

**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

-vs-

Lower Court Case No. 15-004596-FC

DAWN MARIE DIXON-BEY

Defendant-Appellee.

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**APPELLEE'S SUPPLEMENTAL BRIEF**

**ORAL ARGUMENT REQUESTED**

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## Counter-statement of Questions Presented

- I. In *Steanhouse* and *Lockridge*, this Court stated that while proportionality is not measured by deviations from the guidelines and that the guidelines remain an important consideration in fashioning a proportionate sentence. This Court also clarified that Michigan's sentencing jurisprudence and longstanding sentencing practices continue to apply. Was the Court of Appeals correct in holding that the trial court violated the principle of proportionality and in doing so, abused its discretion?

The People answer, "No."

Defendant-Appellee answers, "Yes."

- II. Did the trial court abused its discretion to the extent that the sentence relied upon an independent finding that Dawn Dixon-Bey committed first-degree murder? Alternatively, did the trial court abuse its discretion by departing 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?

The People answer, "No."

Defendant-Appellee answers, "Yes."

## Counter-Statement of Facts

### Introduction

Defendant-Appellee, Dawn Marie Dixon-Bey's long-term boyfriend, Gregory Stack, died from stab wounds on February 14, 2015. Ms. Dixon-Bey admitted that she stabbed Mr. Stack, but claimed that she did so in self-defense. She was charged with first-degree murder, MCL 750.316. After an eight-day jury trial, she was found guilty of second-degree murder, MCL 750.317. The advisory guidelines indicated a minimum sentence between 144-240 months. The presentence report stated that "the advisory sentencing guidelines call for a prison term in this matter, and this agent can find no compelling reason to deviate from those guidelines. As such, term of incarceration within those guidelines is recommended." (PSIR, 388a-389a)).

Numerous witnesses testified that Greg used alcohol excessively and regularly took a variety of drugs, including Vicodin, Percocet, methadone, morphine, cocaine, mushrooms and ecstasy. He often would start arguments with Dawn and regularly exhibited aggressive behavior towards her. On the day of the incident, he started drinking liquor in the morning and took 4 Vicodin's throughout the day. He also was angry with Dawn's daughter. The trial court imposed a sentence of 35-70 years, exceeding the guidelines by 180 months. The trial judge based his sentence on his belief that Dawn was a "cold-blooded killer" and that Greg "had one major fatal flaw, that's that he stayed in a relationship with you." (ST at 17, 428a).

In its September 26, 2017, published decision<sup>1</sup>, the Michigan Court of Appeals remanded the matter for resentencing, finding that the trial court abused its discretion and violated the principle of proportionality set forth in this Court's opinion in *People v Steanhouse*, 500 Mich 453; 900 NW2d 327 (2017).

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<sup>1</sup> *People v Dixon-Bey*, 321 Mich App at 490; 909 NW2d 458 (2017)

## **Trial Testimony**

**Dawn Dixon–Bey testified that Gregory Stack took numerous drugs and drank liquor excessively. He was often physically and verbally aggressive with her. On the day of the incident he was very angry and was yelling and throwing things at her. She stabbed him in the chest when he lunged at her.**

Dawn Dixon–Bey testified that she met Gregory Stack in 2003 or 2004 when she was working in a bar. Greg drank a lot when they first met and his drinking increased during the relationship. His drinking increased after her father moved in with them. When he drank liquor he became angry and would pick on Dawn and do things that he knew would irritate her.

She denied that she had ever threatened to stab Greg or threaten him with physical harm. (TR 6 at 103, 299a). Greg would push her into the counters and wrap his arms around her and hold her. His aggressive conduct increased during the last 6 months of his life. Whenever he was angry, depending on the situation, he would say she was worthless. Greg took Vicodin, Percocet, methadone, morphine, cocaine, mushrooms and ecstasy.

On the morning of February 14, Greg drunk a half a pint and left the house to move things from their old house to their new apartment. (TR 6 at 108, 303a-304a). At some point he returned and brought a couple of boxes inside that were not supposed to come to the new apartment. She told him that the things didn't belong there and that he needed to take them back to the old house. He complained about her daughter Natiezia. He was upset when he left.

When he returned home he was yelling and he threw a dog cage at her. She believed he was complaining that the kids didn't get things together for the move. He pushed her out of the way as he was going in the living room. When he threw the dog cage at her, she hit her knees on the coffee table. Greg sat on the couch and was screaming and yelling at her. He started throwing things at her that were on the coffee table. She told him that he should just pass out and he would feel better. He got angered and started pushing and shoving her.



He slammed into her and pushed her against the wall. She told him to sit down to leave her alone. The kids were in the living room and when he shoved her backwards she tripped over her child's walker. She was cornered in the kitchen and could not get around him without climbing over the kids. She tried to push him backwards and he shoved her back into the refrigerator. She told him to leave her alone and he started trying to grab her. (TR 6 at 111-115, 307a-311a).

She grabbed a skillet off the stove and swung it at him. He grabbed it from her and threw it in the kitchen. He grabbed her after that and she ended up grabbing a knife. At that point they were just a few feet away from each other. Because of the look on his face she had no idea what he was going to do to her. She was very afraid that he was going to hurt her. (TR 6 at 118, 314a). After she had a knife she told him to get away from her and she was holding the knife by her side. She testified that "he lunged at me in the kitchen and I pretty much -- not sure what happened after that. I closed my eyes, because I was just afraid of what was coming next. The next thing I know, I'm standing there and he was standing there and he lifts his shirt and see -- we both kinda see the cut and he turns around and he goes in and sits on the couch." (TR 6 at 119, 315a).

