STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

DAVID ROSS AMES

Defendant-Appellant
_____/

SC: 156077

COA: 337848

Circuit Court Nos. 16-17887 FH
16-17888 FH

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL

Oral Argument Requested

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Statement of Question Presented

I. MCL 769.34(10) requires appellate courts to affirm any and all sentences falling within a properly calculated sentencing guidelines range regardless of the proportionality or reasonableness of the sentence. Is that provision of the statute invalid under the now advisory sentencing guidelines?

Defendant-Appellant answers, Yes.

Plaintiff-Appellee answers, No.

Court of Appeals made no answer.

Standard of Review

This Court reviews questions of law de novo, including constitutional questions and questions concerning the interpretation and application of statutes. *People v Kennedy*, __ Mich __ , (June 29, 2018) (Docket No. #154445); slip op at 4.

Statement of Facts

David Ames was sentenced following a guilty plea to a prison term of 60 months to 15 years imprisonment for home invasion second degree and 30 months to 4 years imprisonment for larceny in a building. (26a). His equally culpable and similarly situated co-defendants, Erika Webb and Jonathan Lewis, received prison sentences of 23 months to 10 years for the lesser offense of breaking and entering with intent. (30a-31a).

Mr. Ames's 60 month minimum sentence was within his properly scored sentencing guidelines range of 36 to 71 months. Mr. Ames sought leave to appeal in the Court of Appeals, challenging the proportionality of his within-guidelines sentence. (11a-13a). He argued his sentence was not proportionate to him as an offender or to the circumstances of his offense given several mitigating factors not taken into account by the sentencing court and the disparate treatment between him and his similarly situated co-defendants. Mr. Ames also argued that his sentence was based on inaccurate information in his presentence report and requested several corrections.

The Court of Appeals denied leave (14a), and Mr. Ames made the same challenges in this Court. (See Defendant-Appellant's Application for Leave to Appeal filed 7/7/17).

This Court directed the prosecutor to respond to Mr. Ames's application. (15a). Following the prosecutor's response, this Court granted oral argument on the application and directed the parties to address:

[W]hether MCL 769.34(1) has been rendered invalid by this Court's decision in *People v Lockridge*, 498 Mich 358 (2015), to the extent that the statute requires the Court of Appeals to affirm sentences that fall within the applicable guidelines range "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." See *People v Schrauben*, 314 Mich App 181, 196 (2016). [16a].

Argument

I. MCL 769.34(10) requires appellate courts to affirm any and all sentences falling within a properly calculated sentencing guidelines range regardless of the proportionality or reasonableness of the sentence. That provision of the statute is invalid under the now advisory sentencing guidelines.

"The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty." *People v Heller*, 316 Mich App 314, 320–21 (2016) (internal citation omitted). "Sentencing is more than a rote or mechanical application of numbers to a page. It involves a careful and thoughtful assessment of the true moral fiber of another. . ." *Id.* at 318 (internal citation omitted).

The portion of MCL 769.34(10) that requires the Court of Appeals to affirm any and all minimum sentences imposed within the appropriately scored guideline range, regardless of proportionality or reasonableness, upsets this principle.

A. Lockridge *necessarily invalidates MCL 769.34(10), which requires appellate courts to affirm any and all within-guideline sentences without regard to the reasonableness or proportionality of those sentences.*

In *People v Lockridge*, 498 Mich 358, 391 (2015), this Court held that Michigan's Legislative Sentencing Guidelines violated the Sixth Amendment because the guidelines authorized judicial fact-finding to mandatorily increase the floor of the minimum sentencing guideline range. As a remedy, the sentencing guidelines were held to be merely advisory in all applications. *Id.*; *People v Steanhouse*, 500 Mich 453, 466 (2017).

After *Lockridge,* the trial court must consult the advisory sentencing guidelines and impose a sentence that is reasonable. *Lockridge,* 498 Mich at 392. The guidelines "remain a highly relevant consideration in a trial court's exercise of sentencing discretion," and a trial court is required to "consult those Guidelines and take them into account when sentencing." *Id.* at 391 (internal citations omitted). A sentence is reasonable if it is proportionate to the "'seriousness of the matter'" before the court. *Steanhouse,* 500 Mich at 472 citing *People v Milbourn,* 435 Mich 630, 661 (1990).

