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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v.

EVAN TAYLOR ARMOGEDA **No. 167760**
Defendant-Appellant.

L.C. No. 21-000260-FC
COA No. 365184

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

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Statement of the Question

I.

Even if a sentence is within appropriately scored guidelines after they are amended to account for a scoring error, if the range is changed by the amendment, resentencing is required unless the error is harmless. The trial judge here stated at sentencing that, as to a disputed variable, he would impose the same minimum sentence no matter how the variable was scored or what range resulted whichever way it was scored. Is any error harmless so that resentencing is not required where the trial court clearly indicates that it would impose the same sentence regardless of the scoring unless, under appropriate appellate review, the resulting sentence is an abuse of discretion, whether inside or outside the guidelines?

Amicus answers: YES

Statement of Facts and Proceedings

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

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Argument

I.

Even if a sentence is within appropriately scored guidelines after they are amended to account for a scoring error, if the range is changed by the amendment, resentencing is required unless the error is harmless. The trial judge here stated at sentencing that as to a disputed variable, he would impose the same minimum sentence no matter how the variable was scored or what range resulted whichever way it was scored. Any error is harmless so that resentencing is not required where the trial court clearly indicates that it would impose the same sentence regardless of the scoring unless, under appropriate appellate review, the resulting sentence is an abuse of discretion, whether inside or outside the guidelines.

Introduction: The Court's question and the answer of amicus

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

- whether resentencing is required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error, but the sentence does not fall within the appropriate guidelines range as amended. See *People v. Francisco*, 474 Mich. 82, 89 n 8 (2006); see also *People v. Lockridge*, 498 Mich. 358 (2015).

Defendant received a sentence of 30-50 years for assault with intent to murder, and also sentences of 22 months to 5 years for carrying a dangerous weapon with unlawful intent, and 1 to 5 years for third-degree fleeing and eluding. On the assault conviction, defendant was scored under OV 2 for 30 points for 4 or more prior low severity felony convictions, making his guidelines range 270 to 450 months, so that the 30-year minimum imposed fell within that range. But the convictions on which the scoring were based were in California, which had reclassified them. Defendant argued he thus had no low-severity felony convictions, which would change the guidelines range to 171 to 285 months, so

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that the 360 month minimum imposed would be an out-of-guidelines sentence. The prosecutor argued that three of the convictions remained low-severity convictions, which, if correct, scored 20 points for PRV 2, and the guidelines range would be 225 to 375 months, leaving the sentencing imposed within the guidelines range. Both "new" ranges differed from the range calculated with four low-severity felony convictions. The trial judge denied the motion for resentencing in any case, because, as the Court of Appeals put it:

> 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 than 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.

In short, then, the trial judge believed the minimum of 360 was the reasonable—that is to say, proportionate—sentence, regardless of whether it was inside or outside the guidelines, and thus regardless how PRV 2 was scored. The Court of Appeals held that under these circumstances no resentencing was required, but remanded for resolution of the PRV 2 scoring issue solely for the accuracy of the guidelines in the presentence report. Amicus agrees; where a sentence is outside the guidelines (and now perhaps inside as well[1]) it is reviewed

[1] A few words on *People v Posey*, 512 Mich. 317 (2023) are necessary here. The case is *not* binding precedent, and the statute still controls. MCL § 769.34(10) provides that "If a minimum sentence is within the appropriate 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." In *Posey* two justices, justices Bolden and Bernstein, said that the they were overruling any "decision that requires appellate courts to affirm within-guidelines sentences on appeal" because "[w]ithout the ability to seek judicial review of the reasonableness of a sentence for which the minimum sentence falls within the guidelines, the guidelines become effectively mandatory any time a defendant's minimum sentence is consistent with the guidelines" in violation of the Sixth Amendment. Justice Cavanagh