She was in shock at the time and wasn't sure what happened. She asked if he needed her to call an ambulance because she wasn't sure how bad the cut was. She testified that she called her friend Sherry Heim and then called 911. When she called 911, they told her to lay him on the floor and administer CPR. While she was performing CPR, she was trying to talk to him, but he was so intoxicated she wasn't sure if he had passed out. (TR 6 at 122, 318a).

She initially told the officers responding to the incident that he had been stabbed on the way home. She did not want Greg getting in trouble for fighting and drinking because he was trying to get his drivers license back. At the time that she grabbed the knife in the kitchen she did not intend to injure him. She was holding the knife at her side when he came towards her. Greg was 9 or 10 inches taller than her. She believed that the knife

was by her chest area at the time he lunged at her. She did not see any blood until Greg lifted up his shirt. She saw the wound bleeding and then it stopped. When he was on the couch he told her that he couldn't see. She wasn't sure what he was talking about. At some point he closed his eyes as she was trying to talk to him. (TR 6 at 147-148, 340a-341a)

**Alissa Todd Kennedy testified that Greg used drugs and drank every day. She stated that the arguments increased between them and that Greg usually initiated them.**

Alissa Todd Kennedy is Dawn's daughter. Dawn started dating Greg when Alissa was about 10 years old. She believed that Dawn and Greg had a good relationship. (TR 6 at 6, 127b). As Greg's drinking increased, arguments between Greg and Dawn increased as well. Most of the arguments were initiated by Greg. Alissa testified that Greg abused drugs every day. He snorted pills and cocaine, used mushrooms and smoked marijuana. She stated that Greg would "pick and touch you and just bother you." She stated that when a person doesn't want to play with him he gets upset, takes it personally and gets very aggressive. (TR 6 at 8, 130b).

Dawn began taking care of her mother at the end of her life and Greg was very upset because Dawn wasn't home to take care of him. He would occasionally throw things at her when he became angry (TR 6 at 17, 139b). She believed her mother was moving because she was trying to get a place she could afford by herself so that she could leave Greg.

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

Karen Bivens was Dawn's sister. She met Greg 13 - 14 years ago. She stated that Greg had a drinking problem which increased over time. In addition to drinking, she observed him smoke crack cocaine and weed, take pills, snort cocaine and ingest mushrooms and LSD. The last time she visited them was between September and November during the previous year. She saw Greg taking pills and snorting something up his nose. He got aggravated very quickly. She stated that when people were in the house he was very nice but

when he was there with Dawn he was very mean. (TR 6 at 26, 148b). Every time she visited them over the past 8 years, Greg would nitpick Dawn and criticize her constantly.

**Daniel Bivens helped Greg move on the day of the incident. He testified that Greg was drinking throughout the day and snorted 4 Vicodins.**

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

On February 14, he met up with Greg at Brian Pierucki's house. (TR 6 at 38, 160b). He and Brian were helping Greg move things out of the apartment. Brian supplied Vicodin and he believed that Greg snorted 4 pills during the day. When they got to the new apartment, Greg started drinking moonshine called Apple Pie. Dawn got upset and they began to argue.

While he was living with Dawn and Greg he observed them fighting. Greg was the person who initiated the fights. He would come home drinking and would criticize Dawn. One time he saw him throw a shoe at her and hit her in the head. On another occasion he saw him take everything off the kitchen table and throw it at her. There always were arguments when he was drinking. Greg became angry with Dawn when she started taking care of her mother. (TR 6 at 49, 171b).

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

Asia Chantel Dixon-Bey is one of Dawn's daughters. She testified that Greg drank every day and that his drinking increased over time. When he starting arguing with Dawn, she tried to walk away most of the time. She picked her mother up from jail in February and she took pictures of her body. Asia identified photographs taken a day after Dawn was released from jail which showed bruises and cuts on her arms and legs. (TR 6 at 55, 177b)

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

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

A few days before February 14, Greg and Dawn's relationship was horrible. "Greg would start hitting my mom and my dog would try to get him off of her." He would push and shove her as well. (TR 6 at 78, 200b). Greg gave her a black eye around Christmas break. She stayed out of school at that time because of the black eye. She testified that Greg got physical with her mother every night and that he threw things at her.

When her mother got out of jail she observed bruises on her. On February 14, Greg and Dawn argued about her. Greg became upset with her when she told him that she didn't want him to take some of her things to the new apartment. On February 15, her mother told her that Greg had thrown a dog cage at her when she was in the kitchen and she could not get out. (TR 6 at 86, 208b).

**Sherry Heim was a long-time friend of both Dawn and Greg. She testified that Greg's demeanor had changed over the past year and that he angered quickly. In addition to his drinking problem he was also taking opiates.**

Greg used to date Sherry Heim's mother. She had known Greg for about 30 years and had known Dawn for about 10 years (TR 2 at 104, 34a). Dawn's 16-year-old daughter, Natiezia, was staying at her house on February 14. (TR 2 at 113, 43a). Dawn called her later in the afternoon and told her that Greg was yelling at her because Natiezia had not packed up things at the old apartment that he wanted to move to their new place. Dawn called her

again at about 5 p.m. and stated that she needed her to come over and get the kids. She told her that Greg had been stabbed in the chest. Dawn called her later that day from the police station and was checking on Natiezia. Sherry told Dawn that Greg had passed away. Dawn was quiet and said "Oh my God." (TR 2 at 120, 50b)

Sherry Heim told Detective Schuette that Dawn had told her that when Greg returned to the house, they were fighting and that he had hit her with a dog cage and backed her into a corner. (TR 2 at 131, 61b). Sherry testified that Greg had a drinking problem and that his demeanor changed a lot over the past year. Any little thing could set him off when he was drunk. Greg also took Norcos which was similar to Vicodin. Dawn and Greg began to argue more during the 6 months before the incident when Dawn's mother became ill and Dawn was occupied helping her mother.

