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 SUR-REPLY

JOHN A. MCCOLGAN, JR. (P37168)
PROSECUTING ATTORNEY

Submitted by:

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STATEMENT OF QUESTIONS INVOLVED

I. Is *Robinson v Woods*, 901 F3d 710 (CA 6, 2018), binding on this Court, relevant or germane to the resolution of the issues before this Court, and readily distinguishable both factually and procedurally from the case at bar where *Robinson* involves a pre-*Lockridge* sentence premised in part on judge-found facts in a then mandatory guidelines scheme? Further, does there exists a prohibition against allowing a judge to engage in judicial factfinding to craft a sentence that falls within the prescribed statutory range, including one falling outside the guidelines, so long as it is not mandatory?

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On November 17, 2015, the Michigan Court of Appeals issued *People v Beck*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2015, (Docket No. 321806), Appendix #63a, affirming defendant's convictions, but for a hearing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).]

Appellant's supplemental brief was filed on June 13, 2018, and on July 30, 2018, the Appellee filed their supplemental brief. On August 13, 2018, the Appellant filed a motion to extend the time by which to file their supplemental reply. That motion was granted on August 15, 2018.

On August 25, 2018, the Appellant filed a second motion to extend the time by which to file their supplemental reply based, in part, on *Robinson v Woods*, 901 F3d 710 (CA 6, 2018). On August 29, 2018, this Court granted that motion, extending the Appellant's time by which to file his reply to September 10, 2018. The Appellant's reply was filed that same day.

On September 18, 2018, the Appellee filed a motion for leave to file a sur-reply. This Court granted that motion on September 27, 2018.

ARGUMENT I

***Robinson v Woods*, 901 F3d 710 (CA 6, 2018), is not binding on this Court, is not relevant or germane to the resolution of the issues before this Court, and is readily distinguishable both factually and procedurally from the case at bar as *Robinson* involves a pre-*Lockridge* sentence premised in part on judge-found facts in a then mandatory guidelines scheme. There exists no prohibition against allowing a judge to engage in judicial factfinding to craft a sentence that falls within the prescribed statutory range, including one falling outside the guidelines, so long as it is not mandatory.**

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).]

In *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), this Court ruled that Michigan courts are bound by decisions issued by the United States Supreme Court that construe federal law. But "there is no similar obligation with respect to decisions of the lower federal courts." *Id.* If there are conflicting decisions rendered by lower federal courts, Michigan courts are free to choose the view that seems most appropriate. *Id.* And even if no such conflict exists, Michigan courts are not bound "to follow the decisions of even a single lower federal court." *Id.* at 607. Lower federal court rulings may be persuasive, but they are not binding on a state court. *Id.*

C. DISCUSSION

In *Robinson v Woods*, 901 F3d 710 (CA 6, 2018), the petitioner sought a writ of habeas corpus under 28 USC § 2254, "arguing that the Michigan trial court violated his Sixth Amendment right to a jury trial by using judge-found facts to score sentencing variables that increased his *mandatory minimum* sentence." *Id*. at 712 (emphasis added). In *Robinson*, the petitioner and his co-defendants, "sold the victim a large amount of crack cocaine on credit, beat the victim when he was unable to repay petitioner, and, eventually, extorted from the victim's parents the roughly $1,000 petitioner felt he was owed for the drugs." *Id*. "As a result, a Michigan jury convicted petitioner of extortion, MCL § 750.213, delivery of a controlled substance, § 333.7413(2), unlawful imprisonment, § 750.349b, and aggravated assault, § 750.81a(1)." *Robinson*, at 712.

Regarding the petitioner's guidelines, the *Robinson* panel stated that:

> [t]he PSIR provided the following sentencing guidelines ranges for the minimum sentence of each conviction: between 84 and 175 months for the extortion conviction (with a 30-year-maximum sentence), between 19 and 38 months for the delivery-of-a-controlled-substance conviction (with a 40-year-maximum sentence), between 50 and 125 months for the unlawful-imprisonment conviction (with a 22-years-and-6-months-maximum sentence), and no recommended range for the aggravated-assault conviction (which comes with a one-year-maximum sentence). The Department recommended that the court give petitioner a minimum sentence near the bottom of each range. At the time of petitioner's sentencing, the ranges were mandatory, allowing a trial judge to "depart" from them only with a showing of "substantial and compelling" reasons. MCL § 769.34(3). [*Robinson*, at 713.]