In *Lockridge*, the Court severed certain portions of the sentencing guidelines statute, such as MCL 769.34(2), which required trial courts to sentence individuals within the sentencing guidelines, and MCL 769.34(3), which required the articulation of a substantial and compelling reason to depart from the guidelines. *Lockridge,* 498 Mich at 391. The Court also struck down "any part of MCL 769.34 or another statute that refers to the use of the sentencing guidelines as mandatory or refers to departures from the guidelines." *Id.* at 365, n.1.

A large portion of MCL 769.34 is devoted to setting up appellate review of claims of error that stem from the guidelines. MCL 769.34(10) is one of six provisions within the statute that deals expressly with appellate review of sentences, and reads, in pertinent part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

See MCL 769.34(7)-(12).

The practical effect of MCL 769.34(10), if this Court were to adopt the prosecution's position and find that it survives *Lockridge*, is that it prohibits appellate review for reasonableness and proportionality of sentences imposed within a now advisory sentencing guideline range. This result skirts the remedy imposed by *Lockridge*. Once the trial court imposes a sentence anywhere within the sentencing guideline range, that sentence is binding and unreviewable. There is no practical difference between requiring a trial court to impose a guidelines sentence (i.e., mandatory guidelines), versus merely "allowing" such a sentence to be imposed but requiring affirmance of that sentence even if it is disproportionate or unreasonable (i.e., advisory guidelines without appellate review).

There are three reasons why MCL 769.34(10) is not a valid jurisdiction-stripping statute that limits "a class of claims from the jurisdiction of the Court of Appeals" as the prosecution contends. (See Prosecutor's Brief in Opposition filed 12/20/17, p. 9). First, a statute cannot strip the appellate courts of jurisdiction that is otherwise granted by the state constitution. The Michigan Constitution provides for an appeal of a criminal conviction. 1963 Const, Art 1, sec 20. This has been understood to include the sentence imposed. *People v Martinez,* 193 Mich App 377, 380 (1992) (under the state constitution, a defendant is entitled to appeal of right from sentence imposed at resentencing). Second, MCL 600.308 expressly grants the Court of Appeals jurisdiction over all final judgments, which includes sentences. This statute was last amended in 2016 and the Legislature has not altered or limited the Court of Appeals' jurisdiction over final judgments. And third, by its

plain language, § 34(10) expressly *grants* the Court of Appeals jurisdiction over within-guideline sentences. The statute requires the court to affirm those sentences falling within what used to be a mandatory sentencing guideline range. However improper, the statute directs the decision of the Court of Appeals in a binding guidelines system; it does not divest the Court of Appeals of jurisdiction over review of within-guideline sentences.

Continuing to enforce the first sentence of MCL 769.34(10) perpetuates the constitutional harm this Court sought to cure in *Lockridge*. Even though the guideline range is "advisory" according to *Lockridge*, it maintains its mandatory directive in MCL 769.34(10). Without appellate review of within-guideline sentences, Michigan's sentencing guidelines cannot truly be advisory.

This is precisely the analysis the US Supreme Court confronted in *US v Booker,* 543 US 220 (2005) when it invalidated the federal sentencing guidelines after concluding they were mandatory. The Court noted, the "Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." *Id.* at 233–234 (internal citations omitted).

Similarly here, while *Lockridge* held that the guidelines are only advisory and one factor to be consulted when imposing sentence, albeit an important factor,

MCL 769.34(10) directs that the appellate court "shall affirm" all sentences within the guidelines. As a result, the guidelines still have the effect of creating a binding and unreviewable sentence, and so the Sixth Amendment violation persists.

The fact that a sentencing court may impose a sentence outside of the sentencing guidelines range is not sufficient to give the guidelines truly advisory non-binding effect. Because of § 34(10), a sentencing court knows it can insulate its sentence from appellate review by choosing a guidelines sentence. If the sentencing court can be reversed *only if* it imposes a sentence *outside* of the guideline range, but can *never* be reversed if it imposes a sentence *within* the guideline range, then the advisory nature of the sentencing scheme fails right along with the *Lockridge* remedy.

