STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

DAVID ROSS AMES **No. 156077**
Defendant-Appellant.

L.C. 16-017887-FH
COA No. 337848

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

The legislature through MCL 769.34(10) has divested appellate courts of authority to review sentences within properly scored guidelines. There is no basis on which the statute can be said to be unconstitutional, so long as understood to allow possible constitutional claims, such as the consideration of constitutionally impermissible factors in setting the sentence. Because the sentence here was within properly scored guidelines, must it be affirmed?

Amicus answers YES

Statement of Facts

Amicus concurs in the facts as stated by the People of the State of Michigan.

Argument

I.

The legislature through MCL 769.34(10) has divested appellate courts of authority to review sentences within properly scored guidelines. There is no basis on which the statute can be said to be unconstitutional, so long as understood to allow possible constitutional claims, such as the consideration of constitutionally impermissible factors in setting the sentence. The sentence here was within properly scored guidelines, and thus must be affirmed.

[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[1]

The ball is in the Legislature's court.[2]

Introduction

This Court in its order directing supplemental briefing and oral argument on the application specified that to be addressed is "whether MCL 769.34(10) 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.'" Amicus answers that the Court in *Lockridge* severed from the legislative sentencing scheme two statutory provisions, neither of which was MCL 769.34(10).[3] Further, the

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[1] *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 5 Wheat. 76 (1820).

[2] *People v. Steanhouse*, 500 Mich. 453, 484 (2017) (Larsen, J., concurring); see also *United States v. Booker*, 543 U.S. 220, 265, 125 S.Ct. 738, 768, 160 L.Ed.2d 621 (2005).

[3] "[W]e sever MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury

Court's remedy for the Sixth Amendment violation it found in the legislative scheme rather carefully excluded sentences *within* the guidelines. These sentence are unreviewable, under MCL 769.34(10), other than as to the scoring of the guidelines and constitutional claims, such as the consideration of inappropriate factors. The *Lockridge* revision of the legislative standard of review of out-of-guidelines sentences from review to determine whether the sentence is justified by substantial and compelling reasons for departure from the guidelines—which, of course, had never applied to guidelines sentences—to "reasonableness review for an abuse of discretion informed by the 'principle of proportionality' standard,"[4] did not touch guidelines sentences. And nothing in the Court's remedy for the Sixth Amendment violation that it found occurs with use of mandatory guidelines that include judicial fact-finding of rendering the guidelines advisory, and substituting review for abuse of discretion/reasonableness, informed by the principle of proportionality, for review for substantial and compelling reasons, for out-of-guidelines sentences, compels any alteration of the legislative command that *within-guidelines* sentences not be reviewed, other than as to possible consideration of inappropriate material or scoring errors affecting the range. Unless

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beyond a reasonable doubt mandatory. We also strike down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *People v. Lockridge*, 498 Mich. 358, 364–365 (2015).

[4] *People v. Steanhouse*, 500 Mich. at 476. Both in its Remedy section, and its introductory section summarizing its holdings, the Court in *Lockridge* excluded guidelines sentences from review for reasonableness: "we hold that a guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and that *sentences that depart from that threshold* are to be reviewed by appellate courts for reasonableness," *People v. Lockridge*, 498 Mich. at 365 (emphasis supplied); "A sentence *that departs from the applicable guidelines range* will be reviewed by an appellate court for reasonableness. *Booker*, 543 U.S. at 261, 125 S.Ct. 738. Resentencing will be required when a sentence is determined to be unreasonable." *People v. Lockridge*, 498 Mich. at 392 (emphasis supplied).

