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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 Appendix to Supplemental Brief

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Date: June 30, 2022

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STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT OF MICHIGSN

THE PEOPLE OF THE STATE OF MICHIGAN,

Case No.: 16-005731-01

vs.

Joshua Lamar -- James Stewart,

Defendants.
_____/

Interrogation of Joshua Lamar -- James Stewart

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I N D E X

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EXAMINATION

OFFICER MACDONALD: All right. All right. Stewart. You want me call you Mr. Stewart or call you Josh?

MR. STEWART: Call me Josh.

OFFICER MACDONALD: Huh?

MR. STEWART: Call me Josh.

OFFICER MACDONALD: Josh?

MR. STEWART: Yeah.

OFFICER MACDONALD: All right. Let's go through some paperwork real quick, Man. There's going to be a couple questions about what happened -- about what happened tonight. What -- what your boy -- Ya'll called him Deon first but his real name is Deonte?

MR. STEWART: Yeah.

OFFICER MACDONALD: All right. Ya'll did the okie dokie.

MR. STEWART: Who?

OFFICER MACDONALD: All right. So, it's J-o-s-h

MR. STEWART: u-a. S-t-e-w-a-r-t.

OFFICER MACDONALD: S-t-a-r-t.

MR. STEWART: Yeah.

OFFICER MACDONALD: And what's your

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birthday?

MR. STEWART: 6-1-97

OFFICER MACDONALD: 6-1?

MR. STEWART: 97. Yeah.

OFFICER MACDONALD: All right. All right you can read and write?

MR. STEWART: Yeah.

OFFICER MACDONALD: Okay. What was the last grade?

MR. STEWART: That I completed? I'm still going to school cause I had to stop.

OFFICER MACDONALD: Okay.

MR. STEWART: So, my last grade was 11. So, senior. But I'm not done with it.

OFFICER MADONALD: So, where you at right now?

MR. STEWART: Clintondale.

OFFICER MACDONALD: Clintondale? Clintondale -- what is it called?

MR. STEWART: It's kinda like a little alternative. It's on Thirteen Mile and John R that's where it's located. But it's in the Clintondale schools.

OFFICER MACDONALD: Currently what -- your senior year?

MR. STEWART: Yeah.

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OFFICER MACDONALD: All right. So, this is a certificate of your constitutional rights. So all I want you to do is read one through five and then next to each one you's (sic) going to put your initials. And all your initials indicates means you understand what you're reading and then if you have any questions you just ask me.

MR. STEWART: Right.

OFFICER MACDONALD: And then what you'll do is you'll sign it here and we'll put the date and then we'll put the time. There you go.

MR. STEWART: Just one through five?

OFFICER MACDONALD: Yeah, just read one through five all out for us.

MR. STEWART: I understand that I have the right to remain silent and do not have -- do not have to answer any questions that -- or make any statements. Any statements -- this number two -- any statement I make or anything I say will used against in the court of law. I have the right to have an attorney, lawyer present during the time I answer my questions or make any statements. If I cannot afford an attorney, lawyer one will be appointed for me without cost by the court prior to any questions. I can decide at any time to exercise my rights and not answer any questions or make any

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statement. I understand that these are my rights under the law. I have not been threatened or promised anything. 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?

OFFICER MACDONALD: No, that would be me.

MR. STEWART: Okay.

OFFICER MACDONALD: You just initial -- put your initials here. Your personalized initials.

MR. STEWART: So what is my charges?

OFFICER MACDONALD: Well now you got –

MR. STEWART: Somebody -- they told me -- said something about --

OFFICER MACDONALD: But that -- the stolen car?

MR. STEWART: Right. And then officer that -- the officer that -- well there was a couple officers that I talked to when I got down to the hospital, whatever. So, when I got down there or whatever they arrested me but they had told me ya'll was going to come and talk to me -- talk to me tonight. Right?

OFFICER MACDONALD: Yeah. I'm going to talk to you about the -- the stolen car.

MR. STEWART: Oh.

OFFICER MACDONALD: Yeah. So, the initials

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go right here next to -- your initials just mean you read it and you understood it.

MR. STEWART: Right.

OFFICER MACDONALD: And then you just -- yeah. Just signature go here and today's date is the 7th. And then time is -- damn it's late. It's 3:40 in the morning.

MR. STEWART: I know.

OFFICER MACDONALD: And just put today's date the 7th, right here.

MR. STEWART: The 7th?

OFFICER MACDONALD: Yeah. And then just put -- the time is 3:41. Just put 3:41 am.

MR. STEWART: That look right?

OFFICER MACDONALD: Yeah, yeah. You good. All right. You got a nickname Joshua?

MR. STEWART: Josh.

OFFICER MACDONALD: Josh?

MR. STEWART: I don't know.

OFFICER MACDONALD: What's the current address you using?

MR. STEWART: 37140 Grossbeck. Apartment 302 Peachtree Apartments.

OFFICER MACDONALD: All right. What -- what city is that?

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MR. STEWART: Clinton Township.
OFFICER MACDONALD: All right. How long you been there?
MR. STEWART: For about -- what -- five -- four five months now.
OFFICER MACDONALD: How old are you?
MR. STEWART: 18.
OFFICER MACDONALD: 6-1-97.
MR. STEWART: Yep.
OFFICER MACDONALD: Birthplace?
MR. STEWART: Detroit.
OFFICER MACDONALD: You said you 6’2”? How much you weigh?
MR. STEWART: 150.
OFFICER MACDONALD: You got any -- you got any scars?
MR. STEWART: Yeah.
OFFICER MACDONALD: Where you got a scar at?
MR. STEWART: Right here. Right here. They surgery scars though.
OFFICER MACDONALD: Okay. So, you got chest –
MR. STEWART: They still scars.
OFFICER MACDONALD: On the right side?

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MR. STEWART: Yeah. On the right chest. And on my armpit area.

OFFICER MACDONALD: Okay. And was that your left arm?

MR. STEWART: Yes.

OFFICER MACDONALD: Any tattoos?

MR. STEWART: Yeah. Right here.

OFFICER MACDONALD: What is it of?

MR. STEWART: My brother's keeper.

OFFICER MACDONALD: So it's a phrase?

MR. STEWART: Yeah.

OFFICER MACDONALD: Okay. Your brother's keeper?

MR. STEWART: Yes.

OFFICER MACDONALD: It's on your chest. All right. Who you living with, Man, over on ?

MR. STEWART: My mom.

OFFICER MACDONALD: What's her name?

MR. STEWART: Jacquelyn Stewart.

OFFICER MACDONALD: J-a-c-q

MR. STEWART: q-u-y-

OFFICER MACDONALD: l-a-n?

MR. STEWART: J-a -- yeah. L-y-n.

OFFICER MACDONALD: Same last name?

MR. STEWART: q-u-e-l-y-n. Yes. Same last

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name. Stewart. Jacquelyn Stewart. Her address is 27140.

OFFICER MACDONALD: 27140. You got -- you know the telephone number offhand?

MR. STEWART: Yeah. 313-918-5260.

OFFICER MACDONALD: All right. Same with your father?

MR. STEWART: No.

OFFICER MACDONALD: All right. Brothers, sisters?

MR. STEWART: I got brothers but I don't live with them.

OFFICER MACDONALD: Son, daughter?

MR. STEWART: No.

OFFICER MACDONALD: Girlfriend, spouse? Any hangouts? Where you hang out at?

MR. STEWART: Haven't been hanging out.

OFFICER MACDONALD: I mean where you usually -- all your homeboys meet out, hang out? Ya'll ain't got no little spot to hang out at? Okay. You know the last four of your social security number? What is –

MR. STEWART: 9868.

OFFICER MACDONALD: 9868?

MR. STEWART: Yes.

OFFICER MACDONALD: And what's your phone number?

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MR. STEWART: 313-

OFFICER MACDONALD: Okay.

MR. STEWART: 335-7398.

OFFICER MACDONALD: Okay. That's your cell? All right. And you staying with your mother?

MR. STEWART: Yeah.

DETECTIVE LUCIE: You only have one phone?

MR. STEWART: Yeah, I do.

DETECTIVE LUCIE: What kind of phone is it?

MR. STEWART: I have an iPhone.

DETECTIVE LUCIE: iPhone? Is it -- do you have a passcode on it? Is it a fingerprint or the numbers?

MR. STEWART: Numbers.

OFFICER MACDONALD: All right. So tell us about -- tell us about today. What -- what happened?

MR. STEWART: I had just -- I first -- with my cousin earlier today cause my people stay around that area.

OFFICER MACDONALD: Around what area?

MR. STEWART: 75 area. By Seven Mile.

OFFICER MACDONALD: 75 and Seven Mile?

MR. STEWART: Yeah.

OFFICER MACDONALD: Okay.

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MR. STEWART: My grandma stay on Greeley around there. But I have seen Prophet or whatever -- I seen him in the car shot up. And hopped in the car, drove to the hospital. The door was open. Ran up to the car, that was in the backseat. He was shot up in the neck. Couldn't really see the other places but I know when I got to the hospital he had three bullet wounds or whatever. Got in and drove him down there. That was it. That's all I -- you know.

DETECTIVE LUCIE: How'd you -- how'd you run into the person that was shot? Help me understand that?

MR. STEWART: Oh, I was walking.

DETECTIVE LUCIE: From where?

MR. STEWART: I was just -- got dropped off by my cousin.

DETECTIVE LUCIE: What's your cousin's name that dropped you off?

MR. STEWART: Reg. Reg.

DETECTIVE LUCIE: What's his real name?

MR. STEWART: Reginald Johnson.

DETECTIVE LUCIE: Reginald Johnson?

MR. STEWART: Yeah.

DETECTIVE LUCIE: How old is Reginald Johnson?

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MR. STEWART: 25.
DETECTIVE LUCIE: You know his birthday?
MR. STEWART: No. Not an exact -- it's in January.
DETECTIVE LUCIE: January. But he's 25 years old?
MR. STEWART: Yeah.
DETECTIVE LUCIE: Reginald Johnson, what kind of car was he driving?
MR. STEWART: A blue car. I -- I don't know exactly what kind of car his girlfriend got. It's a blue it's kind of like a 2011. It's a Ford I'm sure. It's a car.
DETECTIVE LUCIE: And it's blue?
MR. STEWART: Yeah.
DETECTIVE LUCIE: And where did he drop you off at?
MR. STEWART: Where did he drop me off? Like on Greeley and -- like Emery or something like that.
DETECTIVE LUCIE: Who stays over there?
MR. STEWART: My grandma stays over there.
DETECTIVE LUCIE: You know her address?
MR. STEWART: Yes. I know her address.
DETECTIVE LUCIE: Can you tell us?

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MR. STEWART: 19305 Greeley.
DETECTIVE LUCIE: 305?
MR. STEWART: Yes.
DETECTIVE LUCIE: And that's where you were going?
MR. STEWART: No.
DETECTIVE LUCIE: Okay. So –
MR. STEWART: When I -- when I got dropped off I was going to walk to the store.
DETECTIVE LUCIE: So, he dropped you off at the intersection of Greeley and Emery? To go to the store?
MR. STEWART: Yes.
DETECTIVE LUCIE: Why didn't he just take you to the store?
MR. STEWART: Cause he had to go back the other way towards the west side. So he let me out, walked to the store.
DETECTIVE LUCIE: Okay.
MR. STEWART: I took Lantz and that's when I had seen -- seen that. Like on Riopelle.
DETECTIVE LUCIE: Lantz and Riopelle?
MR. STEWART: Yeah. That's the next block over. But on the side street.
DETECTIVE LUCIE: That's where you seen

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the shot up car?

MR. STEWART: Yeah. It was like -- that's like where the alley at? There's a little alley over there. He was between them on the side street.

DETECTIVE LUCIE: You said Lantz and Riopelle.

MR. STEWART: Yeah.

DETECTIVE LUCIE: What kind of car was shot up?

MR. STEWART: It was a blue -- blue Concord I think or something.

DETECTIVE LUCIE: How did you know the person?

MR. STEWART: How did I know the person? Cause I know him through the neighborhood. I grew up over there.

DETECTIVE LUCIE: What's his name?

MR. STEWART: Prophet is his name.

DETECTIVE LUCIE: That's his last name?

MR. STEWART: Yes.

DETECTIVE LUCIE: Prophet is his last name?

MR. STEWART: Yeah. And then his first name Deron or –

DETECTIVE LUCIE: Deron or whatever? You

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don't know?

MR. STEWART: Yeah -- that's -- I don't know -- I mean I don't -- I don't know if it's short or full name like –

DETECTIVE LUCIE: Okay.

OFFICER MACDONALD: How long you been knowing him as Prophet?

MR. STEWART: I have really just met them like few years back. I went to school -- I went to school over there too.

DETECTIVE LUCIE: How tall -- how tall is your cousin Reginald?

MR. STEWART: 6 foot.

DETECTIVE LUCIE: 6 foot?

MR. STEWART: Yeah.

DETECTIVE LUCIE: Light, medium or dark completed?

MR. STEWART: Light skin. Kinda heavyset.

OFFICER MACDONALD: I'm going to show you a picture, Man. Who is that?

MR. STEWART: That's the one that was shot up.

OFFICER MACDONALD: Okay. Put that's the one that was shot up for me. And the name that you know him by.

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MR. STEWART: Put how many times he was shot on –

OFFICER MACDONALD: Yeah. Whatever. Whatever you want to put on.

MR. STEWART: Three times. I don't know how to spell Deron or nothing.

OFFICER MACDONALD: You know how to spell -- oh, okay.

DETECTIVE LUCIE: You don't call him Deron, you just call him Prophet, right?

MR. STEWART: Right.

OFFICER MACDONALD: Just put your name right there. That way you don't think I wrote that. Just put your name. All right.

DETECTIVE LUCIE: Who drove? You did?

MR. STEWART: Yes.

DETECTIVE LUCIE: You drove? So Blue Concord or something?

MR. STEWART: It was a blue little car. Window was shot out the back. The back windows is shot. It was shot. Seen him. Back door was open too. Like somebody in -- I don't know.

OFFICER MACDONALD: Which back door?

MR. STEWART: Back door of the car.

OFFICER MACDONALD: I know, which one?

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MR. STEWART: I think it was on the left side. On his side. But I seen him.

DETECTIVE LUCIE: So where was he at inside of the vehicle?

MR. STEWART: In the passenger's seat.

DETECTIVE LUCIE: Okay. By hisself (sic)?

MR. STEWART: And he looked like he was trying to like get up or get out. Feel me -- like get out the car or whatever.

OFFICER MACDONALD: How can you tell that's what he was trying to do?

MR. STEWART: Yeah. That's what -- like --

OFFICER MACDONALD: I'm saying how can you tell that's -- that's what he was trying to do?

MR. STEWART: Cause I kinda saying like he was struggling for his breath and all of that. You feel me? And I didn't really want to remove or whatever. So, we got to the hospital then I tried to pick him up again. He's like nah. Had them do it, you feel me? I still got bullets in -- there was a hole right here. So, I guess he still had a bullet in his neck and I didn't even really know. I mean I seen blood. I just didn't know he got hit that many times until I got to the hospital.

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So that's when you feel me? They took him back. Well they told me to stop trying to grab him cause I guess they didn't want to move the bullets or whatever. Came out with the stretcher, put him on there, took him to the . It was bad.

OFFICER MACDONALD: When did -- go ahead.

DETECTIVE LUCIE: You said which door was open?

MR. STEWART: Back, left door. Behind the passenger.

DETECTIVE LUCIE: The back passenger door was open?

MR. STEWART: Yeah.

OFFICER MACDONALD: By the driver or –

MR. STEWART: Behind the passenger.

OFFICER MACDONALD: So the back, right door.

MR. STEWART: Yeah. Well if you're sitting in the front seat it would

M; When you jumped in did you have to adjust the seat? When you got in the car? Do you --

MR. STEWART: No.

OFFICER MACDONALD: Oh okay.

MR. STEWART: Get in the car didn't have no -- side mirrors even. So, I was really trying to kinda

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rush. I jumped in. I did have to -- what did I have to do -- gave him something to put on -- on his neck or whatever. You feel me? So he was just holding his neck the whole time there. Like Holding his neck the whole time. But he was up though. He was still talking. I ain't even -- lie though.

OFFICER MACDONALD: What was he saying?

MR. STEWART: He weren't really saying nothing I'm like you hear? Can you hear me? He just like -- like yeah. I mean like (sound) like he mumbled. Like (sound) you feel? Like I'm good. Like that. I did try to let him know he was straight. I thought he was through.

OFFICER MACDONALD: All right. So, your cousin dropped you off at Lantz and Riopelle?

DETECTIVE LUCIE: Greeley?

OFFICER MACDONALD: Greeley?

MR. STEWART: Greeley.

OFFICER MACDONALD: And Lantz.

MR. STEWART: Yeah. No. Greeley and Emery.

OFFICER MACDONALD: And then you saw the car –

MR. STEWART: Lantz is the next side street.

OFFICER MACDONALD: All right. So it goes

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Seven Mile --

MR. STEWART: Seven Mile –

OFFICER MACDONALD: Emery, Lantz.

MR. STEWART: Yeah. Seven -- no -- well -- yeah. You right. Seven Mile, Emery, Lantz, State Fair. State Fair, and Riopelle, and Greeley. So, he was like –

OFFICER MACDONALD: All right.

MR. STEWART: That area. Between -- between the -- on the side street though.

OFFICER MACDONALD: All right. And you telling us you was with your cousin all day?

MR. STEWART: I wasn't with my cousin all day. I was with him about –

OFFICER MACDONALD: What -- What time you hook up with your cousin?

MR. STEWART: I'm trying to see what time did I find him? Ya'll don't got the like -- time around -- cause I don't got the exact time I hooked up with my cousin.

DETECTIVE LUCIE: What's your cousin's phone number?

MR. STEWART: 313-948-4173

DETECTIVE LUCIE: 948

MR. STEWART: 4173.

DETECTIVE LUCIE: 4173? So any

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information you give about your whereabouts he can verify?

MR. STEWART: Oh, yeah.

DETECTIVE LUCIE: Okay.

MR. STEWART: Yeah. Yeah.

OFFICER MACDONALD: You remember the time you hooked up with him?

MR. STEWART: No. I mean -- It was like --

OFFICER MACDONALD: His name's Reginald?

MR. STEWART: Yeah. It was 30 minutes -- 30 minutes for I took him to the hospital. Cause it had like -- 90 minutes. So, yeah had to been like -- I don't know what time I got to the hospital.

OFFICER MACDONALD: So, what time you hook up with Reginald?

MR. STEWART: Today? It was early. Earlier in the day. Around –

OFFICER MACDONALD: Before 12, after 12?

MR. STEWART: Like 2 probably.

OFFICER MACDONALD: 2?

MR. STEWART: Yeah.

OFFICER MACDONALD: And then you hung out with him for how long?

MR. STEWART: About like -- I don't know.

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I can't remember. I gotta see -- I mean -- right after I got done with him that's when I seen that. So, it's like -- whatever time he got processed in the hospital -- it's like 30 -- 40 minutes ago is when I was with him.

OFFICER MACDONALD: All right. Do you know what you was doing at 6 o clock?

MR. STEWART: 6. 6. I think I was up there at the hospital, 6. Around 6.

OFFICER MACDONALD: No you wasn't at the hospital no 6 o clock.

MR. STEWART: What time I get up there around what 9?

OFFICER MACDONALD: I mean we're talking about 6 o clock. What was you doing at 6 o clock.

MR. STEWART: That's what I'm saying. I'm off track. I'm trying to figure out what -- exactly where I was at. I know I was --

OFFICER MACDONALD: Do you know what you did at all today prior to finding my man in the stolen car, shot up? Do you know what you did? Do you know what you did from the time you woke up until the time you found this car?

MR. STEWART: What you mean like -- what I do?

OFFICER MACDONALD: I'm just asking.

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MR. STEWART: Yeah. I mean I ain't do nothing. Chillin'.

OFFICER MACDONALD: All right. So you woke up where?

MR. STEWART: I woke up –

OFFICER MACDONALD: On Groesbeck, on –

MR. STEWART: I woke up at --.

OFFICER MACDONALD: And that's where?

MR. STEWART: On 9 and Van Dyke.

OFFICER MACDONALD: So you woke up at 9 and Van Dyke.

MR. STEWART: Van Dyke. Chill. Woke up, came over to the neighborhood I guess. I'm trying to see. I guess it was like around -- what time did I get over here? Around 4 I guess.

DETECTIVE LUCIE: What makes you think 4?

MR. STEWART: I'm not even sure. I'm trying to figure out what time did I get over here?

OFFICER MACDONALD: What part -- what part of the neighborhood we talking about?

MR. STEWART: Over on Seven Mile and 75.

OFFICER MACDONALD: Oh. Okay. All right.

MR. STEWART: The neighborhood I was at.

OFFICER MACDONALD: Okay.

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MR. STEWART: I got dropped off.

OFFICER MACDONALD: So you think you got there 4. So then when did you hook up with your –

MR. STEWART: I'm not sure. I don't know what time exactly I got there. I called him

DETECTIVE LUCIE: You had any phone calls around the time that you were -- did you make any phone calls when you got to the neighborhood? You do anything with your phone? Any SnapChats?

MR. STEWART: Yeah. I got Snaps.

DETECTIVE LUCIE: I'm saying did you do any of that while you were in that neighborhood that day?

MR. STEWART: Oh. No.

DETECTIVE LUCIE: You did nothing that's -- determine your timeline?

MR. STEWART: I ain't gonna lie. I get high.

DETECTIVE LUCIE: Okay.

MR. STEWART: So I really forget a lot of stuff -- like. That's all I do is smoke weed but I don't really -- I'm trying -- I ain't really do nothing yesterday.

DETECTIVE LUCIE: So, you went -- after you got dropped off at Greeley and Emery do you have any idea what time that was?

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MR. STEWART: That was around -- it was like 30 minutes before he got processed at the hospital.

DETECTIVE LUCIE: Give me an idea what time that was.

MR. STEWART: I don't even know what time we got to the hospital. Like --

OFFICER MACDONALD: All right, so –

MR. STEWART: But it was -- it was -- I mean -- it was daytime when I drove him down there. So it had to be late daytime or -- 6, 7, 8. I don't know, Man. It just -- whenever he was processed in -- 30 minutes before that is when I seen him. Or 15-20 minutes. I drove down here fast. 20 minute time.

OFFICER MACDONALD: All right. You hang -- do you hang out with Prophet, Man? You don't hang out with Deron?

MR. STEWART: I said I didn't know -- I don't -- no.

OFFICER MACDONALD: All right. When was the last time you seen him prior to running into him in the car?

MR. STEWART: I was driving one day and I seen him. That was it. You said like how long ago? I probably seen him like few weeks ago.

OFFICER MACDONALD: Why?

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MR. STEWART: I just start coming -- I just start coming back outside like -- even over there.

OFFICER MACDONALD: So -- so this is what you want me and my partner to believe. That Reginald dropped you off at Greeley and Emery. And you's (sic) going to the store. What store was you going to?

MR. STEWART: I wasn't even going to the store. I was just roaming the hood.

OFFICER MACDONALD: You told my partner you was going to go to the store and she asked –

MR. STEWART: Oh, yeah. The Family Dollar. I was going to go to the Family Dollar.

OFFICER LUCIE: Right. And I asked you why didn't he just drop you off at -- at the Family Dollar.

MR. STEWART: Because I said he wasn't going that way. He was going straight to the west side.

OFFICER MACDONALD: So, now you just told me you wasn't going to the store. You was going to roam the neighborhood.

MR. STEWART: Yeah. I was roaming the neighborhood. I had just had got over there. Walking over there. I was gonna go get me some blunts at the Family Dollar –

DETECTIVE LUCIE: Did you go?

MR. STEWART: No. I never got there.

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OFFICER MACDONALD: So, you get dropped at Emery and Greeley and you want me and my partner sit here and believe that you just happened to come across your boy in a car, shot up.

MR. STEWART: What do you mean my boy?

OFFICER MACDONALD: Prophet. You been knowing him a couple years.

MR. STEWART: I'm saying -- right. I know of him. I don't be involved –

OFFICER MACDONALD: All right. So you happen to just be walking.

MR. STEWART: Right.

OFFICER MACDONALD: Down the street. And you see this car with the doors open and when you walk up to it it just happen to be Prophet shot up. So you close the doors, jump in the driver's seat and drive off? So, you close the back door. And what other door you close?

MR. STEWART: That was it.

OFFICER MACDONALD: And then obviously you open the driver's door.

MR. STEWART: And got in it.

OFFICER MACDONALD: So -- that's gonna explain why your handprints or you DNA is gonna be on the back door, because you touched. And that's gonna explain why your handprints is on the front. Because you touched

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it to get in. And obviously cause you had to drive down there. So, I'm getting a whole totally different story. All right? So, not only am I investigating this stolen car –

MR. STEWART: Right.

OFFICER MACDONALD: I'm investigating how Prophet got shot. And his name ain't Prophet. His last name is White. So -- but you know him as Prophet. So, I'm also investigating how Prophet got shot, all right?

MR. STEWART: I ain't got –

OFFICER MACDONALD: It's my understanding that Prophet, you -- listen before you say anything.

MR. STEWART: All right. All right.

OFFICER MACDONALD: And some other cat was -- was off Meade -- you know where Meade is at? You know where Meade and Greeley is at?

MR. STEWART: Me?

OFFICER MACDONALD: Meade.

MR. STEWART: And Greeley?

OFFICER MACDONALD: Yeah.

MR. STEWART: M-e-d-e?

OFFICER MACDONALD: Yeah. M-e-a-d-e.

MR. STEWART: Meade and Greeley, no.

OFFICER MACDONALD: All right. Ya'll pull up, do a robbery -- just listen. Ya'll do a robbery and

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Prophet end up getting shot cause my man got a pistol. So then Prophet drop the gun. A black gun with an extended clip. And you race him to the hospital. Right? So, now ya'll at the hospital. Prophet shot. You locked up for being in the car. So, in the car that you driving is evidence or items taken from another robbery that happened off of Packard and Spencer. I mean Packard and Savage.

MR. STEWART: Packard and Savage.

OFFICER MACDONALD: Right. Same car. So you ain't involved in not one of these?

MR. STEWART: No.

OFFICER MACDONALD: At all?

MR. STEWART: I can stand in front of -- what witnesses? You know what I'm saying.

DETECTIVE LUCIE: But you can't verify your whereabouts.

MR. STEWART: I'm telling ya'll where I was at.

OFFICER MACDONALD: You gave me a couple stories.

MR. STEWART: I'm saying though -- Me -- by you all saying me being with them -- how does -- like -- I wasn't -- you feel me? It don't add up.

DETECTIVE LUCIE: You going to tell us

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our story don't add up?

MR. STEWART: They don't. I'm saying how I was with them.

DETECTIVE LUCIE: Repeat your story to us. One more time out loud.

MR. STEWART: I said I seen –

DETECTIVE LUCIE: Repeat your story to us one more time. Out loud. And see which one makes more sense.

MR. STEWART: I got dropped in the neighborhood.

DETECTIVE LUCIE: In the neighborhood. Where's the Family Dollar located?

MR. STEWART: Family Dollar located on State Fair.

DETECTIVE LUCIE: State Fair and what?

MR. STEWART: State Fair and what? Between Riopelle and martin. Right there.

DETECTIVE LUCIE: Okay.

MR. STEWART: on State Fair.

DETECTIVE LUCIE: I heard you. Go ahead.

MR. STEWART: Got dropped off.

DETECTIVE LUCIE: So, why you didn't get dropped off at State Fair?

MR. STEWART: Because I said he had to go

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to the west side.

DETECTIVE LUCIE: Okay. But you got dropped off at the intersection of Greeley and Emery.

MR. STEWART: Right.

DETECTIVE LUCIE: Wouldn't it be easy to take State Fair to the west side?

MR. STEWART: No. He took –

DETECTIVE LUCIE: Seven Mile to the west side?

MR. STEWART: From where we was coming from -- from Nine Mile and Van Dyke –

DETECTIVE LUCIE: I understand.

MR. STEWART: You take that all the way up Seven Mile –

OFFICER LUCIE: Okay

MR. STEWART: All the way down.

DETECTIVE LUCIE: So he can't shoot you to the Family Dollar.

MR. STEWART: No, he didn't even know I was going to the Family Dollar. Him was just dropping me off over there.

DETECTIVE LUCIE: And after you left the Family Dollar –

MR. STEWART: I didn't never get to the Family Dollar. I saw -- I got dropped off on Greeley.

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DETECTIVE LUCIE: What were your -- Where were your -- where were your intentions –

MR. STEWART: To the Family Dollar. I was walking up to the Family Dollar.

DETECTIVE LUCIE: After the Family Dollar where were you going to go?

MR. STEWART: Smoke.

DETECTIVE LUCIE: With who?

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.

MR. STEWART: Cause I never got to it. I

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never got to the Family Dollar.

DETECTIVE LUCIE: I know. Cause you were doing something else.

MR. STEWART: I wasn't.

DETECTIVE LUCIE: You were. Yeah you were.

OFFICER MACDONALD: Wasn't nobody wearing no mask. Wasn't no gloves, right? The gun got dropped so -- I know at one point Deron had an assault rifle. And at one point somebody in that car had a handgun with the extended clip. So we got the handgun with the extended clip. So that's gone. At any point when we test that gun is your handprints going to be on it?

MR. STEWART: No. Sir. I'm telling you. I'm not lying. I'm telling you. Ya'll can do all of that with the guns. Whatever guns you all catches or put me in front of anybody. That's that. They got me fingerprinted up here. When I got through the system or whatever. Whatever. However they did it. They fingerprinted me. Ya'll can check it or whatever.

OFFICER MACDONALD: How come you ain't -- listen. How come we don't got no blood on your clothes from trying to help your boy?

MR. STEWART:NESS: You know I did have some blood on me. As a matter of fact. Here's some blood right

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here.

OFFICER MACDONALD: Fine. And where else?

MR. STEWART:NESS: That was all -- that was really it.

OFFICER MACDONALD: That was it?

MR. STEWART: I didn't really even touch him when I got in the car. Gave him that -- gave him his little shirt thing he put up to his neck. This is the most blood I got on me.

OFFICER MACDONALD: So let me -- you want me to believe that somebody drove this mother fucker from where he got shot at -- Meade and Greeley -- so they drove his ass from Meade and Greeley -- up to State Fair and Greeley just dumped his ass off?

MR. STEWART: No. State Fair and Greeley. It was on the side street.

OFFICER MACDONALD: You told the -- you told -- you told the mother fucking police you found his ass at State Fair and -- I got the report.

MR. STEWART: I said I rode -- we ride up State Fair and Greeley when I got onto 75. I didn't see -- I didn't see him on State Fair and Greeley. I didn't see him on State Fair and Greeley.

OFFICER MACDONALD: All right. So you gonna tell they dumped him in the mother fucking alley –

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MR. STEWART: They didn't dump him. The car was just there. I seen the car there.

OFFICER MACDONALD: Just sitting on -- on Greeley?

MR. STEWART: No.

OFFICER MACDONALD: Sitting on Riopelle.

MR. STEWART: No.

OFFICER MACDONALD: Sitting in the alley.

MR. STEWART: On the side street. By the alley -- the alley.

DETECTIVE LUCIE: Did you say Greeley or did you say Lantz?

MR. STEWART: Lantz is the side street.

DETECTIVE LUCIE: Correct.

MR. STEWART: Greeley is -- Riopelle is –

DETECTIVE LUCIE: Correct.

MR. STEWART: All right. It's like this. Car right here between these two. This is little alley right here. Car was by the alley.

OFFICER MACDONALD: So is it parked on the street?

MR. STEWART: Yeah but it was like closer to the alley.

OFFICER MACDONALD: So, it's parked on the street between State Fair and Lantz or –

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MR. STEWART: Right. No. Not State Fair and Lantz. That don't even –

OFFICER MACDONALD: Listen homeboy. Greeley goes up and down. Like north and south.

MR. STEWART: I know that.

OFFICER MACDONALD: Okay. And then Lantz go east and west. State Fair go east and west. Emery go east and west. So if he's parked on Greeley is it between State Fair and Lantz or is it between –

MR. STEWART: I didn't say he was parked on Greeley. I said he was parked on Lantz. Look, Greeley run straight. Lantz is the side street.

OFFICER MACDONALD: So he parked on Lantz?

MR. STEWART: Yes, on Lantz. The side street between Greeley and Emery. And you know how between every block is a little alley –

OFFICER MACDONALD: Right. I get that, bro.

MR. STEWART: he's by the alley.

OFFICER MACDONALD: If he's parked on Lantz, he has to be between Greeley and Riopelle.

MR. STEWART: Right.

OFFICER MACDONALD: So, he's parked on Lantz between Greeley and Riopelle.

MR. STEWART: Right.

OFFICER MACDONALD: So, somebody just drove

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his ass there and just dumped him?

MR. STEWART: I don't know.

OFFICER MACDONALD: With the doors open?

MR. STEWART: I don't know. I seen the back door open.

OFFICER MACDONALD: Let me tell -- let me tell you what I think of why you telling me the back door is open.

MR. STEWART: Oh. Go ahead.

OFFICER MACDONALD: Because -- to explain why your prints is going to be on that back door. I'm thinking you in the backseat and you got out the mother fucking car to get into the driver's seat and drive his ass to the hospital.

DETECTIVE LUCIE: Cause your homebody dipped on you.

OFFICER MACDONALD: Cause your homeboy dipped. Took the -- took the -- took the fucking chomper.

DETECTIVE LUCIE: Yep.

MR. STEWART: What chomper? What?

OFFICER MACDONALD: Cause prophet dropped the fucking handgun. Who in their right mind -- you don't even hang with -- listen -- this is what you telling me. I don't need to hang With that mother fucker like that. I saw his ass a couple weeks ago. I just know him. I don't

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hang With him. I just know of him. Right? But you happened to just be in the same spot as this mother fucker when he's shot up in the car. Just by coincidence. This is what you telling me. Hey Officer MacDonald, Detective Lucie, my homeboy -- cousin dropped me off. I happened to just be walking up the fucking street and I looked down the street like 'oh, shit.'

DETECTIVE LUCIE: I'm going to be a fucking hero.

OFFICER MACDONALD: There go a car With mother fucking door open. Let me see what's going on. So, I'm be nosy as fuck. I'm gonna walk up to –

MR. STEWART: No. I seen blood.

OFFICER MACDONALD: So, listen --

MR. STEWART: Like I seen --

OFFICER MACDONALD: You see the fucking car on the street –

MR. STEWART: Blood. Yeah.

OFFICER MACDONALD: So, instead of just minding your fucking business let me go be nosy? Let me go see -- let me go see why that door open to that car? So you walk to the car but oh, shit it's Prophet. Oh, shit he's shot. Let me take his ass to the hospital. But you tell the police I ain't -- I ain't -- you ain't telling the same story.

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MR. STEWART: I told the police the same story at the hospital. I say I seen Prophet on -- I'm telling them the same thing I told you all.

OFFICER MACDONALD: But I'm not going to believe that -- that -- that bullshit. Cause don't nobody in the hood just be walking down the street and be like oh let me fucking go be nosy. Let me be a mother fucking hero.

MR. STEWART: That ain't even it. I seen a car shot up and I know -- like I know his face.

DETECTIVE LUCIE: Nobody else seen him -- seen that car over there.

MR. STEWART: Oh, I don't know.

OFFICER MACDONALD: So you happened to be the only one to drive– to walk past and see the mother fucker in the car, shot. Mother fucker's drove down Lantz didn't see it. Somebody else walking they dog didn't see it.

MR. STEWART: Cause the alley. I don't know. I don't know.

DETECTIVE LUCIE: Why were you -- why were you even near the alley?

MR. STEWART: Because I was -- tracked up Lantz, Riopelle is the next block, Family Dollar is right there on the State Fair. Come up Greely, turn up Lantz,

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go right there.

OFFICER MACDONALD: So why you don't take Greeley straight up to mother fuckin' –

MR. STEWART: State Fair?

OFFICER MACDONALD: Yeah. Why you got to walk down Lantz?

MR. STEWART: No, no. Family Dollar is on Riopelle.

OFFICER MACDONALD: I get that, bro. Greeley and Riopelle's right there. Greeley –

MR. STEWART: I always -- this is my route. When I walk -- when I walk -- if I walk up to the Family Dollar I always walk up Greeley, get to Lantz, turn right, then hit a left on Riopelle and go to the Family Dollar.

OFFICER MACDONALD: Bro, you hang off of Seven Mile.

MR. STEWART: I don't hang off Seven Mile.

OFFICER MACDONALD: So, this is your route. Where you coming from to take that route all the time?

MR. STEWART: My grandma stays on Greeley and Emery.

OFFICER MACDONALD: So every time you go to the Family Dollar instead of taking Greeley just all the way up to State Fair and make a left -- or make a

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right –

MR. STEWART: Right.

OFFICER MACDONALD: You decide to fucking go up to Lantz, let me take Lantz across instead and then walk up Riopelle to State Fair.

MR. STEWART: Right.

OFFICER MACDONALD: That's your route you take every time you go to that store?

MR. STEWART: Cause Family Dollar right there, man.

OFFICER MACDONALD: I know where the Family Dollar at, bro.

MR. STEWART: All right. That's all I'm saying. That's the route I took.

OFFICER MACDONALD: So, that's -- that's how you going to explain how you found the car? I take that route every day and because –

MR. STEWART: I ain't about to say I take this route every day --

OFFICER MACDONALD: You said that's the route you always take when you go up to the Family Dollar.

MR. STEWART: Not every day. I just start coming back to the neighborhood. I don't just be over there like that no more.

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OFFICER MACDONALD: All right, Josh listen. At what point are you going to sit here and say and be honest about what the fuck happened? Because I'm not buying that shit.

MR. STEWART: Man, I'm being honest.

OFFICER MACDONALD: You can't be honest.

MR. STEWART: I am. I ain't –

OFFICER MACDONALD: Maybe what happened -- you didn't know was going to happen. But to sit here and -- sit here and tell me that you stumbled across your boy in the car shot the fuck up -- boy, I been doing this shit for a long time and I ain't never talked to nobody was like yeah I was walking down the street and I ran across my boy shot the fuck up so I took him to the hospital. I ain't never heard that fucking story in my whole life. Since I been doing this job. And I have talked to many mother fucker's. On many different occasions about many different things. I ain't never heard a fucking story like that. That's the route I take when I go to Family Dollar. My cousin dropped me off over here instead of taking there because he was going to the west side. Come on, man. You better off saying 'listen, man. I didn't know what the fuck was going down. I end up With this nigger down so I shot him to the hospital.' That's what happened.

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MR. STEWART: I seen him, shot him to the hospital.

OFFICER MACDONALD: No, but you not going to tell me this story about how you found him, man.

MR. STEWART: I shot him to the hospital. I'm telling you.

DETECTIVE LUCIE: Who did you rehearse this story With? Who did you ask what you should tell the police? You asked somebody. You asked somebody. I gotta talk to the police when I get there so what should I say.

MR. STEWART: No. Who do I look like? I didn't say nothing like that.

DETECTIVE LUCIE: You didn't ask nobody?

MR. STEWART: No.

DETECTIVE LUCIE: You thought of this story all on your own?

MR. STEWART: No. Only thing I asked the officers is what –

DETECTIVE LUCIE: I didn't say the officers. I said somebody you know. Who did you ask what to tell us when you made contact With the Detroit Police Department?

MR. STEWART: No one.

DETECTIVE LUCIE: You didn't ask them nothing?

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MR. STEWART: No.

DETECTIVE LUCIE: So you came up With this story all on your own?

MR. STEWART: I didn't ask nobody nothing.

DETECTIVE LUCIE: You should have. Cause it doesn't make sense.

MR. STEWART: I seen him.

OFFICER MACDONALD: So, what -- Prophet ain't dead. So, when I go talk to Prophet at the hospital what's he going to say? Hey man I was just parked on Lantz and mother fucking –

DETECTIVE LUCIE: My man –

OFFICER MACDONALD: My man -- my man who I ain't seen in a minute just walked up and fucking miraculous found me and saved my mother fucking life?

MR. STEWART: I don't know what he's going to say.

OFFICER MACDONALD: He going to say 'hey I was on trying to rob this mother fucker and I got fucking shot. Because ain't no -- cause he can't say nothing else because that's what happened. He ain't going -- he can't tell you -- he can't tell me nothing else but I was on me, I went to rob these mother fuckers and my man had a pistol and he shot my ass the fuck up. And my homeboy drove me to the fucking hospital because we're fucking

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dumb. We're out here doing dumb shit.

MR. STEWART: Who is we? Who is we?

OFFICER MACDONALD: Who am I talking to?

MR. STEWART: I didn't do nothing dumb.

OFFICER MACDONALD: You put yourself in the position to be here.

MR. STEWART: I mean, that's the only -- yeah that was dumb –

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.

MR. STEWART: Stumbled across. I ain't --

OFFICER MACDONALD: You could just stumbled across the mother fucker in the field dead.

MR. STEWART: Ya'll are trying to --

DETECTIVE LUCIE: Just chill, bro. Did you ask Prophet what happened? Did you ask Prophet what happened?

MR. STEWART: He was shot up. How can I ask him what happened?

DETECTIVE LUCIE: He could talk.

MR. STEWART: No. He wasn't talking. He

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mumbled.

DETECTIVE LUCIE: He wasn't talking to you?

MR. STEWART: He did that.

DETECTIVE LUCIE: Why would you put yourself in the position that you could have been hurt? Driving a car that just got shot up?

MR. STEWART: I mean -- I just seen -- I know him so I taking him to the hospital.

DETECTIVE LUCIE: Is that why you put yourself in the position to be shot up?

MR. STEWART: I ain't -- I ain't get shot up. What you mean?

DETECTIVE LUCIE: You could have. It could have been something someone retaliated against him. Somebody could have felt like you were taking their car, you know.

MR. STEWART: Oh. I mean -- I don't know who car that is.

DETECTIVE LUCIE: But you were confident enough to drive it cause you sitting in the backseat.

MR. STEWART: Sitting in the –

DETECTIVE LUCIE: Behind Prophet.

MR. STEWART: Never was.

DETECTIVE LUCIE: Yeah, you were.

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MR. STEWART: No, I wasn't.

DETECTIVE LUCIE: Absolutely, you were.

MR. STEWART: I wasn't. I'm serious. I mean -- I know how you all play this out.

DETECTIVE LUCIE: It's not a game. It's not my life.

MR. STEWART: I know it's not a game.

DETECTIVE LUCIE: It's not my life.

MR. STEWART: No, it's mine.

DETECTIVE LUCIE: And you playing With people that could alter your life.

MR. STEWART: I'm not playing.

DETECTIVE LUCIE: Oh, no you're playing. You absolutely are playing. Our job is to figure out what they -- what things happened and who was -- and who was responsible for them.

MR. STEWART: I don't know what happened. I don't got my hands on nothing besides that vehicle that I end up jumping in. That's it.

DETECTIVE LUCIE: So, you more worried about the fact that you were driving a stolen car.

MR. STEWART: No, because that's what they told me at the hospital. I was being charged With a stolen car.

DETECTIVE LUCIE: What -- did you use a

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key to start that car?

MR. STEWART: There was a key in the ignition.

DETECTIVE LUCIE: There was a key in the ignition. Did you use that key to start the car?

MR. STEWART: Yes.

DETECTIVE LUCIE: And it cranked right up.

MR. STEWART: When driving it said it was cranked up.

OFFICER MACDONALD: So, not only did they dump the car. They had enough courtesy to even turn it off? So, they dumped the car and turned it off.

MR. STEWART: I guess. When I got to the car the car was just sitting there.

OFFICER MACDONALD: Josh, you 18 man.

MR. STEWART: Yeah I'm 18.

OFFICER MACDONALD: What do you want in life?

MR. STEWART: I'm trying to be successful. You mean what I want in life?

OFFICER MACDONALD: All right. Well, to be successful, Man you gotta have some type of honesty.

MR. STEWART: I don't get down With all this cancer junk and all of this other bull. I ain't

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doing nothing. You hear me? I been going to school every day. Just got back from school. I mean -- ya'll ain't trying to hear none of this

DETECTIVE LUCIE: How you going to be successful? What's going to be your means to success?

MR. STEWART: I mean I just got out of -- I'm about to graduate. What's your name from high school. I got free scholarships cause this little people -- little programs deal With you and stuff like that when they find out what your help or whatever it is. So I got a bunch of -- I can go to a little college or whatever. They'll pay for something.

DETECTIVE LUCIE: But what are you -- what do you want to do?

MR. STEWART: Management. I want to do sports management. And not as far as got to be hoopin' (sic) all the time. I'm talking about management as far as sports. That's what I want to do.

DETECTIVE LUCIE: So, you want to be in charge of somebody else's money.

MR. STEWART: I mean yeah. Sports management.

DETECTIVE LUCIE: Be in charge of your life right now and quit playing With me. Quit playing With me. Just tell me the truth. Just tell me the truth.

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MR. STEWART: I'm not playing.

DETECTIVE LUCIE: You don't want nobody to testify against you.

MR. STEWART: Who going -- I know nobody going to testify against me.

DETECTIVE LUCIE: Oh, no you don't.

MR. STEWART: I mean -- who could testify against me? Any witnesses –

DETECTIVE LUCIE: How do you think that we got here With you today? In the middle of the night? At four in the morning?

MR. STEWART: I knew you all was coming.

DETECTIVE LUCIE: Okay, for what reason?

MR. STEWART: Cause the officers told me. They told me you all was coming.

DETECTIVE LUCIE: What reason do you think we're here?

MR. STEWART: To investigate.

DETECTIVE LUCIE: Investigate what kind of crime?

MR. STEWART: Whatever happened.

DETECTIVE LUCIE: What kind of crime?

MR. STEWART: Stolen vehicle.

DETECTIVE LUCIE: Really?

DETECTIVE LUCIE: Well a shot crime?

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Shooting crime? That's what you all talking about. Shooting crime.

OFFICER MACDONALD: I told you that's why we was here.

MR. STEWART: Right. Say something about Greeley and Meade -- May.

OFFICER MACDONALD: Right. What do you know about an incident that happened on Savage and Packard? Involving Prophet?

MR. STEWART: Savage and Packard. I don't know nothing about Savage and Packard.

OFFICER MACDONALD: You don't know about rolling up With Prophet –

MR. STEWART: No.

OFFICER MACDONALD: And two guys on Savage and Packard?

MR. STEWART: No.

OFFICER MACDONALD: And then Prophet shooting one of them in the back?

MR. STEWART: No. I don't know nothing about that.

OFFICER MACDONALD: So the MR. STEWARTwe talking to just got it –

MR. STEWART: I mean I'm telling you. I don't know nothing about no Prophet shoot nobody in the

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back or –

DETECTIVE LUCIE: So, who did?

MR. STEWART: Or Savage -- I don't know. I don't know about Savage.

DETECTIVE LUCIE: Who shot him?

MR. STEWART: I don't know what's about Savage. I only heard that With the officers.

OFFICER MACDONALD: I mean you know where that's at?

MR. STEWART: Savage? Yeah, I know where it's at on Erie.

OFFICER MACDONALD: You know where Packard's at?

MR. STEWART: Packard, I don't know where Packard's is.

DETECTIVE LUCIE: Who shot my man in the back?

MR. STEWART: I don't have no clue. I don't even know who got shot. I just heard it when I was in With the officers. When they was walkie talkie shit on Savage and Packard. I mean –

DETECTIVE LUCIE: It's hard –

OFFICER MACDONALD: You heard that on a walkie talkie? Savage and Packard?

MR. STEWART: Yes. And when I was –

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DETECTIVE LUCIE: And it just stuck in your mind?

MR. STEWART: No. Ya'll just brought it up.

DETECTIVE LUCIE: I mean but it stayed in your mind.

MR. STEWART: Because you all brought it up. I remembered.

DETECTIVE LUCIE: So, I could say any intersection. That don't mean it will be fresh in your mind.

MR. STEWART: No. I'm just saying -- like if you would have said do you know where is that I'd have just said yeah.

DETECTIVE LUCIE: He said -- you kept repeating the word Savage, correct?

MR. STEWART: After he brought it up, right?

DETECTIVE LUCIE: Okay. That's not my point.

MR. STEWART: Oh.

DETECTIVE LUCIE: My point is that you remember Savage cause you're familiar With Savage.

MR. STEWART: Right.

DETECTIVE LUCIE: Cause you heard of it before.

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MR. STEWART: Right. I seen the street before.

DETECTIVE LUCIE: So, you hearing some intersections on the police walkie talkie -- those intersections made a difference to you.

MR. STEWART: No. I just heard Savage. That's all I'm saying. Then I heard you all sit up here and say Savage.

DETECTIVE LUCIE: And Packard.

MR. STEWART: Right. I mean that's -- I don't know nothing about no Packard.

DETECTIVE LUCIE: And then you said yeah. I didn't know nothing about it but I heard it on the police walkie talkie.

MR. STEWART: Because you just asked me that. You just said something about Savage, right? And I said I heard that on –

DETECTIVE LUCIE: I am asking –

MR. STEWART: Yes. And I'm telling you that I heard that on the police walkie talkie. Same street you just said.

DETECTIVE LUCIE: And I'm asking you why would that intersection stay fresh in your mind? Because the radio -- police radio talks all day. It's constant. It's a lot of intersections. A lot of information is

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given out all day long. If you sat wherever you were waiting for whomever to arrive you probably heard 15 intersections. 15 different types of crimes. Why does that intersection is fresh in your mind?

MR. STEWART: Just heard it. I'm tell you. I heard Savage. You said it.

OFFICER MACDONALD: So what are you -- what are you -- where is Savage? Where do you think Savage is located?

MR. STEWART: I know it's on the east. It's on the east side somewhere. Savage on the east side somewhere.

OFFICER MACDONALD: Okay. I mean where at? Between –

MR. STEWART: I don't know. I don't know exactly where Savage is. I just know it's an east side street.

OFFICER MACDONALD: All right. You -- you 18, bro. Right?

MR. STEWART: Yes, Sir.

OFFICER MACDONALD: 18 years old. And this is decision -- decisions you making at 18. All right. All right. You just going to put yourself in a stolen car for a dude that you just know of.

MR. STEWART: He was shot up. And still

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living.

DETECTIVE LUCIE: How do you know?

MR. STEWART: Because he was talking to me. I keep telling you that.

DETECTIVE LUCIE: That's not what you just told me. What did you tell me before?

MR. STEWART: The (sound). Yeah, right. The (sound). Like that. He was responding to me.

OFFICER MACDONALD: All right. I'm not saying when this incident took place that you pulled the trigger. We already know who pulled the trigger. But I am saying you was there. And I got Witlessness saying you was there. Unless there's another person that's 6'2", thin build that's walking around like your ass, that look like you -- then I'm -- then I got -- I should be looking for that person if you got a twin around here. Walking around here hanging With Prophet, doing dumb shit. And that's what it is. Dumb shit. And maybe he took it a little bit further.

MR. STEWART: I don't know. I'm serious. I'm dead serious.

OFFICER MACDONALD: I mean I'm dead serious too, bro.

MR. STEWART: I wish I wasn;t down there.

DETECTIVE LUCIE: Excuse me.

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MR. STEWART: Bless you.

DETECTIVE LUCIE: Thank you. Why do you think he was shot up?

MR. STEWART: I mean I don't know. There's a lot go on over there. Detroit period.

DETECTIVE LUCIE: Give me a reason. That's your home.

MR. STEWART: I don't know. That's not my home. I keep saying it's not my home. I just know of.

DETECTIVE LUCIE: You just know of. I mean, you got to realize that. You 18. Okay?

MR. STEWART: Right.

DETECTIVE LUCIE: We're both old enough to be your parents. Okay?

MR. STEWART: Yes. Yes.

DETECTIVE LUCIE: So it's like you trying to sit there and convince your mother and your father that you didn't do some shit when we know you did. We didn't say you killed nobody.

MR. STEWART: I didn't do nothing.

DETECTIVE LUCIE: We didn't say you pulled the trigger. We didn't say you didn't pull nothing out of nobody's pocket. But you know what happened.

OFFICER MACDONALD: That's a car involved in a mother fucking homicide, bro. That's a car involved

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in a homicide. And you want me to sit here and my partner's here and believe you just stumbled across this mother fucker? That's what I'm still stuck on. I'm still trying to get past you just happen to be walking down the fucking street and find a nigger in the car shot.

MR. STEWART: Man, I was just as surprised as you all is.

OFFICER MACDONALD: And then have the balls to jump in that mother fucker and drive off.

MR. STEWART: Just cause I -- so if you is seeing somebody shot –

OFFICER MACDONALD: I'm calling the police. Hey, there's a mother fucker in the car shot the fuck up. Ya'll might want to get over here ASAP.

MR. STEWART: You know -- call the police?

OFFICER MACDONALD: Yeah.

MR. STEWART: C'mon man. C'mon be for real. They coming. They coming. They is not coming.

OFFICER MACDONALD: When the last time you call the police and they ain't show up?

MR. STEWART: Millions of times.

DETECTIVE LUCIE: You ain't never called.

OFFICER MACDONALD: You called a million times?

MR. STEWART: No, I –

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OFFICER MACDONALD: So, why your ass didn't call today when he was sitting there?

MR. STEWART: I said I seen millions of times people call police and police never show up. Ambulance, nothing. For hours. Dude dam near was dead. For real.

OFFICER MACDONALD: And you -- who called the police?

MR. STEWART: I didn't call no police. He didn't call no police. I don't know –

DETECTIVE LUCIE: What are you doing in the city anyway if you stay way out there?

MR. STEWART: Because my grandma stay on Greeley. My mom –

OFFICER MACDONALD: But you weren't going to grandmama house dog. You going to the dollar store to get some blunts and smoke.

MR. STEWART: Right.

OFFICER MACDONALD: By yourself. You ain't smoke in your grandmama house.

MR. STEWART: Wherever.

DETECTIVE LUCIE: Smoke where? With who? Who you smoking With? Where you going to smoke?

MR. STEWART: I gonna smoke by myself.

DETECTIVE LUCIE: Where at?

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MR. STEWART: Wherever. Bro loves to smoke. Ya'll don't believe me? I'm so serious. Like I really –

DETECTIVE LUCIE: So you was going to stand your ass at the intersection of Greeley and Emery and smoke a blunt?

MR. STEWART: No. I going -- I go –

DETECTIVE LUCIE: Think.

MR. STEWART: Back. All right. I go -- it's a little bit to my grandma crib. So I go back there and smoke.

DETECTIVE LUCIE: So you smoke at your grandmama's then?

MR. STEWART: Right. They don't know but –

DETECTIVE LUCIE: You think nobody can't smell the weed? That's how -- that's how I know you 18.

MR. STEWART: For real -- they don't know I smoke --

DETECTIVE LUCIE: You can't be low-key the way the marijuana smells.

MR. STEWART: My grandma don't know I smoke. I mean my auntie do but she stay there With us –

OFFICER MACDONALD: Man, how long you think you going to sit here and bullshit me with your soft tone, low voice?

MR. STEWART: I don't -- I mean -- I roll

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but –

OFFICER MACDONALD: That's cool. That's cool.

MR. STEWART: Fucking With all that. I don't -- I don't care about how you feel about me being soft or whatever.

OFFICER MACDONALD: I ain't call you soft. Man, I say your soft tone voice.

MR. STEWART: Oh.

OFFICER MACDONALD: I didn't call you soft. I know you ain't soft cause you out here doing fucking licks With fucking Prophet.

MR. STEWART: I'm not doing licks. I'm not doing licks With nobody. I don't hit --

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. I don't know how he got shot, why he got shot. So I'm going to take the chance of jumping in the car, not knowing if the

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mother fuckers that did this is around the corner or they inside the house waiting. Instead I just going to jump in the car for a dude that I really don't hang out With that I seen weeks ago. Now this was your homeboy I could understand you jumping in the whip and taking him to the hospital cause that's your homeboy. But you sat here told me and her that I don't know why you keep calling him my homeboy. He ain't my homeboy. I don't hang With him. I see him here and there. I don't do nothing. I don't go nowhere. I'm at my grandmama house on the balcony smoking. That's what you sit here telling us. And I'm supposed to -- me and my partner supposed to take this thing. Oh, oh shit, okay. All right Josh. All right, Josh. Yep, yep, yep. Hell no. I been doing this shit 15 years. She been doing this shit 16. That shit don't work that way. You do dumb shit cause -- do you carry -- did you get caught With a burner?

MR. STEWART: Who?

OFFICER MACDONALD: You. You got caught With a burner?

MR. STEWART: Yes I do. Years ago.

OFFICER MACDONALD: Okay. So you do dumb shit though.

MR. STEWART: Two years ago I did that.

OFFICER MACDONALD: Why?

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DETECTIVE LUCIE: Don't give a fuck when it was.

OFFICER MACDONALD: Well that's some dumb shit.

DETECTIVE LUCIE: It was dumb.

OFFICER MACDONALD: That's some dumb shit.

MR. STEWART: I'm not trying to get tough when I say that.

DETECTIVE LUCIE: But you did. You raised your voice.

MR. STEWART: No. No I'm not trying to get tough. Cause I'm not that type of person.

DETECTIVE LUCIE: But you did -- wanted to emphasize that it was two years ago cause you were juvenile. Like that matters.

MR. STEWART: I'm not saying that.

DETECTIVE LUCIE: it still shows your tendencies.

MR. STEWART: Right.

DETECTIVE LUCIE: You have the ability to carry a pistol. Don't get it twisted.

MR. STEWART: What pistol?

DETECTIVE LUCIE: It was a pistol you got caught With. What you mean what pistol?

MR. STEWART: Oh you talking about that

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when I -- oh.

DETECTIVE LUCIE: So it shows the character that you have.

MR. STEWART: I don't have that no character.

DETECTIVE LUCIE: Okay. But you have the ability to carry a pistol.

MR. STEWART: I got caught With an empty gun.

DETECTIVE LUCIE: And you got caught With it.

MR. STEWART: That I found.

DETECTIVE LUCIE: Okay. And? I don't care how you got it.

OFFICER MACDONALD: Listen –

DETECTIVE LUCIE: Man up to some shit sometime.

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

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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. Or not –

MR. STEWART: I didn't say none of that.

OFFICER MACDONALD: You just said that. You just said you found the gun. It was unloaded.

MR. STEWART: No I just told ya'll that.

OFFICER MACDONALD: Man up to some shit. Be 18 and -- and start being fucking responsible. Cause you sitting here and you going to let mother fucking Prophet heal the fuck up and when I see and talk to him -- if I'm Prophet I'm like fuck yo, bro. Go holler at nigger Josh. That nigger don't want to have to grill. I didn't know he was going to do that. I didn't know this is going to happen. Go talk to this person. Go talk to that person. I'm ready to testify. I'm ready to do this. Cause this nigger know he in trouble. He got shot. And it's a rap for him. So what did you have to do? I got to deflect this shit. Go holler at Josh. Or go holler at so and so.

MR. STEWART: Don't holler at Josh. Josh not going to be none of the people that anybody can --

DETECTIVE LUCIE: The problem is that you

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let somebody live. That's the problem. Ya'll let somebody live.

MR. STEWART: Somebody –

DETECTIVE LUCIE: When you did the shit you was doing, little robberies and shit. You left somebody live.

OFFICER MACDONALD: You got the one on Savage lived. I mean -- shooting at his feet. Then you got -- then you got the mother fucker on Meade lived cause he had a pistol. So he shot back.

DETECTIVE LUCIE: Ya'll sloppy. Ya'll do sloppy work.

OFFICER MACDONALD: I mean you wearing the same -- you wearing the same clothes you wore all day. I mean have you changed clothes since you been up?

MR. STEWART: No.

OFFICER MACDONALD: So, you the same height, the same complexion, the same age, the same hairstyle. The same clothes as this mother fucker's responsible for this shit on Savage and you –

MR. STEWART: So they say –

OFFICER MACDONALD: So you like well this shit is a coincidence.

MR. STEWART: They got a 6'2" dude -- this you telling me. You telling me they said they seen a 6'2"

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dude, which is me, right?

OFFICER MACDONALD: What I just -- what I just tell you?

MR. STEWART: That's what you said. I'm asking -- that's why I'm asking?

OFFICER MACDONALD: Is that what's come out of my mouth?

MR. STEWART: That's why I'm asking you. I'm not -- I'm trying to –

OFFICER MACDONALD: When?

MR. STEWART: All right. I'm trying to clear it up. That's what you said. Oh well.

OFFICER MACDONALD: They say a tall, slim dude.

6'1" 6'2". Short hair.

MR. STEWART: That ain't me.

OFFICER MACDONALD: Then this boy had -- then this boy had the dreads.

MR. STEWART: That's crazy. That's crazy how you all got that.

DETECTIVE LUCIE: Cause somebody live it.

OFFICER MACDONALD: That's called witnesses, bro.

MR. STEWART: I said -- that's what I'm saying – that's

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crazy

DETECTIVE LUCIE: That's why. Everybody didn't die. When people don't die they want to see justice.

MR. STEWART: Right. I know how that works.

DETECTIVE LUCIE: And they were -- you know -- ya'll don't wear masks and shit. Ya'll sloppy. Ya'll do bad work. Ya'll did a hit couple licks and get caught Within hours on some bullshit.

MR. STEWART: Who is ya'll?

DETECTIVE LUCIE: What do you mean who is ya'll?

MR. STEWART: I didn't hit -- I didn't hit –

DETECTIVE LUCIE: You didn't get a cut? Didn't cut you cause you didn't get no bread.

MR. STEWART: I didn't do nothing.

DETECTIVE LUCIE: Ya'll got a bunch of bullshit in the car.

MR. STEWART: I didn't have nothing in the car.

DETECTIVE LUCIE: Nothing.

MR. STEWART: Nothing. Not one thing. I mean I didn't have nothing in that car.

DETECTIVE LUCIE: You smoke cigarettes?

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MR. STEWART: No.

DETECTIVE LUCIE: Just weed?

MR. STEWART: Yes.

DETECTIVE LUCIE: You got a lighter With you today?

MR. STEWART: I can't smoke cigarettes.

DETECTIVE LUCIE: You got a lighter With you today? In your property bag?

MR. STEWART: I'm not sure. I'm not sure. They checked me about 5 times.

OFFICER MACDONALD: Who you hang with down that way? When you got caught With that pistol who you hanging With?

MR. STEWART: What you mean who I was hanging?

OFFICER MACDONALD: I mean -- were you with anybody when you got caught with the gun? Or were you by yourself?

MR. STEWART: By myself.

OFFICER MACDONALD: All right you play with any type of little group over that way? Were you playing with a little group when you got caught With that pistol? Do you –

DETECTIVE LUCIE: Do you know what he's asking you?

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OFFICER MACDONALD: Are you sure you're not playing With some little group over there?

MR. STEWART: Oh. A group? No.

OFFICER MACDONALD: A little gang.

MR. STEWART: No.

OFFICER MACDONALD: Mother fuckers that call themselves -- check my phone -- the Bang Bang Pooy Gang. Remember wearing that shirt? Ain't that -- that's a little crew over there. That's what the fuck I just asked you.

MR. STEWART: No. That's why I said explain it to me and –

OFFICER MACDONALD: Nigger a crew over there.

MR. STEWART: I didn't know you was talking about them.

OFFICER MACDONALD: Are they a crew? Is that considered a crew?

MR. STEWART: It's not a crew.

DETECTIVE LUCIE: He's no Krispie --

OFFICER MACDONALD: Little rapper and shit. Krispie -- what the fuck is his name?

DETECTIVE LUCIE: Krispie Cheese.

OFFICER MACDONALD: Krispie Cheese. You know Krispie Cheese? Yeah.

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DETECTIVE LUCIE: Yeah.

MR. STEWART: Bang Bang Pooy Gang --

OFFICER MACDONALD: So, what is that? That's a rap group?

MR. STEWART: No. It's just -- I mean -- they was gonna turn into a rap group –

OFFICER MACDONALD: No. No. We. Go ahead. We.

MR. STEWART: They was going to turn into a rap group –

OFFICER MACDONALD: We was about to turn into --

MR. STEWART: Him got killed.

OFFICER MACDONALD: Who?

MR. STEWART: Jolly?

OFFICER MACDONALD: So were you affiliated with them?

DETECTIVE LUCIE: You know Jolly too.

MR. STEWART: Jolly.

DETECTIVE LUCIE: You know Jolly.

MR. STEWART: No, I'm dead serious. I don't know no Jolly.

DETECTIVE LUCIE: Why you put all that bass in your voice when you talking to me?

MR. STEWART: Oh, I'm sorry.

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OFFICER MACDONALD: So you know Krispie Cheese?

MR. STEWART: You be thinking I be trying to be all –

DETECTIVE LUCIE: Oh no. Your face -- your face get all twisted –

MR. STEWART : No, I --

DETECTIVE LUCIE: You put a little bit of bass in your voice but it doesn't intimidate me at all. Not one bit.

OFFICER MACDONALD: So what --

DETECTIVE LUCIE: And it's not going to change my line of questioning either. It is not going to make me feel any different about you. You have to make me feel different about you.

MR. STEWART: You think I'm a criminal.

DETECTIVE LUCIE: It's not about what I think.

OFFICER MACDONALD: I think you 18 and made some –

DETECTIVE LUCIE: Made some bad decisions.

OFFICER MACDONALD: Past fucking decisions. And now you sitting here –

WITNESS:

OFFICER MACDONALD: Listen, now you sitting

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here with the opportunity to fuck around correct these dumb ass decisions you made. Just like you had the opportunity to correct when you had that gun. Just like you had the opportunity to correct hanging with these little Bang Bang Poony Gang mother fuckers. You still affiliated with them?

MR. STEWART: That's family.

OFFICER MACDONALD: That's your family?

MR. STEWART: Not family as in like immediate family –

DETECTIVE LUCIE: But you enjoy -- you enjoy being around them.

MR. STEWART: No I just --

DETECTIVE LUCIE: And all they do is getting in trouble.

MR. STEWART: I just knew Poony -- I just knew Poony since he was –

DETECTIVE LUCIE: They -- all they do is hit licks. They steal cars.

MR. STEWART: Who?

DETECTIVE LUCIE: They do B&E's.

MR. STEWART: I didn't know he was –

DETECTIVE LUCIE: They sell dope.

MR. STEWART: Since we were younger.

OFFICER MACDONALD: He got killed. That's

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why it's called the Pooty poo -- The Bang Bang -- what he go to prison?

MR. STEWART: He didn't get killed. It was a little car accident out on 75. Right there.

OFFICER MACDONALD: All right. Is he dead?

MR. STEWART: Yeah. He dead.

OFFICER MACDONALD: All right. So he died and now that's why they came over Bang Bang Pooty.

MR. STEWART: Yeah, but I'm saying he -- Pooty -- he been –

OFFICER MACDONALD: All right. This is what it is. You got caught with a gun. You -- you affiliated with mother fuckers -- this little group that do dumb shit. Go around sell dope, rap, carry pistols.

MR. STEWART: They don't sell dope.

OFFICER MACDONALD: I know they do.

MR. STEWART: I don't sell dope, man.

OFFICER MACDONALD: I didn't -- Listen mother -- listen. Listen what I said. You are affiliated with a crew or a gang -- is what they like to call themselves -- or rap group -- whatever how you want to label it -- that do dumb shit. That carry guns. That sell dope. Cause I've talked to Krispie Cheese and he said that's what they do.

MR. STEWART: What video?

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DETECTIVE LUCIE: The Bang Bang Pooty Gang video.

OFFICER MACDONALD: So you affiliated with all this bullshit. You affiliated with all this bullshit but you want to separate yourself. I'm this great guy. I don't do shit. I stay at home all day.

MR. STEWART: I just got done with cancer. I can't even move like I used to move. I used to weigh 180. I don't even weigh 180 no more. I don't be in school.

DETECTIVE LUCIE: Which video are you in?

MR. STEWART: That one.

OFFICER MACDONALD: Prophet in it? You sure?

MR. STEWART: I'm sure.

DETECTIVE LUCIE: Which one you in. You the money hungry one or which one?

MR. STEWART: I'm in that one.

DETECTIVE LUCIE: You're in this one?

MR. STEWART: Yeah. I used to have dreadlocks. My dreadlocks got cut.

(video plays)

MR. STEWART: That's reppin' my man.

OFFICER MACDONALD: Boy, You got an excuse for everything, Man.

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MR. STEWART: No I'm not --

OFFICER MACDONALD: Yeah you do. Listen—

MR. STEWART: I know --

OFFICER MACDONALD: Instead of saying -- yeah instead of sitting here be like yo I be at -- you wearing a fucking shirt so instead of yeah I'm a part of it and be proud of it all you sitting here saying nah, you know, I'm just -- I just rep them but I'm not -- I'm not part of it. But then you say that's my fam. If you're part of it you're part of it, Man. Why -- Don't sit here and downplay it. You like yeah. That's me. I'm affiliated with them.

MR. STEWART: I'm just telling you all that's not no gang though.

DETECTIVE LUCIE: What's the last word of -- what's the last word of it?

MR. STEWART: Yeah.

OFFICER MACDONALD: You wouldn't walk around -- Ya'll wouldn't walk around mother fucking giving people handshakes and be like 'yo, peace.' You walk -- fools running around like 'we run this. This is us. It's our hood. Don't bring your ass over here.'

DETECTIVE LUCIE: You in the white tee?

MR. STEWART: White tee. Yeah.

DETECTIVE LUCIE: In the video? How you

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not gone know Krispie Cheese and he got a -- he a verse in the song?

MR. STEWART: I didn't say I didn't know -- I say I ain't know Jolly or Dolly.

DETECTIVE LUCIE: Jolly. That's not you rapping is it? So you do got little bit bass in your voice.

MR. STEWART: Yeah. You just thought I'm trying to

DETECTIVE LUCIE: So that was your verse, right?

MR. STEWART: Yes.

DETECTIVE LUCIE: How'd things change? So you can come up off the innocence shit. You go ahead and come up off that innocence shit with me.

OFFICER MACDONALD: Josh, Man, what happened on Meade? What happened -- what happened on Savage?

MR. STEWART: I don't know what -- ya'll think I'm lying. I don't know what happened on Meade or Savage. I don't know nobody -- about him shooting nobody in no back with no -- whatever type of big gun ya'll said. I don't know nothing about none of it.

DETECTIVE LUCIE: What type of big gun ya'll said?

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MR. STEWART: Ya'll I just said that.

DETECTIVE LUCIE: You a street dude. You know all type of guns.

MR. STEWART: I'm saying though I don't know what type of gun ya'll say he had.

DETECTIVE LUCIE: You on some bullshit. You just faking it for videos?

MR. STEWART: No.

DETECTIVE LUCIE: Unless your failure is your people.

MR. STEWART: Right.

DETECTIVE LUCIE: They

MR. STEWART: I just used to be feeling it. I grew up over there. My grandma grew up over there.

DETECTIVE LUCIE: Okay. It doesn't matter.

MR. STEWART: That's what I'm telling you. Yes, I know them.

DETECTIVE LUCIE: Okay. That's not my point. My point is quit giving us this image like you just some soft-spoken, well-mannered young man.

MR. STEWART: I'm not doing that. I'm just telling ya'll I didn't -- been through so much junk. I ain't got time to backtrack.

DETECTIVE LUCIE: Well, our point is you can't make us believe you just happened to taking a

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stroll and find a person shot up and just shot him to the hospital. Just off love. That ain't how the hood work.

OFFICER MACDONALD: What's going to happen, Man, when I do this search warrant tomorrow on your -- on your phone and your -- your GPS tells me everywhere you at?

MR. STEWART: Right.

OFFICER MACDONALD: And what -- and if your phone puts me -- when your phone puts me on -- puts you on Savage and Packard or puts you on Meade and Greeley -- what is your answer going to be? That you gave your phone -- somebody's using your phone. You let mother fuckers borrow your phone? Cause the mother fucking phone don't lie. These iPhones -- those mother fuckers don't like dog.

MR. STEWART: Right.

OFFICER MACDONALD: You can't turn that -- you can't turn that privacy shit off on your phone. The mother fucking towers, they pick them bitches up everywhere you go. Everything you do. Them fucking phones are gonna be like aw nigger Josh was right here, Oh, Josh was right here. Josh was right here. So your phone's going to tell me if you was on Emery and Greeley. Your phone's going to tell me if you was on Lantz. Your phone's going to tell me what route you took to take this

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nigger to the hospital. Your phone's going to tell me all that. That's technology. That shit don't lie. You can't cover that shit up. You can sit here and lie about all this other shit but that mother fucking phone going to be like, hey Officer MacDonald. Come holler at me. I'm going to talk to you. But I'm going to talk to you in math. I'm going to talk to you in technology. I'm going to talk to you in GPS. That's what your phone going to tell me. And then I'm going to do Prophet phone. And then Prophet phone going to tell me where he was at. And I better not see Prophet phone with mother fucking Stewart phone. But that's what I'm going to see. I'm going to see your fucking phone number and his phone number together. That's what I'm going to see, Josh. That's what I'm going to find. And you can't explain that shit. You can't explain like that gun you had –

MR. STEWART: What gun did I have?

OFFICER MACDONALD: That you called 2014.

MR. STEWART: Oh.

OFFICER MACDONALD: You ain't gonna dismiss it like you did that gun. You ain't about to dismiss it like you did with this mother fucking shit you just tried to play with this Pooty Poo bullshit. You ain't gonna dismiss that phone. That mother fucker is going to tell me everywhere that you was at from the day you bought

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that bitch to today. It's going to show you were in here right now. So, you sit there across that fucking table and you keep telling me and my partner I don't know what the fuck you talking about. You keep playing that game. Cause that phone's a MR. STEWARTagainst your ass. That's what your phone is. It's a MR. STEWARTagainst you. 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. Now you can sit here and throw that shit away and let your phone be your fucking worst enemy or you fucking let your phone fucking be your fucking friend and fucking help you out. 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. But you throwing that shit away. So, I'm going to give you the opportunity to make the fucking right decision.

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If you keep fucking bullshitting me and I go to technology or you can say 'Officer MacDonald, this what the fuck happened. This is why it happened. This is why it shouldn't have fucking happened.' You show some fucking -- you show some remorse by taking this nigger to the hospital. You coulda (sic) left that nigger there and be like 'yo bro, that shit on you. I'm out.' But you did right thing by taking his ass to the hospital, even though it was going to put you in the fucking trick bag. So you got some fucking heart, Bro. You got some fucking passion in you. So, do something. Continue to care. Care about your god damn self. You got enough to care about Prophet, Man. Start caring about yourself. Cause that where you at right now. This mother fucker ain't going to care for you. You need to care for yourself now cause you already took care of him. You think he going to return that fucking favor? Like I told you, he already stuck. He got shot by a nigger that he tried to rob. His boys plugged his ass. He can't get away from that. The bullets that's in his body is from my man's pistol. That's evidence he cannot dispute. So, it's done for Prophet. He ain't got not mother fucking doors. You do. You got to pick the fucking right door. Cause right now you picking the one this nigger's in. So, what are you going to do? What door you going through?

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DETECTIVE LUCIE: Just tell us what happened. Get this shit off your chest, man. Because at the end of the day he's smarter than you. He made bad decisions. He got caught up. But he smarter than you. He going to run circles around your ass when it comes to the judicial system. He gone to have you looking stupid as fuck and you going to do 20 to life –

WITNES: 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.

DETECTIVE LUCIE: You're not saying what happened. He's smart enough to put you as the shooter. He knows how to lie better than you do. He will testify in the court, in a room full of people, in front of a judge that you the one killed dude. And you gone tell us you just happened to be taking a gingerly stroll in the city of Detroit and ran up -- ran up on dude and you just shot him to the hospital real quick. That ain't going to fly with nobody. We talking about a community of people that won't even cut they fucking grass and you think you just going to be a superhero today? And just shoot a dude you just see every now and then to the hospital? Because whoever was driving him, left him. But you like 'you know what that's fucked up. Let me go help.' No. That mother

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fucker going to put that pistol in your hand, not the one that's got dropped. He's going to put the one that killed somebody in your hand. So he can take the plea deal and be out and be able to make babies and shit before he get old.

OFFICER MACDONALD: He'll cop to the robbery.

DETECTIVE LUCIE: It's no big deal. He can take a plea on that. But he's going to testify you is the murderer. Because the person you didn't shoot is still alive. And he ready for you. He ready. He ready to -- he's ready to testify against the person that killed his best friend or brother. He ready. And you sitting over -- over other side of this table -- while we have the table to put everything together and -- the way it should be. And you -- you about to just -- 'I don't know what happened. Do whatever ya'll got to do.' Okay.

OFFICER MACDONALD: What happened, Man?

MR. STEWART: Nothing, I just --.

OFFICER MACDONALD: Josh, what happened?

MR. STEWART: Ya'll don't understand. Ya'll really don't. You don't.

OFFICER MACDONALD: I know –

MR. STEWART: No you don't understand.

OFFICER MACDONALD: Did you pull the

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trigger on Savage?

MR. STEWART: No. I didn't do none of that. Ya'll don't understand. I didn't do none of that.

OFFICER MACDONALD: What am I not understanding?

MR. STEWART: Just period. I didn't -- I don't understand Man.

DETECTIVE LUCIE: He forced you then?

MR. STEWART: Forced me?

DETECTIVE LUCIE: Did he force you?

MR. STEWART: Ain't nobody force Josh to do nothing.

OFFICER MACDONALD: Josh, explain to us what we don't understand about how this shit go?

MR. STEWART: Just saying. You should know, Man.

OFFICER MACDONALD: What do you -- you worried about the snitch? What are you worried about? Being called a snitch? You worried about mother fuckers retaliating? I know -- I know how the streets go. I been working this bitch long enough. I lived in them. Yeah I know how they mother fuck -- they work. But I ain't about to let a mother fucker sit -- you got about to sit here and go to prison for another nigger? I love my mother -- I love the mother fuckers I hang with, Bro. I love these

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mother fuckers. I do anything for they ass but I ain't about to go to prison for they ass on some shit they did? Fuck that. I know you didn't shoot this nigger in the back.

MR. STEWART: That's all I'm saying.

OFFICER MACDONALD: I know you didn't shoot him in the back. But I know you was there. Listen, I'm not saying you are the shooter.

All right. I already know Prophet is the shooter. Prophet already been identified as the shooter for this murder on Packard. But I know you was there. All right. I'm not sitting here saying hey Josh confess to a fucking -- to murder. Cause I know you didn't do it. I already know you ain't the shooter. I ain't pushing for that. I'm not asking you to sit here and tell me 'yeah, Officer MacDonald, yeah Detective Lucie, I shot this mother fucker.' I'm not asking for that at all because I know you didn't do it. The MR. STEWARTsays you didn't do it. 'Yo the nigger in the dreads shot my boy in the back for nothing. He gave that nigger the shoes and the belt. He gave the nigger everything he wanted and he still shot the nigger in the back.' I know it wasn't you. But I know you was there, Bro. That's all I'm saying. I know you was there. That's all I want you to get off your chest. 'Man I was there. Yes, I was there.' I ain't asked you to do

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nothing else. I'm not saying -- asking you to fucking -- admit to fucking murder cause I know it wasn't you. If I thought it was you I sit here and tell you.

MR. STEWART: It's hard to believe that ya'll want me to put me somewhere –

OFFICER MACDONALD: What do you -- all right. So what do you think your phone going to put you?

WIITNESS: I'm saying. You want me –

OFFICER MACDONALD: I don't want you to do shit, Bro. I don't want you to do shit you ain't do. I ain't sitting here trying to force you to say shit.

MR. STEWART: I'm not trying to do nothing I didn't do either. I mean –

OFFICER MACDONALD: Okay. That's fine.

MR. STEWART: I didn't do nothing but I'm not trying to –

OFFICER MACDONALD: Listen, like I told you -- I'm gone do a search warrant on your phone. I'm do the search warrant on your phone and your GPS is going to tell me everywhere you at. Is your GPS going to put you on Packard and Savage? Is your GPS going to put you on Greeley and Meade?

MR. STEWART: Meade? No.

OFFICER MACDONALD: All right. So, your phone ain't going to put you where Prophet got shot at?

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MR. STEWART: No.

OFFICER MACDONALD: And your phone ain't going to put you on Savage on Packard where Prophet did this shooting?

MR. STEWART: No.

OFFICER MACDONALD: All right. All right. I'm not -- I'm not bluffing you, Bro. I'm doing the search warrant on your phone.

MR. STEWART: I know.

OFFICER MACDONALD: And I'm doing it on his. That ain't no bluff. I ain't bluffed you all day.

MR. STEWART: All right.

OFFICER MACDONALD: I ain't bluffed you all day.

DETECTIVE LUCIE: Just tell us your role in it then. Just tell us what you did.

OFFICER MACDONALD: Warrants. Search warrant for phone. It's already ready to go. So it ain't -- it ain't a bluff. And I told you technology don't lie. You can't beat it. Can't nobody beat technology, Bro. No one. There is not one lie you can cover to say why your phone was there. It's impossible. Unless you going to sit here and say you gave your phone to somebody. And you already told me ain't nobody had your phone. Like I told you, we came to you man to man. Let you sit here and --

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and -- give you an opportunity to speak. Cause I'm going to go to Prophet. If this nigger -- if he lives. I'm going to go to him. I told you he can't -- he can't beat what happened. My man bullets from his pistol's in his chest. So he can't lie. He can't say I wasn't there. It's impossible for this nigger to lie. So like my partner told all he can do is deflect. 'Hey, hey man. Let me tell you about some other shit that happened. Let me tell you about this homicide.' Whatever you want to do. That's his only way out. That's his only way out, Josh. Cause he can't beat -- he can't beat the RA. He can't beat why he got shot. He got evidence in him. That puts him there. His phone's going to put him there. Your phone gone put you there. That shit don't lie. Don't lie. And you know that. You smart enough to know those phones don't mother fucking -- those GPS don't lie. You smart enough to know that.

MR. STEWART: Right.

OFFICER MACDONALD: So, you want to sit here and put your fate in what you think mother fuckers can't prove? You going to lose.

MR. STEWART: Man,

OFFICER MACDONALD: Listen --

MR. STEWART: Dude, 20 years though –

OFFICER MACDONALD: Man, I didn't say you

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was going to do 20 years. I didn't say he was going to do 20 years. You control that. You control -- listen, Man -- at the end of the day, Bro, you control your own -- you control your own destiny.

MR. STEWART: I didn't have a gun. I didn't shoot nothing.

DETECTIVE LUCIE: Well tell us -- tell us what happened then.

MR. STEWART: I didn't do none of this.

DETECTIVE LUCIE: Okay. Quit telling us what you didn't do and tell us what you did do.

MR. STEWART: I didn't do nothing.

DETECTIVE LUCIE: Well tell us that. What's the nothing? What was it? What you gone tell us? You was in the back? You asked where the weed at? Did you ask where the weed house at? What'd you say?

MR. STEWART: Mumble

DETECTIVE LUCIE: Listen, you ain't got to tell on nobody. But you can tell us what you did.

MR. STEWART: Mumble

DETECTIVE LUCIE: Say what?

MR. STEWART: Feel like ya'll are trying to hit me with that, Man.

DETECTIVE LUCIE: Nobody trying to -- what did I just tell you?

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MR. STEWART: But this feel like that though. You can't --

DETECTIVE LUCIE: Okay, but listen -- but listen -- you gone believe -- who you gone believe? You going to believe a person --

MR. STEWART : I didn't --

DETECTIVE LUCIE: Listen to me. Let me finish first. You trying to think faster than what I'm saying. You rather believe a person that has minimal education, that's been hustling, that's -- that got you hitting licks. Well nobody can't tell you to do shit. That's what you told me. They going to show you that way of life. And I'm on the side that determines -- I want to know your alibi to prove you did not commit the crime and you won't give me that.

MR. STEWART: I'm saying -- what you mean my alibi? Can you explain that?

DETECTIVE LUCIE: I'm trying to get information from you to determine that there's no way possible that you could have committed the crime. And somebody is telling an absolute lie on you and we have the wrong guy. That's what I'm trying to get from you. You're not giving me anything.

MR. STEWART: I didn't do nothing though.

DETECTIVE LUCIE: Well tell me what you

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did do.

MR. STEWART: That's what I'm trying to tell you. Nothing. I didn't have nothing. I didn't do nothing.

DETECTIVE LUCIE: Tell me -- tell me the story that's in your head right now.

MR. STEWART: What story?

DETECTIVE LUCIE: Whatever you know about this situation.

MR. STEWART: Well everything you just said. I didn't do nothing. Literally.

OFFICER MACDONALD: What are you scared of, Man? And I don't mean that in a coward way but I mean just -- what are you -- like what are you -- what are you scared of?

MR. STEWART: Man, I don't know -- Man. And it's not that I'm scared or anything. It's just -- I'm just sick of this junk Dog. It's too crazy.

OFFICER MACDONALD: Like you sitting here believing like Man, I can't believe I'm in this shit?

MR. STEWART: Yes. Man. I mean –

OFFICER MACDONALD: I can't believe I got caught.

MR. STEWART: I can't believe I'm in here. Dog.

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DETECTIVE LUCIE: So, we asked you specific questions about where you were, who you were with, and what time. Can you give us those answers?

OFFICER MACDONALD: I'm -- I'm waiting on you, Josh. Man, I mean -- I mean -- listen -- you think me and my partner sit on this side of the table trying to send you away for the rest of your life.

MR. STEWART: Yeah, I do.

OFFICER MACDONALD: When actually -- actually we sitting on this side of the table -- we trying to find the fucking truth. Cause that's all I'm here for is the truth about what happened. That's it. 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. That's my job. Is to find out what happened. What led up to it and what happened afterwards. What's the evidence. That's all I'm here. I don't send anybody to prison, Bro. She don't send anybody to prison. All we do is find out the truth. Or we try to. That's all we do. I'm not the fucking judge. I'm not the fucking jury. I'm the guy that's supposed to find out what happened. And that's it. That's my job. And once I find out what happened I'm done. My

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job is over. I give it to somebody else. They do their job. That's all -- that's all we do, Man. But you sit here -- you thinking these mother fuckers trying to send me to prison forever. They don't understand. Mother fucker, we black. I ain't white. I ain't grow up with a mother fucking silver spoon in my mother fucking mouth. I had hustle. I had to fight off mother fucking bullies. Nigger I walked to school. I had a paper bag for mother fucking lunch. So, I ain't trying to sit here and act like I don't know what the fuck going on. She ain't trying to sit here like she don't know what the fuck going on. But we're here to do our job. To find out the truth and that's it, Man. That's it. Ain't trying to do nothing else. Ain't nobody sitting here trying to trick yo ass. We came at you straight up.

MR. STEWART: I know, but –

OFFICER MACDONALD: You know what I'm saying? You sitting there and you -- you -- you want to sit there act like I don't know what the fuck ya'll -- I don't know what the fuck ya'll -- I don't know what the fuck ya'll talking about. Every time we bring something up you -- you sit here and you push it off like you got an excuse for it. You had an excuse for the gun you caught in 2014. You got an excuse of why you affiliated yourself with these knuckleheads. You got an excuse for

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everything. I ain't heard you one time go 'yeah, that's me. Yeah, I hang with the mother fuckers. A'ight. Yeah, I had that burner. Yeah.'

MR. STEWART: I didn't have no burner.

OFFICER MACDONALD: 2014 gun, Bro. God damn. I ain't put no gun in your hand, tonight.

MR. STEWART: Right.

OFFICER MACDONALD: So, get off that shit. I ain't putting that gun in your hand. I know Prophet had the pistol. A'ight? I know he shot and killed that boy. I know that. Fucking man the fuck up.

MR. STEWART: That's all I'm saying. So, what you want me to say?

OFFICER MACDONALD: I want you to fucking be honest. Cause that bullshit about you just walking through the hood and find this nigger shot, Bro -- fuck that. I ain't believing that shit. I been doing this shit too long. She been doing this shit too long. I ain't never heard a mother fucking story like that in fucking Detroit. Where nigger's just help a mother fucker in a car, shot the fuck up. You mother fucker's -- you know niggers don't do that shit. They walk past like 'damn that nigger fucked up.'

DETECTIVE LUCIE: That's fucked up.

OFFICER MACDONALD: And call it a day. And

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get to stepping. That's -- that's the nigger way. 'Who they tore his ass up. Yo we going to the store?' and go about they mother fucking business. But you want to sit here and tell me and her, 'nigger I was being a good Samaritan today.

DETECTIVE LUCIE: In your hood.

OFFICER MACDONALD: In the hood.

DETECTIVE LUCIE: Your hood.

OFFICER MACDONALD: Come on man. You tell that shit to some mother fuckers that's brand new.

DETECTIVE LUCIE: You also want us to believe that nobody in that hood saw him. With your version of what happened. Nobody saw him injured. Is what you want us to believe.

MR. STEWART: I don't know.

DETECTIVE LUCIE: That's what you want us to -- but that's your version. That's your story. We know that's all false. We know that's all false, ok. 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? We know you drove him to the hospital. Of course. We know that. We can prove that. Right?

MR. STEWART: Yeah.

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DETECTIVE LUCIE: Okay. What we're trying to get at is everything up until you having to drive dude to the hospital. Your version of what happened. Cause you don't want anybody else to determine your destiny. And at the end of the day it's about survival at this point. Cause everybody locked up. Except for one person. You sitting in the room with two people that are trying to find out the story and give you the opportunity to tell your story. And you just sitting there looking at us like there's something wrong with us.

MR. STEWART: Nah.

DETECTIVE LUCIE: Oh yeah, you are. We're the ones that document the version of what happened. And then put it in the hands of another individual to determine what crime you committed or did not commit. And you gonna let someone else say what crime you committed. Cause you not giving us the details of what you did or did not do. It's okay for you happen to be there. It's okay but you have to tell us.

MR. STEWART: It's not okay.

DETECTIVE LUCIE: It is okay.

MR. STEWART: How is that okay?

DETECTIVE LUCIE: It's okay to just be there. It's okay. If somebody's willing to say that you did a murder it's okay to be there unarmed and MR.

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STEWARTthe murder. As opposed to someone willing to save their life and say he's the one that committed the murder. It's a huge difference.

MR. STEWART: So it's basically like -- off of what you just said -- me even putting my –

DETECTIVE LUCIE: What I said was it's a huge difference between you telling me 'I was there and I seen what happened' as opposed to having a person that committed the murder, which is smarter than you. He's wiser than you. He's been in more trouble than you. Lie and say 'I was just sitting around as he committed the murder.' That's a huge difference. It's huge. Think about that. You can say 'I seen what happened' or you can -- you can have somebody else say 'nah, I -- I'm willing to tell he world he the one did it.' That don't make sense. Why would you let that happen to yourself? Like he said, the person that's willing to do that, they got evidence in they body they can't get rid of. So they know they screwed. So they going to do whatever it takes to not do life in prison. So -- it would make more sense for you just to be 'these are the things that happened and this is what happened until I got him to the Detroit Receiving Hospital.

MR. STEWART: I'm trying to just get out of here.

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DETECTIVE LUCIE: Well, getting out of here -- I understand that. Everyone though. No one wants to be in jail.

WITNESS: Mumble

DETECTIVE LUCIE: Nobody wants to be in jail. Why are you hesitating on telling us the version -- your versions of what happened to make your life easier. I don't understand that.

MR. STEWART: I don't see my life being easy. I just saying like I'm just --

DETECTIVE LUCIE: Well ask the appropriate questions so we can get you some clarity. Ask the appropriate questions.

MR. STEWART: How is that a big difference you said? You said it's a difference?

DETECTIVE LUCIE: Between you pulling the trigger.

OFFICER MACDONALD: That's what she meant, Bro –

MR. STEWART: I didn't pull no trigger.

OFFICER MACDONALD: Listen. Your life is in your hands. Are you gone take control of your own life and tell us what transpired or are you gone put your life into Prophet's hands and let him decide what happened? Because like I told you, he shot three times. That means

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he got three bullets from the other dude's gun. He can't beat that. He's stuck. He's done. He has evidence in his body from somebody else gun that was protecting themselves from him. So, he can't dispute that. You understand what I'm saying?

MR. STEWART: Yeah.

OFFICER MACDONALD: There's nothing he can do about that. So at the end of the day him sitting there knowing that, he's going to sit here and be like 'my way out is to blame somebody else.' And she's telling you, who do you think he gone blame? Who do you think he's going to blame? Because he has no other road to take? So, you're sitting here -- do you want to sit here and tell us what transpired and put your -- put your life in your own hands. Or you going to sit here and continue to be like 'man ya'll don't get it.' And let this mother fucker control your destiny from this point forward. Cause that's the way it's gone go, Josh.

MR. STEWART : I'm gone get –

DETECTIVE LUCIE: Because people lie to save their selves.

OFFICER MACDONALD: What we got witnesses from both incidents.

MR. STEWART: Yeah a MR. STEWARTis going to look at me and say Josh did anything. Not one MR.

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STEWARTis gone look at me and say I did anything.

OFFICER MACDONALD: Listen –

MR. STEWART: Nothing.

OFFICER MACDONALD: I told you. Listen. I already told you you didn't do anything.

MR. STEWART: That's what I'm saying.

OFFICER MACDONALD: What are you not understanding?

MR. STEWART: Why do you ya'll -- What else do ya'll need though?

OFFICER MACDONALD: Listen. I know you didn't pull –

MR. STEWART: You said ya'll know who did it. How –

OFFICER MACDONALD: That meant 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 MR. STEWARTis going to point me -- point and say I was there?

OFFICER MACDONALD: Listen, Man -- I'm done with you, Bro.

MR. STEWART: I'm not saying –

OFFICER MACDONALD: You can sit and talk

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with my partner, Man. Cause you not -- you not comprehending. All you worrying about is -- is you. What is anybody going to say about me?

WITNESS: Oh, I --

DETECTIVE LUCIE: You think the hood loves you? Does the hood -- let me ask you this before if I ask you if the hood loves you. Do you -- Does the hood feed you? Do they put money in your pocket?

MR. STEWART: No.

DETECTIVE LUCIE: Neither one?

DETECTIVE LUCIE: When you were going through your -- your illness were they there for you? While you were healing and getting better?

MR. STEWART: Some of my boys

DETECTIVE LUCIE: Some of them were? In what way? How were they there for you?

MR. STEWART: They pull up at the hospital. Or come up to my crib. That was that. Or hit me up. They just hit me up a lot.

DETECTIVE LUCIE: Josh, Is that enough for you to be loyal to them?

MR. STEWART: I mean, yeah cause some of them was loyal as far as -- I don’t need to talk -- he ain’t even been to the hospital to see me or nothing like that. I’m not saying him.

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DETECTIVE LUCIE: You're not talking about him?

MR. STEWART: No. I was talking about –

DETECTIVE LUCIE: Close friends.

MR. STEWART: Yeah. They the ones who came. Was there. Checking up on me.

DETECTIVE LUCIE: So, that still brings me back to why ya'll were together tonight?

MR. STEWART: Who?

DETECTIVE LUCIE: You and Dude? Prophet. Ya'll had something in common tonight for ya'll to be together.

MR. STEWART: This is crazy.

OFFICER MACDONALD: All right, Man. Just a question. Tell me how you came across the stolen car. I'm ask you questions. You give me an answer. Tell me how you came across the stolen car?

MR. STEWART : Ah, I don't know, mumble --

OFFICER MACDONALD: That's what you want your story to be. I don't know. Prophet gone love this one. I don't get ya'll, Man. You putting your life in the hands of other mother fuckers, Bro. I don't get it. I don't get it. Seem like you got common sense and -- and you refusing to use it.

MR. STEWART: I'm not.

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DETECTIVE LUCIE: Hey you come over. You come over halfway? Or half of it? You come over there for half of it?

MR. STEWART: Nah.

DETECTIVE LUCIE: Can you come over there?

MR. STEWART: I'm cool.

DETECTIVE LUCIE: Over the –

MR. STEWART: Am I from over there? No.

DETECTIVE LUCIE: So nobody even know you over there.

MR. STEWART: I come over there.

DETECTIVE LUCIE: So that's not who you fearing.

MR. STEWART: Huh?

DETECTIVE LUCIE: You not scared of the people over on Savage.

MR. STEWART: What you mean? No. Are you talking about as far as the incident? With them coming to me? Are you saying I'm scared in that way? As far as them killing me or something like that?

OFFICER MACDONALD: Is that what you worried about? Mother fuckers coming after you?

MR. STEWART: Yes, Man. This jack is real, Man. Real, Dog.

OFFICER MACDONALD: Who are you -- I mean

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who you think outside this room is going to find out? I mean you think we gone –

MR. STEWART: Billions, Man.

OFFICER MACDONALD: You think we gone

MR. STEWART: I know how this work. Sitting at a court date. Pointing people out.

OFFICER MACDONALD: Josh, you going to court regardless. That's -- that's inevitable, Bro. That's -- that's inevitable. I mean -- you going to court regardless. But the problem is who do you want -- who do you want controlling your -- your path while you in court? You want to control or you want this nigger next to you controlling it?

MR. STEWART: Me.

OFFICER MACDONALD: Right. So, that's why you sitting here. To control your own path. Cause at the end of the day when we leave this room I'm not going on mother fucking Seven Mile and -- and -- and Greeley and be like 'hey guess what the fuck Josh told me.' She ain't going on mother fucking Seven Mile and 75 like 'hey guess what Josh told me.' Only person that find out is you. You the only person that can tell everybody. You only -- you the only person.

MR. STEWART: I'm telling ya'll I will get -- man ya'll just know --

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DETECTIVE LUCIE: Tell us what will happen?

MR. STEWART: Ya'll know what'll happen. Why ya'll playing it like that? Ya'll know what'll happen.

DETECTIVE LUCIE: Why don't you just say it then? Express it. Get it off your chest.

MR. STEWART: No, I know.

DETECTIVE LUCIE: What's gone happen to you. Somebody gone kill you? Is that what's gone happen? Somebody gone kill you? Who gone kill you?

OFFICER MACSONALS: Who are you scared of?

MR. STEWART: I'm not scared. I'm just -- the point.

DETECTIVE LUCIE: Who is gonna kill you?

MR. STEWART: I know.

DETECTIVE LUCIE: The -- the victim's family?

MR. STEWART: I don't know who. It's just -- you know how that goes.

DETECTIVE LUCIE: How dare you be scared. How dare you.

MR. STEWART :

OFFICER MACDONALD: Dude, you faced -- listen –

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DETECTIVE LUCIE: How dare you be scared.

OFFICER MACDONALD: You facing the judicial system. You worried about some -- you worried about some -- you worried about what somebody gone think or what somebody gone say about you in court? Fucking defending yourself? You scared to go to court and defend yourself, Man? So, you gone let another mother fucker -- you gone let another mother fucker defend you? These mother fuckers get the bird. Ya'll just sent a mother fucker -- you know I just got done doing a homicide trial, Man? This mother fucker shot two people with his sister in the car. With his sister in the car he killed 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 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.

MR. STEWART: Oh, my god, Man. What –

OFFICER MACDONALD: But the point is she took her own mother fucking fate in her own hands. She didn't let her fucking brother dictate her mother fucking

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life. The court says she was going to travel.

MR. STEWART: I didn't take nobody vehicle. I didn't shoot nobody.

DETECTIVE LUCIE: So tell us what you did do.

MR. STEWART: I didn't have a gun.

DETECTIVE LUCIE: So, what did you do?

OFFICER MACDONALD: Josh, was you in the car when they was -- when they was on Savage?

MR. STEWART: I don't even want to be living no more, Man.

OFFICER MACDONALD: Hey, Bro, Come on.

MR. STEWART: I'm serious, Man.

OFFICER MACDONALD: Listen -- Listen -- Bro, don't even -- don't even -- don't even –

MR. STEWART: I just fucked my life up. Might just Dog. I just fucked my shit .

OFFICER MACDONALD: Josh, was you in the car? Was you the one that asked my man where the weed at?

MR. STEWART: No. Hell, no.

OFFICER MACDONALD: Okay.

DETECTIVE LUCIE: Who said it? Who said that?

MR. STEWART: Hell, no. I didn't ask nobody –

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DETECTIVE LUCIE: Who said -- who asked where the weed house was at?

MR. STEWART: I don't know who said that.

MR. STEWART: You don't know who said that? Were you sitting next to the person?

OFFICER MACDONALD: Josh, Man, get this shit off your chest, Man.

MR. STEWART: I can't do this, Man. You just don't know, Man, for real. Ya'll just don't understand this junk, Dog.

DETECTIVE LUCIE: You gotta realize that we are –

MR. STEWART: I realize –

DETECTIVE LUCIE: We understand that. The mentality in the hood is fuck the police. We get it.

MR. STEWART: I'm not saying –

DETECTIVE LUCIE: No, no, no. It's not personal.

MR. STEWART: No.

DETECTIVE LUCIE: It's not personal. But, like you said we -- we weren't raised in the valley. We ain't from the fucking Hampton's with million dollar houses. So, we know the mentality. That's why we work and do the job that we do. Because we know people make fucked up, stupid ass mistakes hanging out with they buddies.

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But on the same note you thinking we the enemy when the enemy was the person that put you in this predicament. They didn't give a fuck what happened that day. And look who's sitting right here. I know the day weren't supposed to end like this. But this the way your day ended. And they didn't give a fuck. Let me tell you why. Because they feel like that's my homie. He loyal to me. Whatever happens, happens. You better realize too, you 18. They figure you could get HYDA, probation, he young. They ain't gonna give him as much time as they give me. That's the role you play in all this bullshit you doing. And you just keep getting used up. Now look at you. You talking to two homicide detectives. Not a stolen car detective.

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

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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?

MR. STEWART: I'm not letting him control my fate.

OFFICER MACDONALD: So, what happened, Bro? How many times -- listen -- would you like to hear -- would you like me to tell you one more time? I know you didn't pull the trigger. I know that.

MR. STEWART: I didn't rob nobody though.

OFFICER MACDONALD: I didn't say -- listen –

MR. STEWART: I didn't rob a sole, Man.

OFFICER MACDONALD: Listen, let me finish.

MR. STEWART: I don't have a gun.

OFFICER MACDONALD: Listen. I know you didn't pull the trigger. Nobody said you rob anybody, Bro. You were there. I know you was there. I didn't say

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you rob anybody. I didn't say you killed anybody. I know who shot my man. A'ight? How many times I got to keep telling you that. Why do you think I showed you the fucking picture of fucking -- the dude and you said that's Prophet? How you think I got that picture? We put in the work, Bro. We ain't coming to you to get this shit started. It's already started. We already know the players. We here to give you the opportunity to sit here and say 'this was my role.'

MR. STEWART: You all want me to go to court and say –

OFFICER MACDONALD: I want you to go to court and say, 'this is what I did.'

DETECTIVE LUCIE: What you did.

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.

MR. STEWART: Ya'll want me to tell ya'll what I'm responsible for.

OFFICER MACDONALD: What are you responsible for?

MR. STEWART: That's what ya'll saying, right?

OFFICER MACDONALD: Yes. I want to know what Joshua Stewart did. That's what I want to know.

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WITNESS: Driving there.

OFFICER MACDONALD: A'ight. So you just driving the car? And who told you to stop? I mean did you stop on your own or did somebody tell you to stop?

MR. STEWART: I don't know. I don't know. I don't know. I just now that's all I played a part in.

OFFICER MACDONALD: A'ight. So you just the driver. I mean you got -- listen -- you're -- you're doing. You gotta start doing good. You heading the right direction.

MR. STEWART: I trying to -- I'm trying to get my life right, Man. Ya'll just don't know how much I had going on.

OFFICER MACDONALD: Josh, this is where -- listen -- but this is where –

MR. STEWART: Ya'll talking bout two, three years.

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.

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MR. STEWART: Right. Right.

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 let somebody else testify for her. 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 (sic)here talking to you. What was Joshua Stewart responsible for.

MR. SREWART: Just driving.

OFFICER MACDONALD: Okay. So you just driving. Which, on Savage and Packard or on the Meade? Or both?

MR. STEWART: Wasn't on both.

OFFICER MACDONALD: Okay. So which one were you at? Was you on the one on Savage? Cause you sitting here telling me you don't know where Meade's at? Or was you on the one on Meade?

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MR. STEWART: One on Savage.

OFFICER MACDONALD: All right. So was you on Meade? When Prophet got shot?

MR. STEWART: Yeah.

OFFICER MACDONALD: All right. So, tell me and my partner from the beginning to the end. If you're just the driver.

MR. STEWART: I don't know. I don't know about no Savage.

OFFICER MACDONALD: Okay.

MR. STEWART: Yes. And then we drove to hospital.

OFFICER MACDONALD: All right. So, walk me through how Meade played out.

MR. STEWART: Shots was fired at us. Retaliation. I guess. Yeah.

OFFICER MACDONALD: Okay. I mean -- Retaliation from -- from what?

MR. STEWART: From the shots that was fired at us.

OFFICER MACDONALD: So, I'm lost. So these guys on Meade shot at you and Prophet before?

MR. STEWART: No. In the midst of it. Around that area. They shot at us.

OFFICER MACDONALD: All right. So how do

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ya'll get -- how do -- how do you guys get in the position of Prophet getting shot? How does that happen?

MR. STEWART: I just looked up. He was shot on.

OFFICER MACDONALD: All right so how does -- how does the gun Prophet get get dropped?

MR. STEWART: I don't know. I really don't. I don't know how that gun get dropped. I mean -- got hit. I don't know.

DETECTIVE LUCIE: When did you get the car though? Is where I'm not understanding. Now as ya'll bending corners all day or –

MR. STEWART: Mumble

DETECTIVE LUCIE: Cause basically right now what you saying is you had nothing to do with this one over here, right? The one on Savage, on Packard, right? So you had nothing to do with that one. Am I right or wrong?

MR. STEWART: Right.

DETECTIVE LUCIE: So, when did you get the whip, pick up Prophet and end up on Meade? We want to know -- we want to know what you did but you got to make it make sense to us too. You can't tell us 'I didn't do nothing over here but I did this over here' but not explain, 'I picked him up, cause he called, whatever,

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whatever. We did this, we did that. Boom. He did this to me -- he made -- he said this, I did' -- you have to paint a -- you have to paint the picture. Because leaving it open leaves us to fill it in with his side of the story. That's what we keep emphasizing you have to tell us your role. And your role means, I -- I'm not going to say you stole the car. I found -- I said I'm not saying that. But I'm say -- just to help -- 'I found a stolie (sic), hit him up, boom, we did this that and the other.' You can't just say 'aw man, yeah, I drove.' What does that mean?

OFFICER MACDONALD: I mean -- It's almost, Man like tell us if we was on the block. I mean you know how everybody on those stories tell -- you know -- you know tell a story a story and they on block? I mean you almost tell us in the same way. We like -- we was bending corners and mother fucker we -- I mean like Prophet saw these niggers or I saw these mother fuckers and was like shit what you want to do? Fuck it let's do this and -- I mean you know how mother fuckers talk? Hey I saw it -- you gotta tell us the story. Cause we don't know. You know? You just saying 'aw I was the driver and I was just driving around and -- you know -- it was some retaliation.' Fill us in. I mean -- tell us what Josh Stewart did.

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MR. STEWART: That was it. I was the driver. I didn't do nothing else.

OFFICER MACDONALD: All right. So you all driving.

MR. STEWART : 100%

OFFICER MACDONALD: All right. All -- like I told you -- I already know you ain't -- you ain't the person responsible for the death of my man on South (sic) and Packard. I already know that.

MR. STEWART: I don't got no gun or have no gun, either. Just -- for real -- like I didn't have no shotgun.

DETECTIVE LUCIE: Who's car was it? Who's car -- who's car -- whose car was it?

MR. STEWART: I don't know who car that is.

DETECTIVE LUCIE: How did you and him get together that day? Yesterday? It's like 5, 6 o clock in the morning. How'd ya'll get together?

OFFICER MACDONALD: I mean it's okay to tell us, Man.

MR. STEWART: It's hard, Man.

DETECTIVE LUCIE: You need some water?

MR. STEWART: I don't know which way I'm going. I mean I don't know which way ya'll –

OFFICER MACDONALD: So listen -- all right.

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So, listen.

WI MR. STEWART : -- direction. I don't know.

OFFICER MACDONALD: All right, Josh. This what I -- listen. Listen. This what we want –

MR. STEWART: I don't really understand what ya'll saying. For real.

OFFICER MACDONALD: All right. Talk about from when you and Prophet hooked up and then take us from there. When ya'll got together and then take us from there.

MR. STEWART: I got with him we just --

OFFICER MACDONALD: Listen, I'm -- I'm trying to help you. Just tell a story, Bro. You sitting here telling like -- you want to like minimize certain things. You want to like -- all right let me tell him this but I don't want to tell him this. Bro, you got to tell the whole story, Josh. I mean this is part of it you got to tell the whole story. All right? You can't be like -- you can't be telling me one, two, three and then jump to six, seven, eight. You know what I'm saying? Just tell me one, and then go to two and then go to three, then go to four, then go to five, go to six, go to seven. You understand what I'm saying? That's how I need you to tell a story. I can't have you go one, two, three, seven, ten,

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fifteen, 35. I need you to go one, two, three, four, five, six, seven, eight, nine, ten. All right me and Prophet -- me and a nigger hooked up, off of Seven Mile and 75. I picked his ass up and then we went and did this and then we did that. And then this is how we came -- and then we was driving and we rode up on Meade, then we saw this and we did that. That -- that's all I need from you.

MR. STEWART: On Meade they fired shots.

OFFICER MACDONALD: I mean was Prophet trying to rob these mother fuckers? Was it -- was it a robbery?

MR. STEWART: No, it wasn't.

OFFICER MACDONALD: Did he know them?

MR. STEWART: No. We was riding past. They -- you know -- they out there.

OFFICER MACDONALD: Listen, Man. This a stick-up it's a stick-up, Bro.

MR. STEWART: It wasn't no stick-up. For real. I mean -- I mean it wasn't no stick-up it was just -- I don't even know who got to shooting. I just heard shots.

OFFICER MACDONALD: Was he -- was Prophet shooting?

MR. STEWART: I know he got -- I mean you told me he dropped his gun -- I mean –

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OFFICER MACDONALD: It was a question like how'd he drop his gun. I mean cause he ended up dropping his gun. That's how we got it.

MR. STEWART: Oh.

OFFICER MACDONALD: But I'm asking you how did this all evolve? Like -- like -- I mean -- you know -- you telling us -- it's like when you go to the movies, Man. They tell you a story from the beginning to the end. I need you to tell me from the beginning to the end. I mean -- you know end of the day, Josh, it is what it is. Mother fucking shit happen but it's how you going to correct it. Cause what you going to do to make it right?

MR. STEWART: I don't want to be that -- I don't want to be that person who got his brains out there on the grass, Man.

OFFICER MACDONALD: Who gone put you –

MR. STEWART: Whatever. Whatever. Ya'll know -- what you mean who?

OFFICER MACDONALD: How you gone -- Listen.

MR. STEWART: I'm just telling you, look -- just listen.

OFFICER MACDONALD: I'm listening.

MR. STEWART: Me telling you or whatever you tell me -- that's gone get back, Man. Like everything get back.

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OFFICER MACDONALD: It only get back if you tell ‘em.

MR. STEWART: No. Ya’ll tell.

OFFICER MACDONALD: I don’t tell nobody, Josh. Let me –

MR. STEWART: Listen. You know how you said you do your part that’s all you do and you pass it to the next? That next person is gonna go in there and reveal me –

OFFICER MACDONALD: That goes to prosecutor –

MR. STEWART: That’s what I’m saying.

OFFICER MACDONALD: That goes to the prosecutor. So it goes from the prosecutor to your -- to your defense attorney. That’s where it goes. It don’t go to nobody else. It goes from me, to the prosecutor and the prosecutor to your defense attorney. Whatever do with your paperwork? That’s on you. That’s on ya’ll, Bro. If you want to get your shit out that’s on you. If you want to sit there and call your boy, be like ‘yeah, I said this stuff.’ That’s on you. I don’t -- I don’t leak out information.

MR. STEWART: You don’t.

OFFICER MACDONALD: The prosecutor don’t leak out information. We give everything to your

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attorney. That's it. Me, prosecutor, your attorney. That's how the paperwork works. That's how it always works. Shit get out because mother fuckers don't know how to keep they mouth closed. Which is people on this side. I don't run back and tell. Cause I know the end game.

MR. STEWART: I know. That's what I'm saying. I done seen and heard it.

OFFICER MACDONALD: Because mother fuckers that sit on this side of the table they run -- they run they fucking mouth.

MR. STEWART: So you think they go out there and be like 'I just told on –'

OFFICER MACDONALD: I'm sitting here telling you me, my partner, people in my crew don't do that. We don't do that. We don't run out -- I'm not going the fuck in your hood and be like 'hey, Josh told me everything. That's not my game, Bro. I don't do that. Your life is just as important as the next mother fuckers. Regardless if you -- regardless you be on this side of the table or this side of the table. Your life still important.

MR. STEWART: Right.

OFFICER MACDONALD: But I don't play games –

MR. STEWART: I feel like -- I mean how can

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I believe that though?

OFFICER MACDONALD: Because I've never –

MR. STEWART: Like, You can't trust -- much as stuff be going on with the police in the city or whatever -- like my man that just got arrested for armed robbery and he recording the police like 'look at the police over here in the neighborhood, what's going on?' Ten minutes later they charging him with an armed robbery and he got video of him just recording. Like they just try to -- Like I mean like ya'll -- and I ain't saying you cause it's not like every cop or whatever but it just seem like -- I mean -- seem like every time that -- that out of there -- man I got too much going on. I supposed to be going to Florida, May 26 with my mama. Supposed to vacation from all the junk I done been through. All the junk she done been through taking me through all this bull. I ain't bout to --

OFFICER MACDONALD: Josh, what happened? What happened, Man?

MR. STEWART: We ride up the block. They shot at us. He shot back.

OFFICER MACDONALD: All right. Who -- did Prophet pick you up or you pick Prophet up? I mean when did you two -- when did you two connect?

MR. STEWART: When did we connect?

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OFFICER MACDONALD: Josh, your phone ain't gonna lie.

MR. STEWART: I'm scared though, Man. I ain't -- I ain't never. I ain't never took a life. I ain't even gonna lie.

OFFICER MACDONALD: I ain't -- Listen, I ain't saying you took –

MR. STEWART: Robbing? Listen -- you probably won't even believe me. I never even robbed -- like -- I'm not talking bout tonight. I'm just talking bout period. I got caught with a gun before yeah. All right. I probably say a little stuff or whatever like that but you people -- ya'll think -- I mean that ya'll know this stuff or whatever like that. Never even robbed a soul. Never even took a life. You feel me? I'm not -- you feel me? I mean -- I'm not scared of nobody. Not scared of nobody? Feel me? 100.

OFFICER MACDONALD: Okay.

MR. STEWART: That's how I feel, but -- it is like -- it's just serious, Man. How serious this is is like -- ya'll don't even know -- I mean -- cause all -- mean ya'll in the streets every day just like us patrolling and whatever but like that junk serious, Man. Discovery package, all that junk serious.

OFFICER MACDONALD: But that's -- listen -

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- the discovery package is yours. Nobody can put that out there but you. You the only person that can let your discovery package be discovered to everybody else.

MR. STEWART: I don't even got the balls to go in court and say he did this. He did that.

OFFICER MACDONALD: I'm not asking you to. I'm asking you to tell me right here, what Joshua Stewart did on -- yesterday. When he was riding around with Prophet. That's what I'm asking you to do. I'm asking you what is Joshua Stewart responsible for. I'm going to go talk to Prophet and find out what that mother fucker did. Cause I already did what he did. I already know what you did.

MR. STEWART: You probably go to Prophet -- I mean I ain't even gone say

OFFICER MACDONALD: Listen -- I'm going to Prophet to talk to him.

MR. STEWART: You just told me this. I know how that work. That happened to me before.

OFFICER MACDONALD: Listen. Josh.

MR. STEWART: Minor case about -- and it dropped all the way to larceny –

OFFICER MACDONALD: Listen to me. Stop.

MR. STEWART: They tried to hit me with a home invasion.

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OFFICER MACDONALD: Listen. What did I tell you –

MR. STEWART: They all said you did it. Then they went back and told all of them -- they all said you did it.

OFFICER MACDONALD: Listen –

MR. STEWART: Everybody went down.

OFFICER MACDONALD: Since me and you sat down this table have one time I said my man over here told me this or my man over told me that. I told you witnesses from these scenes told me. Not none of your boys. Not nobody over here. Witnesses from the scene. Cause that's all I needed to talk to. I needed to talk to them. I needed to talk to you. And I'm gonna go talk to Prophet. I don't need to sit here and go to Prophet and say hey, Man this what Joshua told me. because Prophet already got bullets in his ass from my man.

MR. STEWART: Right.

OFFICER MACDONALD: So, I don't need you. I don't need to go back and say bro this is what Josh told me. I don't need to say this. This nigger got evidence in his body from my man's pistol.

MR. STEWART: That's the dude who shot him.

OFFICER MACDONALD: On Meade. Right.

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MR. STEWART: Yeah, they shot him.

OFFICER MACDONALD: Right. So I don't need to -- I don't need to play you. That's not -- I don't need to -- that's not my game. I come straight at a mother fucker one-on-one. No sidebar. I don't bring in mother fuckers off the sideline. I don't -- I don't pull bench players. I come at your ass straight up man to man and we have this talk. And I smell bullshit I let you know it's bullshit. Did I not do that today? Did I go and say Josh you pulled a shit dude.

MR. STEWART: Right.

OFFICER MACDONALD: That shit like that don't happen in the D. Cause I know. So, I ain't have to come at you with no side shit. When I go to this nigger I don't gotta go sideways. I'm coming his ass head on. My gloves on, his gloves on and we gone sit there and we gone battle this bitch out. And I'm going to tell him straight up. You got holes in you. You got evidence in your body. I don't need nothing else. So, you can sit here and you can do whatever you want to do and then we gone go back and forth. So, your name won't come up. That's not me. I don't do that. I ain't do that with you. I ain't gone do it with him. I don't do it with nobody else I talk to. I'm 100. I head on.

MR. STEWART: You just don't understand,

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Man. I'm like -- serious. Like –

OFFICER MACDONALD: Listen, Bro. If I wasn't serious you think I'd be fucking sitting here talking to you? You think I'd be talking --

MR. STEWART: Ya'll trying to do your job and play it to the tee and --

OFFICER MACDONALD: This ain't playing --

MR. STEWART: I open my mouth -- I mean -- but then at the same time this how it work. You is -- you lowkey or you and her are trying to help me -- I mean trying to help me or whatever cause ya'll don't -- like you said you know I didn't do it or whatever like that. So, I do understand that though. Yes, I do. I don't know, Man.

OFFICER MACDONALD: If you take -- listen -- if you take our whole conversation has been straight at you.

MR. STEWART: This is crazy.

OFFICER MACDONALD: The whole conversation did I go hey, I went and talk to your boy. He told -- did I go -- did I even bring Prophet in this. I could have been like I went to the hospital and talked to Prophet cause you don't know what condition that nigger is in do you?

MR. STEWART: Right.

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OFFICER MACDONALD: You don't know if he talking or not. You don't know if that mother fucker up drinking on some soup or whatever the fuck. so I didn't come to you like I just came from the hospital talking to Prophet. That nigger told me everything. I ain't -- did I -- did you get that from me?

MR. STEWART: No.

OFFICER MACDONALD: Hell no. I came straight at your ass like My man, holler at me about this stolen car. And then soon as you gave me that bullshit what I say? Like nah, nigger, that shit -- try to play that shit on somebody else. I came at you straight up. And I'm telling you straight up, Bro. I don't throw niggers names out there. Only person can throw they name out there, Dog is you.

MR. STEWART: So every time somebody name get threw out there ya'll think it cause of theyself (sic), personally?

OFFICER MACDONALD: Yeah. Niggers go -- listen -- you trying to tell me mother fuckers come back in the hood and be bragging about shit? Do niggers not come back in the hood brag about shit? Do they not put they business out there?

MR. STEWART: Yeah, niggers put they business out there.

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OFFICER MACDONALD: All day.

MR. STEWART: They talk too much.

OFFICER MACDONALD: Exactly.

MR. STEWART: They talk too much.

OFFICER MACDONALD: So I don't need to go out there and do it, Dog. I let them mother fuckers do it. Like I told you -- any day, when you get back out there in that mother fucking world -- it's on you what you want to tell a mother fuckers. It ain't coming from me. It ain't coming from me. It gonna have to come from you.

MR. STEWART: Where this going?

OFFICER MACDONALD: This going in the file. This gonna be -- this gonna go back -- this gonna go back to you.

MR. STEWART: This gonna go to the judge.

OFFICER MACDONALD: Nah, nah. This is going to your -- this is going to your attorney.

MR. STEWART: My lawyer.

OFFICER MACDONALD: Yeah.

MR. STEWART: If I have a lawyer.

OFFICER MACDONALD: So, at the end of the day, when this all over with 'yo man, here go ya'll discovery.' And if you want to take your discovery and you want to mother fucking fold it up and be like 'yo

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Dave man, ya'll want to read this?' Ya'll want to read this and shit in the hood?

MR. STEWART: Let me see this.

OFFICER MACDONALD: There ain't nothing on there dude. I ain't wrote nothing down yet. I wrote down exactly what you told me. What it say? I don't know nothing. I want you to tell me what you did. That's all this is about. I don't want you to tell me about nobody else.

MR. STEWART: All right. I ain't -- I was driving the car. I was driving the car. That was it. What else? Cause I know you want something else. I mean -- coming at you –

OFFICER MACDONALD: Listen man -- I mean -- so –

MR. STEWART: I was driving the car and then –

OFFICER MACDONALD: When do you -- So, when did you and Prophet hook up?

MR. STEWART: I don't remember --

OFFICER MACDONALD: At what point? In the morning time, afternoon time --

MR. STEWART: You don't believe me. I really be -- like -- I don't be knowing -- I be knowing times but I don't remember exactly.

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OFFICER MACDONALD: All right. I mean -- Where you pick him up at? Did he pick you up?

MR. STEWART: I ain't -- I mean I didn't pick him up.

OFFICER MACDONALD: Okay. Did he pick you up?

MR. STEWART: I didn't pick him up. I didn't pick him up, Man. I ain't cause I ain't stealing cars. I don't know how to steal a car.

OFFICER MACDONALD: All right. So, did he pick you up? I mean somehow ya'll niggers got in the car, Dog.

MR. STEWART: Right.

OFFICER MACDONALD: That's what I'm saying. How'd ya'll niggers get in the car?

MR. STEWART: I didn't pick him up. You feel me, Bro?

OFFICER MACDONALD: All right. And so he picked you up, from where? Where were you at when he picked you up? Josh, you know where you was at. I ain't what time. I just asking where.

MR. STEWART: Cause this going to bring

OFFICER MACDONALD: I'm not -- I'm not going to nobody's crib. I'm asking you where did he pick you up at. That's it. That's all I'm asking. Where he

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pick you up at?

MR. STEWART: I was on Greeley.

OFFICER MACDONALD: Okay, Greeley Seven Mile, Greeley Emery, Greeley Lantz, Greeley State Fair, Greeley and mother fucking Remington -- Greeley where?

MR. STEWART: Greeley and like Lantz.

OFFICER MACDONALD: All right so he pick you up. And -- and where did ya'll go?

MR. STEWART: Straight. Straight on Greeley.

OFFICER MACDONALD: Towards State Fair? You mean towards where?

MR. STEWART: Where you said, Meade.

OFFICER MACDONALD: All right. So ya'll Greeley to Meade. And then what happened when ya'll get to Greeley and Meade?

MR. STEWART: I was driving though.

OFFICER MACDONALD: Okay.

MR. STEWART: At this time.

OFFICER MACDONALD: Okay.

MR. STEWART: But like I told you --

OFFICER MACDONALD: So ya'll driving down Greeley to Meade and what happened?

MR. STEWART: Shots was fired at us and then –

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OFFICER MACDONALD: I mean -- Where were they standing when they started shooting at you?

MR. STEWART: That's what I'm saying. When we was driving -- we were driving and shots -- like coming to like -- I can't say this was the house. Shots are coming like three seconds after we passed the house.

OFFICER MACDONALD: All right. So ya'll on Greeley. Did ya'll pass Meade yet or ya'll coming up to Meade?

MR. STEWART: I don't even know -- oh, Meade the side street?

OFFICER MACDONALD: Yeah. Meade is like Lantz.

MR. STEWART: Yeah.

OFFICER MACDONALD: It goes like the same direction.

MR. STEWART: I guess we cross Meade.

OFFICER MACDONALD: Okay and then all of a sudden some mother fuckers start shooting?

MR. STEWART: Yeah. It was -- I don't know who. I don't know who started shooting cause like I said we had passed it that's when I heard the shots. That's when I just seen windows just -- you know -- I'm just taking cover. And that was it.

OFFICER MACDONALD: Is -- is Prophet

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shooting back?

MR. STEWART: I'm taking -- I don't know. You said he dropped the gun. Gun was dropped. I don't know. I just know I -- I didn't know he got hit up yet.

OFFICER MACDONALD: All right. So, you telling me ya'll was just driving down the street and somebody just shot the car up?

MR. STEWART: It was like -- yeah, that's what happened but -- we drove past whatever and -- they was -- they was outside or whatever.

DETECTIVE LUCIE: Who did you all go to shoot at but they got up at the best of you though?

MR. STEWART: Huh?

DETECTIVE LUCIE: Ya'll went to go shoot at somebody, right?

MR. STEWART: No. We didn't go shoot first.

DETECTIVE LUCIE: That wasn't -- that wasn't your intent?

MR. STEWART: No.

DETECTIVE LUCIE: How did they all know that was you in that car?

MR. STEWART: Who?

DETECTIVE LUCIE: Whoever shot at you, how did they know?

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MR. STEWART: They don't even know -- I mean I don't even know those people

DETECTIVE LUCIE: You don't know the people?

MR. STEWART: Not from a can of paint. Like I'm dead serious.

DETECTIVE LUCIE: So they just started dumping? Why?

MR. STEWART: Probably -- I don't know -- probably cause we was looking.

DETECTIVE LUCIE: Ya'll was looking?

MR. STEWART: Yeah but -- I mean -- like -- shit happened fast though so –

DETECTIVE LUCIE: I mean -- they ain't shooting the air?

MR. STEWART: Huh? No. Nobody shooting in the air. I mean -- what I know -- from what people say --

DETECTIVE LUCIE: Which way did you travel to the hospital?

MR. STEWART: 75. All the way.

DETECTIVE LUCIE: Did you see who was shooting? At -- at the car you were driving?

MR. STEWART: No.

DETECTIVE LUCIE: Nobody?

MR. STEWART: I didn't see who was

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shooting. I mean like -- we was riding past. It was like a couple people in the car and I guess they had guns. The people that was in car.

DETECTIVE LUCIE: In what car?

MR. STEWART: It was some little car.

DETECTIVE LUCIE: What kind of car?

MR. STEWART: Let's see –

DETECTIVE LUCIE: What color?

MR. STEWART: Think it was black.

DETECTIVE LUCIE: Think it was black.

MR. STEWART: Think.

DETECTIVE LUCIE: Think it was black.

MR. STEWART: Think it was black. Think. I guess it was like a couple people in the car or whatever. And then like we was riding past is when I heard like -- first shot and then after that that's when like they started coming.

DETECTIVE LUCIE: What side of the street were they standing on when they started the shooting?

MR. STEWART: Left side.

DETECTIVE LUCIE: The left side?

MR. STEWART: Yeah.

DETECTIVE LUCIE: Would that be your side as the driver or the passenger?

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MR. STEWART: The driver.
DETECTIVE LUCIE: The driver's side?
MR. STEWART: Yeah.
DETECTIVE LUCIE: So, where was Prophet at in the car?
MR. STEWART: He was in the passenger.
DETECTIVE LUCIE: The rear passenger or front passenger?
MR. STEWART: Front passenger. He was in the front.
DETECTIVE LUCIE: So they were shooting from both sides of the street.
MR. STEWART: No. They wasn't though. Wasn't shooting from both sides of the street I'm sure.
DETECTIVE LUCIE: They was shooting on your side but you -- you're not injured?
MR. STEWART: I thought I was hit. I just knew I was hit.
OFFICER MACDONALD: All right, Josh. Listen -- man -- personally I think you made some great process -- I mean progress from the first time we sat here to now but -- and I appreciate it, Man. I mean it takes a lot. Obviously it took a lot for you to build up this courage to sit here and lest give us this. But I know you minimizing it. All right. Cause my man house got

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a camera pointing right at the street. I already know he was sitting in his car. I already know ya'll rode up. I know everybody jump out, announce the robbery. I know his brother came out.

MR. STEWART: Everybody jumped out of what?

OFFICER MACDONALD: Jump out the car.

MR. STEWART: I jumped out is what you said?

OFFICER MACDONALD: I'm –I'm just telling you what he -- I'm just telling you -- I'm telling you what the guy said. So -- listen -- all I can do is what information is given to us. All right? I know people jump out that car, announce the robbery, his brother came out the house, shootout happened. He got shot. Prophet got shot. Ya'll jump in the car. Or whoever jump back in the car and you shoot him to the hospital. So, like I said I think it took a lot of courage, Man -- to get here and open up about it and start talking about it but I know leaving -- I know you leaving things out. All right? And that's -- like my partner told you, Man -- that's what -- that's what we don't want you to do. We don't want you to just to give us what you think won't hurt you and leave things out that will. Cause at the end of the day, Man just straight up lying is going to hurt you all the way

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around. You feel what I'm saying? Giving 10% of the truth, Man, don't help you. It hurts you. Cause we know what 10% of the truth is and we know what 90% of the lie is. You know. Like I said my man got video on the front of his house. So, it's on video. All right? And then he's sitting there telling us what happened. So, be 100% man. Cause 100% is going to help you. Not 10%. 100% is going to help you. You know the 90% of lies, Man, is just going to make your 10% look like bullshit. You feel what I'm saying? So, just be 100%. Cause everything else is just going to hurt you at the end of the -- at the end of the day.

MR. STEWART: I still get hurt though –

OFFICER MACDONALD: Because you sitting here. Because -- like I told you. I said Josh, I need you go one, two, three, four, five, six, seven, eight, nine, ten. I can't have you go one, two, three, six, seven, eight. And that's what you doing. You going one, two, three, six, seven, eight. 15, 14. You just -- you just jumping all over the place. You giving me just a little bit. You giving us what you think --

MR. STEWART: I telling you what I did though.

OFFICER MACDONALD: Right. Well listen -- I know you pulled up. I know the car came to a stop. I

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know these mother fuckers got out. You know that. You know they got out. You know they got out the car. You know they ran up on them. You know they try to rob them. And the shootout happened. My man shooting off the porch. The guy you all jumped -- that they jumped out on he start shooting. Prophet shooting. That's why he dropped his pistol. He got hit outside the car. Got back in the car and you took him to the hospital. We know -- we know -- we know that. You know that. 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.' So, that's why I'm telling you by 10% of the truth –

MR. STEWART: See you just told me –

OFFICER MACDONALD: To tell you what you did. I know. But you sitting there telling me you was telling me you was driving down the street and niggers just start shooting at ya'll. You not telling me I was driving the car and I stopped. These mother fuckers got out and then a fucking -- everybody started shooting. You telling me you just driving down the street and they start shooting.

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DETECTIVE LUCIE: And then when you told the lie you put the shooters on the wrong side of the street. They can't shoot up his side of the car from your side. And you not have a bullet in you.

MR. STEWART: They shot at my side.

DETECTIVE LUCIE: Also.

MR. STEWART: Mumble

DETECTIVE LUCIE: They could also -- But you didn't say that when I asked you where were they standing.

MR. STEWART: I said they shot on my side. That's why I said I don't know why I didn't get hit.

DETECTIVE LUCIE: That's not what you said back then. I promise you that. I repeated it back.

OFFICER MACDONALD: All right. So you driving and you come to a stop. Do the doors open up?

DETECTIVE LUCIE: You don't have to take possession of it. It's a yes or no.

OFFICER MACDONALD: It's just a yes no question.

MR. STEWART: Ya'll know about that.

DETECTIVE LUCIE: When do the doors pop open?

MR. STEWART: Mumble

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OFFICER MACDONALD: How am I trying to get you? I'm telling you -- Listen. I'm telling you what happened.

MR. STEWART: Seems like ya'll trying -- you talking about all ya'll hopped out.

DETECTIVE LUCIE: That's not what he said.

MR. STEWART: That -- what –

DETECTIVE LUCIE: That's not what he said.

OFFICER MACDONALD: They jumped out the car.

DETECTIVE LUCIE: He said they. Leaving you in the front seat.

OFFICER MACDONALD: Did you -- did -- you already told me you driving the car. Did you come to a stop at Meade and -- and -- and people got out the car? Is that a true -- is that a true statement? And it's yes or no. Is that a true statement. Without you explaining what each person did. Is it true that you was driving down Greeley and you stopped at Meade and people got out the car you was driving? Is that -- is that a fair statement?

MR. STEWART: Yeah.

OFFICER MACDONALD: Okay. At some point did a dude come out the house and start shooting in your direction? Is that a fair statement?

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MR. STEWART: Yeah, I guess. I mean -- yeah. The windows -- yeah.

OFFICER MACDONALD: All right. Did you see the guy that was sitting -- that was -- that was sitting in the parked car -- did you see him start shooting you guys' direction? All right.

MR. STEWART: No.

OFFICER MACDONALD: All right. All right. Did you notice –

MR. STEWART: Moving too fast.

OFFICER MACDONALD: All right. Is it fair to say that it's possible Prophet was shooting back? Is it possible he was shooting back? Yes -- I mean -- it's just yes or no. All right. And you think that's how -- by him getting hit -- you think that's how he dropped his gun? Because he was outside the car shooting back and that's how his gun end up staying outside?

MR. STEWART: I don't know how he dropped it.

OFFICER MACDONALD: All right. So, when Prophet got back in the car did you see him with a gun?

MR. STEWART: He was bloody.

OFFICER MACDONALD: All right. You saw him all bloody. All right. So, Prophet get back in the car. Whoever was with you get back in the backseat -- get back

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in the backseat and ya'll pull off. Is that fair? Is that -- is that fair to say that's what happened? Not giving any names. I know who Prophet is. So I don't know who the guy in the backseat is so I'm going to go the unknown guy. So, Prophet get back in the car. He get back in the front seat. Does he -- do he get back in the front seat?

MR. STEWART: Yeah.

OFFICER MACDONALD: All right. And then some unknown guy get back in the backseat. Without giving names he get in the backseat. Huh?

MR. STEWART: Yeah.

OFFICER MACDONALD: All right. And you take him to the hospital.

MR. STEWART: Yeah.

OFFICER MACDONALD: What's that?

MR. STEWART: Yeah. I took him to the hospital.

OFFICER MACDONALD: Okay. At any point on the way to the hospital do you drop the guy off that's in the backseat? Anywhere? Intersection? Do you drop him off somewhere? Well he don't go to the hospital with you.

MR. STEWART: I don't -- I mean -- I don't -- ya'll saying --

OFFICER MACDONALD: Did you make a stop?

MR. STEWART: No.

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OFFICER MACDONALD: A'ight. So -- the –

MR. STEWART: That's what I'm saying. I don't know what you mean -- you saying -- they jumped out the car –

OFFICER MACDONALD: So you didn't -- All right -- they means more than one. So, you stayed in the car. Prophet get out the car and then the unknown guy in the backseat get out the car.

MR. STEWART: What --

OFFICER MACDONALD: I mean I don't know his name. You going to tell me his name?

MR. STEWART: I don't know.

OFFICER MACDONALD: So it's just you and the Prophet in the car?

MR. STEWART: Yeah.

OFFICER MACDONALD: So just two of you all?

MR. STEWART: Yeah.

OFFICER MACDONALD: Cause my man, my man saying there was three. He was saying there was three in the car. I'm not sitting there asking you giving me names. I'm just asking was there three people in the car?

MR. STEWART: No.

OFFICER MACDONALD: Okay it was just you and Prophet in the car?

MR. STEWART: No.

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DETECTIVE LUCIE: So there was four?

OFFICER MACDONALD: Okay, was there three people in the car?

MR. STEWART: Yeah, Man. There was three people in the car.

OFFICER MACDONALD: Okay. So, Prophet get in the front seat. The third guy get in the backseat. Ya'll take off. Do you stop somewhere?

MR. STEWART: I take off. I don't know where the third guy was.

OFFICER MACDONALD: Oh. He never got back in the car?

MR. STEWART: No. I pulled off.

OFFICER MACDONALD: Okay. All right. And you shoot Prophet straight to the hospital. All right. Do you make any stops anywhere before –

MR. STEWART: No.

OFFICER MACDONALD: Okay. Do you get rid of any evidence out the car?

MR. STEWART: No. I just drove straight there.

OFFICER MACDONALD: Okay. All right. So, it's going to be fair to say that your phone's going to put you -- it's going to back up your story of putting you on Meade and then driving straight to the hospital

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and making no stops in between.

MR. STEWART: Yeah.

OFFICER MACDONALD: Okay.

MR. STEWART: Drove right on 75 all the way.

OFFICER MACDONALD: Okay. All right. So -- I mean -- we gonna have to –

MR. STEWART: See already know.

OFFICER MACDONALD: It’s bout to go where?

MR. STEWART: Mumble.

OFFICER MACDONALD: So, What about Savage? You was never on Savage?

MR. STEWART: No,

OFFICER MACDONALD: And Packard.

MR. STEWART: No.

OFFICER MACDONALD: Your phone ain’t gonna put you there?

MR. STEWART: No.

OFFICER MACDONALD: You 100% Josh? Your phone ain’t gonna put you on Savage and Packard?

MR. STEWART: Ahh --

OFFICER MACDONALD: It’s just a yes or no question, Man. It’s a yes or no question. Is your phone going to put you on Packard and Savage? I mean you know I gotta ask you, Man. Come on. The dude that -- that -- the

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incident that happened on Packard and Savage my man belongs in that car. So you know I gotta ask. I wouldn't be doing my job if I don't ask you. So that's why I made it a simple question. Do your phone put you on Packard on Savage? That's why I left it to a yes or no answer. Yes James. No James.

MR. STEWART: Yes.

OFFICER MACDONALD: So your phone's gonna put you on Packard and Savage. All right. Are you driving for that one too?

MR. STEWART: Yeah.

OFFICER MACDONALD: Okay. Is it the same people in the car with you on Packard and Savage that was on Meade and Greeley? Are they the same people?

MR. STEWART: Yeah

OFFICER MACDONALD: What's -- I'm sorry?

MR. STEWART: Yeah.

OFFICER MACDONALD: So it was you, Prophet and the unknown male on Packard and Savage. Did you have anything to do with taking the shoes and -- did you hear the shot?

MR. STEWART: Nothing to do.

OFFICER MACDONALD: All right. Did you hear the gunfire? I'm just trying to lead to yes no questions. Without you implicating anybody did you hear

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the gunshots? Josh, come on. We getting through this, Man.

MR. STEWART: Ya'll not trying to help me, Man.

OFFICER MACDONALD: Listen, I'm asking you yes no questions. Have I asked you to identify anybody? Have I asked you to put a gun in Prophet's hand?

MR. STEWART: Just saying I know how that stuff works.

OFFICER MACDONALD: How does it working? I'm asking you what did you hear? Did you hear any gunshots? I'm not asking you to tell on anybody. I'm asking you what did you hear? Did you hear gunshots? It's a yes or no question. That's -- that's all it is.

