

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No. 156746

Court of Appeals No. 331499

-vs-

Lower Court Case No. 15-4596-FC

DAWN MARIE DIXON-BEY

Defendant-Appellee.

Jerard M. Jarzynka (P35496)
Prosecuting Attorney
Jerrold Schrottenboer (P33223)
Chief Appellate Attorney
Attorneys for Plaintiff-Appellant
Jackson County Prosecutor
312 S. Jackson Street
Jackson, MI 49201-2220
(517) 788-4283

Gary David Strauss (P48673)
Attorney for Defendant-Appellee
Strauss & Strauss, PLLC
Attorney for Defendant-Appellee
306 S. Washington Ave, Ste 220
Royal Oak, MI 48067
(248) 584-0100

ANSWER TO APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

BY: Gary D. Strauss (P48673)

TABLE OF CONTENTS

Statement of Jurisdiction v

Counter-Statement of Question Presented vi

I. Was the Court of Appeals correct in holding that the trial court violated the principle of proportionality and in doing so, abused its discretion where the judge considered factors adequately accounted for in the guidelines and factors that were not unique to this offense or offender? Further, did the trial judge fail to provide an adequate basis for the sentence? vi

Dawn Dixon–Bey testified that prior to the stabbing, Gregory Stack was aggressive and had thrown things at her. 1

Alissa Todd Kennedy testified that Gregory Stack used drugs and drank everyday. She stated that the arguments increased between them and that Stack usually initiated them. 4

Daniel Bivens helped Mr. Starks move on the day of the incident. He testified that Starks drunk throughout the day and snorted 4 Vicodins 5

Asia Chantel Dixon-Bey testified that Starks’s drinking increased. She picked Dawn up from jail and observed that her leg was bruised. 5

Natiezia Janae Headen testified that Dawn and Gregory argument a lot and that Gregory started the arguments. She testified that prior to the incident he was physically assaulting Dawn. 6

Brian Keith Pierucki worked with Starks and stated that Starks’s drinking appeared to be getting worse and that they would buy drugs together. He stated that Starks initiated arguments, which he believed were related to his alcohol and drug use 6

Sherry Heim was a long-time friend of both Dawn and Greg. She testified that Greg’s demeanor had changed over the past year and that he angered quickly. He had a drinking problem and took the opiate, Norcos 7

Paul Pierucki helped Greg move on the day of the incident. They started drinking at 8 in the morning. He said that they drank together almost every day. Dawn did not want to be around Greg when he was drunk. Paul said that they argued a lot and that Greg was always the aggressor 7

I. The Court of Appeals was correct in holding that the trial court violated the principle of proportionality and in doing so, abused its discretion where the judge considered factors adequately accounted for in the guidelines and factors that were not unique to this offense or offender. Further, the trial judge failed to provide an adequate basis for the sentence. 16

A. Standard of review and issue preservation 16

B. Discussion 16

Relief Requested 24

Proof of Service 24

TABLE OF AUTHORITIES**Cases**

<i>Gall v United States</i> , 552 US 38; 128 S Ct 586, 590; 169 L Ed 2d 445 (2007)	23
<i>Kimbrough v US</i> , 552 US 85; 128 S Ct 558; 169 L Ed 2d 481 (2007)	23
<i>People v Babcock</i> , 469 Mich 247; 666 NW2d 231(2003)	18
<i>People v Houston</i> , 448 Mich 312; 532 NW2d 508 (1995)	20
<i>People v Lockridge</i> , 498 Mich 358; 870 NW2d 502 (2015)	16, 17, 19, 20, 22
<i>People v Milbourn</i> , 435 Mich 630; 461 NW2d 1 (1990)	17-22
<i>People v Smith</i> , 82 Mich 292; 754 NW2d 284 (2008)	18, 20
<i>People v Steanhouse</i> , 500 Mich 453; 900 NW2d 327 (2017)	1
<i>People v Steanhouse</i> , 500 Mich 453; 900 NW2d 327 (2017).	16, 17, 19-23
<i>Weems v. United States</i> , 217 US 349, 367; 30 SCt 544; 54 LEd 793 (1910)	17

Constitutions, Statutes, Court Rules

18 USC 3553	23
MCL 750.316	1
MCL 750.317.	1
MCL 777.31	20
MCL 777.32	20
MCL 777.35	21
MCL 777.36	21
MCL 777.49	21
MCL 777.61	22
MCR 7.302	v, 24
MCR 7.302	iv, 17

Statement of Jurisdiction

The People filed this application seeking leave from the Court of Appeal's opinion reversing Defendant, Dawn Marie Dixon-Bey's sentence.

This application should be denied because the Court of Appeals' opinion is not clearly erroneous, it does not conflict with other decisions by this Court or the Court of Appeals, and it will not cause material injustice. MCR 7.302(B).

Counter-statement of Question Presented

- I. Was the Court of Appeals correct in holding that the trial court violated the principle of proportionality and in doing so, abused its discretion where the judge considered factors adequately accounted for in the guidelines and factors that were not unique to this offense or offender? Further, did the trial judge fail to provide an adequate basis for the sentence?**

The People answer, "No."

Defendant-Appellant answers, "Yes."

Counter-Statement of Facts

Introduction

Defendant-Appellee, Dawn Marie Dixon-Bey's long-term boyfriend, Gregory Stack, died from stab wounds on February 14, 2015. Ms. Dixon-Bey admitted that she stabbed Mr. Stack, but claimed that she did so in self-defense. She was charged with first-degree murder, MCL 750.316. After an eight-day jury trial, she was found guilty of second-degree murder, MCL 750.317. The advisory guidelines indicated a minimum sentence between 144-240 months. The presentence report stated that "the advisory sentencing guidelines call for a prison term in this matter, and this agent can find no compelling reason to deviate from those guidelines. As such, term of incarceration within those guidelines is recommended." (PSIR at 2). The trial judge imposed a sentence of 35-70 years, exceeding the guidelines by 180 months.