the Constitution compels the setting aside of the legislative judgment, it stands. Indeed, this Court said in *Lockridge* that its goal in fashioning a remedy was to "preserve as much as possible the legislative intent in enacting the guidelines."[5] As Chief Justice, then Justice, Markman said in dissent in *Lockridge*, "Striking down statutes that reflect such a considered judgment of the people and their representatives is something to be done only when the incompatibility of a state law with the federal or state Constitution is manifest and our duty to preserve and maintain these charters of government is therefore directly and necessarily implicated."[6] There is no basis on which to void the legislative judgment here. Sentences within the guidelines, assuming the guidelines were correctly scored and the court did not consider anything inappropriate in setting sentence, are not subject to review under the legislative scheme, except for a claim, however unlikely, of constitutional cruel and unusual punishment.[7] If the legislature wishes to change MCL 769.34(10) in light of *Lockridge*, then in the words of Justice Larsen, "the ball is in the Legislature's court," and not that of this Court.

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[5] *People v. Lockridge*, 498 Mich. at 365.

[6] Id., at 429–430 (Markman, J., dissenting).

[7] Defendant says that "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)." Defendant's Supplemental Brief, at 5. While the premise is fundamentally mistaken, amicus would note that there would be nothing impermissible at all about a legislative scheme of advisory guidelines without appellate review. Indeed, it is any system of appellate review of an out-of-guidelines sentence other than one with the very lightest touch that *itself* imperils the advisory nature of the guidelines.

Discussion

A. A brief history of sentence review in Michigan: separation of powers, and judicial creation of appellate review of sentences

Until 1983 it was the understanding in this State that review of the length of a sentence—laying aside the use of impermissible considerations in sentencing—went only to whether it was within the limits allowed by law. For example, the Court of Marston, Graves, Cooley, and Campbell said in 1879 that there "The sentence was not in excess of that permitted by statute, and when within the statute this court has no supervising control over the punishment that shall be inflicted. The statute gives a wide discretionary power to the trial court, upon the supposition that it will be judicially exercised in view of all the facts and circumstances appearing on the trial."[8] In 1894, the Court said that the sentence there "was authorized by law, and was one within the exclusive province of the legislature to prescribe. This court will not review the discretion of the trial court in such matters."[9] And the Court in 1971 said the same.[10] All of this changed in 1983 with the *Coles*[11] decision.

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[8] *Cummins v. People*, 42 Mich. 142, 144 (1879), overruled by *People v. Coles*, 417 Mich. 523 (1983).

[9] *People v. Kelly*, 99 Mich. 82, 86 (1894).

[10] *People v. Malkowski*, 385 Mich. 244, 247–48 (1971).
This is not remarkable. "In the federal system, the 'doctrine of non-reviewability' prevailed until 1987, when the Federal Sentencing Guidelines became effective." Judge Nancy Gertner, "A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right," 100 J. Crim. L. & Criminology 691, 695–96 (2010). See *Dorszynski v. United States*, 418 U.S. 424, 432, 94 S. Ct. 3042, 41 L. Ed. 2d 855 (1974) ("We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end").

[11] *People v. Coles*, 417 Mich. 523, 528 (1983), holding modified by *People v. Milbourn*, 435 Mich. 630 (1990).

The Court in *Coles* decided to reconsider the venerable *Cummins* decision; surprisingly, the Court gave no consideration whatever to stare decisis, which appears nowhere in the opinion. Though noting that "the *Cummins* holding appears to stand for the proposition that there should be no appellate review of sentences imposed within statutory limits," the Court said this understanding was actually overstated, for the Court had and would undertake to determine if a sentence was unconstitutional as constituting cruel and unusual punishment, or statutorily illegal as outside statutory limits.[12] Further, the Court continued, review of sentences "historically ha[d] encompassed more than the limited considerations whether the sentence imposed was within the statutory limits and whether it constituted cruel or unusual punishment in violation of the constitution," as relief had been granted if the appropriate amount of credit for time served had not been included in the judgment,[13] and if the sentence imposed was not actually for the offense for which the defendant had been convicted.[14] And, the Court continued, the basing of a sentence on inappropriate considerations, such as punishment for going to trial instead of pleading guilty, or consideration of inaccurate information, had justified relief, as had the imposition of a sentence that violated the 2/3 rule of *People v. Tanner*.[15] The Court concluded that it was thus "clear that appellate review of

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[12] Id., at 529-530.