Regarding the petitioner's sentence, the *Robinson* panel stated that:

> [t]he sentencing judge reviewed and accepted the recommended scores for the guidelines variables but disagreed with the Department's "low end" recommendation. Instead, he sentenced petitioner to a minimum of 150 months to a maximum of 30 years for the extortion conviction, 38 months to 40 years for the delivery-of-a-controlled-substance conviction, 10 years to 22 years and 6 months for the unlawful-imprisonment conviction, and one year for the aggravated-assault conviction, all to be served concurrently. [*Id*.]

The Court will note that there was no claim that the trial court exceeded the then mandatory guidelines, nor was there a claim that the trial court considered acquitted conduct when determining the petitioner's sentence.

Instead, the *Robinson* panel framed the issue on appeal as, "whether Alleyne's holding rendered Michigan's *then-mandatory sentencing regime* unconstitutional, such that the Michigan Court of Appeals decision in Robinson's case was contrary to clearly established federal law." *Id*. at 715 (emphasis added). The Court held that, "*Alleyne* requires us to hold that the Michigan trial court's use of judge-found facts to score *mandatory* sentencing guidelines that resulted in an increase of petitioner's minimum sentence violated petitioner's Sixth Amendment rights." Robinson at 718, citing *Alleyne v United States*, 570 U S 99, 108; 133 S C 2151; 186 L Ed 2d 314 (2013)(emphasis added). The Court reasoned that:

> Michigan's sentencing regime *violated Alleyne*'s prohibition on the use of judge-found facts to increase mandatory minimum sentences. 570 U.S. at 111–12, 133 S.Ct. 2151. And, although we are not bound by its decision, *we note that the Michigan Supreme Court recently so held* in *People v. Lockridge*, 498 Mich. 358, 870 N.W.2d 502, 513–14 (2015) ("[A] straightforward application of the language and holding in *Alleyne* leads to the conclusion that Michigan's sentencing guidelines scheme violates the Sixth Amendment."). While Michigan's regime uses a number of OVs and PRVs to come to a guidelines range, rather than the slightly more straightforward three-tier scheme addressed in *Alleyne*, 570 U.S. at 103–04, 133 S.Ct. 2151, this distinction does not except the Michigan regime from *Alleyne*'s fundamental principles. In sum, *Alleyne* proscribed exactly that which occurred at petitioner's sentencing hearing—the use of "[f]acts that increase the mandatory minimum sentence" that were never submitted to the jury and found beyond a reasonable doubt. 570 U.S. at 108, 133 S.Ct. 2151. The Michigan Court of Appeals' conclusion that Michigan's sentencing scheme did not violate the Sixth Amendment was, therefore, "contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). [*Robinson*, at 716-17 (emphasis added).]

In *Robinson*, the petitioner sought relief from the Michigan Court of Appeals decision in *People v Robinson*, unpublished opinion per curiam of the Michigan Court of Appeals, issued dated July 30, 2013 (Docket No. 303236), annexed hereto as Exhibit A, and this Court's

December 23, 2013, denial of leave in *People v Robinson*, 495 Mich 915; 840 NW2d 352 (2013) (order).

As this Court is aware, *Lockridge* was decided on July 29, 2015. This was approximately two years after the adverse appellate decisions upon which the petitioner in *Robinson* based his claims for habeas relief and this Court acknowledged that the mandatory nature of Michigan's sentencing guidelines regime was violative of the Sixth Amendment and rendered them advisory. In fact, the *Robinson* panel specifically acknowledged the former status of the guidelines, that *Lockridge* alleviated this problem inasmuch as they are no longer mandatory, and that the Michigan Court of Appeals erred in their reliance on them in 2013. Accordingly, the Robinson panel remanded "this case to the district court with instructions to remand to the state sentencing court for sentencing proceedings consistent with this opinion and the Constitution." *Robinson*, at 718. This is exactly the remedy that this Court crafted in *Lockridge* and its progeny.

