood, stands for the general proposition that a sentence must be based on accurate information." *Ewing*, 435 Mich 472. As the court can appreciate, this is to

ensure that a defendant is afforded all applicable rights and protections under the United States and Michigan constitutions.

## D. CONCLUSION

In summation, the question presented in *Ewing* was one of evidentiary concern and the question presented in *Grimmett* was one of constitutional concern. Specifically, *Ewing* answers the question of whether it is appropriate to use the preponderance of the evidence standard regarding conduct outside of a jury verdict to support a trial court's findings at sentencing and the inherent difference between that standard and the beyond a reasonable doubt standard imposed on a jury. On the other hand, *Grimmett* answers the question of whether it is constitutionally permissible for the trial judge to reach that same conclusion without having established the requisite facts and meet that evidentiary threshold within a constitutionally acceptable framework. Therefore, in the case at bar the trial judge properly considered the subject acquitted conduct pursuant to *Ewing* and *Watts* and did not make the impermissible independent finding of guilt seen in *Grimmett*.

## ARGUMENT II

**"At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *People v Anderson*, 501 Mich 175, 189; 912 NW2d 503 (2018), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Here, the trial court permissibly considered relevant factors including acquitted conduct and found that a preponderance of the evidence supported its finding that the defendant-appellant was responsible for the victim's death, thereby justifying the sentence imposed. Therefore, because the trial court's imposition of sentence constituted a reasonable and principled outcome, the trial judge did not abuse his discretion.**

### A. STANDARD OF REVIEW

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Lockridge*, 498 Mich at 392. "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion." *Steanhouse*, 500 Mich. at 471. In *Steanhouse*, this Court explained that "the relevant question for appellate courts reviewing a sentence for reasonableness" is "whether the trial court abused its discretion by violating the principle of proportionality . . .." *Id*. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Anderson*, 501 Mich at 189, quoting *Babcock*, 469 Mich at 269.

### B. LEGAL STANDARDS

The principle of proportionality is one where:

> a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender." [*Id*. at 472, quoting *Milbourn*, 435 Mich at 651.]

Under the principle of proportionality, "'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.'" *Steanhouse*, 500 Mich at 472, quoting *Milbourn*, 435 Mich at 661. In adopting the "principle-of-proportionality test" for reviewing a sentence for reasonableness, the *Steanhouse* Court based its reasoning, in part, on "its history in our jurisprudence." *Steanhouse* 500 Mich at 471.

While the *Lockridge* Court corrected the inherent constitutional defect in our sentencing guidelines by rendering them fully advisory:

> nothing else in our opinion indicated we were jettisoning any of our previous sentencing jurisprudence outside the Sixth Amendment context. Moreover, none of the constitutional principles announced in *Booker*[1] or its progeny compels us to depart from our longstanding practices applicable to sentencing. Since we need not reconstruct the house, we reaffirm the proportionality principle adopted in *Milbourn* and reaffirmed in Babcock and Smith[2]. [*Steanhouse*, 500 Mich at 473, 902 NW2d 327.]

Relevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines rang include (1) whether the guidelines accurately reflect the seriousness of the crime, see *People v Houston*, 448 Mich 312, 321–322; 532 NW2d 508 (1995), and *Milbourn*, 435 Mich at 657; (2) factors not considered by the guidelines, *Houston*, 448 Mich at 322–324, see also *Milbourn*, 435 Mich at 660; and (3) factors considered by the guidelines but given inadequate weight, see *Houston*, 448 Mich at 324–325, and *Milbourn*, 435 Mich at 660.

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[1] *United States v Booker*, 543 U S 220; 125 S Ct 738; 160 L Ed2d 621 (2005).

[2] *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008).

When determining the proportionality between a sentencing a defendant within or outside of the guidelines, a trial court must "'justify the sentence imposed in order to facilitate appellate review,'" *Steanhouse*, 500 Mich. at 470, quoting *Lockridge*, 498 Mich at 392. This necessarily "includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Smith*, 482 Mich at 311.

## C. DISCUSSION

The next question that this Court's May 4, 2018, Order instructed the parties to answer is:

> (2) 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. [*People v Beck*, 910 NW2d 298, 299 (Mich 2018).]

As noted above, the defendant-appellant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of felony (felony firearm), MCL 750.227b. At the defendant-appellant's sentencing, the trial judge exceeded the guidelines on the felon in possession, stating the following:

> The court is going to, on that count, sentence you to five years the credit for 268 days. That material is to be consecutive two, and preceding the count, the previous count of felon in possession of a firearm.
>
> With respect to that charge the Court does find that there are compelling reasons to go over the guidelines. The court believes that the – to sentence within the guidelines would not be proportionate to the seriousness of the defendant's conduct or the seriousness of his criminal history. And for that reason court is going to go over the guidelines in setting a sentence that is, in fact, proportionate to those things.
>
> In addition to that, the maximum – when you reach the maximum of the guidelines in this case it's at 75 points, this is way over that at 125 points. That is another reason the Court may, and will go over the guidelines in this case.
>
> This gentleman 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.

