Michigan Supreme Court
Lansing, Michigan

Syllabus

Chief Justice:
Stephen J. Markman

Justices:
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Reporter of Decisions:
Kathryn L. Loomis

PEOPLE v STEANHOUSE
PEOPLE v MASROOR

Docket Nos. 152671, 152849, 152871, 152872, 152873, 152946, 152947, and 152948. Argued January 10, 2017 (Calendar No. 1). Decided July 24, 2017.

Alexander J. Steanhouse was convicted by a jury in the Wayne Circuit Court of assault with intent to commit murder (AWIM), MCL 750.83, and receiving and concealing stolen property, MCL 750.535(3)(a). The court, Patricia P. Fresard, J., departed from the sentencing guidelines' recommended minimum range of 171 to 285 months and sentenced Steanhouse to 30 to 60 years' imprisonment for AWIM, to run concurrently with a sentence of one to five years' imprisonment for receiving and concealing stolen property. Steanhouse appealed his convictions and sentences by right, arguing in part that the trial court had violated the Sixth and Fourteenth Amendments by basing his scores for several offense variables on judicially found facts in violation of *Apprendi v New Jersey*, 530 US 466 (2000), and *Alleyne v United States*, 570 US ___ (2013). The Court of Appeals, WILDER, P.J., and OWENS and M. J. KELLY, JJ., affirmed the convictions but ordered a remand under the procedure adopted in *People v Lockridge*, 498 Mich 358 (2015), from *United States v Crosby*, 397 F3d 103 (CA 2, 2005), to determine whether the sentences were reasonable. The panel held that the proper standard for determining whether a sentence was reasonable was not the approach employed by federal courts, which is guided by the factors in 18 USC 3553(a), but rather the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630 (1990). 313 Mich App 1 (2015). Both the defendant and the prosecution sought leave to appeal. The Supreme Court granted the prosecution's application for leave to appeal in Docket No. 152849, ordered the appeal to be argued and submitted with the prosecution's application for leave to appeal in *People v Masroor*, Docket Nos. 152946 through 152948, and kept Steanhouse's application for leave to appeal in Docket No. 152671 pending. 499 Mich 934 (2015).

Mohammad Masroor was convicted by a jury in the Wayne Circuit Court of 10 counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and five counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. At sentencing, defense counsel objected to the scoring of the guidelines on the basis of judicial fact-finding and also objected that the scores of several offense variables were unsupported by a preponderance of the evidence. The court, Michael M. Hathaway, J., departed from the sentencing guidelines' recommended minimum range of 108 to 180 months and imposed concurrent prison terms of 35 to 50 years for each of the CSC-I convictions and 10 to 15 years for each of the CSC-II convictions. The Court of

Appeals, GLEICHER, P.J., and MURPHY, J. (SAWYER, J., concurring in the result only), affirmed Masroor's convictions but ordered a *Crosby* remand and directed the trial court to apply the proportionality standard adopted in *Steanhouse*. However, the majority stated that but for the *Steanhouse* decision, it would have affirmed Masroor's sentences by applying the federal "reasonableness" standard from *Gall v United States*, 552 US 38 (2007), which was specifically rejected in *Steanhouse*, and it called for a conflict panel to determine which standard was the proper one. 313 Mich App 358 (2015). The Court of Appeals declined to convene a conflict panel. Both Masroor and the prosecution applied for leave to appeal in the Supreme Court. The Supreme Court granted the prosecution's application for leave to appeal in Docket Nos. 152946 through 152948, ordered those cases to be argued and submitted with the prosecution's application for leave to appeal in *Steanhouse*, Docket No. 152849, and kept Masroor's applications for leave to appeal in Docket Nos. 152871 through 152873 pending. 499 Mich 934 (2015).

In an opinion by Justice MCCORMACK, joined by Justices VIVIANO, BERNSTEIN, and LARSEN, the Supreme Court *held*:

The legislative sentencing guidelines are advisory in all applications. The proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality set forth in *Milbourn*. It was unnecessary to reach the question whether *People v Stokes*, 312 Mich App 181 (2015), correctly held that the remedy for a Sixth Amendment sentencing violation should be the same regardless of whether the sentencing error was preserved in light of the fact that both defendants received departure sentences and therefore could show no harm from the application of the mandatory guidelines. For the same reason, *Crosby* remands were unnecessary. The judgments of the Court of Appeals in both cases were reversed to the extent that they remanded to the trial court for further sentencing proceedings under *Crosby*. In lieu of granting defendants' applications for leave to appeal in Docket Nos. 152671 and 152871 through 152873, the cases were remanded to the Court of Appeals under MCR 7.305(H)(1) for plenary consideration of whether the departure sentences imposed by the trial courts were reasonable under the standard set forth in this opinion. In all other respects, leave to appeal with regard to those applications was denied.

1. The remedial holding in *Lockridge* that rendered the guidelines advisory in all applications was reaffirmed. The constitutional holding in *Lockridge* was premised on the interplay between the requirement of judicial fact-finding to score the guidelines and their mandatory nature. What made the guidelines unconstitutional was the combination of the two mandates of judicial fact-finding and adherence to the guidelines. MCL 769.34(2), which imposed the second mandate, was therefore held to be constitutionally deficient. Assuming without deciding that mandatory guidelines would remain constitutional in some applications, MCL 8.5 does not require a different result. Even if the proposed bifurcated mandatory/advisory guidelines system fully avoided any constitutional problems, it would be an inoperable scheme if trial courts were statutorily directed to score the highest number of points possible but were constitutionally constrained from treating the guidelines as mandatory only if facts relied on to justify the scoring of the guidelines are found by a judge rather than by a jury or admitted by a defendant. The distinction between judge-found facts and facts sufficiently admitted by a defendant that they may be used to increase the defendant's sentence is unclear, and it is not

always evident whether a jury's findings on a point of fact are sufficiently conclusive to determine that it found that fact beyond a reasonable doubt. Further, it is unclear what standard trial judges would use to determine whether a jury had made the requisite finding to support a proposed OV score or what standard appellate courts would apply when reviewing those determinations. The result of adopting a system in which the guidelines' mandatory-versus-advisory nature hinged on whether judicial fact-finding had occurred in a particular case would be endless litigation and perpetual uncertainty, and MCL 8.5 does not require this result. Finality interests also strongly supported adherence to the holding in *Lockridge*, given that scores of *Crosby* remands have been ordered since *Lockridge* was decided and that trial courts have seemingly uniformly understood *Lockridge* to have imposed a purely advisory system.

2. The rule of decision to be applied by the trial courts is the principle of proportionality set forth in *Milbourn*, not the federal statutory factors listed in 18 USC 3553(a). The statutory factors in 18 USC 3553(a) were created by Congress for use by the federal courts and include reference to policy statements issued by the Sentencing Commission or by act of Congress that have no counterpart in Michigan law, whereas the principle of proportionality has a lengthy jurisprudential history in this state. None of the constitutional principles announced in *United States v Booker*, 543 US 220 (2005), or its progeny compelled a departure from Michigan's longstanding principles applicable to sentencing, and the principle of proportionality was not irreconcilable with *Gall*, 552 US at 46, because it did not create an impermissible presumption of unreasonableness for sentences outside the guidelines range.

3. Remand for a *Crosby* hearing in cases involving departure sentences is unnecessary. The *Crosby* remand procedure was adopted for the specific purpose of determining whether trial courts that had sentenced defendants under the mandatory sentencing guidelines had their discretion impermissibly constrained by those guidelines. Departure sentences were specifically exempted from that remand procedure, at least for cases in which the error was unpreserved, because a defendant who had received an upward departure could not show prejudice resulting from the constraint on the trial court's sentencing discretion. Therefore, the purpose for the *Crosby* remand is not present in cases involving departure sentences. The analysis of the *Masroor* panel was affirmed to the extent that it rejected the *Steanhouse* panel's decision to order a *Crosby* remand, and the *Steanhouse* panel should have reviewed the departure sentence for an abuse of discretion using the "principle of proportionality" standard. Both cases were remanded to the Court of Appeals to consider the reasonableness of the defendants' sentences under the standards set forth in this opinion, and if the Court of Appeals determined that either sentencing court 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.

In Docket Nos. 152849 and 152946 through 152948, Court of Appeals judgments affirmed to the extent they held that appellate review of departure sentences for reasonableness required review of whether the trial court abused its discretion by violating the principle of proportionality set forth in *Milbourn*; Court of Appeals judgments reversed to the extent they ordered *Crosby* remands.

In Docket Nos. 152671 and 152871 through 152873, in lieu of granting leave to appeal, cases remanded to the Court of Appeals for plenary review of whether defendants' sentences were reasonable under *Milbourn*; leave to appeal denied in all other respects.

Justice LARSEN, joined by Justice VIVIANO, concurring, wrote separately to address the points raised by the partial dissent, stating that, while some of the language in *Lockridge* could raise a question about the extent of *Lockridge*'s remedial holding if read in isolation, the Court in *Lockridge* clearly chose to render the guidelines fully advisory as a remedy for the constitutional violation identified in that case, and the fact that *Lockridge* imposed this remedy has been clearly understood by the participants in Michigan's criminal justice system. Justice LARSEN noted that the question whether this remedy was the one most reasonably consistent with the Legislature's intentions was the issue before the Court in *Lockridge*, not in the present case, and she stated that any changes to the remedy adopted in *Lockridge* would require upending criminal sentencing in this state for a second time in two years and would set off another round of litigated questions, including whether and how to resentence the resentenced. Justice LARSEN further noted that if the *Lockridge* remedy was not the best effectuation of the Legislature's intent, it was within the Legislature's power to install a different sentencing scheme.

Chief Justice MARKMAN, joined by Justice ZAHRA, concurring in part and dissenting in part, concurred in the majority opinion to the extent that it (1) reaffirmed the holding that a defendant receiving a sentence that represents an upward departure is not entitled to a *Crosby* remand and (2) held that the proper inquiry when reviewing a departure sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality set forth in *Milbourn*. He dissented from the portion of the majority opinion that held that the legislative sentencing guidelines are always advisory, regardless of whether a mandatory application of the guidelines would violate the Sixth Amendment, on the ground that, under separation-of-powers principles, the Court has the authority to strike down statutes only to the extent that they are unconstitutional and is required to give the constitutional portions of a statute effect as long as they are not inoperable or rendered inconsistent with the manifest intent of the Legislature. Chief Justice MARKMAN noted that there were multiple alternative remedies that were more consistent with the Legislature's intent to impose mandatory guidelines, including rendering the floor advisory and the ceiling mandatory, rendering both the floor and the ceiling mandatory but prohibiting judicial fact-finding when determining the floor, rendering the guidelines advisory when the court engages in fact-finding to score offense variables that increase the guidelines range and mandatory when it does not, allowing the guidelines to be mandatory by prohibiting judicial fact-finding when scoring offense variables, and allowing the guidelines to be mandatory by requiring the jury to find any facts that the defendant did not admit when scoring the offense variables. Chief Justice MARKMAN would have held that the guidelines are mandatory to the extent that a mandatory application does not run afoul of a defendant's Sixth Amendment right to a jury trial.

Justice WILDER took no part in the decision of this case.

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Michigan Supreme Court
Lansing, Michigan

OPINION

Chief Justice:
Stephen J. Markman

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Kurtis T. Wilder

FILED July 24, 2017

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 152671

ALEXANDER JEREMY STEANHOUSE,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 152849

ALEXANDER JEREMY STEANHOUSE,

Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Nos. 152871, 152872, and 152873

MOHAMMAD MASROOR,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Nos. 152946, 152947, and 152948

MOHAMMAD MASROOR,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH (except WILDER, J.)

MCCORMACK, J.

Two terms ago, in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), this Court, applying binding United States Supreme Court precedent, held that Michigan's sentencing guidelines scheme violates the Sixth Amendment of the United States Constitution. To remedy the constitutional violation, we held that the guidelines would thereafter be merely advisory rather than mandatory. In these consolidated cases, we address residual issues stemming from our decision in *Lockridge*. We hold the following:

(1) In *Lockridge*, we held, and today reaffirm, that the legislative sentencing guidelines are advisory *in all applications*.

(2) We affirm the Court of Appeals' holding in *People v Steanhouse*, 313 Mich App 1; 880 NW2d 297 (2015), that the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the "principle of proportionality" set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), "which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."

