STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

-vs-

DAWN MARIE DIXON-BEY

Defendant-Appellee.
_____/

Supreme Court No. 156746

COA No. 331499

Jackson CC No. 15-004596-FC

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

ERIC LAMONTEE BECK

Defendant-Appellant.
_____/

Supreme Court No. 152934

COA No. 321806

Saginaw CC No. 13-039031-FC

AMICUS CURIAE BRIEF - CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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CDAM answers: "Yes."

II. DOES THE USE OF ACQUITTED CONDUCT TO ENHANCE A SENTENCE VIOLATE A DEFENDANT'S SIXTH AMENDMENT RIGHTS?

CDAM answers: "Yes."

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Since its founding in 1976, the Criminal Defense Attorneys of Michigan ("CDAM") has been a statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members. As reflected in its bylaws, CDAM exists in part to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." CDAM has a long standing and continuing interest in the sentencing of criminal defendants.

STATEMENT OF FACTS

CDAM relies on the Statements of Facts provided by Defendant-Appellee Dixon-Bey and Defendant-Appellant Beck in their respective briefs.

ARGUMENTS

I. WHEN THE COURT OF APPEALS REVIEWS FOR AN ABUSE OF DISCRETION, THE GUIDELINES SHOULD BE CONSIDERED TO THE EXTENT THAT THIS COURT INDICATED IN *PEOPLE V MILBOURN,* AS MODIFIED BY *PEOPLE V STEANHOUSE.*

This Court asks the parties in *People v Dixon-Bey*: "to what extent the sentencing guidelines should be considered to determine whether the trial court abused its discretion in applying the principle of proportionality under *People v Steanhouse*, 500 Mich 453 (2017)." The case underlying the principle of proportionality, *People v Milbourn*, spells out the role of the guidelines in a proportionality "rule of decision." *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). The guidelines "did not have a legislative mandate" at the time of the *Milbourn* decision. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Just as they did then, our advisory guidelines still have an important role at sentencing. In *People v Lockridge*, this Court ruled our guidelines advisory but required trial courts to still consult them and take them into account when sentencing. *People Lockridge*, 498 Mich 358, 391; 870 NW2d 502 (2015). "Sentencing courts must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392.

In *Steanhouse*, this Court unequivocally adopted the *Milbourn* principal of proportionality test to assess whether a trial court abused its discretion in sentencing. *Id*. 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. The guidelines are an "invaluable tool for gauging the seriousness of the particular offense by a particular offender," (*Milbourn*, 435 Mich at 655) because "the Legislature has endeavored to provide the most severe punishments for those who commit the most serious crimes… [and ensure that] offenders with prior criminal records are likewise subject to harsher

punishment." *Milbourn*, 435 Mich at 650. The Court explained how to use the guidelines as a reference tool, short of requiring adherence to them:

> Departures are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. …Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines….
> Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality.

Milbourn, 435 Mich at 657, 659-660.

These are the "parameters and standards for the [trial court's] exercise of [sentencing] discretion." *Id* at 665. Helpfully, this Court disavowed particular dicta that came "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Steanhouse*, 500 Mich at 474. None of the above-quoted portions of *Milbourn* or *Smith* were disavowed.

Discretion is not an all or nothing proposition. The guidelines serve as "objective, factual guideposts" for determining a sentence proportionate to a particular offender and offense. "If the Court of Appeals determines that either trial court has abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed, it must remand to the trial court for resentencing." *Steanhouse*, 500 Mich at 476.

Overwhelmingly, these standards have been applied with fidelity in the Court of Appeals. In *Dixon-Bey*, the Court of Appeals found that a 35-70 year sentence, representing a 15-year upward departure from the guidelines for second-degree murder "was unreasonable and that, in light of the record [], the trial court abused its discretion by violating the principle of

proportionality." *People v Dixon-Bey*, 321 Mich App 490; 909 NW2d 458, 477 (2017). As directed in *Steanhouse*, the Court of Appeals used the Guidelines as a tool to assist in their analysis. *Dixon-Bey*, 909 NW2d at 479 (considering "(1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, (3) factors considered by the guidelines but given inadequate weight") (citations omitted). The Court of Appeals found that the trial court "did not adequately explain" its rationale for the beyond-the-guidelines sentence. *Id* at 478. The "trial court's articulation" was not "sufficiently detailed to facilitate appellate review." *People v Smith*, 482 Mich 292, 311; 754 NW2d 284 (2008). Fifteen years, a substantial departure, must be supported "by a more significant justification than a minor [departure]." *Gall v US*, 552 US 38, 50; 128 S Ct 586l 169 Led 2d 445 (2007). The trial court "failed to offer any explanation as to why [the Guidelines] scoring was insufficient." *Dixon-Bey*, 909 NW2d at 478.