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

Brian Pierucki had known Greg and Dawn for about 5 years. He saw Greg almost every day for the past 3 years and considered him to be his best friend. (TR 2 at 149, 5b). Paul was helping Greg move on February 14. Greg and Dan Bivens picked him up around 8 in the morning and they began drinking peppermint schnapps and beer. The three of them drank together just about every single day. When Greg came over to his house to pick him up he gave Greg 4 Vicodins and recalled that Greg took them all. Greg was upset during the day because Natiezia was not helping with the move. Dawn and Greg argued about that all day on the telephone.

Dawn stayed at the new apartment because she didn't want to deal with Greg while he was drinking. He testified that Dawn would try to leave when Greg was drinking and they would argue about it. He said that Greg was always the aggressor. (TR 2 at 155, 11b). During the day, the three of them drank two fifths of peppermint schnapps and more than

a 12 pack of beer. He called Greg about 20 minutes after he left and Dawn answered the phone. Dawn told him that Greg had gotten into a fight on his way home and that she couldn't talk because the police were standing next to her. He was surprised and wondered how Greg could have gotten into a fight in the 5 minutes that it took to get home from his house. After he got off the phone with Dawn he called Sherry Heim to find out what happened. (TR 2 at 167, 33b).

**George Wilson** owned a heating and cooling business. Greg installed duct work for him among other things. After he learned that Greg passed away, he spoke with Dawn to make arrangements to pick up his tools. (TR 2 at 215, 82a-83a). Dawn told him that Greg came bursting into the house and threw a dog cage at her and her 2 grandchildren who were sitting on the floor. He testified that she said she had had enough and she killed him. (TR 2 at 218, 85a).

**Megan Marshall** is Greg's daughter. She has known Dawn since she was 7 or 8 years when Dawn began dating her father. Her sister, Jersey Stack, was Greg and Dawn's biological child. (TR 3 at 81, 154a). She spoke with Greg about 2 hours prior to the incident. Dawn told her that when Greg came home he was drunk and violent. He cornered her in the kitchen. After she picked up a knife, Greg lunged at her. (TR 3 at 91, 164a)

Detective Schuette asked her to call Dawn and to try to get her to explain what happened so that he could record it. (TR 3 at 94, 167a). Megan asked Dawn what happened and she stated that she wasn't really sure because it all happened so fast. She didn't know what she was going to do without Greg. She testified that her father got aggressive, loud and mean when he was drunk. Megan said that she had never seen her father act violent towards Dawn and that Dawn never told her of any such incidents. (TR 3 at 119, 192a). She had seen Greg annoy Dawn and make her mad when he was drunk.

**Sean Pierce** was good friends with Greg and had known him for 8 - 10 years. He met Dawn about the same time that he met Greg. He lived with Greg and Dawn on a couple

of occasions. (TR 3 at 147, 208a). He witnessed Greg and Dawn argue on a few occasions and stated that neither one was the aggressor.

**Jeffrey Tobin** testified that Greg, Dawn, Dawn's father and her kids moved in 2 doors away from him when he lived at 807 Northwest Ave. He had a lot of contact with both Greg and Dawn and described the relationship as normal. He witnessed them arguing but it was nothing out of the ordinary. When Greg drank he would go to bed early and when he drank too much he would be argumentative. (TR 3 at 166, 225a-226a). He never saw him get physical with Dawn.

Dawn told him that on the day of the incident, Greg had come home drunk and was arguing with her. She told him that Greg threw a dog cage at her and that she swung a frying pan at him. After he took it away from her she grabbed a knife, lunged at him and it just happened to hit him in the chest. She said she was not aiming for his chest. (TR 3 at 178, 237a).

**Thomas Gove** had known Greg for about 14 years and would see him 3 - 4 times a month. He also knew Dawn. He recalled that in November 2014, he was waiting for Greg to come home from work. Greg and Dawn were arguing. Dawn walked towards him and "said all I got to do is stick him in the chest and claim self-defense." (TR 3 at 187, 247a). He didn't think anything of it at the time because it wasn't the first time she said that. He stated that in 2003, while he was waiting to go hunting with Greg, Dawn came into the kitchen and stated "I'm going to kill that F'er one of these days." (TR 3 at 188, 248a). Greg said that she was just pissed off.

**Richard Petersen** had known Greg since 3<sup>rd</sup> grade and believed that Greg considered him to be his best friend. They lived together for at least 17 years at various times after they were 17 years old. (TR 4 at 6, 259a). He stated that Greg "would stick up for the little guy. Greg... was fun loving and very caring for the children." Greg took him hunting and fishing and made sure he had fun. He stated that "Greg taught me how to have

fun."

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

He stated that at times he would be called over to the house when Greg and Dawn were in the midst of an argument because Greg had to leave. On multiple occasions Dawn would tell Greg "I'm going to stab your ass." Petersen stated that when Greg was drunk he did get violent "but it was always as a reaction." (TR 4 at 20, 273a). During the 6 months before he passed away he would see Greg three times a week at his house. Peterson supplied both Dawn and Greg with 4-5 Vicodin pills several times a week.

He stated that on one occasion either Greg or Dawn called him to come over and get Greg. He arrived at the house between 1:30 and 2:30 a.m. and Dawn and Greg were yelling back and forth at each other. As he got closer, he saw blood coming from Greg's arm down to his hand. He stated that Dawn had a knife in her left hand and he could clearly see there was blood on the knife.