(3) We decline to import the approach to reasonableness review used by the federal courts, including the factors listed in 18 USC 3553(a), into our jurisprudence.

(4) We agree with the Court of Appeals that defendant Alexander Steanhouse did not preserve his Sixth Amendment challenge to the scoring of the guidelines and that defendant Mohammad Masroor did preserve his challenge, but we decline to reach the question whether *People v Stokes*, 312 Mich App 181; 877 NW2d 752 (2015), correctly decided that the remedy is exactly the same regardless of whether the error is preserved or unpreserved in light of the fact that both defendants received departure sentences, and that, therefore, neither defendant can show any harm from the application of the mandatory guidelines.[1]

[1] Defendant Masroor also concedes that judicial fact-finding did not affect his guidelines range because removing points from his OV score to account for any judicial fact-finding would not change the applicable guidelines range. See *Lockridge*, 498 Mich at 394-395 (stating that in "cases in which (1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced . . . the defendant suffered no prejudice from any error").

(5) We reverse, in part, the judgments of the Court of Appeals in both cases to the extent they remanded to the trial court for further sentencing proceedings under *United States v Crosby*, 397 F3d 103 (CA 2, 2005).[2] Both of the trial courts imposed upward departure sentences on the defendants, and we made clear in *Lockridge* that defendants who receive upward departure sentences cannot show prejudice from the Sixth Amendment error. Accordingly, the Court of Appeals in *People v Masroor*, 313 Mich App 358, 396; 880 NW2d 812 (2015), correctly concluded that ordering *Crosby* remands in such cases "unnecessarily complicates and prolongs the sentencing process." Instead, the proper approach is for the Court of Appeals to determine whether the trial court abused its discretion by violating the principle of proportionality.

(6) Because of our ruling in (5), in lieu of granting leave to appeal in the defendants' appeals (Docket Nos. 152671 and 152871 through 152873), pursuant to MCR 7.305(H)(1), we remand those cases to the Court of Appeals for plenary consideration of whether the departure sentences imposed by the trial courts were reasonable under the standard set forth in this opinion. In all other respects, leave to appeal with regard to those applications is denied because we are not persuaded that the questions presented should be reviewed by this Court.

I. LEGAL BACKGROUND

In *Lockridge*, we relied on the United States Supreme Court's recent decision in *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), to

[2] For ease of reference, hereinafter we will use the shorthand "*Crosby* remand" to refer to such proceedings.

conclude that Michigan's mandatory sentencing guidelines violated the Sixth Amendment because they require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increased the floor of the guidelines' minimum sentence range. As a remedy for the constitutional infirmity, we held that the guidelines were advisory only and that many defendants sentenced under the mandatory guidelines were entitled to *Crosby* remands for the trial court to determine whether it would have imposed a materially different sentence if it had been aware that the guidelines were not mandatory. We also held that departure sentences post-*Lockridge* would be reviewed for reasonableness, though we did not elaborate on the proper standard for this reasonableness review. *Lockridge*, 498 Mich at 392.

Notably for purposes of these cases, we also held that the defendant in *Lockridge* was not entitled to a *Crosby* remand because he had received an upward departure sentence; we concluded that "[b]ecause he received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for *departing* from that range), the defendant cannot show prejudice from any error in scoring the OVs in violation of *Alleyne*." *Id*. at 394.

II. FACTS AND PROCEDURAL HISTORY

A. *STEANHOUSE*

The defendant was jury-convicted of assault with intent to murder (AWIM), MCL 750.83, and receiving and concealing stolen property with a value between $1,000 and $20,000, MCL 750.535(3)(a). Defense counsel objected at sentencing to the evidentiary

basis for scoring OVs 5, 6, and 7, MCL 777.35, MCL 777.36, and MCL 777.37. The trial court upheld the scoring of OVs 5 and 6 but eliminated points for OV 7 for lack of factual support. The trial court departed from the applicable guidelines range (calling for a minimum prison term of 171 to 285 months) and imposed a 30- to 60-year (360- to 720-month) prison sentence for the AWIM count, concurrent with a 1- to 5-year sentence for the stolen-property count.

The Court of Appeals affirmed the defendant's convictions in a published opinion but ordered a *Crosby* remand. The panel then proceeded to evaluate two potential approaches it could adopt to frame the "reasonableness" review of sentences post-*Lockridge*: (1) the standard currently employed by the federal courts, which is guided by the factors in 18 USC 3553(a), or (2) the "principle of proportionality" standard from *Milbourn*. The panel adopted the latter standard. *Steanhouse*, 313 Mich App at 46-47.

Both the defendant and the prosecution sought leave to appeal in this Court. We granted the prosecution's application for leave to appeal, ordered it to be argued and submitted with the prosecution's application for leave to appeal in *Masroor*, and kept the defendant's application for leave to appeal pending. *People v Steanhouse*, 499 Mich 934 (2016).[3]

[3] Our grant order asked the parties to address:

> (1) whether MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding, see MCL 8.5; (2) whether the prosecutor's application asks this Court in effect to overrule the remedy in *People v Lockridge*, 498 Mich 358, 391 (2015), and, if so, how *stare decisis* should affect this Court's analysis; (3) whether it is proper to remand a case to the circuit court for consideration under Part VI of this Court's opinion in *People v Lockridge* where the trial

B. *MASROOR*

The defendant, in three cases tried together, was jury-convicted of 10 counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and five counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. At sentencing, defense counsel made a general objection to scoring the guidelines on the basis of judicial fact-finding, citing *Alleyne*, 570 US ___; 133 S Ct 2151, and objected to the scoring of several OVs on the basis that the scoring was unsupported by a preponderance of the evidence. After resolving those challenges, the trial court departed from the applicable guidelines range (calling for a minimum prison term of 108 to 180 months) and imposed concurrent prison terms of 35 to 50 years (420 to 600 months) for each of the CSC-I convictions and 10 to 15 years for each of the CSC-II convictions.

The Court of Appeals affirmed the defendant's convictions in a published opinion but ordered a *Crosby* remand and directed the trial court to apply the "proportionality" standard adopted in *Steanhouse*. But the panel majority said that but for the *Steanhouse* decision, it would have affirmed the defendant's sentences by applying the federal "reasonableness" standard from *Gall v United States*, 552 US 38, 46; 128 S Ct 586; 169 L Ed 2d 445 (2007), which was specifically rejected in *Steanhouse*, and it called for a conflict panel to resolve which standard was the proper one and "so that the procedure

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> court exceeded the defendant's guidelines range; and (4) what standard applies to appellate review of sentences following the decision in *People v Lockridge*. [*Steanhouse*, 449 Mich at 934.]

established by [the *Steanhouse*] panel may be more carefully considered by a larger number of the judges of this Court."[4] *Masroor*, 313 Mich App at 361.

On December 17, 2015, the Court of Appeals issued an order announcing that a special panel would convene pursuant to MCR 7.215(J) to resolve the conflict between these cases "concerning the standards applicable to review for reasonableness of sentences constituting departures from the recommendations of the sentencing guidelines, and the extent to which remands are required in cases involving sentencing decisions before *People v Lockridge*, 498 Mich 358 (2015), was decided"; the next day, however, the Court issued another order vacating that order because of a polling error and stating that a special conflict panel would not be convened. *People v Masroor*, 313 Mich App 801 (2015).

As in *Steanhouse*, both the defendant and the prosecution appealed in this Court. We granted the prosecution's application for leave to appeal, ordered it to be argued and submitted with the prosecution's application for leave to appeal in *Steanhouse*, and kept the defendant's application for leave to appeal pending. *People v Masroor*, 499 Mich 934 (2015).

III. ANALYSIS

A. THE *LOCKRIDGE* REMEDIAL HOLDING/MCL 8.5

The prosecution contends that this Court's decision in *Lockridge* rendered the legislative sentencing guidelines advisory only in cases that involved judicial fact-finding that increased the applicable guidelines range and that the guidelines remain mandatory

[4] Judge SAWYER concurred only in the result.

in all other cases. Despite its argument that our holding in *Lockridge* was unclear, the prosecution has cited no case—and we have found none—in which a lower court has held that the guidelines remained mandatory in any application post-*Lockridge*. Additionally, we note that no party in *Lockridge*—including the prosecution as amicus—argued that the remedy set forth in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), should extend only to cases in which judicial fact-finding occurred. Indeed, in *Lockridge*, "the prosecution . . . ask[ed] us to *Booker*-ize the Michigan sentencing guidelines, i.e., render them advisory only. We agree[d] that this [wa]s the most appropriate remedy." *Lockridge*, 498 Mich at 391. The prosecution, albeit a different prosecutor's office than in *Lockridge*,[5] now asks us to *Booker*-ize the Michigan sentencing guidelines only in part. The prosecution cites MCL 8.5[6] for the proposition

[5] The Oakland County Prosecutor's Office represented the People in *Lockridge*. The Wayne County Prosecutor's Office, which represents the People in both cases here, participated in *Lockridge* as amicus curiae.

[6] MCL 8.5 provides:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

that we lacked the authority in *Lockridge* to impose fully advisory guidelines when the guidelines were not unconstitutional in all their applications.[7]

We disagree and reaffirm *Lockridge*'s remedial holding rendering the guidelines advisory in all applications. As we stressed in *Lockridge*, our constitutional holding was premised on the interplay of two key aspects of the guidelines: the requirement of judicial fact-finding to score them and their mandatory nature. *Lockridge*, 498 Mich at 364 (outlining the constitutional error as "the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne*"). What made the guidelines unconstitutional, in other words, was the combination of the two mandates of judicial fact-finding and adherence to the guidelines. *United States v Pirani*, 406 F3d 543, 551 (CA 8, 2005) (describing the constitutional error as "the *combination* of" a sentencing enhancement based on judge-found facts and a mandatory guidelines regime). We therefore held MCL 769.34(2), which imposed the second mandate, to be constitutionally deficient.

[7] Steanhouse also argues that MCL 8.5 requires that the top of the guidelines range remain mandatory. We explicitly rejected this remedy in *Lockridge*, 498 Mich at 389-390. Moreover, neither defendant sought leave to appeal on this basis, and this argument is outside the scope of our grant order, which asked "(1) whether MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding, see MCL 8.5; (2) whether the prosecutor's application asks this Court in effect to overrule the remedy in" *Lockridge* "and, if so, how *stare decisis* should affect this Court's analysis . . . ." *Steanhouse*, 499 Mich at 934.

Assuming without deciding that mandatory guidelines would remain constitutional in some applications—i.e., cases in which no judicial fact-finding occurs that increases the applicable guidelines range[8]—we believe MCL 8.5 does not require a different result. Even if the proposed bifurcated mandatory/advisory guidelines system fully avoided any constitutional problems, we reject the operability of a guidelines scheme in which trial courts are statutorily directed to score the "highest number of points" possible but are constitutionally constrained from treating the guidelines as mandatory only if facts relied on to justify the scoring of the guidelines are found by a judge rather than by a jury or admitted by a defendant. See MCL 8.5 (providing that the remaining constitutional applications of the statute are to be given effect unless determined to be "inoperable").

First, the distinction between judge-found facts and facts sufficiently admitted by a defendant that they may be used to increase the defendant's sentence is unclear.[9] Second, whether a jury's "findings" on a point of fact are sufficiently conclusive to determine that

[8] See *Booker*, 543 US at 267-268 (concluding that a sentence set solely on the basis of the jury's verdict, i.e., without judicial fact-finding, does not violate the Sixth Amendment).

