STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Elizabeth L. Gleicher, Mark J. Cavanaugh, Colleen A. O'Brien

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 156077
Plaintiff-Appellee,	Court of Appeals No. 337848
v	Lenwaee Circuit Court Nos. 16-017887-FH 16-017888-FH
DAVID ROSS AMES,	
Defendant-Appellant. _____/	

SUPPLEMENTAL BRIEF OF APPELLEE PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

Linus Banghart-Linn (P73230)
Assistant Attorney General
Attorneys for the People
Plaintiff-Appellee
Criminal Appellate Division
P.O. Box 30217
Lansing, MI 48909
517-373-4875

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STATEMENT OF JURISDICTION

The Michigan Court of Appeals denied Ames's delayed application for leave to appeal on May 12, 2017. Defendant Ames timely filed an application for leave to appeal to this Court on July 7, 2017. This Court has jurisdiction over the appeal under MCR 7.303(B)(1).

COUNTER-STATEMENT OF QUESTION PRESENTED

1. *Lockridge* struck down only those statutes that infringed on the power of the jury or that impermissibly expanded or restricted the sentencing judge's discretion. Section 34(10) does neither; it relates only to the standard for appellate review. Is § 34(10) still valid after *Lockridge*?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

STATUTE INVOLVED

Section 34 of the Code of Criminal Procedure provides in part:

(10) 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. . . . [MCL 769.34(10).]

INTRODUCTION

In *People v Lockridge*, this Court extended a line of U.S. Supreme Court cases that held that using judge-found facts to change the range of available sentences from the range available based on the jury's verdict alone violates the Sixth Amendment's guarantee of the right to trial by jury. *Lockridge* made the Michigan sentencing guidelines advisory only, such that the jury's verdict authorizes a sentence anywhere below the statutory maximum, and the judge is free to impose a sentence anywhere within that range regardless of judicial fact-finding. *Lockridge* explicitly struck down parts of MCL 769.34, and it also held that any "statute [that] refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines" is also "severed or struck down as necessary." *Id.* at n1.

MCL 769.34(10) is not one of the sections explicitly struck down by *Lockridge*. Nor does § 34(10) refer to use of the sentencing guidelines as mandatory or refer to departures from the guidelines. It does not make any sentences available or unavailable based on judge-found facts. In fact, no trial judge needs to be even aware of § 34(10). That section is directed at the Michigan Court of Appeals: its first sentence withholds from that court's appellate jurisdiction the review of a within-guidelines sentence (with two exceptions not at issue here).

Ames argues that the first sentence of § 34 (10) is unconstitutional for two reasons. First, he argues that *Lockridge* renders this provision invalid on the theory that forbidding reasonableness review of within-guidelines sentences makes within-guidelines sentences mandatory. Ames is wrong: offering a safe harbor is quite different from mandating that someone dock in that harbor. After *Lockridge*,

a trial court is free to impose a sentence inside the guidelines (inside the safe harbor), or the court may sentence outside them, as the court sees fit. It is true that outside-guidelines sentences are reviewable for reasonableness, but that would still be true if the safe-harbor sentence of § 34(10) were struck down. There is no sense in which § 34(10) makes within-guidelines sentences mandatory.

Ames's second argument is outside the scope of this Court's order directing briefing. He argues that reasonableness review of within-guidelines sentences is necessary to guard against judges imposing different sentences on similarly situated defendants with the same guidelines range. Although Ames refers to *Lockridge* in making this argument, it has nothing to do with *Lockridge*. Even under the pre-*Lockridge* mandatory guidelines system, a trial court could impose a bottom-of-the-guidelines sentence on one defendant and a top-of-the-guidelines sentence on another, and § 34(10) would insulate both sentences from reasonableness review. This Court has already held that § 34(10) is constitutional, and Ames gives no reason to overturn this holding.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Defendant David Ames, along with codefendants Erika Webb, Jonathan Lewis, and Justin Foster, committed a string of break-ins through Lenawee, Hillsdale, Washtenaw, and Jackson Counties. In Lenawee County, all codefendants pleaded guilty to some charges, in exchange for which others were dismissed.

