STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
JUDGES O'BRIEN, HOEKSTRA, AND BOONSTRA (dissenting)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No. 156746
Court of Appeals No. 331499
Circuit Court No.15-004596-FC

V

DAWN DIXON-BEY,

Defendant-Appellee.

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APPELLANT'S SUPPLEMENTAL BRIEF
ORAL ARGUMENTS REQUESTED

PROOF OF SERVICE

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STATEMENT OF THE QUESTION PRESENTED

Where the trial court concluded that defendant "brutally murdered in cold blood," is 35-70 years for second-degree murder disproportionately high?

Defendant-Appellant answers:	**Yes**
Plaintiff-Appellee answers:	**No**

STATEMENT OF FACTS

On December 9, 2015, a jury convicted defendant of second-degree murder. MCL 750.316. Subsequently, Jackson County Circuit Court Judge John McBain sentenced her to 35-70 years. Then, on September 26, 2017, in a 2-1 opinion, the Court of Appeals remanded for resentencing (while affirming the conviction). 321 Mich App 490; 909 NW2d 458 (2017).

The Court of Appeals succinctly summarized the facts as follows:

> Defendant, Dawn Marie Dixon-Bey, was arrested after admittedly stabbing her boyfriend, Gregory Stack, to death in her home on February 14, 2015. At first, she claimed that the victim must have been stabbed during an altercation with others before returning to their home. Later, however, defendant admitted that she was the person who stabbed the victim but claimed that she did so in self-defense. (P 1); 909 NW2d 461; (433a).

Jackson City Police Officer Gary Kingston testified that defendant had denied that she and the victim had been fighting. (December 1, 2015, Trial Transcript [TrII], p 45; (21a)).

Sherry Heim testified that, about two or three days after defendant got out of jail, defendant told her that the victim had hit her with the dog cage and had thrown her over her grand babies. (TrII, p 131; (61a)). In addition, Heim testified that the drinking and drug taking were mutual between defendant and the victim. (TrII, p 143; (73a)). Later, George Wilson testified that defendant had said that throwing the dog cage had caused her to kill the victim as she had had enough. (TrII, 218; (85a)). Ryan Wilson also testified that defendant had said that she had had enough and therefore killed him. (December 2, 2015, Trial Transcript [TrIII], p 71; (145a)).

Dr. Rubén Ortiz-Reyes testified that the victim had two stabs to his heart, about one inch apart. (TrIII, pp 8, 11; (98a, 101a)). Both wounds had been sutured. (TrIII, p 11; (101a)). The wounds were four inches deep. (TrIII, p 13; (103a)). Although he could not necessarily rule out

that the second wound had been caused by the surgeons, he did not believe that it had happened that way. (TrIII, pp 25, 27, 56; (115a, 117a, 134a)).

Megan Marshall, defendant's daughter, testified that defendant had said that the victim had come home drunk and violent. When he cornered defendant, she picked up a knife and he lunged at her. (TrIII, p 91; (164a)). Marshall also said that she had not seen the victim, her father, violent—just loud and obnoxious. (TrIII, p 118; (180a)). Specifically, she has not seen him violent toward defendant. (TrIII, p 119; (181a)). Sean Pierce also testified that he never saw the victim get physical when he drank, just argumentative. (TrIII, pp 156-158; (217a-219a)). Jeffrey Tobin also testified that the victim was not physical when he drank. (TrIII, pp 166-167; (226a-227a)).

Thomas Gove testified that defendant had once said that all that she needs to do is stick a knife in the victim's chest and then claim self-defense. (TrIII, p 187; (247a)). Sometime around 2003, defendant had said that she would one day kill the victim. (TrIII, p 188; (248a)). Richard Petersen also testified that defendant had a number of times threatened to stab the victim. (December 3, 2015, Trial Transcript [TrIV], p 16; (279a)). The victim was not the one to start the fights. (TrIV, p 20; (273a)).

Defendant testified that she had no explanation for why she had told Brian Pierucki that the victim had been attacked and stabbed on his way home. (December 7, 2015, Trial Transcript [TrVI], p 157; (350a)). She also said that she continued telling the police the story about the stabbing on the way home even after learning that he was dead, simply because she had already started with the story and decided to stick with it. (TrVI, p 160; (353a)). She also denied

having previously stabbed the victim. (TrVI, p 178; (371a)). Last, she said that she did nothing with the knife afterwards other than set it down. (TrVI, pp 179-180; (372a-373a)).