Thus, the sentence in *Dixon-Bey* was procedurally flawed. *Gall* at 51 ("It must first ensure that the district court committed no significant procedural error, such a failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines range as mandatory…or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range."). The Court of Appeals rightly did not "substitute its own reasons for departure," *Smith*, 482 Mich at 318 but instead remanded to the trial court. This example is one of many cases that exemplify the extent that "the sentencing guidelines should be considered to determine whether the trial court abused its discretion in applying the principle of proportionality under *People v Steanhouse*, 500 Mich 453 (2017)."

What has created a sense of unease, at least among prosecutors[1], is that in their otherwise appropriate analyses, the Court of Appeals oft-quotes *People v Smith* and states that a trial court should include "an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Dixon-Bey*, 321 Mich App at 479 (citing *Smith*, 482 Mich at 311)[2]. It is the use of "more" that is seemingly of concern. The prosecutors' argument goes that under an abuse of discretion, the sentence need only be proportionate to the offender and the offense, not *more* proportionate than a guidelines sentence

[1] PAAM Amicus, 6 n 11.

[2] *See*, *People v Walden*, 318 Mich App 344; 901 NW2d 142 (2017) (affirmed the departure sentence) lv den 501 Mich 951 (2018) ; *See also People v Beall*, unpublished opinion from the Court of Appeals, issued September 18, 2018 (Docket No 339054) (affirmed the departure sentence); *People v Hartson*, unpublished opinion from the Court of Appeals, issued August 9, 2018 (Docket No 338584) (remanded to the trial court to "articulate its reasons for departing from the sentencing guidelines in imposing the second-degree murder and AWIM sentences."); *People v Brynn*, unpublished opinion from the Court of Appeals, issued June 12, 2018 (Docket No 337481) (remanded because "reasons supporting the trial court's departure sentence were insufficient and the trial court did not explain the extent of the departure sentence"); *People v Colbert*, unpublished opinion from the Court of Appeals, issued June 12, 2018 (Docket No 337869) (affirmed the departure sentence); *People v Fruge*, unpublished opinion from the Court of Appeals, issued May 22, 2018 (Docket No 336629) (affirmed the sentence); *People v Schwander*, unpublished opinion from the Court of Appeals, issued May 22, 2018 (Docket No 320768) (remanded because the trial court "failed to adequately explain why those grounds defined a sentence that was more proportionate to the offense and the offender than a guidelines sentence would have been."); *People v Naccarato*, unpublished opinion from the Court of Appeals, issued May 1, 2018 (Docket No 334824)(remanded for the trial court to determine on the record whether a sentence within the guidelines range is proportionate to the circumstances surrounding both the offense and the offender); *People v Taylor*, unpublished opinion of the Court of Appeals, issued April 24, 2018 (Docket No 329849) (remanded for trial court to "articulate 'why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.'" *Smith*, 482 Mich. at 304.); *People v Sleeper*, unpublished opinion from the Court of Appeals, issued April 19, 2018 (Docket No 337069) (affirmed the departure sentence); *People v Raffler*, unpublished opinion from the Court of Appeals, issued March 22, 2018 (Docket No 336509) (affirmed the departure sentence); *People v James*, unpublished opinion from the Court of Appeals, issued March 15, 2018 (Docket No 335398) (remanded because the trial court "abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed."); *People v King*, unpublished opinion from the Court of Appeals, issued March 13, 2018 (Docket No 337186) (affirmed the departure sentence); *People v King*, unpublished opinion from the Court of Appeals, issued February 22, 2018 (Docket No 324500)(affirmed the departure sentence); *People v Titus*, unpublished opinion from the Court of Appeals, issued February 15, 2018 (Docket Nos 336352, 337177) (remand for the trial court to explain the extent of the departure); *People v Willis*, unpublished opinion from the Court of Appeals, issued February 1, 2018 (Docket No 320659) (remanded because the trial court "abused its discretion in failing to apply the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed."); *People v Farren*, unpublished opinion from the Court of Appeals, issued December 28, 2017 (Docket No 326593) (affirmed departure sentence); *People v Wilson*, unpublished opinion from the Court of Appeals, issued December 7, 2017 (Docket No 334025) ("vacate defendant's sentences so that the trial court can provide a more detailed explanation as to why this sentence is proportionate to the seriousness of the matter before it."); *People v Gunn*, unpublished opinion from the Court of Appeals, issued November 21, 2017 (Docket No 333317) (affirmed departure sentence). *See Appendix for a copy of all cited unpublished opinions.*

