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State of Michigan
In the Supreme Court

People of the State of Michigan,
Plaintiff-Appellee,
v.
Joshua Lamar-James Stewart,
Defendant-Appellant.

SC No. 162497
COA No. 343755
Wayne CC. 16-005731-01-FC
Filed under AO 2019-6

Joshua Lamar-James Stewart's Supplemental Brief on Appeal

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Statement of Jurisdiction

Joshua Stewart was convicted by jury trial in the Wayne County Circuit Court and sentenced on December 2, 2016. A Claim of Appeal was filed on May 4, 2018 pursuant to Mr. Stewart's timely request for counsel. This Court has jurisdiction in this appeal of right. Const 1963, art 1, § 20; MCL 600.308(1); MCL 770.3; MCR 7.203(A); MCR 7.204(A)(2).

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Statement of the Questions Involved

I. Did the police coerce a confession out of eighteen-year-old Joshua Stewart by deceiving him, using racial slurs, bullying him, manipulating him based on his age and race, and promising him a lenient sentence if he confessed? Was Mr. Stewart's confession a product of these coercive tactics and is it inadmissible?

Mr. Stewart answers: Yes.
Court of Appeals answered: No.

II. Is the provision of MCL 769.34(10) requiring appellate courts to affirm within guideline sentences, whether they are reasonable or not, unconstitutional and inconsistent with *Lockridge*?

Mr. Stewart answers: Yes.
Court of Appeals made no answer.

III. Was Mr. Stewart's sentence of 23 to 46 years for armed robbery unreasonable and disproportionate?

Mr. Stewart answers: Yes.
Court of Appeals made no answer

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Issue Preservation and Standard of Review

Issue I is preserved and there is no preservation requirement for Issues II and III.

Constitutional questions are presented in all issues and this Court reviews them de novo. *People v LeBlanc*, 465 Mich 575, 579 (2002).

In Issue I, this Court will review the "trial court's determination of the voluntariness of inculpatory statements." *People v Shipley*, 256 Mich App 367, 372 (2003). This Court "must examine the entire record and make an independent determination, but will not disturb the trial court's factual findings absent clear error." *Id.* at 373. "A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made. . . However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses." *Id.* (cleaned up).

Here, no deference should be given to the trial court as the court did not make any credibility findings. The trial court did not hold a *Walker*[1] hearing on Mr. Stewart's motion to suppress, and the trial court's ruling was based solely on the pleadings. The DVD of the interrogation has been provided to this Court. This Court may review the video tape of the interrogation de novo and make its own findings without deference to the trial court. *People v Kavanaugh*, 320 Mich App 293, 298, (2017); *People v Kavanaugh*, 503 Mich 933 (2018).

[1] *Walker* hearings are afforded to those who file a motion to suppress their statements and challenge the voluntariness of those statements. *People v Walker,* 374 Mich 331 (1965).

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Statement of Facts

Joshua Stewart was 18 years old when he was arrested and investigated for a murder and two robberies. Mr. Stewart was arrested when police saw him at the hospital where he took Deontea White, who had been shot. Police believed that Mr. White (aka Prophet) and another man—not Mr. Stewart—committed the robberies and murder and alleged Mr. Stewart was the driver. During a three-hour interrogation that began at 3:40 in the morning, Mr. Stewart told police he was the driver, supplying the only evidence against himself.

A jury acquitted Mr. Stewart of murder but found him guilty of armed robbery and other offenses. His guidelines for armed robbery were 171 to 285 months. He was sentenced to 23 to 46 years for armed robbery.

This appeal challenges the nature of the interrogation and the disproportionate sentence.

Deontea White was identified as the shooter

Etoh Walker testified he was with his friend Aaron Foster at around 5:00 pm walking to a gas station in Detroit. (388a). A car with three men pulled up. Two men jumped out of the back seat of the car, each armed with a gun, and robbed them. Mr. Walker identified Deontea White as one of the men and testified that Mr. White fired several shots towards his feet and demanded his property. (392a). He gave Mr. White some cash from his pocket. (402a). He saw Mr. Foster give up some of his belongings. Mr. White and the second man walked back to the car, but once they got there, Mr. White turned and fired at Mr. Foster, hitting him in the back and killing him. (396-397a). When he was running to help Mr. Foster, Mr. Walker saw the two men get back into the car as it drove away. (398a). He described the car as a dark colored Intrepid. (399a).

Kyle Upshaw testified that at around 6:00 pm the same day, he was standing outside his house washing his car when a blue Intrepid rapidly drove up and stopped, and two men carrying guns got out. (456a). He

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identified one as Mr. White. The men demanded money, but Mr. Upshaw told them he did not have any. (457a). Mr. Upshaw heard shots fired, but he did not see who was shooting. (458a). He ducked down behind his car and began shooting at the men. (459a. Mr. Upshaw heard his brother, Daniel Claxton, calling from the house that he had been shot, and he ran into the house to help. Mr. Upshaw saw the car drive off. (460a). Mr. Upshaw drove his brother to the hospital for treatment.

Daniel Claxton, Mr. Upshaw's brother, was inside the house when he heard shouting from outside. (431a). When he looked outside, he saw two men with guns pointed at his brother. Mr. Claxton grabbed his own gun and started firing at the two men. (432a). He exchanged shots with a man he identified in court as Mr. White. (432a). He believed that some of his shots hit Mr. White. (433a-434a). He later identified a photo of Mr. White as the person who shot him.

Mr. Stewart was not identified

The only evidence police had against Mr. Stewart was that he was in the Dodge Intrepid at the hospital. They did not have any forensic evidence or eyewitnesses.

Neither Mr. Claxton, nor Mr. Walker, nor Mr. Upshaw identified Mr. Stewart as involved in the incidents. When Mr. Upshaw first talked to police, the only description he gave of the driver was that he was wearing a white shirt. (468a-479a). At the preliminary examination two months later, Mr. Upshaw did not identify Mr. Stewart as the driver. (466a). At trial four months later, he attempted to testify he saw the driver and that it was Mr. Stewart. (456-457a). But he eventually agreed he had not seen Mr. Stewart driving the car at the time of the incident and had only seen him later that day at the hospital near an Intrepid. (468a, 470a-471a, 477a). He admitted he had assumed Mr. Stewart was the driver of the car once he saw him with the Intrepid at the hospital. (478a).

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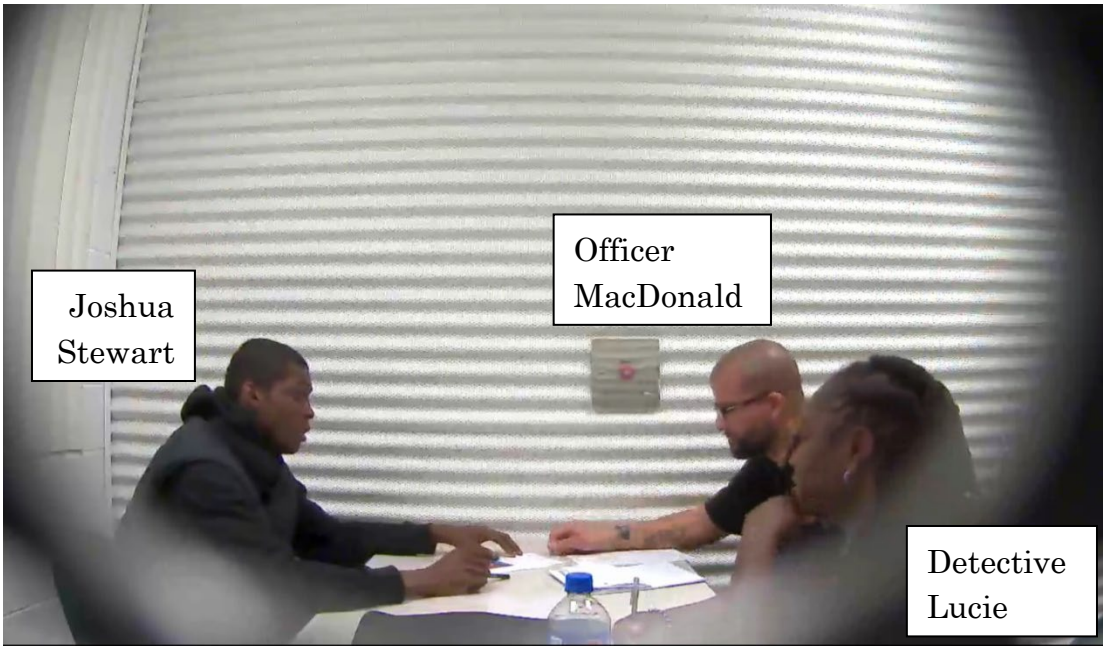
Mr. Stewart was arrested at the hospital

Sometime around 7:30 pm, police at the hospital were told that a blue Dodge Intrepid arrived with its rear window broken out and damaged with bullet holes. (492a-494a). Mr. Stewart was driving the car and he was arrested when the police learned the Intrepid was reported stolen. (496a). Mr. White was in the car, shot, and was taken into the hospital for treatment. (494-495a).

When he was first questioned, Mr. Stewart told the officers he had been walking along, had seen a man in a car who had been shot, and offered to drive him to the hospital. (495a).

Police interrogated Mr. Stewart for approximately three hours and employed escalating interrogation tactics

At approximately 3:40 am, two homicide detectives brought Mr. Stewart into a small interrogation room.



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Mr. Stewart told Officer MacDonald he could read and write and had last completed the 11th grade but had not finished 12th grade. (4a[2]). He had also just recovered from cancer treatment. (76a). He told the detectives he was attending Clintondale, an alternative school. The detectives asked no questions about his grades or reason for being in an alternative school placement. (4a).

The interrogation lasted for approximately three hours, concluding just before 8 o'clock in the morning. Throughout the interrogation, police tried a variety of tactics to get Mr. Stewart to talk:

- The police referred to his *Miranda* warnings and waiver, as "paperwork," and police never confirmed he understood them. (3a).

- The police lied to Mr. Stewart about why he was being interrogated, telling him it was only for a stolen car. (6a).

- The police threatened Mr. Stewart that they would "battle" if Mr. Stewart did not answer their questions. (33a).

- The police repeatedly taunted Mr. Stewart about not "manning up" to take responsibility for his actions. (82a). The police yelled at him to "man up," "fucking man the fuck up," "Be 18 and—and start being fucking responsible," and "You 18. Nigger, you got life ahead of you." (62a, 65a-66a, 82a, 96a). The police told him they "came to [him] as a fucking man. You 18. You considered a fucking man. Legally. But you don't fucking act like one. Gotta fucking start manning up to shit." (82a).

---

[2] The video recording of the interrogation was played to the jury and admitted as an exhibit, but it was not transcribed. (509a). On appeal, the parties stipulated to having the interrogation video transcribed by a certified court reporter to aid with the litigation of these issues. (1a-197a). The DVD of the interrogation has been provided to this Court and should be viewed in full for a de novo review.

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- Officer MacDonald called Mr. Stewart a "nigger" multiple times and used the racial epithet nearly 50 times throughout the course of the interrogation. (46a, 82a, 188a).

- The police lied to Mr. Stewart about video evidence they had against him: "my man house got a camera . . . I already know ya'll rode up," and "Like I said my man got video on the front of his house. So it's on video." (102a, 142a-144a). That was not true.

- The police lied to Mr. Stewart about there being witnesses against him: "I got [witnesses] saying you was there," (57a), telling him that "witnesses from the scenes told me," (129a) and "These mother fuckers telling me you was there." (102a). None of that was true.

- The police implored Mr. Stewart to tell them what happened and lied that "[Prophet] will testify in the court . . . that you the one killed dude," that "he's going to testify you is the murderer," and that "[h]e gone to have you looking stupid as fuck and you going to do 20 to life." (84a-85a, emphasis added)). The police had not yet spoken to Prophet.

- When Mr. Stewart asked how he could get "20 to life," the police linked it to him refusing to confess and replied, "Cause . . . you sit here not saying nothing." (84a-85a).

- The police told Mr. Stewart a story about a woman who was in a similar situation as him and who "was man enough" to confess and "she got two years." (109a). The police directly connected this to Mr. Stewart's situation, saying, "She said this is what I did. I'm responsible for this. And that's what she got. She got two years. That's why we's here talking to you. What was Joshua Stewart responsible for." (116a).

Immediately following that story, Mr. Stewart said he was "[J]ust driving." (116a).