Ames pleaded guilty in Lenawee Circuit Court to one count of second-degree home invasion, MCL 750.110a(3), and one count of larceny in a building, MCL 750.360. In exchange for this plea, the prosecutor agreed to dismiss nine other

charges—three additional charges of second-degree home invasion, three charges of conspiracy to commit second-degree home invasion, and three charges of larceny in a building.

Ames testified that he and Webb selected a home at random, broke a sliding glass door, and stole a television, a necklace, and a radio scanner from the house. (6/29/16 Plea Tr., pp 8–10.) He testified that he and Webb were going to split the money and use it to buy heroin. (*Id.*, p 10.)

Ames further testified that on another occasion, he, Lewis, and Foster selected a house at random to burgle. (*Id.*, p 11.) Lewis broke the window, and he and Ames entered through the window, then unlocked the door for Foster to enter. (*Id.*, pp 11–12.) The three stole jewelry and money in the home. (*Id.*, p 12.) Again, they planned to split the money and use it to buy heroin. (*Id.*, p 13.)

Ames, Webb, Lewis, and Foster all received within-guidelines sentences. Ames's guidelines called for a minimum sentence between 36 and 71 months. (Sentencing Information Report; 9/13/16 Sentencing Tr, p 5.) The court sentenced Ames to a minimum sentence of 60 months. (9/13/16 Sentencing Tr., p 10.)

Ames then filed a delayed application for leave to appeal in the Court of Appeals, arguing that his sentence was unreasonable and that his PSIR contained inaccurate and irrelevant information. The Court of Appeals denied the delayed application "for lack of merit in the grounds presented."

Ames then sought leave to appeal in this Court, raising the same claims. This Court ordered briefing and argument on the question "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.' "

STANDARD OF REVIEW

The question presented here is one of constitutional law, which this Court reviews de novo. *Lockridge*, 498 Mich at 373.

ARGUMENT

I. Section 34(10) does not impinge on the role of the jury or expand or restrict the discretion of the trial court in setting a minimum sentence, and therefore it does not violate the Sixth Amendment.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v New Jersey*, 530 US 466, 490 (2000).

Ames levels a two-pronged attack on the constitutionality of § 34(10). The first prong is based on *Lockridge* and the Sixth Amendment; Ames argues that because *Lockridge* struck down the mandatory nature of the sentencing guidelines, § 34(10) must also fall. The second prong is not grounded in any constitutional provision, but rather argues simply that Michigan's appellate courts must be free to review within-guidelines sentences to avoid disparity in sentences and to create an

incentive in judges to properly exercise discretion when they choose to sentence within the guidelines. Both sets of arguments are without merit.

Michigan's Constitution vests sentencing authority in the Legislature. Const 1963, art 4, § 45. For many offenses, including second-degree home invasion, the offense at issue here, the Legislature has prescribed the maximum offense. See MCL 750.110a(6). For others, the Legislature has delegated that decision to the courts, allowing the courts to impose a sentence of life or any number of years. See, e.g., MCL 750.83 (assault with intent to commit murder). When it comes to minimum sentences, the Legislature instituted the sentencing guidelines, intended to reduce disparity in sentences by requiring trial courts to sentence within the guidelines unless substantial and compelling reasons exist to depart. MCL 769.34(2), (3).

The reason *Lockridge* held that this system, as the Legislature enacted it, runs afoul of the Sixth Amendment is that it relies upon judge-found facts to change the range within which the trial court may impose a minimum sentence. According to *Lockridge*, when judge-found facts are used to raise the guidelines range, such that lower sentences that would have been available based on the jury's verdict alone are no longer available after fact-finding, the Constitution is violated. 498 Mich at 364, 373–379.

MCL 769.34(10) is not part of the mandatory guidelines system. It is not directed at trial courts, but at the Michigan Court of Appeals. It bars that appellate court from reversing a trial court's discretionary decision to sentence within the

guidelines sentence except when the guidelines are mis-scored or when the trial court relies on inaccurate information at sentencing. Nothing in § 34(10) changes the range of sentences that are available to the trial judge after judicial fact-finding. Post-*Lockridge*, the range of sentences available to the trial court based on the verdict alone is the same as the available range after the trial court has scored the guidelines.

