STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

Court of Appeals No. 337848

Circuit Court No. 16-17887 FH
16-17888 FH

DAVID ROSS AMES

Defendant-Appellant
_____/

LENAWEE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

MARILENA DAVID-MARTIN (P73175)
Attorney for Defendant-Appellant
_____

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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David Ross Ames appeals the May 12, 2017 order of the Court of Appeals denying his Application for Leave to Appeal. (Order of the Court of Appeals, Appendix A).

Mr. Ames pled guilty to multiple counts of home invasion second degree, along with co-defendants Erika Webb and Jonathan Lewis. All three were equally as culpable and shared similar criminal histories, yet Mr. Ames received a minimum sentence 3 years higher than Ms. Webb and Mr. Lewis. This is so, even though Mr. Ames cooperated with police and turned himself in. Additionally, the home invasion offenses were non-violent, no one was harmed, and were motivated by a need to feed a severe heroin addiction.

Even though Mr. Ames's 5 year minimum sentence (60 months) was within his guideline range of 36 to 71 months, the sentence was unreasonable and disproportionate in light of the sentence of his co-defendants and the individual circumstances surrounding Mr. Ames.

This Court should grant leave to appeal and undertake proportionality review of Mr. Ames's sentence. He acknowledges that MCL 769.34(10) bars resentencing absent a showing that the trial court erred in scoring the guidelines variables or otherwise relied upon inaccurate information. *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). Mr. Ames submits, however, that neither *Schrauben* nor any other decision of the Court of Appeals or this Court addresses

whether MCL 769.34(10) survives our Supreme Court's ruling in *People v Lockridge*, 498 Mich 358, 392 (2015). For the reasons discussed below, this Court should hold that it does not.

Further, Mr. Ames's Presentence Investigation Report is peppered with inaccurate and irrelevant information that must be corrected. The probation agent's commentary in the report is judgmental, misguided, inaccurate, and serves no purpose other than to inflame the reader. The PSIR is an important document that guides programming, placement, and parole within the Michigan Department of Corrections and must be accurate at the time of sentencing and beyond. *People v Lloyd,* 284 Mich App 703, 705-706 (2009).

This Court should grant leave or issue a memorandum opinion or peremptory reversal order, and hold that Mr. Ames is entitled to resentencing where he is serving a sentence that is disproportionate to him and to the offense, and is 3 years higher than the sentence of his equally culpable co-defendants, and that he is entitled to correction to his PSIR.

Statement of Questions Presented

I. Did Mr. Ames receive a sentence of three years and one month longer than his equally culpable co-defendants for the exact same acts? Was his sentence disproportionate to him and the offense and is unreasonable? Is Mr. Ames entitled to resentencing?

Trial Court made no answer.

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

II. Is Mr. Ames entitled to resentencing and correction of his Presentence Investigation Report where it contains inaccurate and irrelevant information?

Trial Court made no answer.

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

Statement of Facts

At the age of 16, David Ames suffered a biking accident and found himself addicted to pain pills. He battled this addiction for many years and, like many individuals throughout this Country, he gradually turned to heroin to fill the void of prescription pills.[1] His heroin addiction spanned approximately a decade, over which time he fell deeper and deeper into drug dependency. (Presentence Investigation Report (PSIR), p. 7, provided under separate cover).

At the age of 31 years old, Mr. Ames found himself committing crimes in order to support his heroin addiction. He was charged with committing a string of home invasions in Lenawee and Hillsdale Counties between October 2015 and December 2015.

Mr. Ames eventually recognized the error of his ways and voluntarily entered drug rehab and became sober before turning himself into police in February 2016. (ST, 5-6).[2]

In this Lenawee County case, Mr. Ames faced four separate cases and 12 charges of home invasion second degree and related offenses.[3] He was charged

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[1] "The surge of heroin use and addiction is closely related to the growing prescription drug epidemic." *Report and Findings and Recommendation for Action,* Michigan Prescription Drug and Opioid Abuse Task Force, located at: https://www.michigan.gov/documents/snyder/Presciption_Drug_and_Opioid_Task_Force_Report_504140_7.pdf, last accessed 7/6/17.

[2] Transcript references are as follows: Plea Transcript (PT) 6-29-16 and Sentencing Transcript (ST) 9-13-16.

