STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v.

DAWN MARIE DIXON-BEY **No. 156746**
Defendant-Appellee.

L.C. No. 15-004596-FC
COA No. 331499

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

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Statement of the Question

I.

The rule of decision for a sentencing court is proportionality, and the rule of decision for an appellate court reviewing a sentencing decision is whether that decision was an abuse of discretion, under a standard of reasonableness informed by the principle of proportionality. In applying this standard, must the appellate court respect the weight given the guidelines by the sentencing court itself, as those guidelines, as to both the weight given to any variable and the determination of a sentence range for the minimum term, do not bind the sentencing court?

Amicus answers: YES

Statement of Facts and Proceedings

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

Argument

I.

The rule of decision for a sentencing court is proportionality, and the rule of decision for an appellate court reviewing a sentencing decision is whether that decision was an abuse of discretion, under a standard of reasonableness informed by the principle of proportionality. In applying this standard, the appellate court must respect the weight given the guidelines by the sentencing court itself, as those guidelines, as to both the weight given to any variable and the determination of a sentence range for the minimum term, do not bind the sentencing court.

Introduction

A. The Court's questions and the answers of amicus

This Court in its order directing supplemental briefing and oral argument on the application specified that to be addressed are

- 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 (2017); and

- 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

  - sentenced the defendant according to an independent finding that she committed first-degree murder, or

  - departed upward from the sentencing guidelines for second-degree murder based on facts established by 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 (1990); *People v. Milbourn*, 435 Mich. 639, 654 (1990).

Amicus answers that:

- The weight to be given to the guidelines by an appellate court in determining whether an out-of-guidelines sentence is within the range of principled outcomes turns on the weight given the guidelines by the sentencing judge, and the weight given any other factors by the judge.[1]

- Conduct for which a defendant was acquitted may be considered as an aggravating fact in setting the sentence within the statutory range for the offense of conviction if found by the sentencing court by a preponderance of the evidence; what is prohibited is consideration of acquitted or uncharged conduct based on a sentencing judge's *assumption* of the defendant's guilt of that conduct.

B. Some issues of terminology: "departure sentences," and "enhanced sentences

1. A sentence that is not within the legislative guidelines is best described as an "out-of-guidelines sentence" rather than a "departure sentence"

This Court has amended the legislative sentencing scheme so that the guidelines are now advisory rather than mandatory. Though they must be scored, and "taken into account [by the sentencing judge] when imposing a sentence,"[2] they do not form a presumptive sentence range from which the sentencing court must justify departure, or else the guidelines are not truly advisory. *Lockridge* and *Steanhouse* instead would have simply have changed the standard of

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[1] Amicus continues to believe that *People v. Lockridge*, infra, was wrongly decided, and that disparity in sentencing would be diminished and stability in sentencing review enhanced by its reconsideration, particularly given that the Court of Appeals continues to review out-of-guidelines sentences by reference to deviation from the guidelines, with a presumption that an out-of-guidelines sentence is unreasonable, see infra, and even this Court's references not to whether the sentence is within the range of principled outcomes—that is, reasonable given the offense and offender—but to whether the trial court "abused its discretion by departing from the guidelines," do not reveal a total fealty to *Lockridge* and *People v. Steanhouse*, infra. See the companion case to this case, *People v. Beck*, __Mich.__, 910 N.W.2d 298, 299 (2018) (order directing MOA) (parties to brief "whether the trial court *abused its discretion by departing from the guidelines range*, where the jury acquitted the defendant of murder, but the court departed based on its finding by a preponderance of the evidence that the defendant had perpetrated the killing").

[2] *People v. Lockridge*, 498 Mich. 358, 392 (2015).

review for an out-of-guidelines sentence from review of the substantial and compelling reasons for the departure given by the sentencing court to review of the reasons given by the trial judge for the departure under a standard of reasonableness informed by the principle of proportionality. But this Court has explicitly disclaimed any presumption that an out-of-guidelines sentence is unreasonable, and rightly so. That the fact that the guidelines are advisory means that there *is no* presumption against an out-of-guidelines sentence was made clear by this Court in meeting concerns expressed by the *Masroor*[3] panel in the Court of Appeals, a companion to *Steanhouse* in this Court, that a "proportionality test cannot be reconciled with *Gall v. United States*."[4] In *Gall*, the United States Supreme Court rejected any requirement that deviations from the guidelines range be justified in proportion to the extent of the deviation, or that the sentencing court must justify a sentence outside the guidelines by articulating "extraordinary" circumstances, as these approaches would "'come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.'"[5] This Court found no such problem in the principle of proportionality that informs the appellate court's review of the trial judge's exercise of sentencing discretion to sentence outside the guidelines in Michigan, because the "Michigan principle of proportionality . . . *does not create such an impermissible presumption*."[6] And it does not precisely because "[r]ather than *impermissibly measuring proportionality by reference to deviations from the guidelines*, our principle of proportionality

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[3] *People v. Masroor*, 313 Mich. App. 358 (2015).

[4] *People v. Steanhouse*, 500 Mich. 453, 473 (2017).

[5] Id.

[6] Id. (emphasis supplied).

requires 'sentences imposed by the trial court to be proportionate *to the seriousness of the circumstances surrounding the offense and the offender*.'"[7] The concern of the *Masroor* panel that "dicta in our proportionality cases could be read to have 'urg[ed] that the guidelines should almost always control,' thus creating a problem similar to that identified in *Gall,*"[8] was thus obviated. Dicta so suggesting was consequently disavowed, including the notion that an out-of-guidelines sentences "should 'alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme'" as "inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness for out-of-guidelines sentences."[9] The bottom line for this Court was that, as it had said in *Lockridge*, "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,'" but the "'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*.'"[10]

Because, then, the reasonableness of a sentence that is not within the guidelines is not measured "by reference to deviations from the guidelines," to call a sentence that is not within the guidelines a "departure sentence," though understandable, is misleading, as, the guidelines

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[7] Id. (emphasis supplied).

[8] Id.

[9] Id.

[10] Id. (emphasis supplied). The Court of Appeals has fallen into the error of treating an out-of-guidelines sentence as presumptively unreasonable, as amicus will discuss.

being but a highly relevant consideration in sentencing, a sentence that is not within them is not a departure from a presumptive range. The reason to distinguish a sentence that falls within the guidelines range from one that falls without it is because the former is not subject to review for its length for reasonableness, the legislature having set those sentences beyond appellate review for other than consideration of inappropriate material,[11] and this Court in *Lockridge* having specifically limited reasonableness review to sentences not within the guidelines.[12] To avoid the implication that a sentencing judge who takes into account the guidelines as a factor in sentencing, and then imposes a sentence that is not within the guidelines range, has thereby departed from a presumptively mandatory range, and that an appellate court reviews for appropriate justifications for the departure rather than the reasonableness of the sentence under an abuse of discretion standard[13] informed by the principle of proportionality, amicus believes

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[11] MCL § 769.34(10). See amicus brief of the Prosecuting Attorneys Association of Michigan in *People v. Ames*, __Mich.__, 908 N.W.2d 303, 304 (2018), order granting MOA, arguing that unless a sentence within the guidelines somehow constitutes cruel and unusual punishment under the Constitution, the legislature is free to preclude appellate review of a guidelines sentence.