would have been. Further, *Smith* was decided when the guidelines were statutorily mandated, so perhaps this quote is no longer apt in the advisory guidelines era to which we have returned.

However, that excerpt from the *Smith* opinion is not signaling a return to the mandatory guidelines or an end-run around this Court's decision in *Steanhouse*. Instead, this statement is upholding what is a yet-undisturbed[3] portion of MCL 769.34, the presumption that a within-Guidelines sentence is reasonable. There is a difference between a presumption of reasonableness for a sentence within the guidelines and a presumption of unreasonableness for a sentence outside the guidelines.

The presumption that a sentence within the Guidelines is reasonable exists within the statute, which calls for a mandatory Guidelines system and is the presumption in action when this Court stated "[t]o be proportionate, a minimum sentence that exceeds the guidelines must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been." *Smith*, 482 Mich at 318. This is distinct from the presumption of unreasonableness for guidelines departures, effectuated by the directive that a "minimum sentence that exceeds the guidelines recommendation…[t]he court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed." *Id*. Requiring "substantial and compelling" reasons for a departure would operate as a presumption of unreasonableness for a departure and would return the courts to a mandatory framework. *See*, *People v Lockridge*, 498 Mich 358, 387 ("The guidelines minimum range *is* binding on trial courts, absent their articulating substantial and compelling reasons for a departure.") (emphasis in original).

[3] *See*, *People v Ames*, 501 Mich 1026 (2018).

Should this Court believe otherwise, and relegate the *Smith* quote—"an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been"— to the dustbin of disavowed dicta created in *People v Steanhouse*, 500 Mich at 474, there need not be any action taken with respect to the lower court opinions that use this quote. *See,* footnote 2.

II. THE USE OF ACQUITTED CONDUCT TO ENHANCE A SENTENCE VIOLATES A DEFENDANT'S SIXTH AMENDMENT RIGHTS.

This Court should overturn *Ewing* and set a bright-line rule: there is no place for acquitted conduct at sentencing. To continue to allow it violates defendants' right to jury trial. US Const, Ams VI, XIV; Const 1963, art 1, §20.

Former Chief Justice Marilyn Kelly summarized the opinions in *People v Ewing* as follows:

> In *Ewing*, four justices of this Court sanctioned the consideration of acquitted conduct by a sentencing judge when the facts were proven to the judge by a preponderance of the evidence. The Court further held that a prior acquittal alone is not a sufficient reason to preclude the judge from taking those facts into account when sentencing a defendant for another offense.

People v Rose, 485 Mich 1027, 1029–30; 776 NW2d 888, 889–90 (2010).

Despite *Ewing*'s "dormancy,"[4] prosecutors and courts seem confident in its continued legitimacy, in large part due to *US v Watts*, 519 US 148, 117 S Ct 633, 136 L Ed 2d 554 (1997). In *Watts*, the United States Supreme Court held that a "jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge." *People v Rose*, 485 Mich 1027, 1028; 776 NW2d 888 (2010). The *Watts* Court cemented what federal courts had long practiced[5]—that acquitted conduct can and should be considered at sentencing— through an interpretation of sections 1B1.3 and 1B1.4 of the US Sentencing Guidelines Manual that read "acquitted conduct" into the phrases "all acts and omissions" and "all harm". *Watts* remains