**Richard Hale** had known Greg for about 33 years and stated that they were together 3 or 4 times a week. After Greg began his relationship with Dawn he did not hang out with him as frequently because he didn't like the way they lived. Greg did not seem to care about how dirty the house was. He stated that on one occasion Greg called him on a Saturday morning about 7 or 8 years ago and asked him to come and get him. When he pulled up in the driveway Greg came right out of the house and he noticed that Greg had bandages on his arm. He could see remnants of blood that had bled through the bandage and Greg was in a hurry to leave. He testified that Greg said "the crazy bitch tried to kill



me." (TR 7 at 34, 223b).

**Shannon Hale** had known Greg for about 22 years. They grew apart once he started going out with Dawn. She said that it didn't seem like a very good relationship and that her husband Richard had stopped drinking. When she and Richard picked him up, Greg was bouncing out of the door with his arm wrapped up and was giggling and laughing. They asked him what happened and "he said the crazy bitch tried to kill me but I blocked it." She asked Greg why wasn't she in jail and he said "Oh I didn't tell. I told 'em I put my arm through a window." (TR 7 at 41, 230b).

**Megan Marshall** testified that she recalled Natiezia telling her that she was trying to stop a fight between Greg and Dawn and got a black eye. She did not recall Dawn ever talking about stabbing her father but she recalled her father talking about it and how he said he had fallen through a window. (TR 7 at 46, 235b)

**Officer Cary Kingston** was dispatched to 807 Steward on February 14, 2015, with regard to a stabbing. (TR 2 at 37, 14a-15a). Greg was lying on his back and had blood on his chest area. Dawn told him that Greg had been in a fight. (TR 2 at 43, 20a). **Sergeant Sergio Garcia** also responded to the incident. It appeared that there had been a scuffle in the living room.

**Doctor Ortiz-Reyes** conducted the autopsy on Greg on February 16, 2015. He determined that two stab wounds to the mid-chest were the cause of death. (TR 3 at 8-16, 106a). Doctor Ortiz Reyes received the body after the medical staff had worked on the body. He did not inquire as to whether an increase in the wound to the heart was a result of the surgeons' work. He testified that Greg had cocaine, hydrocodone, alcohol and acetaminophen in his body.

**Detective Gary Schuette** spoke with Dawn. She initially told him that Greg had been moving things with both her father, Daniel Bivens, and Brian Pierucki to her new place. She said that Greg must have gotten into a fight on his way home. Dawn told him that

Greg had been drinking that day. Schuette testified that she said Greg was "a dirty, nasty drunk." Dawn still maintained that by the time Greg came home he already had been stabbed. When he asked whether it was self-defense, Dawn told him that she would like to leave. At that point he read her the Miranda rights. She was angry and felt that he had misled her and felt that she was never free to leave. (TR 4 at 80-82, 88b ).

He stated that Sherry Heim's testimony during trial was not entirely consistent with what she told him on February 14. Sherry had told him that she spoke with Greg early on February 14 and had given Greg \$50. She also had mentioned that Natiezia was upset over conversations between Greg and Dawn. Sherry Heim told him that she had been concerned that Dawn and Greg had not been getting along very well.

### **Conviction and Sentence**

On December 9, 2015, Dawn Marie Dixon-Bey, was convicted of second degree murder. The sentencing hearing was held on January 27, 2016. The trial court imposed a sentence of 35-70 years, exceeding the guidelines by 180 months. Prior to imposing the sentence, the trial court stated that "Mr. Stack had a lot of really great qualities and he had one major fatal flaw, that's that he stayed in a relationship with you." The trial judge expressed disbelief that this was "some kind of domestic situation" and came to the conclusion that Dawn "murdered [Greg] in cold blood." The trial judge told Dawn that "[y]ou'll be an old woman before you get out of prison." (ST 17-20, 428a-431a)

**After the Court of Appeals vacated Dawn's sentence, the People filed an application for leave. This Court directed supplemental briefing and oral argument in order to decide if the application should be granted.**

Dawn Dixon-Bey appealed her conviction and sentence. In its September 26, 2017, published decision, the Michigan Court of Appeals affirmed the conviction and vacated the sentence. (*People v Dixon-Bey, supra*). Relying on this Court's decision in *People v Steanhouse*, 500 Mich 453; 900 NW2d 327 (2017) and *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015), the Court of Appeals held that the trial judge abused its

discretion with regard to the sentence and remanded matter for resentencing.

On May 4, 2018, this Court directed the parties to file supplemental briefs 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 (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 established by a preponderance of the evidence that the jury did not find were established beyond a reasonable doubt.

- I. **In *Steanhouse* and *Lockridge*, this Court stated that while proportionality is not measured by deviations from the guidelines and that the guidelines remain an important consideration in fashioning a proportionate sentence. This Court also clarified that Michigan’s sentencing jurisprudence and longstanding sentencing practices continue to apply. The Court of Appeals was correct in holding that the trial court violated the principle of proportionality and in doing so, abused its discretion.**

A review of the proportionality of a sentence turns on the specific facts of each case, regardless of any standards applied. The People’s recitation of the facts in this case completely ignores the context of the stabbing which led the jury to reject the first degree murder charge. A fuller recitation of the facts shows that numerous witnesses documented Greg’s long history of drug and alcohol abuse, as well as his aggressive behavior towards Dawn. On the day of the incident, he had been drinking since the morning and had taken 4 Vicodins. He was particularly upset with Dawn’s daughter and Dawn tried to avoid him that day. The jury did not buy the trial judge’s belief that Dawn “brutally murdered him in cold blood.” (ST at 19, 430a).