[12] "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v. Lockridge*, 498 Mich. at 392.

[13] See e.g. *People v. Smith*, 482 Mich. 292, 316, 317 (2008) under the mandatory-guidelines scheme ("When a trial court renders a departure sentence, Michigan appellate courts must review whether the court abused its discretion in concluding that *extraordinary circumstances justified it*"; and "the judge abused his discretion because he imposed a departure sentence without adequately justifying the extent of the departure") (emphasis added). But justifying the extent of the departure is no longer the test, though *Smith* and this language continue to be cited by the Court of Appeals as it disregards *Steanhouse* and "impermissibly measur[es] proportionality by reference to deviations from the guidelines." See e.g. *People v. Steanhouse (On Remand)*, 322 Mich. App. 233 (2017) ("the trial court's articulation of the reasons for imposing a departure sentence must explain how *the extent of the departure is proportionate* to the seriousness of the circumstances surrounding the offense and the offender. See *People v. Smith*.") (emphasis added).

that these sentences should be denominated "out-of-guidelines sentences," whether above or below the guidelines, rather than "departure sentences," and will use that description here. And after all, this Court used that term in *Steanhouse*.[14]

2. A judge making findings of fact in determining what minimum sentence to impose within a statutory range is not "enhancing" the sentence, but *determining* it, and may consider matters of mitigation and aggravation as to the offense and the offender

There is no question that in determining the appropriate sentence *within* a legislatively-authorized range a trial court may find facts in aggravation, and that these are not elements that must be submitted to a jury for a finding beyond a reasonable doubt. *Alleyne* itself, on which this Court's decision in *Lockridge* is founded, makes the point pellucidly clear:

> [W]e take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, e.g., *Dillon v. United States*, 560 U.S. ——, ——, 130 S.Ct. 2683, 2692, 177 L.Ed.2d 271 (2010) ("[W]ithin established limits[,] . . . the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi*, 530 U.S., at 481, 120 S.Ct. 2348 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute"). This position has firm historical roots as well. As Bishop explained:
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> > "[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his

[14] "We agree that such dicta [that dicta from *Milbourn* being disavowed by the Court] are inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness *for out-of-guidelines sentences*. . . and so we disavow those dicta." *People v. Steanhouse*, 500 Mich. at 474 (emphasis supplied).

> discretion to be *influenced by matter shown in aggravation or mitigation*, not covered by the allegations of the indictment."[15]

"Enhancement" of a sentence is a legal term of art for when the statutorily authorized sentence it itself increased, and this may only be accomplished by the fact of a prior conviction,[16] or by a fact concerning the offense found by a jury, or judge at a bench trial, beyond a reasonable doubt, which is the teaching of the cases from the United States Supreme Court.[17]

Because the guidelines are not mandatory, judicial fact-finding in consideration of a sentence "proportionate to the seriousness of the circumstances surrounding the offense and the offender" does not "enhance" the sentence; rather, these facts are aggravating facts when the sentencing court makes the sentencing decision, and amicus will employ that term.

Discussion

A. A necessary consequence of rendering mandatory guidelines advisory is that they become but a factor to be consulted by the sentencing judge in determining an appropriate sentence, so that a sentence outside the range cannot be presumptively unreasonable. A sentencing judge is thus free to conclude that the applicable guidelines range itself is inadequate, or that the guidelines give too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy

> *The Supreme Court's decision in Booker implicitly rejected the position that no additional weight could be given to factors included in calculating the applicable advisory Guidelines range, since to do otherwise would essentially render the*

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[15] *Alleyne v. United States*, 570 U.S. 99, 116–117, 133 S. Ct. 2151, 2163, 186 L. Ed. 2d 314 (2013) (emphasis supplied).

[16] *Almendarez–Torres v. United States*, 523 U.S. 224, 246–247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). See e.g. *People v. Wilson*, 500 Mich. 521 (2017).

[17] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Booker v. United States*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Alleyne.*

> *Guidelines mandatory. . . . This necessarily means that the sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy.*[18]
>
> *Permitting a court to use forbidden facts to depart from the guidelines undermines clearly expressed legislative will.*[19]

The above statements cannot both be true. The first is a necessary consequence of guidelines that are advisory rather than mandatory; the second disallows a trial court from disagreeing with the weight given by the guidelines to a particular fact or factor, and is the approach regularly taken by the Court of Appeals. Indeed, it becomes increasingly difficult to distinguish the approach taken by the Court of Appeals to review of out-of-guidelines sentences from the statutory "substantial-and-compelling reasons" regime struck down by this Court in *Lockridge*, except that the Court of Appeals review, rather than being "highly deferential"—a necessary standard else the guidelines again become mandatory—is if anything *more* restrictive of trial court discretion than was the statutory scheme. This approach is inconsistent with our "*Booker*-ized" system of review as explicated by this Court in *Lockridge* and *Steanhouse*, and as compelled by the cases of the United States Supreme Court. Those cases reveal the error of the Court of Appeals.

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[18] *United States v. Williams*, 517 F.3d 801, 809 (CA 5, 2008).

[19] *People v. Schwander*, (No. 320768, 5-22-2018), slip opinion, at 9.

1. *Booker*, *Rita*,[20] *Gall*,[21] *Kimbrough*,[22] *Lockridge*, and *Steanhouse*: reasonableness review is review for an abuse of discretion informed by the principle of proportionality, not review of the proportionality of a "departure" from the guidelines, else the guidelines remain mandatory

a. *Booker*

After finding the federal guidelines violative of the Sixth Amendment because mandatory, the Court made them advisory, but maintained a standard of review. The Court severed 18 U.S.C. § 3553(b)(1), providing that the guidelines were mandatory, and also severed 18 U.S.C. § 3742(e), which provided standards of review on appeal, including *de novo* review of departures from the applicable guidelines range. But the Court found a reasonableness standard of review for all sentences remained implicit in the federal statutory scheme.[23] Because the guidelines were found to be advisory, the federal courts have understood that *Booker* "implicitly rejected the position that no additional weight could be given to factors included in calculating the applicable advisory Guidelines range, since to do otherwise would essentially render the Guidelines mandatory."[24]

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[20] *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007).

[21] *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007).

[22] *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558, 169 L. Ed.2d 481 (2007).

[23] "[A] statute that does not explicitly set forth a standard of review may nonetheless do so implicitly. . . . We infer appropriate review standards from related statutory language, the structure of the statute, and the 'sound administration of justice.'. . . And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness].'" *Booker*, at 125 S.Ct. 765.