The testimony in this case by one of the witnesses who could not identify him was that a man approached the victim of a gun. She saw muzzle flash and the victim fell to the ground and the perpetrator ran off.

The other witness, who is not alive at the time of the trial, and was barely alive at the time of the prelim, identified this gentleman as the person who approached the victim with a gun. Gave a positive identification. Indicated she saw the gun. Then her story wavered as far as whether she saw the shooting or whether she was in her kitchen at the time of the shooting. I think the inconsistency, and where she was at the time of the shooting, as well as her not being in court, affected the jury's verdict. They 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.

And I'm not substituting my opinion for their's [sic]. 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 seeing at the scene with a weapon seconds prior. Two people hearing a shot, and another lady seeing a shoot [sic] 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.

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. In the court finds by a preponderance of the evidence that this gentleman did shoot the victim.

The court is going to go over the guidelines in setting the minimum sentencing this matter. In the court will set a minimum sentence of 240 months, maximum of 400 there is no credit since the credit gets added onto count two, the felony firearm. [ST, pp. 11-13, Appendix #56a-59a.]

Among other things, on appeal the defendant-appellant argued that the trial court could not consider the victim's death when imposing a sentence because the jury found defendant not guilty of homicide and that the trial court failed to justify the sentencing departure with substantial and compelling reasons. Regarding the first point, the Court of appeals stated that:

> Contrary to these assertions, it is well-settled that a trial court may consider all the evidence admitted at trial when determining the appropriate sentence. See *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). Indeed, a trial court may consider even acquitted conduct during sentencing, provided that the facts are proven to the judge by a preponderance of the evidence. See *People v Ewing*, 435

> Mich 443, 451–452; 458 NW2d 880 (1990) (opinion by BRICKLEY, J.); *id*. at 473 (opinion by BOYLE, J.); *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Consequently, in this case, we see nothing improper in the trial court's consideration of defendant's role in Pruitt's death when crafting an appropriate sentence. The evidence introduced at trial included Loyd–Beal's identification of defendant in her preliminary examination testimony along with other evidence establishing defendant's identity as the shooter by a preponderance of the evidence. Thus, the trial court was free to consider defendant's responsibility for Pruitt's death as a circumstance surrounding defendant's conduct when imposing the sentence for defendant's felon in possession conviction. [*Beck*, unpub op at 2, Appendix #64a-65a.]

Turning its attention to the second point, the Court of Appeals articulated its duty to review the sentence for reasonability utilizing the principles of proportionality previously discussed herein to determine if the trial court abused its discretion when imposing the subject sentence. *Id*. at 3, Appendix #65a. Ultimately the Court of appeals did not endeavor this analysis, stating that, "the trial court sentenced defendant before the decisions in *Lockridge* and *Steanhouse* were issued. Consequently, the trial court articulated substantial and compelling reasons for departing, rather than focusing on the "reasonableness" of the sentence imposed. In these circumstances, the *Steanhouse* Court determined that a remand for a Crosby hearing is the appropriate remedy. *Id*. at 4, Appendix #66a. The record reflects that the defendant-appellant declined to be resentenced pursuant to *Crosby*.

Despite the Court of appeals characterization of the basis for the trial court's departure, the trial judge did indicate 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. And for that reason court is going to go over the guidelines in setting a sentence that is, in fact, proportionate to those things." ST, pp. 11, Appendix #56a. The Court will note that, even though *Lockridge* had not yet reinstated the *Milbourn* framework, the trial judge's sentencing decision was one based on reasonability utilizing the principles of proportionality.

The 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." *Milbourn,* 435 Mich at 636. "[D]epartures are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing." *Id.* at 657. In the case *sub judice*, the record reflects that the trial court was cognizant of the seriousness of the circumstances surrounding the offense and the offender and relied on those factors when crafting the defendant-appellant's sentence. Further, the trial court established that the guidelines did not account for several factors that the sentencing judge found important and worthy of legitimate consideration.

## D. CONCLUSION

As described above, the sentencing court considered the nature of defendant-appellant's background, the seriousness of the offense, and the facts and circumstances surrounding the offense, and found they were not adequately considered by the guidelines. As discussed in Argument I, the manner in which he did so, and the information he used to justify the departure, were appropriate. Reviewing the court's reasons for departing, the departure was reasonable and proportionate under the totality of the circumstances. Given the advisory nature of the guidelines, the departure was within the range of reasonably principled outcomes. The People thus ask this Honorable Court to find that the trial court did not abuse its discretion and find the sentence at issue reasonable and proportionate.

## SUMMARY AND RELIEF SOUGHT

WHEREFORE, the People respectfully request that this Honorable Court deny defendant-appellant's application for leave to appeal the judgment of the Court of Appeals. Alternatively, the People respectfully request that this Court affirm the defendant-appellant's sentence.

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Respectfully submitted,

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/s/ Nathan J. Collison

Dated: July 30, 2018

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