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The police continued to lie to Mr. Stewart, telling him that the judge would not see his statement and that it would only go to the prosecutor and to his lawyer. (133a). Mr. Stewart repeatedly asked if he could call his mom, but the police did not let him. (153a-156a). Mr. Stewart relied on the assurance of a lesser sentence if he confessed, saying, "I ain't never did no time, feel me? Period. For my mamma though. Cause ya'll talking about 20 or 2. Who wouldn't take 2. Do you feel me?" (163a). The police lied about leniency again telling Mr. Stewart that he could come out a "winner" for confessing and that "if you truthful all the way through this yeah it's gonna turn out good for you." (163a-164a).

The trial court denied Mr. Stewart's motion to suppress without holding a *Walker*[3] *hearing*

Prior to trial, defense counsel filed a motion to suppress, arguing that Mr. Stewart's *Miranda* warnings were not given to him properly and Mr. Stewart did not knowingly and voluntarily waive his rights. (296a). Trial counsel argued the interrogation was coercive and the police lied and threatened Mr. Stewart to make a statement. (306a-307a).

In his response, the prosecutor said defense counsel did not cite to the interrogation video with specificity to support his claims. (316a-317a). The prosecutor, without himself citing to the interrogation video with specificity, argued Mr. Stewart's waiver and statement were voluntary. (319a-323a).

The trial court "recognize[d] that for purposes of a *Walker* Hearing that the People bear the burden" of proving Mr. Stewart's waiver and confession were voluntary. (327a-328a). But the trial court did not hold a *Walker* hearing. Based on the pleadings alone, the court found (1) the length of the interrogation was not significant (328a), and (2) "the reasonable interpretation of the Advice of Rights made by the officers in this case does in fact establish that the defendant was advised of his Constitutional rights." (328a-330a).

[3] *People v Walker*, 374 Mich 331 (1965).

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Without any assessment of the psychological impact the interrogation had on Mr. Stewart, the trial court summarily held that "looking at the totality of the circumstances, the duration of the interview, the representations made by the officers, I'm not persuaded that it is an involuntary statement." (332a).

Although the trial court acknowledged the interrogation video was part of the record, it is unclear whether the trial court watched the video before rendering its decision:

> *Mr. Polk (defense counsel):* Judge, for the record there has not been anything placed on the record other than the fact that I filed my motion. The People filed their response, and there was a three-hour video.
>
> Is that video a part of the Court's analysis?
>
> *The Court.* It is. The video, which is attached and is part of the prosecutor's response, and I think an attachment. It will be made part of the court file for any type of appellate review. [332a].

At trial, the entire three-hour interrogation video was played for the jury. (509a-510a, 534a). Specific colloquies from the interrogation that are the subject of this appeal are described in detail below.

Mr. Stewart was acquitted of murder and sentenced to 23 to 46 years in prison for armed robbery

Mr. Stewart and co-defendant Mr. White were tried jointly with separate juries. The third man that participated in the robberies with Mr. White was not apprehended, charged, or identified. Mr. Stewart was acquitted of the murder of Mr. Foster and of assault with intent to commit murder. (583a-584a). He was convicted of three counts of armed robbery, MCL 750.529, and other lesser charges. Mr. White was convicted of murder, as well as on the other counts, by his separate jury.

Mr. Stewart's guidelines were 171 to 285 months (14.5 to 23.75 years) for armed robbery. He was sentenced to 23 to 46 years for armed robbery and lesser terms for the other charges. (ST, 600a-601a).

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Arguments

I. The police coerced a confession out of eighteen-year-old Joshua Stewart by deceiving him, using racial slurs, bullying him, manipulating him based on his age and race, and promising him a lenient sentence if he confessed. Mr. Stewart's confession was a product of these coercive tactics and is inadmissible.

Mr. Stewart has a state and federal constitutional right to be free from compelled self-incrimination. Const 1963, art 1, §17; US Const, Ams V, XIV.

In *People v Conte,* 421 Mich 704 (1984), the Court considered five cases involving claims of involuntary confessions based on police promises of leniency. The Court granted leave in *Conte* to resolve the split from *People v Jones,* 416 Mich 354 (1982), in which the Court divided equally on the test that should be applied to determine the voluntariness of statements when a promise of leniency was involved. Three justices in *Jones* would have adopted a "per se" test to hold that a confession was involuntary and inadmissible when it was "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." *Jones,* 416 Mich at 408 (cleaned up). Three other justices in *Jones* would have adopted a "totality of circumstances" test that depended on "a careful scrutiny of all the surrounding circumstances." *Id.* at 413 (cleaned up), (Ryan, J., concurring).

In *Conte,* the Court split 4-3 in favor of the totality of circumstances test. 421 Mich at 754. This test requires the consideration of many factors including, but not limited to:

- Police conduct and behavior, including whether threats or promises of leniency were made by the police, or whether police engaged in physical or psychological harm
- The length and conditions of detention, including whether the suspect was deprived of sleep, food, or water
- The physical and mental state of the suspect, including his age, education, intellect, and prior experience with police

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- The advice of rights process and whether those procedures were adequate or reoccurring

Id. at 755 (cleaned up). See also *People v Shipley*, 256 Mich App 367, 373–74 (2003).

"If, after considering all relevant factors, the court concludes that the inducements offered did not overcome the defendant's ability to make a voluntary decision to make a statement, the statement(s) will be admissible." *Conte,* 416 Mich at 754.

The *Conte* Court noted that "[u]nder a strict per se approach any promise however slight is sufficient to vitiate a confession. Moreover, there is really no critical inquiry into causation for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." *Id.* at 728 (cleaned up).

In *Conte,* three justices wrote in favor of a test that combined elements of both a per se test and a totality of circumstances test to determine whether a confession was voluntary when a promise of leniency was made:

> We would hold that under Const.1963, art. 1, § 17, a statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible, if there was a promise of leniency and that promise caused the defendant to confess. In determining whether a promise of leniency exists, the relevant inquiry is whether the defendant reasonably understood the official's statements to be a promise of leniency. In determining whether that promise caused the defendant to confess, we will ask whether the promise was one relied upon by the defendant in making his decision to offer inculpatory statements, and whether it was one that prompted him in fact to give those statements. If the answer to all of the foregoing inquiries is affirmative, the defendant's statements are involuntary and inadmissible. If the answer to any of the questions is

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> negative, the defendant's statements are admissible. [*Id.* at 712].

The Court "relied "solely upon the Due Process and Self-Incrimination Clauses of the Michigan Constitution. Const. 1963, art. 1, § 17" to analyze the voluntariness of a confession that involved a promise of leniency. The Court recognized that the Michigan constitutional protections and the federal constitutional protections are "almost identical." *Id.* at 724.

There is one glaring difference. The Michigan Constitution provides additional protections:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. **The right of all individuals . . . to fair and just treatment in the course of . . . executive investigations and hearings shall not be infringed.** [Const. 1963, art. 1, § 17, emphasis added].

The bolded provision above is not found in the United States Constitution. US Const, Ams V, XIV. By its plain language, this provision provides Michigan citizens with additional protections against unfair treatment during executive investigations, which include police investigations.

This Court should adopt the combination test proposed in *Conte* to determine the voluntariness of a confession involving a promise of leniency by police: when police offer leniency and an individual is induced by that promise of leniency to make a statement, the statement is inadmissible in violation of one's due process right and the right against self-incrimination. *Conte,* 416 Mich at 712. It is fundamentally unfair and coercive for police to engage in fraud to obtain a statement from an individual in the interrogation room. "[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own

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mouth." *Jones*, 416 Mich at 359–60 quoting *Rogers v Richmond,* 365 US 534, 540-541 (1961) (cleaned up).

Any confession that is the product of fraud and deception is not voluntary and is not admissible as it violates an individual's right to due process and right against self-incrimination. Const. 1963, art. 1, § 17.

Mr. Stewart's confession is inadmissible whether this Court applies a per se test, a totality of circumstances test, or a combination of both. Since the totality of circumstances test carried the day in *Conte,* Mr. Stewart will analyze his claims under that test.

It is the prosecutor's burden to prove by a preponderance of the evidence that the statement was voluntary. *Lego v Twomey*, 404 US 477, 489 (1972); *Conte,* 421 Mich at 754-755.

A. Mr. Stewart was particularly vulnerable to psychological coercion given his young age and lack of education, both of which were known to police at the time of the interrogation.

Mr. Stewart's youth and lack of education are relevant to this Court's totality of the circumstances analysis. *Conte*, 416 Mich at 712; *Shipley,* 256 Mich App 367, 373–74.

At the time he was interrogated, Mr. Stewart was an 18-year-old African American who had not completed high school. He had also just recovered from cancer treatment. (76a). Mr. Stewart told this to police officers as soon as he was brought into the interrogation room at 3:40 am (4a). He told them that the name of his high school was "Clintondale" and that "[i]t's kinda like a little alternative." (4a). Mr. Stewart's Presentence Investigation Report confirms he last completed 10th grade and that he "attempted to secure a GED Certificate at Clintondale Continuing High School however he was unsuccessful."[4] The Clintondale school is "designed for students who can be better served in

[4] Confidential PSIR provided to court separately, page 1.

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an alternative system. Students served include those who have specific needs and are often at risk of not graduating."[5]

The police did not inquire into Mr. Stewart's reason for not completing high school, for attending an alternative school, or otherwise engage about his level of intellect. The police only confirmed that he could read and write. (4a).

As an 18-year-old, Mr. Stewart is not considered a "child" or "juvenile" for purposes of this legal analysis. See, e.g., *In re Gault,* 387 US 1, 45 (1967) and *Haley v Ohio,* 332 US 596, 600-601 (1948) (affording children under 17-years-old special scrutiny when it comes to waiver of *Miranda* rights and voluntariness of statements). But, the same reasoning that has led the United States Supreme Court to recognize the need to give higher scrutiny to children 17 and under in interrogation settings applies to 18-year-olds.

Eighteen-year-olds react to police pressure similarly to those 17 and under. As pointed out by Justice Alito in his dissent in *JDB v North Carolina*, "[m]ost juveniles who are subjected to police interrogation are teenagers nearing the age of majority. These defendants' reactions to police pressure are unlikely to be much different from the reaction of a typical 18–year–old in similar circumstances." 564 US 261, 296 (2011) (Alito, J., dissenting, cleaned up). Research demonstrates that, like their younger counterparts, individuals ages 18 to 25 are more susceptible than older adults to pressure from peers, adults, and elders. Gardner & Steinberg, *Peer Influence and Risk Taking, Risk Preference, and Risky Decision Making*, 41 Dev Psychol 625 (2005); Knoll et al., *Age-related Differences in Social Influence on Risk Perception Depend on the Direction of Influence*, 60 J Adolesc 53 (2017); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 Cornell JL & Pub Pol'y 395, 405 (2013).

A young person's cognitive ability and their maturity of judgment are different things. Feld, *Behind Closed Doors* at 405. Cognitive ability

[5] Located at <https://www.clintondaleschools.net/enroll-today/continuing-education-center> (accessed 6/29/22).

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controls the ability to distinguish right from wrong, and most young people can do so just as well as adults. *Id.*

On the other hand, maturity of judgment involves "risk assessment, temporal orientation, capacity for self-regulation, and susceptibility to external influences." *Id.* (cleaned up). This bears on ones "susceptibility to coercive pressures." *Id.* "While most youths sixteen years of age or older exhibit cognitive abilities comparable with adults, they do not develop mature judgment and adult-like competence to make decisions until their twenties." *Id.* (cleaned up); See also Drizin and Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 945 (2004) (studying 125 proven false confessions in the United States and concluding both that 63% of false confessors were under the age of 25 and that 32% were under the age of 18.).

The police here knew what we all know—young people are susceptible to adult and authoritative pressures, especially in an interrogation room, at a higher rate than older adults. Feld, *Behind Closed Doors* at 404. The police knew Mr. Stewart was young. They told him, "You 18 fucking years old. I got a fucking daughter older than you. . . I'm not trying to send kids to prison." (94a). Yet, they consistently played on his young age throughout the interrogation, telling him to "man up" and "we came to you as a fucking man. You 18. You considered a fucking man. Legally. But you don't fucking act like one." (82a). This was manipulative and it would have near impossible for Mr. Stewart to realize that.

Mr. Stewart's ability to make the complex and mature judgment of whether to implicate himself to police was impaired by his young age, combined with his lack of education and the pressure of the adult police officers. The police knew this, and they used his age and vulnerabilities against him to increase his already high susceptibility to coercive interrogation techniques.