In its September 26, 2017, published decision, the Michigan Court of Appeals remanded the matter for resentencing, finding that the trial judge abused its discretion and violated the principle of proportionality set forth in this Court's opinion in *People v Steanhouse*, 500 Mich 453; 900 NW2d 327 (2017).

Trial Testimony

Dawn Dixon–Bey testified that prior to the stabbing, Gregory Stack was aggressive and had thrown things at her. She stabbed him in the chest when he lunged at her.

Dawn Dixon–Bey testified that she met Gregory Stack in 2003 or 2004 when she was working in a bar. Greg drank a lot when they first met and his drinking increased during the relationship. His drinking increased further after her father moved in with them because her father was a drinker. Greg started drinking schnapps around that time. He previously was not a liquor drinker and when he drank liquor he became angry. He would pick on Dawn and do things that he knew would irritate her.

She denied that she had ever threatened to stab Greg nor had she ever threatened

him with physical harm. (TR 6 at 103). Greg would push her into the counters and wrap his arms around her and hold her. His aggressive conduct increased during the last 6 months of his life. Whenever he was angry, depending on the situation, he would say she was worthless. Greg took Vicodin, Percocet, methadone, morphine, cocaine, mushrooms and ecstasy.

On the morning of February 14, Greg drunk a half a pint and left the house to move things from their old house to their new apartment. (TR 6 at 108). At some point he returned and brought a couple of boxes inside that were not supposed to come to the new apartment. She told him that the things didn't belong there and that he needed to take them back to the old house. He complained about her daughter Natiezia and then he and the others who were helping him move drank Apple Pie moonshine. He was upset when he left.

When he returned home he was yelling and he threw a dog cage at her. She believed he was complaining that the kids didn't get things together for the move. He pushed her out of the way as he was going in the living room. When he threw the dog cage at her she hit her knees on the coffee table. Greg sat on the couch and was screaming and yelling at her. He started throwing things at her that were on the coffee table. She told him that he should just pass out and he would feel better. He got mad and started pushing and shoving her. He was standing up and he slammed into her and pushed her against the wall. She told him to sit down to leave her alone. The kids were in the living room and when he shoved her backwards she tripped over her child's walker. She was cornered in the kitchen and could not get around him without climbing over the kids. She tried to push him backwards and he shoved her back into the refrigerator. She told him to leave her alone and he started trying to grab her.

She grabbed a skillet off the stove and swung it at him. He grabbed it from her and threw it in the kitchen. He grabbed her after that and she ended up grabbing a knife. At that

point they were just a few feet away from each other. Because of the look on his face she had no idea what he was going to do to her. She was very afraid that he was going to hurt her. (TR 6 at 118). After she had a knife she told him to get away from her and she was holding the knife by her side. She testified that "he lunged at me in the kitchen and I pretty much -- not sure what happened after that. I closed my eyes, because I was just afraid of what was coming next. The next thing I know, I'm standing there and he was standing there and he lifts his shirt and see -- we both kinda see the cut and he turns around and he goes in and sits on the couch." (TR 6 at 119).

She was in shock at the time and wasn't sure what happened. She asked if he needed her to call an ambulance because she wasn't sure how bad the cut was. She testified that she called her friend Sherry Heim and then called 911. When she called 911, they told her to lay him on the floor and administer CPR. While she was performing CPR, she was trying to talk to him, but he was so intoxicated she wasn't sure if he had passed out

When the officers showed up she told them that he had been stabbed on the way home. She did not want Greg getting in trouble for fighting and drinking because he was trying to get his drivers license back. She did know how serious the wound was at first. At the time that she grabbed the knife in the kitchen she did not intend to stab or injure him. She stated that she grabbed a steak knife or a butcher knife. She was holding the knife at her side when he came towards her. Greg was 9 or 10 inches taller than her. She believed that the knife was by her chest area at the time he lunged at her. She did not see any blood until Greg lifted up his shirt. She saw the wound bleeding and then it stopped. When he was on the couch he told her that he couldn't see. She wasn't sure what he was talking about. At some point he closed his eyes and she was trying to talk to him. He was still sitting on the couch when she called Sherry but he was not talking at all. His eyes were still open at that point.

Alissa Todd Kennedy testified that Gregory Stack used drugs and drank everyday. She stated that the arguments increased between them and that Stack usually initiated them.

Alissa Todd Kennedy is Dawn's daughter. Dawn started dating Greg when she was about 10 years old. She would spend time living with both her mother and her father. She believed that Dawn and Greg had a good relationship. (TR 6 at 6). Over time Greg's drinking increased as well as arguments between Greg and Dawn. Most of the arguments were initiated by Greg. Greg abused drugs every day. He snorted pills and cocaine, used mushrooms and smoked marijuana. She stated that Greg would "pick and touch you and just bother you." She stated that when a person doesn't want to play with him he gets upset, takes it personally and gets very aggressive. (TR 6 at 8).

When Dawn was taking care of her mother at the end of her life, Greg was very agitated because Dawn wasn't home to take care of him and occasionally he might throw a shoe or something at her if he got pissed off. (TR 6 at 17). She believed her mother moved into the new place because she was trying to get a place she could afford by herself so that she could leave Greg.

Karen Bivens testified that Mr. Starks's drinking problem increased over time and that she observed him do numerous drugs. She said that he got aggravated very quickly.

Karen Bivens was Dawn's sister. She met Greg 13 - 14 years ago. She stated that Greg had a drinking problem which increased over time. In addition to drinking, she observed him smoke crack cocaine and weed, take pills, snort cocaine and ingest mushrooms and LSD. The last time she visited them was between September and November of the previous year and she stayed overnight. She saw Greg taking pills and snorting something up his nose. He got aggravated very quickly. She stated that when people were in the house he was very nice but when he was there with Dawn he was very mean. (TR 6 at 26). Every time she visited them over the past 8 years, Greg would nitpick Dawn and criticize her constantly.

Daniel Bivens helped Mr. Starks move on the day of the incident. He testified that Starks drunk throughout the day and snorted 4 Vicodins.