Without question, a murder ranks among the most devastating circumstances in life to those close to the decedent. A trial judge’s power to determine the length of time an offender must spend in prison is one of the most momentous decisions a judge is permitted to make. The trial court’s pronouncement that Dawn murdered Greg in “cold blood” was not only contrary to the jury’s verdict - it ignored the mountain of evidence demonstrating that Greg’s excessive drinking and drug use was intertwined with his physical and verbal abuse of Dawn. Despite this evidence, the trial court stated that Greg’s major flaw was meeting Dawn. The trial court’s sentence of 35-70 years, which exceeded the top end of the advisory guidelines by 180 months, essentially ignored this Court’s decisions in *Steanhouse* and *Lockridge*.

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

for reasonableness on appeal is abuse of discretion.” *People v Steanhouse*, 500 Mich 453, 470; 902 NW2d 327 (2017). As the Court of Appeals recognized, this Court clarified that “the relevant question for appellate courts reviewing a sentence for reasonableness” is “whether the trial court abused its discretion by violating the principle of proportionality.” *Steanhouse*, 500 Mich at 477.

The principle of proportionality is one in which “a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender.” *Id* at 472, (quoting *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990)). The Court of Appeals recognized 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.” *Id* at 472, quoting *Milbourn*, 435 Mich at 661, 461 NW2d 1.

In *Steanhouse*, this Court recognized that its earlier opinion in *Lockridge* was intended to correct the constitutional flaw in the sentencing guidelines. *Lockridge* did not dispose of Michigan’s sentencing jurisprudence. In fact, this Court stated in *Lockridge* and reiterated in *Steanhouse* that:

nothing else in our opinion indicated we were jettisoning any of our previous sentencing jurisprudence outside the Sixth Amendment context. Moreover, none of the constitutional principles announced in *Booker*<sup>2</sup> or its progeny compels us to depart from our longstanding practices applicable to sentencing. Since we need not reconstruct the house, we reaffirm the proportionality principle adopted in *Milbourn* and reaffirmed in *Babcock*<sup>3</sup> and *Smith*<sup>4</sup>. *Steanhouse* 500 Mich at 473.

The Court of Appeals noted that this Court disavowed any dicta from its prior

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<sup>2</sup> *United States v Booker*, 543 US 220; 125 SCt 738; 160 LEd2d 621 (2005)

<sup>3</sup> *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003)

<sup>4</sup> *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008)

decisions that was “inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness for out-of-guidelines sentences.” *Steanhouse* 500 Mich at 474. This Court reaffirmed:

our directive from *Lockridge* that the guidelines ‘remain a highly relevant consideration in a trial court's exercise of sentencing discretion’ that trial courts ‘must consult’ and ‘take ... into account when sentencing,’ *Lockridge*, 498 Mich at 391, 870 NW2d 502, quoting *Booker*, 543 US at 264, 125 SCt 738, and our holding from *Milbourn* 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,’ *Milbourn*, 435 Mich at 661, 461 NW2d 1. *Steanhouse* 500 Mich at 474 -475.

Of particular importance is this Court’s recognition that “the Legislature [ ] incorporated the principle of proportionality into the newly adopted legislative sentencing guidelines.” *Steanhouse* 500 Mich at 472 (citing *People v Babcock*, 469 Mich 247, 666 NW2d 231 (2003)(stating that the Legislature “subscribed to this principle of proportionality in establishing the statutory sentencing guidelines”)

This Court’s comprehensive review of Michigan’s sentencing jurisprudence in both *Lockridge* and *Steanhouse* answered this Court’s first question posed in its May 4, 2018 Order. In determining whether a trial court abused its discretion in applying the principle of proportionality, the advisory guidelines remain a highly relevant consideration. This Court also reaffirmed the proportionality principles enunciated in *Milbourn* and its progeny as well as Michigan’s sentencing jurisprudence. As the Court of Appeals’ opinion made clear, the trial judge in this case virtually ignored these principles.

The advisory guidelines in this case were 144-240 months. The presentence report stated that “the advisory sentencing guidelines call for a prison term in this matter, and this agent can find no compelling reason to deviate from those guidelines. As such, term of incarceration within those guidelines is recommended.” (PSIR, 388a-389a). The trial court imposed a sentence of 35-70 years, exceeding the guidelines by 180 months. For convenience of the Court, the trial judge’s explanation is repeated here:

All right, Ms. Bey, you can retake the lectern. It's your turn. All right, well

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

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

And then, on -- on -- on the night in question we know the murder weapon vanished. It was never found, never able to be processed by the police. So, you had the presence of mind to do that. You had the presence of mind to go ahead and try to minimize your role and then try to turn the focus, you know, back on Mr. Stack as being the cause. Well, today the focus is about you. An intent can be determined by what you did, what you said, both before, during and after the crime. And, frankly, you plunged that knife into Mr. Stack's heart twice and you brutally murdered him in cold blood. And for that by the power vested in me in the State - by the State of Michigan you're to serve thirty- five (35) years to seventy (70) years in the Michigan Department of Corrections . . .

You know, with you married to another man in prison I'm just amazed he ever even stayed with you in the - in a relationship. And - and by the way, I did consider the sentencing guidelines which were 10 years to 20 years but I considered that the additional level of depraved heart and murder and the cold calculated nature of you brutally stabbing him twice in the heart and letting him bleed to death and die in this matter. So, the court believes my sentence is within the range. The guidelines are only advisory so you will serve that time. You'll be an old woman before you get out of prison. (ST at 17-20, 428a-431a)

In analyzing whether the trial court abused its discretion, the *Dixon-Bey* panel noted that a proportionality determination must consider (1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines and (3) factors considered by the guidelines but given inadequate weight. (*People v Dixon-Bey*, 321

Mich App at 490, 525;909 NW2d 458 (2017)(citing *Houston*<sup>5</sup> and *Milbourn*). The *Dixon-Bey* panel relied on this Court’s decisions in *Steanhouse*, *Lockridge* and *Smith* for the propositions that a trial court must “justify the sentence imposed in order to facilitate appellate review . . . which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.” *Dixon-Bey*, 321 Mich App at 525.