In rebuttal, Marshall testified that defendant had admitted stabbing the victim when they had first started dating. (December 8, 2015, Trial Transcript, p 47; (384a)).

As pointed out above, on September 26, 2017, the Court of Appeals affirmed the conviction and remanded for resentencing. Defendant has not appealed. Instead, plaintiff did. On May 4, 2018, this Court ordered oral argument on the application with the parties addressing:

> (1)to what extent the sentencing guidelines should be considered to determine whether the trial court abused its discretion in applying the principle of proportionality under *People v Steanhouse*, 500 Mich 453; 902 NW2d 237 (2017); and (2) whether, when a jury convicted the defendant of second-degree murder, the trial court abused its discretion in applying the principle of proportionality if it either (a) sentenced the defendant according to an independent finding that she committed first-degree murder; or (b) departed upward from the sentencing guidelines for second-degree murder based on facts based on a preponderance of the evidence that the jury did not find were established beyond a reasonable doubt. See MCL 777.36(2)(a); *People v Ewing (After Remand)*, 435 Mich 443; 458 NW2d 880 (1990); *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990). 910 NW2d 303 (2018); (462a).

This case will be argued with *People v Beck*, 910 NW2d 298 (2018) (from Saginaw County).

ARGUMENT

Because, as the trial court concluded, defendant "brutally murdered in cold blood," 35-70 years for second-degree murder is not disproportionately high.

Given what defendant did, 35-70 years for second-degree murder is not disproportionately high. She not only had stabbed the victim in the past, but this time, she stabbed him twice in the heart (after having said that she would one day stab him and claim self-defense). Then, not only did she dispose of the murder weapon, but she lied to the police about what had happened. The Court of Appeals majority's reasoning tying proportionality to the guidelines comes too close to making the guidelines mandatory. The sentencing judge, who listened to the trial testimony, had the right to conclude that defendant had cold-bloodly murdered the victim. Whether it did or not, the sentencing court had the right to find, by a preponderance, that defendant had committed a first-degree murder. Thirty-five to 70 years for what is, in essence, a first-degree murder, is not disproportionate. The sentencing court did not abuse its discretion in giving this sentence.[1]

The Court of Appeals' majority made two fundamental mistakes in its analysis. First, by tying proportionality so much into the guidelines, it has done what both this Court and the United States Supreme Court said that it should not do: to a certain extent, in essence, making the guidelines mandatory. In language that the Court of Appeals' majority ignored (and the dissent picked up on (p 1; 321 Mich App 481-482; (461a)), *People v Steanhouse*, 500 Mich 453; 902 NW2d 327, 337 (2017), said that, although the guidelines are to be used, proportionality analysis is not to be tied to them:

[1] This Court reviews sentence proportionality for an abuse of discretion. *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017).

> The [United States Supreme] Court [in *Gall v United States*, 552 US 38, 47; 128 S Ct 586; 169 L Ed 2d 445 (2007)] reasoned that these approaches would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." The Michigan principle of proportionality, however, does not create such an impermissible presumption. Rather than impermissibly measuring proportionality by reference to deviations from the guidelines, our principle of proportionality requires "sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." [Citation omitted.] . . . [Such dicta that guidelines should almost always control] are inconsistent with the United States Supreme Court's prohibitions on presumptions of unreasonableness for out-of-guidelines sentences . . . and we disavow those dicta. We repeat our directive from [*People v Lockridge*, 498 Mich 358, 391; 870 NW2d 502 (2015),] that the guidelines "remain a highly relevant consideration in the trial court's exercise of sentencing discretion" that the trial courts "'must consult'" and "'take . . . into account when sentencing'" and our holding from [*People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990),] that "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."

Earlier, the United States Supreme Court recognized this problem in two cases where it reversed the circuit courts' having looked hard at the guidelines in finding the sentence (which deviated from the guidelines) to be unreasonable. In *Kimbrough v United States*, 552 US 85; 128 S Ct 558; 169 L Ed 2d 481 (2007), the guideline range was 228-290 months. Based on disagreeing with the 100-1 powder-to-crack ratio, the judge gave only 180 months. The Fourth Circuit remanded for resentencing saying that going outside the guidelines was unreasonable based solely on disagreeing with the guidelines. In reversing the Fourth Circuit, the Supreme Court pointed out that the federal guidelines were by then advisory only. 552 US 101. The guidelines are merely the starting point and the initial benchmark. 552 US 108. As it is, the judge is in a superior position and has a greater familiarity with the case than does either the

sentencing commission or the appellate courts. 552 US 109.[2] Although the sentence was 4 ½ years below the guidelines, the sentence was not unreasonable as the judge had honed in on the defendant's particular circumstances. 552 US 111.