Daniel Bivens is Dawn's father. At some point he moved in with Dawn and Greg and lived with them for about 5 years. He had a good relationship with Greg when Greg was sober. At first they used to drink beer and then Greg got into schnapps. In the 6 months prior to his death Greg was coming home drunk almost every day. He was into Vicodin pretty heavy and also did a little cocaine.

On February 14, he met up with Greg at Brian's house. (TR 6 to 38). He and Brian were helping Greg move things out of the Backus street apartment. Brian supplied Vicodin and he believed that Greg snorted 4 pills during the day. When they got to the new apartment, Greg started drinking moonshine called Apple Pie and Dawn got upset and they began to argue.

While he was living with Dawn and Greg he observed them fighting. Greg was the person who initiated the fights. He would come home drinking and would criticize Dawn. One time he saw him throw a shoe at her and hit her in the head. On another occasion he saw him take everything off the kitchen table and throw it at her. There always were arguments when he was drinking. When Dawn started taking care of her mother, Greg was angry about it all the time. (TR 6 at 49).

Asia Chantel Dixon-Bey testified that Starks's drinking increased. She picked Dawn up from jail and observed that her leg was bruised.

Asia Chantel Dixon-Bey is one of Dawn's daughters. She testified that Greg drank every day and increased the amount he drank over time. When he argued with Dawn, Dawn tried to walk away most of the time. She picked her mother up from jail in February and she took pictures of her body. She identified was a photo of her mother's left leg with a bruise. She testified the pictures were taken a day after she was released from jail. Asia identified photographs which showed bruises and cuts on her arms and legs.

Natiezia Janae Headen testified that Dawn and Gregory argument a lot and that Gregory started the arguments. She testified that prior to the incident he was physically assaulting Dawn.

Natiezia Janae Headen is another one of Dawn's daughters. She stated the during the past 3 years Greg and Dawn argued a lot. Greg started the arguments. They would begin with something small and escalate as the day went on. Greg was drunk every day. When he came home from work he would come home smelling like alcohol and he would begin drinking at home. On the weekends he started drinking as soon as he woke up. Dawn's mother did not want Greg drinking so much and he would argue with her about it. She also observed him snorting pills.

A few days before February 14, Greg and Dawn's relationship was horrible. "Greg would start hitting my mom and my dog would try to get him off of her." He would push and shove her as well. (TR 6 at 78). Greg gave Natiezia a black eye around Christmas break. She stayed out of school at that time because of the black eye. She testified that Greg got physical with her mother every night and that he threw things at her.

When her mother got out of jail she observed bruises on her. On February 14, Greg and Dawn argued about her. She was trying to tell Greg that she did not want the things that he was trying to move from the old house. He became upset with her and she asked him to throw the things away. On February 15, her mother told her that Greg had thrown a dog cage at her when she was in the kitchen and she could not get out. (TR 6 at 86).

Brian Keith Pierucki worked with Starks and stated that Starks's drinking appeared to be getting worse and that they would buy drugs together. He stated that Starks initiated arguments, which he believed were related to his alcohol and drug use.

Brian Keith Pierucki testified that Greg's drinking appeared to get worse during the past 8 months. He testified that they would both drink on the job. He and Greg would go to Richard Petersen's house to buy Vicodin and Percocet. Greg and Dawn argued mainly because of Greg's drinking and drug use. (TR 5 at 151). Greg would instigate the arguments. He had never heard Dawn mention anything about stabbing Greg. He saw Dawn on a daily

basis. They were close friends and confided in each other about a lot of things and he never heard her say anything of that nature. He believed that the stabbing would never have occurred if Greg was not high and drunk.

Sherry Heim was a long-time friend of both Dawn and Greg. She testified that Greg's demeanor had changed over the past year and that he angered quickly. He had a drinking problem and took the opiate, Norcos.

Mr. Stack used to date Sherry Heim's mother. She had known Greg for about 30 years and had known Dawn for about 10 years (TR 2 at 104). Dawn's 16-year-old daughter, Natiezia, was staying at her house on February 14. (TR 2 at 113). Dawn called her later in the afternoon and told her that Greg was yelling at her because Natiezia had not packed up things at the old house that he wanted to move to their new place. Dawn called her again at about 5 p.m. and stated that she needed her to come over and get the kids. She told her that Greg had been stabbed in the chest. Dawn called her later that day from the police station and was checking on Natiezia. Sherry told Dawn that Greg had passed away. Dawn was quiet and said "Oh my God." (TR 2 at 120)

Sherry Heim told Detective Schuette that Dawn had told her that when Greg returned to the house, they were fighting and that he had hit her with a dog cage and backed her into a corner. (TR 2 at 131). Sherry testified that Greg had a drinking problem and that over the past year his demeanor changed a lot. Any little thing could set him off when he was drunk. Greg also took Norcos which was similar to Vicodin. Dawn and Greg began to argue more during the 6 months before the incident when Dawn's mother became ill and Dawn was occupied helping with mother.

Paul Pierucki helped Greg move on the day of the incident. They started drinking at 8 in the morning. He said that they drank together almost every day. Dawn did not want to be around Greg when he was drunk. Paul said that they argued a lot and that Greg was always the aggressor.

Paul Pierucki had known Greg and Dawn for about 5 years. He saw Greg almost every day for the past 3 years and considered him to be his best friend. (TR 2 at 149). Paul

was helping Greg move on February 14. Greg and Dan Bivens picked him up around 8 in the morning and they began drinking peppermint schnapps and beer. The three of them drank together just about every single day. When Greg came over to his house to pick him up he gave Greg 4 Vicodins and recalled that Greg took them all. Greg was upset during the day because Natiezia was not helping with the move. Donna and Greg argued about that all day on the telephone.