[9] See, e.g., *People v Collins*, 500 Mich 930 (2017) (ordering oral argument on the application and directing the parties to brief "whether a defendant who was sentenced prior to *People v Lockridge*, 498 Mich 358 (2015), sufficiently waived his constitutional rights to notice and jury proof beyond a reasonable doubt of facts used to score offense variables under MCL 777.1 *et seq*., where those facts were not charged in an indictment or information, but where he pleaded guilty or no contest and stipulated under oath to the aggravating facts in the context of a general waiver of his jury trial rights"); see also, e.g., *State v Dettman*, 719 NW2d 644, 650-651 (Minn, 2006) (holding that "a defendant must expressly, knowingly, voluntarily, and intelligently waive his right to a jury determination of facts supporting an upward sentencing departure before his statements at his guilty-plea hearing may be used to enhance his sentence").

it "found" that fact beyond a reasonable doubt is not always evident.[10] Third, what standard would trial judges use to determine whether a jury in fact made the requisite finding to support a proposed OV score? Moreover, what standard would appellate courts apply to those determinations by the trial court to decide whether they were correctly made? All of these issues would be left unsettled in a system in which the guidelines' mandatory-versus-advisory nature hinged on whether judicial fact-finding had occurred in a particular case. The result would be endless litigation and perpetual uncertainty. See *Booker*, 543 US at 266 (noting the "administrative complexities" that such a bifurcated system would create). We will not travel that ill-advised road when MCL 8.5 does not require us to.[11]

Finally, we believe that finality interests strongly support adherence to our holding in *Lockridge*. We decided *Lockridge* almost two years ago and have ordered scores of *Crosby* remands in the interim. Trial courts have seemingly uniformly understood our

[10] For example, one theory of conviction for CSC-I is that the "actor is in a position of authority over the victim and used this authority to coerce the victim to submit" to the sexual abuse. MCL 750.520b(1)(a)(*iii*). May a defendant convicted under that theory be scored 15 points for OV 10 for "predatory conduct," or at least 10 points for "abus[ing] his or her authority status," without judicial fact-finding? MCL 777.40.

[11] Moreover, the proposed bifurcated system has a bit of a "[w]hat a neat trick" flair: two mandatory components are unconstitutional when used in tandem until . . . they aren't. *Williams v Illinois*, 567 US 50, 133; 132 S Ct 2221; 183 L Ed 2d 89 (2012) (Kagan, J., dissenting) (discussing the Confrontation Clause). Such an approach certainly seems to at least undervalue the constitutional principle on which *Booker* was decided. And by delaying a determination of the guidelines' mandatory or advisory nature until sentencing, the proposed system would give no weight to the notice interests protected by *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and its progeny. See *id*. at 476 (noting that the constitutional principle is grounded in part in the notice and jury trial guarantees of the Sixth Amendment).

decision to have imposed a purely advisory system.[12] It would sow much greater confusion to retreat from *Lockridge* than to adhere to it.[13]

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[12] See also *People v Rice*, 318 Mich App ___; ___ NW2d ___ (2017) (Docket No. 329502), slip op at 2-3:

> Addressing the entire scheme and system of MCL 769.34, the *Lockridge* Court held that the guidelines are advisory and struck down the MCL 769.34(3) requirement that a trial court articulate substantial and compelling reasons to depart from the guidelines. It is clear from this language that the Court drew no distinction between cases that applied judge-found facts and cases that did not. The Court's language was precise and explicit, and the Court in no way limited its holding to cases in which judicial fact-finding actually occurred.
>
> For these reasons, we conclude that the trial court properly held that the legislative sentencing guidelines are advisory in every case, regardless of whether the case involves judicial fact-finding.

[13] With regard to the dissenting opinion, we make the following observations: the dissent's constitutional separation-of-powers concern is not shared by the parties, who argue only that a different remedy from fully advisory guidelines per *Booker* is mandated by MCL 8.5 because there is no federal severance statute. This is unsurprising insofar as if this Court's decisions in *Lockridge* and these cases violate the constitutional separation of powers, so did the United States Supreme Court's decision in *Booker*. We disagree with the dissent that the passage it cites from *Sears v Cottrell*, 5 Mich 251, 259 (1858), stands for the proposition that we only possess the authority to strike down statutes to the extent they are unconstitutional. Instead the quoted language stands for the proposition that legislation is to be presumed constitutional and may only be voided by a court when it is *clearly* unconstitutional.

Finally, to the dissent's Footnote 21—the dissent asserts that "[i]f it is the 'combination' of these two 'mandates' that makes the guidelines unconstitutional, removing a single one of these 'mandates' presumably would eliminate the constitutional problem." Precisely right. That is exactly what we did in *Lockridge* by eliminating the mandatory nature of the guidelines. The proposed remedy discussed by the dissent at this point of its opinion—a bifurcated advisory/mandatory system—would not *remove* one of the mandates; it would have it blink on or off on a case-by-case basis. Again, quite a neat trick, but not one that sufficiently protects the constitutional interest. Similarly, the dissent opines that a bifurcated system would not undervalue the constitutional principle vindicated in *Booker* because the *Booker* Court admitted that sentences not based on

We therefore decline to modify the remedial holding in *Lockridge*, which rendered the sentencing guidelines advisory in all cases. "Sentencing courts must . . . continue to consult the applicable guidelines range and take it into account when imposing a sentence . . . [and] justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392.

B. REASONABLENESS REVIEW

Next, we turn to an issue that divided the *Steanhouse* and *Masroor* panels: the proper standard to use to determine whether a defendant's departure sentence is so unreasonable as to constitute an abuse of the trial court's discretion and warrant reversal on appeal.[14] One important note on which the panels did *not* disagree is significant: the standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion. See *Steanhouse*, 313 Mich App at 45; *Masroor*, 313 Mich App at 394. 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 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

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judicial fact-finding do not violate the Sixth Amendment. Yet this ignores the fact that despite that recognition, the *Booker* Court nonetheless *fully invalidated* the federal guidelines scheme. That result certainly suggests that the remedial majority thought the constitutional violation sufficiently egregious that a broad remedy was appropriate.

[14] Because both defendants received departure sentences, we do not reach the question of whether MCL 769.34(10), which requires the Court of Appeals to affirm a sentence that is within the guidelines absent a scoring error or reliance on inaccurate information in determining the sentence, survives *Lockridge*.

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)?

In light of the substantial overlap and the identical standard of review for appellate courts, little likely separates the two approaches in terms of the outcomes they would produce in a given case. But we affirm the *Steanhouse* panel's adoption of the *Milbourn* principle-of-proportionality test in light of its history in our jurisprudence. The statutory factors in 18 USC 3553(a) were created by Congress for use by the federal courts and include reference to "policy statements" issued by the Sentencing Commission or by act of Congress that have no counterpart in Michigan law.

The principle of proportionality has a lengthy jurisprudential history in this state. See *Milbourn*, 435 Mich at 650, quoting *Weems v United States*, 217 US 349, 367; 30 S Ct 544; 54 L Ed 793 (1910). In *Milbourn*, we described that principle as one in which

> a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender. [*Milbourn*, 435 Mich at 651.]

In describing how that principle interacted with the then-existing advisory judicial sentencing guidelines, we 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." *Id*. at 661.

In *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), this Court held that the Legislature had incorporated the principle of proportionality into the newly adopted legislative sentencing guidelines. *Id*. at 263 (stating that the Legislature "subscribed to

this principle of proportionality in establishing the statutory sentencing guidelines"); see also *People v Smith*, 482 Mich 292, 304-305; 754 NW2d 284 (2008) (holding that in order "to complete our analysis of whether the trial judge in this case articulated substantial and compelling reasons for the departure, we must, of necessity, engage in a proportionality review").

Although in *Lockridge* we followed the lead of the United States Supreme Court in *Booker*, 543 US at 233, in the remedy we adopted for the constitutional flaw in the sentencing guidelines (making the guidelines fully advisory), and the United States Court of Appeals for the Second Circuit in *Crosby*, for its remand procedure, nothing else in our opinion indicated we were jettisoning any of our previous sentencing jurisprudence outside the Sixth Amendment context. Moreover, none of the constitutional principles announced in *Booker* or its progeny compels us to depart from our longstanding practices applicable to sentencing. Since we need not reconstruct the house, we reaffirm the proportionality principle adopted in *Milbourn* and reaffirmed in *Babcock* and *Smith*.[15]

[15] We disagree with the panel in *Masroor* that adhering to the principle of proportionality necessarily entails doing so "to the exclusion of other concepts," thereby "erod[ing] a court's sentencing discretion." *Masroor*, 313 Mich App at 396. First, we note that the panel did not identify any particular concepts that it believed were excluded by the principle of proportionality. Second, we do not purport to require a trial court to consider the principle to the exclusion of any other permissible concepts. We merely decline to import "other concepts" from 18 USC 3553(a) when some of those concepts have no history in Michigan law. See *Steanhouse*, 313 Mich App at 47 (observing that the Michigan Legislature "does not issue policy statements under the statutory sentencing scheme, MCL 777.1 *et seq*., so . . . it is effectively impossible for a trial court or this Court to consider a factor analogous to § 3553(a)(5) to determine whether a sentence is reasonable").

That being said, we feel compelled to address the *Masroor* panel's concern that our proportionality test cannot be reconciled with *Gall v United States*, 552 US 38; 128 S Ct 586; 169 L Ed 2d 445 (2007). *Masroor*, 313 Mich App at 398. Our proportionality test differs from the one the United States Supreme Court rejected in *Gall*. In *Gall*, the United States Supreme Court rejected a federal circuit court's requirement that deviations from the guidelines range be justified in proportion to the extent of the deviation. *Gall*, 552 US at 47. In particular, the Supreme Court held:

> In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may . . . 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. [*Id*.]

The Court reasoned that these approaches would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Id*. The Michigan principle of proportionality, however, does not create such an impermissible presumption. 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." *Milbourn*, 435 Mich at 636. The *Masroor* panel was concerned 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 *Gall*. *Masroor*, 313 Mich App at 398, citing *Milbourn*, 435 Mich at 656, 658; see also *Milbourn*, 435 Mich at 659 (stating that departure sentences

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"). We agree that such dicta are inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness for out-of-guidelines sentences, see *Gall*, 552 US at 51, and so we disavow those dicta. We repeat our directive from *Lockridge* that 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,' " *Lockridge*, 498 Mich at 391, quoting *Booker*, 543 US at 264, and our holding from *Milbourn* 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," *Milbourn*, 435 Mich at 661.

C. THE NEED FOR A *CROSBY* REMAND

Regarding the appropriate procedures for review of departure sentences, we agree with the *Masroor* panel's conclusion that "remand for a *Crosby* hearing in cases like that now before us unnecessarily complicates and prolongs the sentencing process." *Masroor*, 313 Mich App at 396. This Court adopted the *Crosby* remand procedure for a very specific purpose: determining whether trial courts that had sentenced defendants under the mandatory sentencing guidelines had their discretion impermissibly constrained by those guidelines. We specifically exempted departure sentences from that remand procedure, at least for cases in which the error was unpreserved,[16] because a defendant

[16] In *Lockridge*, the error was unpreserved. Here, defendant Masroor preserved the Sixth Amendment challenge based on counsel's general objection to guidelines scoring based on judicial fact-finding. Although we did not address the question of preserved errors in

who had received an upward departure could not show prejudice resulting from the constraint on the trial court's sentencing discretion. *Lockridge*, 498 Mich at 395 n 31 (stating that "[i]t defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory").

Therefore, the purpose for the *Crosby* remand is not present in cases involving departure sentences. We therefore affirm the *Masroor* panel's analysis to the extent that it rejected the *Steanhouse* panel's decision to order a *Crosby* remand; the panel in *Steanhouse* should have reviewed the departure sentence for an abuse of discretion, i.e., engaged in reasonableness review for an abuse of discretion informed by the "principle of proportionality" standard. We therefore remand these cases to the Court of Appeals to consider the reasonableness of the defendants' sentences under the standards set forth in this opinion. 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. See *Milbourn*, 435 Mich at 665 (stating that "[i]f and when it is determined that a trial court has pursued the wrong legal standard or abused its judicial discretion according to standards articulated by the appellate courts, it falls to the trial court, on remand, to exercise the discretion according to the appropriate standards"); *Smith*, 482 Mich at 304 (noting that "an appellate court cannot conclude that a particular

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Lockridge, that fact is irrelevant to our consideration whether *Crosby* remands are appropriate in cases in which the defendant received an upward departure.

substantial and compelling reason for departure existed when the trial court failed to articulate that reason").

IV. CONCLUSION

In Docket Nos. 152849 and 152946 through 152948, we reaffirm our holding in *Lockridge* that the sentencing guidelines are advisory only. We affirm the Court of Appeals' holding in *Steanhouse* that appellate review of departure sentences for reasonableness requires review of whether the trial court abused its discretion by violating the principle of proportionality set forth in our decision in *Milbourn*. But we reverse the Court of Appeals to the extent it ordered *Crosby* remands to the trial courts. In Docket Nos. 152671 and 152871 through 152873, we remand to the Court of Appeals for plenary review of whether the defendants' sentences are reasonable under the standard elucidated in our opinion; in all other respects, leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 152671

ALEXANDER JEREMY STEANHOUSE,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 152849

ALEXANDER JEREMY STEANHOUSE,

Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v Nos. 152871, 152872, and 152873

MOHAMMAD MASROOR,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Nos. 152946, 152947, and 152948

MOHAMMAD MASROOR,

Defendant-Appellee.