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B. The police used psychologically coercive interrogation tactics against Mr. Stewart, including deception, using racial slurs, bullying, manipulation, and promises of leniency.

"Whether a statement is voluntary is determined by examining the conduct of the police. *People v. Howard*, 226 Mich. App. 528, 538 (1997)." *Shipley*, 256 Mich App at 373. The voluntariness of a statement is undermined when the police use threats or promises of leniency during an interrogation. *Conte,* 421 Mich at 729.

The right to be free from compelled self-incrimination means that a confession must be "free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" *Brady v United States*, 397 US 742, 753 (1970) quoting *Bram v United States*, 168 US 532, 542-543 (1897). A confession is voluntary when it is "the product of an essentially free and unconstrained choice by its maker." *Schneckloth v Bustamonte*, 412 US 218, 225-226 (1973) (cleaned up).

Mr. Stewart's right to be free from self-incrimination is based "on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v New York*, 360 US 315, 320–21 (1959).

Mr. Stewart's confession was the result of psychologically coercive police tactics and was involuntary in violation of his constitutional rights.

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i. The advice of rights procedure was flawed because police trivialized the Miranda *waiver and did not confirm that Mr. Stewart understood his rights.*

The adequacy and frequency of the advice of rights process is a relevant factor under a totality of the circumstances analysis when examining the voluntariness of a statement. *Conte*, 421 Mich at 754–55.

Here, the advice of rights process was flawed. The first piece of deception occurred when Mr. Stewart was advised of his *Miranda* rights. The police called Mr. Stewart's *Miranda* warnings "paperwork," which is an effective technique designed to trivialize the significance of the *Miranda* rights and to induce a waiver. (3a); Powell, *Do You Understand Your Rights As I Have Read Them To You? Understanding The Warnings Fifty Years Post Miranda*, 43 N Ky L Rev 435, 447-48 (2016). Police characterize the *Miranda* warnings as "an administrative formality to complete before the suspect can talk. They sometimes referred to it as 'paperwork' to emphasize its bureaucratic quality. A waiver form provides a vehicle to convert *Miranda* into a bureaucratic exercise." Goldstein, et. al., *Waving Good-Bye to Waiver,* NYU Journal of Legislation and Public Policy, Vol. 21:1, p. 37 (2018). This is done to "trivialize the legal significance of *Miranda* rights to be the 'equivalent to other standardized bureaucratic forms that one signs without reading or giving much thought' and to 'communicate that the interrogator expects the suspect ... to execute the waiver and respond to subsequent questioning.'" Powell, *Do you Understand Your Rights* at 447-448. Here, the police treated the signing of the form as a foregone conclusion and merely as insignificant paperwork that had to be taken care of before they talked.

Further, the police made Mr. Stewart read his *Miranda* warnings aloud from a written form. But, our courts have expressed preference that the police give suspects an oral recitation of their rights: "An effective waiver of *Miranda* rights does not require an oral recitation. Although it is not generally encouraged, a written advice-of-rights form may be sufficient. . . The use of a written form becomes more palatable in a case involving a defendant who is hearing-impaired." *People v Brannon*, 194 Mich App 121, 130 (1992) citing *People v Nantelle*, 130 Mich App 51, 52–53 (1992). Mr. Stewart was not hearing-impaired.

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When Mr. Stewart read the form aloud, it was apparent he was confused and may not have understood what he was reading. Mr. Stewart pronounced "present" as a verb (defined as to give someone something) rather than an adjective (defined as to appear in attendance some place), changing the meaning of having a right to have a "lawyer present." (5a; DVD at 3:38). Mr. Stewart also expressed confusion about the part of the form that required entry of the interrogating officer's name, thinking that his own name might go in that spot: "I am now desiring and agree to answer any questions to put me or to make any statement in the presence of – this supposed to be my name?" [6a; See DVD at 3:38:58 - 3:39:47]. Officer MacDonald told him to sign the form, and he did.

"[A]pproximately ninety-four percent of youth ages twelve to nineteen demonstrated less than adequate appreciation of the significance and consequences of waiving their rights. They had the greatest difficulty understanding the implications of waiving the right to silence, with ninety-nine percent demonstrating less than adequate appreciation." Goldstein, *Waving Good-Bye* at 31-32. Mr. Stewart similarly did not demonstrate an understanding of the waiver. He read the form, initialed the form, and signed the form because the officer told him to. This procedure was inadequate.

ii. The police exploited Mr. Stewart's youth and race against him, telling him, "You considered a fucking man. Legally. But you don't fucking act like one" and calling him a "Nigger."

Police conduct and behavior, including whether police engaged in physical or psychological harm is a relevant consideration under a totality of the circumstances test. *Conte,* 421 Mich at 754-755. The length and condition of the interrogation is also a relevant factor. *Id.*

Here, police created a psychologically harmful and threatening atmosphere during the three-hour interrogation. It is worth nothing that young people have a distorted sense of time, especially in the interrogation setting. Cleary, Hayley, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations*: New

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Directions for Research, Policy, and Practice, 23 Psych, Pub Policy, and L 118, at 121 (2017). Even a relatively short interrogation may be perceived as endless for an adolescent. *Id.*

What is worse is that the police made this atmosphere more intense by using his age and race against him. Again and again, the police yelled at Mr. Stewart to "man up to some shit," (65a-66a), "[b]e 18," (66a), and "[f]ucking man the fuck up." (96a). They berated him for not "manning up," (62a) telling him, "we came to you man to man" (89a) and "I come at your ass straight up man to man and we have this talk." (130a). The police repeatedly and intentionally told him he was not acting like a man by not talking to them:

> *Officer MacDonald:* I mean you sit here -- this what you doing. You sitting here -- **instead of sit here manning up and be like hey this is what happened.** That wasn't supposed to happen. I didn't know that was going to happen. Instead you sitting here saying I stumbled across the mother fucking car with somebody shot in it and low and behold it's a dude I fucking know so I took his ass to the hospital instead of calling the police cause I don't know what the fuck going on. [62a].
>
> * * *
>
> *Officer MacDonald:* So, Josh your gun you found. Listen, listen, listen. You found your gun. **Let me tell you how you not – how you not manning up – how you not taking on responsibilities.** You found the gun. Right? Now you found the mother fucking car shot up? You see what I'm saying? You ain't taking responsible for shit. All you doing is pushing that shit off. Deflecting it. I found that gun. And it wasn't loaded. So that really don't mean nothing. Today I was walking down the street and I found my boy shot up. You always finding shit. When you going to take responsibility for some shit like yeah, that was me. I was carrying that pistol straight up? Not I found this bitch and it was unloaded. [65-66a].
>
> * * *

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> *Officer MacDonald:* **Man up to some shit.** Be 18 and -- and start being fucking responsible. [66a].
>
> * * *
>
> *Officer MacDonald:* You got the opportunity to sit here and fucking be like 'this what the fuck happened. This is what happened. I didn't know it -- whatever. I didn't know it was going to happen. I didn't want it to happen. It wasn't supposed to happen.' That's your opportunity . . . **It's your fucking decision. But we came to you as a fucking man. You 18. You considered a fucking man. Legally. But you don't fucking act like one. Gotta fucking start manning up to shit.** Shit happens, Bro. That's the way mother fucking life is. That's how you going to handle that shit and do with the opportunities that come before you to correct the mistakes -- the mistakes that was made that put you in this fucking situation. **That's what you need to do. You 18. Nigger, you got life ahead of you.** [82a].
>
> * * *
>
> *Detective Lucie:* **Can we agree that you told us a false story? Can we at least agree on that? That you made that up? You can't even -- you won't even man up to that portion of it? That you fed us a little bit of bullshit?** [97a].

The officers intentionally used Mr. Stewart's age to bully him into believing he was not worthy of respect as a man unless he confessed. All the while, the police knew that he was just a kid:

> *Officer MacDonald:* I'm not sitting here trying to send you to prison for the rest of your life. You 18 fucking years old. I got a fucking daughter older than you. I got a fucking grandson on the way. I'm not trying to send kids to prison. I'm trying to find out the truth of what happened. [94a].

The aging up and adultification of Black youth is nothing new. Research confirms that Black children and youth are more likely to be

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treated as adults than white children and youth. Goff, Phillip A., et. Al, *The Essence of Innocence: Consequences of Dehumanizing Black Children,* Journal of Personality and Social Psychology, 2014, Vol. 106, No. 4, 526-545. One explanation for this is the concept of dehumanization. Dehumanization allows one to afford less protection to a certain class of people due to the characteristics and perceptions that strip them of their humanity. *Id.* at 527. Within the criminal legal system, one way we dehumanize is by treating children and adolescents as adults, thereby affording them less protections.

One study found that "for every age group after the age of 9 (i.e., 10-13 through 22-25), Black children and adults were rated as significantly less innocent than white children and adults or children and adults generally." *Id.* at 529. Participants, including police officers, rated the age of Black felony suspects as older than white and Latino felony suspects and rated Blacks as more culpable than Latinos and whites. *Id.* at 531-534. The study predicted that the aging up of Black youth increased the likelihood that police would use force against that individual. *Id.* at 536. It is not a stretch to believe this would also increase the likelihood that police would use coercive interrogation techniques.

Another way to dehumanize an African American in the criminal legal system is to call them a "nigger," as Officer MacDonald did here. Mr. Stewart was subjected to extreme racism during the interrogation. Officer MacDonald told Mr. Stewart during one part of the interrogation that Officer MacDonald was Black: "Mother fucker, we black. I ain't white." (95a). He proceeded to call Mr. Stewart a "nigger" on multiple occasions and used the word throughout the interview nearly 50 times (188a):

> *Officer MacDonald:* You know what else is dumb sitting here telling me this bullshit ass story you telling me. **Nigger, you had a better off chance stumbling across a mother fucking gold before you stumbled across a mother fucking car that's shot the fuck up.** That shit just don't happen. [46a].

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* * *

Mr. Stewart: You 18. **Nigger**, you got life ahead of you. But you throwing that shit away. [82a].

* * *

Officer MacDonald: That's—that's the **nigger** way. [97a].

* * *

Officer MacDonald: That's what I want you to go to court to do. This was what I did. This is what Joshua Stewart is responsible for. Fuck these **niggers**. [114a].

* * *

Officer MacDonald: That's what I'm saying. How'd ya'll **niggers** get in the car? [135a].

Whether Officer MacDonald is white or Black makes no difference. Even if Mr. Stewart and Officer MacDonald were the same race, the conduct was racist and dehumanizing.

"Nigger" is "perhaps the most offensive and inflammatory racial slur in English." Gregory S. Parks & Shayne E. Jones, *"Nigger": A Critical Race Realist Analysis of The N-Word Within Hate Crimes Law*, 98 J Crim L & Criminology 1305, 1316 (2008) citing Merriam-Webster's Collegiate Dictionary 837 (11th ed. 2003).

The use of the word is an act of violence. It is one of the most violent racial epithets one could use against an African American. The use of the word has no place in an interrogation room, and interrogating officers should not be permitted to ever call an African American suspect a "nigger." This alone violates Mr. Stewart's right "to fair and just treatment in the course of . . . executive investigations. Const. 1963, art. 1, § 17. The power dynamic in the interrogation room is already skewed in a way in which the police have all the power, all the authority, all the control, and all the information. Here, the use of the word, at times

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toward Mr. Stewart, increased the hostile atmosphere and psychologically coercive nature of the interrogation room.

iii. The police intentionally lied to Mr. Stewart about the purpose of the interrogation and about the evidence they had against him when they had none.

The psychologically coercive technique of lying to suspects about the purpose of the interrogation and the evidence against them is common and effective. It is also currently legal in Michigan.

But at least some states are beginning to recognize the insurmountable tension between a voluntary statement and one that is given based on police deceit. See 705 Ill. Comp. Stat. Ann. 405/5-401.6, 725 Ill. Comp. Stat. Ann. 5/103-2.2, and Utah Code Ann 80-6-206 (forbidding police from lying to minors or promising leniency during interrogations) and Or Rev Stat Ann 133.403 (creating rebuttable presumption that custodial statement made by minor is involuntary if officer intentionally used false information to elicit statement.)

The ability of the police to be deceitful during an interrogation is not absolute. The nature and frequency of the deceit are relevant under a totality of the circumstances analysis when examining the voluntariness of a statement. *Conte*, 421 Mich at 754–55.