Dawn stayed at the new apartment because she didn't want to deal with them when they were drinking. Dawn would try to leave when Greg was drinking and they would argue about it. He said that Greg was always the aggressor. (TR 2 at 155). During the day, the three of them drank two fifths of peppermint schnapps and more than a 12 pack of beer. He called Greg about 20 minutes after he left and Dawn answered the phone. Dawn told him that Greg had gotten into a fight on his way home and that she couldn't talk because the police were standing next to her.

He was surprised and wondered how Greg could have gotten into a fight in the 5 minutes that it took to get home from his house. After he got off the phone with Dawn he called Sherry Heim to find out what happened. He met with Detective Schuette on a couple of occasions. Schuette came to his house on February 14th and Dan Bivens was there as well. He believed that Dawn had something to do with the stabbing. (TR 2 at 167).

George Wilson owned a heating and cooling business. Gregory Stack installed duct work for him among other things. After he learned that Greg passed away, he spoke with Dawn to make arrangements to pick up his tools. (TR 2 at 215). Dawn told him that Greg came bursting into the house and threw a dog kennel at her and her 2 grandchildren who were sitting on the floor. He testified that she said she had had enough and she killed him. (TR 2 at 218).

Megan Marshall is Gregory Stack's daughter. She has known Dawn since she was 7 or 8 years at the time she began dating her father. Her sister, Jersey Stack, was Greg and

Dawn's biological child. (TR 3 at 81). Her step sisters are Alicia, Asia and Natiezia. On February 14, Megan was at her mother's house relaxing when she received a message from Natiezia that her father had been stabbed and that she needed come over. She had spoken to her father within 2 hours prior to the incident. When she asked Dawn what happened she told her that Greg came home drunk and was being violent and had her cornered in the kitchen. She picked up a knife and he lunged at her.

Detective Schuette asked her to call Dawn and to try to get her to explain what happened so that he could record it. (TR 3 at 94). Megan asked Dawn what happened and she stated that she wasn't really sure because it all happened so fast. She didn't know what she was going to do without Greg. The prosecutor asked Megan whether she thought "that it was actually a case of self-defense" when she spoke with Dawn. She responded "Not to the extent of killing him, no. If it was self-defense she could've hurt him anywhere else and not his heart. So, no." (TR 3 at 105). She testified that her father got aggressive, loud and mean when he was drunk.

Megan said that she had never seen her father act violent towards Dawn and that Dawn never told her of any such incidents. (TR 3 at 119). She had seen Greg annoy Dawn and make her mad when he was drunk.

Sean Pierce was good friends with Gregory Stack and had known him for 8 - 10 years. He met Dawn about the same time that he met Greg. He lived with Greg and Dawn on a couple of occasions. (TR 3 at 147). He witnessed Greg and Dawn argue on a few occasions and stated that neither one was the aggressor. He stated:

Well I heard one time that got my attention but I didn't think nothing of it really. It was, you know - - I can't remember exact words but she did say, you know, I'm going to stab you. Along those lines and - - or one of these days you're going to get stabbed or - - you know, so - - you know, that caught my attention. But shortly after that they walked away so I didn't, you know, think too much of it. It's like - - you know, thinking it's probably just a heated discussion. They went their own ways and, you know, after that they were fine and talking and, you know, the rest of the night seemed to - - went okay." (TR 3 at 151-152).

He didn't remember what they were fighting about.

Jeffrey Tobin testified that Greg, Dawn, Dawn's father and her kids moved in 2 doors away from him when he lived at 807 Northwest Ave. He had a lot of contact with both Greg and Dawn and described the relationship as normal. He witnessed them arguing but it was nothing out of the ordinary. When Greg drank he would go to bed early and when he drank too much he would be argumentative. (TR 3 at 166). He never saw him get physical with Dawn.

He spoke with Dawn a couple days after Dawn told him that Greg had come home drunk and was arguing with her and they got into an altercation. She told him that she swung a frying pan at Greg. After he took it away from her she grabbed a knife, lunged at him and it just happened to hit him in the chest. She said she was not aiming for his chest.

On cross-examination he admitted that Dawn told him that Greg threw a dog cage at her. He stated "I couldn't really make out that part. I knew it was either a couch or a dog cage that he either pushed over her or pushed her into it or something." (TR 3 at 178).

Thomas Gove was friends with Greg Stack and had known him for about 14 years. He would see him 3 - 4 times a month. He also knew Dawn. He learned that Greg had been killed from a voicemail message and could not believe that Dawn did it. He recalled that in November 2014, he was waiting for Greg to come home from work. Greg and Dawn were arguing. Dawn walked towards him and "said all I got to do is stick him in the chest and claim self-defense." (TR 3 at 187). He didn't think anything of it at the time because it wasn't the first time she said that. He stated that when they were living at Dawn's mother's house in 2003, he was waiting to go hunting with Greg and Dawn came into the kitchen and stated "I'm going to kill that F'er one of these days." (TR 3 at 188). Greg said that she was just pissed off.

Richard Petersen had known Gregory Stack since 3rd grade and believed that Greg considered him to be his best friend. They lived together for at least 17 years at various

times after they were 17 years old. (TR 4 at 6). He stated that Greg "would stick up for the little guy. Greg... was fun loving and very caring for the children." Greg took him hunting and fishing and made sure he had fun. He stated that "Greg taught me how to have fun."

He stated that his relationship with Greg changed considerably because he was against his relationship with Dawn. It almost felt like he was losing his significant other. They spoke together multiple times a day and when Greg hung up he would tell him "I love you." Peterson said that he got along well with Dawn. He was over at their house 5 - 7 times a week. Greg was a drinker and during their last fishing trip he drank 18 beers and a pint of whiskey. He had known Greg to be a drinker since 9th grade.

He stated that at times he would be called over to the house when Greg and Dawn were in the midst of an argument because Greg had to leave. On multiple occasions Dawn would tell Greg "I'm going to stab your ass." Petersen stated that when Greg was drunk he did get violent "but it was always as a reaction." (TR 4 at 20). During the 6 months before he passed away he would see Greg three times a week at his house. Peterson supplied both Dawn and Greg with 4-5 Vicodin pills several times a week.

