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STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

EVAN TAYLOR ARMOGEDA,
Defendant-Appellant.

Supreme Court no. 167760

Court of Appeals no. 365184

Circuit Court no. 21-260-FC

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SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

I. Where the judge (while stating that the guidelines are now discretionary and acknowledging that his sentence is now above them) said that the facts compelled him to give a sentence no lower than originally given, is defendant entitled to a resentencing anyway?

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

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COUNTERSTATEMENT OF FACTS

Plaintiff accepts defendant's Statement of Facts with the following additions and change.

The first two paragraphs on page 6 mention defendant's prior relationship with Abby O'Connor (the mother of his most recent child) and her present relationship with Zackary Wickizer. After defendant broke it off with O'Connor, he showed up a few times at her home unannounced:

> After he called it quits with me there were a few times where he showed up at my house unannounced. There was a time I remember waking up in the morning and he was sitting on my back porch in a chair staring at my bedroom window. A few incidents like that, I suppose, where he would just randomly pop up and, you know, we would argue. Things would not go well. (Defendant's Appendix [AppI], p 87a).

The video (in the court file) does not show that Wickizer hit defendant. Instead, it shows defendant (with his knife hidden behind his back) walking up to him, pushing him, and then stabbing him and then walking back to his car. At most, Wickizer stuck out his right hand against defendant. Beforehand, defendant had threatened Wickizer. (Plaintiff's Appendix [AppII], p 4b). Although defendant denied it (AppII, p 5b), Ronald Holbrook III testified that defendant smiled as he walked away (AppII, p 3b) and Abby O'Connor testified that he was almost laughing as he drove away (AppI, p 6a). Defendant admitted to purposely stabbing Wickizer, wanting him to hurt. (AppII, pp 6b-7b).

The second paragraph on page 7 mentions defendant's not stopping for the police. He went up to 90 mph. (AppI, p 70a).

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The last paragraph on page 8 mentions only part of what Ingham County Circuit Court Judge David Jordon said in denying the motion for resentencing. He also said:

> First of all, as judges always say, the guidelines are advisable. Even if the guidelines had been, and are—were appropriately 170- to 185, I think 360 months is the lowest minimum sentence that I felt, in my discretion, was appropriate.
>
> This act didn't kill the victim by a confluence of a lot of very fortuitous things. That there were people on the scene to stop bleeding. That there was very quick transmittal, emergency run to Sparrow Hospital. That the knife almost miraculously didn't go any higher or any lower, and it didn't hit enough of a major blood vessel to cause the victim to bleed out. And the harm that was done is grave. (AppI, pp 153-154).

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ARGUMENT

I. Because the judge, while stating that the guidelines are now discretionary and that his sentence is now above them, said that the facts compelled him to give a sentence no lower than originally given, defendant is not entitled to a resentencing.

In asking this Court to discard the very longstanding rule that appellate courts do not order resentencing when the sentencing court unequivocally states that the error would have been the same despite the errors, defendant also asks this Court to, at the very least, take a step back from its position that the guidelines are discretionary and also overrule its own unanimous precedent on this very precise question. His argument turns on its head this Court's statements that the only question is whether the sentence is proportionate (something that he does not argue), not whether the sentence departs from the guidelines.

People v Hull, 437 Mich 868; 462 NW2d 585 (1990), is directly on point. In *Hull*, this Court reversed the Court of Appeals ordering a resentencing in precisely the same situation as the present case. It unanimously concluded that the sentencing court's statement that it would impose the same sentence, even if over the discretionary guidelines, was good enough to require no resentencing. The sentencing court's statement made the issue moot.[1] This decision, which defendant does not cite, is still binding and cannot be distinguished. In other words, the rest of this brief shows that *Hull* is correct and should not be overruled.

[1] *People v Ratowski*, 181 Mich App 361,364; 448 NW2d 841 (1989), also declined to order resentencing where the sentencing court had said that, even if using the old discretionary guidelines (as opposed to the new discretionary guidelines), it would depart and give the same sentence anyway.

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Starting as long ago as *People v Watroba*, 89 Mich App 718; 282 NW2d 196 (1979), even long before any sentencing guidelines existed, courts have consistently held that a defendant is not entitled to a resentencing where the sentencing court says that its sentence would have been the same even without the error. In *Watroba*, the sentencing court relied on a more substantial mistake than occurred in the present case. Rather than a numerical miscalculation, the court relied on an unconstitutionally obtained prior conviction. Even so, because the sentencing court (when the error was brought to its attention in a motion for resentencing) denied resentencing by saying that the sentence would have been the same anyway, the Court of Appeals affirmed, saying:

> As factfinder, it was [the sentencing court's] province to consider all the factors and elements which culminated in the original sentence imposed, determine what emphasis was to be given each, and to resolve whether that sentence should be altered. [89 Mich App 724-725]

Then, this Court unanimously said the same thing in *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003) (after the guidelines had become mandatory). In *Mutchie*, in denying the motion for resentencing, the trial court said it would deviate above the guidelines and impose the same sentence anyway despite the guideline error:

> As the Court of Appeals observed, the circuit court clearly expressed its view that the sentences imposed in this case were the proper sentences without regard to how OV 11 might be scored. The forty-year minimum sentence imposed for each CSC-1 conviction was a departure above the remanded range in any event, and the court expressly stated the substantial and compelling reasons that justified the departure.