[4] *Rose*, 485 Mich at 1030.
[5] Johnson, Barry. *If At First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 NC L Rev 153, 162 (1996). As of the date of this article, eleven federal circuits had already held that acquitted conduct could be used at sentencing. This was ten years before *Watts* was decided.

undisturbed, though not without some consternation.[6] And importantly, *Watts* is not a Sixth Amendment case and thus, *Watts* is not binding Sixth Amendment precedent. *Watts* is a "pre-*Apprendi* case, which upheld the use of "acquitted conduct" in the context of a due process and double-jeopardy challenge, but which did not address the Sixth Amendment issues that gave rise to *Apprendi*, *Blakely*, *Booker*, *Rita* or *Gall*." Peter Erlinder, *"Doing Time" after the jury acquits: Resolving the post-Booker "acquitted conduct" sentencing dilemma*, 18 S Cal Rev L & Soc Just 79, 92 (2008). Nevertheless, federal circuit courts continue to cite *Watts* as binding precedent. *Jones*, 135 S Ct at 9 ("[T]he Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial fact-finding, so long as they are in the statutory range.") (citations omitted). But the missed opportunities of federal Courts of Appeals to state clearly what the Sixth Amendment provides does not prevent this Court from taking this opportunity in stride.

Watts, which ultimately is a case of statutory interpretation, can be easily differentiated from *Ewing* based on the fact that the federal sentencing guidelines were "created by Congress for use by the federal courts and include references to 'policy statements' issued by the Sentencing Commission or by an act of Congress that have no counterpart in Michigan law." *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017).

Disavowing *Watts*, in the context of 6th Amendment claims, while helpful, is not the heavy lifting required of this Court. This Court should sever any ties to the unconstitutional common thread that unites *Watts* and *Ewing*: "acquittal on criminal charges does not prove that the defendant

[6] *Jones v US*, 135 S Ct 8, 9 (2014) (Scalia, J, dissenting from denial of cert) ("The present petition presents the nonhypothetical case the Court claimed to have been waiting for. And it is a particularly appealing case, because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense."); *US v Bell*, 808 F3d 926; 420 US App DC 387 (2015) (Millet, J, concurring in the denial of hearing en banc) ("While I am deeply concerned about the use of acquitted conduct in this case, I concur in the denial of rehearing en banc. That is because only the Supreme Court can resolve the contradictions in the current state of law.")

is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *Watts*, 519 US at 155 (citing *US v One Assortment of 89 Firearms*, 465 US 354, 361; 104 S Ct 1099, 1104, 79 L Ed 2d 361 (1984)); *People v Ewing*, 435 Mich 443, 473 n 15, 458 NW2d 880 (1990) (citing the same). This requires a Sixth Amendment analysis consistent with *Alleyne*. *Ewing* and *Watts* were both decided before *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

The United States Supreme Court seemed to have addressed this very issue in *Alleyne*:

> When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. **It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical.** One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

Alleyne, 570 US at 115 (emphasis added).

How is the hypothetical situation addressed in *Alleyne* at all different from the situation Ms. Dixon-Bey finds herself in? The jury found the facts that supported the elements of second-degree murder, not first-degree murder. Yet, her legally ascribed punishment is aggravated by the judge found fact that she is a cold-blooded murder, and therefore actually committed first-degree murder. That she could have been sentenced to life for second-degree murder "is no answer," when, at day's end she faced an aggravated sentence based entirely on the judge's and not the jury's findings. If this dicta alone is not enough, the United States Supreme Court very recently held unequivocally that "[a]bsent conviction of a crime, one is presumed innocent." *Nelson v Colorado*, 137 S Ct 1249, 1252; 197 Led 2d 611 (2017). This holding in *Nelson* is exactly opposite the holding in *Ewing*:

> In support of this holding, Justice Brickley's lead opinion and Justice Boyle's opinion (joined by Chief Justice Riley and Justice Griffin) noted that "an acquittal does not necessarily mean that the defendant did not engage in criminal conduct.

People v Rose, 485 Mich 1027, 1029–30; 776 NW2d 888, 889–90 (2010). Our case law undermines the United States Supreme Court's pronouncement that the presumption of innocence is The United States Supreme Court "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 US 358, 363, 90 S Ct 1068, 25 L Ed 2d 368 (1970)).