MR. STEWART: Can I call my Mama?

OFFICER MACDONALD: How old is your mother, Man?

MR. STEWART: 55.

OFFICER MACDONALD: And you really want to put a 55 year old lady through this?

MR. STEWART: That's what I'm saying

OFFICER MACDONALD: No.

MR. STEWART: I'm sick of doing this shit to her, Man. That shit crazy.

OFFICER MACDONALD: This something you do

face to face, Man.

MR. STEWART: I'm supposed to be with my mama today too, man.

OFFICER MACDONALD: You don't do this -- you don't do this over the phone. Did you -- did you hear shots fire, Man?

MR. STEWART: Yeah. Yeah I heard something.

OFFICER MACDONALD: Did you see anybody fall?

MR. STEWART: No. I didn't see nobody fall. I'm serious.

OFFICER MACDONALD: Okay.

MR. STEWART: I didn't see nothing, Man. I didn't see nobody fall. Like nobody try to even

OFFICER MACDONALD: Did you know it was going to be a robbery?

MR. STEWART: No.

OFFICER MACDONALD: Do you know who the third guy was?

MR. STEWART: No. No. No.

OFFICER MACDONALD: Do you know him?

MR. STEWART: I had no clue.

OFFICER MACDONALD: Did it seem like –

MR. STEWART: Uhhh

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OFFICER MACDONALD: Who picked -- was he already in the car with Prophet when ya'll got hooked up or ya'll picked him up?

MR. STEWART: I think he was in there.

OFFICER MACDONALD: He was already in the car when Prophet picked you up?

MR. STEWART: Think so, yeah.

OFFICER MACDONALD: Well how come they had you drive?

MR. STEWART: I don't know. I don't know.

OFFICER MACDONALD: All right. What do you --

MR. STEWART: I don't know.

OFFICER MACDONALD: After ya'll left Savage where did you -- where did you go? What did ya'll do when you pulled off of Savage and Packard?

MR. STEWART: I don't know.

OFFICER MACDONALD: Did ya'll drive around?

MR. STEWART: Why you keep doing this to me, Man? Yeah. Went over -- that's where -- when we was on Meade.

OFFICER MACDONALD: So ya'll left Savage Packard and went over to the Meade?

MR. STEWART: Yeah.

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DETECTIVE LUCIE: You thirsty, baby?

MR. STEWART: Yeah.

DETECTIVE LUCIE: You want some water?

MR. STEWART: Can I just call my mama real quick? I don't want no water.

DETECTIVE LUCIE: You don't want no water?

MR. STEWART: I just want to holler at her, Dog.

DETECTIVE LUCIE: We'll let you talk to her.

MR. STEWART: I just telling you like man, I just let her down.

DETECTIVE LUCIE: That's real shit.

OFFICER MACDONALD: That's about some of the truest shit you said, Man, since we been sitting here.

MR. STEWART: Damn. All this shit.

OFFICER MACDONALD: A'ight listen. I got one more question.

MR. STEWART: I'm gonna kill myself, Dog.

OFFICER MACDONALD: I got one more question, Man. At any point, Bro, you touch that gun?

MR. STEWART: No.

OFFICER MACDONALD: Okay. I'm just telling

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you they gone -- they gone –

MR. STEWART: No.

OFFICER MACDONALD: A'ight.

MR. STEWART: I did touch no gun, Man.

OFFICER MACDONALD: Okay. You didn't touch the assault rifle.

MR. STEWART: No gun. Not a gun was in my hand.

OFFICER MACDONALD: Fine. You just the driver for both incidents?

MR. STEWART: See now that's just all so fucking crazy.

OFFICER MACDONALD: Wait, I'm just -- no I'm just saying it. I didn't -- I wasn't asking you I'm just saying it. You was just the driver.

MR. STEWART: Oh, shit. Can I see that paper?

OFFICER MACDONALD: Ain't nothing on it, Man. I mean you want to write on it some -- you want to your story on there? In your own handwriting?

MR. STEWART: No, Man.

OFFICER MACDONALD: I mean cause the question is tell me about the incident on Meade and Greeley.

MR. STEWART: I don't want to write

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nothing. I ain't cried in so long, Dog.

OFFICER MACDONALD: Ain't nothing wrong with crying, Man.

DETECTIVE LUCIE: It's okay to cry.

OFFICER MACDONALD: Some of the most powerful people in the world cry. Best believe that. I'm one of them and you know I cry. What you feeling right now, Man? I mean –

MR. STEWART: I just feel like I let her down, Man. Again, Dog.

OFFICER MACDONALD: I mean are you feeling any remorse about what happened with the Savage and Packard incident and the Meade and Greeley incident?

MR. STEWART: Yeah -- what you mean? Yeah you know I do, Man. Shit.

OFFICER MACDONALD: You do feel a little bit get that shit off your chest?

MR. STEWART: I do but I still don't think shit's straight, Man. This shit is crazy, Dog.

DETECTIVE LUCIE: You know that in advance or that something you learning?

MR. STEWART: I did not know that.

DETECTIVE LUCIE: So why you stay in it?

MR. STEWART: I don't know. I been good for so long. Doing good.

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OFFICER MACDONALD: This the first time you hooked up with this mother fucker, yesterday? Or ya'll been together for -- or ya'll been hanging for a minute?

MR. STEWART: I mean no I ain't been hanging for a minute. I know -- like I said -- like I wouldn't lie to ya'll. I know him from the neighborhood -- I just –

OFFICER MACDONALD: All right.

DETECTIVE LUCIE: You made a mistake, basically.

MR. STEWART: Dumb ass mistake, Man.

DETECTIVE LUCIE: Were you supposed to get some bread, though? I mean --

MR. STEWART: I don't even care about money, Dog.

OFFICER MACDONALD: I mean was – How hard you think it's going to be for me to find this third guy? You think I need to go far?

MR. STEWART: What you mean?

OFFICER MACDONALD: I mean how hard you think it gonna be for me to find him?

MR. STEWART: I don't know .

DETECTIVE LUCIE: You know a nickname? How you know -- how --

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OFFICER MACDONALD: I just asked how hard you think it would be for me to find him?

DETECTIVE LUCIE: How'd you know he wasn't going to hurt you? Cause you ain't know him and ya'll was in.

MR. STEWART: Just dumb, Man.

DETECTIVE LUCIE: Just dumb?

MR. STEWART: I'm dumb. I'm dumb.

OFFICER MACDONALD: All right.

MR. STEWART: Get this stuff off my mind. Ya'll don't understand my mama had just told me. No. It's not even that. I just -- cause look -- I got some other friends over there, feel me? We be chilling. I ain't gonna lie we get high but we just be chilling. We mess with some girls or I'm at the crib at 16 and Grosbeak. Feel me? Only reason Mama -- I mean -- she don't even really want -- like -- ya'll don't even know how many times she been telling me like I don't want you to get nothing She want me to go to church back with her. I ain't even going. Yeah I shoulda been going because god like still like today that done crazy. She had just call me and say come down the street. We cooking got buddies there or whatever. And her church got church on Saturday. It's a little impact church or whatever. Her church got church on Saturday so she been begging me to go with her

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on Saturday. So she like just do this with me for her mother's day. Just go to church with me, you feel me?

OFFICER MACDONALD: You know -- did you think Prophet, Man was capable of shooting somebody?

MR. STEWART: I don't think so. No. No.

OFFICER MACDONALD: I mean I do --

MR. STEWART: I was in the front.

OFFICER MACDONALD: I mean you heard shots what -- what did you do? Did you look up and look to see what the fuck was going on?

MR. STEWART: No. Ain't no looking up. Look down man. You hear shots, shots coming for you, feel me? But I don't think he shot, Dude. Yeah I don't know. I can't say I don't think. I can't say I do know he did shoot but I don't know if he shot.

DETECTIVE LUCIE: How you feeling?

MR. STEWART: I don't know how to feel right now, Man. I feel like you just know for all time. I don't know how I feel, Dog. I just feel selfish. So selfish. I'm so selfish. I'm selfish and they tell me this though. Stay out of trouble, you feel me? That shit -- Last time I hang out like that my brother had told me like you probably don't understand this shit, you feel me? I say fuck with this too. Feel me? They really hit me with that shit. I ain't never did no time, feel me?

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Period. For my mama 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.

DETECTIVE LUCIE: 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.

DETECTIVE LUCIE: You can be.

OFFICER MACDONALD: I mean as long as you -- I meant -- listen Josh –

DETECTIVE LUCIE: You can be.

OFFICER MACDONALD: Like -- like we been sitting here and we been telling you, Man, all this is just about to find out the truth. Man the only person that can tell us the truth is you. I mean we go around. We talk to witnesses and they tell us what happened but the only person that really -- the only people -- only person that knows what happened is the people that was involved. So, when you got multiple people -- when you

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got multiple players involved and all these players get caught, you gotta sit down and you gotta really think. I know we out here doing some dumb shit but do these mother fuckers really give a fuck about me? Like at the end of the day what's going to happen to me if I don't stick up for myself? And that's what we wanted -- that's what we -- that's what we was trying to tell you. You can only stick up for yourself. You can't let other mother fuckers stick up for yourself that's doing dirt with you. Cause them niggers gone want to be outside. You want to be outside. They want to be outside. So, all this depends on how truthful you gone get. Cause I still know you holding back. I still know there certain things you don't want to tell me. So, at the end of the day man -- just like -- I mean -- you can't tell me -- and I'm getting offense -- you can't tell me that you ain't see these niggers get shot.

MR. STEWART: Who?

OFFICER MACDONALD: On Packard.

MR. STEWART: I didn't see nobody getting shot. Why you think I'm lying about that?

OFFICER MACDONALD: So, you can't tell me you ain't see Chris jump back in the car with the gun? Or yo can't tell me your homeboy didn't jump back -- the nigger in the back didn't jump back in the car with the

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gun so I was like hey Josh, on Packard and Savage did Prophet jump in the car with the rifle? You can't sit here and tell me I didn't see that part. I know you saw it. But there's some things you don't want to tell me. So I go, Josh, did you see Prophet jump back in the car with the rifle? What are you going to tell me?

MR. STEWART: Ya'll I feel like this though --

OFFICER MACDONALD: See what I'm saying? That's what I told you That's what I'm telling you about -- cause you asked her –

You sit here and asked her am I going to turn out good on this and I sit here and told you yeah if you 100% -- if you truthful all the way through this yeah it's gonna turn out good for you. And that's why this came with this. If I ask you this question are you going to give me the answer? And you just proved it. No, you not. You not going to be 100% all the way through this. You gonna try to hold certain shit back. That's what you gone do and going through this process, Man you can't -- they not gone allow you to hold back. They gonna want -- they gonna want the truth. They want to know -- they want -- they want –

MR. STEWART: Who else gonna want the truth?

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OFFICER MACDONALD: The prosecutor. When this comes down the prosecutor's like, 'hey Joshua, what happened? Did you see Prophet get back in the car with the assault rifle?'

DETECTIVE LUCIE: Are you going to be honest with the lawyer at least?

OFFICER MACDONALD: Or you gone be like -- you know -- I was looking away. I was looking left. I wasn't looking right. He'll be like 'oh, okay. That's what you want to do?' See what I'm saying?

MR. STEWART: See, ya'll want me to testify.

OFFICER MACDONALD: I -- nah. I'm not saying you's testifying.

MR. STEWART: That's testifying.

OFFICER MACDONALD: This is when you and the prosecutor and your lawyer sitting down and -- and your lawyer is having –

MR. STEWART: You're saying the judge will ask me.

OFFICER MACDONALD: Judge ain't going to ask you shit, Bro. This what the judge do, The judge sit there makes sure it's a fair trial.

MR. STEWART: He gone say 'you -- okay -- you was with them –'

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DETECTIVE LUCIE: That's juvenile court. You thinking of a referee.

MR. STEWART: No. this –

OFFICER MACDONALD: The judge don't ask questions.

MR. STEWART: Trust me man I been to court –

OFFICER MACDONALD: No. I been doing this shit

MR. STEWART: Ya'll don't think they gone say -- ya'll don't think they gonna be like okay, take the stand. Do you see the person sitting in the court that you was with?

OFFICER MACDONALD: That's -- that's if you want to do it. They can't make you get up there and do it, Bro. That's -- that's something you and your team have to work out with the prosecutor. If you want to get on the stand that's on you. She -- the prosecutor can't make you get up there. That's -- listen -- that is 100% your decision to get on that stand and testify. Nobody can force you to do that.

MR. STEWART: And you know what's gonna happen? Oh, he lying or something.

OFFICER MACDONALD: Just because you don't get on the stand don't mean you lying. It means you're

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not getting on the stand. That's all it means. I'm not getting up there. I don't want to get up there I'm not getting up there. That's all it means. You got this shit misinterpreted. Nobody can force you to get on that stand and say this is what I saw. This -- nobody make you get up and do that. That's a decision you gotta make on your own.

MR. STEWART: You said my prosecutor. You mean my lawyer?

OFFICER MACDONALD: Your lawyers gonna talk to the prosecutor.

MR. STEWART: And the prosecutor is the person that goes against you.

OFFICER MACDONALD: Right. The prosecutor is going to have to prove the case on whoever they decide to charge. So, they can't make you get up there on the stand and testify. Nobody can do that but you. You the only person -- well you know I want to get up there and sit and tell my story. I want to be 100% about this because this is who I am. I'm tired of all this bullshit. Like you sat that and said my mama don't deserve this shit. My brother don't deserve this shit. I want to be 100%. That's your decision. That's your choice to get up there and do that. Nobody can force you. You can sit your ass at that table all mother fucking day and just sit

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there and listen, all day. That's what you could do. So, that's it.

MR. STEWART: And you telling me I gotta tell my prosecutor what I said?

OFFICER MACDONALD: Nah. No. I mean you gonna have a sit-down -- you gonna have a talk with your lawyer and your lawyer probably going to ask you what happened that day and like she asked you are you going to be 100% with your lawyer? Or you going to feed that nigger half -- half the shit.

MR. STEWART: I'm be 100% with my lawyer.

OFFICER MACDONALD: Right. Right.

MR. STEWART: My own attorney.

OFFICER MACDONALD: That's what I asked you can you be 100%. You can't even be 100% now. Like she asked you when Prophet got back in the car did he have an assault rifle. That was a yes or no question. I didn't ask you did you see him shoot the dude. I just said hey did he get back in the car with a rifle? Yes or no. That's -- that's the answer. That what I was looking for. Those two answers. Either or.

MR. STEWART: Yeah

OFFICER MACDONALD: All right. So, when he got back in the car he had the rifle? Is that a yes? I mean your head going up and down and shit.

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MR. STEWART: Yeah, Man. All right. So -- what to tell my mom I'm in here for?

OFFICER MACDONALD: Whatever you want to tell her. You can tell her you're Bro. It's whatever you want to tell her. You can tell her you're in for stolen car. You can tell her you being investigated for a homicide that happened, that you was -- that you was around when it happened. You can tell her whatever you want to tell her. Only you know how to break bad news to your mama, Man. I can't tell you how to do it. I don't know her. So -- so how you want to play it?

MR. STEWART: So -- so all right. I talked to ya'll. So what's next?

OFFICER MACDONALD: So, you want to come back over here and we got the person -- we got 72 hours. If we ain't nothing come up in -- well we got 48 hours. If nothing come up in 48 hours you up out of here.

MR. STEWART: How though?

OFFICER MACDONALD: So we got 48 hours. They got 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.

MR. STEWART: If ya'll don't.

OFFICER MACDONALD: Yeah.

MR. STEWART: But ya'll gonna present

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what I -- my lawyer -- they gone --

OFFICER MACDONALD: Yeah. They gone read over it and make a decision.

MR. STEWART: Mumble

OFFICER MACDONALD: Well, I mean -- I don't -- listen –

MR. STEWART: Right. Yeah.

OFFICER MACDONALD: I don't know. Every situation is different. I ain't never had two the same situations go down the same way. Every situation is totally different. But I tell you what -- you walk out these doors in 48 hours, Man and be out on the streets running your mouth –

MR. STEWART: What? I don't even think I'm gonna leave in 48 hours

OFFICER MACDONALD: We got 48 hours. I'm saying you walk out of here don't be in the hood running your mouth.

MR. STEWART: I ain't get out of here after 72 hours before. listen, they let me out after 72, got arrested, they said I had a warrant and I told them like ya'll you just let me out after 72 hours. How do I got a warrant? They said we gone take you to the precinct, if you not lying we gone let you go. They booked me here and I had just done 72 like the day before

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that. And I gave police my real name again.

OFFICER MACDONALD: And they booked you all over again?

MR. STEWART: Yeah.

OFFICER MACDONALD: On a different charge?

MR. STEWART: No.

OFFICER MACDONALD: On the same shit?

MR. STEWART: Yeah. I had to do the whole 72 -- well no. I don't think I did the whole 72 over. Probably did a 48 though. But I had just got off the 72 I'm like how do I got a warrant? Ya'll released me.

OFFICER MACDONALD: How long ago was that?

MR. STEWART: That was on my mama birthday.

OFFICER MACDONALD: You got some more you want to talk about, Man? Got some more shit you want to get off your chest? Cause I mean -- I got like a thousand more questions but I know it's gonna take a lot more talking to give me these answers.

MR. STEWART: See this shit I'm in some real shit.

OFFICER MACDONALD: Yeah it is some real shit, I don't care wahtitis.

MR. STEWART: Yeah, but –

OFFICER MACDONALD: I mean you ain't the

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one that pull the trigger to kill a man, so at least you know that. Least you know they can't -- they ain't -- you know -- you ain't do that. At least your conscience clear on that. It might be -- it might be dirty -- it might be hurting on some other shit but at least you know you can close your eyes knowing you ain't kill somebody.

MR. STEWART: Accessory.

OFFICER MACDONALD: I mean -- We still got a lot of work to do, Man, so -- you know.

MR. STEWART: Shit.

OFFICER MACDONALD: I mean -- you put yourself in a bad predicament, Bro. Ain't no way around that. You ain't gone sugar coat that shit.

MR. STEWART: I ain't saying --

OFFICER MACDONALD: I'm just saying we can't sugar coat that. You put yourself in a bad predicament. But I don't mean -- that don't mean the light got to get turned off in the tunnel. You feel?

MR. STEWART: Ain't no hope in this, Man.

OFFICER MACDONALD: You want to be 100% all the way through the whole process. Cause right now we 85%.

MR. STEWART: Can I call my mana on one of your phones?

OFFICER MACDONALD: You want do it over

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the phone?

MR. STEWART: Who, me?

OFFICER MACDONALD: Yeah.

MR. STEWART: Yeah.

INTERREGATION CONCLUDED

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STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

RECORDER'S CERTIFICATE AND NOTARIZATION

I, Donald Handyside, Court Recorder, do hereby certify that that the foregoing is a true and accurate transcription of the electronic recording if the interrogation of Joshua Lamar -- James Stewart

I further certify that I am not related to or employed by any party of this cause or their respective counsel.



DONALD HANDYSIDE (CER 1464)

Notary Public

My Commission Expires: 5/6/2020

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STATE OF MICHIGAN

IN THE 36TH DISTRICT COURT FOR THE CITY OF DETROIT

CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

-vs-

36th District Court No. 16-057956-01 and 02
Circuit Court No. 16-005731-01 and 02

JOSHUA LAMAR STEWART AND DEONTEA JAMAR WHITE,

Defendants.
_____/

PRELIMINARY EXAMINATION

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled cause, before the HONORABLE KENNETH J. KING, Judge, 36th District Court, at Courtroom 204 Frank Murphy Hall of Justice, Detroit, Wayne County, Michigan, on Friday, July 1, 2016.

APPEARANCES:

For the People: RON HAYWOOD
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Detroit, Michigan

For the Defendant: (Joshua Lamar Stewart) LARRY POLK
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APPEARANCES CONTINUED:
For the Defendant: WANDA CAL
Deontea Jamar White)

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EXHIBITS

Identification		Marked	Received
People's Xbt 1	Photo Lineup	4	45
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Detroit, Michigan

Friday, July 1, 2016

P R O C E E D I N G S

— — —

(People's Exhibit Numbers 1, 2 and 3 Marked for Identification.)

THE COURT: Calling case 16-57956, People of the State of Michigan versus Defendant Number One, Joshua Lamar James Stewart. Defendant Number Two, Deontae Jamar White. Both Defendants are charged in Count One, Felony Murder. Both Defendants are charged in Count Two, Armed Robbery. Both Defendants are charged in Count Three, Armed Robbery. Both Defendants are charged in Count Four, Assault With Intent to Murder. Both Defendants are charged in Count Five, Armed Robbery. Both Defendants are charged in Count Six, Receiving and Concealing Stolen Property $1,000 or more but less than $20,000. Both Defendants are charged in Count Seven, Felony Firearm. Appearances for the record.

MR. HAYWOOD: Good morning, your Honor. Ron Haywood for the People.

MR. POLK: Your Honor, may it please this Honorable Court, Larry Polk on behalf of Mr. Stewart who's present and sitting directly in front of me.

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MS. CAL: Wanda Cal on behalf of Mr. White, your Honor. I'd ask the Court to allow me to sit through these proceedings.

THE COURT: Yes, no problem. Are we ready to proceed.

MR. HAYWOOD: Yes, your Honor.

MR. POLK: Judge, I'd ask that there be a mutual order of sequestration of any and all witnesses that are involved in the testifying in this matter.

MS. CAL: I would join in that motion.

MR. HAYWOOD: Ask for the exception for the officer in charge.

THE COURT: Any objections to the officer in charge?

MR. POLK: Is that him sitting right there? I guess not, Judge.

THE COURT: Okay. Any objection Ms. Cal?

MS. CAL: Well I'd just object that he sits because I understand he will be a witness testifying. I ask that he be the witness testifying first so he won't be listening to the testimony.

THE COURT: Mr. Haywood, is he testifying today, sir?

MR. HAYWOOD: Yes, your Honor.

THE COURT: You want to call him first and

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call him out of order.

MS. CAL: Thank you, Judge.

THE COURT: Ladies and gentlemen in the courtroom if there are any witnesses who may testify today or in a future hearing please step out into the hallway until the further notice.

How many witnesses for the People?

MR. HAYWOOD: Five, your Honor.

THE COURT: Call your first witness, please.

Sir, please give your name and spell to the court reporter.

MR. MITCHELL: John Mitchell.

THE COURT: Please raise your right hand, do you swear to tell the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

THE COURT: Thank you, sir. Please have a seat.

You may begin when you're ready.

MR. HAYWOOD: Thank you.

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P. O. J O H N M I T C H E L L

At 11:00 a.m., witness called by the People, sworn by the Court, examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q. Officer, if you could state your full name for the record, where you're employed, for how long?

A. John Mitchell, Detective, City of Detroit for 18 years.

Q. Officer Mitchell, are you assigned as the officer in charge of the case of People versus Joshua Stewart and People versus Deontae White?

A. Yes.

Q. When did you get that assignment?

A. The date it happened, sir, July 6th.

Q. And what is the date of this case?

A. It was a homicide.

THE COURT: What date did you say that it was, sir?

THE WITNESS: Can I see my report.

THE COURT: I thought I heard you say July 6th.

THE WITNESS: July 6th, that's wrong.

MR. HAYWOOD: May I approach, your Honor.

THE COURT: You may.

THE WITNESS: May 6. I'm sorry, not July 6.

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THE COURT: Okay, of what year?

THE WITNESS: 2016.

THE COURT: Thank you.

Q. (By Mr. Haywood, Continuing): When you got assigned to this case, what were some of the -- as pertaining to items that were taken in this case, do you know what those items were that were taken in this case?

A. Well there were several items taken. Can you be more specific on what items you're talking about.

Q. The items that were photographed later on, the clothing?

A. I don't know what you talking about.

Q. Were there items taken from any of the witnesses in this case?

A. Yes.

Q. Do you know what those items were?

A. Yes.

Q. What were they?

A. There was a belt and some shoes.

Q. And those items, you know if they were photographed?

A. Yes.

Q. Those items once they were photographed were they shown to anybody?

A. Yes.

Q. Who were they shown to?

A. To one of the witnesses.

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Q. And do you remember which witness that was?
A. Yes, Mr. Walker.
Q. Was Mr. Walker --

MR. POLK: Judge, I don't know. I think I need to object because I don't know if the officer is testifying from his first-hand knowledge or if he's giving us some hearsay. Even though he's the officer in charge still doesn't overcome the possibility of some hearsay.

THE COURT: All right. Can you clear that up for us.

Q. (By Mr. Haywood, Continuing): Are you testifying from what somebody told you or are you testifying from what you saw?
A. What I saw.

THE COURT: Okay.

MR. POLK: And I notice that the witness has something in his hand. I'd like to know what it is.

THE WITNESS: It's a copy of the Investigator's Report.

MR. POLK: Okay. And there are no other reports from this witness?

THE COURT: I don't know. You'll get a chance to explore that on cross.

MR. POLK: All right, Judge.

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THE COURT: Go ahead.

MR. HAYWOOD: Thank you, your Honor.

Q. (By Mr. Haywood, Continuing): Were you able to show that photograph of these items to one of the victims -- one of the witnesses?

A. Correct.

Q. Was he able to identify those items?

A. Yes.

Q. And those items that he identified, what did he identify those items as?

A. He identified them as items taken from the fatal victim.

Q. Did you have an opportunity to investigate the car that was involved in this incident?

A. Yes.

Q. What did you do as far as investigating the car that was involved in this incident?

A. I spoke to the registered owner of that car.

Q. How did you find out who the registered owner of that car was?

A. Through our LEIN system is who it was registered to.

Q. Where was the car found at?

A. It was found at Detroit Receiving Hospital.

Q. And the car that was found at the hospital, do you know who was in that car prior to it being left at the hospital?

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A. Yes, the Defendant's.

MS. CAL: Your Honor, I'm going to object. Unless he knows from personal knowledge it has to be hearsay.

Q. (By Mr. Haywood, Continuing): Did you speak to Mr. Stewart?

A. No.

Q. The car that was stolen, did you speak to the owner?

A. Yes, I did.

Q. What was the value of that car?

A. I believe -- I don't have the actual value. I think it was around 15,000.

Q. What type of car was it?

A. Dodge Intrepid.

Q. What year was it?

A. If I can refer to my report again.

Q. If that will refresh your recollection.

A. '04.

Q. Do you know the date that it was stolen?

A. It was stolen on the 5th.

Q. May 5th?

A. May 5th, 2016.

MR. HAYWOOD: I have no further questions, your Honor.

THE COURT: Cross-exam.

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CROSS-EXAMINATION

BY MR. POLK:

Q. So when you say you believe the value of a 2004 Dodge Intrepid is $15,000, that's just something off the top of your head, right?

A. Yes.

Q. You have nothing to support that, no proof of --

A. No.

Q. -- value or anything of that nature?

A. Correct.

Q. You didn't take the photographs, any of the photographs involved in this incident, did you?

A. Can you repeat that.

Q. You didn't take any photographs concerning this issue?

A. No.

Q. You reviewed all the police reports prior to making your report, your Investigator's Report?

A. Yes.

Q. Did you have personal interviews with any of the individuals?

A. I performed an interview with Mr. White, yes.

Q. With who?

A. Mr. White.

MR. POLK: I don't have any other questions.

THE COURT: Ms. Cal, do you have anything?

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CROSS-EXAMINATION

BY MS. CAL:

Q. You wouldn't have any personal knowledge where the belt and the shoes come from?

A. Just from the testimony of the witness.

Q. My question was you don't have any personal knowledge where it came from?

A. No.

Q. And as far as where the pictures were taken, where they are from, you have no personal knowledge of that either?

A. Say that again.

Q. You have no personal knowledge of where the items were found that was photographed?

A. Was I present when they were found?

Q. Yes.

A. No.

MS. CAL: Thank you. Nothing further.

THE COURT: Any redirect?

MR. HAYWOOD: No, your Honor.

THE COURT: Thank you, sir. You may step down.

(At 11:08 a.m., witness excused.)

MR. HAYWOOD: If I may call the next witness, Etoh Walker.

THE COURT: And you may stay as well, sir.

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Sir, please step forward. Give your name and spelling to the young lady that's seated here.

MR. WALKER: My name is Etoh Walter, E-t-o-h, W-a-l-k-e-r.

THE COURT: Please raise your right hand, sir. Do you swear or affirm to tell the true, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

THE COURT: Thank you, sir. Please have a seat right there. There's a microphone that's in that stick to your left. Swing that around to your mouth and speak directly into that for us, okay.

You may begin when you're ready.

MR. HAYWOOD: Thank you, your Honor.

E T O H W A L K E R

At 11:09 a.m., witness called by the People, sworn by the Court, examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q. Sir, if you could state your full name for the record?

A. My name is Etoh Rayfield Walker.

Q. Mr. Walker, how old are you?

A. I'm 22.

Q. Mr. Walker, I'm going to take you back to the date of May 6, 2016 around 7:15 p.m. Do you recall where you

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were at at that time?
A. I was walking down the street with my best friend.
THE COURT: I can't hear you.
A. I was walking down the street with my best friend at the time.
Q. (By Mr. Haywood, Continuing): What was his name?
A. His name is Aaron Foster.
Q. And at the time was it light out? Is it getting dark?
A. It was broad daylight outside.
Q. And where were you going with Mr. Foster?
A. I was going to the gas station at the time on Van Dyke.
Q. So what happened on your way to the gas station with Mr. Foster?
A. Well during the time we was walking down the street and a car approached in the street and -- the car approached and they asked me and Aaron if we was --
MR. POLK: I object to the term they.
THE COURT: Okay, rephrase.
Q. (By Mr. Haywood, Continuing): What kind of car was it?
A. I believe it was an Intrepid I believe if that's the name.
Q. Intrepid?
A. Yes, I believe that.
Q. Do you remember what color it was?
A. Not is specifically, no. I know it was a dark color

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though.

Q. And you said that car pulled up and someone spoke from the car?

A. Yes.

Q. Do you know who spoke from that car?

A. No.

Q. Do you know if it was the driver or the passenger?

MR. POLK: Objection. Leading, Judge. He said he didn't know who spoke from the car.

THE COURT: Rephrase.

Q. (By Mr. Haywood, Continuing): Do you know who spoke from the car?

A. No.

MR. POLK: Once again, asked and answered. Objection.

A. The person who spoke I know they spoke to Aaron though. I didn't really see who asked him the question.

Q. (By Mr. Haywood, Continuing): What was the question that you heard?

A. "Do you know where to get some weed from?"

Q. What happened after that?

A. I told them -- I told Aaron to tell them, no, we don't know where to get none at.

Q. After you told them no what happened?

A. They pulled to the corner of I believe Rogue and then

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they backed up.
Q. Could you tell how many people were in the car?
A. Three.
Q. Could you tell where the three people were sitting in the car?
A. One was driving and it was two in the back seat.
Q. And you say they pulled up and then they backed back?
A. Yes.
Q. What happened next?
A. Well after they backed up two got out the back seat and they came up with guns at me and Aaron?
Q. When they pointed the guns could you tell what type of guns they were?
A. One had a submachine gun and one had a pistol.
Q. And what happened once these two people got out the car?
A. Well they pointed the guns at us and they basically told and basically to stop moving.
Q. You said there was two people?
A. Uh-huh.
Q. Yes?
A. Yes.
Q. Now you said they. I'm not going to know who you mean by they.
A. Okay.
Q. So can you describe the people for me?

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A. Well one of the guys was tall and he had dreads and another one was kind of heavyset and --
Q. Could you describe the driver?
A. No.
Q. So the tall one that had dreadlocks, what type of gun did he have?
A. He had a submachine gun. It looked like an AK-47 but smaller.
Q. And then the other person had what?
A. A pistol --
Q. Okay.
A. -- with an extended mag.
Q. Do you recognize these guys -- do you recognize anybody here in court that was there that day?
A. Yeah.
Q. Who do you recognize?
A. These gentlemen right here.
Q. Which one are you referring to?
A. This gentlemen right here.
Q. The one closest to you?
A. Yes.
Q. And how do you recognize him? Which one is he?
A. He's the one that shot my friend.
Q. Is he the one that had the AK-47 or is he --
A. Yes.

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Q. And he's the one that you referred to as the tall gentleman?
A. Yes.
MR. HAYWOOD: For the record the witness identified the Defendant in this case, Deontae White.
THE COURT: What is he wearing today, sir?
THE WITNESS: Come again?
THE COURT: Today what is he wearing?
THE WITNESS: Yellow outfit I suppose.
THE COURT: When you say it's the one that's closest to you?
THE WITNESS: Yeah.
THE COURT: So noted. The record should reflect the witness has identified -- that's Deontae White?
MR. HAYWOOD: Yes, sir.
THE COURT: Defendant Number Two, Deontae Jamar White. You may proceed.
Q. (By Mr. Haywood, Continuing): Do you recognize the other person?
A. No.
Q. So when you're making reference to the people can you reference them as the Defendant White or the Defendant -- or the other person?
A. Come again?

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Q. When you're referring to the Defendant White can you specify on the record that that's White that you're referring to?
A. Okay.
Q. Now so you said once that they pulled up, they got out and you saw Mr. White with a machine gun?
A. Yes.
Q. What happened next?
A. I'm not really sure what him and Aaron went through when they were face-to-face with each other, but the other gentleman that got out the back seat was in front of me, but I'm not sure what his name was but he had a pistol pointed in my face and things like this and --
Q. Did he say anything to you?
A. Yes.
Q. What did he say?
A. He told me to basically put my hands up and things and tried to reach in my pocket and then I smacked his hand away and then he asked me do I think this was a game and I didn't say anything then he put the pistol in my face then I moved it out my face slowly and then, okay, he shot at my feet.
Q. How many times did he shoot at your feet?
A. I'm not sure.
Q. Was it more than one?

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A. Yes.
Q. After he shot at your feet what happened?
A. Nothing. I didn't do nothing. He just -- we looked eye-to-eye for a slight second and he put it to my head and like I moved it slightly and then he said, "Okay, I see you have heart so I'm not going to kill you," you know, "because you" -- can't say profanity in the courtroom.
Q. You can say exactly what he told you?
A. Okay, he said, "I see you have heart so I'm not going to kill you because you not no bitch." After he did that he turned around. He went back towards the vehicle.
Q. Do you know where the other person was standing as it relates to Mr. Aaron, Mr. Foster?
A. Yes. After he turned away from me I drew my attention back to White and Aaron and I seen Aaron had all his belongings in his hand as far as his shoes and his belt and whatever else he had in his pocket and this gentleman White turned and he went to the car and put Aaron belongings in the car, then Aaron started to draw towards me and then at this point he turned and he shot him.
Q. Let's back up a little bit.
A. Okay.
Q. You said that you saw Mr. Love with items in his hand;

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is that correct?
A. Yes.
Q. And Mr. Love gave those items to who -- I'm sorry, Mr. Foster?
A. I don't know him. Yes. Aaron gave his belongings to White and then White put them in the car and then Aaron started towards me and then he shot him.
Q. When Mr. Foster was drawing towards you, is he coming towards you and are you moving or are you standing still?
A. I'm standing still at this point.
Q. When he's coming towards you he's coming to -- is he coming to you sideways or did he turn around and come towards you?
A. No. He was coming to me face-to-face, you know, straight walking towards me.
Q. You said that you saw Mr. White go back to the vehicle?
A. Yes.
Q. When he went back to the vehicle where was the other person?
A. The other person was on the right side of the back passenger side.
Q. Did you see if they got into the car?
A. Yes, they got into the car.
Q. Did Mr. -- did the other person who you don't know, did

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he get into the car before the shooting or after the shooting?

A. Before.

Q. And then you said the other person, Mr. White, he did the shooting. Did he say anything before he shot?

A. No.

Q. What did you see him do exactly?

A. Well after he put Aaron belongings in the car he just turned around and just shot him in the back.

Q. At the time Mr. Foster was shot was he running? Was he standing?

A. He was jogging.

Q. What do you mean jogging?

A. He was in the motion of beginning to run.

Q. Were you both in the motion to beginning to run or just --

A. No. I was waiting for him to come closer to me. We was going to run together.

Q. What happened after you heard the gunshot?

A. Well after the gunshot I looked at Aaron to try to see if he was okay, check his condition and things like this and they pulled off after he shot, got in the car and drove away and I went to Aaron to see how he was doing.

Q. About how many gunshots did you hear?

A. All together or just from him, from White?

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Q. From White?
A. One.
Q. And when you got to Mr. Foster had he already fallen on the ground?
A. Yes.
Q. What did you do once you got to him?
A. Well I held him in my arms and I tried to call to see if he was going to respond and to see if he could talk to me at all.
Q. Was he able to respond at all to you?
A. No.
Q. He never said anything?
A. No. He was gasping for air at the time.
Q. Did you have a phone?
A. No.
Q. What did you do next?
A. Well I just sit there and I held him and tried to resuscitate him after a second because he took his last breath and he wasn't breathing no more so I tried to resuscitate him and things like this and I believe the neighbors in the neighborhood start to appear around me.
Q. Start seeing people?
A. Yes, and --
Q. And that's when they call the police?
A. I believe so. I'm not really sure exactly who but I

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believe it was one of the neighbors that stay on the corner.

MS. CAL: Objection, your Honor. He's speculating. He said he didn't know who called.

THE COURT: Sustained.

Q. (By Mr. Haywood, Continuing): You know you didn't call them?

A. Umm?

Q. You didn't call the police?

A. No.

Q. Did the police come or did the ambulance come?

A. The police come.

Q. How long did it take for the police to come?

A. I'm not sure.

Q. When the police came what happened?

A. Well they checked the condition of Aaron and they spoke something on the radio and another car pulled around and I believe he was paramedic, I'm not sure, but him and another gentleman put Aaron in the back seat of the police car and they drove away.

Q. What did you do at that time?

A. Well at that time I was sitting down and I believe a police officer came to me. He asked me for a statement, asked me what was my relationship to Aaron and things like this.

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Q. Were you able to talk to him at that time?
A. Yes.
Q. What happened next?
A. After I gave him my information and my statement he told me I'll be getting a contact later from authorities later on.

MR. HAYWOOD: I have nothing further at this time, your Honor.

THE COURT: Cross-exam.

CROSS-EXAMINATION

BY MR. POLK:
Q. You had an opportunity to sit in this witness room today, correct?
A. (Nods head.)
Q. Other individuals in there?
A. Yes.
Q. Were there other people in there?
A. Yes.
Q. Do you know if those other individuals are a part of this case?
A. I'm not sure, no.
Q. You're not sure?
A. No.
Q. You have any conversation with them in reference to the reason that you're here today?

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A. Yes, I have.
Q. You did?
A. Yeah.
Q. So you all talked about, you know, circumstances surrounding this particular incident?
A. Not necessarily about this incident, about just how things happen in the world.
Q. But you didn't talk about specifically your reason for being here today on this case?
A. No.
Q. Okay. Are you sure?
A. No, cause if they here they already know I suppose.
Q. But you say that you didn't know that they were here on this particular case, right?
A. No.
Q. And you never found that out while sitting in that room?
A. They was talking about what I just said, so.
Q. And you gave a statement to the police --
A. Yes.
Q. -- the day of the incident?
A. Yeah.
Q. And you were being truthful? You wanted to be helpful in terms of what had happened on that day?
A. Yes.
Q. So you provided them with the best information that you

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had, correct?

A. Yes, I did.

MR. POLK: I don't have any other questions.

THE COURT: Ms. Cal.

CROSS-EXAMINATION

BY MS. CAL:

Q. Do you live in this neighborhood?

A. Like what you mean, like --

Q. Do you live in the neighborhood? You got a house that you go to in that neighborhood?

A. When the incident happened, yeah, if that's what you mean.

Q. Yeah, that's what I mean?

A. Well, yeah.

Q. So you're familiar with the area?

A. Yes.

Q. And immediately before the shooting where had you come from?

A. I just left home.

Q. And what street is that?

THE COURT: Why do we need to know which street he lives on?

MS. CAL: I'm trying to find out how far away was --

THE COURT: Why don't we ask in terms of

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minutes or seconds. We don't need to know the street.

MS. CAL: Okay.

Q. (By Ms. Cal, Continuing): How far away from your home from where the incident took place?

A. I say about five or six minutes away depending on how fast you walk. I don't know.

Q. I'm asking how fast you walked. It's about you, sir. So how far away were you from the house in your walk?

A. I guess about ten minutes away I suppose.

Q. Ten minutes. And had you had any narcotics that day, marijuana, cocaine?

A. No.

Q. You wear glasses?

A. No.

Q. And you indicated that someone from the vehicle spoke to Aaron but you didn't hear what they said, right?

A. No, I never said that.

Q. You said there was some conversation with somebody. You weren't paying attention who it was?

A. I said they asked Aaron do we know where the weed was or something like that. That's what I said. I didn't ask --

Q. Right, something like that. You don't know exactly what was said?

A. They asked where the weed was when they pulled up.

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That's the answer.
Q. I'll keep asking until I get what I want.
A. Okay, go ahead.
Q. And you don't know who in the car said that?
A. No.
Q. And how long had you and Aaron been walking before the car pulled up? You said you had been walking ten minutes from your house. How long had you and Aaron been walking together before this car pulled up?
A. About the same time, ten minutes. We was together from my house.
Q. Oh, you were together at your house, okay. Now you gave a statement to the police that night?
A. It was daytime.
Q. You gave a statement to the police in the daytime. Did you give another statement to the police at night?
A. Yes. I believe it was the detective that pulled up on me when I was walking.
Q. So you gave two statements?
A. Yes.
Q. Now you gave one at the location where it happened, correct, where you were sitting down on the curb, right?
A. Yes.
Q. Do you know who you talked to?
A. No.

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Q. Can you describe the officer?
A. No.
Q. Male, female?
A. He was a male.
Q. Black, White?
A. I'm not sure.
Q. You're not sure if he was Black or White?
A. I know he was a male but I just said I can't describe him.
Q. I understand you said that, sir, and I asked you was he a Black male, African American male or a White male?
A. Like I said, I can't describe him. Is that good enough for you? I just said it was a male. That's what I can tell you at the time. I'm sorry.
Q. Sir, I understand if he was a male, but you can tell --
THE COURT: He says he doesn't recall if he was African American or --
MS. CAL: He didn't say that. He said he couldn't describe what he looked like. He didn't say what his race was.
A. Okay, I can't describe his race. I can describe his gender. That's about it.
Q. (By Ms. Cal, Continuing): And did you give him a written statement?
A. I mean when I started to talking he started to write

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down what I was saying but I didn't write anything myself.

Q. No, the officer wrote it down, that's all. And that was in the broad open daylight, correct?

A. Yes.

Q. Now you recall what time you gave the next statement?

A. No. I don't know exactly what time it was, no.

Q. Was that in the daylight as well?

A. The second statement was at night.

Q. Were you still at the location or were you somewhere else when you gave the statement?

A. I was somewhere else.

Q. And where were you?

A. I was downtown.

Q. Police station?

A. I'm not sure exactly the name. My mind was a little out of whack at the time but I do know I was downtown.

Q. Did they come pick you up to take you?

A. Yes.

Q. So the police came to pick you up somewhere and you gave a statement?

A. Yes.

Q. Did you have an opportunity to read over that statement?

A. Yes, I did.

Q. And in that statement didn't you indicate that this was

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a Stratus the people were in?

A. I said Intrepid and then when I gave a statement I wasn't sure between a Stratus and Intrepid.

Q. So in the statement you said Stratus?

A. I don't know. I'm pretty sure I said Intrepid though.

MS. CAL: If I can just have a moment, Judge. Will you stipulate that he said Stratus versus me having to roll over there and show him his statement?

MR. HAYWOOD: It's a Stratus.

MS. CAL: Stipulate for the record that he said in his statement Dodge Stratus. Thank you.

THE COURT: Okay. Anything further? Any redirect?

MS. CAL: I'm not quite finish.

THE COURT: Oh, I'm sorry.

Q. (By Ms. Cal, Continuing): And the person that you indicated that shot your friend, his name was Aaron, right? Correct?

A. My friend's name?

Q. Was Aaron, right?

A. Yes.

Q. I just want to get his name correct, sir. The person in this case your friend Aaron you believe is this man right here, correct?

A. If you're pointing to the one I referred as White, yes.

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THE COURT: Indicating for the record Defendant Number Two, Deontae Jamar White.

Q. (By Ms. Cal, Continuing): How long did this incident take place? How many minutes or seconds?

A. I don't know.

Q. Did it take longer than it took you to walk there or a shorter period of time?

A. No. I'm pretty sure all this happened less than ten minutes. I believe that.

Q. Okay, thank you. And Mr. White did not shoot at your feet, correct?

A. You said what now?

Q. Mr. White is not the one who shot at your feet?

A. No.

Q. Or he never pointed a gun at your head either?

A. You're referring to this gentleman? No.

Q. I said Mr. White did not point the gun to your head?

A. No.

Q. Thank you. In fact, you had no interactions with Mr. White at all, correct?

A. No.

MS. CAL: I don't have anything further. Thank you.

Redirect examination? No redirect?

MR. HAYWOOD: Nothing further. Thank you.

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THE COURT: Thank you, sir. You may step down.

MR. HAYWOOD: We'll call our next witness.

MR. POLK: Judge, can the witness be instructed to not have any conversation about his testimony.

THE COURT: Mr. Walker, don't discuss the case, your testimony with anyone, okay?

THE WITNESS: All right.

THE COURT: All right.

(At 11:31 a.m., witness excused.)

MR. UPSHAW: Kyle Upshaw.

THE COURT: Please raise your right hand, sir. Do you swear or affirm to tell the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: Yes.

THE COURT: Thank you, sir. Please have a seat right there. Swing that microphone that's there up to your mouth and speak directly into that for us, okay.

You may begin when you're ready.

MR. HAYWOOD: Thank you, your Honor.

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K Y L E U P S H A W

At 11:32 a.m., witness called by the People, sworn by the Court, examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q. Sir, if you can state your full name for the record, please?

A. Kyle Upshaw.

Q. Mr. Upshaw, how old are you?

A. Twenty-five.

Q. Can you pull that a little bit closer towards you.

Sir, I want to take you back to the date of May 6, 2016. Do you recall something unusual happening on Meade Street?

A. Yes.

Q. Did you live on Meade Street?

A. Yes.

Q. About what time was the unusual event, about what time was that?

A. Between 6:00 and 6:30.

Q. Evening?

A. Yes, p.m.

Q. And where were you at, in front of your house, but what were you at in front of your house?

A. Cleaning out my car.

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Q. What type of car do you have?
A. Buick Sable -- Buick Regal.
Q. When you were cleaning out the car was anyone with you?
A. No.
Q. When did you notice something was going on?
A. After I heard skid marks from behind my head.
Q. Behind your --
A. Behind my head.
Q. When you heard the skids marks what did you do?
A. I looked back and I seen him right there with an AK in his hand and another dude with a handgun.
Q. All right, slow. Point to the person you're referring to.
A. Right here.
Q. Describe his hair and describe what he's wearing for me?
A. Braids. He had on red and --
Q. No, describe what he's wearing here today?
A. Yellow -- what you mean describe what he got on?
Q. What color?
A. Yellow.

MR. HAYWOOD: For the record the witness identified the Defendant in this case, Deontae White.

THE COURT: So noted.

Q. (By Mr. Haywood, Continuing): And Defendant White is the person you saw with a gun?

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A. Yes.
Q. What type of gun did you see him with?
A. AK-47.
Q. When you saw him with an AK-47 where was he at?
A. Running across the street towards my car.
Q. Did you see him get out of a car?
A. I didn't. I heard a skid mark. When I looked back they running across the street.
Q. They being Mr. White and another person?
A. Yes.
Q. And what happened at that point when you saw them running across the street?
A. They came up to me, told me to give 'em my money. I'm like, "I ain't got nothing in my pockets. I just got off work."
Q. Who's speaking to you?
A. Right here.
Q. Defendant White?
A. Yes.
Q. And he asked you to give you him -- asked you to give him your money?
A. Yes.
Q. And you told him you didn't have any?
A. Yes.
Q. And what happened next?

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A. After that out of nowhere my brother, he came out the house and started firing his firearm and I came above the car and start firing too.
Q. What's your brother's name?
A. Daniel Claxton.
Q. You said your brother came out of -- would it be in the house you live in?
A. Yes.
Q. And your brother had a gun?
A. Yes.
Q. And you heard a gunshot?
A. Yes.
Q. After you heard that gunshot what did you do?
A. I heard gunshot. I ducked in the car for a minute because I'm thinking I just got hit, you know what I'm saying. After I seen I didn't get hit I lifted up out the car and start returning fire.
Q. Let me step you back. When Mr. White asked you for your money were you still inside of your car or you got out of the car?
A. I was inside the car.
Q. When your brother came out of the house were you still in the car or were you outside of the car?
A. Still in the car.
Q. So you never got out the car?

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A. Not yet.
Q. So once your brother got out, you heard a gunshot, did you see your brother come out?
A. No, not at all.
Q. You just heard a gunshot?
A. I just heard a gunshot.
Q. And then what happened once you heard that gunshot? You said you ducked down in the car?
A. Yes.
Q. What happened next?
A. After I ducked down in the car the guns were drawn off me so after I seen that I wasn't hit I came from out of my car and sit in the back seat and I rose above the car and returned fire.
Q. So you had a gun on you also?
A. Yes.
Q. Do you have a CPL license to hold a gun, carry a gun?
A. (Nods head.)
Q. Carry a concealed license to have a gun?
A. If I wasn't I wouldn't be here.
Q. So you had that?
A. Yes.
Q. What kind of gun did you have?
A. A 9 millimeter.
Q. So you get up and you return fire. Do you remember

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where you shot at?
A. No, I don't. I just blanked out.
Q. How many times did you shoot?
A. My whole clip was empty so it had to be nine times.
Q. Do you remember if you were shooting at people or were you just shooting in the air or what?
A. Shooting at people.
Q. Were you shooting at the people who came and were trying to rob you?
A. Yes.
Q. What happened next?
A. I ran out of bullets. I heard my brother yell, "I got shot. I got shot," so after that I ran on the side of the house cause they was still firing on me, the AK-47. I ducked on the side of the house and then after I seen I didn't hear no more gunshots I ran to go see what my brother was doing and he was laying upstairs on the floor.
Q. Did you hear if the car took off?
A. It took off at the time when we was going inside the house.
Q. Was that -- after you didn't hear the shooting did you hear the car pull off or before the shooting end?
A. Soon as the shooting ended the car pulled off and then I ran inside the house and --

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Q. And you ran inside the house. You said you went where in the house?
A. Upstairs to my brother room.
Q. And you say he was lying on the floor?
A. Yes.
Q. Could you tell at the time where he was shot at?
A. Not sure.
Q. Did you seen any blood --
A. Everywhere.
Q. What did you do at that point?
A. I picked him up and dragged him down the steps, put him in the car and I took him to Children's Hospital because I didn't know where Receiving was at.
Q. I didn't --
A. I didn't know where Receiving Hospital was at so I took him to Children's.
Q. When you took him to Children's what happened?
A. Took him to Children's and I went inside to go get I guess some medical attention and they came out and grabbed him.
Q. And when you took your brother to the hospital was he in the back seat while you were driving to the hospital?
A. He was in the front.
Q. How long did it take you to get to the hospital?
A. Two minutes, three minutes.

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Q. Once you got to the hospital the medical personnel came and assisted your brother?
A. Yes.
Q. Did you stay at the hospital?
A. Yes.
Q. Did the police arrive at the hospital?
A. Five minutes after.
Q. Did you speak to the police at that time?
A. Yes.
Q. Did you tell the police what happened?
A. Yes.
Q. Do you recall the car that the Defendants were in? Do you recall what kind of car that was?
A. A blue Intrepid or Saturn. It was one of the Chrysler Intrepids or something like that but it was blue.
Q. How long were you at the hospital for?
A. All night until around 12, 1:00.
Q. And this incident this occurs on Meade Street and that's also in the City of Detroit?
A. Yes.
Q. How many times did you tell the Defendant that you didn't have anything?
A. I only told him one time.

MR. HAYWOOD: Nothing further at this time, your Honor -- oh, actually I do. I'm sorry.

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Q. (By Mr. Haywood, Continuing): I'm going to show you what's been marked as People's Exhibit Number 1 for identification.

MR. HAYWOOD: May I approach, your Honor.

THE COURT: You may.

Q. (By Mr. Haywood, Continuing): I'm showing you now what's marked as People's Proposed Exhibit Number 1. Can you take it and review it for me, please. Have you had a chance to review it? Have you ever seen this before?

A. To number one?

Q. Well not have you ever seen that exhibit before, the whole thing?

A. Yes.

Q. When you saw it was it in color or black and white?

A. It was in color.

Q. Were you able to pick out somebody in the exhibit?

A. Yes.

Q. Who did you pick out?

A. Number three.

Q. Number three is who?

A. (Pointing.)

MR. HAYWOOD: For the record the witness has pointed to the Defendant, Deontae White.

THE COURT: So noted.

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Q. (By Mr. Haywood, Continuing): Can you tell us that that's the person who did what?
A. The one that shot my brother in the stomach.
MR. HAYWOOD: Your Honor, I'd move to admit People's Proposed Exhibit Number 1 at this time.
THE COURT: Any objection?
MS. CAL: No.
THE COURT: Received for exam purposes only.
(People's Exhibit Number 1 Admitted.)
MR. HAYWOOD: No further questions.
THE COURT: Cross-exam.
MR. POLK: I don't have any questions of this witness, Judge.

CROSS-EXAMINATION

BY MS. CAL:
Q. This is Mr. Upshaw?
A. Yes.
Q. Mr. Upshaw, on this date and time after you were asked for money were you shot?
A. No.
Q. The first shooting that you heard you said you heard from your brother shooting from upstairs?
A. Yes, shooting from on the porch. He hadn't went upstairs. He was on the porch.
Q. He was on the porch?

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A. Yes.
Q. Then at some point he got upstairs?
A. Yeah.
Q. You found him later upstairs?
A. Found him upstairs.
Q. So the first shooting was your brother on the porch, correct?
A. Correct, yes.
Q. That was the first gunshot you heard?
A. Yes.
Q. Then you heard gunshots coming from the car, the other car, the blue car?
A. I heard them coming from everywhere.
Q. You don't know where they were coming from because you ducked down?
A. Yes.
Q. And when you came back up you came up shooting?
A. Yes.
Q. Did you shoot through your car or did you get out of the car?
A. I got out the car.
Q. And you said you blanked out and just emptied a clip?
A. I knew what I was shooting at 'em but, yeah.
Q. I'm just trying to understand what you said. You said you blanked out and just start shooting your whole clip,

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correct?
A. Yes.
Q. Did you hit anybody?
A. I don't know.
Q. You don't know. You just shot in a direction?
A. Yes.
Q. What direction did you shoot in?
A. Straight ahead.
Q. Straight ahead. Now did you see anybody else in the car, the blue car?
A. Yes.
Q. Who else did you see?
A. I guess the dude, the driver.
Q. You saw the driver. Anyone else?
A. And that was it.
Q. You only saw two people in the car?
A. (Nods head.)
Q. Is that a yes?
A. Yes.
Q. Now when you saw Mr. White, did he get out the front passenger seat or the back passenger seat?
A. I didn't know at the time.
Q. Okay. So when you were approached by him your head was down while you were cleaning your car?
A. Yes, ma'am.

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Q. So the first notice you would have had of him was when he spoke to you?
A. First notice I heard when I heard the tire marks, when I heard the skirt.
Q. When you heard the car screeching did it stop right in front of your house or --
A. Across the street.
Q. Across the street. A lot of houses over there on that side of the street?
A. No, just one.
Q. So after you heard the car screech and stop then you went back to cleaning your car?
A. No, I looked up, looked behind me.
Q. Okay, you looked up and then you went back to cleaning your car?
A. No.
Q. Did you see Mr. White get out the car?
A. Yes.
Q. So do he get out from the front or the back?
A. I seen him just walking in the street.
Q. You didn't see him get out the car, you just saw him walking?
A. The doors just closed and I seen him walk across the grass.
Q. You didn't actually see what part of the car he got out

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of?

A. No.

Q. You just saw him walking away from the car towards you?

A. Yes.

Q. And how close do he get to you before he asked you for some money?

A. The gun was almost at my nose.

Q. So he was close?

A. Yes.

Q. And when you said you didn't have any money, you started back cleaning your car?

A. No.

Q. That's when your brother shot?

A. Yes.

Q. But prior to your brother shooting there was no other shots fired?

A. Yes. It was other shots fired.

Q. Did you get hit by any shots?

A. No.

Q. Did you see any other individual out there with a gun?

A. Them two. I seen an AK-47 and I seen a handgun.

Q. Oh, you saw a handgun. Where did you see the handgun?

A. The other dude that walked up to the car too.

Q. I'm sorry. I can't hear you?

A. The other guy that walked up to the car.

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Q. Oh, it was another guy that walked up? He had a handgun?
A. Yes.
Q. Do you know what kind of gun?
A. (Shakes head.)
Q. Can you describe it?
A. My main focus was on Mr. White.
Q. Where did the other guy walk to with the handgun?
A. I don't know. Stayed on --
Q. And he shot, the guy with the handgun?
A. I didn't -- you talking --
Q. I'm talking about the guy with the handgun?
A. They must have returned fire at my brother because they was shooting at him while he was on the porch.
Q. Now at the time Mr. White walked up to you and asked for money, did the other guy with the handgun walk up to you as well or did he stay near the car?
A. He stayed right on the side of Mr. White.
Q. Can you describe him?
A. I was focussed on Mr. White.
Q. I understand, but you can't describe him at all?
A. No.
Q. Do you know his race, Black or White?
A. I know he was Black.
Q. So by the time they got up to you and they're standing

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side by side at the car and you said you heard your brother shooting his gun and that's when the shots started going back and forth?

A. (Nods head.)

MS. CAL: Nothing further. Thank you.

MR. HAYWOOD: Just one more question.

REDIRECT EXAMINATION

BY MR. HAYWOOD:

Q. When you -- the two people that were outside the car with the guns drawn on you?

A. Uh-huh.

Q. Could you tell if there was anybody else in the car in addition to those two people that had the guns drawn on you?

A. It was one more person still sitting in the driver's seat.

MR. HAYWOOD: Nothing further. Thank you. -

THE COURT: All right. Thank you, sir. You may step --

MR. POLK: Judge, I got a follow-up on this.

THE COURT: Oh, okay.

CROSS-EXAMINATION

BY MR. POLK:

Q. So you gave a description of the two individuals that got out of the vehicle with weapons, right?

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A. Yes.
Q. And you identified the second individual as being husky?
A. Yes.
Q. 210 to 220 pounds?
A. Yes.
Q. Nappy hair with rough facial hair?
A. Yes.
Q. That was the description that you gave of the other individual that allegedly got out that vehicle, correct?
A. (Nods head.)
Q. Yes?
A. Yes.

MR. POLK: No other questions.

THE COURT: Okay.

MR. HAYWOOD: Thank you, your Honor.

THE COURT: Thank you, sir. You may step down.

(At 11:49 a.m., witness excused.)

MR. POLK: If I may, Judge, if you could please instruct the witness that just testified not to share his testimony with anyone else. I neglected to say that before he walked out.

THE COURT: Where is the witness? Is he still hanging around?

Sir, we just want to make sure you don't

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discuss your testimony with anyone else, okay?

MR. UPSHAW: (Nods head).

THE COURT: All right, thank you.

What's your name, sir?

MR. CLAXTON: My name? Daniel Claxton.

THE COURT: Dan --

MR. CLAXTON: Daniel.

THE COURT: Daniel Claxton.

MR. CLAXTON: Um-hmm.

THE COURT: Pull that -- if you can swing it around to your mouth and speak directly into that for us, okay. Please raise your right hand, sir. Do you swear or affirm to tell the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: Yes.

THE COURT: Thank you. You may begin when you're ready.

D A N I E L C L A X T O N

At 11:50 a.m., witness called by the People, sworn by the Court, examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q. Mr. Claxton, if you can state your full name for the record?

A. Daniel Claxton.

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Q. How old are you Mr. Claxton?
A. Twenty-eight.
Q. I want to take you to the date of May 6, 2016 in the evening hours in front of a location on Meade Street. Do you recall something unusual happening on that date on Meade Street?
A. Yes.
Q. That's in the City of Detroit?
A. Yes.
Q. And when did you notice that something unusual was happening that day?
A. I noticed when I was standing in my living room and I heard my brother like frantic screaming, you know.
Q. You remember what he was saying?
A. He was saying, "I don't have nothing. I don't have anything."
Q. And you recognize that being your brother's voice?
A. Yes.
Q. What did you do at that point?
A. I went and I looked out the front door and I seen guys with guns to his face.
Q. What did you do next?
A. I grabbed my gun and I went outside and I start shooting at them.
Q. Do you recognize anybody in court that you shot at?

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A. This one guy with -- this first guy right here.

MR. HAYWOOD: For the record --

Q. (By Mr. Haywood, Continuing): Describe his hair for me and what he's wearing?

A. He had the same type of braids, same type of little stupid looking braids in his head and, you know.

Q. What is he wearing here today?

A. Got all yellow, yellow jumpsuit.

MR. HAYWOOD: For the record the witness has identified the Defendant in this case, Deontae White.

THE COURT: So noted.

Q. (By Mr. Haywood, Continuing): So you said you noticed them with guns drawn and then you went back in the house and you did what?

A. I didn't go back in the house. I already -- when I seen what was going on outside I already had my gun on my hip already.

Q. What kind of gun did you have?

A. I had a Glock.

Q. Do you have a Concealed License Permit to have a Glock?

A. Yes.

Q. What did you do next?

A. I took the gun off my hip and I went outside and I start firing at them, at these guys.

Q. How many times did you fire?

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A. I don't know. It was maybe more than eight times.
Q. What happened next?
A. After I start shooting at them they start shooting back at me and I end up getting shot in my stomach.
Q. Do you recall if the Defendant White was shooting at you?
A. Yeah, it was White.
Q. Do you recall if the other person was shooting?
A. Yeah, he was shooting too. I just didn't get shot by him. I got shot by White.
Q. So you got shot. Where did you get shot at?
A. In my stomach.
Q. Did you know immediately that you got shot?
A. Yes.
Q. What did you do at that point?
A. At that point I went back in the house and by that time they were already leaving, so after I went back in the house, my brother came back in and we went to the hospital. He drove me to the hospital.
Q. Did you see what kind of car they were in?
A. It was like a purple like Dodge Stratus or Intrepid or something like that.
Q. Prior to all this happening what were you doing?
A. I was doing some cleaning, doing some cooking, regular Friday night.

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Q. When you went to the hospital were you able to get treated at the hospital?
A. Yes.
Q. And do you recall if you had to have surgery?
A. Yeah, I had to have surgery.
Q. What type of surgery did you have to have?
A. Surgery, just -- I was in -- I don't know what type of surgery it's called.
Q. Did they have to take something out of you?
A. Yeah, a bullet.

MS. CAL: Your Honor, I'm going to object. He has no personal knowledge. I assume he was under anesthesia when he had surgery. For him to say he had surgery, I have no problem with that. Unless the Prosecutor wants him describe the surgery -- I don't he has the personal knowledge.

THE COURT: Overruled. He may have something.

A. Well the surgery was to remove the bullet from my stomach because the bullet did damage. It hit my lung. It hit my liver. I had fragments.

MS. CAL: Your Honor, I still have an objection. He would not know that unless someone told him that.

THE COURT: Your objection is noted for the record. Overruled. You may proceed.

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A. I had fragments. I had the actual bullet still inside me because it didn't go all the way through.
Q. (By Mr. Haywood, Continuing): Is that bullet still inside of you?
A. No. They took the bullet out.
Q. How long did you stay in the hospital for?
A. I only stayed in the hospital for a week and three days.
Q. A week and three days?
A. Uh-huh.
Q. Yes?
A. Yes.
Q. Did you have to return back to the hospital?
A. Yes.
Q. Why?
A. Just cause complications from the gunshot wound. I had caught infection in my stomach so I had to go back for another like three days.
Q. And are you -- do you have to go back anymore after this?
A. Yeah. I still have my regular checkup, follow-up visits.

MR. HAYWOOD: Nothing further at this time, your Honor.

THE COURT: Cross-exam.

MR. POLK: No questions of this witness,

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Judge.

CROSS-EXAMINATION

BY MS. CAL:

Q. Mr. Claxton?

A. Yes.

Q. Mr. Claxton, was this in the daylight this occurred?

A. Yes.

Q. And so once you saw the individuals standing near your brother with the gun, that's when you started firing, sir?

A. Correct.

Q. Can you describe the other person?

A. Which other person?

Q. You said there was two people standing by your brother?

A. Uh-huh.

Q. You described Mr. White. Can you describe the other person?

A. The other person -- not really, no.

Q. Was he African American or White?

A. He was an African American.

Q. Do you know if he was short or tall?

A. He was kind of tall. I can't really, you know, directly say who it was but it was a tall African American male with a gun. I can say that.

Q. Do you know what kind of gun he had?

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A. It was a pistol. It was a handgun.
Q. And how close was he to your brother when you start shooting?
A. Maybe about two feet away, two or three feet.
Q. And he was standing next to Mr. White?
A. Yes.
Q. And when you heard your brother making those statements that he made, that's when you went out with your gun prepared, correct?
A. Yes.
Q. Is that a yes?
A. Yes.
Q. And once you started shooting then the two people with the guns started shooting, correct?
A. Yes.
Q. And shots are going back and forth?
A. Yes.
Q. Do you know how many shots they shot?
A. No.
Q. You think you shot about eight?
A. I think -- yes, I this so.
Q. You had a clip in the gun?
A. Yes.
Q. Was the clip empty or you don't know?
A. No, I don't know.

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Q. Do you know how many your clip held?
A. The clip that I had at that time, it was a 15 round.
Q. And do you know if you got shot when you were downstairs on the porch?
A. Yeah, I got shot when I was on the porch. I never left the porch. I was on the porch and they were on the curb.
Q. And your brother was at the car?
A. Yeah. My brother was on the curb at the car.
Q. I don't know your house. Does your house have a driveway or is he parked on the street?
A. It's no driveway. It's just straight, the front of the house, the porch, the front porch. The door is right in the middle of the porch.
Q. And his car would have been on the street at the curb?
A. Yes.
Q. And the other car that you saw, the purple Dodge Intrepid or Stratus was on the other side of the street?
A. Yes.
Q. Now did there -- was there any pause in the firing or were you all just firing back and forth back and forth back and forth?
A. It was just back and forth.
Q. Was your brother shooting?
A. No, not that I recall.

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Q. And then at some point you felt like you were hit, correct?
A. Yes.
Q. And you don't know what kind of bullet was in you, do you, at that time?
A. Yeah, I know.
Q. You know at that time?
A. Yes.
Q. Did you know at that time?
A. At that time.
Q. The time you got shot?
A. Yes.
Q. You knew what kind of bullet was in you?
A. I knew what I got shot with. I knew who shot me. I know what kind of gun I got shot with.
Q. Okay, sir, if the bullets were being back and forth and there was no pause in this, how could you know what kind of bullet it was?
A. Because I seen the bullet come from the gun straight to me and hit me.
Q. And the other person wasn't firing towards you?
A. Yes.
Q. You know what their bullets look like?
A. Yeah.
Q. What do their bullets look like?

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A. It was a smaller bullet. It was a handgun bullet. It wasn't a rifle bullet.
Q. You didn't remove the bullet from yourself, correct?
A. No.
Q. And the bullet went into of inside of your body?
A. Yes.
Q. So you didn't look inside yourself to see what the bullet was?
A. No, but I seen --
Q. Thank you.
A. I know what it look like.
Q. Thank you, sir. And how long after this transaction did you go to the hospital?
A. It was right after.
Q. But your brother said he found you upstairs?
A. Yeah, I mean --
Q. You didn't stay on the porch the whole time?
A. No. I didn't stay on the porch.
Q. Did you call the police?
A. I believe my brother did.
Q. My question was about you. I can only --
A. I didn't. No, I didn't.
Q. You never called the police?
A. No.
Q. Did you ever call for 911 or EMS?

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A. No.
Q. And you've never met any of these individuals before?
A. Nope, never.
Q. And was there anyone else still in the car?
A. In whose car? In their car? I don't know.
Q. Your attention was only towards the people that were outside of the car?
A. Just the guys with the guns standing on the front of my house.
Q. Shooting towards you, correct?
A. Yep.
Q. Both of them were shooting towards you?
A. Both of them, yep.

MS. CAL: Thank you. Nothing further.

MR. HAYWOOD: Couple questions.

REDIRECT EXAMINATION

BY MR. HAYWOOD:

Q. Sir, do you know if you shot anyone? The other two people that were shooting at you, do you know if you shot any one of them?
A. I don't know for sure because I, you know --
Q. I'm going to show you what's marked as People's Exhibit 2.

MR. HAYWOOD: May I approach the witness, your Honor.

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THE COURT: You may.

Q. (By Mr. Haywood, Continuing): Looking at People's Proposed Exhibit Number 2, do you recognize that?

A. Uh-huh.

Q. How do you recognize that?

A. How do I recognize it?

Q. You seen it before?

A. Seen this guy before?

Q. No, that exhibit before?

A. This whole thing?

Q. Yes.

A. Yes.

Q. Was it in color when you saw it originally?

A. Yeah, it may have been in color.

Q. Were you able to identify anybody in the photographs?

A. Yes.

Q. Who were you able to identify?

A. Can I say the number or -- yeah, number three.

Q. And that was the person who you said who shot you; is that correct?

A. Yes.

MR. HAYWOOD: Your Honor, at this time I move to admit People's Exhibit Number 2 into evidence.

THE COURT: Any objection?

MS. CAL: No.

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THE COURT: Received for exam purposes only.

(People's Exhibit Number 2 Admitted.)

MR. HAYWOOD: I have no further questions, your Honor.

MS. CAL: Just a couple of follow-up, your Honor.

RECROSS-EXAMINATION

BY MS. CAL:

Q. Can you describe what Mr. White's hair look like?

A. I already did. I said it looked like the same as it does right now.

Q. Okay.

MS. CAL: All right, thank you.

THE COURT: Thank you, sir. You may step down, and we ask that you not discuss your testimony with anyone else, okay?

THE WITNESS: Okay.

THE COURT: All right.

(At 12:02 p.m., witness excused.)

THE COURT: This is your last witness?

MR. HAYWOOD: Yes.

MS. LUCY: Kelly Lucy, K-e-l-l-y, L-u-c-y.

THE COURT: Do you swear or affirm to tell the truth, the whole truth and nothing but the truth so help you God?

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THE WITNESS: I do.

THE COURT: Thank you. Please have a seat. You may begin when you're ready.

MR. HAYWOOD: Thank you.

D E T E C T I V E K E L L Y L U C Y

At 12:03 p.m., witness was called by the People, sworn by the Court, examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q. Detective, would you state your full name for the record, where you're employed, for how long?

A. Kelly Lucy. I'm employed at the Homicide Section, 17 years on the police department.

Q. How long have you been with the Homicide Section?

A. Three years.

Q. Taking you back to the date of May 6, 2016, were you assigned to work on a case of People versus Deontae White and Stewart?

A. Yes, I was.

Q. And what did you do as far as investigating this case?

A. I did the interrogation.

Q. Who did you do the interrogation on?

A. Mr. Stewart.

Q. And you see him -- for the record you see Mr. Stewart here in court?

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A. I do.
Q. Can you point him out and describe what he's wearing in court?
A. He has on yellow and he has the short hair.
MR. HAYWOOD: For the record the witness has identified the Defendant in this case.
THE COURT: So noted.
MR. HAYWOOD: Joshua Stewart.
Q. (By Mr. Haywood, Continuing): Where did you do this interrogation of Mr. Stewart at?
A. It was at the Detroit Detention Center on Mound.
Q. And do you remember how many days after this incident that you actually did the interrogation?
A. If I can see the Interrogation Record I can let you know.
MR. HAYWOOD: Approach, your Honor.
A. Interrogation Record is dated 5-7-16.
Q. (By Mr. Haywood, Continuing): Thank you. Was the interrogation videotaped?
A. Yes, it was.
Q. Did you read the Defendant his Miranda rights?
A. I did.
Q. And after his Miranda rights was read, did the Defendant make any statements to you?
A. They were verbal and he didn't make a written statement.

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Q. Did he make some verbal statements towards you?
A. Yes.
Q. To you?
A. Yes, he did.
Q. And those statements were recorded?
A. On a video.
Q. As it pertains to this case did the Defendant say anything about being on Packard Street during this incident?
A. He did.
Q. What did he tell you?
A. He was driving the vehicle.
Q. What vehicle did he tell you he was driving?
A. I can't recall.
Q. What did he tell you he was doing while driving the vehicle?
A. He drove to that location and set at the location until the other parties returned.
Q. And the location on Packard Street, is that in the City of Detroit?
A. Yes, it is.
Q. Did he name the people that was with him?
A. I can't recall the names because there's not a written record.
Q. So he said that he waited for what exactly? He waited

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for people to return from what?

A. That I can't recall exactly what he said. I can't -- not his exact words.

Q. What did he tell you that he was doing on Packard Street?

A. That he was waiting and that there were -- there was an attempted robbery.

Q. Did he tell you who was with him?

MR. POLK: Objection. Asked and answered. She said she don't know.

THE COURT: She said she didn't remember. Sustained.

Q. (By Mr. Haywood, Continuing): Did he tell you if people were with him?

A. He did tell me he was with other parties, yes.

Q. And about what time was that?

A. If I can look at the Crisnet Report I can give you an idea of what time the crime occurred.

MR. POLK: Judge, I don't know if the Crisnet Report is going to refresh her recollection in terms of what allegedly my client said.

THE COURT: It may. We don't know. Anything can be used to refresh recollection.

Q. (By Mr. Haywood, Continuing): Do you recall what day and time it was on Packard Street?

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A. May 6, 7 p.m.
Q. He told you what was he doing on Packard Street at that date and at that time, what was he doing?
A. He was there for the attempted robbery.
Q. What else did he tell you?
A. That he was the driver of the vehicle.
Q. Did he tell you what type of vehicle he was driving?
A. It's in this Preliminary Report if I can use it to refer.
Q. If it will help to refresh your recollection.
A. It was a blue 2004 Intrepid.
Q. And did he tell you anything about the details of that -- of the first attempt robbery, what happened?

MR. POLK: Objection, Judge. I don't believe that there's any testimony on this record that there's been one, two, three, four -- number of attempt robberies, so I don't know why the Prosecutor is attempting to lead this witness to that. I ask it be stricken.

THE COURT: Rephrase.

Q. (By Mr. Haywood, Continuing): What did he tell you that he was doing -- prior to this attempt robbery what was he doing and what did he do after this attempt robbery?

MR. POLK: Compound question. Ask one question at a time.

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THE COURT: Sustained.

A. Could you repeat the question, please.

Q. (By Mr. Haywood, Continuing): Did he tell you what he was doing before the robbery and what he was doing after the robbery?

THE COURT: One question at a time Mr. Haywood. It's a compound question.

Q. (By Mr. Haywood, Continuing): Before the robbery what was he doing?

A. He was on Meade Street if I'm not mistaken and then he was on Packard Street.

Q. He was on -- what was he doing on these streets?

A. He was involved in a robbery, in a nonfatal/fatal shooting.

Q. Do you know which one came first?

MR. POLK: Judge, I would again object. She's asked a question. She's holding some documents. Now she's reading the documents. I don't know what the purpose is in terms of her reading the document.

MR. HAYWOOD: In terms of refreshing her recollection.

MR. POLK: Well she hasn't said that she needed to refresh her recollection.

THE COURT: Officer, do you need to refresh your recollection?

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THE WITNESS: I do for times.

THE COURT: And what is that you have in your hand?

THE WITNESS: This is our crime scene investigation, the details of what we investigated that day.

THE COURT: And to refresh your recollection you may do so but then put the document down after your recollection is refreshed, okay?

THE WITNESS: I will.

THE COURT: Okay, thank you.

A. It's indicated by these documents the Meade accident happened --

MR. POLK: Objection, Judge. Now it's hearsay.

THE COURT: Sustained.

Q. (By Mr. Haywood, Continuing): Did you ever have an opportunity to look at the Investigator's Report in this case?

A. I did.

Q. And in the Investigator's Report did it indicate in the report what the --

MR. POLK: Objection, hearsay.

MR. HAYWOOD: Well --

THE COURT: It's an out-of-court statement

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offered for the truth of the matter asserted. Now if it's used to refresh her recollection, she can testify in that regard, but she can't tell me what the document says.

MR. HAYWOOD: I'm not asking her that. I was asking her --

MR. POLK: Judge, once again it's hearsay. I don't want him to be able to get it out because he's asking her did the report say something. That's his question. That's the --

THE COURT: I sustained the objection.

MR. HAYWOOD: But I'm not saying what it said.

THE COURT: You said according to the document, according to the report. We don't want to know what the report says. We want to know how it refreshes her recollection.

Q. (By Mr. Haywood, Continuing): Would the report your recollection?

A. It would.

MR. HAYWOOD: May I show her the report, your Honor.

THE COURT: You may.

MR. POLK: Judge, may I ask what she's now looking at.

THE COURT: What is that she's looking at?

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MR. HAYWOOD: The Investigator's Report.

THE COURT: All right.

Q. (By Mr. Haywood, Continuing): Does the Investigator Report help refresh your recollection of what the Defendant Stewart said to you in the interrogation?

A. It does.

Q. What did he tell you?

A. That he was at -- I'm sorry?

Q. What did he tell you?

A. That he was at two separate locations in a Dodge Intrepid and he was the driver of that vehicle.

Q. And what was he doing?

A. As far as?

Q. He was at these two locations. What was he doing at the --

A. It was a nonfatal shooting and fatal shooting at those locations.

Q. Did he tell you what he was doing at those locations?

A. He was sitting in the vehicle as the getaway driver.

Q. Did he tell you how long it took between the first incident and the second incident?

A. He could not give a specific time.

Q. Did he tell you that it happened -- did he tell you that it occurred on the same day?

A. He did.

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Q. Did he tell you -- the first location -- did he tell you what happened at the first location?
A. I'm sure he did but I don't have any documents to refresh the entire dialogue.
Q. Do you recall if the actual fatal happened at the first incident or the second incident?
A. The fatal incident was on Packard Street.
Q. Would that have been the first originally?
A. Yes.
Q. And then did he tell you that he went to Meade Street?
A. He did.
Q. And did he tell you what happened on Meade Street?
A. That it was a nonfatal shooting that occurred.

MR. HAYWOOD: Nothing further, your Honor. Thank you.

THE COURT: Cross-exam.

CROSS-EXAMINATION

BY MR. POLK:

Q. So you did the interrogation. So when you first --
A. Excuse me, sir.
Q. So when you first talked to Mr. Stewart did you make some inquiries prior to giving him his Miranda? Did you talk to him prior to giving him his Miranda warnings?
A. We went straight to Miranda warnings.
Q. You went straight to the Miranda warnings. So you

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didn't ask him if he was on any medication?
A. I didn't ask him about medication.
Q. You didn't ask him if he had been afforded the opportunity to have sleep?
A. I asked him about his education level. I asked him about if he was under the influence of narcotics, was he hungry and was he thirsty.
Q. And that's all on video?
A. That's correct.
Q. And so you didn't ask him about whether or not he had had the opportunity to have sleep?
A. That's correct.
Q. And you didn't ask him if in fact he needed to use the bathroom or had been allowed the opportunity to use the bathroom?
A. I offered him the opportunity for the restroom while we were doing the interrogation, prior to the beginning.
Q. Prior to the interrogation. And you say you asked him about if he was on any medication or you did not ask him about medication?
A. I did not ask about medication.
Q. You asked him about narcotics?
A. Correct.
Q. Drugs?
A. Which is narcotics?

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Q. Specifically drugs like illegal drugs?
A. I used the word narcotics.
Q. Narcotics. You informed him that he was being recorded?
A. I don't know if I specifically said it.
Q. And you didn't prepare the Crime Scene Report, right?
A. I did not.
Q. You didn't prepare the Investigator's Report?
A. I did not.
Q. So you don't know if the information is true in the Investigator's Report, do you?
A. I don't understand what you're asking.
Q. You don't know whether it's true or not? You don't know the factual nature of the Investigator's Report, do you?
A. I've read the document.
Q. You read it. Do you know whether or not it's truthful information?
A. I would say, yes, I do.
Q. And but you didn't make the report and you weren't there when that -- the incident occurred, correct?
A. When what incident occurred?
Q. The incident we're here for Officer?
A. Are you saying was I present during the --
Q. Absolutely.
A. -- during the robberies?
Q. Yes.

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A. No, I was not.
Q. So you don't know first hand if the Incident Report -- I mean the Investigator's Report truthfully reflects what allegedly happened that day?
A. Correct.
Q. And so you didn't generate that report and you didn't generate the Crime Scene Report, correct?
A. Correct.
Q. Because you weren't present at any of the alleged incidents that happened on that day, correct?
A. Correct.
Q. But you utilized those to refresh your recollection --
A. Correct.
Q. -- today?

Now you said earlier Mr. Stewart was the getaway driver. He didn't tell you that, did he?
A. Yes, he did.
Q. He said I'm the get away driver?
A. He said he was driving the vehicle.
Q. Driving the vehicle. You said getaway driver. That's your terminology, correct?
A. That is.
Q. So he didn't tell you that?
A. No.
Q. Did he ever mention to you about his being on any type

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of medication for cancer?
A. He did not.
Q. Did he tell you that he had cancer?
A. No, he did not.
Q. When he comes into the interrogation room you close the door and automatically it begins taping?
A. Yes, because the light is on prior to us entering.
Q. So where did you get Mr. Stewart from?
A. From the Detention Center.
Q. Okay. I understand from the Detention Center, but where specifically was he housed prior to you taking him into that interrogation room?
A. Do you mean what cell he was in?
Q. Yes.
A. I don't know. The guards bring him to us.
Q. And the guards bring him to you and walk him into the room?
A. No. They walk us to the doorway and we walk him from the detention area to the interview area.
Q. And so was there any conversation with Mr. Stewart prior to walking into that room?
A. No, it was not.
Q. So what you testified to in terms of you asking him about if he needed the restroom, narcotics, education and all of those types of things, all of that is

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included in your interview of Mr. Stewart?
A. That is correct.
Q. Have you seen the interview?
A. I have.
Q. You have? When the last time you looked at it?
A. I reviewed it before I downloaded it.
Q. Okay, when did you download it?
A. The day after the interview occurred.
Q. So that would be May the 8th?
A. Correct.
Q. And you haven't seen it since then?
A. I have not.
Q. Now on that interview is it -- is that the only thing on that interview on that disk, the it interview of Mr. Stewart?
A. You said is that the only information that's provided on the DVD?
Q. Yes.
A. Yes.
Q. And were you ever provided information that the vehicle involved in this incident was a black Sedan?
A. No.
Q. Ever provided any information that the vehicle was possibly an Impala, a black Impala?
A. Not to my knowledge.

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Q. I'm handing you a copy -- is this what you were looking at earlier?
A. Yes.
Q. Okay. I'd like you to just take and read the paragraph and see if that refreshes your recollection in reference to whether or not you were provided information about a vehicle being involved being a black Impala. Provide you any information?
A. Yes. It says a --

THE COURT: We don't want you to read from your report. Just tell is if that refreshes your recollection if you were ever told that.

Q. (By Mr. Polk, Continuing): Refresh your recollection that a black Impala was the vehicle that was thought to be involved in this?
A. Correct. That's on the document.

MR. POLK: Judge, I think at this time I want to move that the interrogation be a part of the of this record, the video interrogation.

THE COURT: Okay. Any objection?

MR. HAYWOOD: I don't know what he means that it being a part of the record.

MR. POLK: That the video --

MR. HAYWOOD: Excuse me.

THE COURT: Be introduced into evidence?

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MR. HAYWOOD: Does he plan to show the video to the Court because he can do that. He can do that but, you know, he need to do that. He just can't say -- it can't be a part of the record unless he does it. If he wants to do it he can do it.

THE COURT: I don't understand what you're saying. He's asking to move for the introduction of the --

MR. HAYWOOD: To play it.

THE COURT: Of the what?

MR. HAYWOOD: To play the interrogation tape. It's about two hours, maybe three.

THE COURT: Do you have an objection to it being admitted into evidence, whether or not he decides to play it or not. If it's evidence I can look at it. I can choose to look at it.

MR. HAYWOOD: That's fine, your Honor. I have no objections to it being admitted into evidence.

THE COURT: Received.

MR. HAYWOOD: And with that, Judge, I'm asking --

THE COURT: And that's Defense Exhibit --

MR. POLK: We can name it A.

THE COURT: A.

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(Defense Exhibit A Marked for Identification and Admitted.)

MR. POLK: I have a copy of it.

THE COURT: How long is it?

MR. POLK: It's about two and a half hours, Judge.

THE COURT: You want me to take two and a half hours to --

MR. POLK: I --

THE COURT: Is there any relevant parts you want me to look at or the entire video?

MR. POLK: Not really, Judge, because it's all over the place and that's why I'm asking that it be a part of this record.

THE COURT: Okay.

MR. POLK: Because it makes it very difficult as the Court is well aware too when trying to cross-examine someone in reference to the contents of something that --

THE COURT: All right. So that's been admitted. Do you have any other questions for this witness?

MR. POLK: I don't think I have any other questions for this witness.

THE COURT: Any redirect?

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MR. HAYWOOD: No, your Honor.

THE COURT: Okay, thank you. You may step down.

(At 12:25 p.m., witness excused.)

MR. HAYWOOD: Is the Court going to listen to the video now?

THE COURT: Do you have any other witnesses?

MR. HAYWOOD: I have no other witnesses, your Honor.

THE COURT: All right: Are you all free this afternoon?

MR. POLK: I am, Judge. I just want justice here.

THE COURT: All right, so do I. Are you guys going to be back here this afternoon?

MR. POLK: At what time?

THE COURT: You say it's two and a half hours long?

MR. POLK: It is, Judge. Would you like to --

THE COURT: See I'm not here next week. I'm on vacation.

MR. POLK: So do we get the question of bind over when you come back?

THE COURT: I'm sorry?

MR. POLK: Do we get the issue as it relate to

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bind over when you return?

THE COURT: Unless we do it today.

MS. CAL: The video has nothing to do with my client.

THE COURT: I know. I can rule on your client today and free you.

MS. CAL: Thank you.

THE COURT: So be back this afternoon say -- once I view the video it shouldn't take more than five minutes as to the bind over so 3:00?

MR. POLK: That's fine.

THE COURT: Mr. Haywood?

MR. HAYWOOD: That's fine your Honor.

THE COURT: As it relates to -- do you have a motion as it relates to Defendant Number Two?

MR. HAYWOOD: At this time I would ask the Court to bind the Defendant over, Defendant Number Two, Deontae White as charged in the complaint and warrant.

MS. CAL: Question of fact, your Honor.

THE COURT: I agree it is a question of fact. The Court after hearing the testimony of John Mitchell, Etoh Walker, Kyle Upshaw, Daniel Claxton, not so much as it relates to Kelly Lucy, is satisfied that the People have met their burdens of probable cause as it relates to the charges in the complaint and warrant.

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The Court finds those charges were committed in the in the City of Detroit. The Court finds probable cause to believe this Defendant committed them. The Defendant will be bound over to the Wayne County Circuit Court Criminal Division for further proceedings. The arraignment on the information date time will be July 8th, 2016, at 9:00 a.m. Defendant will be remanded to the custody of the Wayne County Sheriff.

As it relates to Defendant Number Two Deontae, Jamar White, this court stands in recess until 3:00. Let's make it 3:00 sharp shall we'll.

MR. POLK: Yes.

THE COURT: 3:00 sharp and I'll take a look at Defense Exhibit A.

MR. HAYWOOD: Judge, I forgot --

THE COURT: We're back on the record on People versus --

MR. HAYWOOD: Deontae White.

THE COURT: -- Deontae Jamar White. There's a stipulation as to the Autopsy Report for exam purposes only. Is that correct Ms. Cal?

MS. CAL: Yes, your Honor.

THE COURT: And if you'll give us the detail of it, it gives us the --

MR. HAYWOOD: Your Honor, if Leonardo,

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L-e-o-n-a-r-d-o, last name is R-o-q-u-e-r-o, Assistant Medical Examiner, he would testify that he performed an autopsy under Case Number 16-5393 in the County of Wayne on one Aaron Foster on May 8, 2016. It was his opinion that the cause of death was a gunshot wound to the back and that the manner of death was a homicide.

THE COURT: And, again, that's been stipulated to for exam purposes only. The Court receives that stipulation.

MR. HAYWOOD: Thank you, your Honor.

(At 12:30 p.m., proceedings adjourned.)

(At 3:21 p.m., proceedings reconvened.)

THE DEPUTY: All rise. The 36th District Court is now in session, the Honorable Kenneth King presiding. You may be seated and remain quiet, please.

THE COURT: Good afternoon ladies and gentlemen.

THE AUDIENCE: Good afternoon.

THE COURT: Recalling 16-57956, People of the State of Michigan versus Defendant Number One, Joshua Lamar James Stewart.

MR. HAYWOOD: Ron Haywood for the People.

MR. POLK: Once again may it please this Honorable Court, Larry Polk on behalf of Mr. Stewart who's present and sitting directly in front of me.

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THE COURT: All right. Mr. Polk, you had an opportunity to review Defense Exhibit A as well as Mr. Haywood you've had an opportunity to view it as well, right?

MR. HAYWOOD: Yes, sir.

MR. POLK: Yes, sir.

THE COURT: Okay. I'll entertain any argument before I make my ruling.

MR. HAYWOOD: Your Honor, first if I could put a stipulation on the record for the Autopsy Report.

THE COURT: Okay.

MR. HAYWOOD: And then move to bind over.

Your Honor, if Leonardo, last name R-o-q-u-e-r-o, Assistant Medical Examiner, he would testify that on May 8, 2016 -- if he was called to testify he would testify that on May 8, 2016 he performed an autopsy on Mr. Aaron Foster under Case Number 16-5393 in the County of Wayne, Detroit.

The results of his examination and his opinion was, "Death was caused by gunshot wound to the back. It was a through and through entrance gunshot wound on the left back. There's no evidence of close-range firing noted on the skin surrounding the wound. The wound track proceeded from this injury through the 11th left rib, left lung, esophagus, aorta, heart, right lung,

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right 4th rib and ended with an exit wound on the right chest.

Associated injuries included left 11th and right 4th rib fractures, perforating injuries from the esophagus, lungs, heart, aorta and significant bleeding in the chest cavity. The wound track was from back to front, left to right and slightly upward when the body is viewed in the standard anatomical position. Finding of cause of death was gunshot wound to the back and the matter manner of death is homicide."

THE COURT: So stipulated for exam purposes only?

MR. POLK: Absolutely for exam purposes only. Judge, I did have an opportunity to review the ME Report.

MR. HAYWOOD: That's people 3. We move ask to move that into evidence also, your Honor.

MR. POLK: No objection.

THE COURT: All right. That will be admitted.

(People's Exhibit Number 3 Admitted.)

MR. HAYWOOD: If Defense doesn't have no witnesses, we make a motion to bind over, reserve argument.

MR. POLK: I have no witnesses, Judge. Judge, in looking at this case five witnesses testified. Four

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of the witnesses that testified at no way put my client at the scene of this particular incident. They have not established anything as it relates to my client being present.

What the People have attempted to do then is to now look and say that there is a statement made but the problem that I had and the reason I asked this Court to review the alleged statement is because the witness's testify -- that's attempting to testify to her interview of my client didn't appear to have any personal knowledge. She utilized someone else's documentation, which I know the Court allows her to be able to do to refresh her recollection. She wasn't refreshing her recollection, she was adopting now what someone else said as an attempt to go around hearsay. There was some inconsistency in some things that she testified directly to this Court that my client allegedly told her.

The Court having the opportunity of the video knows that at least a few of the things she said were not inclusive in that video.

THE COURT: For instance.

MR. POLK: For instance when she said that -- asked a specific question about the getaway driver. My client never identified himself as any getaway driver. That was, you know, her putting her spin on what she

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want to say my client served as in this particular incident.

So I think a full review of the video and definitely of the witnesses that have testified demonstrates that at no point in time ever did my client have a gun. At no point in time is he accused of firing a gun. There is nothing that places my client even in the vehicle. What vehicle are we talking about. On this record there's a purple vehicle, there's a black vehicle, there's a blue vehicle; there's an Intrepid, there's a Stratus.

And so at what point in time are the allegations that my client is the driver that is somehow connected to this homicide and to these attempted murder as well as these armed robberies. I don't think the People have demonstrated that in fact my client had the requisite intent or that he did anything to push this matter forward and therefore I ask that you not bind over.

THE COURT: Mr. Haywood.

MR. HAYWOOD: Your Honor, the Defendant basically places himself at the scene of the crime in listening to his interrogation tape. He puts himself as the driver of the first incident that happened on Packard. Then he says that he was driving these

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individuals -- he says it was only one in his statement. He never said it was two people but he says that he was driving the person -- he was driving them on Packard. He had stopped the car. The people got out or the person got out then he came back and he saw him with a gun when he came back in after hearing the shots fired. Then he took this person later on in the day to the second location which was at Meade and dropped off two people that was planning to commit or commit a robbery and that they engaged in a gun fight there where one of the people that was with him jumped into the car after being shot during this -- during the shootout where he later then take that person to the hospital and was arrested at the scene of the hospital -- at the hospital.

I think the Court in looking at the testimony of the other witnesses and looking at -- listening to the Defendant's testimony the Court can make the inference that the Defendant was helping them out because he was driving the car. There's certainly wasn't any mistake because he continued to drive them around as they continued to commit crimes on people.

There's no evidence or any testimony that he was forced to do this. It appears that these people -- he knew these people. They were his friends and when

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Mr. White got shot he was concerned enough for Mr. White, to take him to the hospital so that he could get treatment.

So it's clear that he knew these people. He cared about these people and that he participated in these two actions, first being the shooting that took place on Packard where Mr. Foster was killed and then, secondly, during the two robberies and the shootout with Mr. Upshaw and Mr. Claxton. So I believe that we've shown on a probable cause basis that he was involved and that he was the driver during these two incidents and we're asking the Court to bind him over as charged.

THE COURT: Sitting before me is a big stupid kid who for whatever reason followed along it would appear to this Court with the two gunmen, and I'm somewhat comfortable in saying that because I had an opportunity to review Defense Exhibit A, and although the Defendant in that interview was very hesitant to commit any involvement or knowledge about what was going on, he does put himself enough in it to say that he was the driver of the vehicle.

So you couple that knowing who the driver is because all the other witnesses, the four other witnesses who were called to testify could only identify Defendant Number Two along with a heavier set person,

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and we know that's not the Defendant here but that there was someone else that was driving the car and nobody else is able to tell us who that person is but the Defendant tells us in his own words that, reluctantly so but that he was in fact the driver.

So Court as well as a rational trier of fact can make logical inferences based on the evidence and the manner in which the person was driving this car, that he stops, that the two people are riding in the back seat get out of the car and do these dastardly deeds and then get back in the car and then they drive off on to the next person and so forth.

I don't -- it's very unfortunate because I think the Court misses a lot when we don't get an opportunity to see the videos like that. It gives me a little better understanding of the Defendant. Sitting here until I saw that I never even knew what the Defendant's voice look like or how he talks or how he acts and that type of thing but this gave me some insight on him and that's why I said he's a big stupid kid, probably not as culpable as the other two gunmen but nonetheless involved himself as an aider and abetter. We all know that any amount of aid or encouragement one gives to another in the commission of a crime, they're just as guilty as if they did it

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themselves so that's why he's here charged today.

It took a long time to get that little bit of information out of the Defendant that he was the driver but it is what it is. He indicates that he was the driver and based on that and the other witnesses that were called, the People's theory of aiding and abetting applies to this Defendant.

So the Court after hearing the testimony of John Mitchell, Etoh Walker, Carl Upshaw, Daniel Claxton and Kelly Lucy is satisfied the People have met their burden of probable cause as it relates to the charges contained in the complaint and warrant. The Courts find those charges were committed in the City of Detroit and the Court finds probable cause to believe this Defendant committed it.

The Defendant will be bound over to Wayne County Third Circuit Court Criminal Division for further proceedings. The arraignment on the information date and time will be July 8th, 2016, at 9:00 a.m. Defendant will be remanded to the custody of the Wayne County Sheriff.

MR. HAYWOOD: Thank you, your Honor.

MR. POLK: Thank you very much, your Honor.

THE COURT: Thank you.

MR. POLK: Judge, may I have that video back.

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THE COURT: Yes, sir.

MR. POLK: Thank you.

- - -

(Proceedings concluded at 3:32 p.m.)

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REPORTER'S CERTIFICATE

STATE OF MICHIGAN)
) - ss
COUNTY OF WAYNE)

I, FELICIA R. COLEMAN, RPR, CSR-3466, Official Court Reporter in and for the 36th District Court, Wayne County, State of Michigan, do hereby certify that the foregoing pages 1 through 98, inclusive, was reduced to typewritten form by means of Computer-Assisted Transcription and comprise a true and accurate transcript of the proceedings taken in the above-entitled matter, on Friday, July 1, 2016.

FELICIA R. COLEMAN-JORDAN
RPR, CSR 3466
Official Court Reporter

Dated: This _____ day of _____, 2016.

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STATE OF MICHIGAN

IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

District Case No.:16-057956-01 & 02
Circuit Case No.: 16-005731-01 & 02
HON. T. KENNY

JOSHUA LAMAR STEWART AND
DEONTEA JAMAR WHITE,

Defendants.

/

WAYNE COUNTY PROSECUTOR'S OFFICE
By: RON HAYWOOD (P
Assistant Prosecuting Attorney
1441 St. Antoine
Detroit, Michigan 48226
(313) 224

LAW OFFICES OF LARRY R. POLK, PC
By: LARRY R. POLK (P48164)
Attorney for Defendant Stewart
500 Griswold, Suite 2340
Detroit, Michigan 48226
(313) 965-6633

/

DEFENDANT, JOSHAU LAMAR STEWART'S MOTION FOR SUPPRESSION OF STATEMENT

NOW COMES, Mr. Joshua Stewart by and through his attorney, LARRY R. POLK, and hereby files his Motion for Suppression of his Custodial Statement and in support states as follows:

1. Mr. Stewart is charged with Count (I) Felony Murder, Count (II) Armed Robbery; Count (III) Armed Robbery; Count (IV) Assault with Intent to Murder; Count (V) Armed Robbery, Count (VI) Receiving and Concealing Stolen Property $1,000 but less than $20,000 and Count (VII) Felony Firearm.

2. That the subject charges stem from two separate armed robberies involving two shooting victims, one fatal.

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3. On July 1, 2016, Preliminary Examination hearing was held in the 36th District Court, presiding Judge Kenneth King, and at the conclusion of same, Mr. Stewart was bound over for trial on the aforementioned charges.

4. In regards to the evidence presented at the preliminary examination hearing as it relates to Mr. Stewart consisted of the sole testimony of Officer Kelly Lucy and video evidence of Mr. Stewart's custodial statement.

5. Upon information and belief, the prosecution plans to introduce into evidence at the Defendant's trial statements allegedly obtained from the Defendant by of the Detroit Police Department.

6. That Mr. Stewart was arrested after for a stolen vehicle and confined for a period of time in the Mound Detention Facility was subsequently interrogated for approximately three (3) hours.

7. After being confined for a period of time at the Mound Detention Facility, Mr. Stewart was subjected to custodial interrogation by Officers Lucy and McDonald while still located within the Mound Detention Facility commencing at approximately 3:40 am.

8. That Mr. Stewart read his Miranda rights but mis-pronounced material words relating to the right to have an attorney "present."

9. That Mr. Stewart used the word "present" as a transitive verb.

10. That the officers conducting the interview failed to correct Mr. Stewart regarding his pronunciation of the word "present."

11. That the officers conducting the interview failed to read Mr. Stewart his Miranda rights or ask if he understand.

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12. Officer McDonald threaten Mr. Stewart with the potential of other individuals testifying against him.

13. Officer McDonald advised that he was going to get a search warrant for his cellular phone and threaten to use Mr. Stewart's cellular phone GPS tracking to confirm his whereabouts.

14. Officer McDonald specifically told Mr. Stewart that his cellular phone was a "witness" against him."

15. Officer McDonald showed Mr. Stewart a copy of a paper reported to be a search warrant for his cellular phone.

16. Officer McDonald advised Mr. Stewart that his confession was in his best interest.

17. Officer Lucy advised Mr. Stewart that he was facing a sentence of 20 to life and advised him that "Prophet" was going to testify that he was the "shooter."

18. Officer Lucy advised Mr. Stewart that the co-defendant is smarter than him and advised that the co-defendant was going to put the weapon associated with the murder.

19. Officers advised Mr. Stewart that co-defendant can lie on him.

20. Officer McDonald referenced another murder case and advised Mr. Stewart that he should take his own life in his hands like the co-defendant in the referenced case who got two (2) years.

21. During the interrogation, Mr. Stewart expressed his desire to die and displayed extreme stress and fear.

22. After two (2) hours,, Officer Lucy advised that she was from the Homicide Department.

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23. Officer Lucy advised Mr. Stewart that the stolen car was not the subject of the interrogation.

24. Officer McDonald continued to threaten Mr. Stewart that Prophet would control his fate.

25. It is clear from the video evidence that Mr. Stewart did not understand the rights he waived.

26. Defense submits that before a confession can be admitted into evidence it must be established that:

1. The Defendant was advised of his constitutional right not to answer any questions put to him, and that any answers he might make could be used against him.

2. The Defendant was advised that before answering he was entitled to have an attorney present with him and that an attorney would be appointed for him at state expense if he could not afford to hire one. *Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 LEd2d 694 (1966).*

27. In this case, the Miranda Warnings were not given to the Mr. Stewart properly, and Mr. Stewart did not knowingly and voluntarily waive his Miranda rights.

28. Defense diligently argues, in order to be admissible in evidence, a confession must be voluntary, i.e., "the product of a rational intellect and a free will"; and if Mr. Stewart's will was overborne the confession is involuntary. *Townsend v Sain, 372 US 293; 83 S Ct 745; 9 LEd2d 770 (1963).*

29. The alleged statements of the Mr. Stewart were obtained by knowingly and intentionally providing false information to the Mr. Stewart about the evidence against him; and by knowingly and intentionally providing Mr. Stewart with false information about his legal status in this case by intentionally misleading him to think that the police could decide what

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would be the appropriate charges; and by intentionally leading Mr. Stewart to believe that if he wouldn't be charged with murder because the shooter was identified.

30. The alleged statements were made at a time of great stress, and under circumstances that were inherently confusing and coercive.

31. The alleged statements of the Mr. Stewart were not made voluntarily, and Mr. Stewart did not knowingly and would face lesser charges or not be prosecuted at all if he gave an incriminating statement; he statements voluntarily waive his Miranda rights.

32. That Mr. Stewart was repeatedly questioned in lengthy interrogation sessions initiated by police.

33. That the video evidence demonstrates that Mr. Stewart appearing to be sleepy and drowsy.

34. That the video evidence demonstrates that Mr. Stewart admitted to having smoked marijuana earlier in the day and to smoking marijuana on a regular basis.

35. After several hours of interrogation, the police ultimately secured a lengthy unsigned and the Police for approximately three (3) hours.

36. As of that time, Mr. Stewart had not made any significant incriminating statements he had been in custody since _____.

37. Therefore, Mr. Stewart's incriminating statements were obtained in violation of his right against self-incrimination and his right to due process of law, US Const Ams V and XIV; Mich Const 1963, Art 1, §17.

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38. In order to be admissible into evidence, an admission must be voluntarily made, i.e., "the product of an essentially free and unconstrained choice by its maker." People v Cipriano, 431 Mich 315, 334 (1988), quoting Culombe v Connecticut, 367 US 568, 602, 6 LEd2d 1037; 81 S Ct 1860 (1961).

39. If, however, the Defendant's "will has been overborne and his capacity for self-determination critically impaired ..." the admission is involuntary. *Cipriano, supra, quoting from Culombe, supra. "*

40. The line of demarcation 'is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession'." *Cipriano, supra, quoting Culombe, supra.*

41. "These standards are applicable whether a confession is the product of physical intimidation or psychological pressure." *Townsend v Sain, 372 US 293, 307; 9 LEd2d 770; 83 S Ct 745 (1963).*

42. As stated in United States v Bautista-Avila, 6 F3d 1360, 1364 (9th Cir 1993)(quoting United States v Leon Guerrero, 847 F2d at 1366, in turn quoting Hutto v Ross, 429 U.S. 28, 30 (1976), in turn quoting Bram v United States, 168 U.S. 532, 542-43 (1897)):

"A statement is involuntary if it is 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." Involuntary statements are inherently untrustworthy, and their use violates our fundamental sense of decency. *Spano v New York, 360 U.S. 315, 320 (1959).*

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43. Where, as here, the interrogating officers pose as a "false friend" of the suspect, leading him to believe that they are on his side and only trying to help him, incriminating statements obtained as a result are involuntary. *Id., at 323.*

44. Further, where as here, false promises of benefits or leniency, whether direct or implied, even if they are only slight in value, are impermissibly coercive. *People v Conte, 421 Mich 704 (1984); Hutto, supra; Bram, supra.* .

45. In determining whether a confession was voluntarily given, the trial court must look at the totality of the circumstances.

46. In this case, a review of the totality of the circumstances clearly establishes that there were numerous improper inducements used to override Mr. Stewart's free will, and to coerce him to both waive his Miranda rights and to make involuntary statements.

WHEREFORE, for all the above reasons, Mr. Stewart requests this Honorable Court grant the following relief:

A. Suppression of his statement or in the alternative that the police officers who spoke with him and took statements from him testify at an Evidentiary Hearing to determine the voluntariness of any alleged statements or waiver of rights they took from the Mr. Stewart, and that they bring with them to that Evidentiary Hearing any notes, records, log sheets, or written transcriptions of those notes, statements, or any tape recordings that may have a bearing on the voluntariness of the alleged statements or waiver of rights.

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Respectfully submitted,
LAW OFFICES OF LARRY R. POLK, PC

By: Larry R Polk
LARRY R. POLK (P48164)
Attorney for Defendant Stewart
500 Griswold, Suite 2340
Detroit, Michigan 48226
Office: (313) 965-6633

Dated: September 8, 2016

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS AND MOTION FOR WALKER HEARING

The facts that are set forth in the Motion to Suppress Statements, supra, and will be further presented to this Court during the evidentiary hearing.

ARGUMENT I:

THE INTERROGATING POLICE OFFICERS INTENTIONALLY PROVIDED FALSE INFORMATION TO MR. STEWART WITH RESPECT TO THE EVIDENCE THEY ALLEGEDLY HAD AGAINST HIM; INTENTIONALLY MISLEAD HIM TO BELIEVE THAT IF HE WAS NOT THE SHOOTER, HE COULD NOT BE CHARGED WITH MURDER INTENTIONALLY PROVIDED HIM WITH FALSE INFORMATION CONCERNING HIS LEGAL STATUS BY MISLEADING HIM TO THINK THAT THE POLICE COULD DECIDE WHAT WOULD BE THE APPROPRIATE CHARGES; AND INTENTIONALLY LEAD HIM TO BELIEVE HE WOULD FACE LESSER CHARGES OR NOT BE PROSECUTED AT ALL IF HE GAVE AN INCRIMINATING STATEMENT; THESE IMPROPER INDUCEMENTS COLLECTIVELY SERVED TO OVERRIDE MR. STEWART'S FREE WILL, AND RENDERED ANY ALLEGED WAIVER OF HIS MIRANDA RIGHTS, AND ANY ALLEGED STATEMENTS MADE DURING THE CUSTODIAL INTERROGATION INVOLUNTARY, UNDER THE TOTALITY OF THE CIRCUMSTANCES.

The interrogating officers used numerous strategies to override the free will of Mr. Stewart and induce him to both give up his Miranda rights and to make a statement. The inducements employed were such as to render any purported waiver of his Miranda rights, and any incriminating statements that he allegedly made, involuntary under the totality of the circumstances.

After being illegally confined for a period of time at the Mound Detention Facility, Mr. Stewart was subjected to repeated interrogations while still located within the Mound Detention Facility. This extensive custodial interrogation was conducted in the absence of counsel, although at no time did the Mr. Stewart expressly waive his right to counsel during the interrogations. Before a confession can be admitted into evidence it must be established that:

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A. The Defendant was advised of his constitutional right not to answer any questions put to him, and that any answers he might make could be used against him.

B. The Defendant was advised that before answering he was entitled to have an attorney present with him and that an attorney would be appointed for him at state expense if he could not afford to hire one. See, *Miranda* v *Arizona, 384 US 436; 86 S Ct 1602; 16 LEd2d 694 (1966).*

In this case, the Miranda Warnings were not given to the Mr. Stewart properly, and Mr. Stewart did not knowingly and voluntarily waive his Miranda rights. Based on the totality of the circumstances, Mr. Stewart's statements were not voluntary. *People* v *Cipriano, 431 Mich 315, 334 (1988), quoting Culombe v Connecticut, 367 US 568, 602, 6 LEd2d 1037; 81 S Ct 1860* (1961). If, however, Mr. Stewart's will has been overborne and his capacity for self-determination critically impaired " the admission is involuntary. *Cipriano, supra, quoting from Culombe, supra.* "The line of demarcation 'is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession'." *Cipriano, supra, quoting Culombe, supra.*

"These standards are applicable whether a confession is the product of physical intimidation psychological pressure." *Townsend* v *Sain, 372 US 293, 307; 9 LEd2d 770; 83 S Ct 745 (1963). or As stated in United States v Bautista-Avila, 6 F3d 1360, 1364 (9th Cir 1993)(quoting United States v Leon Guerrero, 847 F2d at 1366, in turn quoting Hutto v Ross, 429 U.S. 28, 30 (1976), in turn quoting Bram v United States, 168 U.S. 532, 542-43 (1897)):*

"A statement is involuntary if it is 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."

Involuntary statements are inherently untrustworthy, and their use violates our fundamental sense of decency. *Spano* v *New York, 360 U.S. 315, 320 (1959).* Where, as here, the

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interrogating officers pose as a "false friend" of the suspect, leading him to believe that they are on his side and only trying to help him, incriminating statements obtained as a result are involuntary. *Id., at 323.*

Further, where as here, false promises of benefits or leniency, whether direct or implied, even if they are only slight in value, are impermissibly coercive. *People v Conte, 421 Mich 704 (1984); Hutto, supra; Bram, supra.* .

In determining whether a confession was voluntarily given, the trial court must look at the totality of the circumstances. In this case, a review of the totality of the circumstances clearly establishes that there were numerous improper inducements used to override Mr. Stewart's free will, and to coerce him to both waive his Miranda rights and to make involuntary statements.

First of all, there is video evidence that police provided false information about the scope of the evidence they had against Mr. Stewart. The interrogating officer told Mr. Stewart that the police knew he was involved in the murder and also told Mr. Stewart that alleged shooter's only way out of the murder was to lie on him.

In fact, evidence at the evidentiary hearing will establish that the interrogating officers told Mr. Stewart that there was eyewitness information and/or co-defendant had told them that Mr. Stewart was the shooter in this case. This information was conveyed to Mr. Stewart repeatedly in an intentional effort to coerce him to give up his Miranda rights, and to override his desire to remain silent and to not make any incriminating statements. During the extensive interrogation that took place, over a 3 hour period, Mr. Stewart became convinced that the alleged shooter could lie on him and name as the shooter and that he could face a 20 year sentence. Officer McDonald specifically referenced a prior murder case where a sister of the

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shooter refused to make a statement against her brother, the alleged shooter. Officer McDonald further advised that the referenced individual would have faced murder had she not changed her mind to make a statement admitted that she was preset in the vehicle at the time of the shooting, and that her alleged cooperation resulted in only a two (2) year sentence versus life for murder. Here, the video clear demonstrates that Mrs. Stewart's statement was pursuant to his fear premised on the false information and was a substantial inducement compelling him to make involuntary incriminating statements.

Any statement taken during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused "in fact knowingly and voluntarily waived [Miranda] rights" when making the statement. **Miranda expressly supports the conclusion that waivers are difficult to establish absent an explicit written waiver or a formal, express oral statement.**

Defense asserts even when warnings have been administered and a suspect has not affirmatively invoked his rights, statements made in custodial interrogation may not be admitted as part of the prosecution's case in chief "unless and until" the prosecution demonstrates that an individual "knowingly and intelligently waive[d] [his] rights." *Miranda v. Arizona, supra, 384 U. S., at 479.*

"[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to retained or appointed counsel." *Miranda, 384 U. S., at 475.* The government must satisfy the "high standar[d] of proof for the waiver of constitutional rights.

Moreover, the question whether a suspect has validly waived his right is "entirely distinct" as a matter of law from whether he invoked that right. It is obvious in the instant

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case that there is no evidence that Mr. Stewart ever expressly invoked or waive his *Miranda* rights.

Furthermore, the fact that he did not affirmatively invoke his rights does not permit an inference that he affirmatively waived his rights which is required before any subsequent statement can be admitted as evidence. Miranda's discussion of the prosecution's burden in proving waiver speaks with particular clarity to the facts of this case and therefore merits reproducing at length: If [an] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

ARGUMENT II: TEST OF VOLUNTARINESS OF STATEMENT:

The analysis of voluntariness is addressed by the Cipriano Court, *People* v *Cipriano, 431 Mich 315; 429 NW2d 781 (1988)].* At some point, a delay will become so long that it alone is enough to make a confession involuntary. In engaging in the balancing process that Cipriano outlines, a trial court is free to give greater or lesser weight to any of the Cipriano factors, including delay in arraignment. A trial court cannot, however, give preemptive weight to that one factor. To do so is to adopt a rule of automatic suppression of a confession obtained during the period of delay . *[Manning, supra at 643 (emphasis in original)*].

The Cipriano Court set forth the following nonexclusive list of factors for use in determining whether a statement is voluntary:

(1) the age of the accused;
(2) his lack of education or his intelligence level;
(3) the extent of his previous experience with the police;
(4) the repeated and prolonged nature of the questioning;

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(5) the length of the detention of the accused before he gave the statement in question;

(6) the lack of any advice to the accused of his constitutional rights;

(7) whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession;

(8) whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement;

(9) whether the accused was deprived of food, sleep, or medical attention;

(10) whether the accused was physically abused; and

(11) whether the suspect was threatened with abuse. [*Cipriano, supra* at *334*; see *also Manning, supra at 635.]*

In regards to factors (1-3), Mr. Stewart is __ years old, and completed _____ years of high school with limited academic intelligence and has two minor contact with police. In regards to factor (4-5), Mr. Stewart had been in custody at the Mound Detention Facility for _____ days prior to the estimated three (3) hour interrogation.. In regards to factor (6), Mr. Stewart was advised of his Miranda rights, but not properly nor did Mr. Smith expressly waive same.

Factor (7) is inapplicable to this case. Next, in regards to factor (8) , there is evidence that Mr. Stewart was under the prescription drug, Norcol for his cancer treatment. In regards to factor (9), the preliminary examination testimony establishes that the interrogating officer offered Mr. Stewart water during the three (3) hour interrogation, however, there is no evidence Mr. Stewart had been provided food prior to the interrogation and clearly at no time during said interrogation. In addition, the record is devoid any questions by the interrogating officer regarding any possible medical conditions or illness or influence of any prescribed medications. Lastly, factors (10 & 11) are inapplicable to this matter. .

Since the State is responsible for establishing the isolated circumstances under which [an] interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders. As

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such, it must be concluded that there was no effective waiver of Mr. Stewart's Fifth Amendment rights even if it is concluded that he advised of Miranda rights absent written or oral evidence Mr. Stewart waived same.

In addition, it is undisputed that Mr. Stewart was being held in custody at the time of the questioning. Obviously, Mr. Stewart's freedom of movement had been more than substantially restricted and he was not free to leave. Here, there was no express waiver of rights in this case and absolutely no reason to infer a waiver of rights which were not understood or comprehended by Mr. Stewart, especially in light of the circumstances of the detention where he had been held in for several days. Certainly, any suggestion to find waiver in this case would not satisfy the "high standards of proof for the waiver of constitutional rights" which the Supreme Court has long demanded. *Miranda v. Arizona, supra, 384 U. S. at 475*;

The underlying constitutional guarantee against self-incrimination reflects "many of our fundamental values and most noble aspirations," our society's "preference for an accusatorial rather than an inquisitorial system of criminal justice"; a "fear that self incriminating statements will be elicited by inhumane treatment and abuses" and a resulting "distrust of self deprecatory statements"; and a realization that while the privilege is "sometimes a shelter to the guilty, [it] is often a protection to the innocent." *Withrow* v. *Williams, supra, 507 U. S. at 692 (internal quotation marks omitted).*

For these reasons, the Supreme Court has expressly noted that a criminal law system "which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation." Ibid. (some internal quotation marks omitted). Such actions and statements which are present in this

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case must be deemed to be an infringement upon Mr. Stewart's rights to silence and to counsel as guaranteed by the Fifth Amendment.

In conclusion, Defense requests this Court to determine that, under a "totality of the circumstances" analysis, the prosecution is unable to prove that his statements were legally obtained. For these reasons, Mr. Stewart's statements must be suppressed or in the alternative, conduct an evidentiary hearing to support this factual allegations and contentions in this case. *People* v *Walker, 374 Mich 311 (1965).*

Respectfully Submitted,

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Dated: September 8, 2016

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STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

v.

Case Number: 16-005731-02
Hon. Timothy Kenny

JOSHUA STEWART,
Defendant.
_____/

PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

NOW COME THE PEOPLE OF THE STATE OF MICHIGAN, by and through Prosecuting Attorney KYM L. WORTHY and Assistant Prosecuting Attorney RON L. HAYWOOD and respectfully submit the following response to the defendant's motion to suppress the defendant's statements

The defendant, Joshua Stewart, made post-Miranda statements to the police and now seeks to suppress those statements. The defendant's motion fails both in form and in substance, and the People therefore respectfully request that the defendant's motion be denied.

FACTS

On May 6, 2016, the defendant participated as the getaway driver for two Armed Robberies one leading to the death of Aaron Foster. He was arrested on May 6, 2016 for suspicion for Armed Robbery and Felony Murder. On May 7, Detective Kelly Lucy and Officer James McDonald interviewed the defendant.

Before the interview began, the detectives informed the defendant of his Miranda rights. Indeed, the defendant was given a written copy of his Miranda rights which the defendant himself read out loud. The defendant then acknowledged an understanding of those rights.

The interview then lasted approximately three hours. During the interview, the defendant admitted to driving the vehicle during the homicide and robberies. The interview of the

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defendant and the presentation and acknowledgement of his Miranda rights was recorded on video. A copy of this video has been presented to the Court. (See Exhibit A.)

The defense has filed a motion to suppress the defendant's post-Miranda statements and appears to argue, first, that the defendant was not given proper Miranda warnings and, second, that the defendant's statements were not voluntarily made. In its motion and accompanying memorandum, the defense provides no quotations from the interview nor does it provide any times at which the supposedly problematic portions of the interview occurred on the video.

The People now respectfully urge the Court to deny the defendant's motion because its arguments run counter to clearly established law and because the defense has failed to state its arguments with insufficient definiteness, clarity, and specificity.

LAW

A. Miranda Warnings

Pursuant to Miranda, the police must "advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." Florida v. Powell, 559 U.S. 50, 59 (2010). "This Court has never indicated that the rigidity of Miranda extends to the precise formulation of the warnings given a criminal defendant." California v. Prysock, 453 U.S. 355, 359 (1981). "Quite the contrary, Miranda itself indicated that no talismanic incantation was required to satisfy its strictures." California v. Prysock, 453 U.S. 355, 359 (1981). In determining whether police officers adequately conveyed Miranda warnings, "reviewing courts are not required to examine the words employed as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights as required by Miranda." Florida v. Powell, 559 U.S. 50, 60 (2010) (citing Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (internal quotations omitted).

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B. Voluntariness of Defendant's Statement

"The voluntariness doctrine . . . encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice." Miranda v. Arizona, 384 U.S. 436, 464–65 (1966); see also People v. Jobson, 205 Mich. App. 708, 711 (1994). "The use of an involuntary statement coerced by police conduct offends due process under the Fourteenth Amendment." People v. Wells, 238 Mich. App. 383, 386(1999)

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.

People v. Cipriano, 431 Mich. 315, 334–35 (1988) (internal citations and quotations omitted).

Courts have held statements to be voluntarily made even after many hours of interrogation. See, e.g., People v. Cipriano, 431 Mich. 315, 339, 362-63 (1988) (interrogated for approximately fourteen hours total on four separate occasions after arrest); People v. Wright, No. 292717, 2010 WL 2867935, at *4 (Mich. Ct. App. July 22, 2010) (interrogated for over four and a half hours).

"[F]alse statements of fact are generally insufficient to render an otherwise voluntary statement involuntary." People v. Taylor, No. 271635, 2007 WL 3015243, at *2 (Mich. Ct. App.

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Oct. 16, 2007); see also People v. Hicks, 185 Mich. App. 107, 112–13 (1990) ("[T]he fact that the police misrepresented the fact to defendant that his fingerprints were discovered on an article retrieved from the crime scene is insufficient to make this otherwise voluntary statement involuntary."); Frazier v. Cupp, 394 U.S. 731, 737, 739 (1969) (court upheld confession as voluntary even where officer "told [defendant], falsely, that Rawls [who defendant claims to have been with at time of crime] had been brought in and that he confessed.").

"[A] promise of leniency is merely one factor to be considered in the evaluation of the voluntariness of a defendant's statements." People v. Givans, 227 Mich. App. 113, 120 (1997); see also People v. Schafer, No. 205583, 1999 WL 33444327, at *1 (Mich. Ct. App. May 18, 1999) (confession not involuntary where officers "told defendant to tell the truth and that she could 'help herself' if the truth revealed"); People v. Shipley, 256 Mich. App. 367, 373 (2003) (confession not involuntary where officer "told defendant was that it would be in his 'best interest' to talk about any other home invasions"); People v. Givans, 227 Mich. App. 113, 119–20 (1997) (statements not involuntary where officer "promise[d] that he would tell the prosecutor if defendant cooperated").

"[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare." Berkemer v. McCarty, 468 U.S. 420, 433 (1984).

C. Specificity and Clarity of Defense's Motion

A defendant must raise his arguments with sufficient definiteness, clarity, and specificity to be entitled to an evidentiary hearing in a motion to suppress. United States v. McTiernan, 695 F.3d 882, 891 (9th Cir. 2012) ("An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to

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enable the trial court to conclude that contested issues of fact exist."); United States v. Howell, 231 F.3d 615, 620 (9th Cir. 2000) (same); Wojtowicz v. United States, 550 F.2d 786, 790 (2d Cir. 1977) (holding that a defendant must present "sufficiently detailed and controverted factual allegations" in order to receive an evidentiary hearing).

ANALYSIS

A. Specificity and Clarity of Defense's Motion

The defense argues that the interview of the defendant was legally problematic for a number of reasons but never, not once, provides either a quotation of the supposedly problematic exchanges nor does he provide any time during the interview video at which the supposedly problematic exchanges occurred. In short, the defense has failed to provide sufficient definiteness, clarity, or specificity to permit a hearing on these matters.

The interview at issue lasted for approximately three hours. The defense makes vague summaries that, among other things, the police supposedly "provided false information about the scope of evidence they had against Mr. Stewart" (Def. Memo. 3), posed as a "false friend" (Def. Memo. 2-3), made "false promises of benefits or leniency" (Def. Memo. 3), and told the defendant about a case where an individual would have faced murder charges had she had not "admitted that she was present in the vehicle at the time of the shooting" (Def. Memo. 3-4).

Where are these statements in the video of the interview? To what exact passage or passages is the defense referring? At what point or points in this three-hour interview did the officers supposedly provide false information? At what point or points in this three-hour interview did the officers supposedly pose as a false friend? At what point or points in this three-hour interview did the officers supposedly make false promises? At what point or points in this three-hour interview did the officers supposedly tell this story about a person who helped themselves by telling the truth about what happened in their case? Are the Court and the People

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to guess about which passages to which the defense is referring? Should the defense be permitted to select specific passages from hours' worth of video without telling the Court and the People which passages it is relying upon? The law requires more from the defense than the defense has here provided.

Another way to illustrate the insufficiency of the defense's motion is to imagine this three-hour interview as a book. It is as if the defense here has thrown down, say, a two-hundred page book and said, "Somewhere in this book the officers acted as a false friend, told a story about a person who benefited herself by telling the truth about being at a crime scene, and so on, but I will not tell you, first, where in those hundreds of pages you can find the passages to which I am referring, and I will not tell you, second, if I am referring to one passage or multiple passages. You can figure all of that out for yourself." That is in essence what the defense is urging the Court and the People here to do. The Court and the People deserve to know what exact passages the defense is relying upon and where those passages can be found. The Court and the People are entitled to greater definiteness, clarity, and specificity. See United States v. McTiernan, 695 F.3d 882, 891 (9th Cir. 2012); United States v. Howell, 231 F.3d 615, 620 (9th Cir. 2000); Wojtowicz v. United States, 550 F.2d 786, 790 (2d Cir. 1977).

The lack of definiteness and clarity in the defense's brief leaves the Court and the People in an untenable position. Neither the Court nor the People know what portion or portions of the interview we must address. Only the defense now knows what are the supposedly offending passages. The defense could have shared that information. It has chosen not to. The defense's motion falls woefully short of what simple, basic notions of fairness require. Accordingly, the Court should deny the defense's motion.

B. Miranda Warnings and Voluntariness of Statements

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Even if the Court does decide to consider the defense's motion, the motion nevertheless should be denied because it runs afoul of clearly established case law.

i. Miranda Warnings

The officers gave the defendant proper and adequate notification of his Miranda rights. First, the officer gave the defendant a written copy of his Miranda rights. Second, the defendant asked the defendant to read those warnings out loud, a fact that ensured that the defendant read the warnings, engaged with the text, and heard all of his rights. Third, the defendant was asked to initial the warnings if he understood them and the defendant did in fact initial the warnings. Fourth, the officer told the defendant simply to ask the officer if the defendant had any questions about his rights. (See Video at 3:36) Fifth, there is no allegation that the written warnings presented to the defendant were defective in any way or that the defendant missed any of the words when he read those warnings. In short, the warnings were properly given.

The defense nevertheless argues that "the Miranda warnings were not given to the Mr. Stewart properly" (Def. Memo. 2) apparently because the defendant, when he was reading the statement out loud, pronounced the word "present" with an emphasis on the second syllable rather than on the first. The defense argues that that renders the entire interview inadmissible. That argument is not legally sound. The defendant was presented a written copy of the warnings, read through all of them, and indicated his understanding of them. That is more than sufficient to establish that the warnings were sufficiently given.

Moreover, courts have explained that "Miranda itself indicated that no talismanic incantation was required to satisfy its strictures," California v. Prysock, 453 U.S. 355, 359 (1981), and that "reviewing courts are not required to examine the words employed as if construing a will or defining the terms of an easement. The inquiry is simply whether the

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warnings reasonably conve[y] to [a suspect] his rights as required by Miranda." Florida v. Powell, 559 U.S. 50, 60 (2010) (internal citations and quotations omitted). In the present case, however, the defense seems to urge the Court to examine the words employed *more stringently* than it would in construing a will or defining the terms of an easement. Put differently, the defense urges this Court to do exactly the opposite of what courts are supposed to do. See Florida v. Powell, 559 U.S. 50, 60 (2010). The People urge the Court to apply the law as the Courts have articulated it and, consequently, to reject the legal arguments of the defense. The Miranda warnings were properly and adequately given to the defendant.

ii. Voluntariness of Statements

The defense further argues that the defendant's statements were involuntarily made. A statement is involuntarily made where an officer employs "interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice." See Miranda v. Arizona, 384 U.S. 436, 464–65 (1966). No such practices were employed here. The defendant's arguments hold no water.

As explained above, the defense raises a number of arguments in support of its position but with insufficient clarity and definiteness. As a result, the People here are left to argue that portions of the interview were proper without knowing exactly what portions of the interview the defense claims are problematic. This obviously is unfair. The defense's motion is inadequate and should be rejected.

However, even if we were to take the arguments in the defense's brief at face value, those arguments still fail because they run contrary to clearly established case law.

The interview speaks for itself and is evidence of the voluntariness of the defendant's statements. The interview was civil. The interviewers interacted with the defendant in a non-

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hostile environment. Although detectives raised their voices, there was no yelling or shouting at the defendant. The defendant was not harmed or threatened. He was not deprived of food or drink or medical attention. He was fully informed of his Miranda rights, both verbally (he read them out loud) and written (he was presented with a written copy of his Miranda warnings). He is literate (he read the Miranda warnings himself out loud) and has had prior contact with the police. He was attentive and appropriately responsive to the questions presented to him. There is no indication that he was intoxicated or drugged at that time of the interview; indeed, his demeanor and responsiveness to questions indicate that he was not intoxicated or drugged. In sum, the facts do not support a finding that officers exerted "such pressure upon an individual as to disable him from making a free and rational choice." Miranda v. Arizona, 384 U.S. 436, 464–65 (1966); see also People v. Jobson, 205 Mich. App. 708, 711 (1994). The facts all indicate that the statements were voluntarily made.

The defendant's arguments are contrary to legal case law

As a preliminary point, it should be noted that it is rare for a person's statements to be considered involuntary where, as here, he first is given his Miranda warnings. Berkemer v. McCarty, 468 U.S. 420, 433 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.").

The defense nevertheless suggests that the length of the interview rendered his statements involuntary and coerced; however, a three-hour interview is insufficient without more to disable a person from making a free and rational choice, as both common sense and case law indicate. See People v. Cipriano, 431 Mich. 315, 339, 362-63 (1988) (interrogated for approximately fourteen hours total on four separate occasions after arrest); People v. Wright, No. 292717, 2010 WL 2867935, at *4 (Mich. Ct. App. July 22, 2010) (interrogated for over four and a half hours).

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In our case, defendant was booked into the jail on May 7, 2016 and questioned at 3:41 a.m. on May 7, 2016. Therefore, he was questioned by detectives less than four hours after booking.

The defense also argues that the police posed as a "false friend" to the defendant and therefore disabled him from making a voluntary choice. There is no legal basis for defendant's arguments on this issue. First, it is not clear where in the interview the defense claims the police were acting as a "false friend," and the People are therefore unable to respond to the defense's insufficiently clear arguments. As a matter of basic fairness, the defense's argument should therefore fail on grounds of insufficient clarity. Nevertheless, even if one were to consider the defense's argument here, the argument still fails based simply on an analysis of the defense's argument. In support of its position here, the defense relies upon Spano v. New York, 360 U.S. 315 (1959). In that case, the court found that the defendant's will was overborne where the defendant was questioned for "virtually eight straight hours" by over ten officers, one of whom was "a close friend [of the defendant] of 8 or 10 years' standing who had attended school with him" to whom the defendant after many hours of refusals finally confessed. Id. at 317, 322. The defense argues that here, like there, the defendant's will was overborne because the defendant made a confession to a "false friend." However, the officer in Spano actually was a close friend of the defendant's for over 8 years before the crime took place; there is no indication that the detective here was a friend of the defendant's before the interview. To compare Spano to this case is to compare apples with oranges. The defense's argument on this point is improper and misplaced. It should be rejected.

The defense further argues that "the police provided false information about the scope of the evidence they had against Mr. Stewart." (See Def. Memo. 3.) Specifically, the defense states the interrogating officer told Mr. Stewart that the police knew he was involved in the murder. (Def. Memo. 3.) Although, the defense does not indicate at what point in the three-hour

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interview the officer supposedly made this statement, the People will concede that the officers told defendant that he was involved in the crime. . Nevertheless, courts have found that even more damning false statements made by the police to a suspect have failed to render a statement involuntary. See People v. Hicks, 185 Mich. App. 107, 112–13 (1990) ("[T]he fact that the police misrepresented the fact to defendant that his fingerprints were discovered on an article retrieved from the crime scene is insufficient to make this otherwise voluntary statement involuntary."); Frazier v. Cupp, 394 U.S. 731, 737, 739 (1969) (court upheld confession as voluntary even where officer "told [defendant], falsely, that Rawls [who defendant claims to have been with at time of crime] had been brought in and that he confessed."). Indeed, "false statements of fact are generally insufficient to render an otherwise voluntary statement involuntary." People v. Taylor, No. 271635, 2007 WL 3015243, at *2 (Mich. Ct. App. Oct. 16, 2007).

The defense further argues that false promises of benefits or leniency were made, although the defense's brief fails to be specific or clear about the portion or portions of the interview where the officer supposedly made such promises. The People cannot respond to an argument that has been inadequately stated just as it cannot knock down a building that has not yet been erected. The People merely point to the fact that "a promise of leniency is merely one factor to be considered in the evaluation of the voluntariness of a defendant's statements," People v. Givans, 227 Mich. App. 113, 120 (1997)[1], and that the defense points to nothing with specificity, and the People have found nothing in its own review of the interview, that would constitute a promise of such a magnitude that it is "likely to exert such pressure upon an

[1] The defense appears to misstate the law regarding false promises of leniency. He claims that "false promises of benefits or leniency, whether direct or implied, even if they are only slight in value, are impermissibly coercive." (Def. Memo. 3.) That is incorrect. People v. Givans, 227 Mich. App. 113, 120 (1997), addresses that point directly. The Court there explains that the majority of the Michigan Supreme Court rejected the position articulated by the defense here and that, rather, promises of leniency are merely one factor to consider in a determination of voluntariness. See People v. Givans, 227 Mich. App. 113, 120 (1997).

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individual as to disable him from making a free and rational choice," Miranda v. Arizona, 384 U.S. 436, 464–65 (1966); see also People v. Schafer, No. 205583, 1999 WL 33444327, at *1 (Mich. Ct. App. May 18, 1999) (confession not involuntary where officers "told defendant to tell the truth and that she could 'help herself' if the truth revealed"); People v. Shipley, 256 Mich. App. 367, 373, 662 N.W.2d 856, 861 (2003) (confession not involuntary where officer "told defendant was that it would be in his 'best interest' to talk about any other home invasions"); People v. Givans, 227 Mich. App. 113, 119–20 (1997) (statements not involuntary where officer "promise[d] that he would tell the prosecutor if defendant cooperated").

There is a part of the interview where Detective McDonald told the defendant that a person involved in a homicide took ownership of her life and told the police that she drove the car after her brother had committed the murder and the sister later got two years. (See Video at 5:24). When defendant express his belief that he would get two years if he talked, Officer McDonald clarified his statement and told defendant that was what happen to the sister, but he could not promise him anything in this case (See Video at 5:33).

In short, the defense has not raised a single argument showing that the defendant was disabled from making a free and rational choice, and every bit of evidence proves precisely the opposite--namely, that the defendant give his statements freely and voluntarily.

Suppression here is unwarranted.

CONCLUSION

The defense has failed to raise its arguments with sufficient definiteness, clarity, and specificity. Notions of basic fairness therefore require on those grounds alone that the defendant's motion be denied. Moreover, if the Court does consider the defendant's arguments, those arguments nevertheless run afoul of current case law, and his motion therefore should be denied for that independent reason as well.

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Accordingly, the defendant's motion to suppress should be DENIED.

Respectfully submitted,

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(313) 224-5762

Dated: September 20, 2016

COPY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs- Case No. 16-5731-01

JOSHUA LAMAR-JAMES STEWART,

Defendant.
_____/

MOTION TO SUPPRESS

Proceedings had in the above-entitled cause before the HONORABLE TIMOTHY M. KENNY, Wayne County Circuit Judge, Room 602, Frank Murphy Hall of Justice, Detroit, Michigan, on Friday, October 21, 2016.

APPEARANCES:

RON HAYWOOD, Esq.,
Appearing on behalf of the People.

LARRY R. POLK, Esq.,
Appearing on behalf of the Defendant.

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Identification	Marked	Received
NONE		

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Detroit, Michigan

Friday, October 21, 2016

Approximately 12:30 p.m.

PROCEEDINGS

THE CLERK: Case Number 16-5731, People of the State of Michigan versus Joshua Stewart.

Here today for a motion to suppress.

MR. HAYWOOD: Good afternoon, your Honor. Ron Haywood for the People.

MR. POLK: Your Honor, may it please this Court, Larry Polk on behalf of Joshua Stewart, who is present and sitting directly in front of me.

THE COURT: Good afternoon, Mr. Stewart.

DEFENDANT STEWART: Good afternoon.

THE COURT: All right.

This matter is before the Court for the Court's ruling regarding the defense' motion to suppress Mr. Stewart's statement.

The defense' motion presents several grounds for suppressing the defendant's statement.

The Court recognizes that for purposes of a Walker Hearing that the People bear the burden of showing by a preponderance of the evidence that the defendant made a voluntary, knowing and intelligent waiver of his Fifth Amendment and Sixth Amendment

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rights to make a statement.

In this particular case one of the claims made by the defense is that the defendant was not appropriately informed of his rights as required by the Supreme Court decision in Miranda versus Arizona.

And certainly as set forward in People versus Wells at 238 Mich App 383, a 1999 case, the use of any involuntary statement that has been forced by police offends the due process provisions of the 14th Amendment.

And the fact that this was an interrogation that lasted three hours, the three-hour time limit in and of itself is not determinative.

The Court is required to examine all of the facts and circumstances in their totality to determine whether or not the length of the interrogation rendered the statement involuntary.

As a notation or bench mark, if you will, the Michigan Supreme Court in 1988 in People versus Cipriano found at 431 Michigan 315, if a defendant was interrogated on a number of different occasions over a 14-hour period, and that was found not to be an involuntary interview or interrogation session.

With regards to the notion of the defense' claim that the defendant was not advised of his Miranda

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Rights, Michigan law is very clear that the defendant has to be apprized of his Constitutional Rights, and also the law is equally clear that the defendant does not have to be ritualistically advised of those rights as set forth in the Miranda decision.

The requirement as set forth by the Court indicating that any Court reviewing the Advice of Rights has to determine whether or not the words that were used by the officers in advising Mr. Stewart of his Constitutional Rights conveyed to him the information that is essential and required in the warnings to be given to the defendant.

If the words used reasonably convey those rights as set forth in the Miranda Decision, then that is sufficient.

Not only does Michigan law stated that, but even in Florida versus Powell found at 559 United States, 50, 2010 United States Supreme Court decision it states the same thing.

An examination in this particular case indicates that the essence and the requirements of Miranda versus Arizona were conveyed to the defendant. 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

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Constitutional Rights, and the guarantees as set forth in Miranda versus Arizona were conveyed to the defendant.

There are two other claims that are made by the defense in terms of their claim that the confession should be suppressed. One is that the police lied to the defendant with regards to information that they had about the investigation that would incriminate the defendant, Mr. Stewart, and it is the defense' contention that that is a justification and a basis for suppressing the statement.

For quite some time United States Supreme Court and the Michigan Appellate Courts have stated that when a defendant is falsely advised of information about the crime, and as a result of that information the defendant confesses, that that in and of itself is not a basis for suppressing the statement.

It is a factor to be considered by the Court in determining whether or not the defendant's statement is involuntary. But the fact that the police may say this to a defendant, hey, we found your fingerprints at the scene, even if that is not true, or we found your fingerprints on the murder weapon, and if that's not true, but the defendant ends up confessing, that is not by any means an automatic requirement that the

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defendant have his statement suppressed.