LARSEN, J. (*concurring*).

I join the Court's opinion in full but write separately to address the points raised by the dissent. Two terms ago, in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), this Court announced two propositions that dramatically altered sentencing law and practice in Michigan. First, compelled by the United States Supreme Court's decision in *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), this Court held that Michigan's system of applying mandatory sentencing guidelines was unconstitutional. *Lockridge*, 498 Mich at 388-389. Second, as a remedy for that unconstitutionality, the Court "*Booker*-ize[d]" the Michigan guidelines—which is to say, it adopted the remedy chosen by the United States Supreme Court in *United States v Booker*[1] to remedy similar unconstitutionality in the operation of the federal sentencing guidelines. *Lockridge*, 498 Mich at 391. The dissent acknowledges, with some lament, the first of these events of 2015, but, curiously, writes as if the second had never happened—as if this Court were today, for the first time, announcing a remedy for the constitutional violation identified in *Lockridge*. But that is decidedly not so. The Court

[1] See *United States v Booker*, 543 US 220, 233; 125 S Ct 738; 160 L Ed 2d 621 (2005).

clearly announced its remedial holding in *Lockridge*, and the evidence clearly reflects that the participants in Michigan's criminal justice system understood. That fact deprives the dissent of much of its force.

The Court was clear in *Lockridge*: the sentencing guidelines were rendered advisory. The dissent is right that some of the language in *Lockridge*, if read in isolation, could raise a question about the extent of *Lockridge*'s remedial holding. See, e.g., *id*. at 364 ("To remedy the constitutional violation, we sever MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory."). But any doubts on this score should have been resolved by the Court's plain statement in *Lockridge*: "[T]he prosecution, in turn, asks us to *Booker*-ize the Michigan sentencing guidelines, i.e., render them advisory only. We agree that this is the most appropriate remedy." *Id*. at 391; see also *id*. at 365 n 1 ("To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary."); *id*. at 391 ("[W]e need only substitute the word 'may' for 'shall' in MCL 769.34(2) and remove the requirement in MCL 769.34(3) that a trial court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure."); *id*. ("Like the Supreme Court in *Booker*, however, we conclude that although the guidelines can no longer be mandatory, they remain a highly relevant consideration in a trial court's exercise of sentencing discretion."); *id*. ("Accordingly, we sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL

769.34(3)."); *id*. at 392 ("Because sentencing courts will hereafter not be *bound* by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court's discretion."); *id*. at 399 ("To remedy the constitutional flaw in the guidelines, we hold that they are advisory only."). The Court's directive in *Lockridge* cannot be reasonably mistaken. Neither the parties, the amici, nor the dissent cites any case in which a lower court has expressed confusion over whether *Lockridge* rendered the guidelines fully advisory. The dissent too once understood the remedy adopted in *Lockridge* to be clear:

> Because I conclude that Michigan's sentencing system does not violate the Sixth Amendment, I need not address the appropriate remedy for what I view as a nonexistent violation. Nonetheless, I submit that the majority has not been persuasive in its adoption *without modification* or significant analysis the so-called *Booker* remedy that *renders the sentencing guidelines 'advisory only' (meaning that the guidelines no longer have any binding effect)* . . . . [*Id*. at 462 n 40 (MARKMAN, J., dissenting) (emphasis added).]

Now, however, the dissent states that "*Lockridge* was not entirely clear regarding whether the guidelines were always to be advisory or whether they could remain mandatory in limited respects."[2] The dissent instead states that "[t]he question in the instant case is

[2] Even accepting the dissent's argument that the Court could have been clearer in *Lockridge* in articulating the contours of its remedial decision, the Court *explicitly rejected* two of the alternative remedies that the dissent now proposes: (1) rendering only the bottom of the guidelines advisory, see *Lockridge*, 498 Mich at 389-390 ("[W]e consider the remedy suggested in Judge SHAPIRO's concurring opinion in this case, which would render advisory only the floor of the applicable guidelines range. . . . [W]e decline to limit the remedy for the constitutional infirmity to the floor of the guidelines range."), and (2) submitting additional facts to the jury, see *id*. at 389 ("[T]he defendant asks us to require juries to find the facts used to score all the OVs that are not admitted or stipulated by the defendant or necessarily found by the jury's verdict. We reject this option.").

whether the majority's remedy of rendering the mandatory guidelines 'fully advisory' or 'advisory in all applications' constitutes the remedy that is most reasonably consistent with the Legislature's intentions or rather strikes down more of the guidelines than is necessary to render them constitutional"; that is, "the question now is only which alternative is *next* best [to fully mandatory guidelines] . . . ." Respectfully, that is not the question in the instant case; that was the question in *Lockridge*, and the Court answered it by opting to *Booker*-ize the guidelines, i.e., render them fully advisory. *Lockridge*, 498 Mich at 365, 389-391. As I see it, the only appropriate question now[3] is whether to maintain the *Lockridge* remedy of fully advisory guidelines or instead to *overrule* our prior decision.[4]

The dissent places much emphasis on MCL 8.5 and argues that the effect of this statute, although brought to this Court's attention in *Lockridge*, was not given proper

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[3] The only appropriate question, that is, other than how to conduct proportionality review, which was a focus of our grant order.

[4] The dissent queries why stare decisis is in play, since, by its lights, the mere fact that the Court granted leave to appeal in this case is proof that *Lockridge* did not settle the remedy question. I set forth here our grant order:

> (1) whether MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding, see MCL 8.5; (2) whether the prosecutor's application asks this Court in effect to overrule the remedy in *People v Lockridge*, 498 Mich 358, 391 (2015), and, if so, how *stare decisis* should affect this Court's analysis; (3) whether it is proper to remand a case to the circuit court for consideration under Part VI of this Court's opinion in *People v Lockridge* where the trial court exceeded the defendant's guidelines range; and (4) what standard applies to appellate review of sentences following the decision in *People v Lockridge*. [*People v Steanhouse*, 499 Mich 934 (2016) (emphasis added).]

consideration by the Court. If we were to properly consider the effect of MCL 8.5, the dissent claims, we would come to the conclusion that the Legislature would have preferred *any other remedy* than the one adopted in *Lockridge*.[5] That strikes me as unlikely. But even if it were true, that would only go to whether *Lockridge* was wrong to have *Booker*-ized the guidelines; it would not tell us what to do about it now.

The remedy adopted in *Lockridge* two terms ago brought dramatic change to Michigan's criminal sentencing scheme. The dissent draws from *Lockridge*'s jurisprudential youth the conclusion that the decision "has hardly 'become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations.' " *Post* at 34, quoting *Robinson v Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000). It is true, in the run of cases, that a decision two terms old is less likely to have produced substantial real-world effects than one two decades its senior. But not every youngster takes time to make its presence felt. In the two years since *Lockridge* was decided, this Court and the Court of Appeals have each remanded hundreds of cases for resentencing in light of the guidelines having been rendered advisory,[6] and tens of thousands of defendants have been initially

[5] The dissent also states that it is in agreement with "*all* of the parties and *all* of the amici-- prosecutors, defendants, the Attorney General and criminal defense organizations alike-- . . . that this Court should not adopt a 'fully advisory' remedy." But each party does not state that it would prefer *any* remedy over the remedy adopted in *Lockridge*. In fact, when specifically asked at oral argument, the prosecution stated that, if the Court did not adopt its proposed bifurcated mandatory/advisory guidelines system, it would prefer fully advisory guidelines to any other remedy.

[6] A July 18, 2017 Westlaw search reveals that this Court alone has issued approximately 220 *Lockridge* remands. The Court of Appeals has surely issued at least that many.

sentenced under the now-advisory guidelines.[7] Any changes to the remedy adopted in *Lockridge* would require upending criminal sentencing in this state for a second time in two years and would set off another round of litigated questions, including whether and how to resentence the resentenced.

Against the prospect of this turbulence, we should ask: What is to be gained? When a court decides how to remedy a constitutional violation, it is necessarily operating with uncertainty. As the dissent rightly and repeatedly points out, the task, beyond eliminating the constitutional violation, is to ascertain, as best it can, the will of the Legislature. E.g., *post* at 10 ("The bottom-line question concerning severability is always one of legislative intentions."). But a court is only approximating the will of the Legislature. The Legislature can tell us its actual will. In *Lockridge*, this Court decided, as was its duty then, on a remedy that it believed best effectuated the Legislature's intent. If it erred, the Legislature is empowered to install any sentencing scheme that it considers best for the Michigan criminal justice system, limited only by the state and federal constitutions.[8] It is certainly better equipped than this Court to weigh the policy options.

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[7] Nearly 50,000 felony offenders are convicted, and sentenced, each year in Michigan. See Mich Dep't of Corrections, *2015 Statistical Report*, p A-2, available at <https://www.michigan.gov/documents/corrections/MDOC_2015_Statistical_Report_-_2016.08.23_532907_7.pdf> (accessed July 12, 2017) [https://perma.cc/34BD-NKKH] (reporting that from 2011 to 2015 there were, on average, 49,800 felony offenders convicted each year).

[8] The dissent criticizes my adherence to *Lockridge*'s remedial holding, and my understanding of the separation of powers, citing *People v Tanner*, 496 Mich 199, 251; 853 NW2d 653 (2014). In *Tanner*, this Court stated:

> When questions before this Court implicate the Constitution, this Court arguably has an even greater obligation to overrule erroneous

> precedent. . . . This is because the policy of stare decisis is at its weakest when we interpret the Constitution because our interpretation can be altered only be constitutional amendment or by overruling our prior decisions. [*Id*. (quotation marks and citations omitted.)]

The dissent's reliance on *Tanner* is curious because the *remedial* holding in *Lockridge* did not "interpret the Constitution." Instead, it rendered the guidelines fully advisory because the Court believed that remedy best effectuated the legislative will. See, e.g., *Lockridge*, 498 Mich at 390 ("Opening up only one end of the guidelines range, even if curing the constitutional violation, would be inconsistent with the Legislature's expressed preference for equal treatment."). Once the Sixth Amendment violation in *Lockridge* was identified, the remedial question was one of legislative intent, a point that the dissent makes repeatedly. E.g., *post* at 10 ("The bottom-line question concerning severability is always one of legislative intentions."); *post* at 20 ("In determining the appropriate remedy, the dominant factor is . . . to assess which remedy is the most consistent with the Legislature's intentions."); *post* at 30 ("[W]hen we are forced to engage in the instant process of severance under MCL 8.5, as we are here, we must remember that it is the Legislature's intentions . . . to which we are striving to give effect." (emphasis omitted)).

The dissent's conviction that *Lockridge* erred in its remedial holding seems to have caused the dissent to confuse the constitutional and statutory (or "legislative intent") questions in this case. No legislature could authorize a court to take an unconstitutional action. And so, if "striking down a greater part of the guidelines than was necessary to remedy the Sixth Amendment violation" were itself unconstitutional, then whether to do just that (the *Lockridge* majority's remedy), or instead to retain as much as was constitutional (the dissent's preferred remedy), would not be a question of legislative will but of constitutional law. And it should go without saying that even if the majority misconstrued that will as expressed in a statute, MCL 8.5, that would be a problem of statutory, not constitutional, construction.

If the *Lockridge* remedy were based on this Court's construction of the Constitution, the Legislature would be powerless to alter our course. But, as the dissent and I agree, it is not. The Legislature remains at liberty to correct us in any way that does not contravene *Lockridge*'s only constitutional holding: that the application of Michigan's mandatory guidelines to increase sentencing ranges based on facts not found by a jury violated the Sixth Amendment. Accord *post* at 37 n 30 ("It should clearly be understood by our Legislature that, notwithstanding that aspects of its guidelines have been struck down by the Court, it retains the constitutional authority to restore such aspects to the law of this state that are not incompatible with *Lockridge*.").

The ball is in the Legislature's court. *Booker*, 543 US at 265. In the meantime, I join the majority's opinion in full.