After Mr. Stewart read his *Miranda* rights aloud, but before he signed the form waiving them away, he asked what the charges were. Officer MacDonald lied and told him "I'm going to talk to you about the—the stolen car." (6a). After waiving his rights, Mr. Stewart still did not want to talk. And right away, the police threatened Mr. Stewart with "battle" for refusing to answer their questions:

> *Detective Lucie:* After the Family Dollar where were you going to go?
>
> *Mr. Stewart:* Smoke.
>
> *Detective Lucie:* With who?

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> *Mr. Stewart:* What you mean with who?
> Myself. I'm smoke by myself.
>
> *Detective Lucie:* You trying to get smart with me?
>
> *Mr. Stewart:* No.
>
> *Detective Lucie:* **Cause you don't want to battle.**
>
> *Mr. Stewart:* No. There ain't no battle or none of that.
>
> *Detective Lucie:* This your life.
>
> *Mr. Stewart:* Right.
>
> ***Detective Lucie:*** **If I ask you who the fuck you was smoking with you tell me.**
>
> *Mr. Stewart:* And I'm saying myself. I said I was going to smoke by myself.
>
> *Detective Lucie:* But you didn't. [33a].

It was only Mr. Stewart's guess as to what the officers meant by "battle," and it was in his best interest not to find out. This was also a clear indication that he really did not have the right to stop answering questions at any time, something he was told was his right during the waiver process. (6a).

Police continued to lie throughout the course of the interrogation, especially about the evidence they had against Mr. Stewart, when in fact they had none. Police even lied when they assured Mr. Stewart they had not lied to him: "I ain't bluffed you all day." (89a).

Repeatedly, Officer MacDonald told Mr. Stewart that they had the offense on camera and that, ironically, Mr. Stewart needed to stop lying:

> *Officer MacDonald:* Cause my man house got a camera pointing right at the street. I already know he was sitting in his car. I already know ya'll rode up. [142a].

* * *

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> *Officer MacDonald:* Like I said my man got video on the front of his house. So, it's on video. [143a].
>
> * * *
>
> *Officer MacDonald:* My man got a camera pointing right at the – right at the front of his house. Where he parked at. So now that's on video. Like I told you. They some things that you just can't lie about. Like I told you. Your phone's going to put you there. Shit you can't lie about. When you on video you can't say 'aw, that ain't me. That nigger look like me but that ain't me. [144a].

The police also lied to Mr. Stewart about there being witnesses against him: "I got [witnesses] saying you was there," (57a) and telling him that "witnesses from the scenes told me," (129a), and that the police knew Mr. Stewart was there:

> *Mr. Stewart:* You said ya'll know who did it. How—
>
> *Officer MacDonald:* That mean you was there. These mother fuckers telling me you was there.
>
> *Mr. Stewart:* Who?
>
> *Officer MacDonald:* Witnesses. Do you know what witnesses are, Bro?
>
> *Mr. Stewart:* What . . . is going to point me –point and say I was there?
>
> *Officer MacDonald:* Listen, Man –I'm done with you, Bro. [102a].

None of that was true.

And the police led Mr. Stewart to believe that "Prophet" would testify against him in court: "he will testify in the court . . . that you the one killed dude." (84a). They told Mr. Stewart that "he's going to testify you is the murderer," and that "[h]e gone to have you looking stupid as fuck and you going to do 20 to life." (84a-85a). This was not true.

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The police made their first false promise of leniency when they directly tied the threat of a "20 to life" sentence to Mr. Stewart's silence:

> *Mr. Stewart*: Why I'm going to do 20 to life?
>
> *Detective Lucie:* Cause you're involved.
>
> *Officer MacDonald:* **Cause what are you doing? You sit here not saying nothing.** [84a-85a].

This is an explicit assurance to Mr. Stewart that if he does not confess, he will get 20 to life.

The police had no evidence against Mr. Stewart, making them desperate for a confession. No one had a camera, there was no video footage of the incident, there were no witnesses against Mr. Stewart, and no one had come forward to pin the murder him. All of that was a lie. And although the bullying, manipulation, and lies began to break Mr. Stewart down, Mr. Stewart was still not talking.

The police escalated their tactics and doubled down on their assurance that Mr. Stewart would receive a lengthy sentence if he did not confess and a short sentence if he did.

iv. After Mr. Stewart withstood various coercive interrogation techniques for two hours without making a statement, the police gave him an assurance that he was likely to serve two years if he confessed and "20 to life" if he did not.

"An officer may suggest broadly that it would be better for a suspect to tell the truth, may indicate that the person's cooperation would be brought to the attention of the public officials or others involved, or may state in general terms that cooperation has been considered favorably by the courts in the past." *Jones,* 416 Mich at 360–361, n 3, (cleaned up). But police are prohibited from making "an assurance, express or implied, that it will aid the defense or result in a lesser sentence" if a suspect confesses. *Id.*

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That is what was explicitly done here. After two hours of employing psychologically coercive interrogation techniques to no avail, Officer MacDonald became desperate. He told Mr. Stewart about a woman who confessed to him and only got a two-year sentence. This woman, according to Officer MacDonald, was a driver in a car that was involved in a murder—just as they alleged Mr. Stewart was:

> *Officer MacDonald:* I just got done doing a homicide trial, Man? This mother fucker shot two people with his sister in the car. And she was scared to leave. You know what this mother fucker did? Point the gun at her and told her drive the fuck off because he didn't give a fuck about her. And when she got locked up I talked to her. She did the same shit you did. 'Man, I don't got nothing to say. I'm protect my brother.' Two weeks later you know what she did? 'Hey, MacDonald, Man, I want to talk to you.' Fuck that. I ain't let this mother fucker decide my fate. This mother fucker got found guilty of murder. You know what she got, Bro? Mother fucking two years. Because she decided her own mother fucking fate. If she'd went into that courtroom with the same attitude you got you know what happen to her? She get found guilty of murder. And then she'd been gone forever. **But instead she took her own fate in her own hands and she got two years. But she wasn't no letting no brother fucking intimidate her and fucking go to prison for life.**
>
> *Mr. Stewart:* Oh, god.
>
> *Officer MacDonald:* And she didn't pull the fucking trigger.
>
> *Mr. Stewart:* I –
>
> *Officer MacDonald:* But she was man enough to fucking stand up to her fucking brother and be like fuck you. I ain't letting you scare me. I ain't letting you bully me. I'm not letting you decide my mother fucking fate. And she faced his ass in court. Face-to-face. And was like the shit you did

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you didn't have to do. You didn't have to kill them two boys. So, I'm not going down with your dumb ass. That's what she did. And she a fucking a 20-year-old female with two kids.

Mr. Stewart: In jail.

Officer MacDonald: She doing two years. Soon as you do two years her record is clean. [108a-109a].

The officers went on to demand that Mr. Stewart tell them what he did, encouraging him to take his fate into his own hands and to confess. (111a). At this point, Mr. Stewart still believed he was being interrogated for being in possession of a stolen car:

Mr. Stewart: Right. So, I'm in here for a stolen car though, Man.

Detective Lucie: · You think that?

Mr. Stewart: I'm here for murder? That's what I'm in here for?

Detective Lucie: ·I'm a police officer that works for the homicide -- homicide section. Yes. Exactly what I do.

Officer MacDonald: Well that's the game of murder, Man.

Detective Lucie: · Period. Fuck that stolen car. That stolen car ain't shit. But what's fucked up is that the person that got murdered, the car you drove to the hospital -- his shit is in the car. Dummy. And you didn't even know it, huh? Well, who was in possession of the car? Possession is how many tenths of the law? You ever heard that? Possession is 9 tenths of the law? You in possession of a car that was at a murder scene, with the murdered persons property in it. That's what you did today. Keep playing.

Officer MacDonald: You still gone let Prophet control your fate?

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Mr. Stewart: I'm not letting him control my fate. [113a].

The police continued to demand he tell them what he did and Mr. Stewart said "Driving there," and then he said, "Ya'll talking bout two, three years." (115a). Even Officer MacDonald knew at that point that he had to backtrack the promise of leniency:

> *Officer MacDonald:* You want two years or – I mean – I'm not saying you getting two years. I just gave you an example of what happened.
>
> *Detective Lucie:* That's the business.
>
> *Officer MacDonald*: I gave an example of what somebody did by taking their own path. By taking their own life in their own hands and that was her outcome. [115a].

* * *

And immediately after backtracking, Officer MacDonald doubled down on the promise and again connected the lenient sentence to Mr. Stewart making a statement:

> *Officer MacDonald:* A'ight? I'm trying to give you an example of what somebody -- what happened when somebody took their own life in their own -- and put it in their hands. They took their control instead of letting somebody bully them or being scared of somebody and let that person control their life. Cause if she'd let that person control her life she'd have got that. But she took her own control and she got this. Because she told her -- what she was responsible for. This was what I did. That's what she testified to. This is what I did. She didn't sit there and shut the fuck up. **She said this is what I did. I'm responsible for this. And that's what she got. She got two years. That's why we's here talking to you.** What was Joshua Stewart responsible for." [116a].

Immediately after hearing this, Mr. Stewart said: "Just driving." (116a). Even after telling police he was the driver, it was still apparent

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Mr. Stewart did not want to talk to police. The police continued to lie to Mr. Stewart, telling him that the judge would not see his statement and that it would only go to the prosecutor and to his lawyer. (133a). He did not answer any open-ended questions, so the police told Mr. Stewart what they thought happened and Mr. Stewart responded mostly with "no" and "yeah." (145a-153a).

The police knew Mr. Stewart wanted to talk to his mom and they guilt tripped him about the impact that would have on her. Mr. Stewart asked, "Can I call my Mama?" but the police would not let him. (153a). The police asked how old his mom was and Mr. Stewart told them she was 55. The police responded, "And you really want to put a 55 year old lady through this?" (153a). This was manipulative. There is nothing significant about being 55 years old, but the police again took advantage of Mr. Stewart being 18 years old to imply that his mom was so old that she could not handle bad news. The police did not let him call his mom and they continued the interrogation. Mr. Stewart again asks, "Can I just call my mama real quick?" (156a). The police said they will let him talk to her, but they do not; they continued the interrogation.

There is no doubt that Mr. Stewart relied on the officer's assertion that he would get two years for taking responsibility and making a statement:

> *Mr. Stewart:* I ain't never did no time, feel me? Period. **For my mamma though. Cause ya'll talking about 20 or 2. Who wouldn't take 2. Do you feel me?**
>
> *Detective Lucie:* Well, we're not saying –
>
> *Mr. Stewart:* Hell.
>
> *Officer MacDonald:* We're not the judge and we're not the jury. We don't – we don't hand down sentencing. All we do is investigate the crime. **But over the years we've seen that we've been explaining how someone does the right thing they come out winning.** It's the people that's—
>
> *Mr. Stewart:* So I should come out a winner.

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Detective Lucie: You can be. [163a].

The police go on to tell Mr. Stewart that they believe he knows more than he is telling them. They then promise him that "if you truthful all the way through this yeah it's gonna turn out good for you." (164a). Mr. Stewart asks, "Who else gonna want the truth?" (164a). The police tell him that the prosecutor wants the truth. Mr. Stewart still does not understand the process and expresses confusion about whether he would be forced to testify and whether the police needed him to be truthful to the prosecutor or to his own defense attorney. (165a-168a). Mr. Stewart asked "what's next" since he provided them with a statement, and the police replied that they have "48 hours to present something to the prosecutor. If we don't have nothing presented to the prosecutor in 48 hours you up out of here." (169a). The interrogation ended with Mr. Stewart asking once again if he could call his mom. (172a).

After interrogating Mr. Stewart for two hours beginning at 3:40 in the morning, and getting nothing, the police shifted the subject to murder and told him a story about how he could get two years. This was a promise of leniency: people who confess get short sentences and do not go to prison for 20 years. But Mr. Stewart did not "come out a winner" for doing "the right thing" by talking to police. (163a). Mr. Stewart never had a chance of serving two years by talking to police. And things did not work out for Mr. Stewart as they did for the woman in Officer MacDonald's story.

C. Mr. Stewart's statement was involuntary and inadmissible because it was the product of a psychologically coercive interrogation.

The totality of the circumstances shows that Mr. Stewart's statement was not voluntary due to the coercive nature of the interrogation. Mr. Stewart could read and write, and he waived his *Miranda* rights. But, the police called his *Miranda* warnings "paperwork" and trivialized their significance. There was some indication Mr. Stewart was confused during the waiver process, and the police never confirmed that he understood. Even after signing the waiver, he did not talk to police.