He stated that on one occasion either Greg or Dawn called him to come over and get Greg. He arrived at the house between 1:30 and 2:30 a.m. and Dawn and Greg were yelling back and forth at each other. As he got closer, he saw blood coming from Greg's arm down to his hand. He stated that Dawn had a knife in her left hand and he could clearly see there was blood on the knife. She told him "you better get him the fuck out of here or I will stab his ass again." Greg responded "I can't believe you stabbed me." Greg finally went to the hospital the following day because he was having trouble using one of his fingers. (TR 7 at 25 - 26).

Richard Hale had known Gregory Stack for about 33 years and stated that they were together 3 or 4 times a week and hung out a lot. After Greg began his relationship with Dawn he did not hang out with him as frequently because he didn't like the way they lived.

Greg did not seem to care about how dirty the house was. He stated that on one occasion Greg called him on a Saturday morning about 7 or 8 years ago and asked him to come and get him. When he pulled up in the driveway Greg came right out of the house and he noticed that Greg had bandages on his arm. He could see remnants of blood that had bled through the bandage and Greg was in a hurry to leave. The prosecutor asked him what Greg said. Defendant's counsel objected. The prosecutor stated that it was not testimonial and that it was an excited utterance. The judge overruled the objection on both grounds. (TR 7 at 34). He testified that Greg said "the crazy bitch tried to kill me."

Shannon Hale had known Greg for about 22 years. They grew apart once he started going out with Dawn. She said that it didn't seem like a very good relationship and that her husband Richard had stopped drinking. When she and Richard picked him up, Greg was bouncing out of the door with his arm wrapped up and was giggling and laughing. They asked him what happened and "he said the crazy bitch tried to kill me but I blocked it." She asked Greg why wasn't she in jail and he said "Oh I didn't tell. I told 'em I put my arm through a window." (TR 7 at 41).

Megan Marshall testified that she recalled seeing Natiezia with a black eye. Natiezia was trying to stop a fight between Greg and Dawn and got a black eye. She did not recall Dawn ever talking about stabbing her father but she recalled her father talking about it and how he said he had fallen through a window.

Officer Cary Kingston was dispatched to 807 Steward on February 14, 2015, with regard to a stabbing. (TR 2 at 37). Gregory Stack was lying on his back and had blood on his chest area. Ms. Dixon - Bey told Kingston that Stack told her that he had been in a fight. (TR 2 at 43). Sergeant Sergio Garcia also responded to the incident. It appeared that there had been a scuffle in the living room, however he added that he didn't know what the room looked like before medical personnel arrived.

Doctor Ortiz-Reyes conducted the autopsy on Gregory Stack on February 16,

2015. He observed two stab wounds to the mid-chest. (TR 3 at 8). There were no other signs of injury. The cause of death was the stab wounds and the manner of death was homicide. (TR 3 at 16). Doctor Ortiz Reyes received the body after the medical staff had worked on the body. He did not inquire as to whether an increase in the wound to the heart was a result of the surgeons' work. He testified that Mr. Stack had cocaine, hydrocodone, alcohol and acetaminophen in his body.

Detective Schuette received a call around 5:50 p.m. regarding the incident. He was with Dawn at the detective bureau when she called Sherry Heim. Dawn told Sherry that Greg had been stabbed prior to coming home. It appeared to him that Dawn learned on the phone that Greg had passed away. (TR 4 at 68). Dawn agreed to speak with him. She initially told him that they were moving to Backus street from Steward and that Greg had been moving things with both her father, Daniel Bivens, and Brian Pierucki. She said that Greg had just left both of them and must have gotten into a fight on his way home.

He observed that Dawn had some red marks on her hands. Schuette stated that his technique was to initially blame the victim and that "typically that's used through a self-defense claim." (TR 4 at 77). Dawn told him that Greg had been drinking that day. Schuette testified that she said Greg was "a dirty, nasty drunk." The prosecutor then asked "so once that happened, when she starts saying [he is a dirty nasty drunk] is that when you start going into the - - the possible self - defense type argument with her?" Schuette agreed and stated that he initiated that line of questioning.

Dawn still maintained that by the time Greg came home he already had been stabbed. When he asked whether it was self-defense, Dawn told him that she would like to leave. At that point he read her the Miranda rights. She was angry and felt that he had misled her and felt that she was never free to leave. (TR 4 at 81 - 82). The interview was terminated. Schuette testified that after Dawn indicated she did not want to talk he "exited the interview room and told her that she could not leave. I did not feel at that point that I

have enough probable cause to arrest her."

The video of the interview was played for the jury. During the interview Dawn had given him a couple of names and he wanted to explore information that he might obtain from them. He called Sherry Heim and she told him that Dawn had called her and told her that she had just stabbed Greg. He testified that Sherry backed off from that statement rather quickly and stated that she wasn't really sure of what Dawn had told her and that she may have told her that when Greg came in he already had been stabbed. (TR 4 at 94).

He got to the crime scene at about 10 p.m. and noticed Greg's boots in the front foyer area. There was very little blood at the scene. He was concerned that no weapon was found that could have inflicted the injury.

He eventually contacted Daniel Bivens and Brian Pierucki and met with Sherry Heim. He stated that Sherry Heim's testimony during trial was not entirely consistent with what she told him on February 14. Sherry had told him that she spoke with Greg early on February 14 and had given Greg \$50. She also had mentioned that Natiezia was upset over conversations with Greg and Dawn. As he pressed Sherry for more information she became very emotional and said that she had loved Greg and she had known him for 30 years. She stated that she had been concerned that Dawn and Greg had not been getting along very well. When he confronted her about her initial statement on the phone that Dawn had told her that she stabbed Greg, she began crying and telling him she did know what she was saying. Dawn had told her that an ambulance was coming. (TR 5 at 21).

Schuette ultimately made arrangements to speak with Megan on February 17. During the interview he requested that Megan make a phone call to Dawn in an attempt to obtain a statement from her regarding her involvement. The story that Megan gave him did not coincide with what Dawn had told him. He testified that he started to believe that this was not a case of self-defense. (TR 5 at 27). He also received information that led him to speak with George and Ryan Wilson, who allegedly heard Dawn make some statements related

to the incident.