Joan L. Larsen
David F. Viviano

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

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ALEXANDER JEREMY STEANHOUSE,

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v

Nos. 152946, 152947, and 152948

MOHAMMAD MASROOR,

Defendant-Appellee.

MARKMAN, C.J. (*concurring in part and dissenting in part*).

In *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015), this Court held that Michigan's statutory sentencing guidelines were unconstitutional for violating a defendant's Sixth Amendment right to a jury trial; the remedy set forth was to make the guidelines advisory or optional.[1] However, *Lockridge* was not entirely clear regarding whether the guidelines were always to be advisory or whether they could remain mandatory in limited respects. Today, this Court clarifies that the guidelines are *never* mandatory as they were intended by the Legislature *always* to be; instead, the guidelines are now always advisory, *regardless of whether a mandatory application of the guidelines would violate the Sixth Amendment*. I respectfully dissent from this part of the Court's opinion.[2] I would not hold that the guidelines are always advisory; instead, I

[1] In other words, although trial courts must continue to score offense variables and to "take into account when sentencing" the resulting guidelines range, they are no longer required to sentence within that range. Thus, legislatively determined guidelines that had previously been binding-- at least in the absence of a determination subject to appellate review that "substantial and compelling" factors existed to support a specific sentence above or below the guidelines range-- are now replaced by nonbinding or "advisory" guidelines.

[2] This Court today also reaffirms its holding in *Lockridge* that a defendant receiving a

would hold that the guidelines remain mandatory to the extent that a mandatory application does not run afoul of a defendant's Sixth Amendment right to a jury trial, as interpreted by this Court in *Lockridge* itself.[3]

This Court possesses the authority to strike down statutes under its power of judicial review only to the extent that they are unconstitutional. The corollary proposition is that to the extent a statute is *not* unconstitutional-- specifically, in this case,

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sentence that represents an upward departure is not entitled to a *Crosby* remand, see *United States v Crosby*, 397 F3d 103 (CA 2, 2005), and holds that "the proper inquiry when reviewing a [departure] sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990) . . . ." I concur in these two holdings.

[3] I dissented in *Lockridge* because I did not believe that the sentencing guidelines violate the Sixth Amendment, *Lockridge*, 498 Mich at 400-465 (MARKMAN, J., dissenting). Although I continue to believe that to be the case, my position did not prevail, and I write here in a manner that fully accepts *Lockridge*'s holding that the guidelines *do* violate a defendant's Sixth Amendment right to a jury trial to the extent that the guidelines require judicial fact-finding beyond facts admitted by the defendant, or found by the jury, to score offense variables that mandatorily increase the floor of the guidelines' minimum sentence range. However, I take this opportunity to note that if the United States Supreme Court does not share the view that Michigan's guidelines violate the Sixth Amendment, it would be beneficial to this state, and perhaps to other states that have similar guidelines, for it to provide greater clarity on this issue. This Court in *Lockridge* specifically relied on United States Supreme Court caselaw to conclude that our guidelines are unconstitutional. See *Lockridge*, 498 Mich at 364 ("We conclude that the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient."). If *Apprendi* as extended by *Alleyne* is, in fact, inapplicable to Michigan's pre-*Lockridge* guidelines system, the Supreme Court might wish to avail itself of an opportunity to so instruct us because this Court's contrary conclusion in *Lockridge* has resulted in the effective nullification and transformation of a criminal sentencing system adopted by the people of this state and their Legislature intended to render criminal sentencing more fair, more consistent, and more equitable. And yet that system has now been deemed to be unconstitutional.

to the extent that mandatory application of the guidelines does not violate the Sixth Amendment-- this Court lacks the authority to strike down the mandatory application of the guidelines. Because there are multiple alternative remedies that are more consistent with that proposition and more consistent with the Legislature's intentions to impose mandatory guidelines than the majority's "fully advisory" remedy,[4] I conclude that the majority here strikes down far more of the sentencing guidelines than is necessary to render them constitutional, and thus acts beyond its authority. And I am not alone in this regard as, quite remarkably, *all* of the parties and *all* of the amici-- prosecutors, defendants, the Attorney General and criminal defense organizations alike-- are in full agreement that this Court should not adopt a "fully advisory" remedy.[5]

The ironic result of the Court's decision today is the effective reversion to the system this state had *before* the Legislature adopted its statutory sentencing guidelines: a system in which trial courts were unconstrained by guidelines, one that in the Legislature's judgment resulted in overly broad exercises of judicial discretion and often-unjustified disparities in sentencing. See *Lockridge*, 498 Mich at 415 n 8, 462 n 40 (MARKMAN, J., dissenting). Such a system was overturned in 1998 when the Legislature enacted the mandatory guidelines rejected in their entirety today. As a result, Maximum Mike will once again be empowered to sentence defendants as high as he chooses and Lenient Larry will once again be empowered to sentence defendants as low as he chooses

[4] The majority also refers to this as an "advisory in all applications" remedy.

[5] Possibly, these parties and amici might be joined in their opposition to a "fully advisory" remedy by at least a few members of the Legislature in which, in 1998, the House and Senate voted 95-0 and 34-2 respectively in support of mandatory guidelines.

because they will now once again be unconstrained by the legislative reforms implemented to impose a measure of equity from case to case and from judge to judge. As a result, criminal defendants' sentences will once again be more significantly a function of *who* the sentencing judge is rather than of the *gravity* of the defendant's conduct and criminal history. Defendants who have committed similar crimes and who have similar criminal histories will be meted out increasingly disparate sentences, just as they were before the enactment of the guidelines.

This undoing of the Legislature's mandatory guidelines system is done in the name of the defendant's jury-trial rights. Whatever the nature of the disagreement I expressed concerning this rationale in *Lockridge*, what seems inarguable to me is the following. When there is *no* such constitutional consideration-- when even *Lockridge* acknowledges that there is no issue of defendant's jury-trial rights-- what conceivable authority does this Court have to nullify legislative efforts to limit judicial sentencing discretion and thereby seek to render criminal sentences more fair and consistent? We simply have no warrant to return defendants to a sentencing system in which they are subject to a largely unconstrained discretion on the part of individual trial judges when the Legislature has chosen to do otherwise *and* when there are no constitutional barriers to what the Legislature has chosen to do.

I. ANALYSIS

In *Lockridge*, 498 Mich at 364, this Court held that the statutory sentencing guidelines violate the Sixth Amendment to "the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score

offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range . . . ." To remedy this asserted constitutional violation, the Court struck down "MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory," as well as the "requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *Id*. at 364-365. Today, the Court clarifies that the guidelines are *never* mandatory; rather, they are now *always* advisory, *regardless* of whether the OVs were scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt-- thus, in essence, *regardless* of whether they are unconstitutional. For the reasons discussed in this opinion, I do not believe that the Court has the authority to adopt this remedy.

A. SEPARATION OF POWERS

"The powers of government are divided into three branches: legislative, executive and judicial," and "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. The Legislature is to exercise the "legislative power" of the state, Const 1963, art 4, § 1; the Governor is to exercise the "executive power," Const 1963, art 5, § 1; and the judiciary is to exercise the "judicial power," Const 1963, art 6, § 1. The "legislative power is the power to make laws." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98; 754 NW2d 259 (2008). The "judicial power" is the power to "interpret[] the law . . . ." *Id*. "In accordance with the constitution's separation of

powers, this Court cannot revise, amend, deconstruct, or ignore [the Legislature's] product and still be true to our responsibilities that give our branch only the judicial power." *Id*. (quotation marks and citation omitted; alteration in original). However, because "the Legislature cannot . . . 'trump' the Michigan Constitution," *Sharp v Lansing*, 464 Mich 792, 810; 629 NW2d 873 (2001), and "it is unquestioned that the judiciary has the power to determine whether a statute violates the constitution," *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 403 n 9; 578 NW2d 267 (1998), this Court can, of course, strike down statutes to the extent that they are unconstitutional. Nevertheless, as this Court observed in *Sears v Cottrell*, 5 Mich 251, 259 (1858):

> No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown; and *it is only when they manifestly infringe some provision of the constitution that they can be declared void for that reason*. In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act. [Some emphasis added.][6]

That is, this Court only has the authority to strike down statutes to the extent that they are unconstitutional. As the concurring Court of Appeals opinion in *People v Lockridge*, 304 Mich App 278, 316; 849 NW2d 388 (2014) (SHAPIRO, J., concurring), recognized, "when

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[6] The majority contends that *Sears* does not "stand[] for the proposition that we only possess the authority to strike down statutes to the extent they are unconstitutional." However, *Sears*, 5 Mich at 259, specifically stated that "it is *only when* [statutes] manifestly infringe some provision of the constitution that they can be declared void for that reason." (Emphasis added.) If we can "only" declare statutes void "when they manifestly infringe some provision of the constitution," then does it not follow that the Court *cannot* declare statutes void when they do *not* manifestly infringe some provision of the constitution?

ruling a portion of an act unconstitutional, courts are required, when possible, to invalidate only the portions of the act necessary to allow it to pass constitutional muster." We do not have the authority to strike down statutes merely because we disagree with their wisdom or prudence. As this Court explained in *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004):

> Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.

This "separation of powers" principle, i.e., that this Court has the authority to strike down statutes only to the extent that they are unconstitutional, has been codified in MCL 8.5, which provides:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be *inconsistent with the manifest intent of the legislature*, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity *shall not affect* the remaining portions or applications of the act which can be *given effect* without the invalid portion or application, provided such remaining portions are not determined by the court to be *inoperable*, and to this end acts are declared to be severable. [Emphasis added.][7]

[7] Although the majority is correct that the *parties* do not expressly raise a "constitutional separation-of-powers concern," they do raise MCL 8.5, which is an obvious codification of the separation-of-powers principle that this Court has the authority to strike down statutes only to the extent that they are unconstitutional. See Brief Amicus Curiae, Criminal Defense Attorneys of Michigan (CDAM), p 28 ("MCL 8.5 is simply an additional codification of the principle that it is the Legislature's responsibility to make law and the Court's responsibility to interpret it."). Furthermore, CDAM did expressly

In other words, this Court can strike down statutes only to the extent that they are unconstitutional, and the constitutional portions of the statutes must be "given effect" provided that they are not "inoperable" and not "inconsistent with the manifest intent of the legislature." That is, "by enacting MCL 8.5, the Legislature has informed us that when we sever unconstitutional language, this Court should leave intact all other language, as long as that language is 'operable' and not 'inconsistent with the manifest intent of the legislature.' " *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 349 n 56; 806 NW2d 683 (2011). Indeed, "[t]his Court has long recognized that '[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand.' " *Id*. at 345 (citation omitted).[8]

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raise this constitutional separation-of-powers concern in its amicus curiae brief. *Id*. at 31 ("The problem with *Lockridge* . . . is that the Court dismantled more of the sentencing guidelines than the Sixth Amendment requires, contrary to MCL 8.5 and the *separation of powers doctrine* . . . .") (emphasis added). In addition, the defendant in *Lockridge* raised the separation-of-powers doctrine. See Defendant's Brief on Appeal, *People v Lockridge* (Docket No. 149073), p 27 (The jury remedy "is also consistent with well-established rules of statutory construction, and it best respects the separation of powers and duties between the Legislature and Judiciary."), and p 35 ("Separation of powers principles further compel this Court to reject Justice Breyer's *Booker* remedy."). Finally, even if *no* party had raised the separation-of-powers principle, this Court has an independent obligation to adopt a remedy that conforms with that principle. See, e.g., Const 1963, art 3, § 2. That is, this Court does not have the authority to displace the Legislature's authority simply because no party expressly asked the Court not to breach the separation-of-powers principle.

[8] *Lockridge* did not address either the separation-of-powers doctrine or MCL 8.5 (even though the parties in *Lockridge* did), and the majority in the present case still does not address the separation-of-powers doctrine and only addresses MCL 8.5 in a passing and cursory fashion. However, it is these constitutional and statutory considerations that are

The bottom-line question concerning severability is always one of legislative intentions. Whenever this Court strikes down any portion of a statute for its lack of constitutionality, we are obviously doing something that is inconsistent with the Legislature's intentions. However, that is the *singular* circumstance in which we may act incompatibly with the Legislature's intentions (only because that is consistent with the *people's* intentions when ratifying our Constitution), but in doing so we must ensure that we are only acting incompatibly with the Legislature's intentions to the extent that it is *necessary* for us to do so, i.e., to the extent required by the Constitution. As this Court has explained:

> [*W*]*henever* the Legislature enacts legislation that this Court deems unconstitutional, it is our responsibility to rectify that unconstitutionality, notwithstanding the Legislature's intent. The next question for any Court confronted with such a situation is to determine whether the unconstitutional language can be severed from the rest of the act without undermining the act, and in this regard, the Legislature's intent *is* controlling. [*Id*. at 349 n 56.]