In Frazier versus Cupp found at 394 Michigan 731, a 1969 United States Supreme Court decision, the United States Supreme Court indicated that false statements given to the defendant by the police is not a basis for suppressing the statement in and of itself.

That is also echoed in People versus Hicks found at 185 Mich Appeals 1990 where the Court of Appeals stated and I quote: "The fact that the police misrepresented the fact to the defendant that his fingerprints were discovered on an article retrieved from the crime scene is insufficient to make this otherwise voluntary statement involuntary.

As the Court stated in Hicks, as well as the Supreme Court Decision in Frazier, it is one factor for the Court to consider in determining whether in the totality of the circumstances the statement is voluntarily made and whether or not the People have met their burden by a preponderance of the evidence.

The other claim made by the defense is that the defendant was allegedly promised leniency and a deal if he would in fact make a statement.

In People versus Givens found at the 227 Mich Appeals 113, a 1997 case, the Michigan Court of Appeals stated and I quote: A promise of leniency is merely

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one factor to be considered in evaluation of the voluntariness of a defendant's statement."

In this particular case the defendant's statement was made after he was appropriately advised of the principles set forth in Miranda versus Arizona.

The fact that there was a misrepresentations about the investigative facts, the statement that is alleged to be one of leniency, this Court finds 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 with regards to the Fifth Amendment protections extended to the defendant.

So the Motion to Suppress the statement is denied.

MR. POLK: 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.

MR. POLK: Thank you, Judge.

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THE COURT: Any offer by the People?

MR. HAYWOOD: Your Honor, the offer right now is murder two, 25 to 40 years.

MR. POLK: Judge, as the Court is aware, my client is 19 years old. He has a very supportive family. Part of his family is here today. His father is normally in the courtroom. He has been to every other hearing, but today I understand he's at work.

I have been in contact with his mother. So I would ask that we have the opportunity to discuss this offer with my client, as well as him discussing it with his family to make a final decision.

THE COURT: Absolutely.

MR. POLK: This matter is set for trial on October 31, 2016. So I ask that we have a special final Pretrial in reference to this matter.

THE COURT: What date works well for both sides?

MR. HAYWOOD: I'm in trial next week, your Honor. Hopefully it will be done by the 28th. So I would say probably the best day would be Friday, the 28th because the 31st for the hearing at the trial date.

I know the Court said the Court may not be here for that week, and the Court may be getting

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another Judge to try the case. We are just going to leave it on for that day.

So I would say the 28th would be the best day.

MR. POLK: That's a week from today.

MR. HAYWOOD: Yes.

THE COURT: Where is your trial?

MR. HAYWOOD: Judge Callahan sitting in for Judge Brennan. Judge Callahan.

MR. POLK: I'll be here anyway for another matter, Judge.

THE COURT: Okay. All right. We will do it then.

MR. POLK: Thank you, Judge.

(Matter concluded).

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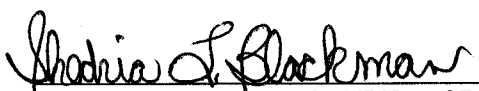
REPORTER'S CERTIFICATE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

I, SHEDRIA L. BLACKMAN, CSR-0454, Official Court Reporter in and for the Third Judicial Circuit, Wayne County, State of Michigan, do hereby certify that the foregoing pages 1 through 11 inclusive, was reduced to typewritten form by means of Computer-Assisted Transcription and comprise a true and accurate transcript of the proceedings taken in the above-entitled matter, on Friday, October 21, 2016.



SHEDRIA L. BLACKMAN, CRS-0454
Certified Shorthand Reporter

DATED: This 9th day of August, 2018.

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 16-005731-01-FC
16-005731-02-FC

JOSHUA LAMAR-JAMES STEWART and
DEONTEA JAMAR WHITE,

Defendant.

_____/

JURY TRIAL - VOLUME II

Taken in the above-entitled matter before Honorable Michael Callahan, Third Judicial Circuit Court Judge, Detroit, Michigan on November 2, 2016

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Detroit, Michigan

November 2, 2016

- - -

(At 10:07 a.m., proceedings begin. Jury panel entered the courtroom.)

THE COURT: You can be seated.

Ladies and gentlemen, good morning. My name is Judge Michael Callahan. You've been brought here possibly to serve as jurors in a criminal case.

I know that jury duty may be a new experience for some of you. It is one of the most serious duties that members in a free society may be asked to perform. Our system of self-government cannot exist without the jury. The right to a trial by a jury is an ancient tradition and part of our heritage. The law says both a person accused of a crime and the People have the right to a trial, not by one person but by a jury of 12 impartial persons. So jurors must be as free as humanly possible from bias, prejudice or sympathy for either side. Each side in a trial is entitled to jurors who keep an open mind until the time comes to decide the case.

During jury selection, the lawyers and I will ask you questions. This is called the voir dire. The questions are meant to find out if you know anything about the case. Also, we need to find out if you have any

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opinions or personal experiences that might influence you for or against the prosecution, the defendant or any witnesses.

One or more of these things could cause you to be excused in this particular case, even though you may otherwise be qualified to be a juror. The questions may probe deeply into your attitudes, beliefs and experiences, but are not meant to be an unreasonable prying into your private life. The law requires we get this information so a fair and impartial jury may be chosen.

If you do not hear or understand a question, please say so. If you do understand the question, answer it truthfully and completely. Do not hesitate to speak freely about anything you believe that we should know.

You jurors have been brought up to finish jury selection in the case of the People of the State of Michigan vs. Joshua Stewart.

Counsel, your appearances.

MR. HAYWOOD: Good morning, your Honor. Ron Haywood for the People.

MR. POLK: May it please this honorable Court, Larry Polk on behalf of Joshua Stewart, who is present.

THE DEFENDANT: Good morning.

THE COURT: Thank you.

To begin the process of jury selection, I will

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ask all of you to stand and raise your right hands to swear or affirm an oath.

THE CLERK: Please stand. Raise your right hands. Here's your oath. Do you solemnly swear or affirm that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case, so help you God?

JURY PANEL: I do.

THE CLERK: You may be seated.

THE COURT: I'm going to read to you a document that is known as an Information. An Information is read in virtually every criminal case so that the jurors with the defendant present may hear the charges. And this information charges the People of the State of Michigan vs. Joshua Lamar-James Stewart; that on May 6th, 2016 at Savage and Packard in the City of Detroit in count 1: He did while in the perpetration or attempted perpetration of a robbery, murder one Aaron Foster. This crime is more commonly known as homicide felony murder.

In count 2, he did in the course of committing a larceny of shoes and a belt use force or violence against Aaron Foster, in the course of that conduct possessed a rifle or a handgun, a dangerous weapon.

Count 3, another count of armed robbery. During the course of committing a larceny of shoes and a belt

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used force or violence against a person present, Etoh Walker, and in the course of that conduct possessed a rifle or handgun.

In count 4, he did make an assault upon Daniel Claxton with intent to commit the crime of murder.

Count 5, another count of armed robbery in the course of committing a larceny of weed and weapons, did use force or violence against Kyle Upshaw and Daniel Claxton and in the course of that conduct possessed a rifle and/or handgun.

Count 6, he did buy, receive, possess, conceal or aid in the concealment of a 2004 Dodge Intrepid, stolen, embezzled or converted property, and the defendant knew or had reason to know or reason to believe the property was stolen, embezzled or converted. The value of the property was greater than $1,000 but less than $20,000.

In count 7, that the defendant did have in his possession a firearm; that is a rifle or a handgun at the time he committed or attempted to commit a felony, being felony murder or armed robbery or assault with intent to murder or receiving and concealing stolen property with a value of greater than $1,000.

The defendant pleads not guilty to these charges. You should clearly understand the Information

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that I have just read is not evidence. An Information is read in every criminal trial so that the defendant and jury may hear the charges. Do not think it is evidence of his guilt or that he must be guilty simply because he has been charged.

And now as to the schedule of the trial, the case will try obviously today, and then tomorrow, that is Thursday and Monday, Tuesday and Wednesday of next week. If those present an unreasonable burden for anyone when you're in the jury box, you can tell me what the burden is, and then I'll decide if that is cause to excuse you.

I'm going to read to you three principles of the law, and as I'm done, I'll have further questions for you about those principles; but first you must understand a person accused of a crime is presumed to be innocent. This means you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.

Every crime is made up of parts called elements. The prosecutor, Mr. Haywood, must prove each of the elements of the crime beyond a reasonable doubt. The defendant is not required to prove innocence or do anything. If you find the prosecutor has not proven every

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element beyond a reasonable doubt, then you must find the defendant not guilty.

A reasonable doubt is a fair and honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or a possible doubt but a doubt that is based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Additionally, you must -- you should know that you jurors have been sworn to answer the voir dire, will be take questions in the jury box once the jury that has already been selected comes out and fills in the seats. Again, you jurors will be questioned individually. But first let me ask, does anybody have any religious beliefs that prevent you serving on a jury? Do any of you have any health problems that you prevent you serving on a jury?

And sir, stand up and tell us your name.

JUROR CICHOWLAS: Sam Chichowlas.

THE COURT: And what is the problem?

JUROR CICHOWLAS: I can't hear, your Honor.

THE COURT: I'll excuse you. Thank you. What was your name, sir?

JUROR CHICHOWLAS: Samuel Chichowlas,

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C-h-i-c-h-o-w-l-a-s, whole thing.

THE COURT: Thank you. You're excused. Go back to one.

Anyone else? And let me tell you as well that in this case, there are two defendants who will be on trial. Your concern is only for Mr. Stewart. The two juries will hear the case simultaneously. Not each jury will hear everything but knowing that you're sworn to be a juror in this case, I instruct you, you're only allowed to have communication with members of your jury. You are not to talk with members of the other jury so you're obviously be able to familiarize yourself with the jurors who are on your case. And my bailiffs are instructed to keep the jurors entirely separate from one another. But again, the reminder is your concern is only with Mr. Stewart, not with the other defendant who is named Mr. White.

You can bring the jury in.

THE DEPUTY: All rise for the jury.

(At 10:17 a.m., the jurors entered the courtroom.)

THE COURT: You may be seated.

Let me call roll.

Perkins?

JUROR PERKINS: Yes.

THE COURT: Favot?

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JUROR FAVOT: Here.

THE COURT: Sterling?

JUROR STERLING: Here.

THE COURT: Maynard?

JUROR MAYNARD: Here.

THE COURT: Godlew?

JUROR GODLEW: Here.

THE COURT: Sands?

JUROR SANDS: Here.

THE COURT: Davis?

JUROR DAVIS: Here.

THE COURT: Mims?

JUROR MIMS: Here.

THE COURT: Price?

JUROR PRICE: Here.

THE COURT: Vargas?

JUROR: Here.

THE COURT: Tchalakov?

JUROR TCHALAKOV: Here.

THE COURT: Prince?

JUROR PRINCE: Here.

THE COURT: Payne?

JUROR PAYNE: Here.

THE COURT: Okay. You can fill that seat.

THE CLERK: Seat eleven, Millicent Grant.

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THE COURT: Ms. Grant, what do you do for a living?

JUROR GRANT: I'm an electrical assistant advisor for the public lighting department.

THE COURT: Well, congratulations to the lighting department. The lights are finally on.

Are you single or married?

JUROR GRANT: Divorced.

THE COURT: What town do you live in?

JUROR GRANT: Detroit.

THE COURT: Have you ever served on a jury before?

JUROR GRANT: Never.

THE COURT: And I indicated the case would try obviously today but tomorrow, Monday, Tuesday and Wednesday of next week. Does that present an unreasonable burden for you?

JUROR GRANT: No, sir.

THE COURT: And do you think you know anything about the case?

JUROR GRANT: I do not.

THE COURT: I'm going to tell you two other principles of law. You understand under our system of justice, every defendant has an absolute right not to testify, and if Mr. Stewart chooses not to testify, you

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may not hold his silence against him. Will you agree to follow that law?

JUROR GRANT: Yes, sir.

THE COURT: Additionally, the law says a police officer is to be judged by the same standard you would use to judge the testimony of any other witness. Will you also follow that law?

JUROR GRANT: Yes.

THE COURT: Questions for the People.

MR. HAYWOOD: Okay. Juror number eleven, good morning. My name is Ronald Haywood. I represent the People of the State of Michigan. We're calling several witnesses. This case comes out of the Detroit -- Detroit area. All the officers are from the Detroit Police Department. I plan to call: a Ms. Rebecca Smith from the Michigan State Police Office, Officer Debra Nix, Detective Kelly Lucie, Officer James McDonald, Officer Veronica Donaldson, Officer James Dubois, Officer Deon Dotson, Officer John Seijutt, police officer. Officer Benjamin Magdison, Mr. Etoh Walker, Mr. Daniel Claxton, Mr. Kyle Upshaw, Sergeant David Babcock, Dr. Leonardo Roquero, Officer Andre Kemp, Ms. Ramona Shewins, Mr. Sidney Phillips, Officer David Soli, Sergeant Andrew Gunsfeller, Officer William Johnson, Officer Michelle Douglas, Officer Blight, Officer Stinton and Ms. Marguerite Foster. The

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officer in charge of the case is John Mitchell. Do you know any of the witnesses?

JUROR GRANT: No.

The Court has probably told you that me, as the prosecutor, I have to prove the case beyond a reasonable doubt. Will you hold me to that burden of beyond a reasonable doubt and nothing higher, nothing lower?

JUROR GRANT: Yes.

MR. HAYWOOD: I have to prove my case. I have to prove the charges in the case, and each charge has a certain amount of elements. Sometimes they'll have -- sometime they have five elements. Sometimes they have three elements. I don't have to prove everything that maybe you will hear in a case. The law says I have to prove the elements. Do you think you can follow that rule and that instruction?

JUROR GRANT: Yes, I can.

MR. HAYWOOD: If I prove my case beyond a reasonable doubt, ma'am, can you return a verdict of guilty?

JUROR GRANT: Yes, I can.

MR. HAYWOOD: Do you have any problems with me proving -- as the prosecutor proving my case using one witness?

JUROR GRANT: Yes.

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MR. HAYWOOD: And what's your problem with that?

JUROR GRANT: One person's perspective will not always tell you the whole story with one description.

MR. HAYWOOD: You do realize that sometimes the only person sometimes that will be here is the person that's committing the crime, the victim of the crime?

JUROR GRANT: Yeah. I understand that.

MR. HAYWOOD: And so if that's the only person that would be there, you know that's the only evidence that was there and that person comes up and testifies and you believe the person, can you find someone guilty based on that testimony, that witness?

JUROR GRANT: Yes.

MR. HAYWOOD: Have you had any bad experience with police officers?

JUROR GRANT: No.

MR. HAYWOOD: What about have you ever spoken to prosecutors, defense attorneys or any type of court personnel?

JUROR GRANT: No, no, sir.

MR. HAYWOOD: You never testified in court at all?

JUROR GRANT: Yes, I have.

MR. HAYWOOD: What kind of a case was that?

JUROR GRANT: It was a workplace; it was an

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employment matter for a sexual harassment.

MR. HAYWOOD: Anything about that experience that will make it difficult for you to hear this case?

JUROR GRANT: No.

MR. HAYWOOD: Do you think that -- I'm assuming that you watch TV. Do you think on each clip, whatever you have seen on TV or movies, you'll keep your mind and focus on the evidence you hear in this case?

JUROR GRANT: Yes.

MR. HAYWOOD: If the Court gives you a law, and it's a -- can you agree with all the laws, at least all the laws that the Court gave to you? But there's one law that the Court read to me, I don't think it's fair. Do you still think you can put aside your personal beliefs and follow that law?

JUROR GRANT: Yeah. It's the law, yes.

MR. HAYWOOD: I have nothing further, your Honor.

MR. POLK: Good morning, everyone.

JURORS: Good morning.

Now, juror number eleven, how are you this morning?

JUROR GRANT: Fine, thank you.

MR. POLK: Very good. I have just a few questions I have to ask you. You heard about the burden

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of proof. You understand you have the burden of proof for you to decide.

JUROR GRANT: Excuse me, the prosecutor?

MR. POLK: The prosecutor, and you understand that it never shifts?

JUROR GRANT: Okay.

MR. POLK: Throughout the whole trial, that burden determines changing your mind that my client, as he sits here now, is presumed to be innocent. And it never changes unless the prosecutor, through his witnesses can change your mind. You understand that burden stays with him?

JUROR GRANT: Yes.

MR. POLK: Okay. And let's draw your attention to this chair, you see this chair?

JUROR GRANT: Yes.

MR. POLK: Does it look different? It is different from the chair you're sitting in, but it's just a chair, correct?

JUROR GRANT: Yes.

MR. POLK: Nothing magical that you can see about it?

JUROR GRANT: No.

MR. POLK: So the individuals sitting in that chair, there's nothing about that chair when they sit in

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it that's going to make them be truthful. You understand that?

JUROR GRANT: Yes.

MR. POLK: That the truth comes if you believe the testimony of the individuals when they sit in the chair. There's nothing special about the chair. Okay. And you have the ability to determine -- you don't have any special powers, do you?

JUROR GRANT: No.

MR. POLK: Nothing that can determine when somebody is being truthful or not?

JUROR GRANT: No. I -- I -- I'm not, no.

MR. POLK: No. All right. And you utilize --

JUROR GRANT: My children but --

MR. POLK: They put that to the test, I know. So you have special tools that you utilize to try to determine if somebody is being truthful or if their testimony is credible, don't you?

JUROR GRANT: Yes.

MR. POLK: What are they?

JUROR GRANT: Especially I -- a lot of times I can tell by certain body language, eye avoidance, just -- and I usually -- those are the two that I usually use --

MR. POLK: Okay.

JUROR GRANT: -- a lot of the times.

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MR. POLK: What about if they're argumentative with one of the lawyers and very nice and cooperative with another lawyer; does that possible give you some insight --

JUROR GRANT: Yes.

MR. POLK: Eye contact?

JUROR GRANT: Yes.

MR. POLK: Okay. And what about the consistency of the story?

JUROR GRANT: Oh, definitely.

MR. POLK: Definitely.

JUROR GRANT: If the story changes, then there is something there.

MR. POLK: Okay. All right. If you had to go back and the judge sent you back right now and told you that you needed to render a verdict, a decision as to the innocence of my client, what would that verdict be?

JUROR GRANT: Right now, it would be -- it would be not guilty because I haven't heard anything.

MR. POLK: Absolutely, and that's because the judge has already instructed you that he's presumed to be innocent.

JUROR GRANT: Yes.

MR. POLK: I'd like to go through just a little game with you, if I may. I'm going to say a word. The

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first word that comes to your mind, you say it. Merry.

JUROR GRANT: Lamb.

MR. POLK: Open.

MR. GRANT: Closed.

MR. POLK: Red.

JUROR GRANT: Blue.

MR. POLK: Easter.

JUROR GRANT: Sunday.

MR. POLK: So in getting that information from me, you were able to add on.

JUROR GRANT: Mm-hmm.

MR. POLK: Do you understand that in this process, you're not going to be able to add on, so you're left with the evidence and the information that's been tendered from the witnesses.

If it appears that something is missing, you can't add on. The judge will tell you about reasonable inferences, and you will hear that. You can't add information in order to make it something that it is not. Is that fair?

JUROR GRANT: Yes. If those are the rules of the Court.

MR. POLK: If they're rules of the Court. And he's going to -- you're not -- only can you follow the rules, you will follow the rules; is that correct?

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JUROR GRANT: Yes.

MR. POLK: Do you bake?

JUROR GRANT: Yes.

MR. POLK: A little bit?

JUROR GRANT: Yes.

MR. POLK: Bake cake?

JUROR GRANT: Rolls, cake, sure.

MR. POLK: Rolls? Okay. We'll go with the rolls.

JUROR GRANT: You have to have flour, yeast, butter, salt, a little sugar.

MR. POLK: Okay. So you're making rolls and you forget to put the yeast in, are they still rolls?

JUROR GRANT: Yeah, but they're not edible. Well, you can eat them but --

MR. POLK: Well, are they still rolls?

JUROR GRANT: Not really.

MR. POLK: Not really because you've left off an important ingredient that's necessary in order to make them what you want them to be. Correct?

JUROR GRANT: Right.

MR. POLK: Okay. So in this process, the prosecutor has four elements he'd like to prove. He has to prove each of those elements beyond a reasonable doubt. He does three very well to your satisfaction. The fourth

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one is not as good and is not even close. What's your verdict?

JUROR GRANT: Not guilty.

MR. POLK: Because of the fact that he has to prove each one of those elements to your satisfaction beyond a reasonable doubt.

JUROR GRANT: Correct.

MR. POLK: You agree that you will wait until all of the evidence comes in before you make any decisions about this particular case?

JUROR GRANT: Yes, sir.

MR. POLK: That you won't jump to any first judgement?

JUROR GRANT: No.

MR. POLK: That you'll hear everything about this case, all of the evidence before you begin to formulate your opinion?

JUROR GRANT: Yes.

MR. POLK: And you won't talk about this with any of the other jurors until the judge instructs you it's time for you to talk about it?

JUROR GRANT: No, I won't.

MR. POLK: Okay. And that's fair?

JUROR GRANT: Yes.

MR. POLK: Okay. Very good. Do you have any

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problems with my client and myself sitting over here, I don't know, playing cards or doing a crossword puzzle?

JUROR GRANT: No.

MR. POLK: Why not?

JUROR GRANT: He's not getting testified and there's nothing he can do.

MR. POLK: And you understand because the judge has already told you, he doesn't have to testify.

JUROR GRANT: Right, and it's your job to defend him, not his.

MR. POLK: Okay. And what if I'm playing cards and --

JUROR GRANT: Well, I have a problem with that.

MR. POLK: If I play cards too?

JUROR GRANT: Yeah.

MR. POLK: But you understand where the burden lies?

JUROR GRANT: Yeah.

MR. POLK: So it's his job, the prosecutor's job in terms of the burden of proof?

JUROR GRANT: Right.

MR. POLK: And you understand that me and Mr. Stewart, we don't really have to do anything.

JUROR GRANT: I understand.

MR. POLK: We don't have the burden. You

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understand that?

JUROR GRANT: Yes.

MR. POLK: So you're not ever going to try to shift the burden to Mr. Stewart to provide you with any information, are you?

JUROR GRANT: No.

MR. POLK: Okay. Because it all comes from the prosecutor --

JUROR GRANT: Yeah, I understand.

MR. POLK: -- through those witnesses that sit in that non-magical chair.

JUROR GRANT: Mm-hmm.

MR. POLK: Thank you. One second. I don't think I have any other questions. Thank you very much.

THE COURT: People pass for cause?

MR. HAYWOOD: Yes, your Honor.

THE COURT: Defense pass for cause?

MR. POLK: Uh-huh.

THE COURT: I'm sorry. Defense pass for cause?

MR. POLK: Pass for cause, Judge.

THE COURT: Challenges to the People.

MR. HAYWOOD: Your Honor, we'd like to thank and excuse the juror seated in seat number eleven.

THE COURT: Okay. Thank you.

Any challenges for the defense?

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MR. POLK: Not at this time, Judge.

THE CLERK: Seat eleven, Carole Bielas, B-i-e-l-a-s.

THE COURT: Let me ask you, Ms. Bielas, what do you do for a living?

JUROR BIELAS: I have two employers. I work at a bank and I work at a retail place.

THE COURT: And are you single or married?

JUROR BIELAS: Divorced.

THE COURT: What town do you live in?

JUROR BIELAS: Southgate.

THE COURT: Have you ever served on a jury before?

JUROR BIELAS: No.

THE COURT: Can you be with us tomorrow, Monday and Tuesday and Wednesday of next week?

JUROR BIELAS: I may have a problem with that. I've never served. Is there a certain time we would be out by? I guess I'm concerned with my -- my part -- one of my employers, I don't get paid when I'm not there. And I'm a single person providing --

THE COURT: Generally, nine to three.

JUROR BIELAS: Okay.

THE COURT: So you can serve?

JUROR BIELAS: Yes.

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THE COURT: And do you think you ever heard anything about this case?

JUROR BIELAS: No.

THE COURT: Can you be fair?

JUROR BIELAS: Yes.

THE COURT: Questions for the People. We'll give it another go-around.

MR. HAYWOOD: Juror number eleven, will you hold me to my burden of beyond a reasonable doubt, nothing higher, nothing lower?

JUROR BIELAS: Yes.

MR. HAYWOOD: And would you have any problems with me including elements of the case, maybe not all the details of the case?

JUROR BIELAS: No.

MR. HAYWOOD: If I prove my case beyond a reasonable doubt, can you return a verdict of guilty?

JUROR BIELAS: Yes.

MR. HAYWOOD: Is there anything about you that you think you should tell us that may make it -- may make it difficult for you to be fair to the prosecution or to the defense? Anything you think we should know about you?

JUROR BIELAS: No.

MR. HAYWOOD: If the Court reads you the law and there's one law you don't agree with, are you able to set

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aside your own personal agreement with that law and still follow what the Court tells you that's the law that you have to follow?

JUROR BIELAS: Yes.

MR. HAYWOOD: Do you have any problems with me proving my case with one witness, as the prosecutor?

JUROR BIELAS: No, sir.

MR. HAYWOOD: I have nothing further, your Honor. Thank you.

THE COURT: And for the defense.

MR. POLK: Good morning.

JUROR BIELAS: Good morning.

MR. POLK: I have just a few questions for you. Do you know where evidence comes from?

JUROR BIELAS: It comes from -- I believe it's provided.

MR. POLK: Okay. So do you know who collects evidence?

JUROR BIELAS: I would think the attorneys, the police, law enforcement --

MR. POLK: All right. Law enforcement.

JUROR BIELAS: -- various people.

MR. POLK: Okay. So you believe that the police have a responsibility to collect evidence?

JUROR BIELAS: Yes.

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MR. POLK: Okay. And as a juror, would you like as much evidence as possible to help you make your decision?

JUROR BIELAS: Yes.

MR. POLK: Okay. And you understand that the witnesses will provide evidence as well as their testimony as evidence?

JUROR BIELAS: Correct.

MR. POLK: And then there is other evidence that you might see in this particular trial?

JUROR BIELAS: Yes.

MR. POLK: Now, nothing magical about that chair, is there?

JUROR BIELAS: No.

MR. POLK: Nice, worn leather chair and there's nothing magical about it, and you agree with that?

JUROR BIELAS: Yes.

MR. POLK: And so we have to rely upon the People when they take the oath and they sit there, they will tell you the truth?

JUROR BIELAS: Correct.

MR. POLK: Okay. And you understand that sometimes, people might even think they're telling the truth, but they're mistaken. That's fair, isn't it?

JUROR BIELAS: Yes.

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MR. POLK: So then you also understand that sometimes people have a motive to not want to tell you the truth?

JUROR BIELAS: Right.

MR. POLK: And that they'll tell you something totally different that they know is not the truth?

JUROR BIELAS: Mm-hmm.

MR. POLK: So you understand, correct?

JUROR BIELAS: Yes.

MR. POLK: And so you understand the idea that you are the one that will be assessing the credibility as to whether or not somebody is being truthful or if you believe their testimony? If you sat on this jury, that's your role?

JUROR BIELAS: Yes.

MR. POLK: Okay. And you've heard some of the tools that other perspective jurors, at least one other the perspective jurors talks about that she utilizes. Are those somethings that you utilize to determine if someone is being truthful?

JUROR BIELAS: Yes.

MR. POLK: Okay. So you look at the body language of an individual, the consistency of their story, whether or not they can look you in the eye, argumentative?

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JUROR BIELAS: Yes.

MR. POLK: Tone, demeanor?

JUROR BIELAS: Yes.

MR. POLK: Very good. You were asked if you could be fair. I'm asking you something a little different. Will you be fair?

JUROR BIELAS: Yes.

MR. POLK: Do you have any problems with my client and I sitting off to the side, playing cards, checkers?

JUROR BIELAS: No.

MR. POLK: No? Because you understand that the burden is not on us. We will not be playing cards and checkers, but you understand?

JUROR BIELAS: I would think you'd be focused.

MR. POLK: Very good. Thank you very much. But you understand he has the burden in this particular trial. So you agree not to talk about the case with anyone until the judge instructs you to?

JUROR BIELAS: Yes.

MR. POLK: You know, there is something that's very close, the prosecutor through the witness brought out something, and it's just one little piece of information that's missing. Can you add it?

JUROR BIELAS: Not if I didn't hear anything.

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MR. POLK: All right. So you will leave the testimony as you heard it. If it's not complete, it's just not complete.

JUROR BIELAS: Right.

MR. POLK: And that's fair?

JUROR BIELAS: Well, I don't want to make up things I didn't hear.

MR. POLK: Absolutely, absolutely. And you realize that people can look at a situation but have different perspectives in terms of how they process it?

JUROR BIELAS: Mm-hmm.

MR. POLK: And so that's one of the reasons you don't want to add your perspective to it because it might be exactly.

JUROR BIELAS: My own.

MR. POLK: Absolutely. Okay. Prosecution is really close in terms of there will be four elements necessary. If, in fact, you are close, I don't know, but he doesn't really convince you beyond a reasonable doubt of that fourth element, what's your verdict?

JUROR BIELAS: Not guilty.

MR. POLK: Not guilty. Now, let me ask you this: There are 11 of your fellow jurors, and they have made up their minds, and you talk and you had discussion about it but you're not convinced, and they're starting to

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put some pressure on you. You know, you're causing us to miss money. I could be at work making money. I miss my family. My baby's at home. Those type of things come in. Is that going to make you change what you believe it your true vote?

MS. BIELAS: No.

MR. POLK: Will you be able to withstand someone being maybe even hostile towards you to get you to change what you believe is the verdict that comes in in this case?

MS. BIELAS: I will stay with what I believe.

MR. POLK: Will you?

MS. BIELAS: Yes.

MR. POLK: No other questions.

THE COURT: People pass for cause?

MR. HAYWOOD: Yes, your Honor.

THE COURT: Defense pass for cause?

MR. POLK: Yes, sir.

THE COURT: Challenges for the People?

MR. HAYWOOD: Your Honor, the People pass.

THE COURT: Challenges to the defense.

MR. POLK: One second, your Honor, please.

Your Honor, at this time, we'd like to thank and excuse juror in seat number eleven.

THE COURT: Ms. Bielas. Thank you.

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MR. POLK: Yes.

THE CLERK: Seat eleven, James Miller.

THE COURT: Mr. Miller, what do you do for a living?

JUROR MILLER: Thirty-six years as a professional certified test driver for Ford Motor Company.

THE COURT: And so do you like to drive fast?

JUROR MILLER: I drove fuel economy.

THE COURT: Then you didn't go fast. Are you single or married?

JUROR MILLER: I'm divorced.

THE COURT: What town do you live in?

JUROR MILLER: Pardon me?

THE COURT: What town do you live in?

JUROR MILLER: Canton. Canton Township.

THE COURT: Do you have a hearing problem?

JUROR MILLER: No, just somebody was coughing.

THE COURT: Okay. Have you ever served on a jury before?

JUROR MILLER: Yes.

THE COURT: How long ago?

JUROR MILLER: About two years ago, two and a half years ago.

THE COURT: Was it civil or criminal?

JUROR MILLER: Criminal.

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THE COURT: Did the jury reach a verdict?

JUROR MILLER: Yes, sir.

THE COURT: Can you be with us the days I outlined?

JUROR MILLER: Yes, sir.

THE COURT: Can you think of any reason that you would not be fair?

JUROR MILLER: No.

THE COURT: Would you believe a police officer more than a civilian simply because they're a police officer?

JUROR MILLER: Not really.

THE COURT: If the defendant chose to exercise his right and not testify, would you hold that against him?

JUROR MILLER: No.

THE COURT: And do you understand the burden of proof is always with the prosecutor, Mr. Haywood?

JUROR MILLER: Yes.

THE COURT: And he must prove each element of a crime beyond a reasonable doubt; do you understand that?

JUROR MILLER: Yes, sir.

THE COURT: And you will hold him to that burden and no other?

JUROR MILLER: Yes, sir.

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THE COURT: Have you heard Mr. Haywood's other questions that he asked the two previous occupants of seat eleven?

JUROR MILLER: Yes, sir.

THE COURT: Do you have any answers that those questions might prompt same or different from the other juror -- panel of jurors? No?

JUROR MILLER: Would you please repeat the question?

THE COURT: Sure. Do you have any answers to Mr. Haywood's questions that would prompt your answer different or the same as other -- as the other two jurors?

JUROR MILLER: No.

THE COURT: And as to Mr. Polk's questions, did you hear his questions that you he asked two times?

JUROR MILLER: Yes.

THE COURT: Would your answers be different from the other jurors?

JUROR MILLER: No.

THE COURT: The People pass for cause?

MR. HAYWOOD: Yes, your Honor.

THE COURT: Defense pass for cause?

MR. POLK: Yes, sir.

THE COURT: Challenges to the People?

MR. HAYWOOD: People pass.

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MR. POLK: We pass too.

THE COURT: And the defense?

MR. POLK: We pass. Yes, sir.

THE COURT: Ladies and gentlemen, you'll be our jury. I will tell you what to do in a moment.

Thank you for being with me, and all of you return to the first floor.

(At 10:44 a.m., the jury panel was excused.)

THE COURT: Just sit tight. I will bring out the other jury.

MR. POLK: Can we approach real briefly?

THE COURT: Sure.

(At 10:45 a.m., bench conference held.)

(At 10:50 a.m., jurors for Defendant White entered the courtroom.)

THE DEPUTY: You may be seated. Court is in session. Remain seated. Remain quiet.

THE COURT: Ladies and gentlemen of the jury -- of the two juries, you have been chosen to decide a criminal charge made by the State of Michigan. I will now ask the jury for Joshua Stewart to stand and raise your right hands to swear or affirm an oath.

THE CLERK: Each of you do solemnly swear or affirm that in this action now before the Court, you will justly decide the questions submitted to you, that unless

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you are discharged by the Court from further deliberation, you will render a true verdict and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the Court, so help you God?

JURORS: I do.

THE CLERK: You may be seated.

THE COURT: Same instruction for the jury judging Mr. White. Please stand and raise your right hands.

THE CLERK: Each of you do solemnly swear or affirm that in this action now before the Court, you will justly decide the questions submitted to you, that unless you are discharged by the Court from further deliberation, you will render a true verdict and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the Court, so help you God?

JURORS: I do.

THE CLERK: You may be seated.

THE COURT: Let me tell both juries. The jurors seated in the jury box nearest to me have blue tags. You can only associate with one another. The jurors in the jury box further from me have red tags, and you can only associate with one another. So the blues and the reds

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don't talk. When it's over, you can talk to anybody you want but not until then. And the elements.

Ladies and gentlemen, a trial follows this procedure: First, the prosecutor makes an opening statement where he gives his theories of the case. defendants' lawyer does not have to make an opening statement but either one or both of the defense lawyers may make opening statements after the prosecutor makes his or they may wait until later. The statements are not evidence. They are only meant to help you understand the evidence and the way each side views the case.

Next, the prosecutor presents his evidence. He will call witnesses to testify and show you exhibits such as documents or objects. The defendant's lawyer has the right to cross-examine the prosecutor's witnesses.

After the prosecutor has presented all of his evidence, defendants' attorneys may also offer evidence, but do not have to. By law, the defense does not have to prove innocence or produce any evidence. If the defense does call witnesses, the prosecutor has the right to cross-examine them. The prosecutor may also call witnesses to contradict the testimony of the defense.

After all the evidence has been presented, the prosecutor and the defendants' lawyer will make -- lawyers will make closing arguments. Like opening statements,

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these are not evidence. They are only meant to help you understand the evidence and the way each side views the case. Base your verdict solely on the evidence.

My responsibility as judge in the trial is to be sure the trial is run fairly and efficiently, to make decisions about the evidence, and to instruct you about the law that applies to the case. Take the law as I give it to you. Nothing I say is meant to reflect my own opinion about facts in the case.

As jurors, you are the ones who will decide the case. Your responsibility is to decide the facts of the case. This is your job and no one else's. Think about all the evidence and all the testimony, then decide what each piece of evidence means and how important you think it is. This includes how much you believe what each of the witnesses said. What you decide about any fact in the case is final.

When it is time to decide the case, you are only allowed to consider evidence that was admitted in the case. Evidence includes only the sworn testimony of witnesses, exhibits admitted into evidence and anything else I tell you to consider as evidence.

Again, you decide the facts of the case, so you decide which witnesses you believe and how important you think their testimony is. You do not have to accept or

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reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

In deciding which testimony you believe, rely on common sense and everyday experience; however, in deciding whether you believe a witness' testimony, you must set aside any bias or prejudice you may have based on race, gender or national origin of the witness.

There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that may have distracted the witness? How did the witness look and act while testifying? Did the witness make an honest effort to tell the truth or did the witness evade questions and argue with the lawyers? Does the witness seem to have a good memory. Does the witness' age or maturity affect how you judge his or her testimony? Does the witness have any bias, prejudice or personal interest in how the case is decided by you? Have there been any promises, threats, suggestions or other influences that affect how the witness testifies? In general, does the witness have any special reason to tell the truth or any special reason to lie? All in all, how reasonable does the witness'

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testimony seem when you think about other evidence in the case?

Questions the lawyers ask witnesses are not evidence. Only the answers are evidence.

Do not think something is true because a lawyer asked questions that assume or suggest it is true.

During the trial, lawyers may object to certain questions or statements made by other lawyers or witnesses. I will rule on these objections according to the law. My rulings for or against one side or the other are not meant to reflect my opinion about the facts of this case.

Sometimes the lawyers and I will have discussions out of your hearing. Pay no attention to any of these interruptions.

Do not discuss the case with anyone, including family or friends. Do not even discuss it with other jurors until the time comes for you to decide the case. When it is time for you to decide the case, I will send you to the jury room for that purpose. Then, discuss the case among yourselves but only in the jury room and only when all the jurors are present. When the trial is over, you may if you wish discuss the case with anyone.

The only information you will receive about the case will come to you in this courtroom. You must not

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consider any information that comes from anywhere else. Do not read newspaper headlines or articles relating to the trial. Do not watch or listen to television or radio comments about accounts of the trial while it is in progress. Until the jury service is concluded, you are not to discuss the case with others, including other jurors, except as authorized by me.

You are not to read or listen to any news reports about the case. You may not use a computer, cell phone or other electronic device with communication capabilities while in attendance at the trial or during deliberation. These devices may be used during breaks or recesses but may not be used at any time to obtain or disclose information about a party, witness, attorney or court officer, news accounts of the case or information collected through juror research on any topics raised or testimony offered by any witness or any exhibit.

Do not visit the scene of the occurrence that is the subject of the trial. You must not consider as evidence any personal knowledge you may have of the scene. Do not make any investigations on your own or conduct experiments of any kind. This includes using the Internet for any purpose regarding this case. If you discover a juror has violated my instructions, you should report it to me.

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During recesses of the trial, I will either send you back to the jury room or allow you to leave the courtroom on your own and go about your business, but do not discuss the case with anyone or let anyone discuss it with you or in your presence. If someone tries to do that, tell him or her to stop and explain that you are a juror, and that you are not allowed to discuss this case. If he or she continues, leave and report the incident to me as soon as you return to court.

Do not talk with the defendant, the lawyers or the witnesses about anything at all, even if it has nothing to do with the case. It is very important you only get information about the case here in court and when you are acting as the jury and when the defendants, the lawyers, and I are all present.

Do not take notes while you're in the courtroom. If you take notes, you may not give full attention to the evidence as it is being presented.

There is more than one defendant in the case. The fact that they are on trial together is not evidence that they were associated with each other or either one is guilty. Each jury must consider the defendant to which they are assigned separately. Each is entitled to have his case decided on the evidence and law that applies to him.

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In both trials, we have chosen a jury of 14. After you have all heard the evidence and my instructions, we will draw lots to decide the two of you from each jury who will be dismissed in order to form a jury of 12, charged upon their oath with reaching a verdict.

Possible penalty should not influence your decision. It is my duty to fix the penalty within the limits provided by law.

I may give you more instructions during the trial. At the close of the trial, I will give you detailed instructions about the law in this case. Consider all of my instructions as a connected series. Taken together, my instructions are the law you must follow.

After the evidence has been presented and the lawyers have given their closing arguments and I have given you the detailed instructions about the rules of law that apply to the case, you will go to the jury room to decide on your verdict.

Your verdict must be unanimous. That means every juror must agree on the verdict and the verdict must reflect the individual decision of each juror. Keep an open mind and do not make a decision about anything in the case until you go to the jury room to decide the case, deliberate and reach your verdict.

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THE COURT: Opening statement by the People.

MR. HAYWOOD: Thank you, your Honor.

On May 6th, 2016, the defendants murdered Aaron Foster, and by the end of this trial, I'm going to prove to you that they are guilty of felony murder, assault with intent to murder, armed robbery, felony firearm, and they were doing all of this in a stolen car.

And in order for you to understand this day, this crime, you need to come back to me to the date of May 6th, 2016 around seven o'clock in the evening. It's a spring day here in the City of Detroit when two friends were walking, Aaron Foster and his friend, Etoh Walker. They were walking and coming near to the intersection of Packard and Savage when they noticed a blue Intrepid driven by the Defendant, Joshua Stewart, came up to them and someone from the car asked them if they knew where weed house was, at which time, they told them they didn't know. And it appeared the car moved on. It was going down the street, but the car stopped and it backed back up and two people got out. One was the defendant here, White, Deontea White, and another person who is not on trial today by the name of Profit.

They got out of the car and they approached both men, Mr. Walker and Mr. Foster, with guns pointed. The defendant White had an AK-47 and Mr. Profit had a weapon,

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a pistol, handgun. And they demanded their property and money from them, at which time they didn't move quick enough, so Mr. Profit starts -- he starts shooting. He shot at Mr. Walker's feet several times.

Aaron started giving away his property. He gave him his belt. He gave him his shoes, gave him whatever he had. It appeared that they were satisfied at that point with their goods because they started to walk toward their vehicle to make the run, and which time, the defendant, Deontea White, decided to turn around and have some fun, and he shot the AK-47 at Mr. Foster as he was running from him, shot him in the back. Then they left.

Mr. Walker ran to his friend, tried to help him. People came out, put a cloth on it, tried to put it on the wound to stop the wound, stop the bleeding. 911 was called. Police got their pretty rapidly, and the EMS wasn't there and so the police took Mr. Foster in their car to the police -- to the hospital. Unfortunately, the injuries to his body did not sustain life anymore and he died.

Now, you would think at this point the defendant had gotten away with their crime that they would be done, but less than an hour after this murder, the defendants decided to rob someone else. They saw a young man by the name of Kyle Upshaw.

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Mr. Upshaw had washed his car and he was inside of his car cleaning the inside of his car in front of his home on Meade Street in the City of Detroit when he noticed the blue Intrepid going by his car. He didn't think anything of it, but then he heard the car stop, but before he could do anything, the defendant White and the defendant Profit again was in his face -- was in his face now with guns demanding money from him. And he told them, I don't have any money. I don't have anything, and he kept saying and he kept saying it loudly.

Inside of his home was his brother, Daniel Claxton, and Daniel Claxton heard what was going on with his brother. And Daniel Claxton has a CPL and he has a gun. And he came outside and he pointed the gun at the defendant, Deontea White. Deontea White shot him. Mr. Claxton also returned fire and both of them were hit. The defendant White was hit in the upper shoulder back and Mr. Claxton was hit in the stomach and there was multiple gun firing going on between the defendant Profit, defendant White and now Mr. Claxton.

After the firing had gone and the defendants had managed to run away, losing one of the -- one of the -- one of the pistol that they were shooting, lost one of the pistols there, had left it at the scene, they jumped into their car and they took off.

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Mr. Upshaw runs into his home, sees his brother shot now, and they take off to the hospital. They don't know what hospital to go to. They ended up going to Children's Hospital.

In the meantime, the defendants, they are both taking -- Joshua Stewart, driving the car, is taking Mr. White to the hospital, also. They stop at a marijuana dispensary because they've got to get rid of the guns. Profit jumps out of the car with an AK-47 and the other weapons and take them into the -- into the dispensary.

And then they finally arrived at Detroit Receiving Hospital, and then they're taking in their -- they look at Mr. White and take him into surgery for his injuries.

And then the police, of course, is called because it's a gunshot wound, somebody has been shot. The police are called. They come to the location. They see Mr. Stewart's car. They see the car has bullet holes in it. Mr. Stewart gives them a story about walking down the street and somebody is shooting and him getting into a car and helping his friend, don't know anything about it.

At some point, Mr. Claxton is transferred from Children to Receiving, so now we have Kyle Upshaw now at Receiving telling the police what really happened. The defendant Stewart at this time is taken into custody for

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the motor vehicle.

Further investigation turns up that the defendants were the shooters in this case. Deontea White as well as defendant Stewart were charged with these crimes, assault with intent to murder, felony murder, armed robbery, felony firearm because they used a gun in this crime as well as having the stolen car.

At the end of the trial, I'm going to come to you and I'm going to ask you to find the defendant guilty, both defendants guilty just as they're charged. Thank you very much.

THE COURT: You're welcome. For Joshua Stewart.

MR. POLK: At this time, Judge, we reserve our opening.

THE COURT: For Deontea White.

MS. CAL: We reserve our opening, your Honor.

THE COURT: Then call your first witness.

MS. CAL: Judge, if we might approach, Judge?

THE COURT: Sure.

(At 11:11 a.m., bench conference.)

(At 11:14 a.m., bench conference concluded.)

Jurors, you know, we'll do a witness now, and then I'll excuse you till tomorrow morning. All the preliminary things are finished, and we'll get right into the evidence tapes.

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THE CLERK: Please raise your right hand. Do you solemnly swear that the testimony you're about to give in the cause now pending before this Court will be the truth, so help you God?

MS. FOSTER: I do.

THE CLERK: Give your name to the court reporter, then have as seat in that black chair.

MARGUERITE FOSTER,

(At 11:14 a.m., was sworn and testified as follows:)

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q Ma'am, will you please state your full name for the record.

A Marguerite Foster.

Q And, Ms. Foster -- Mrs. Foster, how are you related to Aaron Foster?

A I'm his mom.

Q I'm going to take you back to the date of May 6th, 2016. Did you get some news about your son?

A Yes, I did. I received a call.

Q Do you remember about what time you got that call?

A It was probably about 7:00, 7:30 in the evening.

Q Do you remember who you got the call by, who called you?

A My oldest son called from work first. And then right

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after hanging up from him, the hospital called. I think it was like the minister or priest at the hospital.

Q Were you able to speak to him, the priest at the hospital?

A Yes.

Q And after you spoke to the priest at the hospital, did you do something?

A He asked us to --

MS. CAL: Objection.

THE WITNESS: -- to come down.

THE COURT: I'm sorry?

MS. CAL: Objection, hearsay, your Honor --

THE COURT: Overruled.

MS. CAL: -- to what the priest said.

BY MR. HAYWOOD:

Q So after he told you to come, do you go down?

A Yes, we did.

Q When you got down at that location, what if anything happened?

A We had to go into a small room to wait. And then there was three doctors came, and they were asking if we had any idea about our son being brought in, and I told him, I said my oldest son called and said something happened to Aaron, but we wasn't real sure like in depth, and they proceeded to tell us that he was shot and he didn't make it.

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Q So when you got to the hospital, he had already -- he had already passed?
A Yeah. He had already passed.
Q Were you able to see him then, see him at the hospital?
A Yeah. I had to go identify him.
Q I'm going to show you what's been marked as People's 1. Do you recognize People's Exhibit Number 1?
A Yes, I do.
Q And how do you recognize it?
A That's my son. That's my younger son, Aaron.

MR. POLK: No objection on behalf of Mr. Stewart.

MS. CAL: No objection on behalf of Mr. White.

THE COURT: It's admitted.

MR. HAYWOOD: I have nothing further, your Honor.

THE COURT: Cross-exam?

MR. POLK: I don't have any questions on behalf of Mr. Stewart, Judge.

MS. CAL: No questions, your Honor.

THE COURT: Thank you, ma'am. You can step down, ma'am. You're free to go.

(At 11:20 a.m., the witness was excused.)

MR. HAYWOOD: I would call as my next witness Mr. Etoh Walker.

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THE CLERK: Okay. Please raise your right hand. Do you solemnly swear that the testimony you're about to give in the cause now pending before this Court will be the truth, so help you God?

MR. WALKER: Yes.

THE COURT: Have a seat in the black chair, please.

ETOH WALKER,

(at 11:21 a.m., was sworn as a witness and testified as follows:)

MR. POLK: May we approach, Judge?

THE COURT: Sure.

(At 11:21 a.m., bench conference.)

(At 11:22 a.m., bench conference concluded.)

DIRECT EXAMINATION

BY MR. HAYWOOD.

Q Sir, would you state your full name for the record?

A Etoh Walker.

THE COURT: What's your first name?

THE WITNESS: Etoh.

THE COURT: Spell it.

THE WITNESS: E-t-o-h.

THE COURT: Thank you.

THE WITNESS: You're welcome.

BY MR. HAYWOOD:

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Q Mr. Walker, how old are you?
A I'm 22 years old.
Q Mr. Walker, I want to take you back to the date of May 6, 2016. Do you recall being with Aaron Foster that day.
A Yes.
THE COURT: You have to to speak louder.
THE WITNESS: Oh, yes, I do.
BY MR. HAYWOOD:
Q What time did you come in contact with Aaron Foster that day?
A Well, he had been with me all day because he was living with me at the time.
THE COURT: Can the jurors in the second jury box hear? Okay. Go ahead.
BY MR. HAYWOOD:
Q So he was living with you at that time?
A Yes.
Q At some point did you -- around seven o'clock that evening, did you leave where you were at and go to a location at Packard at Savage, in that area?
A Yes.
Q Where were you going?
A I was going to a gas station in the neighborhood.
Q And while you were traveling to the gas station, did anything happen?

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A Yes.
Q What happened and where did it happen?
A Well, when me and him was walking to the gas station, we were approached by a car, and it had three gentlemen inside the car. And they asked me and Aaron --

MR. POLK: Objection as to "they," Judge.

MS. CAL: I would join in that objection, your Honor.

THE COURT: So somebody said something?

MR. HAYWOOD: Yeah. Somebody said something.

THE COURT: I'll allow it.

THE WITNESS: Okay. So someone in the car asked me and Aaron do we know where we can get some weed from, and Aaron told him no, we don't. So they pulled off afterwards, and when they got to the corner, they pulled back the corner.

BY MR. HAYWOOD:
Q Would that have been --

THE COURT: Instead of saying "they" pulled back, so what pulled back?

THE WITNESS: The gentlemen in the car.

THE COURT: Okay. What pulled back?

THE WITNESS: The gentlemen in the car.

BY MR. HAYWOOD:
Q The car pulled back?

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A You say what?
Q The car pulled back?
A Yes, they --
THE COURT: Okay. Go ahead.
THE WITNESS: Anyways, they had pulled back and two gentlemen got out of the car. There were two weapons on me and Aaron and things like this, and they robbed us.
BY MR. HAYWOOD:
Q Okay. Let's just step back for a second. What street were you walking on?
A I was walking on Savage.
Q And when you said that this car pulled up, was that car -- did that car also pull up on Savage?
A Yes.
Q And do you know if Savage goes east and west or north and south, if you know that?
A I'm not exactly.
Q Okay. So you said that the car went to a corner. Would that corner -- what would that corner have been that they -- that the car went to?
A Roby.
THE COURT: Talk louder.
THE WITNESS: Roby.
BY MR. HAYWOOD:
Q Roby?

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A Yeah.
Q All right. And what happened at that point? You said the car came and then the car pulled back; is that correct?
A Yes.
Q Did it come back in reverse?
A Yes.
Q When the car came back in reverse, were you looking at it?
A Yes.
Q What if anything were you saying at that time, were you thinking at that time?
A Well, I'm thinking that this -- this can't be good.
Q And then you said you saw somebody get out of the car.
A Yes, I did.
Q Did you see where they got out of the car from?
A Yes.
Q Where did they get out of the car from?
A The backseat.
Q How many people got out of the back seat?
A Two.
Q Did you see if there was still somebody in the car?
A I know there was a driver still in the car.
Q The two people who got out of that car, do you see any of that -- any of those -- that person -- any one of those people in court today?
A Yes, one of them.

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Q Who do you see?
A The gentleman here, White.
Q And what is he -- describe what he's wearing for the jury.
A He's wearing black pants and a tie and he has a ponytail.
Q And what color shirt?
A I guess a more grayish-blue type of shirt.

MR. HAYWOOD: Thank you. For the record, the witness has identified the defendant in this case, Deontea White.

BY MR. HAYWOOD:
Q Now, you said there was another person that was there; is that correct?
A Yes.
Q And who came up to you?
A The other gentleman.
Q And what happened once that person came up to you?
A Well, he tried to reach in my pockets and things like this after he pointed his weapon at me. I moved his hand and things like that, and then he pointed a gun in my face and he asked me was this a game and things like that. I didn't respond to him, and then he fired several shots at my feet.
Q I'll show you what's marked as People's proposed Exhibit Number 2 for identification. Do you recognize People's proposed Exhibit Number 2?

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A Do I recognize number 2, the exhibit?
Q The exhibit. Have you ever seen that exhibit before?
A Yes.
Q And do you recall when you saw that exhibit first?
A Not the exact date, no.
THE COURT: Wait, I can't hear you.
THE WITNESS: I said not the exact date. No.
BY MR. HAYWOOD:
Q Do you recall where you saw it at?
A I believe the police station.
Q The police showed it to you?
A Yes.
Q And in that exhibit, are there six photographs?
A Yes.
Q And were you able to pick out anybody in that exhibit?
A Yes.
Q Who were you able to pick out?
A The first picture.
Q And who was the first picture?
A Well, I'm not -- I don't know his name.
Q But how do you know, why did you pick him out?
A Because he was the one that approached me when the incident happened.
Q He was the other guy, other than the defendant White in court, he was the other guy?

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A Yes.

MR. HAYWOOD: Your Honor, at this time I'd move People's proposed Exhibit Number 2 into evidence.

MR. POLK: No objection on behalf of Mr. Stewart.

MS. CAL: No objection on --

THE COURT: It's admitted.

MS. CAL: -- behalf of Mr. White.

BY MR. HAYWOOD:

Q Now, when you pick out this gentleman as the person who was robbing you, on the exhibit, you mention that he had a gun. Do you remember what kind of gun it was?

A Not for certainty, no.

Q Do you know the difference between an automatic and a revolver?

A Yes.

Q Do you know if it was either an automatic or revolver?

A It was like it was semiautomatic. It had an extended mag.

Q When you said an extended mag, a magazine?

A Yes.

Q So this person approaches you, and you said he started reaching in your pockets?

A Yes.

Q And then what happened next?

A I moved his hand away from my pocket and things, and then

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he pointed his weapon at my head, and he asked me do -- did I think it was a game that he was playing, and I didn't respond to him. And then after that, he started to shoot at my feet.

Q How many times did he fire?

A I'm not really sure.

Q Would you say it was more than once?

A Yes.

Q Do you know if it was more than twice?

A Yes.

Q After he fired the gun, what if anything did you do?

A I didn't do nothing. I just stood there.

Q What happened next?

A Well, after that, I guess he must have been intimidated or something. He turned -- he turned from me and he went back to his vehicle.

Q Where is Aaron at this time?

A Aaron is in front of White at the time.

Q Did defendant White and the other gentleman, were they close to each other, the other robber? Were they close to each other, where you were standing?

A No. Are you referring to the guy that robbed me? No.

Q I'm sorry?

A Are you referring to the guy that robbed me? No.

Q When you got robbed, where was Aaron standing in proximity

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to you?
A About ten or 15 feet away from me.
Q Was Aaron standing in front of you, in back of you or to the side of you?
A He was standing in front of me.
Q When the other robber was -- when the robber was standing with you, where was the Defendant White? Where was he at?
A He was in front of Aaron.
Q Did you see anything that happened while the Defendant White was in front of Aaron?
A All I know is he was pointing his weapon at him.
Q Did you see what kind of weapon the Defendant White had?
A Yes. It looked like an AK-47, but it was small, a miniature size.
Q What happened after you saw the Defendant having the weapon -- pointing the weapon at Mr. Foster?
A That's all I seen because the guy was still in front of me.
Q What did you see next?
A Well, after he turned from me and went toward the car --
Q He would be the robber?
A Yes.
Q Okay.
A I pulled my attention back on Mr. White and Aaron. And at this moment, I seen Aaron had all his belongings in his

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hand.

Q Do you recall what he had?

A From what I seen, he had his shoes and I'm guessing what he had in his pockets, I believe, and he gave it to him.

Q So you saw him give him his shoes. What kind of shoes were they; do you remember?

A I believe they was Air Max Shoes.

Q Air?

A Max, Nikes.

Q Nikes?

A Yes.

Q Sneakers?

A Yeah. Yes.

Q And did you see Aaron give him a belt?

A Yes.

Q And did you see him give him anything else other than a belt and his shoes?

A No.

Q Once Aaron gave him the shoes and a belt, what was the next thing that you saw?

A I saw White turn, and he went toward the car and he put Aaron's belongings in the car. And then after that, I told Aaron to come with me so we can run away from the scene. And in the process of that, White turned and he shot Aaron in his back.

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Q Did you hear the defendant White say anything?
A No.
Q He just -- did you hear anybody say anything when they got his car open or before they got to the car?
A No.
Q So he turns around and he shoots Mr. Foster. Are you looking at him at the time?
A Yes.
Q Once he shoots Mr. Foster, what if anything do you do?
A Well, I run to Aaron to see how bad the situation is as far as that. And then I started to hold him, you know, because he was taking his last breaths and things like that, and I seen Mr. White get in the car and they drove away.
Q So you saw him run up -- you saw them go away, and then you're holding your friend. And do you ask for someone -- do you call 911?
A Well, the neighbors heard the shooting, so there was a crowd gathering around the scene.
Q Do you recall if anything -- anybody -- any police came to that location?
A Yes, the police came.
Q What happened once the police got there?
A Well, when the police got there, they -- they picked up Aaron and they put him in the back of the car because I

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believe they couldn't wait for the ambulance to arrive.
Q And they took him -- took him away?
A Yes.
Q And you were still at the scene at the time?
A Yes.
Q What happened at that point?
A Well, after that, I was sitting on the curb and things, and a police officer came to me and asked me for my statement.
Q Were you able to give the police officer your statement about what happened?
A Yes.
Q Then where did you go after that point?
A Right after that, I went back home.
Q Can you describe the car that the defendant was driving?
A It was a dark-colored Intrepid.
Q And all this occurred in the city of Detroit?
A Yes.
Q It's also the county of Wayne. Do you recall if you ever gave a description to the police of the defendant White and the robber, the person that robbed you?
A Yes.
Q When the robber shot at your feet, do you recall him saying something to you about killing you?
A Yes.

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Q What did he tell you?
A Well, since I didn't move or I didn't say anything, he told me he wasn't going to kill me because I wasn't no bitch.
Q After he told you that, did you -- did you feel a little bit more calm that you weren't going to get hurt?
A No.
Q Do you recall how many times the Defendant White shot the AK-47?
A Once.

MR. HAYWOOD: I have nothing further at this time, your Honor. Thank you.

THE COURT: Cross-exam?

MR. POLK: I don't have any questions on behalf of Mr. Stewart, Judge.

THE COURT: Ms. Cal?

CROSS-EXAMINATION

BY MS. CAL:
Q Mr. Walker?
A Yes.
Q Good morning, Mr. Walker.
A Good morning to you.
Q Now, you said that you and Aaron had been walking for awhile before the incident occurred, correct?
A Yes.

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Q About how long had you been walking?
A A few minutes.
Q Can you tell us who many? Five, Ten? Fifteen?
A Maybe about five, ten.
Q And it was just the two of you?
A Yes.
Q Now, the prosecutor kept indicating that you were robbed, that you were robbed, but you stated that you were not robbed, correct?
A That I didn't --
Q You were not robbed, were you?
A Yes, I was robbed.
Q What was taken from you, sir?
A Well, I had $10 that was taken from me.
Q Now, you indicated that the person put their hand near your pocket but you knocked the hand away?
A Yes.
Q So he got the money after you knocked his hand away?
A His hand was halfway in my pocket, and when I smacked his hand away, my $10 fell out of my pocket and he just picked it up.
Q And nothing else? I'm sorry, sir.
A No.
Q And during that transaction with the person you were interacting with that you've identified, you were paying

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attention to what he was doing with you, correct?
A Yeah.
Q You watched him try and reach in your pockets, correct?
A Yes.
Q And you watched him try to point a gun at your face, correct?
A Yes.
Q And then you moved the gun away from your face, correct?
A Yes.
Q And then you smacked his hand away from your pocket, correct?
A Yes, all this happened.
Q Those were all interactions with you and the person that you pointed out, correct?
A Yes.
Q How long had that transaction taken when he said he wasn't going to kill you because he --
A I'm not really sure. I wasn't counting or looking at my watch or something.
Q I know, but you know how long it took you to walk that far, five to ten minutes. Did it take as long for that transaction to take place or shorter?
A I believe it was a shorter time span.
Q During the time that you were having your transaction with this individual, you couldn't see what was happening with

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Mr. Foster, correct?

A I only got two glimpses of what was going on between him and Mr. Foster.

Q I'm sorry. I didn't understand.

Q I said I only got two glimpses of what was going on between White and Foster.

Q Okay. Okay. So at the time that you -- until the first person moved away from you and you watched him go back to his car? Are you nodding yes?

A Yes.

Q And did he do anything else once he went to the car?

A No.

Q And after that, you said you had your attention go to Aaron?

A Yes, to Mr. White, yes.

Q Now you keep saying Mr. White. Did you know his name at the time?

A No, I didn't.

Q You've learned that subsequently?

A Yes.

Q Now, did you give a description to the police of the individual you thought had shot Mr. Foster?

A Yes.

Q And what was the description you gave?

A A tall gentlemen, kind of skinny, had long dread-like hair

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down to his shoulders.
Q Did you give any description about his complexion?
A Yes.
Q What was the description you gave the police?
A I said he was light skinned, a little bit lighter than myself, actually.
Q A little bit lighter than?
A My complexion.
Q Did you give a clothing description?
A No.
Q And what time of day or night was this?
A It was broad daylight outside. It was daytime.
Q When you say broad daylight, what time was it?
A I'm not really sure around what time it was that it happened.
Q Well, was it in the morning?
A No. It wasn't in the morning.
Q And it was between twelve and five?
A I believe so.
Q It wouldn't have been after six or seven?
A No.
Q Do you think it was closer to noon than it was five?
A No. It was closer to five.
Q Now, when you gave a statement to the officer at the scene, did you get the name of that officer who you gave

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your statement to?

A No.

Q And was that a written or oral statement you gave to the officer on the scene?

A It was an oral statement I gave.

Q And this was a Detroit Police officer?

A Yes.

Q Can you describe the officer?

A No. I know the officer was a male so --

Q African-American or white?

A I'm not sure.

Q You're not sure?

A No.

Q Was it still broad daylight when you talk to the officer?

A Yes.

Q But you're not sure of his race, correct? Is that a yes?

A No.

Q You're not sure of is race, correct?

A I'm not sure. No.

Q Thank you. Now, did you go to -- did you give a second statement?

A Yes.

Q Where was that at?

A I'm not really sure of the location. I know it was downtown. The detectives came and picked me up

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afterwards.

Q Okay. So you went to police headquarters?

A I believe so, yes.

Q Okay. You weren't out on the street any longer?

A No.

Q When was that statement given?

A I'm not sure of the time.

Q No. What day was that statement given?

A The same day.

Q The same day, May 6th?

A Yes.

Q Now, did you write that one?

A No.

Q But you had an opportunity to review it, right?

A Yes.

Q And everything you said to the officer was written in that statement, right?

A Yes.

Q You didn't find any corrections that you needed to make, right?

A No.

Q Now, did you subsequently go to a lineup?

A No.

Q Did you go somewhere and look at some pictures and they asked you, could you recognize anybody?

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A Yes.
Q You did with the other person, right, that tried to rob you, correct? That's the one that we just looked at?
A Yes.
Q Now, did you go to a lineup for Mr. White?
A No.
Q Pardon me?
A No.
Q You did not go to a lineup for Mr. White?
A No.
Q So you never saw a lineup where Mr. White was involved in, correct?
A No.
Q You did not go to one?
A Correct.

MS. CAL: Your Honor, may I approach the witness?

THE COURT: Sure.

BY MS. CAL:
Q Mr. Walker, I'm showing you documentation from the Detroit Police Department about -- for you, Etoh Walker.
A Okay.
Q If you can read this to yourself. Look at it. It's a three-page document.

THE COURT: What are you asking him to do?

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MS. CAL: Look at the document that I've just showed him.

BY MS. CAL:

Q You've had an opportunity to look at these documents I showed you. Did you see Mr. White's name on any of these documents?

A Yes.

Q You did? Is that a yes?

A Yes.

Q And are these documents a photo -- the second and third page are photographs?

A Yes.

Q Is one of those photographs Mr. White?

A Yes.

Q Okay. So you did go to a photo lineup with Mr. White in it?

A Is that what you're saying, you're asking?

Q Yes.

A Are you asking me?

Q Yes.

A No, I didn't see no photo lineup.

Q So you're saying that on May the 7th, this document that indicates you went to a photo lineup for Mr. White is incorrect?

A I believe so.

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Q You believe so? So you did not pick Mr. White from this lineup, photo lineup?
A No.
Q So the only lineup where you saw anybody was the other person, right?
A Yes.
Q And the photo lineup for Mr. White, you didn't pick Mr. White out, correct?
A Uh-uh.
Q And now you're telling us you didn't go to this photo lineup at all, right?
A No.
Q Pardon me?
A No.
Q So this photo lineup that indicates that you were there for Mr. White is false?
A I believe so. I don't really recall that.
Q Sir, if you did go to a photo lineup for Mr. White and if those documents are correct, you didn't pick him out, did you, on May the 7th?
A Say that again.
Q I said if those documents are correct and you did go to a photo lineup for Mr. White, you didn't pick him out on May 7th, did you?
A No.

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Q And that's the day after this incident?
A I believe so, yes.
Q I'm sorry?
A I said I believe so, yes.
Q Thank you. Now, the first time you identified that Mr. White was the shooter was at the preliminary examination, right?
A Yes.
Q And do you remember how many people were at the preliminary examination?
A No.
Q You don't?
A No.
Q How many defendants were there?
A Oh, about two.
Q Would it be the same two that are here now?
A Yes.
Q So with the same two defendants sitting at the table, on that date on July 1st, when you went to the preliminary examination here in this building, you gave the testimony?
A Yeah, okay.
Q And on July 1st, 2016 in this building when you saw the two of them sitting together, that's when you pointed out Mr. White?
A Yes.

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Q Did you also give the police in your statement what type of car it was?
A I gave the best description I could.
Q And did you tell them it was a Dodge Stratus?
A No, I said an Intrepid.
Q You didn't tell the police it was a Status in that initial statement?
A I believe I said Intrepid.

MS. CAL: May I approach the witness again with his statement, your Honor?

THE COURT: Sure.

BY MS. CAL:

Q I'm showing you a three-page document, sir, dated May 6th, 2016 at 11:15 p.m. It has your name on it. Do you recognize this is the statement you gave the police? Keep going. That is your signature at the bottom of each page?
A Yes, it is.
Q Now, let me point to you on page three. Were you asked this question?

"Are you sure the vehicle was a Dodge Stratus?

Answer: Yes, I'm not sure of the year but I saw a Stratus."

Did you sign you name to the bottom of that page?
A Yes.
Q So you indicated to us everything in that statement was

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true, correct?
A Yes.
Q So you did tell them it was a Dodge Stratus, correct?
A I told them I saw it on a different date.
Q I asked you for that date. You said it was a Dodge Stratus.
A It was the same date.
Q You told them it was a Dodge Stratus in the statement, didn't you, sir?
A I said I believe more it was a Status, but it was an Intrepid.
Q Sir, I'm looking at the statement. I asked you about the statement.
A Okay.
Q In your statement, you told the police it was a Dodge Stratus, correct?
A Okay.
Q Sir, is that correct?
A Yes. I would say from looking at it.
Q I'm sorry. You want to look at it again?
A Yeah, yeah.
Q Okay then.
A No, I don't need to look at it again.
Q Okay. So you did tell them it was a Dodge Stratus?
A Yes.

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Q Thank you.

MS. CAL: I don't have anything further of this witness, your Honor.

THE COURT: Anything else?

MR. HAYWOOD: Yes.

REDIRECT EXAMINATION

BY MR. HAYWOOD:

Q Are you familiar with cars, sir?

A Not really.

Q Not really?

A But I do know an Intrepid and Stratus look similar though. That was the confusion.

Q They look alike?

A Yeah.

Q And in July, when you came here at the preliminary examination, you identified the Defendant White as a shooter. Why did you do that?

A Say what?

Q When you came to the preliminary examination July 1st --

A Yes.

Q -- 2016, you picked out the Defendant White as a shooter of the AK-47. Why did you do that?

A Because he's the shooter.

Q And today when you testified in front of this jury that the Defendant White is the shooter and you identified him

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as the shooter, why did you do that today?

A Because I saw him shoot Aaron.

MR. HAYWOOD: Nothing further, your Honor.

MS. CAL: Could I have a follow-up, your Honor?

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MS. CAL:

Q But on May 7th at the police station when you were shown a lineup with Mr. White in it, you could not identify it; is that correct?

MR. HAYWOOD: Object. That assumes facts not in evidence. He was never shown a lineup.

MS. CAL: Photo lineup, photo array.

MR. HAYWOOD: That's a big difference.

BY MS. CAL:

Q At the photo array, you were not able to pick Mr. White out at the police station the next day after the incident?

A I don't believe I saw a photo of him.

Q So these documents are not true that you appear --

THE COURT: Well, you can't ask a question like that. He said he did not believe he saw a photo of him.

BY MS. CAL:

Q So after you looked at these documents, you saw his name, Mr. White's name on here, correct?

A After you just showed me, yes.

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Q And you saw a photo label with Mr. White's name on it, correct?

A Yes.

Q But you don't believe you ever saw these before?

A No, not until today.

THE COURT: Thank you. You can step down. You're free to go.

(At 11:56 a.m., witness was excused.)

THE COURT: Ladies and gentlemen, that will conclude our session for today. Each jury is being cared for by a different bailiff, so the jury for Mr. Stewart be back at 8:45, 8:45 for the Stewart jury; 9:00 a.m. for the White jury. And again, you'll probably be arriving at about the same time, so steer clear of one another. Red badges with red badges, blue badges with blue badges. Have a pleasant evening. Thank you.

THE DEPUTY: All rise for a jury.

(At 11:57 a.m., the jury for defendant White and the jury for defendant Stewart were excused.)

THE COURT: Do they know where to go?

THE DEPUTY: Tomorrow morning when we meet, we're going to meet at the far end of the hallway. Do not come into the courtroom until myself and my partner comes down to get you, and we'll all meet at the far end of the hallway and come in together as a group.

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THE DEPUTY: You may be seated. We ask everybody remain in the courtroom until the jury has left the courtroom.

THE COURT: Well, you wanted to make an argument about something? Go ahead.

MR. POLK: Well, Judge, I wanted to make a record as it relates to the -- there were some lab reports that were provided, and in looking at the lab reports, they were provided on October 27th by way of e-mail for 20 different labs. And in looking at the dates of the completion of some of the lab reports, I note that there were six different separate reports. One report was done and completed on June 3rd. Another report was completed on September 21. Another report was completed on September 27th, another one September 21 and the final report was completed on June 23rd.

Now, these reports were completed well in advance of October 27th, and that's when they were provided, and so based upon that, I'm asking that the People not be allowed to utilize the reports from the Michigan State Police. If in fact after reviewing them, I had wanted to utilize an expert to address any of them, they weren't provided in a proper time. I know it's one thing if you can get them from the lab because they hadn't completed them and then they got them to you late. It's

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something totally different when these reports are completed and they're not turned over, and so I'm asking that they be stricken.

THE COURT: Mr. Haywood?

MR. HAYWOOD: Your Honor, the defense was put on notice from the very, very beginning that we would have persons from the Michigan State Police testifying on the ballistics in this case. As far as the report, they're -- when the reports are originally sent over, they sent us back a report saying that they received some. But the analysis in this case wasn't done until September 21st. That's when the analysis was actually done on the case. And, you know, when they gave it to me is when I gave it to defense counsel.

THE COURT: I'll allow the reports over objection but subject to strength.

MR. POLK: Okay.

MS. CAL: For the record, I'm just joining in that motion.

MR. POLK: Okay. And then there was a -- in reference to the witness list on -- the witness list has been amended on three separate occasions. It was provided by way of e-mail as well, and there were additional witnesses placed on the witness list. And based upon the tardiness of the witness list, the court rule states that

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the witness list must be provided to the defense within 30 days prior to the commencement of the trial. This trial has been set on track for the date of October 31st for at least two months.

THE COURT: So what do you want me to do?

MR. POLK: Strike the witness list because it wasn't timely provided to the defense.

MR. HAYWOOD: Just for the record, your Honor, they had the witness list for months.

MR. POLK: No.

MR. HAYWOOD: Excuse me. I'm talking. They had the witness list for months. What I added is that I added several people to the witness list as an amendment to the witness list, but they had the --

THE COURT: Well, I already ruled.

MR. HAYWOOD: -- witness list.

THE COURT: The motion to strike is denied.

MR. HAYWOOD: Thank you.

THE COURT: What else?

MS. CAL: Your Honor, may I make an argument on that motion?

THE COURT: Oh, sure.

MS. CAL: Thank you. Your Honor, the witness list -- the first witness list that was provided was by e-mail. That was October the 4th, so it was not months

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ago. It was within this month, and the court date was October 31st. That's well under 31 -- 30 days. So when he tells you it was months before --

THE COURT: Well, what do you want me to do, is my question. That was my question to Mr. Polk.

MS. CAL: I would ask you to strike the witness list completely, and if not completely at least strike the amendments when he amended them on October the 27th.

THE COURT: Denied. What else?

Okay. See you tomorrow at nine o'clock. Everybody be prompt.

MS. CAL: Your Honor, I have one more.

THE COURT: Okay.

MS. CAL: I just want to make a record of it.

THE COURT: Sure.

MS. CAL: I was provided a video of my client regarding a statement that he made to them. It was not made -- It was not provided -- it was provided to me at exam, an exam. I could not play it. It would not play. I indicated to Mr. Haywood immediately that it would not play. He said he would provide me another one. I've asked him on several occasions to provide me another one. He provided it on October the 21st, and it still will not play. I've had the the I-tech person up in the prosecutor's office try to play it. It still will not

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play.

THE COURT: And what do you want me to do?

MS. CAL: Well, I just want to put on the record that I never got the video that would play, and I'd just like Mr. Haywood to say on the record that he's not going to be using that video.

MR. HAYWOOD: Your Honor, I -- I turned over two copies of the video. It's not my fault they can't -- they can't play it on their computer, but at this point, I have -- I have no legal reason that I would have even put in Mr. White's statement.

THE COURT: So you're not going to play it?

MR. HAYWOOD: No.

THE COURT: Thank you.

MS. CAL: Judge, I still need a copy of it. If there's something exculpatory on there, I'd like to see it, one that plays, and it doesn't play because they put something called a player on the video. They just gave me the video. There's something called a player.

THE COURT: Well, what do you want me to do?

MS. CAL: Well, I'm asking you to order him to provide me a copy that has the player on it.

THE COURT: Denied.

MS. CAL: The player was on it.

THE COURT: All of this should have been handled

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in front of Judge Kenney months ago.

MS. CAL: And it was. He told him to provide me with a copy of it, and he didn't provide it.

THE COURT: And what do you want me to do now?

MS. CAL: I'm asking you to have him to provide me a copy that has the player on it. There's something that's called a player. It's called Generex, and it has to be put on with the video so that you can play it. They do it with all the other videos. They did it with everyone else's video. They just didn't do it with Mr. White, and the person that made the video or put it on there, it's a very simple thing for them to put the player on there. It's not like I'm asking something extraordinary. Just put it on the --

THE COURT: Well, I don't know if you are or aren't. Can you have that thing added.

MR. HAYWOOD: I can't do it. Can you?

OFFICER MITCHELL: I can try.

MR. HAYWOOD: Officer in charge says he will -- -- he will amend the video.

THE COURT: And that's Sergeant Mitchell.

MS. CAL: Thank you, your Honor.

THE COURT: See you. See you tomorrow, nine o'clock.

(At 12:05 p.m., proceedings concluded.)

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STATE OF MICHIGAN)

) SS

COUNTY OF WAYNE)

R E P O R T E R' S C E R T I F I C A T E

I, Eileen Higer, CSMR-5018, do hereby certify that I have recorded the proceedings had and testimony taken in the above-entitled matter at the time and place hereinbefore set forth and that the foregoing is a full, true and correct transcript of proceedings had in the above-entitled matter; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Eileen S. Higer, CSMR-5018

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 16-005731-01-FC
16-005731-02-FC

JOSHUA LAMAR-JAMES STEWART,
DEONTEA JAMAR WHITE,

Defendant.

_____/

JURY TRIAL - VOLUME III

Taken in the above-entitled matter before Honorable Michael Callahan, Third Judicial Circuit Court Judge, Detroit, Michigan on November 3, 2016

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Detroit, Michigan

November 3, 2016

- - -

(At 9:30 a.m., proceedings begin.)

THE COURT: People of the State of Michigan vs. Deontea White and Joshua Stewart. Counsel, your appearances.

MR. HAYWOOD: Good morning, your Honor. Ron Haywood for the People.

MR. POLK: Your Honor, may it please this Honorable Court, Larry Polk on behalf of Joshua Stewart, who is present.

MS. CAL: Good morning, your Honor. Wanda Cal on behalf of Deontea White, who is present, your Honor.

THE COURT: And, Ms. Cal, there was an offer -- a settlement offer in this case. Is your client ready to place that on the record.

MS. CAL: Yes. On Thursday, the prosecution made an offer to Mr. White of 25 years plus two for the gun. And I did communicate that offer to Mr. White, did I not, Mr. White?

DEFENDANT WHITE: You did.

MS. CAL: And you rejected that offer?

DEFENDANT WHITE: Yep.

MS. CAL: And decided to go to trial?

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DEFENDANT WHITE: Yes.

MS. CAL: Thank you.

THE COURT: Anything else? Bring in the juries.

MS. CAL: Your Honor, we have some argument about exhibits that the prosecutor had just shown to us this morning. Do you want us to do those now or are you --

THE COURT: And are you objecting these?

MS. CAL: Yes.

THE COURT: What are they?

MS. CAL: On the Packard case, I'm -- I am objecting to Exhibits 9, 10, 11 and 12. They're cumulative and I believe prejudicial. They are just cumulative shots over and over of the same area of blood, a lot of blood on the sidewalk or the street area. There is four pictures of that. I think that's cumulative.

THE COURT: Blood on the sidewalk is prejudicial?

MS. CAL: Four. Four.

THE COURT: You can show me the pictures. Show me the pictures now.

MS. CAL: Nine, ten, eleven and twelve.

THE COURT: Moving right along, what else?

MS. CAL: The next one is 16 and 17. They are casing of the -- they are pictures of a casing of a -- of

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a bullet number eight at the scene, so there's two copies of bullet number -- casing number eight at the scene that have that number eight on there on the yellow tab that has number eight showing at the scene, that that was the eighth casing, and there's two copies of that. I think that's cumulative.

THE COURT: Are you going to put in two copies?

MR. HAYWOOD: Your Honor, I'm going to -- I was planning to put on everything I have marked and shown to the defense attorney.

THE COURT: And these are shell casings in the picture?

MS. HAYWOOD: Yes, yes.

THE COURT: I'll allow those over objection and I've reviewed the complained of photos with the bloodstains on the pavement and the curbside. I do not find that there -- there are no bodies in the pictures. It's simply what the People describe as a bloodstain. I don't find that it's prejudicial.

MS. CAL: And cumulative? Cumulative? You don't find that?

THE COURT: No, no, absolutely not.

MS. CAL: Also Exhibits 20 and 21. It's two pictures of the window of the car shot out. The same car, the same windows, the same bullet going through the

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windows, your Honor. You need two copies of that?

THE COURT: I'll allow it over objection. Anything else.

MR. POLK: I have a -- just want to draw the Court's attention to -- and I spoke to the prosecutor about it. There are two guns. There is the proposed exhibits on the Meade case. And so number 24 shows a weapon that was recovered as well as number 36. And my contention is it's cumulative. That is the same weapon.

Now, the prosecutor, when I drew it to his attention, he says he believes that they are different weapons. I believe in looking at them that they are the same weapons.

THE COURT: Well, the jury will decide that. I'll allow it over objection.

You can bring in the juries.

THE DEPUTY: All rise for the jury.

MR. POLK: And then the last one, Judge, is there are three photographs of the gym bags in the back of the vehicle, and that would be number 45, 50 and 51, and it just shows the gym bag and gym shoes in the back of the vehicle. They're cumulative.

THE COURT: I'll allow it over objection.

THE DEPUTY: All rise for the jury. Please take your assigned seats.

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(At 9:34 a.m., the jury for defendant White and the jury for defendant Stewart entered the courtroom.)

THE COURT: You can be seated.

THE DEPUTY: Court is in session. All jurors are properly seated and accounted for. Remain quiet in the courtroom.

THE COURT: Ladies and gentlemen, thank you for your promptness. Our schedule today will be testimony from between 75 and 90 minutes. Then we'll call a break. Then you'll return to court for a similar amount of testimony. Then we will break for this case until Monday morning.

Counsel, call your next witness.

MR. HAYWOOD: Sure, your Honor. Judge, I need one second to get the witness.

THE DEPUTY: Stand right here and raise your right hand.

THE CLERK: Do you solemnly swear that the testimony you're about to give in the cause now pending before this Court will be the truth, so help you God?

MR. CLAXTON: Yeah, I do.

THE CLERK: Okay. Give your name to the court reporter.

THE WITNESS: Daniel Claxton.

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THE CLERK: Have a seat in the black chair, please.

DANIEL CLAXTON,

(At 9:38 a.m., was sworn as a witness and testified as follows:)

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q Mr. Claxton, if you could state your full name for the record. That's not a microphone, so I'm going to need you to speak up.

A Daniel Claxton.

Q Mr. Claxton, how old are you?

A Twenty-eight.

Q Mr. Claxton, I'm going to take you back to the date of March -- May 6th, 2016. Do you recall something unusual happening unusual happening to you that day around seven o'clock?

A Yes.

Q Where were you at?

A I was at home on Meade Street.

Q What were you doing?

A I was doing some cooking and some cleaning.

Q Is that a one-family home here or a residential home?

A Yes. It's a one-family home.

Q Did something unusual happen that caused you to go

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outside?

A Yeah. I heard some -- like some loud yelling and screaming noises.

Q Did you recognize the voices?

A I recognized one of them being my brother, but I didn't recognize the other voices that I was hearing.

Q When you heard these voices, did you hear what the voices were saying?

A I could hear my brother saying like I don't have anything. I don't have nothing, and then I just heard, you know, other voices yelling back there, but I couldn't really make out what they were saying.

Q What did you do at that time?

A I looked outside to see what was -- got up and ran to the door and looked to see what was going on.

Q And when you went to the door, what if anything did you see?

A I seen two guys drawn down with guns in my brother's face.

MR. HAYWOOD: For the weapon -- for the record, when you said both hands, I'm pointing as in pointing of the gun.

BY MR. HAYWOOD:

Q Could you tell what type of guns were pointed at your brothers?

A One of them was a -- one guy just had a pistol, and the

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other guy had an AK-47 assault rifle.

Q What did you do at that point?

A I had my gun already on my person already, so I just immediately just took my gun off of my hip and went out there and I started shooting at those guys. I started gunning at them because they had guns in my brother's face.

Q When you first saw your brother, where was he at?

A He was standing somewhere in the street right off of the curb, between the curb and the street.

Q And where were the two gunmen?

A They were standing right in front of him, drawn down on him.

Q Can you describe the gunmen?

A This guy right here.

MR. HAYWOOD: For the record, the witness pointed and identified the defendant in this case, Deonte White.

BY MR. HAYWOOD:

Q Who else did you see?

A It was another -- it was another guy, a heavy-built guy.

Q And which one had the AK-47?

A This guy.

Q White? The defendant?

A The defendant.

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Q Now, do you have a permission to carry a gun?
A Yeah. I have a CPL. I've had my CPL maybe about ten years now.
Q So you go outside -- and you actually open the door and go outside?
A I opened the door and went outside.
Q And when you go outside your home, is there a porch that you go immediately on outside the house?
A When I go outside, there's a porch. There's an awning on the porch, and then you have to walk down the steps to get to the sidewalk.
Q But you went to the porch or did you go to the steps?
A I walked outside, and I stood on the porch. I never went down the steps. I stayed on the porch.
Q And then what happened once you were on the porch and you said you started to fire your weapon?
A I started to fire my weapon and they started firing their weapons back at me.
Q Could you tell if both, both the Defendant and the other person was firing a gun at you?
A Yeah. Both of them were shooting at me.
Q What did you do at that point?
A Shooting. We had a shootout, and I realized that I got hit, like I got shot.
Q Where did you get shot at?

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A In my stomach.
Q Do you know which one shot you? Was it the Defendant or the other person?
A It was the Defendant.
Q How many -- if you know, how many times did you fire a gun?
A I fired my gun, I mean maybe about -- it was more than eight times.
Q And how many times do you think that the guns were firing back at you?
A It had to be over a dozen times.
Q And do you know if you hit anyone?
A Do I know if who -- if they hit anyone?
Q Do you know if you hit anyone with those weapons?
A I didn't know at the time. No, I don't.
Q So when you got -- do you know immediately when you were shot or --
A Oh, yeah. I knew immediately.
Q Once you got shot, what if anything did you do?
A When I got shot, I kind of like -- I didn't fall or anything on the ground. I just like grabbed my stomach, and I realized I had a big hole in my stomach, and it wasn't bleeding too much but I knew I was shot, like when you get shot with AK-47, you're going to know, you know. And so I grabbed my stomach, and I went back inside the

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house because by this time when I got shot, I dropped my gun. So I didn't even try to pick my gun up. I just went back in the house already.

Q Once you get inside of the house, what do you do?

A When I got inside the house, I went -- and I went upstairs so I can get a better view out of my window what was going on, and when I looked out the window, I seen them taking off.

Q So --

A But I really went upstairs to go get a bigger gun. That's what I went to go do, but by that time it was already over. They were already traveling off. I was already shot.

Q And when you looked out your window, you saw them drive off. Were they actually running to the car or were they actually in the car?

A They were already in the car pulling off already.

Q What did you do at that point?

A I was headed back downstairs, and by that time, my brother was coming in and he was asking me -- you know, he was coming in. He asked me, you know, was I hit? And I told him yeah, so he ran upstairs to come and grab me and help me downstairs, and we got downstairs. We went outside. He put me in the car and he drove me to the hospital.

Q Do you know how long it took you to get to the hospital?

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A It was fast, maybe about ten minutes.
Q Once you got to the hospital, what if anything happened?
A When I got to the hospital -- he actually ended up taking me to Children's Hospital because he was so frantic that he didn't know what to do. So the first hospital he seen, we pulled into the nurses and people came out to help come get me out of the car. And they prepped me immediately for surgery because I had to go to surgery. So at Children's Hospital, they prepped me. They took me through a tunnel to Receiving, because there's a tunnel that attaches to the two hospitals, and I went to surgery.
Q I want to show you what's marked now as People's proposed Exhibits 5 and 6.

Have you had a chance to look at People's proposed Exhibit Number 5 and 6?

MR. POLK: Judge, if I may, just one second, Judge. May we approach?

THE COURT: No. Just tell me what you want.

MR. POLK: Well, I believe that the prosecutor -- this is 6 here.

THE COURT: What difference?

MR. POLK: He's saying on the record, Judge, he's having the witness look at six and he hasn't --

THE COURT: No. He said five and six, didn't he?

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MR. HAYWOOD: Yeah. I said five and six.

THE COURT: You can proceed.

MR. HAYWOOD: Thank you, your Honor.

BY MR. HAYWOOD:

Q People's four and five. Have you had a chance to look at People's four and five?

A Looking at these two? Is that what you're saying?

Q Yes, yes. Have you seen those documents before?

A Yes.

Q On the back, there's a number? First, looking at four, do you recognize -- were you able -- do you recognize that document before?

A Yes.

Q Where do you recognize it from?

A From the police.

Q Is that the -- did the police show you a photograph of the lineup?

A Yes.

Q And was that the photograph of the lineup that the police showed you?

A Yes, I believe so.

Q And were you able to pick someone out at that photograph of the lineup?

A Yes.

Q Who were you able to pick out of that photograph of the

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line up?
A White, the defendant.
Q The defendant here in court?
A Yes.
MR. HAYWOOD: I move People's 4 into evidence at this time, your Honor.
MS. CAL: No objection.
THE COURT: It's admitted.
BY MR. HAYWOOD:
Q Now, in People's 4, did you write something on under the description?
A "For sure the guy that shot me."
Q And when you said for sure the guy who shot you, what did you mean by that?
A Like I was positive that was the guy that shot me.
Q And that's the defendant here in court?
A Yes.
Q How was he wearing his hair the day that he shot you?
A With braids.
Q Do you recall if the braids were going to the back, how the braids were going?
A No. I don't really know how, you know.
Q Now, looking at People's 5, do you recognize People's 5?
A Yes.
Q How do you recognize People's 5?

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A That was the other gunman.
Q The other gunman?
A Mm-hmm.
Q Yes?
A Yes.
MR. HAYWOOD: At this time, your Honor, I'd move People's 5 into evidence.
THE COURT: Do you have any objection?
MS. CAL: No objection.
MR. POLK: No objection on behalf of Mr. Stewart.
THE COURT: It's admitted.
MR. HAYWOOD: Thank you, your Honor.
BY MR. HAYWOOD:
Q And then on number 5, you also wrote something on there. What did you write on Exhibit 5?
A "He was at the scene when I got shot."
Q Now, when you say he was at the scene when you got shot, what was he doing at the scene when you got shot?
A He was -- he was the other gunman. He was -- he was the person that had the other gun at my brother's face.
Q When you said you were at the hospital, how long were you at the hospital for?
A I was there for about two weeks.
Q Let me show you now what's been marked People's Exhibit 6.

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Can you take a look at this.

THE COURT: Well, what did you hand the witness?

MR. HAYWOOD: His medical records.

THE COURT: His?

MR. HAYWOOD: His medical records. Yes, your Honor.

THE COURT: Any objection?

MR. POLK: No objection, Judge.

THE COURT: They're admitted.

MR. HAYWOOD: Thank you, your Honor.

BY MR. HAYWOOD:

Q Do you recall what type of surgery you had?

A I mean it was a surgery for a gunshot wound, but they had to cut my stomach open.

MS. CAL: Your Honor, I'm going to object. He wouldn't have any personal knowledge of --

THE COURT: Overruled.

MS. CAL: -- about a particular surgery.

THE COURT: He can testify about the medical treatment over objection.

THE WITNESS: They cut my stomach open all the way from my chest all the way down to my pelvic area. They had to go in to remove the damage. bullet. It did some damage. It hit my liver, shattered my rib, some other stuff, hit my colon, so they had to go in and remove

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the bullet. I had a lot of fragments that they couldn't get -- get to. There was too many fragments, so they just got a large portion of the bullet, and I still have fragments inside of me.

BY MR. HAYWOOD:

Q Did you have to return to the hospital after you left?

A Yeah, I did.

Q And why was that?

A Complications from the gunshot wound. I ended up developing like an infection, so I had to go back for like another week, get on antibiotics and start all over with the pain medication and all of that type of stuff so --

Q If you know, when you first saw the gunmen, how far in distance were they away from your brother?

A Maybe about two feet away from him.

Q And in distance, how far would you have been away from the gunmen and your brother when you came out on your porch?

A Maybe about 15 feet away.

MR. HAYWOOD: I have nothing further. Thank you, your Honor.

THE COURT: Cross-exam?

MR. POLK: No questions on behalf of Mr. Stewart.

CROSS-EXAMINATION

BY MS. CAL:

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Q Good morning, Mr. Claxton.
A Good morning.
Q What time of day or evening did this occur?
A It was late on in the day. It was after five.
Q Had you ever seen either of these people before?
A No, never seen them.
Q Now, are you familiar with guns?
A Oh, yeah, I am. Yes.
Q Is that from having your CPL for ten years?
A Yes, it is.
Q So when you went outside -- when you looked outside and saw the situation your brother was in, you came out right on the porch and began shooting?
A Yes.
Q And then the individual -- then the individual shot back at you?
A Yes.
Q So both of them were shooting at you?
A Yes.
Q At the same time?
A Yes.
Q Did they continue to remain out in the street area where they were with your brother?
A At the time of the shooting?
Q Yes.

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A Yeah. They were still in the street.
Q So that's about 15 feet away from you, correct?
A Yes.
Q And I think you said you might have shot more than eight shots, but you're not exactly sure.
A No. I'm not sure.
Q But it was more than eight you said, right?
A Yes.
Q And you thought between the two of them, they shot back over a dozen times?
A Yes.
Q Do you know what your brother was doing immediately before this shooting or had you seen him before the shooting began?
A Did I see my brother before the shooting began?
Q Yes.
A Yes. I seen him.
Q Did you see what he was doing?
A He just -- I seen him run the other -- the opposite direction, so I really didn't know what he was doing. He was --
Q Okay. You just saw him and then you all went in a different direction?
A Correct.
Q Is that --

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A He went in a different direction than we were in. He was out of the picture. When I came out and I started shooting, he got out of the way.
Q But he was near his car in the beginning?
A Yes.
Q Do you know what he was doing there?
A He was cleaning out his car.
Q That's what I was asking. Thank you. So your brother was parked in the street outside the curb of your house?
A Yes, because there's no driveway to my house so all the cars have to be parked on the curb.
Q Thank you. And can you describe the car you saw?
A Can I describe my brother's car?
Q Not your brother's car.
A The defendant's car, it was a -- it was a blue Chrysler .
Q Now, do you recall testifying at a preliminary examination earlier this year?
A Yes.
Q Do you recall being asked this question: And the other car that you saw, the purple Dodge Intrepid or Stratus was on the other side of the street? And your answer was yes?
A Yes.
Q So at that time, you indicated it was purple, correct?
A It was a --
Q On that date, sir. On that date.

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A It was a purple-blue Chrysler.
Q My question was about what you said at the preliminary examination. At the preliminary examination, you said it was purple, correct?
A I -- I -- I might have said. I don't recall.
Q Sir, please.
A I don't recall.

MS. CAL: May I approach the witness, your Honor?

THE COURT: Why?

MS. CAL: I asked him the question. He said he recalled the question and the answer, and he said that was his question and answer. Now he doesn't recall what he just said he did.

THE COURT: Ms. Cal.

MS. CAL: Yes.

THE COURT: Tell the record the page, the line, the question, the answer.

BY MS. CAL:

Q On page 61 of the preliminary exam, it would have been line 17 through 19. The question was: "And the other car, the purple Dodge Intrepid or Stratus was on the other side of the street?" And his answer was yes.

MR. HAYWOOD: That was the question.

THE COURT: Well, I understand that. That --

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we'll sort that out for the jury in a moment, but you don't need to approach him.

MS. CAL: Okay.

THE COURT: You're using the transcript to do whatever you're doing.

MS. CAL: Okay. Thank you.

BY MS. CAL:

Q So at the exam, you didn't say, no, no, it's not purple, it was blue. You didn't say that?

A No. All I --

Q Thank you. Now, do you recall -- if you recall how long it was until this accident shootout before you got -- when you got there?

A No.

Q And you indicated you immediately went back in the house after that because you were going upstairs to get a bigger gun, right?

A Yes.

Q But after you looked out the window and saw that they were gone, you just stayed there waiting for your brother?

A Yes.

Q While you were going up the stairs, do you have a landline in your house?

A No.

Q Do you have a cell phone?

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A Yes.
Q Did you call the police?
A No.
Q Did you call EMS?
A No.
Q You were just going to get a bigger gun?
A Yes.
Q What kind of gun did you have that you were using?
A It was a Glock 40 caliber.
Q Is that a big caliber gun?
A Yes. It's a bigger caliber gun.
Q Now, the lineup you did was in the hospital?
A I'm not sure where I did the lineup. I don't recall where I did the lineup at.
Q All right. Did you give a statement in the hospital?
A That I don't recall either.
Q Okay. So after you were hit and your brother took you to the hospital, you kind of pretty much out of it then?
A No. I was awoke. I was conscious the whole time. I told him how to get to the hospital.
Q Now, you said at one point during the shooting, your brother went the other way? What way would that have been?
A I'm not sure.
Q But he ran away from the shooting area?

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A He just -- he was -- he was out of my -- he was out of my way. He was out of my vision.
Q Okay. But both shooters were still in your vision?
A Yes.
Q While you were standing on the porch?
A Yes.

MS. CAL: If I could have a moment, your Honor.

BY MS. CAL:

Q Do you recall the hairstyle of the person that was the AK-47?
A I knew he had braids. I don't know how he had them or what designs he had in them and what --
Q Okay, sir. The question was answered. You said braids. And do you wear glasses?
A No.
Q Was there any other description that you gave to the police about the shooter?
A About the shooters? I'm not sure what type of description I gave them.

MS. CAL: Thank you.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. HAYWOOD:

Q When you said that Defendant White had his hair braided, was it short braids or long braids?

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A It was -- I'm not sure. I don't know.
Q For the record, what is your brother's name, full name?
A My brother's name is Kyle Upshaw.
Q And these incidents occurred on Meade Street; is that correct?
A Yes.
Q Is that in the city of Detroit?
A Yes.
Q County of Wayne?
A Yes.

MR. HAYWOOD: I have nothing further, your Honor.

THE COURT: Anything else, Ms. Cal.

MS. CAL: No, your Honor.

THE COURT: Thank you. You can step down. You're free to go or you may stay in the courtroom, if you wish. Call your next witness.

MR. HAYWOOD: Thank you, your Honor.

(At 10:05 a.m., the witness was excused.)

THE CLERK: Sir, please raise your right hand. Do you solemnly swear that you're about to give in the cause now pending before this Court will be the truth, so help you God?

OFFICER DUBOIS: I do.

THE CLERK: Have a seat in the black chair,

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please.

OFFICER JAMES DUBOIS,

(at 10:07 a.m., was sworn as a witness and testified as follows:)

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q Officer, can you please state your full name for the record, where you're employed and for how long?

A James Dubois, Detroit Police Officer, 11th Precinct.

Q I want to take you back to the day of May 6th, 2016. Did you get a call to go to the area of Packard and Savage?

A Yes, I did.

Q Why did you get -- why did you go there?

A We got a call for a shooting.

Q About what time did you get this call?

A I don't recall exactly what time it came out. It was still daylight.

Q Did you note that in your report?

A I believe I did, if I can --

Q If it will help refresh your recollection.

A Seven-fifteen p.m., approximately.

Q Is that the time you got there or the time you got the call?

A I'm not sure which. I only have one sheet before me, which would tell me exactly when I got the call, but

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according to the report --

Q How long did it take you to get to that location once you got the call?

A Maybe two to three minutes.

Q Were you working with anyone in particular?

A No, I was not.

Q So when you get there, are you on patrol or what are your duties?

A I'm in a fully-marked scout car in my uniform working patrol.

Q So you're by yourself?

A Correct.

Q So when you get to that location, what's the first thing that you notice or see?

A I notice a victim laying on the ground, in the street on Packard.

Q You noticed someone laying in the street?

A Yes.

Q Could you tell at the time if it was a male or a female?

A It was a male.

Q Could you tell the race of the male?

A It was a black male.

Q What did you do once you saw this person laying in the street?

A I checked right away for a pulse, called for additional

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units and a request for EMS.
Q Other than the person laying in the street, were there other people there?
A There were.
Q And did you recognize any of those people that were there?
A I talked to an individual that was with the victim, talked to him briefly. I don't know that I could identify that person again due to the circumstances of the situation and that.
Q So you called EMS. Did EMS come?
A Yes. EMS was delayed in route. They got there later. Another unit showed up, and due to delay from EMS, he was privately conveyed in the back of the scout car.
Q So you got notification that EMS was tied up?
A EMS was delayed in route, and we didn't think we had that much time, so he was conveyed by another unit while I stayed at the scene.
Q What did you do once you were at the scene? Once the victim was taken from the scene, what did you do?
A Secured the scene. Police tape, stood by for an additional unit, and I spoke to the witness that was with the victim and got a brief statement from him.
Q What do you do next?
A What did I do next?
Q Yes. Do you call anyone?

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A I made a few notifications while I was there.
Q What was the section that you called?
A I called the homicide section, let them know that we had a shooting at that location, called my control center, which is our main number to call in a shooting situation, and they make additional notifications from there. I called my front desk, notified my boss on the desk what I had over there.
Q When you first got on the scene when you saw Mr. Foster laying on the ground, did you -- was anybody doing anything to him?
A Yes. The witness was doing chest compressions on him when I arrived.
Q Has homicide arrived on the scene?
A They did come later, yes.
Q Did they come on the scene while you were there?
A Yes.
Q And once homicide came on the scene, do you turn over -- did you turn over the scene to homicide?
A To homicide and the evidence techs.

MR. HAYWOOD: I have nothing further at this time, your Honor.

THE COURT: Cross-exam?

MR. POLK: No questions for this witness, Judge, on behalf of Mr. Stewart.

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CROSS-EXAMINATION

BY MS. CAL:

Q Mr. Dubois?

A Dubois.

Q Dubois. Good morning, Officer Dubois.

A Good morning.

Q You indicated that you got information from an individual that was with the victim?

A Correct.

Q And some of that information you received, was it about a car?

A It was about a car and individuals in a car.

Q What kind of -- do you remember what kind of car?

A He said it was a black Stratus, I believe.

Q Thank you. Is that the only person you talked to?

A I talked to other people that night, but no one directly involved in the investigation of this.

MS. CAL: All right. Thank you.

THE COURT: Anything else?

MR. HAYWOOD: Nothing for the People.

THE COURT: Thank you, Officer. You're free to go.

(At 10:13 a.m., the witness was excused.)

THE COURT: Call your next witness.

MR. HAYWOOD: Kyle Upshaw.

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THE CLERK: Thank you.

THE DEPUTY: Can you give your name to the court reporter, please.

MR. UPSHAW: Kyle Upshaw.

THE COURT: Can you raise your right hand. Do you swear that the testimony you're about to give shall be the truth?

MR. UPSHAW: Yes.

KYLE UPSHAW,

(at 10:14 a.m., was sworn as a witness and testified as follows:)

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q Mr. Upshaw, can you state your full name for the record and spell it for us, please.

A Kyle Upshaw, K-y-l-e U-p-s-h-a-w.

Q And, Mr. Upshaw, how old are you?

A Twenty-five.

Q Mr. Upshaw, I want to take you back to the date of May 6th, 2016. Do you recall something happening unusual to you that day?

A Yes.

Q Where were you at?

A In front of my house.

Q In the city of Detroit, county of Wayne?

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A Yes.
Q And about what time did this unusual occur?
A Around 6:00, 6:30 p.m.
Q What were you doing at that time?
A At the time, I was cleaning out my car.
Q Had you gone to work that day?
A I was just coming back from work.
Q Did you stop somewhere in between work and home?
A Straight from work, coming straight from work.
Q So when you were cleaning out your car, were you cleaning out the inside of our car or the outside?
A Inside.
Q And what happened once you were -- while you were cleaning out your car?
A When I was cleaning out my car, I noticed -- I heard tire marks or burned rubber, so I turned around and I seen two fellas right here, not him but I seen two people running across the street with handguns, well, a handgun and an AK.
Q Did you see what car they came from?
A A blue Intrepid.
Q Did you see if there was anybody driving the car?
A Yes.
Q Did you see that person?
A Yes.

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Q Who was that person?
A Right here.
MR. HAYWOOD: For the record, he's identifying the defendant, Joshua Stewart.
BY MR. HAYWOOD:
Q Two people that approached you, when they make the approach, are you still -- where are you at on your car?
A The passenger backseat.
Q What happens once they come to your car?
A I looked up, and I noticed I had an AK and a handgun in front of my face.
Q Could you tell who had the AK?
A Yes.
Q Who had the AK?
MR. HAYWOOD: Pointing -- for the record, you're pointing to Defendant Deonte White.
BY MR. HAYWOOD:
Q And the other person had what?
A A handgun.
Q Did they say anything to you when they at that point approached you?
A Yes. They told me to give them the money out of my pocket.
Q What did you do?
A I had no money. I had nothing on me.

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Q And was that true, you don't have anything on you at that time?
A I had my handgun on me, but I had no cash on me.
Q Did you have a wallet and identification to get in the house or something?
A I had my wallet and my handgun on me.
Q So they asked you for the money and you said what?
A I don't got nothing.
Q And what happened next?
A Shortly -- what happened, I heard a gunshot.
Q Did you see where that came from?
A No.
Q What happened next?
A I ducked down in the backseat of the car. Guns was drawn off of me. I left the parked car, ducked down on the side of the car, my car.
Q I need you to slow up a little bit for me. You said you heard a gunshot?
A Yes.
Q You were still in the backseat of the car?
A Yes.
Q And after you heard that gunshot, you said the guns turned off of you. Whose guns turned off of you?
A His AK and another handgun.
Q The Defendant's gun and the other person's?

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A Yes.
Q And can you describe the other person for me?
A Heavyset, light-skinned, rough beard.
Q Once the gun was turned off of you, did you immediately hear anything at that point?
A I just heard gunshots, gunshots, gunshots, gunshots.
Q Now, you said you ducked down. So when you're ducking down, where are you ducking down at?
A On the side of my Buick.
Q Are you outside at this point?
A Yes.
Q Do you recall if you are on the side closest to your home or further from?
A Closest to my home, passenger side, backseat door.
Q What happens? Once you say you ducked down and you did something.
A I came up on the car and returned fire.
Q Who were you shooting at?
A The dude with the AK.
Q The defendant with the AK.
A Yeah.
Q What happened next?
A After that, I ran out of bullets. I heard from my brother, and he was yelling, I got shot, I got shot. So I ran on the side of the house because he was still

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shooting.
Q He being who? The defendant?
A Yes.
Q Deontea White?
A Yes.
Q All right. And what happened then?
A And then after that, I looked. I ain't seen no more -- I didn't hear no more gunshots. I seen they was trying to get inside of the car. I ran in the house to see if my brother was there. He was upstairs lying on the floor.
Q How did they get in -- how did they get into the car? Did you see how they were getting into the car?
A No.
Q Did you see them when they got into the car?
A I seen the car, the doors shutting, and I seen the car pulling off.
Q When the car pulled off, where were you at?
A Just running upstairs.
Q So you were outside the steps?
A Yes.
Q And so obviously, are you able to get into the house?
A Yes. The front door was open.
Q When you get into the house, what do you do?
A I run. I heard my brother yelling. I run upstairs, I see him lying on the floor, so I picked him up, dragged him

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down the steps. I put him in the car and I took him to Children's Hospital because I didn't know where Receiving was at.

Q You didn't know where Receiving was?

A I didn't know that Receiving Hospital is next door.

Q When you got to the hospital -- got your brother to the hospital, what did you do at that point?

A Ran inside the hospital, went to go get somebody to help me.

Q And they were able to assist you?

A Yes.

Q At some point did you move from one hospital to another hospital?

A I left Children's and went over to Receiving.

Q When you went over to Receiving Hospital, did you talk to anybody?

A I was with three officers.

Q At what point were you with the officers? Were you with the officers when you were at Children's Hospital or when you went to Receiving Hospital?

A When I was Children's. I was with them all night.

Q Did you talk to the officers about what happened?

A Yes.

Q Did you tell the officers what had happened similar to what you told the jury today?

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A Yes.
Q Do you recall what the Defendant White was wearing that day?
A A red t-shirt. It had a white and blue stripe in it and blue jeans.
Q What about the driver? Do you remember what the driver had on?
A A white t-shirt, blue jeans -- black jeans.
Q And the heavyset guy, the other guy?
A Dark t-shirt, blue jeans.
Q About how tall was the other person, the other guy, the other guy with the gun?
A From where I was sitting down, I can say about like 6'2", 6'1".
Q You were sitting down?
A In the car.
Q How tall are you?
A 6'2".
Q So you're saying he was about your size?
A Yes.
Q But you're saying he was bigger?
A Yes.
Q How long did it take for you to get to the hospital?
A Four to five minutes.
Q How far was the gun away from your body when the

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Defendants approached you?

A It was in my eyeball. It was in my eyeball.

Q Which gun?

A AK.

Q You said you sent to the hospital, and you were speaking to some officers. At some point did you leave the hospital?

A No. They wouldn't let me leave.

Q You made a statement for the officers?

A Yes.

Q Do you recall being shown a photograph of the lineup?

A Yes.

Q Let me show you what's been marked as Exhibit Number 3. Let me know if you recognize People's Exhibit Number 3.

A Yes.

Q How do you recognize it?

A It's a lineup.

Q Have you seen it before?

A The same picture I seen May 6th.

Q Were you asked to identify somebody in that photographs?

A Yes.

Q Were you able to identify somebody in the photograph?

A Yes.

Q Who were you able to identify.

A Number three.

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Q And that would be the defendant?
A Mr. White.
MR. HAYWOOD: Your Honor, I'd move People's Exhibit --
THE WITNESS: Deontea.
MR. HAYWOOD: Thank you. I'd like to People's proposed Exhibit Number 3.
MS. CAL: No objection.
THE COURT: It's admitted.
BY MR. HAYWOOD:
Q Under the proposed Exhibit Number 3, you write something under the exhibit. What do you write there?
A I didn't write this.
Q It's a question and answer. What's your answer. Can you read it?
MS. CAL: The witness has answered. He didn't write that.
THE WITNESS: "Do you see anyone you recognize? Yes."
THE COURT: Well, I don't understand the objection.
MS. CAL: Well I'm -- I'm objecting because the witness said he didn't write it. He asked him, did he see what he had written. He said he didn't.
THE COURT: Thank you. I heard it three times.

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That's for cross-examination.

Go ahead.

MR. HAYWOOD: Thank you, your Honor.

BY MR. HAYWOOD:

Q Were you asked a question and you gave an answer?

A Yes.

Q Okay. What question were you asked?

A I don't remember at the time.

THE COURT: So are you asking him to read from that document?

MR. HAYWOOD: Yes.

THE COURT: Read from the document what it says.

THE DEFENDANT: Oh. I can't read this. "Do you have any --

BY MR. HAYWOOD:

Q Do you remember being asked the question, "Do you have any additional comments?" He was the -- and you wrote as the answer, "He was the one doing all the talking with the red shirt. He had an AKA."

A Yes, I said that to the officer that wrote that down.

MR. HAYWOOD: Nothing further at this time, your Honor.

THE COURT: Cross-exam.

CROSS-EXAMINATION

BY MR. POLK:

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Q Now, you testified at the preliminary exam, correct?
A Yes.
Q And all the information that you testified to at the preliminary exam on July 1st, 2016 was truthful as the information, correct?
A Yes.
Q And you gave a statement to the police, correct?
A Yes.
Q Now, when you gave that statement to the police, it was truthful information, correct?
A Yes.
Q Now, would you agree with me that a person's memory is better closer to an event as opposed to further away?
A No.

THE COURT: What did you say?

MR. POLK: That --

THE COURT: Hang on. What did you say?

THE WITNESS: I couldn't even be clear what he just said. Say it again.

THE COURT: Ask it again.

BY MR. POLK:

Q Would you agree that a person's memory is better closer to a particular event as opposed to further away?
A It really don't matter.
Q It doesn't matter?

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A No.
Q Okay. So when you were asked to give a description of the driver and -- let's do this. The police, they gave you a -- they interviewed you, correct?
A Yes.
Q On the day of this incident.
A Yes.
Q And you signed and dated and put the time at the bottom of each page of the interview that they had with you, correct?
A Yes.
Q And you signed it. Why did you sign it?
A Because they asked me to sign it.
Q Pardon?
A Because they asked me to sign it.
Q Because they asked you to sign it, but they also gave it to you so you could read it, right?
A Yes.
Q And so you read it through and the answers to the questions, you answered them truthfully, and that's what was reflected in your statement, correct?
A Yes.
Q And that's why you signed it because that's what I told the police, right?
A Yes.

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Q Now, the police asked you if you could -- if you could give a description of the driver, correct?
A Yes.
Q And you told them that the only thing you could tell them was that the individual had on a white shirt.
A Yes.
Q That's it.
A Yes.
Q And you never, ever told the police that you saw Mr. Stewart driving that vehicle.
A I seen Mr. Stewart at Receiving Hospital sitting on the hood when I walked over there with the police.
Q Okay.

THE COURT: Wait a second. Hold on. You have to talk louder and slower. Now I don't know what you're saying.

THE WITNESS: I said I seen the dude right here at Receiving Hospital sitting on the front of the hood of the Intrepid.

BY MR. POLK:

Q And so when you --

THE COURT: Sitting on what?

THE WITNESS: Sitting on the car hood.

THE COURT: And then what did you say?

THE WITNESS: I didn't say nothing. I was with

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the police officers.

MR. HAYWOOD: He said Intrepid.

THE COURT: Oh. Okay.

BY MR. POLK:

Q So you're saying that you saw Mr. Stewart sitting on the hood at Receiving Hospital?

A Yes.

Q And you were with a police officer?

A Yes.

Q And that was before you made your statement, wasn't it?

A I didn't make my statement.

THE COURT: Talk louder.

THE WITNESS: I didn't make my statement.

BY MR. POLK:

Q Okay. So when did you make your statement then?

A On the paper.

Q No, when?

A At the hospital.

Q Okay. So you made your statement at Receiving Hospital. And do you recall what time you made you made your statement to the officers?

A Around ten o'clock.

Q Okay. So now you're walking with the officer over to Receiving Hospital, correct?

A Yes.

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Q Now, which officer are you walking with?
A I don't remember the officer.
Q You don't remember the officer, but it's a police officer?
A Yes.
Q Okay. And so you tell the officer, that's the car right there.
A Yes.
Q Okay. You told him that and then you said and that's the person I saw driving that car?
A Yes.
Q Okay. And so now is this officer a black male, white male? Describe the officer.
A Black male.
Q It's a black male, and you provided that information. Did you see the officer writing something down?
A No. I was in the back of the police car.
Q Okay. Did you ever go back and tell the officer, you know what, I -- I think I remember something now about this incident. I want to change my statement?
A No, I didn't.
Q Okay. Because --

THE COURT: Would you talk louder?

THE WITNESS: No, I didn't.

BY MR. POLK:

Q Okay. Because you never identified or saw Mr. Stewart

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driving that vehicle, did you?

A I didn't see him driving it.

Q Absolutely. You assume because you saw him him at the hospital --

A With the same white t-shirt on that --

Q You --

A -- I seen --

Q -- with a --

A -- before.

Q -- white t-shirt on.

THE COURT: Hang on. You can't both talk at the same time. I don't know why it's so difficult for you to speak louder. Go on.

BY MR. POLK:

Q So you didn't --

THE COURT: Ladies and gentlemen, I'll clear the courtroom if I hear anything from the audience.

Go on.

BY MR. POLK:

Q So you saw Mr. Stewart with a white t-shirt on near that vehicle, and you just assumed that was the person driving, correct?

A No. How can I assume if I seen him earlier in the day?

Q Well --

THE COURT: Don't ask him any questions. Just

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answer his questions.

MR. POLK: Thank you, Judge.

BY MR. POLK:

Q You already testified that you told the officers when they asked you that the only thing you could say about the driver was a white t-shirt. Now that's in your statement, isn't it?

A Yes.

Q You don't give a --

THE COURT: I still can't hear you.

THE WITNESS: Yes.

BY MR. POLK:

Q You don't give a complexion of the person, do you?

A No.

Q You don't give a hairstyle of the person, do you?

A No.

Q You don't give any features whatsoever in terms of trying to identify who you allegedly saw as the driver, do you?

A No.

Q The only think you say is the driver had on a white t-shirt?

A Yes.

Q And that's all you tell the police when they asked you in the statement and they gave you a chance to read the statement before you signed it?

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A Yes.
Q That's all you said, isn't it?
A Yes.
Q And so now you come in here -- how far was the car that you -- that these individuals came to that location on Meade Street, how far was it from your vehicle?
A Four to five feet.
Q Okay. So is it parked on the same side of the street as you?
A No.
Q Okay. So on the other side of the street, correct?
A Yes.
Q And do you get out of your vehicle?
A Not yet.
Q Not yet. When do you get out of your vehicle?
A When I returned fire.
Q Okay. When you returned fire. So you didn't get in the backseat of your vehicle and return fire?
A No.
Q So when you return fire, how close do you get to the vehicle that these individuals allegedly came in?
A Five feet.
Q You get about five feet. So you're not standing up to the window, are you?
A No.

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Q And so the alleged driver in that vehicle, he never gets out of the vehicle, does he?
A No.
Q Okay. So it's your testimony that the individual that now you have some recollection that the individual had on black jeans?
A No.
Q You just testified, sir, did you or did you not?
A I'm sorry. Yes.
Q -- that the individual had -- the driver had on black jeans?
A Yes.
Q Okay. But you never saw that driver get out of that vehicle, did you?
A No.
Q And you never walked up to the vehicle to look inside to determine what the individual had on?
A Can I say something?
Q You can answer my question, please.
A No.
Q You never did. You never walked up the vehicle to make some determination?
A No.
Q And it's your testimony that you don't -- that you got out of the vehicle and returned fire?

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A Yes.

MR. POLK: If I may have one second, Judge.

BY MR. POLK:

Q So once you hear gunshots, you duck down in the car, correct? And then you came out from your car, correct?

A Yes.

Q And then sat in the backseat, correct?

A No.

Q On page 40 of the preliminary exam transcript --

THE COURT: Line?

MR. POLK: Line? I'm sorry, Judge. Starting with line 11 -- starting with line 10.

BY MR. POLK:

Q So I guess for --

THE COURT: Just ask him --

BY MR. POLK:

Q -- context for --

THE COURT: No, sir. There's not going to be a context. Line, page, question, answer.

BY MR. POLK:

Q Well, the question starts at 10 -- page 40, line 10.

"What happened next? Your response, "After I ducked down in the car, the guns were drawn off me, so after I seen that I wasn't hit, I came from out of my car and sit in the backseat, and I rose above the car and

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returned fire."

MR. HAYWOOD: Objection. It's not impeaching.

THE COURT: Well, the jury will decide that.

MR. HAYWOOD: It's improper impeachment.

THE COURT: Well, the jury will decide that.

Overruled.

MR. POLK: Thank you, Judge.

BY MR. POLK:

Q So do you recall that being your answer at the preliminary exam that you were on the backseat when you returned fire?

A No, I didn't say that.

Q You what?

A I don't recall --

THE COURT: That could be an objection if --

THE WITNESS: -- saying that.

THE COURT: -- that's not what he said.

MR. POLK: Well, I read it verbatim, Judge.

THE COURT: Okay. Go ahead.

BY MR. POLK:

Q Okay. Have you -- is this your first day here in this courthouse in reference to this case?

A No.

Q Have you seen the officer that you allegedly told that's the guy and I remember him as the driver? Have you seen him here?

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A I have seen him.
Q Now, how many times have you talked to the police since this incident?
A Multiple times.
Q Multiple times. Did you ever tell any other police officers that you could identify the person that was driving this alleged vehicle on that day?
A No.
Q So you just told that officer that day; is that correct?
A Yes.
Q And you allegedly pointed the individual out; correct?
A That's earlier when the incident --

THE COURT: I can't hear you at all.

THE WITNESS: That was earlier when the incident happened.

BY MR. POLK:

Q Okay. When you --
A We drove -- we drove over to the hospital. He was sitting on the hood of the car. That's when I see the black jeans and white t-shirt.
Q Okay. And -- but you didn't see him at the scene?
A No, I didn't see him at the scene.
Q Then you couldn't identify the person that allegedly was driving at the scene?
A No.

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Q Is that correct?
A The only thing I seen at the scene was the white t-shirt.
Q White t-shirt. And that's all you told the officers, correct? Then you're just really making an assumption that that was the driver because you saw him allegedly later on at Receiving Hospital, correct?
A Four minutes later, yes.
Q Yes. Okay. And it took you more than four minutes to get to Receiving, didn't it?
A Eight minutes.
Q Well --
A It took me four to get there. We walked over to Receiving.
Q Okay.
A We drove over to Receiving because I was in the car.
Q Okay. So -- so it took you, you say, up to eight minutes to get there, so by the time you get to Receiving, this is right when you bring your brother to the hospital, correct?
A Yes.
Q Okay. You haven't made your statement then.
A I haven't made it. They got me earlier in the day to later on that night, I made it.
Q Later on that night. And later one that night when you made the statement, you didn't say nothing about I saw the

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guy at Receiving Hospital and this what we had on.

A Dealing with a situation like that, man, you -- you ain't gonna give a lot of information about it.

Q My question is a little different, sir. You didn't say one thing about being able to identify who allegedly was driving when you made your statement after being at Receiving Hospital that day?

A No.

MR. POLK: I don't have any other questions.

THE COURT: Ms. Cal?

CROSS-EXAMINATION

BY MS. CAL:

Q Good morning, Mr. Upshaw.

A Good morning.

Q Now, while you were in the car heard the skid marks and turned your head around, you indicate you saw Mr. White?

A Yes.

Q With the AK?

A Yes.

Q And can you described what he looked like, again?

A When the incident happened, he got cornrows.

Q Cornrows? Okay.

A Light skin, light facial hair.

Q Light facial hair?

A Yes.

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Q What does that mean?
A Peach fuzz.
Q He had peach fuzz. And where was the peach fuzz located on his face?
A Under his chin.
Q Under his chin. Anything else?
A That's it.
Q You didn't tell the police anything about him having cornrows when you gave your statement, did you?
A Yes.
Q You did? Have you seen your statement today?
A No.
Q Do you remember when you gave it at the hospital?
A No.

MS. CAL: May I approach the witness, your Honor?

THE COURT: Oh, sure.

MS. CAL: I'm handing to the witness a three-page statement from 5-6-16.

BY MS. CAL:

Q Is this the statement you gave the police? Do you see your signature on the bottom of the page?
A Yes.
Q Can you look at the other pages and see if your signature is on the bottom of the other pages?

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A Yes.
Q Do you want to speak up, sir?
A Yes.
THE COURT: Now I can't hear anybody.
THE WITNESS: Sorry, your Honor. Yes.
THE COURT: Why is it so difficult to talk up?
Go on.
BY MS. CAL:
Q So is this the statement that you gave to the police?
A Yes.
Q At the hospital?
A Yes.
Q Okay. Can you look at the third page at the top. The top four lines, and just read to yourself. Good?
A Yes, I'm good.
Q Now, do you need to continue looking at it while I ask you questions?
A Yeah.
Q Okay. Did you say on this statement that he had cornrows?
A No, ma'am.
Q Did you saw on this statement that he had peach fuzz?
A I said a goatee.
Q Did you say peach fuzz?
A No, ma'am.
Q Did you ever see him exit the car, Mr. White?

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A When I looked -- when I checked around, I seen him running across the street.
Q So you did not see him exit the car?
A No.
Q Now, you said he had on a red t-shirt with black and red stripes?
A Similar like that, yes.
Q Similar like that?
A Yes. Yes, yes, yes, yes.
Q You're sure about the color?
A Yes.
Q Now, do you wear glasses?
A No.
Q Nothing was taken from you?
A No.
Q And the first shot came from your brother, correct?
A Yes.
Q And that was while he was on the porch?
A Yes.
Q How far away was that?
A Twenty or -- 20, 25 feet.
Q And you said that eventually you got out of the car and you started shooting?
A Yes.
Q Safe to say there's four people out there shooting?

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A Yes.
Q You and your brother, correct?
A Yes.
Q And the other two individuals, correct?
A Yes.
Q And what were you shooting with? What kind of gun did you have?
A A 9 mm.
Q Did you hit anybody with your gun?
A No.

THE COURT: Anything else? Go on.

BY MS. CAL:

Q Can you describe the other guy?
A Which other guy, the one that had the handgun?
Q Yes.
A Yes.
Q Can you describe him? Yes?
A Yes.
Q Can you give us that description?
A He was around 6'2", heavyset and light skinned.
Q So were he and Mr. White the same height from your vantage point?
A Yes, from sitting down.
Q And how many rounds did you shoot?
A Nine.

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Q Nine rounds?
A Yes.
Q Is that what your gun holds, the clip holds or does it hold more?
A That's all it holds.
Q So you emptied your gun?
A Yes.
Q And after -- now, when you went back toward the house after you heard your brother's voice, was the car still there with the people there?
A Yes.
Q So you didn't go back immediately into the house?
A After I heard the last gunshot.
Q Okay. So while the shooting was still in place, you were still on the side of the car?
A I was still running while I was shooting the gun off.
Q Running to where?
A The side of the house.
Q Okay. And then you turn around and shot. You never stopped to shoot? You were shooting as you were running?
A No. I been --
Q I'll ask you another question.
A Okay.
Q So you shot nine rounds.
A Yes.

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Q Correct? And you were running?
A No.
Q You stopped running to shoot back?
A No.
Q You shot from the side of the house while you were standing still?
A No.
Q So you were running and shooting?
A No.

THE COURT: Counsel --

MS. CAL: I'm trying to --

THE COURT: Why don't you ask him when he started shooting and when he stopped shooting and then what happened. Go on.

BY MS CAL:

Q When did you start shooting?
A I started shooting when the guns was drawn off me and when I figured out that I wasn't hit. So I came above the car. I came off the car. I was still outside of the car. I rose up.
Q And you fired nine rounds?
A Yes.
Q And then you started running?
A I fired nine rounds. I didn't have no more bullets and the gun -- I guess he was still shooting at --

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Q Sir, sir, I'm asking you what you did. After you emptied the nine rounds, did you start running then?
A Yes.
Q And that's when you ran to the side of the house?
A To take cover, yes.
Q And while you were running, you still hear gunshots?
A Yes.
Q And after the last shot you heard -- when you heard your brother's voice, was there still shooting?
A It was just about around the last shot.
Q Okay. And then you came into the house?
A I waited.
Q For how long did you wait?
A Thirty seconds.
Q And then you came into your house?
A Yes. I ran up the side. I ran up the porch.
Q No one shot at you when you were running up the porch?
A No.
Q The car had gone?
A No. The car had -- they just got inside the car.
Q And then you had to locate your brother?
A Yes.
Q How did you locate him?
A I ran upstairs.
Q Okay. Do you have a cell phone?

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A Yes.
Q Did you call 911?
A I called 911 on my way to the hospital.
Q But you didn't call from your house?
A No.
Q Did you call EMS from your house?
A I did 911.
Q I just asked you --
A I was calling 911 on the way to the hospital.
Q Thank you. And since that date, you haven't given another written statement to the police, have you?
A No.
Q And your only other time was when you came to court for the preliminary examination on July the 1st?
A Yes.
Q And have you talked to the police since July 1st?
A Yes.
Q How many times?
A Multiple times.
Q Multiple times?
A Yes.
Q Okay. What is multiple, sir? I don't know. More than five?
A Around there.
Q Is it more than five or more than ten?

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A From three to five.
Q Did they have you at the police headquarters or did you come down?
A I went to police headquarters.
Q Now, when you came and saw that, that's after you came into court, right?
A Yeah.
Q And you didn't make any more written statements about the conversation you had with the police?
A No.
Q And you didn't get shot, did you?
A No.

THE COURT: Anything else?

MR. HAYWOOD: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. HAYWOOD:

Q You said that in your statement, you did mention that the Defendant had a goatee?
A Yeah. It was a black goatee.
Q Did you ever describe his hairstyle in your statement?
A No.
Q And you never gave a different -- a different hairstyle switch in your statement?
A No, I don't remember.
Q Do you need to look at your statement?

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A Yes.

MR. HAYWOOD: May I approach, your Honor?

THE COURT: Sure. Go ahead.

BY MR. HAYWOOD:

Q So you never give a description of his haircut in this case -- or his hairstyle in this case?

A Officer -- he never asked.

THE COURT: No. That's not the question.

BY MR. HAYWOOD:

Q Did you ever give a description?

A No.

Q Do you recall on the date of this incident, the defendant, Deontea White, had braids?

A Yes.

Q Now, the defendant, Stewart, you said you saw him that evening at the Receiving Hospital?

A Yes.

Q And you said he was sitting on an Intrepid?

A Yes.

Q And you remember him having on a white shirt and black pants?

A Yes.

Q Was it just a regular white t-shirt? Or was it anything unusual about the t-shirt?

A A regular, white t-shirt.

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Q And you remember the driver of the incident where your brother was shot having a white t-shirt on?

A Yes.

MR. HAYWOOD: Nothing further, your Honor.

THE COURT: Recross?

RECROSS-EXAMINATION

BY MS. CAL:

Q You never used the word peach fuzz --

A No.

Q -- in your statement?

A No.

MS. CAL: Thank you.

THE COURT: Anything else? Thank you. You can step down. You're free to go.

MR. POLK: Nothing else on behalf of Mr. Stewart.

THE COURT: Or you can wait in the courtroom.

(At 10:52 a.m., the witness was excused.)

Ladies and gentlemen, you can take a half-hour break. I know that you're very prompt, so make it a half hour, and then you'll return for more testimony. But in the meantime, go to your respective jury rooms, and do not associate one member -- the red team can't talk to the blue team. Thank you.

THE DEPUTY: All rise for the jury. Red jury,

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follow my partner out.

THE COURT: Thirty minutes.

(At 10:53 a.m., the jurors for defendant White and defendant Stewart exited the courtroom.)

THE COURT: Anything for the record form the last session by any of the attorneys?

MR. HAYWOOD: Not from the People, your Honor.

MR. POLK: Nothing on behalf of Mr. Stewart, Judge.

MS. CAL: Nothing on behalf of Mr. White.

THE COURT: Thank you.

(At 10:54 a.m., proceedings adjourned.)

(At 11:29 a.m., proceedings reconvened; all parties present.)

THE DEPUTY: Court is in session. All jurors are properly seated and accounted for. Remain quiet. You may be seated.

THE COURT: Will you raise your hand? Do you swear the testimony you're about to give shall be the truth?

OFFICER SEIJUTT: Yes.

THE COURT: You can proceed.

OFFICER JOHN SIEJUTT,

(at 11:29 a.m., was sworn as a witness and testified as follows:)

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DIRECT EXAMINATION

BY MR. HAYWOOD:

Q Officer, if you could state your full name for the record, where you're employed and for how long.

A Officer John Seijutt, 11th Precinct, four years.

Q Let me take you back to the date of May 6th, 2016. Do you recall if you were working that day?

A Yes, I was working that day, sir, scuttle out of one.

Q Did you get called to a scene at Packard and Savage?

A Yes, sir.

Q About what time did you get there?

A Around seven o'clock, approximately.

Q When you got the call at seven, how long did it take you to get to that scene?

A Within three to four minutes.

Q When you got to the scene, what was the first thing you recalled?

A I saw a young man laying on his back, another gentleman administering CPR or chest compressions to him.

Q Were you able to approach the scene?

A We were. We approached. My partner and I approached on foot.

Q Who was your partner that day?

A Eric Pinelle (phonetic).

Q When you got to the area where the person was performing

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the CPR, were there other people around there also?
A Yeah, the responding unit, EBF 11 was there, and I believe Officer Duobis with scuttle 11 5 Adam was also there.
Q What did you do at that point?
A We called to see what the ETA was going to be for medics. They couldn't give a firm estimate of the time, so my partner and I loaded the victim up into our scout car that conveyed -- took him to the hospital.
Q How long did it take you to get to the hospital?
A I would say approximately like five to ten minutes, somewhere in there.
Q Once you got to the hospital, were you able to get assistance?
A Yes, sir.
Q After they took the victim into the hospital, what did you do at that point?
A We cleaned -- my partner decided to take a breath because he was doing compressions all the way to the hospital. We cleaned the car. I was cleaning the car out, went back in to clean my clothes off, walked back out of the hospital. And then I was informed that there was another car there with gunshot victims that had just pulled up.
Q Did you see that car?
A Yeah. It was a -- it was a blue Dodge Intrepid car. The rear window was busted out and there was multiple bullet

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holes in the vehicle.
Q Do you recall where the bullet holes were in the vehicle?
A Down the side of the -- down the passenger side of the vehicle.
Q What did you do at that point?
A There was a driver. He came -- the driver, had him sit on the trunk of the car while we figured out what was going on.
Q Do you see that person here in court?
A Yes, sir.
Q Can you describe him to me?
A A blue shirt, a blue shirt, tie, blue pants.
MR. HAYWOOD: For the record, the witness has identified the Defendant in this case, Mr. Stewart.
BY MR. HAYWOOD:
Q When you first saw the defendant Stewart, was he actually in the car or was he out of the car?
A He was standing on the outside of it.
Q Was anybody else in the car?
A The victim. There was a victim with gunshot wounds. They were putting him on a gurney to take him inside of the hospital.
Q Do you see that person here in court?
A Yes. He's wearing a gray shirt and black pants.
Q Can you point to him for me?

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MS. HAYWOOD: The witness has identified the second defendant, Deontea White.

BY MR. HAYWOOD:

Q What did you do at that point?

A Tried to talk to Mr. Stewart, I believe his name was, to figure out where they -- where they got shot at so I could see if I needed to go to that area. Mr. Stewart told me that he was just walking down the street and saw a gentleman shot in the car and popped in and drove him down to the hospital. He wasn't sure where the shooting occurred at, somewhere on the eastside.

Q Did he say where he had saw the car?

A No. He said -- it was real vague. I was walking down the street, saw a guy shot in a car, hopped in and drove him down to the hospital.

Q What happened next?

A I had my partner come over after he regained his composure, had him stay with Mr. Stewart. And I walked in the hospital and talked to Mr. White. He provided me with the name of Durand (sic) Profit, told me that they were driving westbound down East State Fair with Mr. Stewart driving, his friend, and their car started taking fire at Greenly and State Fair. At that point, you've got doctors and everybody working on him, got minimal information because they had him in triage.

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Q Did you notice any injuries on --
A Yeah. He had apparent gunshot wounds to his upper torso.
Q What did you do at that point?
A I went back outside, talked with my partner, secured -- started making phone calls, notifications, held the scene. While we're doing all this, there was radio information of another shooting scene coming out, a vehicle that we were investigating and detaining fit the description of another shooting on Meade.
Q What did you do at that point?
A Continued to hold the scene. A non-fatal shooting team came out. We detained Mr. Stewart for awhile, ended up putting him in custody because the vehicle that they were driving was stolen.
Q Did you see the other people, anybody that possibly had belonged to the other Meade?
A No, I did not see anybody else.

MR. HAYWOOD: Nothing further, your Honor.

THE COURT: Cross-exam?

CROSS-EXAMINATION

BY MR. POLK:

Q Did anyone approach you while you were -- what hospital were you at?
A Detroit Receiving Hospital.
Q So you were at Detroit Receiving Hospital. Did anyone

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approach you with information about this incident?
A The security notified that the car was stolen. That's how we were able to determine that it was stolen.
Q Okay. But anyone other than them?
A No.
Q Any other police officers provide you with any information in reference to the allegations set forth?
A No.
Q Any civilians approach you and say -- give you any reference to what's going on at that location?
A No.
Q Do you recall what Mr. Stewart was wearing that day?
A I believe he was wearing some blue jeans. I don't remember what color the shirt was.

MR. POLK: I don't have any other questions.

THE COURT: Ms. Cal?

MS. CAL: I have no questions for this witness, our Honor.

THE COURT: Anything else from the People?

REDIRECT EXAMINATION

BY MR. HAYWOOD:
Q When you looked at the vehicle, did you see if there was any blood in the vehicle?

MR. POLK: Objection, Judge. That's outside the scope of my cross-examination.

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THE COURT: Overruled.

BY MR. HAYWOOD:

Q Did you see any blood in the vehicle?

A Yes, sir.

Q Where did you see the blood at?

A Passenger side front seat.

Q Thank you, your Honor.

A You're welcome.

MR. HAYWOOD: Nothing further, your Honor.

THE COURT: Anything else?

MR. POLK: Nothing, your Honor.

THE COURT: Thank you, Officer. You're free to go.

(At 11:36 a.m., the witness was excused.)

THE COURT: Call your next witness.

THE CLERK: Raise your right hand. Do you solemnly swear that the testimony you're about to give in the cause now pending before this Court will be the truth, so help you God?

OFFICER JOHNSON: I do.

THE CLERK: Give your name to the court reporter, please.

OFFICER JOHNSON: William Johnson.

WILLIAM JOHNSON,

(At 11:37 a.m., was sworn as a witness and

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testified as follows:)

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q Officer Johnson, if you could just state your full name for the record, where you're employed and for how long.

A Officer William Johnson, employed by the City of Detroit, Department of Police.

Q I want to take you back to the date of May 6th. Do you recall going to the area on Meade Street? Strike that.

Do you recall going to the Detroit Medical Center, the Receiving Hospital?

A Yes.

Q About what time did you go to that location?

A I don't recall the time that I went to DRH, Receiving Hospital.

Q Did you get a call to go there?

A Actually, no. I got a call to go to Packard and Savage, a person shot.

Q Did you go? Did you make the scene of Packard and Savage?

A Yes, I did.

Q Before you went to the hospital?

A Yes.

Q What time did you go to the Packard and Savage location?

A I don't recall the exact time. It had to be sometime after six because I was working a second shift, and my

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second shift started after six.

Q When you got to that location, can you tell the jury what you saw?

A I seen an unknown black male sitting on the corner -- or laying on the ground on the corner of Savage and Packard, south of Savage on his back.

Q Did it appear to be that this person was injured?

A Yes.

Q And what did you do at that point?

A Mainly, my actions there was just to do crowd control. I informed dispatch that it was a person down with gunshot wounds.

Q And at some point, did you leave the Packard area?

A Yes. I assisted Officer Seijutt and Pengale. They transported that gentleman to the hospital. I gave assistance in conveying as far as traffic and escorting.

Q How long did it take you to get to the hospital?

A Probably less than eight minutes.

Q When you got to the hospital, were you able to get assistance for Mr. Foster?

A Yeah. We had informed dispatch to call DRH and tell them we got one on the way with a gunshot wound. They were right there at the front door when we got there.

Q While you were at the hospital after they took Mr. Foster in for treatment, what is the next thing that you did?

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A I mainly stood right near the emergency room, the ER room to get a condition, track condition on the gentleman that was escorted, taken to the hospital.

Q And were you able to get any response on his condition?

A Yes.

Q And what was that?

A He was DOA.

Q Dead on arrival?

A Yes.

Q What did you do at that point?

A Mainly did nothing else after that point, just went back to the station to start my CRISNET report.

MR. HAYWOOD: I have nothing further, your Honor.

THE COURT: Cross-exam?

MR. POLK: No questions for this witness, Judge.

MS. CAL: I have no questions.

THE COURT: Thank you, Officer. You can step down. You're free to go.

(At 11:40 a.m., the witness was excused.)

THE COURT: Call your next witness.

MR. HAYWOOD: Just one second, your Honor. Your Honor, may we approach?

THE COURT: Sure.

(At 11:41 a.m., bench conference.)

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(At 11:42 a.m., bench conference concluded.)