[24] *United States v. Williams*, 517 F.3d at 809; *United States v. Christensen*, 732 F.3d 1094, 1100 (CA 9, 2013).

b. *Rita*

After *Booker*, several circuits held that an appellate court may presume that a sentence *within* the guidelines range is reasonable. Rita argued at sentencing for a sentence below the guidelines range, and the trial judge said that he could not find that the range was inappropriate, and sentenced near the bottom of the range. The Fourth Circuit on review said that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable,"[25] noting that while in an individual case a sentence outside the guidelines range might be appropriate, it had "'no reason to doubt that most sentences will continue to fall within the applicable guideline range,'" rejecting Rita's arguments that the sentence was unreasonable.[26]

The Supreme Court held use of this rebuttable presumption permissible, emphasizing that it is an appellate presumption, not a trial one—"Given our explanation in *Booker* that appellate 'reasonableness' review merely asks *whether the trial court abused its discretion*, the presumption applies only on appellate review." And the Court was clear that "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness."[27]

c. *Gall*

In *Gall* the Court considered reasonableness review applied not to a sentence within the guidelines, as in *Rita*, but an out-of-guidelines sentence. The Government appealed a sentence

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[25] In Michigan, by statute there is no issue concerning the reasonableness of a guidelines sentence—it is not "presumed" to be reasonable, but is simply unreviewable as to its length as a matter of legislative determination. MCL 769.34(10). See fn 11.

[26] *Rita v. United States*, 127 S. Ct. at 2462.

[27] Id., 127 S. Ct. 2467.

substantially below the bottom of the range, and the Eighth Circuit applied proportionality review to the variance; that is, in that circuit's view, a "sentence outside of the Guidelines range must be supported by a justification that 'is proportional to the extent of the difference between the advisory range and the sentence imposed."[28] Because the sentence imposed was a 100% downward variance, the court held that such a dramatic variance "must be—and here was not—supported by *extraordinary circumstances*."[29]

The Supreme Court rejected proportionality review of departures from the guidelines range, saying "we shall explain why the Court of Appeals' rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker*."[30]

> In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.[31]

The Court held that the approach of the Eighth Circuit came "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[32]

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[28] *Gall v. United States*, 128 S. Ct. at 594.

[29] Id. (emphasis added).

[30] Id.

[31] Id.

[32] Id., 128 S. Ct. at 595.

The Court also disapproved of "*quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines*";[33] further, these approaches, said the Court,"reflect a practice—common among courts that have adopted 'proportional review'—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review" of sentencing decisions.[34] The Court, then, quite clearly rejected a "heightened standard of review" for out-of-guidelines sentences. Review of an out-of-guidelines sentence must be highly deferential, else the guidelines remain mandatory.[35]

d. *Kimbrough*

Here, the question was whether a sentence can be reasonable if the sentencing judge rejects a guidelines policy. Put another way, given that the guidelines are advisory, and thus do not bind the judge, may a judge reject the weight of a guidelines factor in an exercise of the judge's sentencing discretion by disagreeing with the statutory scheme? Under federal statute, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine, and the Fourth Circuit held that a departure from the guidelines was

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[33] *Gall v. United States*, 128 S. Ct. at 595 (emphasis supplied).

[34] Id., at 596.

[35] "Assuming that the district court's sentencing decision is procedurally sound, the appellate court *should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.* When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. . . . if the sentence is outside the Guidelines range, *the court may not apply a presumption of unreasonableness*. . . . The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." Id., at 597 (emphasis supplied).

unreasonable when based on a disagreement with scoring in this fashion. The Supreme Court disagreed. The Court upheld the departure as reasonable, noting that even the Government agreed that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines."[36] Federal circuit courts have thus held since *Kimbrough* that to prohibit sentencing judges from weighing factors that are included within the guidelines differently than does the statutory scheme—though the guidelines themselves must be calculated in the manner set for in the statute—"would essentially render the Guidelines mandatory."[37] Thus, "the sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy. . . . the sentencing 'judge may determine . . . that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing.' . . . Obviously, the sentencing court may also conclude in a particular case that a sentence within the Guidelines range is not lengthy enough to serve the objectives of sentencing."[38]

e. *Lockridge* and *Steanhouse*

In *Lockridge*, this Court rendered the guidelines advisory, saying that it was adopting the same remedy that the United States Supreme Court had decided on with regard to the federal

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[36] *Kimbrough v. United States*, 128 S. Ct. at 570.

[37] *Williams*, supra, at 809-810, the court also noting that "The Supreme Court reminded us that 'the Guidelines are only one of the factors to consider when imposing sentence.'"

[38] Id.

guidelines.[39] The Court said that the guidelines must still be scored, and "remain a highly relevant consideration in a trial court's exercise of sentencing discretion" which the sentencing court "must consult . . . and take . . . into account when sentencing," citing *Booker*. An out-of-guidelines sentence "will be reviewed by an appellate court for reasonableness," said the Court, again citing *Booker*, with resentencing required if the sentence is determined to be unreasonable.[40]

Steanhouse further explicated the meaning of review of an out-of-guidelines sentence. The Court said that the question before it was not actually one of the standard for appellate review, as the there is no question, said the Court, that "the standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion."[41] Rather, the question was the sentencing standard to be applied *by the sentencing judge*, who is no longer bound by the guidelines, but must consult and consider them. The Court said that "[t]he sticking point is *the rule of decision to be applied by the trial courts*: the principle of proportionality adopted by our opinion in *Milbourn*, or the federal statutory factors listed in 18 USC 3553(a). In other words, is the relevant question for appellate courts reviewing a sentence for reasonableness (1) whether the trial court abused its discretion by violating the principle of proportionality or (2) whether the trial court abused its discretion in applying the factors set forth

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[39] "We agree that this is the most appropriate remedy. First, it is the same remedy adopted by the United States Supreme Court in *Booker*." *People v. Lockridge*, 498 Mich. at 391.

[40] Id., at 391-392.

[41] *People v. Steanhouse*, 500 Mich. at 471.

in 18 USC 3553(a)?[42] The Court opted for the former; the rule of decision guiding the sentencing judge is proportionality, and then appellate courts must review of out-of-guidelines sentences "for an abuse of discretion, i.e., engage[] in reasonableness review for an abuse of discretion informed by the 'principle of proportionality' standard."[43]

This Court in *Lockridge* and *Steanhouse* thus established that review of a sentence above or below the guidelines is for reasonableness, and that it is *the sentence itself* that is reviewed for reasonableness informed by the principle of proportionality, not whether the trial judge has justified departing from the guidelines, as this re-establishes the guidelines as mandatory. This Court said in *Lockridge* that "*A sentence* that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. . . . Resentencing will be required when *a sentence* is determined to be unreasonable."[44] There is no such thing as an "improper departure" from the guidelines range—the guidelines are only advisory—there are instead sentences that are above or below the guidelines that are an abuse of discretion when reviewed for reasonableness informed by the principle of proportionality.

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[42] Id. (emphasis supplied).

[43] Id., at 476

[44] *People v. Lockridge*, at 392 (emphasis added).

2. The Court of Appeals here treated the out-of-guidelines sentence as presumptively unreasonable, and considered the guidelines as far more than a factor to be consulted by the sentencing judge

This decision here, and other published cases like it, such as *People v. Steanhouse (On Remand)*,[45] as well as many unpublished cases, established and applied a presumption that an out-of-guidelines sentence is disproportionate. This standard is inconsistent with this Court's decision in *Steanhouse*, though certain language in this Court's opinion may have contributed to these results.[46] This Court must make clear that review is for the reasonableness of the sentence imposed, not whether the reasons stated by the trial court overcome a presumption in favor of a guidelines sentence.