In other words, when this Court determines that a statute is unconstitutional, it *must* strike down that statute to the extent it is unconstitutional, but at the same time it *must* preserve whatever portions are not unconstitutional in a manner most consistent with the Legislature's intentions.[9]

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central to this case.

[9] We must preserve whatever portions of a statute are not unconstitutional in a manner that is *most* reasonably consistent with the Legislature's intentions because our dual responsibilities are to ensure that a statute does not violate the Constitution and to ensure that the statute is being interpreted as consistently with the Legislature's intentions as possible without breaching the Constitution.

B. "FULLY ADVISORY" REMEDY

In *Lockridge*, 498 Mich at 364, we held that the sentencing guidelines are unconstitutional to "the extent to which [they] *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range . . . ." The question in the instant case is whether the majority's remedy of rendering the mandatory guidelines "fully advisory" or "advisory in all applications" constitutes the remedy that is most reasonably consistent with the Legislature's intentions or rather strikes down more of the guidelines than is necessary to render them constitutional. For the following reasons, I believe that the majority strikes down considerably more of the guidelines than is necessary.

In 1983, this Court promulgated *judicial* sentencing guidelines by administrative order. "However, because the recommended ranges found in the judicial guidelines were not the product of legislative action, a sentencing judge was not necessarily obliged to impose a sentence within those ranges." *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). Finally, in 1998, the Legislature enacted statutory sentencing guidelines. MCL 777.1 *et seq*. Unlike the judicial guidelines, the statutory guidelines had the full force of law and were mandatory. See MCL 769.34(2) ("Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 *shall* be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.") (emphasis added).

As *Lockridge*, 498 Mich at 390, itself recognized, "[t]he legislative intent in this provision is plain: the Legislature wanted the applicable guidelines minimum sentence range to be mandatory in all cases (other than those in which a departure was appropriate) . . . ." Accordingly, rendering the statutory guidelines advisory in all cases is, I believe, directly contrary to the Legislature's intentions. Indeed, the Legislature has already considered and rejected the very system the majority adopts today.[10]

Of course, as discussed earlier, anytime this Court strikes down a portion of a statute as unconstitutional, it is doing at least *something* that is contrary to the Legislature's intentions. Therefore, the appropriate question is whether there are other available remedies that are somewhat *less* inconsistent with the Legislature's intentions than the majority's "fully advisory" remedy. If there are, then the majority strikes down more of the Legislature's guidelines than is necessary to render them constitutional, which, as discussed, this Court lacks the authority to do. For the reasons that follow, I believe that there are actually multiple alternative remedies that are more consistent with the Legislature's intentions than the "fully advisory" remedy.[11] Indeed, "[u]nlike a rule

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[10] As appellate defense counsel in *Lockridge* explained at oral argument:

> The key achievement of the sentencing guidelines is that they remove disparity in these cases. Moving to advisory guidelines would be completely contrary to . . . the key achievement of this complicated legislative scheme.

Appellate defense counsel for Steanhouse also made this point at oral argument, stating, "What this Court chose, not only, in a sense – you know, I don't want to be disrespectful, but – mocked the legislature, because you chose to go back to the very system that they had chosen deliberately to abandon."

[11] See CDAM brief, p ix ("*Lockridge*'s remedy undermines the Legislature's intent more

that would merely require judges and prosecutors to comply with the Sixth Amendment, the Court's systematic overhaul turns the entire system on its head *in every case*, and, in so doing, runs contrary to the central purpose that motivated Congress to act in the first instance." *United States v Booker*, 543 US 220, 302; 125 S Ct 738; 160 L Ed 2d 621 (2005) (Stevens, J., dissenting).

C. ALTERNATIVE REMEDIES

1. ADVISORY FLOOR/MANDATORY CEILING[12]

In *Lockridge*, 498 Mich at 364, 373, this Court held that the guidelines are unconstitutional only to the extent that judicial fact-finding is used to mandatorily "increase the *floor* of the guidelines minimum sentence range," because it is "the *floor* of the guidelines range [that] compels a trial judge to impose a mandatory minimum sentence beyond that authorized by the jury verdict." (Emphasis added.) That is, according to *Lockridge*, 498 Mich at 388-389, 376 n 15, "the Sixth Amendment does not permit judicial fact-finding to score OVs to increase the *floor* of the sentencing guidelines range," but "the *top* of the guidelines range does not implicate the Sixth Amendment . . . ." (Emphasis added.) Given that the top of the guidelines range does

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than is necessary to remedy the Sixth Amendment concern raised in that case."); *id*. at 28-29 ("By . . . freeing sentencing courts of important limitations on their discretion even where it was not necessary to do so, the Court encroached upon the legislative sphere."); *id*. at 31 ("The problem with *Lockridge* . . . is that the Court dismantled more of the sentencing guidelines than the Sixth Amendment requires, contrary to MCL 8.5 and the separation of powers doctrine . . . .").

[12] Defendant Steanhouse argues in favor of this remedy. Although the majority in *Lockridge* addressed this remedy, the majority in the instant case does not, other than to indicate that it was rejected in *Lockridge*.

not implicate the Sixth Amendment, this Court lacks the authority to strike down the mandatoriness of the top of the guidelines range. In other words, given that the majority acknowledges that the Legislature intended the top of the guidelines to be mandatory, see *id*. at 390 ("The legislative intent in this provision is plain: the Legislature wanted the applicable guidelines minimum sentence range to be mandatory in all cases (other than those in which a departure was appropriate) at both the top and bottom ends."), and the majority acknowledges that keeping the top of the guidelines mandatory does not violate the Constitution, see *id*. at 376 n 15 ("the top of the guidelines range does not implicate the Sixth Amendment"), the Court lacks the authority to disturb the Legislature's intentions to have the top of the guidelines be mandatory.

The portion of the guidelines deemed to be unconstitutional and thus invalid in *Lockridge* was exclusively that portion involving the mandatory floor of the guidelines range. However, MCL 8.5 provides that "such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application . . . ." Therefore, the invalidity of the mandatory floor of the guidelines range "shall not affect" the mandatory ceiling of the guidelines range. "[B]y enacting MCL 8.5, the Legislature has informed us that when we sever unconstitutional language, this Court should leave intact all other language, as long as that language is 'operable' and not 'inconsistent with the manifest intent of the legislature.' " *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 349 n 56. It is indeed possible to make the floor of the guidelines range advisory but to retain the ceiling of the guidelines range as mandatory. That is, such an understanding of the guidelines is hardly "inoperable," i.e., it is fully "capable of functioning," *Midland Cogeneration Venture*

Limited Partnership v Naftaly, 489 Mich 83, 96; 803 NW2d 674 (2011), citing *Maki v East Tawas*, 385 Mich 151, 159; 188 NW2d 593 (1971), and the majority does not state otherwise.

This construction of the guidelines is also not "inconsistent with the manifest intent of the legislature." MCL 8.5. First, "there is no indication in the act that the drafters of [the guidelines] intended a different severability rule than MCL 8.5 to apply." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 346. And second, "it seems clear . . . that the Legislature would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act." *Id*. (quotation marks and citation omitted). Although the Legislature obviously intended both the bottom and the top of the guidelines range to be mandatory, the question is whether the Legislature would still have adopted the guidelines had it known that it could only make the top of the guidelines mandatory, and I believe that it would have.

As already discussed, before the Legislature enacted the statutory sentencing guidelines, we had judicial sentencing guidelines. The main difference between these is that the former were only advisory and the latter were mandatory. Therefore, the most obvious and straightforward purpose of the statutory guidelines was to constrain the unchecked discretion of trial courts in such a way as to render criminal sentences across the state, and across courtrooms, less disparate and more fair. See *People v Babcock*, 469 Mich 247, 267 n 21; 666 NW2d 231 (stating that "[t]he Legislature adopted these guidelines intending to reduce unjustified disparities in sentencing," citing 1994 PA 445, § 33(1)(e)(*iv*), which states that sentencing guidelines shall "[r]educe sentencing

disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences"). The Legislature did this by adopting a scheme in which the trial court was required to sentence defendants within a sentencing range and only allowed to depart either below or above the range if "substantial and compelling" reasons for that specific departure could be articulated. MCL 769.34(3). This would prevent Maximum Mike from sentencing too high or Lenient Larry from sentencing too low. The question is whether, had the Legislature known that it could *only* prevent Maximum Mike from sentencing too high, it would have still enacted the guidelines. I believe that it would have because retaining the top of the guidelines as mandatory would still to a significant extent render criminal sentences less unjustifiably disparate and more fair by constraining the discretion of trial courts. There would remain some reasonable semblance of a guidelines range-- a narrowed but still consequential realm within which the sentencing discretion of judges would be replaced by legislative judgments.

Before the enactment of the statutory sentencing guidelines, there were, from one point of view, essentially two problems: excessively low sentences and excessively high sentences. From this perspective, the question posed in this case is whether, had the Legislature been required to choose between addressing only *one* of these two problems or addressing *neither*, what would it have done? I cannot imagine that the Legislature would not have sought to ameliorate at least one of these problems, in particular because to have done so would have done nothing to worsen the other; it simply would have left the other problem unaddressed, just as it had been before the statutory guidelines were enacted in the first place. That is, presumably the Legislature would have preferred to

address one of two problems rather than addressing zero of two problems. Moreover, even if one looks at the enactment of the statutory guidelines as addressing only a single larger problem-- excessive judicial sentencing discretion and unjustified sentencing disparities-- I believe that the Legislature would have chosen to solve the problem to some *limited* extent rather than to *no* extent at all.

Perhaps even more significantly, there are almost certainly far more judges within the state judiciary disposed to mete out sentences above rather than below the guidelines range; thus, rendering only the ceilings and not the floors of the guidelines mandatory would solve by far the greatest number of the unjustified sentencing disparities that the Legislature sought to remedy by adopting the guidelines in the first place.[13] In other words, although the extent to which the guidelines addressed unjustified sentencing disparities would "be diminished to a small degree as the result of the severance, what [would] remain [would] nonetheless enable[] the Legislature to realize its stated objective" in large part. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 346. By contrast, the majority's "fully advisory" remedy will not allow the Legislature to realize its stated objective *to any degree* because the guidelines will *never* be mandatory and, as a result, trial courts will be enabled to

[13] Both the prosecutor and defense counsel for Steanhouse indicated at oral argument that the heavily preponderant number of departures are above, rather than below, the guidelines range. In my own experience on the Court, the number of upward departures from the guidelines range is many times greater than the number of downward departures.

sentence defendants above the top of the guidelines without ever having to articulate any "substantial and compelling" reason for doing so.[14]

Obviously, the Legislature intended to make both the top and the bottom of the guidelines range mandatory. Then, in *Lockridge*, we held that making the bottom of the guidelines range mandatory violates the Constitution, and "whenever the Legislature enacts legislation that this Court deems unconstitutional, it is our responsibility to rectify that unconstitutionality, notwithstanding the Legislature's intent," *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 349 n 56 (emphasis omitted). "The next question for any Court confronted with such a situation is

[14] In other words, defendants will now be incarcerated for lengthier periods than the Legislature intended, but at least they will be able to take comfort in knowing this to be done in exchange for their Sixth Amendment right to a jury trial (or at least this Court's interpretation of that right) being better protected. See my dissent in *Lockridge*, 498 Mich at 457-462, for a more thorough discussion of the notable ironies of the majority's conclusion that the guidelines must be rendered advisory in order to protect defendants' Sixth Amendment rights. As counsel for Steanhouse himself put it at oral argument, "You know, from the defendant's perspective, who wants [this] Sixth Amendment right?" Given that defendants here are imploring this Court to *not* "protect" them in this manner, one might wonder whether the majority's is indeed a correct construction of the constitutional "protection" our founders intended to provide defendants. See Steanhouse Brief, p 3 ("A remedy of a fully advisory guidelines scheme is not constitutionally mandated and it is worse than the disease of the Sixth Amendment violation it sought to cure. The Sixth Amendment is supposed to be a shield for the defendant, not a sword used to harm him."). See also *Booker*, 543 US at 304 (Scalia, J., dissenting) ("The majority's remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing."); *id*. at 313 (Thomas, J., dissenting) ("Rather than applying the usual presumption in favor of severability, and leaving the Guidelines standing insofar as they may be applied without any constitutional problem, the remedial majority converts the Guidelines from a mandatory system to a discretionary one. The majority's solution fails to tailor the remedy to the wrong, as this Court's precedents require.").

to determine whether the unconstitutional language can be severed from the rest of the act without undermining the act, and in this regard, the Legislature's intent is controlling." *Id*. (emphasis omitted). For the reasons discussed earlier, I believe that making only the bottom of the guidelines range advisory, which according to *Lockridge* is constitutionally required, rather than making *both* the bottom and the top of the guidelines range advisory, which is not constitutionally required, is more consistent with the Legislature's intentions.