When he saw the results of the autopsy on February 23 he learned that there were two stab wounds. (TR 5 at 38). He stated that the autopsy resulted changed his view as to whether the stabbing could have been done in self-defense. He also received information about Mr. Gove who came in for an interview. He agreed with the prosecutor that on February 23 his focus turned away from a self-defense theory. (TR 5 at 39). The prosecutor then asked whether he had interviewed people who actually had been involved in a self-defense situation. He agreed that he had. The prosecutor then asked whether people involved in self-defense tended to act in a certain way. He agreed and went on to recite that people involved in self-defense situations were very excited, often crying and have all kinds of information and asked if they would be in trouble. The prosecutor then asked "I guess it's fair to say that's not what you got from talking to Dawn Dixon - Bey." He responded "Not at all." (TR 5 at 40)

On December 9, 2015, Dawn Marie Dixon-Bey, was convicted of second degree murder. On January 27, 2016, she was sentenced to 35-70 years. Ms. Dixon-Bey appealed her conviction and sentence. In its September 26, 2017, published decision, the Michigan Court of Appeals affirmed the conviction and vacated the sentence. The Court of Appeals held that the trial judge abused its discretion and violated the principle of proportionality set forth in this Court's opinion in *People v Steanhouse*, 500 Mich 453; 900 NW2d 327 (2017) and remanded matter for resentencing. The People filed an application contesting that opinion.

I. The Court of Appeals was correct in holding that the trial court violated the principle of proportionality and in doing so, abused its discretion where the judge considered factors adequately accounted for in the guidelines and factors that were not unique to this offense or offender. Further, the trial judge failed to provide an adequate basis for the sentence.

A. Standard of review and issue preservation

“A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness.” *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). “[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion.” *People v Steanhouse*, 500 Mich 453; 900 NW2d 327 (2017).

B. Discussion

The People argue in their application the Court of Appeals:

ignored the rule from such cases as *People v Ewing* (after remand) 435 Mich 443, 446, 462; 458 NW3d 880 (1990), *United States v Watts*, 519 US 148, 152; 117 S Ct 633; 136 L Ed 2d 554 (1997), and *United States v White*, 551 F3d 381, 386 (CA 6 2008), cert denied 556 US 1215; 129 S CT 2071; 173 l Ed 2d 1147 (2009), that in aggravating a defendant’s sentence, a judge may consider the facts underlying an acquittal. (Application at 4)

The People assert that the trial properly found that Ms. Dixon-Bey actually committed first degree murder and punished her accordingly because Ms. Dixon-Bey stabbed Stack twice; she previously had stabbed him; she allegedly had told somebody that she would stab him one day and claim self-defense; and the murder weapon was never found. The People assert that the Court of Appeals consideration of the advisory guidelines “comes very close to making the guidelines mandatory.” (Application at 5).

The People do not even address this Court’s recent decision in *People v Steanhouse* in which this Court extensively discussed the relevant factors to be considered by a reviewing court to determine if a trial judge’s sentence violated the principle of proportionality. The advisory guidelines remain an important consideration as well as the extent to which the guidelines already address conduct related to the offense. Further, the

trial judge must set forth a rational basis supporting the extent of the departure. In the present case, the Court of Appeals did not come close to blurring the distinction between the advisory nature of the guidelines and the principles informing the principle of proportionality. Instead, the Court of Appeals arrived at a detailed and well-reasoned opinion that applies the directive set forth by this Court with regard to appellate review of a post-*Lockridge* “departure.”

In *Steanhouse*, this Court clarified that “the relevant question for appellate courts reviewing a sentence for reasonableness” is “whether the trial court abused its discretion by violating the principle of proportionality[.]” *Id.* 500 Mich __; 900 NW2d 330. This Court stated that:

The principle of proportionality has a lengthy jurisprudential history in this state. See *Milbourn*¹, 435 Mich. at 650, 461 N.W.2d 1, quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

In *Milbourn*, we described that principle as one in which a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender. [*Milbourn*, 435 Mich. at 651 [461 N.W.2d 1].] *Steanhouse*, __ Mich __; 900 NW2d 336

As the Court of Appeals in the present case, cited *Steanhouse* for the proposition that under the principle of proportionality, “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.’ ” *Id.*, quoting *Milbourn*, 435 Mich at 661. The People’s assertion that the Court of Appeals came close to treating the advisory guidelines as if they were mandatory is simply not supported by the Court’s analysis. The Court of Appeals stated that:

As such, our Supreme Court noted that, although its opinion in *Lockridge*

¹ *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990)

corrected a constitutional flaw in the sentencing guidelines by making them fully advisory, nothing else in [that] opinion indicated we were jettisoning any of our previous sentencing jurisprudence outside the Sixth Amendment context. Moreover, none of the constitutional principles announced in *Booker* or its progeny compels us to depart from our longstanding practices applicable to sentencing. Since we need not reconstruct the house, we reaffirm the proportionality principle adopted in *Milbourn* and reaffirmed in [*People v. Babcock*, 469 Mich 247, 666 NW2d 231(2003)] and [*People v Smith*, 82 Mich 292, 754 NW2d 284 (2008)]. [Id. at ____, slip op at 16.] (*People v Dixon-Bey*, slip opinion at 17)

The Court of Appeals noted that the trial court recognized that the guidelines were advisory and thus “it is apparent that the trial court was aware that its upward departure sentence would be reviewed for reasonableness on appeal.” The Court of Appeals also recognized that “presumptions of unreasonableness for out-of-guidelines sentences” were no longer relevant.