[3] He was charged with home invasion second degree, conspiracy to commit home invasion second degree, and larceny in a building in case nos. 16-17887, 16-17888, 16-18016, and 16-18017.

alongside co-defendants Jonathan Lewis, Erika Webb, and Justin Foster, all of whom entered into plea agreements.[4] (PSIR, 5-6).

Mr. Ames entered into a plea agreement in which he agreed to plead guilty to one count of home invasion second degree (16-1788) and one count of larceny in a building (16-17877), in exchange for dismissal of all remaining counts and charges. (PT, 3-4, 15). He also agreed to pay restitution joint and severally with his co-defendants in all cases, including the dismissals. (PT, 4).

At sentencing, Mr. Ames took responsibility for the offense and apologized to the victims for his actions. (ST, 5-6). He also apologized to his own family for causing them so much grief in dealing with his difficulties. (ST, 6). Mr. Ames informed the court that he knew it was time to turn his life around, which was why he turned himself into police when he did. (ST, 6).

Defense counsel asked the court for a sentence equal to that of co-defendants Erika Webb and Jonathan Lewis. Ms. Webb and Mr. Lewis were sentenced to 23 months to 10 years for the lesser offenses of breaking and entering with intent. (PSIR, 5-6). Counsel informed the court that Ms. Webb and Mr. Lewis did not turn themselves in like Mr. Ames had, and argued that they were "just as guilty as" Mr. Ames. (ST, 7).[5]

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[4] Nicholas Stokes was a fourth co-defendant. The Lenawee County Circuit Court confirmed they have no records for Mr. Stokes. A lack of records indicates his case may have been dismissed at the district court level. (PSIR, 6).

[5] Ms. Webb and Mr. Lewis were also co-defendants with Mr. Ames in a Hillsdale County case in which Mr. Ames went to trial while the others pleaded guilty and testified at his trial. Mr. Ames's Hillsdale appeal is currently pending before the Court of Appeals in Docket No. 333239.

The trial court acknowledged that Mr. Ames turned himself in to police and that he apologized to the victims and recognized that Mr. Ames's "addiction is part and parcel of [his] criminal behavior." (ST, 9). The trial court also noted the great impact Mr. Ames's actions had on the victims. (ST, 9).

Mr. Ames's sentencing guidelines were scored at 36 to 71 months. The trial court sentenced him to 60 months (5 years) to 15 years imprisonment for home invasion second degree and 2 and a half to 4 years for larceny in a building, and assessed $22,795.84 in restitution. (ST, 10).

I. Mr. Ames received a sentence three years and one month longer than his equally culpable co-defendants for the exact same acts. His sentence is disproportionate to him and the offense and is unreasonable. Mr. Ames is entitled to resentencing.

Introduction

This Court should grant leave to appeal and undertake proportionality review of Mr. Ames's sentence. He acknowledges that his 60 month minimum sentence falls within the controlling guidelines range for second degree home invasion (36 to 71 months). He further acknowledges that MCL 769.34(10) bars resentencing absent a showing that the trial court erred in scoring the guidelines variables or otherwise relied upon inaccurate information. *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). Mr. Ames submits, however, that neither *Schrauben* nor any other decision of the Court of Appeals or this Court addresses whether MCL 769.34(10) survives our Supreme Court's ruling in *People v Lockridge*, 498 Mich 358, 392 (2015). For the reasons discussed below, this Court should hold that it does not. Further, this Court may undertake a proportionality review of Mr. Ames's sentence.

Issue Preservation

This Court has not articulated a preservation requirement for challenging the proportionality of a sentence falling within the legislative guidelines range. This is not surprising, given that the legislative guidelines preclude this Court from disturbing such a sentence. MCL 769.34(10); *Schrauben*, 314 Mich App at 196. But if this provision is struck down, this Court should revive the preservation

requirement articulated in *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Sharp applied the "principle of proportionality" standard set forth by *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990), which is the same standard adopted to govern appellate review of post-*Lockridge* sentences. *Sharp*, 192 Mich App at 505; *People v Steanhouse*, 313 Mich App 1, 47-48; 880 NW2d 297 (2015), *lv gtd* 499 Mich 934; 879 NW2d 252 (2016). Under *Sharp*, a defendant had to present to the sentencing court unusual circumstances indicating that a sentence within the guidelines range would not be proportionate before the sentence is imposed. *Sharp*, 192 Mich App at 505-506. Otherwise, the issue would be deemed waived. *Id.* at 506.