That the Court of Appeals did not review for an abuse of discretion, under a standard of reasonableness informed by the principle of proportionality, as this Court directed in *Steanhouse*, where, as noted earlier, this Court said that in determining the reasonableness of the sentence "[r]ather 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*,'" is plain from the opinion of the Court of Appeals. That court said:

- [T]he trial court in imposing an out-of-guidelines sentence was required to give "an explanation of why the sentence imposed is *more proportionate*

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[45] *People v. Steanhouse (On Remand)*, 322 Mich. App. 323 (2017), application held in abeyance, *People v. Steanhouse*, No. 156900, 2018 WL 2089661 (2018).

[46] "If the Court of Appeals determines that either trial court has abused its discretion in applying the principle of proportionality *by failing to provide adequate reasons for the extent of the departure* sentence imposed, it must remand to the trial court for resentencing." *People v. Steanhouse*, at 476 (emphasis supplied).

to the offense and the offender than a different sentence would have been'" [the court citing the pre-*Lockridge Smith* case].[47]

- In this case, the trial court did not adequately explain why a minimum sentence of 35 years *was more proportionate than a different sentence within the guidelines would have been*.[48]

- Generally, OV 6 (offender's intent to kill or injure another individual), MCL 777.36, can be scored to reflect an offender's intent and does not warrant an upward departure. However, under MCL 777.36(2)(a), a sentencing court must score OV 6 "consistent[ly] with a jury verdict unless the judge has information that was not presented to the jury." As a result, a sentencing court may be constrained under the guidelines from scoring OV 6 as highly as it otherwise would have.[49]

- [B]ecause defendant was convicted 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 had any information that was not presented to the jury, yet it nonetheless concluded that defendant acted with premeditation. 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.[50]

- [W]hile we do not seek to minimize the victim's death, we cannot conclude on the record before us that the trial court's 15–year upward departure sentence *was more reasonable and proportionate than a sentence within the recommended guidelines range would have been*.[51]

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[47] *People v. Dixon-Bey*, 321 Mich. App. 490, 909 N.W.2d 458, 478 (2017) (emphasis supplied).

[48] Id. (emphasis supplied).

[49] Id., at 479.

[50] Id.

[51] Id., at 480 (emphasis added).

Though the court purported to follow *Steanhouse*,[52] it viewed the guidelines range as presumptive, a departure from which must be justified. It required a showing not that a sentence is reasonable informed by the principle of proportionality, with the trial judge's decision to be upheld if within the range of principled outcomes, but that an out-of-guidelines sentence be shown to be "more proportionate" and "more reasonable" than would be a guidelines sentence. This is nothing other than a presumption in favor of a guidelines sentence, and this is forbidden by this Court's decision in *Steanhouse.*[53] It is difficult to distinguish the review for reasonableness being undertaken by the Court of Appeals for out-of-guidelines sentences from the statutory requirement struck down by this Court in *Lockridge* that the departure from the guidelines be justified by a finding of substantial and compelling reasons, which this Court has said, before *Lockridge*, must be objective and verifiable, and keenly grab the attention.[54] Under *Steanhouse* the appellate court reviews for an abuse of discretion. The sentencing court applies the principle of proportionality as its rule of decision, but need not demonstrate to the reviewing court that the sentence it chose, if an out-of-guidelines sentence, is "more proportionate" and "more reasonable" than a guidelines sentence.

The Court of Appeals also treats the guidelines as mandatory by finding explanations by the sentencing court for the reasonableness of an out-of-guidelines sentence based on factors

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[52] "We of course agree that *Steanhouse* directs that proportionality in Michigan be based upon the seriousness of the offense and not a deviation from the guidelines, but we disagree that Steanhouse encourages appellate courts to determine proportionality in a void without consideration of the sentencing guidelines." Id., at 490.

[53] See also *People v. Steanhouse (On Remand)*, supra.

[54] See *People v. Babcock*, 469 Mich. 247, 257–258 (2003).

considered by the guidelines to be improper. While it is true that MCL 769.34(3)(b) says that "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight," this provision does not survive *Lockridge*. As observed previously, under the *Booker* regime the "sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy." And "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." But here, as well as in other cases,[55] the Court of Appeals refuses to find sentences reasonable when a part of the explanation for the sentence given by the trial judge includes a fact or factor that the guidelines preclude from scoring in establishing the guidelines range.

Here, the defendant was charged with 1st-degree murder on a theory of premeditation, and the jury found defendant guilty of 2nd-degree murder. The jury may have had a reasonable doubt as to premeditation, or dispensed mercy, or compromised; there is no way of knowing. The panel observed that MCL 777.36(1)(a) concerning intent requires that premeditation be scored "consistent with a jury verdict unless the judge has information that was not presented to the jury." Because the judge had no information not presented to the jury, then, OV 6 could not be scored at 50 points for a premeditated intent to kill. But the statute limits the scoring of the guidelines, which this Court held in *Lockridge* must be scored and consulted. That the OV

[55] See e.g. *People v. Schwander*, supra.

cannot be scored higher does not mean that the trial judge, apart from the scoring of the guidelines, may not consider premeditation if the trial judge finds by a preponderance that the killing was premeditated. This is not, as the Court of Appeals appears to think, inconsistent with the guidelines. The guidelines are scored as required by statute, but a consequence of *Lockridge* is that the neither the scoring of any OV nor the resulting range bind the sentencing judge, as they are but factors to be considered by the trial judge. The Court of Appeals here said it was "highly skeptical of a trial court's decision to sentence a defendant convicted of second-degree murder as though the murder were premeditated," and that "even if the trial court had scored this variable at 50 points, reflecting a premeditated intent . . . that change would have increased defendant's overall OV score from 70 points to 95 points, leaving her recommended minimum sentence range unchanged . . . . even if the trial court believed that this variable was given inadequate weight and should have been scored to reflect a premeditated intent, that determination would not have supported a conclusion that a departure sentence was more proportionate."[56] The trial court's discretion to determine a proportionate sentence is not limited, however, to adding weight to the guidelines scoring within the guidelines framework; again, the "sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy." Amicus leaves to the People the further demonstration that the Court of Appeals failed to review for an abuse of discretion, considering whether the trial judge's determination of a proportionate sentence was within the range of principled outcomes, or instead one no reasonable judge could impose for the reasons given by the sentencing judge, but rather applied a presumption in favor of a guidelines

[56] *People v. Dixon-Bey*, at 909 N.W.2d 479.

sentence, and found the sentencing judge's explication of the reasons for the sentence inadequate to overcome the presumption.[57] As the 10th Circuit has observed, "*Gall* and *Kimbrough* end [the] practice of permitting a variance only if the [sentencing] court 'first distinguish[es] [the defendant's] characteristics and history from those of the ordinary. . . offender' contemplated by the Guidelines.'"[58] The Court of Appeals erred in this case.