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More recently, *People v Latham*, 334 Mich App 501, 505-506; 965 NW2d 248 (2020), (the case that the Court of Appeals in the present case relied on) also said that no resentencing is required where the judge says that the sentence would have been the same anyway. In relying on this Court's opinion in *Mutchie*, it said:

> The trial court had the opportunity to resentence defendant, and it expressly declined to do so. After rescoring OV 11 and recalculating the correct guidelines range, the trial court decided to maintain defendant's original sentence. Thus, the trial court's explanation in its order and its familiarity with this matter—particularly in light of the procedural posture and its ultimate disposition of the case—demonstrates the trial court's intent to maintain the same sentence, regardless of the prior scoring error.

Even more recently, another opinion said it more directly:

> A trial court's sentencing decision will be upheld despite any underlying errors in scoring the guidelines if it is clear that the trial court would have imposed the same sentence irrespective of the errors and that the sentence is not otherwise improper. [*People v Epplett*, unpublished opinion per curiam of the Court of Appeals, issued 10/28/21 (Docket no. 353093), p 3.]

Yes, things changed with the mandatory guidelines. Defendant's argument would certainly be a lot better if the guidelines were still mandatory. But they are not.

Ten years ago, *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), declared mandatory guidelines to be unconstitutional and, as the remedy, made the guidelines discretionary, adopting the remedy that the United States Supreme Court had adopted in *Booker v United States*, 543 US 220, 258-259; 125 S Ct 738; 160 L Ed 2d 621 (2005).

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Not that much later, the US Supreme Court said that it really meant what it had said: that the guidelines are to be discretionary. In *Gall v United States*, 552 US 38; 128 S Ct 586; 169 L Ed 2d 445 (2007), despite what the guidelines said (30 to 37 months), the sentencing court gave only probation. In reversing, the Eighth Circuit ruled that a sentence outside the range must be justified by a reason proportional to the difference between the advisory range and the sentence imposed.

In reversing, the Supreme Court pointed out that, although the starting point, the guidelines are not the only consideration. The Eight Circuit's analysis comes "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." 552 US 47. In the end, the appellate court must review the sentence for an abuse of discretion, noting that the sentencing court is "in a superior position to find facts and judge their import." 552 US 51.

In *Kimbrough v United States*, 552 US 85; 128 S Ct 558; 169 L Ed 2d 481 (2007), the sentencing court had gone below the (now discretionary) guidelines by noting its disagreement with the then 100-to-1 crack/powder ratio. In using analysis very similar to defendant's (reducing unwarranted disparities), the Fourth Circuit reversed and ordered resentencing. In the end, the Supreme Court reversed and reinstated the sentence, rejecting the government's claim that unwarranted disparities would ensue.

In other words, in both cases, the Supreme Court said that adhering to the guidelines too much tends to make them mandatory again. And this Court too has tended to affirm that the guidelines are indeed discretionary. In *Lockridge*, itself, this

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Court did not order resentencing in any case but (1) remanded (where the sentence had been within the guidelines) to have the court decide if it would have imposed the same sentence and (2) affirmed the sentence in *Lockridge* itself as that sentence was above the guidelines anyway. 498 Mich 399.

Later, in *People v Posey*, 512 Mich 317; 1 NW3d 317 (2023), this Court found unconstitutional the statutory mandatory presumption that a within-the-guidelines sentence is proportionate. It first pointed out "Michigan's sentencing scheme is modeled to be parallel to the federal sentencing scheme." 512 Mich 358. Then, it stated that a nonbinding presumption "alleviates pressure faced by sentencing courts to impose within-guidelines sentences." 512 Mich 359.

Accordingly, *People v Francisco*, 474 Mich 82, 91; 711 NW2d 44 (2006), supports plaintiff's, not defendant's, approach. As the Court of Appeals in the present case noted, this Court ordered resentencing there simply because "we simply do not know" whether the guideline correction that affected the range would have resulted in a different sentence. Yet, this Court also said that "[r]esentencing is . . . not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error." That this Court also said "and the sentence falls within the appropriate guidelines range," 474 Mich 89 n 8, no longer applies. The guidelines were mandatory when *Francisco* was decided. They are not now. Back then, a court had to have substantial and compelling reasons to depart. Now, it must merely articulate the departure reason (which was done here) and the appellate court reviews for only proportionality. In other words, the rules as they

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applied before 1999 (when the mandatory guidelines went into effect) now apply. And *Hull* is one of them.

As it is, none of defendant's claims support resentencing. To a very large extent, he relies on arguments that this Court rejected in *Lockridge*. Even though mandatory guidelines would better reduce unwarranted disparities, this Court still made the guidelines discretionary, which has to mean something. He even goes so far as to cite the dissent in *Lockridge*. (P 12).