Here, Mr. Ames offered several reasons for a lesser and more reasonable sentence at the time of sentencing and argued that his sentence should be in line with that of his co-defendants. (ST 5-7). This Court should consider this issue preserved for appeal.

Standard of Review

An appellate court's proportionality review considers whether the sentence is proportionate to the seriousness of Mr. Ames's conduct and to him in light of his criminal record. *Steanhouse*, 313 Mich App 46-48, *lv gtd* 499 Mich 934; 879 NW2d 252 (2016); *Milbourn*, 435 Mich at 635-636. The reasonableness of a departure is reviewed for an abuse of discretion. *Lockridge* 498 Mich at 395.

Discussion

A. Historically, *Milbourn* review has always included a mechanism for allowing defendants to rebut the presumption that a sentence within the controlling guidelines range is proportionate.

Before this Court's decision in *Lockridge*, the legislative sentencing guidelines were binding upon trial judges. *Lockridge*, 498 Mich at 387 (citing MCL 769.34(2)). *Lockridge* held unconstitutional that portion of the guidelines that made them mandatory and replaced it within an advisory scheme. *Id.* at 364, 387-389, 391-392. After *Lockridge*, sentencing courts still "must determine the applicable guidelines range and take it into account when imposing sentence." *Id.* at 365. But courts need not articulate substantial and compelling reasons for departing above or below that range; rather, the sentence only has to be "reasonable." *Id.* at 392.

Even after *Lockridge*, a sentencing court must "justify" its sentence in order to facilitate appellate review. *Id.* Appellate courts would then review for "reasonableness." *Lockridge,* 498 Mich at 392. Although *Lockridge* limited its discussion of this "reasonableness" standard to departures from the guidelines range, there was no qualifier to the Court's subsequent statement that "[r]esentencing will be required when a sentence is determined to be unreasonable." *Id.*

The *Lockridge* Court did not clarify a framework for considering the reasonableness of a departure. Our courts have, however, has adopted the "principle of proportionality" test that once applied to departures from the judicial sentencing guidelines. *Steanhouse*, 313 Mich App at 47-48 (citing *Milbourn*, 435 Mich at 660).

"[A] sentence that fulfills the principle of proportionality under *Milbourn* and its progeny constitutes a reasonable sentence under *Lockridge*." *Steanhouse*, 313 Mich App 47-48. This Court is currently reviewing this ruling. *People v Steanhouse*, 499 Mich 934; 879 NW2d 252 (2016) (granting leave to appeal).

B. MCL 769.34(10) violates the rule of *Lockridge* by precluding defendants from challenging disproportionate sentences that happen to fall within a guidelines range calculated through the use of facts found by a judge, not a jury.

This Court should conclude as an initial matter that the first sentence of MCL 769.34(10) is no longer valid. That statutory subsection begins: "If a minimum sentence is within the appropriate sentence guidelines range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in the scoring of the sentencing guidelines or inaccurate information relied upon in determining the sentence." Because *Lockridge* declared the legislative sentencing guidelines to be advisory rather than mandatory, there can be no mandatory presumption of reasonableness. Rather, there must be a mechanism for rebutting the presumption—similar to the one that existed in the *Milbourn* era and to the one that continues to function in federal court. See *Sharp*, 192 Mich App at 505-506; *Rita v United States*, 551 US 338, 347; 127 S Ct 2456; 168 L Ed 2d 203 (2007) (discussed *infra*).

To cure the constitutional defect found in the mandatory sentencing guidelines, *Lockridge* "sever[ed] MCL 769.34(2) to the extent that it is mandatory and [struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." *Lockridge*, 498 Mich at 391. It

further recognized that other portions of MCL 769.34 might need to be severed in the future: "To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Id.* at 2 and n 1. Indeed, the Michigan Court of Appeals has already relied upon this holding to strike down that part of MCL 769.34(4) that made intermediate sanctions mandatory whenever the top end of the range equaled 18 months or less. *Schrauben*, 314 Mich App at 195.

The *Schrauben* Court did not address whether MCL 769.34(10) contained mandatory language of the same type that was fatal to the subsection addressed to intermediate sanctions. It simply assumed without analysis that sentences within the controlling guidelines range "must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *Id.* at 196 (citing MCL 769.34(10)). Consequently, a mandatory, non-rebuttable presumption of proportionality—fashioned by the Legislature to fit a scheme in which adherence to the guidelines was mandatory—continues even though this Court has held that the guidelines, to pass constitutional muster, must now be treated as advisory.