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Mr. Stewart was a teenager, had never graduated from high school, was in an alternative school, and had just recovered from cancer. Although he did not have a mental illness or severe intellectual deficiency, he was still quite vulnerable and easily susceptible. The police used his youth against him and taunted him about not being a man and taking responsibility for his actions.

Mr. Stewart was under arrest and not free to leave. He was interrogated at 3:40 in the morning after having been arrested the day before. He did not initiate the interrogation. He had not been allowed to speak to his mother or anyone.

The police lied to him about why he was there, telling him he was being questioned about a stolen car when he was really being questioned about a murder.

Mr. Stewart was interrogated for three hours straight, without a break, while the police yelled at him, bullied him, intimidated him, and used a violent racial epithet, repeatedly calling him a "nigger" and using the word nearly 50 times. Three hours for a teenager under these circumstances is an endless amount of time.

The police did not physically harm Mr. Stewart, but they did physically threaten him. They told him they thought he was a man and would treat him like a man. They told him that if he did not answer their questions, they would "battle." (33a).

The police lied to him about evidence they said they had against him, including video evidence, witnesses, and a person who would testify that he was the shooter. They had no evidence against Mr. Stewart and were desperate for him to confess.

When Mr. Stewart withstood the psychologically coercive interrogation for nearly two hours, police upped the ante. They told him he could come out a winner if he confessed and that he could get two years instead of 20 to life, just as another woman in his exact circumstances had done.

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The police fed him information and required him to answer yes or no to their version of the events. The police refused to let him call his mom. The police implied he might be able to go home, which they knew was a lie. The police told him that his statement would not be viewed by a judge, which was also a lie.

The atmosphere of the interrogation caused Mr. Stewart a great deal of stress. Throughout the interrogation, Mr. Stewart twice expressed suicidal ideation, telling the police: "I don't even want to be living no more." (110a). And "I'm going to kill myself, Dog." (156a). The coercive interrogation tactics worked. The high stress of the interrogation was distressing to Mr. Stewart and incentivized him to confess as a means of ending the interrogation.

In *Miranda,* the Court held that "the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda*, 384 US at 476. "In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." *Id.*

That reasoning applies here and supports a finding that Mr. Stewart's statement was involuntary. After nearly three hours of intensely coercive tactics by police, and immediately following a promise of leniency for confessing, Mr. Stewart told detectives that he was the driver of the car. (115a).

A totality of the circumstances test results in a finding that Mr. Stewart's statement is involuntary and inadmissible. Even so, this Court should instead adopt the rule proposed in *Conte,* 416 Mich at 712*:* "a statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible if there was a promise of leniency and that promise caused the defendant to confess":

> In determining whether a promise of leniency exists, the relevant inquiry is whether the defendant reasonably understood the official's statements to be a promise of

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> leniency. In determining whether that promise caused the defendant to confess, we will ask whether the promise was one relied upon by the defendant in making his decision to offer inculpatory statements, and whether it was one that prompted him in fact to give those statements. If the answer to all of the foregoing inquiries is affirmative, the defendant's statements are involuntary and inadmissible. If the answer to any of the questions is negative, the defendant's statements are admissible. [*Id.*].

This rule is necessary to ensure fundamental fairness, to deter police misconduct, and to protect vulnerable populations from police conduct that can, in certain cases, lead to false confessions. Mr. Stewart was subjected to an interrogation that no person should ever have to endure. The Michigan Constitution prohibits an interrogation setting like the one Mr. Stewart experienced. Const. 1963, art. 1, § 17.

Mr. Stewart's confession supplied the only evidence the police had against him. It was obtained illegally in violation of his state and federal rights against self-incrimination. His statement is inadmissible and he is entitled to a new trial.

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II. The provision of MCL 769.34(10) requiring appellate courts to affirm within guideline sentences, whether they are reasonable or not, is unconstitutional and inconsistent with *Lockridge*.

The provision of MCL 769.34(10) requiring appellate courts to affirm within guideline sentences must be struck down. First, this provision violates the Sixth Amendment as it is a feature of a mandatory—not advisory—sentencing guideline scheme. *People v Lockridge*, 498 Mich 358 (2015). Second, certain unique features of Michigan's sentencing guideline scheme provide no reassurance that the guideline ranges provide a proportionate sentencing option. Third, MCL 769.34(10) violates due process, the right to appeal, and the separation of powers doctrine. MCL 769.34(10) acts as an improper amendment to Article 1, § 20 of Michigan's Constitution by limiting the right to appeal a sentencing outcome, which is part and parcel of an appeal. Such a limitation must be done by constitutional amendment, not by statute.

A. MCL 769.34(10) is a feature that cannot exist in an advisory system and violates the Sixth Amendment and the remedy intended by *Lockridge*.

In *People v Lockridge*, 498 Mich 358 (2015), this Court declared that Michigan's legislative guidelines were no longer mandatory—they were now advisory. "This remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court's discretion." *Id.* at 392. This Court severed the portion of MCL 769.34(2) that required a within-guideline sentence and MCL 769.34(3) that required the sentencing court to state a "substantial and compelling reason" to depart from the guideline range. *Lockridge,* 498 Mich 358, 364. This Court warned that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Id.* at 365, n 1.

But nearly seven years after *Lockridge*, MCL 769.34(10) remains intact. It provides: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that

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sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." The continued adherence to the mandatory affirmance language of MCL 769.34(10) has led to unreviewable disproportionate sentences based on judicially-found facts. Michigan's sentencing scheme is not yet a system that adequately safeguards Mr. Stewart's rights under the Sixth and Fourteenth Amendments. Truly advisory sentencing systems allow a non-binding appellate presumption of reasonableness for within guideline sentences and prohibit any presumption of unreasonableness for outside of guideline sentences. Michigan's system does the opposite.

To be true to the remedy of advisory guidelines this Court adopted in *Lockridge*, a within-guidelines sentence must be subject to appellate review for proportionality and reasonableness in the same way a sentence outside of the guidelines is reviewable. See *People v Milbourn*, 435 Mich 360, 661 (1990) and *Rita v US*, 551 US 338, 351 (2007). This approach is consistent with post-*Booker* US Supreme Court and federal precedent.

In *Rita v US*, 551 US 338, 347 (2007), the Court found no Sixth Amendment violation where appellate courts apply a rebuttable presumption of reasonableness when reviewing sentences within the properly scored guidelines. The court reasoned that a "nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence." *Id.* at 353.

But there is no mere presumption of reasonableness for within-guideline sentences in Michigan because MCL 769.34(10) is a mandate, not a presumption. A presumption, by definition, is rebuttable. A presumption is an inference that shall or may be drawn "unless and until the truth of such inference is disproved." Black's Law Dictionary (11th ed. 2019), "presumption." (citing John D. Lawson, The Law of Presumptive Evidence 639 (2d ed 1899). A presumption of law is "a [required] legal assumption" valid until "contradictory evidence is produced." *Id* at "presumption of law." MCL 769.34(10) requires a mandatory affirmation of all within-Guidelines sentences without any form of review and regardless of evidence of the unreasonableness of the chosen sentence.

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In other jurisdictions that operate with a presumption of reasonableness for within guidelines sentences, it is a true legal presumption for the appellate court. Consider the federal system. In *Gall v United States*, 552 US 38 (2007), the Supreme Court of the United States held that "if the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness." *Gall*, 552 US at 51. The Seventh Circuit employs that presumption but makes clear it is a rebuttable one:

> The defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in §3553(a). While we fully expect that it will be a rare Guidelines sentence that is unreasonable, the Court's charge that we measure each defendant's sentence against the factors set forth in §3553(a) requires the door be left open to this possibility. [*US v Mykytiuk*, 415 F3d 606, 608 (7th Cir, 2005)].

And further, *Gall* held that "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard." *Gall*, 552 US at 51. In Michigan, only sentences outside the correctly-scored guidelines are afforded such a review.

Without the ability to review within-guideline sentences, no presumption of reasonableness exists for the appellate courts in Michigan. MCL 769.34(10) is not a presumption, it is a mandate.

The current mechanics of Michigan's sentencing guidelines system, especially the lack of a requirement to justify a within guideline sentence combined with the lack of an appeal of the reasonableness of those sentences, are mechanisms that unconstitutionally encourage, if not ensure, that within-guideline sentences are imposed without regard to reasonableness. Trial courts *must* give a within guideline sentence—one they do not have to justify at all—*unless* they put on the record why they are imposing an outside of guideline sentence. Trial courts are *prohibited* from imposing outside of guideline sentences without articulating proper reasoning. That reasoning requires justification for

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the departure itself and the extent of the departure. *Milbourn,* 435 Mich at 660. The explanation provided must expressly reference why the sentence imposed is more proportionate than a guidelines sentence. *People v Dixon-Bey*, 321 Mich App 490, 525 (2017). Trial judges must work harder if they want to impose a sentence that varies from the sentencing guideline range, and they do this with the knowledge that the outside of guideline sentence they impose can be appealed while the sentences they impose within the guidelines cannot and do not have to be justified. The multi-layered differential treatment of within guideline and outside of guideline sentences for both trial courts and appellate courts creates a preference for within guideline sentences and a presumption of unreasonableness for outside of guideline sentences. This runs afoul of the Sixth Amendment.

Sentencing in Michigan presently operates with the exact system *Gall* cautioned against:

> 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 all sentencing decisions—whether inside or outside the Guidelines range. [*Gall v United States*, 552 US 38, 49 (2007)].

The Sixth Amendment problem in the federal sentencing guidelines was remedied not only by making the federal guidelines advisory on trial courts but also maintaining meaningful appellate review of within guidelines sentences, consistent with outside of guideline sentences. *US v Booker*, 543 US at 261.

Continuing to enforce the first sentence of MCL 769.34(10) perpetuates the constitutional problem this Court sought to solve in *Lockridge*. After *Lockridge*, the guidelines were replaced with the principle of proportionality, with the guidelines intended to serve as a reference point in a proportionality determination. This Court expressly cited *Milbourn* for that principle, the case wherein this Court acknowledged that "[c]onceivably, even a sentence within the sentencing

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guidelines could be an abuse of discretion in unusual circumstances." *Milbourn*, 435 Mich at 661.[6] But, with MCL 769.34(10), a sentence within the guidelines being reviewed for an abuse of discretion is inconceivable.

In addition to impeding on the Sixth Amendment and neutralizing the *Lockridge* remedy, MCL 769.34(10) runs counter to this Court's historical reliance on appellate review to ensure individualized, proportionate and non-disparate sentences.

B. MCL 769.34(10) prohibits appellate courts from reviewing whether the imposition of a sentence within the Legislatively authorized guidelines is individualized, proportionate, and non-disparate.

Sentences imposed that are within statutory limitations "must be subject to judicial review in order to ensure" adherence to the constitution. *People v Coles,* 417 Mich 523, 529-530 (1983). Statutory sentencing limits provide "wide discretionary power to the trial court but it is up to the appellate courts to "determine[ ] whether the trial court judicially exercised its discretion in imposing a sentence within the statutory limitations or even whether the court imposed a sentence that was illegal and subject to appellate relief." *Id.* at 528-529. *Coles* recognized the importance of appellate review of sentences—even those within Legislatively authorized ranges—to provide integrity in appeals, increase public trust, and combat disparities. *Coles*, 417 Mich at 543-545.

At the time *Coles* was decided, there were no sentencing guidelines and no legislation prohibiting appellate review of sentences.

Shortly after *Coles* was decided, Michigan established the advisory judicial sentencing guideline system in 1983. In 1990, this Court established the principle of proportionality for appellate sentencing

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[6] While *Milbourn* was analyzing the judicial guidelines, this Court has revived *Milbourn* as the proportionality standard-bearer in this post-*Lockridge* sentencing landscape.

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review of guideline sentences. *Milbourn*, 435 Mich 630. Mr. Milbourn was convicted of breaking and entering. The judicial sentencing guidelines recommended a minimum sentence of between 12 to 30 months. The trial court, however, imposed a 10-year minimum sentence, which was the statutory maximum penalty authorized by the Legislature. On appeal, Mr. Milbourn argued that the trial court abused its discretion in imposing such a sentence.

In deciding the issue, this Court did not have to grapple with whether within guideline sentences were reviewable because the sentence being challenged was outside the applicable judicial guidelines range. But it *was* within the range of sentencing permitted by the Legislature. Still, this Court found the trial court had abused its discretion because the sentence imposed was not proportionate to the facts of the case or to Mr. Milbourn. *Id.* at 667.