[13] But to require that statutory commands regarding sentence credit be met is not a review of the length of the sentence imposed.

[14] Again, that the sentence imposed must be for the offense for which defendant was actually convicted is not a review of the exercise of discretion of the judge in sentencing for the appropriate offense within the proper statutory limits.

[15] *People v. Tanner*, 387 Mich. 683 (1972). *Coles*, at 530-532. *Tanner* is also not a case involving review of the discretionary sentencing decision of a trial judge, but a determination—whether correct or not—that a sentence was not indeterminate unless the minimum is not more than 2/3 of the maximum, so that, as construed by *Tanner*, a sentence with

sentences to date has included both the procedural consideration of how the defendant was sentenced as well as a consideration of whether the substance of the sentence was statutorily or constitutionally permissible."[16] While this is surely so, it says nothing about review of the sentencing decision made by a trial judge within statutory and constitutional limits, without procedural irregularity, and provided no basis for overruling *Cummins*. As the Court put it, the question was whether the Court should turn aside from *Cummins*, and "expand the scope of appellate review to include a review of the trial court's exercise of discretion in sentencing a defendant when the sentence falls within statutory limits which do not constitute cruel or unusual punishment, when the sentence does not violate the rule established in *Tanne*r, . . .when the trial court has not relied upon impermissible considerations, and when the court rules relating to sentencing procedures were properly followed."[17]

The Court determined so to do. While agreeing that there was no constitutional or statutory authority vesting the appellate courts with jurisdiction to engage in this sort of review of sentencing, the Court also noted with approval the defendant's argument that *"no constitutional or statutory provision exists which limits the review power of this Court or precludes it from passing upon the propriety of sentences imposed by trial courts*."[18] The Court thus determined that both it and the Court of Appeals had authority to review a sentencing decision by a trial court even where no

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a minimum of more than 2/3 of the maximum was simply statutorily illegal. The 2/3 rule is now actually part of the statutory scheme. MCL 769.34(2)(b).

[16] Id.

[17] Id., at 532-533.

[18] Id., at 533-534 (emphasis added). As will be argued subsequently, the current situation is distinct, as MCL 769.34(10) *is* a legislative prohibition on review of a sentence within properly scored guidelines (so long as the constitution is not violated in the setting of the sentence, such as by consideration of an impermissible factor), as the sentence must then be affirmed.

statutory or constitutional irregularity had occurred either in the procedure in setting sentence or in the substance of the sentence. The standard that the Court determined to employ was whether the sentence imposed "shocked the conscience" of the reviewing court.[19]

Seven years later, the Court adhered to appellate review of sentence length, but, having promulgated the "judicial" sentencing guidelines, modified the standard of review.[20] The Court adopted a principle of "proportionality," which it teased out of the fact that the "Legislature in establishing differing sentence ranges for different offenses across the spectrum of criminal behavior has clearly expressed its value judgments concerning the relative seriousness and severity of individual criminal offenses."[21] From the legislative gradation of offenses and penalties the Court inferred that, "with regard to the judicial selection of an individual sentence within the statutory minimum and maximum for a given offense, the Legislature similarly intended more serious commissions of a given crime by persons with a history of criminal behavior to receive harsher sentences than relatively less serious breaches of the same penal statute by first-time offenders."[22] And so "a given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."[23]

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[19] Id., at 550.

[20] *People v. Milbourn*, 435 Mich. 630, 650–51 (1990).

[21] Id., at 635.

[22] Id.

[23] Id., at 635-636.