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joined this approach and holding in her concurring opinion. But in her concurring opinion Justice Welch disagreed with this rationale: "I do not believe a Sixth Amendment violation can be found within MCL § 769.34(10) based upon *Lockridge* and *Steanhouse* because the prior constitutional defect at issue in those cases was already cured, and MCL § 769.34(10) does not constrain the sentencing discretion of trial courts or mandatorily increase a defendant's minimum term of punishment." Instead, Justice Welch found that the statute deprives defendant of the state constitutional right to appeal the sentence, an issue not raised by the defendant in the lower courts nor included within the MOAA order. She was the only Justice to base her conclusion that the statute is unconstitutional on this rationale. The three dissenters on the sentencing issue, in an opinion by Chief Justice Clement, disagreed with the two-justice opinion by Justice Bolden, joined by Justice Cavanagh in her concurring opinion, that the statute somehow renders the guidelines mandatory, agreeing, then, on that point with Justice Welch. Four justices—a majority of the Court—thus *rejected* the rationale for striking the statute that it somehow renders the guidelines mandatory in violation of the Sixth Amendment that three justices embraced, and a *single justice* found—erroneously—that the state constitutional right to appeal was violated by the statute. "The clear rule in Michigan is that a majority of the Court *must agree on a ground for decision in order to make that binding precedent for future cases*. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment, but *the case is not authority beyond the immediate parties*." *People v. Anderson*, 389 Mich. 155, 170 (1973), overruled on other grounds by *People v. Hickman*, 470 Mich. 602 (2004) (emphasis supplied). See also *Spectrum Health Hosps. v. Farm Bureau Mut. Ins. Co. of Michigan*, 492 Mich. 503, 535 (2012); *Auto-Owners Ins. Co. v. All Star Lawn Specialists Plus, Inc*., 497 Mich. 13, 21 (2014); *Frankenmuth Mut. Ins. Co. v. Masters*, 460 Mich. 105, 115 (1999). It is said federally that if a concurring opinion is a logical subset of the plurality opinion, then the rationale of that more narrow opinion controls precedentially. Here, as the Ninth Circuit put it in one case, "only an opinion that 'can reasonably be described as a logical subset of the other' is binding. . . . neither the plurality nor Justice Kennedy's concurrence are a logical subset of the other *since they differed on why the statute was unconstitutional*." *Ballinger v. City of Oakland*, 24 F.4th 1287, 1295 (CA 9, 2022) (emphasis supplied). See also *United States v. Young*, 129 F.4th 459, 467 (CA 8, 2025) (concurring opinion must be a "logical subset of the plurality's rationale"); *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 785 (CA 8, 2021) (same); see also *Pap's A.M. v. Erie*, 719 A.2d 273, 278 (Penn. 1998), rev'd on other grounds 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) ("it is certainly permissible to find that a Justice's opinion which stands for the 'narrowest grounds' is precedential, but only where those 'narrowest grounds are a sub-set of ideas expressed by a majority of other members of the Court. The mere finding that one Justice expressed a narrower belief than others does not dispense with the requirement that a majority of the Court need agree on a concept before that concept can be treated as binding precedent").

So in *Posey*. A Sixth Amendment violation and a violation of the state constitutional right to appeal are quite different things. Justice Welch's rationale is hardly a subset of Justice Bolden's rationale (which a majority of the Court rejected in any event). *Posey* is not binding precedent. In *People v. Purdle*, —Mich. App.—, 2024 WL 735485, at 3 (No. 353821, Mich. Ct. App. Feb. 22, 2024) the court said that "It can be argued that our Supreme Court's decision in *Posey* is not technically binding because it is only a plurality

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for reasonableness under an abuse of discretion standard, and there is no claim that the sentence here was not reasonable. Where the trial judge clearly states that the scoring of an offense variable or a prior record variable would not affect the sentence, any error in scoring that variable is harmless whether the resulting sentence is inside or outside the resulting advisory guidelines, and the sentence itself is reviewed for an abuse of discretion—the *sentence*, not the "degree" to which the sentence is outside the guidelines, if it is—informed by the principle of proportionality.

Discussion

A. Where a sentencing judge addresses a scoring dispute by saying that however it is resolved, and whatever guidelines result, he or she would impose the same minimum sentence, review of the sentence is for an abuse of discretion, guided by the principle of proportionality, whether the resulting sentence is within or without the guidelines as correctly scored

In *People v. Francisco*,[2] decided at a time when the guidelines were mandatory, this Court required resentencing where correction of a guidelines scoring error results in a change in the range, even if the sentence remains within the range, but said that resentencing is not required "where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range." The Court cited *People v. Mutchie*,[3] which approved of the statement of the Court of

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opinion in which the majority of the justices were unable to concur on the exact reasoning for the holding . . . . [but] in the interest of judicial economy and jurisprudential stability, we will apply the essential holdings upon which the *Posey* plurality agreed to the instant case." The court should have followed the statute, *Posey* not being binding, unless it found the statute unconstitutional, which it did not.

[2] *People v. Francisco*, 474 Mich. 82, 91 (2006).

[3] *People v. Mutchie*, 468 Mich. 50, 51 (2003). See also *People v. Latham*, 334 Mich. App. 501 (2020), lv. den. 507 Mich. 959 (2021), where the only dispute between the majority and dissent was whether the trial judge had clearly indicated he would impose the same sentence with or without the scoring error, but both opinions followed the principle

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Appeals that "the scoring issue is moot because, even if there were error, resentencing is not warranted given the trial court's remarks that it would have imposed the same sentences regardless of the scoring of OV 11" as a "correct statement."[4] The issue here, then, appears to be whether *Francisco* and *Mutchie* apply if the guidelines were amended so that the resulting sentence is outside the new range rather than inside it and apply now that the guidelines are not mandatory but advisory in any event.

The People, in their answer to the application for leave and supplemental brief, deftly and cogently dispose of any argument that the language in *Francisco* that the scoring error is harmless where the sentencing judge indicates clearly he or she would impose the same sentence either way and the sentence is within the amended appropriate range means that if the sentence is *without* that range—that is, would be an out-of-guidelines sentence—resentencing is required. As the People observe, time—and the law—have not stood still since *Francisco*, and the requirement that the sentence fall within the amended range "no longer applies. The guidelines were mandatory when *Francisco* was decided. They are not now [or at least not supposed to be]. Back then, a court had to have substantial and compelling reasons to depart."[5] Now, it is the *sentence*, not the departure, that is ostensibly reviewed, and for an abuse of discretion as to its reasonableness, guided by the principle of proportionality. As this Court has said, "[r]ather than *impermissibly measuring proportionality by reference to deviations from the guidelines*, our principle of proportionality requires 'sentences imposed by the trial court to be proportionate *to the seriousness of the circumstances surrounding*

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that such a clear statement would render the error harmless.