In *Milbourn,* this Court recognized that by setting a "range of allowable punishments for a single felony," the Legislature "intended persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record are less threatening to society." *Id.* at 651. The trial court satisfies legislative intent "by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of" the offense and the background of the individual being sentenced. *Id.*

The *Milbourn* Court reaffirmed the principle it recognized in *Coles* that "an appellate court must review the trial court's exercise of the sentencing discretion entrusted to it by the Legislature." *Id.* at 644. "Discretion . . . is a matter of degree, not an all or nothing proposition." *Id.* at 664. Appellate courts, by their very nature, exist to ensure that trial courts are functioning properly and legally. *Id.* Appellate courts must engage in sentencing review without "substitut[ing] their judgment for that of the trial court," and must "interpret the legislative will." *Id.* at 666. Sentencing discretion vested to the trial court by the Legislature is appropriately exercised only when the imposed sentence is proportionate. See *Coles, supra, Milbourn, supra and Lockridge, supra.* But MCL 769.34(10) operates to prohibit any assurance of proportionality of within guideline sentences.

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i. Michigan's legislative sentencing guideline ranges do not incorporate principles of proportionality, which increases the need for appellate review of within guideline sentences.

In 1998, the Legislature enacted a mandatory legislative sentencing guideline scheme. See 317 PA 1998. Unlike under the judicial guidelines, trial courts were required to sentence individuals within the legislative sentencing guideline range. To enforce the mandatory nature of the sentencing guidelines, the Legislature required trial courts to justify any sentence imposed outside of the sentencing guideline range with "substantial and compelling reasons," required the trial court to advise individuals about the right to appeal a sentence that was more severe than the guideline range, and required appellate courts to automatically affirm within guideline sentences absent a sentencing guideline scoring error. MCL 769.34; See 317 PA 1998.

In *People v Babcock,* 469 Mich 247, 240-241 (2003), this Court held that the *Milbourn* principle of proportionality was incorporated into the legislative sentencing guideline ranges because the guidelines considered "the seriousness of the crime and of *the defendant's criminal history*." (Emphasis added.) Our legislative sentencing guidelines only consider those two things—the crime and the individual's criminal history. But this Court was wrong to characterize that as proportionality.

Pursuant to *Milbourn*, proportionality depends on two things—the seriousness of the crime and the *background and characteristics* of the offender. (Proportionality "must take into account the nature of the offense and *the background of the offender*," *Milbourn,* 435 Mich at 651, 658, 667 (emphasis added). These facts include more than a person's criminal history. They include one's "background" and "characteristics." *Id.* at 651, 658, 667). But our legislative sentencing guideline ranges do not take individual characteristics or backgrounds into account. There are no mitigating factors. The sentencing guideline ranges do not consider whether someone has a mental health issue, a medical condition, or a substance dependency. The ranges do not consider whether someone experienced childhood trauma, abuse, or neglect. The ranges do not consider age, maturity level, poverty, or work history. The

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ranges do not consider diminished culpability, acceptance of responsibility, or expressions of remorse. The ranges do not take into account anything meaningful about the individual being sentenced. The *Babcock* Court was wrong when it concluded that "the appropriate sentence range is determined by reference to the principle of proportionality." *Babcock,* 469 Mich at 264.

Proportionality principles were not intentionally incorporated into the legislative guideline ranges when they were enacted, and the lack of proportionality within the guidelines has worsened over the decades with no oversight. This makes the need for appellate review of sentences even more pressing.

ii. The legislative sentencing guidelines promote disparity and unreasonable sentences in Michigan, which increases the need for appellate review of within guideline sentences.

There is no historical evidence or current data to suggest that Michigan's sentencing guideline ranges are proportionate to the offense and to the background of the person being sentenced.

But there is real reason to believe that, even assuming the guideline ranges were proportionate when enacted in 1998, they are not proportionate now after decades of existence and amendments without sentencing commission review or oversight. Traditionally, sentencing commissions exist to monitor and revise the guidelines in response to legislation or appellate court rulings, collect and analyze data to examine issues of disparity and proportionality, develop analyses to identify the impact of legislation or policy changes, examine the effectiveness of sentencing policies, and more.[7] "To its credit, the Michigan Legislature attempted comprehensive sentencing reform in 1998 when it enacted the statutory sentencing guidelines with the aid of a nineteen-member sentencing commission." Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*,

[7] The Role of Sentencing Commissions, Robina Institute Of Criminal Law And Criminal Justice, (2015), last accessed on April 5, 2022 at https://sentencing.umn.edu/content/role-sentencing-commissions.

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47 U. Mich. J. L. Reform 645, 648 (2014). But by 2002, the sentencing commission had been abandoned. *Id.* "This was done over public objection that the Legislature was ill-suited to conduct the continuing research and study necessary to support the guidelines and that legislatures often tend to reflect current public thought (or fears) when amending penal laws [rather] than . . . sound research in adopting a course of action most likely to deter crime and safely reduce prison overcrowding." *Id.* at 650-651 (cleaned up).

From 1999 to present, and without oversight from a sentencing commission, the guidelines and ranges lost any semblance of proportionality. The "Legislature passed dozens of laws that increased maximum penalties and increased the sentencing guidelines ranges, either through increased scoring of the variables or by moving offenses to higher crime classifications." Yantus, *Sentence Creep* at 651. "[T]he increased penalties appear to have been made without reference to the proportionality principle that discrete crime classifications [should] make sense when matched against one another." *Id.* (cleaned up). "The result is that stealing from a store is now treated more seriously than assault with a dangerous weapon and obtaining money by false pretense is punished the same as breaking into a home while armed with a weapon. Several crimes that were mid-level offenses in the past are now punishable by up to life imprisonment, and several low-level offenses have moved to the mid-level category." *Id.* at 651-652 (cleaned up).

In November 2021, Safe & Just Michigan published a comprehensive report titled, "Do Michigan's Sentencing Guidelines Meet the Legislature's Goals?" (612a-846a).[8] The short answer is no. The report provides a detailed history of the legislative guidelines and makes several findings that tend to show the disproportionality of our sentencing guideline system:

- "Points are scored for facts that are actually required elements of the offense." P. 71 (690a).

[8] The report is also available online at: Do_Michigans_Sentencing_Guidelines_Meet_The_Legislatures_Goals.pdf (safeandjustmi.org), last accessed April 5, 2022.

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- "No mitigating characteristics are scored." P. 157 (776a).
- The guideline ranges are "very broad" and "extremely wide." P. 77 (696a).
- "[T]he guidelines themselves do a great deal of double-counting." P. 160 (779a).
- The guidelines were enacted under the "assum[ption] that the Sentencing Commission would review how the guidelines were working in practice and make periodic recommendations for modification," but that did not happen. P. 15 (634a).

Levine et al, *Do Michigan's Sentencing Guidelines Meet the Legislature's Goals?*, Safe & Just Michigan (2021).

Michigan trial court judges have broad discretion within a wide range to impose guideline sentences that are not guaranteed to be proportionate and that do not consider individual characteristics—including mitigating factors—of the person being sentenced. Neither the Legislature nor the appellate courts have provided direction or guidance on how to select an appropriate sentence within expansive guideline ranges. This broad discretion to choose a sentence anywhere within a massive range without articulating the reason for imposing the sentence and without the possibility of appellate review does not ensure proportionality or non-disparity.

This has been proven true in at least Washtenaw County where a statistical analysis revealed racial disparities in sentencing decisions that was unchecked, in part, because "[t]here appears to be no effective mechanism for appellate review of overall patterns of racial disparities that could indicated discriminatory or racially biased rulings." *Race to Justice,* Citizens for Racial Equity in Washtenaw (CREW), August 2020, p. 14.

It has further been proven true in Mr. Stewart's case. Mr. Stewart's guideline range was originally scored at 171 to 285 months (14.25 to 23.75 years). This range represents a difference of nearly 10 years from the bottom to the top. He was given a minimum sentence of 276 months.

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This was a sentence within the range, one that the trial court did not have to justify, and one that was unappealable.

Another case pending in this Court paints an even starker picture. Jamar Terrelle Purdle was sentenced for second-degree murder as a fourth habitual offender using a guidelines range of 270 to 900 months. *People v Purdle*, unpublished per curiam opinion of the Court of Appeals, issued February 1, 2022 (Docket No. 353821), cert pending (Docket No. 164218). A sentence of 22.5 years or a sentence of 75 years, for the same offense, occurring in the same circumstances, by a person with the same criminal background, is unreviewable by the appellate courts with continued adherence to MCL 769.34(10). This result is illogical, inconsistent with Michigan case law, and/or unconstitutional.

C. MCL 769.34(10) violates Mr. Stewart's due process rights, right to appeal, and the separation of powers clause. The Legislature's authority to set sentencing penalties does not authorize it to limit the constitutional right to appeal a sentence or to usurp the appellate court's ability to ensure just sentencing outcomes.

In *Lockridge*, this Court recognized that mandatory sentencing guidelines implicated Mr. Lockridge's Sixth Amendment right to a jury trial *and* his due process right. *Lockridge*, 498 Mich at 384 n 22. The Michigan Constitution provides that "no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." Article 1, §17. In § 20, the Michigan Constitution supplies a right to appeal "in every criminal prosecution" with one exception, effectuated by constitutional amendment: "except as provided by law, an appeal by an accused who pleas guilty or nolo contendere shall be by leave of the court…." The Michigan Constitution later states that "[t]he jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." Const 1963, art 6, §10.

MCL 770.12 establishes an appeal by right from a "final judgment or final order from the circuit court." MCL 770.12(a). "A sentence imposed

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in a criminal case is part of the final judgment of the trial court." *People v Reynolds*, 181 Mich App 185, 188 (1989) (citing *Coles*, 417 Mich at 535; overruled in part on other grounds by *Milbourn*, 435 Mich at 644). "Appellate courts are vested with the jurisdiction to review all sentencing issues." *People v Brown*, 184 Mich App 722, 725 (1990) (citing *Coles*, 417 Mich at 535; overruled in part on other grounds by *Milbourn*, 435 Mich at 644).

MCL 769.34(10) requires the appellate court to affirm all sentences that are "within the appropriate guidelines sentence range." An exception is made where there is "an error in scoring the sentencing guidelines or inaccurate information [was] relied upon in determining the defendant's sentence." MCL 769.34(10). But otherwise, "the court of appeals shall affirm that sentence and shall not remand for resentencing…" MCL 769.34(10).[9]

This statutory language, removing the right to appeal following a final sentencing order with enumerated exceptions, regardless of whether guilt was found by plea or by trial, violates the constitutional right to appeal under Const. 1963, art 1, §20. Any change in the scope of a right to appeal must come through constitutional amendment, not through the Legislature.

i. MCL 769.34(10) removes a right to appeal that is guaranteed by Michigan's Constitution.

The United States Supreme Court has not recognized a federal constitutional right to appeal, *McKane v Durston*, 153 US 684, 687 (1894), but when a state provides a right to appeal it must do so in a way that is fair and accords with due process principles. See *Griffin v Illinois,* 351 US 12 (1956)*; Douglas v California,* 372 US 353 (1963)*; Halbert v Michigan*, 545 US 605 (2005). "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in

[9] MCL 769.34(10) has not been read to preclude issues with respect to the constitutionality of a sentence. *People v Conley*, 270 Mich App 301 (2006).

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particular, in accord with the Due Process Clause." *Evitts v Lucey*, 469 US 387, 401 (1985).

Generally speaking, "[a] defendant's exercise of the right to appeal must be free and unfettered." *North Carolina v Pearce*, 395 US 711, 724 (1969) (cleaned up).

Both the United States Supreme Court and this Court have found a denial of due process when a state, through its actions, effectively precludes the appeal, precludes meaningful appellate review, or chills the exercise of the right to appeal. *Douglas v California, supra* (denial of counsel on appeal leaves a meaningless ritual); *Griffin v Illinois, supra* (transcript requirement effectively precludes adequate appellate review for indigents); *Evitts v Lucey*, *supra* (denial of effective assistance of counsel precludes meaningful review); *North Carolina v Pearce*, *supra* (right to appeal chilled); *Blackledge v Perry*, 417 US 21 (1974) (right to appeal via trial de novo chilled); *Thigpen v Roberts*, 468 US 27; (1984) (right to appeal chilled by prosecutor's filing of higher charge during pendency of appeal); *People v Harrison*, 386 Mich 269, 275 (1991) (adjournment of one case with notice it would be dismissed if defendant did not pursue appeal in second case is "constitutionally obnoxious" and chills the constitutional right to appeal); *People v Mazzie*, 429 Mich 29 (1987) (increased sentence following appeal, if imposed by same judge, creates presumption of vindictiveness for exercise of right to appeal).