In fashioning an appropriate sentence, a trial court must take into account the nature of the offense and the background of the offender. *Steanhouse*, 500 Mich at 472. Dawn’s prior record variable score was zero. With regard to the nature of Dawn’s conviction, most, if not all, of the factors referenced by the trial court were already considered in the guidelines. Despite the fact that this Court has held that the Legislature incorporated the principle of proportionality into the legislative sentencing guidelines, the trial court did not offer any explanation for rehashing conduct that should already have been considered.

The trial court gave great weight to the fact that Dawn stabbed Greg twice in the chest. However, OV 1 (aggravated use of weapon), MCL 777.31, and OV 2 (lethal potential of weapon possessed or used), MCL 777.32 incorporate the trial court’s consideration. Any stabbing involves aggravated use of weapon and lethal potential. Nothing in the record suggests that the nature of the stabbing in this case was so out of the ordinary that it warranted more consideration than provided in OV 1 and OV 2.

Likewise, OV 5 (psychological injury to member of victim's family), MCL 777.35, was scored to reflect any impact on Greg’s family. The trial court did not offer any facts which distinguished this type of injury from any other case. The trial court’s comments concerning its belief that Dawn hid the knife are also unremarkable and could have been scored under OV 19 (interfering with the administration of justice), MCL 777.49, but was not.

The trial court repeatedly referred to what it believed was the “cold-blooded” nature

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<sup>5</sup> *People v Houston*, 448 Mich 312; 532 NW2d 508 (1995)



of the crime. However, OV 7 (aggravated physical abuse), MCL 777.37, which relates to brutality or similarly egregious conduct was not scored. The trial court's characterization of Dawn as a cold-blooded killer is curious, given the testimony of numerous witnesses documenting that Greg had snorted 4 Vicodins, drank all day and was upset with Dawn and her daughter prior to the incident.

The Court of Appeals believed that the references to the "cold-blooded" nature of the crime might have been based on the judge's belief that the killing was premeditated. However, OV 6 (offender's intent to kill or injure another individual), MCL 777.36, can be scored to reflect an offender's intent. Further, under MCL 777.36(2) (a), a sentencing court must score OV 6 "consistent with a jury verdict unless the judge has information that was not presented to the jury." *Dixon-Bey*, 321 Mich App at 527. Because the principle of proportionality was baked into the guidelines, this restraint imposed by the legislature demonstrates that when a trial judge proceeds to sentencing he/she must respect the jury's verdict. This restraint does not preclude a judge from exercising its discretion where it is warranted.

The *Dixon-Bey* majority noted that the Legislature expressly gave trial courts an opportunity to find a premeditated intent for crimes to which a premeditated intent does not necessarily attach. However, where intent is an element of the offense, the legislature did not provide the trial judge with that opportunity. Further, as the Court of Appeals noted, even if the trial court scored OV 6 at 50 points, the guidelines would not have changed.

None of the trial court's other observations supported the sentence. The trial court stated that "Mr. Stack had a lot of really great qualities and he had one major fatal flaw, that's that he stayed in a relationship with you." (ST at 18, 429a) This statement is so subjective and unrelated to Dawn's sentence, it cannot support the sentence. Likewise, the judge's comment regarding his belief that she tried to minimize her role is typical, rather

than a factor that warrants such a huge departure.

While a trial judge no longer has to offer substantial and compelling reasons for departing from the guidelines, the proportionality of the sentence must still be supported by the record. The trial court's sentence in this case appeared to relegate the guidelines to a minor supporting role and often ignored this Court's decisions in *Steanhouse* and *Lockridge*.

The prosecutor avoids addressing this Court's clear pronouncements in *Lockridge* and *Steanhouse* that the guidelines are an important consideration in sentencing and that Michigan's longstanding practices applicable to sentencing remain good law. *Steanhouse* 500 Mich at 473. The prosecutor also does not acknowledge that this Court has recognized that the legislative guidelines incorporate the principle of proportionality.

Despite this Court's rejection of the applicability of the statutory factors in 18 USC 3553(a) and recognition that those factors "have no counterpart in Michigan law" Appellant mainly relies on federal court decisions. Appellant states that *United States v Rayyon*, 885 F3d 436 (CA 6, 2018) "shows how a sentence with an upward deviation is to be reviewed. . . [and that] "the opinion pointed out that review is 'highly deferential' and that 'this is a matter of reasoned discretion, not math.'" (Appellant's Supplement at 6). These phrases were plucked from the following passage in *Rayyon*:

A claim that a sentence is substantively unreasonable is a claim that a sentence is too long (if a defendant appeals) or too short (if the government appeals). The point is not that the district court failed to consider a factor or considered an inappropriate factor; that's the job of procedural unreasonableness. **It's a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual.** Needless to say, this is a matter of reasoned discretion, not math, and our highly deferential review of a district court's sentencing decisions reflects as much. *Rayyon*, 885 F3d at 442 (citing *Gall*, 552 U.S. at 51, 128 S.Ct. 586) (emphasis added).