While the majority in *Lockridge* observed that this proposed remedy "is a less disruptive remedy that is fairly closely tailored to the constitutional violation," it still declined to adopt it because "[o]pening up only one end of the guidelines range, even if curing the constitutional violation, would be inconsistent with the Legislature's expressed preference for equal treatment" and because "it would require a significant rewrite of the statutory language to maintain the mandatory nature of the guidelines ceiling but render the guidelines floor advisory only." *Lockridge*, 498 Mich at 390.

Concerning the first of the majority's objections, although opening up only one end of the guidelines range would be inconsistent with the Legislature's explicit preference for equal treatment of these ends, opening up both ends of the guidelines range to mere "advisory" application is also inconsistent with the Legislature's expressed preference for mandatory guidelines. And, for the reasons set forth earlier, I believe that the Legislature would clearly have preferred to make only the bottom end of the guidelines range advisory, a system in which judicial discretion would at least be limited

on *some* occasions, rather than to make both the bottom and the top of the guidelines range advisory, a system in which the guidelines would never limit judicial discretion.[15]

Concerning the second of the majority's objections, although this alternative remedy does require the Court to alter more words in the statutes than the majority's approach, I also do not believe that is a particularly relevant consideration in choosing the most appropriate remedy. In determining the appropriate remedy, the dominant factor is not to calculate which remedy requires the Court to alter the fewest number of words in the statute; rather, it is to assess which remedy is the most consistent with the Legislature's intentions. As an illustration, adding the word "not" to a statute that provides that somebody "shall" do something might constitute a minimalist change in regard to the number of words changed; however, it would almost certainly constitute a maximalist change in regard to maintaining consistency with the Legislature's intentions. Largely the same is true in the instant case. *Lockridge* changed "shall" to "may" across the board because it involved the "least judicial rewriting of the statute . . . ." *Id*. at 391. However, while changing "shall" to "may" across the board may consume less paper and ink, it is not the remedy most consistent with the Legislature's intentions. Instead, for the reasons earlier stated, changing "shall" to "may" with regards to *only* the bottom of the guidelines range is more consistent with the Legislature's intentions, whether defined in

[15] While both the majority and I are engaged necessarily in speculation concerning the Legislature's hypothetical intentions had it been confronted at the time of its enactment of the guidelines with the severance decision made necessary by *Lockridge*, it is clearly the majority that proposes to invalidate a greater part of the *non-unconstitutional* provisions of the Legislature's enactment than do I and thus would seem to bear the burden of justification of this course of action.

terms of limiting extreme sentences or in terms of checking judicial discretion and disparate criminal sentencing. It is also more consistent with this Court's authority to strike down statutes only to the extent that they are unconstitutional.

2. MANDATORY FLOOR/MANDATORY CEILING[16]

Another alternative remedy represents a slight variation of the first alternative remedy described earlier. Under this remedy, the ceiling of the guidelines would always be mandatory just as in the first remedy, but the floor of the guidelines would also be mandatory, although the floor would have to be determined absent judicial fact-finding. A hypothetical example might be helpful to explain this remedy. If the jury's verdict or defendant's admissions supported a guidelines range of 10-20 months, but the judge-found facts supported a range of 60-100 months, the mandatory guidelines range would be 10-100 months. In other words, the trial court could sentence anywhere within that expanded range without having to articulate substantial and compelling reasons for doing so. This remedy would fully address the constitutional problem because judicial fact-finding would not be used to increase the mandatory floor of the guidelines range, yet it is also more consistent with the intentions of the Legislature than the majority's "fully advisory" remedy because both the bottom and the top of the guidelines would be mandatory.[17] It is also an "operable" remedy because it is fully "capable of functioning."

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[16] CDAM argues in favor of this remedy, and in *Lockridge*, the Wayne County Prosecuting Attorney argued in support of it. The majority, however, did not address this proposed remedy in either *Lockridge* or in the instant case.

[17] Just as with the first alternative remedy, this remedy would prevent Maximum Mike from sentencing too high, but, unlike the first remedy, it would also prevent Lenient Larry from sentencing too low (or at least lower than the modified floor of the guidelines

Midland Cogeneration, 489 Mich at 96. That is, trial courts are altogether capable of determining the top of the guidelines by relying on judicial fact-finding and determining the bottom of the guidelines without relying on judicial fact-finding. The fact that this might be a slightly more time-consuming process does not render it "inoperable," and the majority does not argue that it does. Many of the fair processes guaranteed by the Constitution are time-consuming, but while this may render these processes more "difficult" or "burdensome" in some regards, it does not render them "inoperable."

3. ADVISORY IF JUDGE-FOUND FACTS/MANDATORY IF NOT[18]

Still another potential remedy is to render the guidelines advisory when the trial court engages in judicial fact-finding to score OVs that increase the guidelines range, but render the guidelines mandatory when the trial court does not engage in judicial fact-finding to score OVs that increase the guidelines range. *Lockridge* held that the guidelines are unconstitutional to the extent that they require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score OVs that mandatorily increase the guidelines range. In order to remedy this constitutional defect, *Lockridge* rendered the guidelines advisory, and now the majority asserts that the guidelines are

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range as determined without reliance on judge-found facts). Given that this alternative remedy would allow both the top and the bottom of the guidelines to remain mandatory and thus would not "[o]pen[] up only one end of the guidelines range," *Lockridge*, 498 Mich at 390, which is what the majority in *Lockridge* did not like about the first alternative remedy, I do not know why the majority did not even address this proposed remedy in *Lockridge* or why the majority in the instant case still does not address this remedy.

[18] The prosecutor and the Attorney General argue in favor of this remedy.

"fully advisory" or "advisory in all applications." In other words, even when a mandatory application of the guidelines would clearly not violate the Sixth Amendment, i.e., when *no* judicial fact-finding occurs that increases the guidelines range, the majority holds that the guidelines are nonetheless advisory. Respectfully, I do not believe that the Court has the authority to do this. As discussed earlier, this Court only has the authority to strike down a statute to the *extent* that it is unconstitutional. However, in this case, although abiding by the Legislature's command to apply the guidelines on a mandatory basis does not violate the Sixth Amendment when there has been no judicial fact-finding that increases the guidelines range, the majority nevertheless strikes down the Legislature's command to apply the guidelines on a mandatory basis in all circumstances, including those in which there has been no judicial fact-finding that increases the guidelines range.

Given that mandatory application of the guidelines does not violate the Sixth Amendment when there has been no judicial fact-finding that increases the guidelines range, the majority once again lacks the authority to strike down this mandatory application of the guidelines. The majority asserts that it does possess this authority because a bifurcated mandatory/advisory guidelines system would be "inoperable." It would be "inoperable," contends the majority, because it would be difficult in some cases to determine whether the trial court had engaged in judicial fact-finding or whether the trial court only relied on the defendant's admissions[19] or the jury's findings in scoring the

[19] The majority contends that the "distinction between judge-found facts and facts sufficiently admitted by a defendant that they may be used to increase the defendant's sentence is unclear." Undoubtedly, this is true to some extent, but equally undoubtedly, it

OVs.[20] However, just because a legislative command may be difficult to apply in some circumstances does not render it "inoperable." We have defined "inoperable" as "incapable of functioning." See *Midland Cogeneration*, 489 Mich at 96. While the majority contends that this remedy might result in increased numbers of appeals and elements of legal uncertainty, that is hardly tantamount to concluding that this remedy is "incapable of functioning" or "inoperable." This Court does not have the authority to strike down statutes just because it would prefer a less difficult or onerous approach in some measure. The Legislature enacted a mandatory guidelines system, and this Court has an obligation to give as much reasonable effect to this legislative command as possible under the Constitution.

The essentially bifurcated mandatory/advisory guidelines remedy does not violate the Constitution because the guidelines would be advisory whenever judicial fact-finding increased the guidelines range, which is the only situation in which the mandatory

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is no more true than that countless other routine legal distinctions are also sometimes unclear. Once again, this observation bears little relevance to what legal obligations are genuinely "inoperable." Moreover, in its ruminations concerning judge-found facts in *Apprendi* and *Alleyne*, the United States Supreme Court discerned no particular need to opine on any difficulties in distinguishing these concepts. Also noteworthy is *People v Collins*, 500 Mich 930 (2017), in which this Court ordered oral argument on the application and directed the parties to brief this very issue. Therefore, it is to be hoped that any remaining "unclarity" regarding this matter will be promptly addressed by the Court before the end of the next term.

[20] The majority contends that "whether a jury's 'findings' on a point of fact are sufficiently conclusive to determine that it 'found' that fact beyond a reasonable doubt is not always evident." Doubtlessly so. However, courts are routinely required to make determinations that are "not always plain." Courts are not "incapable" of making such determinations, and thus this proposed remedy is again hardly "inoperable." See *Midland Cogeneration*, 489 Mich at 96.

guidelines violate the Sixth Amendment according to *Lockridge*, and it would be more consistent with the Legislature's intentions than the majority's "fully advisory" remedy because whenever judicial fact-finding did *not* increase the guidelines range, the guidelines would be mandatory, which is what the Legislature clearly intended.[21] In

[21] The majority contends that "the [prosecutor's] proposed bifurcated system has a bit of a '[w]hat a neat trick' flair: two mandatory components are unconstitutional when used in tandem until . . . they aren't." However, rather than this being a "neat trick" of some kind, the proposal is the straightforward and direct result of the majority's holding that "[w]hat made the guidelines unconstitutional . . . was the *combination* of the two mandates of judicial fact-finding and adherence to the guidelines." (Emphasis added.) If it is the "combination" of these two "mandates" that makes the guidelines unconstitutional, removing a single one of these "mandates" presumably would eliminate the constitutional problem. Contrary to the majority's characterization, this is not a matter of any sort of "trickery," but rather a matter of inexorable logic: $1 + 1 = 2 =$ unconstitutional, but $1 + 0 \neq 2 \neq$ unconstitutional.

Similarly, the majority contends that "[s]uch an approach certainly seems to at least undervalue the constitutional principle on which *Booker* was decided." However, given that *Booker*, 543 US at 267, held in the companion case regarding defendant Ducan Fanfan that a "sentence . . . authorized by the jury's verdict," i.e., one not based on judicial fact-finding, "does not violate the Sixth Amendment," I fail to see how this approach in any way "undervalue[s]" any such constitutional principle. See also *Lockridge*, 498 Mich at 394-395, in which this Court held that in "cases in which (1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced," i.e., judicial fact-finding did not increase the defendant's guidelines range, "the defendant suffered no prejudice from any error . . . ."

Finally, the majority contends that "by delaying a determination of the guidelines' mandatory or advisory nature until sentencing, the proposed system would give no weight to the notice interests protected by *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and its progeny." Although under the majority's "fully advisory" system defendants will indeed know from the outset that the trial court will not be bound to sentence within the guidelines range, whereas under the bifurcated system, defendants will not know until sentencing whether the trial court will or will not be bound to sentence within the range because that will depend on whether judge-found facts increase the guidelines range, I suspect that most defendants will prefer this lack of

other words, as discussed earlier with regard to the first alternative remedy, I believe the Legislature would prefer a system in which the guidelines are at least sometimes mandatory and would at least sometimes limit judicial discretion, to a system in which the guidelines are never mandatory and thus would never limit judicial discretion. That is, just as I believe the Legislature would prefer a system in which, although the bottom of the guidelines range is advisory, the top of the range would be mandatory, to a system in which both the bottom and the top of the guidelines are advisory (and thus in which effectively there are no guidelines at all), I also believe the Legislature would prefer a system in which, although the guidelines are advisory when the trial court *engages* in judicial fact-finding that increases the guidelines range, the guidelines would be mandatory when the trial court did *not* engage in judicial fact-finding that increases the range. Given that, in the absence of judicial fact-finding that increases the guidelines range, mandatory guidelines are simply not unconstitutional, this Court, again, lacks the authority to hold that the guidelines are not mandatory in the absence of judicial fact-finding that increases the guidelines range. In other words, this Court lacks the authority to adopt its "fully advisory" remedy.