In *Gall v United States*, 552 US 538; 128 S Ct 586; 169 L Ed 2d 445 (2007), the judge gave 36 months probation despite a 30-37-month range. The Eighth Circuit reversed finding a 100% downward departure unreasonable as not supported by extraordinary circumstances. The Supreme Court, on the other hand, reversed the Eighth Circuit and reiterated that the guidelines are now advisory. Review is limited to only what is "reasonable." 552 US 46. Extraordinary circumstances are not required. 552 US 47. Thus, "the approaches we reject come too close to creating a presumption of unreasonableness for sentences outside the guidelines range." *Id*. No heightened review standard exists for sentences outside the guidelines. 552 US 49. The standard is abuse of discretion either way.

As it is, a recent Sixth Circuit case, *United States v Rayyon*, 885 F3d 436 (CA 6, 2018), shows how a sentence with an upward deviation is to be reviewed. In *Rayyon*, the defendant pled to some gun charges and received a 15-21-month range. Eastern District Judge George Caram Steeh III ended up giving 60 months. Rather than in any way looking at the guidelines to see if the guidelines had already considered the factors that the judge cited in deviating (or varying) upwards, the opinion pointed out that review is "highly deferential" and that "this is a matter of reasoned discretion, not math." 885 F3d 442. After noting that the deviation upwards is significant, the opinion points out:

[2] This analysis tracks far better the Court of Appeals' dissent's position in the present case than the majority's.

> The point of the *Booker* line of cases is that district courts should not—in truth, may not—lash themselves to the guidelines range; they must independently apply the [appropriate] factors to each defendant to determine an appropriate sentence.

The opinion then goes on:

> It sometimes will happen that this independent inquiry will lead to a sentence below the guidelines, sometimes above them, and sometimes within them. But it remains a constitutionally mandated independent inquiry all the same, and we should be loath to override that required exercise of judgment lightly.

Yet, the Court of Appeals' majority's approach ignores these principles. By tying proportionality to whether the guidelines have already considered a factor, in effect, it said that a sentencing court is *not* to independently evaluate the facts (the factors). For all intents and purposes, it has "lashed" proportionality analysis to the guidelines. It requires something extraordinary to deviate. It ignored that the judge who heard the testimony is in a better position to evaluate an appropriate sentence than is the appellate court. In fact, distinguishing its approach from the unconstitutional substantial-and-compelling approach is difficult.

The majority's approach also makes proportionality review more subjective than intended. Even though proportionality compares the sentence with the crime and criminal record, this test requires a resentencing if the stated reasons are not good enough.

In any event, in tying proportionality review so much to the guidelines, the majority missed that the legal landscape has materially changed since *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Back then, no one could have imagined that mandatory guidelines would one day be ruled to be unconstitutional.

In declaring the mandatory guidelines unconstitutional, this Court made them discretionary. If they are truly discretionary, then proportionality analysis should not consider

whether the guidelines have already considered the reasons that the judge gave for deviating. Instead, it should do what this Court said in *Steanhouse* that it would do, just compare the sentence with the appropriate sentencing factors (like the facts underlying the crime that was committed and the criminal record). Although reducing sentence disparities is important, making sure that the sentencing scheme is constitutional is also important.

Hence, the dissent properly analyzed this matter concluding that the sentence is not disproportionately high:

> On the basis of the record, I conclude that the trial court's sentencing decision reflects a reasoned process and a reasoned decision. The record makes clear that the court listened to the arguments of defense counsel and the prosecution. It listened to defendant, as well to a family member and a friend of the victim. It evaluated the evidence having spent several weeks listening to the testimony. It specifically took into account the now-advisory sentencing guidelines and found that they did not adequately capture the circumstances before it. It noted what it saw as a heightened level of depravity underlying this particular murder, its "cold calculated nature," the fact that defendant stabbed the victim in the heart not only once but twice, the fact that she had stabbed the victim in the past and that she had told a third party that she could stab the victim in the chest and then claim self-defense (precisely as she later did in this case), the fact that she disposed of the murder weapon after the killing, and the fact that her relatively young age necessitated a lengthy sentence to adequately secure the protection of the public. (P 5); 321 Mich App 485; (465a).