[4] It is rather curious that the Court in *Francisco* remanded for resentencing rather than for the trial court to determine whether the change in guidelines range affected its sentence, and, if so, *then* for resentencing.

[5] Appellee's answer, p. 5 (bracketed material added).

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the offense and the offender.'"[6] And so, while "the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion'" that trial courts "'must consult'" and "'take . . . into account when sentencing,'" 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*.'"[7] This is the standard approach to the matter taken in the federal system with regard to the federal guidelines. Unfortunately, the time is past for the Court to address the fact that it is not followed in Michigan, which has, as a result, a de facto mandatory guidelines system.

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

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

This Court in *Lockridge* altered the legislative sentencing scheme so that the guidelines are now advisory rather than mandatory. Though they must be scored and "taken into account [by the sentencing judge] when imposing a sentence,"[8] they do *not* form a presumptive sentence range from which the sentencing court must justify departure, or else the guidelines are not truly advisory. *Lockridge* and *Steanhouse* instead would have simply changed the standard of review for an out-of-guidelines sentence from review of the substantial and compelling reasons for the departure given by the sentencing court to review of the reasons given by the trial judge for the departure under a standard of reasonableness informed by the principle of proportionality. But this Court has

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[6] *People v. Steanhouse*, 500 Mich. 453, 474 (2017) (emphasis supplied).

[7] Id., at 475 (emphasis supplied). The Court of Appeals has fallen into the error of treating an out-of-guidelines sentence as presumptively unreasonable, as amicus will discuss.

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

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explicitly disclaimed any presumption that an out-of-guidelines sentence is unreasonable, and rightly so. That the guidelines are advisory means that there *is no* presumption against an out-of-guidelines sentence was made clear by this Court in meeting concerns expressed by the *Masroor*[9] panel in the Court of Appeals, a companion to *Steanhouse* in this Court, that a "proportionality test cannot be reconciled with *Gall v. United States*."[10] In *Gall*, the United States Supreme Court rejected any requirement that deviations from the guideline range be justified in proportion to the extent of the deviation or that the sentencing court must justify a sentence outside the guidelines by articulating "extraordinary" circumstances, as these approaches would "'come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.'"[11] This Court found no such problem in the principle of proportionality that informs the appellate court's review of the trial judge's exercise of sentencing discretion to sentence outside the guidelines in Michigan because the "Michigan principle of proportionality . . . *does not create such an impermissible presumption*."[12] And it does not precisely because "[r]ather than *impermissibly measuring proportionality by reference to deviations from the guidelines*, our principle of proportionality requires 'sentences imposed by the trial court to be proportionate *to the seriousness of the circumstances surrounding the offense and the offender*.'"[13] The concern of the *Masroor* panel that "dicta in our proportionality cases could be read to have 'urg[ed] that the guidelines should almost always control,' thus creating a problem similar to that identified in

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

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

[11] Id.

[12] Id. (emphasis supplied).

[13] Id. (emphasis supplied).

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Gall,"[14] was thus obviated. Dicta so suggesting was consequently disavowed, including the notion that an out-of-guidelines sentence "should 'alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme'" as "inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness for out-of-guidelines sentences."[15] The bottom line for this Court was that, as it had said in *Lockridge*, "the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion' that trial courts "'must consult'" and "'take . . . into account when sentencing,'" but the "'the key test is whether the sentence is proportionate to the seriousness of the matter, *not whether it departs from or adheres to the guidelines, 'recommended range*.'"[16]

Because, then, the reasonableness of a sentence that is not within the guidelines is not measured "by reference to deviations from the guidelines," to call a sentence that is not within the guidelines a "departure sentence," though understandable, is misleading, as the guidelines being but a highly relevant consideration in sentencing, a sentence that is not within them is not a departure from a presumptive range. The reason to distinguish a sentence that falls within the guidelines range from one that falls without it is because the former is—or at least was—not subject to review for its length for reasonableness, the legislature having set those sentences beyond appellate review for other than consideration of inappropriate material,[17] and this Court in *Lockridge* having specifically limited

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[14] Id.

[15] Id.

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

[17] See footnote 1.

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reasonableness review to sentences not within the guidelines.[18] At the least, there now is a presumption that a guidelines sentence is not an abuse of discretion. To avoid the implication that a sentencing judge who takes into account the guidelines as a factor in sentencing and then imposes a sentence that is not within the guidelines range has thereby departed from a presumptively mandatory range, and that an appellate court reviews for appropriate justifications for the departure rather than the reasonableness of the sentence under an abuse of discretion standard[19] that is informed by the principle of proportionality, amicus believes that these sentences should be denominated "out-of-guidelines sentences," whether above or below the guidelines, rather than "departure sentences," and will use that description here. And after all, this Court used that term in *Steanhouse*.[20]

A large part of the difficulty is that the Court of Appeals routinely relies on *People v. Smith*,[21] a case decided under the mandatory guidelines when substantial

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[18] See footnote 1 regarding *Posey*. "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v. Lockridge*, 498 Mich. at 392.

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

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

[21] *People v. Smith*, 482 Mich. 292, 316, 317 (2008) ((emphasis added).