A. Barring appellate review of within-guidelines sentences does not make those sentences mandatory.

Ames's argument rests on a fundamental mistake. Post-*Lockridge*, a trial court has the discretion to sentence within the guidelines, below the guidelines, or above the guidelines. This is true with § 34(10) in force, and it would be no more or less true if § 34(10) were struck down. Ames argues, however, that the availability of appellate review for outside-guidelines sentences, combined with the lack of appellate review of within-guidelines sentences, makes within-guidelines sentences mandatory. Ames is mistaken. One could as well argue that the grant or denial of a motion for directed verdict (before the jury returns a verdict) is not truly within the trial court's discretion. After all, if the trial court grants the motion, there can be no appellate review, but if the motion is denied, there may be. Similarly, trial courts are not *required* to deny successive motions for relief from judgment simply because a denial may not be appealed, while a grant may be. See MCR 6.502(G)(1). And by the same token, pro-defendant rulings at trial can be appealed only on an interlocutory basis, if at all, while pro-prosecution rulings can be appealed by right

following a conviction. Even though each of these rules creates a safe harbor for the trial court, none of them mean that trial courts are *required* to rule in favor of defendants.

Ames argues that a sentencing scheme is 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 the range, where the sentence should fall." (Def's Br on Appeal, p 7.) Michigan's sentencing scheme passes this test. Section 34(10) does nothing to impinge on the trial court's discretion as to any of those three decisions. Ames contends that " '[t]he exercise of discretion for within-guidelines sentences by its very nature, must be subject to review." (*Id.*) But his explanation why does not go to the "very nature" of the exercise of this discretion. Instead, it is a policy argument.

Ames claims that, without any appellate review of within-guidelines sentences, trial courts have no incentive to exercise their discretion to choose an appropriate sentence within the guidelines range. (*Id.*) Ames does not explain the basis of this attack on trial judges. Ames might be correct to say that the availability of appellate review would provide an *additional* layer of incentive, on top of the inherent desire of a judge to do justice, the inherent incentive of any public servant to serve the public, and, for many judges, future judicial elections. But this discussion of incentives is a policy argument, not a constitutional one. How many incentives, and what incentives, trial judges should have to do their jobs

properly is not a constitutional question—it has nothing to do with the Sixth Amendment or with *Lockridge* .

If the current statutory scheme creates an incentive for trial courts to sentence within the guidelines, that is permissible, and in fact consistent with the overall scheme the Legislature has put in place to encourage uniform sentences. The Legislature has struck the balance by attempting to limit trial courts' discretion to sentence outside the guidelines while maximizing discretion to sentence within. Though *Lockridge* held that the Legislature's attempt to achieve the former goal violates the Sixth Amendment, the effort as to the latter goal is proper. As *Lockridge* recognized, "*unrestrained judicial discretion within a broad range is in*; legislative constraints on that discretion that increase a sentence . . . beyond that authorized by a jury's verdict are out." 498 Mich at 375 (emphasis added). Unrestrained judicial discretion within a broad range (i.e., within the sentencing guidelines) is exactly the "problem" Ames is complaining about—but it is not a problem at all; after *Alleyne*, it remains "in." *Alleyne v United States*, 570 US 99 (2013).

B. The Legislature's choice to withhold appellate jurisdiction from within-guidelines sentences does not violate the Sixth Amendment's guarantee of the right to trial by jury.

The core holding of the *Apprendi* line of cases is that judge-found facts may not be used to alter the range within which a sentencing judge may sentence. In *Apprendi*, the U.S. Supreme Court held that judge-found facts that increased the maximum available sentence violated the Sixth Amendment. In *Ring v Arizona*,

536 US 584 (2002), the Court applied this holding to cover cases in which an additional judge-found fact was required beyond the jury's verdict to allow imposition of the death penalty. *Ring* struck down the scheme as unconstitutional, in part because the maximum available sentence based on the jury's verdict alone was life imprisonment. *Id.* at 597, 609. In *United States v Booker*, 543 US 220 (2005), the holding was extended to include judge-found facts that increase a mandatory guidelines range. The Court reasoned that, even though the sentence imposed was below the statutory maximum, using judge-found facts to raise the guidelines range still allowed the judge to impose a sentence not available based on the jury's verdict alone, and was thus a constitutional violation.