The *Rayyan* decision was based on the application of the federal sentencing guidelines. Rayyan pleaded guilty to federal gun charges. The federal sentencing guidelines indicated a sentence between 15 and 21 months. After a three-day sentencing hearing, the

district court imposed a sentence of 60 months and issued a 33 page opinion. The Sixth Circuit noted that the 5 year sentence was reasonable because the district court properly considered and balanced all of the 18 USC 3553(a) factors. Part of the district court's consideration included a defendant who "repeatedly broke federal law to obtain firearms, reveled online about the exploits of a terrorist group, and confided in others that he had planned to carry out violent attacks of his own . . . ." It found that the "Rayyan, undeterred by one firearm-related arrest, committed the same two crimes a month later." *Rayyvan*, 885 F3d at 442-443. Even if *Rayyvan* had any applicability to the present case, which it does not, the trial court's decision in the present case mainly relied on subjective and/or irrelevant considerations and did not demonstrate an understanding of the role of the advisory guidelines.

Appellant also references *Rayyon* for the proposition that "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." (Appellant's Supplement at 7). Appellant used the bracketed word [appropriate] to replace "the § 3553(a)" factors. This Court made it clear that the § 3553(a)" factors "have no counterpart in Michigan law." Similarly, Appellant asserts that the Court of Appeals' majority in the present case "ignores these principles" by tying proportionality to whether the guidelines have already considered a factor." It is clear that the *Rayyvan* Court did not set forth any "principles" that have applicability to this case. *Rayyvan* involved an exhaustive opinion that applied the federal factors, which were explicitly disavowed by this Court.

More importantly, the trial court did not appear to understand the principles set forth by this Court in *Steanhouse* and *Lockridge*. It certainly did not address any of them. Similarly, the Appellant does not address the continuing importance of the guidelines and the Court of Appeals' detailed analysis in this matter. The Court of Appeals correctly

determined that the trial court abused its discretion.

**II. The trial court abused its discretion to the extent that the sentence relied upon an independent finding that Dawn Dixon-Bey committed first-degree murder. Alternatively, the trial court abused its discretion by departing 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.**

**A. MCL 777.36(a)(2) precludes the trial court from independently finding that Dawn committed first-degree murder.**

MCL 777.36 concerns scoring offense variable 6 with regard to an offender's intent to kill. MCL 777.36(2)(a) provides that “[t]he sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury.” As discussed above, by enacting MCL 777.36, the Legislature expressly provided trial courts with an opportunity to find a premeditated intent for crimes to which such an intent does not necessarily attach. Because the jury acquitted Dawn of first degree murder, the judge was constrained to respect the jury’s verdict.

“Criminal statutes are to be strictly construed,” and cannot be extended beyond their clear and obvious language. *People v Jahner*, 433 Mich 490, 498; 446 NW2d 151 (1989). “The intent of the Legislature governs the interpretation of legislatively enacted statutes.” *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). The intent of the Legislature is expressed in the statute's plain language. *People v Cole*, 491 Mich 325, 330, 817 NW2d 497 (2012). When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. *Id.* “Statutes must be construed to prevent absurd results.” *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) (quotation marks, citation, and footnote omitted). The unambiguous language of MCL 777.36 provides that in the context of the murder conviction in this case, the trial judge must respect the jury’s verdict. It would work an absurd result for the trial judge to be able to score OV-6 at 25 points and then turn around and find that “[t]he offender had premeditated intent to kill.” MCL 777.36(1)(a). The legislature has

determined that when it comes to the specific intent offenses of first and second degree murder, the verdict must be respected. The trial court abused its discretion to the extent that it independently ruled that Dawn committed first degree murder.

**B. The trial court abused its discretion by departing from the sentencing guidelines for second-degree murder based on facts established by a preponderance of the evidence when the jury found that those facts were not established beyond a reasonable doubt.**

In *People v Ewing*, 435 Mich 443; 458 NW2d 880 (1990), a majority of this Court held that a prior acquittal of a charge *other than the sentencing offense* could be considered by the sentencing judge. *Ewing* did not address the scenario in the present case, where the jury found that Dawn Dixon-Bey did not possess the premeditated intent required for a first degree murder conviction.

In *Ewing*, the defendant was convicted of first degree criminal sexual conduct. At sentencing, the trial court considered acquitted charges arising from a violent sexual assault alleged by one complainant and an additional alleged CSC case from another complainant which never resulted in charges being filed. In *Ewing*, four justices agreed that the sentencing judge was permitted to consider acquitted conduct when the facts were proven to the judge by a preponderance of the evidence. The majority held that a prior acquittal is not a sufficient reason to preclude the judge from taking those facts into account at sentencing, stating that "an acquittal does not necessarily mean that the defendant did not engage in criminal conduct."

*Ewing* is inapplicable to the present case. *Ewing* did not present a situation where the defendant was acquitted of a first degree CSC charge and convicted of a lesser crime. It involved two separate offenses. Further, criminal sexual conduct is a general intent crime, not a specific intent crime. *People v Russell*, 266 Mich App 307, 315; 703 NW2d 107, 114 (2005) (citing *People v Piper*, 223 Mich App 642, 567 NW2d 483 (1997)). While there are

reasons<sup>6</sup> why *Ewing's* "rule" regarding acquitted conduct should be reversed, unlike the present case, the judge would not be constrained by a statute similar to MCL 777.36

Appellant cites *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995) for the proposition that "the sentencing court did not abuse its discretion in considering acquitted conduct in departing upward." (Appellant's Supplement at \_\_\_) In *Shavers*, this Court did not mention the phrase "acquitted conduct." Instead, this Court adopted Judge Murphy's dissent, which stated that:

In my opinion, the court gave ample reasons for the guideline departure and for what the court considered to be an appropriate sentence in view of the fact that the victim was shot in the back five times, was unarmed and completely defenseless. This sentence, in my opinion, does not violate the principle of proportionality established in *Milbourn*.

Additionally, in my view, the court did not make an independent finding of defendant's guilt of first-degree murder by referring to his actions as cold-blooded, but, rather, the court considered the evidence admitted at trial as an aggravating factor in determining the appropriate sentence. *Shavers*, 448 Mich at 393.

