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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v EVAN TAYLOR ARMOGEDA, Defendant-Appellant.	MSC Case No. 167760 Court of Appeals No. 365184 Circuit Court No. 21-260-FC

DEFENDANT-APPELLANT'S RESPONSE TO ADVERSE AMICUS CURIAE BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

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ARGUMENT

Introduction

In the amicus curiae of the Prosecuting Attorneys Association of Michigan (hereinafter, "PAAM"), the organization makes two arguments: (1) Even though the Trial Court did not follow the proper procedure in reasserting Mr. Armogeda's sentence, such is harmless error; and (2) That no meaningful consideration of the legislative Michigan Sentencing Guidelines can occur or else they are mandatory. Neither of these arguments have merit.

First, the harmless error test creating a presumption against remedying the error does not apply to this issue. PAAM cites to no case where the appellate courts of this State have applied the harmless error test to the errors here. Furthermore, the harmless error test does not apply here because the errors here are constitutional procedural issues. This is consistent with the Sixth Circuit's interpretation of the Federal Sentencing Guidelines – upon which PAAM relies on extensively in its arguments.

Second, while PAAM pays lip service to this Court's holding that the sentencing guidelines remain a highly relevant consideration, it instead advocates for its own new form of government essentially eliminating any consideration of the sentencing guidelines arguing that any consideration of such is likely to constitute reinstituting the mandatory sentencing guidelines. PAAM's assertion is largely based on the arguments in *Gall v US*, 552 US 38, 128 S Ct 586, 169 L Ed 445 (2007) that this Court explicitly rejected back in *People v Steanhouse*, 500 Mich 453, 902 NW2d 327 (2017) as inapplicable. Michigan's proportionality test remains constitutional (as PAAM concedes and advocates for as the sole applicable test for appellate review), but PAAM advocates for a system different than the Federal Sentencing Guidelines system and asks that this Court replace our Michigan system with.

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Harmless Error Review Does Not Apply in this Case

PAAM inherently concedes that the sentencing procedures that Mr. Armogeda was subjected to at the hands of the Visiting Judge were inappropriate. However, it appears to advocate for this Court to apply the *People v Lukity*, 460 Mich 484, 596 NW2d 607 (1999) harmless error test (proposed by the dissent in *People v Franscisco*, 474 Mich 82, 711 NW2d 44 (2006) and rejected by the majority) to the errors in this case – itself a test that this Court has expressed concern about the appropriateness of recently. See *People v Nelson*, ____ Mich ___; ___ NW3d ____ (2025) (Docket No. 166297). PAAM does not cite any applicable case law to assert that the errors in this matter are subject to the harmless error test. It spends the large breadth of its amicus on this topic related to railing against this Court's decisions in *People v Posey*, 512 Mich 317, 1 NW3d 101 (2023) and *Francisco*, but does not cite any applicable law that the harmless error test should apply.

It briefly cites *People v Mutchie*, 468 Mich 50, 658 NW2d 154 (2003) and *People v Latham*, 334 Mich App 501, 965 NW2d 248 (2020), but neither of these cases stand for the proposition that the harmless error test applies to the errors in this case. Neither *Mutchie* nor *Latham* are applicable and neither discuss the harmless error test at all. In the memorandum opinion in *Mutchie*, this Court affirmed the Court of Appeals stating that because the trial court expressly stated the substantial and compelling guidelines justifying the departure from the then-mandatory guidelines, the proper calculation of Offense Variable 11 in dictum was moot. *Mutchie*, 468 Mich at 51-52. The Court of Appeals also did not apply the harmless error test in *Latham* but rather stated that when the Trial Court properly calculated the guidelines and asserted that it would institute the same sentence, resentencing is not required. *Latham*, 334 Mich App at 505-506.