As it is, accepting defendant's arguments tend to make the guidelines somewhat still mandatory, making this Court step back from its pronouncements that the guidelines are to be discretionary in all applications. Putting it plainly, his argument is actually quite narrow. He in no way says that his sentence is disproportionate. He does not claim that he does not deserve his sentence. Instead, he claims nothing more than form over substance—that a resentencing is always required whenever (1) the original sentence was within the guidelines and (2) a guidelines error takes that sentence outside the guidelines even if the judge says that the sentence would have been the same anyway.

Yet, while quoting *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990), this Court in *People v Steanhouse*, 500 Mich 453, 475; 902 NW2d 327 (2017) flat out said 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." It also reaffirmed that "the legislative sentencing guidelines are advisory *in all applications*." 500 Mich 459. Defendant's arguments turn that ruling on its head.

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According to him, that the guidelines are merely advisory and that the sentence's proportionality is not even being challenged (and never have been) is not particularly relevant. To him, nothing matters other than the sentence is now outside the guidelines—even if the judge said that the sentence would have been the same anyway.

Defendant's further claim that he is entitled to be sentenced on accurate information, although legally correct, has nothing to do with this case. He points to no inaccurate facts themselves that the judge relied on in denying his motion for resentencing. Judge Jordon was very clear that the sentence would have been the same anyway even assuming a 171-to-285 guideline range:

> Even if the guidelines had been, and are—were appropriately 170- to 185, I think 360 months is the lowest minimum sentence that I felt, in my discretion, was appropriate.
>
> This act didn't kill the victim by a confluence of a lot of very fortuitous things. That there were people on the scene to stop bleeding. That there was very quick transmittal, emergency run to Sparrow Hospital. That the knife almost miraculously didn't go any higher or any lower, and it didn't hit enough of a major blood vessel to cause the victim to bleed out. And the harm that was done is grave. (AppI, pp 153-154).

Judge Jordon could not have been clearer. He stated that the case's facts justified the sentence no matter how the guidelines came out—something that this Court has said is appropriate (as in *Mutchie*). As pointed out in *Potter v United States*, 887 F3d 785, 788 (CA 6, 2018), "[i]t is difficult to think of a better source of information" as to what the judge was thinking than the judge himself.[2]

[2] Judge Jordon's full opinion likewise counters defendant's claim that the judge did not justify the deviation's extent. The judge said that the crime itself (which came

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Therefore, the Court of Appeals' unpublished opinion is correct. It specifically pointed out what this Court had said in *Francisco* and then correctly followed *Latham* and (correctly sub silentio followed this Court's opinion in *Hull*):

> Here, the trial court confirmed with the parties that a reduction in the guidelines ranges was in order, but stated that it would stay with the sentence it had imposed despite any change in the guidelines range. The trial court noted that the guidelines range was advisory, and explained, "Even if the guidelines had been . . . appropriately 170 [sic, 171] to 285, I think 360 months is the lowest minimum sentence that I felt, in my discretion, was appropriate." The Court emphasized that the victim was fortunate to survive, and concluded that, in light of "the harm to the victim . . ., regardless of these scores, I'm just not able to go any lower that that on the minimum." Thus, the trial court made clear that, regardless of the guidelines range, it would issue a minimum sentence of 360 months. (41a).

In the end, the following from *People v Ristich*, 169 Mich App 754, 759; 426 NW2d 801 (1988), applies: "We see no need . . . to engage the trial court in the futile exercise of marching up the sentencing hill again, only to hand out the same sentence and march back down again." This Court cited this language with approval in *People v Raby*, 456 Mich 487, 492; 572 NW2d 644 (1998). Even though Judge Jordon is no longer on the bench, this sentiment applies anyway simply because this Court has taken this case to decide what it considers to be a significant jurisprudential issue. Whatever this Court decides will apply every time that a judge states a sentence now

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close to killing the victim) justified this particular sentence. As it is, the sentence was only 20% (six years, three months) above the range that the parties eventually considered to be correct, 171 to 285. This is not an extraordinary deviation, at least not as any court has found. And, again, defendant does not claim the sentence to be disproportionately high.

over the guidelines would have been the same anyway. Of course, in most situations, the sentencing judge would still be around after the appeal.

In summary, cases like *Hull* and *Mutchie* control. The judge saying what he did precludes a resentencing. In effectively asking this Court to either ignore or overrule these cases, defendant is asking this Court to take a step back from its numerous pronouncements that the guidelines are discretionary. And he has never claimed that the sentence as given is anything but proportionate, even over the guidelines. He is not entitled to a resentencing.

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RELIEF

ACCORDINGLY, plaintiff asks this Court to either deny this application or affirm.

July 7, 2025

Respectfully submitted,

/s/ Jerrold Schrotenboer

Jerrold Schrotenboer (P33223)
Assistant Appellate Attorney

STATEMENT OF WORD COUNT

There are 2,901 countable words in this answer.

/s/ Jerrold Schrotenboer

Jerrold Schrotenboer (P33223)
Assistant Prosecuting Attorney