In *Alleyne*, the Court extended the rule to cover cases in which judge-found facts *restrict* the sentencing court's discretion at the low end, rather than expanding it at the high end. And most recently, in *Lockridge*, this Court extended the *Apprendi* line from cases in which the judge was imposing a definite term of imprisonment to cases in which the judge was setting a parole eligibility date.

No court, however, has held that the Sixth Amendment requires appellate review of sentences. In fact, the federal Constitution does not require any criminal appellate review at all. *Jones v Barnes*, 463 US 745, 751 (1983); *Griffin v Illinois*, 351 US 12, 18 (1956); *McKane v Durston*, 153 US 684, 687 (1894). The Sixth Amendment questions in *Apprendi* and its progeny are questions of the balance of power between the jury and the sentencing judge. Again, § 34(10) does nothing to alter that balance and therefore does not implicate the Sixth Amendment.

C. Section 34(10) is not a judicially created presumption of reasonableness, like that at issue in *Rita*.

On its face, this question looks like the question addressed by the U.S. Supreme Court in *Rita v United States*, 551 US 338 (2007). If the question were the same, that would sink Ames's argument, because *Rita upheld* the practice of several U.S. Courts of Appeals that applied a presumption of reasonableness to within-guidelines sentences. But *Rita* is inapposite here because § 34(10) does not create a presumption of reasonableness; rather, it simply removes reasonableness from appellate review, and nothing in the Sixth Amendment right to have a jury find facts requires appellate review of the reasonableness of a sentence.

As *Rita* recognized, an *appellate* presumption of reasonableness does not create a presumption of reasonableness in the *trial* judge. Ames argues that the problem with § 34(10) is that "there is no doubt that Michigan's *trial* courts are enjoying the benefit of a legal presumption it should not have." (Def's Supp Br, p 14 (emphasis added).) But *Rita* rejected this argument because the presumption was "an *appellate* court presumption," and therefore "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." 551 US at 351. In short, *Rita* recognized that a trial-level presumption of reasonableness was problematic, but upheld the appellate presumption regardless, because it recognized that the appellate presumption is only that —"an *appellate* court presumption." *Id.*

The same reasoning applies by analogy here. Section 34(10) is a rule directed at the Court of Appeals. Just as the appellate rule in *Rita* did not create an

impermissible trial rule, the rule at issue in this case does not create an impermissible trial rule.

Ames brings up another aspect of *Rita*, claiming that *Rita* held that a presumption of reasonableness could be upheld only if it was rebuttable. (Def's Supp Br, pp 8, 11.) *Rita* did not hold this. It is true that *Rita* considered the fact that the appellate presumption was not binding as part of its analysis. 551 US at 347. But it never held that a binding presumption would be unconstitutional.

And even if *Rita* had held as Ames contends, it would not require the same result in this case. For one thing, as discussed above, § 34(10) is not a presumption of reasonableness. But more importantly, the rule in *Rita* was a judicially created rule. Section 34(10) is a statute passed by the Legislature, and the Legislature holds the ultimate authority over sentencing—including the authority to create substantive standards of review. Even if it is problematic for a reviewing court to completely foreclose its own ability to review a class of claims, it is not a problem for the Legislature to do the same.

One final helpful point from *Rita* comes from Justice Scalia's concurring opinion—the point that *any* appellate review could influence the trial judge's discretion, so if that influence is a problem, then the solution would be to eliminate *all* appellate review of reasonableness. If Ames prevails and this Court strikes down the first sentence of § 34(10), within-guidelines sentences will still be reviewed more deferentially than outside-guidelines sentences. Perhaps this Court or the Court of Appeals will formally adopt a presumption of proportionality like

that in *Rita*, but even if no presumption is formally adopted, reviewing courts will naturally scrutinize departure sentences more closely than within-guidelines sentences. And so, as Justice Scalia recognized, some sentences will be affirmed only because they are within the guidelines—i.e., affirmed only because of judge-found facts that increased the guidelines range. 551 US at 369–370 (Scalia, J., concurring.) If Justice Scalia was correct that this is a problem, then the only solution is the one Justice Scalia identified: eliminating substantive reasonableness review of *all* sentences. *Id.* at 370.