THE COURT: Ladies and gentlemen, that will conclude our session for today. The People are awaiting some witnesses, and they'll be available Monday morning. Be back at nine o'clock. Do not discuss the case. Thank you.

THE DEPUTY: All rise for the jury. Blue jury, if you'd like to step in the jury room for a moment. Red jury, if you'd like to step on out.

(At 11:43 a.m., the jury for defendant Stewart and the jury for defendant White were excused.)

THE COURT: Well, the question that I have is from the People. Will we be able to finish with you on Monday morning?

MR. HAYWOOD: Not without -- with the three-hour confessions, probably not.

THE COURT: And then how many live witnesses?

MR. HAYWOOD: Probably four, four witnesses and then the confession tape.

THE COURT: So when the three-hour confession starts, one of the juries goes home, right?

MR. HAYWOOD: Yes.

THE COURT: Because they can't hear it.

MR. HAYWOOD: Correct.

THE COURT: Okay. And is there any way you can

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abbreviate the length of the interrogation? In other words, is there dead time where people are just sitting there in silence?

MR. HAYWOOD: It's three hours. The defendant doesn't really admit to it probably until the last hour of the -- of the tape.

THE COURT: But during the three hours, people are talking and interacting?

MR. HAYWOOD: Yes.

THE COURT: We'll have to play it all then.

The defense, do you know what you're going to do yet, Mr. Polk?

MR. POLK: No, sir, I do not.

THE COURT: Ms. Cal?

MS. CAL: Not at this time, your Honor.

I'm trying to schedule another trial, but I'll have to start it on Wednesday. Thank you. All done.

(At 11:46 a.m., proceedings concluded.)

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STATE OF MICHIGAN)

) SS

COUNTY OF WAYNE)

R E P O R T E R' S C E R T I F I C A T E

I, Eileen Higer, CSMR-5018, do hereby certify that I have recorded the proceedings had and testimony taken in the above-entitled matter at the time and place hereinbefore set forth and that the foregoing is a full, true and correct transcript of proceedings had in the above-entitled matter; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Eileen S. Higer, CSMR-5018

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 16-005731-01-FC
16-005731-02-FC

DEONTEA JAMAR WHITE and
JOSHUA STEWART,

Defendant.

_____/

JURY TRIAL - VOLUME V

Taken in the above-entitled matter before Honorable Michael Callahan, Third Judicial Circuit Court Judge, Detroit, Michigan on November 8, 2016

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Detroit, Michigan

November 8, 2016

- - -

(At 9:17 a.m., proceedings begin

THE COURT: Can we waive Mr. Payne?

MR. HOWARD: People would waive Mr. Payne, yeah.

MR. POLK: We do not waive Mr. Payne.

THE COURT: I'll excuse him over objection. He's excused and the video can be -- the disc can be admitted without objection.

MR. POLK: Judge, that disc was the subject of a separate motion in front of Judge Kenny. I'll leave it to the court's discretion.

THE COURT: Well, you know it's admissible. You can bring the jury.

THE CLERK: All rise for the jury.

(At 9:19:34 a.m., the jurors for defendant Stewart a entered the courtroom.)

THE DEPUTY: You may be seated. All jurors are properly seated and accounted for.

THE COURT: You can call your next witness.

MR. HOWARD: The People call Officer James McDonald.

THE CLERK: Do you solemnly swear that the testimony you're about to give in the cause now pending

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before this Court will be the truth, so help you God?

OFFICER McDONALD: Yes, ma'am.

OFFICER JAMES McDONALD,

(at 9:19:53 a.m., was sworn as a witness and testified as follows:)

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q Officer McDonald, you can state your full name for the record, where you're employed and for how long.

A James McDonald, police officer for the City of Detroit. I'm about a month away from 16 years.

Q Officer, I'll take you back to the date of May 7, 2016. Did you have any contact with anyone you see here in court today?

A Yes, I did.

Q Who did you come in contact with?

A Mr. Stewart during an interrogation.

Q And where was that at?

A It was at the Detroit Detention Center.

Q And when you say interrogation, is that when you talk to the defendant?

A Yes, it is.

Q Did you get any statement from the defendant?

A Not a written statement, no.

Q Did you videotape the session you had with him?

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A Yes, it was.

Q Before you started talking to the defendant, did you read him his Miranda rights.

MR. POLK: No, your Honor.

THE COURT: Is all that on the tape?

THE WITNESS: Yes.

THE COURT: Any objection to admission of the video?

MR. POLK: Judge, as I stated earlier, it's the subject of a motion that's already been ruled on by Judge Kenny. I leave it to the discretion of the Court.

THE COURT: I'll admit it.

MR. HAYWOOD: Thank you.

Do you need Officer McDonald to sit there?

MR. HAYWOOD: No, your Honor.

THE COURT: You can step down.

MR. HAYWOOD: You can step down.

(At 9:21 a.m., the witness was excused from the witness stand.)

(At 9:25 a.m., the video was played for the jurors.)

THE COURT: Ladies and gentlemen, take a 15-minute break.)

(At 10:33:50 a.m., the jurors exited the courtroom.)

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(At 10:53:40 a.m., the jurors entered the courtroom.)

THE DEPUTY: You may be seated. Court is in session. Remain quiet. All the jurors are properly seated and accounted for.

THE COURT: We can proceed.

(At 10:54:06 a.m., video played.)

(At 11:28:14 a.m., video paused.)

MR. POLK: May we approach again, Judge?

THE COURT: What's that?

MR. POLK: May we please approach again.

(At 11:28 a.m., bench conference held.)

(At 11:29 a.m., bench conference concluded.)

THE COURT: Ladies and gentlemen, you can step back into the jury room. I'm about to bring the other jury in, and then we have other matters.

THE DEPUTY: All rise for a jury.

(At 11:29 a.m., the jurors were excused from the courtroom.)

THE DEPUTY: You may be seated.

THE COURT: In the interest of time, juror number 14 is excused by me for cause because he got confused by when he was supposed to be here. And we can take Mr. Stewart back at this time as well.

(At 11:30 a.m., proceedings adjourned.)

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(At 11:37 a.m., proceedings reconvened.)

THE COURT: Okay. We're back in the record in the case of Joshua Stewart and Deontea White. The jurors are now present. Counsel, your appearances.

MR. HAYWOOD: Good morning, your Honor. Ron Haywood for the People.

MR. POLK: May it please this Honorable Court, Larry Polk on behalf of Joshua Stewart, who is present.

MS. CAL: Wanda Cal on behalf of Deontea White.

THE COURT: You can bring the juries.

THE DEPUTY: All rise for a jury.

(At 11:38 a.m., the jurors for defendant Stewart and the jurors for defendant White entered the courtroom; all parties present.)

THE DEPUTY: Court is in session. All jurors are properly accounted for. Remain quiet.

THE COURT: You can call your next witness.

THE CLERK: Do you solemnly swear that the testimony you're about to give in the cause now pending before this Court will be the truth, so help you God?

DETECTIVE MITCHELL: I do.

THE CLERK: Have a seat in that black chair, please.

DETECTIVE JOHN MITCHELL,

(at 11:40:20 a.m., was sworn as a witness and

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testified as follows:)

DIRECT EXAMINATION

BY MR. HAYWOOD:

Q Detective Mitchell, can you state your full name for the record, where you're employed and for how long?

A John Mitchell, Detective, City of Detroit.

Q How long have you been with the City of Detroit?

A Almost 19 now, 19 years.

Q And take me back to the day of May 6th of 2016, did you -- were you assigned as the officer in charge of the case of Joshua Stewart and Deontea White?

A Yes.

Q When did you get that assignment?

A On that date.

Q Did you go to the scene?

A Briefly, yes.

Q At some point did you come up with the names of the suspects that were involved in this case?

A Yes, I did.

Q Can you tell the jury how you came up with those names?

A On the same night shortly thereafter the incident happened on Packard, two individuals arrived at Receiving Hospital, which -- in a car which turned out to be stolen. We recovered some items from the car that belonged to the victim from the fatal shooting on Packard, basically put

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two and two together and added it up that way.
Q How did you investigate this car was stolen?
A It was at the hospital. Officers discovered when they arrived at the hospital. Protocol when someone arrives at the hospital, security automatically goes to the -- what we call a conveyance vehicle and investigates that vehicle, and at that time they discovered that the ignition was punched, put the car plates into the system and discovered the car was stolen.
Q What's the value of that car?
A Kelley Blue Book puts it at about 2,500.
Q Now, did you speak to the defendant, Joshua Stewart, at the hospital?
A No, I did not.
Q When is the first time you saw or spoke to the Defendant?
A The first time I spoke to Mr. Stewart is when I attempted to get a buccal swab from him while he was arrested at Wayne County.
Q At what point did you know the names of the suspect -- did you know the names of the suspect?
A That night. Like I said, I knew Mr. White and Mr. Stewart arrived at that location in the car to the hospital.
Q And then there is a third person?
A Yes.
Q How did you find out that person's name?

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A The day after the homicide, which would have been May 7th, I was contacted by Ms. Williams, who works at our public info office. She stated to me --

MR. POLK: Objection.

MS. CAL: Objection.

MR. POLK: It's hearsay, Judge.

MS. CAL: It's hearsay.

MR. HAYWOOD: It's not for the truth of the matter.

THE COURT: Well, what's it for? What happened then? Don't say what she said, just tell us what happened then.

THE WITNESS: There was a police run to an address of 13501 State Fair for a person exiting a blue Intrepid armed with an AK-47. Officers responding to that location found no such address. I got in contact with the person who called 911, who stated --

BY MR. HAYWOOD:

Q When you spoke to the person, what did you do?

A I went to an area where he said that he was at, at the time he made the call.

Q Where was that?

A That was in the area of State Fair and Greenlawn.

Q Did you find anything in that area?

A Yes. There is a marijuana dispensary located at 1351 East

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State Fair.

MR. HAYWOOD: People's 65. Judge, may I approach the witness?

THE COURT: Yes.

BY MR. HAYWOOD:

Q Handing you what's been marked as People's 65, for the record. Do you recognize People's 65?

A Yes.

Q How do you recognize that?

A It's a downloaded copy of the videotape from the dispensary.

MR. HAYWOOD: Your Honor, at this time, I'd like to move People's 65 into evidence.

MR. POLK: No objection on behalf of Mr. Stewart, Judge.

MS. CAL: No objection on behalf of Mr. White.

THE COURT: It's admitted.

MR. HAYWOOD: Your Honor, at this time, I would like to publish to the jury.

(At 11:44 a.m., videotape played for the jury.)

BY MR. HAYWOOD:

Q Detective Mitchell, is the real time in this video embedded in the time that this --

A No. I believe it was approximately 15 minutes off, so 15 minutes slow.

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Q How many days after the actual robbery and homicide occurred did you get this videotape?
A It would have been the second day, so probably I believe it would have been the 8th because my -- when the video was observed.
Q Did you have the name of the third person at that point?
A No, I did not.
Q Were you able to get that person's name?
A Yes.
Q How were you able to do that?
A I gave a copy of the video to our public infos to put on the different news agencies who put it on the news, and I received Crime Stoppers tips on who the third suspect is.
Q And were you able to determine what that person's name was?
A Yes.

MR. POLK: Objection, hearsay, your Honor.

THE COURT: Overruled.

BY MR. HAYWOOD:

Q What was the person's name?
A Demarco Profit.
Q There was Joshua Stewart, Deontea White and Demarco Profit?
A Correct.
Q Now, let me show you what's been marked as People's 56 and

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57. Have you had a chance to review People's 56 and 57?

A Yes.

Q Do you know what they are?

A Yes.

Q What is it?

A It's -- well, number 56 is going to be a fired 7.62 by 39 shell casing, and 57 is another 7.62 by 39 shell casing. That actually contains five shell casings.

Q All the same shell casings?

A All 7.62, yes.

Q Do you know where these shell casings were found?

A Yes. The first one, item 56 was recovered on Packard and Savage, and the Exhibit 57 was received on Meade.

Q And do they have different case numbers?

A Yes.

Q They have different case numbers?

A Yes. They both have different case numbers.

Q Why do they have different case numbers?

A They were two different accidents at the time. We didn't know they were connected, so therefore, one is on on, the other is on a separate one.

MR. HAYWOOD: Nothing further, your Honor.

THE COURT: Cross-exam?

CROSS-EXAMINATION

BY MR. POLK:

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Q When you look at those envelopes, you personally don't know where they were found.
A Where the envelopes were found?
Q Yeah, or where the contents of those envelopes were found. You don't personally know where they were found?
A No.
Q All right. You just looked at the envelopes, and you were basing your testimony off of what was on the envelope?
A Correct.
Q Okay. And you said that an individual called and gave you information about this location, this marijuana location?
A Not me. He called 911.
Q And did you provide that 911 tape to the -- that 911 call to the prosecutor?
A No. I don't have the 911 tape, no.
Q No, okay. Okay. So you were the officer in charge, correct?
A Correct.
Q It is your duty to assemble this particular case, yes?
A Yes.
Q And all evidence and so forth to amass it together and then provide it to the prosecutor, right?
A Correct.
Q And the prosecutor then provides it to the defense attorneys, correct?

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A Correct.
Q And so there was a 911 call that you were -- that you have testified to, but you don't have that call?
A No.
Q And do you know if there was any effort to get that call?
A Yes. I attempted to get the 911 -- the actual audio of the 911 call. I do not have it. I do have what we have as a CAD, which is a printout of the call.
Q Okay. So did someone from your evidence unit modify the tape that we just saw?
A No.
Q Did they do anything to it, do you know?
A They put clips on the news. They took different images from the video and put clips on the news. They didn't show old video on the news, if that's what you're referring to.
Q Well, no. I'm just asking if they did anything, any modification of what they got from that?
A Not to my knowledge, no.
Q None whatsoever?
A No.
Q Okay. So the information -- I mean that video is exactly what it appears to be, what it shows to be?
A Yes.
Q You stated that you attempted to get a buccal swab from

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Mr. Stewart. Did you -- did you get one?
A Not at first, no.
Q Okay. Did you get a -- did you have a warrant at the time to get one?
A Yes.
Q And you weren't able to get one?
A He wouldn't consent to it, no.
Q Well, you have a warrant though, correct?
A Correct.
Q And so it's your testimony that you had a warrant, but you didn't take the buccal swab?
A Correct.
Q And did you prepare a report in reference to that?
A No.
Q And where did you attempt to get the buccal swab?
A At the Wayne County Jail.
Q And what day was it?
A That I don't know.
Q So as the officer in charge, you're directing the case. Did you ever do any type of a -- order any type of fingerprint analysis on the weapons that were found?
A Yes.
Q Did you receive any type of response back from the -- did you have the Michigan State Police do it?
A Yes.

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Q Did you receive any type of response back --
A Yes.
Q -- from the Michigan State Police in reference to prints?
A As far as prints, it was inconclusive.
Q Okay. Did you provide that to the prosecutor?
A Yes.
Q And when it's inconclusive, they're saying that they can't tell you yes or no in reference to any of the prints?
A Correct.
Q Okay. Did you do anything with the analysis in terms of the blood that was collected?
A Which blood, sir?
Q Any blood --
A Yes.
Q -- that was collected in this case?
A Yes.
Q Okay. Was that sent to the Michigan State Police as well?
A Yes.
Q Okay. And did they come back with any type of report as it relates to the DNA of the blood that was found?
A It's still pending.
Q So they -- the answer to my question would be no.
A Yes.
Q So it's still out there, and we don't have those analyses?
A Correct.

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Q All right. Did you provide any information to the prosecutor in reference to the fact that you sent it to the laboratory, and they have not responded as of yet with a report?
A Yes. He knows it.
Q He knows it. Did you provide any documentation?
A That it's still pending?
Q Yes.
A No.
Q So do you know if he conveyed that information to the defense?

THE COURT: Counsel, how would he know that?

MR. POLK: I don't know, Judge. He might have been present.

THE COURT: Let's go on to something else.

BY MR. POLK:
Q The day that you went to the dispensary, you had a warrant that day?
A No.
Q The video was voluntarily given to you?
A Yes.
Q Did you search that dispensary?
A No. Well, yes, actually, yes.
Q Okay. And that was voluntary, as well?
A Yes.

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Q Didn't find any weapons?
A No.
Q The vehicle analysis of the prints that the -- from the vehicle, did you get a report back from the -- did you get a report back from the laboratory in terms of any print analysis from the vehicle?
A Yes, I did.
Q Was that provided to the prosecutor?
A Yes.
Q And there's a report from MSP?
A No. It's -- yes, yes, a report from MSP. Correct.
Q Do you know when you provided it to the prosecutor?
A No.
Q Was it within the last month?
A A month or so, yes.
Q A month or two?
A Yes.
Q And so those reports come directly to you, back to you?
A Yes.
Q And then you disseminate them to the prosecutor?
A Yes.
Q Do you know if any of the casings were dusted for prints?
A No.
Q How about live rounds?
A No.

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MR. POLK: Judge, may we approach, please?

THE COURT: Sure.

(At 11:58 a.m., bench conference.)

(At 11:59 a.m., bench conference concluded.)

BY MR. POLK:

Q This incident happened on May 6, 2016?

A Correct.

Q And the video that we just saw was from May 5th, 2016, correct?

A No, May 6th.

Q The video had the date on it, correct?

THE COURT: Well, the video says what it says, but your question was what was the date of the video? And he answered.

MR. POLK: The video says what it says, Judge, but I believe that the witness believes that the video said 5-6-2016.

THE COURT: So?

MR. POLK: That's not what the video said and so I want to see if I can refresh his recollection by letting him see the --

THE COURT: No, I didn't understand. Was the question to you when did you retrieve the video or when did -- or what did the video detect? Officer Mitchell?

THE WITNESS: I don't know what the video

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depict. That I don't recall. I'd have to look at it again. I don't -- I know the time frame was off. I just don't remember if it was a day off, but I know the time frame was off.

THE COURT: So what's the answer to Mr. Polk's question.

THE WITNESS: Can you ask the question one more time?

BY MR. POLK:

Q The video -- isn't it true that the video depicts May 5th, 2016?

A I don't know. I'd have to look at it again.

MR. POLK: All right. Can we now look at it, Judge?

THE COURT: Well, it's in evidence so what are you going to -- you're not going to argue with him. That's why I said, it depicts what it depicts.

MR. POLK: Judge, he said he'd just have to look at it again. Can't he just look at the banner so it refreshes --

THE COURT: Oh, sure.

MR. POLK: -- his recollection?

THE COURT: Oh, sure. Take your time.

THE WITNESS: It does say 5-5-16.

MR. POLK: I don't have any other questions.

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Thank you.

THE COURT: Ms. Cal.

CROSS-EXAMINATION

BY MS. CAL:

Q Now, when you -- when did you get assigned as the OIC, Detective?

A On that date. I was next up for a case, so when it came in, it was mine.

Q That was on May 6th?

A Yes.

Q So did you go to the DMC Hospital?

A To the -- no, I did not.

Q Did you arrest Mr. White?

A No.

Q But you are aware that he was arrested at the hospital?

A Yes.

Q And what's the procedure when someone gets arrested? What's the booking?

A Well, it depends. On a normal, you would --

Q Well, let me ask you this, when someone is booked, is a picture taken of him?

A Yes.

Q Okay.

MS. CAL: May I approach the witness, your Honor?

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THE COURT: Sure.

BY MS. CAL:

Q Showing you what is going to be marked as defense proposed Exhibit 1. Would that be the arrest photograph taken of Mr. White on December the 6th -- I mean on May the 6th?

A It was actually May -- he was arrested on the 7th, but the picture was taken on the 6th and the picture was taken on the 7th.

Q You said the report was printed on the 7th. It doesn't say picture was taken on the 7th.

A When this form is generated, it would have been the 7th.

Q Right, when the form was generated, but he would have been arrested on the 6th?

A Yes.

Q Okay. So this picture was how he looked on the 6th?

A Yes.

MS. CAL: I'd move to admit Defense Exhibit 1 for White. I'll have it marked afterward.

THE COURT: Well, I don't care about that. Any objection?

MR. HAYWOOD: No, your Honor.

THE COURT: It's admitted.

MS. CAL: Thanks.

(At 12:03:57 p.m., the jurors for defendant Stewart were excused from the courtroom.)

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(At 12:16:10 p.m., the jurors for defendant White were excused from the courtroom.)

THE COURT: Enter.

(At 12:16:53 p.m., the jurors for defendant Stewart entered the courtroom.)

THE COURT: All right. So the Stewart jury still has to finish with the video. I think the prosecutor has sorted out the difficulties so there shouldn't be those interruptions. So be back tomorrow morning at nine o'clock.

Do not discuss the case with any other person. Do not associate with anyone and don't go get your haircut at Eastland Mall.

MR. HAYWOOD: Your Honor, on behalf of the People for the defendant, Deontea White, the People would rest at this time.

THE COURT: So Mr. White's jury is excused until 10:30 tomorrow morning. Don't be late. Don't go anyplace except for here. I mean I don't care what you do before 10:30, but be here at 10:30.

MR. HAYWOOD: Your Honor, may we approach for one second?

THE COURT: Oh, sure. Please do.

(At 12:15 p.m., bench conference.)

(At 12:16 p.m., bench conference concluded.)

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THE COURT: So the White jury is excused.

(At 12:16 p.m., the jurors for defendant White were excused from the courtroom.)

THE COURT: You can be seated. So the Stewart jury still has to finish with the DVD, the date. The prosecutor has sorted out the difficulties, so there shouldn't be those interruptions, but be back tomorrow morning at nine o'clock. Do not discuss the case. Do not associate with any other jurors, and don't go get your haircut at Eastland Mall.

THE DEPUTY: All rise.

(At 12:17 p.m., the jurors for defendant Stewart were excused from the courtroom.)

THE DEPUTY: You may be seated. We'd ask everybody to please remain in the courtroom until the juries have cleared the floor.

THE COURT: So you can be seated. So what happened to Mr. Profit then?

MR. HAYWOOD: He's still out.

THE COURT: He's still out?

MR. HAYWOOD: Yeah. He's got to catch up.

THE COURT: He's in flight or something?

MR. HAYWOOD: Yes.

THE COURT: All right. So as to the defense, do you wish to question your clients about testifying or not

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testifying?

MR. POLK: Not for Mr. Stewart at this time, Judge. We still have the rest of the video and I believe that there will be other testimony.

THE COURT: Do you?

MS. CAL: I would like to not do it at this time, your Honor. We're still in discussions.

THE COURT: We're also proceeding to closing argument tomorrow. Thank you.

MS. CAL: I understand.

(At 12:18 p.m., proceedings concluded.)

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STATE OF MICHIGAN)

) SS

COUNTY OF WAYNE)

R E P O R T E R' S C E R T I F I C A T E

I, Eileen Higer, CSMR-5018, do hereby certify that I have recorded the proceedings had and testimony taken in the above-entitled matter at the time and place hereinbefore set forth and that the foregoing is a full, true and correct transcript of proceedings had in the above-entitled matter; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Eileen S. Higer, CSMR-5018

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 16-005731-01-FC

JOSHUA LAMAR STEWART,

Defendant.

_____/

JURY TRIAL - VOLUME VI

Taken in the above-entitled matter before Honorable Michael Callahan, Third Judicial Circuit Court Judge, Detroit, Michigan on Wednesday, November 9, 2016

APPEARANCES:

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EXHIBITS:

None marked.

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Detroit, Michigan

Wednesday, November 9, 2016

- - -

(At 9:01 a.m., proceedings begin.

The jurors entered the courtroom.)

THE DEPUTY: You may be seated. Court is in session. All jurors are properly seated and accounted for. Remain quiet.

THE COURT: So ladies and gentlemen, thanks for your promptness. The interview of the defendant by the homicide detective continues.

You can go ahead. Thank you.

(At 9:02 a.m., video played.)

(At 10:23 a.m., video concluded.)

OFFICER JAMES McDONALD,

(at 10:24 a.m., having been previously sworn as a witness testified as follows:)

MR. HAYWOOD: No further questions, your Honor.

MR. POLK: No questions of this witness, your Honor.

THE COURT: You're excused.

(At 10:24 a.m., witness excused.)

MR. HAYWOOD: Your Honor, on behalf of the People for the defendant, Joshua Lamar Stewart, the People would rest at this time.

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THE DEPUTY: All rise.

(At 10:24 a.m., the jurors were excused from the courtroom.)

MR. POLK: Judge, I ask that my client be sworn.

THE COURT: Mr. Stewart, would you stand and raise your right hand. Do you swear the testimony you're about to give will be the truth?

THE DEFENDANT: Yes.

THE COURT: Go ahead.

MR. POLK: Please stand. Remain standing. Have you had an opportunity to sit through this trial, correct?

THE DEFENDANT: Yes.

MR. POLK: Okay. And you know that the judge will instruct the jury that if you don't testify, they cannot hold it against you.

THE DEFENDANT: Right.

MR. POLK: You know that you have a right to testify at your own trial?

THE DEFENDANT: Yes.

MR. POLK: Have you made a decision as to whether or not you would like to testify?

THE DEFENDANT: Yes.

MR. POLK: And do you want to testify in your trial?

THE DEFENDANT: No.

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MR. POLK: Okay. Is anyone coercing you or promising you anything if, in fact, you don't testify?

THE DEFENDANT: No.

MR. POLK: We've had discussion well in advance of today in reference to whether or not you want to proceed with testimony on your own behalf, correct?

THE DEFENDANT: Correct.

MR. POLK: And your decision to not testify is your own decision?

THE DEFENDANT: Yes.

THE COURT: Okay. You can -- the Defendant can return. The Court is going to take a 15-minute break.

(At 10:24 a.m., proceedings adjourned.)

(At 12:14 p.m., proceedings reconvened.)

THE COURT: Okay. You can bring in the jury.

THE DEPUTY: All rise for a jury. You can come up and take your seats, please.

THE COURT: You can be seated.

Closing argument as to Joshua Stewart.

MR. HAYWOOD: Ready, Judge.

In a moment, you're going to go back to the jury room. You're going to go back to the jury room and you're going to decide this case. And when you decide collectively, I want you to keep these three things in mind: the evidence of which you just saw, heard the

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witness saying and any exhibits that you saw; the law that the Court is going to read to you at the end of the trial, and the truth of what happened -- what really happened May 6th, 2016.

And when you think about these things, think about what makes sense to you. The Court is going to tell you, you can use your common sense. We want you to use your common sense in this case because if you use your common sense in this case, it becomes really clear that this defendant participated in these robberies as the driver, which led to the death of young Aaron Foster.

Now, the defendant -- the defendant was the getaway driver, and not only was he the getaway driver for the first robbery, he also was the getaway driver for the second robbery. At the first robbery, Aaron was killed, not by the defendant but by Mr. Deontea White.

What are you saying? He was killed by him, but that didn't change the plans. That didn't change the plans for this defendant. He knew that he had participated in a robbery where a young man had been killed, and instead of saying I'm out, I'm out of here, I'm not doing this anymore, less than 40 minutes later, he is committing another robbery with the same group of people, less than 40 minutes later after he killed this young man -- participated in killing this young man. Why?

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Why did he do this? Because he has no heart; he has no soul. For you to sit there and watch someone kill somebody and then 40 minutes later, you're going to do another robbery with him? You don't care.

And remember on the video he said nobody makes me do anything. I do this stuff because I want to do it. This is his choice to be a part of this robbery, and when the robbery went bad, when someone lost their life, when Mr. Foster lost his life, he didn't change his plans whatsoever. He continued to participate, and his plans never changed; but the plans did end up changing because someone had a gun, and they started firing back.

You see, when you got the gun and you can go up to people and point the gun at them and say, hey, you demand all of these things, I mean people will give you something because nobody wants to be shot and nobody wants to die. Nobody wants to lose their life. And even at 21 years of age, Aaron Foster knew that his life was a lot more valuable than a belt and some shoes.

So when they started firing their gun at that time, Mr. Profit, at the feet of Mr. Walker, Aaron freely gave up what he had because he didn't want to get shot. And he gave it up, and as he's running away from the robbers, Defendant White shoots him in the back. And then they just take off, riding in the car, they just take off

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and the defendant, he's driving it.

He drove them to the robbery. He drove them from the robbery. And even after this man lost his life, he didn't change the plan whatsoever. The plan continued, but again, Mr. Claxton had a gun and he fired back. And when he fired back at him, then what happens? They fall apart, dropping the gun. You know, it was a lot different when somebody is firing back at you. You're not so big and bad anymore. You're not the man anymore. You're a coward running, running to the car, dropping your guns.

Going to the defense, we talked about the big gun and then going to the hospital. Why did the -- why did defendant Stewart take him to the hospital? Because Stewart knew that if he didn't take White to the hospital, White probably would have died or could have died.

He cared about White, his buddy, but did not care anything about the young man who just lost his life 40 minutes ago. And how come I -- how come I say that? Because he continued to plan a robbery, continued robbing people, didn't care at all.

And then what happened? He lied to the police about his crimes. He lied to the police, all about what he did. I didn't do this. I was just there. I saw this guy and I just picked him -- I just decided to take him to the hospital. All lies. And he knew what he did, and he

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knew that what he did would cause him problems with the law.

There's laws on the book. There's laws -- many laws, felony murder, murder, rape, all the laws under the book, but it doesn't affect you, it doesn't affect people. The only way that these laws start affecting people is when they break the law. Then the laws affect them; it comes into play, and he knew that. He knew that he was going to get into trouble. He knew that he had -- they had shot this young man, so he lied.

Lies, lies, lies, but eventually the truth came out. And you saw the video; it was a long video, but eventually the truth came out. Yeah. I was -- I was -- I participated in the robbery. Yes, I drove him to the robbery. Yes, I drove him to the second robbery. Yes, yes, yes; I am guilty.

And they were still in the possession of the stolen property. That's how quick this robbery turnaround was. The defendant in the vehicle was still with the stolen property and from the first robbery at seven o'clock.

And then the time, I'd ask you to focus on the times of the officers because they wrote the times down. People could only remember what they can remember, but the officers wrote the time down; that at seven o'clock,

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they were there at the first scene on Packard, and it was 40 minutes later that the need (phonetic) had occurred.

And the most -- the strongest evidence in the case came from the defendant's own mouth, that he was there. I mean, based on all the evidence they had, they knew that he was there. They knew that he didn't just find somebody laying out. They knew he was there, but his confession confirms that he was there. His confession confirms that he was there participating in these robberies.

Now, we talk about -- earlier in voir dire, I asked you about the law and what is there in the law that you don't know like. And what if that law that you don't like caused something to happen that you don't like? And all of you said that it did not matter; you'd still follow the law. You took the oath to follow the law. You took the oath to follow the law in this case. I didn't take the oath. Defendant's counsel didn't take the oath. Defendant didn't take the oath. You took it, and you said I will follow the law in this case how the judge gave it to me.

One of the laws in this case is called aiding and abetting. Anyone who intentionally who assists with someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of

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that crime as an aider and abettor. I want you to think about that when you think about this case because the defendant is aiding in these crimes.

Me, as the prosecutor, have to prove aiding and abetting; first, that the alleged crime was actually committed either by the defendant or someone else. So we know these crimes were committed because we know we have a young man who was killed. We know we have a young man that was robbed and then was killed, and we know these crimes -- crimes have occurred.

And second, that before or during the crime, the defendant did something to assist in the commission of the crime. And we know that; what did he do? He drove to the scenes and he drove away from the scenes.

Third, at the time, the defendant must have intended the commission of the crime alleged or let them know that the person intended the commission or that the crime alleged was the natural and probable consequence of the commission of that crime intended.

Eventual and probable consequences: When you rob people with gunpoint -- at gunpoint, the natural consequence that sometimes people will get hurt. People will get shot.

So he did aid and abet in these crimes. And I want you to think about him as an aider and abettor in

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these crimes when I refer to the defendant. A lot of it will be the defendant, and a lot of it will be the actions of White or other people, but because he's an aider and abettor, he becomes the defendant just as if he was doing the actions.

Felony murder. The defendant caused the death of Aaron Foster. We know that Aaron Foster was alive before the defendants came in contact with him. We know that after they came in contact with him, he was dead. We know that because the medical examiner testified that he was shot in the back and that wound killed him. The damage from that wound destroyed his life, took his life.

The defendant intended to kill and intended to do great bodily harm or created a high risk of death or great bodily harm. Now, these are "or." They're not "and," but it could be either -- it could be either/or.

Certainly when you're shooting somebody with an AK-47, you're trying to kill them. So certainly, there was an intent to kill this young man. Certainly there was intent to hurt him, and we all can probably agreed that if you are shooting somebody with an AK-47, you are creating a very high risk of death and great bodily harm.

When he, the defendant, did that, that caused the death of Aaron, defendant was committing or helping someone to commit the -- commit the armed robbery --

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commit the armed robbery. So we know that the defendant was helping by driving.

The felony murder has been met. The defendant is guilty of felony murder. He's also charged with armed robbery. The defendant used force or violence against Aaron Foster; he shot him or violated him. The defendant did -- the defendant did so while he was in the course of committing a larceny, taking a property, the intent to taking the property. It all would be larceny whether he did something or not.

Aaron was present while the defendant was, of course, committing the larceny, and we know Aaron was present because we know he died. And then the defendant possessed a weapon designed to be dangerous and capable of causing death or serious injury. We know that the weapon appeared to be called a weapon in the video, and the weapon was a dangerous weapon and it caused the death of Aaron. So the defendant is guilty of armed robbery.

Now, the Court is going to allow you to consider second degree murder also as a lesser included of felony murder; and in order for me to prove that type of proof, the same element that the defendant caused the death, being White but, you know, also because he helped him.

And then the one of three states of mind, he either intended to kill, he intended to commit great

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bodily harm or he created a very high risk of that great bodily harm.

So that element has been met. The defendant is guilty of second degree of murder, but when you find he was guilty of second degree murder and he also has killed somebody in this case, second degree murder -- I'm sorry. Let me back up.

When you have somebody who has committed -- committed murder in this state and they also committed armed robbery, which is a felony, and they've committed both of them, it merges together and that becomes a felony murder. And so I'm going to ask you to find the defendant guilty of the high count of felony murder because that's what he did. He killed -- he killed someone as a result of that felony.

There's another count of assault with intent to murder as it pertains to Daniel Claxton. The defendant tried to physically injure another person, being Daniel Claxton, and when the defendant committed the assault, he had the ability to cause an injury or believed that he had the ability. Certainly, he had an AK-47 so he had the ability to do this.

The defendant intended to kill the person he assaulted. Remember, he was shooting an AK-47 at a human being, so the intent is clear. So the defendant is guilty

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of assault with intent to murder.

The court is going to allow you to consider assault with intent to commit great bodily harm, and that is the same as felony murder, but instead of killing the person, you're intending to commit great bodily harm.

Again, you're shooting a gun at somebody, I believe an AK-47. You're trying to kill the person, not just hurt them. So the defendant is guilty of assault with intent to commit great bodily harm -- I'm sorry, assault with intent to commit murder.

And then felony firearm is that when you committed these acts, whether you find him guilty of felony murder or murder -- murder in the second degree or something else. Well, when he committed these crimes, he had a firearm. So if you find that he had a firearm when he committed any of those crimes, he's be guilty of felony murder, and we believe, the Court, that he had a firearm because Aaron died as a result of the gunshot wound.

And we believe that this crew was the crew that shot and killed Aaron. And the defendant was a part of that. How do we know the defendant was a part of that? Because it came out of his own mouth.

Now, there was a lot of struggling, not giving his name to the People, but you can fill in the blanks now as you've seen the whole case.

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You know that Deontea White was in the car. You know that a person by the name of Demarco Profit was in the car, and that they were in the backseat. Defendant was driving, and when they pulled up to the people, the people they robbed, those two would jump out of the backseat, rob the person, jump back in and go. And if they would have done that, if that's what it would have been, you know, it still wouldn't be here. It didn't lead to this tragedy. It wouldn't be this tragedy. This man died for absolutely nothing. He gave them what they wanted and they still killed him.

Ladies and gentlemen of the jury, I will return with my second closing after the defense does his closing. Thank you so much for your time and attention. Thank you.

THE COURT: Defense.

MR. POLK: Thank you very much, your Honor.

So, ladies and gentlemen, first of all, I'd like to thank you for paying attention to this trial, paying attention to this. As the prosecutor has already told you, I don't get to talk twice because the burden is his, and it remains his as we talked about it in jury voir dire. He has to prove beyond a reasonable doubt what he has alleged that my client did.

And when we looked at this particular case, I mean it is a tragedy, absolutely. So if we just go and we

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look at some of the things that were done and were not done in this particular case, and then we'll move forward in reference to trying to analyze what you've seen as evidence.

The first thing they said, well, you know, we've got some DNA, did nothing with it. Said, well, it's always pending. We'll tell you something about the DNA - he didn't tell you nothing about it because it wasn't tested.

We have some weapons -- weapons were not fingerprinted. There is nothing that's been presented to you in terms of weapons being fingerprinted. What you have now is this information that alleges that now there's an aiding and abetting theory. The prosecutor wants you to try to fold in that all of the actions of some other person somehow now attributable to Mr. Stewart.

Mr. Stewart tells the officers again and again and again, ad nauseum in that video, I didn't do what you're trying to do say I did. I didn't do it. I never touched a gun. There is nothing that even remotely insinuates that Mr. Stewart had possession of a weapon, a felony firearm charge and used that weapon while, in fact, this tragedy is going on, nothing. There is no fingerprints. There is nothing that demonstrates he ever possessed a gun. He says it again and again and again.

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The officer even said to him numerous times, we know you didn't do it. We know you did not do it. We know you didn't. But what they want now is to blend in the actions of someone else and attribute them, to Mr. Stewart.

At the point in time you see Mr. Stewart -- and he tells the officer. I've been sick. I'm a cancer survivor, you know, and I found myself in a situation that I know is not good, but I didn't do anything. I didn't do what they're alleging I did.

I never killed anyone. I never robbed anyone. I never shared in any proceeds from anyone in reference to what went on on that particular day.

When you look at what the police did, they submitted nothing to the crime lab. They didn't do anything that gave you any insight in terms of what was going on or what had allegedly happened on that particular day.

My client talks to the officers and he tells them again and again, I'm not involved with any murder. I'm not involved with any robbery. I didn't do it. You see him deny again and again, getting out of the car. He never got out of the car, never did anything in reference to that.

My client talks about and you hear him, he's

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terrified - terrified. Says I don't really -- I'm not going to say nothing because I am fearful of my life. That's what he says on the video. I'm fearful of my life. I really don't want to provide any type of information.

You heard again and again and again, he's an 18-year-old young man, 18 years old, and he's acknowledged and the judge will tell you that you're here just to make your determinations on this case and this case alone, because he acknowledged that, you know, I've done some things in my life, and I'm here to tell and talk about that, but I'm telling you what I did not do.

Under no circumstances was I ever involved in the murder of Mr. Foster. I wasn't involved in the robbery of Mr. Walker. I was not involved in the robbery of Mr. Claxton. I was not involved in the robbery of Mr. Upshaw.

The only one I found to be interesting, Mr. Upshaw comes in here and deliberately said that -- he wants to say oh, no, I saw Mr. Stewart driving the car. Well, that's not what you told the police. You know, you told the police that you saw somebody with a white shirt on, and that was the only description, no other description of anything. And he did that because I would suppose that he's been talking to the officers, and the officers provided him with that information, so he

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probably just threw it in when he came in here to testify.

There are numerous times, and he said it himself several times, that he spoke to the police numerous times. Never one time he said that you know what, I can recognize that guy or I think that that's the guy that I saw over on one of those locations, never did it because he didn't.

And so when you look at this particular case, I'm asking you to look at Mr. Stewart for what you know in terms of what he did. He did not participate in the murder. He has nothing. There is no -- and the prosecutor has not -- is not going to be able to demonstrate anything that relates to this specific intent; any type of intent in the lying of Mr. Stewart that there be a robbery or that there be any type of murder, not at all.

Mr. Stewart tells you and you see in the video, and he tells you on that video that he was terrified. And based upon that, he was only a driver and that was it. So I'm asking you, as you've already vowed to do, to use your common sense in looking at this particular case and judge Mr. Stewart based upon his actions and his actions alone, nothing that relates to anyone that might be sitting as a codefendant in this particular case.

He's not a murderer. He's not a robber. He specifically talked about what he did, and that was a

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driver who at some point was terrified. And so based upon that, I'm asking you to come back with a not guilty as it relates to the charge of felony murder, as it relates to any of the robbery counts that have come before you.

When he sat in that chair and provided conversation, interviewed with those officers, that was the same issue as it relates to a stolen vehicle. You know, I didn't know the vehicle was stolen. I was picked up and keys were in the ignition, and that was part of the video that you saw. So based upon that, again, I'm asking you to come back with a verdict of not guilty. Thank you.

THE COURT: Mr. Haywood.

MR. HAYWOOD: One problem with that is that the vehicle ignition was punched. That will tell you right there, the car was stolen. The ignition was punched, the same.

Now, the burden of proof is on me. I have to prove these counts beyond a reasonable doubt. That's the same burden in all of our state courts and all our federal courts. People are found guilty by that same burden every day. You know why? Because it's a doubt based on reason and common sense. And when you put your reason and your common sense to this case, it is clear that the defendant is the driver for both robberies. The first robbery led to the death of Aaron Foster.

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Now, of course, when he's speaking to the officers in a confession, he's not owning up to what he has done. He knows what he's done. He knows what he did, but eventually they do get him to admit that he was there for both robberies.

In order for you to not find him guilty, you have to completely forget about the law of aiding and abetting, and that is a law that's already read to you; that the Court is going to tell you, you have to follow. If you -- counsel says, you know, don't blame him for anything he does. Well, I mean, you have to completely forget about that law that's going to be read to you that says anybody that assists somebody is just as guilty as the person who committed the crime.

I'll give you a scenario here. So if I'm an older person and I want to take -- I want to go and commit robberies, and I take two 15-year-olds and make them get out and do the robberies with the gun and I'm just driving them, and I'm driving them to this place and this place and they commit all these robberies, you're saying -- counsel is saying that I shouldn't be held guilty because I didn't do anything. I could go -- I could go scot free. No. That's why we have a law of aiding and abetting.

No, you get charged with the same thing, all -- what the other people did while they committed those

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robberies. If you were driving the getaway car in a bank robbery and somebody gets killed in the bank, based on those robbers that you're helping and you're the getaway driver and you don't even go into the bank, and you just wait outside, guess what, you're still guilty of that bank robbery and that murder because you participated in it.

These crimes do not happen unless they get there in the car driven by the defendant. This is the way, this is why they're able to complete these crimes. This is why they're able have two people jump out of the back because he's driving them there, and he knows exactly what he's doing because he says nobody make me do anything.

They want to point to his youth. Well, yeah, he is young, but so was Mr. Foster, he was only 21, three years older than this defendant, and now his life is gone. No legacy to leave behind, no grandchildren, nothing, just gone.

I wanted to talk to you about the DNA a fingerprints. And we already know the people who were -- we knew who the people were within a -- within the day of the crime. DNA, fingerprints, when we're doing it, we're trying to identify suspects. We knew who they were. We already knew who the people were.

They pray upon he was sick with cancer. Well, you know what, he may have been, but it still didn't stop

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him from driving to the scene, still didn't change that stony heart. When you kill somebody and just go on to the next robbery, the next plan, that sickness didn't change him at all. He still has a stony heart.

He's terrified for his life? What about the life of Aaron Foster? What about his life? It didn't matter to you at all? When you were participating and he died, why didn't you say enough of this. I didn't sign up for this. I didn't sign up for you killing anybody. No. Forty minutes later, committed another robbery.

The witnesses, Mr. Upshaw -- no, that was Mr. Walker because he said that oh, yeah, I saw the defendant on the car. Well, I mean the defendant was there. You did see him. It was the defendant. We know it was the defendant because the defendant confessed that he was at both scenes, and he was at the hospital. So why are you attacking him and telling you that he's conspiring with the police. Really? Well, when you conspire with the police, you can do it a little bit better than that.

Ladies and gentlemen of the jury, when you look at this case, it is a sad case, but why did it happen?

People made choices. People made choices to commit robberies. People made choices to shoot a gun at a young man for no reason. And the defendant was part of this crime, and we know that he had no remorse. We know

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he had no compassion. We know he had no sympathy because 40 minutes later, he continued with a plan, a plan to even go out and rob again.

I'm asking you to find the defendant guilty of felony murder, assault with intent to murder as to Daniel Claxton, felony murder as to Aaron Foster, armed robbery as it relates to Mr. Foster, Mr. Walker, Mr. Claxton and Mr. -- and Kyle Upshaw and felony firearm, and of course, the car, which he didn't know it was stolen. How are you driving the car? No. It's ridiculous.

Ladies and gentlemen of the jury, thank you for your time and attention to this. Thank you.

THE COURT: Members of the jury, the evidence and arguments in this case are finished, and all that remains is for me to instruct you on the law, which I will do tomorrow morning. You'll be first at 8:30. Please be prompt. Then the case will be deliberated and in your hands for deliberation and verdict. Then I'll instruct the other jury, and the same charge will be made for them.

So again, don't discuss the case. Be back at nine and never, never associate with members of the other jury. Thank you.

THE DEPUTY: All rise for the jury.

(At 12:46 a.m., proceedings concluded.)

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STATE OF MICHIGAN)

) SS

COUNTY OF WAYNE)

R E P O R T E R' S C E R T I F I C A T E

I, Eileen Higer, CSMR-5018, do hereby certify that I have recorded the proceedings had and testimony taken in the above-entitled matter at the time and place hereinbefore set forth and that the foregoing is a full, true and correct transcript of proceedings had in the above-entitled matter; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Eileen S. Higer, CSMR-5018

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 16-005731-01-FC

JOSHUA LAMAR STEWART,

Defendant.

_____/

JURY TRIAL - VOLUME VII

Taken in the above-entitled matter before Honorable Michael Callahan, Third Judicial Circuit Court Judge, Detroit, Michigan on November 10, 2016

APPEARANCES:

For the People:
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WITNESSES:

None called.

EXHIBITS:

None marked.

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Detroit, Michigan

November 10, 2016

- - -

(At 8:40 a.m., proceedings begin.)

THE DEPUTY: You may be seated. Court is in session. All jurors are properly seated and accounted for.

THE COURT: People of the State of Michigan vs. Joshua Lamar Stewart.

Counsel.

MR. HAYWOOD: Good morning, your Honor. Ron Haywood for the People.

MR. POLK: Your Honor, may it please this honorable Court, Larry Polk on behalf of Mr. Joshua Stewart, who is present.

THE COURT: Thank you.

MR. POLK: Thank you.

THE COURT: Members of the jury: The evidence and the argument in the case are finished and I will now instruct you on the law; that is I will explain the law that applies to this case. Remember, you have taken an oath to return a true and just verdict based only on evidence and my instructions on the law. You must not let sympathy or prejudice influence your decision. As jurors, you decide the facts of the case. This is your job and no

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one else's.

Think about all of the evidence, then decide what each piece of evidence means and how important you think it is. This includes whether you believe what each of the witnesses said. So what you decide about any fact in the case is final.

It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say.

At various times, I have already given you some instructions about the law. Take all of my instructions together as the law you are to follow. You should not pay attention to some instructions and ignore others.

To sum up, you decide the facts of the case, apply the law as I give it to you, and in that way reach a verdict.

A person accused of a crime is presumed to be innocent. This means you must start with the presumption the defendant is innocent. This presumption continues with the defendant throughout the trial and entitles him to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.

Every crime is made up of parts called elements. The prosecutor must prove each element of a

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crime beyond a reasonable doubt. The defendant is not required to prove innocence or do anything. If you find the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

A reasonable doubt is a fair and honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary nor possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of the case.

Every defendant has the absolute right not to testify. When you decide the case, you must not consider the fact he did not testify. It must not affect your verdict in any way.

When you discuss the case and decide on your verdict, consider all the evidence properly admitted in the case. Evidence includes only the sworn testimony of the witnesses and the exhibits admitted into evidence and anything else I told you to consider as evidence. The fact that the defendant is charged with a crime and is on trial is not evidence. Likewise, the fact he is charged with more than one crime is not evidence. Lawyers' statements and arguments are not evidence but are only

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meant to help you understand the evidence and each side's legal theories.

Accept only those things that the lawyers say that are supported by evidence or by your own common sense and general knowledge. Lawyers' questions to witnesses are not evidence. Consider these questions only as they give meaning to the witnesses' answers.

My comments, rulings, questions and instructions are not evidence. It is my duty to see the trial is conducted according to the law and to tell you the law that applies to the case; however, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe I have an opinion about how you should decide the case, pay no attention to that opinion. You are the sole judges of the facts, and you decide the case based on evidence.

Your decision should be based on all of the evidence, regardless of which party produced it.

You should use your common sense and general knowledge in weighing and judging the evidence, but do not use any personal knowledge you may have about a place, person or event. To repeat once more, you decide the case based only on the evidence admitted during the trial.

As I said, you decide the facts of the case.

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You decide the witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of any person's testimony.

In deciding the testimony you believe, rely on common sense and everyday experience; however, in deciding whether you believe a witness' testimony, set aside any bias or prejudice you may have based on race, gender or national origin of the witness.

There is no fixed set of rules for judging whether you believe a witness, but it may help you if think about these questions. Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that may have distracted the witness? Did the witness have a good memory? How did the witness look and act while testifying? Did the witness make an honest effort to tell the truth or did the witness evade questions or argue with the lawyers? Does the witness' age and maturity affect how you judge his or her testimony? Does the witness have any bias, prejudice or personal interest in how the case is decided? Have there been promises, threats, suggestions or other influences that affect how the witness testified? In general, does the witness have any special reason to tell the truth or any special reason to

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lie? All in all, how reasonable does the witness' testimony seem when you think about other evidence in the case.

Sometimes testimony of different witnesses will not agree, and you must decide the testimony you accept. Think about whether the disagreement involves something important or not and whether you think someone is lying or simply mistaken. People see and hear things differently. Witnesses may testify honestly but simply be wrong about what they thought they saw or remembered.

It is also a good idea to think about which testimony agrees best with other evidence in the case; however, you may conclude that a witness deliberately lied about something that is important to how you decide this case. If so, you may choose not to accept anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, simply accept the part you think is true and ignore the rest.

The prosecution introduced evidence of a statement that it claims the defendant made. Before you may consider such an out-of-court statement against the defendant, you must first find the defendant actually made the statement as given to you. If you find the defendant did make the statement, you may give the statement

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whatever weight you think it deserves. In deciding this, think about how and when the statement was made and about all the other evidence in the case. You may consider the statement of the defendant in deciding the facts of the case.

The defendant, Joshua Stewart's confession has been admitted as evidence only against him.

Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. So if you look outside and see rain falling, that is direct evidence that it is raining.

Facts also can be proved by indirect or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So if you see a person come in from outside wearing a raincoat covered in small drops of water, that would be circumstantial evidence that it is raining.

You may consider circumstantial evidence. Circumstantial evidence by itself or a combination of circumstantial evidence and direct evidence can be used to prove the elements of a crime. In other words, consider all the evidence that you believe.

There has been evidence that the defendant ran away after the alleged crime. The evidence does not prove

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guilt. A person may run or hide for innocent reasons such as panic, mistake or fear; however, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and if true, whether it shows the defendant had a guilty state of mind.

You may consider whether the defendant had a reason to commit the alleged crime, but a reason by itself is not enough to find a person guilty of a crime. The prosecutor does not have to prove the defendant had a reason to commit the alleged crime. He only has to show the defendant actually committed the crimes and meant to do so.

Defendant's intent may be proved by what he said, what he did, how he did it or by any other facts and circumstances in evidence.

Do not decide the case based on which side presented more witnesses. Instead, think about each witness and each piece of evidence and whether you believe them. Then you must decide whether the testimony and evidence you believe proves beyond a reasonable doubt that the defendant is guilty.

You have heard a lawyer talked to one of the witnesses. There is nothing wrong with this. A lawyer may talk to a witness to find out what the witness knows about the case and what the witness' testimony will be.

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You have heard evidence that was introduced the defendant committed a crime for which he is not on trial. You must not consider this evidence for any purpose. For example, you must not decide it shows the defendant is a bad person or he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crimes or you must find him not guilty.

You have heard testimony from expert witnesses, Leonardo Roquero, in the field of forensic pathology on the cause and manner of death; and Rebecca Smith, from the Michigan State Police, an expert in the field of firearms toolmark identification. Experts are allowed to give opinions in court about matters on which they are experts; however, you do not have to believe an expert's opinion. Instead, decide whether you believe it and how important you think it is.

When you decide whether to believe an expert's opinion, think carefully about the reasons and facts the expert gave for the opinion and whether those facts are true. Also, think about the expert's qualification and whether his opinion testimony makes sense when you think about all the other evidence in the case.

You have heard testimony from witnesses who are

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police officers. That testimony is to be judged by the same standards you use to evaluate the testimony of any other witness.

One of the issues in this case is the identification of the defendant as the person who committed the crimes. The prosecutor must prove beyond a reasonable doubt the crime was committed and the defendant was the person who committed it.

In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, whether the area was well-lighted and the witness' state of mind at the time. Also, think about circumstances at the time of the identification such as how much time had passed since the crime, how sure the witness was about the identification and the witness' state of mind during the identification.

You may also consider anytime the witness failed to identify the defendant or made an identification or gave a description that did not agree with the identification of the defendant during the trial. Examine the witness' identification testimony carefully. You may consider whether other evidence supports the

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identification because then it may be more reliable; however, you may use the identification testimony alone to convict the defendant as long as you believe the testimony and you find it proves beyond a reasonable doubt the defendant was the person who committed the crime.

In this case, the defendant is charged with committing felony murder or second degree murder or armed robbery or assault with intent to murder or assault with intent to do great bodily harm less than murder or felony firearm, or he starts as intentionally assisting someone else in committing any of those crimes.

Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.

To prove this charge of aiding and abetting, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, the alleged crime was actually committed, either by the defendant or someone else. It does not matter whether anyone else has been convicted of the crime.

Second, before or during the crime, defendant did something to assist in the commission of the crime.

Third, at the time, the defendant must have

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intended the commission of the crime or must have known the other person intended its commission or that the crime alleged was the natural and probable consequence of the commission of the crime in general. It does not matter how much help or advice or encouragement the defendant gave. However, you must decide that the defendant intended to help another commit the crime, and whether his help or advice or encouragement actually did help or advise or encourage the crimes. Even as the defendant knew the alleged crime was planned or being committed, the mere fact that he was present when it was committed is not enough to prove he assisted in committing it.

The defendant is charged with first degree felony murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, defendant caused the death of Aaron Foster, that is Aaron Foster died as a result of a gunshot wound. Second, the defendant had one of these three states of mind: He intended to kill or he intended to do great bodily harm to Aaron Foster or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions. Third, that when he did the act that caused the death of Aaron Foster, the defendant was committing or

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helping someone else commit the crime of armed robbery.

For the crime of armed robbery, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, the defendant used force or violence against Aaron Foster or Etoh Walker or Daniel Claxton or Kyle Upshaw. Second, the defendant did so while in the course of committing a larceny.

A larceny is the taking and movement of someone else's property with the intent to take it from that person permanently. In the course of committing a larceny includes acts that occur in an attempt to commit the larceny or during the commission of the larceny or in flight or attempted flight after the commission of the larceny or in an attempt to retain possession of the property or money. Third, Aaron Foster, Etoh Walker, Daniel Claxton, Kyle Upshaw were present while the defendant was in the course of committing the larceny. Fourth, while in the course of committing the larceny, the defendant possessed a weapon designed to be dangerous and capable of causing death or serious injury.

You may also consider the less serious charge of second degree murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, the defendant caused the death of Aaron Foster, either as a principal or an

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aider and abettor; that is Aaron Foster died as the result of a gunshot wound. Second, the defendant had one of these three states of mind: He intended to kill or he intended to do great bodily harm to Aaron Foster or he knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would be the likely result of his actions.

Defendant is charged with the crime of assault with intent to murder, either as a principal or aider and abettor. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, defendant tried physically to injure another person. Second, when the defendant committed the assault, he had the ability to cause an injury or at least believed he had the ability. Third, that the defendant intended to kill the person he assaulted and the circumstances did not legally excuse or reduce the crime.

The defendant is charged with assault with intent to murder with the less serious charge of assault with intent to do great bodily harm less than murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, defendant tried physically to injure another person. Second, at the time of the assault, the defendant had the ability to cause an injury or at least believed he had the

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ability. Third, the defendant intended to cause great bodily harm. Actual injury is not necessary, but if there was an injury, you may consider it as evidence in deciding whether the defendant intended to cause great bodily harm. Great bodily harm means any physical injury that could seriously harm the health and function of the body.

The defendant is charged with the crime of receiving and concealing stolen property. To prove this charge, the prosecutor must prove each element of the following elements beyond a reasonable doubt: First, that some property was stolen. Second, the defendant possessed the property. Third, the defendant knew or had reason to believe the property was stolen when he possessed it. Fourth, the property was a motor vehicle and fifth, the property had a fair market value when it was possessed of more than $1,000 but less than $20,000.

Defendant is also charged as a principal or an aider and abettor with the separate crime of possessing a firearm at the time he committed the crime of felony murder, armed robbery, and assault with intent to murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, the defendant committed the crime of felony murder, armed robbery, assault with intent to murder, as defined with you or intentionally assisted someone else in committing

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those crimes. It is not necessary, however, the defendant be convicted of those crimes. Second, at the time the defendant committed the crimes, he knowingly carried or possessed a firearm. It does not matter whether or not the gun was loaded. And a pistol is a firearm.

Joshua Stewart and Deontea White are both on trial in this case before separate juries. The fact they are on trial together is not evidence that they were associated with each other or either one is guilty of the crimes. You must consider only the actions of Joshua Stewart. He is entitled to have his case decided on the evidence and the law that applies to him.

The prosecutor must prove beyond a reasonable doubt that the crime occurred on or about March 5th, 2016 in Wayne County.

When you go to the jury room, you will receive a written copy of these instructions of mine. You should first choose a foreperson. The foreperson should see to it that your decisions are -- that your discussions are carried on in a business-like way and everyone has a fair chance to be heard.

The verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary each of you agrees on that verdict.

In the jury room, you will discuss the case

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among yourselves, but ultimately each of you will have to make up his or her own mind. Any verdict must represent the individual judgment of each juror.

It is your duty as jurors to talk with each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to fellow jurors. Rethink your opinions. Do not hesitate to change your mind if you decide you are wrong. Try your best to work out any differences; however, although you should try to reach agreement, none of you should give up an honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own and you must vote honestly and in good conscience.

In this case, there are several different crimes you may consider. When you discuss the case, first consider the crime of felony murder and/or assault with intent to murder first. If you agree the defendant is guilty of those crimes, stop your discussions and return your verdict. If you believe the defendant is not guilty of felony murder or assault with intent to murder or you cannot agree about those crimes, consider the less serious crime of second degree murder or assault with intent to do great bodily harm less than murder.

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You decide how long to spend on felony murder or assault with intent to murder or do great bodily harm less than murder. You can go back to the principal charge after discussing the less serious charge if you want to.

If you have any questions about these jury instructions before you begin deliberations or questions about the instructions that arise during deliberations, put them in a note and knock on the door and give it to the bailiff, who will bring the note to me.

Possible penalty should not influence your decision. It is my duty to fix the penalty within the limits provided by law.

If you want to communicate with me while you are in the jury room, have the foreperson write a note and give it to the bailiff. It is not proper for you to talk directly with me, lawyers, court officers or other persons involved in the case.

As you discuss the case, do not let anyone, even me, know how your voting stands. Therefore, until you return with a unanimous verdict, do not reveal this to anyone outside the jury room.

When you go to the jury room to deliberate, you will have a copy of these instructions, and if you want to look at the exhibits that have been admitted, simply write a note and ask for them.

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The defendant is charged with seven counts; that is felony murder, assault with intent to murder, armed robbery and felony firearm, along with the lesser included offenses. These are separate crimes and the prosecutor is charging the defendant committed all of them. You must consider each crime separately in light of all the evidence.

As I indicated, you will return a verdict solely on the activity of Joshua Lamar Stewart.

And, ladies and gentleman, it comes time now for the jury to be reduced by lot from 13 down to 12, who are charged upon their oath with reaching a verdict. As the court will call the name or seat number of one of you, you in turn will be excused, but I'll ask that juror who is excused to wait behind so I may give that juror further instruction.

THE CLERK: Seat number four.

THE COURT: That's Mr. Maynard.

THE CLERK: And juror four.

THE COURT: Mr. Maynard, if you can have a seat in this jury box until we're --

And now the bailiffs can be sworn to keep the jury.

THE COURT: Do you solemnly swear to keep this jury in the form and manner as prescribed by law, so help

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you God?

THE DEPUTIES: I do.

THE COURT: Ladies and gentlemen, please step into the jury room and choose a foreperson and begin your deliberations.

THE DEPUTY: Ladies and gentlemen, I'm going to take you to another jury room to deliberate, so if you'll just follow my partner for a moment.

(At 9:09 a.m., the jurors exited the courtroom.)

THE COURT: Mr. Maynard, before I excuse you, I want to instruct you that you may be called back as an alternate juror if something happens to one of the 12 who are deliberating. So leave with us your phone number or landline or however else you are contacted. And then call this courtroom each morning at nine o'clock until you are informed that the deliberation as to Mr. Stewart has finished.

Again, do not discuss the case because you still may be called for jury service. You can be excused.

THE DEPUTY: You can step down, sir.

THE COURT: People satisfied with the instruction and form of the verdict?

MR. HAYWOOD: Yes, your Honor.

THE COURT: Defense satisfied?

MR. POLK: Judge, I'd just note that for the

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record, the 8.8, less serious crimes, I do note it is incorporated in other -- other verdicts. Other than that, satisfied.

THE COURT: Thank you.

(At 9:09 a.m., proceedings adjourned.)

(At 11:34 a.m., proceedings reconvened; all parties present.)

THE COURT: So the jury for the Stewart case has sent the following two letters, one at 10:07 hours, one at 11:13 hours. Again, I'll not allow the lawyers in that case to leave anymore. I'm trying to get through this case. So the first note says, "In the case of Mr. Stewart, if we believe he aided and abetted in a crime, do we have to find him guilty of the actual crime? Thank you."

Note two, "If we allow the elements of aiding and abetting but not all the elements of another crime, does the aiding abetting elements trump the elements of the crime?" I don't even know what that means, but I'll read the jury instruction on aiding and abetting again.

Any objection?

MR. POLK: No objection.

MR. HAYWOOD: No.

You can bring in the jury.

THE DEPUTY: All rise for a jury.

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(At 11:36 a.m., the jurors entered the courtroom.)

THE COURT: You may be seated. Ladies and gentlemen, I can't always get right to your questions, but let me read the questions into the record that you asked.

"In the case of Mr. Stewart, if we believe he aided and abetted in a crime, do we have to find him guilty of the actual crime?"

Then the second note you wrote, "If we allow the elements of aiding and abetting but not all the elements of another crime, does the aiding abetting elements trump the elements of the crime?"

I'm going to reread to you the instructions that I read on aiding and abetting.

In this case, defendant is charged with committing felony murder, second degree murder, assault with intent to murder, assault to do great bodily harm, a number of counts of armed robbery, receiving and concealing stolen property and felony firearm.

Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.

To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:

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First, that the alleged crime was actually committed, either by the defendant or someone else. It does not matter whether anyone else has been convicted of the crime.

Second, that before or during the crime, the defendant did something to assist in the commission of the crime.

Third, the defendant must have intended the commission of the crime alleged or must have known the other person intended its commission at the time of giving the assistance. It does not matter how much help or advice or encouragement the defendant gave. However, you must decide whether the defendant intended to help another commit the crime, and whether his help or advice or encouragement actually did help or advise or encourage the crimes. Even as the defendant knew the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove he assisted in committing it.

Please return to the jury room and you continue your deliberations.

THE DEPUTY: All rise for the jury.

(At 11:40 p.m., the jurors left the courtroom.)

(At 11:41 p.m., proceedings adjourned.)

(At 1:29 p.m., proceedings reconvened; all

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parties present.)

THE COURT: In the matter of the People of the State of Michigan vs. Joshua Stewart, the jury has sent a note that say they have reached a verdict. You can bring in the jury.

THE DEPUTY: All rise for a jury.

(At 1:29 p.m., the jurors entered the courtroom.)

THE DEPUTY: You may be seated. Court is in session. All jurors are properly seated and accounted for.

THE COURT: The jury has sent a note to say they've reached a verdict. Who is the foreperson of the jury?

JURY FOREPERSON: I am.

THE COURT: And let me first ask, was the verdict of the jury unanimous?

JURY FOREPERSON: It was.

THE COURT: As to count 1, what is the verdict of the jury?

JURY FOREPERSON: Count 1 was not guilty.

THE COURT: As to count 2, what is the verdict of the jury?

JURY FOREPERSON: Guilty.

THE COURT: Guilty of?

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JURY FOREPERSON: I'm sorry. Guilty of robbery armed for Aaron Walker.

THE COURT: Count 3?

JURY FOREPERSON: Guilty of robbery armed, Etoh Walker.

THE COURT: Count 4?

JURY FOREPERSON: Guilty of assault with intent to commit great bodily harm less than murder for Daniel Claxton.

THE COURT: Count 5?

JURY FOREPERSON: Guilty of robbery armed for Kyle Upshaw and Daniel Claxton.

THE COURT: Count 6?

JURY FOREPERSON: Guilty of stolen property, receiving and concealing $1,000 or more but less than $20,000.

THE CLERK: Count 7?

JURY FOREPERSON: Guilty of weapons, felony firearm.

THE COURT: And let me poll the jury.

Juror in seat one, did you hear the recitation of the verdict by the foreperson?

JUROR PERKINS: Yes.

THE COURT: Is that -- was that and is that your verdict?

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JUROR PERKINS: Yes.

THE COURT: I'm sorry?

JUROR PERKINS: Yes.

THE COURT: Juror in seat two, was that and is that your verdict?

JUROR FAVOT: Yes, sir.

THE COURT: Juror in seat three, was that and is that your verdict?

JUROR STERLING: Yes.

THE COURT: Juror in seat five, was that and is that your verdict?

JUROR GODLEW: Yes.

THE COURT: Juror in seat six, was that and is that your verdict?

JUROR SANDS: Yes, sir.

THE COURT: Juror in seat seven, was that and is that your verdict?

JUROR DAVIS: Yes, sir.

THE COURT: Juror in seat eight, was that and is that your verdict?

JUROR MIMS: Yes.

THE COURT: Juror in seat nine, was that and is that your verdict?

JUROR PRICE: Yes, sir.

THE COURT: Juror in seat ten, was that and is

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that your verdict?

JUROR VARGAS: Yes, sir.

THE COURT: Juror in seat eleven, was that and is that your verdict?

JUROR MILLER: Yes, sir.

THE COURT: Juror in seat twelve, was that and is that your verdict?

JUROR TCHALAKOV: Yes, sir.

THE COURT: Juror in seat thirteen, was that and is that your verdict?

JUROR PRINCE: Yes.

THE COURT: Ladies and gentlemen, I want to thank you for your jury service. Follow the direction of the court officers, but I need you to sign and date the jury form before you leave. Thank you.

THE DEPUTY: All rise for a jury. Foreperson, please hand the verdict form to my partner on your way out, please

(At 1:33 p.m., the jurors were excused.)

THE DEPUTY: You may be seated. Court is still in session. We ask the people to remain in the courtroom until the jury leave the floor.

THE COURT: I have been handed a signed and dated verdict form. The Defendant is found not guilty in count 1; guilty of robbery armed in count 2; guilty of

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armed robbery in count 3; guilty of assault with intent to do great bodily harm less than murder in count 4; guilty of armed robbery in count 5; guilty of receiving and concealing stolen property more than $1,000 in count 6, and guilty of felony firearm in count 7.

Those convictions are entered upon the record. The bond if any is canceled, and he's remanded in the custody of the Wayne County Sheriff.

And the sentencing date will be? We need separate dates for security. So sentencing date will be?

THE CLERK: December 6th.

THE COURT: I'm sorry?

THE CLERK: December 6th, Judge.

THE COURT: Thank you. Counsel?

MR. POLK: If I may, I start a trial in Oakland Count then.

MR. HAYWOOD: How about the 9th?

THE CLERK: I have November 30th.

MR. HAYWOOD: I'm in trial.

MR. POLK: I am as well.

MR. HAYWOOD: How about the 2nd?

THE CLERK: Well, I try not to schedule everything on Fridays. December 2nd.

THE COURT: Sentencing date, December 2nd. Thank you.

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(At 1:36 p.m., proceedings concluded.)

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STATE OF MICHIGAN)

) SS

COUNTY OF WAYNE)

R E P O R T E R' S C E R T I F I C A T E

I, Eileen Higer, CSMR-5018, do hereby certify that I have recorded the proceedings had and testimony taken in the above-entitled matter at the time and place hereinbefore set forth and that the foregoing is a full, true and correct transcript of proceedings had in the above-entitled matter; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Eileen S. Higer, CSMR-5018

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 16-005731-01-FC

JOSHUA LAMAR STEWART,

Defendant.

_____/

SENTENCE

Taken in the above-entitled matter before Honorable Michael Callahan, Third Judicial Circuit Court Judge, Detroit, Michigan on December 2, 2016

APPEARANCES:

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WITNESSES PAGE

None called.

EXHIBITS:

None marked.

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Detroit, Michigan

December 2, 2016

- - -

(At 9:34 a.m., proceedings begin.)

THE COURT: People of the State of Michigan vs. Joshua Lamar-James Stewart. Counsel.

MR. HAYWOOD: Good morning, your Honor. Ron Haywood for the People.

MR. POLK: Good morning. May it please this honorable Court, Larry Polk on behalf of Joshua Stewart, who will be here at the podium shortly.

THE COURT: Counsel, as to the sentencing information report, I'll go over the guideline range with you.

Mr. Stewart is present in court, standing next to Mr. Polk, his attorney. Go ahead.

As to the prior record variable score, the PRV total points is 40 and the level is -- do you have any objections?

MR. POLK: No objection, Judge.

MR. HAYWOOD: No objection.

THE COURT: And the offense variable, the point total is 175 and the level is six. Any objection?

MR. HAYWOOD: You know, I would ask the Court to score OV-5 15. That would take the OV level to --

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THE COURT: Oh, eight. Why?

MR. HAYWOOD: It's the victim's family, psychological counseling, the need of counseling.

THE COURT: Any objection?

MR. POLK: Judge, I leave it to the discretion of the Court. I did look at that, and I read the presentence report. I said -- I saw what the victim, Mr. Foster's mother, is going to be in need of, that report, so I'll leave it to the discretion of the Court.

THE COURT: I'll score OV-5 at 15 points. Anything else in the OV offense variables?

MR. HAYWOOD: No, your Honor.

THE COURT: And so the point total is 190?

MR. HAYWOOD: Yes.

MR. POLK: That is correct, Judge.

THE COURT: Then the OV level is what?

MR. HAYWOOD: Remains the same.

THE COURT: Okay. And so the sentencing guideline range, 171 to 285; that's correct?

MR. HAYWOOD: Yes.

MR. POLK: That is correct, Judge.

THE COURT: I'll sign the sentencing information report as to both those -- to the substance of the presentence report.

MR. POLK: Judge, I had an opportunity to go

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through the presentence report with my client. In our review, we found it to be factually correct except for one area. It's a prior. It's located on page 4 of the report. Convictions: Presentence investigation in criminal -- in relationship to the criminal justice system. And it states in number two of three that my client was charged with felony burglary and felony sexual assault, and my client denies that he ever was charged with any type of a sexual assault and so --

THE COURT: Well, apparently, there was some kind of an adjudication that resulted in the charges were larceny in a building?

MR. POLK: That's correct, but he states that he was never charged with the felony sexual assault.

THE COURT: I'll strike it.

MR. POLK: Thank you very much. Other than that, we find the presentence report to be factually correct, and there are no need for any other additions, deletions or corrections at this time.

THE COURT: Do you wish to allocute on your client's behalf?

MR. POLK: Absolutely, Judge. The Court is in receipt, I believe, of letters from family members and loved ones of my client's.

THE COURT: Are there doctors?

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MR. POLK: And there is a letter also that has been tendered to the Court from my client's treating physician. The Court is aware based upon the letter that my client very recently had cancer, and he had been treating for his cancer. Right now, I believe that it's in remission, but of course, as the letter stated, he needs to be monitored very closely for any reoccurrence of that particular condition.

I've had an opportunity throughout my representation of Mr. Stewart to come to realize that he is extremely remorseful as it relates to when this happened in this particular instance. The Court heard this trial and the Court is aware, I'm sure, from listening to the trial that my client was placed as a driver, never got out of the vehicle, never did anything as it relates to possessing a weapon, shooting a weapon, any type of taking of anyone's property.

He understands and we had a discussion about the theory of the Court and the law where it talks about the theory of aiding and abetting individuals. My client, as the report states, he comes from a good family, very concerned about his well-being.

His father is present as well as other family members are here today, and based upon that, I'd just ask that the Court give him a fair and reasonable sentence as

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it relates to his involvement in this unfortunate incident.

THE COURT: Mr. Haywood?

MR. HAYWOOD: Your Honor, I do have the victim's mom here, Ms. Foster. She'd like to address the Court.

THE COURT: You can stand up in the jury box.

MR. HAYWOOD: Your Honor, as Ms. Foster is coming, there is just one correction I would make to the report -- two corrections to the presentence investigating report.

THE COURT: Yes.

MR. HAYWOOD: The first one is your name is wrong. It should be -- you should be Michael, not James Callahan.

THE COURT: Thank you. Actually, the sentencing information report has it correct, but I'll change that.

MR. HAYWOOD: And on -- for page 2 of an agent's description of the offense under the investigation section, the second paragraph, I believe it should read suspects approached Kyle Upshaw on the street and announced a robbery; Daniel Claxton, with a CPL, produced his weapon.

THE COURT: Anything else?

MR. HAYWOOD: No, that's it, your Honor.

THE COURT: And, ma'am, would you tell us your

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name.

MS. FOSTER: Marguerite Foster.

THE COURT: And, Ms. Foster, you wish to give a -- speak to me, a fact statement as to the deceased son of yours?

MS. FOSTER: Yes, sir.

THE COURT: The law provides you can do that and it's fine with me, but you have to address me. You may not speak to the defendant. Go ahead.

MS. FOSTER: I thank your Honor. May 6th, it was a day that I will never forget. A part of my heart was taken from me. My baby, my baby boy, Aaron James Foster, although we called him AJ, it's hard to believe that he is gone. Not a day goes by that I don't think about him. I wish I could have protected him from the evil that he faced that day.

Your Honor, he was robbed of his stuff and then his life was taken for no reason. They robbed him of his future. He was only 21 years old. He wanted to be an artist. He had a very creative mind, and now I will never get to see him become a great man, a father or a husband.

I won't get to hear him say: Momma, I love you, and that's the last thing he said to me when I talked to him the week before.

I hear his voice over and over in my head. He

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didn't deserve to die in the streets. They left him there like he was an animal. Only a person with no soul, no heart or no regard for life would do this or be a part of such a horrible act.

Yes, I am angry and hurt, but I'm not going to let this make me bitter. But I hope that Mr. Stewart -- Judge, I hope he realizes the pain he caused my family; his family; his mom, his dad. I would never wish this on anybody. A parent, nobody should have to lose a child like this in such a tragic way.

I ask you, Judge Callahan, to give the greatest amount of time to serve in prison so that he can't walk the streets because my child can't walk the streets ever again. I pray that they never forget all the pain they caused.

And I want to read something my son wrote and we put in his obituary. And this is giving us some comfort in our family. "There is beauty in tragedy for tragedy has the power to motivate the human mind. It can turn weakness into strength, become greatness. Why would you focus on the storm when you can focus on the rainbow." By AJ Aaron James Foster. Thank you.

THE COURT: Thank you.

Mr. Haywood, anything else?

MR. HAYWOOD: Your Honor, yes. The family is

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requesting $1,522 in restitution. I did show the receipt to Mr. Polk. It was the last thing the Court ordered on in this case.

THE COURT: What's the amount again?

MR. HAYWOOD: One thousand, five hundred and twenty-two dollars.

As far as the sentencing, your Honor, the Court is aware of what happened in the case. I would ask the Court to sentence the defendant to the top of the guidelines. I'm asking for 23 plus -- 23 years plus 2 -- 23 and 50 plus 2.

THE COURT: And, Mr. Stewart, anything that you wish to say?

THE DEFENDANT: Yes.

THE COURT: Go ahead.

THE DEFENDANT: Thanks for letting me be able to speak. First and foremost, I want to apologize to God and to the family of Aaron Foster, and I apologize for what happened and everything. I beg them for their forgiveness. I know that it is a hard pill to swallow for what I'm asking of the families for their forgiveness. I realize how important it is to be forgiven for your sins.

With all sincerity, I do apologize for the pain and suffering of the families. Regardless of what might be said after my apology, I want Ms. Foster to know that I

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am truly sincere and remorseful. I also apologize to you, your Honor, and to my family for being here and for taking them through this.

I've been incarcerated since May 6. I honestly can say that I have matured and have grown mentally and that is not the person that I am.

THE COURT: And first, let me address the issue of the credit for time served. The face page says no days' credit, but then they indicate the total jail credit is 211 days. Do the People agree?

MR. HAYWOOD: I do, Judge.

THE COURT: Okay. And defense?

MR. POLK: I agree, Judge.

THE COURT: And I have read the letters submitted by relatives of the defendant and the minister for the defendant, and the doctor's orders that quite obviously, the time in prison will be accompanied by a medical notice to the Department of Corrections regarding the frequent checkups that Mr. Stewart will need.

Let me begin by sentencing for the felony firearm. It's the sentence of the Court, Mr. Stewart, on the charge of felony firearm, you'll be committed to the state prison for a minimum period of 24 months with 211 days credit for time served.

On the charge of receiving and concealing stolen

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property greater than 1,000 but less than $20,000, it's the sentence of the Court you be committed to the state prison for a term of 12 months to 60 months.

Then on assault with intent to do great bodily harm less than murder, you're sentenced to a concurrent term of 60 months to 120 months.

And for the three charges of armed robbery, it's the sentence of the Court you serve a concurrent term of 276 months to 552 months.

You must comply with DNA testing and pay a $60 fee, pay $408 state costs, a crime victim's assessment fee of $130, court costs of $1,300 and an attorney fee of $400. Also, restitution must be paid in the amount of $1,522.

You were convicted by a jury of these offenses on November 10, 2016, so you have a right to appeal your conviction and my sentence and the form will be furnished to you. Mr. Stewart, it indicates the manner in which you can take an appeal; however, your signature on that form does not indicate that you have begun an appeal. Thank you.

MR. HAYWOOD: Thank you, your Honor.

(At 9:50 a.m., proceedings concluded.)

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STATE OF MICHIGAN)

) SS

COUNTY OF WAYNE)

R E P O R T E R' S C E R T I F I C A T E

I, Eileen Higer, CSMR-5018, do hereby certify that I have recorded the proceedings had and testimony taken in the above-entitled matter at the time and place hereinbefore set forth and that the foregoing is a full, true and correct transcript of proceedings had in the above-entitled matter; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Eileen S. Higer, CSMR-5018

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2020
v	No. 343755 Wayne Circuit Court
JOSHUA LAMAR-JAMES STEWART, Defendant-Appellant.	LC No. 16-005731-01-FC

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM.

On May 6, 2016, Joshua Lamar-James Stewart acted as the getaway driver in an armed robbery crime spree that left one victim dead. Although the jury acquitted Stewart of first-degree felony murder and assault with intent to commit murder, the jury convicted him of three counts of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, receiving or concealing stolen property valued between $1,000 and $20,000, MCL 750.535(3)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. Stewart challenges the trial court's denial of his motion to suppress his statement to the police, defense counsel's failure to seek redaction of that statement, and the proportionality of his armed robbery sentences. We discern no prejudicial error and affirm.

I. FACTUAL OVERVIEW

On May 6, 2016, then-18-year-old Stewart drove a stolen Dodge Intrepid to carry Deontea White and an unidentified second man on a crime spree in the city of Detroit. In the first incident, Stewart approached Aaron Foster and Etoh Walker, who were walking in the area of Packard and Savage streets. White and the second man exited the backseat of the vehicle. The second man approached Walker, pointed a semiautomatic weapon at his face, and took $10 from him. White approached Foster, pointed an AK-47 rifle at him, and stole Foster's shoes and belt. White and the second man returned to the car. As Foster and Walker ran away, White shot Foster in the back, killing him. Stewart and his companions then drove away.

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Shortly thereafter, Stewart pulled up to a home where Kyle Upshaw was outside cleaning his car. White and the second man again exited and attempted to rob Upshaw at gunpoint. Upshaw's brother, Daniel Claxton, heard the commotion and came outside with his own weapon. Claxton, White, and the second robber exchanged fire. White shot Claxton in the stomach while Claxton shot White in the torso. The injured White and the second man returned to the Intrepid, and Stewart drove away from the scene.

Fortuitously, Stewart took White to the same hospital in which Claxton received treatment for his gunshot wound. Upshaw observed Stewart in the hospital parking lot, sitting on the hood of a Dodge Intrepid covered in bullet holes. Upshaw alerted the police. The police arrested Stewart after discovering that the vehicle had been reported stolen. During a search of the vehicle, the police found Foster's stolen belongings, tying the two crimes together. During a late-night police interrogation, Stewart admitted to driving the Dodge Intrepid during both incidents. At trial, Stewart contended that he had only driven the getaway vehicle under duress and did not know in advance that White and the second man were armed and planned to commit robberies that day.

II. MOTION TO SUPPRESS

Stewart first argues that the trial court erred by denying his motion to suppress his custodial statement, and allowing the statement to be admitted at trial. We review de novo a trial court's ultimate decision regarding a motion to suppress, but review any factual findings for clear error. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000). A finding is clearly erroneous if the reviewing court "is left with a definite and firm conviction that a mistake has been made." *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). Underlying questions of law are reviewed de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

Both the Michigan and the United States Constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The prosecution must prove by a preponderance of the evidence that the defendant's waiver was knowingly, intelligently, and voluntarily made. *Daoud*, 462 Mich at 634. Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity to understand the warnings given. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997).

Stewart contends that his waiver was invalid both because the *Miranda* warnings were inadequate and because he was unable to comprehend them. In *Miranda*, 384 US at 479, the Supreme Court held that a suspect

> must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

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See also *People v Cortez (On Remand)*, 299 Mich App 679, 713; 832 NW2d 1 (2013). No precise formulation exists for conveying the *Miranda* warnings; the language used to inform the defendant of these rights is adequate if it reasonably conveys the essential information. *Florida v Powell*, 559 US 50, 60; 130 S Ct 1195; 175 L Ed 2d 1009 (2010). Consequently, a reviewing court is simply required to determine whether the warnings reasonably conveyed to a suspect his rights as required by *Miranda*. *Id.* "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986) (quotation marks and citation omitted). When considering the "totality of the circumstances," a court is required to evaluate an accused's "age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his [*Miranda*] rights, and the consequences of waiving them." *Dauod*, 462 Mich at 634 (quotation marks and citation omitted).

The *Miranda* warnings given in this case were sufficient. Stewart read the advice of rights form aloud. Stewart complains that the officer did not read the rights to him, but *Miranda* does not require this form of advice. Through his own clear recitation, Stewart was unequivocally informed that he had the right to remain silent, that any statements made could be used in a court of law, that he had the right to consult with an attorney and to the presence of an attorney, that if he could not afford an attorney one would be appointed, and that he could ask for an attorney and invoke his right to remain silent at any time. The form read aloud by Stewart covered all the rights enumerated in *Miranda*. Stewart urges this Court to find the warnings inadequate because the interrogating officer used a "minimization technique": "Let's go through some paperwork real quick, Man." Stewart further notes that the entire waiver process took only five minutes. However, Stewart has provided no legal support for his contentions that *Miranda* requires a particular amount of time to execute or that the "paperwork" must be presented in a particular tone or fashion.

Stewart's waiver was also understanding. To establish his understanding, the interrogating officer asked Stewart to initial next to each individual right on the form. Contrary to Stewart's contentions, the officer was not required to stop Stewart after each statement to more thoroughly question his understanding.

Further, relying on several articles, Stewart argues that his waiver was not voluntary, knowing, and intelligent because his youth, limited intellect, and limited education made him vulnerable to coercive police tactics. At the time of his interrogation, Stewart was not a minor, he was 18 years old, although he was still in high school. He attended an "alternative school . . . designed to meet the needs of children and adolescents who cannot learn effectively in a traditional school environment . . . due to learning disabilities, certain medical conditions, psychological and behavioral issues, or advanced skills." Stewart also noted that he was only recently in remission after undergoing cancer treatment.

Stewart was no longer a "juvenile" and therefore could not benefit from the legal recognition that juveniles have a diminished decision-making capacity. Moreover, the record establishes that Stewart had sufficient capacity to understand his rights. Stewart read the rights himself, and there is no record evidence that he suffered from any mental condition that would have prevented him from understanding the warnings.

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Alternatively, Stewart contends that the statement he made after waiving his rights was not voluntary because the interrogating officer employed overly coercive tactics. Coercive police activity is a necessary predicate to finding that a confession is not voluntary. *Colorado v Connelly*, 479 US 157, 164; 107 S Ct 515; 93 L Ed 2d 473 (1986). "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *Givans*, 227 Mich App at 121. The following factors should be considered when determining the voluntariness of a statement:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

Any promises of leniency should also be considered. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). A promise of leniency does not render a statement per se involuntary and inadmissible; it is but "one factor to be considered" in determining whether a defendant freely and voluntarily made a statement. *Id*. "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, that statement will be admissible." *People v Conte*, 421 Mich 704, 754, 365 NW2d 648 (1984).

Stewart relies on various statements made by his interrogators, which he contends amounted to promises of leniency. It is apparent on this record that the officers strongly encouraged Stewart to disclose his role in the crimes and suggested that his punishment would be greater if he did not tell the truth, but would be lesser if did. This interview technique did not impermissibly alter Stewart's psychological state such that he could not operate of his own free will. The fact that the 18-year-old Stewart initially denied any involvement, then admitted to only limited involvement, and still denied knowing of any plans to commit a robbery supports that Stewart was still operating under his own free will. Even if the officers went too far in implying that the prosecutor would be lenient on Stewart, this is only factor to consider. Stewart was otherwise old enough and intellectually capable of understanding what he was doing. This was not Stewart's first encounter with the police. Although the officers interrogated Stewart in the middle of the night, there is no evidence that he was deprived of sleep, food, or drink.

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Considering the totality of the circumstances, the trial court did not err by finding Stewart's *Miranda* waiver and statement to be voluntary, knowing, and understanding.

III. SENTENCE PROPORTIONALITY

The trial court sentenced Stewart to concurrent prison terms of 23 to 46 years for each robbery conviction, 5 to 10 years for the assault conviction, and one to five years for the receiving or concealing conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Stewart contends that his 23-year minimum sentences for his three armed-robbery convictions are disproportionate and unreasonable.

Stewart's sentence falls within the advisory minimum sentence range, although near the top of the range. And Stewart does not allege any error in scoring the sentencing guidelines, only that the trial court should have imposed a lower sentence based on various mitigating factors like his young age and relatively minor prior record. We may not review Stewart's sentence for reasonableness. *People v Anderson*, 322 Mich App 622, 636-637; 912 NW2d 607 (2018). A within-guidelines sentence based on accurately scored guidelines is deemed proportionate and must be affirmed. *People v Jackson*, 320 Mich App 514, 527; 907 NW2d 865 (2017), rev'd in part on other grounds 504 Mich 929 (2019).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Stewart contends that he is entitled to a new trial because his trial counsel was ineffective for failing to request redaction of his recorded police interrogation, which was played for the jury, to prevent the jury from hearing repeated irrelevant and prejudicial references to his possible gang affiliation and that he possessed a weapon two years earlier. Stewart did not file a motion for a new trial and has not sought remand to do so. In any event, we can adequately review Stewart's challenge on the existing record. See *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

A claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish that counsel's performance was deficient, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664.

"Decisions regarding what evidence to present . . . are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Generally, all relevant evidence is admissible unless otherwise prohibited by the rules of evidence or the state or federal constitutions. MRE 402; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

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MRE 401. However, even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403.

Stewart's trial counsel should have sought redaction of the interrogation video to prevent the jury from hearing irrelevant information about Stewart's possible affiliation with the "Bang Bang Pooy Gang." Not only was there no evidence supporting Stewart's gang affiliation, there was no evidence that the charged offenses were gang related.[1] Accordingly, the information was possibly untrue and was completely irrelevant. By failing to seek redaction of the interrogation video, defense counsel unnecessarily exposed Stewart to the risk that the jury could conclude that he committed the charged crimes because he was acting in conformity with typical gang activity. See *People v Bynum*, 496 Mich 610, 630; 852 NW2d 570 (2014) (evidence of a defendant's gang membership risks causing a jury to conclude that the defendant "acted in conformity with the character traits commonly associated with gang members on a particular occasion"). Counsel could have no strategic reason for permitting the video to be played before the jury as is. Indeed, the references to Stewart's possible gang membership went against the crux of the defense—that Stewart was an innocent driver taken by surprise when his friends decided to engage in armed robbery.

Counsel was also ineffective in failing to request redaction of the officers' references to Stewart's prior act of possessing a weapon. Other-acts evidence is admissible under MRE 404(b)(1) if: it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial under MRE 401, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). "MRE 404(b) permits the admission of evidence" of a defendant's other acts for any relevant purpose that "does not risk impermissible inferences of character to conduct." *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001) (quotation marks and citation omitted). While using his prior gun possession may have been an allowable police tool to interrogate Stewart, there was no argument that this prior act was relevant to this case. Again, this information was contrary to the theory of the defense and counsel should have sought redaction.

However, neither of these errors prejudiced Stewart or required a new trial. Multiple eyewitnesses placed Stewart as the driver of a stolen getaway car in a crime spree that resulted in the death of one victim, the shooting of a second victim, and the shooting of Stewart's codefendant. While Stewart claimed ignorance of his companions' plans or even their possession of weapons, he did not leave his companions after the first incident. Ultimately, the jury credited Stewart to some extent as it acquitted Stewart of first-degree murder and convicted Stewart of a lesser assault offense rather than the charged assault with intent to murder. Given the record evidence, however,

[1] The Supreme Court has held that "[t]he introduction of evidence regarding a defendant's gang membership is relevant and can 'assist the trier of fact to understand the evidence' when there is *fact evidence that the crime at issue is gang-related*." *People v Bynum*, 496 Mich 610, 625-626; 852 NW2d 570 (2014) (emphasis added).

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we cannot conclude that the jury would have been more lenient absent the problematic information in his recorded police interrogation.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2020
v	No. 343755 Wayne Circuit Court
JOSHUA LAMAR-JAMES STEWART, Defendant-Appellant.	LC No. 16-005731-01-FC

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur, but write separately to note my view that MCL 769.34(10), which requires us to affirm any sentence within the guidelines range,[1] is inconsistent with the Sixth Amendment, the due-process right to appellate review and the holding in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). *Lockridge* made clear that mandating a sentence within the sentencing guidelines range—even when permitting departures for substantial and compelling reasons—is unconstitutional. How then can it be constitutional to mandate that appellate courts affirm any sentence that falls within the guidelines?

No such deprivation of sentence review exists under federal law. Following the United States Supreme Court's decision in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), there was a split in the federal circuits whether it was constitutional to apply a presumption of reasonableness to sentences within the guidelines. That split was resolved by the Supreme Court in *Rita v United States*, 551 US 338, 347; 127 S Ct 2456; 168 L Ed 2d 203 (2007), where it held that a presumption of reasonableness was constitutionally permissible. In explaining its holding that the "Sixth Amendment . . . [does] not forbid appellate court use of the presumption," *id*. at 353, the Court began by observing that "*the presumption is not binding*. It does not, like a trial-related evidentiary presumption, insist that one side or the other, shoulder a particular burden of persuasion or proof," *id*. at 347 (emphasis added). This principle has a long history in Michigan jurisprudence as well. In *People v Milbourn*, 435 Mich 630, 661; 461 NW2d

[1] Absent a scoring error or reliance on inaccurate information.

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1 (1990), the Michigan Supreme Court stated that "the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from *or adheres to* the guidelines' recommended range." (Emphasis added).

To remedy this problem, as was done by *Lockridge* with MCL 769.34(2), we "need only substitute the word 'may' for 'shall' " in MCL 769.34(10). *Lockridge*, 498 Mich at 391. See also *People v Schrauben*, 314 Mich App 181, 194; 886 NW2d 173 (2016) ("Consistently with the remedy explained in *Lockridge* we replace the word 'shall' in MCL 769.34(4)(a) with the word 'may.' "). In other words, the directive, "If a minimum sentence is within the reveals guidelines sentence range, the court of appeals *shall* affirm that 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," MCL 769.34(10) (emphasis added), becomes the premise, "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *may* affirm that sentence and *not* remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Indeed, *Lockridge* has mandated such a remedy: "To 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." *Lockridge*, 498Mich at 365 n 1.

In *People v Ames*, 501 Mich 1026 (2018), the Michigan Supreme Court granted oral argument on the application to consider whether we are compelled to affirm all guidelines sentences. Unfortunately, the Court ultimately denied leave in a brief order without discussion of the issue. *People v Ames*, 504 Mich 899 (2019). I respectfully suggest that it would be helpful to both bench and bar for the Court to issue a full opinion on the question in this or some future case. The persistence of confusion concerning the question is demonstrated by a case cited by the majority, *People v Jackson*, 320 Mich App 514, 527; 907 NW2d 865 (2017), rev'd in part on other grounds, 504 Mich 929 (2019), in which this Court stated: "The court's minimum sentence was within the appropriate guidelines range and thus, it is *presumptively proportionate* and *must be affirmed*." (Emphasis added). A sentence cannot be both only *presumptively* proportionate and yet beyond review. And it is unconstitutional for the guidelines, now merely advisory, to bind a court, including appellate courts.

/s/ Douglas B. Shapiro

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Do Michigan's Sentencing Guidelines Meet the Legislature's Goals?

A Historical and Empirical Analysis of Prison Terms for Life-Maximum Offenses

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-19 Points	21	35	27	45	42	70	51	85	81	135	108	180	
		43		56		87		106		168		225	HO2
		52		67		105		127		202		270	HO3
		70		90		140		170		270		360	HO4†
II 20-39 Points	27	45	42	70	51	85	81	135	108	180	126	210	
		56		87		106		168		225		262	HO2
		67		105		127		202		270		315	HO3
		90		140		170		270		360		420	HO4†
III 40-59 Points	42	70	51	85	81	135	108	180	126	210	135	225	
		87		106		168		225		262		281	HO2
		105		127		202		270		315		337	HO3
		140		170		270		360		420		450	HO4†
IV 60-79 Points	51	85	81	135	108	180	126	210	135	225	171	285	
		106		168		225		262		281		356	HO2
		127		202		270		315		337		427	HO3
		170		270		360		420		450		570	HO4†
V 80-99 Points	81	135	108	180	126	210	135	225	171	285	225	375/L	
		168		225		262		281		356		468/L	HO2
		202		270		315		337		427		562/L	HO3
		270		360		420		450		570		750/L	HO4†
VI 100+ Points	108	180	126	210	135	225	171	285	225	375/L	270	450/L	
		225		262		281		356		468/L		562/L	HO2
		270		315		337		427		562/L		675/L	HO3
		360		420		450		570		750/L		900/L	HO4†

Barbara Levine, Anne Mahar, & Justin Smith

November 2021

Safe & Just Michigan

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Do Michigan's Sentencing Guidelines Meet the Legislature's Goals?

A Historical and Empirical Analysis of Prison Terms for Life-Maximum Offenses

Barbara Levine, Anne Mahar, & Justin Smith

November 2021

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Barbara Levine, J.D. began her legal career representing indigent defendants on appeal at the State Appellate Defender Office before Michigan had any sentencing guidelines. She was the first administrator of the Michigan Appellate Assigned Counsel System, the executive director of Citizens Alliance on Prisons and Public Spending (the predecessor to Safe and Just Michigan), and a member of the Criminal Justice Policy Commission. She received both her Bachelor's and Juris Doctor degrees from the University of Michigan.

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Acknowledgements

The authors would like to thank several people whose contributions have enriched this report. This work would not have been possible without the efforts of Elsie Kettunen, who extracted relevant information from the MDOC's massive database and organized it into the datasets that underlie this report. Michigan Attorney Patricia Streeter's persistence and attention to detail made the comparison of Michigan's guidelines to those of other jurisdictions possible. Judge Douglas Shapiro, Jacqueline McCann, and Kelly Mitchell each read selected portions, and provided helpful insights. The meticulous editing of Annalisa Zox-Weaver and Jacqueline Carsello significantly improved the final product.

Note: Safe & Just Michigan avoids use of the term "offender" whenever possible. It is used in this report when adhering to legal terminology.

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THE POINT OF THIS REPORT

Protecting citizens from crime—or at least punishing those who commit it—is one of the primary functions of state government. But views on how this responsibility should be fulfilled shift over time. Public sentiment about punishment for crime has softened since the "get tough" years of the 1980s and 1990s; public concern about the social and fiscal costs of mass incarceration has increased. Harsh prison sentences for drug crimes have been revised; alternatives to incarceration for non-violent offenses are more readily available; drug and alcohol treatment courts have become common; the use of jails and prisons as the mental health system of last resort is being decried; community support for people returning from prison has expanded. At the end of 2019, the Michigan prisoner population was at 38,053, the lowest since 1991.

However, one particularly stubborn problem persists: How to sentence individuals who commit serious crimes against other people, like murder, armed robbery, and sexual assault. These cases provoke strong emotions, involve vulnerable victims and/or family members, and often receive attention from the press. They also raise difficult questions of law and policy.

- While some amount of prison time for such offenses may be inevitable, how much is enough?
- Is there a point at which very long sentences are disproportionate to the crime, unfair to the individual, unnecessary to protect the public or an ineffective use of resources?
- How much discretion should local judges have to select the sentence? What factors should they be able to consider?
- What role should the prosecutor play in determining the sentence?
- Who should ultimately decide what sentence is appropriate and by what standard?
- How important is it that sentences for serious assaultive offenses be consistent, so that people do not receive widely varying prison terms for essentially similar conduct?

Addressing these questions is often the work of a sentencing commission. The answers may change over time as data become available and public attitudes evolve. In the absence of a commission in Michigan, this report aims to stimulate data-driven discussion. To begin, it helps to understand a few basic points about the structure of Michigan sentencing.

Striking a balance between too much discretion for decision-makers and too little is at the core of criminal justice policy-making.

Although the criminal justice process is governed by many complex rules, the implementation of those rules depends on the exercise of discretion by thousands of individuals—from police officers and prosecutors to judges and parole board members—each of whom has their own vision of the "right" sentence. Different states, different counties within states, and different judges within the same counties weight the goals of criminal sentencing differently and may reach strikingly disparate outcomes based on similar sets of facts. The entire system rests on a series of judgment calls made by multiple (often elected) decision-makers in the context of ever-evolving societal values. The tension between the need for rules to constrain the exercise of power by individual officials and the need for discretion so that these individuals can apply rules fairly and sensibly to individual defendants persists.

That tension is exacerbated by questions of local control. Michigan judges and prosecutors are locally elected; trial-level courts and jails are, for the most part, locally funded. Some argue that sentences should reflect the values of the local community and the predilections of local officials. Yet defendants are being convicted of violating state law and sentenced by judges whose salaries are paid by the state. And the prisons that judges use to carry out their sentences are operated at the expense of state taxpayers. Ensuring reasonable consistency in how the law is applied, how punishment is apportioned, and how resources are expended is an ideal but difficult goal.

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Sentencing guidelines are meant to help strike that balance in accordance with stated policy goals.

Many states utilize sentencing guidelines that are meant to help judges choose sentences that are consistent, unbiased, proportional to both the offense and the defendant, and realistic in their use of scarce resources. Michigan's guidelines establish ranges within which minimum sentences should fall depending on the defendant's criminal history and the seriousness of the offense.

Three points about the legislative guidelines enacted in 1998 indicate that now is the time to reconsider them.

1. They were developed during the period in which numerous "tough on crime" measures were being adopted. In fact, their passage was tie-barred to the elimination of all good behavior credits for prisoners in the name of "truth in sentencing." Part of their stated purpose was to increase prison terms for the most serious crimes.

2. Little systematic review of how well the guidelines are meeting their goals has been conducted. Unlike other jurisdictions with active, well-staffed commissions, the original sentencing commission was disbanded shortly after the current guidelines were adopted. A subsequent commission also came and went without conducting a comprehensive analysis.[1] In the meantime, the Legislature has repeatedly amended the guidelines on an ad hoc basis.

3. As enacted by the Legislature compliance with the guidelines recommendation was mandatory unless the sentencing judge stated "substantial and compelling reasons" for departing. In a 2015 decision, the Michigan Supreme Court made the guidelines advisory, and the sentence imposed must now simply be "reasonable."

Numerous choices made by legislators, prosecutors, and appellate courts expand or contract the boundaries within which judges act. Moreover, the minimum sentence a judge imposes is only one determinant of how long the defendant will actually spend in prison.[2] Nonetheless, the selection of the minimum sentence is a critical component of the criminal justice process. It not only has obvious consequences for defendants, victims, criminal justice officials, and taxpayers, but also represents the community's values regarding proportionality and consistency of punishment.

Life-maximum offenses afford sentencing judges enormous discretion and have a major impact on the prison population.

Under Michigan's penal code, most sentences are "indeterminate." The Legislature sets the maximum term, and a judge sets the minimum, which cannot exceed two-thirds of the maximum. Of the prison sentences imposed in 2012, 45% carried maximums of five years or less, and 75% carried maximums no greater than 15 years. In these cases, whatever the sentencing guidelines recommended, unless the defendant was charged as a habitual offender, the breadth of the judge's discretion in setting a *minimum* sentence was ultimately constrained by the statutory *maximum* to no more than 10 years and, more often, to three and one-third years or less.

For the most serious crimes short of first-degree murder, the situation is different. The penalty for these offenses is life or any term. If the judge chooses "life," the person will become eligible for parole in 15 years. If—as is far more common—the judge chooses an indeterminate term, they select both the minimum and the maximum, which could be 10-20, 30-50, 60-90, or one of an infinite variety of other combinations.[3] Even the two-thirds rule limiting the length of minimum sentences does not apply.
In 2019, 35.0% of the total Michigan prisoner population was serving for one of four life-maximum offenses: second-degree murder (M2), assault with intent to commit murder (AWIM), first-degree criminal sexual conduct (CSC), or armed robbery (RA). Roughly 6,000 people—just more than 16% of the population—were serving either parolable life sentences or minimum terms of over 20 years. The

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prison beds allotted to people who are serving minimum terms of one, two, or three years turn over quickly. But the people serving very long minimums stay in their beds for many years. As new long-termers enter prison, these prisoners stack up, and their share of the population keeps growing. Thus, the life-maximum offenses present the most difficult and consequential questions about how judicial discretion should be exercised and the extent to which it should be constrained.

Life-maximum offenses are peculiarly relevant to examining the operation of the sentencing guidelines for multiple reasons.

- These are the serious offenses that the legislative guidelines policy of lengthening sentences was primarily designed to affect.
- Because these cases provide judges with the maximum amount of sentencing discretion, they provide the clearest window into how and with what consequences that discretion is exercised and the extent to which the guidelines actually constrain it.
- These are the cases in which a prosecutor's decision about whether to charge someone as a habitual offender can have by far the most dramatic effect.
- These offenses have a large and growing impact on the size and cost of the prison population.
- These are the cases in which disproportionately harsh and/or inconsistent sentences have the greatest impact on individual defendants, their families, and their communities.
- Criminal justice experts both in Michigan and nationally have come to recognize that significantly reducing prison populations will be impossible without addressing the very long sentences imposed on people convicted of assaultive and sex offenses.

This report examines how the guidelines have affected sentence lengths and whether they have achieved the goals of increased proportionality and decreased disparity in sentences for life-maximum crimes.

Section I places the Michigan guidelines in historical and practical perspective. Chapter One traces the evolution of the guidelines, describes their enforcement by the appellate courts, and then places them in the context of other legislative changes that have lengthened sentences. Chapter Two examines the extent to which sentences for life-maximum offenses have grown longer over the decades and the consequences of that trend. Chapter Three reviews the prior research on the need for and effect of Michigan's sentencing guidelines.

Section II presents an empirical analysis of more than 38,000 sentences imposed for the four most common life-maximum offenses in 13 Michigan counties over the course of nearly 30 years. The research examines:

- How sentences for the life-maximum offenses grew when the judicial guidelines were replaced by legislative guidelines.
- How the structure of the legislative guidelines, including the complex series of grids, the prior record and offense variables, the breadth of the recommended ranges, and the extent of both upward and downward departures from those ranges, permit or promote certain outcomes.
- How effective the legislative guidelines have been in reducing disparity based on certain systemic factors (method of conviction, county of conviction, identity of sentencing judge) and selected defendant characteristics (sex, age, race).
- The impact of habitual offender sentencing under the legislative guidelines on both proportionality and disparity.

The findings are summarized in Chapter Four and discussed in detail in Chapters Five through Fourteen.

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Section III explores the policy implications of the research. Chapter Fifteen compares Michigan's guidelines to those of other jurisdictions. Chapter Sixteen discusses the change in required guidelines compliance from mandatory to advisory. Chapter Seventeen utilizes all that we have learned from the history, prior research, analysis of the guidelines structure, current empirical findings, and examples of other jurisdictions to propose changes that would improve the guidelines' capacity to achieve their objectives.

Whether mandatory or advisory, Michigan's sentencing guidelines still provide guideposts that are meant to increase proportionality and decrease disparity. With so much at stake, the value of an empirical analysis of Michigan's sentencing guidelines is evident. But such a study is not only a good thing to do, now is a good time to do it. Crime rates that are at a 60-year low,[4] a Michigan Department of Corrections budget that still exceeds $2 billion,[5] and a growing awareness that "get tough" policies can be counter-productive have moderated public attitudes. Legislators have exhibited a bipartisan willingness to address a number of controversial criminal justice issues.[6] It is hoped that the moment to consider so consequential an issue as the appropriate sentences for serious assaultive crimes has also arrived.

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Section I. History and Context

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CHAPTER ONE. THE EVOLUTION OF SENTENCING GUIDELINES

Until the mid-1970s, indeterminate sentencing was the norm all over America. It was based on the belief that sentences tailored to individuals could best achieve the "rehabilitative ideal." The thinking was that judges can evaluate each defendant's background and behavior to determine an appropriate minimum punishment and corrections officials can best determine when someone is sufficiently rehabilitated to return to society.

In its purest form, indeterminate sentencing is awash in discretion. Eventually, it fostered dissatisfaction from multiple perspectives. Some people were concerned about disparities among defendants and abuses of discretion in individual cases and sought a system with more consistency. Some thought defendants were not incarcerated for long enough. Some focused on the lack of accountability among decision-makers. Beginning in the mid-1970s, various reforms were adopted to varying degrees and in many combinations by jurisdictions across the country. Today, no two state sentencing and corrections schemes are exactly alike.

Michigan has retained the traditional indeterminate sentencing scheme it first adopted by state constitutional amendment in 1902.[1] Historically, the sheer length of the minimum sentence could not be reviewed by a higher court so long as it was not based on a constitutionally or statutorily impermissible factor and did not rise to the level of cruel or unusual punishment.[2] However, in 1972, the Michigan Supreme Court had before it "a plethora of cases involving sentences with a period of but 30 days between minimum and maximum."[3] In *People v. Tanner*, it concluded that such sentences violate the clear intent and purpose of the indeterminate sentence act by leaving virtually no time for the parole board to exercise its statutory discretion. As a result, the Court adopted a rule prohibiting imposition of a minimum sentence that exceeds two-thirds of the maximum.[4] By the end of the decade, the Court was ready to tackle the problems of sentencing on a much larger scale.

A. The Michigan Felony Sentencing Project Creates a Vision

In April 1978, the Michigan State Court Administrative Office established the Michigan Felony Sentencing Project (MFSP). A 19-member Steering and Policy Committee oversaw a staff of four researchers who were supported by dozens of data collectors, consultants, and advisors. The staff analyzed about a quarter of all felony sentences imposed in Michigan in 1977—approximately 6,000 cases. Random sampling was performed in a manner that ensured a sufficient number of cases for analysis by crime type and geographic region. Just 16 months later, in July 1979, the MFSP published its report, *Sentencing in Michigan*.[5] This extremely thorough analysis and the resulting recommendations laid the groundwork for how Michigan's sentencing scheme has evolved ever since.

The MFSP report identified three core problems: disparity, lack of accountability and the diffusion of authority over the actual sentence to be served among prosecutors, judges and parole boards. Disparity comes in three types:

- Justifiable disparity that can be explained by differences in the facts of the offense or the background of the defendant.[6]
- Invidious disparity that is unjustified but explainable as derived from case-processing variables, such as the identity of the sentencing judge, conviction method or county of conviction or such personal characteristics as race or economic status[7]
- Arbitrary disparity cannot be systematically explained by empirical research.

Project staff tested the hypothesis that judges systematically consider defendant and offense variables, accord each a relevant weight and then add the weighted variables together to determine whether a defendant should be incarcerated (the In/Out decision) and, if so, for how long (the Length decision). They found that a large degree of variation in sentences within crime categories is not explained by

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offense and defendant variables. They tested multiple other variables in an effort to determine what accounted for the rest of the variation in judges' decisions.[8]

The researchers also designed grids with points for defendant variables on the horizontal axis and points for offense variables on the vertical axis. Each cell where these points intersected contained the range of minimum sentences that judges actually imposed in these cases. These ranges were enormously broad, such as 12 to 300 months.

While believing that neither the unexplained nor the unwarranted sources of disparity resulted from judges intentionally discriminating, the MSFP researchers nonetheless concluded the following: "In a state adhering to the same laws and professing the value of equal justice, this is not a situation which should be allowed to remain unchanged."[9] Their solution was to adopt sentencing guidelines based only on those offense and defendant variables that judges actually deem relevant.

Based on the empirical research, the MSFP Steering and Policy Committee said the Legislature should establish a broad-based and racially balanced sentencing guidelines commission to develop and promulgate guidelines. Until the Legislature acted, the Committee urged the Michigan Supreme Court to appoint its own guidelines commission. The Committee assumed a commission would monitor the use and effectiveness of its guidelines on a regular basis.

B. The Judiciary Adopts Voluntary Guidelines

The Supreme Court responded by appointing five trial judges to the Sentencing Guidelines Advisory Committee or SGAC. The SGAC developed an initial set of guidelines that were pilot tested, revised and ultimately implemented in 1983.

The judicial guidelines primarily focused on disparity. The SGAC did not purport to decide what the "right" sentences were; rather, the goal was to rein in outlier judges whose sentences were above or below the average for similar offenses and defendants.[10]

To this end, the SGAC decided to focus exclusively on the facts of the crime and the defendant's prior record. It rejected variables that:

- Might increase racial disparity, such as demographic and socioeconomic considerations.
- Are not consistently either mitigating or aggravating, such as the prior relationship between the victim and defendant.
- Arise infrequently.
- Are not related to the goals of sentencing.
- Are not objective, such as remorse or the defendant's prospects for rehabilitation.[11]

The SGAC developed sets of prior record variables (PRVs) and offense variables (OVs). Each variable was scored according to its seriousness. The SGAC divided the most commonly occurring felonies into 11 crime groups.[12] Each crime group had multiple grids for more and less serious offenses as indicated by the statutory maximum penalty. Thus, for instance, within the assault group, five grids addressed offenses ranging from assault with intent to murder to attempted felonious assault.

Each grid had a horizontal axis divided into six levels for the PRV point scores, a vertical axis divided into three levels for the OV scores and cells containing recommended ranges of months within which the minimum sentence should be selected. The intersection of the OV and PRV levels identified the appropriate cell for the defendant's sentence. The lowest number in the cell—often referred to as the minimum-minimum or "min-min"—indicated the smallest number of months of incarceration that should be imposed. The highest number in the cell, often referred to as the maximum-minimum or "max-min," indicated the greatest number of months that should be imposed. For example, the grid for assault with intent to murder looked like this.

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Figure 1. Assault Grid, First Judicial Guidelines

ASSAULT

Statutory Maximum
LIFE OR TERM OF YEARS

PRIOR RECORD LEVEL

OFFENSE SEVERITY	A	B	C	D	E	F
I	0-36	18-36	24-48	36-72	48-96	72-120
II	48-96	48-96	60-96	72-120	84-120	120-240
III	120-240	120-240	180-240	180-LIFE	180-LIFE	180-LIFE

Offense Title:

750.83 Assault w/intent to commit murder
750.349 Kidnapping

The recommended ranges were deliberately very broad, especially for the most serious offenses, leaving judges with a great deal of discretion. For instance, as Figure 1 shows, for someone being sentenced for assault with intent to murder who scored at the midpoint for both prior record level (Level D) and offense severity (Level II), the 72–120 month range was four years. Even so, the judicial guidelines were not mandatory. Judges were required to score them but they were not required to comply with their recommendations. When judges chose to depart from the guidelines, they simply had to complete a form explaining why their sentence was above or below the range.

The judicial guidelines were limited in their application, covering fewer than 100 frequently occurring offenses.[13] They did not apply to crimes with statutorily mandated sentences nor to defendants being sentenced for probation violations or as habitual offenders.

The SGAC made several important policy decisions. One was to adopt "real offense" sentencing. While the applicable sentencing grid is determined by the statutory maximum penalty for the conviction offense, the offense severity score is to be as high as all available evidence will support. If the proven or admitted facts are not consistent with the conviction offense, the actual facts are to be scored. So, for instance:

- If a defendant charged with armed robbery pleaded guilty to unarmed robbery to limit the maximum sentence to 15 years but use of a weapon was acknowledged, points for the weapon would be scored.
- Points may be scored for the aggregate value of property stolen or damaged even if some of that value was attributable to uncharged offenses or offenses that were dismissed pursuant to a plea agreement. Thus charges dismissed in plea bargaining do not really go away; they can come back to enhance the defendant's sentence precisely *because* they did not result in conviction.

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- If someone claims to have been a victim of a similar offense committed by the defendant that was never charged, the sentencing judge need only determine the accuracy of these claims by a preponderance of the evidence in order to consider them.[14]

The second policy decision was to decide which prior convictions, if any, are too old to be scored. The SGAC created a "10-year gap rule" that takes into account not only the time since the prior offense was committed but also the time during which the defendant was incarcerated or under supervision for that prior offense. The rule prohibits scoring a felony, misdemeanor or juvenile adjudication that occurred 10 or more years before the commission of the sentencing offense so long as the defendant had been discharged from that conviction for 10 years or more before committing any subsequent offense. Thus, the rule captures not only every offense that was committed during the preceding 10 years but also every offense the defendant ever committed before having a "clean" 10 years after discharge from incarceration or supervision.

The rule is applied in chain-like fashion so that each prior counted becomes the end-point of a new 10-year period. Take, for instance, a person charged in 2018 who was discharged in 2010 from a sentence imposed in 1995 for which he served 13 years in prison and two years on parole. If the person had a felony conviction in 1984, for which he received two years' probation (discharging in 1986) and a juvenile adjudication in 1975, the 1995, 1984 and 1975 offenses would all be scored as prior convictions even though they occurred 23, 34 and 43 years before the newest offense, respectively.[15]

Finally, the SGAC initially chose to reduce the guidelines score if one of three mitigating circumstances that were not legally sufficient to constitute a complete defense existed at the time of the crime:

1. Avoiding Harm (use of reasonable force to avoid harm to person or property)
2. Provocation/Passion
3. Mistake/Inadvertence (misunderstanding or ignorance of a significant fact)[16]

The method used was to calculate the guidelines scores, then reduce either the offense severity or prior record level by one step.

The SGAC monitored compliance with the guidelines, assessed departure explanations and considered feedback from trial judges. Racial disparity declined below statistically significant levels. The rate of compliance with the guidelines overall was roughly 80%. However, for the major violent crime groups (assault, robbery and criminal sexual conduct) the compliance rate was more like 60%. In many instances, people in the same guidelines cell were dissimilar in terms of the factors judges considered most important. [17]

The SGAC concluded that the guidelines needed to better capture the reasoning process of the sentencing judge. As a result, it made three fundamental changes.[18] It restructured the scoring system so that the points awarded better captured the order and magnitude of each category within a given variable and in relation to other variables. It reconfigured the grid structure from 3x6 to 4x4 on the rationale that four levels of prior record were sufficient to distinguish among defendants but that a fourth level of offense severity was needed to separate the various degrees of culpability. The SGAC believed that these changes yielded grid cells that contained people who were, "in fact, similar in terms of those factors that are most salient to the sentencing decision."[19] Third, the SGAC revised the recommended sentence range. It also omitted any scoring of mitigating circumstances and added Prior Record Variable 7, which awarded points for subsequent and concurrent felony convictions. The express goal was not to make sentences more or less harsh but "to continue the effort . . . to reduce sentencing disparity" and to ensure that the recommended sentences reflected the "going rate."[20] Nonetheless, the outcome was to increase the recommended ranges for some crimes, particularly CSC, substantially.

The second edition of the judicial guidelines became effective on October 1, 1988. It was never updated and so did not apply to any crimes created by the Legislature after 1988. Scoring the guidelines continued to be mandatory but actually using them to set sentences remained voluntary. Yet, by 1995, the

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overall compliance rate was 88%, and the rates for the major violent crimes had also increased,[21] not because more judges were following the guidelines but because the guidelines more closely followed the judges.

C. *Milbourn* Sets a "Proportionality" Standard for Appellate Review

Although compliance with the sentencing guidelines was not required, there was a nascent willingness to address sentences that were excessively long. The Michigan Supreme Court had to decide what standard to apply when reviewing sentences on appeal. In 1983, the Court held in *People v. Coles* that appellate courts could review sentences imposed by trial courts for an abuse of discretion that "shocked the conscience."[22] However, the *Coles* standard proved unworkable.

In December 1984, a young man named Kevin Milbourn broke into the apartment he had previously shared with his former girlfriend and trashed it, causing several hundred dollars' worth of damage. The break-in was part of a series of events over several weeks, including confrontations and damage to the victim's car, that arose from the difficulty Mr. Milbourn was having with the break-up. Milbourn had no prior record, and the sentencing guidelines recommended a minimum prison term between 12 and 30 months. The trial judge imposed a prison sentence of 10 to 15 years. The Court of Appeals found that its conscience was not shocked and affirmed the sentence.

When it considered Mr. Milbourn's case in 1990,[23] the Michigan Supreme Court noted that in the thousands of sentences reviewed since *Coles* was decided, the Court of Appeals had been shocked by only a handful. On a number of occasions, Court of Appeals judges had expressed the desire for further guidance on how the *Coles* standard should be applied. The primary difficulty, the Court noted, was with *Coles*'s complete subjectivity.

The *Milbourn* majority found that Michigan's legislative scheme reflects the "principle of proportionality"; that is, the concept that the most severe punishments should be reserved for the most serious crimes and that people who have prior records should be treated more harshly than those who do not. It noted that by providing a range of punishments for most felonies, the Legislature also recognized that any given instance of a particular crime may be more or less serious. The purpose of discretionary sentencing, the majority concluded, is not "to accommodate subjective, philosophical differences among judges." Rather, the task of the judiciary is to determine "where, on the continuum from the least to the most serious situations, an individual case falls" and to impose sentence accordingly.[24]

For assistance in making that determination, *Milbourn* directed judges to rely on the sentencing guidelines. Although compliance with the guidelines remained voluntary, the gradation of recommended ranges reflected the consensus of most judges on the appropriate penalty for each combination of sentencing factors. Departures from the guidelines should be based on reasons that were not already covered by guidelines variables or were not scored points sufficient for the circumstances. Departures not supported by such reasons "would alert the appellate court to the possibility that the sentence under review was disproportionate.[25]

The majority noted that following the guidelines would not unduly restrict judicial discretion, as the recommended sentence ranges were "generally quite broad."[26] Even where some departure from the recommended range was warranted, the extent of the departure was also subject to review for proportionality. The majority concluded that while Mr. Milbourn's behavior might warrant some departure from the guidelines, imposing the maximum penalty allowed for breaking and entering was disproportionate and therefore an abuse of discretion.

Milbourn brought intensive scrutiny to trial court sentencing practices. As will be discussed in more detail in Chapter Sixteen, the results of that scrutiny varied widely. While resentencing was ordered in many cases, the Supreme Court itself upheld extreme upward departures from the guidelines range in others. The Court of Appeals was left without clear guidance and various subjective grounds for departing evolved.

The extent to which departures are allowed presents an enormous challenge to any guidelines system. No matter how carefully designed a scoring system is, inevitably there will be unique cases that

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guidelines cannot easily accommodate. Judges understandably want the ability to tailor sentences to the facts of such cases. Yet if individual sentencing judges are routinely allowed to depart from guidelines recommendations that they believe do not fit the crime or the defendant, the goals of proportionality and consistency will be undermined. Trying to simultaneously preserve and restrain judicial discretion is a high-wire act that requires a lot of skill.

D. The Legislature Enacts Mandatory Guidelines

In 1998 the Michigan Legislature enacted its own version of sentencing guidelines. Four years earlier, MCL 769.32 established a sentencing commission that was quite different from the small group of judges that constituted the SGAC. The legislative commission had 19 members, including eight legislators and representatives of various stakeholders, such as the defense, prosecution, corrections and law enforcement but only had slots for two judges.[27] It was structured to ensure that compromises would be reached before legislators had to vote up or down on the entire package.

The Sentencing Commission did its work during the height of the "tough on crime" movement. Although Michigan's overall "index" crime rate has declined almost steadily from 1981 to the present, this decrease largely reflects the steady drop in property crimes that begin in that year.[28] The decline in violent crime lagged behind. The violent crime rate peaked in 1986, declined for three years, went up again in 1990 and peaked again in 1991, before declining steadily after 1993.[29]

Thus the perception in the 1990s was that harsh responses by the criminal justice system were necessary to stem the tide of assaultive offenses. These responses included a decline in parole approval rates, an increase in parole revocations for "technical" violations of parole conditions, the automatic waiver to adult court of juveniles 14 and older who committed serious assaultive offenses, and the construction of the Michigan Youth Correctional Facility, a private prison to house the wave of juvenile "super-predators" that ultimately never materialized. Most notably, passage of the guidelines legislation was conditioned on simultaneous passage of truth-in-sentencing legislation that was designed to lengthen the time prisoners actually serve by eliminating sentence reductions for good behavior and prohibiting placement in halfway houses before the entire minimum sentence was served.

The Legislature charged the commission with developing sentencing guidelines that accomplish multiple goals; these included public protection, reserving the most severe penalties for crimes of violence against people, identifying cases in which non-prison sanctions are appropriate and accounting for state and local correctional resources. MCL 769.33 (e) also said the sentencing guidelines should:

> (iii) Be proportionate to the seriousness of the offense and the offender's prior criminal record.
> (iv) Reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences.

1. Structural Differences

Structurally, the legislative sentencing guidelines are broadly similar to the judicial guidelines. Offense and prior record variables are scored, and the intersection of these scores on a grid determines the recommended sentencing range. Many of the variables are similar in both sets of guidelines. Offense variable scoring is still based on the "real" offense. There is still no scoring of mitigating circumstances. The "10-year gap" rule for counting prior convictions was retained. However, there are many significant differences:

- The legislative guidelines are policy-based. Recommended sentences are designed to implement deliberate choices about who should and should not go to prison and how long prison sentences should be, not simply reflect existing judicial practices.

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- Penalties for less serious offenses committed by people with less serious criminal records were designated as "intermediate" or community-based sanctions, which may run the gamut from jail or residential treatment to probation, outpatient programs, community service, tether and fines. [30]
- Prison sentences for more serious crimes and defendants with longer prior records were lengthened.

- The legislative guidelines were mandatory. Until the Michigan Supreme Court decided *People v. Lockridge* in 2015,[31] judges had to sentence within the recommended ranges unless they placed on the record substantial and compelling reasons for departing from the guidelines. MCL 769.34 (3). The reasons were subject to appellate review.
  - Under *Milbourn*, reviewing judges focused on the ultimate propriety of the sentence compared to the offense and the defendant, using the judicial guidelines to inform that assessment. The statutory scheme focused on enforcing the guidelines themselves as a means of promoting proportional sentences.
  - Substantial and compelling reasons had to:
    - be "objective and verifiable,"
    - "'keenly' or 'irresistibly' grab our attention,"
    - be "of 'considerable worth' in deciding the length of a sentence" and
    - exist "only in exceptional cases."[32]
- The legislative guidelines apply to all offenses except the handful with mandatory penalties that leave judges with no discretion to exercise.
- The legislative guidelines apply to habitual offenders.
- The legislative guidelines did not initially apply to probation violators but do now as the result of a 2005 Michigan Supreme Court decision.[33]
- The legislative guidelines contain "straddle cells," which leave complete discretion to trial judges in more than ten thousand cases annually as to whether to impose a prison sentence or an "intermediate" (community-based) sanction.[34]
- The legislative guidelines are structured somewhat differently.
  - The judicial guidelines grouped offenses into crime groups based on the nature of the offense, (e.g., assault, burglary, CSC, drugs, homicide). Within each crime group were separate grids depending on the seriousness of the offense, with seriousness defined by the maximum penalty, (e.g., armed robbery (life), unarmed robbery (15 years), larceny from a person (10 years)). The grids all had four rows for offense level and four columns for prior record level, for a total of 16 minimum sentence ranges. On every grid, some ranges were redundant. For instance, on the criminal sexual conduct grid, the 120–300 month range could be reached through three different combinations of offense and prior record levels.
  - The legislative guidelines divide all felonies into nine crime classifications based roughly on the statutory maximum term. Second-degree murder is its own class (M2). Otherwise, very different offenses with similar maximums are in the same class. Class A is for life-maximum offenses other than murder, including assault with intent to murder, first-degree criminal sexual conduct and armed robbery, even though they involve very different behaviors and cause very different kinds of harm.[35]

    Each crime class has its own grid that displays the recommended ranges for the minimum sentence, depending on the offense and prior record levels. The recommended ranges increase as the crime class increases. For instance, if the defendant had the lowest possible score for both offense and prior record, the range for the Class A offense of assault with intent to murder would be 21 to 35 months in

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prison while the range for the Class F offense of felonious assault would be 0 to 3 months with a presumptive intermediate (non-prison) sanction.

All of the grids have six prior record levels. Grids A–E also have six offense levels, for a total of 36 minimum sentence ranges per grid. The F grid has four offense levels; the M2, G and H grids have three. The increased number of ranges resulted in more redundancy. [The guidelines grids for M2 and Class A appear in Chapter Eight.]

The legislative guidelines reduce the crime classification if the offense was an attempt. If the attempted offense falls in classes A, B, C or D, the offense is scored on the E grid. If the attempted offense falls in classes E, F, or G, it is scored on the H grid.

The Sentencing Commission took two major steps that increased the lengths of prison sentences for the most serious offenses and defendants. One, it raised the recommended minimum sentence ranges. Two, for those defendants that prosecutors decided to treat as habitual offenders, it further broadened the ranges by raising the high end.

2. Raising the Minimums

It is difficult to compare the recommended sentences for each set of guidelines because the grid structure changed with each version. However, by looking at the corners of each grid, it is possible to at least compare the extremes (i.e. what the recommended ranges would be for the least and most serious cases). Table 1 shows the non-habitual offender sentencing ranges (in months) at the four corners of the grid for each set of guidelines for the four life-maximum offenses.

- The upper left corner is for the lowest score on both offense and prior record variables.
- The lower left corner is for the highest offense but lowest prior record scores.
- The upper right corner is for the highest prior record but lowest offense scores.
- The lower right corner is for the highest score on both offense and prior record variables.

Table 1. Comparison of Sentence Lengths under Judicial and Legislative Guidelines

Crime	Guidelines Period	Low Offense Low Priors	Hi Offense Low Priors	Low Offense Hi Priors	Hi Offense Hi Priors
Homicide	1st Judicial	12–84	120–life	72–216	240–life
	2nd Judicial	12–84	120–300/life	120–180	240–480/life
	Legislative	90–150	162–270/life	270–450/life	365–600/life
Assault with intent to murder	1st Judicial	0–36	120–240	72–120	180–life
	2nd Judicial	0–36	84–180	60–120	180–300/life
	Legislative	21–35	108–180	108–180	270–450/life
Criminal Sexual Conduct	1st Judicial	12–36	72–120	72–120	180–life
	2nd Judicial	12–72	96–240	72–180	240–480/life
	Legislative	21–35	108–180	108–180	270–450/life
Armed Robbery	1st Judicial	12–18	36–72	60–96	120–240
	2nd Judicial	0–36	36–96	36–120	120–300/life
	Legislative	21–35	108–180	108–180	270–450/life

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This very basic comparison reveals several points:

- The judicial guidelines treated each listed offense quite differently. In the second version, murder had the highest ranges, CSC was next, the assault ranges were substantially lower and the armed robbery ranges were the lowest by far. The legislative guidelines left murder on its own grid and raised the low ends of the murder ranges substantially. But they placed all the other life-maximum offenses on the A grid and thus treated them the same. The result was to push assault sentences up substantially and armed robbery sentences up even more while leaving CSC offenses, which already had very high ranges, less changed.
- Except for one corner for one offense,[36] the starting point of the legislative ranges (the minimum-minimum) was substantially higher than those of either set of judicial ranges for all of the most serious offenses. The extent of the increase varied depending on each offense's range under the second judicial scheme. For instance, the beginning of the range for someone with a low offense score for murder but multiple prior convictions increased by 12.5 years. For assault with intent to murder, the increase was four years; for CSC, it was three years and for armed robbery it was six.
- The cell ranges in every version of the guidelines were extremely broad. The legislative guidelines narrowed some and increased others. But except for the upper left corner of the "A" grid, the range in every cell was at least three years. Overall, sentences for people with similar offenses and similar prior records could vary by six, ten, 15 or even 20 years without judges having to depart from the recommended range; that is, enormous room for disparity, particularly for life-maximum offenses, was built into each incarnation of the guidelines that had reduction of disparity as their primary mission.

Both the breadth of the cells and the way in which the cell parameters changed from one set of guidelines to the next illustrate how the definition of proportionality is a moving target. While setting a baseline punishment for varying offenses is an inherently subjective process, it is still important to ask how the same set of facts can be "worth" six years one day and 15 years the next or, indeed, six years in one courtroom and 15 years in the courtroom next door.

3. Habitual Offenders

The habitual offender statutes, which have been around in some form since at least 1927,[37] were designed to give prosecutors and judges an extra tool in sentencing defendants with prior convictions. They were premised on the notion that each successive conviction reflects the defendant's unwillingness to change their criminal conduct. If a prosecutor decides to treat a defendant as a habitual offender, Michigan statutes provide a formula for increasing the maximum sentence beyond what the penal statutes normally allow.

- If the defendant receives a second offender enhancement, and the current offense carries a statutory maximum sentence less than life, the maximum may be raised by 50%.[38]
- If the defendant receives a third offender enhancement, and the current offense carries a maximum sentence less than life, the maximum sentence may be doubled.[39]
- If the defendant receives a fourth offender enhancement, and the current offense carries a maximum sentence less than five years, the maximum may be raised to 15 years. If the current offense carries a maximum of five or more years, the defendant may be sentenced to life or any term.[40]

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Of course, if the current offense already carries a maximum of life or any term, a habitual offender enhancement has little legal effect. In these cases, the court is already free to impose any maximum sentence it chooses and can take the defendant's entire prior record into account in making that decision. Whether habitualization has any practical effect in these cases depends on whether the court choses to give more weight to the defendant's criminal history because the prosecutor has chosen to utilize the enhancement.

Independent of sentencing guidelines, increasing the maximum sentence under the habitual offender statutes also has the collateral effect of allowing for longer minimum sentences. Since the *Tanner* rule described earlier prohibits the minimum sentence from exceeding two-thirds of the maximum sentence, lengthening the maximum creates room for the minimum to grow as well. Recall, however, that *Tanner* does not apply to life-maximum offenses so in those cases the court could impose any minimum it desired.

The judicial guidelines did not apply to defendants whom prosecutors treated as habitual offenders. Judges simply selected minimum sentences for these defendants as they always had without reference to the guidelines.

The legislative guidelines do not only cover people being sentenced as habitual offenders, but also increase the possible *minimum* sentence for those defendants by broadening the cell ranges. The high end of the range is raised by 25, 50, or 100%, depending on whether the person is being sentenced as a second, third or fourth offender. Thus, the judge can choose to impose a much longer minimum sentence while staying within the guidelines (i.e., without having to justify an upward departure).

Leveraging the habitual offender statute into a mechanism for raising both the minimum and maximum sentences raises multiple concerns that will be discussed in depth in Chapter Six. The bottom line is that the exclusive purpose of the habitual statutes had been to raise the statutory maximum. The sentencing guidelines are designed to structure the consideration of the defendant's prior record in selecting the minimum sentence. The more prior convictions the defendant has, the higher the prior record score and the longer the recommended minimum. Using the defendant's habitual offender status, which is also based on the defendant's prior convictions, to further enhance the recommended minimum sentence means that, for those defendants that prosecutors choose to treat as habitual offenders, prior criminal history is counted twice.

E. The Guidelines Are Not Assessed; Sentences Get Longer

The legislative guidelines were built on a raft of assumptions about how judges would actually use them. The enabling legislation assumed that the Sentencing Commission would review how the guidelines were working in practice and make periodic recommendations for modification. However, once the guidelines were submitted to the Legislature in 1997, the Commission never met again.[41] In 2002, the statutes that established the Commission and defined its tasks were repealed.[42] The assumptions that were used to develop the guidelines went untested. In the meantime, the Legislature proceeded to enact a host of provisions that undermined those assumptions, causing sentences to creep higher and higher. In her thorough and insightful analysis of trends from the adoption of the legislative guidelines in 1999 through 2013,[43] Anne Yantus explains the impact of these provisions.

1. Guidelines Amendments

Without a commission to provide context and consistency, the guidelines were periodically amended by the Legislature. Adjustments had to be made when new crimes were enacted or maximum penalties were changed. Increased maximums meant the offenses were moved to different sentencing grids with higher recommended minimums. In some cases, crimes were moved to higher grids without any change in the statutory penalty.

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Yantus gives dozens of examples.[44] Two are particularly striking. When the guidelines took effect in 1999, first-degree child abuse was a Class C offense with a 15-year maximum. In 1999, the Legislature moved it to Class B. In 2012, the Legislature made child abuse a life-maximum offense and moved it to the A grid.

The crime of first-degree retail fraud was created with a two-year maximum in 1988 to distinguish shoplifters from people more appropriately charged with larceny in a building, which carries a four-year maximum. However, in 1998, the maximum for retail fraud was increased to five years. In 1999, retail fraud was placed on the H grid of the new sentencing guidelines. But in 2000, retail fraud was moved up to the E grid.

- As a result, 25% of people sentenced for first-degree retail fraud were pushed into presumptive prison sentences. Previously, 71% had been subject only to intermediate sanctions and 29% had fallen into straddle cells.[45]
- Moreover, retail fraud is now treated more seriously than larceny in a building, which still has a four-year maximum and remains on the G grid. It is also treated more seriously than felonious assault, which has a four-year maximum and is on the F grid.

Legislators also made changes that affected individual defendants. They tinkered with the scoring of various prior record and offense variables, repeatedly increasing point assessments. That resulted in moving affected defendants into higher guidelines ranges on the grids applicable to their crimes.

The effect of ad hoc legislative changes was three-fold. It undermined the comprehensive balancing of factors worked out by the Sentencing Commission and adopted by the Legislature itself when it enacted the guidelines. It altered the evaluation of proportionality for specific crimes by redetermining punishments without regard to the overall scheme. And, because virtually all the changes resulted in longer sentences and more incarceration, it increased the pressure on the prison system. Yantus concluded:

> A comprehensive review of Michigan's statutory sentencing guidelines from enactment in 1998 to 2013 reveals guidelines that have failed to evolve in a meaningful way. Instead, these guidelines reflect the politics of criminal law: a one-way ratchet that leads to ever-increasing penalties. [46]

2. Consecutive Sentences

Changes to the guidelines were not the only tool that legislators employed to lengthen sentences. Another was more consecutive sentences. Michigan's longstanding rule is that multiple sentences are to be served concurrently unless there is express statutory authority that requires or allows them to be consecutive. This rule holds whether the crimes arose from the same transaction or from different transactions that occurred before the defendant was arrested. There are two primary kinds of exceptions. One is for crimes by prisoners and others already under criminal justice supervision when they committed a new offense.[47] The other is for crimes specifically designated by the Legislature as requiring or permitting consecutive sentencing, such as possessing a firearm during the commission of a felony[48] and selected drug offenses.[49]

Yantus reports that, as of 1990, Michigan had 13 consecutive sentencing statutes, nine of which were mandatory while four gave trial judges the discretion to make sentences consecutive if they choose. By 2013, there were 42. Most of the 29 new provisions were discretionary. While many of the crimes involved were newly created, the penalties for some common longstanding offenses, like first-degree home invasion, first-degree CSC and resisting an officer were changed to allow for discretionary consecutive sentences.[50]

The cost of consecutive sentencing authority can be very high to both individuals and taxpayers. The Michigan Supreme Court has held that when a defendant receives consecutive sentences, so long as each one standing alone is proportional under *Milbourn*, their aggregate length will not be

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disproportionate. That is, each sentence is assessed separately; their cumulative effect need not be considered.[51] It has also adopted an interpretation of the CSC 1st statute that allows for consecutive sentencing on each count of CSC that occurred during the same criminal transaction (as opposed to just each different crime that occurred at the same time, such as CSC and robbery). Thus, where defendant Tommy Brown was convicted of three counts of first-degree CSC involving a minor that arose from the same incident, the Supreme Court upheld consecutive sentences of 40–60 years without regard to the fact doing so made the sentence 120 to 180 years.[52]

These extreme sentences are not limited to sexual assaults on children. Christopher Barron had four convictions that arose from a single 2000 offense: assault with intent to commit and conspiracy to commit armed robbery, carrying a concealed weapon and possessing a weapon while committing a felony. While serving his minimum prison term of 8.75 years, for those offenses, he was convicted of being a prisoner in possession of a weapon and received an additional sentence of 1.67 years. He was eventually paroled and was discharged from supervision in 2014.

Barron was then convicted of first-degree home invasion and armed robbery for forcing his way into the home of a Calhoun County couple in 2015. Armed with an authentic-looking BB gun, Barron had forced the man to lie down, struck him repeatedly and stolen about $1,500 in cash. The prosecutor treated Barron as a fourth habitual offender; the trial court imposed sentences of 25–60 years for the home invasion and 50–100 years for the armed robbery, to be served consecutively. With combined sentences of 75–160 years and no chance of reductions for good conduct, Barron will first become eligible for parole in 2091.[53]

These extraordinarily long consecutive sentences yield several observations.