B. Where sentencing discretion is cabined not by a minimum range calculated through mandatory guidelines, with departure allowed only in exceptional circumstances that is strictly reviewed,[59] but by a highly deferential abuse-of-discretion standard so as to avoid the unconstitutionality of mandatory guidelines that include judicial fact-finding, it follows ineluctably that the advisory guidelines cannot play a controlling role in sentence review

1. Only the lightest of appellate review of out-of-guidelines sentences is consistent with an advisory guidelines scheme

> *One theme runs through all three cases [Rita, Gall, and Kimbrough]: Booker* ***empowered district courts, not appellate courts*** *and not the Sentencing Commission.*[60]
>
> *Proportionality analysis* ***grounded in the guidelines*** *protects against "unjustified sentence disparity."*[61]

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[57] Id., at 478 ff. The Court of Appeals disavowal of a presumption of disproportionality of an out-of-guidelines sentence is flatly inconsistent with its insistence that the sentence judge justify why an out-of-guidelines sentence is "more proportionate" than would be a guidelines sentence.

[58] *United States v. Smart*, 518 F.3d 800, 808 (CA 10, 2008).

[59] Review as to whether substantial and compelling reasons existed to justify the particular departure, reasons which were "objective and verifiable" and "keenly or irresistibly grab[bed] the court's attention." *People v. Smith*, 482 Mich. at 299.

[60] *United States v. Vonner*, 516 F.3d 382, 392 (CA 6, 2008) (emphasis supplied).

[61] *People v. Schwander*, 2018 WL 2339617, at 5 (emphasis supplied).

Again, both of the above statements cannot be true. "[A]fter *Booker* [*Lockridge*] what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* [*Lockridge*] decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory."[62] The rule of decision *for a sentencing judge* in setting the sentence is that the sentencing court, taking into consideration all relevant material, including properly-scored guidelines, is to set a proportionate sentence, one taking into account the seriousness of the offense and the characteristics of the offender.[63] There is no one proportionate sentence;[64] a reviewing court is to review an out-of-guidelines sentence "for an abuse of discretion, i.e., engage[] in reasonableness review for an abuse of discretion informed by the 'principle of proportionality' standard."[65] This Court has said that the Michigan standard of

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[62] *United States v. Pankow*, 884 F.3d 785, 793–794 (CA 7, 2018); *United States v. Johnson*, 427 F.3d 423, 426 (CA 7, 2005).

[63] "The sticking point is the rule of decision to be applied by the trial courts: the principle of proportionality adopted by our opinion in *Milbourn*, or the federal statutory factors." *Steanhouse*, 500 Mich. at 471.

[64] See *People v. Babcock*, at 267 ("At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome").

[65] *People v. Steanhouse*, at 476. The use by this Court of the phrase "informed by the principle of proportionality" in the abuse-of-discretion standard of review has proven problematic, as the Court of Appeals, though on occasion mouthing the phrase, generally simply views the principle of proportionality not as "the rule of decision to be applied by the trial courts," *People v. Steanhouse*, at 471, but the standard for appellate review. See, among a host of others, *People v. Rivera*, No. 336384, 2018 WL 791573, at 4 (2018) ("we review whether the court conformed to the principle of proportionality"); *People v. Jackson*, No. 333722, 2017 WL 6345819, at 2 (2017) (same). This Court has routinely remanded to the Court of Appeals not to review the trial court's sentencing decision for an abuse of discretion under a standard of reasonableness informed by the principle of proportionality, but "for plenary review of the defendant's claim that [the] sentence . . . was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990)." See e.g. *People v. Taylor*, 501 Mich. 906

review for abuse of discretion in sentencing is identical to the federal standard.[66] Both systems refer to a range of principled outcomes, which is further described by federal cases as meaning that the sentence imposed must be affirmed "unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the [sentencing] court provided."[67] An appellate court in Michigan, then, should review for an abuse of discretion, applying the standard of reasonableness informed by the principle of proportionality, to determine whether no reasonable sentencing court would have imposed the sentence given for the reasons stated by the sentencing judge, understanding that "it is clear that the Legislature has imposed on the trial court the responsibility of making difficult decisions concerning criminal sentencing, largely on the basis of what has taken place in its direct observation."[68] If the review standard is not truly deferential, then the guidelines are also not genuinely advisory.

Federal courts have stressed the requirement that appellate review of sentences be highly deferential and narrow to avoid de facto reinstatement of a mandatory guidelines scheme, departure from which must be justified in some fashion.[69] The "abuse of discretion standard

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(2017). This is a likely result of the difficulty in discerning the meaning of a standard of "reasonableness *informed* by the principle of proportionality."

[66] See id., at 471, referring to the "the identical standard of review for appellate courts" in the two systems.

[67] *United States v. Tomko*, 562 F.3d 558, 568 (CA 3, 2009) (en banc).

[68] *People v. Babcock*, at 268.

[69] See *United States v. Feemster*, 572 F.3d 455, 464 (CA 8, 2009) ("we agree with the D.C. Circuit that because the Guidelines are now advisory only, 'substantive appellate review in sentencing cases is *narrow and deferential*. As the case law in the courts of appeals since *Gall* demonstrates, it will be *the unusual case when we reverse a district court sentence*—whether within, above, or below the applicable Guidelines range—as substantively unreasonable'"

cabins [appellate] review of [a defendant's] sentence."[70] As already noted, in order to avoid reinstatement of mandatory guidelines, the "sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy." The federal courts, in avoidance of reinstating a prohibited mandatory guidelines scheme, have thus said that the appellate court must rule after "putting aside all notions of exceptional/extraordinary circumstances, departure percentages, *proportionality review*, and similar databased standards of review."[71] And one circuit puts it this way: "substantive reasonableness review is intended to 'provide a backstop' against sentences that are "'shockingly high, shockingly low, or otherwise unsupportable as a matter of law.' . . . . substantive reasonableness review is not an opportunity for 'tinkering' with sentences we disagree with, and . . . we place 'great trust' in sentencing courts."[72] Other circuits have observed that because "trial courts are granted very broad discretion when imposing sentences. . . . it is only the rare sentence that will be substantively unreasonable."[73]

(emphasis supplied). See also *United States v. Gardellini*, 545 F.3d 1089, 1090 (CA DC, 2008).

[70] *United States v. Washington*, 670 F.3d 1321, 1326 (CA DC, 2012).

[71] *United States v. Jenson*, 586 F.3d 620, 626 (CA 8, 2009) (emphasis supplied); *United States v. Burns,* 577 F.3d 887 (CA 8, 2009).

[72] *United States v. Dorvee*, 616 F.3d 174, 183 (CA 2, 2010); *United States v. Rigas*, 583 F.3d 108, 123 (CA 2, 2009).

[73] *United States v. McQueen*, 727 F.3d 1144, 1156 (CA 11, 2013); *United States v. Irey*, 612 F.3d 1160, 1190-1191 (CA11, 2010).