In *United States v Cooper*, 739 F 3d 873 (6th Cir, 2014), the Sixth Circuit stated that, "[f]irst, *Alleyne* dealt with judge-found facts that raised the mandatory minimum sentence under a statute, not judge-found facts that trigger an increased guidelines range, such as happened to the defendants. This distinction has been acknowledged by the Supreme Court." *Id*. at 884. In *Alleyne*:

> the Court stated that it has 'long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.'" *Id*. at 2163 (citing Dillon v. United States, 560 U.S. 817, 130 S.Ct. 2683, 2692, 177 L.Ed.2d 271 (2010); *Apprendi*, 530 U.S. at 481, 120 S.Ct. 2348). Unlike the statutes at issue in *Alleyne* and *Apprendi*, the career-offender guidelines, which are triggered by judicial factfinding, do not require a district court to give a defendant a higher sentence, nor do they allow a judge to impose a harsher sentence that was necessarily unavailable before. The career-offender guidelines merely advise a district court how to wield its discretion, and therefore the commands of *Alleyne* do not apply here. [*Cooper*, 739 F 3d at 884.]

In *United States v Hebert*, 813 F 3d 551 (5th Cir, 2015), the 5th Circuit stated that the petitioner's "Fifth and Sixth Amendment challenges are foreclosed by our precedent, however, because we have held that courts can engage in judicial factfinding where the defendant's sentence ultimately falls within the statutory maximum term." *Id*. at 564. The *Hebert* panel went on to state that, "[f]ollowing *Booker*, we noted that '[t]he sentencing judge is [still] entitled to find by a preponderance of the evidence all the facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guidelines sentence.'" *Id*., quoting *United States v Mares*, 402 F 3d 511 (5th Cir, 2005).

The *Hebert* panel went on to state that, "in *Hernandez* our circuit 'foreclosed as-applied Sixth Amendment challenges to sentences within the statutory maximum that are reasonable only if based on judge-found facts.'" *Hebert*, 813 F 3d at 564, quoting *United States v Hernandez*, 633 F 3d 370, 374 (5th Cir, 2011). Further, "a 'within-guidelines and above-guidelines sentence [imposed within the statutory maximum can be] reasonable solely based on judge-found facts.'" *Id*. "As a result, the judicial factfinding that made [the petitioner]'s 92–year sentence substantively reasonable does not violate the Fifth and Sixth Amendments because his sentence was ultimately within the 153–year statutory maximum he could have received for the seven counts to which he pleaded guilty." *Hebert*, at 564.

D. CONCLUSION

Based on long-standing legal principles, *Robinson v Woods*, 901 F3d 710 (CA 6, 2018), is not binding on this Court. However, at its core, *Robinson* is not a case that forecloses the practice of judicial factfinding in its entirety. Fundamentally, *Robinson* very directly addresses the practice of using facts that increase the *mandatory* minimum sentence that were never

submitted to the jury and found beyond a reasonable doubt. Therefore is not relevant or germane to the resolution of the issues before this Court because there exists no prohibition against allowing a judge to engage in judicial factfinding to craft a sentence that falls within the prescribed statutory range, including one falling outside the guidelines, so long as it is not mandatory. As this Court can appreciate, our post-*Lockridge* sentencing regime has rendered the guidelines advisory in all applications. Further, *Robinson* is readily distinguishable both factually and procedurally from the case at bar. While it does involve a pre-*Lockridge* sentence premised in part on judge-found facts in a then mandatory guidelines scheme, Robinson does not address an out-of-guidelines sentence and it also does not address the use of acquitted or uncharged conduct for sentencing purposes.

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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PROSECUTING ATTORNEY

/s/ Nathan J. Collison

Dated: October 10, 2018

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_____/

APPENDIX

A. Exhibit A – *People v Robinson*, unpublished opinion per curiam of the Court of Appeals, issued July 30, 2013 (Docket No. 303236).

EXHIBIT A

People v Robinson, unpublished opinion per curiam of the Court of Appeals, issued July 30, 2013 (Docket No. 303236)