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Despite citing extensively to federal law that PAAM supports its position, it omits applicable case law directly on point with regards to whether the errors here were harmless. "The failure to calculate the Guidelines range renders a sentence procedurally unreasonable." *US v Gates*, 48 F4th 463 (CA 6, 2022) (citing *US v Fowler*, 819 F3d 298 (CA 6, 2016)). See also *Rosales-Mireles v US*, 585 US 129, 138 S Ct 1897, 201 L Ed 2d 376 (2018). *Gates* is actually relatively factually on point with this case. In *Gates*, the trial court did not calculate defendant Trevon's guidelines. *Gates*, 48 F4th at 469. When the defense brought the error to the court's attention, instead of reviewing the guidelines and correcting the error, the trial court said, "Well, all right. If that's correct, then I have varied upward for the reasons that I stated." *Id.* The 6th Circuit rejected such - and also rejected the assertion of harmless error that PAAM argues makes denying resentencing appropriate in this case. *Gates*, 48 F4th at 469-472. This Court should also reject the amicus's assertion for the same reasons.

Meaningful Consideration of the Michigan Sentencing Guidelines is Not a Return to the Guidelines Being Mandatory, But Consistent with Federal Law Post-Booker

PAAM avers that our current jurisprudence has resulted in "a de facto mandatory guidelines system." PAAM Amicus at 7. It also avers that, "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." PAAM Amicus at 19 (emphasis in original). In support of this latter assertion, it cites *Rita v US*, 551 US 338, 127 S Ct 245, 168 L Ed 2d 203 (2007); *Gall v US*, 552 US 38, 128 S Ct 586, 169 L Ed 2d 445 (2007); and *Kimbrough v US*, 552 US 85, 128 S Ct 558, 169 L Ed 2d 481 (2007). Undersigned Counsel

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must assume that PAAM has been citing these cases in every applicable case before this Court since 2007 since this Court has already rejected that Michigan's reasonableness test is not implicated by the holdings of *Gall* in *Steanhouse* – which PAAM acknowledges at 8-9 – and the others have been largely superseded or reshaped by the Supreme Court.

What is shockingly missing from PAAM's amicus brief - given the extensive citation of not-wholly-applicable various circuit court federal cases (which are not binding on this Court) is the current state of federal law with regards to the Federal Sentencing Guidelines that is articulated in *Rosales-Mireles v US*, 585 US 129, 138 S Ct 1897, 201 L Ed 376 (2018).

In *Rosales-Mireles*, a 7-2 majority of the United States Supreme Court stated:

> Each year, thousands of individuals are sentenced to terms of imprisonment for violations of federal law. District courts must determine in each case what constitutes a sentence that is sufficient, but not greater than necessary to achieve the overarching sentencing purposes of retribution, deterrence, incapacitation, and rehabilitation. Those decisions call for the district court to exercise discretion. Yet, to ensure certainty and fairness in sentencing, district courts must operate within the framework established by Congress.
>
> The Sentencing Guidelines serve as an important role in that framework. District courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process. Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as a meaningful benchmark in the initial determination of a sentence and through the process of appellate review.

Rosales-Mireles, 585 US at 133 (quotation marks and citations omitted). Obviously, this system parallels our own system in Michigan with regards to the factors from *People v Snow*, 386 Mich 586, 194 NW2d 314 (1972) to be considered (punishment, deterrence, protection of society, and rehabilitation) and the legislatively-produced Michigan Sentencing Guidelines.

The United States Supreme Court in *Rosales-Mireles* also stated:

> Before a court of appeals can consider the substantive reasonableness of a sentence, it must first ensure that the district court committed no significant procedural errors, such as failing to calculate (or improperly calculating) the Guidelines range. This makes eminent sense, for the district court is charged in the first instance with determining whether, taking all sentencing factors into

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> consideration, including the correct Guidelines range, a sentence is sufficient, but not greater than necessary. If the district court is unable properly to undertake that inquiry because of an error in the Guidelines range, the resulting sentence no longer bears the reliability that would support a presumption of reasonableness on review. Likewise, regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings. The mere fact that Rosales-Mirales' sentence falls within the corrected Guidelines range does not preserve the fairness, integrity, or public reputation of the proceedings.
>
> *Rosales-Mireles*, 585 US at 143-144 (citations omitted).

There are obviously differences between the Federal Sentencing Guidelines and the Michigan Sentencing Guidelines including the guidelines factors themselves, the standard for a trial court sentence (sufficient, but not greater than necessary), and the procedure for establishing an error in correcting the sentencing guidelines originally missed (no motion to correct an invalid sentence preserving the issue in Michigan and instead a plain error standard echoing our own), this Court's past decisions including *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015) (echoing *US v Booker*, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621 (2005)) give way to an instructive comparison.