1. Since they exceed the defendant's life span, they are obviously designed to avoid the possibility of release that a parolable life sentence would bring. Regardless of the person's age, health or changed behavior, the parole board will have no authority to grant release, and the public will continue to pay the cost of incarceration and medical care.
2. The Legislature's decisions about which crimes should allow for consecutive sentences do not reflect any principled rationale. The list of 29 consecutive sentencing provisions added from 1994–2013 ranges from impersonating a firefighter to identity theft to first-degree CSC and carjacking.[54] Hundreds of other offenses, including many that are hard to distinguish from those 29, still require concurrent sentences. Thus the changes appear to be ad hoc responses to situations that grabbed a legislator's attention.
3. Ad hoc decisions regarding consecutive sentences create anomalies. For instance, consecutive sentences are allowed for multiple counts of the same crime committed during a single incident, such as when a sexual assault victim was penetrated more than once during a single transaction. Yet the sentences for the same counts if committed at different times must be concurrent, such as when the victim was penetrated repeatedly in separate transactions over a period of time.[55]
4. Prosecutors control the number of offenses that are charged from a single criminal incident. In many cases where there are multiple victims or the chain of events violates multiple statutes, it is easy to increase the number of counts, thereby giving the prosecution more leverage in plea bargaining. Allowing multiple counts from the same transaction to be imposed consecutively without regard to their aggregate length allows prosecutors more room to increase the total time to be served.
5. Allowing proportionality to be assessed per count takes the focus off the real nature of the criminal behavior overall. If one person engaged in one criminal transaction, *Milbourn* suggests that the total time to be served should be proportional to the entire transaction. Viewing the behavior as isolated component parts while ignoring their cumulative effect risks artificially inflating the aggregated sentence to the point of absurdity. Moreover, the guidelines that are used to inform review under *Milbourn* were constructed on the assumption

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> that nearly all sentences would be concurrent and the longest one would control the minimum amount of time the defendant would actually serve.

In *People v. Norfleet*,[56] the Court of Appeals panel took an innovative approach to the issue of when and why discretionary consecutive sentences should be allowed. The defendant was sentenced as a fourth habitual offender on seven charges: three counts of delivery of less than 50 grams of heroin, one count of possession with intent to deliver less than 50 grams of heroin, one count of conspiracy to deliver less than 50 grams of heroin, one count of maintaining a drug house and one count of maintaining a drug vehicle. He was sentenced to consecutive terms of 134 months to 40 years for each of the first five counts plus concurrent terms of 46 months to 15 years for the last two, making him eligible for parole after 55 years.

The Court of Appeals recognized that the reasonableness of each of these sentences, which were at the high end of the recommended guidelines ranges, had to be reviewed on its own merits. However, the decision to impose the sentences consecutively was an exercise of discretion subject to review for abuse. The standard of review is whether the result is within the range of principled outcomes. In order to aid appellate review for abuse of discretion, the trial court must articulate its rationale for the imposition of each consecutive sentence; that is, it cannot treat the imposition of multiple consecutive sentences as a single act of discretion. The panel emphasized that Michigan historically considered consecutive sentences to be "strong medicine" and expressed the belief that requiring justification for each consecutive sentence will ensure that drastic deviations from the norm are reserved for appropriate situations.[57]

3. Mandatory Minimums

A second legislative technique that explicitly trumps the use of sentencing guidelines is the enactment of mandatory minimum sentences. Unless the penalty statute expressly allows for a departure, judges have no discretion to impose a lower minimum term. On the other hand, a mandatory minimum simply sets a floor. A judge can always choose to go higher.[58] Thus, the trial court's discretion to impose an individualized sentence is restricted for sentences below the mandatory penalty but not for sentences that exceed it.

Historically, Michigan's mandatory minimums were primarily aimed at drug offenses. However a massive overhaul of the drug laws in 2002 eliminated most of these. Yantus reports that seven common offenses currently have mandatory minimums. Among the harshest are two relatively recent enactments.[59]

In 2006, the Legislature added a 25-year mandatory minimum for first-degree CSC against a victim under the age of 13. Compared to the sentencing guidelines recommendation, this modification adds roughly 10 more years in prison for a person with no prior criminal record.[60]

In 2012, the Legislature added a 25-year mandatory minimum for selected people convicted of being fourth offenders.[61] The selection criteria are complex.

- The sentencing offense must be one defined by the statute as "serious."
  - The "serious" offenses are all assaultive although of varying degrees of severity.
  - They include, for instance, assault with intent to commit great bodily harm less than murder, which carries a 10-year maximum sentence, and assault with intent to commit unarmed robbery, which carries a 15-year maximum.
- At least one of the prior felonies must be among those defined as "listed."
  - The group of "listed" crimes is much longer.
  - Many are common and not all are assaultive.

So, for instance, a person charged with assault with intent to commit great bodily harm less than murder who has three very old prior convictions—two property offenses and the listed crime of CCW—must be sentenced to a minimum term of 25 years.

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As Yantus notes, many people will receive much longer sentences than they would have previously, even if the threat of these habitual offender minimums are used more as prosecutorial bargaining tools. The legislative analysis predicted the need for 1,600 more prison beds within 10 years and 7,300 beds after 25 years. The cost could be as high as $55.7 million per year after 10 years.[62]

4. A Lost Opportunity

In December 2014, the Legislature finally created a successor to the sentencing commission by establishing the Criminal Justice Policy Commission (CJPC).[63] Chief among the CJPC's broad array of tasks was evaluating the operation of the guidelines and recommending whatever modifications may be necessary to more effectively meet the Legislature's stated goals. The Legislature again specified a list of goals that modifications to the guidelines were to accomplish. The list was similar to that in the 1994 statute and exactly repeated the sections on proportionality and disparity quoted above.

However, the new statute went further. MCL 769. 33a permitted the commission to recommend changes not only to the sentencing guidelines but "to any law, administrative rule, or policy that affects sentencing or the use and length of incarceration." It also specified 10 policies that recommended modifications were to reflect. These policies emphasized such values as proportionality, equity, consistency, utilizing least restrictive means, the rational use of resources, reliance on research, transparency and the exercise of "judicial discretion to individualize sentences within a framework of law." Overall, the statute not only mandated criteria for the construction of the sentencing guidelines, it laid out the Legislature's broad vision for an integrated scheme of sentencing and corrections that would reduce reliance on incarceration to the extent that is conducive with public safety.

The CJPC statute contained a four-year sunset provision. Although the sunset was extended for nine months, the commission was ultimately allowed to die on September 30, 2019. The only aspect of the sentencing guidelines that it had examined in depth was the operation of the straddle cells.

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CHAPTER TWO. CHANGING VIEWS OF HOW LONG IS LONG ENOUGH

While the current research specifically examines the impact of several versions of sentencing guidelines on sentences for four life-maximum offenses, it is useful to place the findings in a broader context. MDOC Annual Statistical Reports for the last 50 years provide a wealth of information about how much our concept of proportional punishment has changed. There was a time when 10 years in prison was considered severe punishment. In the 1970s, a large majority of everyone sentenced for second-degree murder, first-degree criminal sexual conduct, and armed robbery received a sentence that made them eligible for parole in 10 years or less. Less than 5% had minimums greater than 20 years.

People sentenced in the 2010s faced a very different reality. Through 2017, the percentage eligible for parole after 10 years had declined by 13 points for armed robbery, 57 points for first-degree criminal sexual conduct, and 62 points for second-degree murder. Conversely, the proportion of people required to serve more than 20 years for CSC had increased ten-fold, and the proportion required to serve more than 20 years for second-degree murder was nearly 15 times greater.[1]

Moreover, these changes must be viewed in the context of what judges well knew about the availability of sentence reduction credits. Under the progressive system of good time in effect until 1978, a 40-year sentence could be served in 16 years. Under the disciplinary credit system in effect from 1982 to 1998, a 40-year sentence could be served in 32.5 years. The minimums imposed after 1998 have no potential reductions for credit of any kind.

Notably, this trend toward ever-longer sentences runs counter to the norms of other countries that still view 10 years as an exceptionally long time to spend in prison. The 44 member states with data reported by the Council of Europe in 2018 collectively housed 1,229,385 prisoners; of these, only 1.5% were serving sentences of 20 years or more, and 1.2% were sentenced to life.[2] Many Latin American countries have banned any form of life imprisonment, as have nine member nations of the Council of Europe.[3]

A. 25-Year Trends and Mass Incarceration

1. The Michigan Evidence

From 1993 to 2017, index crimes plummeted by more than 56%, from 505,497 to 220,640.[4] The proportion of felony defendants sentenced to prison—as opposed to some other sanction—declined dramatically, from 29.3% in 1993, to 19.7% in 2017. Yet the Michigan prisoner population in 2017 (39,666) was 2.9% bigger than it was in 1993 (38,942). That failure of the prison population to decline can be explained by the ever-growing number of people serving very long sentences.

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From 1993 to 2017, the proportion of prison commitments with minimum sentences longer than 20 years more than doubled from 3.5% of the total to 7.4%.

The increase in very long minimum sentences also reflects a decline in the imposition of parolable life sentences, which dropped from 38 in 1993 to four in 2017. It appears that judges shifted from sentences that allow parole eligibility in 15 years to "big numbers" (i.e., minimums of 25 years or more).

The increases for specific life-maximum crimes were dramatic. The average sentence for second-degree murder rose by 29.0%, from 19 to 24.5 years. The average sentence for armed robbery grew by 32.3%, from 6.5 to 8.6 years. The average sentence for assault with intent to commit murder grew by "only" 9.3 %, from 12.0 to 13.1 years.[5]

More and more people serving very long sentences have changed the composition of the prison population.

- In 1993, more than 8,600 prisoners (including those serving life terms) had sentences that required them to serve more than 10 calendar years. That was 22.1% of the entire prisoner population. In 2017, more than 16,500 people—41.7% of the population—were serving sentences with effective minimums of more than 10 years.

- The number of people serving indeterminate terms (that is, non-lifers) with minimum sentences of more than 20 years grew from 1,622 (4.2%) to 4,843 (12.2%).

- In 2017, nearly 8,000 people—20% of the prisoner population—were serving either life terms or minimum sentences that exceeded 25 years. Half of those were serving non-parolable life terms that would end only with commutation or death.

Life Sentences in Michigan

Non-parolable

Life without the possibility of parole is mandatory for first-degree murder and a very small number of other offenses. Release is only by death or commutation.

Parolable

All of the most serious offenses short of first-degree murder carry a penalty of life or any term. This allows the trial judge to either impose a term of life with the possibility of parole or an indeterminate sentence, for which the judge selects both the minimum and maximum terms.

Parolable lifers never earned good time or disciplinary credits even when these were available. Until 1992, under the "lifer law," they became eligible for release after serving 10 calendar years. Lifers sentenced since then must serve at least 15 calendar years. In practice, parole at first eligibility is rare. Hundreds of parolable lifers serve 25, 35, or 45 years before release, or are left to die in prison.

Lifer Law

Until the passage of the 1978 "truth in sentencing" ballot proposal, the lifer law created the possibility of parole for anyone who had served 10 calendar years. That is, it applied to people with very long minimum sentences, not just to parolable lifers. Since then, a person with a long minimum must serve every day imposed by the judge. Thus, in theory at least, a lifer can be paroled in 15 years while someone with a 40-year minimum must serve 40 years.

The increase in people serving very long minimums, combined with a decrease in the number serving short sentences, has caused a shift in the overall population. In 1993, 57% had minimum sentences of five years or less; in 2017, it was just 40%. Some prison sentences may have become shorter; others may have become community-based sanctions.

While the number of prisoners serving shorter minimums has declined substantially, the increases for the longer sentences are dramatic. For example, the number of people with minimums of two years or less decreased by 23%, while the number with minimums over 25 years (not including lifers) grew 193%.

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This effectively means that 2,188 people serving two or fewer years were replaced by 1,780 people serving more than 25 years. Depending on their actual sentences, to serve their minimum terms, the missing short-termers would have required fewer than 4,376 prison beds over the course of their incarceration, while the additional very long-termers will require well over 44,500 beds.

This trend is not unique to Michigan. Researchers at the Urban Institute examined data from 44 states to analyze growth in prisoners' length of stay from 2000 to 2014—the result of policy changes in the 1980s and 1990s.[6] The extent of the increase varies across states, reflecting differences in state-level decision-making. In most states the trend was driven primarily or entirely by an increase in time served for violent crimes.

In Michigan, nearly one in four people had been in prison for more than 10 years. The average time served by the top (longest-serving) 10% of the population was 10 years in 1989, 16.6 years in 2000, and 26 years in 2013—a 160% increase in 25 years.

In sum, much longer sentences for those convicted of assaultive offenses —sentences that (if imposed after 1998) cannot be reduced by any award of disciplinary credits—have helped push up the average length of stay for Michigan prisoners. In turn, the increased length of stay keeps the size of Michigan's prisoner population from falling much below current levels despite efforts to divert more people convicted of non-violent offenses to community-based sanctions, rationalize drug laws, increase parole rates and return fewer people to prison for probation and parole violations.

2. Criminologists Weigh In

Criminologists and reform advocates increasingly agree that the problem of mass incarceration cannot be solved without addressing the long sentences imposed on people convicted of assaultive and sex offenses. Marie Gottschalk argues against leaving the "worst of the worst" out of the discussion about criminal justice reform strategies because they typically serve the longest sentences and make up a large portion of imprisoned people.[7] Prescott, Pyle, and Starr maintain: "Policies that seek to shrink the expansive prison population while ignoring prisoners who have committed violent offenses will fail to address the core of the problem." [8] Mauer, Nellis, and Myers not only agree that mass incarceration cannot be remedied without addressing long sentences, but also argue that sentences longer than 20 years are both cruel and impractical, as they do nothing to improve public safety and they add to the social and fiscal costs of incarceration.[9]

According to John Pfaff, the standard narrative that mass incarceration is driven by drug and other non-violent offenses is wrong; in fact, most people are in prison for serious, violent offenses. Based on his analysis of the research, he concludes that relying on long sentences in the name of public safety is ineffective and potentially counter-productive.[10]

Ryan King and his colleagues at the Urban Institute examined this comparison empirically. Using 2012 data, they illustrated the relative impact in 15 states of various techniques for reducing prison populations. For Michigan, they calculated that if then-current trends continued to December 2021, the population would be 39,304. A 15% reduction in the length of stay by those convicted of violent offenses would reduce the projected baseline by 5%, while a 50% reduction in the admission of those convicted of drug offenses would reduce the population by 3%.[11]

Austin et al observe that grouping people under the label "violent offender" has a host of consequences, including more pretrial detention, less access to alternatives to incarceration, longer prison sentences, and less eligibility for in-prison programs, lower security levels, and good time credits. The authors argue that the label—shorthand for multiple types of crime—often does not reflect the defendant's actual behavior and is not associated with high rates of recidivism, as policymakers fear. Generally ignored is the fact that violence is situational and that people who commit violent offenses have themselves often been victims of or witnesses to violence.

The authors conclude that the label "violent offender" undermines the principle of parsimony (imposing the least severe punishment necessary to achieve the goals of sentencing), distorts proportionality, and fails as a tool to predict future violent behavior. They recommend the following:

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1. Policymakers should make pretrial, prison classification, and parole decisions without the "violent offender" label.
2. Shorten prison sentences and lengths of stay for people convicted of violent offenses.
3. Make significant and lasting investments in social policy for communities challenged by violence and provide trauma-informed care and restorative justice options.[12]

B. Consequences of Longer Sentences

The increasing length of the sentences imposed under the legislative guidelines puts into stark perspective questions about how much punishment is proportional to a given crime and what limits, if any, there should be. As a group, the people convicted of these crimes are the least sympathetic prisoners in the system. Whatever the reasons for their behavior, in most cases they have caused serious harm to other people. However, it is because these defendants are the most vulnerable to sentences based on emotion and public pressure that the guard rails ostensibly erected by sentencing guidelines are particularly important. A broad consensus that some amount of prison time is warranted does not mean that *any* amount of time is acceptable or that all the collateral consequences of very long sentences are worth the cost.

1. The Fiscal Costs

The most obvious cost of longer sentences is the additional prison beds that are required. Consider, for example, a person convicted of armed robbery. The MDOC reports that the average sentence for armed robbery was 6.1 years in 1991[13] and 9.2 years in 2020,[14] a difference of 3.1 years. The 2021 average per-prisoner cost is projected to be $40,139 a year.[15] Thus, in today's dollars, the cost of incarcerating just one person convicted of armed robbery grew by $124,431. Lengthening the average sentence of 100 people imprisoned for armed robbery costs taxpayers over $12 million. And this calculation does not begin to count even larger increases in the average sentences for other life-maximum offenses.

The annual per-prisoner cost includes medical care. As prisoners age, they face the same illnesses and disabilities as the rest of us. They get cancer and heart disease and kidney failure and Alzheimer's. Their vision, hearing and mobility decline. Caring for the medically frail has become an inevitable consequence of very long sentences.

The House Fiscal Agency (HFA) reports that for the 15-year period from 2006 to 2020, per-prisoner costs for health care increased by an average of nearly 7.0% annually. Total health care spending for the period rose from $262 million to $296 million.[16] HFA says a major factor in the increase is the aging of the prisoner population.

- In 2006, 39.1% of prisoners were over age 40; 14.4% were over age 50.
- By 2020, those percentages had increased to 48.0% over age 40 and 25.6% over age 50.
- In 2020, 9.6% of Michigan prisoners—more than 3,200 individuals—were age 60 or older.[17]

The MDOC has a hospice unit, a dialysis unit and specialized geriatric units. Our prisons, already known for the role they play in housing the mentally ill, are increasingly becoming nursing homes as well.[18]

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2. The Impact on Public Safety

The belief that incarceration into middle or old age is necessary to ensure public safety is simply not supported. A host of research has found that the majority of former prisoners do not commit new crimes, people serving for homicide and sex offenses, in particular, have very low recidivism rates, and long sentences have a margin of diminishing returns.

Contrary to images of prison as a revolving door, research shows that a substantial majority of former prisoners do not return; for example:

- In a study of people released in 17 states between 2000 and 2012, Rhodes et al. found that 68% did not return to prison for any reason.[19]
- In 2009, the Citizens Alliance on Prisons and Public Spending (CAPPS) published a study of nearly 77,000 Michigan prisoners sentenced to indeterminate terms after 1981 and released for the first time from 1986 through 1999. It found that roughly 63% did not return to prison within four years; of those that did, nearly 20% were returned for technical parole violations; only about 18% were returned with new sentences for new crimes.[20]
- The MDOC's 2019 Statistical Report has a three-year follow-up of people released in 2016. It shows overall returns at 26.7%—13.6% for technical violations and only 13.2% with new sentences.[21]

Criminologists have long discussed the concept of "aging out" of crime. The data show indisputably that older people commit less crime than younger people,[22] at least in part because they have matured and are less impulsive, because they have settled into jobs and families, and because they are less willing to endure criminal justice system involvement. Whatever the reasons, extremely long sentences are unnecessary to reduce the likelihood of re-offending. Nature takes care of that.

A factor in recidivism with particular relevance to the issue of long sentences is the nature of the conviction offense. The 2009 CAPPS study found that people convicted of economically motivated crimes were much more likely to be returned to prison within four years, either for a technical violation or a new sentence, than those whose crimes tended to be impulsive.[23] Success rates, defined as no return to prison within four years for any reason, were 80.1% for homicide and 77.6% for sex offenses.

In looking at the types of new offenses for which people returned, the data showed:

- While 17.6% of all the people studied received new sentences for some kind of new crime, only 4.5% of the new offenses were crimes against a person (defined as homicide, sex, assault, and robbery).
- Only 7.2% received new sentences for crimes of the same type as their original offense (e.g., burglars who were released and then convicted of another burglary). For the people most likely to receive long sentences, the proportions were even lower:
    - Robbery – 4.9%
    - Sex – 3.1%
    - Assault – 2.9%
    - Homicide – 0.5%

These figures are corroborated by similar findings in numerous jurisdictions.[24]

The trend appeared again in research conducted by CAPPS in 2014. In 2009, then-governor Granholm expanded the parole board and directed it to review thousands of prisoners who had served their minimum sentences but been denied parole. Not surprisingly, these decisions had often been based more on the nature of people's offenses than on their institutional records or risk assessment scores. As a result of this "continuance review" process, the number of paroles for people convicted of homicide and sex offenses more than doubled.

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CAPPS examined the re-offense rates of people serving for homicide and sex offenses who were paroled from 2007 through the first quarter of 2010.[25] *More than 99% did not return to prison within three years with a new sentence for a similar offense.*

- Of 820 people who had been serving for murder or manslaughter, just two (0.2%) returned to prison for a new homicide.
- Of 4,109 people who had been serving for a sex offense, 32 (0.8%) returned to prison for a new sex offense.

A five-year follow-up of 188 people paroled in Maryland as the result of a state Supreme Court decision found similar results. The average age of these parolees when released was 64. They had served an average of 39 years, primarily for murder and rape. Their recidivism rate was less than 1%.[26]

Prescott, Pyle, and Starr reviewed prior research studies, then analyzed the three-year reimprisonment rates of 1,175,096 people released from prison in New York and California from 1991 to 2013, with a primary focus on 23,982 people convicted of murder and non-negligent manslaughter.[27] They found:

- The overall re-incarceration rate for individuals released after an initial incarceration for murder or non-negligent manslaughter is the lowest of any offense category—4.4% compared to 9.9% for the entire group, regardless of offense type.[28]
- The murder/manslaughter group's re-incarceration rate for a new murder or non-negligent manslaughter offense is 1.3%, which is high relative to the 0.2% rate for all releasees but still very low in absolute terms.
- As with every offense category, re-incarceration rates for the murder/manslaughter group declined steadily with increasing age at release.
- Years served is also associated with a decreased risk of recidivism but that correlation could not be disentangled from older age as a causal factor.

The authors conclude that older people convicted of violent offenses, particularly homicide, pose very little risk to the public upon release. They stress that every study has found that the vast majority of people convicted of homicide (usually more than 99%) do not commit another homicide upon release.

Notably, the 2009 CAPPS study found no relationship between the amount of time served and success upon release. This finding accords with a large and diverse body of empirical research demonstrating that increased length of stay does not reduce recidivism.[29] That is, keeping people in prison longer does nothing to enhance public safety.

Imposing very long sentences in the name of public protection is both ironic and counter-productive. Such sentences are unsupported by actual data on recidivism and are most often imposed on the people who are the least likely to repeat their offenses in any event. They substantially hamper the ability of people to be productive and self-sufficient when they are eventually released. And they require taxpayers to spend tens of millions of dollars annually for the illusion of increased safety.

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CHAPTER THREE. PRIOR RESEARCH ON MICHIGAN SENTENCING GUIDELINES

A handful of existing studies of Michigan sentencing are important for testing and explicating the current findings. The foundation was laid when Zalman and his colleagues first explored why guidelines were needed.

A. Michigan Felony Sentencing Project (1979)

Before the advent of any guidelines, the MFSP examined the extent to which offense and defendant characteristics explained both the In/Out decision and the length of sentences to incarceration. They then attempted to determine what other factors affected these sentencing decisions. Throughout their analysis the MFSP researchers grouped offenses into 10 crime types, ranging from homicide, assault, sex and robbery to drugs and other non-violent offenses. They formed these categories on the rationale that "judges and other participants in the sentencing process tend to mentally group crimes into general categories and may apply different policies to these groups."[1] That is, the nature of the crime is a factor to be controlled for in testing the impact of other factors. The MFSP researchers concluded:

- Depending on the crime type, the combination of offense and defendant characteristics explained anywhere from 34 to 72% of the variance in length among prison sentences, with most crime types falling between 47 and 56%.
- Defendant characteristics are far more important than offense variables in determining who is incarcerated. Offense characteristics are most important for determining how long sentences are for violent crimes.[2]
- In looking at the specific crimes of first-degree criminal sexual conduct, armed robbery and felonious assault, it appears that "judges vary their sentences over the entire range of possible sentences regardless of the relevant offense and offender variables."[3]
    - The variation is greatest where the life or any term penalty allows for the widest expanse of discretion to be exercised. "Thus, a wide expanse of sentencing discretion itself generates unexplained variation. This implies that in order to reduce unexplained variation of sentences, it is necessary to have some method which reduces the amount or structures the content of discretion."[4]
    - Sentences appear more coherent where the statutory maximum is low and the range of discretion is smaller.
- The sentencing patterns of individual judges vary widely. "It seems clear that the source of the greatest amount of variation in sentencing lies in the treatment of those cases with the most severe maximum penalties."[5]
- There is substantial geographic disparity in sentencing practices.
    - The researchers divided the counties into three strata based on the number of criminal dispositions in a county's circuit court, regardless of where in the state the county was located. The strata were:
        - I (metro) – Oakland, Wayne and Recorder's Court
        - II (urban) – Bay, Berrien, Calhoun, Genesee, Ingham, Jackson, Kalamazoo, Kent, Macomb, Monroe, Muskegon, Ottawa, Saginaw, St. Clair, and Washtenaw
        - III (rural) – all the remaining counties (except Keweenaw which reported no felonies in 1977)
    - Average sentences were longest in Stratum I.

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    - Outcomes are much more consistent in larger jurisdictions than in rural counties. The extent of the variance in sex offenses explained by offense and defendant characteristics was 79% for Stratum I, 61% for Stratum II, and 47% for Stratum III.[6]
  - Because "different decision rules are being used in the three strata . . . the sentence an offender receives is dependent, in part, upon where he is sentenced."[7]
- Taking In/Out and Length decisions together, "there is evidence of very distinct differences in the treatment of whites and non-whites." [8]
  - Non-whites receive longer sentences to a degree that is statistically significant for drugs, burglary, larceny, and especially sex offenses.[9]
  - The racial disparity may or may not indicate invidious discrimination. At a minimum, it requires understanding the relative impact of the relevant variables on each group.
- Criminal justice processing variables, including type of attorney, custodial status, and conviction method, all have an impact on sentences, particularly on the In/Out decision.
  - Since having appointed counsel and being unable to make bail are both proxies for lower socioeconomic status, and requesting a jury trial is a constitutional right, the researchers considered these to be further forms of invidious disparity.
  - However, they found a statistically significant increase in sentence length associated with conviction method only for homicide cases. A jury trial added 53 months and a bench trial added 26 months.[10]

The MFSP findings set the standards for measuring the success of sentencing guidelines. Several studies since have looked at aspects of how Michigan's guidelines have affected sentencing disparity in practice.

B. Abel F. Ekpunobi, "Judicial Decision Making Under Michigan Sentencing Guidelines" (1999)[11]

In his doctoral dissertation, Ekpunobi used both logistic and linear regression models to assess the effectiveness of the second judicial guidelines "in reducing or eliminating sentencing disparities – situations in which legally similar defendants receive dissimilar sentences." The data were taken from nearly 21,000 felony cases with sentences imposed in four counties from 1992 to 1997. Ekpunobi examined both legally relevant factors (prior record, nature and severity of offense, guidelines range, criminal justice status) and extra-legal variables (demographic characteristics of defendants, sentencing judges and counties). Although identified by pseudonyms, the counties were Wayne, Oakland, Saginaw, and Kalamazoo.[12]

Ekpunobi looked at both the likelihood of incarceration in either jail or prison (the In/Out decision) and the length of prison sentences. His findings included:

- Among similarly situated defendants, the odds of *receiving* a prison sentence were higher for non-whites in all four counties; however, the *length* of the sentence was significantly associated with race only in Saginaw. The odds of going to prison or jail are higher for men than for women, but women who were sentenced to prison actually had longer average terms than men in Wayne County.
- The identity of the county significantly affects the outcome for some counties but not all. "In general, the mid-size counties have significantly higher state imprisonment and overall incarceration levels than the larger counties."
  - The odds of receiving a prison sentence were higher in Saginaw and Kalamazoo than in Wayne, but there was not a significant difference for Oakland.
  - Oakland had a higher overall incarceration rate than Wayne because it used jail more often.

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    - When it came to the length of prison sentences, county was a statistically significant indicator for two counties. Average minimum sentences were lower in Oakland and higher in Saginaw.
- Extra-legal factors, along with criminal justice status (e.g., probation, parole), were more important in the In/Out decision than they were in determining the length of prison sentences. Prior felony convictions, sentencing guidelines, and offense type/severity were the major predictors of the average minimum prison term.[13]

Ekpunobi suggested that more research should be conducted regarding the impact of variables he was unable to examine, particularly the method of conviction and whether defense counsel was retained or appointed. He concluded that it appeared desirable to strengthen the guidelines "by providing more structure and improving the enforcement mechanism."

C. National Center for State Courts (2008)

The National Center for State Courts (NCSC) examined the results of very different sentencing guidelines systems in Michigan, Minnesota, and Virginia.[14] Minnesota has a mandatory system that affords judges the least discretion. Michigan's sentencing ranges are five to six times greater than Minnesota's.[15] Minnesota has a single grid with 77 cells compared to Michigan's nine grids with 258 cells. Virginia has a voluntary system with a very active sentencing commission but no appellate review of compliance. Instead of grids, it uses 15 worksheets with a list of factors keyed to the type of offense. Both Minnesota and Virginia recommend an explicit single sentence that is the midpoint of a range.[16]

The goal of the research was to test the extent to which each state's guidelines achieved the goals of predictability, proportionality, and non-discrimination. The questions asked were whether:

- Similarly situated defendants received similar sentences.
- The guidelines provided meaningful and proportional distinctions between more and less serious wrongdoing.
- There was evidence of discrimination in sentencing based on race, age, sex, geographic region, or conviction method.

1. Background

For Michigan, the researchers looked at 32,754 individuals sentenced in 2004. NCSC stated that the legislative guidelines were designed to trim extreme sentences but to preserve considerable judicial discretion and tie recommendations to past practice.

- The compliance rate is very high for grids D–H, which have relatively narrower cell ranges and lower statutory maximum sentences. Departure rates are much higher for the M2 and A grids, which have life or any term as the statutory maximum, even though the cell ranges are much broader and therefore already allow for substantial exercise of discretion.[17]

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Table 2. NCSC Findings: 2004 Departure Rates for Life-Maximum Crimes			
Grid	Depart Below	Comply	Depart Above
M2	34.6%	57.7%	7.7%
A	39.9%	55.6%	4.4%

- The authors noted that inconsistencies can arise not only from prohibited discrimination but also from differing judicial philosophies. Some judges may give more weight to moral culpability, apparent dangerousness, or rehabilitative prospects than to imposing similar sentences on people with similar guidelines scores.[18]

2. The Impact of Guidelines Elements on Sentence Length

The NCSC researchers examined both the In/Out decision and the length of prison sentences. They assessed the impact of multiple guidelines elements: offense severity, prior record level, offense level, grid cell type (intermediate sanction, straddle cell, presumptive prison), habitual offender status, and departure. Regarding sentence length, they found:

- The average sentence for second-degree murder was 260 months. The average sentence on the A grid was 102 months.[19]
- For Michigan, the guidelines elements accounted for 67% of the variation in sentence length. For Minnesota, the guidelines elements explained 86.1%, a figure the authors characterized as "extraordinary."[20]
- All the major elements of the guidelines framework were highly significant in predicting the sentence length, with conviction offense severity (i.e., crime class/grid) having the greatest impact.[21]
- When both guidelines elements and extra-guidelines factors were included in the analysis, the extent to which habitual offender status lengthened the predicted sentence was:
  - Habitual 2nd 7.4%
  - Habitual 3rd 24.7%
  - Habitual 4th 38.7%[22]
- After controlling for all elements of the guidelines, upward departures were 121% longer than the expected sentence; downward departures were 48.5% shorter than the expected sentence. The authors call the magnitude of Michigan's departures "quite extensive." By comparison, in Minnesota, an upward departure increased the expected sentence by 47%; downward departure decreased the expected sentence by 29.1%.[23]
- Redundant cells had very different estimated sentences. For example, six cells on the A grid have a minimum-minimum of 108 months. The estimated lengths of sentences in these cells were: A-VI = 138, B-V = 107, C-IV = 126, D-III = 145, E- II = 141, and F-I = 127.[24]
- On the A grid, PRV levels A and B yielded virtually identical estimated sentence lengths at each offense level.[25]

3. The Impact of Extra-Guidelines Factors

The NCSC researchers also examined two kinds of extra-guidelines factors. Defendant characteristics included age, race, and sex. Systemic factors included conviction method and region of the state. The NCSC findings on defendant characteristics were:

- Blacks were more likely to be in a straddle cell.[26]
- Women were less likely to receive a prison sentence; young black males were somewhat more likely to receive one.[27]

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- Blacks received a 6% decrease in the length of sentence.[28]
- The profile of black defendants was different from whites. They were:
  - More likely to be on the M2 and A grid.
  - More likely to score at PRV levels D, E, and F.
  - More likely to be sentenced as habitual offenders, with the extent of the difference increasing as the habitual level increases.
  - Less likely than whites to be represented in every OV level (60% of blacks were in OV I, the least serious offense level)
  - More likely to be sentenced in southeast Michigan (59% of all black defendants compared to 14% of whites resided there, and 60% of defendants sentenced there were black).[29]

Regarding systemic variables, the NCSC found:

- Sentences in SE Michigan (defined as the counties of Wayne, Oakland, Macomb, and Washtenaw) were 22% lower than sentences in the rest of the state.[30] The exception was for people convicted at trial in SE Michigan where the trial tax of 30% made the SE sentence roughly equal to that of someone convicted by plea outstate.[31]
- 86% of the difference between SE Michigan and outstate sentences was due to differences in the weight given by judges to the relevant variables, as opposed to the mean values of those variables.[32]
- Habitual offender status 2nd and 3rd were used less often in SE Michigan but habitual 4th was used twice as often. [33]
- Conviction at trial (including both bench and jury) increased the sentence by 17.7%.[34]
- The "trial tax" was two and one-half times higher in the large urban courts.[35]

4. NCSC Conclusions and Recommendations

The NCSC authors concluded:

- Although the purpose of state sentencing guidelines is to achieve statewide consistency, Michigan effectively has two sentencing "regimes," the circuit courts in the SE counties and those in the 53 other circuits.[36]
- What makes this geographic dichotomy possible is the magnitude of the guidelines ranges that allow judges to sentence quite differently without having to depart. "If the norms of the urban courts lead judges to look to the bottom of the ranges, while outstate judges look toward the top, there can be dramatic differences in sentencing outcomes . . . While there is little evidence of discrimination as usually conceived, consistency is being achieved in a manner that suggests discrimination of a different kind – rather than using suspect factors to set sentences, judges in Michigan have been free to apply different weights to the sentencing relevant factors."[37]
- While there is no evidence of direct racial discrimination, blacks may benefit from their concentration in SE Michigan, where sentences are lower (unless they go to trial), which could mask any type of systematic statewide race effect.[38]
- As author Kevin Reitz observed: "[T]he most obvious mediating levers of sentencing authority – the trial courts' departure policy and the intensity of appellate review – are not the only factors that matter. Other critical factors include the breadth or narrowness of guideline ranges and the simplicity or complexity of factual considerations that must be fed into guideline considerations."[39]

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The authors recommended:

- Combine PRV levels A and B.
- Reduce number of OV levels.
- Reduce number of straddle cells.[40]

The NCSC report highlights a tension inherent in the design of guidelines ranges. On the one hand, wide ranges are a source of disparity. On the other hand, broader ranges generally mean fewer departures, and the goal of a sentencing commission should be to minimize departures.[41] The report does not address the anomaly that Michigan's M2 and A grids are extremely broad and nonetheless have many departures.

Finally, the NCSC authors concluded that sentencing commissions should periodically assess the extent to which their guidelines are actually achieving their goals. They trenchantly remarked: "Established policies are no more vibrant and self-sustaining over time than they are self-executing at inception."[42]

D. The Council of State Governments (2014)

In its analysis of Michigan's sentencing practices, the Council of State Governments (CSG) reached multiple broad conclusions. Among them were:

- Application of Michigan's guidelines yields disparity in sentencing.[43]
- Minimum prison sentence ranges are wide, and sentences are distributed across the ranges and beyond.[44]
- Michigan's guidelines result in minimum sentences that are "all over the map."[45]

CSG compared all the non-habitual sentences imposed in 2012 to the minimum sentences required by the low end of the relevant guidelines ranges or minimum-minimum. It found the distribution to be:

Below min-min	15%
At min-min	12%
10–190% of min-min	35%
200–290% of min-min	15%
300–390% of min-min	6%
400% or more of min-min	17%

CSG also noted that people who fell into the same straddle cell received very different punishments,[46] from 4–4.5% of guidelines prison sentences involved consecutives,[47] and as we will discuss in Chapter Fourteen, it found wide and troubling disparities in the use of habitual offender sentences.

E. Criminal Justice Policy Commission (2019)

The CJPC examined the sentences of 18,841 people whose guidelines scores placed them in straddle cells from 2012 to 2017. It found substantial disparity in whether straddle cell defendants were sentenced to prison or to community-based sanctions depending in part on the county of conviction. Other factors affecting disparity included race, age, sex, employment status, representation by retained vs. appointed counsel, crime type and method of conviction (trial vs. plea).[48]

Before it was disbanded, the CJPC began examining the use of habitual offender sentences. Its preliminary findings will be discussed in Chapter Fourteen.

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Section II. The Current Research

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CHAPTER FOUR. A SUMMARY OF THE FINDINGS

Basic Background Information

The research examined 38,651 sentences, including over 21,000 that were imposed under advisory guidelines developed by the judiciary and nearly 17,000 imposed between 1999 and 2012 under the mandatory guidelines enacted by the Michigan Legislature.

The sentences were for four types of offenses that carry maximum sentences of life or any term: second-degree murder, assault with intent to murder, first-degree criminal sexual conduct, and armed robbery. They were imposed in 13 counties and included nearly 5,600 with habitual offender enhancements. The data are consistently analyzed by offense type and habitual offender status to avoid confounding the effects of these key variables.

The findings address the sheer length of sentences and disparities that may be caused by particular factors. The unit of comparison is the median sentence length. Bivariate analysis was used to determine whether the relationship between sentence length and individual variables or between two individual variables, such as sex and prior record, was statistically significant (i.e., that it did not occur by chance). Throughout the report, the word "significant" is used to indicate a high degree of certainty that a factor had an impact on the length of the sentence. For more information about the data and the methods of analysis, see Technical Appendix A.

Multiple regression analysis was used to simultaneously examine the various factors known to impact sentence length in order to understand the unique contribution of each one. Regression interprets the impact of multiple independent variables at once so the effect of each can be seen while controlling for the others. Regressions can be used for two purposes: to identify how much of the variance in sentence length individual factors explain and to estimate how much a particular minimum sentence would change if a particular variable were adjusted. Key results of the regression analysis appear throughout the report. For a complete summary, see Technical Appendix B.

To understand the findings, the basic structure of the sentencing guidelines must be recalled. Offenses are divided into nine groups, depending on their statutory maximum sentence. Each group has its own grid containing recommended minimum sentences. The recommended sentences get longer from grid to grid as the seriousness of the offenses increase. Murder has its own grid, M2. The other life-maximum offenses are on the A grid.

Defendants receive points for various aspects of their prior record. The points are grouped into Prior Record Variable (PRV) Levels A–F, which are displayed horizontally across the top of each grid. Defendants also receive points for various details of the offense, which are grouped in Offense Variable (OV) levels and displayed vertically down the side of the grid.

The grid is divided into cells, where the PRV and OV levels intersect. Each cell contains a range of months within which the judge has full discretion to select the minimum sentence. The low end of the range is called the "minimum-minimum" or "min-min." The high end of the range is called the "maximum-minimum" or "max-min." A sentence below the min-min is called a "downward departure." A sentence above the max-min is called an "upward departure." If the defendant is being sentenced as a second, third, or fourth habitual offender, the max-min can be increased by 25, 50, or 100%, respectively.

What follows are 21 key findings from the research and, for most, brief summaries of the facts that support each finding. Substantially more detail can be found in Chapters Five through Fifteen.

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1. **The legislative guidelines increased sentence lengths for life-maximum offenses.**

    A. Altogether, in today's dollars, the cost of increasing sentence lengths for life-maximum offenses was $1.2 billion over 14 years (1999–2012), with no evidence that longer sentences improve public safety.
        1. The median non-habitual sentence increased by 1.5 years, or 23%.The cost of this increase was $51 million per year or $720 million for the 14-year period of study.
        2. The median habitual sentence increased by five years, or 50%. The cost of this increase was $35 million per year or $486 million over 14 years.
    B. The difference in median sentence length between non-habitual and habitual sentences grew substantially.
        1. Under the second judicial guidelines the median habitual sentence for all offenses was 3.5 years longer than the median non-habitual sentence.
        2. Under the legislative guidelines the difference between non-habitual and habitual median sentences overall grew to seven years.
    C. The increase in length of median sentences varied by offense and habitual offender status.
    D. The increase in length of median sentence varied depending on the county of conviction and each county's practices under the former judicial guidelines. For example:
        1. The medians for non-habitual offender sentences went from four to seven years in Oakland County, seven to eight years in Wayne County, and eight to 10 years in Ingham and Genesee Counties.
        2. The medians for habitual offender sentences went from seven to twelve years in Oakland County, 12 to 18 years in Wayne County, and 15 to 20 years in Genesee County.

2. **The percentage of sentences with habitual offender enhancements increased by more than a quarter, from 13.8 to 17.5% of the total.**

3. **The number of sentences per defendant increased under the legislative guidelines.**

    A. The frequency of multiple sentences is important because of the various ways they can be used to make sentences longer.
    B. Among individuals without habitual offender enhancements, 81.3% received only one sentence during the second judicial period. That proportion dropped to 74% under the legislative guidelines.
    C. Among individuals with habitual offender enhancements, the proportion who received just one sentence dropped from 78.6% under the judicial guidelines to 65.1% under the legislative guidelines.
    D. The frequency of single sentences under the legislative guidelines differed greatly by offense type and conviction method.
    E. The number of multiple sentences imposed varied substantially by county of conviction. For example:
        1. A CSC defendant in Oakland was nearly 10 times more likely to receive three or more sentences than a CSC defendant in Kent.
        2. A CSC defendant in Saginaw was nearly eight times more likely to receive three or more sentences than a CSC defendant in neighboring Genesee.

4. **The number of parolable life sentences has declined over time as the number of long indeterminate terms has grown. After peaking at 96 in 1993, the number of parolable life sentences imposed for offenses committed and sentenced in 2007–2012 never exceeded 17.**

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5. **The four critical guidelines components—offense type, defendant's prior record, severity of the way in which the offense was committed and the defendant's habitual offender status—together explained 70.9% of the variance in sentence length overall.**

    A. The extent of the overall variance explained differed significantly by offense type, ranging from just 28.9% for murder to 67.9% for robbery.
    B. The extent of the variance explained by the guidelines components differed significantly when examined by county of conviction.
        1. Guidelines components explained just 65% of the variance for Wayne and Genesee Counties.
        2. Kent, Macomb Jackson and Ingham Counties were all between 70 and 75%.
        3. The extent of variance explained was more than 82% for the counties of Oakland, Kalamazoo, Washtenaw, Muskegon, Calhoun, and Berrien.

6. **Offense type is the single most important component, explaining 25.6% of the variance in sentence length overall.**

    A. Murder sentences, which are calculated on a separate grid to reflect the unique seriousness of the crime, are always the longest by far.
    B. Armed robbery is consistently viewed as the least serious of the life-maximum offenses and sentences for that offense are much lower.
    C. The extent to which offense type accounts for differences in sentence length depends on the county; for example, it explains 34% of the variance in Wayne but only 16% in Oakland.

7. **Although the scoring of the seven prior record variables is designed to move people into higher prior record levels with relative ease, the majority of life-maximum defendants who were not habitualized had criminal histories that were minimal or relatively modest.**

    A. Depending on the offense, 15–20% of the sentences fell into Level A, although that requires that the defendant received no points for any prior record variable. At the other extreme, only 5 to 9% fell into Level F.
    B. While at least 50% of the sentences for every offense type fell at Level C or below, the proportion ranged from just 50.5% for assault sentences to 70.9% for CSC sentences.
    C. A great majority of life-maximum sentences received zero points for high severity felonies or high or low severity juvenile adjudications.
    D. PRV 7, which adds 10 or 20 points for concurrent or subsequent convictions that are, by definition, not "prior" to the instant offense, is the single most consequential. PRV 7 allows for punishment for the sentencing offense to be increased on the basis of convictions that would not otherwise count. Overall, 47% of sentences were pushed into at least PRV Level C based on this single variable.
    E. The extent of the variance in sentence length explained by prior record level ranged from 19.2% for murder to 35.8% for robbery.
    F. The extent of the variance in sentence length explained by prior record level also differed by county, ranging from 17.6% for Wayne to 35.7% for Muskegon.
    G. How much sentence lengths increased with each increase in PRV level depended on the offense. Prior record level was roughly three times as important to the length of armed robbery sentences as it was to murder sentences.
    H. The impact of changes in PRV level varied by county. For example, in Genesee, sentence length increased by 23% for PRV Level B, and 176% for PRV Level F. In Kalamazoo, the increase at Level B was 57%, and at Level F, 271%.

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8. With only 20 points separating each of the six offense levels on the A grid and 50 points separating the three offense levels on the M2 grid, the offense variable scoring results in people easily reaching the 100-point cut-off for the highest level on either grid.

A. For murder, assault and CSC, OV Level I is virtually irrelevant.
    1. Of the three offense levels on the M2 grid, 53% of the murder sentences scored 100 or more points, placing them at Level III.
    2. Of the six offense levels on the A grid, 44.6% of the assault sentences scored at least 100 points, placing them at Level VI; 85.8% were at Levels IV, V, or VI.
    3. In the CSC group, 29% of the sentences scored at least 100 points, placing them at Level VI; 68% were at Levels IV, V, or VI.

B. For armed robbery the situation is reversed: 48% of the sentences scored at OV Levels I or II while only 6% were at Level VI.

C. The non-habitual sentences illustrate exactly how this occurs. For example:
    1. OV 6 scores a large number of points for the very intent to kill, which is an element of the offense for both murder and assault with intent to murder.
        a. Among murder sentences, 21.9% received 50 points and 49.8% received 25.
        b. Among assault with intent to murder sentences, 18.4% scored 50 points and 47.3% scored 25.
    2. OV 1 scores aggravated use of a weapon when, although not a legal element, that behavior is an overwhelmingly common means of committing murder, assault, and armed robbery.
        a. Over 61% of armed robbery sentences had 15 points for pointing a gun at or toward a victim or threatening a victim with a knife, although actual or purported *possession* of a weapon is an element of the offense.
        b. Nearly 75% of murder sentences and 80% of assault sentences had 25 points for discharging a firearm at a victim or for cutting or stabbing a victim.
    3. OV 12 scores felonious conduct not resulting in conviction that occurred within 24 hours of the sentencing offense.
        a. Using the policy of "real offense" sentencing, the sentence for the conviction offense can be increased based on uncharged conduct or charges dismissed in plea negotiations.
        b. Roughly 25% of sentences received five, 10, or 25 points for OV 12 except in the CSC group, where the proportion was 18%.
    4. OV 13 further enhance the penalties for defendants with a pattern of sexual assaults on one or more children younger than 13, for defendants with substantial prior criminal conduct, and for gang-related behavior. All crimes within a five-year period, including the sentencing offense, must be counted without regard to whether the offense resulted in a conviction.
        a. In the CSC group, 27.1% of the sentences scored 50 points; 26.6% scored 25 points.
        b. Awards of 25 points occurred in 13.3% of murder sentences, 25.3% of assault sentences, and 27.8% of robbery sentences.

D. The extent to which offense level explained variance in sentence length differed greatly from county to county.
    1. Wayne County at 11.9% and Ingham County at 12.2% were at the very low end.
    2. Oakland at 36.6% and Calhoun at 38.9% were at the other extreme.

E. OV level explained only 5.4% of the variance in sentence length for murder but between 24 and 29% for the other three offense types.

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F. Each increase in OV level had far more impact on CSC sentences than on any other offense type.

9. Under the legislative guidelines, the overall median for habitual offender sentences was 88% longer than the median for non-habitual sentences.

A. The median length of habitual offender sentences reflects larger prior record scores as well as their enhancement to habitual status.
B. When all other factors are held constant, we see the impact on sentence length of enhancement alone.
    1. Enhancement as a second habitual offender increased the sentence by 10%.
    2. Enhancement as a third habitual offender increased the sentence by 19%.
    3. Enhancement as a fourth offender increased the sentence by 25%.
    4. The effect of enhancements varied substantially by county.

10. Departures, which are essentially a rejection of guidelines recommendations, play a critical role in sentence length.

A. The overall compliance rate with the second judicial guidelines was 88%
B. The compliance rate for non-habitual sentences under the legislative guidelines on the M2 and A grids combined was 55.4%.
C. The rate of downward departures increased from the judicial guidelines for every offense, suggesting that judges often found the recommended ranges to be too severe. The proportion of downward departures was:
    1. Murder – 32.3%
    2. Assault – 38.6%
    3. CSC – 23.3%
    4. Robbery – 40.3%
D. The rate of upward departures also increased, albeit much more modestly. The proportion of upward departures was:
    1. Murder – 11.7%
    2. Assault – 10.7%
    3. CSC – 13.6%
    4. Robbery – 5.4%
E. Overall, downward departures decreased sentence length by 44%. Upward departures increased sentence length by 76%.
F. The extent of variance in sentence length explained by departures is roughly the opposite of the extent explained by the guidelines components. Although departures explain 18% of the variance overall, the rate differs greatly depending on offense type.
    1. For murder, departures explain fully 50% of the variance—almost twice as much as the guidelines components.
    2. For assault, CSC and armed robbery departures explain 30, 26, and 20% of the variance, respectively.
G. The extent of variance in sentence length explained by departures also differs substantially by county.
    1. For Wayne and Genesee, departures explain roughly 22% of the variance.
    2. For Kent, Macomb, Ingham, Jackson, and Saginaw, departures explain from 12.7 to 17.5% of the variance.
    3. For Oakland, Kalamazoo, Washtenaw, Berrien, Calhoun and Muskegon departures explain only 5 to 10% of the variance.

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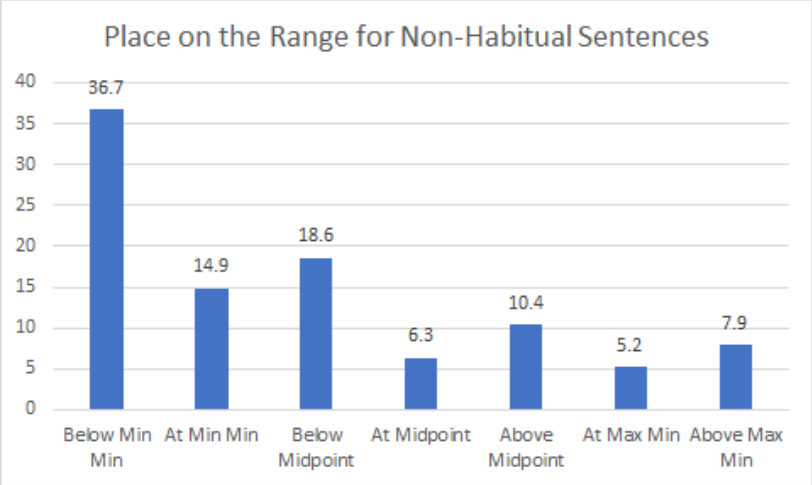
11. The broad guidelines ranges promote disparity.

A. Some ranges are so broad that recommended minimum sentences for people with similar backgrounds and similar offenses can differ by seven, nine, 12, even 20 years. As a result, where within the applicable range sentences fall can be as important as upward and downward departures.

B. The graph shows that sentences were far from evenly distributed.



C. Adding the sentences at the min-min to the downward departures, and adding those at the max-min to the upward departures, demonstrates how many sentences for each offense type were relatively long and relatively short.
   1. For murder, 38.3% of the sentences were at the low end, and 19.7% were at the high end.
   2. For assault, 47.6% were at the low end, and 16.7% were at the high end.
   3. For CSC, 33.4 were at the low end, and 25.0% were at the high end.
   4. For robbery, 59.0% were at the low end and 8.5% were at the high end.

D. Judges' decisions about place on the range are not explained by PRV or OV levels.
   1. In every offense group, people with high prior record scores received downward departures and people with low prior record scores received upward departures.
   2. Having a low OV score does not increase the likelihood of a downward departure nor does having a high OV score increase the likelihood of an upward departure.

E. The disparity allowed by the guidelines can be best seen by comparing the sentences imposed on people with the same offense type whose PRV and OV scores combined to place them in the same guidelines range. The A grid has four cells that have a range of 135–225 months (11.25–18.75 years) with a midpoint of 15 years for non-habitual sentences. From 2003–2012, 223 people convicted of sex offenses fell into one of these cells. Of these:

- 43 received minimums below 11.25 years, the lowest being 3.5 years
- 12 were sentenced to exactly 11.25 years
- 46 received sentences above 11.25 and below 15 years,
- 39 were sentenced right at the midpoint to 15 years
- 28 received sentences greater than 15 but less than 18.75 years
- 21 were sentenced to exactly 18.75 years
- 34 received minimums above 18.75 years, the highest being 65 years

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12. The guidelines create the illusion of precision but so many cell ranges are repeated and overlapping that median sentences are inconsistent and unpredictable.

A. Over and over again, identical ranges produce widely different median sentences.
    1. The M2 grid has 18 cells but only eight different ranges. This mixture results in 12 different medians.
    2. The A grid has 36 cells but only 11 different ranges. These result in 26 different medians for assault, 25 medians for CSC, and 19 for robbery.
B. Not uncommonly, medians are at or below the low end of the range.

13. While habitual offender sentences are much longer than non-habitual sentences, fewer than half exceed the standard high end of the applicable range.

A. At 12.6%, the rate of downward departures was far lower for habitual than for non-habitual sentences. Nonetheless more than 10% of sentences at every habitual level were below the min-min.
B. At least 40% of the sentences at every habitual level were below the midpoint of their cell range—a little more than half the rate of non-habitual sentences. Much of the difference is attributable to the lower rate of downward departures.
C. Depending on the offense type the proportion of sentences above the standard max-min was 28.5% for second offender enhancements, 38.5% for third offenders, and 40.2% for fourth offenders.
D. Compared to non-habitual sentences, habitual offender enhancements resulted in one-third the rate of downward departures and four and a half times the rate of sentences above the high end of the guidelines. Between these extremes, the distribution along the range of habitual and non-habitual sentences did not differ substantially.
E. The extent to which sentences were above the standard max-min, regardless of habitual level, ranged from 26.3% for assault and robbery to 31.4% for CSC.
F. Habitual offender sentences that did exceed the standard max-min ran the gamut from only slightly above to well above even the 100% increase in the recommended range that the guidelines allow for fourth offenders.

14. Defendants with similar backgrounds and offenses received significantly different sentences depending on the county in which they are convicted.

A. County size appears to be more important than location. The median sentences imposed in the larger counties tended to be shorter than those imposed in smaller counties.
B. The data undermines some widely held assumptions about which counties are "tough" and which are "lenient." Wayne County, home to the City of Detroit, did not impose the lowest non-habitual sentences in any offense group. Oakland County sentences were in the low-to-middle range for every offense, despite the county's "law and order" reputation.
C. County differences in median sentence length for non-habitual sentences may reflect, in part, the extent to which defendants with high PRV levels have or have not been shifted into the habitual sentence group.
D. Murder sentences showed the greatest amount of consistency despite the fact that the M2 grid has the widest cell ranges by far. The median sentence in nine counties was 20 years; it ranged from 22.5 to 24 years in the other four counties.
E. CSC sentences showed the least consistency with a spread of nearly nine years between the lowest medians and the highest.

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F. Downward departure rates cannot be explained by county size or location. For example, rates for the four largest counties declined in increments of roughly 10 points:

- Wayne – 47.6%
- Kent – 36.0%
- Macomb – 26.4%
- Oakland – 16.5%

G. The obverse of departure rates is the extent to which counties comply with the sentencing guidelines.
    1. Wayne, the county with the largest number of cases by far, imposed sentences within the recommended range only 41.5% of the time. At 57.6, 59.5, and 60.8%, respectively, the counties with the next lowest compliance rates were Ingham, Kalamazoo, and Kent.
    2. At the other extreme, the smaller counties of Berrien, Muskegon, Calhoun, and Jackson imposed within-range sentences between 85 and 89% of the time.
    3. Notably, Oakland, at 81.1%, and Washtenaw, at 78.6%, behaved much more like the smaller counties than like their larger peers.

H. Combining the downward departures and minimum-minimums gives a picture of the extent to which counties imposed sentences at the low end.
    1. Five counties: 53.0–65.4%.
    2. Four counties: 38.5–45.3%.
    3. Four counties: 13.8–24.1%

I. The proportion of both low-end and high-end sentences for each offense varied across counties.
    1. The length of sentence overall was significantly longer in seven counties compared to Wayne, significantly shorter in three, and not much different in the remaining two. For instance, Genesee, Jackson, and Muskegon had sentences that were 7% longer, while Oakland's were 7% shorter.
    2. Similarly, Kent's sentences were 4% longer than Wayne's, while Macomb's were 4% shorter.

J. The disparities by county were far and away most pronounced for CSC sentences.
    1. Eight counties had sentences that were significantly different than Wayne's and all were longer.
    2. The greatest difference was with Genesee, which was 24% longer; the smallest was Kent, which was 5% longer.

K. Counties varied greatly in their rate of plea-based sentences for each type of offense.
    1. Plea rates for murder ranged from 54.3% in Macomb to 85.7% in Ingham.
    2. For assault, plea rates ranged from 50.0% in Jackson to 79.1% in Kent.
    3. For CSC, plea rates ranged from 62.9% in Ingham to 86.6% in Kalamazoo.
    4. For robbery, plea rates ranged from 79.5% in Jackson to 94.7% in Kent.

L. While one would expect a clear relationship between a large proportion of low-end sentences and a high rate of guilty pleas, in fact that relationship was inconsistent.
    1. Although nine counties all had median minimums of 20 years for murder, their rates of guilty pleas ranged from 54.3% for Macomb and 62.7% for Oakland to 85.7% for Ingham and 83.3% for Genesee.
    2. For the A grid offenses, the relationship between plea rates and low-end sentences was all over the map.

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15. **Although the available data were limited, it was apparent that judges in the same county imposed significantly different sentences for the same type of offense. Whether a defendant is made to serve 10 years in prison or 15 may well come down to whether their case was assigned to Judge A in Courtroom 1 or Judge B nextdoor in Courtroom 2.**

16. **The use of habitual offender enhancements varies significantly by county.**
    A. The percentage of eligible sentences that received habitual enhancement ranged from 13% in Wayne to 91.7% of eligible sentences in Muskegon and Saginaw Counties. The rate of application can be broken into three groups
        1. Kent, Macomb, Washtenaw, and Wayne Counties applied the enhancement to 13%–30% of eligible sentences.
        2. Berrien, Genesee, Ingham, Jackson, and Kalamazoo Counties applied the enhancement to 42%–52% of eligible sentences.
        3. Calhoun, Muskegon, Saginaw, and Oakland Counites applied the enhancement to more than two-thirds of eligible sentences.
    B. The rate of habitual enhancement differed by offense. Murder sentences were enhanced the least often, with 24.7% of eligible sentences receiving enhancement, and CSC sentences were the highest, with 44.7% receiving the enhancement.
    C. PRV level is significantly related to whether a sentence was enhanced or not. Generally, eligible sentences that had high PRV scores were more likely to receive habitual enhancement.
    D. The method of conviction is significantly related to the application of enhancement to eligible sentences.
        1. Approximately 80% of sentences that were not enhanced resulted from a plea, compared to 51.6% of sentences that were enhanced.
        2. Similarly, 16% of eligible but not enhanced sentences resulted from jury trial compared to 41.9% of sentences that were habitualized.
    E. There was no apparent pattern between how frequently a county applied the habitual enhancement and the size of the impact on sentence length.
        1. Kent and Wayne Counties applied the habitual enhancement to less than 25% of the eligible sentences, but when they did, the sentence length doubled between not enhanced and fourth habituals.
        2. Oakland County applied the habitual enhancement often but had the smallest increase in sentence length.

17. **The guidelines have reinforced disparities created by plea bargaining.**

    A. The rate of guilty pleas in life-maximum cases, which was 79.6% in 2019, is historically lower than it is for less serious offenses, which was 97.4%.
    B. Plea rates vary by offense type. For non-habitual sentences under the legislative guidelines the rates ranged from just 59% for assault to 85% for robbery.
    C. After the Legislature extended guidelines coverage to habitual offender sentences with the threat of increasing the high end of the recommended range by 25, 50, or 100%, guilty plea rates declined and jury trial rates increased dramatically.
        1. The decline in the plea rates and the increase in jury trials from the judicial period, when the guidelines did not apply to habitual sentences, to the legislative period was roughly 20 points for every offense type except murder.
        2. During the judicial period, depending on offense type, the plea rate for habitual sentences was just 0–7 points lower than for non-habitual sentences. Under the legislative guidelines, the plea rate for habitual sentences was 26–33 points lower than for non-habitual sentences.

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D. In both guidelines periods, defendants who were convicted by a jury received significantly longer sentences than those who pleaded guilty. The size of the trial tax, calculated as the percentage increase in sentence length for jury trials over pleas, varied by offense type.
    1. For non-habitual sentences, the trial tax during the judicial period ranged from 33.30% for murder to 150.0% for robbery.
    2. During the legislative period the extent of the trial tax on non-habitual sentences was roughly similar, ranging from 38.9% for murder to 118.0% for robbery.

E. Compared to the judicial period, under the legislative guidelines the trial tax on habitual offender sentences exploded. It grew from:
    1. 20% to 60% for murder
    2. 66.7% to 100% for assault
    3. 33.7% to 66.7% for CSC

   For robbery, the tax as a percentage increase declined from 100% to 77.8%, but the actual difference in sentence lengths remained substantial. During the judicial period, the median sentences were 7.5 years for pleas and 15 years for trials. Under the legislative guidelines, the median robbery sentence became 11.25 years for a plea and 20 years for a trial.

F. For non-habitual sentences, the rates of downward departures for guilty pleas vs. jury trials were dramatically different. Although relatively more modest, the differences in upward departures by conviction method were also substantial.

Percentage of Departures by Conviction Method for Non-Habitual Sentences				
Crime	Downward Departures		Upward Departures	
	Pleas	Jury Trials	Pleas	Jury Trials
Murder, second	39.8	9.2	10.0	17.9
Assault	55.0	9.9	6.5	17.1
CSC, first	28.3	9.2	9.0	23.9
Robbery	43.3	13.9	4.3	14.8

    1. Sentences right at the high end of the range after jury trials compared to pleas were three times as common for murder sentences, nine times as common for assault sentences, twice as common for CSC sentences and 3.5 times as common for robbery sentences.
    2. These differences were not explained by differences in the PRV or OV scores of people who pleaded guilty as opposed to those who went to trial.

G. Among habitual offender sentences, the differences in departures above the usual maximum-minimum between pleas and jury trials were even more extreme. For example:

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Percentage of Departures by Conviction Method for Habitual Sentences				
Crime	Plea		Jury	
	Downward	Upward	Downward	Upward
Murder – Hab 2	3.5	8.8	2.9	57.0
Assault – Hab 2	32.0	12.0	0.0	76.0
CSC – Hab 4	18.0	30.0	0.0	66.0
Robbery – Hab 4	19.0	18.0	1.0	60.0

H. The trial tax reflects not only the fact that the defendant went to trial but also all the factors associated with that decision, including the defendant's prior record, the details of the offense, habitual offender status, and the likelihood of a departure. When the regression analysis honed in solely on the impact of the conviction method while holding all other variables constant, it appeared that just the fact of having a jury trial added 18% to the sentence compared to a guilty plea.
    1. The amount of the increase varied by offense, ranging from 12% in murder cases to 21% when the conviction was for assault.
    2. The sentence increase for selecting a jury trial varied substantially by county.
        a. The fact of a jury trial added 11% in Ingham and Kent, 12% in Wayne, 15% in Kalamazoo and 19% in Washtenaw.
        b. A jury trial added 24–26% to the sentence in Genesee, Macomb, Muskegon, and Oakland, and 30% in Calhoun.
        c. The most striking county disparities were the lack of any significant increase for a jury trial in Berrien and Jackson and, at the other extreme, a 38% increase in sentence length for having a jury trial in Saginaw.

18. Although women received significantly shorter sentences than men, the reasons were not altogether clear.

A. Women accounted for nearly 11% of the murder sentences but less than 5% of other offense types.
B. For every offense, women's median sentences were shorter than those of men by varying percentages: murder - 17%, assault - 41%, CSC - 30%, robbery - 29%.
C. The difference in median sentence is attributable in part to women having significantly lower PRV levels than men.
D. Women's sentences were also significantly more likely to have resulted from guilty pleas.
E. Given that women's median sentences were from roughly two to five years shorter than men's, the differences may also result from a combination of factors not captured by the data.
F. Nonetheless, sex per se only makes a significant difference in assault sentences, which it lengthens for men by 11%.

19. While trends based on age were not consistent, older defendants tended to receive longer sentences overall and juveniles under 17, who had to be waived into the jurisdiction of adult court, tended to receive longer sentences than youth who were just 17.

A. In three offense groups, the largest number of sentences by far was imposed on people who were between 20 and 29. In the CSC group the most common age was 30–39.
B. The median sentence for murder was 20 years for every age except juveniles younger than 17, whose median sentence was three years shorter.
C. Among assault sentences, the median was lowest for those younger than 17 and older than 39.

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D. In the CSC and armed robbery groups, juveniles under 17 had longer median sentences than 17-year olds.
    1. Those under 17 were more likely to score at PRV Levels C and D, indicating that the younger defendants had more severe juvenile histories.
    2. For the A grid crimes, those under 17 were more likely to score at OV Levels V and VI than either those who were 17, or the group as a whole, suggesting that the younger defendants committed their offenses in a more serious manner.
    3. Both the youngest groups were more likely to plead guilty than defendants overall.
E. There was virtually no difference by age in the rate of departures.

20. Although non-white incarceration rates are greatly disproportionate to white rates, the causes are complex and rarely appear to result from decisions based directly on race at the sentencing stage.

A. The disparity between white and non-white sentences is most extreme for life-maximum offenses. While non-whites comprise 14% of the state's total population and 55% of the prisoner population, they account for 74% of the life-maximum sentences. This includes: 76% of the murder sentences, 78% of the assault sentences, 79% of the robbery sentences but only 44% of the CSC sentences.
B. Of 2,300 sentences imposed from 1999 to 2012 on defendants who were 17 years or younger when they committed their crimes, 84% involved teenagers of color.
C. Racial statistics vary greatly by county.
    1. In most of the study counties, the population was 18–26% non-white. Wayne County was a key exception at 45.4%.
    2. Five urban counties accounted for 88% of the non-white sentences, with nearly two-thirds coming from Wayne County alone.
    3. In every county the amount of non-white sentences was greatly disproportionate to the county's non-white population.
    4. In most counties the non-white proportion of sentences was greater for each offense type except CSC.
D. There were stark differences between racial groups by age.
    1. Non-whites committed their offenses at a younger age than whites. For example, more than 38% of all the robbery sentences were imposed on non-white defendants who were younger than 20, compared to 6.3% of white youth.
    2. The proportion of non-white sentences was much smaller for CSC than for other offense types at every age. For example, 23.4% of the CSC sentences were imposed on non-whites age 30 and over while 37.1% were imposed on whites that age.
E. Under both the judicial and legislative guidelines, median sentence lengths were significantly longer for non-whites for every life-maximum offense except for murder. The extent of the disparity decreased under the legislative guidelines for CSC and robbery but increased for assault.
F. The extent of significant racial disparity varied by county and offense.
    1. Six counties had no significant instances of disparity.
    2. Five counties had significant disparity for one offense.
    3. Oakland had longer non-white sentences for both assault and robbery.
    4. Wayne imposed significantly longer sentences on non-whites for every offense but murder.

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G. Of 10 instances of significant racial disparity, nine involved substantially longer sentences for non-whites. The exception was Genesee County, where the median sentence for robbery was seven years for non-whites and nine years for whites.
H. Racial disparities in sentence length can be explained, at least in part, by significant differences in how routine factors impact each group.
    1. For three of four offense types, non-white sentences fell into higher prior record levels than white sentences. However, non-whites showed less serious prior records than whites for robbery.
    2. Non-whites had significantly higher prior record levels in both Wayne and Oakland Counties.
    3. Overall, higher non-white prior record levels appeared to be primarily attributable to higher non-white scores on PRVs 1, 2, 4, and 6 (high and low severity prior felony convictions, low severity juvenile adjudications, and relationship to criminal justice system).
    4. There were also significant differences in offense severity levels. Whites had consistently lower OV levels for assault and robbery.
    5. Whites had a significantly higher proportion of sentences imposed after guilty pleas than non-whites.
I. Once prior record and offense levels determined the appropriate range, racial disparities could arise from where within, below, or above that range the judge selects the sentence.
    1. Place on the range showed no significant differences by race for most counties.
    2. Statistically significant differences existed for four: Genesee ($p < .01$), Kent ($p < .05$), Oakland ($p < .001$), Saginaw ($p < .001$).
        a. In each of these four counties, non-white sentences were more likely to be both below and at the minimum-minimum than white sentences.
        b. In three of these counties, white sentences were more likely to be at or above the maximum-minimum. In Saginaw, white sentences were more likely to be above the max-min.

21. Michigan's guidelines are designed to be harsher and less consistent than those of other states using guidelines grids.

A. Michigan's lack of a sentencing commission with dedicated professional staff means there is no central body to:

- Monitor the guidelines' implementation.
- Collect, analyze, and publish data regarding their effectiveness.
- Recommend changes necessary to promote the guidelines' goals.
- Respond to changes in the law and public policy.
- Avoid the inconsistencies that tend to arise from ad hoc legislative amendments.

B. Other states have been able to avoid making their guidelines advisory instead of mandatory because their judges engage in fact-finding regarding individual aggravating and mitigating circumstances only after the presumptive sentencing range has been determined.
C. Michigan's presumptive sentencing ranges are far wider than those of other jurisdictions, allowing for substantial disparities in recommended sentences.
D. Michigan is unique in the extent to which it broadens the presumptive sentencing range for habitual offenders.

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E. Michigan requires the use of "real offense" sentencing that can increase the punishment for the conviction offense based on charges that were reduced or dismissed as part of a negotiated plea and conduct that was not even charged.
F. Michigan's guidelines repeatedly increase the recommended sentence by counting the same facts multiple times.
G. Whether Michigan's actual sentences are longer than those of other guidelines jurisdictions depends on the extent to which judges choose to depart from the presumptive ranges their guidelines recommend.
    1. However, the construction of Michigan's guidelines was guided by a series of policy choices that consistently favor harsher penalties.
    2. While they often follow the federal example, Michigan's guidelines frequently differ from the more moderate policies of other states.

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CHAPTER FIVE. HOW SENTENCES GREW LONGER AND MORE NUMEROUS

As we discussed in Chapter One, the legislative guidelines were intentionally designed to increase sentence lengths for life-maximum offenses. In this chapter, we will look at just how much sentence lengths actually grew.

Table 3 shows how each version of the guidelines changed minimum sentences for the life-maximum offenses. Although a major purpose of the second judicial guidelines was to raise the recommended sentences for these crimes, a substantial increase occurred in the median sentence only for murder. The median sentences for CSC and armed robbery were unchanged, and the median for assault actually declined by two years.

From the second judicial to the statutory guidelines, the median sentence increased substantially for every offense group, by a low of 15 months for CSC cases to a high of three years in assault with intent to murder cases. The increases were statistically significant for every offense group except CSC. The percentage increases were greatest for assault and robbery.

Table 3 offers two conclusions. First, compared to the initial guidelines, those enacted by the Legislature 15 years later reflect an increase in sentence lengths of anywhere from 8 to 40%. Second, although the judicial guidelines were revised in the late 1980s specifically to better align sentences for assaultive offenses with the practices of sentencing judges, the sentencing commission that developed the legislative guidelines chose to increase those sentences by 20%.

Table 3. Difference in Median Minimum Sentence between Judicial and Legislative Guidelines, by Offense Type

	M2	AWIM	CSC	RA	Total
Judicial 1 1984–1988	15	12	10	5	7.5
Judicial 2 1989–1998	18	10	10	5	7.5
Difference	**3 (20%)**	**-2 (-17%)*** **	**--------**	**--------*** **	**--------*** **
Legislative 1999–2012	20	13	11.25	7	9
Difference	**2 (11%)*** **	**3 (30%)*** **	**1.25 (12.5%)**	**2.0 (40%)*** **	**1.5 (20%)*** **

CMIS data, *** p < .001

This snapshot provides just the starting point for understanding the impact of the statutory guidelines on sentences for life-maximum crimes. The table masks several important distinctions. First, it does not address the shift from parolable life to long indeterminate sentences. Second, it considers all cases together, regardless of whether the defendant was sentenced as a habitual offender. Third, it fails to recognize large differences among counties. Finally, focusing solely on sentence length fails to capture another phenomenon: the increase over time in multiple sentences per defendant.

A. Life vs. Long Indeterminate Sentences

When we looked in Chapter Two at MDOC commitment data from 1993 to 2017, we saw that sentences of life with the possibility of parole had declined while indeterminate sentences with long minimum terms had increased dramatically. Figure 2 shows that the decline in parolable life sentences began a decade earlier. While life terms were always a small portion of the total sentences actually imposed for life-maximum offenses, the proportion declined from 6.8% in 1984 to 1% or less after 2006. After peaking at 96 in 1993, the annual number of parolable life sentences imposed for offenses committed and sentenced from 2007 to 2012 never exceeded 17.

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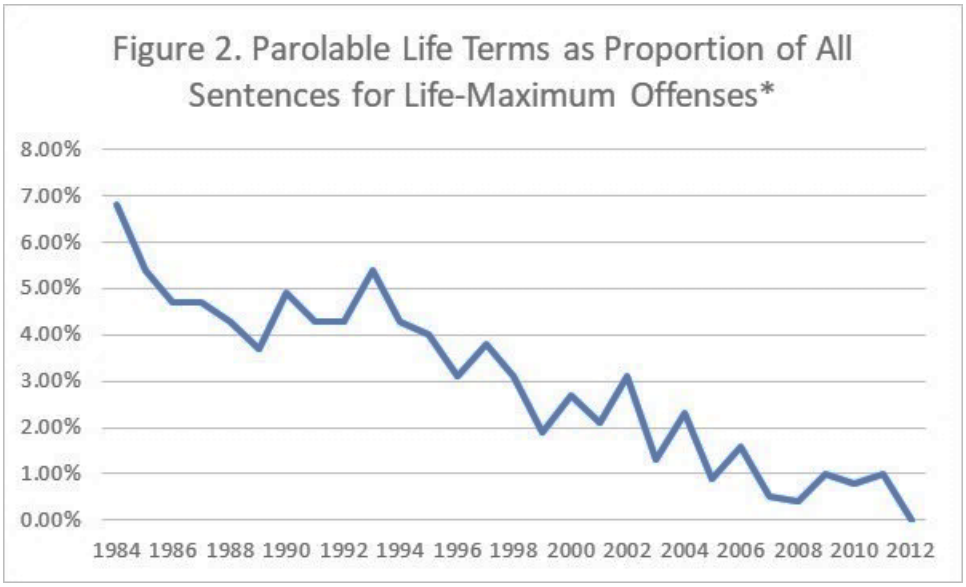

*CMIS data, includes redundant sentences

The possible reasons for a change in the pattern of life sentences are contradictory and hard to pin down:

- The proportion of cells that allows life as an option actually increased from the second judicial to the legislative guidelines. The difference is greatest by far for second-degree murder; the percentage of cells on the M2 grid that have life as a possibility went from 31% to 72%.
- People sentenced to parolable life terms for offenses committed through October 1992 became eligible for release after serving 10 years. For offenses committed after that date, parole becomes possible after 15 years. Judges who want to ensure that a defendant is incarcerated for a longer period often choose to impose a very long indeterminate term, leading to fewer life sentences and more long minimums over 15 years. Notably, on the M2 grid, the high end of every cell but one substantially exceeds 15 years. On the A grid, 16 of 36 cells (44%) have recommended sentencing ranges with a high end that exceeds 15 years.
- Until the mid-1980s, judges imposed life terms in the belief—based on past parole board practice—that defendants would be released in 12 or 14 years. In fact, lifer paroles had become rare in the late 1980s for various reasons, and in the 1990s, procedures were adopted that deliberately reduced the prospect of a lifer being paroled. Until practices gradually began to loosen again after 2005, virtually no lifers were released except those serving for drug offenses or who were terminally ill. Judges who wanted parole to be a realistic possibility may have begun to impose a term of years with a minimum on which they could rely.[1]

All these scenarios may well be playing out simultaneously. Whatever the reasons, Figure 2 shows that the proportion of life sentences began to decline precipitously after 1993—well before the legislative guidelines were enacted—and continued to drop thereafter.

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B. Habitual vs. Non-Habitual Sentences

Recall that the judicial guidelines did not apply to habitual offenders. People were charged and sentenced as habitual offenders during the period that the judicial guidelines were in effect, but the trial judge's selection of a sentence was not made with reference to the guidelines. Conversely, as explained in Chapter One, being sentenced as a habitual offender under the legislative guidelines has enormous consequences. The high end of the applicable guidelines cell is increased, doubling or tripling the breadth of the range for third or fourth offenders and increasing the scope of the judge's discretion accordingly. Lumping habitualized and non-habitualized offenders together produces a marriage of apples and oranges that is misleading for both groups. When we separate the second judicial and statutory periods into non-habitual and habitual sentences in Table 4, four points jump out.

Table 4. Median Length in Years for Two Time Periods – Habitual vs. Non-Habitual Sentences (Number of sentences in parentheses)

	Non-Habitual Sentences Compared by Time Period			Habitual Sentences Compared by Time Period			Habit/Non- Habitual Difference	
Crime	Jud. 2 (Col. A)	Legis. (Col. B)	Change (B/A)	Jud. 2 (Col. C)	Legis. (Col. D)	Change (D/C)	Jud.2 (C/A)	Legis. (D/B)
M2	17.5 (1,891)	20.0 (1,723)	2.5*** 14.3%	25.0 (145)	31.5 (256)	6.5*** 26.0%	7.5*** 42.9%	11.5*** 57.5%
AWIM	10.0 (1,342)	11.25 (1,398)	1.25*** 12.5%	15.0 (188)	25.0 (348)	10.0*** 66.7%	5.0*** 50%	13.75*** 122%
CSC	10.0 (2,314)	10.0 (1,976)	-----***	20.0 (414)	22.6 (454)	2.6*** 13.15%	10.0*** 100%	12.6*** 127.6%
RA	4.0 (7,626)	6.0 (8,883)	2.0*** 50.%	8.0 (1,370)	13.0 (1,913)	5.0*** 62.5%	4.0*** 100%	7.0*** 116.7%
TOTAL	6.5 (13,173)	8.0 (13,980)	1.5*** 23.1%	10.0 (2,117)	15.0 (2,971)	5.0*** 50.0%	3.5*** 53.8%	7.0*** 87.5%
CMIS Data, *** p < .001								

First, for non-habitualized offenders, the increase in the median minimum sentence from the judicial to the legislative period is less substantial for assault than Table 3 suggests and the increase for CSC defendants disappears altogether. However, for all groups combined, the increase in the median sentence for those not charged as habitual offenders was still 1.5 years or 23.0%. The change for every offense group was statistically significant.

By comparison, from the judicial to the legislative period, median sentences for habitualized offenders increased by anywhere from nearly three to 10 years. The percentage increase was greatest for those convicted of assault (66.7%) and robbery (62.5%), whose sentences were the least severe under the judicial guidelines. The change for every offense group was statistically significant. For all offense groups combined, the increase in the median sentence for those charged as habitual offenders was five years or 50.0%.

The sheer fiscal costs of these changes are enormous. In today's dollars, the overall per diem cost per prisoner is $115.09.[2] Over the 14 years during which we have data on the legislative guidelines, 11,434 people not sentenced as habitual offenders had an increase of 1.5 years or 547.75 days in their sentences. This computes to:

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11,434 individuals x 547.75 days x $115.09/day = $720,476,635 for 14 years
or $51,462,626 per year.

During the same period, 2,313 people who were sentenced as habitual offenders had an increase of five years or 1,825 days in their sentences. This computes to:

2,313 individuals x 1,825 days x $115.09 = $485,820,785 for 14 years
or $34,701,484 per year.

Thus, the increased habitual and non-habitual offender sentences that resulted from the legislative sentencing guidelines cost taxpayers $86,164,110 per year. That is more than $1.2 billion over 14 years, with no proof that the additional years served increased public safety.

Second, observe how much higher habitual sentences were than non-habitual sentences in each period. When the 2nd judicial guidelines were in effect, habitual offender sentences overall were 54% longer than non-habitual sentences. By offense type, the habitual sentences were 43, 50, 100, and 100% longer than the non-habitual sentences for murder, assault, CSC, and robbery, respectively. Translated into years, this meant that the median cost of being habitualized was 10 additional years for CSC defendants, more than seven years for murder defendants, five years for those convicted of assault, and four years for robbery defendants.

Under the legislative guidelines, the gap between habitual and non-habitual sentences widened much further. For the group overall, habitual sentences were 87.5% longer than those for people not habitualized. In murder cases, the habitual sentences were 57% longer, but in every other offense group the difference was more than 120%. The median cost in years of being habitualized under the legislative guidelines was roughly 13 years for assault and CSC defendants, 11 years for murder defendants, and seven years for those convicted of robbery.

Third, consider the actual minimum number of years being served for each offense group. It is no surprise that murder convictions bring the longest sentences. Both sets of guidelines gave second-degree murder its own sentencing grid with ranges designed to produce longer minimums than other life-maximum offenses. Nonetheless, the median sentence of 31.5 years for those convicted of murder who have been sentenced as habitual offenders is striking, especially since we do not know how old or how serious the prior convictions were.

Also noteworthy are the strong similarities in sentence lengths of those convicted of assault with intent to murder and criminal sexual conduct. When not charged as habitual offenders, the consensus has been consistent that both types of offenses warrant a minimum sentence of 10–11 years. But when charged as habitual offenders, under the legislative guidelines for both groups, the median sentence became nearly 23–25 years.

Equally apparent are the much lower sentences for armed robbery. The consensus is longstanding that armed robbery is a less serious crime than CSC or assault with intent to murder, perhaps because in most armed robberies the victims do not experience actual physical harm.

Finally, Table 4 shows a substantial increase in the proportion of life-maximum defendants who are sentenced as habitual offenders. In the 2nd judicial period, 13.8% of life-maximum sentences were imposed with habitual enhancements. In the legislative period, the overall proportion increased by more than a quarter to 17.5%. The overall figure is heavily skewed by the large volume of robbery sentences which had the least growth in habitual charges. By offense, the proportion of habitual offender sentences increased as follows:

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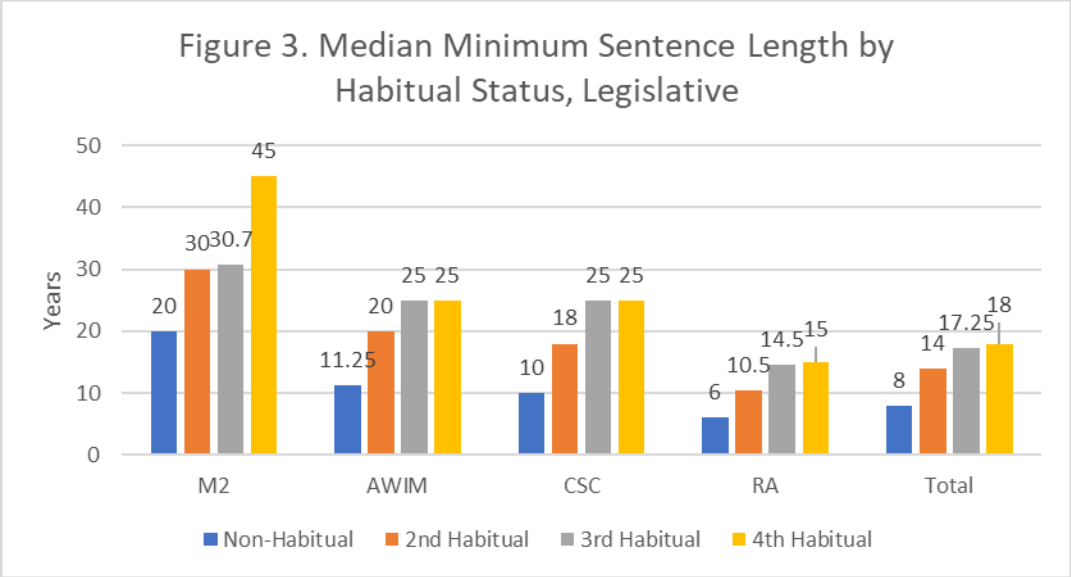
- Second-degree murder: 7.1 → 12.9%
- Assault with intent to murder: 12.3 →19.9%
- Criminal sexual conduct: 15.2 → 18.7%
- Armed robbery: 15.2 →17.5%

Both later periods constitute a large increase over the 1980s. When the 1st judicial guidelines were in effect, the proportion of habitual sentences was just 7.4%.

Table 4 compares habitual sentences as a group to non-habitual sentences in different time periods. Figure 3 allows us to see the differences in median sentences in the legislative period depending on whether the defendant was treated as a second, third, or fourth habitual offender.[3]



CMIS Data, All offense types significant at $p < .001$

It is evident that the most significant increases generally occurred as soon as the defendant's status changed from being a non-habitual to a second habitual offender. Murder sentences, which were much longer to begin with, increased by 50%, while minimums in the other offense groups increased by at least 75%. The rate of increase slowed down from second to third habitual. Murder sentences barely changed at all; assault sentences increased by another 25%; CSC and robbery sentences increased by about 38%. From third to fourth habitual—except for murder sentences—the medians changed little or not at all.

These findings have substantial implications for plea negotiations. Although the high end of the guidelines range may increase by 25, 50, or 100%, for people sentenced as second, third, or fourth offenders, the actual medians are 75, 116, and 125% longer than those for non-habtitualized defendants. While a reduction in a habitual charge from fourth offender to third would seem to have great value, except in murder cases the bargain may not mean much. Conversely, a threat to charge someone as a second habitual offender can easily mean a sentence increase of eight years.

C. Differences in Impact Among Counties

Enactment of the legislative guidelines has had very different effects in different counties. Since the judicial guidelines were only advisory, they could be followed to varying degrees by judges around the state. Perhaps even more importantly, the recommended sentence ranges under both sets of guidelines

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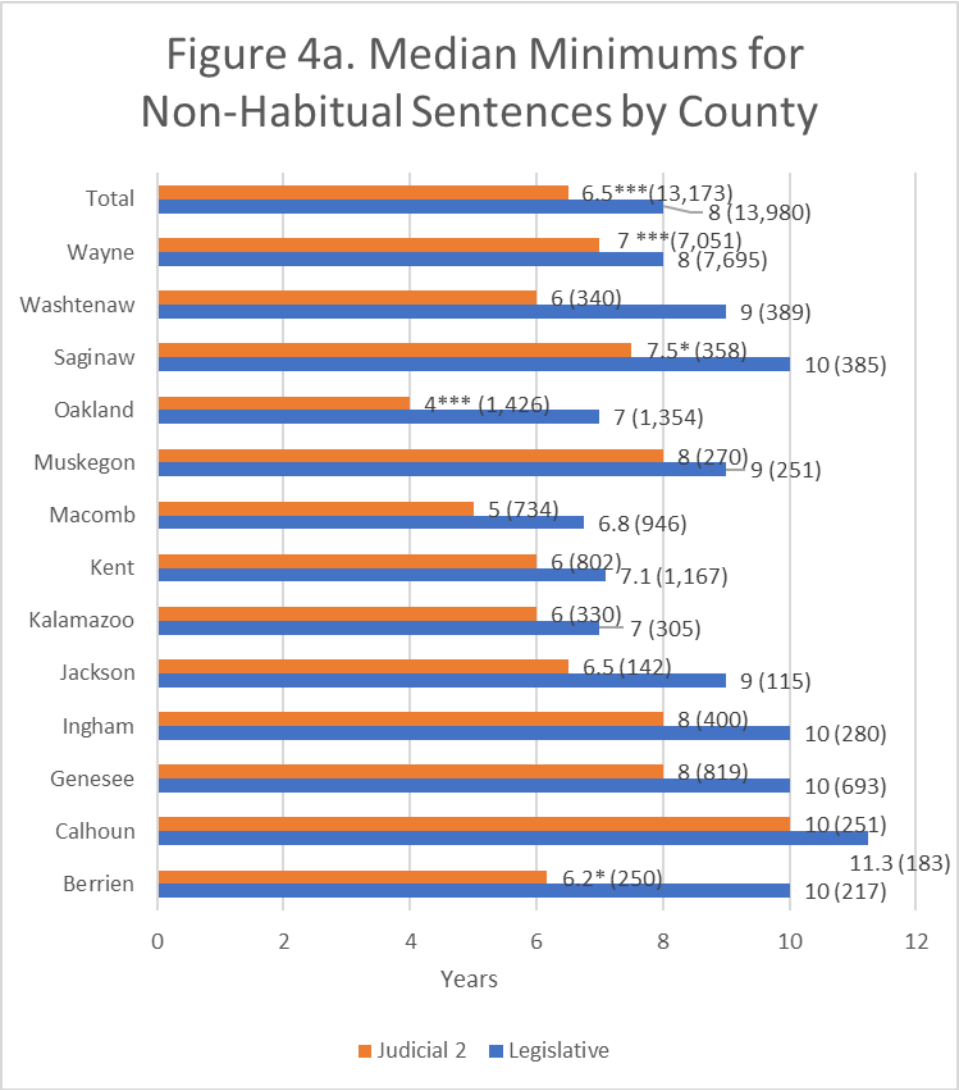
were extremely broad and overlapping. How much the mandatory nature of the legislative guidelines forced a change depended on what local practice had been under the judicial guidelines.

While disparity among counties will be discussed at length in Chapter Ten, Figures 4a and 4b show how the transition from the second judicial to the legislative guidelines affected sentences around the state. This presentation allows us to see which counties saw the most dramatic deviations from then-current practices and which were driving the changes in the statewide averages.

1. Non-Habitualized Defendants

Figure 4a shows that, for those not sentenced as habitual offenders, the median sentence for life-maximum offenses overall increased in every county with the advent of the legislative guidelines. The extent of the increase varied from one year in Wayne, Muskegon, Kalamazoo, and Kent Counties to three years in Oakland and Washtenaw, and 3.8 years in Berrien. Since the counties started in various places, the actual medians remained quite disparate. For example, the Oakland County median went from four to seven years, while Washtenaw County's median grew from six years to nine. The extent of county increases also varied depending on the offense. There are no apparent patterns related to county size or location.



CMIS Data, *p < .05, ***p < .001

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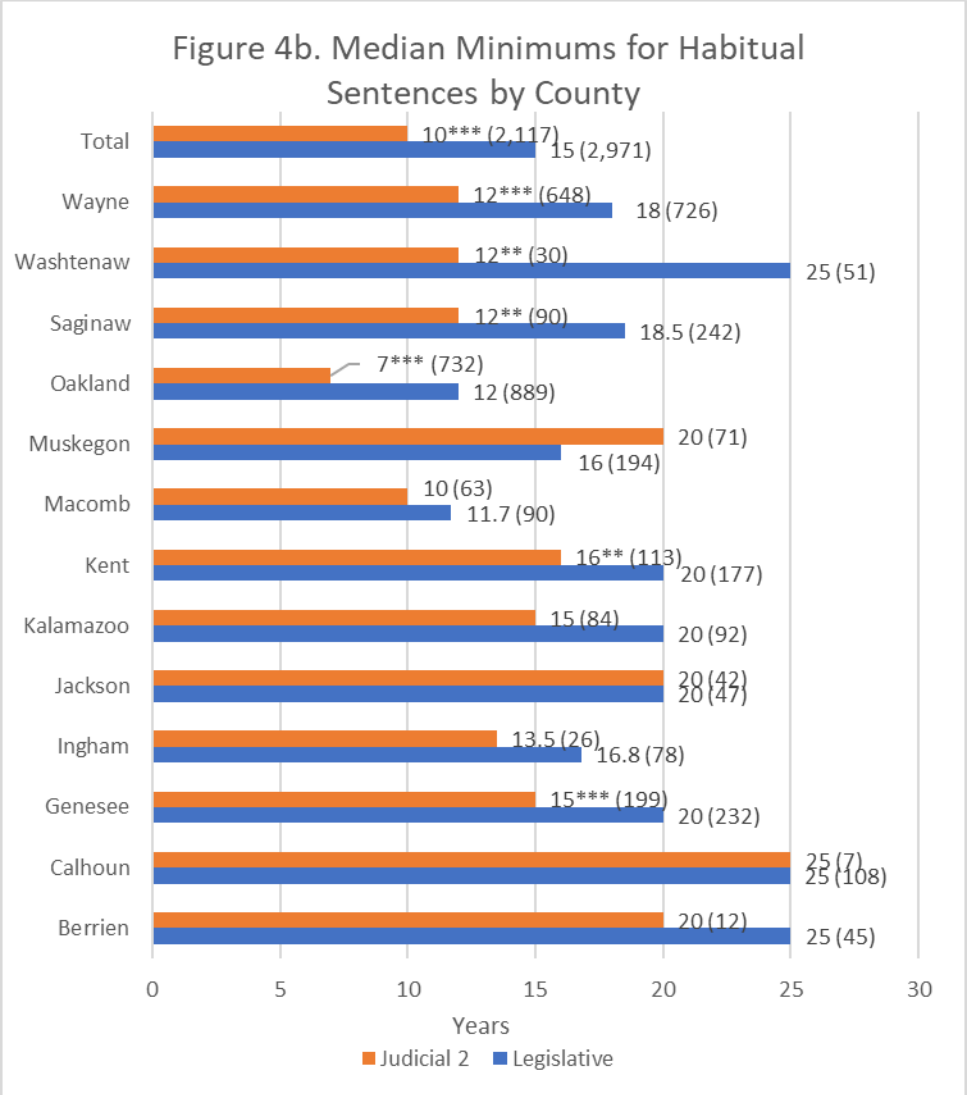
2. Habitualized Defendants

Figure 4b shows the change in median sentences across counties for people sentenced as habitual offenders. Given the new application of guidelines to habitual sentences and the seven-year increase in habitual minimums overall, it is not surprising that the changes for most counties were often much greater than they were for non-habituals. The median habitual sentence rose by less than two years in Macomb—from 10 to 11.7 years, while it increased by more than 13 years in Washtenaw—from 12 years to 25. In seven counties, the increase was at least five years. Notably, the median habitual offender sentence declined from 20 to 16 years in Muskegon and stayed constant at 20 years in Jackson and 25 years in Calhoun. There are no evident patterns within counties in the extent to which habitual sentences changed compared to non-habitual sentences.

For those sentenced as habitual offenders, the change in guidelines reduced the differences among the counties by raising the low end of the range. Under the judicial guidelines, the median sentences ranged from a low of seven years in Oakland to a high of 25 in Calhoun—a spread of 18 years. Under the legislative guidelines, the median sentences ranged from a low of 11.7 years in Macomb to a high of 25 in Berrien, Calhoun, and Washtenaw—a spread of 13.3 years.



CMIS Data, **p < .01, ***p < .001

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When comparing habitual and non-habitual sentences across counties, there is an important caveat. By definition, defendants sentenced as habitual offenders have prior record levels that reflect some number of felony convictions. Those not sentenced as habitual offenders will have a mixture of prior record levels that may or may not include felony convictions. When counties employ habitual offender enhancements, they pull defendants with the highest PRV levels out of the entire pool. Those left in the non-habitualized group have, on average, lower PRV levels. As a result, counties with a larger proportion of habitual sentences may have relatively low median sentences for non-habituals. Counties that use fewer enhancements may have longer non-habitual sentences precisely because they have not shifted out as many defendants with high PRV levels. This point will be discussed more fully in Chapter Fourteen.

D. The Increase in Multiple Sentences Per Defendant

As explained in Technical Appendix A, for the purpose of determining median sentence lengths, we eliminated multiple sentences that were redundant from the dataset. Nonetheless, examining the frequency of all multiple sentences is important because of the various ways they can be used to make sentences longer.

- Most obvious are the circumstances in which judges have the duty or the discretion to require that sentences imposed at the same time be served consecutively.
- Convictions for multiple charges increase the defendant's prior record score. (See Chapter Six section B)
- Multiple charges and convictions may also increase the offense severity level. (See Chapter Six section C)
- Multiple sentences can also affect the defendant in the future.
    - Each of the multiple sentences can be scored as a prior conviction.
    - Each of the multiple sentences can be used to charge the defendant as a habitual offender.

Thus, even though multiple sentences may be served concurrently, they can provide substantial advantages to the prosecution.

Table 5 displays the total number of sentences and individuals for each guidelines period as well as the frequency of multiple sentences for an individual. Percentages in parentheses show the proportion of individual defendants who received the indicated number of sentences.

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Table 5. Distribution of Multiple Sentences by Habitual Status and Guidelines Period*						
	Judicial 1 (1984–1988)		Judicial 2 (1989–1998)		Legislative (1999–2012)	
Sentences	Non-Habitual	Habitual	Non-Habitual	Habitual	Non-Habitual	Habitual
1	4,149 (83.5%)	355 (84.7%)	8,948 (81.3%)	1,338 (78.6%)	8,459 (74.0%)	1,505 (65.1%)
2	598 (12.0%)	51 (12.2%)	1,464 (13.3%)	231 (13.6%)	1,843 (16.1%)	455 (19.7%)
3	128 (2.6%)	9 (2.2%)	367 (3.3%)	82 (4.8%)	566 (5.0%)	167 (7.2%)
4	52 (1.1%)	3 (0.7%)	121 (1.1%)	17 (1.0%)	268 (2.3%)	75 (3.2%)
5	22 (0.4%)	1 (0.2%)	49 (0.5%)	15 (0.9%)	122 (1.1%)	43 (1.9%)
6	6 (0.1%)	-	22 (0.2%)	9 (0.5%)	56 (0.5%)	26 (1.1%)
7	4 (0.1%)	-	16 (0.1%)	3 (0.2%)	41 (0.4%)	15 (0.6%)
8	3 (0.1%)	-	11(0.1%)	4 (0.2%)	23 (0.2%)	9 (0.4%)
9	2 (0.0%)	-	4 (0.0%)	1 (0.1%)	16 (0.1%)	4 (0.2%)
10 or more	5 (0.1%)	-	7 (0.1%)	2 (0.1%)	40 (0.3%)	14 (0.6%)
Total Sentences	6,228	501	14,154	2,326	16,991	3,974
Total Individuals	**4,969**	**419**	**11,009**	**1,702**	**11,434**	**2,313**

* Note: On this table, individuals are counted more than once if they had sentences that fell into different offense groups.

We can see that over time the practice of charging multiple sentences increased. In the first judicial period, roughly 84% of defendants—whether habitualized or not—had just one sentence for a life-maximum offense. The second judicial guidelines period saw a small decrease in the frequency of single sentences for the non-habitual group and a more marked decline for the habitual group. In the legislative guidelines period, the proportion of defendants who received just one sentence declined to 75% for the non-habitual group and 65% for the habitual group. Conversely, the instances of multiple sentences in every amount grew steadily and substantially.

Further examination reveals that the increased use of multiple sentences differs by offense. Table 6 displays the frequency of multiple sentences for non-habitualized defendants during the legislative guidelines period by offense group. Each group includes all of the sentences imposed on one individual for the indicated type of offense. While 95% of the second-degree murder cases have only one murder sentence imposed, that proportion declines to 84% for assault sentences, 74% for robbery, and 69% for the CSC group. Fifteen percent of the CSC defendants received three or more CSC sentences.

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Table 6. Frequency of Multiple Sentences for Non-Habitualized Defendants by Offense Type under Legislative Guidelines				
Sentence	M2	AWIM	CSC	RA
1	1,629 (95.5%)	1,156 (84.3%)	1,255 (68.9%)	5,268 (74.1%)
2	57 (3.3%)	146 (10.6%)	291 (16.0%)	1,209 (17.0%)
3	17 (1.0%)	36 (2.6%)	137 (7.5%)	299 (4.2%)
4	3 (0.2%)	21 (1.5%)	58 (3.2%)	172 (2.4%)
5	-	5 (0.4%)	27 (1.5%)	63 (0.9%)
6	-	3 (0.2%)	19 (1.0%)	32 (0.5%)
7	-	3 (0.2%)	12 (0.7%)	19 (0.3%)
8	-	1 (0.1%)	5 (0.3%)	15 (0.2%)
9	-	-	8 (0.4%)	7 (0.1%)
10 or more	-	1 (0.1%)	10 (0.5%)	24 (0.3%)
Total Sentences	1,806	1,726	3,061	10,398
Total Individuals	**1,706**	**1,372**	**1,822**	**7,108**

Not surprisingly, multiple sentences appear to be related to conviction method. Except in murder cases, people who pleaded guilty were much more likely to have just one sentence than were those who opted for a jury trial. This difference presumably reflects that reducing the number of charges is one form of plea bargaining. We found no evidence that the number of multiple sentences an individual received was related to race.

Particularly interesting is the extent to which the number of multiple sentences varies by county. As Table 7 shows, the number of defendants who received just a single sentence for robbery ranged from over 90% in Berrien, Jackson, and Kalamazoo, to roughly 67% in Oakland and Macomb all the way down to 53.7% in Saginaw.

For the CSC group, the disparities were much starker. Five counties (Berrien, Genesee, Jackson, Kalamazoo, and Kent) show that at least 80% of defendants received a single sentence. Five other counties (Ingham, Macomb, Muskegon, Washtenaw, and Wayne) ranged from 63 to 69%, while in Oakland and Saginaw, just 54% of the CSC defendants received a single sentence. Indeed, in Saginaw more than a third of the CSC defendants had three or more sentences. At 27.7%, Oakland also far exceeded the extent to which other counties imposed three or more sentences.

In some counties the number of cases is relatively small. However, differences in case numbers do not explain the apparent differences in the number of multiple sentences. When we look at counties with similar case volumes, the disparities remain. Compare, for example, CSC cases in Kent and Oakland or Saginaw and Genesee. A CSC defendant in Oakland is nearly 10 times more likely to receive three or more sentences than a CSC defendant in Kent. A CSC defendant in Saginaw is nearly eight times more likely to receive three or more sentences than a CSC defendant in neighboring Genesee.

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Table 7. CSC/RA Number of Sentences per Individual by County (Legislative, Non-Habituals)								
County	Criminal Sexual Conduct				Armed Robbery			
	1	2	3+	Total	1	2	3+	Total
Berrien	35 83.3%	3 7.1%	4 9.5%	42	127 94.1%	7 5.2%	1 0.7%	135
Calhoun	55 75.3%	9 12.3%	9 12.4%	73	54 80.6%	9 13.4%	4 6.0%	67
Genesee	55 83.3%	8 12.1%	3 4.5%	66	289 81.9%	49 13.9%	15 4.3%	353
Ingham	40 67.8%	10 16.9%	9 10.2%	59	132 88.6%	12 8.1%	5 3.4%	149
Jackson	28 96.6%	1 3.4%	-----	29	67 91.8%	5 6.8%	1 1.4%	73
Kalamazoo	50 82%	7 11.5%	4 6.5%	61	160 90.4%	13 7.3%	4 2.3%	177
Kent	188 80.3%	39 16.7%	7 2.9%	234	568 83.5%	90 13.2%	22 3.2%	680
Macomb	85 63.4%	2 19.4%	23 17.2%	134	369 67.8%	120 22.1%	55 10.2%	544
Muskegon	52 69.3%	14 18.7%	9 12.0%	75	100 83.3%	16 13.3%	4 3.1%	120
Oakland	119 53.8%	41 18.6%	61 27.7%	221	487 66.9%	167 22.9%	74 10.2%	728
Saginaw	34 54.0%	7 11.1%	22 35.1%	63	95 53.7%	59 33.3%	23 13.0%	177
Washtenaw	39 68.4%	9 15.8%	9 15.9%	57	158 71.2%	44 19.8%	20 9.2%	222
Wayne	478 67.1%	119 16.7	115 16.1%	712	2,827 73.8%	634 16.5%	372 9.7%	3,833
CMIS Data	p < .001				p < .001			

Variation in the number of sentences imposed is just one example of how the county of conviction affects defendants. In Chapter Ten, we will explore the relationship between county and the median sentence length. In Chapter Fourteen, we will examine disparities in the rates at which counties choose to utilize the habitual offender statutes. The outcomes are sometimes surprising. But the result is always that—statewide sentencing guidelines notwithstanding—the exercise of discretion by local courts and local prosecutors produces widely disparate results.

Conclusion

Implementation of the legislative guidelines had multiple consequences.

- The median length of non-habitual sentences grew overall by 1.5 years.
- The median length of habitual offender sentences grew overall by five years.
- The proportion of habitual offender sentences increased by more than a quarter.
- The imposition of multiple sentences for individual defendants increased dramatically.

The extent of all these changes varied substantially by offense group and by county. But the trends are undeniable. For the life-maximum offenses, the legislative guidelines brought longer sentences, as they were designed to do. In the next chapter, we will examine that design in detail to see exactly how it achieved these results.

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CHAPTER SIX: HOW THE GUIDELINES PROMOTE LONGER SENTENCES

The longer sentences for life-maximum offenses were achieved by carefully constructing the guidelines components and anticipating the intricate interplay among them. Because there has been no ongoing commission monitoring, the impact of each component has not been evaluated.

Five factors determine the parameters of the recommended sentencing range:

- The grid on which the crime type falls.
- The prior record score, which places the defendant into one of six prior record levels (A–F).
- The offense score, which places the defendant into one of multiple offense severity levels, depending on the grid.
- The cell range that sits at the point on the grid where the variable levels intersect.
- Whether the high end of the cell is increased because the defendant is being sentenced as a habitual offender.

We saw in Table 4 how the number and length of habitual offender sentences exploded when the statutory guidelines were enacted. In Chapter Fourteen, we will examine who is chosen to be habitualized. Here we will deconstruct that design in order to examine exactly how the grids, the prior record variables, and the offense variables each work to promote longer sentences, along with policy decisions about habitual offenders and departures.

A. The Grids

Michigan divides all offenses into six crime groups based on the general nature of the conduct.[1] The crime group is used to determine which offense variables are to be scored. Michigan also assigns offenses to one of nine crime classes, based roughly on the statutory maximum sentence. Each crime class has its own sentencing grid. Among the life-maximum offenses, murder is treated separately and has its own grid, M2. The other life-maximum offenses are on the A grid. Grids B–H, in descending order of seriousness, are for offenses with maximums of 20 years in prison, down to jail or other intermediate sanctions. Thus, the grid is a proxy for the relative seriousness of the offense type.

1. Sentence Increases from Grid to Grid

The recommended minimum sentences change dramatically from grid to grid. Consider, for example, a defendant whose PRV Level is C. (Note that the B grid was designed for offenses with statutory maximums of 20 years.)

- If the defendant scores 50 OV points, the minimum-minimum goes from 4.25 years on the B grid to 6.75 on the A grid to 15 years on the M2 grid.
- If the defendant scores 100 OV points, the minimum-minimum on the B grid increases by just six months to 4.75 years, but it goes to 11.25 years on the A grid and 18.75 years for murder 2.

Similarly, consider a defendant whose PRV Level is D.

- If the defendant scores 50 OV points, the minimum-minimum goes from 6.5 years on the B grid to nine on the A grid to 18.75 years on the M2 grid.

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- If the defendant scores 100 OV points, the minimum-minimum on the B grid again increases by just six months to seven years, but it goes to 14.25 years on the A grid and 22.5 years for murder 2.

The percentage change in the range from grid to grid varies substantially.

- Moving from the B to the A grid, the greatest changes occur when offense severity increases.
- Moving from the A to the M2 grid, the greatest changes occur when PRV level increases.

In every cell, the maximum-minimum is 66.7% greater than the minimum-minimum. The low end of each range is 25% below the midpoint, and the high end is 25% above the midpoint. As the midpoints grow larger, the actual increases in the widths of the ranges are stunning.

- On the A grid, the range for the A-I cell is 14 months; for the F-VI cell it is 15 years.
- On the M2 grid, the narrowest range is five years and the widest is nearly 20.

2. The Number and Redundancy of Cells

As explained in Chapter One, all the grids have six PRV levels. The M2, G, and H grids have three OV levels, for a total of 18 cells each. The A, B, C, D, and E grids have six OV levels, for a total of 36 cells each. The F grid has four OV levels, for a total of 24 cells. Thus, collectively, the Michigan guidelines present a choice among 258 cells.[2]

The grids are structured so that PRV levels A–F are arranged horizontally across the top of the grid, while the OV levels run vertically down the left side. On grids A–D, the cell ranges in each row have a column that is an exact counterpart. For example, on the A grid, the low ends of the cells in the row for OV Level III are 42, 51, 81, 108, 126, and 135 months. The low ends of the cells in the column for PRV Level C are also 42, 51, 81, 108, 126, and 135 months. The pattern is consistent throughout the grid. The column of cells for PRV Level A matches the row of cells for OV Level I; the column for PRV Level F matches the row for OV Level VI. The same concept is employed on the M2 grid but adapted to account for the fact that the grid has only three OV levels. To visualize this fully, see Figures 5a and 5b in Chapter Eight.

This repetition produces a series of diagonals along which different combinations of PRV and OV levels result in identical cells. Thus cells A-VI, F-I and every combination along the diagonal line between them has a range with a low of 108 months and a standard high of 210 months. As a result of this design, the M2 grid has 18 total cells but only eight different recommended minimum sentence ranges. On the A grid, of 36 total cells, there are actually just 11 different ranges.

The apparent intent of all this redundancy is to treat prior record and offense severity as equally important. A balance is repeatedly struck between cases that have more prior record points but fewer OV points and cases that have fewer prior record points but more OV points. Chapter Eight explores how successful this strategy has been at producing equivalent median sentences. But, from a broader perspective, there is reason to question the desirability of a policy that makes the seriousness of the current offense no more important than the defendant's criminal history, no matter what combination of factors produced the prior record score. A person with a long history of relatively petty crimes may receive a longer recommended sentence than someone with a more serious current offense. Longer prison sentences can be based on prior record scores that reflect a mix of factors over a long period of time but not a single assaultive felony. It is worth reconsidering whether this is the best use of scarce resources, the best way to protect the public, or the fairest way to treat defendants.

The guidelines ranges do not just repeat, they overlap. Adjacent cells do not begin where the next lowest one left off. Instead the very wide ranges include many of the same months. For instance, the C-III

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cell on the A grid is 81–135 months; the C-V and D-III cells are 108–180 months. The period of 108–135 months is included in both ranges—an overlap of 27 months.

The confounding impact of overlapping and redundant cells is apparent if we consider a minimum sentence of 180 months or 15 years. It is included in the ranges starting with 108, 126, 135, and 171 months. Collectively, that is 18 of the A grid's 36 cells. What, exactly, is a 15-year minimum meant to punish when it is equally available at one cell at OV Level I, two cells at OV Level II, three of cells at OV Level III, and four cells each at OV Levels IV, V, and VI?

B. Prior Record Variables

Before examining the nature and impact of each of the seven prior record variables, it is helpful to consider some of the important policy analysis contained in the Robina Institute's "Criminal History Enhancements Sourcebook."[3] There are two primary rationales for increasing a sentence based on the defendant's criminal history. One is retribution: the notion that people who continue to commit crimes despite previous encounters with the criminal justice system are more blameworthy. The other is risk reduction: the notion that longer sentences reduce the risk of re-offending.[4]

Sentencing commissions are typically not explicit about which rationale underlies their choices. Presumably it is often both. But the rationales lead to different policy choices. If the goal is risk reduction, it makes sense to assess the effectiveness of each criminal history component at actually reducing future offending. Validation research based on data available in each jurisdiction can be used to determine whether and to what extent a prior record variable affects re-offending.[5]

Such research is critical because criminal history enhancements can have a number of adverse impacts.[6]They can:

- Increase the size and expense of prison populations.
- Shift the age composition and risk level of prison inmates as older, non-violent individuals tend to have longer criminal histories.
- Undercut the goal of using limited prison beds for people convicted of violent crimes.
- Decrease the proportionality of sentence severity relative to offense severity; that is, the more weight given to prior record, the less the sentence length depends on the severity of the conviction offense.
- Increase racial disparity in prison populations because, as will be discussed in Chapter Thirteen, non-white defendants have larger criminal history scores than whites.

To assess the impact of Michigan's prior record variables, we will refer to Table 8, which shows the extent to which no points were scored for each PRV for sentences in each offense group.

Table 8. Percent of Non-Habitual Sentences with Zero Points for Each Prior Record Variable under Legislative Guidelines, 2003–2012

Prior Record Variable		Murder 2nd	Assault	CSC 1st	Robbery
1	High Severity Felonies	81.7	77.7	85.1	81.4
2	Low Severity Felonies	59.9	56.6	76.9	64.3
3	High Severity Juvenile	93.3	92.0	94.8	89.6
4	Low Severity Juvenile	80.1	78.6	93.2	76.8
5	Misdemeanors	54.7	54.2	63.4	53.6
6	Relationship to Criminal Justice System	64.4	60.9	81.6	60.6
7	Subsequent or Concurrent Felonies	65.0	46.9	43.5	52.7
OMNI data, $p < .001$					

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Prior adult felonies. Every version of the guidelines scored both high and low severity adult felonies. At each severity level, scoring is the same regardless of whether the prior conviction resulted in probation, jail, or prison; that is, the fact of the prior conviction not the seriousness of the specific conduct determines the points.

The statutory guidelines define high severity felonies as those listed in crime classes M2, A, B, C, and D (i.e., crimes carrying maximum sentences of over five years). According to the MDOC 2019 Statistical Report,[7] the most common high severity crimes are possession of methamphetamine,[8] delivery of narcotics under 50 grams,[9] assault with intent to commit great bodily harm less than murder,[10] breaking and entering a commercial structure,[11] and uttering and publishing.[12]

There is no requirement that prior felonies must have arisen from different criminal incidents; that is, if multiple convictions resulted from a single transaction, such as three counts of armed robbery because there were three victims or car theft, possession of drugs and fleeing from police, each of those convictions is scored as a separate prior. There is also no prohibition on scoring prior felonies that were used to enhance the punishment for the current offense. While this is not an issue with the life-maximum offenses, there are many less serious crimes for which the statutory penalty is increased if the defendant committed the same crime in the past. In that circumstance, the prior conviction is used to enhance the person's punishment at least twice.[13]

PRV 1. The statutory guidelines award 25 points for one prior high severity felony conviction, 50 points for two, and 75 points for three or more. At 25 points, one prior high severity felony alone puts the defendant into Level D, and two such felonies push the defendant into at least Level E. As Table 8 shows, more than three-quarters of sentences in every crime group had no prior high severity felonies, with the CSC group having the fewest and the assault group having the most. At the other extreme, the proportion of sentences that score 75 points ranged from 1.8% in CSC cases to 3.7% in armed robbery cases. From 9.1 to 15.3% received 25 points in CSC and assault cases, respectively; from 3 to 5% received 50 points.

PRV 2. PRV 2 awards five points for a single low severity felony conviction and a maximum of 30 points for four or more. More than half of all sentences received no points for low severity priors but the proportion varied widely by offense group, ranging from a low of 56.6% in assault cases to 76.9% in CSC cases. The proportion receiving either five or 10 points was 16.2% for the CSC group but ranged from 25.9 to 30.9% for the other groups. Except for CSC sentences, 10.8–12.6% of sentences were awarded 20 or 30 points, enough to put them into PRV levels C or D, respectively.

Juvenile adjudications. The legislative guidelines divide juvenile adjudications into high and low severity on the same basis as adult convictions. However, the point scale for juvenile adjudications is substantially lower than for adult convictions in recognition of juveniles' lesser culpability. Juvenile adjudications do not "roll off" at any point simply because they were juvenile. They are subject to the same 10-year gap rule as adult convictions.

PRV 3. The guidelines award 10 points for a single high severity juvenile adjudication, 25 points for two and 50 points for three or more. Table 8 shows that roughly 90 to 95% of the sentences in every offense group had no points for this variable. Fewer than 3% in any group scored 25 points or more.

PRV 4. The guidelines award two points for a single low severity juvenile adjudication up to a maximum of 20 points for six or more. Table 8 shows that over 93% of CSC sentences and about 77 to 80% of the sentences in every other offense group had no points scored for this variable. Except for sex offenses, which scored far fewer, roughly 12-13% of sentences were scored two points for one low severity juvenile adjudication. Just 3.25% of all sentences received either 15 or 20 points.

Misdemeanor convictions (PRV 5). The statutory guidelines award two points for one prior misdemeanor and up to 20 points for seven or more. Just three misdemeanors in the preceding 27 years brings 10 points—enough, in itself, to put the defendant at Level C. However, nearly 87% of all the life-maximum sentences scored no more than five points for misdemeanors. Roughly 54% of the sentences in three of the offense groups scored zero; among CSC sentences, the proportion was 63.4%.

The statutory guidelines score any misdemeanor or equivalent juvenile adjudication that is an offense against a person or property, a controlled substance or weapons offense, or involves operating a vehicle of any kind while under the influence. No differentiation is made based on the severity of the

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conduct. However, a prior misdemeanor that was used to elevate the sentencing offense to a felony, as occurs, for instance, with first-degree retail fraud and third-offense drunk driving cannot be scored.

Eight of 17 guidelines jurisdictions that count juvenile adjudications limit the scoring to felonies. Michigan is one of nine jurisdictions that count juvenile misdemeanors.[14] In fact, it awards almost identical points for misdemeanors regardless of the defendant's age when committed and low severity juvenile adjudications: two points for one of either, five points for two of either, 10 points for three or four of either, and 15 points for five of either. The point scheme only diverges at the high end, where six or more low severity juvenile adjudications are awarded 20 points but seven or more misdemeanors are required for 20 points.

Given that juveniles' reduced culpability is taken into account in scoring juvenile adjudications, it is unclear why they are treated like adults in scoring misdemeanors. Two prior misdemeanors committed as a juvenile (five points) and two prior low severity juvenile adjudications (five points) are enough to push the defendant into Level C. On the A grid, compared to PRV Level A this combination doubles both the low and high ends of the recommended ranges at Offense Levels I-IV. For example, at OV Level III, a minimum of 3.5 years (42 months) becomes 6.75 years (81 months).

Criminal Justice Status (PRV 6). PRV 6 awards points based on the defendant's relationship to the criminal justice system when the sentencing offense was committed. The four categories of points depend on whether the defendant was incarcerated and, to a limited extent, whether the relationship arose from a felony or misdemeanor:

- Five points if the defendant was on probation, delayed sentence status, or out on bond regarding a misdemeanor.
- Ten points if the defendant was on parole, probation, delayed sentence status, or out on bond regarding a felony.
- Fifteen points if the defendant was in jail awaiting adjudication or sentencing on a conviction or probation violation (no difference whether the pending proceeding was for a felony or misdemeanor).
- Twenty points if the defendant was serving a sentence in prison or jail (includes escapees; no difference in whether jail sentence was for a felony or misdemeanor).

Thus, serving a jail sentence is treated as the equivalent of three prior low severity felony convictions. Being on probation for a single low severity felony is the equivalent of two prior low severity felony convictions.

The rationale for PRV 6 is unclear. While a common factor in sentencing guidelines scoring, custody status is the least researched. It is not considered a predictor of re-offending in most risk assessment instruments.[15] Its one clear result is to pile punishment on top of punishment.

Every relationship to the criminal justice system already carries its own consequences for the defendant who has committed a new felony. Probation, parole, and bond can be revoked; sentences can be made consecutive. MCL 768.7a requires that a sentence imposed for an offense committed while the defendant was incarcerated or on parole be served consecutively to the prior sentence. Thus, for instance, a defendant who is sentenced for being a prisoner in possession of a cell phone,[16] which carries a maximum sentence of five years, will be scored 20 points for PRV 6, 25 points for OV 19 (Threat to Security of a Penal Institution), and the sentence will be consecutive to the one being served.

As Table 8 shows, nearly 82% of the CSC sentences and more than 60% of all others were awarded zero points for PRV 6. In every offense group, 1.3% or less of the sentences received 15 or 20 points combined; however, except for the CSC group, between 25 and 31% of sentences received 10 points, putting them immediately into PRV Level C.

Subsequent/Concurrent Convictions (PRV 7). While PRVs 1 and 2 are careful to define "prior" convictions as ones entered before the sentencing offense was committed, PRV 7, called "Subsequent or Concurrent Felony Convictions," undercuts that concept. PRV 7 awards points for two types of

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convictions that, by definition, are not prior: if the defendant was convicted of multiple felony counts including the sentencing offense or was convicted of a felony after the sentencing offense was committed. Ten points are awarded for one concurrent or subsequent conviction; 20 points are awarded for two or more. Convictions for felony firearm or for other offenses that result in mandatory consecutive sentences are not counted. There is no exception for convictions that result in discretionary consecutive sentences.

PRV 7 is the single most impactful PRV as a practical matter. Table 8 shows that while 65% of the murder sentences scored zero points for PRV 7, the proportions for the other offense groups were much lower. In fact, for the other three groups PRV 7 had a lower proportion of zero scores than any of the other PRVs. The contrast was starkest for CSC sentences, which had the greatest percentage of zero scores on every other PRV and, at just 43.5%, the lowest percentage of zero scores on PRV 7. PRV 7 has the greatest impact on CSC sentences because prosecutors commonly charge separate counts for multiple penetrations of the same victim in a single incident or of the same or multiple victims over time.

Overall, 21.4% of the sentences under the statutory guidelines were awarded 10 points, and 26% were awarded 20 points, meaning 47% were pushed into at least PRV Level C based on this single variable.

PRV 7 has two purposes. It nullifies some of the benefits of concurrent sentencing. Although the defendant who has multiple convictions out of a single transaction may only have to serve the longest sentence imposed, by increasing the number of points used to calculate that sentence, the other convictions are used to enhance the punishment. Unlike the PRVs that actually focus on the defendant's past, PRV 7 gives substantial control to prosecutors who decide how many concurrent charges to bring.[17]

Similarly, subsequent convictions cannot be scored as prior convictions and cannot be the basis for charging someone as a habitual offender. But PRV 7 allows them to be scored to enhance the defendant's punishment nonetheless. Of course, when the defendant is sentenced for the subsequent conviction, the current conviction will be scored as a prior conviction for purposes of enhancing the subsequent sentence.

As will be discussed in more detail below, PRV 7 can also result in the double-counting of convictions as both prior record and offense variables. Concurrent and subsequent convictions that are scored in PRV 7 may also be scored as part of a continuing pattern of criminal behavior under OV 13. In sum:

- A great majority of life-maximum sentences receive zero points for high severity felonies or high or low severity juvenile adjudications.
- A majority of sentences in every crime group have no low severity felonies, no misdemeanors, and no relationship to the criminal justice system.
- On six prior record variables, CSC sentences are far and away the most likely to receive zero points.
- PRV 7, which adds 10 or 20 points for concurrent or subsequent convictions that are, by definition, not "prior" to the instant offense is the single most consequential.

Of course, what ultimately counts is the total number of points a defendant scores on all the PRVs—that determines in which of the six prior record levels the case is placed. Table 9, which indicates the number of points that define each variable level in parentheses, shows that under the statutory guidelines, for people not sentenced as habitual offenders, the single most common PRV level for three offense groups is C; for the assault group, it is D. Overall, CSC defendants have by far the lowest prior record scores and assault defendants have the highest. While at least 50% of the sentences for every offense type fell at Level C or below, this ranged from just 50.5% for assault sentences to 70.9% for CSC sentences.

Roughly 15–20% of the sentences fall into Level A, although that requires the defendant receive no points for any prior record variable. When we collapse Levels A and B, we see the extent to which sentences in each group have nine or fewer points:

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- Murder, 2nd degree – 33.2%
- Assault with intent to murder – 23.0%
- Criminal Sexual Conduct, 1st degree – 27.3%
- Armed Robbery – 25.7%

Table 9. Percentage of Non-Habitual Sentences Among PRV Levels, by Offense 2003–2012

PRV Level (points)	M2 (N = 1,218)	AWIM (N = 884)	CSC (N = 1,225)	RA (N = 5,659)	TOTAL (N = 8,986)
A (0)	19.8	14.9	20.0	15.3	16.5
B (1–9)	13.4	8.1	7.3	10.4	10.1
C (10–24)	29.1	27.5	43.6	31.4	32.3
D (25–49)	22.2	28.5	16.2	24.0	23.1
E (50–74)	9.1	11.9	7.8	10.8	10.3
F (75 +)	6.5	9.0	5.1	8.1	7.6
OMNI Data, p < .001					

At the other extreme, only 5 to 9% fall into Level F. More than 82% of the nearly nine thousand non-habitual sentences for which guidelines scores are available did not reach PRV Levels E or F.

The statutory guidelines were designed to place defendants with one prior high severity conviction into at least PRV Level D and to place defendants with one prior high severity juvenile adjudication or one prior or subsequent conviction of any felony or nearly every possible current relationship to the criminal justice system into at least PRV Level C. It does not appear that, overall, the prior record variables are increasing sentence lengths by driving defendants into the highest guidelines ranges. The majority of life-maximum defendants have criminal histories that are minimal or relatively modest.

Nonetheless, since prior record level depends on the total number of points, regardless of how they accumulated, it is quite possible for a defendant to score into PRV Level E without any prior convictions more serious than a Class E felony with a five-year maximum.[18] For the 41% of sentences that score at PRV Level D or above and particularly for the 18% that score in the E and F levels, the scoring of the prior record variables can serve to push defendants with relatively low offense severity scores into high guidelines cells, adding years to the low end of the recommended range.

C. Offense Variables

The Michigan Felony Sentencing Project found that, for serious assaultive offenses, the facts of the crime play a much larger role in determining the sentence length than does the defendant's criminal history.[19] The results of our analysis of the legislative guidelines are less clear cut.

The 20 offense variables used to score crimes against people address every possible aspect of the defendant's conduct. Some apply to person crimes generally but have exceptions for specific offenses. Two are scored only if the offense involved the operation of a vehicle or other means of transportation. Four carry a maximum of 15 points; five carry a maximum of 10 points. At the other extreme, four OVs carry up to 50 points and two carry up to 100.

The offense variables used to score life-maximum crimes evolved with each version of the guidelines. Most notably, the statutory guidelines added four entirely new offense variables:

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- OV2 Lethal Potential of Weapon Possessed or Used
- OV 13 Continuing Pattern of Criminal Behavior
- OV 19 Threat to Security of Penal Institution or Court or Interference with Administration of Justice or Rendering of Emergency Services
- OV 20 Terrorism

The Guidelines Manual conveys the Commission's intent to maximize the number of OV points awarded to every defendant. The instructions direct: "Determine which one or more of the statements addressed by the OV apply to the offender and assign the point value indicated by the applicable statement with the highest number of points."[20]
Table 10 shows that 53% of murder defendants and nearly 45% of assault defendants receive 100 or more points, thereby falling into the highest offense levels on their respective grids. Within the sex offense group, nearly 46% fall into the two highest offense levels on the A grid. For these three offenses, the lowest offense levels are nearly irrelevant. Less than 3% of the CSC sentences fall in OV Level I; less than 5% of the assault sentences fall in either OV I or OV II; less than 7% of the murder sentences fall into OV I which, on the M2 grid, includes up to 49 points. Robbery cases, however, present the opposite scenario with nearly half falling in the two lowest OV levels and more than three-quarters falling in the lowest three.

Table 10. Percentage of Non-Habitual Sentences Among OV Levels, by Offense 2003–2012

OV Level (points)	M2 (N = 1,218)	AWIM (N = 884)	CSC (N = 1,225)	RA (N = 5,659)	Total
I (0–19)		1.9	2.5	11.9	8.9
M2 (0–49)	6.7*				
II (20–39)		2.9	12.7	36.2	30.2
M2 (50–90)	39.8*				
III(40–59)		9.4	16.7	27.8	28.0
M2 (100+)	53.4*				
IV (60–79)		20.8	22.3	12.8	13.2
V (80–99)		20.4	16.5	5.0	7.4
VI (100+)		44.6	29.2	6.2	12.3
OMNI Data, p<.001					
*Note that the M2 grid has only three offense levels with point totals divided differently than the A grid					

These figures, while striking, are not a surprise. For each crime type, the OVs were structured to produce just these results. To examine the impact of offense variables on sentences for life-maximum crimes, we will highlight aspects of the 18 OVs that apply to our four life-maximum offenses.

Aggravated Use of Weapon (OV 1). OV 1 scores 25 points for discharging a firearm at a victim or for cutting or stabbing a victim. Nearly 75% of murder sentences and 80% of assault sentences had 25 points. Over 61% of robbery sentences had 15 points for pointing a gun at or toward a victim or threatening a victim with a knife. On the other hand, 88% of the CSC sentences had zero points for this OV. OV 1 also allows 10 points if the victim was touched by any other type of weapon and five points if a weapon was displayed or implied. Accomplices who were unarmed receive the same number of points as the principal.

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OV 1 is scored if the sentencing offense is armed robbery or felonious assault, both of which have possession or use of a weapon as an element, and if the defendant is also receiving a mandatory consecutive sentence for possession of a firearm during the commission of a felony (felony firearm).[21] Notably, in defining permissible sentencing considerations, the *Model Penal Code: Sentencing* would require that "no finding of fact may be used more than once."[22]

Lethal Potential of Weapon Possessed or Used (OV 2). OV 2 goes beyond scoring the use of a weapon done in OV1 to add points depending on the nature of the weapon:

- Fifteen points for possessing chemical or biological weapons, incendiary or explosive devices, and fully automatic weapons,
- Ten points for short-barreled rifles or shotguns,
- Five points for pistols, rifles, shotguns, and knives,
- One point for any other potentially lethal weapon

Thus, a defendant who pointed a handgun at a victim during a robbery would be sentenced on the A grid for being armed during the robbery, then receive 15 points for pointing the gun under OV 1, and get an additional five points under OV2, immediately pushing his sentence into OV Level II. Among murder, assault and robbery sentences, 70% or more received five points for OV 2. (Conversely, nearly 90% of CSC sentences received zero points.)

As with OV 1, all co-defendants must be assessed the same number of points for possessing a weapon, regardless of whether they personally were armed. Also as with OV 1, a defendant who is being sentenced for armed robbery or felonious assault can receive points for OV 2 and also receive a mandatory consecutive two-year sentence for felony firearm.

Physical Injury to Victim (OV 3). OV 3 scores 100 points if death results from commission of a crime and homicide is not the sentencing offense. So, for instance, if the defendant is an accomplice to a robbery or assault in which the principal kills someone, and the defendant is allowed to plead guilty to robbery or assault, he will still receive 100 points for the death. One hundred points were scored in 7.6% of assault sentences and 1.9% of robbery sentences. Additional scoring under OV 3 is:

- Fifty points if death resulted from the operation of any sort of vehicle when the defendant was under the influence of drugs or alcohol.
- Twenty-five points for life threatening or permanent incapacitating injury. Twenty-five points can also be scored when the sentencing offense is homicide and the defendant causes physical injury to the victim in the process of the killing.
- Ten points if the victim incurred bodily injury requiring medical treatment.
- Five points for bodily injury that did not require treatment. Notably, five points cannot be scored if bodily injury is an element of the offense but 10 points can be.

Nearly 30% of murder sentences scored 50 points; 23.2% scored 25. Among assault sentences, nearly 40% scored 25 points; nearly 34% scored 10. Nearly two-thirds of CSC sentences and three-quarters of robbery sentences scored zero on OV 3.

Psychological Injury to Victim (OV4). OV 4 awards 10 points if "serious psychological injury requiring professional treatment occurred to a victim." "Serious psychological injury" is not defined. The instructions require these points to be scored if the injury "may" require treatment; they do not require that treatment actually had been sought. OV 4 applies to all offenses except those involving a controlled substance. The percentage of sentences that received 10 points were: murder – 5.6, robbery – 24.7, assault – 40.0, and CSC – 85.3%.

Psychological Injury to Member of Victim's Family (OV 5). OV 5 awards 15 points if "serious psychological injury requiring professional treatment occurred to a victim's family." As with OV 4, "serious psychological injury" is not defined, and treatment need not actually have been sought. OV 5 is

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scored only if the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to murder. Fifteen points were scored in 16.9% of the assault sentences and 63.0% of the murder sentences.

Offender's Intent to Kill or Injure Another Individual (OV 6). OV 6 is scored only if the offense is homicide, attempted homicide, conspiracy, or solicitation to commit a homicide or assault with intent to commit a homicide. It awards points for the same state of mind that is an element required for conviction of these offenses. Because of the intent to kill or injure the crimes of second-degree murder and assault with intent to murder are placed, respectively, on the M2 and A grids, which recommend harsher sentences. OV 6 then increases the recommended sentence based on that same intent.

Notably, the *Model Penal Code: Sentencing* would prohibit departure sentences "based on any factor necessarily included in the elements of the offense of which the offender has been convicted."[23] However the Michigan Supreme Court has taken the opposite position. Observing that the sentencing guidelines explicitly direct courts not to consider conduct inherent in a crime when scoring certain offense variables, the Supreme Court held that "absent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables."[24]

OV 6 scores 50 points for premeditation, or if the killing occurred during an enumerated felony. Thus 50 points can be scored when first-degree murder is pleaded down to second-degree and when the sentencing offense is assault with intent to murder. It scores 25 points for malice, which is an element of second-degree murder, and 10 points if the intent to kill was mitigated by provocation or the conduct amounted to gross negligence. (Note: Ten points would normally be scored for manslaughter sentences, but 25 points could be awarded if the defendant pleaded down from second-degree murder to manslaughter, which carries a maximum of 15 years.)

Among murder sentences, 21.9% received 50 points and 49.8% received 25. Among assault with intent to murder sentences, 18.4% scored 50 points and 47.3% scored 25.

Aggravated Physical Abuse (OV 7). OV 7 awards 50 points if "a victim was treated with sadism, torture or excessive brutality" or conduct designed to substantially increase the victim's fear and anxiety. The Michigan Supreme Court has upheld awards of 50 points for racking a shotgun that was displayed during a carjacking and for striking store employees in the head with an airsoft gun designed to look like a sawed-off shotgun during a robbery.[25] Each person who was placed in danger of injury or loss of life is considered a victim. OV 7 was scored in 12.7% of murder sentences, 9.3% of assault sentences, 11.9% of CSC sentences, and 4.0% of robberies.

Victim Asportation or Captivity (OV 8). OV 8 awards 15 points if "a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." As with OV 7, "each person who was placed in danger of injury or loss of life is a victim for purposes of scoring OV 8." No distinction is made for incidental or minor movements.[26] OV 8 cannot be scored when the sentencing offense is kidnapping, but since 2006, it is scored when the sentencing offense is unlawful imprisonment. Among the murder, assault, and robbery sentences, 5 to 8% were awarded 15 points. However, among CSC sentences, 15 points were awarded in nearly 18%.

Number of Victims (OV 9). OV 9 scores 100 points if more than one death occurred in a homicide case. This occurred in 3% of the murder sentences. Fewer points are scored depending on the number of victims who were placed in danger of injury or death, with 25 for 10 or more victims and 10 points for two to nine victims. No distinction is made between people who are direct subjects of the offense and responding law enforcement personnel.[27] Awards of 25 points are rare. However, the proportions of sentences that received 10 points were: murder – 28.7%, assault – 49.4%, CSC – 14.8%, and robbery – 39.8%.

Exploitation of Vulnerable Victim (OV 10). OV 10 awards 5 points if the defendant exploited an advantage in size or strength or if the victim was intoxicated, drugged, asleep, or unconscious. It awards 10 points if the defendant exploited a victim's physical or mental disability, youth or old age, a domestic relationship, or the defendant's authority status. It awards 15 points if "predatory conduct was involved." Points for OV 10 are far and away most common in CSC sentences; 61.1% received 10 points, and 23.6%

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received 15, even though many of the facts scored in OV 10 are elements of the offense described in 750.520(b)(1). In the other offense groups, the proportion of sentences that received zero points was nearly 79% for murder, 86% for assault, and 87% for robbery.

Criminal Sexual Penetrations (OV 11). OV 11 scores 25 points for one sexual penetration beyond the one for which the defendant is being sentenced and 50 points for two or more. It is designed to enhance punishment for multiple penetrations in the same incident *regardless of whether they are charged.* For instance, if the defendant is convicted of two counts of penetration against the same victim, 25 points can be scored in each sentencing based on the other conviction. If one of two counts is dismissed as part of a plea bargain, 25 points can be added to the one on which the defendant is sentenced. In the CSC group, 42.3% of sentences received zero points, 20.3% received 25 points, and 37.4% received 50 points. In our other three offense groups, at least 99.5% of the sentences received no points. Conduct that is scored under OV 11 cannot be scored under OV 12 and can be scored under OV 13 only in limited circumstances.

Contemporaneous Felonious Criminal Acts (OV 12). OV 12 enhances the sentence by scoring felonious conduct *not resulting in conviction* that occurred within 24 hours of the sentencing offense. It scores 25 points for three or more contemporaneous felonious acts against a person with five or 10 points for fewer or non-person crimes.

The same conduct cannot be scored in both OVs 11 and 12. However charges can be prosecuted in ways that maximize scoring under both OVs. Suppose, for instance, the defendant kidnaps the victim, strikes her, sexually penetrates her three times during a 24 hour period and resists arrest. If he pleads guilty to kidnapping, he can be given 50 points under OV 11 for two penetrations and 25 points under OV 12 for the third penetration, the assault and the resisting. The only type of criminal conduct that cannot be scored under OV 12 is the possession of a firearm during the commission of a felony (i.e., "felony firearm").

OV 12 reflects the policy of "real offense" sentencing by scoring conduct found to have occurred even though it was not used to support a conviction. It allows for the sentence to be increased based on uncharged conduct or charges dismissed in plea negotiations. If the defendant has not admitted the conduct, punishment can nonetheless be increased based on judicial fact-finding that does not require proof beyond a reasonable doubt or other procedural safeguards. *The Model Penal Code: Sentencing* would prohibit "real offense" sentencing.[28]

In each offense group, 4 to 6% of sentences received 25 points for OV 12. Roughly three-quarters of the sentences received zero points for OV 12 except in the CSC group, where the proportion of sentences with zero points was 82.0%. Presumably, multiple sexual penetrations either resulted in conviction or, if uncharged, were primarily scored under OV 11, where they would receive more points.

Continuing Pattern of Criminal Behavior (OV 13). Perhaps the most significant of the variables added by the statutory guidelines, OV 13 has multiple aims and scoring options. It is meant to further enhance the penalties for defendants with a pattern of sexual assaults on one or more children younger than 13, for defendants with substantial prior criminal conduct, and for gang-related behavior. The scoring is complex. All crimes within a five-year period, including the sentencing offense, must be counted *without regard to whether the offense resulted in a conviction* and may include juvenile adjudications. However, conduct scored for OVs 11 or 12 cannot also be scored for OV 13, unless it was gang-related.

OV 13 awards 50 points if the sentencing offense is CSC 1 and the other conduct was three or more penetrations of a child younger than 13. Twenty-five points are scored in two different situations—when the offense was part of a pattern of felonies related to inducing or maintaining gang membership, or when the offense was part of a pattern of three or more felony crimes against a person. So long as the sentencing judge finds the defendant committed multiple person crimes related to the sentencing offense, 25 points must be scored regardless of whether those crimes resulted in convictions. Other combinations of events can bring awards of 10 or five points. There is no prohibition against using the same convictions to score OV 13 and PRV 7. Thus:

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- PRV 7 addresses multiple counts resulting in conviction.
- OV 11 addresses multiple penetrations arising from the sentencing offense.
- OV 12 addresses multiple felonies committed within 24 hours of the sentencing offense that will not result in conviction.
- OV 13 addresses a pattern of criminal conduct committed over a period of years regardless of whether there was a conviction.