This is far different than the approach used in the federal sentencing scheme that inspired the *Lockridge* remedy. In *Rita*, *supra*, the United States Supreme Court examined the reasonableness of a federal sentence imposed after the federal guidelines were declared advisory in *United States v Booker*, 543 US 220, 261-263; 125 S Ct 738; 160 L Ed 2d 621 (2005). The *Rita* Court held that "[a] *nonbinding*

appellate presumption that a Guidelines sentence is reasonable" does not violate the Sixth Amendment principles underlying *Booker*. *Rita*, 551 US at 352-353 (emphasis added). After all, "*presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable." *Rita*, 551 US at 366 (Stevens, J., concurring) (emphasis in original).

A non-rebuttable presumption, on the other hand, raises Sixth Amendment problems. Even after *Lockridge*, sentencing courts must continue to score the guidelines using facts found by the judge by a preponderance of the evidence. *Lockridge*, 498 Mich at 365. By imposing a mandatory presumption, MCL 769.34(10) ensures that "some sentences . . . will be upheld as reasonable only because of the existence of judge-found facts." *Rita*, 551 US at 373 (Scalia, J., concurring in part and concurring in the judgment). This Court should therefore determine that MCL 769.34(10) is incompatible with *Lockridge*.

C. Mr. Ames's sentence is unreasonable under *Steanhouse and Milbourn*.

Under *Milbourn*, "'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.'" *Steanhouse*, 313 Mich App at 45 (quoting *Milbourn*, 435 Mich at 659-660). Specifically, reviewing courts must consider factors such as: (1) the seriousness of the offense, (2) factors not considered by the guidelines, and (3) factors given inadequate weight by the guidelines in a particular case. *Id*. (citing *Milbourn*, 435 Mich at 660, and *People v Houston*, 448 Mich 312, 321-324; 532 NW2d 508 (1995)).

The seriousness of the offense: The home invasion second degree offense was not serious in the scheme of home invasions. According to the record, Mr. Ames and his co-defendants purposefully looked for homes where no one was home so that they could take property and convert it to cash to support their drug habit. (PSIR, 2-5). Mr. Ames was never involved in a home invasion where anyone was home or where there was risk of bringing harm to any person. There were no weapons involved and no one suffered any physical harm. While it is true that the victims suffered an emotional impact and loss of a sense of security, that fact is taken into account in the scoring of the guidelines as discussed below.

Factors not considered, or inadequately considered, by the guidelines: At sentencing, the trial court noted the statements made by the homeowners in this case and the lack of security they now find in their homes. (ST, 9). Mr. Ames was assessed a 10 point score for Offense Variable 4, which takes into account the psychological impact of the offense on the victim. He was also assessed a 10 point score for Offense Variable 9, which assesses points for the number of victims involved. Victim impact was adequately accounted for in the guidelines.

Remorse and responsibility: Additionally, Mr. Ames has consistently shown great remorse for this offense and has accepted responsibility. This factor was not taken into consideration in the guidelines. Mr. Ames turned himself into police after voluntarily putting himself through rehab to overcome a decade-long drug addiction. He apologized to the victims at sentencing and the trial court recognized

it as sincere. Mr. Ames also agreed to pay over $22,000 in restitution in an attempt to right the wrongs of his behavior. (ST, 5-6, 9; PT, 4).

Potential for rehabilitation: Mr. Ames has potential for rehabilitation, due in large part to his serious substance abuse issues and the likelihood of success through intervention. This factor is also not taken into account in the sentencing guidelines. Mr. Ames became sober before turning himself into police in February 2016. He has been incarcerated since that time and has had no substance abuse issues while in custody. As he stated at sentencing, he is attempting to make amends for the years of his life he has wasted due to his heroin addiction. (ST, 5). Mr. Ames can and will rehabilitate with proper substance abuse treatment and programming.

Based on the *Steanhouse* and *Milbourn* factors surrounding reasonableness, the sentence imposed against Mr. Ames was unreasonable.

D. Mr. Ames's five year minimum sentence is constitutionally disproportionate to his circumstances and to the circumstances of his crimes, especially in light of the two year minimum sentence received by his equally culpable codefendants.