2. Because the guidelines are advisory, and, though a sentencing judge must score them in accordance with statutory requirements, the judge is free to give different weight to offense and offender characteristics than do the guidelines, to reject the range that results from the guidelines scoring, and to consider factors not scored by the guidelines, even those prohibited from guidelines scoring, the weight to be given to the guidelines by an appellate court in determining whether an out-of-guidelines sentence is within the range of principled outcomes turns on the weight given the guidelines by the sentencing judge, and the weight given any other factors by the judge

The guidelines are advisory. That means the weight given to various offense and offender characteristics by the guidelines are *suggestions* to the sentencing judge, as is any preclusion of consideration of a fact in the scoring of the guidelines; again, the guidelines are scored as required by statute, but because only advisory a judge may consider facts that are by statute not scored in the guidelines,[74] such as premeditation in the present case. The range determined by properly-scored guidelines is also a suggestion to the sentencing judge. There is no presumption that an out-of-guidelines sentence is unreasonable, and thus there can be no requirement that the trial judge show that the out-of-guidelines sentence given is "more proportionate" and "more reasonable" than a guidelines sentence; indeed, the judge need not articulate "exceptional circumstances" for the out-of-guidelines sentence. Whether the sentence imposed is an abuse of discretion turns on whether it is within the range of principled outcomes, so that it cannot be said that no reasonable judge would find the sentence proportionate to the seriousness of the offense and the circumstances of the offender for the reasons given by the sentencing judge.

With guidelines that are, both as to the weight to be given facts concerning the seriousness of the offense and the circumstances of the offender, and to the suggested range for the minimum term of the indeterminate sentence, suggestions for the sentencing judge, who may

[74] See section C., infra.

give a sentence outside the range without justifying it by laying out "exceptional circumstances," what weight is to be given the guidelines when an appellate court reviews an out-of-guidelines sentence to determine whether the sentencing judge's application of the principle of proportionality was within the range of principled outcomes? This is a rather vexing question. The United States Supreme Court, as well as this Court, have made it plain—despite the Court of Appeals application of a presumption in favor of a guidelines sentence—that there is no presumption that an out-of-guidelines sentence is unreasonable, and that a sentencing judge is not bound by the weight given by the guidelines to any "sentencing factor," or to the determination of a suggested range by calculation of the guidelines. Several federal courts have noted the "somewhat mixed messages" sent by *Gall*,[75] where the Court ruled out proportionality review of an out-of-guidelines sentence as compared to a guidelines sentence, ruled out a requirement of exceptional circumstances for an out-of-guidelines sentence, said that "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court," and yet also said that the "the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant" to the abuse-of-discretion inquiry,[76] and that "a major departure should be supported by a more significant justification than a minor one."[77] And yet it remains the case that "[d]espite the greater justification required, 'a sentence outside the Guidelines carries no presumption of

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[75] See e.g. *United States v. Levinson*, 543 F.3d 190, 197 n. 6 (CA 3, 2008); *United States v. Irey*, 612 F.3d 1160, 1187 (CA 11, 2010); *United States v. Feemster*, supra.

[76] *Gall,* 128 S. Ct. at 591.

[77] Id., at 597.

unreasonableness,'" and the "sentencing court's explanation need not be precise to the point of pedantry."[78]

In order to give great deference to the sentencing court's decisions, so as to avoid re-institution of the guidelines as mandatory through the backdoor, the reviewing court must look and defer to the weight given the suggestions of the various guidelines factors as to the seriousness of the offense and the circumstances of the offender and the sentencing range by the sentencing judge, since that judge was not bound in any sense by the guidelines.[79] After all, surely this Court did not say that in this state "[r]ather 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,'" only to simply go around the barn and back and end up measuring reasonableness by reference to deviations from the guidelines in describing the weight to be given them in appellate review for abuse of discretion, as the Court of Appeals is doing in requiring that an out-of-guidelines sentence be justified by the sentencing judge as "more proportionate" and "more reasonable" than a guidelines sentence.

The sentencing judge must "consult" the guidelines, but the weight to be given any variable, or the ultimate range, is within the discretion of the sentencing judge, to be affirmed unless no reasonable judge could have reached the same conclusion. Ordinarily, even in out-of-

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[78] *United States v. Pantojas-Cruz*, 800 F.3d 54, 61 (CA 1, 2015). See also *United States v. Turbides-Leonardo*, 468 F.3d 34, 40 (CA 1, 2006).

[79] "We do not apply the reasonableness standard to each individual decision made during the sentencing process; rather, we review the final sentence for reasonableness." *United States v. Campbell*, 491 F.3d 1306, 1313 (CA 11, 2007).

guidelines sentences the sentencing court accepts the suggestions of the guidelines as to most variables, if not all, but gives different weight—greater or lesser—to a variable or variables, or considers factors not scored in the guidelines at all, even factors prohibited in the scoring of the advisory guidelines, but which cannot be prohibited by the guidelines from consideration by the judge in determinating a sentence that is proportionate to the seriousness of the offense and the circumstances of the offender. Because unless disclaimed, it may reasonably be concluded that a trial judge imposing an outside-the-guidelines sentence accepts the suggestions of the guidelines, it is reasonable, as the Supreme Court said in *Gall*, to expect the sentencing court to lay out in greater detail the reasons for its sentence the more outside the guidelines the sentence imposed is, though those reasons need not be "exceptional." The reviewing court should expect reasoned decision-making by the sentencing judge: the judge's sentence must not be irrational or arbitrary;[80] it should be consistent with the explanation given; it should not fail to account for an important factor or give significant weight to an irrelevant factor; and it should not in its ultimate conclusion reflect a sentence that no reasonable judge would impose. In other words, it should not be "shockingly high, shockingly low, or otherwise unsupportable as a matter of law."

Greater sentencing disparity is a likely result of such narrow appellate review and appellate consideration of the advisory guidelines in considering whether the trial judge's application of the principle of proportionality is outside the range of principled outcomes, but

[80] In *Rita*, Justice Stevens observed that "A district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable." *Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring).

that is an unavoidable result of *Lockridge*,[81] and cannot be permitted to drive appellate review, causing a de facto reinstatement of mandatory guidelines, as is occurring with the Court of Appeals in its requirement of sentencing justifications for out-of-guidelines sentences that establish that the sentence is "more proportionate" than a guidelines sentence would be.[82]

C. Conduct for which a defendant was acquitted may be considered as an aggravating fact in setting the sentence within the statutory range for the offense of conviction if found by the sentencing court by a preponderance of the evidence; what is prohibited is consideration of acquitted or uncharged conduct based on a sentencing judge's *assumption* of the defendant's guilt of that conduct

This Court has also asked if a sentencing court abuses its discretion in a case where the defendant was charged with 1st-degree murder and convicted of the included offense of 2nd-degree murder by sentencing the "defendant according to an independent finding that she committed first-degree murder"; that is, by taking into account the conclusion of the trial judge that the killing was premeditated; or by "depart[ing] upward from the sentencing guidelines for second-degree murder based on facts established by a preponderance of the evidence that the jury did not find were established beyond a reasonable doubt." These are very much the same question, it seems to amicus. As amicus has argued, a sentencing court may abuse its discretion by, in applying the rule of decision for the sentencing court—proportionality—imposing a sentencing that a reviewing court finds to be outside the range of principled outcomes, one no reasonable jurist would impose for the reasons given by the sentencing judge. But the reviewing

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[81] "That district judges are permitted under the advisory regime to apply their own policy views inevitably will result in some disparity in the sentencing of similarly-situated offenders that might have been avoided under the original guidelines system." *United States v. Sholds*, 827 F.3d 758, 760 (CA 8, 2016).