It goes without saying that a state Legislature may not remove a right to appeal guaranteed by a state constitution. A unanimous Michigan Supreme Court held that where the Michigan Constitution[10] provides for "direct review by the courts as provided by law" of a final administrative decision of a quasi-judicial nature that affects private rights, the Legislature could not pass a law that precluded appeal of a

[10] Const. 1963, art 6, §28 reads in relevant part: "All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law."

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state tax commission classification decision.[11] *Midland Cogeneration Venture LTD. Partnership v Naftaly,* 489 Mich 83 674 (2011), As the *Midland* Court explained, "The Legislature lacks the authority to abolish the [constitutional] right to judicial review by enacting a statute." 489 Mich at 87.

The *Midland* Court took pains to differentiate between the Legislature's authority to set procedural limits and its lack of authority to preclude the appeal. "There is a significant difference between dictating the mechanics of an appeal and preventing an appeal altogether." *Id.*, at 94. The "mechanics" of the appeal include the "time frames for filing an appeal . . . whether a party may obtain a stay pending appeal, and . . . the controlling standard of review." *Id.* Control over the mechanics of an appeal does not include "limit[ing] the jurisdiction of the circuit courts." *Id.*

What the Legislature has done in MCL 769.34(10) is to preclude appellate review of a within-guideline sentence, with limited exceptions. The statute says that the Court of Appeals "shall affirm" a guidelines sentence, and this effectively precludes appellate review. Opposing counsel in a companion case acknowledges this: "Sentences within the guidelines . . . are not subject to review under the legislative scheme…" (Prosecutor's Answer in Opposition to Application for Leave to Appeal in *People v Stewart* (Docket No. 343755, p. 15, filed June 14, 2021).

By precluding appellate review of a within guideline sentence, the Legislature has reduced the scope of the constitutional right to appeal. Appellate review has nearly always included appellate review of the sentence. This Court recognized the existence of appellate sentence review dating back to at least 1879. *Coles*, 417 Mich at 528, relying on *Cummins v People*, 42 Mich 142 (1879). While the scope of that review

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[11] MCL 211.34c(6), the statutory language in question in *Midland*, provided: "An appeal may not be taken from the decision of the state tax commission regarding classification complaint petitions and the state tax commission's determination is final and binding for the year of the petition."

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has evolved over the years, there is no question that the sentence "is as much a part of the final judgment of the trial court as the conviction itself." *Coles,* 417 Mich at 535. In other words, sentence review has been part of the appeal process for more than a century, and it has been an accepted component of the constitutional right to appeal since 1963.

It is acknowledged that there is some language suggesting there is no constitutional right of sentence review, or at least review of sentencing discretion, in *People v Coles, supra.* In *Coles,* this Court concluded that the constitutional right to appeal did not mandate appellate review of sentencing discretion:

> We do not agree that the constitutionally guaranteed right of appeal mandates review of the trial court's exercise of discretion in sentencing in order to comport with due process of law. The expansion of the scope of appellate review is a matter of public policy within this Court's power to adopt; it is not constitutionally required. [*Coles*, 417 Mich at 542.]

That conclusion, however, is dependent on the context in which it was made. This Court recognized in *Coles* that it was venturing into new territory, with arguments both for and against expanded appellate review. *Id.* at 532-533. In support of its decision, the Court pointed to the evolving nature of sentence review and to the "far-reaching powers" of the Supreme Court in the area of appellate review. *Id.* at 529-532, 534-535. The Court additionally noted the need for discretion in a system of indeterminate sentencing (a voter-approved system that directs the Legislature to provide for a "flexible law" that necessarily entails discretion). *Id.* at 539. The Court further reflected on the reality that "a sentence following a conviction is as much a part of the final judgment of the trial court as is the conviction itself." *Id.* at 535, 539.

Building on these arguments and acknowledging no constitutional or legislative impediment to appellate review of sentences, 417 Mich at 534-535, the Court took the next logical step of authorizing appellate review of a trial judge's sentencing discretion. The Court cautioned, however, that it was not grounding its decision in the constitutional

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right to appeal because that right does not "mandate" such review. *Id.* at 542.

The difference between pre-*Coles* and now is that appellate review of sentencing discretion has existed for forty years, making it an accepted component of appellate review. It logically follows that if the sentence is part of the conviction, and the constitution authorizes appellate review of the conviction, it necessarily authorizes appellate review of the sentence, including post-*Coles* appellate review of sentencing discretion. [12]

Moreover, in *Coles* the Court was not grappling with *infringement* of the right to appeal. Although the Court was not prepared to find a right of appellate review of sentencing discretion in Article 1, § 20, once it recognized that right via case law it was constrained by due process principles. The state may not afford a right of appeal and then render it meaningless. See *Douglas v California, supra*; *Griffin v Illinois, supra; Evitts v Lucey*, *supra*. By precluding appellate review of a within guideline sentence, the Legislature effectively precludes appellate sentence review for an extraordinary number of individuals.

In many ways, this appeal boils down to the question of whether the Legislature has authority to eliminate appellate review of sentencing discretion as part of its constitutional authority to determine the penalty for crime. The *Coles* Court addressed this in passing by recognizing that it was not dealing with a system of presumptive sentencing (which might lead to a different result) and by highlighting the need for an exercise of discretion within a system of indeterminate sentencing. 417 Mich at 538, 539. The Court offered the view that appellate review of sentencing discretion in a non-mandatory setting "will in no way

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[12] Care should be taken to differentiate between a constitutional right to appeal and one that is provided solely by statute. The Legislature may determine "what cases, under what circumstances, and from what courts, appeals may be taken," 417 Mich at 533, but that statement appears to relate to statutory appeals. See *Moore v Spangler*, 401 Mich 360, 368-369 (1977) (appeals are generally a creation of statute and the Legislature may prescribe what cases and under what circumstances the appeal may be taken).

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interfere with the Legislature's ability to maintain or change the method of sentencing in this state." *Id.* at 538, 539. In other words, appellate review of sentencing discretion that is exercised within a *discretionary* sentencing scheme does not impair the Legislature's constitutional sentencing power.

This last point—that the Legislature's sentencing power extends only so far—may have been obscured during the 2018 appeal on this same issue in *People v Ames,* Docket No. 337878. In *Ames*, Amicus PAAM argued that "Now, as before, a sentence within properly scored guidelines – now advisory guidelines – is not subject to appellate review, and this raises no constitutional issue whatever." (Brief by Prosecuting Attorneys Association of Michigan as Amicus Curiae, Docket No. 337878, p. 13, filed July 18, 2018). Amicus PAAM asserted, without support, that "Appellate review is only permissible within the *statutory* scheme if the legislature so allows, it has not done so for guidelines sentences, and there is no reason why its prohibition on review is unconstitutional." *Id.* at p. 15 (emphasis in original). Amicus PAAM further argued, again without support, that "[s]o long as the guidelines are advisory, there being no requirement to sentence within them, no problem can arise from the legislative choice." *Id.* Amicus PAAM finally concluded, albeit with some effort to support the assertion that "The statute [MCL 769.34(10)] is simply a form of or analogue to a jurisdiction-stripping statute, and is constitutional," relying on a Washington Supreme Court decision[13] that approved a Washington state statute that precluded appellate review of a within-guidelines sentence. *Id.*

The problem with the above assertions is two-fold. First, while there can be no doubt that the Michigan Legislature has authority to determine the appropriate penalty for a crime, it has chosen to delegate a degree of discretion to the sentencing judge. This is especially true in an advisory guideline system, where judges have discretion to sentence within or beyond the guidelines range. See *Lockridge, supra*. This Court has previously concluded that where there is judicial discretion, review

[13] *State v Williams*, 149 Wash 2d 143; 65 P3d 1214 (Wash, 2003).

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of that discretion exists in a non-mandatory-guidelines setting. *Coles, supra; Milbourn*, *supra*.

More importantly, Amicus PAAM in *Ames* failed to grasp the context of the Washington Supreme Court case upon which it relied. Washington State has presumptive (what we might call mandatory) sentencing guidelines with departures for substantial and compelling reasons. See *State v Fletcher*, 19 Wash App 2d 566, 576; 497 P3d 886 (WA App, 2021). Within that scheme, a sentence is not considered an abuse of discretion if it falls within the guidelines range. This is so because the Washington Legislature has determined that a sentence within the standard range is presumptively appropriate: "This provision of the SRA [Washington Sentence Reform Act] does not violate the constitutional right to appeal because '[w]hen the sentence given is within the presumptive sentence range then as a matter of law there can be no abuse of discretion.'" *State v Delbosque*, 195 Wash 2d 106, 126, 456 P3d 806, 817 (WA, 2020), citing *State v Ammons*, 105 Wash 2d 175, 183; 713 P2d 719, 718 P2d 796 (1986). In effect, the Washington statute sets forth a principle that could just as easily be set forth by an appellate court: there is no abuse of discretion when a judge sentences within a *mandatory* range (or to a *mandatory* term) that has been set by the Legislature.

It may be, consistent with the Washington decision, that the Michigan Legislature has some claim of constitutional authority to restrict appellate review of a sentence falling within a *mandatory* sentencing guidelines scheme in light of its constitutional authority to determine the penalty for a crime, *People v Hegwood*, 465 Mich 432, 436 (2001) (recognizing Legislature's constitutional authority to determine the penalty for crime), but that argument falls when applied to advisory sentencing guidelines. Where there is discretion, there is generally review. "There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property[.]" *Jones v Barnes*, 463 US 745, 756 n 1 (1983) (Brennan, J., dissenting). This Court has previously recognized the appropriateness of appellate review of sentencing discretion in *Coles* and *Milbourn*.

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In sum, the Michigan Legislature has attempted to limit appellate review of sentencing discretion under MCL 769.34(10). Due process emphasizes fairness between the state and the individual, *Evitts v Lucey*, 469 US at 405, citing *Ross v Moffitt*, 417 US 600, 619 (1974), and a long line of cases protect the right to appeal from state interference. A statute that precludes exercise of a constitutional right to appeal, an appeal that includes both conviction and sentence, cannot stand.

ii. MCL 769.34(10) acts as an improper amendment of Article 1, § 20 of Michigan's Constitution.

It is a basic principle of law that the Legislature may exercise its law-making authority except when it contradicts the will of the people as expressed in a state or federal constitution. "A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution." *Carmichael v Southern Coal & Coke Co*, 301 US 495, 510 (1937). "The legislative power is the authority to make, alter, amend, and repeal laws . . . , save as limited and restrained by the state and federal Constitutions." *Harsha v City of Detroit*, 261 Mich 586, 590 (1933).

The Michigan Constitution of 1963 provides a right to appeal in Article 1, § 20, as previously indicated. This right was not explicitly recognized in earlier constitutions, but the right was enshrined and guaranteed in 1963. See *People v Bulger*, 462 Mich 495, 503 (2000), abrogated by *Halbert v Michigan, supra* (1908 Constitution provided for assistance of counsel to pursue appeal when trial court so ordered, but there was no recognized right of appeal).

In 1994, the voters limited the right to appeal when an individual pleads guilty or no contest: "In every criminal prosecution, the accused shall have . . . an appeal as a matter of right, except as provided by law an appeal for an accused who pleads guilty or nolo contendere shall be by leave of the court." Const 1963, art 1, §20. The 1994 constitutional amendment, prompted by a desire to reduce the caseload of the Court of Appeals, did not eliminate the right to file a first appeal in a plea case but made that first appeal one of leave rather than right. *Halbert v Michigan*, 545 US at 612, 617-619.

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With reference to the 1994 amendment, the Legislature apparently recognized that it could not restrict the right to appeal in a plea case on its own. Legislative analysis reflects a Joint Resolution of both chambers that necessitated submission to the electorate:

> The joint resolution proposes an amendment of Article 1, Section 20 of the State Constitution of 1963, which enumerates the rights of the accused in a criminal prosecution, to specify that an appeal by an accused who had pleaded guilty or *nolo contendere* would be by leave of the court, rather than as a matter of right.
>
> The joint resolution would have to be submitted to the electorate of the State at the next general election. [Senate Fiscal Agency, First Analysis, Senate Joint Resolution D (Feb. 18, 1993), p 1.]