Both the federal and state constitutions forbid the imposition of a disproportionate sentence. US Const, Am VIII; Const 1963, art 1, § 16; *People v Bullock*, 440 Mich 15, 37; 485 NW2d 866 (1992). Sentences must be proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003); *Milbourn*, 435 Mich at 636. Mr. Ames's 5 year minimum term of imprisonment is not.

As a general rule, a sentence that fell within the range recommended by the judicial guidelines was presumed to be neither excessive nor disparate. *Sharp*, 192 Mich App at 505 (citing *Milbourn*, 435 Mich at 660-661). But *Milbourn* itself recognized that "[c]onceivably, even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." *Milbourn*, 435 Mich at 661. Defendants could therefore overcome the presumption of proportionality by presenting evidence of "uncommon" or "rare" circumstances. *Sharp*, 192 Mich App at 505 (citing *Milbourn*, 435 Mich at 661).

Unusual circumstances, indicating a disproportionate sentence, may be shown (as is the case here) by disparate sentences of codefendants for the same crime. "Neither justice nor the appearance of justice is served when similar offenders committing similar offenses receive dissimilar sentences." *People v Haymer*, 165 Mich App 734, 737 (1988) (remanding for resentencing where sentences between codefendant's were severely disparate); citing, Michigan Sentencing Guidelines, Statement of Purpose.

Where a defendant receives a minimum sentence much longer than his more culpable co-defendant, "this sort of disparate treatment in sentencing shocks . . . judicial conscience and requires resentencing." *People v Pfeiffer*, 177 Mich App 170, 172 (1989) (remanding for resentencing where difference of 15 years in minimum sentences of codefendants). See also, *People v Lorentzen,* 387 Mich 167 (1972); and *People v Meeks,* 92 Mich App 433 (1979) (directing that in assessing proportionality in light of cruel and unusual punishment, courts should examine whether the

punishment is comparable to punishments imposed in other jurisdictions for the same offense).

Mr. Ames's sentence of an additional three years and one month of imprisonment for his joint participation in the exact same acts as his co-defendants, Erika Webb and Jonathan Lewis, indicates that his sentence is disproportionate, unjustified, and unreasonable.

Ms. Webb was facing 11 counts in three Lenawee cases. (Erika Webb Docket Sheets, Appendix B). After entering into a plea deal, she received a 23 month to 10 year sentence for these offenses. See Table 1, below.

Table 1: Erika Webb (Appendix B)

Case no.	Offense Date	County	Original Charges and Plea	Plea Date	Date of Sentencing	Sentence
16-17878	10/26/2015	Lenawee	1. HI-2nd 2. HI-2nd 3. Larceny Building 4. B&E w/Intent Pleaded guilty to B&E w/Intent; all other counts dismissed.	3/16/16	4/28/16	23 months – 10 years
16-01781	12/11/15	Lenawee	1. HI-2nd 2. HI-2nd 3. B&E w/Intent Pleaded guilty to B&E w/Intent; all other counts dismissed.	3/16/16	4/28/16	23 months – 10 years
16-17892	12/14/15	Lenawee	1. HI-2nd 2. HI-2nd 3. Larceny Building 4. B&E w/Intent Pleaded guilty to B&E w/Intent; all other counts dismissed.	3/16/16	4/28/16	23 months – 10 years

Jonathan Lewis was also facing 11 counts in three Lenawee cases when he too pled to the lesser offense of breaking and entering with intent and received a 23 month to 10 year prison sentence. (Jonathan Lewis Docket Sheets, Appendix C). See Table 2, below.

Table 2: Jonathan Lewis (Appendix C)

Case no.	Offense Date	County	Original Charges and Plea	Plea Date	Date of Sentencing	Sentence
16-17841	11/23/2015	Lenawee	1. HI-2nd 2. HI-2nd 3. Larceny Building 4. B&E w/Intent Pleaded guilty to B&E w/Intent; all other counts dismissed.	3/9/16	4/7/2016	23 months – 10 years
16-17877	12/3/2015	Lenawee	1. HI-2nd 2. Larceny Building 3. B&E w/Intent Pleaded guilty to B&E w/Intent; all other counts dismissed.	3/9/16	4/7/2016	23 months – 10 years
16-17876	12/18/2015	Lenawee	1. HI-2nd 2. Larceny Building 3. Felony Firearms 4. B&E w/Intent Pleaded guilty to B&E w/Intent; all other counts dismissed.	3/9/16	4/7/2016	23 months – 10 years

Justin Foster, a third co-defendant, was facing only 2 counts in Lenawee and received 97 days jail and 5 years' probation. (Justin Foster Docket Sheets, Appendix D). See Table 3, below.