[82] See the opinion in the present case, 321 Mich. App. 490, 909 N.W.2d at 477.

court examines not whether discretion was abused by the sentencing court's "departing upward from the guidelines," as the guidelines range is only advisory, not presumptive. And a judge may consider conduct that the jury did not find beyond a reasonable doubt; a judge need not find a sentencing factor beyond a reasonable doubt, but by a preponderance of the evidence.

In *People v. Grimmett*,[83] the owner of a small grocery store was killed during a robbery, and a customer wounded. Grimmett was convicted of manslaughter for the homicide, and at a separate trial was found guilty of assault with intent to murder for the shooting of the customer. He was sentenced to 14 years and 14 months[84] to 15 years for the homicide and life for the assault with intent to murder. The trial and sentencing for the assault took place before the conviction and sentence for the manslaughter, and at sentencing the trial judge took into account the homicide, saying that defendant was "certainly the same person who murdered the other grocer, Mr. Shaker Aubrey at the same time,"[85] though that case had not yet been tried. This Court found this improper because it constituted an "independent finding of defendant's guilt on the murder charge" where the trial judge had simply "assumed" defendant was guilty of the murder.[86] The Court cited no statute, constitutional provision, or case authority for the proposition that the trial judge's consideration of the homicide of the grocer was improper, but

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[83] *People v. Grimmett*, 388 Mich. 590 (1972).

[84] The opinion so reads, but it appears likely it was meant to read "14 years, 11 months," as otherwise the minimum is not only greater than the maximum, but greater than that—15 years—allowed by law. *People v. Tanner*, 387 Mich. 683 (1972), limiting the minimum to 2/3 of the maximum, had not yet been decided.

[85] Id., at 607-608.

[86] "We believe the trial judge acted improperly in assuming defendant was guilty of the murder charge when he sentenced defendant on the assault charge." Id., at 608.

appeared possibly to limit consideration at sentencing to "public records concerning the defendant, or even defendant's admissions to the court."[87] Justice Brennan dissented from the order for resentencing, saying that "The suggestion that a sentencing court may not delve beyond public records, previous convictions and open-court admissions, is a pernicious departure from our established practice."[88]

Then in *People v. Lee*[89] the defendant was convicted of robbery of a dry-cleaning store. The presentence report contained the fact that defendant had pending two indictments for armed robbery, and conspiracy to commit armed robbery; as in *Grimmett*, then, the defendant had not been convicted of these charges at the time of sentencing. In setting sentence, the trial judge took note of the pending indictments, sentencing defendant to 6-20 years. The Court held this proper, distinguishing *Grimmett* on the basis that "there is no evidence that the court *drew false inferences* from the presentence report, as in *People v. Grimmett* . . . .where the trial judge made an independent finding of defendant's guilt on another charge, in stating at the sentencing hearing that 'while (Grimmett) was tried for the shooting of Mr. Kubon, he is certainly the same person who murdered the other grocer . . . at the same time.' We will not sanction a judge's making *an assumption of guilt* of other crimes on the basis of the presentence report."[90] It is

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[87] Id.

[88] Id., at 609-610.

[89] *People v. Lee*, 391 Mich. 618 (1974). See also *People v. Henry*, 395 Mich. 367, 378, (1975), where the Court said that "Of course, the defendant has the right to challenge or explain these pending charges," and again distinguished *Grimmett* on the ground that "There is no evidence on the record that . . . the court drew false inferences from the presentence report as in *People v. Grimmett*."

[90] Id., at 638 (emphasis added).

difficult to discern the "false inference" drawn by the judge in *Grimmett*, or how the consideration of pending charges is not in some sense a belief that the defendant has in those matters engaged in criminal misconduct.[91] Then came *People v. Ewing*.[92]

In *Ewing* a pretrial hearing on the admissibility of other acts was held. Defendant was charged with the sexual assault of a seventeen-year old woman, and four other women testified at the hearing that Ewing had assaulted them in a similar manner. Their testimony was held admissible, and the trial judge took it into account at sentencing—though defendant had not been charged or convicted of those assaults—saying "it's obvious to me you have carried on a course of conduct involving attacks on young women over a period[] of five years." The Court of Appeals held that this constituted an independent finding of guilt of the other assaults, in violation of *Grimmett*.[93] Though this Court granted leave to appeal to determine whether the Court of Appeals misapplied *Grimmett*, the result was fractured, with four opinions issuing.

Justice Boyle, for herself and Justices Riley and Griffin, found that *Grimmett* unduly limited that which the trial court can consider in setting sentence: "In reaching the proper sentence, the court's inquiry is broad in scope, largely unlimited either by the kind of information that may be considered or the source from which it comes. To the extent that *Grimmett* appears to limit the trial court's considerations in sentencing to 'previous convictions, public records concerning the defendant, or even defendant's admissions to the court,' it conflicts with both the

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[91] Later, this Court, citing *Grimmett*, said that a sentence may be invalid where the trial judge "improperly assumes a defendant's guilt of a charge which has not yet come to trial." *People v. Whalen*, 412 Mich. 166, 169–170 (1981).

[92] *People v. Ewing (After Remand)*, 435 Mich. 443 (1990).

[93] Id., at 467.

general rule and the Court's own explanation that the sentencing judge has 'wide latitude' in imposing sentence."[94] Further, Justice Boyle took note of the "difficulty in drawing a distinction between *Lee* (the trial court may 'notice the existence of pending charges') and *Grimmett* (the trial court may not 'use unsupported assumption of guilt of other crimes as a factor' at sentencing)" that had "created a lack of consistency in the Court of Appeals decisions on this issue."[95] Justice Boyle "clarified" *Grimmett* and said that "any circumstance which aids the sentencing court's construction of a more complete and accurate picture of a defendant's background, history, or behavior is properly considered in individualizing the sentence to fit 'the offender and not merely the crime,'" and that properly understood *Grimmett* stood for "the general proposition that a sentence must be based on accurate information."[96] Justice Boyle also affirmed the rule that a sentencing factor need be proved only by a preponderance of the evidence, which encompasses facts regarding criminal acts, including "criminal activity of which the defendant has been acquitted, whether prior or subsequent to sentencing, so long as it satisfies the preponderance of the evidence test."[97]

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[94] Id., at 470.

[95] Id., at 471.

[96] Id., at 472. Justice Boyle repeatedly referred to *Grimmett* as having established that "unsupported assumptions of guilt cannot be made at sentencing." See id., at 462. See also id., at 467, 471.