In the CSC group, 27.1% of the sentences scored 50 points; 26.6% scored 25 points; only 44.2% scored zero. Since 50 point awards are reserved for CSC sentences, virtually no sentences in the other offense groups received that many. In fact, from 63 to 80% of sentences in the other groups received zero points for OV 13. However, awards of 25 points were still substantial: murder – 13.3%, assault – 25.3%, and robbery – 27.8%.

Offender's Role (OV 14). OV 14 awards 10 points if the defendant was "a leader in a multiple offender situation." "Leader" is not defined. Judges are instructed to "consider the entire criminal transaction when determining the offender's role." The instructions specifically note that if the offense involved three or more people, more than one may be determined to have been a leader (i.e., of three co-defendants, two can be scored as leaders). In the CSC group, less than 2% of the sentences received 10 points. In the other groups, the proportion of 10-point awards ranged from 7.1% for assault to 11.5% for robbery.

Degree of Negligence Exhibited (OV 17). OV 17 is scored only if the offense involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. It awards five points if the defendant failed to show ordinary care and 10 points if they showed wanton or regardless disregard for life or property. It cannot be scored if points are assessed under OV 6 (intent to kill or injure). While the overwhelming majority of sentences in every offense group received no points for OV 17, 6.4% of the murder sentences and 4.4% of the assault sentences received 10.

Threat to security of Penal Institution or Court or Interference with Administration of Justice or Rendering of Emergency Services (OV 19). OV 19 scores 25 points for threatening the security of a penal institution or court, 15 points for using force or the threat of force against a person or property to interfere with the administration of justice, and 10 points for "otherwise" interfering or attempting to interfere with the administration of justice. The conduct scored usually occurs after the conviction offense was committed but not necessarily after charges were filed. For instance, 10 points may be awarded for resisting arrest and for acts meant to avoid arrest or cover up the crime, like giving the police a false name or disposing of a weapon. The conduct scored may also be unrelated to the conviction offense, such as attempting to smuggle contraband into a jail or prison. At the other extreme, the defendant can be awarded points under OV 19 even if the conduct is also the basis for the conviction offense (e.g., perjury[29] or smuggling drugs into a prison[30]) and will result in a consecutive sentence.[31]

Among all the offense groups, awards of 15 and 25 points are rare. However, awards of 10 points occurred in 3.3% of the CSC cases, 8.1% of the murder cases, 8.6% of the assault cases, and 10.2% of the robbery cases.

In sum, the offense variables were very carefully designed to enhance the sentences for second-degree murder, assault with intent to murder, and first-degree criminal sexual conduct (especially when the victim was a child) and, to a lesser degree, for armed robbery by every means imaginable. It is inherent in the structure of the guidelines that the most serious offenses fall on the grids that recommend the longest sentences precisely because of the nature of the conduct and the harm caused. However, multiple techniques are used to increase the punishment by pushing the case into cells with higher recommended minimum sentence ranges.

These techniques go well beyond awarding points for uncommon "extra" conduct, like torture, kidnapping, or causing permanent physical incapacity. Points are scored for facts that are actually required elements of the offense or that, as a practical matter, occur routinely in crimes against people.

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The OVs are not designed to punish just the conviction for which the defendant is being sentenced or even just the "real" offense (i.e., conduct in the same incident that supported charges which were reduced or dismissed in plea negotiations). Between OVs 11, 12, 13, and 19, along with the PRVs, the guidelines are designed to punish virtually every form of misconduct in which the defendant has engaged, whether prior to, concurrent with, or subsequent to the conviction offense, regardless of whether that misconduct resulted in a conviction or was anything like the current offense in nature or severity. The punishment is enhanced further if the conviction offense was gang-related. The same convictions can be scored as PRVs and OVs and, of course, as the basis of habitual offender enhancements. The guiding principle appears to be that once a person is convicted of a serious assaultive or sexual offense, no justification for increasing their incarceration is too much of a reach.

D. The Intersection of the PRVs and OVs on the M2 and A Grids

The recommended sentence is determined by where the PRV and OV levels intersect on the applicable grid. The manner in which the PRV and OV scores intersect demonstrates the greater impact of high-offense scores. We saw in Table 9 that, for every offense group, the greatest concentration of sentences was at PRV Levels C and D. We saw in Table 10 that, except for robberies, the greatest concentration of sentences was at the highest OV levels. Thus the OV scores appear to have more impact on pushing cases into the ranges that recommend longer minimum sentences.[32]

- For the assault group, by far the largest concentration of cases is in the C-VI (117 cases) and D-VI (174 cases) cells, where the recommended ranges begin at 135 and 171 months, respectively. Out of 36 cells on the A grid, these two account for nearly 27% of the assault sentences. Twenty cells have 20 or fewer sentences; nine of the 12 cells at OV Levels I and II have five or fewer sentences.
- For the CSC group, the largest number of cases is also in the C-VI cell. That is, despite their relatively modest prior records, these defendants also fall into higher guidelines ranges because of their offense scores. Nearly 40% of all the CSC sentences are concentrated in five cells: C-III, IV, V, and VI, and D-VI.
- For the murder group, which has only three offense levels, the largest number of cases falls in the C-III cell, with a recommended sentencing range that begins at 225 months. The second largest number of cases falls in the D-III cell, which begins at 270 months. Together, these two cells account for 27% of all the M2 sentences. Notably, there are 112 sentences in the A-III cell, with a recommended sentencing range that begins with 162 months. That is, they have zero prior record points but 100+ OV points. Conversely, there are only 90 sentences in all the OV Level I cells, regardless of PRV Level.
- By comparison, robbery cases, which tend to have lower OV scores, are concentrated in the C-II, C-III, D-II and D-III cells, where the ranges begin at 51, 81, and 108 months, respectively. Collectively these four cells account for 32% of the robbery sentences. Just 6.6% of the sentences fell into the C-V, C-VI, D-V, or D-VI cells.

For further details, see the distribution of sentences displayed in Figures 5a–5d in Chapter Eight.

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E. Broader Cell Ranges for Habitual Offenders

The enabling legislation for the statutory sentencing guidelines directed the Commission to:

> Establish separate sentence ranges for convictions under the habitual offender provisions in sections 10, 11, 12 and 13 of this chapter, which may include as an aggravating factor, among other relevant considerations, that the accused has engaged in a pattern of proven or admitted criminal behavior. [33]

The Commission initially chose to satisfy this charge by increasing the high end of the applicable guidelines range by 5, 10, or 15%, depending on whether the defendant was being sentenced as a second, third or fourth offender. However, at the eleventh hour, during the same meeting at which the Commission voted on the entire package of proposed guidelines, the following amendment was adopted:

> Proposal to Revisit the Treatment of Habitual Offenders and to Increase the Appropriate Cell Maxima from the Current 5%, 10%, and 15% for 2nd, 3rd, and 4th Habitual Offenders (respectively).[34]

The result of the amendment was to increase the maximum allowable minimum sentence by 25, 50, or 100% for second, third, and fourth offenders, respectively.

The decision to multiply habitual offender increases by a factor of five or more was apparently rooted in a consultant's report on a pilot project that was submitted to the Commission just six weeks earlier.[35] The project tested the impact of the proposed guidelines by having 30 judges from six counties and Recorder's Court score a sample of 344 cases.[36] Of this total, two sentences were on the M2 grid; 13 were on the A grid.[37] The sample included 31 cases of defendants being sentenced as habitual offenders—17 as habitual 2nd, five as habitual 3rd , and nine as habitual 4th. On what grids the habitual sentences fell is unclear.[38]

The sentences selected by the judges were compared to the high end of what would be the applicable guideline cell. Approximately 45% of the sentences (i.e., 14 cases) were below the cell maximum; 13% of the sentences (four cases) were at the cell maximum; 42% of the sentences (13 cases) were above the cell maximum. The extent to which the latter 13 sentences exceeded the cell maximum was:

- 1–25% – 2
- 25–50% – 1
- 51–75% – 1
- 76–100% – 3
- 101–200% – 5
- 201%+ – 1[39]

The level of habitual offender status these 13 cases involved is unclear.

The "Habitual Offender Analysis" concluded:

> As can be seen, when the judge goes above the pre-existing cell maximum, the sentence is oftentimes a 100% or more increase. Although the number of cases are quite small, it may make sense to look at the following habitual policy consideration:
>
> > Habitual 2nd – increase cell maximum by 25%
> > Habitual 3rd – increase cell maximum by 50%
> > Habitual 4th – increase cell maximum by 100%[40]

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In sum, the pilot project included only 31 habitual sentences, 58% of which did not exceed the high end of the guidelines cell. Why it would "make sense" to base such a consequential change in the guidelines ranges for habitual offender sentences on the remaining 13 sentences was not explained.

Using habitual offender status as an excuse to expand the sentencing guidelines range raises multiple troubling issues. Criminal history has always been an important consideration in sentencing. Long before that consideration was structured by guidelines scoring systems, individual judges gave a defendant's prior record whatever weight the judge felt it deserved in setting the *minimum* sentence. In Michigan, that was limited only by the *Tanner* rule, which says the minimum cannot exceed two-thirds of the maximum.

The habitual offender statutes allow judges to increase the *maximum* sentence beyond what is set by the penal code for the conviction offense. If the conviction offense already carries a penalty of life or any term, the habitual offender statute cannot make the potential *maximum* sentence any harsher. However, by leveraging the defendant's habitual offender status to raise the guidelines recommendation for the *minimum* sentence, defendants convicted of life-maximum offenses may also have their prison terms lengthened by the prosecutor's decision to pursue habitual offender charges.

There is no limit on the age, nature, or severity of the prior felonies that can be used to support a habitual offender enhancement. A 40-year-old defendant convicted of larceny from a person, which has a 10-year maximum, who had three non-violent offenses at age 19, such as breaking and entering a store, receiving stolen property, and unlawfully driving away a motor vehicle, could face a sentence up to life.

Under the Michigan Supreme Court's decision in *People v. Gardner*,[41] the prior convictions do not even have to arise from separate criminal incidents. Our hypothetical defendant could have helped a co-defendant break into a liquor store, accepted his share of the stolen goods, and driven off in a vehicle stolen by the co-defendant, then been convicted of all three charges when he refused to negotiate a plea. To whatever extent the maximum is raised, under the *Tanner* two-thirds rule, the minimum can be raised as well.

The defendant's criminal history is a key component of the sentencing guidelines. Identifying a recommended minimum sentence depends on the intersection of the prior record level and the offense level. The higher the prior record score, the higher the guidelines range. Why, then, should that range be expanded based on the very same consideration—the defendant's criminal history?

This use of the habitual offender enhancement does not just double-count the defendant's prior record in a general way. It has multiple specific consequences. Most apparent, it allows for such enormously long minimum sentences and such enormously wide guidelines ranges that it effectively negates any constraints on judicial discretion in sentencing people charged as habitual offenders.

Take, for instance, a defendant we will call Dennis, who was convicted of second-degree murder but whose only prior criminal activity was breaking into stores at night, a high severity felony.

- With one prior conviction and an offense severity level of III, the recommended minimum sentence is 270–450 months (22.5–37.5 years). But if Dennis is sentenced as a second offender, the range becomes 270–562 months (22.5–46.8 years).

  Thus for someone with a single prior non-violent conviction an approved minimum sentence can become nearly 50 years and the range within which the judge can select a minimum sentence may be more than 24 years wide.
- If Dennis had two prior convictions but a lower offense severity score that put him in the E-II cell, his initial sentencing range would still be 270–450 months. But if he is sentenced as a third offender the range becomes 270–675 months (22.5–56.25 years).
- If Dennis had three prior convictions for breaking and entering but an even lower offense severity score that put him in the F-I cell, his initial sentencing range would again be 270–450 months. But if he is sentenced as a fourth offender, the range becomes 270–900 months (22.5–75 years).

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Equally important:

- The habitual enhancement and the PRV score can count exactly the same prior crimes. That is, the same priors can put the defendant into a higher range in the first place, and then be used to raise the high end of that range.
- Conversely, the habitual enhancement can be used to increase a minimum sentence based on priors that the sentencing guidelines weigh less heavily or exclude altogether. While the guidelines take a more refined approach, allotting points based on the severity of the prior offense and awarding no points for stale priors under the "10-year gap rule," increasing the recommended minimum sentence based on the habitual enhancement circumvents that approach by allowing any old prior conviction to push up the minimum sentence.
- Since filing habitual offender enhancements lies solely in the prosecutor's discretion, widely divergent practices across counties adds to the disparities in sentencing the guidelines were meant to reduce.

F. Bringing It All Together: Regression Analyses

The regression analyses found in Appendix B allow us to examine how the independent variables of offense type, PRV level, OV level, and habitual status contribute to sentence length.[42] In the full model that combines the four offense types, which offense was committed explains more than 25% of the differences observed in sentence length. Offense is followed by the two other variables we would expect to have substantial explanatory power, the offense severity (OV level) and prior criminal history (PRV level). These elements explain an additional 19.6%, and 23.1%, respectively. Habitual status contributes only 2.6% of the variance explained, largely because the prior convictions required for habitual status are already counted in the prior record level.[43] Together, these four variables explain more than 70% of the variance in sentence length, with about 30% left unexplained by guidelines factors. These results are similar to those of NCSC, which found that the guidelines elements account for 67% of the variation in sentence length, and that conviction offense had the greatest impact. The extent to which variance is explained by departures from the guidelines recommendations will be explored in Chapter Seven.

We can also use the regression results to estimate how the length of the sentence would change as individual guidelines factors change.

- In the full model, the increase from PRV Level A to Level C was associated with a 73% increase in sentence length, and an increase from A to F was found to have a 228% increase.
- Similarly, an increase from OV Level I to Level III was associated with a 78% increase in sentence length, and an increase from I to VI was associated with an increase of 226%.
- When all the variables were held constant as they are in the regression analyses, the increase in sentence length from a non-habitual to a second, third, and fourth habitual was 10%, 19%, and 25%, respectively.

Breaking the full model into separate analyses based on the offense committed allows us to compare the relative importance of the guidelines factors to see if there are differences among offenses. As we have found previously, examining the life-maximum sentences together can mask important variations. Since each of these regressions is focused on a specific offense, the first variable included is the OV level, which is found to have differing amounts of explanation across the offenses.

- Offense severity explains a minimum of only 5.4% of the variance in sentence length for second-degree murder offenses and a maximum of 29.3% in armed robberies.
- Prior record explains 19% for second-degree murder to 36% for armed robberies of the variance in sentence length.

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- These results suggest at least two things. First, murder is so inherently different than other crimes that the nature of the offense overwhelms the importance of other guidelines factors. Second, because murder is different it is on its own grid with higher recommended sentences that itself explains much of the variance in sentence length.
- Like the full model habitual status does not explain a large amount of the difference in sentence lengths, only 5% or less.

When we examine the amount of variance the guidelines factors explain for each offense type, the results are quite different than they were for the full model. For murder sentences, the four sentencing guidelines factors explain only 29%. For assault with intent, it is 53%, for CSC it is 60%; and for armed robbery, they explain almost 68% of the variance in sentence length.

The estimation models separated by offense type also show different patterns for the impact of OV and PRV level and habitual status. For a second-degree murder sentence, the increase from a PRV Level A to a PRV Level C was associated with a 32% increase in sentence length—less than half of the impact observed in the full model. In contrast, the same change in PRV level brought a 91% increase for armed robbery sentences. Overall, PRV level had the largest impact on armed robbery sentences, then CSC, assault, and the least on murder. There are also differences in the impact of OV level on sentence length depending on the sentencing offense.

OV level has the most impact on sentences for CSC, with increases from OV Level I to III resulting in a 163% increase, and from Level I to VI in a 277% increase. Sentences for murder are less altered by changes in OV Level, with the increase from Level I to II resulting in an increase of 22%, and to level III in 49%. The impact of habitual status is also the greatest for CSC offenses, ranging from an increase of 17% for a second habitual offender, 29% for third offender, and 34% for fourth.

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CHAPTER SEVEN. HOW THE GUIDELINES PROMOTE DISPARITY

The offense determines the sentencing grid on which the case belongs. The intersection of the points awarded for the prior record and offense variables determines which cell on that grid contains the range of months within which the defendant's minimum sentence should be chosen. Thus, the PRV and OV scores set the parameters for the recommended sentence. However, these parameters provide only a starting point for determining the actual sentence.

A. How Sentences are Distributed Within, Above and Below the Applicable Range

Recall that the legislative mandate was to "Reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences." Yet the legislative guidelines, like their judicial predecessor, were deliberately designed to permit similarly situated people to receive very different punishments. These disparities arise in two ways.

First, the ranges are very broad. Judges are free to select a sentence within these parameters for any reasons they choose. The Sentencing Commission said it sought "to create a balance between unfettered judicial discretion and confining discretion too stringently and thereby destroying the goal of individualized sentences."[1] The M2 and A-D grids are designed so the low and high ends of the cells represent a variance of 25%, plus or minus, from the cell's midpoint.[2] Because the sentences at the midpoint of the cells on the M2 and A grids are so long, this variance creates extremely wide ranges.

Take, for instance, someone whose offense is on the A grid, whose prior record Level is D, whose offense variable Level is V, and who is not being sentenced as a habitual offender. The cell range is 135–225 months. That is 90 months or 7.5 years. While the midpoint of the range is 180 months, or 15 years, two people with identical PRV and OV scores could get sentences as different as 11.25 and 18.75 years and still be within the guidelines recommendation.

On the M2 grid, even people who have the lowest possible scores on the both the offense and prior record variables could, without a departure, receive minimum sentences that differ by five years. At the other extreme, in the F-III cell of the M2 grid, the distance between the low and high ends of the recommended range is 20 years. As Sentencing Commission Chair Judge Paul Maloney observed in reference to the judicial guidelines: "Frankly, I find myself at some point wondering whether the guideline cells, with that breadth of ranges, are providing much guidance at all as to what sentence I ought to impose."[3]

Second, even with such broad choices available, judges have always been permitted to depart from the ranges by setting sentences that are below the low end (the minimum-minimum) or above the high end (the maximum-minimum). In 1994, the overall compliance rate with the advisory second judicial guidelines was 88%.[4] Compliance with the legislative guidelines was mandatory until 2015, but departures were permitted so long as an appellate court agreed they were supported by "substantial and compelling reasons."

The Sentencing Commission, which differentiated only by grid, not by offense, anticipated that, for the M2 grid, the rate of upward departures would be 12% and downward departures would be 15%, leaving a compliance rate of 73%. For the A grid, the Commission anticipated a compliance rate of 80%, with 5% upward departures and 15% downward departures.[5]

This projection proved to be far too optimistic. Compliance rates vary greatly by guidelines grid. The large majority of sentences fall onto grids where the ranges are narrower because the statutory maximum sentences are lower. When the maximum sentence is five or 10 years, and the minimum cannot exceed two-thirds of the maximum, there is simply a lot less room to move. The National Center for State Courts (NCSC) found that, in 2004, compliance rates for grids D–H were between 94 and 99%; for the C grid, compliance was nearly 82%.

However, for the M2, A, and B grids, NCSC found compliance rates between 55 and 58%, with downward departures being far more frequent than upward departures. The authors concluded: "Given the

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wide bandwidth, this level of downward departure sends a message that Michigan judges believe that the recommended sentences are too high."[6]

Table 11 shows that our findings on the life-maximum sentences were similar to those of NCSC, with compliance rates for non-habitual sentences ranging from 51.0 to 63.2%. Table 11 also shows how departures in non-habitual sentences under the legislative guidelines compared to departures under the predecessor judicial guidelines. Downward departures increased for every offense, more than doubling for murder sentences and nearly quadrupling for robbery sentences. Upward departures also increased, albeit much more modestly. The combined result was a decline in compliance rates that ranged from 10 points for CSC sentences to 31 points for armed robbery sentences.

Table 11. Percentage of Departures under 2nd Judicial and Legislative Guidelines (Non-Habitual sentences)[7]

Crime	Downward Departure		Within Range		Upward Departure	
	Judicial 2nd	Statutory	Judicial 2nd	Statutory	Judicial 2nd	Statutory
Murder, 2nd	12.9	32.3	78.1	56.0	9.0	11.7
Assault	23.9	38.6	70.7	51.0	5.4	10.7
CSC, 1st	19.2	23.3	73.2	63.2	7.5	13.6
Robbery	10.5	40.3	85.4	54.3	4.4	5.4

Ironically, the mandatory legislative guidelines actually resulted in much less compliance than the advisory judicial guidelines, which were designed to reflect actual sentencing practices. The Sentencing Commission chose a policy of dramatically increasing sentences for life-maximum offenses. The judges who were expected to enforce that policy often chose not to follow it.

1. Non-Habitual Sentences

Table 12 shows us that, overall, 4,008 of the 8,986 non-habitual sentences, or 44.6%, were either upward or downward departures; thus, only 55.4% followed the guidelines recommendations. Table 12 also allows us to see how many sentences were right at the lower and upper margins of the guidelines ranges, that is, at either the "minimum-minimum" or the "maximum-minimum." Because they were required to state "substantial and compelling reasons" for departing from the recommended ranges, some judges may have chosen to go only as far as selecting a sentence at the limits of the ranges within which they still had complete discretion. Given the breadth of the guidelines ranges, adding the cases at the margins to the departures gives a strong sense of how many sentences within each offense group were relatively long and relatively short.

- For murder, 38.3% of the sentences were at the low end and 19.7% were at the high end.
- For assault, 47.6% were at the low end and 16.7% were at the high end.
- For CSC, 33.4% were at the low end and 25.0% were at the high end.
- For robbery, 59.0% were at the low end and 8.5% were at the high end.

All told, for the life-maximum offenses, only about a third are sentenced somewhere along the continuum of sentences within the recommended ranges, as opposed to at, below, or above the margins.

A closer look at the sentences between the extremes shows how often judges go straight to the middle of the applicable range as opposed to making a deliberate decision to go toward the low or high end. Overall, just 6.3% of the non-habitual sentences fell directly at the midpoints of their respective cell ranges. From half to three-quarters of the non-habitual sentences in every offense group fell somewhere below the midpoint:

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- Murder – 56.9%
- Assault – 63.6%
- CSC – 52.7%
- Robbery – 77.9%[8]

Because the large volume of robberies so heavily impacts the total, overall more than two-thirds of the life-maximum sentences were below the midpoint of the applicable guidelines cells and more than one-third were below the minimum-minimum. This finding confirms the NCSC authors' conclusion that Michigan judges see the guidelines recommendations as being too high.

Sentencing judges clearly treat the offenses on the A grid differently from each other. Armed robbery had the greatest proportion of downward departures and the smallest number of upward departures. Conversely, sex offenses had a far lower rate of downward departures and more upward departures. To the extent that judges think the guidelines recommendations are too high, they feel less so with regard to people sentenced for sex offenses.

Table 12. Percentages of Minimum Sentences across Guidelines Ranges, by Habitual Level, 2003–2012

	N	Median (in mos.)	Below Min-Min	At Min-Min	Below Midpoint	At Midpoint	Above Midpoint	At Max-Min	Above Max-Min
M2									
None	1,218	240	32.3	6.0	18.6	11.4	12.2	8.0	11.7
2nd	73	360	17.8	5.5	12.3	9.6	13.7	6.8	34.2
3rd	50	368.5	19.6	9.8	21.6	2.0	11.8	2.0	33.3
4th	58	540	15.8	5.3	14.0	1.8	8.8	5.3	49.1
AWIM									
None	884	132	38.6	9.0	16.0	5.4	14.3	6.0	10.7
2nd	67	240	13.4	14.9	13.4	1.5	9.0	0.0	47.8
3rd	53	300	1.9	5.7	17.0	15.1	5.7	1.9	52.8
4th	85	300	12.9	9.4	10.6	7.1	7.1	1.2	51.8
CSC									
None	1,225	126	23.3	10.1	19.3	8.1	14.3	11.4	13.6
2nd	118	232.5	6.0	8.5	9.4	4.3	18.8	5.1	47.9
3rd	64	336	0.0	4.6	6.2	4.6	20.0	1.5	63.1
4th	103	300	5.8	1.7	12.6	4.9	11.7	1.0	53.4
RA									
None	5,659	72	40.3	18.7	18.9	5.0	8.6	3.1	5.4
2nd	408	126	15.1	22.2	21.2	5.6	13.9	2.9	19.0
3rd	288	165	16.5	12.7	18.7	4.6	14.4	2.5	30.6
4th	531	180	12.0	17.1	15.6	6.4	11.8	2.3	34.9
TOTALS									
None	8,986	96	36.7	14.9	18.6	6.3	10.4	5.2	7.9
2nd	666	169.5	13.7	17.3	17.3	5.4	14.4	3.5	28.5
3rd	455	216	13.0	10.3	17.1	5.3	13.6	2.2	38.5
4th	777	224	11.5	14.5	14.5	6.0	11.1	2.2	40.2
OMNI Data, All offense types significant at $p < .001$									

Table 12 shows how sentences were distributed across the range of choices that judges can make once the applicable cell has been identified. But what do these choices mean as a practical matter? How long are the sentences that are above and below the extremes? How long are those within the guidelines range but not right at either end?

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Table 13 answers these questions. It looks at the single most commonly used cell for each offense type, then displays the median length of the sentences that fell at each point on the range. So, for example, the cell in which murder sentences most commonly fall is C-III, which has a min-min of 225 months and a max-min of 375 months. For the 58 sentences imposed with downward departures, the median sentence was 180 months or 15 years. For the 14 sentences imposed with upward departures, the median sentence was 480 months or 40 years. Thus, for the defendant the choice between an upward and a downward departure meant 25 years of incarceration. Indeed the difference between the median sentences at and above the max-min was nearly nine years.

For assault sentences in the D-VI cell, the difference between the median downward departure and the median upward departure was 19.75 years. For CSC sentences in the C-VI cell, the difference was 17 years. Because the most common cell for robbery sentences was C-II (i.e., at much a lower OV level than the other offenses), the difference between the median downward departure and the median upward departure was six years.

Table 13. Median Sentence by Place on the Range for Most Common Cells per Offense Non-Habitual, 2003–2012 (Number of sentences in parentheses)

	Below Min-Min	At Min-Min	Below Mid-point	At Mid-point	Above Mid-point	At Max-Min	Above Max-Min
Murder/Cell C-III							
Median (197)	180 (58)	225 (6)	240 (50)	300 (25)	360 (35)	375 (9)	480 (14)
Assault/Cell D-VI							
Median (139)	120 (46)	171 (5)	196 (28)	228 (4)	240 (29)	285 (13)	357 (14)
CSC/Cell C-VI							
Median (169)	96 (26)	135 (9)	150 (37)	180 (31)	216 (23)	225 (18)	300 (25)
Robbery/Cell C-II							
Median (669)	36 (231)	51 (167)	60 (134)	68 (8)	78 (85)	85 (9)	108 (35)
OMNI Data, All offense types significant at $p < .001$							

The relationship of place on the range to disparity in sentencing is amplified when we examine redundant cells (i.e., different cells with the same recommended ranges). Consider the four cells on the A grid [C-VI, D-V, E-IV, F-III] with a range of 135–225 months (11.25–18.75 years) and midpoint of 180 months (15 years). From 2003–2012, 223 people convicted of sex offenses who were not charged as habitual offenders fell into these cells. Of these:

- 43 received minimums below 11.25 years, the lowest being 3.5 years
- 12 were sentenced to exactly 11.25 years,
- 46 received sentences above 11.25 and below 15 years,
- 39 were sentenced right at the midpoint to 15 years,
- 28 received sentences greater than 15 but less than 18.75 years,
- 21 were sentenced to exactly 18.75 years,
- 34 received minimums above 18.75 years, the highest being 65 years

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Even assuming the cases at the greatest extremes were unique, this distribution, which is more or less replicated in every cell for every offense, shows that large disparities in the sentences imposed on people with similar prior records and similar offense severity are routine.

2. Habitual Sentences

Returning to Table 12, we also find the minimum terms imposed on people sentenced as habitual offenders. This allows us to compare the distribution of habitual sentences across guidelines ranges with non-habitual sentences and among habitual sentences depending on the defendant's status as a second, third, or fourth offender. In particular, we can see to what extent judges actually use their authority to exceed the high end of the guidelines ranges based on the defendant's habitual offender status. The major takeaways are the following:

- Not surprisingly, at 12.6%, the rate of downward departures was far lower for habitual than for non-habitual sentences. Depending on the offense group and the habitual level, the rate of downward departures was two-three times lower for habituals. The differences were even more extreme for the CSC group.
- What *is* surprising is how many downward departures there were among habitual sentences. In the murder group, more than 15% of the habitual sentences were below the low end of the guidelines range. In the robbery group, it was more than 12%. Except for those sentenced as third habitual offenders it was roughly 13% for assault sentences. Only for the CSC group were downward departures for habitual sentences at 6% or below.

  Moreover, when we look at how many habitual sentences were below the midpoint, we find:

  Habitual second – 48.3%
  Habitual third – 40.4%
  Habitual fourth – 40.5%

That is, despite the designation of habitual offender status—even fourth habitual status—in a substantial proportion of cases judges chose to impose sentences at the lower end of the applicable guidelines range. Indeed, that designation did not prevent downward departures in more than 10% of habitual sentences at every level.

- Again, not surprisingly, the rate of sentences above the high end of the standard guidelines range was from three and a half to six times higher for habitual than for non-habitual sentences, depending on the offense group and habitual level. Nonetheless, the overall percentage of sentences above the maximum-minimum was just:

  Habitual second – 28.5%
  Habitual third – 38.5%
  Habitual fourth – 40.2%

- Here, too, the surprise is that things are not more extreme. Even with the large difference from non-habitual sentences, with just a few exceptions, only about one-third to one-half of the habitual sentences for every offense at every habitual level exceeded the standard maximum-minimum. Specifically the percentage of each offense group was:

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Murder – 38.7%
Assault – 50.7%
CSC – 53.5%
Robbery – 28.2%

- The differences between habitual and non-habitual sentences at different points along the guidelines range are more varied and much less extreme than they are at the far ends.

It is quite clear that regardless of offense or habitual status, judges do not feel compelled to exercise their authority to impose on habitual offenders minimum sentences that are 25, 50, or 100% higher than the maximum-minimum applicable to defendants who were not habitualized. In fact, of 1,898 enhanced sentences that were at any habitual level, only 35.7% (677 sentences) exceeded the basic max-min. Moreover, when we examine how far above the max-min these 677 sentences were, we find the increases were not typically as high as they could have been.

We took all of the enhanced sentences that exceeded the max-min and determined the percentage by which each sentence was greater. For each offense group and each habitual level, we rank ordered the extent of the excess, which allowed us to find the median percentage above the basic max-min. Looking at each offense group regardless of habitual offender level, the percentages above the max-mins were:

Murder – 28.0%
Assault – 26.3%
CSC – 31.4%
Robbery – 26.3%

That is, despite the allowable increases of 25, 50, and 100%, the median extent of the increases hovered close to 28%.

When we look at each level of habitual status regardless of offense group, the median extent above the basic max-mins was:

Habitual second – 23.3%
Habitual third – 33.3%
Habitual fourth – 33.3%

Thus, from the perspective of both offense type and habitual level, the median extent of the increases was closer to 25% than to the 50% allowed for habitual third or the 100% allowed for habitual fourth.

Of course, by definition, medians tell us only what is in the middle, not what is at the extremes. Habitual offender sentences that did exceed the basic max-min ran the gamut from slightly above to those that departed well above even the 100% increase in the recommended range that the guidelines allow for fourth offenders. Certainly, the availability of increased ranges for defendants sentenced as habitual offenders makes a great deal of difference in individual cases and pushes sentences over the high end of the normal range more than a third of the time. However, it is apparent that judges exercise a great deal of individualized discretion. Perhaps they feel less need to utilize their expanded authority because the base ranges are already broad enough to provide them with abundant discretion, and the guidelines scoring provides ample consideration of the defendant's prior record.

Finally, we turn back for a moment to the differences among sentences at different habitual levels. We saw in Chapter Five, Figure 4, that the biggest impact on the median sentence occurs when the sentence goes from being non-habitual to habitual second. The changes thereafter, from habitual second to habitual third and from habitual third to habitual fourth, are generally much less substantial. Table 12 also indicates that the differences between each habitual level are often not great and that there are generally not clear progressions.

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Take, murder, for example. The differences in the proportion of habitual sentences that are below the min-min is small, and the habitual third group has the largest share. At the other extreme, the habitual second and third groups have nearly identical proportions of sentences above the basic max-min with a big increase between habitual third and fourth. By comparison, the CSC group has no habitual third sentences below the min-min but the largest share by far of sentences above the max-min. Overall, there is little difference among the habitual levels in terms of proportion of sentences below the min-min but a substantial difference between habitual second and habitual third among sentences above the max-min.

3. Departures in the Regression Analyses

In the full model, the addition of departures below and above the guidelines range explains an additional 18% of the variance in sentence length, bringing the cumulative total explained to 88.8%. Considering that the sentencing guidelines factors have already established very broad recommended ranges, having departures—which are essentially a rejection of those ranges—explain almost one-fifth of the variance is concerning.

While the inclusion of departures was an important factor in the overall model, the inclusion of departures when examining the offenses separately displays important differences. Fully half of the variance in M2 sentences can be explained by departures, compared to 30% of assault, 26% of CSC sentences, and less than 20% of the variance in armed robbery sentences.

Despite the range of explanatory power for variation in sentence length, the actual impact of departures on sentence length is fairly consistent. In the full model, if a sentence were a downward departure instead of being within the guidelines range, we estimate a 44% decrease in sentence length, and a 76% increase if the sentence were an upward departure. Notably, while NSCS found a greater estimated increase in sentence length for upward departures, their downward departure estimated decrease of 48.5% was practically identical.

In the offense-specific models, we see less variation in impact than we observed with other variables. The impact of a downward departure ranged from a 46% decrease for CSC to a 43% decrease for robbery. The impact of upward departures is a bit more varied, ranging from a 59% increase for murder sentences to a 82% increase for CSC sentences.

B. The Impact of PRVs and OVs on Where Within Ranges Sentences Fall

So what, apart from habitual status, determines where on the broad continuum of possibilities any particular sentence will fall? Several possible factors may influence how judges exercise the very broad discretion the guidelines afford them in life-maximum cases.

- Judges may give more or less weight to the individual and offense characteristics identified by the PRVs and OVs.
- Sentences may be affected by systemic factors such as the county of conviction or whether the defendant pleaded guilty as opposed to having a jury trial.
- Sentences may be influenced by identifying characteristics of the defendant, such as age, race, or sex, or by individualized information about the defendant's employment status, family history, mental health, or substance abuse.
- Individual judges may have personal predilections about what sentences are appropriate for particular crimes.

We will first explore the possibility that PRV and OV scores systematically explain how judges choose specific sentences within or outside the recommended range. We will examine the influence of extra-guidelines factors in subsequent chapters.

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1. PRV Levels

If judges' decisions about sentences are heavily influenced by the defendants' criminal histories, we would expect to see lower PRV levels yield more downward departures and higher PRV levels yield more upward departures; however, the data for the non-habitual sentences show that this expectation is not accurate.

- For the murder group, 30% of those who received upward departures scored at the lowest PRV Level, A. Only 4% scored at the highest level, F. Conversely, a quarter of those who received downward departures were at the two lowest PRV levels, A and B; another quarter were at the two highest levels, E and F.
- Upward departures among assault sentences have 34% scoring at PRV Level A and just 9.5% scoring at the highest level, F. Downward departures had 25.5% scoring at the two highest PRV levels, E and F.
- Among CSC defendants, a fifth of those who received upward departures scored at PRV Level A and fewer than 5% scored at Level F. Nearly one-fifth of those who received downward departures were at Level A while another one-fifth were at the two highest levels, E and F, combined.
- For the armed robbery group, nearly 40% of those with upward departures scored at PRV Level A while only 5% scored at Level F. Among those who received downward departures, 10% scored at Level A and 10% scored at Level F.

In sum, in every offense group, people with high prior record scores received downward departures, and people with low prior record scores received upward departures. Thus, it appears that PRV level does not explain why judges choose to depart from the guidelines recommendation in either direction for any offense type. Rather, the extent to which sentences at each PRV level fall below, within, and above the recommended guidelines range tends simply to track, albeit imperfectly, the frequency with which sentences at each PRV level appear in each offense type overall.

2. OV Levels

If judges' decisions about sentences are heavily influenced by the details of the offense, we would expect to see lower OV levels yield more downward departures and higher OV levels yield more upward departures. However, the data indicate that this expectation is also not accurate. Except for the robbery group, the single largest share of both downward and upward departures are sentences that score at the highest OV levels.

- For the murder group, 57% of the downward departures compared to 44% of the upward departures were sentences scored at OV Level III, the highest on the M2 grid. Conversely, 18% of the upward departures were at OV Level I.
- Among assault sentences, 40% of the downward departures and 45% of the upward departures had OV scores at Level VI, the highest level on the A grid; however, 15% of the upward departures scored at OV Level I.
- In the CSC group, 34% of the downward departures and 30% of the upward departures scored at OV Level VI; however nearly a quarter of the upward departures were sentences that scored at the two lowest OV levels, I and II, combined.
- The robbery group shows the opposite pattern. Over 60% of the upward departures are sentences with low OV scores as are 43% of the downward departures. High OV levels account for only 12% of the downward departures and 9% of the upward departures. As we

saw in Table 10, robbery sentences are far more likely overall to have low OV scores than is the case in the other offense groups.

As with PRV levels, the frequency with which sentences at each OV level appear at each point in the sentencing range tends to reflect the frequency with which sentences at each OV level appear in each offense group overall. Having a low OV score does not increase the likelihood of a downward departure nor does having a high OV score increase the likelihood of an upward departure. On the contrary, except for the robbery group, well over half the downward departures occurred in sentences with high OV levels. In fact, for every offense type, upward departures have a much greater proportion of sentences with low OV scores than do downward departures.

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CHAPTER EIGHT. HOW THE ACTUAL MINIMUM SENTENCES RELATE TO THE RECOMMENDED RANGES

So where does this complex process of grid selection, prior record, and offense variable scoring, judicial choices made within guidelines ranges, and upward and downward departures lead? In the 8,986 non-habitual sentences imposed for our four life-maximum offenses between 2003 and 2012, it led to the distribution of median sentences displayed in Figures 5a–5d. Each figure is a guidelines grid that has the median sentence for every cell on the grid written above the recommended minimum-minimum. The number of sentences that fell into that cell is written in parentheses below the recommended min-min. We can see the impact of the guidelines on proportionality and disparity by examining a half-dozen characteristics common to all the grids.

Figure 5a. Sentencing Grid for Class M2 —MCL 777.61
Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c)
Second-Degree Murder

OV Level	PRV Level A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		Offender Status
I 0-49 Points	168	150	216	240	174	270	240	300/L	252	375/L	215	450/L	
	90	187	144	300	162	337	180	375/L	225	468/L	270	562/L	HO2
		225		360		405		450/L		562/L		675/L	HO3
	(14)	300	(13)	480	(24)	540	(21)	600/L	(8)	750/L	(2)	900/L	HO4†
II 50-99 Points	180	240	216	270	240	300/L	240	375/L	240	450/L	315	525/L	
	144	300	162	337	180	375/L	225	468/L	270	562/L	315	656/L	HO2
		360		405		450/L		562/L		675/L		787/L	HO3
	(115)	480	(69)	540	(133)	600/L	(102)	750/L	(39)	900/L	(27)	1050/L	HO4†
III 100+ Points	216	270/L	216	300/L	264	375/L	300	450/L	330	525/L	306	600/L	
	162	337/L	180	375/L	225	468/L	270	562/L	315	656/L	365	750/L	HO2
		405/L		450/L		562/L		675/L		787/L		900/L	HO3
	(112)	540/L	(81)	600/L	(197)	750/L	(147)	900/L	(64)	1050/L	(50)	1200/L	HO4†

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Figure 5b. Sentencing Grid for Class A Offenses—MCL 777.62
Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c)
Assault with Intent to Murder

OV Level	PRV Level A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		Offender Status
I 0-19 Points	180	35	29	45	60	70	–	85	150	135	–	180	
	21	43	27	56	42	87	51	106	81	168	108	225	HO2
		52		67		105		127		202		270	HO3
	(14)	70	(1)	90	(1)	140	–	170	(1)	270	–	360	HO4†
II 20-39 Points	27	45	22	70	53	85	96	135	63	180	156	210	
	27	56	42	87	51	106	81	168	108	225	126	262	HO2
		67		105		127		202		270		315	HO3
	(5)	90	(1)	140	(6)	170	(7)	270	(2)	360	(5)	420	HO4†
III 40-59 Points	48	70	66	85	69	135	108	180	126	210	200	225	
	42	87	51	106	81	168	108	225	126	262	135	281	HO2
		105		127		202		270		315		337	HO3
	(19)	140	(13)	170	(18)	270	(21)	360	(7)	420	(5)	450	HO4†
IV 60-79 Points	67	85	81	135	96	180	120	210	120	225	120	285	
	51	106	81	168	108	225	126	262	135	281	171	356	HO2
		127		202		270		315		337		427	HO3
	(34)	170	(13)	270	(59)	360	(40)	420	(29)	450	(29)	570	HO4†
V 80-99 Points	84	135	108	180	126	210	135	225	198	285	160	375/L	
	81	168	108	225	126	262	135	281	171	356	225	468/L	HO2
		202		270		315		337		427		562/L	HO3
	(31)	270	(25)	360	(46)	420	(45)	450	(16)	570	(17)	750/L	HO4†
VI 100+ Points	120	180	126	210	180	225	210	285	286	375/L	267	450/L	
	108	225	126	262	135	281	171	356	225	468/L	270	562/L	HO2
		270		315		337		427		562/L		675/L	HO3
	(29)	360	(19)	420	(113)	450	(139)	570	(50)	750/L	(44)	900/L	HO4†

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Figure 5c. Sentencing Grid for Class A Offenses—MCL 777.62

Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c)

Criminal Sexual Conduct, First-Degree

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-19 Points	60 21 (13)	35 43 52 70	31 27 (4)	45 56 67 90	45 42 (8)	70 87 105 140	61.5 51 (2)	85 106 127 170	60 81 (2)	135 168 202 270	168 108 (2)	180 225 270 360	 HO2 HO3 HO4†
II 20-39 Points	36 27 (36)	45 56 67 90	45 42 (23)	70 87 105 140	61 51 (58)	85 106 127 170	96 81 (21)	135 168 202 270	150 108 (11)	180 225 270 360	156 126 (7)	210 262 315 420	 HO2 HO3 HO4†
III 40-59 Points	49.5 42 (46)	70 87 105 140	60 51 (15)	85 106 127 170	108 81 (92)	135 168 202 270	120 108 (25)	180 225 270 360	168 126 (21)	210 262 315 420	138 135 (6)	225 281 337 450	 HO2 HO3 HO4†
IV 60-79 Points	60 51 (60)	85 106 127 170	90 81 (23)	135 168 202 270	132 108 (114)	180 225 270 360	174 126 (44)	210 262 315 420	180 135 (20)	225 281 337 450	196 171 (12)	285 356 427 570	 HO2 HO3 HO4†
V 80-99 Points	96 81 (41)	135 168 202 270	139.5 108 (14)	180 225 270 360	156 126 (93)	210 262 315 420	166.5 135 (28)	225 281 337 450	169.5 171 (14)	285 356 427 570	168 225 (12)	375/L 468/L 562/L 750/L	 HO2 HO3 HO4†
VI 100+ Points	120 108 (49)	180 225 270 360	180 126 (10)	210 262 315 420	180 135 (169)	225 281 337 450	186 171 (78)	285 356 427 570	228 225 (28)	375/L 468/L 562/L 750/L	294 270 (24)	450/L 562/L 675/L 900/L	 HO2 HO3 HO4†

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Figure 5d. Sentencing Grid for Class A Offenses—MCL 777.62
Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c)
Armed Robbery

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-19 Points	24 21 (151)	35 43 52 70	27.5 27 (92)	45 56 67 90	42 42 (165)	70 87 105 140	51 51 (138)	85 106 127 170	81 81 (72)	135 168 202 270	108 108 (55)	180 225 270 360	 HO2 HO3 HO4†
II 20-39 Points	27 27 (417)	45 56 67 90	42 42 (270)	70 87 105 140	51 51 (669)	85 106 127 170	79.5 81 (396)	135 168 202 270	108 108 (160)	180 225 270 360	120 126 (138)	210 262 315 420	 HO2 HO3 HO4†
III 40-59 Points	42 42 (188)	70 87 105 140	51 51 (157)	85 106 127 170	81 81 (506)	135 168 202 270	108 108 (419)	180 225 270 360	126 126 (178)	210 262 315 420	135 135 (139)	225 281 337 450	 HO2 HO3 HO4†
IV 60-79 Points	51 51 (66)	85 106 127 170	68 81 (35)	135 168 202 270	108 108 (238)	180 225 270 360	120 126 (205)	210 262 315 420	135 135 (108)	225 281 337 450	156 171 (74)	285 356 427 570	 HO2 HO3 HO4†
V 80-99 Points	72 81 (19)	135 168 202 270	81 108 (19)	180 225 270 360	126 126 (74)	210 262 315 420	135 135 (99)	225 281 337 450	174 171 (39)	285 356 427 570	169.5 225 (32)	375/L 468/L 562/L 750/L	 HO2 HO3 HO4†
VI 100+ Points	120 108 (25)	180 225 270 360	102 126 (19)	210 262 315 420	156 135 (129)	225 281 337 450	180 171 (100)	285 356 427 570	180 225 (57)	375/L 468/L 562/L 750/L	240 270 (23)	450/L 562/L 675/L 900/L	 HO2 HO3 HO4†

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A. The Number of Different Medians

For each offense group, the same median sentences are repeated at different points on the grid. That is, different combinations of offense level and prior record level sometimes produce the same median and sometimes produce different ones. As a result, for every offense group, the total number of different median sentences is less than the total number of cells on the grid.

- Murder – 18 cells, 12 medians
- Assault – 36 cells, 26 medians
- CSC – 36 cells, 25 medians
- Robbery – 36 cells, 19 medians

We will see that some, but not all, of the repeated medians are due to the number of redundant cells on the grids. At the least, this arrangement raises questions about what is gained by having so many cells that produce similar results.

B. Medians Below the Minimum-Minimum

Particularly noteworthy is that every offense group has medians that are actually below the min-min. Bear in mind that the median represents the midpoint of the sentences in the relevant cell and that multiples of the same sentence may cluster around the median. This means that at least half the sentences in that cell were equal to or below the median and thus departed below the low end of the recommended range. The figures show how many cells with medians below the min-min each offense group had:

- Murder – 3
- Assault – 9
- CSC – 3
- Robbery – 11

We have already seen that a substantial proportion of sentences in each offense group were downward departures; that is, they were below the min-min. This could occur, of course, even if the median of all the sentences in a particular cell was above the min-min. (For instance, if there are 100 sentences in a cell with a min-min of 60 months and the median is 68 months, there could still be dozens of sentences with minimums shorter than 60 months.) Figures 5a–5d show us the specific cells in which at least half the sentences were downward departures.

The figures also indicate that the size of the departures was substantial. For instance, in the murder group, the medians were from 30 to 59 months below the low end of the indicated ranges. While the departures in the other offense groups were not all equally dramatic, in the assault group, the medians were from two to 65 months below the min-mins; in the CSC group, the medians were from 1.5 to 57 months below the min-min; in the robbery group, the medians were from 1.5 to 55.5 months below the min-mins. That is, every group had cells in which judges felt the recommended minimum was at least four and a half years too long for half the sentences that scored there.

Clearly, the extent to which there were medians below the min-min varied greatly among the offense types. On the murder grid, this occurred only among the higher PRV levels, where judges apparently felt that despite the defendant's prior record the guidelines recommendations were excessive. On the CSC grid, these below-range medians were rare but were also confined to PRV levels E and F. The assault grid was quite different, with below-range medians at five of the six PRV levels and five of the six OV levels. On the robbery grid, the numerous cells with below-range medians were heavily concentrated at OV levels IV–VI.

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Another sort of departure, not sanctioned by law and not visible from the grids, should be noted here. MCL 750.520b(2)(b) was amended in 2006 to require a mandatory minimum sentence of 25 years for convictions of first-degree criminal sexual conduct if the defendant was 17 or older and the victim was younger than 13.[1] The statute contains no provision for judges to depart below 25 years. The sentences on our CSC grid include 110 that were eligible for this mandatory minimum and thus should have been at least 25 years. However, 80 of them, or 72%, were less than 25 years. In fact, they ranged from one to 23.75 years with a median of 10.8 years. As the following distribution shows, half of them were below the midpoint of their applicable guidelines range.

- Below min-min – 17.5%
- At min-min – 11.3%
- Below midpoint – 22.5%
- At midpoint – 7.5%
- Above midpoint – 18.8%
- At max-min – 16.3%
- Above max-min – 6.3%

Although the numbers are not large, there is a statistically significant correlation between departing from the mandatory minimum and the county of conviction.[2] Among the counties with the most sentences eligible for the mandatory minimum, Kent departed in 16 of 17 sentences (94%), Wayne departed in 12 of 15 sentences (80%), and Washtenaw and Oakland departed in 100% of their eligible sentences (10 and nine, respectively), while Macomb departed in only 64% (nine of 14 eligible sentences), and Saginaw departed in just 33% (four of 12 eligible sentences).

We do not know how many of these CSC sentences were the result of plea negotiations that focused on avoiding the mandatory minimum while still obtaining a conviction of the offense that required it. We do know that 15% resulted from jury trials. In every case, two things are certain: judges felt the mandatory 25-year minimum sentence was inappropriately high, and prosecutors either agreed or at least did not disagree enough to have the lower sentences overturned on appeal.

C. Medians at the Minimum-Minimum

Also noteworthy are the many median sentences that were right at the low end of the applicable guidelines range. These medians represent the lowest sentences that could be imposed without requiring justification for downward departures. The CSC group had none of these medians, and the murder group had only one, in the F-II cell. However the other two offense groups tell a very different story.

The assault group had eight cells with medians that equaled the min-min. As with the downward-departing medians, the ones at the min-min were at nearly every OV and PRV level. When the two sets of medians are combined, we find that 17—nearly half of the cells on the assault grid—had medians at or below the bottom of the recommended guidelines range.

The robbery group was even more extreme. It had 19 cells with medians that equaled the min-min. Most of them were at offense levels I–III. When the medians at and below the min-min are combined, they accounted for 30 of the 36 cells on the grid, or 83%.

The extent of medians at and below the low end of the guidelines ranges does more than show a general judicial predisposition to impose lower sentences than the guidelines allow, particularly for robbery and assault. It raises the question of what the medians would look like if the starting point for the guidelines ranges against which judges measure their sentences were lower.[3]

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D. Same Ranges, Different Medians: Outcomes in Redundant Cells

As we observed above in Section A, the grids contain many redundant cells. The apparent goal of repeating the same ranges for different combinations of PRV and OV levels was to balance these factors in a way that achieved equivalent outcomes. To see how well this worked, pick any grid and follow the diagonal lines from the low PRV/high OV ranges on the left upward to high PRV/low OV ranges on the right. Over and over, you will find that the very same guidelines ranges produce very different median sentences.

Take, for instance, the series of cells on the CSC grid with a low end of 108 months. Moving along the six cells on the diagonal, this range started in the A-VI cell with a median of 120 months, went up to 139.5 months, moved down to 132 months, moved down further to 120 months, then jumped up to 150 months, and ended in the F-I cell, with a median of 168 months. That is, the identical ranges produced median minimum sentences that differed by as much as four years.

Consider also the series of cells on the assault grid with a low end of 135 months. Moving along the four cells on the diagonal, this range started in the C-VI cell with a median of 180 months. That dropped precipitously to a median of 135 months, declined further to 120 months, and then rose in the F-III cell by 80 months to a median of 200 months. In this instance, the identical ranges produced median minimum sentences that differed by nearly seven years in cells that were just one step apart.

The patterns among redundant cells differ depending on the offense and the guidelines range. In some instances, the high OV, low PRV cell has the highest median; in others, it is the low OV, high PRV cell. Thus, it cannot be said that judges consistently weigh either variable more heavily. But the result is largely the same. As NCSC also found, over and over again, identical ranges produce widely different median sentences.[4]

E. Different Ranges, Identical Medians: Outcomes in Non-Redundant Cells

While many redundant cells produced dissimilar results, the grids also provide examples of the opposite: cells with different ranges that had identical medians. On the murder grid, for instance, the three OV levels for PRV B had cell ranges that began with 144 months, 162 months, and 180 months. But every range had a median sentence of 216 months. Similarly, three of the six PRV levels that intersected with OV Level II—C-II, D-II, and E-II— had medians of 240 months, although the low ends of their respective ranges were 180, 225, and 270 months.

The same phenomenon is visible for the A grid offenses. For instance, for the assault group the D-IV, E-IV, and F-IV cells all had a median sentence of 120 months, even though the low ends of their ranges are 126, 135, and 171 months, respectively. That is, even though the min-mins differed by nearly four years, the medians were the same.

In the CSC group, the cells with identical medians were far from adjacent. The F-I, E-II, and F-V cells all had medians of 168 months, although the low ends of their ranges are 108, 126, and 225 months, respectively. That is, sentences in cells with starting points that differed by nearly 10 years somehow had identical medians.

Even the robbery group shows this sort of disparity. Compare the F-IV and C-VI cells, which both had median sentences of 156 months, although the former had a starting point of 171 months and the latter's range began at 135 months. Clearly, the fact that OV and PRV scores place sentences in different ranges is no guarantee that the defendants will receive different sentences.

F. Same Ranges, Different Offenses: Medians All Over the Map

Finally, we can compare the same the cells on the A grid for different offenses. The cells with a starting point of 108 months are arrayed on the diagonal that runs from A-VI in the lower left corner of the grid to F-I in the upper right corner. Figure 6 shows where the medians fall in these cells for the assault, CSC,

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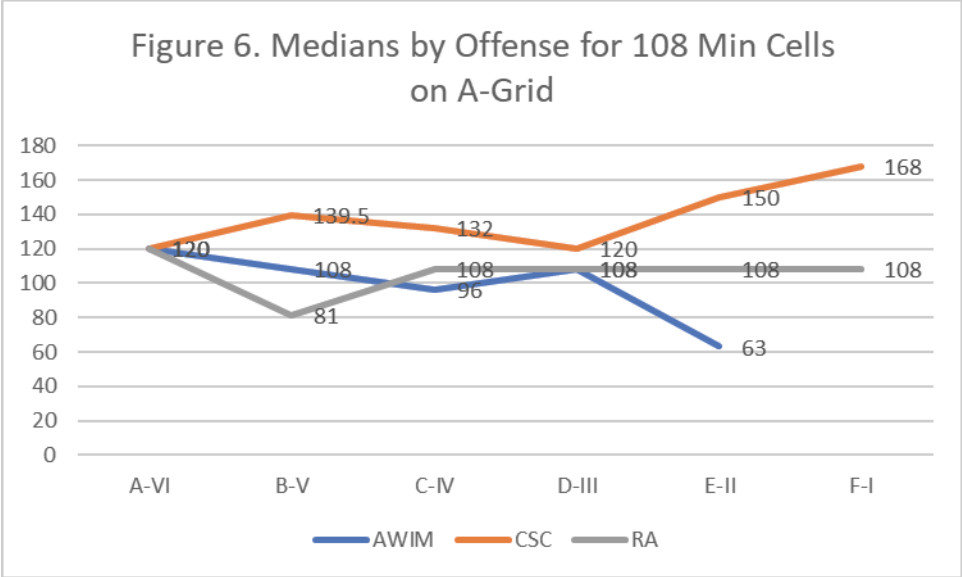
and robbery groups. While each offense begins with a median of 120 months, they exhibit very different patterns as they move toward the F-I cell. The CSC medians rise, the assault medians fall, and the robbery medians stay the same, resulting in a difference of more than seven years between median sentences in the very same cell.



OMNI Data, AWIM, & CSC, $p < .05$, RA $p < .001$

The jumble of outcomes we have seen throughout Chapter Eight is difficult to explain. Perhaps it simply stems from the breadth of discretion judges can exercise within the guidelines ranges combined with the high rate of both upward and downward departures. The enormous variety of choices available in every individual case inevitably undermines even the most complex effort to rationally balance the key guidelines components of offense type, criminal history, and offense severity.

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SUMMARY OF OUTCOMES RESULTING FROM THE GUIDELINES STRUCTURE

In adopting the Sentencing Commission's guidelines, the Legislature made numerous critical choices.

- It opted to group offenses on grids by their statutory maximum sentences instead of by the similarity of the defendant's conduct, although judges and prosecutors generally think about crimes by the nature and extent of the harm they cause.
- It included numerous redundant cells in an attempt to balance the weight given to prior record and offense severity scores.
- It made the ranges on the grids that apply to life-maximum offenses extremely broad in order to preserve judicial discretion.
- It designed prior record and offense severity variables that double-count aspects of the conviction offense and the defendant's criminal history, that score behavior that was not part of the conviction offense, and that purposefully enhance sentence lengths in murder, assault, and CSC cases.
- It incorporated numerous aggravating factors into guidelines variables, then required judges to award the maximum number of points available for those factors.
- It declined to incorporate mitigating factors into the variables.
- It extended the high end of the guidelines ranges for second, third, and fourth habitual offender sentences by 25, 50, and 100%.
- It made compliance with the guidelines mandatory but permitted departures for "substantial and compelling reasons."

It was expected that the Commission would have the opportunity to assess the impact of these choices and recommend changes as needed to better achieve the guidelines' goals. Because the Commission was abolished, that assessment never occurred. While the analyses in these chapters are no substitute for a systematic review by a multi-stakeholder, professionally staffed commission, the evidence we have examined suggests several conclusions.

- The guidelines do not compel extremely long sentences but they allow and encourage them.
    - Judges routinely imposed minimum sentences at or below the low end of the ranges, especially in armed robbery cases, even when the defendant had received a habitual offender enhancement. Judges and prosecutors often behaved as if they felt the guidelines recommendations were inappropriately harsh.
    - However, judges also commonly imposed minimum terms of 25+ years, especially on those convicted of murder, sex offenses, and as habitual offenders, while staying in compliance with the guidelines.
- The extent of departures from the recommended ranges suggests that judges were frequently dissatisfied with the options they were given.
- The complexity of the guidelines creates the appearance of precision while preserving enormous discretion for judges and enhancing the ability of prosecutors to achieve the outcomes they desire.
- The guidelines not only fail to reduce disparity, they promote it.

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CHAPTER NINE. SYSTEMIC FACTORS: METHOD OF CONVICTION

The guidelines account for all the factors relevant to punishment by addressing every aspect of the defendant's criminal conduct, past and current, in exhaustive detail. Yet the regression analyses have already shown us that, because the broad guidelines ranges were designed to preserve substantial judicial discretion in life-maximum cases, and because judges nonetheless regularly depart from their recommendations, the guidelines variables do not fully account for the length of sentences imposed. This leads us to consider other factors that may affect sentence length.

These other factors can be divided into two types. First are those inherent in criminal justice case processing. These systemic variables include the method of conviction (i.e., whether the defendant pleaded guilty or went to trial), the county of conviction and the identity of the sentencing judge. Although none of these variables is logically related to the extent of punishment that is warranted by the defendant's conduct, all three have been long-recognized by practitioners and identified by prior researchers as contributing to sentence length. We will examine these factors next. A fourth systemic factor that may be related to sentence length is whether defense counsel was appointed or retained. That could not be examined because the available data did not include that information.

The second group of factors includes characteristics of the defendant not scored by the guidelines, such as age, sex, and race. We will examine these factors in Chapters Twelve and Thirteen.

The research confirms what every criminal practitioner knows: people who plead guilty get shorter sentences than people who go to trial. Indeed, sentence reductions are the primary method of inducing defendants to plead guilty, thereby sparing the emotional costs of a trial for victims, the financial costs for taxpayers, and the work for overloaded courts and prosecutors. It is a truism that the criminal justice system would grind to a halt if the majority of cases were not disposed of by negotiated pleas. The U.S. Supreme Court recognized this when it upheld the constitutionality of bargaining fifty years ago in *Brady v. United States*.[1] Yet, because the right to a jury trial is guaranteed by the United States and Michigan constitutions, the flip side of a reward for pleading guilty is a tax on the decision to go to trial.

Some argue that a bargained sentence is a benefit as opposed to a punishment for going to trial. This reasoning assumes that sentences imposed after trial are what defendants deserved and by pleading they get less than they deserve. This view further assumes that there is a "regular" sentence that clearly identifies what each defendant deserves. However, where judges have very broad discretion as in the life-maximum cases, there is no regular sentence. In fact, where plea bargains are routine, the bargained sentences become the norm. The sentences imposed at trial are an upward deviation from that norm. And the only thing that distinguishes the cases may be the fact of a trial. That fact is unrelated to any of the traditional goals of sentencing: retribution, deterrence, incapacitation, rehabilitation. On occasion, a particularly harsh sentence after trial can be explained by information the judge has gained about the offense or the defendant (e.g., through witness testimony or the defendant's behavior in court). However this is not sufficiently common to account for the routine differential in sentences after trial.[2] The bottom line is: "Whether one calls this a punishment for going to trial or the failure to receive a benefit for pleading guilty, the fact that differential sentencing occurs is indisputable."[3]

A. The Risks of Plea Bargaining and the Decision to go to Trial

Concern about the coercive effect of plea bargaining on the waiver of the constitutional right to jury trial is more than theoretical. The critical practical risk is that a defendant who is factually innocent or who would, at least, have a substantial chance of acquittal at trial, will be induced by a highly generous offer or the threat of extremely harsh punishment to forego the opportunity to have his or her guilt determined by a jury.

The decision is by far the most complex in life-maximum cases. Obviously, the risk of a very lengthy sentence is the greatest in these cases. Consequently the prosecution has far more leverage. The inducements may be dismissed charges, an agreement not to bring charges, or the promise, express or implied, of a lower sentence. The multiple terms of the bargain in *People v. Biggs* illustrates this point.

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The defendant was charged with the life-maximum offenses of armed robbery and assault with intent to murder, plus felony firearm, which carries a mandatory consecutive sentence of two years. The agreement was that the defendant would plead guilty to the robbery in exchange for dismissal of the assault and firearm charges, a promise that the prosecution would not file a habitual offender enhancement and a sentence recommendation of 12 to 25 years.[4]

Plea bargaining does not only affect the guilty. It creates pressure on defendants who might well be acquitted or convicted of a lesser offense to forego the chance to have a jury weigh the credibility of prosecution witnesses or consider evidence of defenses such as alibi, mistaken identification, self-defense, provocation, or lack of intent.[5]

On the other hand, life-maximum cases are also the ones in which prosecutors who have strong evidence may have the least incentive to make an attractive offer or to make an offer at all. The seriousness of the crimes, press attention, or objections by victims may all lead prosecutors to refuse to negotiate, giving defendants little or no incentive to plead. Ironically, just as extreme pressure may induce even innocent defendants to waive their constitutional right to a trial, the fact that there is no right to a beneficial bargain means that guilty defendants who would be willing to accept a reasonable offer may be forced to go to trial.

A note about bench trials

A trial just before the court, without a jury, is often referred to as a bench trial. It is a simpler, more efficient proceeding than a jury trial. Logistically, there are fewer people to assemble and accommodate. There is no need for jury selection or jury instructions, and ultimately only one person must be persuaded of the defendant's guilt.

Bench trials are sometimes chosen for strategic reasons related to the complexity or nature of the evidence. If a case is highly technical or highly emotional, it may be preferable for the fact-finder to be a professional with experience in such cases.

However, a bench trial may also be a compromise between pleading guilty and an expensive, time-consuming jury trial. The defendant with little chance of persuading a jury to acquit nonetheless gets the chance to present a defense, while losing the chance to hang a jury and require a retrial. The hope is that a sympathetic judge may convict of a lesser offense or at least reward the waiver of a jury with a sentence reduction. As the data show, the trial tax is generally lower when the trial is by the court. For this reason, bench trials are sometimes referred to as "slow pleas of guilty."

In most jurisdictions, bench trials are rare. In the former Recorder's Court for the City of Detroit, they were relatively common. Although their numbers declined after Recorder's Court was abolished and its judges joined the Wayne County Circuit bench, the proportion of bench trials in Wayne County still far exceeded that of other counties in both of our study periods.

B. Frequency of Conviction Methods

The frequency of dispositions by plea has long been less for life-maximum offenses than for all other crimes. The State Court Administrative Office (SCAO) keeps separate statistics for "capital" (i.e., life-maximum) offenses. In 2019, 97.4% of non-life-maximum cases were resolved by guilty plea. The comparable figure for life-maximum cases was 79.6%,[6] a proportion that was actually skewed by the large number of armed robbery cases that are more likely than other crimes to result in a plea.

Figure 7a shows the methods of conviction by offense type for non-habitual offender sentences in the second judicial and legislative guidelines periods. Note that under both sets of guidelines, the rate of pleas varied by offense type but increased markedly for each offense under the legislative guidelines. For all but murder sentences, the increase in pleas resulted from a decline in bench trials while jury trial rates stayed roughly constant. Among murder sentences, plea rates exploded while the proportion of both bench and jury trials declined. The greater change for murder sentences may be related to the fact that many involve a plea down from first-degree murder with its mandatory sentence of life without parole.[7]

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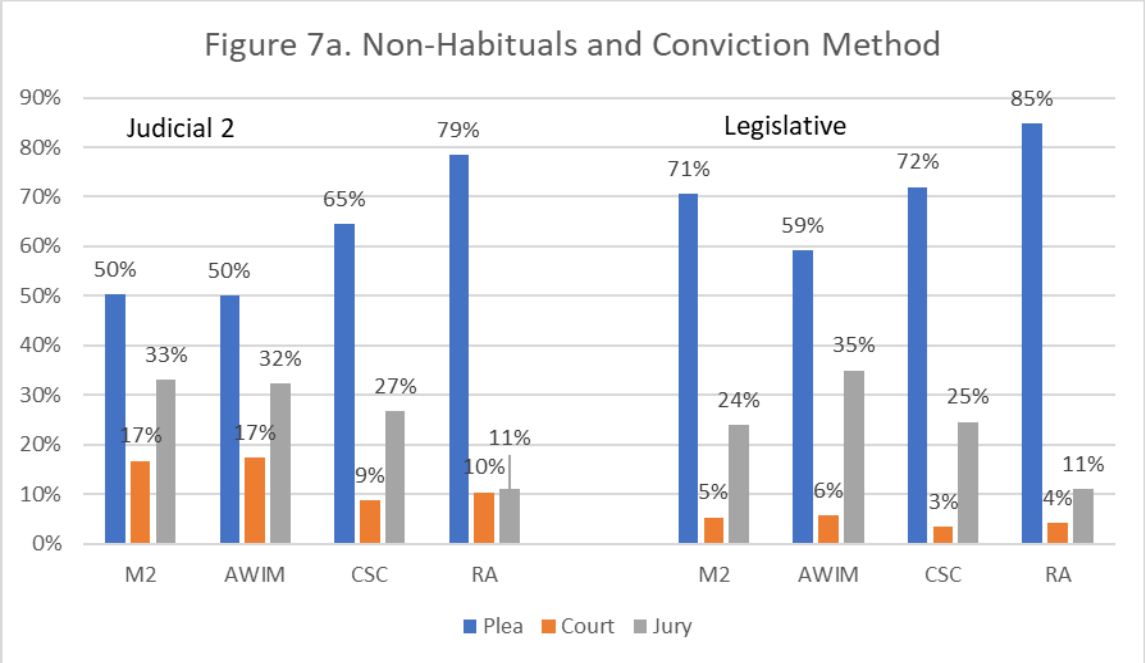
Despite the increase in pleas after 1998, the plea rate for non-habitualized defendants in life-maximum cases remained much lower than that in non-life-maximum cases. The numbers alone cannot tell us which of the two opposite explanations are at work—whether prosecutors make fewer substantial offers in life-maximum cases, or defendants insist on going to trial because they believe they have viable defenses.



CMIS data, P < .001 CMIS data, P <.001

Figure 7b shows the conviction methods for habitual offender sentences in each offense group during each time period (i.e., those of defendants who did not have habitual enhancements dismissed or who, at most, had them reduced). After the change from judicial to legislative guidelines, when habitual offenders were covered by guidelines for the first time, the proportion of pleas dropped dramatically and the proportion of jury trials increased in an equally striking fashion. For every group except murder, pleas declined and jury trials increased by roughly 20 points. Murder cases showed the same trend to a lesser degree. The differences cannot be explained by a shift in the use of bench trials. For one thing, this shift was very small. Moreover, when bench trials declined for non-habituals, the proportion of pleas increased.[8]

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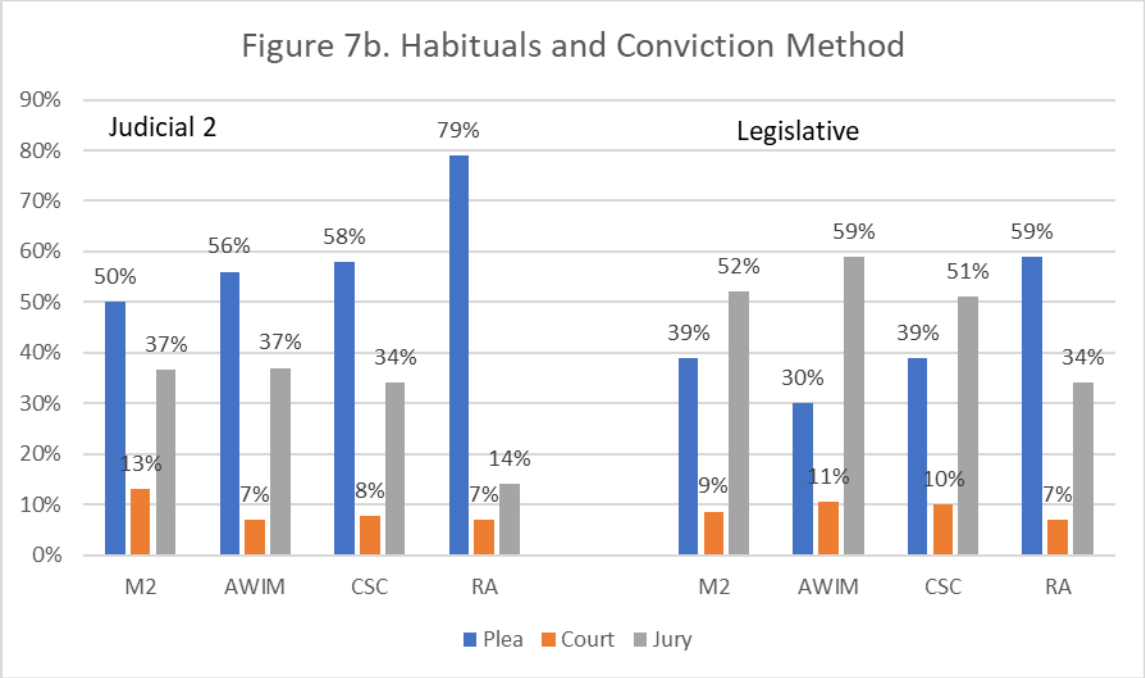

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When we compare Figures 7a and 7b, we can see how much conviction methods underlying habitual and non-habitual sentences differed from each other in each time period. When the second judicial guidelines, which did not cover habitual sentences, were in effect, jury trial rates for habitual and non- habitual sentences were quite similar. For each offense group, the jury trial rate for the habitual group was three to seven points higher. The difference in plea rates was zero to seven points lower for the habitual group.

Under the legislative guidelines, the differences in conviction methods between habitual and non-habitual sentences became stark. As habitual enhancements led to far fewer pleas for every offense type, the overall rate of jury trials nearly doubled, from 21.7% during the judicial period to 40.8% under the legislative guidelines.

The data show us only which sentences were and were not habitualized, not any underlying plea negotiations. We cannot see how many habitual enhancements were brought and dismissed in each time period or how many enhancements were threatened but not brought as part of a plea bargain. However, if prosecutors used the threat of having the minimum sentence increased by 25, 50, or 100% primarily to create leverage in plea negotiations, one would expect the rate of pleas to rise, not fall. If prosecutors refused to reduce or eliminate habitual enhancements because their priority was increasing sentence lengths, that would explain the decline in habitual pleas under the statutory guidelines.

C. Relationship to Sentence Length: The Size of the Trial Tax

Whether defendants go to trial because they want to assert defenses or simply for lack of better options, they face the prospect of receiving a longer prison term for having done so. This result raises questions the data cannot answer.

- Are sentences longer after a trial simply because the defendants lack the benefits of a negotiated plea?
- Is it because the court had the opportunity at trial to consider particular evidence or the demeanor of the defendant or that of prosecution witnesses?

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- Or is it a deliberate penalty for the defendant's decision to "waste" the court's time by insisting on exercising his or her Sixth Amendment right?
- Even more fundamentally, what is the relationship of the conviction method to the purposes of sentencing? If 15 years is adequate to punish the defendant and protect the public when someone pleads guilty, why is 25 years necessary when the same person goes to trial?

Whatever the answers, the trial tax existed before the adoption of judicial guidelines and continued to exist under the legislative guidelines. The trial tax is calculated as the percentage increase in sentence length for jury trials over pleas. Thus, for instance, if the median sentence for defendants who pleaded guilty was 10 years, and for people convicted by a jury it was 20 years, the trial tax would be 100%.

Table 14 summarizes the median sentences and the extent of the trial tax for both non-habitual and habitual sentences during the judicial period. While the habitual sentences for pleas were much higher than the non-habitual sentences for pleas, the actual number of years added for going to trial was not. The number of years non-habitualized defendants paid for going to a jury trial was between five and seven. The number of years habitualized defendants paid was between five and eight.

Table 14. Median Sentences by Conviction Method During 2nd Judicial Guidelines Period Non-Habitual and Habitual Sentences (in years), 1989–1998

	Non-Habitual			Habitual		
Crime	Plea	Jury Trial	Trial Tax	Plea	Jury Trial	Trial Tax
Murder, second-degree	15.0	20.0	5 yrs/33.3%	25.0	30.0	5 yrs/20.0%
Assault	8.0	15.0	7 yrs/87.5%	12.0	20.0	8 yrs/66.7%
CSC, first-degree	8.0	15.0	7 yrs/87.5%	17.25	23.75	6.5 yrs/33.7%
Robbery	4.0	10.0	6 yrs/150.0%	7.5	15.0	7.5 yrs/100.0%
CMIS Data	All offense types significant at p <.001			M2 p < .05, AWIM, CSC, & RA p < .001		

Figure 8a illustrates the pattern of sentence increases from plea to bench trial to jury trial for non-habitual sentences under the legislative guidelines. The baseline was increased compared to the judicial period in that sentences for pleas of every offense type were longer. Except for CSC, sentences for jury trials were longer too.

For every offense type the sentences for bench-tried defendants were between those for guilty pleas and jury trials but closer to pleas. The number of years defendants paid for going to a jury trial was between six and nine.

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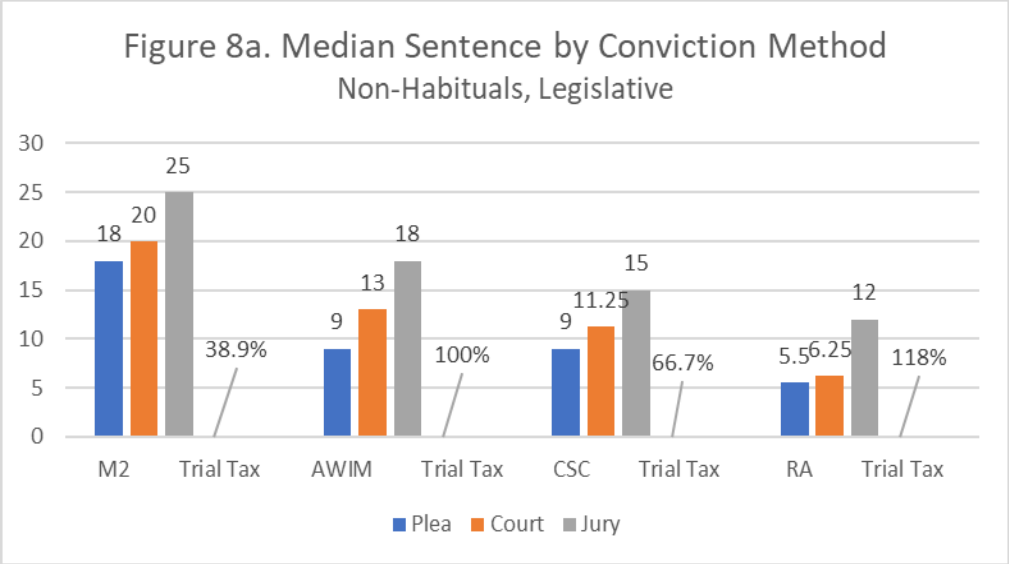
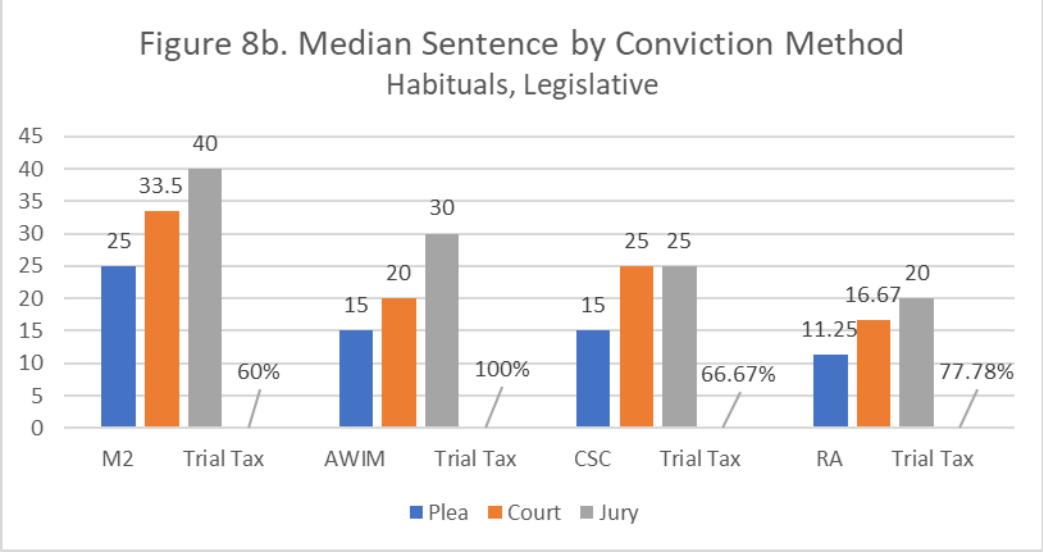


CMIS Data, All offense types significant at p < .001

Figure 8b indicates that, compared to the judicial period shown in Table 14, under the legislative guidelines the trial tax on habitual offender sentences exploded. The percentage increase for jury trials over pleas was much greater for every offense group except robbery. The actual years added for requesting a jury trial ranged from nearly nine in robbery cases to 15 in murder and assault cases. Even having a bench trial cost habitualized defendants an extra five to10 years in prison.



CMIS Data, All offense types significant at p < .001

Thus defendants sentenced as habitual offenders for life-maximum offenses under the legislative guidelines pay three times over. The guidelines ranges for these offenses are higher for all defendants than they were under the judicial guidelines. The ranges are then broadened by enhancement as a habitual offender. And habitual offenders are far more likely to be convicted at a jury trial, which exposes them to a substantial trial tax.

The trial tax reflects not only the fact that the defendant went to trial but all the factors associated with that decision, including the defendant's prior record, the details of the offense, habitual offender

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status, and the likelihood of a departure. When the regression analysis honed in solely on the impact of the conviction method while holding all other variables constant, it appeared that:

- Just the fact of having a jury trial added 18% to the sentence compared to a guilty plea, while the impact of a bench trial increased sentence length by 6%. These results are similar to NCSC's finding that conviction at trial increased the sentence by 17.7%.
- The amount of the increase varied by offense—ranging from a 12% increase for murder cases to a 21% increase when the conviction was for assault.
- As we will see in Chapter Ten, the sentence increases for selecting a jury trial varied substantially by county.

D. How the Trial Tax Is Applied Under Sentencing Guidelines

The medians show how greatly sentences differ depending on whether the defendant was convicted by guilty plea or jury trial. But how, exactly, do the sentencing guidelines allow these wide disparities to occur? Our discussion in Chapter Seven has already suggested the answers: the breadth of the cell ranges and the amount of departures above and below those ranges.

Together, these factors create so much room for discretion that a non-guidelines consideration like conviction method can have a striking impact on the sentence. Table 15 shows that, for every type of offense, those who pleaded guilty were far more likely to receive a sentence below the bottom of the applicable cell range while those convicted by a jury were far more likely to receive a sentence right at or above the highest end of the range. Overall, plea-based sentences were more than twice as likely to be below the midpoint of the applicable range.

Table 15. Percentages of Minimum Non-Habitual Sentences across Guideline Ranges, by Conviction Method, 2003–2012

	Number of Cases	Below Min-Min	At Min-Min	In Range, Below Midpoint	At Midpoint	In Range, Above Midpoint	At Max-Min	Above Max-Min
M2	**1,218**							
Plea	896	39.8	5.9	19.4	9.5	10.2	5.1	10.0
Court	49	22.4	12.2	22.4	10.2	16.3	10.2	6.1
Jury	273	9.2	5.1	15.0	17.9	17.9	16.8	17.9
AWIM	**884**							
Plea	553	55.0	9.6	16.6	2.9	7.8	1.6	6.5
Court	38	21.1	13.2	13.2	5.3	21.1	2.6	23.7
Jury	293	9.9	7.5	15.0	10.2	25.6	14.7	17.1
CSC	**1,225**							
Plea	873	28.3	12.4	21.0	7.4	12.5	9.4	9.0
Court	38	23.7	0.0	15.8	5.3	18.4	5.3	31.6
Jury	314	9.2	5.1	15.0	10.2	18.8	17.8	23.9
RA	**5,659**							
Plea	4,915	43.3	19.4	19.1	4.5	7.6	1.8	4.3
Court	210	37.1	22.9	13.8	6.2	8.1	4.3	7.6
Jury	534	13.9	10.9	19.3	9.2	17.6	14.4	14.8
OMNI Data, All offense types significant at $p < .001$								

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To test the possibility that this distribution of sentences may reflect different combinations of offense and prior record scores (e.g., that downward departures involve less serious cases), we looked at the distribution of sentences within the range most commonly used for each offense. The patterns were similar to those in Table 15. That is, people whose OV and PRV scores placed them in cells with identical parameters received very different sentences depending on whether they pleaded guilty or went to trial.[9]

Among habitual offender sentences the differences in departures above the usual maximum-minimum between pleas and jury trials were even more extreme. For example:

- When the defendants were sentenced for murder as second offenders, 35% of the plea-based sentences were downward departures and only 8.8% were above the max-min. Of those convicted by a jury, 2.9% of the sentences were downward departures and 57% were above the max-min.
- Among second-offense assault sentences, 32% of the pleas but none of the jury trials resulted in downward departures. Conversely, 12% of the pleas and 76% of the jury trials resulted in sentences above the max-min.
- Assault defendants treated as fourth offenders who were jury-tried received downward departures in just 2% of their sentences and terms above the max-min in 75%. By comparison, among plea-based sentences 31% received downward departures while 21% had terms above the max-min.
- Fourth offender CSC sentences reflected downward departures in 18% of the pleas and none of the jury trials. Conversely, 30% of the plea-based sentences and 66% of the jury-based sentences were above the max-min.
- Fourth offense armed robbery sentences showed the same pattern. Only 1% of the jury-based sentences were downward departures compared to 19% of the pleas. At the other extreme, nearly 60% of the jury-based sentences but only 18% of the plea-based sentences were above the max-min.

In sum, sentences for every type of offense that resulted from guilty pleas were far more likely to be at or below the low end of the applicable guidelines range and far more likely to be at or above the high end if they resulted from jury convictions. This would not have a major impact on sentence length if the ends were not so far apart. However, given the breadth of the guidelines ranges, the use of habitual offender charges to broaden them even further and the routine use of both upward and downward departures, it becomes easy to see how the price of a jury trial may be years or even decades of additional incarceration.

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CHAPTER TEN. SYSTEMIC FACTORS: COUNTY OF CONVICTION

The current analysis confirms what previous research has shown about the impact of locality. Whether Michigan has no guidelines, advisory judicial guidelines, or mandatory legislative guidelines, defendants with similar backgrounds who commit similar offenses may receive very different sentences depending on the county of conviction. To assess the differences in sentence lengths among counties, we must first recognize that there are significant differences in the frequency of offenses. A disproportionate share of offenses that typically carry longer sentences could explain why some counties have longer median sentences. This possibility reinforces the importance of controlling for offense type in analyzing the data.

Table 16. Frequency of Offense Type by County, Non-Habitual Sentences, 1999–2012

	Murder	Assault	CSC	Robbery	Total
Berrien	21	14	43	139	217
	9.7%	6.5%	19.8%	64.1%	
Calhoun	15	20	74	74	183
	8.2%	10.9%	40.4%	40.4%	
Genesee	144	77	70	402	693
	20.8%	11.1%	10.1%	58.0%	
Ingham	42	23	62	153	280
	15.0%	8.2%	22.1%	54.6%	
Jackson	7	6	29	73	115
	6.1%	5.2%	25.2%	63.5%	
Kalamazoo	33	23	67	182	305
	10.8%	7.5%	22.0%	59.7%	
Kent	83	67	246	771	1,167
	7.1%	5.7%	21.1%	66.1%	
Macomb	46	92	143	665	946
	4.9%	9.7%	15.1%	70.3%	
Muskegon	18	11	81	141	251
	7.2%	4.4%	32.3%	56.2%	
Oakland	59	113	267	915	1,354
	4.4%	8.3%	19.7%	67.6%	
Saginaw	39	61	68	217	385
	10.1%	15.8%	17.7%	56.4%	
Washtenaw	34	26	60	269	389
	8.7%	6.7%	15.4%	69.2%	
Wayne	1,182	865	766	4,882	7,695
	15.4%	11.2%	10.0%	63.4%	
Total	1,723	1,398	1,976	8,883	13,980
	12.3%	10.0%	14.1%	63.5%	

CMIS Data, $p < .001$

As Table 16 shows, in most counties for non-habitual sentences, robbery is far and away the most common of the four offense types. Robbery sentences, which are generally the shortest, are at least 55% in 12 of 13 counties; they are over two-thirds of the total in Oakland, Macomb, Kent, and Washtenaw. In 10 counties, CSC is the second most frequent offense type. In Wayne and Genesee, murder sentences, which are generally the longest, are the second most common, while in Oakland, Macomb, Saginaw, and Calhoun they are fourth.

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A. Median Sentence

Whether the sentences in a particular county are harsher or more lenient than those of other counties varies with the offense. No single county always gives the longest or the shortest minimum terms. The extent of disparity also varies with the offense. However, as Table 17 shows, there are definite patterns among the non-habitual sentences.

- County size appears to be more important than location.[1]
  - Sentences in the largest counties were more similar to each other than they were to the sentences imposed by mid-sized counties that are closer by. So, for instance, Kent sentences were generally more like those in Macomb, Oakland, and Wayne than they were like other counties on the west side of the state. Genesee, the fifth largest county, did not cluster with the other large counties as consistently.
  - Differences among the medium and smaller counties do not appear to depend on geography. Counties that are right next to each other, like Kalamazoo and Calhoun, had very different median sentences for CSC and robbery.
- The median sentences imposed in the larger counties tended to be shorter than those imposed in smaller counties.
- The data undermine some widely held assumptions about which counties are "tough" and which are "lenient." Wayne County, home to the City of Detroit, did not impose the lowest median sentences in any offense group. Oakland County sentences were in the low-to-middle range for every offense, despite the county's "law and order" reputation.
- Despite the fact that the M2 grid has the widest cell ranges by far, murder sentences showed the greatest amount of consistency, with nine counties at 20 years and four from 22.5 to 24 years.
- Assault sentences trended markedly higher than CSC sentences.
- CSC showed the least consistency among counties, with a spread of nearly nine years between the lowest medians and the highest.
- Although armed robbery had much lower sentences than the other offenses, the four-year spread between the lowest and highest counties was the same as the spread for murder.

Table 17. Median Sentence by County, 1999–2012 (non-habitual)

Murder, Second-Degree			Assault to Murder			CSC, First-Degree			Armed Robbery		
County	Yrs	N	County	Yrs	N	County	Yrs	N	County	Yrs	N
Berrien	20	21	Kent	10	67	Kalamazoo	6.75	67	Macomb	5	665
Calhoun	20	15	Macomb	10	92	Oakland	9	267	Oakland	5	915
Genesee	20	144	Oakland	10.5	113	Washtenaw	9.5	60	Kalamazoo	6	182
Jackson	20	7	Wayne	11	865	Kent	10	246	Kent	6	771
Kalamazoo	20	33	Jackson	11.25	6	Macomb	10	143	Wayne	6	4,882
Kent	20	83	Muskegon	12	11	Wayne	10	773	Muskegon	6.5	141
Macomb	20	46	Genesee	14	77	Calhoun	10.6	74	Saginaw	6.75	217
Oakland	20	59	Ingham	14	23	Berrien	11.25	43	Washtenaw	6.75	269
Wayne	20	1,182	Washtenaw	14	26	Muskegon	12	81	Ingham	7	153
Saginaw	22.5	39	Kalamazoo	15	23	Genesee	13.3	70	Jackson	7	73
Ingham	22.7	42	Saginaw	15	61	Saginaw	13.5	68	Genesee	7.1	402
Washtenaw	23	34	Calhoun	15.5	20	Ingham	14.5	62	Berrien	8	139
Muskegon	24	18	Berrien	16.25	14	Jackson	15	29	Calhoun	9	74
Spread	4		Spread	6.25		Spread	8.75		Spread	4	
CMIS data, Not Sig			$p < .05$			$p < .001$			$p < .001$		

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Regression analysis confirms these findings. Examining estimated sentence lengths for all offenses combined and using Wayne County as the baseline found that:

- The length of sentence overall was significantly longer in seven counties compared to Wayne, significantly shorter in three, and not much different in the remaining two.
    - For instance, Genesee, Jackson, and Muskegon had sentences that were 7% longer while Oakland's were 7% shorter.
    - Similarly, Kent's sentences were 4% longer than Wayne's while Macomb's were 4% shorter.
- The disparities by county were far and away most pronounced for CSC sentences.
    - Eight counties had sentences that were significantly different than Wayne's and all were longer.
    - The greatest difference was with Genesee, which was 24% longer; the smallest was Kent which is 5% longer.

B. Place on the Range

The difference in median sentence length is related to how a county's judges utilize the often very broad guidelines ranges. In Chapter Seven we explored how "place on the range," that is, the extent to which sentences are at the high or low end of the applicable cell range, or depart from the range altogether, varied depending on the nature of the offense and the defendant's habitual offender status. Table 18 allows us to examine how place on the range varies by county without regard to offense type. By rank ordering the counties at points below, within, and above the range we can more readily see patterns. Each county's percentages of non-habitual sentences below and at the minimum-minimum are added to create a "low end" total; each county's percentages of sentences at or above the maximum-minimum are added to create a "high end" total.

The great many departures below the guidelines' recommended range cannot be explained by county size or location.

Downward departure rates vary greatly by county. For instance, rates for the four largest counties decline in increments of roughly 10 points:

- Wayne – 47.6%
- Kent – 36.0%
- Macomb – 26.4%
- Oakland – 16.5%

The medium-sized counties also differ from each other; for example, the rate of downward departures is 35.6% in Kalamazoo but only 17.2% in Washtenaw.

The smaller counties of Berrien, Muskegon, Calhoun, and Jackson show more consistency, with fewer than 10% of their sentences being downward departures.

Overall there are more than 4.5 times as many downward as upward departures.

- Most counties depart down at anywhere from four to 10 times as often as they depart upwards.
- The smaller counties of Berrien, Muskegon, Calhoun, and Jackson each departs both up and down at small but more similar rates.

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Table 18. Place on the Range by County, Rank Ordered by Percentage of Non-Habitual Sentences, 2003–2012													
Below Min-Min		At Min-Min		Low-End Total		Below/At/Above Midpoint Total		At Max-Min		Above Max-Min		High-End Total	
Wayne	47.6	Washtenaw	42.4	Kalamazoo	65.4	Muskegon	71.8	Genesee	20.4	Wayne	10.9	Calhoun	25.9
Kent	36.0	Oakland	36.5	Washtenaw	59.6	Jackson	63.8	Berrien	18.3	Ingham	9.8	Genesee	25.2
Kalamazoo	35.6	Kalamazoo	29.8	Wayne	56.3	Berrien	52.3	Calhoun	17.9	Calhoun	8.0	Berrien	24.6
Ingham	32.6	Macomb	29.6	Macomb	56.0	Calhoun	50.0	Jackson	16.3	Saginaw	7.0	Jackson	22.6
Genesee	28.0	Calhoun	20.5	Oakland	53.0	Kent	47.2	Saginaw	12.0	Jackson	6.3	Saginaw	19.0
Macomb	26.4	Saginaw	18.6	Kent	45.3	Saginaw	42.1	Ingham	7.3	Berrien	6.3	Ingham	17.1
Saginaw	20.2	Berrien	14.3	Ingham	41.9	Ingham	40.9	Macomb	7.1	Muskegon	5.8	Wayne	13.4
Washtenaw	17.2	Genesee	10.5	Saginaw	38.8	Oakland	39.2	Muskegon	6.4	Kalamazoo	4.9	Muskegon	12.2
Oakland	16.5	Ingham	9.3	Genesee	38.5	Genesee	36.4	Oakland	5.3	Genesee	4.8	Macomb	11.2
Berrien	8.7	Kent	9.3	Calhoun	24.1	Washtenaw	33.6	Kent	4.2	Washtenaw	4.2	Kalamazoo	8.3
Muskegon	7.7	Jackson	8.8	Berrien	23.0	Macomb	32.8	Kalamazoo	3.4	Macomb	4.1	Oakland	7.7
Jackson	5.0	Wayne	8.7	Muskegon	16.0	Wayne	30.3	Washtenaw	2.7	Kent	3.2	Kent	7.4
Calhoun	3.6	Muskegon	8.3	Jackson	13.8	Kalamazoo	26.3	Wayne	2.5	Oakland	2.4	Washtenaw	6.9
OMNI Data, Chi-Square p < .001													

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The obverse of departure rates is the extent to which counties comply with the sentencing guidelines. Compliance can be seen by adding the second, fourth, and fifth columns in Table 18.

- Wayne, the county with the largest number of cases by far, imposes sentences within the recommended range only 41.5% of the time. At 57.6, 59.5, and 60.8%, respectively, the counties with the next lowest compliance rates are Ingham, Kalamazoo, and Kent.
- At the other extreme, the smaller counties of Berrien, Muskegon, Calhoun, and Jackson impose within-range sentences between 85 and 89% of the time.
- Notably, Oakland at 81.1% and Washtenaw at 78.6% behave much more like the smaller counties than like their larger peers.

As we also observed in Chapter Seven, judges who do not wish to depart, with the requirement for justification that departures entail, may nonetheless gravitate toward the very lowest or very highest minimum sentences that define the boundaries of the applicable range. The extent to which judges chose sentences at the min-min, below it, or both varied, again without regard to size or location.

- While Oakland and Washtenaw judges did not often depart below the range, 42.4 and 36.5% of their sentences, respectively, were the minimum-minimum.
- Wayne, Ingham and Kent, which all had high rates of downward departures, all imposed the minimum-minimum in only about 9% of their sentences.
- Kalamazoo and Macomb each had substantial rates of both downward departures and imposition of the minimum-minimum.

When the downward departures and minimum-minimums are combined, we get a picture of the extent to which counties impose sentences at the low end.

- Five counties: 53.0 – 65.4%
- Four counties: 38.5 – 45.3%
- Four counties: 13.8 – 24.1%

To a much smaller degree, we see a similar phenomenon with judges who did not often depart upward but who imposed a substantial number of sentences at the maximum-minimum. For the most part, the counties that had the most low-end sentences had the fewest at the high end.

The proportion of low-end sentences suggests that judges in the larger and medium-sized counties saw the guidelines recommendations as too high. But we must confirm that this appearance is not an artifact of the frequency with which these judges see certain offense types. To do so, we separate the sentences by offense type, then compare each county's proportion of low-end and high-end sentences. This process allows us to see three things: (1) the extent to which the proportion of low-end and high-end sentences each vary by offense, (2) the extent of disparity among counties for sentences for the same offense, and (3) whether there are any patterns in the relationship between high- and low-end sentences.

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Table 19a. County Differences in Low and High-End Non-Habitual Sentences, 2003–2012		
Murder, Second-Degree		
County	Percent at Low End	Percent at High End
Macomb	44.1	26.5
Genesee	43.3	29.2
Wayne	41.0	17.8
Washtenaw	38.4	7.6
Kalamazoo	33.4	36.4
Ingham	30.4	30.4
Saginaw	30.0	20.0
Jackson	25.0	50.0
Kent	23.4	20.0
Oakland	20.9	13.9
Calhoun	18.2	36.4
Berrien	10.0	30.0
Muskegon	0.0	22.0
OMNI Data, $p < .001$		

We begin by looking at the non-habitual sentences for murder, which tend to be very similar. Table 19a makes two things apparent. First, there are wide disparities across counties, with the proportion of low-end sentences ranging from 44% down to zero and the proportion of high-end sentences ranging from 50% down to 7.6. The differences cannot be explained by county size or location. Compare, for example, the low-end rates of Macomb and Wayne with those of Kent and Oakland. Compare as well the high end rates of Washtenaw and Oakland with those of Calhoun and Kalamazoo.

Second, there is no consistent relationship within counties between the rates of high- and low-end sentences. Some counties had substantially more low-end sentences, some had more at the high end and some had quite even proportions at both ends. Compare, for instance, Wayne and Washtenaw with Kent and Kalamazoo.

Table 19b has the non-habitual sentences for the offenses on the A grid. It shows significant disparity by county both within and across offense types.

- The proportion of low-end sentences for the same offense varies widely across counties. Compare, for example, Genesee with Macomb or Kalamazoo with Wayne.
- The proportion of high-end sentences for the same offense also varies widely across counties. Compare, for example, Berrien with Washtenaw or Oakland with Genesee.
- For robbery the rates of low-end sentences were exponentially higher than for any other offense.
    - For eight counties, more than half the robbery sentences were at or below the min-min.
    - Among the four counties with low end rates between 61 and 67%, the proportion attributable to downward departures differed dramatically with Wayne at 51%, Macomb at 30%, Oakland at 20%, and Washtenaw, at just 14.5%.
    - Kalamazoo's low-end rate of 80% was achieved by a combination of 40% downward departures and 40% at the min-min.
- Overall, CSC sentences were markedly different from the other offense types. Eight of the counties had less than 25% of their CSC sentences at the low end, while the same eight counties had nearly 25% of their CSC sentences at the high end.
- The extent to which counties tended to be consistent in their rate of low-end sentences across offense types varied.
    - Genesee, for example, had roughly 40% of its sentences for every other offense type at the low end but only 7.5% of its CSC sentences. Macomb and Ingham also saw large declines in their CSC sentences.
    - On the other hand, Washtenaw, Oakland, and Kent each had roughly similar rates of low-end sentences for assault and CSC with lower rates for murder.
    - Kalamazoo was unique in having a much greater percentage of low-end sentences for CSC than for assault or murder.

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Table 19b. County Differences in Low and High-End Non-Habitual Sentences for Assault, CSC, and Robbery, 2003–2012								
Assault with Intent to Murder			Criminal Sexual Conduct			Armed Robbery		
County	Percent at Low End	Percent at High End	County	Percent at Low End	Percent at High End	County	Percent at Low End	Percent at High End
Macomb	53.6	12.7	Kalamazoo	52.8	16.7	Kalamazoo	79.8	7.0
Wayne	52.8	18.3	Washtenaw	49.0	19.2	Washtenaw	66.8	3.5
Washtenaw	47.0	5.9	Wayne	44.8	21.9	Macomb	64.0	7.0
Oakland	41.7	8.4	Kent	36.4	17.6	Wayne	62.8	10.0
Ingham	41.2	11.8	Oakland	35.7	15.9	Oakland	61.0	4.9
Kent	40.5	7.2	Macomb	23.6	24.7	Ingham	53.6	10.8
Genesee	40.0	26.7	Ingham	17.0	29.3	Saginaw	52.6	8.3
Kalamazoo	38.1	19.0	Calhoun	15.2	41.3	Kent	50.7	3.1
Berrien	33.3	22.2	Saginaw	13.2	50.0	Genesee	40.9	18.5
Saginaw	24.4	24.4	Genesee	7.5	55.0	Calhoun	35.5	11.1
Calhoun	20.0	10.0	Muskegon	1.9	28.3	Berrien	32.0	14.1
Muskegon	12.5	12.5	Berrien	0.0	51.7	Muskegon	26.8	1.2
Jackson	0.0	0.0	Jackson	0.0	54.5	Jackson	19.2	7.7
OMNI Data	$p < .001$			$p < .001$			$p < .001$	

C. Conviction Method

Disparities in sentence length may also be affected by differences in the rate of pleas versus jury trials. Recall that median sentences resulting from pleas are substantially shorter than sentences resulting from jury trials and are typically shorter than those resulting from bench trials as well. Recall also that Wayne County is unique in its tradition of using bench trials. This higher rate of bench trials helps explain why Wayne County's median sentences are not among the very lowest for the three A-grid offenses.

Table 20 shows that, within each offense type, the counties vary greatly in their rate of plea-based sentences. Some consistencies exist. Kent and Kalamazoo have among the highest plea rates for every offense. Genesee also has high rates while Ingham and Wayne have among the lowest for every offense except murder. Other counties have roughly similar proportions of pleas across offense types. Most have their lowest plea rates for assault and their highest for robbery.

What is not consistent is a relationship between the proportion of pleas and the proportion of low-end sentences. Given the undeniable and intentional relationship between guilty pleas and lower sentences, one would expect the counties with the highest rates of pleas to have the highest rates of low-end sentences. However, this did not prove to be the case.

The clearest example is the murder sentences. Although nine counties all had median minimums of 20 years, their rates of guilty pleas ranged from 54.3% for Macomb and 62.7% for Oakland to 85.7% for Ingham and 83.3% for Genesee.

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When we examine the A grid offenses, we find the relationships between plea rates and low-end sentences are all over the map. For example:

- Kalamazoo has a high rate of pleas for every offense type. It also has a high rate of low-end sentences for CSC and robbery but not for assault.
- Wayne has low rates of pleas for every offense type but high rates of low-end sentences.
- Washtenaw has a high rate of low-end sentences but its plea rates vary substantially by offense.
- Kent has higher plea rates for assault and robbery than its proportion of low-end sentences would suggest.

Table 20. Percentage of Conviction Method by Offense and County (Non-Habitual Sentences, 1999–2012)

County	Murder, Second-Degree			Assault with Intent to Murder			CSC, First-Degree			Armed Robbery		
	Plea	Court	Jury	Plea	Court	Jury	Plea	Court	Jury	Plea	Court	Jury
Berrien	76.2	0.0	23.8	57.1	0.0	42.9	74.4	0.0	25.6	94.2	0.0	5.8
Calhoun	60.0	0.0	40.0	60.0	0.0	40.0	67.6	1.4	31.1	83.8	0.0	16.2
Genesee	83.3	1.4	15.3	68.8	1.3	29.9	85.7	1.4	12.9	91.8	0.7	7.5
Ingham	85.7	0.0	11.9	52.2	0.0	47.8	62.9	1.6	35.5	79.7	1.3	19.0
Jackson	71.4	14.3	14.3	50.0	0.0	50.0	86.2	6.9	6.9	79.5	2.7	17.8
Kalamazoo	78.8	0.0	21.2	69.6	4.3	26.1	86.6	0.0	13.4	94.5	1.6	3.8
Kent	78.3	1.2	20.5	79.1	0.0	20.9	84.1	0.8	15.0	94.7	0.3	5.1
Macomb	54.3	0.0	45.7	63.0	0.0	37.0	68.5	0.0	31.5	88.6	0.8	10.7
Muskegon	72.2	0.0	27.8	63.6	9.1	27.3	82.7	3.7	13.6	93.6	0.0	6.4
Oakland	62.7	1.7	35.6	61.1	0.9	38.1	77.2	0.4	22.5	86.2	0.8	13.0
Saginaw	74.4	0.0	23.1	50.8	0.0	49.2	76.5	0.0	23.5	81.6	0.9	17.5
Washtenaw	76.5	0.0	23.5	73.1	0.0	26.9	75.0	0.0	25.0	91.1	1.1	7.8
Wayne	68.4	7.4	24.2	56.3	8.8	34.9	63.1	7.3	29.6	80.8	7.0	12.1
CMIS Data	Chi-Square p < .001			Chi-Square p < .001			Chi-Square p < .001			Chi-Square p < .001		

D. County-Specific Analyses

In addition to the full model and offense-specific models mentioned already, we ran separate analyses for each of the 13 counties, also found in Appendix B. This step allows us to further explore differences among counties that were noted earlier. Each county differed in the importance placed on individual guidelines factors and how the factors come together to explain sentence length. Breaking apart the counties is an important step in analysis, as Wayne County comprises a large portion of the sentences in our data, and therefore our overall model is more reflective of Wayne County which, as we will see, is unique in many ways.

When examining the variance model summaries by county of conviction, Wayne County stands out in several ways. First, the offense explained 34% of the variance in sentence length, the highest percentage of the 13 counties included. The remaining counties ranged from a low of 10% of variance explained in Calhoun County to 28% in Kalamazoo. In most of the counties the offense explained about 20–25% of the variance in sentence length.

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Second, OV and PRV levels provided the lowest percent of variance explained in Wayne County at 11.9% and 17.6%, respectively.

- For OV level, the remaining counties ranged from the high of almost 39% of variance in Calhoun County to 12.2% in Ingham. For most of the counties OV level explained 25–30%.
- PRV Level explained almost 36% of the variance in Muskegon County down to 22% in Genesee County. For most of the counties PRV level explained 25–30%.

Further, while the full model and offense-based models show PRV level having greater explanatory power than OV level, this largely results from the influence of Wayne County. The PRV level explained more variance in only four counties (Ingham, Kent, Saginaw, and Wayne), while OV level also explained more variance in four counties (Berrien, Calhoun, Oakland, and Washtenaw). The remaining five counties had similar amounts of variance explained by OV and PRV levels. The differences among counties in the percentage of variance explained by habitual status displayed interesting results that will be examined in Chapter Fourteen.

Examining the amount of variance explained by specific guidelines factors reveals important differences among how counties utilize the sentencing guidelines overall. In the full model, guidelines factors explained 71% of the variance in sentence length; however, most counties have a greater amount of variance than that explained by these factors. Again, Wayne County is unique in that the guidelines factors explain the least amount of variance at 65.8%.

- At 66% and 70.7%, respectively, only Genesee and Saginaw Counties are also below the full model's level of explanation.
- Berrien County has the most variance in sentence length explained by the guidelines factors at almost 87%.
- Calhoun, Kalamazoo, Muskegon, Oakland, and Washtenaw are not far behind with at least 80% of variance explained.

A high amount of variance explained is evidence of sentence lengths being determined by guidelines factors. The three counties that have more than 30% of the difference in sentence length unaccounted for by guidelines factors suggest less adherence to the sentencing guidelines.

The inclusion of departures into the model reconciles a large amount of the differences among counties so that the percentage of variance explained ranges from 85% in Saginaw to 94.2% in Kalamazoo. Departures explain 23% of the variance in sentence lengths in Wayne County, which—as discussed previously—departs frequently. In contrast, in Calhoun County, departures explain 5.5% of the variance. In general, the counties that had relatively low levels of explanation from the guideline's factors have high percentages explained by departures, while the counties that had high levels of explanation from the guidelines factors had relatively low percentages of explanation from departures.

Turning to the impact of changes in PRV and OV levels on estimated sentence length, we again find variations by county. For example, Kalamazoo had some of the largest effects for increases in PRV level: the increase from Level A to B is a 57% increase, and at Level F it is 271% increase. Comparatively, in Genesee County, increases in PRV level had a more tempered effect on sentence length, with an increase of 23% for PRV Level B and 176% for PRV Level F.

County patterns in the effect on sentence length of OV level increases were less consistent. Moving from OV level II and then to OV level III**,** Wayne County had the smallest increases at 28% and 65%, respectively; Muskegon County had the largest increases, at 53% and 103%. For movement to OV level VI, the difference between the smallest and largest impact was 90 points. The sentence increased 189% in Saginaw compared to 279% in Washtenaw County.

The impact of departures on estimated sentence length varied among counties within a fairly narrow range. The impact of downward departures ranged from a 34% decrease in Calhoun County to

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more than 50% decreases in Jackson and Genesee Counties. Most of the counties saw an estimated decrease of 38–45%. The range is broader for upward departures. Ingham County had the smallest upward departure impact, with a sentence length increase of 63%, followed by Oakland and Washtenaw at 65% and 67%, respectively. In five counties, an upward departure was associated with more than a 90% increase. Interestingly, Wayne County, which we have previously highlighted for its extensive use of departures, fell in the middle for the impact of both downward and upward departures with 44% decreases and 70% increases, respectively.

Finally, the sentence increase for selecting a jury trial varied substantially by county. At the lower end, choosing a jury trial increased estimated sentence lengths by 11% in Ingham and Kent, 12% in Wayne, 15% in Kalamazoo, and 19% in Washtenaw. A jury trial added 24–26% to the sentence in Genesee, Macomb, Muskegon, and Oakland, and 30% in Calhoun. The most striking county disparities are the lack of any significant increase for a jury trial in Berrien and Jackson and, at the other extreme, a 38% increase in sentence length for having a jury trial in Saginaw.

E. Further Observations

While no data were available with regard to prosecution decision-making, a last point worth noting about counties is that each has one unique factor: the identity of the elected prosecutor. Because prosecutors are county officials who select the charges (including habitual offender enhancements), negotiate guilty pleas, agree or object to bench trials, recommend sentences, and decide whether to appeal downward departures, their influence on sentence lengths—both direct and indirect—is substantial, albeit difficult to measure. Some prosecution policies are idiosyncratic. They depend on the elected prosecutor's views about plea bargaining, sentencing, or particular offenses. However some practices may be a practical function of the county's size and thus may result in similar outcomes among like-sized jurisdictions. For instance, prosecutors in large counties with heavy caseloads, many personnel to manage, and a wide range of judges and defense attorneys to interact with may make more pragmatic, less individualized, and generally less publicly visible decisions than prosecutors in smaller counties.

County disparities in sentence length are often defended by judges and prosecutors on the basis of "local control" over "local crimes." The sentences are said to reflect differences in community values that local elected officials are bound to respect. Disparities are also presumed to reflect individualized decisions based on knowledge of local resources and circumstances.

The opposing view is that defendants are convicted in the name of the "People of the State of Michigan" of crimes defined by state statute. Their convictions and sentences are subject to appellate review by state-level courts, and their prison sentences are served in state facilities funded by all state taxpayers. Yet some Michigan prisoners are serving minimum sentences that are twice as long as those of other prisoners with similar prior records who committed similar crimes in a different county. This result is not only unfair to the individuals who drew the long straw but also means that some counties' sentencing decisions disproportionately affect the allocation of state resources.

In theory, the adoption of statewide sentencing guidelines indicates that the Legislature has resolved this dispute by coming down on the side of statewide consistency. However, in practice, the structure of the guidelines permits very substantial disparities among counties to continue unabated.

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CHAPTER ELEVEN. SYSTEMIC FACTORS: SENTENCING JUDGE

Sentencing disparities do not only exist among counties. As Jesse Mack can attest, they also exist within counties among judges on the same bench.

> *On June 26, 2011, Jesse Mack, Christopher Hubbert, and Deangelo Reynolds went to a residence in Detroit to find Michael Miller, whom they believed stole a pistol from Mack's home the preceding week. Mack had reported the gun stolen without action by the police. Mack placed a shotgun in the trunk of the car because he believed Miller was at a "weed house." Mack drove. Miller was standing outside his residence. When Miller refused to talk to the occupants of the car and headed for his house, Reynolds fired the shotgun, which he had retrieved from the trunk, and Hubbert fired a pistol for a total of 14–15 shots aimed at the house. Miller was not hurt, but his mother, who was inside the house, sustained injuries to her forearm and calf.*
>
> *All three men were charged with assault with intent to commit murder, which carries a maximum sentence of life or any term of years, and possession of a firearm during the commission of a felony ("felony firearm"), which carries a mandatory sentence of two years to be served consecutively to the sentence for the underlying crime. Mack, who had not actually fired a weapon, was charged with both crimes as an aider and abettor. All pled no contest which, for most purposes, has the effect of a guilty plea.*
>
> *Mr. Mack, aged 23, had a high school diploma and various trade certifications, a well-paying job and no prior record, adult or juvenile. He lived with his longstanding girlfriend (whom he married while on bail) and their two children. He had no history of substance abuse or mental illness.*
>
> *On December 22, 2011, Judge Daniel Hathaway sentenced Mr. Mack to serve 7.5–20 years for the assault. The minimum was near the low end of the range recommended by Michigan's sentencing guidelines, which was 81–135 months (6.75–11.25 years). Mack also received two additional years for the felony firearm.*
>
> *The two co-defendants were not arrested immediately. They were sentenced nearly a year after Mr. Mack by a different judge after negotiating pleas with a different prosecutor.*
>
> *On November 14, 2012, Judge Gregory Dean Bill sentenced Mr. Reynolds. Because he had two prior felony convictions and was currently on parole, Mr. Reynolds's sentencing guidelines range was 225–375 months (18.75–31.25 years). He was sentenced to serve 5–15 years for the assault, plus two years for the felony firearm. His minimum of 60 months for the assault was 165 months—nearly 14 years—below the low end of the guidelines range. His Sentencing Information Report does not reflect any reasons for the departure.*
>
> *Six days later, Mr. Hubbert was also sentenced by Judge Bill. Like Mr. Mack, Mr. Hubbert had no prior record and his sentencing guidelines range was also 81–135 months. However, Mr. Hubbert was sentenced to 3–15 years for the assault and the additional two years for the felony firearm. His minimum of 36 months for the assault was 45 months—nearly four years—below the low end of the guidelines range. His Sentencing Information Report also does not reflect any reasons for the departure.*
>
> *Judge Hathaway, who had sentenced Mr. Mack, subsequently considered Mr. Mack's postconviction motion for relief from his sentence. Although Judge Hathaway thought the discrepancy in sentences between Mack and his co-defendants was "strange," he declined to question the decisions of other judges and concluded that Mr. Mack's sentence was proportional to the crime because it was within the range established by the sentencing guidelines.*

The discrepancies in this case are particularly stark because they occurred among co-defendants. But they are not unique. The data reveal that the median sentences of judges in the same county for the same type of offense imposed under the same legislative guidelines vary by three, six, 10, and even 12 years.

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The nearly 21,000 sentences in the CMIS dataset for 1999–2012 were imposed by hundreds of different judges. Many of those judges did not have a sufficient number of cases for analysis. Therefore, it is not possible to include "identity of the sentencing judge" as a variable in a regression analysis. We can, however, compare the sentences of those judges from a number of counties who did have a substantial volume of cases.

Wayne County, where Jesse Mack was sentenced, has the largest bench in the state. Table 21 shows us that if you were convicted of second-degree murder, you could expect to receive a minimum sentence of 16 years from Judge R, but a sentence of nearly 23 years if you were unfortunate enough to draw Judge B3. If you were convicted of assault with intent to murder, you were likely to receive a minimum sentence of 10 years if sentenced by Judge B1, but you risked receiving over 13 years more if you were sentenced by Judge B3. Similar disparities existed for the other offenses. Judges B2 and M had median minimum sentences of nine years for first-degree CSC while Judge B3.'s median sentence was four years longer. Judge A's 10-year median sentence for armed robbery was twice as long as the 5-year medians of Judges F and S.

Table 21. Median Non-Redundant Sentences Imposed by Select Wayne County Judges

Offense	No. of Judges	No. of Sentences	Low Median	Hi Median	Difference
Murder, second-degree	10*	567	16.0	22.75	6.75
Assault with intent to murder	7**	327	10.0	23.4	13.4
Criminal sexual conduct, first-degree	7***	310	9.0	13.0	4.0
Armed robbery	16****	3308	5.0	10.0	5.0

*More than 50 sentences each **At least 40 sentences each ***At least 39 sentences each ****At least 170 cases each

While other counties did not have the same volume of sentences, there were numerous examples of substantial disparities among judges who shared the same bench.

- In Oakland County CSC cases, Judge T typically imposed seven years while Judge G imposed 15 years. Among nine Oakland County judges who collectively imposed 855 armed robbery sentences, the median minimums showed a disparity of 8.5 years, ranging from 4.25 to 12.75 years.
- In Kent County, six judges had a difference of 1.5 years in their median sentences for CSC (from 10 to 11.5) and 2.8 years for their median robbery sentences (from 5.7 to 8.5).
- In Genesee County, while four judges imposed similar median sentences of either nine or 10 years for armed robbery, the same judges had very different medians for murder—18, 22.5, 24, and 30 years.
- In Saginaw County, three judges had median sentences for armed robbery that ranged from seven to 10 years, while the two Muskegon judges with enough cases for comparison had armed robbery medians of 10 and 10.3 years.

These findings, along with sample cases like Mr. Mack's, confirm what every criminal practitioner knows from experience: the sentence ultimately imposed depends, to a greater or lesser extent, on the luck of the draw. That image is not just a cliché; it is literally true. By court rule, circuit court cases are assigned to judges by lot.[1] This serves to even out judges' caseloads, avoid even the appearance of bias and prevent "judge-shopping" by the parties. Ironically, it also reinforces the randomness of sentence lengths. Whether the defendant is made to serve 10 years in prison or 15 may well come down to whether his case is assigned to Judge A in Courtroom 1 or Judge B next door in Courtroom 2.

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During interviews by a researcher, Michigan judges attributed differences in sentence lengths to varying judicial philosophies about the purpose of sentencing and the judge's role in the process. They also discussed the effect of local crime rates and local demographics, the need to work around the policies of different prosecutors, presentence report recommendations, the availability of alternative resources, and judges' attitudes toward such defendant characteristics as addiction, mental illness, family support, and employment.[2]

To the extent that it occurs in life-maximum cases, sentence bargaining can have some leveling effect. But experienced prosecutors and defense attorneys know the predilections of the local judges and what sentence agreements each judge is likely to accept. Thus the identity of the judge is itself a factor for consideration in negotiations. The parties also know how judges are likely to receive arguments for departures from guidelines recommendations, upward or downward.

The data show the final sentences—after plea negotiations and guidelines calculations have been taken into account by the identified judges. It is possible that without these constraints, the extent of disparity might have been even greater. It is undeniable that the sentencing guidelines do not prevent substantial disparities that are attributable not to what the defendant has done but to who the sentencing judge is.

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CHAPTER TWELVE. DEFENDANT CHARACTERISTICS: SEX AND AGE

Disparity caused by systemic factors is difficult to address because it can result from policies that may be defensible or even seemingly inevitable. Plea bargaining, on which the operation of the criminal justice system has come to depend, is built on the idea that people ought to receive less punishment as a reward for waiving their right to a jury trial. Local officials justify county differences in sentencing on the rationale that local criminal justice outcomes should reflect local values and concerns. And differences in the sentences imposed by judges on similar defendants are said to be a byproduct of desirable judicial independence and experience.

Consideration of the personal characteristics of individual defendants presents a different situation. Except for the possibly mitigating factor of youth, demographic factors like sex, age, and race bear no relevance to culpability and have no justification in public policy or even the practicalities of administering public institutions. Given the over-representation of people of color among those who are incarcerated, the prospect of racial disparity, in particular, has long been a matter of concern.

Some defendant characteristics that might logically relate to sentence selection in particular cases include mental health, substance abuse history, employment status, and residential stability. We cannot examine their impact because this sort of background information was not part of the available data. However, prior research suggests that such factors are more likely to affect the In/Out decision for less serious offenses than the length of an inevitable prison sentence.

A. Sex

In 2019, women constituted 5.4% of the Michigan prisoner population. From 1999–2012, they accounted for 4.9% of the sentences imposed in life-maximum cases under the legislative guidelines. Their proportion of these sentences varied by offense group:

- Murder – 10.9%
- Assault – 4.6%
- CSC – 1.9%
- Robbery – 4.6%

Overall, at 69.7%, women are more likely than men, at 58.3%, to have only one sentence. This may reflect the fact that women are over-represented among murder sentences which are most likely to be single and under-represented among CSC sentences, which have a high proportion of multiples. Figure 9 shows substantial disparity by sex for non-habitual offender sentences in each offense group.[1]

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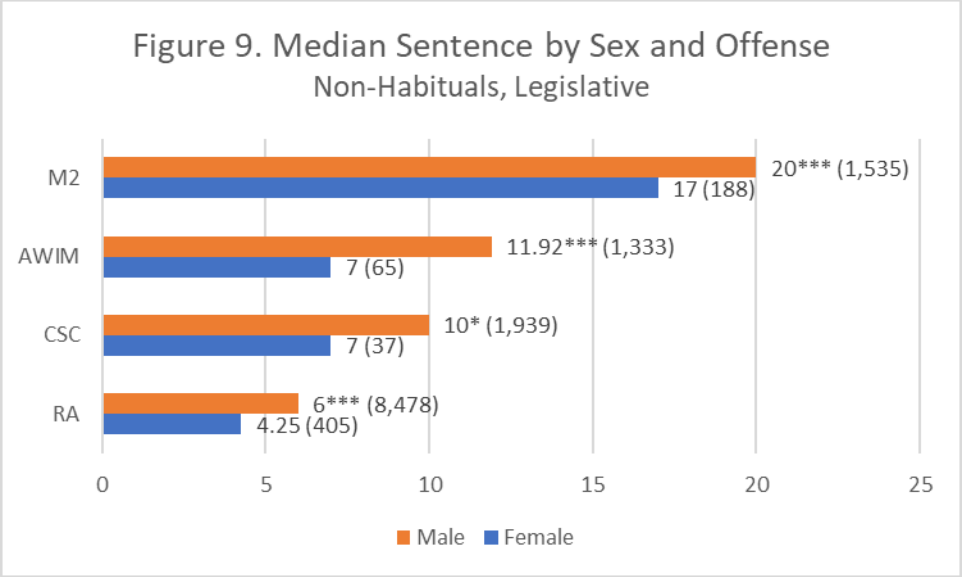

CMIS data, M2, AWIM, & RA*** $p < .001$, CSC* $p < .05$

Overall, 56.3% of the women's non-habitual sentences were at or below the low end of the applicable sentencing guidelines range, compared to 51.4% of the men's sentences.

Sex disparity may be largely the result of judicial perceptions that women are less dangerous than men. It may occur because women are often co-defendants with men who are viewed as the primary perpetrators. Or it may be because women simply have lower OV and/or PRV scores. Table 22 shows that women do, in fact, score substantially lower than men on prior record. With a few minor exceptions women are much more likely than men to score at Levels A–C; men score at Levels D–F at much higher rates than women.

Table 22. Percentage of Non-Habitual Sentences Among PRV Levels by Sex, 2003–2012

	Murder, Second-Degree		Assault w/Intent		CSC, First-Degree		Armed Robbery	
PRV Level	Female (N = 134)	Male (N = 1,084)	Female (N = 43)	Male (N = 841)	Female (N = 25)	Male (N = 1,200)	Female (N = 262)	Male (N = 5,394)
A	38.8	17.4	39.5	13.7	16.0	20.1	23.7	14.9
B	17.9	12.8	7.0	8.2	8.0	7.2	11.5	10.3
C	26.9	29.3	37.2	27.0	68.0	43.1	41.2	30.9
D	12.7	23.3	16.3	29.1	8.0	16.3	17.6	24.3
E	3.7	9.8	0.0	12.5	0.0	8.0	4.2	11.2
F	0.0	7.3	0.0	9.5	0.0	5.3	1.9	8.5
OMNI Data	$p < .001$		$p < .001$		Not Significant		$p < .001$	

The same level of sex disparity is not evident in the offense variable levels. No offense type showed statistically significant differences in offense severity between males and females. Another factor that may have helped nudge women's sentences below men's is that, for murder and assault, women's sentences were significantly more likely to result from guilty pleas.[2] Regression analyses also found little to no statistical difference in sentence length between the sexes. Exceptions to this were present in the offense-specific analysis for assault and the county analysis for Saginaw. In the assault regression, men were found to have an 11% increase in their sentence compared to women. In the county analysis, the results suggest that in Saginaw sentences were 13% longer for men.

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In sum, the sentences imposed on women were consistently shorter than those imposed on men by amounts ranging from nearly two to nearly five years. This discrepancy can be partially explained by women having lower PRV scores and a somewhat higher rate of guilty pleas.[3] However, given the size of the disparity, it seems likely that much of the difference is attributable to a combination of individual background factors not captured in this research and to more lenient attitudes toward female defendants.

B. Age

Table 23 examines the potential impact of age on sentences under the legislative guidelines. Overall, it shows no uniform relationship between the defendant's age and sentence length. There was not, for instance, a direct increase in median sentence as defendants got older. Although that was the general trend, there were numerous exceptions.

- The median sentence for murder was the same at virtually every age. The sole exception was juveniles younger than 17 whose median sentence was three years shorter.
- Those who were 17 and under had median sentences that, at below 11 years, were shorter than most in assault with intent to murder cases. Oddly the median dropped back to 10 years for those who were 40 or older.
- In the CSC and armed robbery groups, juveniles under 17 had longer median sentences than 17-year olds. The CSC group again shows a drop back to a 10-year median for defendants who were 40 and older.

In three offense groups, the largest number of sentences by far was imposed on people who were between 20 and 29. In the CSC group the most common age group was 30–39.

Table 23. Age at Offense and Median Minimum Sentence, Non-Habitual Sentences, 1999–2012

Age	Murder, Second-Degree		Assault with intent to Murder		CSC, First-Degree		Armed Robbery	
	Years	Number	Years	Number	Years	Number	Years	Number
<17	17.0	90	10.0	66	8.0	76	6.0	673
17	20.0	95	10.7	87	6.3	88	5.0	1,132
18–19	20.0	284	11.25	87	9.0	134	5.0	2,183
20–29	20.0	720	12.0	633	10.0	482	6.0	3,239
30–39	20.0	276	12.0	239	11.0	645	7.5	1,040
40+	20.0	258	10.0	165	10.0	551	8.0	616
Total	20.0	1,723	11.25	1,398	10.0	1,976	6.6	8,883
CMIS Data	$p < .05$		$p < .01$		$p < .001$		$p < .001$	

The age groups that show particularly interesting characteristics are under 17 and 17. Differences between the sentences for these groups and between the sentences for the entire OMNI dataset that were statistically significant at the $p < .001$ level appear below. Importantly, the law considered defendants younger than 17 to be juveniles who had to be waived into the jurisdiction of the circuit court in order to be tried and sentenced as adults.

- Those under 17 were less likely than those who were at 17 to score at Prior Record Levels A and B and more likely to score at PRV Levels C and D, indicating that the younger defendants had more severe juvenile histories. Not surprisingly, both groups of teenagers rarely accumulated enough of a criminal history to score at PRV Level E or F. The

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significantly different scoring in Wayne County of two particular prior record variables provides some insights.
    - Youth under 17 were almost twice as likely as those aged 17 to receive 10 points under PRV 3 for having a prior high severity juvenile adjudication.
    - On PRV 7, 33% of youth under 17 received 20 points for two or more concurrent or subsequent convictions compared to 23% of those aged 17.
- For the A grid crimes, those under 17 were less likely than those at 17 to score at Offense Levels 1 and 2. Their proportion at OV Levels 1 and 2 was also markedly below that of the group as a whole. Conversely, those under 17 were more likely to score at OV Levels 5 and 6 than either those who were at 17 or the group as a whole, suggesting that the younger defendants committed their offenses in a more serious manner.
- Both the youngest groups were more likely to plead guilty than defendants overall, which would militate toward shorter minimum sentences.
- Defendants under 17 had a markedly lower percentage of single sentences and a greater proportion of five or more sentences compared to the 17-year olds, again suggesting that their offenses were more serious.
- There was virtually no difference by age in the rate of departures. Apparently defendants' youthfulness did not move judges to be more lenient.

These findings suggest that the waived juveniles had more serious offenses and criminal histories than 17-year-olds convicted of the same crimes, which helps explain why the youngest defendants generally did not receive leniency based on their age—except perhaps when the crime was murder.

There were, however, significant differences among counties in the proportion of sentences attributable to waived juveniles.

- Saginaw accounted for 3.7% of all sentences but 8.3% of those under 17 as well as 5.3% of the 17-year olds.
- Less dramatically, Kent County accounted for 7.9% of all sentences but 10.3% of those under 17.
- Wayne County, on the other hand, accounted for 49.7% of all sentences and 52.8% of those imposed on 17-year-olds but only 40.7% of the under 17 group, which suggests that Wayne may be employing alternatives to treating juveniles as adults more often.

It has been suggested that guidelines commissions consider age as a mitigating factor at two extremes. Based on current brain science, younger defendants may be considered less culpable. Older defendants, on the other hand, are closer to "aging out" of crime. Even if they have substantial criminal histories, they are approaching the point where further offending is increasingly less likely. The length of their prior records, which may well consist of numerous non-violent offenses, could be balanced against the substantial cost of incarcerating older people.[4]

In general, the regression analyses did not have many significant findings related to age, except for confirming the lower sentences for those aged 17, compared to those both younger and older than 17. In the offense-specific models, if the defendant was 17 at the time of the offense, the sentence decreased by 10%. In the county-specific models, four counties (Berrien, Kalamazoo, Kent, and Macomb) showed that defendants who were 17 at the time of the offense received a decreased sentence. Additionally, in four counties (Calhoun, Macomb, Washtenaw, and Wayne), defendants older than 29 at the time of the offense saw a significant increase in sentence length.

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CHAPTER THIRTEEN. DEFENDANT CHARACTERISTICS: RACE

Use of the term "non-white"

The Michigan Department of Corrections data on which this research is based does not distinguish the ethnic group "Hispanic" from the racial groups white and non-white. While race is a required field for probation officers who are inputting initial data, ethnicity is not. Hispanics, of course, have varied racial backgrounds depending on their country of origin.

The MDOC's Offender Tracking System (OTIS) shows that many people with common Hispanic surnames are identified as white while other people with identical names are identified as Hispanic. Because there is no reliable way to count Hispanics separately, they are simply included in whichever racial group they were placed at intake. Thus it is likely that many Hispanics are counted as white.

For the reader's information, Appendix Table C1 includes census data that shows the estimated percentage of Hispanics in each of the study counties.

There is no dispute that a disproportionate number of Michigan prisoners are non-white. In 2019, non-whites constituted 55% of the prisoner population although they accounted for only about 14% of the state's total population. For those convicted of life-maximum offenses, the numbers are even more skewed. Among all the sentences imposed under the statutory guidelines on people not sentenced as habitual offenders, non-whites accounted for 73.7% overall: 76% in the murder group, 78% in the assault group, 79% in the robbery groups and 44% in the CSC group. Of 2,300 sentences imposed from 1999-2012 on defendants who were 17 years or younger when they committed their crimes, 84% involved teenagers of color.

There are undoubtedly multiple reasons for these overwhelming differences. They may include higher arrest rates, higher actual crime rates, less favorable plea offers and less ability to post bail, investigate available defenses, or obtain adequate representation. In turn, these may result from economic, residential, educational, and health disparities rooted in historical and contemporary racism. However, the focus of the current research is limited to exploring the relationship of race to the sentencing guidelines and to the sentences ultimately imposed.

Many researchers have discovered just how complicated this exercise can be. Before examining the Michigan data, it is useful to consider Prof. Marie Gottschalk's summary of their efforts in *Caught*. Gottschalk quotes multiple researchers who have found little evidence of overt statewide racial disparity in sentencing but who suggest that differences in county-level policies may be masked by statewide data. Gottschalk goes on to express concern about the extent to which the research emphasis on racial and other forms of disparity has shifted focus from the policies that have caused harsher penalties for defendants of every race.[1] Referring specifically to the federal sentencing guidelines, she observes: "The most rigorous studies of the guidelines suggest that they have not had much success in reducing sentencing disparities between judges, but they have been wildly successful in raising the severity of sentences in most crime categories."[2]

Prior Michigan research also shows little or no racial disparity in sentence length when the analysis controls for prior record and offense severity. Recall that the Michigan Felony Sentencing Project found that 1977 sentences were significantly higher for non-white defendants only when the offenses were drugs, burglary, larceny and sex. In assessing sentences imposed under the judicial guidelines from 1992–1997, Ekpunobi found that race was significantly associated with sentence in only one of the four counties he studied. The National Center for State Courts found no significant difference by race in the average length of prison sentences.

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A. County Population

Before turning to the current research, it is useful to consider some basic figures about the non-white populations of the study counties compared to the proportion of sentences imposed on non-whites. These figures are summarized here. More details can be found in Appendix C.

In most of the study counties, the population is 18–26% non-white.

- Jackson is an exception at the low end with just 12.4% non-white.
- At the other end, Wayne County is unique, with a non-white population of 45.4%.

Five urban counties accounted for 88% of the non-white sentences, with nearly two-thirds coming from Wayne County alone. They were Wayne – 63.8%, Oakland – 8.3%, Kent – 6.4%, Macomb – 5.0%, and Genesee – 4.5%.

The proportion of sentences imposed on whites and non-whites varies by offense and county.

- Broadly speaking, the proportion of non-white sentences is two to three times larger than the proportion of non-whites in the county's population. So, for instance, 17.8% of Kent County's population is non-white, but 56% of its life-maximum sentences were imposed on non-whites.
- The proportion of white sentences is generally one-half or less of the proportion of whites in the county's population. Looking again at Kent County, 82% of its population is white but only 44% of its life-maximum sentences were imposed on whites.
- For Wayne County, the proportion of white sentences is just a quarter of the proportion of whites in the county's population.

When considered by offense type, there is notable variation.

- Only four counties have more white than non-white murder sentences (Calhoun, Ingham, Jackson and Kalamazoo).
- Only Muskegon has more white assault sentences.
- For every county except Wayne a higher proportion of CSC sentences are white than non-white.
- A higher proportion of every county's robbery sentences are non-white than white.

B. Age

The sentencing data reveals two fundamental points about race and age.

First, non-whites committed their offenses at a younger age than whites. The trend for every offense type is that, from age 17 on, the proportion of non-white sentences declines with each increase in age. For robbery, for instance, the non-white share of sentences is about 86% for those between 17 and 19 years old, 76% for those between 20 and 29, and then drops to 67% for both the 30–39 and 40+ groups.

- Among those sentenced for murder and assault, about 29% of the non-whites compared to 19% of the whites were younger than 20 at the time of their crimes.
- Among robbery defendants, 49% of the non-whites compared to 30% of the whites were younger than 20.

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Second, the proportion of non-white sentences is much smaller for CSC than for other offense types at every age. It declines steadily from 61.4% for 17-year olds to 35.4% for those who are age 40 and over.

Table 24 breaks down for each offense type the percentage of sentences imposed on whites and non-whites by age group.

- For murder and assault, about 22% of all the sentences were imposed on non-white defendants who were 19 or younger at the time of the offense. Both racial groups show large spikes for these offenses at ages 20–29, and then decline. We cannot say how the circumstances under which these crimes were committed may relate to age.
- For robbery, which accounts for nearly two-thirds of all the life-maximum sentences, the figures shifted. The proportion of robbery sentences imposed on those who were 17 or younger was nearly twice the proportion imposed on these youth for murder and assault. More than 38% of all the robbery sentences were imposed on non-white defendants who were younger than 20 (compared to 6.3% imposed on white youth). The proportion again peaked at ages 20–29 but less sharply. The decline from there was even steeper. Armed robbery is clearly the crime that leads so many economically disadvantaged young men to prison.
- CSC shows a totally different pattern as to both age and race. The majority of sentences are imposed on white defendants. Relatively few of the offenses were committed by defendants younger than 20. The peak age group was 30–39. Defendants were 40 or older at the time of CSC offenses nearly four times as often as for murder and eight times as often as for robbery.