Table 3: Justin Foster (Appendix D)						
Case no.	**Offense Date**	**County**	**Original Charges and Plea**	**Plea Date**	**Date of Sentencing**	**Sentence**
16-17890	12/3/2015	Lenawee	1. HI-2nd 2. Larceny Building Pleaded guilty to larceny; HI-2nd dismissed.	3/16/16	6/3/16	97 days jail; 5 years probation

In comparison to Ms. Webb and Mr. Lewis, Mr. Ames was facing 12 counts in four Lenawee County cases. He received a 60 month to 180 month sentence following his guilty plea. Mr. Ames's 60 month minimum sentence was disproportionate to the sentence of his co-defendants who received only a 23 month minimum term for the exact same crimes. He, Ms. Webb, and Mr. Lewis each played equal roles in the offense, they each have very similar criminal histories, and Mr. Ames exhibited a high level of cooperation with authorities. His minimum sentence is disproportionate.

Proportionality review also examines the severity of the offense and the seriousness of the offender's criminal record. *Milbourn*, 435 Mich at 636. The sentencing offense in this case is second degree home invasion. Mr. Ames and his co-defendants were charged with breaking into homes in the hopes of stealing property that could be used to fund their heroin habit. As explained above, the offense did not involve weapons or any physical harm to others. This was a lower level second-degree home invasion with no real assaultive component. Mr. Ames does not ignore the impact on the victim—for which he deeply apologized at sentencing. Yet a 5 year minimum term does not consider the circumstances of the

crime or his prior record. He has no prior felonies and only 1 prior scorable misdemeanor conviction. (PSIR, 1).

This Court should grant leave to appeal, or remand this case for resentencing and order the trial court to explain why its minimum sentence of 5 years imprisonment is proportionate to Mr. Ames and the offense.

II. Mr. Ames is entitled to resentencing and correction of his Presentence Investigation Report where it contains inaccurate and irrelevant information.

Issue Preservation

Trial counsel did not object to this error. Mr. Ames concurrently filed a motion to remand in the Court of Appeals to preserve this issue, MCR 6.429(C), which was denied. (Order of the Court of Appeals, Appendix A). The error is plain[6], or alternatively counsel was ineffective for not objecting.

Standard of Review

Non-constitutional unpreserved errors are reviewed for plain error that affect substantial rights, seriously affecting the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines,* 460 Mich 750, 763 (1999).

Claims of ineffective assistance of counsel can be raised for the first time on appeal. *People v Henry,* 239 Mich App 140, 607 NW2d 767 (1999). Constitutional questions and ineffective assistance of counsel issues are reviewed de novo. *People v LeBlanc,* 465 Mich 575, 579, 640 NW2d 246 (2002). Questions of fact related to ineffective assistance claims are reviewed for clear error. *LeBlanc*, *supra.*

Discussion

Mr. Ames has a due process right to be sentenced on the basis of accurate information. *Townsend v Burke,* 334 US 736; 68 S Ct 1252; 92 L Ed 2d 1690 (1948); US Const, Ams V, XIV; Mich Const 1963, art 1, § 17. Mr. Ames is entitled to

[6] Should this Court disagree that the error is plain, Mr. Ames asks this Court to remand this case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

resentencing and to have his Presentence Investigation Report (PSIR) corrected as it contains inaccurate and irrelevant information.

The purpose of the Presentence Investigation Report (PSIR) is to provide the trial court with "relevant and accurate information relating to the offender and the offense." (Appendix E, Michigan Department of Corrections Policy Directive (MDOC PD) 06.01.140, p. 1). All statements contained within the PSIR must be "clear, concise and accurate." (Appendix E, p. 3). The content of the PSIR may be challenged for containing inaccurate or irrelevant information. MCL 771.14(6). If the Presentence Report contains inaccurate or irrelevant information, the report "shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections." MCL 777.14(6).

Here, Mr. Ames requests the fourth paragraph under "Evaluation and Plan" on page 1 of the PSIR be amended to remove the agent's subjective, inflammatory, and mocking comments about Mr. Ames, his addiction, and this offense.