The trial court’s reasoning for imposing a 15 year “departure” from the 144-240 month guideline range is as follows:

All right, well the court sat-- through this trial, for several weeks I listened to a lot of testimony and I've learned that few people in this business are perfect. And Mr. Stack had a lot of really great qualities and he had one major fatal flaw, that's that he stayed in a relationship with you. And I - I - I don't buy your - your theory that this was just some kind of domestic situation and you struck out at him in some type of vulnerability. In fact, I think some - some -some facts that were well established during the trial are significant and that's the - first, is that you stabbed him not one but twice in the heart.

Mr. Carter, might've - oh, you know, maybe Dr. Ortiz-Reyes, you know, cut that when he was doing the autopsy. That - that wasn't - there was a second stab wound and it was directly to the heart. One and one half years before this even occurred you slashed Mr. Stack, you know, such that he had to have reconstructive surgery on his hand. So, this wasn't the first time there was a domestic act of violence with you involving a knife with the victim. In fact, you told Mr. Gove that all I have to do is stick him in the chest and then claim self-defense. That was a statement that you made before the alleged time when he was - Mr. Stack was stabbed twice in - in the heart.

And then, on -- on -- on the night in question we know the murder weapon vanished. It was never found, never able to be processed by the police. So, you had the presence of mind to do that. You had the presence of mind to go ahead and try to minimize your role and then try to turn the focus, you know, back on Mr. Stack as being the cause. Well, today the focus is about you. An intent can be determined by what you did, what you said, both before, during and after the crime. And, frankly, you plunged that knife into Mr. Stack's heart twice and you brutally murdered him in cold blood. And for that by the

power vested in me in the State - by the State of Michigan you're to serve thirty- five (35) years to seventy (70) years in the Michigan Department of Corrections . . .

You know, with you married to another man in prison I'm just amazed he ever even stayed with you in the - in a relationship. And - and by the way, I did consider the sentencing guidelines which were 10 years to 20 years but I considered that the additional level of depraved heart and murder and the cold calculated nature of you brutally stabbing him twice in the heart and letting him bleed to death and die in this matter. So, the court believes my sentence is within the range. The guidelines are only advisory so you will serve that time. You'll be an old woman before you get out of prison. (ST 17-20)

In finding that the trial court abused its discretion by violating the principle of proportionality, the Court of Appeals noted that *Milbourn* adopted the principle of proportionality to “effectively combat unjustified disparity” in sentencing. *Milbourn*, 435 Mich at 647. The *Milbourn* Court noted that the sentencing guidelines were “a useful tool in carrying out the legislative scheme of properly grading the seriousness and harmfulness of a given crime and given offender within the legislatively authorized punishments.” *Milbourn*, 435 Mich at 657-658.

Similarly, in *Steanhouse*, this Court noted that the Legislature had incorporated the principle of proportionality into the legislative sentencing guidelines. *Steanhouse*, ___ Mich at ___, NW2d at 336 (citing *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003)). This Court also noted that the guidelines ‘remain a highly relevant consideration in a trial court’s exercise of sentencing discretion’ that trial courts ‘must consult’ and ‘take . . . into account when sentencing.’ ” *Steanhouse*, ___ Mich at ___; slip op at 18, quoting *Lockridge*, 498 Mich at 391. The People appear to imply that the guidelines deserve little or no attention. No law supports that view. Because the guidelines embody the principle of proportionality and trial courts must consult them when sentencing, it follows that they continue to serve as a “useful tool” or “guideposts” for effectively combating disparity in sentencing. The Court of Appeals in the present case noted that:

relevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines range: continue to

include (1) whether the guidelines accurately reflect the seriousness of the crime, *People v Houston*, 448 Mich 312, 321-322, 532 NW2d 508 (1995), see also *Milbourn*, 435 Mich at 657, (2) factors not considered by the guidelines, *Houston*, 448 Mich at 322-324, see also *Milbourn*, 435 Mich at 660, and (3) factors considered by the guidelines but given inadequate weight, *Houston*, 448 Mich at 324-325, see also *Milbourn*, 435 Mich at 660 n 27.9. When making this determination and sentencing a defendant, a trial court must “justify the sentence imposed in order to facilitate appellate review,” *Steanhouse* ___ Mich at ___, slip op at 14, quoting *Lockridge*, 498 Mich at 392, which “includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been,” *Smith*², 482 Mich at 311.

The Court of Appeals noted that the trial court in this case did not provide an explanation justifying the significant departure. Ms. Dixon-Bey’s Prior Record Variable score was zero. The Court of Appeals stated that “Without a criminal history, the trial court had no basis to conclude that defendant was a “recidivist . . . criminal” that deserved a “greater . . . punishment” than that contemplated by the guidelines. *Dixon-Bey*, slip opinion at 19. Nothing regarding defendant’s background supports a departure.

With regard to the nature of the offense, the Court of Appeals stated that none of the factors mentioned by the trial court before imposing its sentence provided a reasonable basis for any departure. Further, the trial court failed to indicate that the guidelines did not adequately address the seriousness of the offense. This Court has made it clear that the guidelines remain a highly relevant consideration in fashioning a sentence. While the trial court failed to address why the guidelines did not address Ms. Dixon-Bey’s conduct, the actual scoring of the guidelines demonstrates that had the trial court properly applied the law, it would be apparent that Ms. Dixon-Bey’s conduct already had been accounted for.

For example, as the Court of Appeals noted, the trial court emphasized that defendant stabbed the victim twice in the chest. Both OV 1 (aggravated use of weapon), MCL 777.31, and OV 2 (lethal potential of weapon possessed or used), MCL 777.32 address the manner of death. The trial judge appeared to be motivated by testimony from Mr.

² *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008)

Stack's family, however, OV 5 (psychological injury to member of victim's family), MCL 777.35, was scored at 15 points. Nothing in the record indicates why the suffering of Starks' family was so inherently different from other victim's families that it would support a departure. The trial court did not attempt to do so.

The trial judge's reliance on the his belief that Ms. Dixon-Bey hid the murder weapon could have been scored under OV 19 (interfering with the administration of justice), (MCL 777.49). Further, hiding evidence related to a crime hardly is conduct that is so different from other defendants that it warrants an excessive sentence.