The Legislature's enactment of MCL 769.34(10) effectively limits the right to appeal, much like the 1994 constitutional amendment. The statute functionally amends the Michigan Constitution to provide: "In every criminal prosecution, the accused shall have the right to . . . have an appeal as a matter of right, except as provided by law an appeal for an accused who pleads guilty or nolo contendere shall be by leave of the court, *and further there shall be no appeal of a sentence falling within the recommended range of the legislative sentencing guidelines absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.*"

The Legislature cannot amend the Michigan Constitution without voter approval. "It is hardly necessary to say that a provision of the Constitution cannot be repealed or amended directly or indirectly by the Legislature[.]" *Board of Education of City of Detroit v Fuller*, 242 Mich 186, 191 (1928). According to Article 12, § 1 of the Michigan Constitution, voter approval is required when the Legislature seeks to amend the constitution:

> Sec. 1. Amendments to this constitution may be proposed in the senate or house of representatives. Proposed amendments agreed to by two-thirds of the members

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> elected to and serving in each house on a vote with the names and vote of those voting entered in the respective journals shall be submitted, not less than 60 days thereafter, to the electors at the next general election as the legislature shall direct. If a majority of electors voting on a proposed amendment approve the same, it shall become part of the constitution and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. [Const of 1963, art 12, §1.]

MCL 769.34(10) operates as a functional amendment of the Michigan Constitution and acts to eliminate part of the right to appeal. It would appear the voters desired something to the contrary when Article 1, § 20 was ratified in 1963. According to Convention Comment, the Legislature may afford greater appeal rights, but it cannot eliminate the right to appeal: "The clause, 'to have an appeal as a matter of right,' is added as a guarantee of the right of a defendant to at least one appeal in a criminal case. The provision is not intended to restrict the Legislature in its power to provide by law for additional appeals." 2 Official Record, Constitutional Convention 1961, p 3365.

Here, Mr. Stewart's right to appeal has been excised by statute, not constitutional amendment. MCL 769.34(10) does not "define the scope" of a criminal appeal, it excludes a huge swath of sentences from being appealable at all. *People v Mulier*, 12 Mich App 28, 34 (1968) ("Since the State has granted the universal right of appeal, standards of procedural fairness forbid cutting down the right."). The Legislature's constitutionally provided role is "provid[ing] for penalties for criminal offenses." *People v Cameron,* 319 Mich App 215, 234 (2017). Delegating some of that authority to trial courts is constitutionally sound. *Id.* But MCL 769.34(10) is not a delegation of authority; it is a contraction of a constitutional right to appeal and is therefore unconstitutional.

iii. MCL 769.34(10) violates the separation of powers by usurping the appellate court's judicial power and jurisdiction over sentencing review.

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"The Michigan Constitution provides for the separation of powers between the legislative, judicial, and executive branches and vests the courts with the judicial power." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 362 (2010), citing Const 1963, art 3, § 2. While the branches of government are part of a comprehensive system, each branch of government must be able to perform its constitutionally assigned functions without interference from other branches. To determine whether a law disrupts the separation of powers, "the proper inquiry focuses on the extent to which it prevents [one] branch from accomplishing its constitutionally assigned functions." *Nixon v Adm'r of Gen Servs*, 433 US 425, 443 (1977).

In *People v Garza*, 469 Mich 431 (2003), this Court considered the issue of whether MCL 769.34(10) violated the separation of powers doctrine and held that it did not. Mr. Garza represented himself in propria persona in this case and presented the court with no "persuasive argument that the constitution of this state or of this nation bars the Legislature from enacting [MCL 769.34(10)]." *Id.* at 435. *Garza* was also considered at a time when the guidelines were mandatory, and many of the features of MCL 769.34 this Court relied upon to reach its holding have since been struck down as unconstitutional. *Lockridge,* 498 Mich at 364. The playing field today is very different than it was in *Garza.*

The separation of powers issue was also addressed in passing in *Ames*. At that time, Amicus PAAM categorized MCL 769.34(10) as lawful "jurisdiction-stripping," which, was, to PAAM, constitutionally unproblematic. (Brief by PAAM as Amicus Curiae, Docket No. 337878, pp. 14-15, filed July 18, 2018). As addressed by Amicus CDAM, this is an unpersuasive characterization:

> Had § 34(10) been passed post-*Lockridge*, this might be a relevant consideration. But that is not the case. Rather, § 34(10) was a part of the very statutory scheme invalidated in *Lockridge*, and there is no indication that the Legislature ever intended that it operate outside that scheme. The prosecution and PAAM would have the Court ignore *Booker*'s warning that the Legislature would not presumably leave some elements of the sentencing scheme in place without others. The Court refused to assume as

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> much in *Lockridge*, and should avoid the same assumption here. To truly *Booker*-ize Michigan's sentencing guidelines, the Court must strike down the first sentence of § 34(10). [Brief by Criminal Defense Attorneys of Michigan as Amicus Curiae, Docket No. 337878, pp. 11-12, filed August 9, 2018, cleaned up].

MCL 769.34(10) is not a lawful exercise of the Legislature's power to curtail the jurisdiction of the appellate courts. *See*, Kaufman, Risa "Access to the Courts as a Privilege or Immunity of National Citizenship", 40 CTLR 1477, 1516 (2008) ("There is a general agreement that Congress cannot curtail the power of the federal courts in a way that violates other provisions of the Constitution.") Article 6, § 1 of the Michigan Constitution provides "the judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court…" MCL 769.34(10) usurps the appellate court's power; it is the Legislature telling the appellate courts how to rule in certain cases. This is a separation of powers violation.

The Legislature has the power to enact laws and penalties. Const 1963, art 4, § 45. The appellate courts have the power to oversee appeals "as provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." Const 1963, art 6, §10. As previously discussed, the rules of the supreme court authorize appellate court jurisdiction over criminal appeals, which include final judgments, which include sentences. MCL 769.34(10) may have had a role within a mandatory sentencing scheme, but it cannot stand in an advisory scheme, as Amicus CDAM noted in *Ames*:

> Indeed, this and other courts have acknowledged that § 34(10) was meant to play a specific role within the mandatory sentencing scheme. See, e.g., *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003) (describing § 34(10) as part of the "structure and content of the sentencing guidelines" that balanced the trial court's discretion in light of the mandatory guidelines); *People v Garza*, 469 Mich 431, 434-435; 670 NW2d 662 (2003) (describing § 34(10) as "part of" "comprehensive sentencing

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> reform" contained elsewhere in § 34); *People v Payne*, No. 232863, 2003 WL 21186606, at *2 (Mich Ct App, May 20, 2003) (describing § 34(10) as "merely limit[ing] the circumstances in which a defendant can challenge a sentence that adheres to legislatively prescribed requirements"). [Brief by CDAM as Amicus Curiae, Docket No. 337878, p. 12, n 3, filed August 9, 2018, cleaned up].

MCL 769.34(10) violates the separation of powers as it interferes with the judiciary's obligation to ensure justice under our advisory sentencing guideline scheme. Heeding *Lockridge's* warning, MCL 769.34(10) should be severed or struck down as an unnecessary relic of a mandatory sentencing guideline scheme that is a thing of the past. *Lockridge,* 498 Mich at 365, n 1.

III. Mr. Stewart's sentence of 23 to 46 years for armed robbery is unreasonable and disproportionate.

Mr. Stewart's sentence must be proportionate to the offense and to him as a person. *Milbourn,* 435 Mich at 651, 658, 667.

Mr. Stewart's sentencing guidelines for armed robbery were 171 to 285 months (14.25 to 23.75 years). Mr. Stewart was sentenced to 23 years to 46 years, a sentence almost at the very top of the guideline range. He is also serving a two-year consecutive sentence for felony firearm and other concurrent sentences for additional offenses. His 23-year minimum sentence is disproportionate and unreasonable.

First, it should be noted that the prosecution offered Mr. Stewart a sentence recommendation of 25 to 40 years in exchange for a guilty plea to second-degree murder. (333a). The jury acquitted Mr. Stewart of any involvement in the murder, yet he ended up receiving just about the same sentence for armed robbery.

Second, Mr. Stewart's sentencing guideline range is highly inflated. Offense Variable (OV) 3 "Degree of Physical Injury to a Victim," is to be scored at 100 points when the sentencing offense is not a homicide, and when "[a] victim was killed." MCL 777.33(1)(a). In *People v Beck*, 504 Mich 605, 629 (2019), this Court held that "due process bars sentencing

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courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." *Id.* at 629. Mr. Stewart was charged with felony-murder, armed robbery, assault with intent to commit great bodily harm less than murder, receiving and concealing stolen property, and felony firearm. The jury acquitted him of felony murder and found him guilty of the remaining charges.

There is a strong argument that the trial court was not permitted to score OV 3 at 100 points for conduct that Mr. Stewart was acquitted of committing. *Beck, supra.* If OV 3 was properly scored at 0 points, Mr. Stewart's guidelines would be reduced from their current range of 171 to 285 months to the new range of 126 to 210 months. Mr. Stewart's minimum sentence of 276 months is outside of what is a more appropriate guideline range given the circumstances of this offense and the jury's findings regarding Mr. Stewart's involvement.

Third, this was a very serious crime and it is tragic that someone was killed. But the person responsible for killing Mr. Foster is Mr. White, and he will be serving the rest of his life in prison. Mr. Stewart never touched a weapon and he was not responsible for the murder committed by Mr. White and he never robbed anyone or got out of the car. Mr. Stewart drove a car and his involvement in this offense in minimal.

Additionally, as discussed above, Michigan's sentencing guidelines do not take into account any mitigating factors. Mr. Stewart's guideline range does not take into account his young age, his medical condition, his family and home environment, or his education level. The guidelines do not take into account any childhood trauma he may have experienced, his potential proximity to poverty, or a potential drug or alcohol dependency. The guidelines do not take into account circumstances of peer pressure, or Mr. Stewart's acceptance of responsibility, or expressions of remorse. The ranges do not take into account anything meaningful about Mr. Stewart.

At sentencing, the trial court was presented with letters of support on Mr. Stewart's behalf. (847a-849a). Mr. Stewart's mother, Jacquelyn Stewart, told the court that Mr. Stewart was diagnosed with Hodgkin Lymphoma Stage III when he was 17 years old. She explained that this diagnosis and treatment had been overwhelming for him: "Between the

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abundance of medication, chemotherapy, radiation, losing weight, hair loss, and constant pain, continuous vomiting, numerous hospital stays[,] [h]e was not himself at all." (849a). She explains that his "character, demeanor, actions, conversations, and friends changed suddenly." (849a). Another letter from his treating physician indicates that, at the time of his arrest, Mr. Stewart was undergoing care for Stage III Hodgkin Lymphoma. (848a). He still had a port in his chest at the time of his arrest and he required ongoing monitoring every 3 months. (847a-848a).

The impact of a cancer diagnosis and treatment on a 17-year-old cannot be understated or understood by anyone who has not experienced it. It does not excuse engagement in any criminal behavior, but it does provide context as to why Mr. Stewart found himself involved in criminal activity around that time. This was the first time Mr. Stewart had ever been incarcerated.

At sentencing, Mr. Stewart was extremely remorseful. (595a). He had and still has the support of his mother, father, and family. (595a).

The guideline range here had a difference of 9.5 years from the bottom (171 months or 14.25 years) to the top (285 months or 23.75 years). That is a very large difference, especially in terms of someone's life. Due to Mr. Stewart's age, medical condition, lack of any significant prior record, his expression of remorse and responsibility, his minimal role in the offense, and other factors that could be developed at a resentencing, it is more proportionate for him to be sentenced at the bottom of this wide guideline range. Not the top.

The sentence imposed against Mr. Stewart was not tailored to the particular circumstances of the case or to him and is not reasonable. He is entitled to resentencing.

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Conclusion and Relief Requested

Mr. Stewart's statement was the result of psychologically coercive police tactics by interrogating officers who took advantage of his age and race and bullied him into a confession. This Court should hold that his confession was involuntary and inadmissible and should grant a new trial.

Mr. Stewart's sentence of 23 to 46 years is disproportionate for an armed robbery conviction given his particular background, and this Court should hold that he and others who receive within guideline sentences, have the ability to challenge within guideline sentences. Mr. Stewart is entitled to resentencing.

Respectfully submitted,

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