First, the agent inaccurately proclaims that Mr. Ames has chosen to fall addicted to drugs:

> Although this defendant does not have much of a criminal history, **he has chosen to begin a criminal career, choosing to use illegal drugs**. He **blames** a "friend" who brought him drugs he thought was opiates, only to find out was heroin, **minimizing his chosen addiction to prescription pills.** [PSIR, 1].

Mr. Ames was not "choosing to use illegal drugs." Drug addiction is a disease. Only through proper intervention and treatment can the addiction be broken. Mr. Ames had not yet received that intervention at the time of these offenses. For the agent to

suggest that Mr. Ames chose to become an addict is extremely offensive and tone-deaf to the millions of Americans who suffer from serious addictions every day.

It is also untrue and inaccurate to claim that Mr. Ames is "minimizing" his "chosen addiction" by placing "blame[ ]" on a friend. The agent asked Mr. Ames to make a statement for the PSIR interview, which is why Mr. Ames provided a written statement in the "Defendant's Description of the Offense." As the trial court recognized, Mr. Ames's "addiction is part and parcel of [his] criminal behavior." (ST, 9). For him, addressing the crime means talking about his addiction. He was asked to talk about the crime and he attempted to explain his battle with drugs.

The agent has no basis to imply that Mr. Ames was attempting to pass blame or to minimize when he was simply sharing his story. Mr. Ames voluntarily completed rehab, turned himself into police, admitted responsibility for the offenses, agreed to pay restitution, apologized to the victims in open court, and provided the probation agent with a written statement. These are not characteristics or behaviors of someone who is minimizing their behavior. The agent's opinion statements are irrelevant and inaccurate and must be deleted from the report.

Next, the agent made a sarcastic statement about Mr. Ames not being forced to commit this crime, while evoking irrelevant details about the victims in an attempt to inflame the reader:

> The defendant and his friends then rifle through **hard working citizens' personal property**, taking whatever they want so they can support their drug habit, **which the law abiding victims did not force on them**. [PSIR, 1].

Whether the victims are "hard working" or "law abiding" is irrelevant. Mr. Ames would be just as guilty and it would be expected that he would be sentenced in the same manner if he had invaded the home of a non-law abiding, unemployed or unsympathetic victims. Also, it is unclear why the agent felt it necessary to declare that the victims did not force Mr. Ames to have a drug habit. No one has ever made or would ever make that claim. The only reason for adding these phrases is to sensationalize the offense in the hopes of influencing the reader of the report. These statements are inaccurate and irrelevant and must be deleted from the report.

The agent then wraps up by giving her opinion as to the lasting effects of this crime on the victims:

> The defendant is asking for leniency and organized **"structure"** when **there is no way he can ever repay the victims for whom he has taken so much from, including the sanctity of their homes.** [PSIR, 1].

Here, the agent mocks Mr. Ames's plea for structure by dismissing his request as ludicrous given what he has done. The agent's implication is that Mr. Ames should be shamed for attempting to advocate for himself and his future success.

Also, it is only the agent's opinion that Mr. Ames could not "ever repay the victims" for what he has done. All of the victims were given the opportunity to speak for themselves at the time of sentencing, and in fact did supply letters to the court. Many expressed the lasting effects this offense has had on them. Even so, it is not the agent's place to dismiss the possibility that Mr. Ames can and will repay the victims through rehabilitation, redemption, and restitution while in prison. The agent's

diminishment of the possibility of redemption and forgiveness is irrelevant and must be deleted from the report.

The above mentioned sentences from the PSIR are anything but accurate or relevant. They represent misplaced, uninformed, and slanted opinions of the agent and must be stricken form the PSIR.

It is important that only accurate and relevant information be contained within the PSIR, not only so that the trial court can make an informed sentencing decision based on accurate information, but also because the Michigan Department of Corrections heavily relies on the PSIR to determine programing needs and other critical decisions. *People v Lloyd,* 284 Mich App 703, 705-706 (2009).

Further, if the trial court did not rely on this information in imposing sentence, Mr. Ames is entitled to have the information stricken from his PSIR. MCL 771.14(6); MCR 6.425(D)(3)(A); *People v Harmon,* 248 Mich App 522, 533 (2001).

Summary and Relief

WHEREFORE, for the foregoing reasons, David Ames asks that this Honorable Court preemptively remand this case for resentencing and order the trial court to explain why its minimum sentence of 5 years imprisonment is proportionate to Mr. Ames and the offense, correct the presentence report, or alternatively, grant leave to appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Marilena David-Martin

BY: _____

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