The Court of Appeals also contrasted the trial judge's reference to the "cold-blooded" nature of the crime with the parties and the court's approval of scoring OV 7 at zero, which provides for scoring for aggravated physical abuse (MCL 777.37). To the extent that the trial judge believed that Ms. Dixon-Bey was guilty of first degree premeditated murder, OV 6 MCL777.36, can be scored to reflect an offender's. However, pursuant to MCL 777.36(2)(a), a sentencing court must score OV 6 "consistent with a jury verdict unless the judge has information that was not presented to the jury." Thus, on the basis of defendant's conviction of second-degree murder in this case, the trial court was constrained by MCL 777.36(2)(a) from scoring OV 6 to reflect a premeditated intent absent "information that was not presented to the jury." There is no indication on the record that the trial court information had information "that was not presented to the jury." Significantly, the Court of Appeals stated that:

The Legislature expressly gave trial courts an opportunity to find a premeditated intent for crimes to which such an intent does not necessarily attach. Absent the legislatively prescribed condition necessary to trigger that ability, we are highly skeptical of a trial court's decision to sentence a defendant convicted of second-degree murder as though the murder were premeditated. See *Steanhouse*, ___ Mich at ___, slip op at 15, quoting *Milbourn*, 435 Mich at 651 (noting that the principle of proportionality is intended "to fulfill the overall legislative scheme of criminal punishment"). Moreover, even were the trial court to have scored this variable at 50 points, reflecting a premeditated intent, rather than as it did at 25 points, reflecting an unpremeditated intent, MCL 777.36, it would have increased defendant's overall OV score from 70 points to 95 points, leaving her recommended

minimum sentence range unchanged, MCL 777.61.

Further, the trial court's comments with regard to a killing in "cold-blood" are somewhat curious. As discussed above, numerous witnesses testified that Mr. Stack was constantly high and that he often provoked fights with Ms. Dixon-Bey. On the day of the stabbing he had snorted 4 Vicodins and was drinking all day. He was upset with Dixon-Bey's daughter. Even if it is assumed that she stabbed Mr. Stack in a fit of rage after a verbal altercation, the combined experience of this Court would likely recognize that this scenario hardly amounts to a "cold blooded" killing. Similarly, the judge's fixation on the fact that he allegedly was stabbed twice is unremarkable. This was not a systematic killing by a terrorist. At most, it was the product of emotion.

Finally, the Court of Appeals noted that the trial court's comments regarding the victim's standing in the community and defendant's attempts to minimize her role in the stabbing are not unique. Similarly, the trial court's reference to the fact that Ms. Dixon-Bey was still married to an inmate had no rational bearing on the sentence or offense. When he imposed his sentence, the trial judge stated that "Mr. Stack had a lot of really great qualities and he had one major fatal flaw, that's that he stayed in a relationship with you." While Ms. Dixon-Bey does not seek to minimize Mr. Stack's death in any manner, the trial judge's assessment ignores the testimony of numerous witnesses with regard to rampant use of alcohol and potent drugs as well as aggressive behavior towards Ms. Dixon-Bey.

The People's appear to argue that the guidelines and case law discussing the application of the principle of proportionality have a minimal role in sentencing. This Court's decisions in *Milbourne*, *Lockridge* and *Steanhouse* take the opposite view. In *Steanhouse*, this Court directed appellate courts to use the sentencing guidelines as an aid when doing so assists in determining whether a sentence is proportionate. In the present case, as discussed above, the guidelines underscored why the trial judge abused his discretion. Moreover, the trial judge failed to provide anything approaching an adequate

explanation for any departure, let alone the excessive departure imposed in this case.

The People argue that the Court of Appeals has come very close to making the guidelines mandatory. This is simply the wrong case to support that assertion. As noted above and in the Court of Appeals opinion, nothing in the record supports the significant departure in this case. In many ways, it appears that the sentence had more to do with the judge's personal feelings than an objective view of the principle of proportionality. There was ample testimony regarding Mr. Stark's excessive alcohol and drug use, abusive behavior towards Ms. Dixon-Bey, as well as a volatile relationship. These circumstances, which set the stage for emotional and irrational conduct, appear to provide less of a basis for a departure than a murder involving a 20 year old killing somebody over \$20 worth of drugs. Similarly, the number of friends that a victim has and/or the ability of these people to articulate their loss should not make a significant departure more proportionate than a victim with few friends.

The People rely on *Kimbrough v US*, 552 US 85; 128 S Ct 558; 169 L Ed 2d 481 (2007) and *Gall v United States*, 552 US 38; 128 S Ct 586, 590; 169 L Ed 2d 445 (2007)³ for the proposition that "No heightened review standard exists for sentences outside the guidelines range. The standard is abuse of discretion either way." (Application at 6). Of course, that is precisely what the Court of Appeals did in this case. It correctly found that the trial court abused its discretion. The People did not begin to address how the Court of Appeals decision was clearly erroneous or how it conflicted with this Court's decision in *Steanhouse*.

This application should be denied because the Court of Appeals' opinion is not

³

In *Steanhouse*, this Court stated that "we affirm the Steanhouse panel's adoption of the *Milbourn* principle-of-proportionality test in light of its history in our jurisprudence. The statutory factors in 18 USC 3553(a) were created by Congress for use by the federal courts and include reference to 'policy statements' issued by the Sentencing Commission or by act of Congress that have no counterpart in Michigan law." 500 Mich at ___, 902 NW2d at 336

clearly erroneous, it does not conflict with other decisions by this Court or the Court of Appeals, and it will not cause material injustice. MCR 7.302(B).

Relief Requested

For the reasons set forth in this brief, Defendant-Appellee requests that this Court deny the People's application for leave to appeal.

Respectfully submitted,

/s/Gary David Strauss P48673

Proof of Service

Gary D. Strauss, states that on December 4, 2017, he served a copy of the Brief on Appeal and Proof of Service upon a representative of the Jackson County Prosecutor's office, via the True Filing System.

/s/Gary David Strauss