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and compelling reasons were required for a departure, with the case thus saying that "[w]hen a trial court renders a departure sentence, Michigan appellate courts must review whether the court abused its discretion in concluding that *extraordinary circumstances justified it*," and "the judge abused his discretion because he imposed a departure sentence without adequately justifying the extent of the departure." But justifying the extent of the departure is no longer the test, though *Smith* and this language continue to be cited by the Court of Appeals, as it disregards *Steanhouse* and "impermissibly measur[es] proportionality by reference to deviations from the guidelines." This Court should put a stop to it.[22]

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[22] This Court also on occasion states that it is the extent of the departure when an out-of-guidelines sentence that is imposed that is to be reviewed for an abuse of discretion rather than the sentence itself. See e.g. *People v. Jaber*, 986 N.W.2d 601, 602 (Mich. 2023) (Viviano, J., concurring) ("if the trial court imposes a sentence outside of the guidelines range, it must justify the extent of the departure. *People v Steanhouse* . . . (explaining that a sentencing court 'abuse[s] its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed'") [and so *Steanhouse* is itself internally inconsistent, on the one hand saying proportionality is not measured by deviations from the guidelines and on the other saying the trial judge must justify the extent of any departure from the guidelines, rather than justify the sentence]; *People v Smith* [as explained previously, a case decided when departures had to be justified by substantial and compelling reasons, the guidelines being mandatory] (holding that a trial court must give an 'explanation for the extent of the departure independent of the reasons given to impose a departure sentence')"; *People v. Taylor*, 510 Mich. 951 (2022) (same quotations in reversing sentence); *People v. Parkins*, 507 Mich. 916 (2021) (order reversing sentence) (The trial judge "failed to explain how the guidelines variables did not adequately account for the seriousness of the offense or the character of the offender"); *People v. Bunch*, 505 Mich. 874 (2019) ("the trial court shall either issue an order articulating why the defendant's sentence is warranted, including the extent of the departure, or resentence the defendant," citing *Smith*); and so on.

The sentences imposed in these cases may have been an abuse of discretion, and the further outside the relevant and important sentencing factor of the *advisory* guidelines the more justification is required to demonstrate the reasonableness of the sentence----but it remains the case that the "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*.'" And proportionality is the rule of decision for the sentencing judge; the appellate court reviews for whether the sentence imposed was within the range of reasonable outcomes, guided by the principle of proportionality. Once review goes justifying the departure from the guidelines—as it does in the Court of Appeals—then the guidelines are mandatory. It was precisely a statutory system of mandatory guidelines with review for the reasonableness of the extent of any

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2. A judge imposing an out-of-guidelines sentence within a statutory range is not "enhancing" the sentence but *determining* it, and may consider matters of mitigation and aggravation as to the offense and the offender

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

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

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departure that was struck down in *Booker* (*United States v. Booker*, 543 U.S. 220, 233, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005)). See 18 U.S.C.A. § 3742(e)(3)(C): "Upon review of the record, the court of appeals shall determine whether the sentence . . . departs to an unreasonable degree from the applicable guidelines range. . . . "

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> *aggravation or mitigation*, not covered by the allegations of the indictment."[23]

"Enhancement" of a sentence is a legal term of art for when the statutorily authorized sentence is *itself* increased, and this may only be accomplished by the fact of a prior conviction[24] or by a fact concerning the offense found by a jury or judge at a bench trial beyond a reasonable doubt, which is the teaching of the cases from the United States Supreme Court.[25]

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

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

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

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

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

> *The Supreme Court's decision in Booker implicitly rejected the position that no additional weight could be given to factors included in calculating the applicable advisory Guidelines range, since to do otherwise would essentially render the Guidelines mandatory. . . . This necessarily means that the sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy*.[26]

> *Permitting a court to use forbidden facts to depart from the guidelines undermines clearly expressed legislative will.*[27]

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

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

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

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by the cases of the United States Supreme Court. Those cases reveal the error of the Court of Appeals.[28]

In *Booker*, after finding the federal guidelines violative of the Sixth Amendment because mandatory (and mandatory because, though departures were allowed, the departures had to be justified as reasonable in their existence and extent), the Court made them advisory but maintained a standard of review. The Court severed 18 U.S.C. § 3553(b)(1), providing that the guidelines were mandatory, and also severed 18 U.S.C. § 3742(e), which provided standards of review on appeal, including *de novo* review of departures from the applicable guidelines range. But the Court found a reasonableness standard of review for all *sentences* remained implicit in the federal statutory scheme.[29] Because the guidelines were found to be advisory, the federal courts have understood that *Booker* "implicitly rejected the position that no additional weight could be given to factors included in calculating the applicable advisory Guidelines range, since to do otherwise would essentially render the Guidelines mandatory."[30]

After *Booker*, several circuits held that an appellate court may presume that a sentence *within* the guidelines range is reasonable. In *Rita*, Rita argued at sentencing for a sentence below the guidelines range, and the trial judge said that he could not find that the range was inappropriate and sentenced near the bottom

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[28] See *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007); *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558, 169 L. Ed.2d 481 (2007).