In other words, if Ames is correct that a more lenient appellate standard for within-guidelines sentences causes trial judges to apply an impermissible presumption in favor of within-guidelines sentences, the solution is to truly free trial judges to treat the guidelines as advisory by assuring them that no reviewing court will second-guess their judgment. An additional benefit of this solution is that it would involve reversing only prior decisions of this Court, and not striking down a law passed by the Legislature. No statute needs to be struck down to stop reviewing departure sentences for reasonableness.

Thus, if this Court holds that it violates the Constitution to apply a more deferential standard of review to within-guidelines sentences than to departures, it faces a choice: either strike down its own rule (that departure sentences may be reviewed for reasonableness) or the Legislature's valid command (that within-guidelines must be affirmed). Given the Legislature's substantive authority over sentencing, the better course is to reverse its own decisions.

II. Although this Court ordered briefing on whether *Lockridge* rendered § 34(10) invalid, Ames raises other, long ago rejected arguments as to why it is invalid. This Court should disregard these arguments.

Ames also argues that § 34(10) is unconstitutional because the Michigan Court of Appeals must be allowed to review sentences as disproportionate, and because trial courts must be given an incentive to properly exercise their discretion when setting within-guidelines sentences. These arguments have nothing to do with the Sixth Amendment or with *Apprendi*, *Alleyne*, or *Lockridge*, but rest on Ames's policy preferences. Because this argument has nothing to do with *Lockridge*, it is outside the scope of this Court's order directing briefing and argument, which asked whether § 34(10) "has been rendered invalid by this Court's decision in *People v Lockridge*[.]"

This Court unanimously rejected a constitutional challenge (based on the separation of powers) to § 34(10) in 2003. *People v Garza*, 469 Mich 431, 434–435 (2003). Apart from the Sixth Amendment issues already addressed, nothing in the legal landscape has changed to justify calling *Garza* into question, and no other constitutional provision creates the right Ames seeks—the right to appellate review for reasonableness of within-guidelines sentences.

Ames says that the first sentence of § 34(10) is "unworkable in an advisory sentencing guideline scheme." (Def's Br on Appeal, p 16.) But with respect to this workability argument, there is no meaningful difference between an advisory guidelines scheme and a mandatory guidelines scheme. *Garza* was correct under the mandatory guidelines scheme, and it remains correct today.

In addition, as discussed above, Ames's argument that trial courts need appellate review of within-guidelines sentence to give them an incentive to do their jobs correctly has nothing to do with *Lockridge* (and is not grounded in any constitutional provision). The "problem" Ames identifies was present under the mandatory guidelines system as well.

Similarly, when Ames points out the range of sentences available in other states (Def's Br on Appeal, p 8), this is another expression of a policy preference without constitutional grounding. Ames says, "If the first sentence of [§ 34(10)] is found to be valid after *Lockridge*, a trial court in Michigan could impose drastically different sentences against similarly situated individuals who share the same sentencing range." (*Id.*) But this has nothing to do with *Lockridge* either—even before *Lockridge*, trial courts could sentence at the top, bottom, or middle of the guidelines. The only difference is that courts are now freer to sentence outside the guidelines.

Ames cites *Gall v United States*, 552 US 38 (2007), in which the U.S. Supreme Court held that within-guidelines federal sentences must be subject to appellate review for reasonableness. But *Gall* was not a constitutional holding; it did not hold that due process requires appellate review of within guidelines sentences, only that federal sentencing procedure requires it. And the *Gall* Court did not have a federal statute barring appellate review of within-guidelines sentences to contend with. So *Gall* does not control this case.

CONCLUSION AND RELIEF REQUESTED

Because § 34(10) does not affect the discretion of the sentencing judge, it does not implicate the Sixth Amendment or *Lockridge*. The statute is constitutional, and the Court of Appeals properly denied leave to appeal.

This Court should deny leave to appeal or affirm Ames's within-guidelines sentence.

In the alternative, if this Court agrees that it violates the Constitution to have different standards of review for within- and outside-guidelines sentences, it should not strike down the constitutionally permissible command of the Legislature but should alter the standard of review of outside-guidelines sentences to match it.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

s/Linus Banghart-Linn

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Attorneys for the People
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