The Court looked to the guidelines it had promulgated as an aid, though not necessarily an outcome-determinative one in a given case, saying that "A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. 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."[24] In fact, said the Court, "even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances."[25] But in the end, the Court continued, "the key test is whether the sentence is proportionate to the seriousness of the matter, *not whether it departs from or adheres to the guidelines' recommended range*."[26]

Justice Boyle cogently dissented, joined by Justice Riley. Justice Boyle found authority for appellate review of sentences that are substantively and procedurally regular lacking; "[d]espite the fact that the Legislature has not chosen to limit the trial court's discretion, the majority holds that trial judges are to sentence within court-created guidelines on pain of reversal, and that appellate judges may reverse sentences by substituting their judgment for that of the trial court. Hereafter, the plea of the defendant who seeks a more lenient sentence than that called for by the guidelines as well as that of the prosecutor who seeks a harsher sentence, is to be filtered through the opaque lens of appellate review."[27] But, said Justice Boyle,

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[24] Id., at 660.

[25] Id., at 661.

[26] Id. (emphasis supplied).

[27] Id., at 671-672.

> [t]he Michigan Constitution gives the Legislature the authority to provide for sentencing, a power which the people gave to that department of government. Pursuant to that authority, the Legislature enacted statutes which set the maximum punishment and gave the authority to set the minimum punishment to the trial court judiciary. Thus, indeterminate sentencing is a legislative delegation of constitutional authority to trial judges to tailor their sentences to the particular offender and the particular offense "within the legislatively prescribed range" of punishment for each felony. . . . *The Court has no authority to amend a statute*. Nor can that authority be manufactured by taking the principle of proportionality between penalties for different crimes and converting it into an authorization to internally restrict the legislatively delegated authority of a trial judge to determine the sentence "within the ... prescribed range" of punishment.[28]

And in *People v. Merriweather*, writing for the majority, Justice Boyle noted, in concluding that the sentence there was not disproportionate, that she did "not retreat from the view that in *People v. Milbourn* . . . the Court violated separation of powers and usurped the authority constitutionally confided by the people of this state in their Legislature, see Const.1963, art. 4, § 45, and by the Legislature in the trial courts, see M.C.L. § 769.1; M.S.A. § 28.1072."[29] She also aptly observed that "More importantly, that this Court could seriously debate the justice of the sentence imposed in this case is proof of the ultimate dehumanization of the sentencing process initiated by the decision. Both the Court of Appeals decision and the dissenting opinion vividly evidence that elaborate rationalizations for lowering sentences distance the appellate judiciary from meaningful connection with reality and distort the concept of individualized justice. As Marie Green's tragedy is mediated through the processes of proportionality and guidelines' evaluation, the focus of the reviewing court

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[28] Id., at 680-681 (emphasis supplied).

[29] *People v. Merriweather*, 447 Mich. 799, 805 (1994).

shifts from the horror of her blood, feces, and burned flesh, to the image of an enfeebled and sympathetic defendant, incarcerated at great cost to the state."[30]

With the promulgation by the legislature of statutory guidelines displacing the judicial guidelines and having the force of law,[31] the scheme for appellate review of sentences became explicitly *statutory*, rather than "teased" out of the legislative gradation of offenses and penalties as among crimes. Sentences were required to be within the properly scored guidelines range, but departures were allowed if the sentencing court had "a substantial and compelling reason for that departure and state[d] on the record the reasons for departure." The sentencing court was not permitted to consider inappropriate factors as reasons for departing—indeed, the factors prohibited cannot be used for setting any sentence[32]—and could not "base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic ha[d] been given inadequate or disproportionate weight."[33] Where the sentence was without the guidelines, then, if "the [reviewing court found] the trial court did not have a substantial and compelling reason for departing from the

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[30] Id.

[31] See, with regard to the judicial guidelines, *People v. Mitchell*, 454 Mich. 145, 173–75 (1997), holding that "because this Court's guidelines do not have the force of law, a guidelines error does not violate the law. Thus, the claim of a miscalculated variable is not in itself a claim of legal error."

[32] "The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range." MCL 769.34(3)(a).