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

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

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of the range. The Fourth Circuit on review said that "a sentence imposed within the properly calculated Guidelines range . . . is presumptively reasonable,"[31] noting that while in an individual case a sentence outside the guidelines range might be appropriate, it had "'no reason to doubt that most sentences will continue to fall within the applicable guideline range,'" rejecting Rita's arguments that the sentence was unreasonable.[32]

The Supreme Court held use of this rebuttable presumption permissible, emphasizing that it is an appellate presumption, not a trial one—"Given our explanation in *Booker* that appellate 'reasonableness' review merely asks *whether the trial court abused its discretion*, the presumption applies only on appellate review." And the Court was clear that "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness."[33]

In *Gall*, the Court considered reasonableness review applied not to a sentence within the guidelines, as in *Rita*, but an out-of-guidelines sentence. The Government appealed a sentence substantially below the bottom of the range, and the Eighth Circuit applied proportionality review to the variance; that is, in that circuit's view, a "sentence outside of the Guidelines range must be supported by a justification that 'is proportional to the extent of the difference between the advisory range and the sentence imposed."[34] Because the sentence imposed was a

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

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

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

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

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100% downward variance, the court held that such a dramatic variance "must be—and here was not—supported by *extraordinary circumstances*."[35]

The Supreme Court rejected proportionality review of departures from the guidelines range, saying "*we shall explain why the Court of Appeals' rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion in United States v. Booker*."[36]

> In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.[37]

The Court held that the approach of the Eighth Circuit came "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[38] The Court also disapproved of "*quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines*";[39] further, these approaches, said the Court,"reflect a practice—common among courts that have adopted 'proportional review'—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion

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[35] Id. (emphasis added).

[36] Id. (Emphasis added).

[37] Id.

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

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

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standard of review applies to appellate review" of sentencing decisions.[40] The Court, then, quite clearly rejected a "heightened standard of review" for out-of-guidelines sentences. Review of an out-of-guidelines sentence must be highly deferential, else the guidelines remain mandatory.[41]

In *Kimbrough,* the question was whether a sentence can be reasonable if the sentencing judge rejects a guidelines policy. Put another way, given that the guidelines are advisory and thus do not bind the judge, may a judge reject the weight of a guidelines factor in an exercise of the judge's sentencing discretion by disagreeing with the statutory scheme? Under federal statute, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine, and the Fourth Circuit held that a departure from the guidelines was unreasonable when based on a disagreement with scoring in this fashion. The Supreme Court disagreed. The Court upheld the departure as reasonable, noting that even the Government agreed that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines."[42] Federal circuit courts have thus held since *Kimbrough* that to prohibit sentencing judges from weighing factors that are included within the guidelines differently than does the statutory scheme—though the guidelines themselves must be calculated in the manner set for in the statute—"would

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[40] Id., at 596.

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

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

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essentially render the Guidelines mandatory."[43] Thus, "the sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy. . . . the sentencing 'judge may determine . . . that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing.' . . . Obviously, the sentencing court may also conclude in a particular case that a sentence within the Guidelines range is not lengthy enough to serve the objectives of sentencing."[44]

In *Lockridge*, this Court rendered the guidelines advisory, saying that it was adopting the same remedy that the United States Supreme Court had concluded appropriate with regard to the federal guidelines.[45] The Court said that the guidelines must still be scored and "remain a highly relevant consideration in a trial court's exercise of sentencing discretion," which the sentencing court "must consult . . . and take . . . into account when sentencing," citing *Booker*. An out-of-guidelines sentence "will be reviewed by an appellate court for reasonableness," said the Court, again citing *Booker*, with resentencing required if the sentence is determined to be unreasonable.[46]

Steanhouse further explicated the meaning of review of an out-of-guidelines sentence. The Court said that the question before it was not actually one of the standard for appellate review, as the there is no question that "the

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

[44] Id.

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

[46] Id., at 391-392.

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standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion."[47] Rather, the question was the sentencing standard to be applied *by the sentencing judge*, who is no longer bound by the guidelines, but must consult and consider them. The Court said that "[t]he sticking point is *the rule of decision to be applied by the trial courts*: the principle of proportionality adopted by our opinion in *Milbourn*, or the federal statutory factors listed in 18 USC 3553(a). In other words, is the relevant question for appellate courts reviewing a sentence for reasonableness (1) whether the trial court abused its discretion by violating the principle of proportionality or (2) whether the trial court abused its discretion in applying the factors set forth in 18 USC 3553(a)?[48] The Court opted for the former; the rule of decision guiding the *sentencing judge*, not the appellate court, is proportionality, and then appellate courts must review of out-of-guidelines sentences "for an abuse of discretion, i.e., engage[] in reasonableness review for an abuse of discretion informed by the 'principle of proportionality' standard,"[49] but not imposing its own view of proportionality.

This Court in *Lockridge* and *Steanhouse* thus established that review of a sentence above or below the guidelines is for reasonableness and that it is *the sentence itself* that is reviewed for an abuse of discretion under a standard of reasonableness, informed by the principle of proportionality, not whether the trial judge has justified departing from the guidelines, as this re-establishes the guidelines as mandatory. This Court said in *Lockridge* that "*A sentence* that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. . . . Resentencing will be required when *a sentence* is

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

[48] Id. (emphasis supplied).