A sentencing scheme is truly advisory when a trial court must exercise discretion as to (1) whether to impose a within-guidelines sentence and, (2) if so, where within that range the sentence should fall, or (3) if outside of the range, where the sentence should fall. "Judicial discretion" is defined by Black's Law Dictionary, 3d as "the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law." The exercise of discretion for within-guideline sentences by its very nature, must be subject to review. If an appellate court is required to affirm every exercise of discretion resulting in a within-guideline sentence, regardless of the reasonableness or proportionality of the sentence, then the trial court is not incentivized to exercise that discretion.

Without equal appellate enforceability, the advisory nature of the sentencing scheme fails. If an appellate court applies a presumption of proportionality to sentences within the sentencing guidelines range, individuals must have the ability to rebut that presumption of proportionality. *Rita v US*, 551 US 338, 351 (2007) (an appellate court presumption of reasonableness is constitutional only if it is rebuttable).

The ability to review a trial court's exercise of discretion in imposing a within-guideline sentence is extremely important in Michigan where the guideline ranges are much more expansive than other states using similar sentencing schemes.[1] (32a-34a). A typical sentencing guideline range in Michigan provides the trial court with a wide range of available sentences where the maximum-minimum sentence is usually 100-300% higher than the minimum-minimum sentence. (33a). While Michigan's most frequently used guideline range cell has a 130% spread between the minimum-minimum and the maximum-minimum (10 months to 23 months), North Carolina's has only a 33% spread (6 months to 8 months), and Kansas has only a 13% spread (15 to 17 months). (32a).

If the first sentence of MCL 769.34(10) is found to be valid after *Lockridge*, a trial court in Michigan could impose drastically disparate sentences against similarly situated individuals who share the same sentencing range. For example, an individual's sentencing guideline range in the F-II cell of the Class G grid would

[1] Compilation of Michigan Sentencing and Justice Reinvestment Analyses, Council of State Governments Justice Center, May 2014, pp. 22-24. (32a-34a). Located at , <https://csgjusticecenter.org/wp-ontent/uploads/2014/07/MichiganReportTechnicalAppendix.pdf>, last accessed July 5, 2018.

be 5 to 23 months. (35a). The trial court could impose the 5 month minimum-minimum sentence against one individual and impose the 23 month maximum-minimum sentence against the other similarly situated individual. Under MCL 769.34(10), neither party could challenge the sentences imposed as disproportionate or unreasonable. The trial court would not be required to give any reasons for imposing the tremendously different minimum sentences against similarly situated individuals. This is true even though one individual received a 360% higher minimum sentence than the other.

This example highlights the need for appellate review of within-guideline sentences; there is a real risk that the lack of a review could result in the unchecked imposition of unreasonable and disproportionate sentences. The decision whether to sentence within the guideline range and where within that range is akin to the decision of whether to depart from the guidelines in the first place and to what extent.[2] Both decisions are fact-intensive and require justification. The ultimate sentence imposed cannot be immune from appellate review if the guideline range offers only an advisory set of numbers that a court is truly free to decide whether to use.

The first sentence of MCL 769.34(10), crafted under a mandatory sentencing guideline scheme, no longer reflects the Legislature's intent given that this Court has *Booker-ized* that system, returning Michigan to a non-binding advisory system.

[2] In *People v Smith*, 482 Mich 292, 312 (2008), this Court held it was not enough to state substantial and compelling reasons for a departure. A court must state why the extent of the particular departure imposed is more proportionate.

MCL 769.34(10) served a purpose under the mandatory sentencing guidelines: MCL 769.34(2) required courts to sentence individuals within the sentencing guidelines and MCL 769.34(10) required appellate courts to affirm those sentences. With § 34(2) severed, the first sentence of § 34(10) must also go. It has no valid role after *Lockridge* and cannot dovetail with an advisory sentencing guideline scheme.

B. *Appellate review is a necessary mechanism for protecting the Sixth Amendment concerns addressed in* Lockridge.

To be true to the remedy of advisory guidelines this Court adopted in *Lockridge*, a within-guidelines sentence must be subject to appellate review for proportionality and reasonableness. See *Milbourn*, 435 Mich at 661 and *Rita v US*, 551 US at 351. This approach is consistent with post-*Booker* US Supreme Court and federal precedent.