Therefore, in answering this Court's first question, the guidelines are to be both calculated and consulted. They, however, do not control proportionality. As the guidelines are discretionary, the proper approach does not consider whether the stated reasons for deviating are already considered by the guidelines but whether the sentence is proportionate to the crime's facts and the criminal record (with a "highly deferential review").

Second, the Court of Appeals' majority ignored the rule from such cases as *People v Ewing (After Remand)*, 435 Mich 443, 446, 462; 458 NW2d 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 den 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. In the present case, the sentencing court did just that. In concluding that defendant had "brutally murdered [the victim] in cold blood," (Sentence Transcript [STr], p 19; (430a)), it noted that (1) defendant had twice stabbed the victim in the heart (STr, p 18; (429a)), (2) about 1 ½ years earlier she had slashed him requiring reconstructive surgery (STr, p 18; (429a)), (3) she had months earlier told someone that she would someday stab the victim and claim self-defense (STr, p 18; (429a)), and (4) the knife disappeared after the stabbing (STr, pp 18-19; (429a-430a)).

Simply put, if the sentencing court is allowed to consider what crime the defendant actually committed, proportionality analysis should consider the crime committed and not the crime that the jury found beyond a reasonable doubt.[3] In assessing proportionality, the judge gets to consider the entire picture.

In *Ewing (After Remand)*, *supra*, the defendant was convicted of first-degree murder for raping a woman in Jackson County. An evidentiary hearing on a MRE 404b motion and the presentence report pointed out that the defendant had similarly attacked (if not actually raped) a number of other women. At sentencing, the defendant did not contest the report's factual allegations. At sentencing, in imposing life (which the defendant is still serving), the sentencing

[3] As it is, this rule has existed for plea bargains for over 25 years. *People v Brzezinski (After Remand)*, 196 Mich App 253; 492 NW2d 781, 783 (1992), lv den 442 Mich 898; 502 NW2d 42 (1993). Specifically, *People v Coulter*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994), lv den 448 Mich 864; 528 NW2d 736 (1995), found the sentence to be proportionate after considering the conduct from the dismissed courts.

court stated that the defendant had similarly attacked a number of women. As it turned out, he was subsequently acquitted of raping the woman who had testified against him at trial (under 404b). In citing *People v Grimmett*, 388 Mich 590, 608; 202 NW2d 278 (1972), which had ordered a resentencing under similar circumstances where the judge had made an independent finding of guilt on a subsequently acquitted charge, the Court of Appeals ordered a resentencing. This Court, however, reversed. It first pointed out that *Grimmett* has led to inconsistent results in the Court of Appeals. 453 Mich 471-472. Although it did not overrule *Grimmett*, *Ewing (After Remand)*, clarified it: "The rule of *Grimmett*, properly understood, stands for the general proposition that a sentence must be based on accurate information." In the end, *Ewing (After Remand)* said:

> Uncharged criminal activity, and activity for which charges are still pending, may be considered by the court, as may criminal activity of which the defendant has been acquitted, whether prior to or subsequent to sentencing, so long as it satisfies the preponderance of the evidence test. (Footnotes omitted.) 435 Mich 473.

About six and a half years later, the United States Supreme Court said the same thing in *Watts*, *supra*. In the both cases in *Watts*, the defendants were convicted on one count but acquitted on the other. In sentencing each defendant, the judges considered the facts behind the acquitted count. The Ninth Circuit then reversed both saying that a judge may never consider the facts behind an acquitted count. The Supreme Court, however, peremptorily reversed the Ninth Circuit in both cases: "In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted." 519 US 154. It later reiterated the point: "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a

preponderance of the evidence." 519 US 156. It concluded that acquitted conduct is "[h]ighly relevant, if not essential . . . information." 519 US 151-152.

More recently, *White*, *supra*, rejected the claim that the *Apprendi-Booker* line of cases had overruled *Watts*. The en banc decision specifically held that acquitted conduct may be used to score the guidelines.