[49] Id., at 476

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determined to be unreasonable."[50] There is no such thing as an "improper departure" from the guideline range—the guidelines are only advisory—there are instead sentences that are above or below the guidelines that are an abuse of discretion when reviewed for an abuse of discretion under a standard of reasonableness, informed by the principle of proportionality.

Many published cases, such as *People v. Steanhouse (On Remand)*,[51] as well as many unpublished cases, establish and apply a presumption that an out-of-guidelines sentence is disproportionate, rendering the guidelines in Michigan de facto mandatory. This standard is inconsistent with this Court's decision in *Steanhouse*, though certain language in this Court's opinion may have contributed to these results.[52] This Court must make clear that review is for the reasonableness of the *sentence* imposed, not whether the reasons stated by the trial court overcome a presumption in favor of a guidelines sentence. While the guidelines are a factor to be considered, and the more outside the guidelines a sentence is, the more justification for the sentence itself as reasonable is needed, it is not the departure and its extent that must be justified, but the sentence. If the departure must be justified, and as to its extent, this is precisely the sentencing scheme *Booker* declared mandatory and improper.

The path taken by the Court of Appeals is exemplified by *People v. Dixon-Bey*.[53] That the Court of Appeals did not review for an abuse of discretion under a

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

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

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

[53] *People v. Dixon-Bey*, 321 Mich. App. 490 (2017).

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standard of reasonableness, informed by the principle of proportionality, as this Court directed in *Steanhouse*, is plain from the opinion of the Court of Appeals, and is typical. That court said:

- [T]he trial court in imposing an out-of-guidelines sentence was required to give "an explanation of why the sentence imposed is *more proportionate to the offense and the offender than a different sentence would have been*'" [the court citing the pre-*Lockridge Smith* case].[54]

- In this case, the trial court did not adequately explain why a minimum sentence of 35 years *was more proportionate than a different sentence within the guidelines would have been*.[55]

- [W]hile we do not seek to minimize the victim's death, we cannot conclude on the record before us that the trial court's 15–year upward departure sentence *was more reasonable and proportionate than a sentence within the recommended guidelines range would have been*.[56]

Though the court purported to follow *Steanhouse*,[57] it viewed the guideline range as presumptive, a departure from which must be justified. It required a showing not that a sentence is within the range of principled outcomes under a standard of reasonableness, informed by the principle of proportionality, but that an out-of-guideline sentence must be shown to be "more proportionate" and "more reasonable" than would be a guideline sentence. This is nothing other than a presumption in favor of a guideline sentence, and this is forbidden by this Court's

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[54] Id., at 525.

[55] Id. (emphasis supplied).

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

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

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decision in *Steanhouse.*[58] It is difficult to distinguish the review for an abuse of discretion being undertaken by the Court of Appeals for out-of-guidelines sentences from the statutory requirement struck down by this Court in *Lockridge* that the departure from the guidelines be justified by a finding of substantial and compelling reasons that this Court held before *Lockridge* must be objective and verifiable and keenly grab the attention.[59] But under *Steanhouse* the appellate court reviews for an abuse of discretion. The sentencing court applies the principle of proportionality as its rule of decision but need not demonstrate to the reviewing court that the sentence it chose, if an out-of-guidelines sentence, is "more proportionate" and "more reasonable" than a guidelines sentence.

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

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

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

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cases,[60] the Court of Appeals refuses to find sentences reasonable when a part of the explanation for the sentence given by the trial judge includes a fact or factor that the guidelines preclude from scoring in establishing the guidelines range. As the 10th Circuit has observed, "*Gall* and *Kimbrough* end [the] practice of permitting a variance only if the [sentencing] court 'first distinguish[es] [the defendant's] characteristics and history from those of the ordinary. . . offender' contemplated by the Guidelines.'"[61]

D. Where sentencing discretion is cabined not by a minimum range calculated through mandatory guidelines where departure is allowed only in exceptional circumstances that are strictly reviewed,[62] review of the sentence is under a highly deferential abuse-of-discretion standard so as to avoid the unconstitutionality of mandatory guidelines that include judicial fact-finding

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

> *One theme runs through all three cases [Rita, Gall, and Kimbrough]: Booker* ***empowered district courts, not appellate courts*** *and not the Sentencing Commission*.[63]

"[A]fter *Booker* [*Lockridge*] what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* [*Lockridge*] decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory."[64] The rule of decision *for a sentencing*

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

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

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

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

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

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judge in setting the sentence is that the sentencing court, taking into consideration all relevant material, including properly-scored guidelines, is to set a proportionate sentence, one taking into account the seriousness of the offense and the characteristics of the offender.[65] There is no one proportionate sentence;[66] a reviewing court is to review an out-of-guidelines sentence "for an abuse of discretion, i.e., engage[] in reasonableness review for an abuse of discretion informed by the 'principle of proportionality' standard."[67] This Court has said that the Michigan standard of review for abuse of discretion in sentencing is identical to the federal standard.[68] Both systems refer to a range of principled outcomes, which is further described by federal cases as meaning that the sentence imposed must be affirmed "unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the

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

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

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

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

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[sentencing] court provided."[69] An appellate court in Michigan, then, should review for an abuse of discretion, applying the standard of reasonableness informed by the principle of proportionality, to determine whether no reasonable sentencing court would have imposed the sentence given for the reasons stated by the sentencing judge, understanding that "it is clear that the Legislature has imposed on the trial court the responsibility of making difficult decisions concerning criminal sentencing, largely on the basis of what has taken place in its direct observation."[70] If the review standard is not truly deferential, then the guidelines are also not genuinely advisory.