The US Supreme Court has held that a sentencing court "may not presume that the Guidelines range is reasonable." *Peugh v United States*, 569 US 530, 536–37 (2013) citing *Gall v United States*, 552 US 38, 49, 50 (2007) (citation omitted); *Nelson v US*, 555 US 350, (2009); See also *US v Matchett*, 802 F3d 1185 (CA 11, 2015); *US v Griffith*, 115 F Supp 3d 726 (2015) (SDW Va, 2015). A sentencing court must be able to properly consider the guidelines while at the same time be allowed "to tailor the sentence in light of other statutory concerns." *Peugh* 569 US at 536–37 (internal citations omitted); *Matchett*, *supra.* The sentencing court must make an individualized assessment when imposing a sentence. See *United States v Carter*, 564 F3d 325, 330 (CA 4, 2009) ("Regardless of whether the district court imposes an above, below, or within-Guidelines sentence, it must place on the record an

'individualized assessment' based on the particular facts of the case before it." Quoting *Gall*, 552 US at 50–52.) "After settling on the appropriate sentence, [the Court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 US at 50 citing *Rita*, 551 US 338.

On the other hand, an *appellate court* "may, but is not required to, presume that a within-Guidelines sentence is reasonable." *Peugh* 569 US at 536–37 citing *Rita,* 551 US at 347; See *United States v Lawrence,* 788 F3d 234, 246 (CA 7, 2015); *United States v Garcia,* 774 F3d 472, 476 (CA 8, 2014). In the context of the federal sentencing guidelines, the Supreme Court held that "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard." *Gall,* 552 US at 51. If an appellate court does apply a presumption of proportionality to sentences within the sentencing guidelines range, individuals must have the ability to rebut that presumption of proportionality. *Rita*, 551 US at 351; See also *US v Moon*, 808 F3d 1085, 1090 (CA 6, 2015).

Post-*Lockridge*, this Court has not yet answered whether a sentence imposed within the now advisory statutory sentencing guidelines range is presumptively reasonable or proportionate or whether such a sentence is immune from appellate

review.[3] The Court of Appeals in *People v Schrauben,* 314 Mich App 181, 194-195 (2016), is the first and only court to address the effect of MCL 769.34(10) after *Lockridge.* The cursory and perfunctory way in which the court analyzed the statutory provision should not be given any precedential effect.

In *Schrauben*, the defendant was sentenced within the sentencing guidelines range to a minimum of 16 months in prison. The defendant claimed his sentence violated MCL 769.34(4), which mandated the imposition of an intermediate sanction sentence (i.e., not prison). The court held that § 34(4) was no longer mandatory, the trial court had discretion whether to impose an intermediate sanction, and the trial court properly exercised that discretion in imposing prison. *Id.* at 195.

Without analysis, the court summarily concluded that a sentence imposed within the minimum sentencing guidelines range must be affirmed, citing MCL 769.34(10). *Id.* In support of this statement, the court noted that this provision had not been expressly altered or diminished by *Lockridge*. *Id.* The court failed to note, however, that the defendant in *Lockridge* had been sentenced to a term *outside* of the sentencing guideline range, which would not have invoked MCL 769.34(10)—a statute addressing sentences *within* the sentencing guideline range. To the extent the *Schrauben* court relied on the failure of *Lockridge* to invalidate MCL 769.34(10), that cursory holding is flawed.

[3] In the advisory judicial sentencing guidelines era, *Milbourn* itself allowed for the review of a within guidelines sentence for proportionality, though this Court noted that it would be a rare sentence within the guidelines range that would be disproportionate. *Milbourn,* 435 Mich at 661.

MCL 769.34(10) does not *just* create an appellate presumption that within-guidelines sentences are reasonable as authorized in the federal system by *Rita*. Instead, it completely insulates from appellate review any challenge that a within-guideline sentence is unreasonable or disproportionate and requires the Court of Appeals to affirm sentences without consideration. MCL 769.34(10) violates the Sixth Amendment by prohibiting appellate courts from reviewing a trial court's exercise of sentencing discretion, thereby creating an incentive to impose a within-guideline sentence that is appeal-proof regardless of whether that sentence is reasonable or proportionate. Within-guideline sentences cannot be immune from appellate review under an advisory sentencing scheme. *Rita,* 551 US at 351.

When a sentencing court imposes a within-guideline sentence, the question is not whether that court understood the guidelines were advisory and that it was not required to impose a guideline sentence. The question is whether the sentencing court understood that it could not presume the sentencing guideline range was reasonable before imposing sentence. *Nelson v United States*, 555 US 350, 351 (2009).