In addition to the fact that there is no discussion of the extent to which the guidelines were considered, this Court stated that the trial court did not make an independent finding of defendant's guilt of first-degree murder. There was no consideration of acquitted conduct in *Shavers*.

Appellant relies on *United States v Watts*, 519 US 148; 117 SCt 633; 136 LEd2d 554 (1997) (per curiam), where the United States Supreme Court held that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge if proved by a preponderance of the evidence. Since *Watts* was decided federal circuit courts have held that the use of acquitted conduct at sentencing is constitutional. That being said, there are two problems with applying *Watts* to Michigan's sentencing scheme. First, *Watts* revolved around a challenge to the use of acquitted conduct under the Double Jeopardy Clause of the Fifth Amendment. It did not address the Sixth

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<sup>6</sup> Reasons for reversing *Ewing* are discussed beginning at page 24.

Amendment violation that this Court addressed in *Lockridge*.

Second, unlike Michigan, Congress has authorized federal courts to consider acquitted charges as relevant conduct under USSG § 1B1.3. As discussed above, the Michigan legislature has not authorized trial courts to consider acquitted conduct. As it pertains to Dawn's circumstance, the Legislature specifically precludes a trial judge from considering premeditated intent to murder with regard to a second degree murder conviction. This distinguishing factor was clarified in *Watts*:

The Commission in the past has considered whether the Guidelines should contain a specific exception to their ordinary "relevant conduct" rules that would instruct the sentencing judge not to base a sentence enhancement upon acquitted conduct. . . Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future. For this reason, I think it important to specify that, as far as today's decision is concerned, the power to accept or reject such a proposal remains in the Commission's hands. *Watts*, 519 US at

To the extent that this Court determines that *Ewing*, *Watts* and their progeny, permitted the trial court to base its sentence on the judge's determination that Dawn committed first degree murder, she urges this Court to overturn *Ewing* to the extent it permits consideration of acquitted conduct and leave the issue in the hands of the Legislature.

In her dissent in *People v Rose*, 485 Mich 1027, 1029; 776 NW2d 888(2010), Justice Marilyn J. Kelly provided sound reasoning for doing so. Justice Kelly wrote that:

In *United States v. White*, [551 F3d 381 (CA6, 2008) (en banc)] the Sixth Circuit, sitting en banc, divided 9–6 on whether the use during sentencing of facts underlying an acquittal constitutes a Sixth Amendment violation. The majority concluded that it does not, under *Booker*, as long as the resulting sentence does not exceed "the statutory ceiling set by the jury's verdict ...."

The dissenting opinion in *White* undertook a very different analysis, examining the common-law heritage of the use of acquitted conduct. The dissent observed that most states do not allow the use of acquitted conduct at sentencing. Moreover, the dissent noted that the American Law Institute and American Bar Association have joined the ranks of those formally opposed to the use of acquitted conduct at sentencing.

The *White* dissent also criticized the majority's 'simple and single-minded reliance on *Watts*' as dispositive of a Sixth Amendment claim. The dissent

acknowledged that the federal circuits are uniform on this issue. However, it noted that the *Booker* line of cases has cast doubt on whether *Watts* governs Sixth Amendment challenges to the use of acquitted conduct at sentencing. Moreover, increasingly, federal district and court of appeals judges have questioned whether the use of acquitted conduct is constitutional under the Sixth Amendment and the Due Process Clause. They have even questioned whether it is consistent with common sense. (footnotes omitted)

In *United States v Nelson*, \_\_\_ US \_\_\_, 137 S.Ct 1249; 197 LEd2d 611 (2017), the United States Supreme Court held that Colorado statutes violated due process by requiring defendants whose convictions have been reversed or vacated to prove their innocence by clear and convincing evidence in order to obtain the refund of costs, fees, and restitution paid pursuant to the invalid conviction. The convictions were the sole basis for assessments made against the defendants. In reaching its decision that the assessments were unconstitutional, the Supreme Court held that:

. . . once those convictions were erased, the presumption of their innocence was restored. See, e.g., *Johnson v. Mississippi*, 486 U.S. 578, 585, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (After a “conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge.”). “[A]xiomatic and elementary,” the presumption of innocence “lies at the foundation of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895). *Nelson*, 137 S.Ct 1241255-1256 (footnotes omitted)

*Nelson* provides one more basis for reversing *Ewing* to the extent that it has been employed to permit acquitted conduct to be used during sentencing. Because Dawn Dixon-Bey was acquitted of first degree murder, she is presumed innocent of that charge. The trial court’s decision in this case is antithetical to this foundational principle of criminal jurisprudence.

In *Steanhouse and Lockridge*, this Court affirmed that after the guidelines became advisory, the guidelines remain a highly relevant consideration at sentencing that must be consulted and taken into account. It was also recognized that the Michigan legislature incorporated the principle of proportionality into the guidelines. The trial court must also justify the sentence imposed in order to facilitate appellate review. In the present case, the trial court did none of this. The Court of Appeals opinion should be affirmed and this Court



should reverse or clarify *Ewing* to reflect that acquitted conduct may not be considered at sentencing.

**Relief Requested**

For the reasons set forth in this supplemental brief, Defendant-Appellee requests that this Court affirm the decision of the Court of Appeals and reverse and/or clarify the ruling in *Ewing* to reflect that acquitted conduct may not be considered at sentencing.

Respectfully submitted,

/s/Gary David Strauss P48673

**Proof of Service**

Gary D. Strauss, states that on July 30, 2018, he served a copy of Defendant-Appellee's Supplemental Brief and Proof of Service upon a representative of the Jackson County Prosecutor's office, via the True Filing System.

/s/Gary David Strauss