Later, *United States v Waltower*, 643 F3d 572, 577 (CA 7, 2011), cert den 565 US 1019; 132 S Ct 562; 181 L Ed 2d 405 (2011) (signed by Judge Posner), agreed: "Because the Supreme Court has rejected due process and double jeopardy challenges to the use of acquitted conduct at sentencing, its use on an advisory basis cannot by itself furnish Sixth Amendment ammunition for excluding acquitted conduct at sentencing." Likewise, *United States v Smith*, 741 F3d 1211, 1226-1227 (CA 11, 2013), cert den US ; 135 S Ct 704; 190 L Ed 2d 439 (2014), also agreed. In fact, *United States v Jones*, 408 US App DC 425; 744 F3d 1362, 1369 (2014), cert den US ; 135 S Ct 8; 190 L Ed 2d 279 (2014), points out that every circuit has come to the same conclusion. In addition, just a few months ago, *Rayyan*, *supra*, 885 F3d 441, confirmed this point: "the Supreme Court has confirmed that sentencing courts may look to uncharged criminal conduct, indeed even acquitted conduct, to enhance a sentence within the statutorily authorized range."

Therefore, this Court's second question can also be answered. To the extent that it did, the sentencing court did not abuse its discretion in considering acquitted conduct in departing upward. In fact, this Court itself answered that question in a case with very similar facts, *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). There, the defendant was charged with open murder and convicted of only manslaughter. The judge then sentenced him to 10-15 years

(the maximum) characterizing the killing as "cold-blooded" and stating that he would "kill again" (far more consistent with murder than with manslaughter). The Court of Appeals then reversed saying that the judge could not independently find guilt based on acquitted conduct. This Court, however, peremptorily reversed adopting the Court of Appeals dissent. It found that a 10-year minimum for repeatedly shooting an unarmed victim in the back (a conclusion far more consistent with murder than with manslaughter) is proportionate.

The dissent in the present case also answered the question:

> Moreover, while the trial court was constrained by the language of MCL 777.36(2)(a) from scoring OV 6 (offender's intent to kill or injure another individual) at 50 points rather than 25 points, it was not constrained from finding that the guidelines minimum sentence range did not take into account defendant's premeditated intent to kill. The trial court referred to the fact that defendant had talked about stabbing the victim and claiming self-defense, that she had stabbed the victim in the past, and that she disposed of the murder weapon after committing the offense. These facts support the inference that defendant's intent was given inadequate weight. (P 5); 321 Mich App 486; (465a). (Footnote omitted.)

As the guidelines are now discretionary, MCL 777.36(2)(a) does not control the sentencing court's decision to vary from the guidelines—to conclude that the guidelines do not adequately consider the crime. "Discretionary" must mean something.

One more point though. The "independent finding" language needs to be addressed further. This language, from *Grimmett*, 388 Mich 608, did not logically survive this Court's opinion in *Ewing (After Remand)*, 435 Mich 475:

> To be sure, trial judges must refrain from prejudgment. However, the reading of *Grimmett* urged by the defendant and the Court of Appeals would prevent the sentencing judge from inferring defendant's guilt as to offenses concerning which the trial court had heard testimony that actually was credited and that in fact was material to the sentencing decision. . . . *The alternative rule would require trial judges to deny the evidence of their senses and the reality of their conclusions*. (Emphasis added.)

A prohibition against independently finding guilt on the one hand and allowing inferring guilt from the evidence (based on "the evidence of their senses and the reality of their conclusions") on the other hand cannot be logically reconciled. Because the difference between making an "independent finding of guilt" and using the underlying facts to "infer guilt" is at least murky (if not actually non-existent), plaintiff asks this Court to overrule *Grimmett* on this point (thus allowing Michigan's jurisprudence to be consistent with the federal courts).

In the end, the requirement that a larger deviation requires more of a reason than does a smaller deviation was met in the present case. As the law allowed, the sentencing court factually found (by a preponderance) that defendant had brutally murdered the victim in cold blood (a conclusion that both *Ewing (After Remand)* and *Shavers* allowed it to make). Under any standard, these facts justify the upward deviation. They justify the 35-70-year sentence. The sentence is proportionate.

RELIEF

ACCORDINGLY, plaintiff asks this Court to reverse and either reinstate the sentence or remand to the Court of Appeals to evaluate the issue under the proper standard.

Dated: June 25, 2018

Respectfully submitted,

/S/ Jerrold Schrotenboer
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PROOF OF SERVICE

The undersigned certifies that this document was served upon:

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By truefiling. I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: June 25, 2018

/s/ Brooke Slusher
BROOKE SLUSHER
LEGAL SECRETARY