[97] Id., at 473. Justice Boyle summed up: "In sum, a prior prosecution which does not result in a conviction, as well as criminal activity for which the defendant has not been prosecuted, may nevertheless reflect wrongful conduct that can be a proper consideration at sentencing, provided the defendant is given an adequate opportunity to rebut or explain. . . . Where the record of the trial or of the plea proceeding or the sentencing report contains evidence supporting a sentencing factor, 'the sentencing judge shall exercise discretion in deciding whether to entertain further proofs.'" Id., at 474-475. And in her view, "the testimony of each of

Justice Brickley, writing for himself, supplied a fourth vote for the bulk of Justice Boyle's opinion, but disagreed with that opinion's conclusion that no remand was required to provide defendant a further opportunity to challenge the uncharged conduct:

> I believe that the trial judge was entitled to base his sentence not only on the defendant's prior conviction, but also on testimony concerning the underlying facts of the prior conviction, a pending charge, and an uncharged offense. The defendant, however, was denied his right to test the accuracy of these allegations regarding his conduct.[98]

Ewing is consistent with decisions from the federal courts, including the United States Supreme Court. In *United States v. Watts*[99] two panels of the 9th Circuit Court of Appeals had held that "sentencing courts could not consider conduct of the defendants underlying charges of which they had been acquitted."[100] In the case of Watts, he was convicted of a drug offense but acquitted of the offense of using a firearm in relation to a drug offense. In sentencing on the drug offense, the trial judge found by a preponderance of the evidence that defendant had in fact used the gun during the drug offense, and considered that conduct in sentencing on the drug offense. In the second consolidated case, the defendant was charged with two drug offenses, and acquitted of one, but the trial judge found that offense established by a preponderance of the evidence and considered it in sentencing on the offense of conviction.

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the victims satisfied the preponderance of the evidence test." Id., at 476.

[98] Id., at 446.

[99] *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997).

[100] Id., 117 S. Ct. at 634.

Reversing the 9th Circuit, the Supreme Court found that consideration of the conduct for which the defendants had been acquitted was appropriate and permissible. The Court observed that before Congress had created the guidelines sentencing regime "it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,"[101] and that the "Guidelines did not alter this aspect of the sentencing court's discretion."[102] As a matter of constitutional law, the Court said,"consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted"; rather, the defendant is "punished only for the fact that the present offense was carried out in a manner that warrants increased punishment."[103] The 9th Circuit, the Court continued, had misunderstood the effect of an acquittal, because it had "failed to appreciate the significance of the different standards of proof that govern at trial and sentencing. We have explained that 'acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.' . . . Thus . . . the jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty."[104] And so the Court concluded that "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

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[101] Id., at 635, citing *United States v. Donelson*, 695 F.2d 583, 590 (CA DC, 1982) (Scalia, J.).

[102] Id.

[103] Id., at 636.

[104] Id., at 637.

proved by a preponderance of the evidence."[105] The federal circuits have, of course, followed *Watts*.[106]

There thus is no basis to distinguish between permissible trial court consideration of acquitted conduct, and an impermissible "independent finding of defendant's guilt" by a trial court on an acquitted charge. As said by Justice Boyle in *Ewing*, what *Grimmett* actually prohibits is an impermissible *assumption* of guilt. But the trial judge *necessarily* makes an "independent finding of guilt," though by a lesser standard of proof, when considering acquitted conduct in establishing an appropriate sentence within the statutory range for the offense of conviction—and in so doing the judge is *not* sentencing on a different offense with a different legislatively-set sentence—this is also true as to conduct that is the subject of a pending charge or has never been charged criminally, and this is perfectly permissible, and is what the trial judge did here.

D. The out-of-guidelines sentence here was within the range of principled outcomes when reviewed for reasonableness informed by the principle of proportionality, for the reasons given by the trial judge, including his finding by a preponderance of the evidence that the killing was premeditated

Amicus will largely leave to the People the argument concerning whether the trial judge's sentence here was outside the range of principled outcomes, but would note that in determining

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[105] Id., at 638.

[106] See e.g. *United States v. Alsante*, 812 F.3d 544, 550 (CA 6, 2016) ("our court, along with every other circuit to address the question, has approved the consideration of conduct for which a defendant was acquitted," citing cases); *United States v. Thurman*, 889 F.3d 356, 371 (CA 7, 2018). *Watts* is good law; its statement that the defendant is *not* receiving punishment for any offense other than that of conviction when conduct for which defendant was acquitted is considered in sentencing on the offense of conviction forecloses that argument. And there is thus no basis under principles of stare decisis to reconsider *Ewing*..

an appropriate, proportionate, sentence for the offense of 2nd-degree murder, the trial judge said, as the People have noted in their application for leave, that defendant had "brutally murdered [the victim] in cold blood," that the defendant twice stabbed him in the heart, that she had slashed him causing serious injury previously, that she had some months before told a person that she would someday stab the victim and claim self-defense, and that she had gotten rid of the knife. The court sentenced defendant to a minimum of 35 years where the top end of the guidelines was 20 years, and the statute allowed any terms of years, or life. The sentencing judge did *not* sentence defendant as though she had been convicted of 1st-degree murder, else the sentence would have been one to life not subject to parole. Rather, the trial judge sentenced defendant within the statutory range for 2nd-degree murder, and took into account in determining the appropriate sentence the judge's finding that the killing was premeditated, as *Watt* and *Ewing* permit.

The rule of decision for a trial court in setting the sentence is proportionality, viewing the seriousness of the offense and the circumstances of the offender, as this Court said in *Steanhouse*. There is no one proportionate sentence; a reviewing court is to review an out-of-guidelines sentence "for an abuse of discretion, i.e., engage[] in reasonableness review for an abuse of discretion informed by the 'principle of proportionality' standard." Applying the standards discussed previously, amicus submits that it cannot be said that the sentencing court's determination of a proportionate sentence, viewing the guidelines range as advisory and not presumptive, was outside the range of principled outcomes on the facts here—one no reasonable jurist would impose for the reasons given by the sentencing judge. As the 6th circuit has noted, "the central lesson from [*Rita*, *Gall*, and *Kimbrough*] [is] that district courts have considerable

discretion in this area and thus deserve the benefit of the doubt when we review their sentences and the reasons given for them."[107] The federal courts have said that the fact that a sentence is "significantly less than the applicable statutory maximum . . . points strongly to reasonableness."[108] The statutory maximum here was life, or any term of years, and so the sentence of 35 years is well below that which could have been given. While the term is lengthy, the life of the victim was taken, through an act of murder, forever, a loss the victim's family and friends will experience and feel keenly the rest of their lives. As Justice Boyle once cogently remarked for the Court, "When, and if, the day dawns on a judiciary that is so insensitive to human pain that it no longer distinguishes between the endless variations of man's inhumanity to man, we will have lost our claim to confidence in the rule of law. As this case so tragically illustrates, a guidelines' regime is not an adequate substitute for trial court discretion."[109]

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[107] *Vonner*, supra, at 392.

[108] *United States v. Nagel*, 835 F.3d 1371, 1377 (CA 11, 2016).

[109] *People v. Merriweather*, 447 Mich. 799, 811-812 (1994).

Relief

Wherefore, the amicus requests that the Court of Appeals be reversed.

Respectfully submitted,

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