Table 24. Percentage of Sentences, by Offense Type, Age, and Race Non-Habitual Sentences, 1999–2012

	Murder, Second-Degree (N = 1,723)			Assault with Intent to Murder (N = 1,398)		
Age	Non-White	White	Total	Non-White	White	Total
17 & under	9.0	1.7	10.7	9.2	1.7	10.9
18–19	13.8	2.7	16.5	12.7	2.2	14.9
20–29	32.4	9.3	41.7	36.9	8.4	45.3
30–39	11.0	5.0	16.0	12.1	5.0	17.1
40+	10.2	4.8	15.0	7.4	4.4	11.8
Total	76.4	23.6	100.0	78.3	21.7	100.0
CMIS Data	p <. 001			p < .001		
	CSC, First-Degree (N = 1,976)			Armed Robbery (N = 8,883)		
Age	Non-White	White	Total	Non-White	White	Total
17 & under	4.6	3.7	8.3	17.7	2.6	20.3
18–19	4.0	2.8	6.8	20.9	3.7	24.6
20–29	12.4	12.0	24.4	27.7	8.8	36.5
30–39	13.5	19.1	32.6	7.9	3.8	11.7
40+	9.9	18.0	27.9	4.7	2.2	6.9
Total	44.4	55.6	100.0	78.9	21.1	100.0
CMIS data	p< .001			p < .001		

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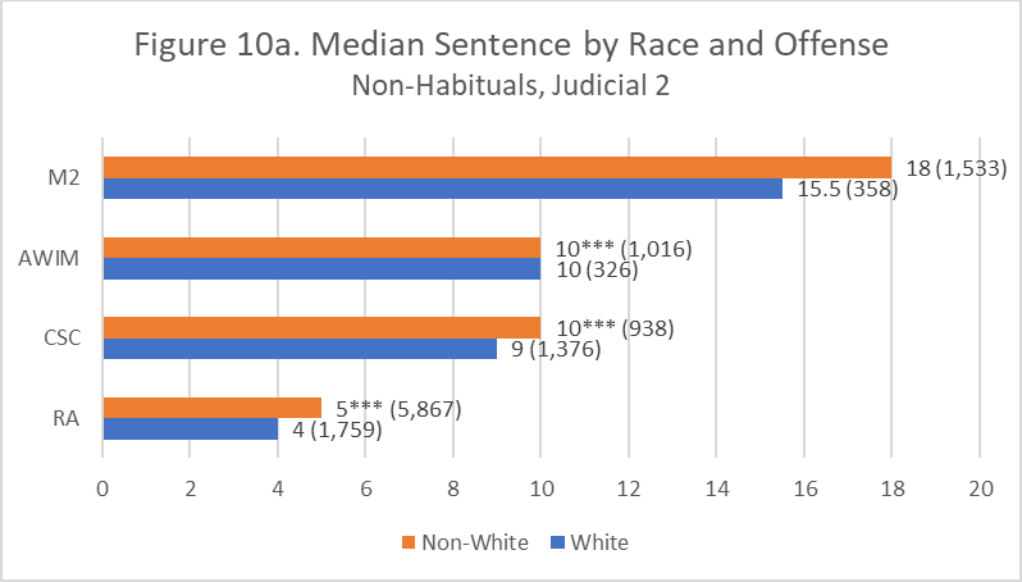
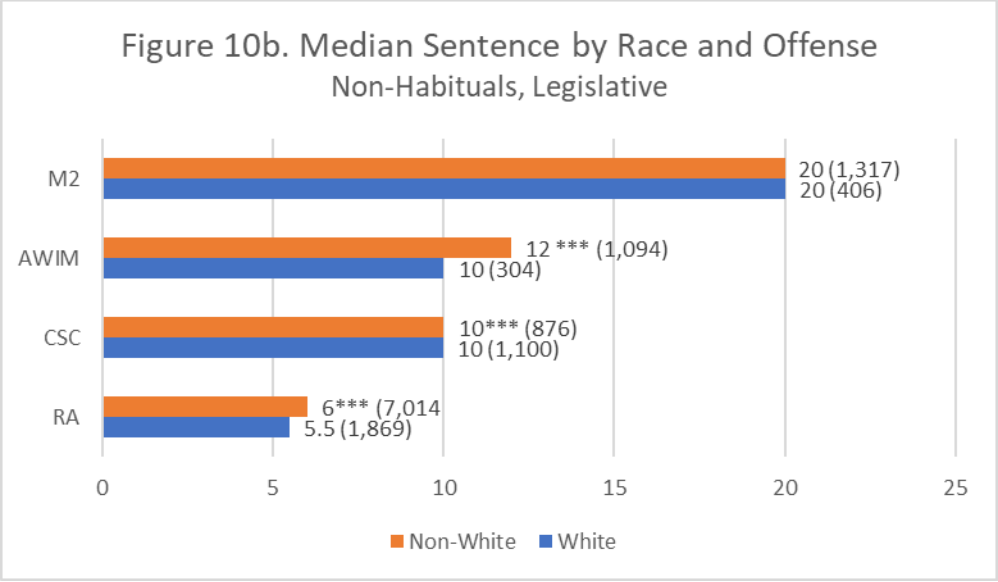
C. Median Sentence Length

The current research shows that when life-maximum offense groups are examined separately, statistically significant disparities in non-habitual offender sentences are apparent under both the judicial and legislative guidelines. Figure 10a shows that non-white defendants received significantly longer minimum sentences under the judicial guidelines for every offense except murder.[3]



CMIS Data, M2 not signif, AWIM, CSC, & RA *** p < .001
Means for white- M2 18.7, AWIM 10.5, CSC 11.5, RA 5.5
Means for non-white- M2 18.7, AWIM 13.0, CSC 14.75, RA 6.3

Figure 10b shows that this pattern of disparity continued under the legislative guidelines with the non-white sentences, except for murder, always being significantly longer.



CMIS Data, M2 not signif, AWIM, CSC, & RA *** p < .001
Means for white- M2 20.5, AWIM 12.0, CSC 10.9, RA 7.1
Means for non-white- M2 21.2, AWIM 14.1, CSC 12.6, RA 7.6

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The extent of the disparity changed between the judicial and legislative guidelines as median sentences increased for each racial group at different rates.

- White legislative sentences for murder "caught up" to non-white sentences because, while the median non-white sentence grew by two years, the median white sentence grew by 4.5 years.
- The disparity in CSC sentences declined because the median non-white sentence held at 10 years but the median white sentence grew by one year.
- Among robbery sentences the disparity decreased by six months because the white median sentence increased by 1.5 years while the non-white median increased by one year.

These changes suggest that the legislative guidelines may have reduced some disparity based on race. However, things went in the opposite direction for assault sentences. Where there had been no difference in the medians by race under the judicial guidelines, under the legislative guidelines the white median sentence held at 10 years but the non-white median grew by two years to 12.

As usual, aggregate figures mask substantial differences among counties.

- Murder sentences were significantly disparate in Ingham County ($p < .05$), where the median white sentence was 17 years but the median non-white sentence was 25 years.
- Assault sentences were significantly disparate in two counties, both at the $p < .05$ level.
  - In Oakland, the median sentence was 9.5 years for whites but 12 years for non-whites.
  - Similarly, in Wayne, the median was 9.25 years for whites but 11.25 years for non-whites.
- CSC sentences showed disparity in three counties, all at the $p < .001$ level.
  - The difference was most dramatic in Jackson, where the median sentence was 11.25 years for whites and 25 years for non-whites.
  - In Kalamazoo, the median for whites was just five years, while for non-whites it was 11.25 years.
  - In Wayne County, the median for whites was eight years, while for non-whites it was 10.5.
- Armed robbery had significant disparities in four counties.
  - In Muskegon ($p < .01$), white median sentences were five years while non-white sentences were 7.4 years.
  - In Oakland ($p < .01$), the difference was between whites at 4.25 years and non-whites at 5.5 years.
  - Wayne County ($p < .001$) had five years as the median for whites but six years as the median for non-whites.
  - In Genesee County ($p < .05$), it was non-whites with a median of seven years while the white median was nine years.

Three points stand out here. First, the low amount of racial disparity at the sentencing stage in most counties for most offenses is promising. Six counties (Berrien, Calhoun, Kent, Macomb, Saginaw, and Washtenaw) had no instances of statistically significant racial disparity; five others had disparity for one type of offense. Oakland's longer non-white sentences for both assault and robbery bear closer examination. The fact that Wayne County, which has by far the greatest number of sentences and the greatest number of non-white defendants, imposed significantly longer median sentences on non-whites is both unexpected and important to explore with more data than is available in the current research.

Second, of 10 instances of significant racial disparity, nine involved substantially longer sentences for non-whites. While not a surprise, this finding helps explain the greater number of non-whites incarcerated for life-maximum offenses.

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Third, even where racial disparity is not apparent at the sentencing stage, more favorable treatment of whites at other stages may help explain the disproportionate number of non-white prisoners. A simple example would be if non-whites received less desirable plea agreements. Suppose, for instance, whites were more often allowed to plead down to lesser included offenses that did not carry life-maximum terms. Whites and non-whites who were convicted of similar offenses might show no evidence of disparity in their sentences but the greater proportion of non-whites sent to prison for life-maximum offenses would still be a product of racially disparate treatment. Or, in some counties, non-white juveniles may be waived into adult courts more often than white youth. The sentence lengths for whichever juveniles are waived may not differ by race but the proportion of non-white youth receiving adult prison terms would be the product of racial disparity. These are the sorts of hypothetical questions that merit further research.

It is important to note that, as used in the bivariate analysis, the variable "race" encompasses any factors that tend to be associated with race. The regression analysis holds other identified factors constant and focuses on the impact of race per se on sentence length. Counterintuitively, in the full model, if the sentence was for a defendant who was white, there was a 2% increase in sentence length. However, there were no significant findings for the impact of race alone on sentence length for any offense type or in any specific county.

Next we will examine identified factors that may indirectly cause racial disparities in sentence length because they impact non-white defendants differently than white defendants.[4]

D. Prior Record Level

Table 25 focuses on the PRV level. It shows that in three of the four offense groups, whites fell into Levels A, B, and C more often than non-whites, while non-whites fell into levels D, E, and F more often than whites. (It does not, of course, show that either group's prior convictions were for offenses similar to the current offense, only that non-whites had more of them.)

In the robbery group, this pattern was reversed. Non-whites showed less serious prior records than whites.

- Of the non-white sentences, 58.2% are at Levels A–C compared to 52.6% of the white sentences.
- Conversely, 7.2% of non-white sentences were at Level F compared to 11.6% of white sentences.
- Non-whites had roughly similar rates of sentences at each PRV level for robbery as they had for other offenses.

The shift in disparity occurred because white sentences were scored at PRV Level A about half as often for robbery as they were for the other offense types. White robbery sentences were scored much more often at PRV Levels E and F.

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Table 25. Percentage of Non-Habitual Sentences Among PRV Levels by Race and Offense, 2003–2012								
	Murder, Second-Degree		Assault w/Intent		CSC, First-Degree		Armed Robbery	
PRV Level	White (272)	Non-white (946)	White (205)	Non-White (679)	White (703)	Non-White (522)	White (1,197)	Non-White (4,462)
A	27.2	17.7	22.4	12.7	24.0	14.6	12.6	16.0
B	14.7	13.0	10.2	7.5	7.7	6.7	12.4	9.8
C	32.7	28.0	31.7	26.2	50.2	34.7	27.6	32.4
D	15.8	24.0	22.4	30.3	12.1	21.6	24.6	23.8
E	7.0	9.7	6.8	13.4	4.1	12.8	11.2	10.8
F	2.6	7.6	6.3	9.9	1.8	9.6	11.6	7.2
OMNI Data	p <.001		p <.001		p <.001		p <.001	

When we examine racial differences in PRV Levels by county we find that non-whites had significantly higher scores than whites in Wayne ($p < .001$), Oakland ($p < .05$), and Muskegon ($p<.001$).

- Among Wayne County sentences, 34.1% of whites but only 25.8% of non-whites scored at PRV Levels A and B. However, 45.4% of white sentences scored at combined levels C and D compared to 52.5% of non-white sentences. This finding helps explain the higher median sentences for non-whites in Wayne. Notably, there was little difference between racial groups in the proportions scored at Levels E and F.
- Among Oakland County sentences, the important differences occurred at PRV Levels C and D. The proportion of non-white scores was 8.4 points lower than white scores at Level C, and 8.3 points higher at Level D. This finding may help explain Oakland's higher non-white sentences for assault.
- Muskegon has dramatic differences by race, with 88.7% of whites but only 59.8% of non-whites scoring at PRV Levels A–C. It must be noted, however, that the overall number of Muskegon sentences at these levels are relatively small (white = 58, non-white = 65), so that percentage differences appear larger.

To try to understand how non-white prior record scores come to be higher, we examined the scoring of each individual prior record variable. Table 26 provides a number of observations.

- For both high and low severity felonies, non-whites had significantly fewer sentences with zero points for every offense type except robbery. The differences for robbery were much less extreme but nonetheless they showed a larger proportion of zero points for non-whites. This finding may reflect the relatively younger age of non-white robbery defendants who would have less time to accumulate adult felony convictions.
- High severity juvenile adjudications showed very little difference by race; the vast majority of all scores showed zero points. Low severity juvenile adjudications showed non-white sentences with a significantly lower share of zero point scores except for robbery offenses. Even for robbery, non-whites had a lower share but the difference from whites was small and not statistically significant.
- A much lower proportion of sentences for both racial groups had zero points for misdemeanors. There was a significant difference for every offense type except CSC, but the direction of the results was not consistent. Non-white sentences showed a larger share of zero

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points for assault and robbery; white sentences showed relatively more zero point scores for murder.

- There was a highly significant difference between racial groups in scores for their relationship to the criminal justice system. Once again, robbery went in a different direction than the other offense types with a higher percentage of non-white sentences being scored at zero points.
- PRV 7 showed no significant differences by race for any offense type. With a few exceptions, PRV 7 generally showed a much lower proportion of zero point scores than the other PRVs for both whites and non-whites.

Table 26. White vs. Non-White Percentage of Sentences with Zero Points for Each Prior Record Variable Non-Habitual Sentences, 2003–2012

		Murder, Second		Assault		CSC, First		Robbery	
		White	N-W	White	N-W	White	N-W	White	N-W
1	High Severity Felonies	89.7***	79.4	85.9*	75.3	92.3***	75.3	78.9*	82.0
2	Low Severity Felonies	77.9***	54.8	74.1***	51.3	84.8***	66.3	60.9***	65.2
3	High Severity Juvenile	96.3 ns	92.4	95.1*	91.0	95.6 ns	93.7	91.7 ns	89.1
4	Low Severity Juvenile	87.9**	77.9	89.8***	75.3	96.3***	89.1	79.7 ns	76.0
5	Misdemeanors	55.9***	54.3	49.3**	55.7	66.7 ns	59.0	36.7***	58.2
6	Relationship to Criminal Justice System	74.3***	61.5	66.8***	59.1	88.3***	72.4	59.1***	61.0
7	Subsequent or Concurrent Felonies	67.6 ns	64.3	53.2 ns	45.1	45.4 ns	41.0	53.8 ns	52.4

OMNI data, *p < .05, **p < .01, ***p < .001, ns = not significant

Overall, it appears that higher non-white prior record levels are primarily attributable to PRVs 1, 2, 4, and 6. Although non-white sentences tended to have lower scores on some PRVs among robbery sentences, the differences in those scores, although statistically significant, were much less extreme than the differences between non-whites and whites for other offense types.

Racial disproportionality in sentencing resulting from higher non-white criminal history scores is not unique to Michigan. The Robina Institute has suggested that policymakers weigh the risk-predictive value of each prior record variable against added racial disparate impact. If a variable has little or no ability to predict future offenses—particularly assaultive offenses—but it contributes substantially to racial disparity, the variable may be eliminated or its weight reduced. Sentencing commissions may also wish to consider dropping or reducing the weight accorded to particular kinds of prior offenses, such as drug crimes, that play a relatively greater role in raising the criminal history scores of non-white as opposed to white defendants.[5]

E. Offense Severity Level

Table 27, which focuses on OV Level, shows more variation among the offense groups.

- There was virtually no difference in OV level by race among murder sentences.
- The assault group presented the largest and most telling difference. The disparity at Level VI, where the percentage of non-whites was 12.3 points higher than the percentage of whites, helps explain the two-year racial difference in median sentence lengths for assault.
- The results in the CSC group were somewhat uneven. At Levels I and II, the proportion of non-white sentences was 17.6%, while the proportion of white sentences was 13.5%. Conversely, 42.7% of the white sentences fell into Levels IV and V compared to 33.6% of the

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non-white sentences. This finding suggests a tendency for non-whites to have lower OV levels than whites. However, non-whites' percentage of sentences at OV Level VI was nearly five points higher than whites'.

- Among the armed robbery sentences, whites showed a clear tendency to have lower OV scores. Nearly 58% of the white sentences scored at OV Levels I and II compared to 45.5% of the non-white sentences. Notably, most of the difference occurred at Level I.

Table 27. Percentage of Offense Variable Level by Race and Offense Non-Habitual Sentences, 2003–2012

	Murder, Second		Assault w/ Intent		CSC, First		Armed Robbery	
OV Level	White (272)	Non-white (946)	White (205)	Non-White (679)	White (703)	Non-White (522)	White (1,197)	Non-White (4,462)
I	6.3	6.9	2.9	1.6	1.8	3.4	20.0	9.7
II	41.5	39.3	5.9	2.1	11.7	14.2	37.8	35.8
III	52.2	53.8	13.7	8.1	16.6	16.9	25.0	28.6
IV	---	---	23.4	20.0	24.8	19.0	9.4	13.8
V	---	---	19.0	20.8	17.9	14.6	3.5	5.4
VI	---	---	35.1	47.4	27.2	32.0	4.4	6.7
OMNI Data	Not Significant		$p < .001$		$p < .05$		$p < .001$	

F. Conviction Method

Another key factor that displays differences by race is conviction method. Table 28 shows that in every offense group, whites have a significantly higher proportion of guilty pleas than non-whites. Conversely, non-whites had higher rates of both jury and bench trials. We know that sentences imposed after both types of trial are longer than those that result from a guilty plea. Thus the difference in conviction method is directly associated with longer sentences for non-whites.

Table 28. Percentage of Conviction Method of Non-Habitual Sentences, 1999–2012

Crime	White			Non-white		
	Plea	Court	Jury	Plea	Court	Jury
Murder, 2nd	75.6	2.2	22.2	69.2	6.3	24.5
Assault	68.4	2.0	29.6	56.7	6.8	36.6
CSC, 1st	78.3	1.1	20.6	64.0	6.3	29.7
Robbery	91.7	1.7	6.6	82.8	4.9	12.3
CMIS Data, All offense types significant at $p < .001$						

Why non-whites have fewer guilty pleas is unclear. It could be that non-whites in general are offered less attractive plea bargains or are more resistant to pleading or have less effective defense counsel. It may also simply result from the fact that the majority of non-whites are convicted in Wayne County which, as we have seen, tends to have a lower rate of guilty pleas and a higher rate of both jury and bench trials than other counties.

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G. Place on the Range

Higher prior record and offense variable scores can explain why non-white sentences would be chosen from higher ranges on the applicable grid. But once the appropriate range is identified and the trial judge must select a sentence that is within, below or above that range, do further racial disparities appear?

Our examination of the data produced intriguing results.

- Place on the range showed no significant differences by race for most counties.
- Statistically significant differences existed for four: Genesee ($p < .01$), Kent ($p < .05$), Oakland ($p < .001$), and Saginaw ($p < .001$).
- In each of these four counties, non-white sentences are more likely to be both below and at the minimum-minimum than white sentences.
- In three of these counties, white sentences are more likely to be at or above the maximum-minimum. In Saginaw, white sentences are more likely to be above the max-min.

Table 29 shows the proportions by race of low-end sentences [downward departures + sentences at the min-min] and of high-end sentences [sentences at the max-min plus upward departures]. The differences are substantial.

Table 29. Race and Place on Range: Four Counties Non-Habitual Sentences, 2003–2012

County	Low End		High End	
	White	Non-white	White	Non-white
Genesee	28.7% [20.5 + 8.2]	43.1% [31.5 + 11.6]	32.9% [24.0+8.9]	21.5% [18.6+2.9]
Kent	42.4% [33.0 + 9.1]	47.4% [37.9 +9.5]	10.6% [6.8+3.8]	5.2% [2.5+2.7]
Oakland	48.1% [13.0 +35.1]	55.8% [18.5+ 37.3]	11.1% [7.4+3.7]	5.8% [4.2+1.6]
Saginaw	26.6% [19.0 + 7.6]	44.8% [20.9 +23.9]	25.3% [7.6+17.7]	15.9% [14.1+1.8]

The various possible explanations for this phenomenon are not necessarily the same for each county. For example, judges may have felt that the guidelines scores produced especially harsh sentences for non-whites. They may have wanted to compensate for what they saw as less favorable plea bargains for non-whites. Or, on the contrary, more low-end sentences for non-whites may have been the product of bargains for certain sentence recommendations. Whatever the cause, in these four counties, non-white defendants had a better chance than whites of receiving a sentence at or below the minimum of the applicable range.

A similar situation exists in Macomb County. The distribution of sentences across the entire range is not statistically significant in Macomb. However, there is a notable difference right at the minimum-minimum, where 33.9% of non-white sentences but only 24.4% of white sentences fell. That is, while there is not a lot of difference by race in general, non-whites were substantially more likely than whites to receive a sentence right at the bottom of the applicable range.

Wayne County presents an analogous but opposite picture. The distribution of sentences across the entire range is also not statistically significant in Wayne. However, there is a notable difference in the rate of downward departures. While sentences below the min-min are common for everyone in Wayne County, they are more common for whites, at 51.5%, than for non-whites, at 46.9%. This lower rate of

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downward departures may help explain why non-white sentences in Wayne County are longer than white sentences.

H. Conclusion

The discussion of defendant characteristics and of race in particular returns us to where we started: these issues are enormously complex. Multiple factors are intertwined, and separating cause from effect is difficult to do with any certainty. Undesirable consequences may have been unintended or accepted as the cost of strategic choices. The possibility of untested influences that relate to multiple factors is always present. If significant disparities in sentence length by sex, age, and race are attributable, at least in part, to the operation of the guidelines, difficult policy choices must be recognized.

The findings regarding Wayne County illustrate these issues. Except in the case of murder, Wayne's median sentences are often longer than those of other large counties. Wayne County accounts for nearly two-thirds of all the non-white sentences, whites' sentences are shorter than those of non-whites, and non-white sentences reflect relatively fewer downward departures. Does all this mean that Wayne County sentences are the result of racial discrimination?

We also know that Wayne County sentences show significantly higher prior record levels for non-whites than whites, that non-whites tended to score at higher offense levels, and that non-whites pleaded guilty less often than whites for reasons that are unclear. Could those racial differences be enough to explain the county's sentencing disparities? Could non-white higher prior record scores in themselves be evidence of racial disparity in adult arrest, charging, and bargaining decisions and/or the treatment of juveniles? Could they result from how the prior record variables are designed or scored? Or might Wayne County's higher PRV scores for non-habitual offender sentences reflect low rates of habitualization so that more people with long prior records appear in the non-habitual sentence data than is true for some other counties?

These questions do not even begin to address differences among counties that this research cannot assess. But they do identify potentially fruitful areas for future research. The data suggest other intriguing questions as well. Why are median sentences for CSC longer for non-whites even though they have a much lower proportion of sentences for CSC than for any other offense? Do the CSC offenses committed by non-whites and whites tend to differ somehow? Are there differences in sentence length related to the race of the victim? Why are prior record levels less serious for armed robbery offenses? Is it just a function of the crimes being committed by younger defendants? Why do non-whites have higher scores for offense severity? Are all the differences in scoring by race objectively supported, or should they be examined for implicit bias?

The bottom line is that identifying the existence of disparity is easier than explaining its causes. Race and county are both shorthand for a constellation of interacting characteristics that include the operation of the guidelines themselves. Ultimately, we will discuss ways to reduce sentencing disparity regardless of its causes.

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CHAPTER FOURTEEN. HABITUAL OFFENDER ENHANCEMENTS: WHO GETS CHOSEN?

Chapters One and Five discuss the purpose of the habitual offender statutes, how they were integrated into the legislative sentencing guidelines, and what the consequences have been. In this chapter, we will examine which of the defendants who qualify for a habitual offender enhancement actually receive one.

Because the decision to habitualize is made by the prosecutor, it is not surprising that practices vary by county. In its analysis of 2012 data, the Council of State Governments (CSG) found that 42.4% of defendants whose prior convictions made them eligible for enhancements were actually sentenced as habitual offenders—an increase from 2008, when the proportion was 38.5%.[1] CSG found enormous differences in the use of habitual enhancements by county. It ranged from 10% of those eligible in Washtenaw County to 89% of those eligible in Oakland County. Wayne, Kent, and Macomb Counties were all below 25%. The other county with an enhancement rate over 85% was Saginaw.[2]

The Criminal Justice Policy Commission (CJPC) also undertook an analysis of habitual offender sentencing, using data from 2012–2017. Although the CJPC was disbanded before the analysis was completed, its preliminary findings included considerable geographical differences. The counties that applied the enhancement most frequently were Muskegon, Oakland, and Saginaw.[3]

Because of the prominence of this finding, which we will confirm shortly, it is important to bear in mind that these research results may or may not reflect any given county's current practices. Because the rate of habitualization reflects the policies of the elected prosecutor, changes in either direction can occur when a new prosecutor is elected.

A. How Many Sentences are Eligible for the Habitual Offender Enhancement and How Many Receive it?

As discussed In Chapter Five, under the legislative guidelines 18% of sentences included in our research received a habitual offender enhancement. To understand how many sentences were eligible for enhancement, we used the OMNI data to create a separate dataset that only included sentences that were habitualized or had points for PRVs 1 and 2. Scores for PRVs 1 and 2, which count prior high and low severity adult felony convictions, are utilized as a proxy for eligibility. This is a conservative estimate of the number of sentences eligible for enhancement, as scoring PRVs is subject to the 10-year gap rule, while there is no time restriction on the use of prior convictions for habitual enhancements.[4] For example, included in this subset there are 26 habitual sentences that scored at PRV level zero, meaning none of their prior convictions could be counted in the scoring of the PRVs, but could still be used in the decision to habitualize.

Table 30 displays by offense type the percentage of sentences that were enhanced out of the total sentences eligible:

- Murder is habitualized the least often, with less than 25% of eligible sentences receiving the enhancement.
- Assault sentences receive the habitual enhancement for about 32% of those eligible.
- CSC sentences have the highest rate of habitualization, at almost 45% of eligible sentences receiving the enhancement.
- Robbery sentences receive the habitual enhancement at a rate similar to assault sentences, at 34% of those eligible. Due to the large number of robbery sentences, in sheer numbers most of the habitual sentences in our data are for robberies.

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Table 30. Percentage of Habitual-Eligible Sentences Enhanced, by Offense, 2003–2012		
	Not Enhanced	Enhanced
M2	75.3 (551)	24.7 (181)
AWIM	68.3 (441)	31.7 (205)
CSC	55.3 (352)	44.7 (285)
RA	65.8 (2,369)	34.2 (1,229)
Total	66.2 (3,713)	33.8 (1,900)
OMNI Data, $p < .001$		

The preliminary findings of the CJPC were similar, finding that 24.1% of second-degree murder convictions, and 31% of convictions on the A-grid received the enhancement.[5]

Like the researchers from CSG and the CJPC, we examined enhancement rates by county. Our results were similar—albeit more extreme—with only 13% of Wayne County sentences and 91% of Saginaw's being enhanced. Table 31 displays the percentage of eligible sentences that received enhancement by county.

Table 31. Percentage of Habitual-Eligible Sentences Enhanced, by County, 2003–2012		
County	Not Enhanced	Enhanced
Berrien	57.1 (48)	42.9 (36)
Calhoun	31.1 (32)	68.9 (71)
Genesee	48.9 (129)	51.1 (135)
Ingham	55.7 (88)	44.3 (70)
Jackson	48.3 (28)	51.7 (30)
Kalamazoo	55.3 (83)	44.7 (67)
Kent	75.4 (337)	24.6 (110)
Macomb	81.3 (278)	18.7 (64)
Muskegon	8.3 (12)	91.7 (133)
Oakland	16.6 (118)	83.4 (591)
Saginaw	8.3 (17)	91.7 (188)
Washtenaw	70.5 (98)	29.5 (41)
Wayne	87.0 (2,445)	13.0 (364)
OMNI Data, $p < .001$		

The counties can be roughly divided into three groups based on their rate of enhancement:

- Low (13%–30%): Kent, Macomb, Washtenaw, and Wayne Counties
- Moderate (42%–52%): Berrien, Genesee, Ingham, Jackson, and Kalamazoo Counties.
- High (more than two-thirds of eligible sentences): Calhoun, Muskegon, Saginaw, and Oakland Counties.

The rate of habitualization does not seem to be associated with location or size. Wayne, Oakland, and Macomb, the three large counties in southeast Michigan represent both extremes. Muskegon, Saginaw, and Oakland, which have the highest rates of habitualization, are different sized counties in different parts of the state.

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B. How are Sentences Selected for the Habitual Enhancement?

1. Guidelines Factors

While prior record scoring and habitual offender enhancement inevitably overlap to the point of double counting, we hypothesized that the decision to enhance may be influenced by just how extensive the defendant's criminal history is. That is, the higher the prior record level, the more likely the sentence will be enhanced. Table 32 displays the percent at each PRV level for habitual-eligible sentences that were and were not enhanced.

Table 32. Percentage of Habitual-Eligible Sentences Enhanced, by PRV Level, 2003–2012

PRV Level	Not Enhanced	Enhanced
A (0)	0	1.4
B (1–9)	4.1	1.1
C (10–24)	16.3	6.1
D (25–49)	38.2	25.2
E (50–74)	23.2	33.5
F (75 +)	18.2	32.8
OMNI Data, $p < .001$		

Overall, we can see in the above table a much higher proportion of enhanced sentences are at higher PRV levels. In the sentences not enhanced, almost 60% scored at level D or below. The opposite is true for the sentences that did receive the habitual enhancement: more than 66% scored in the highest two PRV levels. The same analysis was conducted for each county and found that:

- PRV level was not significant in four counties (Berrien, Jackson, Muskegon, and Saginaw). These counties were identified as moderate-to-frequent users of the habitual enhancement, including the two counties that utilize the habitual enhancement the most frequently.
- Differences in PRV level for those selected for habitual enhancement was significant in the remaining eight counties.

Similarly, it could be anticipated that sentences with the highest OV levels would be selected for habitualization. However, analysis did not find this to be true. In examining the distribution of habitual sentences by OV level for the counties together, there was no significant difference for murder or CSC offenses. The remaining two offense types were significant, however there was no discernable pattern. There were also no discernable patterns when examining the OV level by county.

Beyond the guidelines factors of offense, PRV, and OV level, systemic factors and defendant characteristics could help explain the difference in which sentences are enhanced and which are not.

2. Conviction Method

Besides county, the systemic factor that may relate to enhancement is conviction method. Table 33 shows a significant difference in conviction method between those who were eligible but did not receive the enhancement and those that did.

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Table 33. Percentage of Habitual-Eligible Sentences Enhanced, by Conviction Method, 2003–2012		
Method	Not Enhanced	Enhanced
Plea	79.4	51.6
Court	4.6	6.5
Jury	16	41.9
OMNI Data, $p < .001$		

Almost 80% of the sentences that were not enhanced were settled by plea—compared to just over half of the habitualized sentences. As indicated earlier, the threat of habitual enhancement can be used in plea negotiation. The evidence of greater plea rates for sentences that were not habitualized supports this possibility. However, there were obviously still many people who pleaded and received enhanced sentences, nonetheless. We do not have data that would indicate whether negotiations may have resulted in enhancement at a lower level such as habitual second instead of habitual fourth.

Analysis of conviction method by county, found that:

- There was significant difference in the method of conviction for sentences that did and did not receive the habitual enhancement in 10 counties.
- The three counties that did not have a significant result for conviction method are the counties that utilize the enhancement the most often—Muskegon, Oakland, and Saginaw. It appears that in these counties the policy was to enhance, at least to some degree, in most eligible cases regardless of the defendant's willingness to plead.

3. Defendant Characteristics

In previous chapters we examined the relationship of sex, age, and race to median sentence length. Examining the relationship of these defendant characteristics to habitual offender status presents different issues. There were too few women with enhanced sentences to make the analysis meaningful.[6] The age of the defendant at the time of the offense is significantly related to the application of the habitual enhancement, but that would be expected since those who were younger have had less time to acquire adult felony convictions.

That brings us to race. The overall analysis found that 39.4% of sentences for white defendants received the habitual enhancement, compared to 32.1% of sentences for non-white defendants. That is, relatively more sentences committed by white defendants were enhanced. Moreover, in seven of the 11 counties where no statistically significant relationship was found more white sentences received the enhancement. In the counties where there was a significant relationship between race and habitual enhancement, the opposite was true. In Berrien County, 54.5% of eligible sentences committed by non-white defendants received the sentencing enhancement, compared to 20.7% of sentences with white defendants. The difference in Genesee County was less extreme, with 55.7% of sentences for non-white defendants, and 40.5% of sentences for white defendants receiving the sentencing enhancement. In the preliminary findings of the CJPC, they found more non-white defendants were eligible for the habitual enhancement but received the enhancement at a similar rate as white defendants.

C. How Much Longer are Habitual Sentences?

Table 34 shows the median minimum sentence length in each county for habitual-eligible sentences by their habitual status. The increase in median sentence length depending on habitual status was significant in every county except for Jackson.

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Table 34. Median Sentence Length in Months for Habitual-Eligible Sentences by County and Habitual Level, 2003–2012					
	Not Enhanced	2nd Habitual	3rd Habitual	4th Habitual	Increase between Not and 4th Habitual
High (More than two-thirds of eligible sentences)					
Calhoun***	180 (32)	240 (27)	300 (21)	420 (23)	133%
Muskegon***	134 (12)	144 (51)	228 (29)	288 (53)	115%
Oakland***	120 (118)	135 (183)	150 (147)	180 (261)	50%
Saginaw*	120 (17)	206 (88)	228 (41)	225 (59)	87.5%
Moderate (42%–52% of eligible sentences)					
Berrien***	190 (48)	279 (13)	240 (9)	405 (14)	113%
Genesee***	150 (129)	192 (40)	262.5 (32)	240 (63)	60%
Ingham**	141 (88)	135 (29)	200 (12)	240 (29)	70%
Jackson ns	180 (28)	250 (10)	240 (11)	300 (9)	60%
Kalamazoo***	120 (83)	216 (33)	318.5 (12)	292.5 (22)	144%
Low (13%–30% of eligible sentences)					
Kent***	120 (337)	240 (42)	177 (26)	270 (42)	125%
Macomb***	108 (279)	126 (31)	171 (12)	180 (20)	67%
Washtenaw***	126 (98)	288 (10)	348.5 (18)	180(13)	43%
Wayne***	120 (2,446)	156 (109)	240 (85)	240 (169)	100%
Total***	120 (3,715)	169.5 (666)	216 (455)	224 (777)	87%
OMNI Data, *** p < .001, ** p < .01, and *p < .05, ns = not significant					

The extent to which sentences got longer as habitual status increased varied widely. For example:

- In moving from no enhancement to second habitual status, the sentence increase was just 10 months for Muskegon, 15 months for Oakland, and 18 months for Macomb. By comparison, the increases were 86 and 89 months in Saginaw and Berrien, respectively, and a whopping 10 years for Kent.
- In moving from second to third habitual status, Oakland again showed a modest increase of 15 months. On the other hand, Wayne's median increased by 84 months, Kalamazoo's median increased by 102 months, while Kent's actually declined by 63 months.
- In moving from third to fourth habitual status, Calhoun's median increased by 10 years and Berrien's increased by almost 14 years, while Macomb's increased by a modest 9 months, Wayne's stayed the same and Genesee's declined.

The ultimate difference between no enhancement and being enhanced as a fourth offender varied tremendously. It appears unrelated to how often the county used the enhancement.

- In five counties the fourth habitual sentence was at least double the median sentence for those not habitualized.
- In six counties, the increase between sentences that were not habitualized and fourth habituals ranged from 60% to 87.5%.
- Kent and Wayne Counties applied the habitual enhancement to fewer than 25% of eligible sentences; but when they did, the increase in sentence length was substantial.
- Oakland County was unique in that it utilized the habitual offender enhancement often but had the smallest increases in sentence length. The change in sentence length between not habitualized and fourth habituals was 50% or 60 months (five years).

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Table 34 reveals several other points.

- There was no consistent pattern of sequential increases from one habitual level to the next. Sometimes a county's median sentence for the third offender was higher than its median for the fourth offender. The median for second offenders might be lower than the median of sentences that were not enhanced or higher than those of third or even fourth offenders.
- The fact that a county's non-enhanced sentences were relatively low or relatively high did not mean that its enhanced sentences were similarly low or high.
- The status of third habitual offender was generally used substantially less than either habitual second or habitual fourth, suggesting that many habitual fourth enhancements were being plead down to habitual second or third.

Earlier we suggested that differences in non-habitual sentence lengths could be related to habitual sentencing enhancement practices. A county that uses enhancements routinely will move many sentences with higher PRV scores into its habitual group; while in a county that enhances less frequently, the sentences with higher PRV scores will be in the non-habitual group, pushing up that group's median sentence. To test this hypothesis, we compared the armed robbery sentences of Oakland County, which enhanced sentences routinely, to those of Wayne County, where enhancements were infrequent. As we saw in Table 17, Oakland's median non-habitual sentence was five years, and Wayne's was six.

First, we divided the sentences for each county into three groups: those not eligible for enhancement, those that were eligible but did not receive the enhancement, and those that were enhanced. We then focused on the first two groups.

For those not eligible for enhancement, we multiplied the number of sentences by the median sentence to get the total number of months. For the eligible but not enhanced sentences, we also multiplied the number of sentences by the median sentence to get a total number of months. We then added together the number of months for each group and added together the number of sentences for each group and then divided months by sentences to get a new median for the combined groups. When we applied this formula to Wayne and Oakland Counties, it looked like this:

In Wayne County:
For the sentences not eligible for the enhancement,
51 months x 1,539 = 78,489
(median) (number of sentences)
For the eligible sentences,
84 months x 1,488= 124,992
(median) (number of sentences)

(78,489 +124,992) ÷ (1,539 +1,488)= 203,481/3,027= **67 months**

In Oakland County:
For the sentences not eligible for the enhancement,
54 months x 484 = 26,136
(median) (number of sentences)
For the eligible sentences,
108 months x 90= 9,720
(median) (number of sentences)

(26,136 + 9,720) ÷ (484+90)=35,856/547= **62.5 months**

Thus, it appears that the hypothesis is accurate. Wayne's median length for non-enhanced sentences was longer than Oakland's because of the criminal history weight of sentences that qualified for enhancement.

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Section III. Policy Implications

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CHAPTER FIFTEEN. COMPARING MICHIGAN TO OTHER JURISDICTIONS

A. Introduction

As noted in Chapter One, sentencing schemes in the United States vary enormously. Reforms over the last 45 years have focused on constraining discretion in two ways.

- Determinate or "flat" sentencing sets a single term of years instead of a minimum and maximum sentence. Determinate sentencing eliminates the role of the parole board in deciding when a person will actually be released from prison.
- Structured sentencing is meant to enhance fairness and consistency in judicial decision-making about what sentence should be imposed. There are two common forms.
    - In presumptive sentencing, the Legislature sets narrow penalty ranges based only on the severity of the offense in statute. Judges must impose a sentence within the applicable range unless they find circumstances warranting a departure.
    - Sentencing guidelines, which may be mandatory or advisory, prescribe penalties based on both offense severity and the defendant's prior record. The guidelines may be calculated based on a grid or on a set of worksheets.

Virtually every possible combination of indeterminate versus determinate sentencing and structured versus non-structured sentencing exists in some jurisdiction. While some states apply different schemes depending on the offense, the National Conference of State Legislatures has summarized the primary systems used by each.[1]

- Twelve states use both determinate sentences and structured sentencing, as do the District of Columbia and the federal courts.[2]
- Five states have determinate sentences but do not structure judicial sentencing decisions.[3]
- Fourteen states retained indeterminate sentences but use some form of structured sentencing.[4]
- Nineteen states use both indeterminate sentences and non-structured sentencing.[5]

In this mix, Michigan is among 14 jurisdictions that use a grid style of sentencing guidelines that places criminal history on one axis, offense severity on the other axis and the recommended sentence or sentencing range in a cell where the two axes intersect.[6] We have selected six of these jurisdictions—Kansas, Minnesota, North Carolina, Oregon, Utah and the federal courts—to provide a basis for comparison. While time and space do not permit an exhaustive review of all the comparable jurisdictions, these are representative and allow us to place Michigan's system in a broader context.

We begin with a brief overview of how each of the other jurisdictions' guidelines is structured. Next we apply each jurisdiction's guidelines to a set of hypothetical cases so that we can compare the sentence recommendations that would result. Finally, we compare how these jurisdictions have addressed issues that are common to every system, such as how to score prior record, how to define offense severity, and the basis on which to allow departures from the recommended sentence.

A few points should be noted.

The purpose of scoring the hypothetical cases is to compare the presumptive sentences or sentencing ranges that would result directly from the application of each jurisdiction's guidelines. We do not attempt to speculate about whether a judge would choose to depart from the guidelines recommendation. We also do not speculate on whether a judge would impose sentences to run consecutively, where that is an option. We do indicate when the offense would be subject to a mandatory minimum sentence that would supersede the minimum sentence recommended by the guidelines. To help the reader put the presumptive guidelines sentence in context, we also provide information about how much of the minimum sentence the defendant would be required to serve.

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Thus, the charts should not be read as predicting what the actual sentence in a given jurisdiction would be or how much time the hypothetical client would actually serve in prison. Rather, they should be used to compare the allowable sentence lengths and the breadth of judicial discretion available for the hypothetical offense as committed by the hypothetical defendant across guidelines systems.

Every effort has been made to score each hypothetical case accurately.[7] This required identifying the most comparable offense from each jurisdiction's penal code, understanding the nuances of each scoring system, and applying any required statutory enhancements.[8] Given the complexity of the effort, we cannot guarantee that every judgment call made would be universally agreed upon. We are confident, however, that, together, the overviews and the hypothetical cases provide a broadly accurate and fair basis for placing Michigan's guidelines in a national context.

B. Overview of Six Jurisdictions

1. Kansas[9]

The Kansas Sentencing Guidelines took effect in 1993, with the goal to seek equity among like offenders in typical case scenarios.[10] The 17-member Sentencing Commission, which is an independent agency within the executive branch, has 14 staff members.[11] To avoid overcrowding, whenever the prison population equals or exceeds 90% of total capacity, or will do so within two years, the Commission is required to propose guideline modifications for legislative approval.[12]

Kansas abolished parole for all felony crimes except those designated as off-grid—capital murder, first-degree murder, treason, terrorism, and certain sex offenses involving victims under age 14. Actual time served on guidelines sentenced may be reduced by good behavior credits of either 15 or 20%, depending on the offense and when it was committed. Up to 60 days credit for program participation may also be applicable.

Kansas utilizes two grids: one each for drug and non-drug offenses. The drug offense grid has five severity levels; the non-drug offense grid has 10.[13] The intersection of the criminal history and offense severity levels yields a grid block containing three numbers. These indicate, in months, the prescribed aggravated, standard, and mitigated determinate sentences.[14] Judges are advised to select the midpoint or standard term in the usual case and use the upper or lower term to take into account any aggravating and mitigating factors that do not amount to sufficient justification for a departure.[15]

The Kansas penal code no longer sets a single statutory maximum sentence for the crime. Instead, the highest sentence in the applicable grid block is considered the presumptive statutory maximum sentence.

Kansas criminal statutes designate each crime's severity level and categorize it as a person or a non-person crime. For example, KSA 21-5420 defines the crimes of robbery and aggravated robbery. It then states that the former is a severity level 5 person felony and the latter is a severity level 3 person felony.

The nine levels of criminal history, labeled A–I, reflect both the number and nature of prior convictions. For example, Category A is the most serious, for offenders with three or more prior felony convictions designated as person crimes. Presumptive sentence lengths drop dramatically between Categories B (two prior person felonies) and C (one person and one non-person prior felonies).

There is no decay factor for adult convictions; all are scored regardless of age, including expungements. Some juvenile adjudications are not included if the current crime is committed after age 25. Otherwise, prior juvenile adjudications are treated the same as adult priors for criminal history classification.[16] Being on adult probation or parole at the time of the sentencing offense does not affect criminal history scoring, but requires consecutive sentencing unless that would result in manifest injustice.[17]

Presumptive sentences may be subject to "special sentencing rules." Among the most common of these are consecutive sentences if the crime was committed while the defendant was incarcerated, on probation, or parole or on bond for a felony, and presumptive incarceration if a firearm was used in the

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commission of a person felony.[18] Incarceration is also presumed if the crime was committed for the benefit of a street gang, but a non-prison sentence is allowed if findings are made about available treatment or the promotion of offender reformation.[19]

Sentence lengths may be enhanced for certain sex offender designations. "Persistent sex offender" status may double the maximum of the presumptive prison term;[20] "aggravated habitual sex offenders" must be sentenced to imprisonment for life without the possibility of parole.[21] "Predatory sex offender" is an aggravating factor that permits an upward departure. By statute, any prior conviction used to establish predatory sex offender status is also included in determining the criminal history category.[22]

Kansas places two notable constraints on sentence length. Upward departures may not exceed twice the maximum presumptive sentence.[23] Consecutive sentences for multiple current convictions, which generally may be imposed in the court's discretion, may not exceed twice the "base sentence." The "base sentence" is the one actually imposed for the primary crime— not the longest sentence in the grid block. Moreover, the non-base sentence is calculated using only the offense severity level of the non-base crime. The criminal history level is assumed to be the lowest one possible.[24]

Compliance with the Kansas guidelines is mandatory. Judges must sentence within the prescribed guideline range, departing only when substantial and compelling circumstances exist.[25] Any fact that would increase the penalty for a crime beyond the statutory maximum other than a prior conviction must be submitted to a jury and proved beyond a reasonable doubt or admitted by the defendant (e.g., as part of a plea agreement.)[26] By statute and case law, appellate courts lack jurisdiction to consider a challenge to a correctly scored presumptive sentence.[27] Departures are subject to review on appeal by either party.[28]

The guidelines contain non-exclusive lists of aggravating and mitigating factors that may justify a departure. These factors generally involve case-specific facts that make the conviction offense more or less serious than the typical crime of its type, such as degree of harm to a victim, the victim's vulnerability, the defendant's role in the offense, and the defendant's physical or mental impairment.[29] Kansas does not provide mitigation consideration in the guidelines scoring for a guilty plea or acceptance of responsibility, but a court may consider assistance provided in the investigation or prosecution of another as a mitigating circumstance. A fact that is an element of the current crime can only be used to justify a departure if the fact makes that aspect of the crime significantly different from the usual criminal conduct of its type.[30]

In 2019, of the incarceration guideline sentences, 50.5% were within the presumptive incarceration range. Of the durational departures, 64.9% were downward and 35.1% were upward. Of those within the presumptive range, 35.4% were standard sentences, 15.6% were aggravated, and 25.7% were mitigated.[31]

2. Minnesota[32]

Minnesota's guidelines, which became effective in 1980, are among the oldest and most thoroughly researched of the state guidelines systems. Among their goals are proportionality, parsimony (the lowest sentence necessary to achieve the purposes of sentencing), and avoidance of prison overcrowding. The state has consistently had the lowest, or one of the lowest, rates of incarceration in the country. The 11-member Minnesota Sentencing Guidelines Commission is an independent agency with a six-person staff.

Minnesota abolished parole and adopted determinate sentencing for all but the few crimes for which parolable life terms are imposed: first-degree murder, treason, and certain sex offenses. Defendants sentenced to prison are incarcerated for two-thirds of the imposed term and spend the remaining one-third on supervised release, although incarceration can be extended for disciplinary violations or refusal to participate in programming.

The guidelines present judges with a presumptive term and a range. The bottom of the range is 15% lower than the presumptive term, and the top of the range is 25% higher. Sentences within this range are not considered departures.

Minnesota utilizes three grids: Standard, Sex Offender, and Drug Offender. On each grid, the offense severity level is on the vertical axis and the criminal history is on the horizontal axis. In

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constructing the guidelines, the Sentencing Commission reduced the emphasis previously given to criminal history and made the conviction offense the primary factor in determining punishment.

There are seven levels of criminal history. The criminal history score is the sum of the points assigned for:

- Prior felonies.
- Custody status at the time of the offense.
- Prior misdemeanors and gross misdemeanors.
- Prior juvenile adjudications.

The weight assigned to prior felonies depends on their severity. No weight is assigned to an offense for which a judgment of guilty has not been entered before the current sentencing. Prior adult offenses cannot be counted if 15 years have elapsed since the date of the initial sentence following the prior conviction or, in the case of a prison sentence, the date the sentence expired.

Offense severity is determined by the ranking assigned to every felony offense by the guidelines commission. The ranking applies to the conviction offense, not the charged offense. For attempts and conspiracies, the presumptive sentence is one-half of that shown in the applicable cell.

The presumptive sentence may be subject to a statutory mandatory minimum sentence. There are mandatory minimums for first-, second-, and third-degree murder, certain sex offenses, and driving while impaired. There are also mandatory minimums for possession or use of a weapon while committing an offense by either the defendant or an accomplice. They are one year and a day for a dangerous weapon other than a firearm; three years for a first offense with a firearm; and five years for a second or subsequent offense with a firearm. Notably, the court can depart from the mandatory minimums for weapons on motion of the prosecutor if it finds substantial and compelling reasons to do so.

Presumptive sentences may also be increased if statutory modifiers apply. For instance:

- If a felony assault was motivated by bias, the presumptive sentence must be increased by 25 percent.[33]
- If the offense was committed for the benefit of a gang and the victim was under the age of 18, the presumptive sentence is increased by 24 months if the offense was completed or 12 months if the offense was an attempt or conspiracy. If the victim was 18 or older, the increases are 12 and six months, respectively.[34]
- If the current conviction is for a severe violent offense, the presumptive sentence is increased for prior convictions of severe violent offenses: 12 months are added for one such prior, 18 months for two priors, and 24 months for three or more. A conviction for an offense excluded from criminal history score computation because it was too old under the decay rule does not qualify as a "prior severe violent offense conviction."

Compliance with the Minnesota guidelines is mandatory. Judges may only depart for identifiable substantial and compelling reasons that are subject to review on appeal by either the defense or the prosecution.

The guidelines contain non-exclusive lists of aggravating and mitigating factors that may justify a departure. These factors generally involve case-specific facts that make the conviction offense more or less serious than the typical crime of its type, such as degree of harm to a victim, the victim's vulnerability, the defendant's role in the offense, and the defendant's physical or mental impairment. However, aggravating factors also include aspects of the defendant's prior record (i.e., whether the defendant is being sentenced as a "career offender,"[35] an "engrained offender,"[36] or a "dangerous offender who commits a third violent crime"[37]). The existence of aggravating factors other than prior record must be determined by a jury unless the defendant has waived that right (e.g., as part of a plea bargain). Pursuant to case law, departures cannot be longer than double the presumptive term.

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The Guidelines also contain a list of prohibited departure factors: race, sex, employment factors, social factors (education, living arrangements, marital status), and "the defendant's exercise of constitutional rights during the adjudication process." Case law prohibits basing a departure on a factor already considered in determining the recommended sentence. In 2019, the departure rate for prison sentences was 23.2%; of these, 20.3% were mitigated dispositions (i.e., downward departures) and 2.9% were aggravated dispositions. The rate of departures varied substantially depending on the judicial district and offense type.[38]

3. North Carolina[39]

North Carolina adopted its Structured Sentencing System in 1994 and abolished parole for crimes committed from that date on.[40] Parole is retained only for crimes committed prior to that date.[41] The system is intended to produce sentences that are truthful, consistent, rational, and prioritize correctional resources.[42] The 28-member sentencing commission is an independent advisory body with a 10-person staff that operates within the state's judicial branch.[43]

In North Carolina, the judge selects the minimum sentence. Although each offense has a statutory maximum, the maximum to be served by the individual defendant is automatically set at 120% of the minimum. For certain sex offenses, the maximum is then increased by 60 months. The defendant must serve the entire minimum but may accumulate credits for work and program participation, which are deducted from the maximum. That is, while no discretionary decisions are made by a parole board, prisoners essentially work their way down from their maximum release date to release on their minimum.[44] Defendants must also complete a period of either nine or 12 months of post-release supervision, depending on the severity level of the offense.[45]

The North Carolina system uses just two grids—one for felonies and one for misdemeanors.[46] The seriousness of the crime is determined by statute, with every crime being assigned to one of 10 offense classes. These 10 classes are listed on the vertical axis of the grid, although Class A offenses carry death or mandatory life without parole and are not scored under the guidelines. To determine offense severity, the court simply identifies in which of the other nine offense classes the crime of conviction falls.

To determine prior record level, the following factors are considered: the number and severity of prior felonies, certain misdemeanors, similarity of the current offense to any prior offense, and custody status. The number of points defining each level range from 0–1 for Level 1 to 18+ for Level VI.

- Prior record points are assigned to each prior felony conviction based on its offense class. The number of points ranges from 10 for a prior Class A felony down to 1 for a Class A1 or Class 1 misdemeanor.
- One additional point is added if all the elements of the present offense are included in any prior offense, whether or not the prior offense was used in determining the prior record level.
- One additional point is added if the offender was on supervised or unsupervised probation, parole, or post-release supervision, serving an active sentence in jail or prison, or was on escape from a correctional institution while serving a sentence of imprisonment at the time the present offense was committed. This factor must either be found by the jury beyond a reasonable doubt or admitted by the defendant.[47]

All prior adult felony convictions are counted. There are no lapse or decay rules, and no statute of limitations on the use of prior convictions to determine prior record level.[48] Juvenile commitments are not counted.[49] Also not included are certain misdemeanors and traffic offenses (except for death by vehicle).[50]

North Carolina employs four statutory enhancements based on the defendant's criminal history that can increase the punishment beyond what the guidelines recommend. For any of them to apply, the prosecution must have opted to charge the specific enhancement and convicted the defendant of it.

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- Habitual felon—three prior felony offenses of any kind increases the offense class by four levels but no higher than Class C.
- Violent habitual felon—two violent prior felonies increases the sentence to life without parole.
- Habitual breaking and entering—one or more prior breaking and entering offenses makes next breaking and entering conviction a Class E felony.
- Armed habitual felon—one or more prior firearm-related felonies requires sentencing as at least Class C with a mandatory minimum of 120 months.

Every cell on the grid contains three ranges: presumptive, aggravated, and mitigated. The court must select the minimum from the presumptive range unless the jury finds or the defendant admits aggravating facts beyond a reasonable doubt,[51] or the defendant proves mitigating factors to the court by a preponderance of the evidence. The court has the discretion to use the aggravated or mitigated range if the facts support the choice. Judges must place the reasons for departing from the presumptive range on the record and either party can appeal the adequacy of the fact-finding.

Factors that can aggravate or mitigate the presumptive sentence are listed in statute, although each list ends with a catch-all category for other factors "reasonably related to the purposes of sentencing.[52] While there is no separate list of prohibited departure factors, the presence or absence of prior convictions is not aggravating or mitigating, as prior record is always considered when determining the prior record level.[53]

The more than 20 permitted aggravating factors include the defendant's role in the offense, victim vulnerability, possession or use of a deadly weapon, serious permanent injury to the victim, exceptional cruelty, interference with arrest, and intent to benefit a gang. Notably, they also include juvenile adjudications for what would be serious felonies and the fact that the defendant does not support his or her family.

The 20 mitigating factors include acceptance of responsibility, assistance in apprehending or prosecuting another felon, minor role in the offense, voluntary participation by a victim older than 16 and characteristics that reduce culpability like age, immaturity, and limited mental capacity.[54] Notably, they also include the defendant's military service, positive employment history, reputation and support in the community, post-arrest entry to drug or alcohol treatment, and the fact that the defendant supports his or her family.

Compliance with the North Carolina guidelines is mandatory. Since aggravation and mitigation are built into the scheme there is no provision for departing above the high end of the aggravated range or below the low end of the mitigated range. In 2018, of the prison sentences imposed for person offenses, 64% were in the presumptive range, 29% were in the mitigated range, and 7% were in the aggravated range.[55]

4. Oregon[56]

The Oregon Criminal Justice Commission, which has a nine-person staff, is responsible for Oregon's sentencing guidelines. The guidelines, which became effective in 1989, apply to all felonies except aggravated murder.[57] They were designed to make sentencing more predictable, proportional and fair, and to take prison capacity into account.

Oregon abolished parole and adopted determinate sentencing for all but the few crimes for which parolable life terms are imposed: first-degree murder, treason, and certain sex offenses. Most defendants serve a specified prison duration that can be shortened by the award of good conduct and program participation credits up to 20%.[58] Time served for certain violent crimes cannot be reduced, including any that have a mandatory minimum sentence.[59]

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Oregon has a single sentencing grid with 11 categories of crime seriousness (11 down to 1) and nine levels of criminal history (A–I). The court selects the presumptive determinate term from the range of months in the grid block where the axes intersect. Oregon's ranges are extremely narrow.

Crime seriousness is determined by reference to the Crime Seriousness Scale in the Oregon Administrative Rules.[60] For example, first-degree robbery is classified at crime category 9. The Rules also contain a list of subclassified crimes that apply to offenses that cover a broad range of conduct.[61] For example, burglary has three possible crime categories depending on whether there was weapon use or victim injury, and whether the location was an occupied dwelling. Attempts and solicitations are ranked two categories below the completed offense.

The maximum possible sentence is identified in the statute defining the crime. Penal statutes place each crime in one of four felony classifications: Class A, maximum 20 years; Class B, maximum 10 years; Class C, maximum five years; and Unclassified felonies that include penalties described in the section defining the crime.[62] For example, first-degree robbery is a Class A felony.[63]

The applicable criminal history level depends on a combination of the nature and number of prior adult convictions and juvenile adjudications in the defendant's history at the time of the current sentencing. Adult convictions and juvenile adjudications are treated the same for person felonies but differently for non-person felonies. For instance:

- Category A includes three or more adult convictions or juvenile adjudications for person felonies.
- Category E includes four or more adult convictions for non-person felonies.
- Category G includes four or more adult convictions for Class A misdemeanors, one adult conviction for a non-person felony, or three or more juvenile adjudications for non-person felonies.
- An adult with no person felony prior conviction cannot score above Category E. A juvenile with no adjudication for a person felony cannot score above Category G.

Expunged prior adult convictions and juvenile adjudications are not included, nor are prior findings of "guilty except for insanity."[64] Only Class A misdemeanors are considered. There are no rules on decay or other limitation on the counting of older convictions.

More than two dozen felonies require a mandatory minimum sentence.[65] Defendants serving mandatory minimums are not eligible for release on post-prison supervision or any form of temporary leave from custody, or any reduction based on the minimum sentence for any reason.[66] If the mandatory minimum exceeds the presumptive sentence from the guidelines grid, the mandatory minimum controls.[67]

Compliance with the Oregon guidelines is mandatory. The court must pronounce a sentence within the recommended range unless it states on the record substantial and compelling reasons to impose a departure.[68] Upward departures may not exceed twice the high end of the applicable guidelines range. Departures may be appealed by either the prosecution or the defense. However, the Oregon rules expressly permit plea agreements to stipulated grid blocks and to stipulated sentences, whether or not they fall in the presumptive guidelines range.[69]

The guidelines contain lists of non-exclusive mitigating and aggravating factors that may be considered grounds to depart.[70] These include such matters as the defendant's role in the offense, the victim's status as an aggressor or participant in the offense, the degree of harm to the victim, use of a weapon, and the crime being part of an organized criminal operation. There is no mitigation for a guilty plea, but consideration may be given if the defendant cooperated with the state on the current crime or any other criminal conduct.[71] Several potential grounds for departure are expressly prohibited:

- Refusal to cooperate cannot be deemed an aggravating factor.
- A fact used to trigger a mandatory sentence cannot be used as an aggravating factor.

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- Crime facts that are elements of the conviction offense or were used to determine its offense severity level can only be used as an aggravating or mitigating factor if the facts make the case significantly different from typical cases of that type.[72]

Sentences imposed on people already serving a sentence for a previous offense must be served consecutively. When the defendant is being sentenced for two or more unrelated crimes, the court has full discretion to make the sentences concurrent or consecutive. When a defendant is being sentenced for multiple crimes committed in a continuous and uninterrupted course of conduct, consecutive sentencing is permitted, but the court must find that one of several enumerated circumstances justifies that decision.[73] Without a departure, the combined length of consecutive prison terms may not exceed twice the length of the maximum term permitted for the most serious of those crimes.[74]

5. Utah[75]

Utah has a 27-member sentencing commission that is part of the Utah Commission on Criminal and Juvenile Justice (CCJJ). The CCJJ includes other agencies that address juvenile justice, substance abuse and domestic and sexual violence. Included in the Sentencing Commission's mandate is increasing equity in sentencing, modifying the guidelines to reduce recidivism and relating sentencing practices to correctional resources. The Commission has two staff members and receives administrative and financial support from CCJJ. The Commission published its first guidelines in 1998. These replaced earlier guidelines drafted by court and corrections officials.

Utah has retained indeterminate sentencing and release through the Board of Pardons and Parole. Minimum and maximum terms of punishment are established by statute. Felonies are classified into four categories:

- Capital (aggravated murder with predicate crimes).
- First-degree, not less than five years up to life.
- Second-degree, not less than one year nor more than 15 years.
- Third-degree, not to exceed five years.

When the defendant is being sentenced to prison, the court imposes a sentence equal to the range defined by statute. The number of months identified on the guidelines grid is not the sentence. Rather, it is the typical time served for the offense by people with the defendant's criminal history. It serves as a recommendation to the parole board, although the board makes the final decision as to when the defendant will be released. The guidelines are purely advisory and have no binding effect on the courts.

While both the court and the parole board are generally prohibited from deviating from the statutory minimum sentence, there are some exceptions. For instance, downward departures from the statutory minimum for "grievous" sexual offenses are allowed upon a finding of mitigating circumstances. Conversely, there are statutory enhancements that add years to the guidelines term for offenses committed in concert with two or more persons, in relation to a criminal street gang, or for repeat and habitual sex offenders. Prisoners may reduce their incarceration time by completing specified programs. At a minimum, there is a four-month reduction in the total period of incarceration for completion of high-priority programs.[76]

The guidelines apply to all felonies other than capital murder. There are also guidelines for misdemeanors and impaired driving. The felony guidelines have three matrices: sex and kidnapping, criminal homicide, and a general matrix for all other offense types.

The sex and kidnapping matrix has 10 levels of crime category; the other two matrices have seven levels. The levels are determined by the nature and degree of the crime.

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The sex and kidnapping matrix has three levels of criminal history; the other two matrices have five levels. Criminal history is scored on the basis of six factors:

- Prior felony convictions.
- Prior Class A misdemeanor convictions.
- Supervision history.
- Prior person or firearm convictions.
- Prior juvenile adjudication within past 10 years.
- Most recent postconviction crime-free gap.

Prior felony convictions include only those for which sentencing occurred before sentencing on the current offense. Current offenses are expressly excluded. If multiple convictions arose from a single prior criminal episode, only one conviction is counted. There is no decay factor for adult convictions. However, most juvenile adjudications of delinquency must have occurred within 10 years of the current conviction date. In addition, defendants have points subtracted from their criminal history for crime-free periods preceding the current offense. The number of negative points increases as the time period gets longer.

The guidelines establish a procedure for documenting departures based upon aggravating or mitigating factors. Because the guidelines are only advisory, there is no standard for the substantive review of departures on appeal. Nonetheless, the Commission has identified factors that are prohibited or should be used with caution. Specifically, the Utah Guidelines state:

> Do not include an aggravating factor if: (1) it is already included as an element of the offense (do not double count) or (2) it is an element of the offense but has not been plead to or otherwise proven beyond a reasonable doubt as required by statute and/or case law (the guidelines are not a means to subvert Constitutional principles).[77]

To avoid double counting, aggravating factors should be used with caution if they have already been considered in a risk assessment. Similarly, factors that reflect socioeconomic status more than risk, such as access to treatment or financial stability, should be considered with caution as should factors specific to sex offenses that may not have a statistical correlation with increased risk to reoffend.[78]

Judges have discretion to decide whether a sentence should be concurrent or consecutive. Sentences for defendants who commit their crime while in prison or parole are presumptively consecutive. Otherwise the factors to be considered are the gravity and circumstances of the offenses, number of victims, and the history, character, and rehabilitative needs of the defendant.[79]

Utah has a unique method of sentencing for multiple offenses. When multiple convictions are to be served concurrently, 10% of the prison stay recommended for each shorter sentence is added to the recommended term for the longest sentence. When multiple convictions are to be served consecutively, the guidelines advise adding 40% of the length of the shortest sentence to the full length of the longest sentence. If there are more than two offenses, the guidelines advise adding 40% of each of the remaining offenses to the full length of the longest sentence.[80]

6. United States[81]

Historical Note

Before the federal sentencing guidelines went into effect in 1987, federal judges imposed indeterminate sentences within broad statutory ranges of punishment, after which the United States Parole Commission would decide when offenders were actually released from prison on parole.[82] The Supreme Court recognized that the broad discretion of sentencing courts and parole officials led to significant sentencing disparities.[83] When Congress enacted the Sentencing Reform Act (SRA) it found: "[e]very day federal

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judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances."[84]

To decrease disparities and promote transparency and proportionality in sentencing, Congress created the United States Sentencing Commission, a bipartisan expert agency located in the judicial branch.[85] The Commission is composed of up to seven voting members, including a chair, who are nominated by the President and must be confirmed by the Senate. No more than four Commissioners can be from the same political party, and at least three Commissioners must be federal judges.[86] The Commission maintains about 100 employees. [87]

As the nation's prison population continued to swell, so did criticism that the guidelines had produced unduly harsh sentences for non-violent offenses, particularly those tending to involve non-white and poor defendants at disproportionate rates. Challenges were raised to their mandatory nature.

The guidelines were designed to establish a sentencing range based on the defendant's admissions or the jury's verdict. However, the trial court could then exceed that range based on findings of fact it made about the offense based on a preponderance of the evidence. In *United States v. Booker*, 543 US 220 (2005), the trial court found the defendant had actually possessed a lot more drugs than the amount for which he was convicted. That finding mandated a much higher guidelines range, so the court increased the sentence by almost 10 years above the base range for the crime of conviction.

The *Booker* Court held that judicial findings not subject to proof beyond a reasonable doubt that result in a sentence greater than otherwise mandated by the guidelines violate the Sixth Amendment right to trial by jury. The Court's solution was to make the federal guidelines advisory. Notably, the Court had no problem with allowing the new guidelines range to be based on the "real" offense so long as the sentencing judge was not required to apply it.

Federal judges must now consult the guidelines, but are not required to impose the sentences recommended. The Supreme Court has held that the guidelines are the "lodestone"[88] and "should be the starting point and the initial benchmark"[89] of federal sentencing. District courts must still "give 'respectful consideration' to the Guidelines."[90] Therefore, on appeal, the guidelines ranges (and the degree of departure from guidelines) must still be taken into account.[91]

Initially, sentences within the federal guidelines were presumed to be reasonable.[92] Since the guidelines became advisory, appeals courts review the reasonableness of all sentences, including those that fall within the guidelines range.[93] This reasonableness review applies a "deferential abuse of discretion" standard that does not require extraordinary circumstances to justify a sentence outside of the guidelines range[94] and does not require an appellate court to presume that a within-guidelines sentence is reasonable.[95]

The role of the Sentencing Commission post-*Booker* remains important for its ability to base its recommendations on empirical data and national experience, guided by professional staff.[96]

The Current Federal System

Federal sentences are determinate. Parole has been abolished but prison sentences are followed by a term of supervised release of several years, depending on the offense. The time actually served can be reduced through the award of good conduct credits of up to 54 days per year.[97]

The federal sentencing guidelines are extremely complex. The court must follow the three-step process set forth by the Supreme Court in *Gall v. United States*.[98] First, the court must properly determine the guideline range.[99] Second, it must determine whether to apply any of the guidelines' departure policy statements to adjust the guideline range. Third, it must consider all the factors set forth in 18 USC § 3553(a) as a whole, including whether a variance is warranted.[100]

There is only one sentencing grid, called the Sentencing Table, for all covered offenses. The offense severity levels are on the vertical axis and the criminal history category on the horizontal axis. The presumptive sentence is within the range that falls in the cell where they intersect. Pursuant to statute,

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"the maximum of the range shall not exceed the minimum by more than the greater of 25% or six months."[101]

Each federal crime is assigned a base offense level that will increase or decrease as specific offense characteristics and other special rules are applied. To determine a prospective sentence range, the first step is to determine the crime's base offense level number, or severity level, as assigned in the Sentencing Guidelines Manual. There are 43 base offense levels, with the lower numbers for low-level offenses and higher numbers for the more serious offenses.

Once a crime's base offense level is determined, "special offense characteristics" for each crime may apply, increasing the base offense level. For example, the base offense level for second-degree murder is 38.[102] If the offense is determined to be a hate crime (motivated by actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation), the level is increased by up to three levels;[103] if a victim was physically restrained in the course of the offense, there will be an increase of two levels.

"Relevant conduct" is "the range of conduct that is relevant to determining the applicable offense level" under the Guidelines Manual.[104] It is a principle that impacts nearly every aspect of guidelines application. It reflects the sentencing guidelines' consideration of characteristics of the offense and the defendant's conduct beyond the count(s) of conviction alone, while also placing limits, specific to the type of offense, on the range of conduct that is appropriately considered. Relevant conduct affects a defendant's offense level, as determined by Chapter Two as well as the role and multiple count adjustments in Chapter Three, the criminal history calculations in Chapter Four, and the adjustments for undischarged terms of imprisonment in Chapter Five.[105]

If a defendant is convicted on multiple counts, the Federal Sentencing Guidelines instruct the judge to determine an appropriate "combined offense level" that takes into account the rules for incremental punishment for multiple offenses. The most serious offense of which the defendant is convicted is used as the starting point for establishing the base offense level, and then the less serious counts are used to adjust the defendant's total sentence upward.[106]

In addition to multiple count adjustments, some cases require consideration of other adjustments that can increase or decrease the defendant's overall sentence; examples include:

- Acceptance of Responsibility—The judge may decrease the offense level from one to three levels if, in the judge's opinion, the offender accepted responsibility for his or her offense.
- Minimal Participant—If the offender was a minimal participant in the offense, the offense level is decreased by four levels.
- Knowledge of Vulnerability—If the offender knew that the victim was unusually vulnerable due to age or physical or mental condition, the offense level is increased by two levels.
- Obstruction of Justice—If the offender obstructed justice, the offense level is increased by two levels.

After the base offense level is adjusted for these considerations, the defendant's criminal history category must be determined. Points are assigned for prior sentences: felony convictions, some misdemeanors, some juvenile adjudications, and the offender's custody status as the time of the offense. The total points determine the applicable criminal history category (I–VI).[107] The court must then determine whether grounds exist to depart from the criminal history category upward or downward if the category substantially under- or over-represents the seriousness of the defendant's criminal history, and whether the offender qualifies as a career offender or armed career criminal.[108] These grounds may include prior sentences not used in scoring the criminal history and prior adult criminal conduct that did not result in conviction.

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In every case, relevant conduct includes actions the defendant performed in preparation for the offense, during the offense, and following the offense to avoid detection. Relevant conduct also always includes the defendant's directions to others. In a case of "jointly undertaken criminal activity," the defendant is liable for all acts and omissions of others that were (1) within the scope of the jointly undertaken criminal activity, (2) in furtherance of that criminal activity, and (3) reasonably foreseeable in connection with that criminal activity.[109]

The scoring of prior convictions is subject to decay rules that depend on the length of the prior sentence. Prior adult convictions with sentences longer than 13 months are not counted if more than 15 years have elapsed since sentencing or final release from custody. If the prior sentence was 13 months or less, the lapse time is10 years. If the prior sentence was 13 months or less and the defendant was younger than 18, the lapse time is five years.[110]

There are several enhancements: doubling the mandatory minimum for certain drugs crimes; increasing the criminal history category for career offenders; increasing the criminal history category for armed career criminals and setting a 15-year mandatory minimum; and a three strikes provision for two prior convictions of a serious violent felony resulting in life imprisonment.[111]

Once the base offense level, criminal history category, specific offense characteristics, and relevant adjustments have all been determined, then the sentencing range can be identified according to the Sentencing Table. At that point, the judge must determine whether applying the guidelines is appropriate, or whether it is more appropriate to "depart" from the guidelines and impose an alternate sentence.

A court may depart upward to reflect the actual seriousness of the offense based on conduct underlying a charge dismissed as part of a plea agreement in the case or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason that did not enter into the determination of the applicable guideline range.[112] A defendant's refusal to assist authorities in the investigation of other persons may not be considered an aggravating sentencing factor; however, a defendant's refusal to assist authorities may be considered in sentencing within the guideline range.[113]

In the federal system, the terms "departure" and "variance" have different meanings and are applied at different stages of the sentencing process. While departures were always contemplated by the guidelines and criteria for applying them were provided, since *Booker* judges may "vary" from the recommended guidelines sentence—based on statutory sentencing goals and principles—even where the rules would not permit a departure. A "variance" outside the guidelines range should occur after consideration of all relevant departure provisions.

Courts have held that variances are not subject to the guidelines analysis for departures. In some situations, a prohibited ground for departure may be a valid basis for a variance. Variances are not subject to notice requirements applicable to departures. A court may grant a departure and a variance in the same sentence (e.g., a departure for substantial assistance and a variance for the defendant's history and characteristics). In sum, the ability to vary preserves district courts' ultimate ability to impose, regardless of the applicable guidelines range, a sentence that it views to be "sufficient, but not greater than necessary" to serve the goals of sentencing.[114]

There is no general prohibition against double counting in the guidelines: using the same factual basis twice, once to form an element of the crime and then to increase a defendant's guidelines sentencing range. The same conduct may determine the base offense level and trigger the cumulative application of enhancements and adjustments unless a specific guideline instructs otherwise.[115]

There are mandatory penalties related to firearms. For example, use of a firearm during a crime of violence carries a mandatory sentence of at least five years,[116] which increases to seven years if the gun was brandished, and 10 if it was discharged. These minimums are consecutive to the substantive crime, such as robbery.

Unless consecutive sentencing is specifically required under applicable statutes (e.g. because the defendant was incarcerated at the time of the current offense), multiple current sentences generally run concurrently. However, a formula is applied that increases the offense severity level of the most serious crime by counting all the current offenses.

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In 2020, the rates of compliance, departures and variances for the federal guidelines, nationally and in federal district courts in Michigan, were as follows. [117]

Table 35. 2020 Federal Guidelines Compliance Rates		
	National	Michigan
Within Range	50.4	47.9
Upward Departure	0.4	1.2
Downward Departure	23.0	14.5
Upward Variance	1.8	2.1
Downward Variance	24.5	34.3

C. Hypothetical Case Results

Charts with descriptions of eight hypothetical cases and details about the presumptive minimum sentences that would apply in each of the comparison jurisdictions appear in Appendix D. The following tables summarize key information from each chart.

The tables show the low and high ends of the applicable presumptive range—the "low min" and "high min." In Michigan, Minnesota, Oregon, and the federal system, the grids present a presumptive range within which the court must choose a term (i.e., a minimum term in Michigan, or a maximum term in the other three jurisdictions. Sentences above and below the ends of the range are departures that must be justified by the facts. Kansas has a single presumptive sentence and single mitigated and aggravated sentences. The court is free to select any of these without it being considered a departure. Therefore the mitigated sentence is treated as the "low min," and the aggravated sentence is treated as the "high min." North Carolina has presumptive, mitigated, and aggravated ranges. The mitigated range is for downward departures, and the aggravated range is for upward departures. Therefore the boundaries of the presumptive range are treated as the low and high mins. The width of each presumptive range is shown. Utah has only a single recommended term that is treated as both the low and high mins.

Any routine sentence reductions are applied to produce the "actual low min" and "actual high min," which permits a more realistic comparison of what the recommended minimum sentence actually means. Kansas and the federal guidelines reflect a 15% good time reduction. In Minnesota, the deduction is not traditional good time. Minnesota defendants serve two-thirds of their prison sentences and are then placed on supervised release.

Finally, to provide further context, the tables also show any mandatory minimum sentence that supersedes the guidelines recommendation and any mandatory sentence enhancement that is statutorily required for possession or use of a firearm.

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Table 36. Summary of Chart 1. Second-Degree Murder, Example 1
[killed man who injured mother during shooting into home, no priors]

Location	Range Width		Low Min.	Time Reduc	Actual Low Min.		High Min.	Time Reduc	Actual High Min.		Gun Enhance.	Mand. Min.
Michigan	120		180		180		300/ Life		300/ Life		24	
Kansas	20		166	-25	141		186	-28	158			
Minnesota	106		261	-86	175		367	-121	246		36	
North Carolina	48		192		192		240		240			
Oregon	n/a		Life		Life		Life		Life			300
Utah	n/a		240		240		240		240			180
United States	58		235	-35	200		293	-44	249		60	

Chart 1. This murder case reveals substantial differences among the jurisdictions in both the low and high ends of the ranges. The difference between the actual low in Kansas and the mandatory minimum in Oregon is over 13 years. The actual high minimums differ by as much as 12 years.

Among the actual low-end sentences, Michigan's are the third shortest. However, among the actual high-end recommended sentences, Michigan's and Oregon's are the longest. For Michigan, this is the result of a range that is 10 years wide combined with a lack of any sentence reductions. Thus, in Michigan, the defendant could be required to serve a minimum of 25 years plus two years for possessing the firearm during the felony without any departure from the guidelines range. Because of their longer required firearm enhancements, the results in Minnesota (23.5 years) and the federal courts (25.75 years) are not far off.

Table 37. Summary of Chart 2. Second-Degree Murder, Example 2
[home invasion, stole jewelry, struck women who found him, she died next day, priors]

Location	Range Width		Low Min.	Time Reduc	Actual Low Min.		High Min.	Time Reduc	Actual High Min.		Gun Enhance.	Mand. Min.
Michigan	210		315		315		525/ Life		525/ Life			
Kansas	25		221	-33	188		246	-37	209			
Minnesota	127		312	-103	209		439	-145	294			
North Carolina	63		254		254		317		317			
Oregon	n/a		Life		Life		Life		Life			300
Utah	n/a		252		252		252		252			180
United States	52		210	-32	178		262	-39	223			

Chart 2. This murder case also shows substantial differences among the jurisdictions. The actual low for the U.S. is 11.5 years below the actual low for Michigan. Except for Oregon's life sentence, Michigan has the longest low and actual low minimums. The actual high minimums differ by as much as 26 years. At nearly 45 years or life, Michigan has an actual high min. that is more than twice as long as those of Kansas, Utah, and the United States—66% longer than North Carolina's and 79% longer than Minnesota's. That is, the Michigan defendant can get a minimum sentence that is anywhere from 17 to 26 years longer than the minimums of other guidelines states without departing from the recommended range.

The cause of Michigan's much higher recommended sentences is the 17.5 year width of the range combined with the lack of any sentence reductions. What pushes the hypothetical defendant into such a high range is Michigan's offense variable structure. Under OV 3, he receives 25 points for injury to the

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victim preceding her death. Under OV 6, he receives 50 points because the death occurred during a home invasion, even though the defendant pleaded down from felony-murder.

Table 38. Summary of Chart 3. Assault with Intent to Murder, Example 1
[choked wife, struck son, combative with police, priors]

Location	Range Width		Low Min.	Time Reduc	Actual Low Min.		High Min.	Time Reduc	Actual High Min.		Gun Enhance.	Mand. Min.
Michigan	114		171		171		285		285			
Kansas	26		221	-33	188		247	-37	210			
Minnesota	54		135	-45	90		189	-62	127			
North Carolina	63		251		251		314		314			
Oregon	9		121		121		130		130			90
Utah	n/a		108		108		108		108			60
United States	52		210	-32	178		262	-39	223			

Chart 3. The differences among jurisdictions are equally apparent in this assault case. The difference in the low and actual low minimums ranges from 108 months (9 years) in Utah to 251 months (20.9 years) in North Carolina. Among both types of low-end sentences, Michigan is in the middle.

However, among the high-end minimums, Michigan's sentences are exceeded only by North Carolina. At 285 and 314 months, the actual high mins of these two states far exceed the 160-month average of the other five jurisdictions. Once again, Michigan's potential for very long minimum sentences without a departure results from the width of the range.

Table 39. Summary of Chart 4. Assault with Intent to Murder, Example 2
[gang beating of rival gang member, victim paralyzed, defendant 17 years old, juvenile priors]

Location	Range Width		Low Min.	Time Reduc	Actual Low Min.		High Min.	Time Reduc	Actual High Min.		Gun Enhance.	Mand. Min.
Michigan	150		225		225		375/ Life		375/ Life			
Kansas	10		82	-12	70		92	-14	78			
Minnesota	38		118	-39	79		156	-52	104			1 yr. + 1 day
North Carolina	32		125		125		157		157			
Oregon	4		111		111		115		115			90
Utah			96		96		96		96			60
United States	73		292	-44	248		365	-55	310			

Chart 4. The differences among jurisdictions are even greater in this assault case. Between the U.S. low min of 292 and the Kansas low min of 82 are 210 months (17.5 years). For actual low mins, the difference between these two jurisdictions is 178 months (14.8 years). Michigan's low and actual low mins are second in length only to those of the federal guidelines.

At the high and actual high ends of the presumptive ranges, Michigan's recommended minimum sentences exceed the federal guidelines. Without even considering sentence reductions, Michigan exceeds the high ends of the other jurisdictions by from 18 to nearly 24 years. Once again, these extreme differences are possible because of the great width of Michigan's applicable range.

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Table 40. Summary of Chart 5. First-Degree Criminal Sexual Conduct, Example 1
[preyed on girlfriend's daughter, multiple counts of CSC<13 and 13–16, no priors]

Location	Range Width		Low Min.	Time Reduc	Actual Low Min.		High Min.	Time Reduc	Actual High Min.		Gun Enhance.	Mand. Min.
Michigan	84		126		126		210		210			300 (cts 1-4)
Kansas	n/a		Life		Life		Life		Life			300
Minnesota	35		180*	-60	120*		215*	-71	144*			
North Carolina	48		192		192		240		240			
Oregon	2		58		58		60		60			100
Utah	n/a		192		192		192		192			300
United States	52		210	-32	178		262	-39	223			360
*Includes 25% statutory enhancement for predatory sexual conduct												

Chart 5. This case involving multiple sexual assaults on a child also presents wide variations in the minimum sentences recommended by each jurisdiction's guidelines. Notably, Michigan ranks fifth in the length of both its low- and high-end sentences because the defendant has no prior record and Michigan weights prior record and offense severity equally. However, the point is moot because five of the seven jurisdictions have mandatory minimum sentences that supersede the guidelines recommendation: 30 years for the United States, 25 years for Michigan, Kansas, and Utah, and 8.3 years for Oregon.

Table 41. Summary of Chart 6. First-Degree Criminal Sexual Conduct, Example 2
[home invasion, repeated assaults on woman woken from sleep, knife, priors]

Location	Range Width		Low Min.	Time Reduc	Actual Low Min.		High Min.	Time Reduc	Actual High Min.		Gun Enhance.	Mand. Min.
Michigan	630		270		270		900/ Life		900/ Life			300*
Kansas	61		592	-89	503		653	-98	555			
Minnesota	63		180	-60	120		216	-71	145			
North Carolina	97		386		386		483		483			
Oregon	9		121		121		130		130			100
Utah	n/a		252		252		252		252			Life, no parole
United States	65		262	-39	223		327	-49	278			
*Mandatory with 4th habitual offender enhancement for "serious" crimes and "listed" priors												

Chart 6. Several things about this sexual assault case stand out. The differences among jurisdictions are greater than for any of the other hypotheticals, including the two murder cases, because of the weight given in several jurisdictions to the defendant's prior record. In addition, the high mins in each jurisdiction are generally longer than they are for any of the other cases. The mandatory sentence of life without parole in Utah is particularly noteworthy.

The weight given to criminal history is enormously magnified in Michigan, where the defendant's status as a fourth habitual offender permits the high end of the presumptive range to be multiplied by 100%. This scheme has two consequences. The range is broadened to 62 years, nullifying any notion that the guidelines are structuring the judge's discretion. And the defendant could be sentenced to a 75-year minimum sentence without having to justify a departure. Moreover, whatever sentence within the guidelines is chosen, the defendant is subject to the mandatory 25-minimum. Notably, given the prior

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record and the egregious offense facts, the presumptive range would have been 270–450 months even without the enhancement. A sentence at the high end, without any possibility of good time, would still require the defendant to serve 37.5 years.

Table 42. Summary of Chart 7. Armed Robbery, Example 1
[gas station hold-up, co-D went back to kill clerk, priors]

Location	Range Width		Low Min.	Time Reduc	Actual Low Min.		High Min.	Time Reduc	Actual High Min.		Gun Enhance.	Mand. Min.
Michigan	150		225		225		375/ Life		375/ Life		60	
Kansas	22		206	-31	175		228	-34	194			
Minnesota	23		58	-19	39		81	-12	69		60	
North Carolina	17		67		67		84		84			
Oregon	6		66		66		72		72			90
Utah	n/a		120		120		120		120			60
United States	23		92	-14	78		115	-17	98		60	

Chart 7. This armed robbery case also shows substantial variations among the jurisdictions at both the low and high ends of the presumptive ranges. The actual low mins are 6.5 years or less in four jurisdictions; the actual high mins in the same jurisdictions are eight years or less. The ranges are less than two years in every jurisdiction but Michigan. At 12.5 years, the Michigan range is more than six times wider than that of the next widest one. Michigan's actual low min is 50 months longer than the next longest one. Michigan's actual high min is 15 years longer than the next longest one—and that does not include the mandatory five years for the defendant's second conviction of possessing a firearm during the commission of a felony.

These discrepancies have two causes. One is Michigan's placement of armed robbery on the "A" grid, along with assault with intent to murder and first-degree criminal sexual conduct, making the presumptive ranges for all three crimes the same. Other jurisdictions tend to treat robbery as a less severe offense.

Second is the scoring of the offense variables. In Michigan, this defendant receives 100 points under OV 3 for the clerk's death, although the murder charge was dismissed in plea negotiations. He also receives 25 points under OV 1 for his co-defendant's discharge of a firearm and 25 points under OV 13 because this robbery and murder and his prior conviction for unarmed robbery constitute three crimes against a person in a five-year period regardless of whether there was a conviction. Without these 150 points the defendant's recommended sentence would be 81–135 months—still high but much more in line with those of other jurisdictions.

Table 43. Summary of Chart 8. Armed Robbery, Example 2
[2nd of 3 robberies in 9 days, toy gun, no prior record, no injuries]

Location	Range Width		Low Min.	Time Reduc	Actual Low Min.		High Min.	Time Reduc	Actual High Min.		Gun Enhance	Mand. Min.
Michigan	34		51		51		85		85			
Kansas	11		89	-13	76		100	-15	85			
Minnesota	19		50	-17	33		69	-23	46			
North Carolina	17		67		67		84		84			
Oregon	1		39		39		40		40			90
Utah	n/a		72		72		72		72			60
United States	11		46	-7	39		57	-9	48			

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Chart 8. In this armed robbery scenario, the absence of both injury to a victim and a prior record for the defendant make the recommended sentences both shorter and more similar across jurisdictions. Nonetheless, there is nearly a five-year difference between the actual low end of the presumptive range for Minnesota and the 90-month mandatory minimum imposed by Oregon. Michigan is closer to the low end. Among the actual high mins, the difference between the extremes is less than four years, with Michigan close to the high end. The width of Michigan's range is still higher than those of other jurisdictions, and the case is still scored on the "A" grid, but since this defendant falls at a relatively low point on that grid there is less room for disparity.

Overall Trends. Despite using structurally similar methods for determining minimum sentences, these guidelines jurisdictions often reach very different conclusions about what sentence is proportional to the facts. The low and high ends of the guidelines ranges differ greatly, and those differences continue when the presumptive sentences are adjusted for routinely awarded reductions. The guidelines vary in the weight they put on the defendant's criminal history, the extent to which they are superseded by mandatory minimum sentences, and whether their recommended sentences are extended by firearm enhancements.

A few trends are common. Sex offenses against children are treated with great harshness. Guidelines sentences are often superseded by statutorily mandated minimums, which are most commonly 25 years. Sex offenses by people with prior convictions for sex offenses also bring extremely long sentences, although the mechanism is more likely to be some form of criminal history enhancement. In the comparison cases, the sexual assaults sometimes brought sentences that were equal to or greater than the murders. On the other hand, recommended minimum sentences for armed robbery tend to be relatively lower.

Michigan is notably different from the other guidelines jurisdictions in several important ways. It has the widest ranges by far, meaning that Michigan judges have much more discretion to impose very long sentences without having to justify a departure from the guidelines recommendation. Michigan requires details about the severity of the offense to be scored that may or may not be used as aggravating factors in other jurisdictions, thereby pushing some defendants into higher ranges. Nonetheless, Michigan does not routinely have the longest sentences at the low ends of the applicable ranges; that is, compared to the other jurisdictions, the starting points of the applicable Michigan ranges are frequently higher than some but lower than others. However, at the high end of the presumptive ranges Michigan's recommended sentences are consistently the longest or one of the longest. Michigan's relatively long guidelines recommendations are compounded by the fact that Michigan allows no sentence reductions for good behavior and it regularly employs every strategy available for lengthening selected sentences, including firearm enhancements, habitual offender enhancements, and mandatory minimum sentences that trump the guidelines recommendations.

D. How Does Michigan's Guidelines System Compare?

The interlocking details of each jurisdiction's guidelines system are so unique that it is difficult to compare specifics. One cannot, for instance, compare the weight given to certain prior record variables by looking at the points awarded because all the point schemes are different. However, there are certain issues that are common to all guidelines systems, and it is possible to broadly compare how the example jurisdictions have resolved them. We saw in the last section that Michigan opted to preserve substantial judicial discretion by having far wider guidelines ranges than other jurisdictions. We will now turn briefly to several other fundamental matters.

1. Commission Oversight

Every jurisdiction except Michigan has a commission that has existed since their guidelines were developed. They vary in the size of their membership, from seven (Oregon and United States) to 27 (Utah) and 28 (North Carolina). They vary in the amount of professional staff they have available, from two in Utah to 100 in the federal system. Apart from these extremes, the average is about nine. They also

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vary as to where in state government the commission is located and how much authority it has to amend guidelines on its own.

However, every jurisdiction assumes the need to have a commission that not only develops guidelines in the first instance but also:

- Monitors their implementation.
- Collects, analyzes and publishes data regarding their effectiveness.
- Recommends changes necessary to promote the guidelines' goals.
- Responds to changes in the law and public policy.
- Avoids the inconsistencies that tend to arise from ad hoc legislative amendments.

The lack of a commission or any central body to perform these tasks in Michigan is unique.

2. Enforceability

In four of the jurisdictions we examined—Kansas, Minnesota, North Carolina, and Oregon—compliance with the guidelines is mandatory. In all but North Carolina, the sentencing court can depart from the presumptive range for substantial and compelling reasons. North Carolina has ranges within which aggravated and mitigated sentences can be imposed. Judges can choose to sentence within one of those ranges if adequate facts exist but cannot depart from them. In Kansas, Minnesota, and North Carolina, aggravating facts must have either been admitted by the defendant or found by a jury.

The Utah guidelines have been advisory since their inception. The federal guidelines began as mandatory and were made advisory by the U.S. Supreme Court's 2005 decision in *United States v. Booker*.[118] The Michigan guidelines also began as mandatory and were made advisory by the Michigan Supreme Court's 2015 decision in *People v. Lockridge.*[119] When the guidelines are advisory, compliance per se is not an issue. That is, while a party may be able to appeal a sentence that is not within the presumptive range, the appeal must allege that there is something impermissible about the basis or length of the departure, not simply that the sentence deviated from the guidelines recommendation.

The fact that guidelines are mandatory in no way guarantees that sentences will actually be within the presumptive ranges. We saw in Chapter Seven that when Michigan's guidelines were mandatory, the compliance rate for the life-maximum offenses was 55%. The jurisdictional overviews in Section B of the current chapter show that overall compliance rates were 50% in Kansas, 77% in Minnesota, and 74% in North Carolina. In 2020, the advisory federal guidelines had compliance rates of 50%. Downward departures far exceeded upward departures in every instance.

3. Establishing Offense Seriousness: Grids and Offense Severity Levels

The purpose of having separate grids is to have the starting points of the ranges vary not only by the severity of the offense and the defendant's criminal history but also by differences in the offenses themselves. Three jurisdictions have only one grid for felonies—North Carolina, Oregon, the United States. Kansas uses two grids for drug and non-drug felonies. Minnesota has three grids: standard, sex, and drugs. Utah also has three grids: general, homicide, sex and kidnapping.

The grids have one axis that reflects offense severity. Most of the state grids have from seven to 11 offense severity levels. These levels are determined by statute or administrative rule or sentencing commission directive. They are based simply on the statutory definition of the conviction offense. For example, a murder may be level 1, an armed robbery may be level 3, an unarmed robbery may be level 5, and breaking into an unoccupied building may be level 7. The intersection of the offense severity and prior record levels identifies the applicable guidelines range. In some states, required statutory enhancements may be applied—such as for weapons use or victim injury. Beyond that, no attempt to adjust the offense severity based on the facts of the individual offense is made at this point. Rather,

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aggravating and mitigating aspects of the offense are used to support departures once the presumptive range has been established.

The federal guidelines are different. They have 43 "base levels" on a single grid, which can be adjusted up or down depending on the existence of various offense characteristics. First, there must be consideration of certain "special offense characteristics," such as use of a weapon, victim injury, and victim asportation. There can then be further adjustments for "relevant conduct" of various kinds. For example, if the offense was a hate crime, it goes up by three levels. Knowledge of victim vulnerability and obstruction of justice each causes two-level increases. Minimal participation can bring a four-level decrease; acceptance of responsibility may result in a decrease of one to three levels. All of these level shifts require judicial fact-finding that occurs as part of the process of determining the presumptive range. Once the base level is determined, the intersection with the defendant's criminal history score identifies the presumptive range. After that, the court can use additional consideration of aggravating and mitigating factors as a basis to depart.

Michigan's guidelines combine the use of multiple grids and the scoring of offense characteristics in order to determine the presumptive range. As noted in Chapter Six, Michigan uses nine grids. Except for the M2 grid that is used exclusively for second-degree murder, Michigan's grids are not based on the nature of the offense but on the statutory maximum penalty, which is ostensibly a proxy for the seriousness of the crime. Thus armed robbery[120] is on the A grid along with first-degree criminal sexual conduct,[121] because they both carry a maximum penalty of life or any term. Providing false information when applying for a state ID, third offense,[122] and manslaughter[123] are both on the C grid because they carry a maximum of 15 years. Larceny from a person[124] and possession of methamphetamine[125] are on the D grid because their maximum penalty is 10 years.

There are then three, four, or six levels of offense severity on each grid that are determined by scoring points on up to 20 offense variables (OVs). These points are assigned based on a judicial determination of the existence of various aggravating characteristics. Judges are required to score the maximum possible points for every applicable OV. No mitigating characteristics are scored. It is the intersection of the offense severity level and the prior record level on the applicable grid that identifies the presumptive minimum sentence range.

Where other states base a presumptive sentence on the general nature of the crime and then make individualized adjustments, Michigan's system is more like the federal guidelines in that it allows an assessment of individual characteristics to determine the presumptive minimum sentence range. But Michigan goes a step further. It actually considers offense severity twice before identifying the presumptive range. First it uses crime seriousness to select the grid, thereby making the recommended sentences more or less severe. This step is comparable to other states' defining offense severity based on the statutory classification of the crime. Then, Michigan moves defendants into increasingly higher ranges on that grid depending on the required scoring of aggravating factors. This consideration of individual factors is what other states do as an exercise of judicial discretion to depart after the presumptive range has been established. Of course Michigan judges can also choose to depart as well.

4. Defining Prior Conviction

One might imagine that defining what counts as a prior conviction would be a straightforward exercise. In fact it depends on the question: prior to what? If the goal is to punish people more severely who continue to commit crimes after having been punished for prior crimes, the logical definition would be a conviction that was entered prior to the commission of the current offense. However, in the jurisdictions examined here, the approach tends to be more literal. A prior conviction is one that preceded the sentencing on the current offense.

- In Kansas the prior conviction had to have occurred prior to the current sentence regardless of when the prior crime was committed. However, the prior cannot be another count in the current case.

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- In Minnesota, a prior conviction is weighed if the judgment of guilty was entered before the current sentencing. If multiple prior convictions arose from a single course of conduct, only the most serious offense is counted unless there were multiple victims. When multiple current convictions from a single course of conduct are being sentenced at the same time, one does not increase the criminal history score of another.
- In North Carolina, a person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime.
- In Oregon, the prior sentence had to have occurred before the current sentence.
- In Utah, the prior sentencing had to have occurred before the sentencing on the current offense. However, there is an express prohibition on counting multiple priors from a single criminal episode or counting additional current offenses.
- The federal guidelines award points for priors based on the length of the sentence imposed. Thus, by definition, the prior sentence had to have occurred before the current sentencing. However, the prior sentence cannot be for conduct that was part of the current offense. Multiple sentences are not counted if they arose from a single offense or were imposed on the same day. Federal judges are permitted to depart upward or downward from the criminal history category they believe to be inadequate.

Michigan approaches the issue from two directions. The scoring instructions for PRVs 1-4 state that a prior adult felony or juvenile adjudication is counted if the conviction or juvenile disposition was entered before the sentencing offense was committed. However PRV 7 undercuts this position by scoring as many as 20 points "if the offender was convicted of multiple felony counts or convicted of a felony after the sentencing offense was committed."[126] That is, points are scored if the defendant is currently being sentenced for multiple offenses arising from the same transaction, a practice other jurisdictions expressly prohibit. Michigan then goes a step further and allows up to 20 points for offenses that not only may not have been committed before the current offense but for which the defendant may not yet have been sentenced. It does not appear that any other jurisdictions contemplate this scenario.

5. Aggravation, Enhancement, and Habitualization

Every jurisdiction employs one or more methods of increasing the presumptive sentence based on specific facts about the defendant or the manner in which the crime was committed. The techniques used, the grounds for increase, and the impact on sentence lengths vary so widely that no exhaustive catalog will be attempted here. However a few general observations will provide perspective.

Other states typically provide non-exclusive lists of factors that might be used to aggravate or mitigate the presumptive sentence. The potential aggravating factors often include offense details that are scored in Michigan's offense variables, such as use of a weapon, injury to a victim, number of victims, extreme physical abuse, knowledge of the victim's vulnerability, gang affiliation, exceptional property loss, and the defendant's role. The critical difference is that whether to consider these details, how much weight to give them, and whether they are offset by any mitigating factors is up to the sentencing court and subject to appellate review. In Kansas, Minnesota, and North Carolina, aggravating facts must have been admitted by the defendant or found by a jury.

In the Michigan scheme, aggravating factors built into the offense variables must be scored at the maximum possible number of points to determine the presumptive sentence in the first instance. Their existence is determined by the court based on a preponderance of the evidence. Additional aggravating or mitigating circumstances can then be considered if Michigan judges choose to depart from the presumptive range. The federal guidelines build both aggravating and mitigating characteristics of the offense into the presumptive sentence by adjustments to the base level. They then allow for consideration of additional factors in departures and variances.

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Statutory enhancements are terms of years added to the presumptive sentence for specific circumstances, such as use of a firearm, bias crimes, or gang involvement. The primary such enhancement in Michigan is for possessing a firearm during the commission of a felony. Enhancements may have to be sought by the prosecution before they are applicable but the increase in sentence is then required.

Jurisdictions also commonly use enhancements to increase the presumptive sentence based on specific aspects of the defendant's criminal history. Multiple levels of enhancement for prior sex offenses or prior violent offenses are common and may be very severe. Jurisdictions also vary in the extent to which the nature of prior convictions is used to score the defendant's criminal history in the first instance. For example, the number of points awarded may depend not only on the number of prior convictions but also on whether they were for person or non-person crimes. The federal guidelines increase the criminal history category for "career offenders" and for "armed career criminals" and has a three strikes provision that brings life imprisonment for two prior convictions of a serious violent felony.

Michigan is unique in the breadth of its enhancement for habitual offenders. Criminal history is scored based on the number and severity of prior convictions (as measured by the maximum penalty, not by the nature of the offense). But if the prosecutor chooses to enhance, the high end of the guidelines range can be increased based on the sheer number of prior convictions regardless of their nature or seriousness. Thus, these enhancements are not aimed at repeated sex offenses or repeated violent crimes. A fourth offender enhancement in Michigan may be based on nothing but three prior property crimes and may increase the high end of the presumptive range by 100%. It appears that the closest any other jurisdiction comes is North Carolina, which allows three prior felony offenses of any kind to increase the offense class by four levels but no higher than Class C.

6. "Real Offense" Sentencing

"Real offense" or "relevant conduct" sentencing permits the court to determine the severity of the conviction offense based on all the criminal acts the defendant may have committed. This model goes well beyond consideration of aggravating facts about how the conviction offense was committed. "Real offense" sentencing can increase the punishment for the conviction offense based on charges that were reduced or dismissed as part of a negotiated plea and charges that were not even brought.

Under the federal guidelines, the base level of the conviction offense may be adjusted for "relevant conduct," which is defined as: "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[127] Federal judges are also given express authority to depart upward based on conduct underlying a charge that was dismissed or not pursued but not used to determine the applicable guidelines range.[128]

Michigan's OV 12 requires the scoring of up to 25 points for felonious criminal acts that occurred within 24 hours of the sentencing offense and that have not and will not result in a separate conviction.

Under both these provisions, if a defendant pleads guilty to robbery, for example, in exchange for the dismissal of charges for assault and resisting arrest, the presumptive sentencing range for the current conviction is increased based on the additional criminal conduct.

Real offense sentencing presents multiple problems.

- The defendant is effectively sentenced for crimes that have not been proven beyond a reasonable doubt, that are determined without various procedural safeguards, and that may be based on double or even triple hearsay.
- The prosecutor can induce sentence increases by choosing to dismiss or not bring charges, and then argue that the conduct underlying those charges must be scored in determining the offense severity level.
- Reliance on charges that were dismissed or not brought to enhance the sentence makes plea bargains illusory.

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None of the other jurisdictions we examined utilize real offense sentencing. The Model Penal Code rejects the practice in several provisions.[129]

7. Double-Counting

A final significant policy choice is whether sentences can be enhanced by counting the same conduct more than once. Double-counting, whether of the defendant's prior conduct or an aspect of the conviction offense, raises questions of fairness. Once the fact is accounted for and appropriately scored, the only purpose served by considering it again is to make the sentence harsher (that is, to punish the defendant repeatedly for the same behavior). Absent a policy prohibiting double-counting, there are theoretically no limits to how often the defendant's sentence can be lengthened by repeated consideration of the same fact.

The Model Penal Code provides that a departure "may not be based on any factor necessarily comprehended in the elements of the offenses of which the offender has been convicted, and no finding of fact may be used more than once . . . ."[130] Multiple jurisdictions incorporate these principles either explicitly or implicitly through their lists of factors that may be used to depart from a recommended sentence.

- Utah[131] expressly prohibits using an element of the offense as an aggravating factor.
- Kansas[132] and Oregon[133] both prohibit using a fact that is an element of the offense to justify a departure unless the fact makes the case significantly different from typical cases of that type.
- Similar positions appear in the guidelines of jurisdictions not reviewed in this report. Pennsylvania explicitly prohibits departures based on factors already scored in its guidelines, including the offense of conviction.[134] Delaware also prohibits using an element of the offense as an aggravating factor.[135]

The federal guidelines, on the other hand, contain no prohibition on double-counting. An element of the offense can be used to increase the guidelines range. Departures can be grounded in aggravating details that were already used to increase the base level of the offense.

Notably, Michigan law also prohibits basing a departure on an offense or offender characteristic already taken into account in the guidelines scoring, unless the court finds from the facts contained in the court record—including the presentence investigation report—that the characteristic has been given inadequate or disproportionate weight.[136] Ironically, however, the guidelines themselves do a great deal of double-counting. As described in Chapter Six:

- OVs 1 and 2 double-count the possession or use of a firearm in some circumstances.
- OV 6 scores the intent to kill when it is already an element of the offense and has been considered in determining which grid is applicable.
- OV 10 scores facts that constitute elements of first-degree criminal sexual conduct.
- OV 13 counts the sentencing offense as well as crimes scored in PRV 7.
- OV 19 is scored even though the conduct that threatened the security of a penal institution or interfered with the administration of justice is the basis for the sentencing offense.
- Michigan's use of habitual offender enhancements to broaden the presumptive sentence range allows prior convictions already scored as low severity felonies to increase the penalty by 100%.

In sum, Michigan's actual sentences may or may not be longer than those of other guidelines jurisdictions for comparable defendants convicted of comparable crimes. The sentence imposed depends heavily on whether actual judges choose to depart from their jurisdictions' presumptive ranges. However, the construction of Michigan's guidelines was steered by a series of policy choices that consistently favor harsher penalties. While they often follow the federal example, Michigan's guidelines frequently differ

from the more moderate policies of other states. More than two decades after they were made, the effect of these choices on the proportionality and consistency of Michigan's sentences and the size of its prison population has not been determined. Collectively, these choices are worth re-examination by a sentencing commission that is armed with the benefit of experience and large quantities of data.

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CHAPTER SIXTEEN. SHOULD THE GUIDELINES BE ENFORCED? THE RESULTS OF REASONABLENESS

The issue of enforcing Michigan's sentencing guidelines actually has three parts. First, could Michigan choose to have mandatory guidelines again? Second, does whether guidelines are mandatory or advisory actually matter? Third, would having mandatory guidelines be desirable? The answer to the first two questions is definitely "Yes." The answer to the third is, "It depends."

A. How Guidelines Can Be Made Mandatory

Allen Alleyne was convicted in federal court of robbery and of using or carrying a firearm in relation to a crime of violence. The federal statute required a minimum sentence of five years for the firearms offense. The mandatory minimum increased to seven years if the defendant brandished the weapon and to 10 years if the defendant fired it. The jury indicated "using or carrying" on its verdict form. However, at sentencing, the judge found brandishing so the sentence necessarily increased by two years.

In *Alleyne v. United States*,[1] the United States Supreme Court held that all facts that are used to increase a mandatory minimum sentence must either be admitted by the defendant or found by a jury beyond a reasonable doubt. Imposing a mandatory minimum sentence based on a critical fact that a judge determined by a preponderance of the evidence violates the Sixth Amendment right to a jury trial.[2]

The Michigan Supreme Court followed *Alleyne* in *People v. Lockridge*.[3] It found that the minimum sentence range of the guidelines is a mandatory minimum because it sets the legally prescribed penalty to be imposed. The majority reasoned that since (1) following the sentencing guidelines was mandatory, and (2) the guidelines increase recommended minimum sentences based on judicial fact-finding, Michigan's guidelines scheme violated the defendant's right to have a jury determine all facts not admitted that increase the minimum sentence. That is, the Michigan guidelines were changed from mandatory to advisory because judicial fact-finding is a required part of scoring offense variables that push defendants into increasingly higher guidelines ranges.[4]

The *Lockridge* Court considered several potential remedies. It rejected the idea that only facts admitted by the defendant or found by the jury should be used to score the offense variables. It also rejected the solution proposed by Court of Appeals Judge Douglas Shapiro, which would make the low end of the guidelines range (i.e., the minimum, advisory while the high end or ceiling continued to be mandatory). Instead, the Court chose to follow the federal example and make the Michigan guidelines entirely advisory. While sentencing courts are still required "to consult the applicable guidelines range and take it into account when imposing sentence," they need not follow the guidelines recommendation.

Lockridge had its detractors. In a vigorous dissent, Justices Markman and Zahra not only disagreed with the majority's reasoning, but also expressed deep concern about once again permitting disparities and excesses the guidelines were meant to reduce. The dissenters described multiple "ironic" consequences of returning the guidelines to advisory status:

- The power of the judiciary is expanded in the name of protecting the right to jury trial.
- Predictability in sentencing is lessened.
- A system designed to limit abuses of state power by curtailing judicial discretion is replaced by one that allows nearly unfettered exercises of discretion.
- The expansion of judicial power comes at the expense of the decision by elected legislators to make the guidelines they set binding.
- In the name of fairness in sentencing, the pursuit of sentencing uniformity and consistency that was "the lodestar" of the guidelines system is replaced by "a rule of deference to the widely disparate judgments of 586 judges."[5]

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Notably, in her concurring opinion in *People v. Steanhouse*,[6] then-Justice Larson observed:

> The Legislature can tell us its actual will. In *Lockridge*, this Court decided, as was its duty then, on a remedy that it believed best effectuated the Legislature's intent. If it erred, the Legislature is empowered to install any sentencing scheme that it considers best for the Michigan criminal justice system, limited only by the state and federal constitutions. [fn. omitted] It is certainly better equipped than this Court to weigh the policy options. The ball is in the Legislature's court…

So, could the Michigan Legislature still choose to make sentencing guidelines mandatory? Absolutely. Kansas, Minnesota, North Carolina, Oregon, and Washington all have mandatory schemes. Michigan's guidelines were made advisory solely because judicial fact-finding is a required part of scoring the offense variables. Michigan need only adopt the more typical model, which does not make judicial fact-finding part of the initial guidelines calculation. In this model, offense severity is determined solely by the offense of conviction. Every crime has a severity level assigned to it by the Legislature or sentencing commission. The intersection of offense severity and criminal history levels on the grid produce a guidelines range or presumptive sentence. Only after the guidelines recommendation has been determined may judges engage in judicial fact-finding while considering whether and how much to depart.

Restructuring Michigan's guidelines to shift judicial fact-finding from the guidelines calculation stage to the departure stage may seem hyper-technical, if not outright hypocritical. Either way, judges can find facts, and then increase the defendant's sentence based on those facts. However, there are important differences in the process.

1. Scoring aggravating (but not mitigating) factors as part of the guidelines calculation raises the baseline recommended sentence. If the court feels the resulting sentence is longer than warranted, its only option is to depart downward.
2. Under Michigan's current scheme, judges are required to take selected factors into account and to score them as heavily as the facts allow, regardless of whether the judge believes the factors warrant that much weight under the circumstances. Leaving consideration of aggravating and mitigating factors until after a range has been identified on the basis of the defendant's prior record and the crime of conviction allows the court to decide whether the presumptive sentence alone is proportional. If not, the court can decide why not and assign weight to additional relevant factors accordingly.
3. As we are about to see, mandatory and advisory guidelines result in critically different types of appellate review.

B. Why the Distinction Matters

The most consequential difference between mandatory and advisory guidelines is the standard for reviewing the sentence on appeal. When compliance with sentencing guidelines is mandatory, sentences above or below the recommended range are not permitted unless established criteria for allowing departures are met. The governing rationale is that correctly scored guidelines produce presumptively appropriate sentences, so enforcing the guidelines is a means to that end. When a sentence is appealed, the task of the reviewing court is to assess whether the guidelines have been correctly calculated and applied and whether any departure is justified under the applicable standard.

When guidelines are merely advisory, the rationale is that guidelines can help the decision-maker reach an appropriate sentence and so should be consulted; but compliance with the guidelines is not an end in itself. On appeal, the reviewing court's job is not to determine whether the guidelines have been followed but whether the sentence is permissible on its merits.

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1. Review Under the Advisory Judicial Guidelines

When the Michigan Supreme Court decided *People v. Milbourn* in 1990, the sentencing guidelines in effect were the advisory judicial guidelines. As explained in Chapter One, *Milbourn* adopted the principle of proportionality: the most severe punishments should be reserved for the most serious crimes and those offenders who have prior records should be treated more harshly than those who do not. Since any given instance of a particular crime may be more or less serious, the gradation of recommended ranges in the sentencing guidelines can help judges determine the penalty that appropriately reflects a combination of sentencing factors. Departures from the guidelines should be based on reasons that were not already covered by guidelines variables or were not scored points sufficient for the circumstances. Even when some departure is warranted, the extent of the departure is also subject to review for proportionality. Where the departure is disproportionate, the sentence is an abuse of discretion.

Proportionality review under *Milbourn* brought intensive scrutiny to trial court sentencing practices. The results of that scrutiny varied widely. While resentencing was ordered in many cases,[7] a number of extreme upward departures were upheld by the Supreme Court.[8] In 1997, just seven years after it was decided, *Milborn* was so often honored in the breach, at least one Court of Appeals panel concluded the proportionality standard had been "substantially altered."[9]

The Supreme Court has not seemed anxious to address that perception. In *People v. Leon Echols*, the Court of Appeals approved a 75–150 year sentence for second-degree murder imposed despite claims that the length was disproportionate and the trial court had failed to justify the 50-year upward departure. Echols was an 18-year-old defendant who shot and killed a man during an altercation over the purchase of a car. He had one prior conviction for cocaine possession. His recommended sentence under the judicial guidelines was in the range of 10–25 years. The trial court's stated reasons for departing were simply "punishment and [to] protect society."

The defendant did not appeal to the Supreme Court when his sentence was upheld in 1992 but sought postconviction relief nearly 20 years later. The majority denied leave to appeal despite Justice Michael Cavanagh's dissent. Relying on *Milbourn*, Justice Cavanagh found that the extent of the departure was not justified by either the defendant's history or the facts of the offense, which he noted were not worse than other second-degree murders.[10]

2. Review Under the Mandatory Legislative Guidelines

When the mandatory legislative guidelines were enacted, the statute required judges to sentence within the recommended ranges unless they placed on the record substantial and compelling reasons for departing from the guidelines. MCL 769.34 (3). In *People v. Babcock*,[11] the Supreme Court held that substantial and compelling reasons had to:

- Be "objective and verifiable."
- "'[K]eenly' or 'irresistibly' grab our attention."
- Be "of 'considerable worth' in deciding the length of a sentence."
- Exist "only in exceptional cases."

In *People v. Smith*,[12] the Court held that such reasons were needed to justify not only the fact of a departure but also the extent of the particular departure imposed. In *Smith*, the Court considered a case where the guidelines recommended 9–15 years for the sexual abuse of a nine year-old girl, but the trial judge imposed 30–50 years. The Supreme Court found that substantial and compelling reasons for an upward departure existed, but the trial court had failed to justify the extent of the specific departure actually made. *Smith* stated the requirement as: "When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been."

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The Court suggested that one method of justification is to place the departure sentence on the appropriate guidelines grid to see into which range that sentence would fall. One could then see how many additional OV and PRV points it would take for the defendant to reach that range and how the additional points would relate to the defendant's facts.

Responding to a dissenting opinion, the *Smith* majority said that not requiring judges to justify both the fact of a departure and its extent would allow similar defendants to "receive widely divergent departure sentences." It continued: "Any arguably reasonable sentence would be upheld, even if it were not proportionate to the offense and the offender. A lack of meaningful review would inevitably encourage idiosyncratic sentencing."

Justice Markman, concurring in *Smith*, emphasized the Legislature's intent that judicial discretion be constrained in order to eliminate wide disparities. He said the question on review "is not whether the sentence is 'reasonable' (cite omitted) but whether it is *lawful*, i.e. in compliance with both the substance and the procedure of the guidelines."

3. Review Under the Advisory Legislative Guidelines

Since the Supreme Court's 2015 decision in *People v. Lockridge*, Michigan's legislative guidelines are now advisory. The "substantial and compelling" standard for departures has been abolished. An appellate court just needs to find that the sentence was "reasonable."[13]

With trial courts no longer bound by the guidelines, the inevitable question is: how does an appellate court determine whether a sentence is "reasonable?" The short answer is: by returning to *Milbourn*. In *People v. Steanhouse*,[14] the Supreme Court said the proper standard upon appellate review is whether a "departure sentence is so unreasonable as to constitute an abuse of the trial court's discretion." The Court observed that when *Milbourn* was decided, the then-existing judicial guidelines were advisory. It described the relationship between the principle of proportionality and those advisory guidelines: "[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range."

While *Steanhouse* repeated its directive from *Lockridge*—that the guidelines "remain a highly relevant consideration in a trial court's exercise of sentencing discretion"—it affirmed the "key test" of *Milbourn.* The Court amplified the point by stressing that no presumption of unreasonableness arises from sentences outside the guidelines range. That is, while sentences within the guidelines are presumed to be proportional, departure sentences are not presumed to be disproportionate.

The Court rejected a rule that would require "extraordinary" circumstances to justify a sentence outside the Guidelines range and further rejected reliance on rigid mathematical formulas to justify the extent of a departure. It also expressly disavowed dicta in *Milbourn* that said departures should "alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme." The Court wanted to avoid suggesting that the guidelines should almost always control and that departures are presumptively unreasonable.

Over time, caselaw has identified various grounds for upholding guidelines departures under *Milbourn*:

1. The guidelines' failure to accurately reflect the seriousness of the crime.
2. Factors not considered by the guidelines.
3. Factors considered by the guidelines but given inadequate weight.
4. Any prior relationship between the victim and the offender.
5. The defendant's misconduct while in custody.
6. The defendant's expressions of remorse.
7. The defendant's potential for rehabilitation.[15]

The subjectivity of most of these grounds is apparent. On what basis does a sentencing judge decide that the guidelines do not reflect the seriousness of a particular offense or that they give inadequate weight to

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particular offense variables or that the defendant lacks the potential for rehabilitation? On what basis does a reviewing court decide that a judge who relies on one of these grounds for departure has abused his or her discretion? At what point do judicial decisions about the "adequacy" of the guidelines effectively overrule the legislative determination of what sentence is appropriate?[16]

In *People v. Dixon-Bey*,[17] the majority sought to address these questions by requiring trial judges to explain why a departure sentence was more proportionate than a sentence within the guidelines would have been. The defendant was charged with first-degree murder for stabbing her boyfriend to death but convicted of second-degree murder by a jury. The defendant had no prior record and the guidelines range was 12 to 20 years. The trial court imposed a sentence of 35–70 years because it believed, the jury's verdict notwithstanding, that the defendant had acted with premeditation. She stabbed the victim twice in the chest, had previously stabbed the victim in the hand, had disposed of the knife, and had once told a witness that she could get away with stabbing the victim in the chest by claiming self-defense. However, the court had no evidence of premeditation that had not been available to the jury.

The majority scrupulously measured the facts against how the applicable offense variables were scored or could have been scored. It noted that the trial court had not explained why the guidelines scoring was insufficient. It observed that non-guidelines factors mentioned by the court were either not unique to the defendant or were otherwise relevant to a proportionality determination. Thus, the majority found no basis for concluding "that the trial court's 15-year upward departure sentence was more reasonable and proportionate than a sentence within the recommended guidelines range would have been." *Dixon-Bey* was a 2-1 decision.

Dissenting Judge Boonstra relied on language from *Babcock* that said when there is more than one reasonable and principled outcome, it is not an abuse of discretion for the sentencing court to select either one. He found that the trial judge had heard all the evidence at trial, listened to arguments from both sides at sentencing, and considered the guidelines. Thus, he engaged in a reasoned process that produced a reasoned decision. The abuse of discretion standard gives deference to the trial judge's experience in sentencing and familiarity with the facts. The majority responded to the latter point by noting that giving trial courts that much deference fails to address unjustified disparity and that reference to the guidelines is most important in life-maximum cases where the legislative penalty is so open-ended.

The Michigan Supreme Court considered whether it wanted to grant leave to appeal and review the Court of Appeals decision in *Dixon-Bey*. However, the Court ultimately chose to let the Court of Appeals decision stand.

The substantial and compelling standard assumes that the sentencing guidelines account for the factors commonly associated with the crime of conviction and that the facts have to be unique and exceptional to justify departing from them. The reasonableness standard assumes that a variety of sentences can be justified and that any of them are permissible as long as they are adequately explained. Reasonableness is thus ultimately in the eye of the beholder.

4. Application of the Reasonableness Standard after *Dixon-Bey*

The inconsistencies that result from the reasonableness standard can be seen by comparing the results on appeal in similar cases.[18]

The defendants in *People v. Harper*[19] and *People v. Calloway*[20] both had long prior records and possessed small amounts of drugs.

The 54 year-old defendant in *Harper* was convicted of possessing less than 25 grams of cocaine for having a trace amount of the substance in a crack pipe. He had eight prior low severity felony convictions for such behavior as theft, lying to police indecent exposure and domestic violence and 22 misdemeanors. He also had a history of substance abuse and failure on probation. Because this was his second controlled substance offense, the guidelines range was 4–34 months. Based on this prior record, the trial court departed upward by 14 months and sentenced the defendant to four to eight years in prison.

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The Court of Appeals said the departure was "carefully selected to fit this particular offender and this particular offense, being defendant's ninth felony conviction overall." Although the panel recognized that the offense "seems rather trivial standing alone," it could not conclude that the trial court abused its discretion.

The 29-year-old defendant in *Calloway*, was convicted of possessing less than 50 grams of drugs and was sentenced as a third habitual offender. He had 11 prior low severity felony convictions involving drugs, theft, resisting arrest, and fleeing from police. He also had 11 misdemeanors. Because the trial court felt the guidelines did not adequately account for the defendant's prior record, it imposed a minimum sentence of eight years—a departure of more than five years. The Court of Appeals found that, while the inadequacy of guidelines scoring can be a reason to depart, the sentencing judge gave no rationale for the extent of the departure. It ordered a resentencing that resulted in a new minimum of 34 months.

***People v. Nelson*[21] and *People v. Boak*[22] both involved child molestation.**

The defendant in *Nelson* was convicted by a jury of second-degree criminal sexual conduct with a 15-year-old nephew when the defendant was 23 and fourth-degree CSC with the nephew's 13-year-old friend when the defendant was 20. Both incidents involved the defendant having the boy watch pornography and then reaching into the boy's pants and grabbing his penis. The two incidents occurred three years apart. The trial court imposed a minimum sentence of nine years, which was three years above the high end of the guidelines range (as originally calculated before a scoring error was corrected on appeal).

The trial judge based the departure on the defendant's serial preying, his betrayal of trust, and the impact of the offenses on the victims and their families. The Court of Appeals found that two incidents in three years do not constitute a pattern of child victimization, the statutory definition of the crime encompasses the victims' age and family relationship, and the psychological impact on the victims and the defendant's predatory behavior were scored by the guidelines. The trial court had not explained why the guidelines scores were inadequate or why the extent of the departure was warranted.

The defendant in *Boak* pleaded guilty to producing and to possession and distribution of child sexually abusive material. In one incident, she removed the diaper from a sleeping two-year-old and held the child's vagina open while she took a photograph. In a separate incident, she forwarded to co-defendant Thelen a photo of a nine-year-old girl with co-defendant Plowman's erect penis posed near the child. The 54-year-old defendant had no prior convictions. She explained at sentencing that her behavior changed when she started dating co-defendant Thelen.

The trial court imposed a minimum sentence of 12 years, an upward departure of over four years. The trial judge characterized the defendant's conduct as "heinous" and said it "turns my stomach." The court expressed concern about public safety and the need to deter others. It expressed skepticism about the accuracy of a risk assessment instrument that said the defendant was at low risk for re-offending and questioned whether rehabilitation was achievable. It also said the defendant was a willing participant who did not offer an apology until sentencing and then did not address the victims directly. It concluded that the guidelines were inadequate and that a sentence within them would not be reasonable or just. It had sentenced co-defendant Plowman to a minimum of eight years and co-defendant Thelen to 14 months.

The Court of Appeals majority quoted and then summarized the trial court's reasoning but did not compare it to the guidelines scoring. The concurring opinion simply concluded that the record supported both the trial court's decision to depart and the extent of the departure.

The dissent found the trial court's reasons insufficient to establish that the sentence was proportional. It noted that nothing made this crime more heinous than others of its type; in addition the two-year-old was asleep and had no memory of the incident. There was no explanation of why the assessment finding the defendant was at low risk for re-offending should not be trusted or why the defendant's conduct and history made her different from defendants sentenced within the guidelines. The dissent noted that the possession and distribution convictions were scored twice in the guidelines for the

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production conviction, resulting in a doubling of the guidelines range for the most serious offense from 24–40 months to 57–95 months. The dissent also quoted the defendant's lengthy and heartfelt statement at sentencing in full.

The defendants in *People v. Mead*[23] and *People v. Tucker*[24] both had long histories of low severity felonies.

Defendant Mead was convicted of Operating While Intoxicated, 3rd offense and was sentenced as a fourth habitual offender. The trial court departed upward by 14 months to impose a sentence of 3–15 years. The reason given for the departure was the defendant's six prior OWIs, his failures in rehabilitation programs, and public safety. In a 2-1 decision, the Court of Appeals majority analyzed the relationship between these reasons and the sentencing guidelines. It found that the prior record had been accounted for both by prior record scoring and the habitual enhancement. It noted that the program failure and recidivism were inter-related. It concluded that the trial court had not explained why the guidelines were inadequate or why the sentence imposed was more proportionate, so it remanded for resentencing.

On the same day that *Mead* was decided, a different Court of Appeals panel issued a unanimous opinion upholding the upward departure in *Tucker*. The 58-year-old defendant was convicted of breaking and entering into a business. Because he was sentenced as a fourth habitual offender, his sentencing guidelines range was 19–76 months. The trial court departed by 32 months and imposed a sentence of nine to15 years. The departure was based on the defendant's extensive criminal history, which included seven felony convictions—primarily for property offenses—and for fleeing from and resisting police, 18 misdemeanors, and multiple probation and parole failures. In upholding the departure, the Court of Appeals found: "Thus, factually, defendant is incorrect when he states that the trial court relied solely on his past criminal history as already contemplated by the guidelines. The trial court clearly also relied on defendant's propensity for recidivism."

The motivation for departures is often judicial dissatisfaction with the actions of other criminal justice actors.

In *People v. Scott*,[25] the defendant broke into the homes of people who were away attending funerals. While he was on bond for a break-in in County A, he committed another one in County B. While on probation in both counties, he committed four more in County C. The County C trial judge found that the prior record and offense variables that scored the other break-ins were inadequate, that the other counties had given the defendant a break, and that he had taken advantage of people in a time of grief. The Court of Appeals found these reasons justified a departure of nearly five years from a range that was already broadened by a habitual third enhancement and upheld the sentence of 19–30 years.

In *People v. Odom*,[26] the defendant was convicted of robbing a payday lender while he was on parole. His prior record made him eligible for enhancement as a fourth offender but the prosecutor had failed to comply with the statutory notice requirements, so the guidelines range could not be broadened. The trial court concluded that the guidelines did not accurately reflect the defendant's recidivism and departed upward by 12.5 years. In finding the 30-year minimum sentence was proportional, the Court of Appeals observed that the defendant's conduct put him in the same position as other repeat offenders notwithstanding the notice error and that had the enhancement been applied the minimum sentence could have been up to 35 years. That is, proportionality was defined by comparison to eligible defendants who received enhancements, as opposed to those who did not. Thus, *Odom* stands for the proposition that no matter why the prosecutor did not seek a habitual offender enhancement, it is reasonable for the sentencing court to achieve the same result through departure.

In *People v. Schurz*,[27] the trial court was apparently dissatisfied with both the prosecution's charging decision and the results of the guidelines scoring. The defendant shared heroin that he had purchased with his best friend from childhood. The friend died of an overdose. The prosecution initially charged the defendant with delivery of a controlled substance causing death, but the defendant pleaded guilty to delivery of heroin under 50 grams. The defendant was scored 100 points under OV 3 for a death occurring during the commission of a crime when the conviction offense was not homicide. He

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challenged this scoring because he had injected the same drug without getting sick and the autopsy showed that the victim had seven different drugs in his system, including an extremely large quantity of fentanyl. However, the trial judge found, by a preponderance of the evidence, that the heroin the defendant provided was a cause of the victim's death.

The scoring of OV 3 resulted in a guidelines range of 19–38 months, which was doubled to 38–76 months because this was the defendant's second drug offense. The trial court then departed by 3.7 years, imposing a sentence of 10–40 years. It relied on the defendant's delay in calling 911 and failure to be wholly forthcoming with first responders, the fact that defendant had provided the drugs that caused his best friend's death, and the view that defendant had failed to take responsibility when he said that this was supposed to have been just another instance of casual use as had occurred many times before. The Court of Appeals found these reasons adequately articulated a rationale for the extent of the departure.

Most common is judicial disagreement with a jury's verdict. In *People v. Latimer*,[28] the defendant was acquitted by a jury of assault with intent to murder but convicted of assault with intent to commit great bodily harm and armed robbery. The 21 year-old defendant had a prior record that consisted of 16 misdemeanors. Because they were mostly traffic offenses, only two were scorable in the guidelines. The trial court departed by over 13 years to impose a 32-year minimum sentence for the robbery conviction. Its basis was the brutality of the attack, the defendant's insistence on claiming self-defense, his failure to show remorse, two misconduct citations while in custody, and his prior record. In upholding the sentence, the Court of Appeals majority noted that since the misdemeanors were not scorable they were aspects of his criminal history not counted by the guidelines that justified a departure. It did no analysis of the extent of the departure and concluded: defendant's argument in this case that his "conduct is entirely taken into consideration in the offense variables" is simply not of critical importance to whether or not his sentence is proportionate.[29]

The data analyzed in this report show that proportionality and consistency were elusive goals even when the guidelines were mandatory. These case examples suggest that making the guidelines advisory have undermined those goals further. The data that would systematically test the impact of *Lockridge* on sentence lengths and disparity have not yet been examined. In the short term, it may be that judges who are used to sentencing within the guidelines continue to do so. However, as new judges take the bench, and as judges who chafed under the restrictions of the guidelines feel less constrained, shifts in sentence length may become more pronounced. Anecdotal evidence suggests that lawyers may be having more success in securing downward departures for sympathetic clients, while judges feel freer to impose lengthy upward departures based on their own reactions to the crime or the defendant.

C. Are Mandatory Guidelines Desirable?

The answer depends on the guidelines being enforced. Shifting the timing of judicial fact-finding does not address other problems that have been discussed in this report, such as the breadth of the guidelines ranges, the length of the minimum-minimums, and the nature of the factors used to aggravate the sentence. Mandating guidelines that promote the inconsistent use of habitual offender enhancements, the double-counting of elements of the offense, and departures based on subjective characteristics like attitude and lack of remorse would not be an improvement.

The definition of substantial and compelling reasons employed when the legislative guidelines were mandatory could avert some of these concerns. After all, it required that reasons for departure be objective and verifiable and that they exist only in exceptional cases. But that definition was developed in the context of guidelines that already scored numerous offense details. It would be incumbent on a new sentencing commission to apply that definition to offense severity levels based solely on the offense of conviction and to carefully define what aggravating factors are acceptable. Restructuring the guidelines to allow them to be mandatory is only a first step. Improving them so that compliance is worth mandating comes next.

Mandatory guidelines can work. The experience of other states is instructive. Minnesota's success at combining high judicial compliance rates with relatively low incarceration rates provides an especially

promising example. Achieving similar success in Michigan would require not just making the guidelines mandatory but rethinking when, why, and which departures should be allowed.

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CHAPTER SEVENTEEN. RECOMMENDATIONS FOR CHANGE

This report has viewed Michigan's sentencing guidelines from multiple perspectives. It has reviewed their history, scrutinized their structure, presented extensive empirical research on their impact, compared them to the guidelines of other jurisdictions, and provided the views of respected commentators. All the analysis leads to a common set of conclusions and supports the following recommendations.

Establish a commission with the mandate and scope of authority of the former Criminal Justice Policy Commission.

Make compliance with the guidelines recommendations mandatory. Allow departures only for substantial and compelling reasons grounded in facts that were found by a jury or admitted by the defendant.

Make fundamental structural changes.

1. Base offense severity scoring that determines presumptive guidelines solely on the crime of conviction. Reserve judicial fact-finding for aggravating and mitigating circumstances that support departures from the guidelines recommendation. Such a system:

    a. Establishes a baseline sentence for the crime of conviction before individualizing punishment based on a wide variety of permutations.
    b. Does not force judges to score the harshest options for each variable regardless of whether they think doing so is appropriate given the facts. Instead, it gives judges the discretion to consider individualized facts in a more nuanced way.
    c. Does not encourage prosecutors to increase the recommended minimum sentence by choosing charges or alleging facts that carry maximum points.
    d. Simplifies guidelines scoring by not requiring complex decision-making about the defendant's guilt of conduct not found by a jury or admitted by the defendant.
    e. Allows the Legislature to return to mandatory guidelines because calculation of presumptive sentences is not based on judicial fact-finding.

2. Weight prior criminal history less heavily than offense severity to avoid imposing punishment that is disproportionate to the harm caused, make better use of scarce prison resources, and reduce racial disparity.

3. Reduce the starting points of cells (the minimum-minimums) on the M2 and A grids to reduce sentence lengths.

4. Narrow the guidelines ranges to reduce disparity and sentence length.

5. Eliminate the use of habitual offender status as a basis for broadening the ranges. This avoids:

    a. Counting prior record twice in selected cases when prior record is already scored in guidelines
    b. Double-counting of specific priors,
    c. Enhancement based on priors that cannot be scored under guidelines,
    d. Undue reliance on priors that may be poor predictors of future risk,
    e. Disparity based on discrepancies among prosecutors' habitual offender charging policies.

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6. Redesign grids to:
    a. Reduce their number
    b. Reduce or eliminate redundant cells
    c. Cluster offenses based on their similarity in nature, not just their maximum sentences

7. Change the lowest PRV level to 0–5 points so that two prior misdemeanors or two low severity juvenile adjudications are Level A. Adjust points for other PRV levels accordingly.

8. Limit the allowable length of departures.

9. Limit the aggregate length of consecutive sentences.

Adopt basic principles.

1. Eliminate "real offense" sentencing. In defining offense, consider only facts that are related to the conviction offense.

2. Prohibit using elements of the offense to increase the calculation of offense severity.

3. Prohibit counting a fact more than once unless the fact makes that aspect of the crime significantly different from the usual criminal conduct of its type.

Enact additional recommendations for increasing proportionality and reducing disparity.

1. Move armed robbery to the B grid to better reflect actual sentences and the high rate of downward departures.

2. Move unarmed carjacking to the C grid, where unarmed robbery resides.

3. Do not score multiple prior convictions that arose from the same transaction.

4. Require sentences for similarly culpable co-defendants to be proportional to each other.

5. If a plea agreement is to a sentence "at the bottom of the guidelines range", require that the range be specified during the plea proceeding and that plea withdrawal be allowed if the range changes.

6. Treat felony convictions of people who were 17 at offense as juvenile adjudications.

Recommendations regarding specific prior record and offense variables under the current scheme.

<u>Prior Record Variables</u>

PRV 1 & 2 (High and low severity felonies) – Change breakpoint between high and low severity felonies; define high severity as M2, A and B grid offenses.

PRV 3 & 4 (High and low severity juvenile adjudications) – Change breakpoint between high and low severity juvenile adjudications, as described above. Reduce points for juvenile adjudications. Treat adult convictions by waived juveniles as juvenile adjudications.

PRV 5 (Misdemeanors) – Eliminate scoring of misdemeanors with maximum sentences of 93 days or fewer.

PRV 6 (Relationship to criminal justice system) – Do not score if conduct is basis for sentencing offense and/or will result in mandatory consecutive sentence.

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PRV 7 (Subsequent or concurrent felony convictions) – Eliminate. By definition convictions scored are not "priors," and they are often scored in OV 13.

Offense Variables

OV 1 (Aggravated use of a weapon) – Do not score if defendant was also convicted of felony firearm. Only score for unarmed accomplice if they had actual knowledge that principal was armed.

OV 2 (Lethal potential of weapon) – Only score 15 points to avoid double-counting conduct scored in OV 1 and, potentially, felony firearm.

OV 3 (Physical injury to victim) – Do not score 100 points if the accomplice did not have the intent to kill. Do not score if the accomplice was convicted of assault with intent to murder because that is scoring an element of the offense. Do not score if the defendant was charged with but not convicted of homicide because that is penalizing the defendant for the "real" offense.

OV 4 & 5 (Psychological injury to victim or family member) – Require professional assessment of the need for treatment.

OV 6 (Intent to kill or injure) – Eliminate. Scores intent element of offense.

OV 7 (Aggravated physical abuse) – Define "conduct designed to substantially increase the defendant's fear" to be the functional equivalent of sadism/torture/excessive brutality. Alternatively, have a separate category with lower points.

OV 8 (Asportation or captivity) – Create an exception for minor or incidental movement.

OV 9 (Number of victims) – Reduce two victims to five points. Do not include responding public safety personnel in counting the number of victims.

OV 10 (Exploitation of vulnerable victim) – Do not score if the same conduct is the basis for the conviction, e.g. a CSC offense under 750.520 b, c, or d

OV 11 (Criminal sexual penetration) – Eliminate. This is based on "real offense" sentencing.

OV 12 (Contemporaneous felonious criminal acts) – Eliminate. This is based on "real offense" sentencing.

OV 13 (Continuing pattern of criminal behavior) – Eliminate. This double counts convictions already scored *and* is based on "real offense" sentencing.

OV 14 (Offender's role) – Add definition of "leader."

OV 19 (Threat to security of penal institution or court, interference with administration of justice, etc.) – Do not score if conduct was element of offense (e.g., providing contraband to or possession of contraband by a prisoner or jail inmate, witness intimidation or perjury) or for routine attempts to avoid prosecution, such as leaving the scene or not cooperating with police.

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CONCLUSION

When the Michigan Felony Sentencing Project issued its report in 1979, it identified three primary concerns about sentencing in Michigan: disparity unrelated to offense severity or to the defendant's criminal history, lack of accountability, and the diffusion of authority over the actual sentence to be served among prosecutors, judges, and parole boards. Unfortunately, despite the development of three sets of sentencing guidelines and the temporary existence of two sentencing commissions, the same concerns remain.

- Sentences continue to vary widely depending on the county of conviction, the identity of the sentencing judge, and whether the defendant was willing to plead guilty. While there is minimal evidence of direct racial bias, non-whites continue to receive disproportionally longer sentences in large part because the guidelines place such heavy weight on prior criminal history.
- Appellate review of sentences for "reasonableness" produces very different results depending on the composition of the appellate panel. Some of the most extreme sentences are reversed, but sentencing judges are largely free to impose whatever departures from the guidelines they choose to rationalize.
- Prosecutors exercise an out-sized influence over sentence length through the ability to add habitual offender enhancements. Enormous differences in the extent to which county prosecutors choose to apply enhancements further add to disparity in sentences for similarly situated defendants.

With the size of the Michigan prison population and the proportion of people serving minimum sentences of more than 10 years having each more than doubled, there is a fourth major concern: the enormous growth in sentence lengths and the pressure that creates on prison resources. The increase in length of time served by Michigan prisoners is compounded by multiple non-guidelines changes, including the elimination of disciplinary credits, the increased use of consecutive sentences and mandatory minimums, and fluctuations in parole practices. However, consistent increases in minimum sentences for life-maximum offenses not only lengthen time served in themselves but also exacerbate the consequences of other "get tough" policies.

The enabling legislation set proportionality, reduction of disparity, and consideration of correctional resources as goals of the sentencing guidelines. The MFSP report warned that broad ranges of sentencing discretion generate disparity and that disparity is inevitably greatest among the life-maximum offenses because that is where the range of discretion available is broadest. Nonetheless, as enacted, the guidelines preserve broad judicial discretion and use multiple mechanisms to encourage extremely punitive sentences for the life-maximum offenses. In many cases, sentencing judges reject this encouragement and impose minimum sentences below the guidelines recommendations. In other cases, judges decide that the recommendation is not harsh enough and choose to depart above the guidelines range. In any event, the high rate of departures suggests judicial dissatisfaction with the guidelines. At a minimum, even when compliance with the guidelines was mandatory, judges appear to have often treated them as simply a starting point for their own decision-making.

Today, Michigan has—in a sense—the worst of both worlds. Unlike other guidelines states, judges must calculate recommended minimum sentences based on guidelines that require them to score every possible aggravating factor, double-count a number of prior record and offense factors, and assign very high weights to selected variables whether or not the judge thinks that weight is warranted by the facts. If followed, the often very punitive results are considered presumptively reasonable. But the guidelines recommendation also creates a baseline from which judges can choose to depart upward for reasons as subjective as their personal feeling that the guidelines scoring did not adequately reflect the

gravity of the crime or the defendant's criminal history. The modest scope of appellate review then permits many of these departures to stand.

Also, unlike other states that use sentencing guidelines, Michigan has no commission to analyze their usage, assess their impact, and recommend changes. Michigan's guidelines have been amended by the Legislature many times on an ad hoc basis but they have not been systematically assessed since they were enacted nearly 25 years ago. The underlying assumptions built into them have never been tested. Their relationship to current knowledge about the effectiveness of criminal justice practices and to evolving public attitudes toward crime and punishment have not been considered.

The research reported here provides a window into what a commission might learn. It provides suggestions about issues a commission might consider. But it is no substitute for a cross-professional commission with a broad mandate, full-time professional staff, and adequate resources. Such a commission could ultimately make sentencing in Michigan fairer, more consistent, and more cost-effective. That is, it could utilize all we have learned over the past 40 years and make the vision of the Michigan Felony Sentencing Project a reality.

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Endnotes

The Point of This Report

[1] See discussions in Chapter One of the Michigan Sentencing Guidelines Commission (1995–2002) and the Michigan Criminal Justice Policy Commission (2015–2019).

[2] Michigan's sentencing scheme is called "indeterminate" because the minimum sentence establishes only when the person *can* be released, not when they will be.