This Court has two options: (1) consider *Dixon-Bey* and *Beck* cases as as-applied challenges to the Sixth Amendment or (2) consider *Dixon-Bey* and *Beck* challeges to the entire practice of using acquitted conduct at sentencing. CDAM recommends the latter.

In their cases, like in *Jones v US*, Ms. Dixon-Bey and Mr. Beck "present a strong case that, but for the judge's finding of fact, the sentences would have been 'substantively unreasonable' and therefore illegal." *Jones*, 135 S Ct 8. A single element of the more-serious crime for which both defendants were acquitted is serving as the underlying basis for scoring some of the guidelines scoring[7] and then additionally as a basis for the departure from above the guidelines range. The premeditated intent for first-degree murder is "an element that must be either admitted by the defendant or found by the jury. It *may not* be found by the judge." *Id.*

[7] At least Mr. Beck's OVs 1 and 3 were scored based on acquitted conduct. *See*, Defendant-Appellant Beck's Supplemental Brief, 17.

But if this Court treats this as an as-applied challenge, it will be intentionally limiting the reach of its holding at a cost to the lower courts and, overwhelmingly, black and minority defendants.[8] Under a sixth amendment analysis, this Court should conclusively ban the consideration of acquitted and uncharged conduct at sentencing.[9]

In order to "give intelligible context to the right of jury trial," "juries must find all the facts of the *crime* the state *actually* seeks to punish." *Jones* Petition for Writ of Certiorari, 14 (citing Berman and Bibas, *Making Sentencing Sensible*, 4 Ohio St J Crim Law, 37, 56 & n 76). Once that act is complete, a judge may not go on to assume defendant was guilty of a separate charge. *People v Grimmett*, 388 Mich 590, 608; 202 NW 2d 278 (1972). This does not remove all discretion from a sentencing judge. "To be sure, many considerations at criminal sentencing, like the defendant's background, criminal history, and other mitigating or aggravating factors, need only be proved by a preponderance of the evidence." *US v Brown*, 892 F 3d 385, 409 (DC Cir, 2018).

However, including acquitted conduct among those considerations "renders the jury a sideshow" and allows the government to "plow[]ahead incarcerating its citizens for lengthy terms of imprisonment without the inconvenience of having to convince jurors of facts beyond a reasonable doubt." *Brown*, 892 F3d at 409.

[8] Yalincak, 54 Santa Clara L Rev 709-710 (2014).

[9] Some state supreme courts have already taken the necessary step of making a bright-line rule. Florida prohibits a trial court from considering acquitted conduct based on due process. Minnesota prohibits uncharged or acquitted conduct from serving as the basis of a departure sentence. Notably, Minnesota reached this result in a case where a defendant was convicted of third-degree murder, but received a departure sentence based on judge-found facts consistent with first-degree murder. *See Lizano v State*, 239 So 3d 714, 717 (Fla Dist Ct App, 2018); *State v Jones*, 745 NW2d 845, 849 (Minn, 2008).

"The genius of the Constitution's protections for criminal defendants was to prevent tyranny in that form by ensuring that an individual's liberty could only be stripped away by a jury of his peers upon proof of a crime beyond a reasonable doubt." *Brown*, 892 F3d at 409 (citing *In re Winship*, 397 US 358, 362, 90 S Ct 1068, 25 L Ed 2d 368 (1970)).

Should this Court still be unconvinced as to the constitutionality of considering acquitted conduct at sentencing, consider its impropriety. There are a host of policy reasons underlying a prohibition of using acquitted conduct. Juries not only protect the people against tyranny, they serve as a substantive check on the law and reinforcement of democratic norms. Ngov, Eang, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn L Rev 235, 276-279 (2009). Furthermore, juries are superior fact-finders. They are diverse, have the benefit of group deliberation, and they are neutral decision-makers. *Id* at 279-284.

CONCLUSION

CDAM asks this Honorable Court to reaffirm the principles of appellate review of sentencing as it articulated in *Steanhouse* and *Milbourn*, to hold that acquitted conduct cannot be considered at sentencing, and to grant the defendants in these cases the relief they requested.

Respectfully submitted,

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