[33] MCL 769.34(3)(b).

appropriate sentence range, the court [was to] remand the matter to the sentencing judge or another trial court judge for resentencing."[34] For a sentence within properly scored guidelines, with no procedural error, "the [reviewing court] shall affirm that sentence." Put another way, there was a particular review standard for guidelines departure sentences—substantial and compelling reasons—and there was *no* review of within-guidelines sentences as to their length (assuming in both situations properly scored guidelines, and no use of impermissible factors in sentencing). And then came *Lockridge*, which not only struck but *changed* the standard of review for out-of-guidelines sentences alone, but did not—as the Court had no reason to—modify MCL 769.34(10) in any way.

B. MCL 769.34(10) prohibits appellate courts from passing upon the propriety of sentences imposed by trial courts[35] when the sentence is within the guidelines range

That this Court has altered the legislative review standard for sentences *outside* properly scored guidelines as part of its remedy for the Sixth Amendment violation it found with regard to mandatory guidelines scored with judicial fact-finding[36] says nothing at all as to a sentence that is

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[34] MCL 769.34(11). This Court construed substantial and compelling reasons under the statute as being reasons that are objective and verifiable, and which keenly grab the attention.

[35] See *Coles*, supra, at 533-534, justifying breaking with precedent and establishing appellate review of the exercise of the sentence discretion in part because the Court found that "no constitutional or statutory provision exist[ed which limit[ed] the review power of this Court or preclude[d] it from passing upon the propriety of sentences imposed by trial courts." *There is now*—MCL 769.34(10).

[36] This is a remarkable exercise of power itself. The legislative standard for appellate review of sentences outside the guidelines was for whether substantial and compelling reasons justified the departure. This Court did not simply strike that standard, leaving no appellate review of such sentences, it being up to the legislature to alter that circumstance if it so desired, but *re-wrote* it to provide for review for "reasonableness," now meaning "abuse of discretion informed by the principle of proportionality." *People v. Steanhouse*, 500 Mich. 453 (2017). Justice Larsen, concurring in *Steanhouse*, said that as to sentencing after *Lockridge* "The ball is in the Legislature's court." But the Court took the legislature's ball out of play, and substituted a new one. When a court severs a portion of a statute or a part of a statutory

within properly scored advisory guidelines. So long as a judge is not *required* to sentence within the guidelines range, even if that range is enhanced by judicial fact-finding, that the judge sentences within the range raises no constitutional issue, nor does the legislative preclusion of judicial review of such a sentence (again, laying aside improper scoring or consideration of constitutionally prohibited factors). Now, as before, a sentence within properly scored guidelines—now advisory guidelines—is not subject to appellate review, and this raises no constitutional issue whatever.

That *Lockridge* did not abrogate MCL 769.34(10) follows ineluctably from *Lockridge* itself, which, while severing other provisions of MCL 769.34, never mentions MCL 769.34(10). More importantly, this Court's remedy excludes from its reach sentences within properly scored guidelines, as the Court both in its introductory summary of the opinion and its remedy section limits reasonableness review to sentences that are *departures* from the guidelines range: 1) "we hold that a guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness"[37]; 2) "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness."[38] *Lockridge* cannot, consistent with common English

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scheme, it is not to substitute something different; "although a court may permissibly sever some provisions of a statute and leave others intact, a court may not rewrite a statute to render it constitutional." *Planned Parenthood Affiliates of Michigan v. Engler*, 73 F.3d 634, 640 (CA 6, 1996). The legislature having determined that *it* was establishing the standards of review for sentences, and this Court having stricken the standard applicable to outside-guidelines sentences, the ball was then in the legislature's court, not the Court's, to determine what, *if any*, review standard should then apply.

[37] *People v. Lockridge*, 498 Mich. at 365. The phrase limiting the remedy to cases where the "guidelines minimum sentence range" was "calculated in violation of *Apprendi* and *Alleyne*" was held to be of no import whatever in *People v. Steanhouse*.

[38] Id., at 392.

usage, be said to have invalidated the legislature's prohibition on appellate review of the length of within guidelines sentences, nor is there any basis for the Court to have done so or so to do.