- The minimum sentence determines when the parole board obtains jurisdiction to release a prisoner. A defendant may serve more time than their minimum requires but cannot serve less without a commutation of sentence by the governor.
- Depending on the amount of time between the minimum and maximum sentences—what prisoners call the "tail" of the sentence—there may be years or decades within which the board can decide whether to grant release.
- Historically, prisoners around the country had their minimum sentences reduced by "time off for good behavior" or "good time." In most jurisdictions, some amount of good time—ranging from very minimal to very generous—is still available. However, Michigan wholly eliminated what were then known as disciplinary credits after the adoption of "truth in sentencing" in 1998. Prisoners sentenced since then must serve every day of their minimum sentences.
    - With credits, on average prisoners not sentenced to life terms had served 88% of their minimums.
    - In 2019 the average minimum sentence was 10.8 years. Disciplinary credits would have reduced the average time to parole eligibility to 9.3 years. Thus the elimination of credits increased the average length of stay by 1.3 years.

[3] The other major exception is the small but important group of offenses with mandatory sentences, particularly life without parole for first-degree murder and the consecutive two-year term required for convictions of "felony firearm" (possessing a firearm during the commission of a felony). In theory at least, indeterminate sentencing defines appropriate punishment in light of the defendant's background, not just the nature of the criminal behavior. With mandatory terms, judges have no discretion to consider individual circumstances and tailor the sentence accordingly. In 2019, 3,899 people were serving mandatory life without parole.

[4] Beggin, Riley. 2019. "Michigan Jails Fill as Crime Sinks and Nobody Seems to Know Why." https://www.bridgemi.com/michigan-government/michigan-jails-fill-crime-sinks-and-nobody-seems-know-why

[5] Risko, Robin. 2021. *Budget Briefing: Corrections.* Michigan House Fiscal Agency. https://www.house.mi.gov/hfa/PDF/Briefings/Corrections_BudgetBriefing_fy20-21.pdf

[6] These have included such diverse matters as asset forfeiture, cash bail, parole criteria, expungement, and the age of criminal responsibility.

Section I. History and Context

Chapter One. The Evolution of Sentencing Guidelines

[1] Ballotpedia. N.d. "Michigan Indeterminate Sentence Proposal, 1902. Retrieved Mar 2, 2021. https://ballotpedia.org/Michigan_Indeterminate_Sentence,_Proposal_2_(1902)

[2] See summary of case law in *People v. Coles*, 417 Mich 523 (1983).

[3] *People v. Tanner*, 387 Mich 683, 689 (1972).

[4] It later held that the rule does not apply to life-maximum offenses. *People v. Powe*, 469 Mich 1032 (2004).

[5] Zalman, Marvin, Charles W. Ostrom, Phillip Guilliams, and Garret Peaslee. 1979. *Sentencing in Michigan: Report of the Michigan Felony Sentencing Project*. NCJRS. https://www.ojp.gov/pdffiles1/Digitization/60907NCJRS.pdf

[6] *Ibid* at 174.

[7] *Ibid* at 265–266.

[8] Their findings will be discussed in more detail in Chapter Three.

[9] Zalman supra note 5 at 295.

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[10] A subsequent legislative analysis noted: "The [judicial sentencing] guidelines were designed to reduce disparity in sentencing from county to county and region to region by mirroring the existing sentencing practices of judges across the state at the time the guidelines were implemented. They were developed using the results of research on sentencing patterns of judges throughout Michigan, and attempt to capture the typical sentence for similar types of offenses and offenders." House Legislative Analysis, SB 826, HB 5419, and HB 5398 (Revised Second Analysis), September 23, 1998, 2.

[11] McComb, James A. 1988. "An Overview of the Second Edition of the Michigan Sentencing Guidelines." *Michigan Bar Journal*, 67:863–867 at 863.

[12] See Michigan Judicial Institute [MJI]. 1983–1988. "Michigan Sentencing Guidelines Manual." Retrieved on Mar 2. 2021. https://mjieducation.mi.gov/documents/felony-sentencing-resources/59-1983-1988-sgm/file The groups were assault, burglary, criminal sexual conduct, drug, homicide, larceny, robbery, fraud, property destruction, weapons possession, and negligent homicide.

[13] Deming, Sheila Robertson. 2000. "Michigan's Sentencing Guidelines." *Michigan Bar Journal*, 79(6):652-655 at 652.

[14] *People v. Ewing*, 435 Mich 443 (1990).

[15] The directions in the 1988 Sentencing Guidelines Manual described the process as follows:

> "6. Do not score any prior felony convictions, misdemeanors or juvenile delinquency adjudications that precede conviction-free periods of 10 years or more. A conviction-free period exists if more than 10 years have elapsed between the discharge date from any conviction or adjudication and the commission of the next offense that results in a conviction… To determine whether the decay factor is applicable complete the following steps.
>
> a. Start from the date of the instant offense and go back in time to the most recent prior conviction and determine the discharge date. If there is less than 10 years between the two dates, the most recent prior conviction is to be scored. If the gap is more than 10 years, that prior conviction and any previous convictions are not to be scored.
>
> b. If there is a prior conviction within the most recent 10 year period, start from the offense date of the most recent prior conviction and go back in time to the discharge date of the next prior conviction. If there is less than 10 years between the two dates, the next prior conviction is to be scored. If there is more than a 10 year gap, that prior conviction and all previous convictions are not to be scored.
>
> c. Continue in a similar fashion until there is a 10 year gap or until there are no further prior convictions."

Michigan Judicial Institute. 1988. "Michigan Sentencing Guidelines (Second Edition)." pp. 6–7. Retrieved on March 2, 2021. https://mjieducation.mi.gov/documents/felony-sentencing-resources/60-1988-2nded-sgm/file

[16] MJI supra note 12 at 154.

[17] McComb supra note 11 at 864.

[18] *Ibid*. The revised guidelines also reduced the number of crime groups from 11 to 10 by dropping negligent homicide as a separate group.

[19] *Ibid* at 866.

[20] *Ibid* at 867.

[21] Ostrom, Charles W., Brian J. Ostrom, and Matthew Kleiman. 2004. "Judges and Discrimination: Assessing the Theory and Practice of Criminal Sentencing." NCJRS, at 162.https://www.ojp.gov/pdffiles1/nij/grants/204024.pdf

[22] 417 Mich 523 (1983).

[23] *People v. Milbourn*, 435 Mich 630 (1990).

[24] *Ibid* at 653.

[25] *Ibid* at 659.

[26] *Ibid.*

[27] A third judge, Paul Maloney, was named as a public member and appointed chair.

[28] Index crimes include murder, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson.

[29] The Disaster Center. N. d. "Michigan Population and Rate of Crime per 100,000 People, 1960-2019." Retrieved on Mar 2, 2021. http://www.disastercenter.com/crime/micrime.htm

[30] Intermediate sanctions are required if the high end of the guidelines range is 18 months or less.

[31] 498 Mich 358 (2015).

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[32] These definitions were provided by the Supreme Court in *People v. Babcock*, 469 Mich 247 (2003). The *Babcock* Court stressed that the principle of proportionality remained relevant as the standard against which the decision to depart was to be assessed. In establishing the sentencing guidelines, the Legislature was subscribing to the "deeply rooted" belief that the punishment should fit both the crime and the criminal. The scoring of offense and prior record variables reflects this belief. Therefore, a departure must contribute to making a sentence more proportionate than a sentence within the guidelines range.

Substantial and compelling reasons must justify not only the fact of *a* departure, but also the extent of the particular departure imposed. As the Supreme Court explained in *People v. Smith*, 482 Mich 292 (2008), a departure that is too extreme will violate the principle of proportionality.

[33] *People v. Hendrick*, 472 Mich 555 (2005).

[34] Straddle cells are those in which the high end of the guidelines range exceeds 18 months but the low end is 12 months or less.

[35] The Council of State Governments found that prison sentences imposed in 2012 were distributed among the crimes classes as follows:

- M2 (life or any term) 2%
- Class A (life or any term) 11%
- Class B (20 years) 11%
- Class C (15 years) 14%
- Class D (10 years) 16%
- Class E (5 years) 27%
- Class F (4 years) 7%
- Class G (2 years) 10%
- Class H (intermed. sanc.) 1%

Council of State Governments Justice Center [CSG]. 2014. "Report Technical Appendix: Compilation of Michigan Sentencing and Justice Reinvestment Analyses." p. 29.
https://council.legislature.mi.gov/Content/Files/mlrc/MichiganReportTechnicalAppendix.pdf

[36] 1st judicial guidelines, assault with intent to murder, high offense, low priors.

[37] Yantus, Anne. 2014. "Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform." *University of Michigan Journal of Law Reform*, 47(3):645–696 at 685.

[38] MCL 769.10.

[39] MCL 769.11.

[40] MCL 769.12.

[41] Deming supra note 13.

[42] Act of Mar. 7, 2002, No 31, 2002 Mich. Pub. Acts 68, 74 (repealing Mich. Comp. Laws Secs. 769.32-33)

[43] Yantus supra note 37 at 685, nn 273.

[44] *Ibid* at 652–658.

[45] *Ibid* at 664–665.

[46] *Ibid* at 666–667.

[47] MCL 768.7a. Mandatory consecutive sentences if defendant was inmate of or on escape from a penal institution or was on parole when they committed the offense. See also MCL 768.7b regarding offenses committed while a felony charge is pending. Consecutive sentencing is mandatory if new crime is a major controlled substance offense; otherwise consecutive sentencing is discretionary.

[48] MCL 750.227b.

[49] MCL 333.7401(3).

[50] Yantus supra note 37 at 681–683.

[51] *People v. Miles*, 454 Mich 90 (1997).

[52] *People v. Tommy Brown*, Michigan Supreme Court No. 147759 (order remanding, 3/26/14) (approving *People v. Ryan*, 295 Mich App 388 (2012)). Brown was also convicted of four other counts of first-degree CSC for other incidents involving the same teenaged victim. The 40–60 year terms imposed for those counts had to run concurrently. It appears from the Michigan Department of Corrections' Offender Tracking Information System (OTIS) that when Brown was resentenced on August 14, 2014, he received seven terms of 25–50 years to be served concurrently since his earliest release date is now January 4, 2037.

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[53] *People v. Christopher Lynd Barron,* unpublished opinion of Court of Appeals issued July 2, 2019 (Docket No. 339508); Christenson, Trace. 2017. "Bellevue Man Faces Up to 160 Years in Prison," *Lansing State Journal*, July 15, pp. 5A.

[54] Yantus supra note 37 at 683, nn 264.

[55] The Court of Appeals acknowledged the illogic in *People v. Ryan,* supra note 52.

[56] 317 Mich App 649 (2016).

[57] On remand, the trial court made two of the sentences consecutive and ordered the rest to run concurrently to each other and the first two, reducing the aggregate minimum sentences to 22 years. The justification given included the defendant's extensive and violent criminal history, his failure to be gainfully employed, his manipulation of addicts and his 18-year old girlfriend to sell heroin, and his long history of dealing. The Court of Appeals affirmed. *People v. Norfleet (On Remand),* 321 Mich. App. 68 (2017).

[58] A mandatory minimum assumes an indeterminate sentence with both minimum and maximum terms. This is distinct from a "flat" or determinate sentence for which the Legislature has mandated a single term of years. While some states use determinate sentences routinely, in Michigan, the primary instances are the consecutive two-year term for possessing a firearm during the commission of a felony, MCL 750.227b and life without parole for first-degree murder, MCL 750.316.

[59] Yantus supra note 37 at 678.

[60] Life without parole is now also mandatory for a defendant convicted of first-degree CSC against a child under age 13, if the defendant has a prior conviction of first, second or third-degree CSC involving a child. MCL 750.520b(2)(c).

[61] MCL 769.12.

[62] Yantus supra note 37 at 680.

[63] 2014 PA 465.

Chapter Two. Changing Views of How Long is Long Enough

[1] For more details on the distribution of minimum sentences for these offenses in the decades from 1970-2009, see Citizens Alliance on Prisons and Public Spending. Fall 2012. "Length of Stay Drives Prison Costs." *Consensus* at p. 5.

[2] Aebi, Marcelo F., and Mélanie M. Tiago. 2018. "Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I Report." *Council of Europe.* 1–17 at p 4. http://wp.unil.ch/space/files/2019/06/Key-Findings_190611-1.pdf Norway and many other countries allow for sentences to be extended or converted to "preventive detention" if the person is determined to be a continuing threat to public safety.

[3] Mauer, Marc. 2017. "Incarceration Rates in an International Perspective*." Oxford Research Encyclopedia of Criminology and Criminal Justice*, 1–20. https://oxfordre.com/criminology/view/10.1093/acrefore /9780190264079.001.0001/acrefore-9780190264079-e- 233#acrefore-9780190264079-e-233-bibItem-0036.

[4] Index crimes include murder, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft and arson.

[5] Comparative averages for first-degree CSC offenses cannot be calculated because they are displayed differently in the MDOC reports for the years in question.

The Council of State Governments (CSG) made similar findings when it examined Michigan felony sentences imposed during the five-year period from 2008–2012. CSG found that increases were most marked for cases on the second-degree murder and Class A grids, (i.e. the life-maximum offenses).

The average minimum sentence for murder grew from 277.9 months to 309.6 months, an increase of 11.4%, even though the average offense variable (OV) score grew only marginally and the average prior record variable (PRV) score actually declined.

The average minimum sentence for A grid offenses grew from 121.4 months to 132.7 months, a 9.3% increase, although the average OV score had not changed and the average PRV score declined slightly. See Council of State Governments, supra note 35 in ch 1 at 25, 27.

[6] Leigh, Courtney, Sarah Eppler-Epstein, Elizabeth Pelletier, Ryan King, and Serena Lei. 2017. "A Matter of Time: The Causes and Consequence of Rising Time Served in America's Prisons." Urban Institute: Justice Policy Center, 1–4. https://apps.urban.org/features/long-prison-terms/trends.html

[7] Gottschalk, Marie. 2016*. Caught: The Prison State and the Lockdown of American Politics*. Princeton: Princeton University Press.

[8] Prescott, James J., Benjamin Pyle, and Sonja B. Starr. 2019. "Understanding Violent-Crime Recidivism." *Notre Dame Law Review*, 95(4):1643-1698 at 1697.

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[9] Mauer, Marc, Ashley Nellis, and Kerry Myers. 2018. *The Meaning of Life: The Case for Abolishing Life Sentences*. New York: The New Press.

[10] Pfaff, John. 2017. *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform.* New York: Basic Books.

[11] King, Ryan, Bryce Peterson, Brian Elderbroom, and Elizabeth Pelletier. 2015. "Reducing Mass Incarceration Requires Far-Reaching Reforms." Retrieved Mar 2, 2021. https://apps.urban.org/features/reducing-mass- incarceration. A 15% reduction in the length of stay of those convicted of all nonviolent offenses would reduce the baseline population by 4.5%.

[12] Austin, James, Vincent Schiraldi, Bruce Western, and Anamiki Dwivedi. 2019. "Reconsidering the "Violent Offender,"" Retrieved Mar 2, 2021. https://squareonejustice.org/wp-content/uploads/2019/09/executive-session-pdf-Reconsidering-the-violent-offender-report-ONLINE_FINAL.pdf

[13] Michigan Department of Corrections. 1993. "1991 Statistical Report." at Table B2c:Commitments and Minimum Term Distribution for Men and Women-Assaultive Offenses.

[14] Michigan Department of Corrections. 2021. "2019 Statistical Report." at Table B2c: 2019 Commitments by Minimum Term Distribution-Assaultive Offenses. https://www.michigan.gov/documents/corrections/MDOC_2019_Statistical_Report_717026_7.pdf

[15] Risko supra note 5 in The Point of This Report.

[16] *Ibid* at 31.

[17] *Ibid* at 32.

[18] Legislation to permit the release of medically frail prisoners to approved nursing homes was amended to exclude anyone serving for first-degree murder or first-degree CSC. Since these people make up the vast majority of the elderly prisoner population, very few of the medically frail will actually be eligible for medical paroles. MCL 791.235(10).

[19] Rhodes, William, Gerald Gaes, Jeremy Luallen, Ryan Kling, Tom Rich, and Michael Shively. 2016. "Following Incarceration, Most Released Offenders Never Return to Prison." *Crime & Delinquency*, 62(8):1003–1025. The authors do not identify the 17 states or the number of people in the dataset. The study does not distinguish between returns to prison for new crimes and returns for parole violations. The authors emphasize that their offender-based method of counting produces a lower recidivism rate than studies that count events, i.e. each return to prison, because the latter method counts people who return multiple times each time they appear in the data.

[20] Levine, Barbara R. 2009. *Denying Parole at First Eligibility: How much public safety does it actually buy?* Retrieved Mar 2, 2021. https://www.safeandjustmi.org/wp-content/uploads/2009/08/Denying_parole_at_first_eligibility.pdf

[21] Michigan Department of Corrections. 2021. "2019 Statistical Report." At table D3: Three-Year Follow-Up Outcomes of Offenders Who Paroled in 2001 to 2016 by Year.

[22] For a review of the research see Ulmer, Jeffrey T., and Darrell J. Steffensmeier. 2014. "The Age and Crime Relationship: Social Variation, Social Explanations." Pp. 377-396 in *The Nurture Versus Biosocial Debate in Criminology: On the Origins of Criminal Behavior and Criminality*. Thousand Oaks: SAGE Publications Inc.

[23] Levine supra note 20.

[24] *Ibid* at 23–27.

[25] Levine, Barbara and Elsie Kettunen. 2014. "Paroling People Who Committed Serious Crimes: What is the Actual Risk?" Retrieved Mar 2, 2021. https://www.prisonpolicy.org/scans/cappsmi/CAPPS_Paroling_people_who_committed_serious_crimes_11_23_14.pdf

[26] Justice Policy Institute. 2018. "The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars." Retrieved Mar 2, 2021. http://www.justicepolicy.org/uploads/justicepolicy/documents/The_Ungers_5_Years_and_Counting.pdf

[27] Prescott supra note 8.

[28] *Ibid* at 1687 [Table 5]. Re-incarceration rates were 4.9% for the rape/sex assault group, 9.9 for the assault group, and 11.0% for the robbery group.

[29] Levine supra note 20 at 43–48. See also Rhodes, William, Gerald G. Gaes, Ryan Kling, and Christopher Cutler. 2017. "The Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity with Multiple Break Points." *Criminology & Public Policy*, 17(3):731–769. (Statistical analysis of federal data finds very little impact of length of stay on recidivism).

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Chapter Three. Prior Research on Michigan Sentencing Guidelines

[1] Zalman supra note 5 in ch 1 at 72.

[2] *Ibid* at 169. Offender variables included not only prior record and relationship to the criminal justice system but also a wide variety of information judges may find relevant, such as residential stability, employment, education, mental health, substance abuse, and "good moves since arrest." (This sort of background information that is found in confidential presentence reports but not scored in the legislative guidelines was not available for the current research.) Age, gender, and race were analyzed separately.

[3] *Ibid* at 191–92.

[4] *Ibid* at 186–87.

[5] *Ibid* at 213.

[6] *Ibid* at 261.

[7] *Ibid* at 263.

[8] *Ibid* at 234.

[9] *Ibid* at 234. For instance, a non-white using a weapon to commit a sex offense received, on average, a minimum of 105 months where a white received 42 months. If the victim of a sex offense was a stranger, the non-white's sentence would increase by 54 months but the white's sentence would decrease by four months. *Ibid* at 250-252.

[10] *Ibid* at 269.

[11] Ekpunobi, Abel E 1999. "Judicial Decision Making Under Michigan Sentencing Guidelines." *Dissertations*, 1504.

[12] The actual identities of the counties were confirmed by Dr. Ekpunobi in an e-mail dated Feb. 3, 2021.

[13] The study also examined the race and gender of the sentencing judges, with mixed results. For further discussion of the 2nd judicial guidelines, see the analysis of the 1995 data used by the Michigan Sentencing Commission in Ostrum supra note 22 in ch 1.

[14] Ostrom, Brian J., Charles W. Ostrom, Roger A. Hanson, and Matthew Kleiman. 2008. Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States. *NCJRS*. https://www.ojp.gov/pdffiles1/nij/grants/223854.pdf

A short summary of the findings was published under the same title in Aug. 2008. References here are to the full report.

[15] *Ibid* at 82.

[16] *Ibid* at 80.

[17] *Ibid* at 85. Other than second-degree murder, which has its own grid, NCSC researchers did not distinguish among specific offenses in its analyses. Because they had only 77 murder cases in their dataset, for some analyses they collapsed the cases on the M2 and A grids.

[18] *Ibid* at 118–19.

[19] *Ibid* at 89.

[20] *Ibid* at 170–71.

[21] *Ibid* at 171.

[22] *Ibid* at 187.

[23] *Ibid* at 174.

[24] *Ibid* at 177.

[25] *Ibid* at 177.

[26] *Ibid* at 185.

[27] *Ibid* at 186.

[28] *Ibid* at 188.

[29] *Ibid* at 184–85.

[30] *Ibid* at 188.

[31] *Ibid* at 210.

[32] *Ibid* at 206.

[33] *Ibid* at 195.

[34] *Ibid* at 188.

[35] *Ibid* at 201.

[36] *Ibid* at 210.

[37] *Ibid* at 211.

[38] *Ibid* at 193.

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[39] *Ibid* at 300.
[40] *Ibid* at 301.
[41] *Ibid* at 302–03.
[42] *Ibid* at 303.
[43] CSG supra note 35 in ch 1 at 16–17.
[44] *Ibid* at 23.
[45] *Ibid* at 24.
[46] *Ibid* at 17.
[47] *Ibid* at 30.
[48] Criminal Justice Policy Commission [CJPC]. 2019. *Evaluation of Straddle Cell Sentencing in Michigan: Summary Report and Recommendations*. http://council.legislature.mi.gov/Content/Files/cjpc/CJPCStraddleCellSentencingLegislators.pdf

Section II. The Current Research

Chapter Five. How Sentences Grew Longer and More Numerous

[1] For detailed discussions of judicial views, parole policy changes, and lifer release patterns, see, respectively:

- Prisons and Corrections Section, State Bar of Michigan. 2002. "What Should 'Parolable Life' Mean? Judges Respond to the Controversy." https://www.safeandjustmi.org/wp-content/uploads/2002/03/What_should_parolable_life_mean.pdf
- Levine, Barbara.. 2014. "Parolable Lifers in Michigan: Paying the Price of Unchecked Discretion." https://www.prisonpolicy.org/scans/cappsmi/Parolable-Lifers-in-Michigan-Paying-the-price-of-unchecked-discretion.pdf
- Citizens Alliance on Prisons and Public Spending. 2006. "When 'Life' Did Not Mean Life: A Historical Analysis of Life Sentences Imposed in Michigan since 1900." https://static.prisonpolicy.org/scans/cappsmi/When%20life%20did%20not%20mean%20life%20for%20web.pdf

[2] Michigan Department of Corrections. 2020. "Report to the Legislature, Pursuant to Article 2, Public Act 166 of 2020, Section 904." https://www.michigan.gov/documents/corrections/Sec_904_713467_7.pdf

[3] The number of sentences in each offense group by habitual offender status under the legislative guidelines was:

	Non-Habitual	2nd Habitual	3rd Habitual	4th Habitual
M2	1,723	108	70	78
AWIM	1,398	123	99	126
CSC	1,976	190	100	164
RA	8,883	643	463	807
Total	13,980	1,064	732	1,175

Chapter Six. How the Guidelines Promote Longer Sentences

[1] The groups are crimes: against a person, against property, involving a controlled substance, against public order, against public safety and against public trust.

[2] The CSG observed that Michigan's guidelines are based on more offense groupings and incorporate more offense and prior record variables than other guidelines states, leading to far more cells. Reynolds, Carl, Andy Barbee, Ellen Whelan-Wuest, and Cassandra Warney. "Sentencing and Justice Reinvestment Initiative." Presented to Michigan Law Revision Commission, March 19, 2014, at p. 2. https://csgjusticecenter.org/wp-content/uploads/2020/10/MLRC-Pres-May-13-2014.pdf .Yet the overlap in allowable sentence lengths means the "complex scoring yields illusory precision." *Ibid* at 12.

The Robina Institute has also noted that Michigan's number of grids is unique. Frase, Richard S., Julian, V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. 2015. Criminal History Enhancements Sourcebook. *Robina Institute of Criminal Law and Criminal Justice*. https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/criminal_history_enhancement_web2_0.pdf. Most

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jurisdictions that use guidelines grids have one or two. Frase at 10. The authors of a Robina analysis that attempted to compare the impact of criminal history scores in guidelines jurisdictions had to exclude Michigan "due to complications related to that state's use of nine separate grids. Frase at 21.

[3] *Ibid*.

[4] *Ibid* at 11–14.

[5] *Ibid* at 97–104.

[6] *Ibid* at 20–21 and 25–27.

[7] Table A2, 2019 Criminal Court Dispositions by Offense and Type of Disposition — All Offenses

[8] MCL 333.7403(2)(b)(i): 10-year maximum, 3,591 dispositions, 14.1% to prison.

[9] MCL 333.7401(2)(a)(iv): 20 year maximum, 1,992 dispositions, 31.4% to prison.

[10] MCL 750.84: 10-year maximum, 1,064 dispositions, 47.7% to prison.

[11] MCL 750.110: 10-year maximum, 1,022 dispositions, 31.8% to prison.

[12] MCL 750.249: 14-year maximum, 1,016 dispositions, 23.7% to prison.

[13] Consider a scenario that could occur under MCL 750.380, which raises the maximum sentence for malicious destruction of a house, barn, or other building from five to 10 years if the defendant has two prior convictions under the same provision. Assume that Charlie has no prior record of any kind but has had a very hard time dealing with a divorce and the fact that his wife got the farm they built up together. On three separate occasions, he was so angry that he damaged property worth a little over $1,000. The first time he was placed on probation. The second time he was placed on probation again but had to serve 30 days in jail. The third time, the maximum became 10 years. And this time he also was convicted of felonious assault for hitting his ex-wife's new boyfriend who tried to intervene. Charlie's sentence will be on the D grid because of the 10-year maximum. He will receive 10 points under PRV 2 for the two prior low severity felonies, 10 points under PRV 6 because he was on probation, and 10 points under PRV 7 because of the concurrent assault conviction. This will place him at PRV Level D. He will receive 10 points under OV 13 because he now has a pattern of three or more property crimes and five points under OV 16 because the property was valued over $1,000. This puts him at OV Level II. The D-II cell has a recommended minimum prison sentence of 5–23 months. Charlie could also have his sentenced enhanced as a fourth habitual offender.

[14] Frase supra note 2 at 48.

[15] *Ibid* at 84.

[16] MCL 800.283a.

[17] It should be noted that a 2004 change in Michigan law defining when multiple convictions are barred by the state constitutional protection against double jeopardy allowed for more concurrent convictions to arise from a single transaction. This, in turn, increased the number of convictions available for scoring under PRV 7. *See People v. Nutt*, 469 Mich 565 (2004).

[18] For example, the requisite 50 points can be reached with two prior low-level felonies (10), three low severity juvenile adjudications (10), three misdemeanors (10), being on probation for one of the felonies (10), and one felony conviction that is concurrent with the sentencing offense.

[19] Zalman supra note 5 in ch 1.

[20] *Guidelines Manual*, online version current through 1/20/21 Step II. B. https://mjieducation.mi.gov/documents/sgm-files/94-sgm/file

[21] The only exception is that five points are not to be scored for displaying or implying a weapon if the conviction offense was armed robbery or felonious assault.

[22] The American Law Institute. 2017. *Model Penal Code: Sentencing Proposed Final Draft.* Sec. 7.03 (3) *Eligible Sentencing Considerations.* https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf

[23] *Ibid*.

[24] *People v. Hardy*, *People v. Glenn*, 494 Mich 430, 442 (2013).

[25] *Ibid*. The Legislature amended OV 7 effective Jan. 2016 to supersede *Hardy* in part. It added the phrase "similarly egregious" before "conduct designed to substantially increase the victim's fear." That the new language failed to provide a satisfactory solution to the problem of excessively scoring 50 points is evident in *People v. Lydic*, __Mich App__ (COA No. 349216, rel'd 1/28/21). During a domestic dispute, the defendant strangled his girlfriend with a belt and said that her young son would come home to find her dead. The defendant received a below guidelines sentence of 17 months to 10 years. The trial court felt compelled to score 50 points under OV 7 but then chose to depart downward in part because it believed that score was too harsh under the circumstances. The Court of Appeals upheld both the scoring and the departure.

[26] *People v. Barrera*, 500 Mich 14 (2017).

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[27] Ten points are also scored if four to 19 victims "were placed in danger of property loss"; 25 points are scored if 20 or more victims "were placed in danger of property loss." This has particular impact if the offense is breaking and entering or home invasion, when multiple victims not present during the crime might have lost property.

[28] Model Penal Code, supra note 22 at Sec. 7.03 (2)(b). See also Reitz, Kevin. 1993. "Sentencing Facts: Travesties of Real-Offense Sentencing." *Stanford Law Review*, 45(3):523-573. https://doi.org/10.2307/1229007

[29] *People v. Underwood*, 278 Mich App 334, 339-340 (2008) (absent an express statutory exclusion, 10 points may be awarded for perjury under OV 19 although interference with the administration of justice was inherent in the perjury conviction for which the defendant was being sentenced).

[30] *People v. Dickinson*, 321 Mich App 1, 24 (2017) (25 points properly awarded under OV19 when conviction offense was furnishing a controlled substance to a prisoner).

[31] *People v. Hamin Lorenzo Dixon*, __Mich App __ (COA No. 349631, 9/10/20) (order directing argument on app for lv., SC. No. 16221, 4/9/21) (25 points properly awarded under OV 19 where defendant pled guilty to attempted possession of a cell phone by a prisoner).

[32] The frequencies in this section include both non-habitual and habitual sentences. If they have the same guidelines scores, habitual and non-habitual sentences fall in the same cells; it is only the maximum-minimum that changes depending on habitual status.

[33] MCL 769.33(1)(e)(vii).

[34] Ostrom, Charles W. 1997. *Technical Report, Pilot Project: Using the MSP Draft Guidelines in Six Counties – Genesee, Kalamazoo, Kent, Macomb, Marquette, Oakland – and Recorder's Court*.

[35] *Ibid*; Maloney, Paul L., Hilda Gage, Mark Murray, and Carlo Ginotti. 1997. *Report of the Michigan Sentencing Guidelines Commission*. Appendix C.

[36] *Ibid* at 7.

[37] *Ibid* at 8.

[38] *Ibid* at 29.

[39] *Ibid* at 31.

[40] *Ibid* at 28.

[41] 482 Mich 41 (2008).

[42] For more detail about the regression analyses, see Appendix B.

[43] See Appendix B for details about how changing the order the variables are entered into the model can change the amount of variance explained.

Chapter Seven. How the Guidelines Promote Disparity

[1] Maloney, Paul L. 1999. "The Michigan Sentencing Guidelines," *Thomas M. Cooley Law Review*. 16(1):13-26. https://heinonline.org/HOL/LandingPage?handle=hein.journals/tmclr16&div=8&id=&page=

[2] *Ibid* at 21.

[3] *Ibid*.

[4] Michigan Supreme Court Guidelines Program. 1994. "Departure Profile for Mandatory Guideline Period. (01/01/94-12/31/94)."

[5] Maloney supra note 35 in ch 6 at 15.

[6] Ostrom supra note 14 in ch 3 at 84. Looking at sentences imposed from 2008-2012, the Council of State Governments (CSG) concluded that the ranges for prison sentences are wide and that the sentences imposed are spread across the ranges and beyond. It used as an example one cell on the D grid for the offense of delivering drugs < 50 grams. The low end of the cell was 10 months and the high end was 23 months. It found that only 58% of the sentences were within the range. CSG supra note 36 in ch 1 at 23.

[7] Michigan Supreme Court Guidelines Program, supra note 4.

[8] The Sentencing Commission had projected that the probable average sentence on the M2 grid would be at the cell midpoint and the probable average sentence on the A grid would be midway between the cell minimum and the cell midpoint. Maloney supra note 35 in ch 6 at 15.

Chapter Eight. How the Actual Minimum Sentences Relate to the Recommended Ranges

[1] 2006 PA 169, effec. Aug. 28, 2006.

[2] Significant at .001 level.

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[3] Another small but noticeable phenomenon is that in the A-I cell on three offense grids, the median sentence actually exceeded the high end of the recommended range, i.e., the median was an upward departure.

- On the M2 grid, where the max-min of the A-I cell is 150 months, the median for the 14 sentences in that cell was 168 months.
- For the offenses on the A grid, where the high end of the A-I range is 35 months, the median sentences were 180 months for assault and 60 months for CSC.

These medians resulted from upward departures in 28 individual sentences across the three offense groups. Our review suggests that in the eight murder cases, judges may simply have felt that 12.5 years was not enough punishment for the crime. In the assault and CSC cases, it appears that a frequent explanation for why judges saw a top of the guidelines sentence as insufficient was the existence of other sentences. This might be multiple sentences of the same type or a sentence for another offense for which the defendant was receiving a longer sentence, as when someone with no prior record was convicted of multiple counts of CSC or assault and murder out of the same incident.

[4] The principle exception is the robbery grid. Because so many medians are at the lowest end of their respective ranges, the starting points and medians of redundant cells along each diagonal are frequently the same.

Chapter Nine. Systemic Factors: Method of Conviction

[1] 397 U.S. 742 (1970). Brady pled guilty to avoid imposition of the death penalty, which was allowed under the applicable statute only if recommended by a jury. Nearly a decade later, the Supreme Court held in another case that this penalty provision unconstitutionally burdened the right to a jury trial because it required the defendant to risk death in order to exercise the right. However, the Court upheld Brady's guilty plea on the rationale that it was voluntary when made and was not invalidated by a subsequent change in the law.

[2] For more detailed discussion, see Grossman, Steven P. 2005. "An Honest Approach to Plea Bargaining." *American Journal of Trial Advocacy*, 29: 101-136. See also Smith, Justin M. 2020. "Disparity in Context: Judges' Perspectives on Disparities in a Sentencing Guideline System." *Journal of Qualitative Criminal Justice & Criminology*, 8(2):1-36 10.21428/88de04a1.52cab578 at pp. 21–23 for interviews with Michigan judges about disparities caused by plea bargaining and impact of witnesses at trial.

[3] Grossman supra note 2 at 130, nns omitted. See also *People v. Byrd*, 12 Mich App 186, 194 (1968) (Levin, J. concurring). Plea bargaining only works if defendants know that sentences will be heavier after trial. In Michigan in 1982, the Supreme Court decided the companion cases of *People v. Biggs* and *People v. Killebrew*, 416 Mich 189 (1982). The Court held that while the practice of charge bargaining with the prosecutor, which is intended to constrain the length of the potential sentence, had long been accepted, the practice of bargaining directly for imposition of a particular sentence or for a recommendation from the prosecutor that the judge impose a particular sentence, had not been expressly recognized as appropriate. The Court prohibited judicial initiation of or participation in sentence negotiations. However, it adopted a process by which judges can approve or reject sentence agreements or recommendations negotiated by the parties so long as the defendant has the opportunity to withdraw his plea if the bargain is rejected.

Ten years later, the Court extended this holding in *People v. Cobbs*, 443 Mich 276 (1993) to allow judges, upon request of a party, to state on the record what the sentence would be based on the judge's knowledge of the case at that point. The judge's preliminary evaluation does not bind the court to impose that sentence, but if the defendant pleads guilty in reliance on an estimate that the judge ultimately decides to exceed, the defendant is entitled to withdraw the plea.

[4] *Biggs* supra note 3. The trial judge rejected the sentence recommendation and imposed a sentence of 20–40 years. Bargains may also be struck about how guidelines variables will be scored or even which grid will be used, e.g., whether a second-degree murder will be scored as manslaughter on the C grid.

[5] The decision to go to trial requires a calculation of the likelihood of conviction. A lawyer may recommend acceptance of a bargain because conviction appears likely, regardless of how strongly the defendant asserts innocence. However, there is also an emotional component to the decision. Defendants, especially young ones, may have an unrealistically optimistic view of the trial process or an inability to accept the consequences of the offered plea. Defendants may also reject bargains they feel are unfair, either because they believe the punishment is too harsh for the crime or because they see it as harsher than normally imposed in similar circumstances.

The ultimate example of such a decision is *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The defendant was charged with uttering a forged instrument in the amount of $88.30 which, under then-applicable Kentucky law, was punishable by 2–10 years in prison. At a prehearing conference the prosecutor offered to recommend a sentence of five years if Hayes would plead but also threatened to seek indictment as a habitual criminal if Hayes refused to

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"save the court the inconvenience and necessity of a trial." With two prior convictions, Hayes faced a mandatory sentence of parolable life. He refused the plea offer, was found guilty on the principle charge by a jury, and received the life term.

The U.S. Supreme Court upheld the result as a product of the "give and take" of plea bargaining and observed that confronting a defendant with the risk of more severe punishment was an inevitable attribute of a system that encourages negotiated pleas. So long as the defendant was informed of the risks when he made his decision to plead not guilty, the threat of increased punishment for exercising the right to trial did not violate due process. After Hayes was convicted, the Kentucky habitual offender statute was replaced by a new statute that would have permitted him to receive, at most, an indeterminate term of 10–20 years. The new statute also set new conditions on which prior convictions could be counted. At least one of Hayes's priors did not meet these conditions. See also Tor, Avishalom. 2010. "Fairness and the Willingness to Accept Plea Bargain Offers." *Journal of Empirical Legal Studies*, 7(1):97–116. https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1834&context=law_faculty_scholarship

[6] For life-maximum cases, 18.3% of the dispositions were by jury and 2.1% were by bench trials. For non-life-maximum cases, only 1.8% of the dispositions were by jury and 0.8% were by bench trials. Michigan Courts. 2019. 2019. "2019 Caseload Reports." re: Criminal Verdicts. https://www.courts.michigan.gov/publications/statistics-and-reports/caseload-reports/2019-caseload-reports/

[7] The number of non-habitual sentences in each offense group under each set of guidelines was:

	M2 Jud.	M2 Leg.	AWIM Jud.	AWIM Leg.	CSC Jud.	CSC Leg.	RA Jud.	RA Leg.	Total Jud	Total Leg.
Plea	951	1,218	674	828	1,493	1,422	5,987	7,523	9,105	10,991
Court	315	92	234	80	203	67	793	373	1,545	612
Jury	625	413	434	490	618	487	846	987	2,523	2,377
Total	1,891	1,723	1,342	1,398	2,314	1,976	7,626	8,883	13,173	13,980

[8] The number of habitual sentences in each offense group under each set of guidelines was:

	M2 Jud.	M2 Leg.	AWIM Jud.	AWIM Leg.	CSC Jud.	CSC Leg.	RA Jud.	RA Leg.	Total Jud.	Total Leg.
Plea	73	100	105	106	242	176	1,079	1,137	1,499	1,519
Court	19	22	13	37	32	46	95	134	159	239
Jury	53	134	70	205	140	232	196	642	459	1,213
Total	145	256	188	348	414	454	1,370	1,913	2,117	2,971

[9] Data available from the authors upon request. This does not mean that there is no relationship between conviction method and the seriousness of the defendant's prior record and or offense severity. In fact a number of relationships that were statistically significant at the p <.001 were found. For example:

- Among non-habitual murder sentences, the percentage that were pleas increased as the offense severity increased going from 58.5 to 69.5 to 78.5 for OV Levels I, II and III, respectively. This suggests that many of the second-degree murder sentences were pleas down from charges of first-degree murder.
- Among non-habitual assault sentences, 70–81% of those that scored at OV Levels I-V arose from pleas. Only 50.5% of those that scored at OV Level VI arose from pleas.
- Among non-habitual robbery sentences, the proportion that was jury-based increased steadily from OV Levels I-VI from 5.9 to 7.0 to 8.3 to 10.9 to 14.2%, then doubled to 28.6.The lower proportion of pleas among sentences scored at OV Level VI suggests that desirable plea offers were less likely to be made in these cases.
- The assault group also shows a particularly clear pattern where the proportion of pleas declined as the prior record level went up. Thus, at PRV Levels A and B the proportion of plea-based sentences was about 75%. At PRV Level C it was 62.6%. However, at PRV Levels D-F, the proportion of sentences that arose from pleas was between 55 and 57.5%.
- Robbery sentences show a similar albeit less dramatic relationship. Thus it appears that the defendants with the most serious prior records may also be less likely to receive desirable plea offers.

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Chapter Ten. Systemic Factors: County of Conviction

[1] Prior studies agreed that where a defendant is sentenced is a factor in disparity; however, just how this disparity manifests is a matter of debate.

As explained in Chapter Three, the Michigan Felony Sentencing Project divided the counties into three strata based on the number of criminal dispositions in a county's circuit court, regardless of where in the state the county is located. The researchers concluded that county size was directly related to sentence length, though notably it found the longest sentences in the largest jurisdictions.

In contrast, the National Center for State Courts divided Michigan's circuits based on geography. It included smaller Washtenaw County with larger Wayne, Oakland, and Macomb Counties in a region it called SE Michigan and compared this region to all the remaining "outstate" counties, regardless of size. The NCSC researchers concluded that sentences are lower in the southeast corner of the state. That is, they found that a county's location, not its size, is related to sentence length.

While we have already observed a tendency for counties to cluster by size, with the larger jurisdictions generally having lower minimum sentences, we tested the size versus location distinction more precisely. Our results could not exactly replicate either of the prior studies because our data are only for life-maximum offenses and come from only 13 counties. But we took those counties and grouped them to simulate the opposing premises.

When we grouped the counties in the manner used by the NCSC researchers, the median for the southeast counties was eight years while the median for the outstate counties was nine years. When we placed the counties into four groups by size, with Wayne County constituting a group on its own, the medians were seven years for the larger counties (Oakland, Macomb, Kent), eight years for Wayne, 9.1 years for the medium-sized counties (Genesee, Washtenaw, Ingham, Kalamazoo), and 10 years for the smaller counties (Saginaw, Muskegon, Berrien, Calhoun, Jackson). Although the results were statistically significant at the .001 level for both approaches, grouping counties by size appears to provide more refined results.

Grouping data makes it more manageable and easier to present. However, while any grouping may be more or less accurate, all groupings smooth over differences among individual counties. Because we are examining results from only 13 of Michigan's counties, not all 83, it is possible for us to avoid groupings and assess the differences among the counties individually.

Chapter Eleven. Systemic Factors: Sentencing Judge

[1] MCR 8.111.

[2] Smith supra note 2 in ch 9 at 16–29.

Chapter Twelve. Defendant Characteristics: Sex and Age

[1] There were too few women sentenced as habitual offenders in each offense group to allow for reliable analysis.

[2] For women, 65.0% of the murder sentences and 58.3% of the assault sentences were plea-based. The comparable figures for men were 55.5% and 51.6%.

[3] Regression analyses run by sex confirm this explanation. The extent of the increase in sentence length as PRV level increased was smaller for women than for men at each level except PRV F, which included only 10 sentences for women.

[4] Frase supra note 2 in ch 6 at 102.

Chapter Thirteen. Defendant Characteristics: Race

[1] Gottschalk supra note 7 in ch 2 at 130–131.

[2] *Ibid* at 132.

[3] The reader should bear in mind that the applicable test for significance, ANOVA, is based on mean sentences, not median sentences, which is why there can be statistically significant disparities among the white and non-white assault sentences even though the medians for both are 10 years. As the note below the graph indicates, the mean assault sentence for whites was 10.5 years while the mean sentence for nonwhites was 13 years. In fact the means were both longer and more disparate than the medians for every offense group except murder.

[4] The possibility of a significant relationship between race and the number of multiple sentences was examined. There was none.

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[5] Frase supra note 2 in ch 6 at 116.

Chapter Fourteen. Habitual Offender Enhancements: Who Gets Chosen?

[1] CSG supra note 35 in ch 1 at 18.

[2] *Ibid* at 20–21. The CSG researchers observed that these broad disparities among counties made the cost of the habitual sentencing option both unpredictable and potentially huge.

[3] CJPC supra note 48 in ch 3. The only county that applied the enhancement more than these three was Eaton, which was not included in CSG's data or that used for the current research.

[4] Prior convictions, per se, are not included in our data. We only have prior record variable scores that indicate where the defendants had one, two, or three or more prior adult felony convictions that qualified for guidelines scoring. Therefore we do not know how many total sentences were eligible for enhancement.

[5] *Ibid*.

[6] The OMNI data had 44 sentences that received the habitual enhancement, and an additional 111 sentences that were eligible but not enhanced, that were committed by women.

Section III. Policy Implications

Chapter Fifteen. Comparing Michigan to Other Jurisdictions

[1] Lawrence, Alison. 2015. "Making Sense of Sentencing: State Systems and Policies." *National Conference of State Legislatures*. https://www.ncsl.org/documents/cj/sentencing.pdf at 5.

[2] Arizona, California, Delaware, District of Columbia, Florida, Indiana, Kansas, Minnesota, North Carolina, Ohio, Oregon, Virginia, Washington, U.S. Federal Courts.

Researchers found that states with a combination of determinate sentencing and presumptive sentencing guidelines had lower incarceration rates and smaller growth in incarceration rates than other states. Neither policy alone is enough. Moreover, "voluntary guidelines do not have the same effect. We consistently found that states with the combination of determinate sentencing and voluntary sentencing guidelines have higher incarceration rates and experienced larger growth in incarceration rates than other states. Thus, it is only by tightly controlling sentencing decisions and release decisions that states achieve lower incarceration rates and smaller growth."

Stemen, Don, Andres Rengifo, and James Wilson. 2005. *Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975-2002*. New York: Vera Institute of Justice. at 143.

[3] Illinois, Maine, New Mexico, New York, Wisconsin.

[4] Alabama, Alaska, Arkansas, Colorado, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, Pennsylvania, Rhode Island, Tennessee, Utah.

[5] Connecticut, Georgia, Hawaii, Idaho, Iowa, Kentucky, Massachusetts, Montana, Nevada, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Vermont, West Virginia, Wyoming.

[6] Arkansas, District of Columbia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, Washington, U.S. Federal Courts. See Robina Institute. 2021. "Sentencing Guidelines Resource Center." https://sentencing.umn.edu/

[7] The authors would like to acknowledge how helpful the website of the Robina Institute's Sentencing Guidelines Resource Center has been in providing a basic understanding of each jurisdiction's system along with citations to original sources.

[8] A mandatory minimum is a term of years below which the minimum sentence for a specific offense cannot be set regardless of the guidelines score. A statutory enhancement is an amount of time that is added to the guidelines score to increase the punishment based on a specific factor, such as use of a gun, habitual offender status, a sex offense against a child or racial bias as a motivation for the crime.

[9] This information in this section was drawn from Kansas Sentencing Commission [KSC]. 2020. "Kansas Sentencing Guidelines Desk Reference Manual 2020." https://sentencing.ks.gov/docs/default-source/2020-drm/2020-drm-text-final.pdf?sfvrsn=aac0fe3f_0 [DRM], and applicable statutes [KSA].

[10] KSA 21-6802 (2020).

[11] KSC. 2020. *Analysis of Sentencing Guidelines in Kansas: Annual Report FY 2019.* at i-ii. https://www.sentencing.ks.gov/docs/default-source/annual-reports/fy2019annualreport.pdf?sfvrsn=110bfd3f_0

[12] KSA 21-6822, 74-9101(15) (2020).

[13] KSA 21-6807(a), 21-6808(a) (2020).

[14] KSA 21-6804, 21-6805 (2020).

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[15] DRM supra note 9 at 30. Each grid block also indicates whether the presumptive disposition is a prison sentence or probation. The non-drug grid has several "border boxes" that allow for judicial discretion in choosing the type of disposition without having to depart from the guidelines recommendation.

[16] KSA 21-6810(d)(4) (2020); KSA 21-6811(f) (2020); DRM supra note 9 at 20

[17] KSA 21-6606(c) (2020).

[18] KSC supra note 11 at 82, Table 41.

[19] KSA 21-6804(k)(1).

[20] KSA 21-5503 (2020), KSA 21-6804(j) (2020); DRM supra note 9 at 43.

[21] KSA 21-6626 (2020); DRM supra note 9 at 40.

[22] KSA 21-6815(a) (2020).

[23] There is generally no limit on downward departures, except in cases of extreme sexual violence which may not be less than 50% of the center of the guideline range. KSA 21-6818(a) and (b).

[24] KSA 21-6819 (2020); DRM supra note 9 at 50.

[25] See KSA 21-6804 (2020), KSA 21-6805 (2020) and KSA 21-6815 (2020).

[26] KSA 21-6815(b) (2020); departures based on a plea agreement may not be appealed, KSA 21-6820(c)(2) (2020).

[27] KSA 21-6820(c) (2020); *State v. Johnson*, 286 Kan 824, 190 P3d 207 (2008).

[28] KSA 21-6820(a) and (c) (2020).

[29] KSA 21-6815(c)(2)(A) through (H) (2020).

[30] KSA 21-6815(c)(3) (2020).

[31] KSC supra note 11 at 66.

[32] The information in this section was drawn from Minnesota Sentencing Guidelines Commission. 2020. "Minnesota Sentencing Guidelines and Commentary" https://mn.gov/msgc-stat/documents/Guidelines/2020/August2020MinnSentencingGuidelinesCommentary.pdf and applicable statutes.

[33] Minn. Stat 609.2233.

[34] Minn Stat 609.229, subd 3(a).

[35] A career offender has five or more prior felonies and the present offense is part of a pattern of criminal conduct. This designation allows for an aggravated departure up to the statutory maximum. Minn. Stat 609.1095, subd 4.

[36] An engrained offender is convicted of an enumerated sex offense and meets several other criteria, including a finding that they are at great risk of reoffending without intensive psychotherapy. This designation allows a sentence that is double the presumptive term up to the statutory maximum.

[37] A dangerous offender who commits a third violent crime has two prior convictions for violent crimes and is found to be a danger to the public based on both past criminal behavior and a current aggravating factor. This designation requires a prison term that is equal to at least the length of the presumptive sentence.

[38] Minnesota Sentencing Guidelines Commission. 2021. *2021 Report to the Legislature*, at 59–65 https://mn.gov/sentencing-guidelines/assets/2021MinnSentencingGuidelinesCommReportLegislature_tcm30-463260.pdf

[39] The information in this section was drawn from: North Carolina Sentencing and Policy Advisory Commission. 2014. "Structured Sentencing Training and Reference Manual." https://sentencing.umn.edu/sites/sentencing.umn.edu/files/n.c._structured_sentencing_training_reference_manual_2014.pdf [Manual], the North Carolina Sentencing and Policy Advisory Commission [NCSPAC], and applicable General Statutes [GS].

[40] GS 15A-1340.10 (2018); Manual supra note 39 at 3.

[41] North Carolina Department of Public Safety. [NCDPS]. 2021. *Parole Process*. https://www.ncdps.gov/about-dps/boards-commissions/post-release-supervision-parole-commission/parole-process .

[42] Manual supra note 39 at 1.

[43] GS 164-37 (2020).

[44] NCSPAC. 2014. "A Citizen's Guide to Structured Sentencing." at 4. https://www.nccourts.gov/assets/inline-files/06_Citizen_Guide_to_Structured_Sentencing_2014.pdf?lT6Y2qIigjioNV0OYoxaBtN2q9JFk2mi; Manual supra note 39 at 34; credits are determined by policy of the state department of Public Safety, "Sentencing Credits", Chapter B, Sec .0100, North Carolina Public Safety, Prisons, Policy and Procedure (07/13/20), available at https://files.nc.gov/ncdps/B-.0100-07-13-20-24214150_0.pdf

[45] GS 15A-1368.2 – 1368.6 (2020); Manual supra note 39 at 36.

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[46] GS 15A-1340.17(c) (2020) (felony chart); GS 15A-1340.23(c) (2017) (misdemeanor chart); Manual supra note 39 at 4, 51.

[47] 15A-1340.14(b) (2020); Manual supra note 39 at 11–18.

[48] *State v. Rich*, 130 NC App 113, 502 SE2d 49 (1998); Manual supra note 39 at 12 n 5.

[49] *State v. Tucker*, 154 NC App 653, 573 SE2d 197 (2002); Manual supra note 39 at 12 n 7.

[50] Manual supra note 39 at 11.

[51] *Ibid* at 19.

[52] GS 15A-1340.16(a) to (a6) (2020).

[53] Manual supra note 39 at 20.

[54] GS 15A-1340.16(e)(7) & (15) (2020); Manual supra note 39 at 24.

[55] NCSPAC. 2019. "Structured Sentencing Statistical Report for Felonies and Misdemeanors: Fiscal Year 2018." at 18 https://www.nccourts.gov/assets/documents/publications/statisticalrpt-fy18.pdf?YTPJvi7g9H0zwNo1JCfLM6wUaI.ldf6q

[56] The information in this section was drawn from the Oregon Administrative Rules (OAR) of the Oregon Criminal Justice Commission, Chapter 213 (2021), and applicable statutes.

[57] 2020 Oregon Revised Statutes (ORS) 163.105 (2018).

[58] ORS 421.121 (reduction in term of incarceration).

[59] ORS 137.635 (determinate sentences for certain felony convictions); ORS 421.120 (reduction in term of sentence).

[60] OAR 213-017-0000 through-0011.

[61] OAR 213-018-0000 through 0090.

[62] ORS 161.535; ORS 161.605, murder in any degree under ORS 163.107 (Murder I) or 163.115 (Murder II) and treason under ORS 166.005 (Treason), which are expressly designated in the section defining the crime.

[63] ORS 164.415.

[64] OAR 213-004-0006(2).

[65] ORS 137.700(2).

[66] ORS 421.121 (reduction in term of incarceration); ORS 137.700 (listing mandatory sentence crimes).

[67] There is an exception. The statute imposing mandatory minimum prison terms for using a firearm to commit a felony permits the court to impose a less severe, guidelines-based sentence on offenders who have not previously been subject to that statute.

[68] ORS 137.667; OAR 213-008-0001.

[69] OAR 213-007-0003 through 0005.

[70] OAR 213-008-0002(1) (departure factors).

[71] OAR 213-008-0002(1)(a)(F).

[72] OAR 213-008-0002(1)(a)(F) and (2)-(3).

[73] ORS 137.123.

[74] OAR 213-012-0020(2)(b).

[75] The information in this section was drawn from Utah Sentencing Commission. 2020. "2020 Utah Adult Sentencing & Release Guidelines." https://justice.utah.gov/wp-content/uploads/2020-Adult-Sentencing-and-Release-Guidelines.pdf [Guidelines], Utah Sentencing Commission, and applicable statutes.

[76] Utah Code 77-27-5.4.

[77] Guidelines supra note 75 at 22.

[78] *Ibid.*

[79] Utah Code 76-3-401(1); Guidelines supra note 75 at 17–18.

[80] Guidelines supra note 75 at 18.

[81] United States Sentencing Commission. 2018. "Guidelines Manual 2018." https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf [Manual].

[82] USSC. 2018. "Federal Sentencing: The Basics." at 1. https://sentencing.umn.edu/sites/sentencing.umn.edu/files/2019_us_federal_sentencing_the_basics_primer.pdf

[83] *Peugh v. United States*, 569 US 530, 535 (2013).

[84] S Rep No 98-225 at 38 (1983), reprinted in 1984 USCCAN, 3182. The Senate Judiciary Committee report is the primary legislative history of the SRA. See *Mistretta v. United States*, 488 US 361, 366 (1988).

[85] See *Dorsey v. United States*, 567 US 260, 265 (2012).

[86] See 28 USC 991(a).

[87] USSC. N.d. "Organization." https://www.ussc.gov/about/who-we-are/organization

[88] *Peugh*, 569 US at 544 (2013).

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[89] *Gall v. United States*, 552 U.S. 38, 49 (2007).

[90] *Kimbrough v. United States*, 552 US 85, 101 (2007) (citing *Booker*, 543 US at 245-26)

[91] See, e.g., *Molina-Martinez v. United States*, 136 S Ct at 1345 (2016) (citing *Gall*).

[92] See *United States v. Nelson*, 237 Fed. Appx. 819, 821 (2007) (per curiam).

[93] See, eg, *Nelson v. United States*, 555 US 350, 351 (2009); *Rita v. United States*, 551 US 338, 351 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply"); *United States v. Perez-Perez*, 512 F.3d 514, 516 (9th Cir. 2008).

[94] *Gall* at 41; *Peugh v. United States*, 569 US 530 (2013).

[95] *Peugh v. United States*, 569 US 530, 537 (2013).

[96] *Kimbrough v. US*, 552 U.S. 85 at 109.

[97] 18 USC § 3582(c)(1) (2019); the First Step Act of 2018, 115 PL 391§ 603(b)(1), amended 18 USC § 3624(b) to provide that such reductions can sometimes be made on motion of the defendant (a motion by the Director of the Bureau of Prisons is no longer essential).

[98] 552 US 38, 49 (2007) (the district court should begin all sentencing proceedings by correctly calculating the applicable guideline range, and "to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); see also USSG §1B1.1(a)–(c) (Application Instructions).

[99] *Ibid*; 18 USC § 3553(a)(4).

[100] See USSG §1B1.1(c); see also *United States v. Hughes*, 401 F3d 540, 546 (4th Cir 2005); *United States v. Stone*, 432 F3d 651, 655 (6th Cir 2005). [This paragraph is from USSC. 2020. "Primer on Departures and Variances." at 2 https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_Departure_Variance.pdf

[101] 28 U.S.C. § 994(b) (2019) ("if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.").

[102] USSG § 2A1.2.

[103] USSG § 3A1.1.

[104] USSG §1B1.3, comment; USSC. 2020. "Primer on Relevant Conduct" at 2 https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_Relevant_Conduct.pdf

[105] USSC supra note 104 at 1

[106] USSG § 3.D.1.

[107] USSG §§ 4A1.1-.2.

[108] USSG §§ 4A1.3; 4B1.

[109] USSG §§ 4A1.3; 4B1.

[110] USSG § 4A1.2(a)(2).

[111] 18 USC 3559(c) requires life imprisonment on conviction in federal court of a "serious violent felony" and has two or more prior convictions in federal or state courts, at least one of which is a "serious violent felony."

[112] USSG § 5K2.21.

[113] USSC at 13, https://www.ussc.gov/guidelines/primers/departures-and-variances.

[114] USSC supra note 100 at 43 (nns omitted)

[115] See *United States v. Vizcarra*, 668 F3d 516 (7th Cir 2012); USSG § 1B1.1 cmt n4; however, in *United States v. Fugate*, 964 F.3d 580 (6th Cir 2020) impermissible double-counting was found for being subjected to dual four-level enhancements under USSG § 2K2.1(b): one under 2K2.1(b)(5) for trafficking in firearms, and the other under § 2K2.1(b)(6)(B) for possessing or trafficking firearms.

[116] 18 USC 922(c).

[117] USSC. 2020. "Statistical Information Packet: Fiscal Year 2020, State of Michigan." At 12, Table 8. The report comparing US Courts nationally to Michigan federal courts is at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2020/mi20.pdf The main set of data is at https://www.ussc.gov/research/data-reports/geography/2020-federal-sentencing-statistics.

[118] 543 U.S.220 (2005).

[119] 498 Mich 358.

[120] MCL 750.529.

[121] MCL 750.520b.

[122] MCL 28.293(3).

[123] MCL 750.321.

[124] MCL 750.357.

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[125] MCL 333.7403(2)(b)(i). Although as discussed in Chapter One, the Legislature has moved a number of crimes from their original grids into higher grids, thereby increasing the cell ranges, without any changes in the maximum penalties.

[126] MCL 777.57(2)(a).

[127] USSG §1B1.3(a).

[128] USSG § 5K2.21.

[129] The American Law Institute supra note 22 in ch 6 at s6B.06(2)(b) and., s7.03(2)(b). See also American Bar Association. N.d. "Criminal Justice Standards Sentencing." at Standard 18-3.6 https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_sentencing_toc/ ; and Reitz, Kevin R. 1993. "Sentencing Facts: Travesties of Real-Offense Sentencing." *Stanford Law Review*, 45(3):523–573. https://doi.org/10.2307/1229007

[130] The American Law Institute supra note 22 in ch 6 at s6B.06(3) and s7.03(3).

[131] Guidelines supra note 75 at p 22.

[132] KSA 2020 Supp 21-6815(c)(3).

[133] OAR 213-008-0002 (2020).

[134] Pennsylvania Commission on Sentencing. 2012. "Sentencing Guidelines Implementation Manual: 7th Edition." at 226. https://sentencing.umn.edu/sites/sentencing.umn.edu/files/Pennsylvania%20Sentencing%20Guidelines%20Manual%207th%20Edition.pdf

[135] SENTAC. 2019. "Delaware Sentencing Accountability Commission Benchbook." at 132-136. https://cjc.delaware.gov/wp-content/uploads/sites/61/2019/01/Benchbook-2019.pdf

[136] Mich. Comp. Laws § 769.34(3)(b) (2016). The viability of this provision post-Lockridge is unclear.

Chapter Sixteen. Should the Guidelines Be Enforced?

[1] 570 U.S. 99 (2013).

[2] Chief Justice Roberts, in a dissent joined by Justices Scalia and Kennedy, expressed the view that the jury trial right was not implicated because the jury's verdict authorized the judge to impose any sentence between the mandatory minimum and the statutory maximum. Judges have long held the discretion to consider sentencing factors they deemed relevant that were not considered by the jury. No one saw a problem if the trial judge, on his own, decided to raise a minimum sentence by two years because the defendant used a gun. Rather, Justice Roberts said, that by prohibiting a legislative mandate from requiring the judge to impose a particular sentence, the majority was really protecting the discretionary power of sentencing judges.

[3] 498 Mich 358 (2015).

[4] What have been traditionally considered to be "mandatory minimums" in Michigan are penalties like the one in *Alleyne*, which are prescribed by statute for certain crimes. As noted in Chapter One, significant examples are the 25-year minimums required for first-degree CSC with a child under 13 and for certain felonies when the defendant is being sentenced as a fourth habitual offender. The guidelines, by contrast, do not require the imposition of any particular sentence. And the breadth of the cell ranges, especially for the life-maximum offenses, preserves an enormous amount of judicial discretion. Nevertheless, departures occur routinely. Moreover the guidelines enabling legislation expressly recognizes a mandatory minimum as being something different from a guidelines minimum. It provides that a mandatory minimum trumps a guidelines recommendation and states: "Imposing a mandatory minimum sentence is not a departure under this section." MCL 769.34(2)(a). However, the *Lockridge* majority considered and rejected the argument that Michigan's guidelines did not set a mandatory minimum for constitutional purposes.

[5] 498 Mich 358, 461 (2015).

[6] 500 Mich 453, 482-484 (2017).

[7] See, e.g., *People v. Pohl*, 445 Mich 915 (1994) (minimum sentence of 86 months for breaking and entering was seven times the guidelines maximum-minimum of 12 months); *People v. Hughes*, unpublished per curiam opinion of the Court of Appeals issued 6/26/98 (Docket # 191776) (40 year minimum for assault with intent to murder was excessive departure from guidelines range of 3-8 years); *People v. Cramer*, 201 Mich App 590 (1993) (60 year minimum for criminal sexual conduct was unwarranted departure from guidelines range of 10–25 years).

[8] See *People v. Merriweather*, 447 Mich 799 (1994) (majority approved a sentence of 60-120 years that was purposefully designed to prevent a defendant who brutally raped and tortured an elderly woman from ever being eligible for parole); *People v. Houston*, 448 Mich 312 (1995) (approved a sentence of 25–50 years for first-degree

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criminal sexual conduct despite a guidelines range of six to 10 years); *People v. Lemons*, 454 Mich 234 (1997) (sentences of both life and 60–90 years were found proportional for a 45-year-old defendant convicted of criminal sexual conduct); *People v. Hansford (After Remand)*, 454 Mich 320 (1997) (a 40–60 year sentence for a habitual offender convicted of receiving and concealing stolen property was justified by the serious nature of the crime, the defendant's seven prior felonies and his clear inability to reform); *People v. Montney*, Court of Appeals Docket #151454, 8/5/1994, unpublished memorandum, *lv den (*defendant with no prior record was sentenced to 50–75 years for his participation in a second-degree murder at the age of 16, although the guidelines range was 10–25 years).

[9] *People v. Phillips (After Second Remand)* 227 Mich App 28 (1997)(65–150 year sentence for murder of off-duty state trooper upheld).

[10] *People v. Leon Orlando Echols*, order of Supreme Court denying leave to appeal issued March 7,2014 (Docket No. 147533) (Cavanagh, J. dissenting). Justice Cavanagh also found that the sentence was designed to avoid the possibility of parole that would exist with a life sentence.

[11] 469 Mich 247 (2003). The *Babcock* Court stressed that the principle of proportionality remained relevant as the standard against which the decision to depart was to be assessed. In establishing the sentencing guidelines, the Legislature was subscribing to the "deeply rooted" belief that the punishment should fit both the crime and the criminal. The scoring of offense and prior record variables reflects this belief. Therefore, a departure must contribute to making a sentence more proportionate than a sentence within the guidelines range.

[12] 482 Mich 292 (2008).

[13] MCL 769.34(3) now states: 3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the departure is reasonable and the court states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

[14] 500 Mich 453 (2017).

[15] *People v. Dixon-Bey*, 321 Mich App 490, 525 (2017).

[16] There is also some irony in the fact that departures can be based on considerations the Sentencing Guidelines Advisory Committee expressly rejected as inappropriate for inclusion in the judicial sentencing guidelines. See text at note 14, *supra.*

[17] Note 14, *supra.*

[18] Note that the Michigan Supreme Court denied leave to appeal in *Mead, Tucker, Scott, Odom, Schurz and Latimer.* An application for leave to appeal filed in *Boak* on July 27, 2021 was pending when this report went to press.

[19] Unpublished opinion of Court of Appeals issued Mar. 19, 2019 (Docket No. 341504).

[20] Unpublished opinion of Court of Appeals issued Mar. 5, 2019 (Docket No. 336563).

[21] Unpublished per curiam opinion of the Court of Appeals issued Nov.21, 2019 (Docket No. 343305).

[22] Unpublished per curiam opinion of the Court of Appeals issued June 3, 2021 (Docket No. 340201).

[23] Unpublished per curiam opinion of Court of Appeals issued Aug. 29, 2019 (Docket No. 341688).

[24] Unpublished per curiam opinion of Court of Appeals issued Aug. 29, 2019 (Docket No. 343351).

[25] Unpublished per curiam opinion of the Court of Appeals issued July 11, 2019 (Docket No. 339325)

[26] 327 Mich App 297 (2019)

[27] Unpublished per curiam opinion of the Court of Appeals issued Aug. 27, 2020 (Docket No. 340420).

[28] Unpublished per curiam opinion of the Court of Appeals issued March 21, 2019 (Docket No. 336692).

[29] In *People v. Beck*, 504 Mich 605 (2019), the jury acquitted the defendant of open murder but convicted him of being a fourth offender felon in possession of a firearm. The judge based a departure of 20 years on its finding by a preponderance of the evidence that the defendant had committed the murder. The Supreme Court held that due process bars a court from basing a sentence on its own finding that a defendant had committed conduct of which he was acquitted. There is no constitutional prohibition on a judicial finding of guilt of conduct the jury never considered, such as charges the prosecution chose not to bring.

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APPENDICES

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TECHNICAL APPENDIX A. THE DATA AND METHODS OF ANALYSIS

As explained above, by focusing on the four most common life-maximum offenses, the instant research examines the effectiveness of the sentencing guidelines in promoting proportionality and decreasing disparities in the cases where judges retain by far the greatest amount of sentencing discretion. These are the offenses for which guidelines ranges are the broadest, recommended minimums are the longest, and the sentences imposed have the greatest impact on both individuals and the prisoner population.

We have built on, expanded, and refined the focus of prior research. We attempt to measure the extent to which factors scored in the legislative guidelines explain the length of prison sentences as well as the extent to which guidelines recommendations are actually followed. We then examine the impact on sentence length of systemic factors including county size, conviction method, and the identity of the sentencing judge, and of defendant characteristics like age, gender, and especially race. Throughout, we analyze each offense group separately to account for the fact that the nature of the crime is, in itself, an exceedingly important factor in determining the sentence and that lumping all the life-maximum offenses together masks the substantial differences among them. We also pay close attention to a factor that became particularly relevant with the enactment of the legislative guidelines—the prosecution's decision to charge the defendant as a habitual offender.

A. Data

The data for our research come from two MDOC databases. The first is the Correctional Management Information System (CMIS), which contains all the information necessary to operate a prison system, including not only basic sentencing information but also the details of institutional life, like transfers between prisons, program participation, and disciplinary citations. CMIS includes sentences from all three guidelines time periods, allowing for the comparison of sentences over time. The second database, the Offender Management Network Information system (OMNI), is smaller but has more details about each sentence, including guidelines scoring. OMNI only includes sentences from the legislative guidelines period. All the sentences in OMNI are also in CMIS. We obtained these databases in early 2013. Thus, our dataset includes cases in which the offense was committed by December 31, 2012, and sentencing information was available.

Which set of sentencing guidelines applies in a given case depends on the date the offense took place. To accurately analyze differences among the guidelines periods, we made several decisions about defining time periods. For the CMIS data, to examine the first judicial guidelines period, we use data with offenses from 1984 to1988. We excluded data from 1983, as it was the first year of the guidelines and reporting was inconsistent. The second judicial guidelines period has data from the entire period, 1989–1998, and the legislative data has offenses committed from 1999 to 2012. The available OMNI data includes sentences imposed from 2003–2012 for offenses committed from 1999–2012.

The data from the first judicial guidelines are utilized only in Chapter Five to examine changes in the length, nature, and number of sentences over time. Because the guidelines were changed substantially after 1988, and the second judicial period is more directly comparable to the legislative period, only the second judicial guidelines are used for comparison in later chapters. To optimize the amount of data available regarding the legislative guidelines, we utilize CMIS data whenever possible. The exception is when we are examining elements of the sentencing guidelines, such as scores for offense and prior record variables or location of the sentence within the applicable range, which are available only in OMNI. Throughout the report, we indicate below tables and graphs which data source was used.

The unit of analysis is the sentence, not the individual defendant. The research goal is to explain, to the extent possible, what factors influence how judges exercise their discretion to impose a sentence of "life or any term." A key focus is on how sentencing guidelines recommendations affect that decision. Therefore, we do not attempt to measure other factors that help determine how long the person must remain in prison, such as whether they have additional sentences for other offenses or whether multiple sentences are imposed consecutively.[1]

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We count every non-redundant sentence imposed for the most common life-maximum offenses committed in each guidelines period. Redundant sentences share all the following characteristics:

- identical minimum sentences
- same statutory citation for offense
- same offense date
- same county
- same sentencing date

Redundant sentences are excluded because they risk artificially skewing the results. Thus, for instance, if someone is convicted of four counts of armed robbery because there were four victims but the sentence for each count is seven to 20 years, that sentence is only counted once. Similarly, if a defendant convicted of criminal sexual conduct receives identical sentences for each of multiple penetrations of the same victim on the same day, that sentence is only counted once. It is assumed that the same guidelines scoring and the same judicial reasoning produced the identical outcomes and that there is nothing to be gained from including redundant sentences in the analysis. On the other hand, counting the same sentence multiple times would distort the calculation of mean and median sentences for all the robbery or all the CSC sentences imposed in a given time period or a given county. The number of redundant sentences that were eliminated was 319 for the first judicial period and 1,190 for the second judicial period. For the legislative period, 4,013 were eliminated from the CMIS data and 2,797 were eliminated from the OMNI data.

Sentences for different life-maximum offenses occurring in the same incident are counted, such as if the defendant was convicted of robbing and assaulting the same victim. Multiple sentences are also counted if the defendant committed the same crime on different dates or on the same date in different counties (e.g., by robbing a series of gas stations in the same county in the course of a week or in different counties on the same day). And, of course, if a defendant received prison sentences for life-maximum offenses in more than one guidelines period, all of that person's non-redundant sentences would be counted. This means that the same individual can and does appear in our data multiple times; specifically, 827 individuals showed up in two time periods and 22 had sentences in all three time periods. The frequency of multiple sentences is discussed in Chapter Five.

In our primary analyses we only include sentences that have a minimum and maximum term of years. Parolable life sentences are excluded because they have no minimum terms that can be quantified and compared statistically to the rest of the data. This filter resulted in the exclusion of 360 sentences from the first judicial period, 713 sentences from the second judicial period, and 312 sentences from the legislative period. In Chapter Five, we briefly examine the declining use of discretionary life sentences over the three time periods.

The composition of our entire dataset, after excluding redundant sentences and parolable life terms, is reflected in Table A1. The total number for each guidelines period is far greater than the number of sentences for life-maximum offenses examined by any previous research.

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Table A1. Number of Sentences by Guidelines Period, Offense Type, and Habitual Offender Status					
	1st Judicial 1984–1988 CMIS	2nd Judicial 1989–1998 CMIS	Legislative 1999–2012 CMIS	All Periods CMIS TOTAL	Legislative 2003–2012 OMNI
Second-degree Murder (M2)	**854**	**2,036**	**1,979**	**4,869**	**1,399**
Non-habitual	834	1,891	1,723	4,447	1,218
Habitual	20	145	256	422	181
Assault with Intent to Murder (AWIM)	**587**	**1,530**	**1,746**	**3,863**	**1,089**
Non-habitual	548	1,342	1,398	3,287	884
Habitual	39	188	348	576	205
First-degree Criminal Sexual Conduct (CSC1)	**1,332**	**2,728**	**2,430**	**6,490**	**1,510**
Non-habitual	1,226	2,314	1,976	5,516	1,225
Habitual	106	414	454	974	285
Armed Robbery (RA)	**3,637**	**8,996**	**10,796**	**23,429**	**6,886**
Non-habitual	3,318	7,626	8,883	19,827	5,659
Habitual	319	1,370	1,913	3,602	1,227
TOTAL	**6,410**	**15,290**	**16,951**	**38,651**	**10,884**
Non-habitual	5,926	13,173	13,980	33,079	8,986
Habitual	484	2,117	2,971	5,572	1,898

The four most common life-maximum offenses are second-degree murder, assault with intent to murder, first-degree criminal sexual conduct, and armed robbery. As we grouped the sentences by offense type, we included, where applicable, highly similar crimes that also carry a maximum sentence of life or any term.[2] The data come from 13 Michigan counties:

-Berrien -Calhoun -Genesee -Ingham -Jackson -Kalamazoo -Kent
-Macomb -Muskegon -Oakland -Saginaw -Washtenaw -Wayne

These were the counties with the largest number of commitments to prison for assaultive offenses in 2013. Collectively, they comprised 75% of the total.[3] Since one of our key foci is county differences in sentence length, it was important to include only counties with a sufficient number of cases to allow for meaningful comparisons.[4]

B. Analytic Strategies

1. Univariate Analysis: Examining Sentence Lengths

The first step in our analyses is to examine how the minimum sentence length for each offense group changed in each guidelines period. To do this, we report the median length of sentences. It is common

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practice to report the mean or average, which is calculated by adding together all the values and dividing by the total number of values. However, this measure of central tendency is sensitive to extreme values or outliers—cases at either the high or low end that are not representative of most cases but can pull the average in one direction or the other. A sufficient number of outliers will cause the data to be skewed.

In contrast, the median is defined as the midpoint in a set of values. To determine the median, all values are listed in order, and the value in the middle is the median. Imagine, for instance, 101 sentences listed from shortest to longest. The sentence in the 51st position is the median.

If the distribution of cases creates a bell-shaped curve, with the majority clustering toward the center and fewer cases at each end, the mean and the median will tend to be quite similar. If the cases tend to cluster more at either the lower or higher end of the scale, the mean and median will be quite different.

Michigan sentencing data are highly skewed. They contain extreme values (i.e., decades-long minimums that affect the mean), resulting in an "average" sentence that is not representative of most sentences. The bulk of the cases are at the lower end of the range of sentence lengths. However, the cases with very high sentences pull the average up substantially.[5] By utilizing the median for our reporting, we can have a more accurate idea of how long most sentences are, as medians are not impacted by extreme scores.

In considering the reported median sentence lengths, the reader should bear in mind what the medians can and cannot tell us. Neither the median nor the mean is necessarily illustrative of the actual sentences people received. While half of all sentences were above the median and half were below, it may be that few if any were actually at the median. Thus, the median does not tell us what sentence in a group was most common.

What the median does give us is a consistent way of comparing sentences across groups or over time. So, for instance, if we know the median sentence for murder under the judicial and legislative guidelines, we can see if the sentences grew longer. If we know the median sentence for murder in each of 13 counties in the legislative period, we can see if the application of the guidelines produced similar sentences around the state. Since the purpose of the research is to compare relative sentence lengths depending on various factors, having accurate medians to represent sentence length accomplishes that goal. For the reader's information, Table C1 in the Appendix provides information about the lowest and highest sentences for each offense group, by county, during the legislative period as well as the range of sentences between the 25th and 75th quartiles.

Figure A1 illustrates this pattern for everyone not sentenced as a habitual offender under the legislative guidelines. The vertical line bisects the horizontal axis at exactly the halfway point. This results in a median of eight years. The peak of the curve is the mean sentence of 10.3 years. Fifty percent of the minimum sentences are concentrated in a range between four and 14 years. Another 25% are at the low end, with sentences below four years. But the other end of the curve is a long tail, with 25% of the sentences—almost 3,500—extending past 14 years to 20, 25, 30, 40, and even 50 years. In fact, the longest minimum sentence is 100 years.

Both the median and the mean for the total group are relatively low because more than 60% of the cases are armed robberies, which have lower sentences than the other life-maximum offenses. But the pattern repeats for nearly every offense group in each guidelines period.[6] Generally, the mean is anywhere from one to five years and seven to 50% longer than the median.

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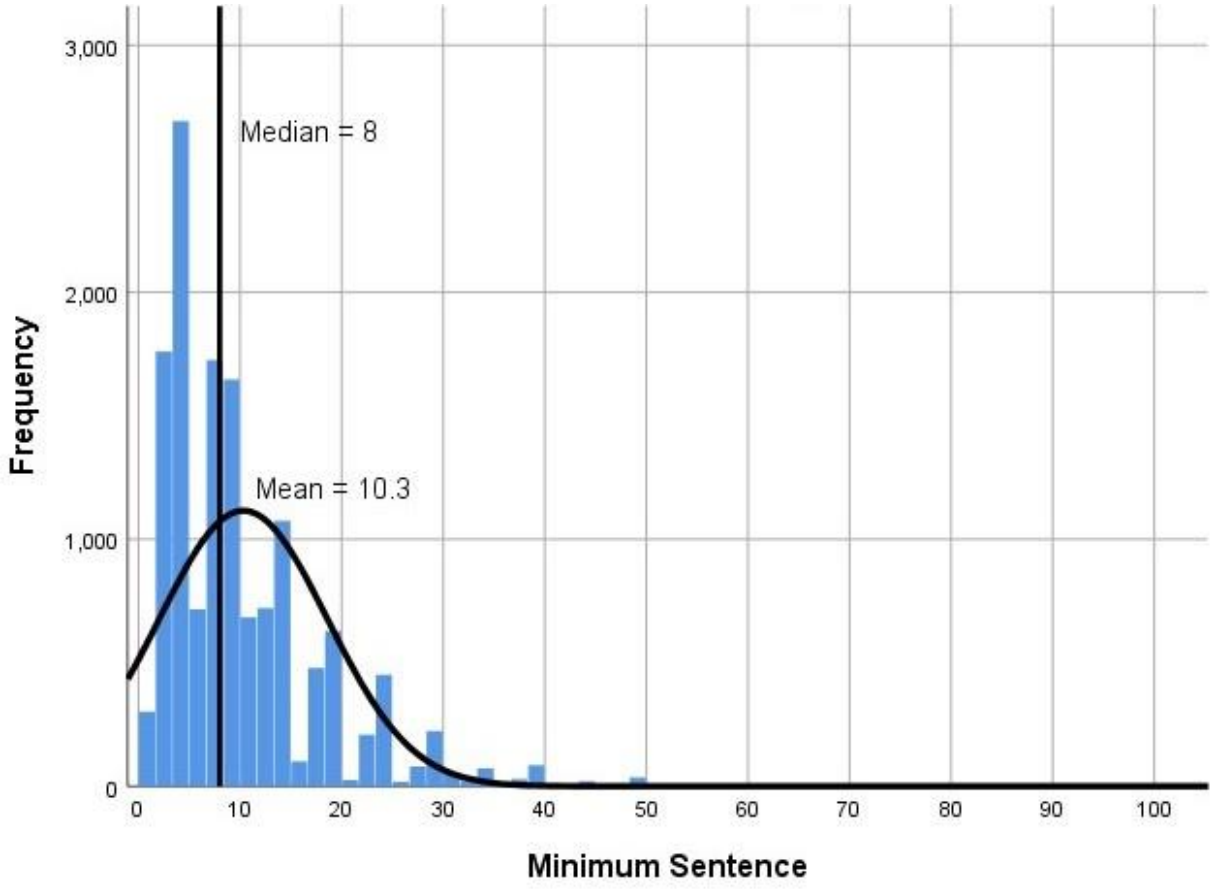
Figure A1. Frequency of Non-Habitual Minimum Sentences in Legislative Period



CMIS data
Using the mean is necessary for some additional computations that we describe next, specifically ANOVA and regression analyses, and so we employ it for those purposes.

2. Bivariate Analysis: The Relationship Between Sentence Length and Individual Variables

The second step of our analyses is to see how sentence length varies in relation to other variables, such as sentencing guidelines scores or county of conviction. To do so, we utilize two forms of bivariate analysis, cross-tabulations and means comparison. Cross-tabulations show the frequency of one variable in relation to two or more categorical variables; "categorical" meaning they are grouped into categories that describe their distinguishing characteristics, such as guilty plea versus jury trial or small, medium, and large counties. For example, we can examine how many sentences of each offense happened in each county, or were resolved through the different methods of conviction.

The means comparison also examines how two, or more, variables vary in relation to each other. In this analysis, the dependent variable is continuous (i.e., when one of the variables is a number, like minimum sentence length, and the independent variable[s] is categorical). For example, we can examine differences in sentence length depending on the county and the method of conviction. While cross-tabulations report the frequency of raw data, the means comparison summarizes those frequencies into means for statistical comparison.

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To evaluate if these differences are meaningful we utilize tests of statistical significance that assess the likelihood that an observed bivariate relationship differs significantly from what could have occurred by chance. The chi-square statistic is used when the variables in question are categorical. The other analysis, ANOVA, "a test for the difference between two or more means," is used when the dependent variable is continuous or ratio-level data.[7]

The significance of all of the findings is reported in the relevant tables. Following convention, the level of significance is displayed at the bottom of each table or figure as a p-value. To say that something is statistically significant at the $p < .05$ level means that there is only a 5% likelihood that the relationship occurred by chance. At $p < .01$ the likelihood of a chance relationship falls to 1%. A p-value of $< .001$ means that we are 99.9% sure the relationship is not occurring by chance.

3. Multivariate Analysis: How Multiple Factors Interact to Produce a Sentence

To understand the extent to which multiple variables each helps determine sentence length we use multiple regression to conduct causal analysis. Multiple or linear regression is one of the most widely used methods of analysis in the social sciences. It simultaneously examines various factors that might cause the dependent variable (in our case, sentence length) to change in order to examine the unique contribution of each variable.[8] This is a progression from the cross-tabulations examined in our bivariate analyses because it allows for the interpretation of one variable while "controlling" for others. For example, using multiple regression we can understand how much of the difference in sentence length is due to factors like offense type or sentencing guidelines scores while accounting for the impact of other factors like county size and whether the conviction resulted from a plea or a trial. The multivariate analyses is explained in more detail in Appendix B.

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[1] If the research focus was factors that drive mass incarceration, we would count people not sentences. No matter how many sentences a defendant receives, the person occupies one prison bed. To measure the shortest time the person will stay in prison requires identifying the "controlling sentence," whether that is a life term or the longest minimum of an indeterminate term. The minimum term(s) of any consecutive sentence(s) must be added to the controlling sentence, and any available good time or disciplinary credits as well as credit for time spent in jail prior to sentencing must be subtracted. Even the minimum length of stay does not, of course, determine an individual's actual length of stay, since that ultimately depends (except in cases of mandatory life without parole) on the decision of the parole board to release the person.

We recognize that the fact that a judge may choose to or be required to impose multiple sentences consecutively may influence the judge's selection of the minimum sentence for each offense. However, there is no way to determine from quantitative data whether or to what extent that influence occurred. Even more to the point, since appellate courts assess the proportionality of each sentence separately—without regard to their aggregate length—our empirical analysis of each sentence independently, regardless of whether they are served concurrently or consecutively, accords with Michigan law. See *People v. Miles* supra note 52 in ch 1

[2] The Second Degree Murder (M2) group includes only MCL 750.317, Second Degree Murder.

The Assault with Intent to Murder (AWIM) group includes:

MCL	750.83	Assault with intent to commit murder
	750.91	Attempt to commit murder
	750.157b	Solicitation to commit murder
	750.204d	Sending explosives with intent to frighten, injure or kill a person
	750.207	Placing explosive substance with intent to frighten, injure or kill a person
	750.317a	Delivery of schedule 1 or 2 controlled substance causing death
	750.90a	Intentional conduct causing a miscarriage or stillbirth.

First Degree Criminal Sexual Conduct (CSC1) includes the eight variations of First Degree Criminal Sexual conduct defined in MCL 750.520b(1)(a)-(h).

The Armed Robbery (RA) group includes:

MCL	750.529	Armed robbery
	750.529a	Carjacking
	750.89	Assault with intent to rob and steal.

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[3] Michigan Department of Corrections. 2014. Michigan Department of Corrections 2013 Statistical Report. Table A1c at pp. A-10. https://www.michigan.gov/documents/corrections/2014-04-04_-_MDOC_2013_Statistical_Report_-_Vers_1_0_452815_7.pdf

[4] Note that, until 1997, the City of Detroit, which is in Wayne County, had its own criminal court. In 1997, the Recorder's Court for the City of Detroit was merged with the Wayne County Circuit Court, and Recorder's Court judges became members of the Wayne Circuit Court bench. The sentences included in our data for the first and second judicial periods were adjudicated in either Recorder's Court or the Wayne County Circuit Court, although they were all prosecuted by the Wayne County Prosecutor's Office. We treat them all as Wayne County sentences for purposes of our data analysis.

[5] If the data skewed to the right so that the majority of cases were at the high end and the extreme sentences were much shorter than normal, the median would be longer than the mean.

[6] The sole exception is the 172 murder cases during the judicial guidelines period for which people were sentenced as habitual offenders.

[7] The decision to test for significance using ANOVA is an imperfect solution. ANOVA is means-based and, for the reasons explained, we are reporting medians. We explored available tests for examining the significance of medians, specifically Independent Medians and Mann Whitney U. We did not choose either of these tests because the distribution of sentences within between our comparison

[8] Allison, Paul. 1999. *Multiple Regression: A Primer.* Pine Forge Press. Pp. 3

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TECHNICAL APPENDIX B. DETERMING SENTENCE LENGTH: WHICH FACTORS COUNT THE MOST

The bivariate analyses identified multiple factors that have a statistically significant relationship to sentence length. We can say with a high degree of certainty that each of these factors has an impact on the length of the minimum sentence. But how much of an impact does each one have? And does the extent of the impact change depending on the presence or absence of other significant factors? For instance, is the defendant's prior record level more important if the offense is robbery or if it is murder? How much difference does it make if the defendant was sentenced as a second offender or a fourth offender? How much of the difference in sentence length for two defendants with similar prior records can be explained by the county of conviction or whether one of them pleaded guilty?

To answer such questions, we use a statistical tool called multiple linear regression. Multiple linear regression or multiple regression is one of the most widely used methods of statistical analysis in the social sciences. The popularity of this method stems from its ability to simultaneously examine various factors that change the dependent variable (in our case sentence, length), in order to examine the unique contribution of each variable.[1] This analysis is a progression from the cross-tabulations examined in the bivariate analyses because it allows for the interpretation of the impact of multiple independent variables at once, while "controlling" for others.

Regressions: Explanation and Estimation

Regressions can perform two functions. First, they can identify how much individual independent variables or groups of independent variables explain the variance in the dependent variable. For this research we are examining the effect of the guidelines factors, systemic factors and defendant characteristics on the dependent variable of sentence length. This aspect of regression analysis allows us to see the relative importance of factors that we know have a significant relationship to sentence length when they are combined with other significant factors. Results can show us, for instance, if the importance of prior record changes depending on the offense or if the importance of a habitual offender enhancement changes depending on the county of conviction.

Regression analysis also allows us to estimate how a baseline sentence will change if particular variables are adjusted. For instance, if the defendant convicted of an armed robbery received a five-year sentence when his prior record level was A, by what percentage would that sentence increase if his prior record level became C? Or if he received five years when he had no habitual offender enhancement, how much more would the sentence increase if he were enhanced to fourth offender status? These predictions or estimated sentences can be tailored to include many details, including the county of conviction and whether the defendant chose a guilty plea or a jury trial.

The Data and Variables

For our regression analyses, we utilize the OMNI data described in Appendix A, as it includes the guidelines factors to be used as independent variables.[2]

The dependent variable in our analyses is the natural logarithm (ln) of minimum sentence in months. Utilizing the natural logarithm achieves two important goals. First it is a technique to normalize skewed data, which is required for using multiple regression. Second, this approach follows prior research that suggests using the natural logarithm of the dependent variable of sentence length is more accurate.[3] In combination with the use of categorical independent variables, the regressions can be interpreted as a percentage increase in sentence length.

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Independent Variables

For our independent variables, we utilize categorical variables, which have been recoded into dichotomous variables, to represent whether a characteristic is present. Our independent variables can be divided into three groups: guidelines factors, systemic factors, and defendant characteristics, following the prior research examining sentencing guidelines in Michigan. The guidelines factors include offense type, offense level, prior record level, habitual offender status, and departure status. Systemic factors include conviction method and county of conviction. The last group of defendant characteristics includes age, race, and sex. We expand upon the prior research in three important ways. First, we separate the data by offense type, while prior research has only examined at the grid level. Second, we conduct separate analyses based on habitual offender status. And third, we conduct separate analyses by county.

Utilizing dummy variables assists in meaningful interpretation of our categorical independent variables. When utilizing this type of variable, one of the categories has to be excluded and is used as the reference category for interpretation, as displayed in Table B1. For example, there are six prior record levels. In our regressions, we omit PRV level A to use it as the reference category, so the included PRV levels can be interpreted as a percentage increase from PRV level 1. The independent variable groups, the reference categories, and which variables are included in the regressions appear in the table below.

Table B1. Independent Variables in the Regression Analyses

Variable Group	Reference Category	Variables included in Regression
Offense	RA	M2, AWIM & CSC
OV Level	OV Level 1	OV Levels 2–6
PRV Level	PRV Level 1	PRV Levels 2–6
Habitual Status	Non-Habitual	Habitual levels 2–4
Departure	In Range	Departure below, departure above
Conviction Method	Plea	Court, Jury
County	Wayne County	Berrien, Calhoun, Genesee, Ingham, Jackson, Kalamazoo, Kent, Macomb, Muskegon, Oakland, Saginaw, and Washtenaw
Defendant Characteristics		
Age	Ages 20-29	Under 17, Age 17, 18–19, 30–39, and 40 and older
Race	Coded as Non-White= 0 and White= 1	
Sex	Coded as Male =0 and Female =1	

Analytical Strategy

To best understand the importance of each of these variables, we utilize sequential, or hierarchical, multiple regression, which is used to determine the variance explained by different sets of independent variables.[4] Since the order in which you enter independent variables influences the outcome, we followed the logic of the Michigan sentencing guidelines and the relationships examined so far in this research to determine the order of our variables. The offense to be sentenced is the primary determining factor in sentence length, as it determines what grid will be used. This is followed by the offense and prior record level, and habitual status. Next are upward and downward departures, which can be viewed as a rejection of the sentencing guidelines that have been shown to be a prevalent and consistent contributor to sentence length. Then come the method and county of conviction, which are not directly related to the guidelines but have been shown to be important in examining sentence length. The last variables entered are the

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demographics or defendant characteristics, which theoretically should not have an influence on sentence length and, if they do, could be an indication of discrimination.

The following sections of this chapter will proceed with explanations of how to read and interpret the explanation and estimation models, using the full model as examples. The full model includes all of the offenses and counties as independent variables. The offense-specific and county-specific analysis tables are included here but interpreted in the text.

Explanation Models

As mentioned above, regression analyses achieve two primary goals: explanation and estimation. The goal of explanation is to examine how much variance in the dependent variable is explained by the included independent variables. To examine this, we report two statistics: the R^2 and the R^2 change. The R^2 statistic is used in regression analyses to express the amount of variance explained in the dependent variable by the included independent variables. So, the R^2 can be interpreted as the percentage of the dependent variable explained by the included independent variables. Following the same logic, the statistic of R^2 change shows the additional percent explained with each new additional set of independent variables included.

Table B2. Percentage of Variance Explained in Full Model

Variable	R^2 Change	R^2
Offense	25.6***	25.6
OV Level	19.6***	45.2
PRV Level	23.1***	68.2
Habitual Status	2.6***	70.9
Departure	17.9***	88.8
Conviction Method	0.5***	89.3
County	0.1***	89.6
Demographics	0.1***	89.6

Table B2 displays the findings regarding the percent of variance explained in the full model, which can help us understand the relative importance of variable groups as well as how much of the variance in sentence length is explained. In the full model, what offense was committed explains the most variance—more than 25% of the differences observed in sentence length. This is followed by the two other variable groups we would anticipate have substantial explanatory power: the offense severity (OV level) and prior criminal history (PRV level). These elements explain an additional 19.6%, and 23.1%, respectively. Comparatively, habitual status contributes only 2.6% of the variance explained.[5] Taking these four variable groups together we can explain more than 70% of the variance in sentence length, with about 30% unexplained by guidelines factors.

In a perfect world, just the guidelines factors would explain 100% of the variance. In reality, other variables also affect sentence length to a greater or lesser extent, including the fact that judges often reject the guidelines recommendation and choose to depart from it. The addition of departures below and above the guidelines range explains an additional 18 percent of the variance, bringing the cumulative total to 88.8%.

From a research perspective, explaining nearly 90% of the outcome being examined is considered a great success. However, it must be remembered that the sentencing guidelines were constructed to incorporate the factors that judges have always considered most important in sentencing: the nature of the crime, how the defendant committed it, and the defendant's prior record. These three factors collectively explained only 68.2% of the variance. The defendant's habitual status reflects a prosecutor's choice to

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place additional emphasis on the prior record. Departures reflect a judge's choice not to follow the guidelines recommendations.

The remaining three variable groups, including the method of conviction, county of conviction and defendant demographics, cumulatively explain less than one additional percent, suggesting that when looking at the variance in sentence length, these elements do not comprise a substantial impact—which does not mean they are unimportant. In individual cases, these elements can have substantial impact on sentence length. We will explore this possibility in the next section, which examines the regression coefficients that can be used to estimate sentence length. Overall, the variables included in our regression analyses explain 89.6% of the variance in sentence length for life-maximum offenses, meaning that there is still 10.4% of the variance that left unexplained.

The additional explanation model tables, B3, which examines the percent of variance explained in each offense separately, and B4, which examines each county separately, can be interpreted in the same way as above. Please note, in each of these analyses, we are examining subgroups of our data, so the population parameters change, as do some of the variables. In the offense-specific models, offense is not included as a variable as it is already accounted for. In the county-specific models, offense is included as a variable group, and county is not for the same reason.

Breaking down the regression analyses by offense type and county allows us to look for differences within these groups. Specifically, it allows us to examine specific differences that may be overshadowed in the full model because so many of the sentences are for armed robbery and from Wayne County. For example, in looking at the offense-specific analyses, we are able to compare the relative importance of PRV level and OV level to find that they collectively explain only 25% of the variance in sentence length for murder sentences but 65% of the variance in robbery sentences. Similarly, examining county differences the guidelines factors explain only 66% of the difference in sentence length in Wayne County, but approximately 85% of the variance in Berrien, Calhoun, Kalamazoo, Muskegon, and Washtenaw counties.

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Table B3. Percentage of Variance Explained by Offense Type								
	M2		AWIM		CSC		RA	
Variable	R^2 Change	R^2	R^2 Change	R^2	R^2 Change	R^2	R^2 Change	R^2
OV Level	5.4***	5.4	24.5***	24.5	27.4***	27.4	29.3***	29.3
PRV Level	19.2***	24.7	23.8***	48.3	29.2***	56.6	35.8***	65.2
Habitual Status	4.8***	29.5	5.3***	53.6	3.9***	60.5	2.8***	67.9
Departure	50.5***	80	30.2***	83.8	25.9***	86.4	19.5***	87.5
Conviction Method	0.8***	80.8	1.2***	84.9	0.6***	87	0.7***	88.1
County	0.2	81	0.4**	85.3	0.8***	87.8	0.4***	88.6
Demographics	0.1	81.2	0.1	85.5	0.1	87.9	<0.1**	88.6

Table B4. Percentage of Variance Explained by County										
	Berrien		Calhoun		Genesee		Ingham		Jackson	
Variable	R^2 Change	R^2	R^2 Change	R^2	R^2 Change	R^2	R^2 Change	R^2	R^2 Change	R^2
Offense	20.4***	20.4	10.1***	10.1	19.8***	19.8	26.9***	26.9	20.8***	20.8
OV Level	34.9***	55.3	38.9***	49	22***	41.8	12.2***	39.1	27.7***	48.5
PRV Level	27.9***	83.2	32.6***	81.6	22.2***	64.1	31.4***	70.5	28.4***	76.9
Habitual Status	3.7***	86.9	3.4***	85.1	1.9***	66	1.8***	72.3	1	78
Departure	6.4***	93.4	5.5***	90.5	21.9***	87.9	17.5***	89.8	12.7***	90.7
Conviction Method	0	93.4	2.3***	92.8	0.8***	88.7	0.3*	90.2	0.6*	91.3
Demographics	0.5	93.9	.03	93.1	0.1	88.8	0.2	90.3	0.8	92.1

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Table B4. Percentage of Variance Explained by County (cont'd)										
	Kalamazoo		Kent		Macomb		Muskegon		Oakland	
Variable	R^2 Change	R^2	R^2 Change	R^2	R^2 Change	R^2	R^2 Change	R^2	R^2 Change	R^2
Offense	28.5***	28.5	21***	21	18.4***	18.4	15***	15	16***	16
OV Level	27.8***	56.3	20.5***	41.5	27.1***	45.6	32.4***	47.4	36.6***	52.6
PRV Level	25.9***	82.2	29.2***	70.7	29.7***	75.3	35.7***	83.1	29.4***	82
Habitual Status	2.3***	84.5	4.2***	75	0.7***	76	1.6***	84.7	0.6***	82.6
Departure	9.7***	94.2	15.3***	90.3	13.8***	89.8	6.2***	90.9	7.6***	90.2
Conviction Method	0.4***	94.6	0.2***	90.5	1***	90.8	0.9***	91.7	1.4***	91.6
Demographics	0.3	94.8	0.1	90.6	0.4***	91.2	0.3	92	<0.1	91.6

Table B4. Percentage of Variance Explained by County (cont'd)						
	Saginaw		Washtenaw		Wayne	
Variable	R^2 Change	R^2	R^2 Change	R^2	R^2 Change	R^2
Offense	22.8***	22.8	26.7***	26.7	34.4***	34.4
OV Level	20.1***	42.8	32.9***	59.6	11.9***	46.3
PRV Level	27.3***	70.1	24.1	83.7	17.6***	63.9
Habitual Status	0.6***	70.7	0.9***	84.6	1.9***	65.8
Departure	14.1***	84.9	8.3***	92.9	23***	88.8
Conviction Method	2.5***	87.3	0.6***	93.5	0.3***	89.1
Demographics	0.4	87.8	0.4*	93.6	<0.1***	89.1

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Estimation Models

To achieve the second goal of estimation, a different set of statistics is utilized. To aid in understanding only the interpretable result is reported.[1] Further, only statistically significant variables in the regression analysis are included. If this column is blank, the variable was not significant at the $P < .05$ level or above. The baseline sentence is the median sentence for a non-white male aged 20–29 who pleaded guilty to armed robbery in Wayne County, had no habitual enhancement or departure and scored at OV 1 and PRV level A. Each significant variable can be interpreted as an increase or decrease of the baseline sentence.[2] For example, if the RA was scored at an OV level II and PRV level C, which are the most common, we estimate that the sentence would increase 35% for the OV level, and 73% for the PRV level.

Estimated Sentence = 24 months +(24 months x 35%) + (24 months x 73%)
Estimated Sentence = 24 months + 8.4 months +17.25 months
Estimated Sentence = 49.7 months

Figure 5d in Chapter Eight shows the actual median sentence for the C-II cell for armed robbery is 51 months, demonstrating that the process of estimation can be quite accurate. The same process can be applied for the rest of the significant variables. If the person receiving this sentence had a second habitual offender enhancement, the sentence would increase by 10% of the baseline sentence and be added to the above total. If the sentence was a downward departure, we would subtract 44% from the baseline, and add 77% if it was an upward departure.

The impact of the independent variable groups that did not appear to contribute to sentence length are more pronounced here. For example, in the full model, if the conviction method was a bench or jury trial, we would estimate that the sentence would be 6% or 18% longer, respectively, than if it was settled by plea. Similarly, county did not account for much of the variance explained, but if the sentence was from Oakland County, we would estimate it to be 7% shorter than if it was from Wayne and if it was from Muskegon we would estimate it to be 7% longer. Similar to the explanation models, the defendant characteristics generally do not have a significant impact on sentence length. In the full model if a defendant is older than 29, we estimate a slight increase in sentence length. There is no significant impact of sex in the full model. The result for race estimates that white defendants would have sentences that are 2% longer than non-white defendants even though no significant differences appear by race for any specific offense.

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Table B5. Interpretation for Full and Offense Regression Models[8]					
	Full	M2	AWIM	CSC	RA
Baseline Sentence	24 months	132 months	28 months	28 months	24 months
M2	228%	-	-	-	-
MA	2%	-	-	-	-
CSC	7%	-	-	-	-
OV Level II	35%	22%	-	50%	35%
OV Level III	78%	49%	46%	107%	82%
OV Level IV	125%	-	90%	163%	121%
OV Level V	177%	-	135%	239%	162%
OV Level VI	226%	-	182%	277%	219%
PRV Level B	31%	11%	24%	30%	39%
PRV Level C	73%	32%	60%	71%	91%
PRV Level D	123%	53%	88%	109%	157%
PRV Level E	173%	85%	132%	158%	216%
PRV Level F	228%	111%	177%	213%	282%
habitual2	10%	9%	15%	17%	7%
habitual3	19%	13%	17%	29%	18%
habitual4	25%	33%	26%	34%	21%
Departure Below	-44%	-45%	-44%	-46%	-43%
Departure Above	76%	59%	65%	82%	79%
Court	6%	8%	10%	-	6%
Jury	18%	12%	21%	14%	20%
Berrien	10%	-	-	19%	9%
Calhoun	8%	-	-	13%	7%
Genesee	7%	-	8%	24%	7%
Ingham	-	-	12%	10%	-4%
Jackson	7%	-	-	21%	-
Kalamazoo	-	-	-	-	-
Kent	4%	6%	-	5%	4%
Macomb	-4%	-	-7%	7%	-5%
Muskegon	7%	-	-	10%	10%
Oakland	-7%	-	-	-	-8%
Saginaw	3%	-	-	-	-
Washtenaw	-6%	-	-	-	-7%
Under Age 17	-	-	-	-	-
Age 17	-	-	-	-10%	-
Age 18–19	-	-	-	-	-
Age 30–39	2%	-	-	-	2%
Ages 40 and older	5%	-	-	-	4%
Race	2%	-	-	-	-
Sex	-	-	-11%	-	-

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Note that in each of these analyses, we are examining subgroups of our data so the population parameters change, as do some of the reference categories and baseline sentences. In the section that looks at each specific offense, armed robbery is no longer the reference category; there is no reference category for offense as each analysis is examining only one offense. For the regression analysis of murder, OV Level 1 is still the reference category, but only OV levels 2 and 3 are included in the regression as murder only has 3 offense levels.

On Table B6, which displays the county-specific analyses, Wayne County is no longer the reference category, as each regression is comprised of only sentences from that county. In the county regression analyses, offense is included as an independent variable again and the reference category is Armed Robbery. In these regression analyses, the baseline sentence is the median sentence for an armed robbery, OV level 1, PRV level A, non-habitual who received a sentence within the guidelines range and pleaded guilty.

As with the explanation models, breaking down the regression analyses for the estimation models by offense type and county also allows us to investigate differences more closely. As highlighted in the text and the findings, the impact of increases in OV and PRV level vary by offense. Specifically, the increases in OV level have the largest impact on CSC sentences, while increases in PRV level are most noticeable for robbery sentences. Similarly, there are differences in the impact of the independent variables by county. For example, in the county-specific regressions, we observe that the increase in sentence length for a jury trial compared to a plea is 11% in Ingham and Kent counties, and 38% in Saginaw, while there is no statistical difference in Berrien and Jackson Counties.

Important findings from the regression analyses are included in the text where applicable.

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Table B6. Interpretation for County Regression Models

Variable	Berrien	Calhoun	Genesee	Ingham	Jackson	Kazoo	Kent	Macomb	Muskegon	Oakland	Saginaw	Wash	Wayne
M2	221%	201%	230%	215%	153%	235%	217%	190%	148%	232%	212%	227%	230%
AWIM	-	-	-	28%	-	-	-	-	-		-	-	5%
CSC	-	-	14%	23%	-	-	-	12%	-	7%	12%	-	5%
OVL 2	31%	37%	29%	30%	41%	33%	40%	30%	53%	43%	29%	36%	28%
OVL 3	81%	96%	78%	79%	95%	78%	86%	76%	103%	98%	71%	83%	65%
OVL 4	137%	151%	141%	104%	160%	126%	125%	124%	129%	147%	116%	120%	108%
OVL 5	192%	176%	191%	142%	180%	195%	193%	172%	197%	208%	140%	198%	153%
OVL 6	255%	229%	238%	200%	200%	222%	240%	213%	244%	270%	189%	279%	192%
PRVL B	27%	-	23%	19%	57%	57%	30%	30%	38%	37%	28%	35%	31%
PRVL C	86%	53%	58%	60%	79%	103%	86%	72%	87%	82%	68%	72%	72%
PRVL D	136%	105%	98%	97%	149%	169%	138%	134%	144%	144%	115%	137%	119%
PRVL E	162%	155%	153%	153%	203%	248%	186%	212%	202%	183%	170%	164%	169%
PRVL F	250%	186%	176%	233%	191%	271%	261%	260%	299%	254%	251%	274%	213%
Hab 2	33%	14%	-	16%	35%	-	21%	-	-	-	-	-	18%
Hab 3	38%	16%	20%	-	-	24%	21%	-	29%	17%	16%	25%	19%
Hab 4	57%	52%	23%	-	41%	15%	38%	-	34%	16%	24%		27%
Dep_Below	-43%	-34%	-52%	-45%	-55%	-38%	-45%	-41%	-46%	-42%	-39%	-39%	-44%
Dep_Above	71%	76%	87%	63%	182%	87%	93%	96%	81%	65%	95%	67%	70%
Court	-	-	26%	-	-	35%	-	-	-	19%		19%	5%
Jury	-	30%	24%	11%	-	15%	11%	24%	26%	26%	38%	19%	12%
Under 17	-	-	-	-	-	-	-	-	-	-	-	-	5%
17	-11%	-	-	-	-	-13%	-6%	-9%	-	-	-	-	-
18-19	-	-	-	-	-	-	-	-	-	-	-	-	-
30-39	-	-	-	-	-	-	-	11%	-	-	-	-	2%
40+	-	11%	-	-	-	-	-	7%	-	-	-	14%	7%
Race	-	-	-	-	-	-	-	-	-	-	-	-	-
Sex	-	-	-	-	-	-	-	-	-	-	-13%	-	-
Baseline Sentence[9]	21 months	21 months	35 months	21 months	21 months	21 months	24 months	21 months	21 months	21 months	21 months	21 months	24 months

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[1] Allison supra note 8 in Appendix A at 3.

[2] Outliers were identified using casewise diagnostics and removed for each analysis. In the full model, 198 sentences were cut. An additional 68 sentences were removed as outliers for the offense and county-specific models for a total of 266 outlier sentences removed. Examination of the excluded outliers found that:

- 36 sentences (13.5%) were for M2, 44 (16.5) for AWIM, 30 (11.3%) for CSC, and 156 (58.6%) for RA.
- The majority of these sentences resulted from guilty pleas (81.6%): 15.8% were imposed after jury trials, and 2.6% were imposed after bench trials.
- Less than 10% of the sentences excluded were within guidelines range. Almost 70% (68.4%) were downward departures: the remaining 21.8% were upward departures. Excluding in range sentences:
    - For the 36 M2 sentences, 66.7% were downward departures, and 2.8% were upward departures.
    - For the 44 AWIM sentences, 66% were downward departures and 32% were upward departures.
    - For the 30 CSC sentences 50% were downward departures and 43% were upward departures.
    - For the 156 RA sentences, 73% were downward departures and 19.2% were upward departures.
- More than half (55.3%) of the outlier sentences were from Wayne County, followed by Macomb (10.5%), Kent (9%), and Oakland (7.9%).
    - Wayne County had the highest rate of downward departures at 75%, with 2.7% in range, and the remaining 22.4% were upward departures.
    - Washtenaw County had the highest rate of upward departures at 66.7%, with the remaining 33.3% as downward departures. However it should be noted that Washtenaw County only had 9 outlier sentences that were excluded.
- Eighty-five percent of the sentences did not have a habitual enhancement, 3.4% were habitualized as a second, 3% as a third, and 8.6% as a fourth habitual offender.

[3] Ostrom supra note 14 in ch 3 at appendix 4b

[4] Mertler, Craig A., and Rachel V. Reinhart. 2005. *Advanced and Multivariate Statistical Methods: Practical Application and Interpretation.* Los Angeles: Pyrczak Publishing.

[5] This is partially due to the order in which the variables were input into the regression. Habitual status is closely correlated with PRV level. When habitual status was prioritized, the impact was greater at 14.4% and reduced the explanatory power of PRV level to 13.3%.

[1] The full regression models are available in the supplemental documentation.

[2] Ostrom supra note 14 in ch 3 at appendix 4b. The Interpretation and Advantage of using Log.

[8] As seen in figures 5b and 5c in Chapter Eight, and mentioned in note 3, Chapter Eight: the median sentence in the A-I cell for AWIM and CSC sentences were higher than the max-min. This resulted in no sentences that fit the parameters for AWIM, and only one sentence for CSC. For this reason, the midpoint of the A-I cell is used as the baseline sentence for these two offenses. Other options were explored:

- such as using the constant in a regression analysis conducted on the dependent variable of sentence length that was not logged, however this resulted in baseline sentences that were upward departures
- averaging the median sentences in the adjoining cells,
- and using the overall median for the cell (which would be the RA median).

The midpoint was selected as it was similar to the solution of averaging the median sentence of the adjoining cells and aligned with the findings that AWIM and CSC sentences start out slightly longer than RA sentences.

[9] There were no sentences that fit the baseline parameters for Berrien, Calhoun, Ingham, and Saginaw counties. The median for all counites was substituted.

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APPENDIX C. ADDITIONAL TABLES

Table C1. Racial Demographics of Counties and Sentences

	Percent of Population			Percent of Sentences	
	White (includes Hispanics)	Non-White	Hispanic	White	Non-White
Berrien	79.7	20.3	5.8	41.0	59.0
Calhoun	81.4	18.6	5.5	55.7	44.3
Genesee	75.3	24.7	3.6	33.8	66.2
Ingham	75.6	24.4	8.0	44.6	55.4
Jackson	87.6	12.4	3.6	54.9	46.1
Kalamazoo	81.2	18.8	5.2	42.3	57.7
Kent	82.2	17.8	10.8	43.7	56.3
Macomb	80.3	19.7	2.8	45.6	54.4
Muskegon	81.2	18.8	5.8	45.4	54.6
Oakland	75.3	24.7	4.3	36.5	63.5
Saginaw	76.3	23.8	8.7	33.2	66.8
Washtenaw	74.2	25.8	4.9	36.8	63.2
Wayne	54.6	45.4	6.1	14.5	85.5

Table C2. High and Low Minimum Sentences by County and Offense

	M2		AWIM		CSC		RA	
	Low	High	Low	High	Low	High	Low	High
Berrien	12	42	5.5	75	1.5	75	1.9	40
Calhoun	8.5	70	4.3	50	1.8	62.5	1.8	50
Genesee	2.5	100	1	62.5	1.9	60	1	75
Ingham	6	50	6	75	1.4	50	1.4	33.3
Jackson	7.5	100	4.5	50	4.3	47.5	1	30
Kalamazoo	3	60	1.7	70	1.8	40	1	60
Kent	8.5	60	1.3	50	0.5	50	0.8	60
Macomb	4.8	60	1	46	1	62	0.5	62
Muskegon	7.5	75	4	46.8	2	70	1.2	56.3
Oakland	2	100	1.5	99	1	75	0.4	60
Saginaw	5	100	1.5	75	1.9	75	0.3	75
Washtenaw	6	60	1.5	30	1	56	1	56
Wayne	1	100	<0.1	100	0.8	70	0.3	75
CMIS Data								

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APPENDIX D. HYPOTHETICAL CASE COMPARISON CHARTS

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Comparison Chart 1: Second-Degree Murder, Example 1

Facts

D is 31 years old (b. 1990). His only priors are two adult misdemeanors and a juvenile adjudication for retail fraud. On May 1, 2020, V shot into D's home because he had a dispute with D's brother. The only one home was D's mother who was sitting on a couch watching TV. A bullet hit her in the leg causing a non-life-threatening injury. She called 911 herself and was taken to the hospital.

When D learned what happened, he immediately got two friends and went looking for V. D had a hunting rifle; the two friends both had handguns. They found V hanging out on a street corner with three friends of his own. D called V to come over to the car where D could confront V about the prior shooting. V refused to come over. He cursed D and his family loudly but did not display a weapon. D shot and killed V. D's friends fired shots at V's friends but no one else was injured.

D was charged with first-degree premeditated murder, three counts of assault with intent to murder and felony firearm. He pleaded guilty to second-degree murder and possession of a firearm during the commission of a felony (felony firearm).

Location	Breadth of Range (in mos)	Presumptive	Mitigated	Aggravated	Mandatory Minimum	Percent of Minimum to be Served	Statutory Maximum	Additional Firearm Penalty
Michigan[a]	120	180-300/L				100	Life	24
Kansas[b]	20	176	166	186		85	186	
Minnesota[c]	106	306 [261–367]				67	480	36
N Carolina[d]	48	192–240	144–192	240–300		100	120% of min	
Oregon[e]	n/a	Life no parole			300	100	Life	
Utah[f]	n/a	240			180	Variable	Life	
US[g]	58	235–293				85	Life	60

[a] MI: Murder II, MCL 750.317; indeterminate sentence; separate first-offense felony firearm charge has mandatory consecutive determinate 24 mos, MCL 750.227b.
[b] KS: Murder II, 21-5403; using firearm in a person felony presumes prison but allows non-prison sentence if findings are made about available treatment or the promotion of offender reformation. KSA 21-6804(h). Maximum is highest sentence in the applicable grid block.
[c] MN: Murder II, Minn Stat 609.19; mandatory minimum 36 mos up to the max for first firearm offense, Minn Stat 609.11, subd 5(a).
[d] NC: Murder II, GS 14-17(b)(1); only min range is scored, max is 120% of the minimum chosen, NC Manual at 28-29; earned credits for prison work or programs apply only to maximum and cannot reduce the minimum; consecutive sentence consideration applies for the separate firearm conviction.
[e] OR: Murder II, ORS 163.115; life with potential second look at 25y (300 mos) if D >15 at time of offense, ORS 163.115(5); mandatory min set by ORS 137.700(2)(a)(A); good time barred by ORS 421.121(1) -- excluded as second-degree murder and having a mandatory minimum.
[f] UT: Murder, 76-5-203; indeterminate sentence, number represents typical prison stay, Guidelines 17; at least 4 mos. credit for program participation unless life sentence, 77-27-5.4(3).
[g] US: Murder II, 18:1111; additional 5 year mandatory sentence for firearm used in a violent crime, 18 USC 924(c).

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Comparison Chart 2: Second-Degree Murder, Example 2

Facts

D is 20 years old. Since he was 15 he accumulated two juvenile adjudications and one adult conviction, all for breaking and entering an unoccupied building.

While on adult probation D committed first-degree home invasion. He believed that the 60-year-old woman who lived in the house was at work but she had taken the day off. D had managed to pocket $1,200 worth of jewelry before V heard him and came to investigate. D was not armed but when V turned to call the police, he struck her hard. V hit her head on a chest of drawers as she fell. D took the cell phone from her hand and ran. V's family found her unconscious five hours later. She died of a brain hemorrhage the next day.

D was charged with first-degree felony-murder. He pleaded guilty to second-degree murder.

Location	Breadth of Range (in mos)	Presumptive	Mitigated	Aggravated	Mandatory Minimum	Percent of Minimum to be Served	Statutory Maximum
Michigan[a]	210	315-525/L				100	Life
Kansas[b]	25	234	221	246		85	246
Minnesota[c]	127	366 [312-439]				67	480
N Carolina[d]	63	254-317	190-254	317-397		100	120% of min
Oregon[e]	n/a	Life no parole			300	100	Life
Utah[f]	n/a	252			180	Variable	Life
US[g]	52	210-262				85	Life

[a] MI: Murder II, MCL 750.317.
[b] KS: Murder II, 21-5403. The maximum is the highest sentence in the applicable grid block.
[c] MN: Murder II, Minn Stat 609.19.
[d] NC: Murder II, GS 14-17(b)(1); only min ranges scored, max is 120% of the minimum chosen, NC Manual 28-29; earned credits for prison work or programs apply only to maximum and cannot reduce the minimum.
[e] OR: Murder II, ORS 163.115; murder sentence to follow remaining probation term being served at the time of the offense; life in prison with potential second look at 25 years (300 mos) if D > 15 at time of offense, ORS 163.115(5); mandatory minimum set by ORS 137.700(2)(a)(A); good time barred by ORS 421.121(1) -- excluded as second-degree murder and having a mandatory minimum.
[f] UT: Murder, 76-5-203; indeterminate sentence, number represents typical prison stay, Guidelines 17; mandatory min 15 yrs to life, 76-5-203(3)(a); at least 4 mos. credit for program participation unless life sentence, 77-27-5.4(3);
[g] U.S.: Murder II, 18:1111.

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Comparison Chart 3: Assault with Intent to Murder, Example 1

Facts

D is 37 years old. In the last five years he has had two convictions for domestic assault, one for felonious assault and two for operating while intoxicated, 3rd offense.

In the evening of the offense, D got drunk and then started railing at his wife. First he slapped her. Then he choked her until he was interrupted by their 12-year-old son. D then turned on the boy, striking and knocking down the child before fleeing the house. He was combative with the police who found and arrested him.

D was charged with assault with intent to murder, assault with intent to commit great bodily harm, resisting arrest, and being a fourth offender. He pleaded guilty to assault with intent to murder.

Location	Breadth of Range (in mos)	Presumptive	Mitigated	Aggravated	Mandatory Minimum	Percent of Minimum to be Served	Statutory Maximum
Michigan[a]	114	171–285				100	Life
Kansas[b]	26	233	221	247		85	247
Minnesota[c]	54	158 [135–189]				67	240
N Carolina[d]	63	251–314	189–251	314–393		100	120% of min
Oregon[e]	9	121–130			90	100	240
Utah[f]		108			60	Variable	Life
U.S.[g]	52	210–262				85	240

[a] MI: Assault with Intent to Murder, MCL 750.83.

[b] KS: Attempt (21-5301(c)(1)) to Commit Murder II (21-5403).

[c] MN: Assault I, Minn Stat 609.221.

[d] NC: Attempt (GS 14-2.5) to Commit M2 (GS 14-17); only min ranges scored, max is 120% of the minimum chosen, NC Manual 28-29; earned credits for prison work or programs apply only to maximum and cannot reduce the minimum.

[e] OR: Assault I, ORS 163.185; mandatory minimum set by ORS 137.700(2)(a)(G); statutory maximum set as felony Class A, ORS 161.605(1); good time barred as a charge with a mandatory minimum, ORS 421.121(1).

[f] UT: Attempt Murder, 76-5-203; 5 yrs to life, 76-3-203(1); indeterminate sentence, number represents typical prison stay, Guidelines 17; at least 4 mos. credit for program participation unless life sentence, 77-27-5.4(3).

[g] US: Assault with Intent to Murder, 18 USC 113.

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Comparison Chart 4: Assault with Intent to Murder, Example 2

Facts

D is 17 years old. He has juvenile adjudications for breaking and entering a building, home invasion 2nd degree and delivery of a schedule 1 controlled substance < 50 grams. His single mother is in prison for drug delivery and he lives with his grandmother. While still on probation to the juvenile court D joined a gang that is competing for control of a neighborhood with another gang. D and two fellow gang members caught V, a member of the rival gang, selling drugs in their neighborhood. They pulled V into a vacant house where they couldn't be seen or heard. They beat V with their fists and bats and kicked him in the back, breaking his spine and leaving him paralyzed from the waist down. D said he never intended to kill anyone and as a new recruit he was just doing as ordered by older members. He went to trial and was convicted as charged of assault with intent to murder.

Location	Breadth of Range (in mos)	Presumptive	Mitigated	Aggravated	Mandatory Minimum	Percent of Minimum to be Served	Statutory Maximum
Michigan[a]	150/L	225-375/L				100	Life
Kansas[b]	10	88	82	92		85	92
Minnesota[c]	38	134 [118–156]			1yr + 1 day	67	240
N. Carolina[d]	32	125–157	94–125	157–196		100	120% of min
Oregon[e]	4	111–115			90	100	240
Utah[f]		96			60	Variable	Life
US[g]	73	292-365				85	240

[a] MI: Assault with Intent to Murder, MCL 750.83.
[b] KS: Attempt (21-5301(c)(1)) to Commit Murder II (21-5403); gang involved presumes prison but allows non-prison sentence if findings are made about available treatment or the promotion of offender reformation. KSA 21-6804(k)(1).
[c] MN: Assault I, Minn Stat 609.221; mandatory min 1 yr + 1 day for dangerous weapon other than a firearm, Minn Stat 609.11, subd 4; and +24 month enhancement for gang involvement, increased guidelines from presumed 110 months, discretionary range 94-132, spread 38, Minn Stat 609.229 subd 3(a).
[d] NC: Attempt (GS 14-2.5) to Commit M2 (GS 14-17); only min ranges scored, max is 120% of the minimum chosen, NC Manual 28-29; earned credits for prison work or programs apply only to maximum and cannot reduce the minimum.
[e] OR: Assault I, ORS 163.185, mandatory min in ORS 137.700(2)(a)(G); statutory max as felony Class A, ORS 161.605(1); good time barred as a charge with a mandatory minimum, ORS 421.121(1).
[f] UT: Attempt Murder, 76-5-203; 5 yrs to life, 76-3-203(1); indeterminate sentence, number represents typical prison stay, Guidelines 17; at least 4 mos. credit for program participation unless life sentence, 77-27-5.4(3).
[g] U.S.: Assault w/Intent to Murder, 18 USC 113.

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Comparison Chart 5: Criminal Sexual Conduct 1st Degree, Example 1

Facts

D, age 34, was V's mother's live-in boyfriend. He has no prior convictions, adult or juvenile.

When V was 11, D began buying her clothes and other gifts. When V was 12, D began going into her room at night several times a month and lying next to her in bed. He told her this helped him relax so he could sleep but they should keep it a secret because it would hurt her mother's feelings. After a few months, he began stroking her body all over. After a few more months, he progressed to fondling her genital area. After several more months, D began to insert his finger into V's vagina. This went on for four months. When V turned 13, D began inserting his penis instead of his finger. After this had happened three times, V confided in the mother of a friend who called social services.

D was charged with seven counts of CSC 1 for digital penetration of a child under 13 and three counts of CSC 1 for vaginal penetration of a child 13–16 in the same household. D pleaded to four counts of CSC 1 <13 and two counts of CSC 1, 13-16.

Location	Breadth of Range (in mos)	Presumptive	Mitigated	Aggravated	Mandatory Minimum	Percent of Minimum to be Served	Statutory Maximum
Michigan[a]	84	126–210			300 (ct 1-4)	100	Life
Kansas[b]	n/a	Life	n/a	n/a	300	85	300
Minnesota[c]	35	180 [180–215]				67	360
N Carolina[d]	48	192–240	144–192	240–300		100	120% of min + 60 mos
Oregon[e]	2	58–60			100	100	240
Utah[f]		192			300	Variable	Life
US[g]	52	210–262			360	85	Life

[a] MI: CSC I, V <13 750.520b(1)(a) & CSC I, V 13-16 750.520b(1)(b); lifetime electronic monitoring 750.520b(2)(d).

[b] KS: Rape, KSA 21-5503; V's age creates off-grid felony, mand Life with mand min 25 yrs until parole eligibility, KSA 21-6627(a)(1), up to 300 mos, *id*. at (b)(2)(B); range applies if downward departure (presumptive 155, mitigated 147, aggravated 165, range 18), *id*. at (d)(1), DRM at 6-7; lifetime electronic monitoring, KSA 22-3717(u)&(v); good time barred, KSA 21-6623; crime of extreme sexual violence limits downward departure range, KSA 21-6818(a).

[b] MN: CSC I, Minn Stat 609.342; includes 25% statutory enhancement for Criminal Sexual Predatory Conduct, Minn Stat 609.3453 (base score: presumptive 144 range 144-172).

[c] NC: Rape I, GS 14-27.24; only min ranges scored, max for major sex crimes is 120% of min (round to highest month) plus 60 mos (GS 15A-1340.17(f); NC Manual at 5); earned credits for prison work or programs apply only to maximum and cannot reduce the minimum.

[d] OR: Rape I, ORS 163.375, mandatory minimum set by ORS 137.700(2)(a)(K); if V <12, mandatory minimum would be 300 months, ORS 137.700(2)(b)(D); good time barred as having a mandatory minimum, ORS 421.121(1); max set as felony class A, ORS 161.605.

[f] UT: Rape of a Child, 76-5-402.1; mand 25 yrs to life; indeterminate sentence, number represents typical prison stay, Guidelines at 17; at least 4 mos. credit for program participation unless life sentence, 77-27-5.4(3).

[g] U.S.: Aggravated Sexual Abuse with Children, 18 USC 2241(c).

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Comparison Chart 6: Criminal Sexual Conduct 1st Degree, Example 2

Facts

D is 29 years old. He has a juvenile adjudication for home invasion 2nd degree and adult convictions for aggravated stalking, home invasion 1st degree, and CSC 3rd degree.

D was on parole for the last conviction when he saw V at a restaurant. He followed her home and waited outside until all the lights were out. Then he broke in. V was in her bed asleep. D woke her by putting a knife to her throat. He removed her nightgown, bound her hands behind her back, and taped her mouth. He forcibly penetrated her vaginally and anally, causing bruising and tearing. Then he sat in the room watching her while she lay helpless on the bed. After 30 minutes, he took the tape from her mouth, forced her to perform oral sex with the knife to her throat, then left.

D was charged with three counts of CSC 1st and with being a fourth offender. The prosecutor made no plea offer. A jury convicted D of all counts.

Location	Breadth of Range (in mos)	Presumptive	Mitigated	Aggravated	Mandatory Minimum	Percent of Minimum to be Served	Statutory Maximum
Michigan[a]	630/L	270–900/L			300	100	Life
Kansas[b]	61	620	592	653		85	653
Minnesota[c]	63	180	-----	216		67	360
N Carolina[d]	97	386–483	290–386	Life, no parole		100	120% of min + 60 mos
Oregon[e]	9	121–130			100	100	240
Utah[f]		252			Life, no parole	100	Life, no parole
US[g]	65	262–327				85	Life

[a] MI: CSC 1, MCL 750.520b(1); lifetime electronic monitoring 750.520b(2)(d). Mandatory 25-year minimum for 4th habitual offender because sentencing offense was "serious" and at least one prior was "listed." MCL 769.12(1) (a).

[b] KS: Rape, KSA 21-5503; persistent sex offender (prior crime of extreme sexual violence) enhancement presumes prison at double the maximum presumptive term but does not apply if sentencing offense is severity level 1 or 2. KSA 21-6804(j). Crime of extreme sexual violence limits downward departure to no less than half of center range, KSA 21-6818(a).

[c] MN: CSC I, Minn Stat 609.342. For dangerous offender who commits third violent crime sentence must be at least length of presumptive. May also impose an aggravated durational departure from presumptive sentence (180) to the 30 yr max if D at least age 18 at time of current offense with no probation, parole, discharge, work release, Minn Stat 609.1095.

[d] NC: Rape I, GS 14-27.24; only min ranges scored, max for major sex crime is 120% of min (round to highest month) plus 60 mos. (GS 15A-1340.17(f); NC Manual at 5); earned credits for prison work or programs apply only to maximum and cannot reduce the minimum.

[e] OR: Rape I, ORS 163.375; mandatory min set by ORS 137.700(2)(a)(K); good time barred as having mandatory minimum, ORS 421.121(1); maximum set by felony class A, ORS 161.605.

[f] UT: Rape, 76-5-402; indeterminate sentence, 252 represents typical prison stay, Guidelines at 17; good time barred by sentence: life no parole, 77-27-5.4(3)(b); program participation credit unavailable for life sentence, 77-27-5.4(3); statute mandates life without parole for prior grievous sexual offense (CSC 3).

[g] US: Aggravated Sexual Abuse (force or threat) 18 USC 2241(a), any term of years or life.

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Comparison Chart 7: Armed Robbery, Example 1

Facts

D is 25 years old. He has three prior misdemeanors and two juvenile adjudications, one for larceny from a person and one for breaking and entering an unoccupied building. At age 21, he got two adult convictions, for unarmed robbery and felony firearm, for which he received probation plus two years in prison.

D and his co-D held up a gas station late at night. Both had handguns. They took money from the cash register and left. However, the co-D realized that the clerk recognized him from high school so the co-D went back inside and shot and the clerk, killing him.

The co-D was charged with first-degree felony-murder and pleaded to second-degree murder. D was also charged with felony-murder but pleaded to armed robbery and felony firearm.

Location	Breadth of Range (in mos)	Presumptive	Mitigated	Aggravated	Mandatory Minimum	Percent of Minimum to be Served	Statutory Maximum	Additional Firearm Penalty
Michigan[a]	150	225–375/L				100	Life	60
Kansas[b]	22	216	206	228		85	228	
Minnesota[c]	23	68 [58–81]				67	240	60
N Carolina[d]	17	67–84	51–67	84–105		100	120% of min	
Oregon[e]	6	66–72			90	100	240	
Utah[f]		120			60	Variable	Life	
US[g]	23	92–115				85	240	60

[a] MI: Armed Robbery, MCL 750. 529. separate second-offense felony-firearm charge has mandatory consecutive determinate 5 yrs, MCL 750.227b.
[b] KS: Aggravated Robbery, KS 21-5420(b); firearm used in a person felony requires prison but allows non-prison sentence if findings are made about available treatment or the promotion of offender reformation. KSA 21-6804(h).
[c] MN: Aggravated Robbery I, Minn Stat 609.245, subd 1; second firearm offense mandatory minimum 5 yrs, Minn Stat 609.11, subd 5(a); aggravated durational departure as a dangerous and repeat offender, up to the statutory maximum sentence with ineligibility for probation, parole, discharge, or work release, Minn Stat 609.1095.
[d] NC: Robbery, GS 14-87; only min ranges scored, max is 120% of the minimum chosen, NC Manual at 28-29; earned credits for prison work or programs apply only to maximum and cannot reduce the minimum.
[e] OR: Robbery I, ORS 164.415, mandatory minimum set by ORS 137.700(2)(a)(R); statutory maximum set as Felony Class A, ORS 161.605(1); up to 20% good time barred by ORS 421.121(1), excluded by mandatory minimum.
[f] UT: Aggravated robbery, 76-6-302; first-degree felony, min 5 yrs, max life, 76-3-203; indeterminate sentence, number represents typical prison stay, Guidelines 17; at least 4 mos. credit for program participation unless sentenced to life, 77-27-5.4(3);
[g] U.S.: Armed Robbery, 18 USC 1951; add'l. 5 yr mandatory sentence for firearm used in a violent crime, 18 USC 924(c)

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Comparison Chart 8: Armed Robbery, Example 2

Facts

D is 27 years old. He is married with two young children, one of whom has a disability that creates substantial medical bills. He has no prior record and worked at the same factory for five years. However he was laid off when the factory closed and was unable to find steady employment for over six months.

D decided to commit a series of robberies. He went to liquor stores in three different counties. Each time he waited until just before closing when the store was empty. He used a realistic-looking toy gun and told each clerk to give him all the money from the till. The information about each offense is as follows:

County A: The clerk complied and gave D $1,100. D was charged with armed robbery and pleaded to unarmed robbery.
Offense – Sept 1 / Conviction – Nov 5 / Sentence – Nov 19

County B: The clerk complied and gave D $740. During the transaction a stock boy came in from the back room so D aimed the gun at him too. D was charged with two counts of armed robbery and pleaded to one count of armed robbery.
Offense – Sept 3 / Conviction – Dec 15 / Sentence – Jan 11

County C: The clerk realized that D's gun was a fake. He pulled a real weapon from under the counter, called the police and held D at gunpoint until the police arrived. D was charged with armed robbery. He pleaded guilty as charged in exchange for a promise not to add a 3rd habitual offender charge.
Offense – Sept 9 / Conviction – Jan 13 / Sentence – Jan 23

The guidelines scoring for the County B sentence is:

Location	Breadth of Range (in mos)	Presumptive	Mitigated	Aggravated	Mandatory Minimum	Percent of Minimum to be Served	Statutory Maximum
Michigan[a]	34	51–85				100	Life
Kansas[b]	11	94	89	100		85	100
Minnesota[c]	19	58 [50–69]				67	240
N Carolina[d]	17	67–84	51-67	84-105		100	120% of min
Oregon[e]	1	39–40			90	100	240
Utah[f]		72			60	Variable	Life
US[g]	11	46–57				85	240

[a] MI: Armed Robbery, MCL 750. 529.
[b] KS: Aggravated Robbery, KSA 21-5420(b).
[c] MN: Aggravated Robbery I, Minn Stat 609.245, subd 1.
[d] NC: Robbery, GS 14-87; only min ranges scored, max is 120% of the minimum chosen, NC Manual 28-29; earned credits for prison work or programs apply only to maximum and cannot reduce the minimum.

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[e] OR: Robbery I, ORS 164.415, mandatory min set by ORS 137.700(2)(a)(R); max set as felony class A, ORS 161.605(1); good time barred, ORS 421.121(1), excluded by mandatory minimum
[f] UT: Aggravated Robbery, 76-6-302; 1st degree felony, min 5 yrs, max life, 76-3-203; indeterminate sentence, number represents typical prison stay, Guidelines 17; at least 4 mos. credit for program participation unless sentenced to life, 77-27-5.4(3);
[g] U.S.: Armed Robbery, 18 USC 1951; toy gun does not support a separate gun charge under 18 USC 924(c).

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Safe & Just Michigan

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November 2021

New Mt. Olive Primitive Baptist Church

Reverend Carl J. Curry, Pastor

4740 Elmhurst Street - Detroit, MI 48204

Phone: 313-468-9953

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Deacon Jeffrey Curry, Chairman
Deacon Board
Sister Freddie Moore, Chairman
Trustees
Sister Louann Johnson
Financial Secretary
Mildred Johnson
Church Secretary

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CATHY M. GARRETT
WAYNE COUNTY CLERK
2016 NOV 30 P 1:51

November 29, 2016

Dear Honorable Judge: Quick

I have known Joshua Stewart all of his life. During this time, I have found Joshua to be a kind and trustworthy person. I understand that the charges brought against Joshua is against the law and very serious, but Joshua is a young man that possesses moral character. It may seem hard to believe in the given situation, but it is true.

Joshua is well-respected by family, friends and church members. Joshua is generally a bright and cheerful person. He is always willing to lend a helping hand whenever he can. Joshua is an all-around good person. He has always been kind and generous with others.

September 2015, Joshua was diagnosed with stage one Lymphoma cancer and has undergone chemo and radiation. Joshua did not get his last results to determine if he is cancer-free, and Joshua still has the port in his chest. I am concerned that this may cause an infection.

I believe if given the chance Joshua will prove to be an excellent man in society and that he would not repeat any crimes again.

Yours sincerely,

Reverend Carl J. Curry, Pastor
New Mt. Olive P.B. Church

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Monday, November 21, 2016

RE: Mr. Joshua Stewart
37140 Brynford, Apt 302
Clinton Twp, MI 48036

To whom this may concern,

I am writing this letter upon request by my patient's mother, Ms. Jacquelyn Stewart. Mr. Joshua Stewart is currently under my care for ongoing surveillance of his previously treated Stage III Hodgkin Lymphoma. The recommended follow up is an office visit with physical examination and basic laboratory monitoring every three months unless symptomatic. Mr. Stewart is also in need of a follow up CT chest, abdomen, and pelvis prior to March 2018 according to the National Comprehensive Cancer Network. If you have further questions, please contact our office, Hematology Oncology Fellowship Clinic, at phone number 248-551-3690 or fax number 248-551-2491.

Sincerely,

LeAnn M Blankenship, MD

Hematology/Oncology Fellow, PGY5
Medical Hematology Oncology Fellowship Clinic
3577 West 13 Mile Road, Suite 202
Royal Oak, MI 48073
Tel: 248-551-3690
Fax: 248-551-2491

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November 29, 2016

To Whom It May Concern
Room 402
Murphy Hall of Justice
Detroit, MI

RE: Case NO. 16-005731-01-FC JOSHUA LAMERN JAME STEWART

I am Jacquelyn Stewart, the mother of **Joshua Stewart**. I am a single mom and have raised my son, Joshua Stewart, to the best of my ability. I have raised him in the best neighborhoods to the best of my ability. We lived in Detroit, St. Clair Shores, Grosse Pointe, Warren, and Clinton Township. From preschool all the way to high-school, I have been involved, volunteered, or worked at each school. I have had him in after school programs, camps, retreats, library events, summer jobs, and Wayne State Program. You name it I did it. I have enrolled him in every sports from baseball, basketball, soccer, track, football, swimming, karate, gymnastics, etc.

I am a Minister at my church and have had Joshua involved in church, classes, youth service, children's church. I have had him volunteer to help seniors, cutting grass, shoveling snow and cleaning the church, etc.

Joshua Stewart was diagnose with **Hodgkin Lymphoma Stage III** last year. It was shortly after he turned 18 years old. It was overwhelming for an 18 year old and today still is. **Between the abundance of medication, chemotherapy, radiation, losing weight, hair loss, and constant pain, continuous vomiting, numerous hospital stays;** He was not himself at all. His character, demeanor, actions, conversations, and friends changed suddenly.

I know the seeds that I have planted of **GREATNESS** in Joshua Stewart is there. I ask that the court, the Judge would please **HAVE MERCY** on my son.

Jacquelyn Stewart

37140 Brynford, #302

Clinton TWP, MI 48036

(313) 918-5260

Mother of Joshua Stewart