In *Nelson*, the Court remanded for resentencing where the appellate court affirmed the sentence of the district court after finding only that the district court "did not treat the Guidelines as 'mandatory' but rather understood that they were only advisory." 555 US at 351. The Court explained that it is "beside the point" whether a sentencing court understands the advisory nature of the guidelines. *Id.* at 352. What is important is that the sentencing court may not impose a sentence

within the guidelines while believing the guidelines are presumed reasonable. "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Id.*

"[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Id.* citing *Rita,* 551 US at 351. Here, however, under MCL 769.34(10), there is no doubt that Michigan's trial courts are enjoying the benefit of a legal presumption it should not have. Any and all sentences imposed within the sentencing guidelines will be automatically affirmed. This scheme violates the Sixth Amendment and can only be remedied by appellate review of reasonableness and proportionality of all sentences, including those within the guidelines.

C. *Michigan's appellate courts have recognized that MCL 769.34(10) was not intended to and cannot prevent appellate review of constitutional errors.*

MCL 769.34(10) authorizes appellate review of within-guideline sentences under only two scenarios: (1) when there is an error in the scoring of the guidelines, or (2) when the trial court relied on inaccurate information in imposing a sentence. That is not enough.

The statute prohibits appellate review of a within-guideline sentence even when the guideline sentence is disproportionate, unreasonable, cruel, unusual, disparate, or otherwise illegal. In addition to hindering the implementation of the *Lockridge* remedy, this statute is at risk of offending myriad of constitutional rights and should be struck down as invalid and unworkable.

A sentence falling within the sentencing guideline range has historically been presumed reasonable and not excessive or disparate. *People v Sharp*, 192 Mich App 501, 505 (1992) citing *Milbourn*, 435 Mich at 660-661. Our courts have recognized, however, that there are scenarios where a trial court may abuse its discretion when imposing a guideline sentence. *Milbourn*, 435 Mich at 661.

Recently, the Court of Appeals recognized that a sentence within the guideline range may be invalid if it is imposed without regard to the "requirement of individualized sentencing. . ." *People v Pennington*, __ Mich App __, __ (2018) (Docket No. 323231); slip op at 6. In *Pennington*, the trial court had a blanket policy of imposing the very top of the sentencing guidelines against individuals who exercised their right to a trial. The court held such a practice violated due process and offended well-established sentencing law that required individualized sentencing. *Id.*

Our courts have also recognized that a sentence that is "grossly disproportionate" violates the state and federal protections against cruel and unusual punishment. *People v Bullock*, 440 Mich 15, 32 (1992). Although in *People v Garza*, 469 Mich 431, 434–35 (2003), this Court failed to recognize its holding in *Bullock* that a grossly disproportionate sentence is a violation of our state constitution's prohibition against cruel or unusual sentences; this Court was not convinced that § 34(10) was unconstitutional.

A guideline sentence may also be challenged on the basis that the sentence is disproportionate, such as when in comparison to similarly situated codefendants.

"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) citing the Michigan Sentencing Guidelines, Statement of Purpose.

As is regularly recognized in the federal system, the sentencing guidelines are a "starting point and the initial benchmark," for establishing the appropriate sentence for individual offenders. *Gall*, 552 US at 49. A sentence that is within the guidelines but does not take into account individualized factors, must be subject to challenge. *Gall*, 552 US at 50.

MCL 769.34(10) violates well-settled sentencing principles and prohibits challenges to sentences that are not individualized or constitutionally sound. "It is axiomatic that a statutory provision, such as MCL 769.34(10), cannot authorize action in violation of the federal or state constitutions." *People v Conley*, 270 Mich App 301, 316 (2006). Recognizing the invalidity of the statute, the Court of Appeals has held that in order "to avoid a reading of the relevant language of MCL 769.34(10) as being partially unconstitutional, we conclude that it is inapplicable to claims of constitutional sentencing error." *Id.* at 317.

The first sentence of MCL 769.34(10) should be struck down as invalid and unworkable in an advisory sentencing guideline scheme. If this Court refuses to reach that holding, the Court should limit the statute's application to guideline sentences that do not raise violations of a constitutional magnitude.

Relief Requested

Mr. Ames requests this Honorable Court strike down the first sentence of MCL 769.34(10), remand for resentencing, or grant his Application for Leave to Appeal.

Respectfully submitted,

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