As such, if PAAM wanted to more closely model Michigan's Sentencing Guidelines after the Federal Sentencing Guidelines, its amicus brief should have answered this Court's question regarding "whether resentencing is required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error" (without regards to whether the sentence falls in the appropriate guidelines range as amended or not) with an enthusiastic, "Yes." After all, the United States Supreme Court stated above, "If the [Trial Court] is unable properly to undertake that inquiry because of an error in the Guidelines range, the resulting sentence no longer bears the reliability because of unjust procedures may well undermine public perception of the proceedings. The mere fact that [the defendant's] sentence falls within the corrected Guidelines range does not preserve the fairness, integrity, or public

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reputation of the proceedings." *Rosales-Mireles*, 585 US at 144. PAAM would also advocate for a presumption of reasonableness for within-guidelines sentences and a presumption of unreasonableness for out-of-guidelines sentences and that the Michigan Sentencing Guidelines serve as a starting point for a sentence that will survive reasonableness review.

Alas, because amicus curiae does not cite any relevant federal law from the last 12 years, it seeks to "return" the State of Michigan to a system that neither parallels the current federal system nor one that is consistent with this Court's jurisprudence since *Lockridge* was decided ten years ago. This would have the effect, if not the intent, of eliminating the legislative Michigan Sentencing Guidelines (in violation of this Court's decision in *People v Coles*, 417 Mich 523, 339 NW2d 440 (1983) that it had the power to do so pursuant to Const 1963, art 4 § 45) and which would further "pose a serious obstacle to legislative efforts to create a sentencing law that would mandate more similar treatment of like offenders, that would thereby diminish sentencing disparity, and that would consequently help to overcome irrational discrimination (including racial discrimination) in sentencing." *Eringer v US*, 602 US 821, 885; 144 S Ct 1840; 219 L Ed 451 (2024) (JACKSON, J., dissenting).

While PAAM advocates for the proportionality test to be the sole consideration in a trial court's decision on a sentence, this Court has previously held that "we believe that the purpose of the Legislature in creating sentencing ranges and, thereby, providing for discretion in sentencing was to allow the principle of proportionality to be put into practice." *People v Milbourn*, 435 Mich 630, 652; 461 NW2d 1 (1990). While the sentencing guidelines "may not be a perfect embodiment of the principle of proportionality" as the Court in *Milbourn* observed (*Milbourn*, 435 Mich at 661), it is important that such remain a "highly relevant consideration" as this Court stated in *Lockridge* or a "meaningful benchmark" that trial courts "must begin with" as the United States Supreme Court said in *Rosales-Mirales*.

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RELIEF REQUESTED

For the reasons stated above, and in the Application previously submitted, Mr. Armogeda respectfully requests that this Court order that the Trial Court resentence him pursuant to the below-requested procedure for resentencings going forward.

Mr. Armogeda respectfully requests that this Court adopt a rule, consistent with *Francisco*, that when the sentencing guidelines range changes, a defendant is entitled to resentencing. At resentencing, the trial court must: (1) Ensure that it is familiar with the prior sentencing hearing including presiding over or reading a transcript (which should have already been prepared and produced for appellate purposes if available) of the prior proceeding with specific attention to the statements made by the parties and victim (if applicable); and (2) Allow an opportunity for the defense, the prosecuting attorney, and the victim (if applicable) to provide an update to the Court since the last sentencing. While the defendant must be present in person (unless waived by the defendant), the victim may provide such an update in person, via video or electronic means, or in signed writing. The defendant may also waive resentencing, and the original sentence will be entered as a final judgment on the date of the written waiver.

Alternatively, if this Court is not going to order resentencing in this case and is going to determine that a more thorough proportionality analysis and appeal could have occurred after the guidelines were stipulated to in the Trial Court, Mr. Armogeda requests that this Court order a remand to the Trial Court for a proper proportionality analysis to occur under Michigan law with the newly-calculated guidelines allowing an appeal to occur thereof.

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Respectfully Submitted,

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Dated: August 4, 2025

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Pursuant to MCR 7.312 and 7.212(B)(2) and (3), this Brief contains 2,680 countable words.

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