Defendant has said that "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."[39] But there is no "mandatory presumption of reasonableness" in the statute, as there is no "reasonableness" to be "presumed"; there is, rather, a legislative prohibition on review of sentences within properly scored guidelines, which may be forced to yield only if the constitution so demands, as when a judge sets the sentence where he or she does within the guidelines based on an unconstitutional criterion, such as race or ethnicity. *Lockridge* itself expressly limited review for reasonableness to out-of-guidelines sentences, and unless MCL 769.34(10)'s prohibition on review of guidelines sentences is for some reason unconstitutional, it stands. Defendant presents no reason why the statute is unconstitutional, arguing that under *Milbourn* sentences within the judicial guidelines were subject to review. But appellate review is only applicable under the *statutory* scheme for out-of-guidelines sentences, where the Court has changed the standard of review to abuse of discretion, informed by proportionality. Appellate review is only permissible under the *statutory* scheme if the legislature so allows, it has not done so for guidelines sentences, and there is no reason why its prohibition on review is unconstitutional. So long as the guidelines are advisory, there being no requirement to

[39] Defendant's application, p. 7.

sentence within them, no problem can arise from the legislative choice.[40] The statute is simply a form of or analogue to a jurisdiction-stripping statute,[41] and is constitutional.[42]

C. Conclusion: defendant's sentence must be affirmed

For over five generations the rule in this State was that sentencing is committed to the authority of the trial court, so long as within legislatively set limits, and procedurally proper. Without consideration of principles of stare decisis, the Court in *Coles* set aside that rule, observing that "no constitutional or statutory provision exists which limits the review power of this Court or precludes it from passing upon the propriety of sentences imposed by trial courts." The legislature then created a comprehensive sentencing scheme, including two principles of appellate review: 1)sentences within properly scored guidelines were not subject to appellate review (must be affirmed); that is, the legislature enacted a "statutory provision precluding appellate courts from passing upon the propriety of sentences" as to their length; and 2)sentences outside of the guidelines were reviewed for whether the trial judge's expressed substantial and compelling reasons that

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[40] Nothing would prevent the legislature from providing that no otherwise proper sentence is reviewable for the appropriateness of its length, other than for constitutional cruel and unusual principles.

[41] Defendant argues that because he has an appeal by right under our state constitution, jurisdiction must exist. Defendant's Supplemental Brief, at 5-6. But while 1963 Mich. Const. Art. 1, § 20 entitles defendant convicted at trial to an appeal by right (but only by leave when convicted by way of plea), nothing precludes the legislature from restricting the *issues* available for consideration in that appeal. Defendant may raise issues concerning the appropriate scoring of the guidelines, or the consideration of inappropriate material by the trial judge, in a sentence within the guidelines, but there is simply no proportionality or reasonableness issue in the legislative scheme for a guidelines sentence, unless the defendant can make a *constitutional* proportionality argument.

[42] Michigan is not alone in this regard. See e.g. *State v. Williams*, 65 P.3d 1214, 1215 (2003), referring to RCW 9.94A.585(1) ("A sentence within the standard sentence range for the offense shall not be appealed.").

justified the departure did so. The Court has now made the guidelines advisory, and altered the standard of review for out-of-guidelines sentences to abuse of discretion, informed by the principle of proportionality, rather than, having stricken the legislative standard of review, leaving the "ball in the legislative court" as to what a new standard of review, if any, should be. Judges are not compelled to sentence within the guidelines, but if they do, under MCL 769.34(10), which was not touched by this Court's decision in *Lockridge*, which appears quite deliberately to have avoided doing so, that sentence must be affirmed. There is no basis to set aside the statute, and defendant's sentence, being within the guidelines, is not subject to review.

Relief

Wherefore, amicus requests that this Court deny defendant's application for leave to appeal, or affirm that MCL 769.34(10), not being unconstitutional, is to be followed by appellate courts.

Respectfully submitted,

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