Federal courts have stressed the requirement that appellate review of sentences be highly deferential and narrow to avoid de facto reinstatement of a mandatory guidelines scheme, departure from which must be justified in some fashion.[71] The "abuse of discretion standard cabins [appellate] review of [a defendant's] sentence."[72] As already noted, in order to avoid reinstatement of mandatory guidelines, the "sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy." The federal courts, in avoidance of reinstating a prohibited mandatory guidelines scheme, have thus said that the appellate court must rule after "putting aside all notions of exceptional/extraordinary circumstances, departure percentages, *proportionality*

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

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

[71] See *United States v. Feemster*, 572 F.3d 455, 464 (CA 8, 2009) ("we agree with the D.C. Circuit that because the Guidelines are now advisory only, 'substantive appellate review in sentencing cases is *narrow and deferential*. As the case law in the courts of appeals since *Gall* demonstrates, it will be *the unusual case when we reverse a district court sentence*—whether within, above, or below the applicable Guidelines range—as substantively unreasonable'" (emphasis supplied). See also *United States v. Gardellini*, 545 F.3d 1089, 1090 (CA DC, 2008).

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

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review, and similar databased standards of review."[73] And one circuit puts it this way: "substantive reasonableness review is intended to 'provide a backstop' against sentences that are "'shockingly high, shockingly low, or otherwise unsupportable as a matter of law.' . . . . substantive reasonableness review is not an opportunity for 'tinkering' with sentences we disagree with, and . . . we place 'great trust' in sentencing courts."[74] Other circuits have observed that because "trial courts are granted very broad discretion when imposing sentences. . . . it is only the rare sentence that will be substantively unreasonable."[75] Indeed, "because the Guidelines are now advisory only, substantive appellate review in sentencing cases is narrow and deferential. . . . As the case law in the courts of appeals since *Gall* demonstrates, it will be the unusual case when we reverse a district court sentence—whether within, above, or below the applicable Guidelines range—as substantively unreasonable "[76]

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

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

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

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

[76] *United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (en banc)

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The guidelines are advisory. That means the weight given to various offense and offender characteristics by the guidelines are *suggestions* to the sentencing judge, as is any preclusion of consideration of a fact in the scoring of the guidelines; again, the guidelines are scored as required by statute, but because only advisory a judge may consider facts that are by statute not scored in the guidelines,[77] such as premeditation in the present case. The range determined by properly-scored guidelines is also a suggestion to the sentencing judge. There is no presumption that an out-of-guidelines sentence is unreasonable, and thus there can be no requirement that the trial judge show that the out-of-guidelines sentence given is "more proportionate" and "more reasonable" than a guidelines sentence; indeed, the judge need not articulate "exceptional circumstances" for the out-of-guidelines sentence. Whether the sentence imposed is an abuse of discretion turns on whether it is within the range of principled outcomes, so that it cannot be said that no reasonable judge would find the sentence proportionate to the seriousness of the offense and the circumstances of the offender for the reasons given by the sentencing judge.

With guidelines that are, both as to the weight to be given facts concerning the seriousness of the offense and the circumstances of the offender, and to the suggested range for the minimum term of the indeterminate sentence, suggestions for the sentencing judge, who may give a sentence outside the range without justifying it by laying out "exceptional circumstances," what weight is to be given the guidelines when an appellate court reviews an out-of-guidelines sentence to determine whether the sentencing judge's application of the principle of proportionality was within the range of principled outcomes? This is a rather vexing question. The United States Supreme Court, as well as this Court, has made it plain—despite the Court of Appeals' application of a presumption in favor of a guidelines sentence—that there is no presumption that an out-of-

[77] See section C., infra.

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guidelines sentence is unreasonable and that a sentencing judge is not bound by the weight given by the guidelines to any "sentencing factor" or to the determination of a suggested range by calculation of the guidelines. Several federal courts have noted the "somewhat mixed messages" sent by *Gall*,[78] where the Court ruled out proportionality review of an out-of-guidelines sentence as compared to a guidelines sentence, ruled out a requirement of exceptional circumstances for an out-of-guidelines sentence, said that "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court," and yet also said that the "the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant" to the abuse-of-discretion inquiry,[79] and that "a major departure should be supported by a more significant justification than a minor one."[80] And yet it remains the case that "[d]espite the greater justification required, 'a sentence outside the Guidelines carries no presumption of unreasonableness,'" and the "sentencing court's explanation need not be precise to the point of pedantry."[81]

In order to give great deference to the sentencing court's decisions so as to avoid re-institution of the guidelines as mandatory through the backdoor, the reviewing court must look to and defer to the weight given the suggestions of the various guideline factors as to the seriousness of the offense and the circumstances of the offender and the sentencing range by the sentencing judge,

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

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

[80] Id., at 597.

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

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since that judge was not bound in any sense by the guidelines.[82] After all, surely this Court did not say that in this state "[r]ather than impermissibly measuring proportionality by reference to deviations from the guidelines, our principle of proportionality requires 'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender,'" only to simply go around the barn and back and end up measuring reasonableness by reference to deviations from the guidelines in describing the weight to be given them in appellate review for abuse of discretion, as the Court of Appeals is doing in requiring that an out-of-guidelines sentence be justified by the sentencing judge as "more proportionate" and "more reasonable" than a guidelines sentence.

The sentencing judge must "consult" the guidelines, but the weight to be given any variable, or the ultimate range, is within the discretion of the sentencing judge, to be affirmed unless no reasonable judge could have reached the same conclusion. Ordinarily, even in out-of-guidelines sentences, the sentencing court accepts the suggestions of the guidelines as to most variables, if not all, but gives different weight—greater or lesser—to a variable or variables, or considers factors not scored in the guidelines at all, even factors prohibited in the scoring of the advisory guidelines, but which cannot be prohibited by the guidelines from consideration by the judge in determinating a sentence that is proportionate to the seriousness of the offense and the circumstances of the offender. Because unless disclaimed, it may reasonably be concluded that a trial judge imposing an outside-the-guidelines sentence accepts the suggestions of the guidelines, it is reasonable, as the Supreme Court said in *Gall*, to expect the sentencing court to lay out in greater detail the reasons for its sentence the more outside the guidelines the

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

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sentence imposed is, though those reasons need not be "exceptional." The reviewing court should expect reasoned decision-making by the sentencing judge: the judge's sentence must not be irrational or arbitrary;[83] it should be consistent with the explanation given; it should not fail to account for an important factor or give significant weight to an irrelevant factor; and it should not in its ultimate conclusion reflect a sentence that no reasonable judge would impose. In other words, it should not be "shockingly high, shockingly low, or otherwise unsupportable as a matter of law."

Greater sentencing disparity is a likely result of such narrow appellate review and appellate consideration of the advisory guidelines in considering whether the trial judge's application of the principle of proportionality is outside the range of principled outcomes, but that is an unavoidable result of *Lockridge*[84] and cannot be permitted to drive appellate review, causing a de facto reinstatement of mandatory guidelines, as is occurring with the Court of Appeals in its requirement of sentencing justifications for out-of-guidelines sentences that establish that the sentence is "more proportionate" than a guidelines sentence would be.[85]

E. Conclusion

A defendant has the right to be sentenced based on accurate information. When the sentencing judge relies on inaccurate information defendant's right to

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

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

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

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due process is violated. There are two elements to so showing: 1) that information before the sentencing court was inaccurate, and 2) that the sentencing court relied on the misinformation in determining the sentence.[86] A sentencing judge relies on misinformation if that information is given specific consideration by him or her,[87] and when a sentencing judge sentences a defendant "in reliance upon an inaccurate guidelines range, it does so in reliance upon inaccurate information."[88] But if the judge does *not* rely on an inaccurate range—that is, as here, the judge says that he or she would impose the same sentence regardless of the scoring of the guidelines, which are, after all, only advisory—then the judge has not sentenced in *reliance* on inaccurate information.[89] Due process is not violated unless the sentence is enhanced by the consideration of inaccurate information, and where the guideline range changes after a misscoring is determined and the trial judge states that the sentence imposed is not reliant on the guideline range but is one that the judge believes is proportionate, then "rather than impermissibly measuring proportionality by reference to deviations from the guidelines, our principle of proportionality requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender," and the reasonableness of the sentence—whether it was an abuse of discretion—is not at issue here. As this Court said in *Lockridge*, "[a]ssuming arguendo that the facts necessary to score OV 5 at 15 points and OV 9 and OV 10 at 10 points each were not established by the jury's verdict or admitted by the defendant, and yet those facts were used to increase the defendant's mandatory

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[86] *United States v. Dennis*, 119 F.4th 1103, 1111 (CA 7, 2024).

[87] *United States v. Barnhart*, 980 F.2d 219, 225 (CA 3, 1992).

[88] *People v. Francisco*, at 91 (n. 7).

[89] *United States v. Garcia*, 693 F.2d 412, 416 (CA 5, 1982). See *People v. McNew*, 15 N.W.3d 596 (Mich. 2025) (sentence vacated because "g iven that the trial court twice stated an inaccurate guidelines range and did not appear to recognize that it was imposing a departure sentence, it relied on inaccurate information"). See *People v Watroba*, 89 Mich. App. 718 (1979); *People v. Ristich*, 169 Mich. App. 754, 759 (1988); .

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minimum sentence, violating the Sixth Amendment, the defendant nevertheless is not entitled to resentencing *[b]cause he received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines*."[90]

Michigan does not currently have advisory guidelines because the Court of Appeals "impermissibly measur[es] proportionality by reference to deviations from the guidelines" rather than "requir[ing] sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." It does not review the sentence for an abuse of discretion under a standard of reasonableness, guided by the principle of proportionality, but instead requires that an out-of-guidelines sentence be "more proportionate" than a guidelines sentence and that the departure and its extent be justified, rather than the sentence, establishing a presumption that out-of-guidelines sentences are disproportionate. Once the departure from the guidelines and its extent are the lodestar of sentence review and must be justified, the guidelines become mandatory, as this is not different than the system outlawed in *Booker*. The Court should put an end to it.

[90] *Lockridge*, at 393-394.

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Relief

Wherefore, the amicus requests that the Court of Appeals be affirmed

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