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notice over knowing from the outset that the trial court will be unrestrained by the top end of the guidelines range at sentencing. In other words, just as I believe the Legislature would prefer to have the guidelines be mandatory in at least some circumstances rather than never, I believe that defendants would likewise prefer to have the guidelines be mandatory in at least some circumstances rather than never, even if this means that defendants will not know until sentencing whether the guidelines are to be mandatory or advisory. To make clear, I do not view this approach to be ideal; I note merely that among the options remaining following the Court's decision in *Lockridge*, it is more consistent with the Legislature's intentions than the majority's approach, and it is constitutional.

4. NO JUDICIAL FACT-FINDING[22]

Alternatively, if we were to hold that trial courts could *never* score the OVs by using judge-found facts, the guidelines could always be mandatory. In other words, if we required trial courts to rely only on the facts found by the jury beyond a reasonable doubt or admitted by the defendant to score the OVs, the guidelines could continue to be mandatory without violating the Sixth Amendment. This remedy would solve the constitutional problem because there would never be reliance on judicial fact-finding to score the OVs, and it would also be more consistent with the Legislature's intentions than the majority's "fully advisory" remedy because it would allow the guidelines always to be mandatory. It is also an "operable" remedy because it is fully "capable of functioning," *Midland Cogeneration*, 489 Mich at 96, and the majority does not dispute this. The trial courts would simply have to score the OVs based on the facts admitted by the defendant or found beyond a reasonable doubt by the jury. While this is certainly an imperfect sentencing approach from the Legislature's perspective, it is also, once more, significantly *less* imperfect than the majority's "fully advisory" approach.

5. JURY-FOUND FACTS[23]

Finally, this Court could also require juries themselves to find the facts used to score all the OVs that are not admitted by the defendant. This remedy would allow trial

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[22] Defendant Masroor argues in favor of this remedy, but the majority does not address it.

[23] In *Lockridge*, both the defendant and CDAM argued in favor of this remedy. In the instant case, both defendant Steanhouse and CDAM argued in support of this remedy at oral argument. Although the majority in *Lockridge* addressed this proposed remedy, the majority in this case does not.

courts to more accurately score the OVs and enable the guidelines to always be mandatory. The majority in *Lockridge* rejected this remedy because it would be "burden[some]." *Lockridge*, 498 Mich at 389. However, just because something is "burdensome," does not mean that it is "inoperable." This Court does not have the authority to choose its own remedy over this remedy simply because its remedy is less burdensome when its own remedy is inconsistent with the Legislature's intentions, while this remedy would be consistent with *both* the Legislature's intentions *and* the requirements of the Constitution. Jury trials themselves can be described as "burdensome," but if they are constitutionally required, they are constitutionally required.

II. REJECTION OF ALTERNATIVE REMEDIES

Because I believe that *each* of these alternative remedies is more compatible with the Legislature's intentions in enacting its mandatory guidelines than the majority's "fully advisory" remedy, I would not adopt the majority's remedy. The majority rejects (either explicitly or implicitly) each of these alternatives for one reason or another. In the present cases, the majority rejects the "bifurcated mandatory/advisory" remedy because that would lead to "endless litigation and perpetual uncertainty." In *Lockridge*, 498 Mich at 390, the majority rejected the "advisory floors/mandatory ceilings" remedy because that would require a "significant rewrite of the statutory language." Also in *Lockridge*, the majority rejected the "'jury" remedy because that would "burden[] our judicial system." *Id*. at 389. And the majority in the present cases is silent as to what is deficient concerning the "mandatory ceiling/mandatory floor" and the "no judicial fact-finding"

remedies, but these are apparently also unacceptable for one reason or another, despite the fact that none of them breaches the Constitution in any way.

I have already explained why I am not persuaded by the majority's reasons for rejecting these alternatives, but I take this opportunity to reemphasize that under MCL 8.5 there are only two factors that this Court may properly consider in the process of severing that which is unconstitutional from that which is not: (a) "the manifest intent of the legislature" and (b) the operability of the post-severance legislation. Levels of litigation, the need to resolve legal uncertainties, and sundry burdens and procedures imposed on our judicial system simply do not render legislation "inoperable" any more than an automobile is rendered "inoperable" by a cracked window, a malfunctioning air conditioner, or a broken headlight.

I certainly accept that none of these alternatives is perfectly consistent with the Legislature's original intentions, or as coherent and effective in achieving the Legislature's purposes as its chosen system of sentencing. However, that system was struck down in *Lockridge*, and the question now is only which alternative is *next* best, not which is altogether equivalent. Since *Lockridge* has proclaimed that the Legislature's preferred system of sentencing is unconstitutional, some part of its chosen statutory scheme must necessarily be altered. Because the mandatory character of the scheme is, I believe, at the heart of the Legislature's intentions, I would alter that aspect as little as possible, whereas the majority jettisons it in its entirety. And in so doing so, the majority gives short shrift to proposed alternatives that might retain *some* prospect of accomplishing what the Legislature manifestly sought to achieve: the curtailment of

excessive judicial sentencing discretion so that criminal sentencing disparities across the state, across courtrooms, and across judges, might be narrowed.

The majority thus places an almost insurmountable burden on the proposed alternatives to be perfect remedies when they are incapable of being so precisely because the perfect remedy has already been struck down by the Court. Of course, the majority can find something deficient about each of the alternatives that renders it less ideal than what the Legislature began with, but that is merely in the nature of what occurs when the "ideal" has been removed from the discussion. In the end, what has been produced by the majority is a sentencing scheme that is 180 degrees removed from that enacted by the Legislature, a sentencing scheme that does little more than restore the *status quo ante* already rejected by that Legislature, a sentencing system in which there are no mandatory guidelines, no limits on excessive judicial discretion, no mechanism for fairly and equitably treating equally situated defendants sentenced at different times in different courtrooms by different judges. Thus, the Court rejects the imperfect in favor of the perfectly opposite. But when we are forced to engage in the instant process of severance under MCL 8.5, as we are here, we must remember that it is the *Legislature's* intentions, not our own, to which we are striving to give effect. These intentions could not have been any more clear in the instant case; the Legislature wanted mandatory guidelines so that criminal sentences would be more directly a function of a defendant's criminal conduct and criminal history and less a function of the individual judge who sentenced the defendant. Therefore, unlike the majority, I would maintain the guidelines as mandatory, at least to the *fullest extent possible*.

III. STARE DECISIS

The majority holds that "finality interests strongly support adherence to our holding in *Lockridge*," while the concurrence concludes that "stare decisis" requires this Court to adhere to its holding in *Lockridge*.

First, contrary to the concurrence's contention, *Lockridge* did not hold with sufficient clarity that it was rendering the guidelines "fully advisory" or "advisory in all applications," hence the very need for an opinion in this case. See, e.g., *Lockridge*, 498 Mich at 373-374 ("[*T*]*o the extent that* OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e., the defendant's 'mandatory minimum' sentence, that procedure violates the Sixth Amendment.") (emphasis added); *id*. at 364 ("To remedy the constitutional violation, we sever MCL 769.34(2) *to the extent that* it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory.") (emphasis added); *id*. at 365 ("[A] guidelines minimum sentence range *calculated in violation of Apprendi and Alleyne* is advisory only.") (emphasis added); *id*. at 391-392 ("*When* a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so.") (emphasis added). If *Lockridge* so clearly articulated that the guidelines are "fully advisory" or "advisory in all applications," as the concurrence asserts, (a) why did the prosecutor in this case argue otherwise? (b) why did defendant Steanhouse argue that it is "unclear

from *Lockridge*" whether the guidelines are "advisory in all applications"? (c) why did this Court grant leave to appeal to address this issue? and (d) why is this Court even bothering to write an opinion today purporting to resolve this very issue?[24]

Second, *Lockridge* addressed neither the separation-of-powers doctrine nor MCL 8.5 and thus can hardly be viewed as establishing binding authority for the instant dispute in which those principles are dominant.

Third, in *Lockridge*, 498 Mich at 393, the majority explicitly "[a]ssum[ed] arguendo" that judge-found facts had been "used to increase the defendant's mandatory minimum sentence, violating the Sixth Amendment . . . ." Accordingly, anything stated thereafter regarding the proper remedy in circumstances in which judge-found facts were *not* used to increase the defendant's mandatory minimum sentence presumably

[24] The concurrence asserts that I "once understood the remedy adopted in *Lockridge* to be clear," quoting a statement from my dissent in *Lockridge* indicating that the majority was rendering the guidelines "advisory only." While indeed I stated this, I did so in the context of a lengthy opinion in which the focus was almost exclusively on whether the sentencing guidelines violated the Sixth Amendment. I concluded that the guidelines did *not* violate the Amendment and thus that it was unnecessary for me to assess the appropriate remedy for what I viewed as a nonexistent violation. More pertinently, however, my position simply did not prevail in *Lockridge*, and thus whatever I had to say about the remedy in my dissent is simply not controlling. Rather, it is the majority opinion that is both controlling and unclear. Moreover, the prosecutor and the defendant, acting in accord, have since convinced me that *Lockridge* did *not*, as the concurrence asserts, clearly hold that the guidelines are "fully advisory," in light of the specific language cited earlier in the paragraph above. Finally, the majority itself must have shared many of the same concerns as do the parties and myself given that the Court granted leave to appeal to address this issue and the present opinion has been written precisely to resolve it. I thus respectfully disagree with the concurrence that *Lockridge* left no room for dispute regarding the extent to which the majority rendered the guidelines advisory.

constituted dictum, which is "not binding under the principle of stare decisis." *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999).

Fourth, even assuming that *Lockridge* had clearly held that it was rendering the guidelines "fully advisory," and that this constituted binding precedent, we have long recognized that "[w]hen questions before this Court implicate the Constitution, this Court arguably has an even greater obligation to overrule erroneous precedent." *People v Tanner*, 496 Mich 199, 251; 853 NW2d 653 (2014).[25] To the extent that *Lockridge* can

[25] The concurrence asserts that the issue here is one of "statutory, not constitutional, construction." I respectfully disagree. As explained earlier in Part I(A), MCL 8.5 is essentially a codification of the "separation of powers" principle that this Court has the authority to strike down statutes only to the extent that they are unconstitutional. That is, even if MCL 8.5 did not exist, we would still be obligated to recognize that we have the authority to strike down statutes only to this same extent. This is because Const 1963, art 4, § 1 grants the "legislative power" to the Legislature; Const 1963, art 6, § 1 grants the "judicial power" to the judiciary; and Const 1963, art 3, § 2 provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." In sum, the Legislature has the authority to enact laws that do not violate the Constitution, and the judiciary has the authority to give reasonable meaning to legislative enactments and to exercise its power of "judicial review" to strike down legislative enactments to the extent that they violate the Constitution. Notably, then, MCL 8.5 *only* applies in those circumstances in which this Court has *first* exercised its power of "judicial review," as this Court did in *Lockridge*, to strike down legislation, which distinguishes that statutory provision from all other state laws and underscores its constitutional underpinnings. The precise question here is whether rendering the guidelines "fully advisory" violates constitutional strictures, i.e., whether this Court acts beyond its authority by striking down the guidelines in their entirety when they are only partially unconstitutional. Therefore, the issue is very much one of constitutional significance, requiring less deferential consideration of our precedents. While the concurrence is correct that the Legislature here is not "powerless to alter [this Court's] course," at least in the sense that it retains the power to adopt a constitutionally proper remedy, this does not absolve us of *our* obligation to ensure that *we* are acting within the scope of our most extraordinary authority-- that of judicial review-- by simply adhering to a precedent that failed to assess separation-of-powers implications. The Legislature "remains at liberty to correct us," as the concurrence asserts, *only* in the sense that it can declare that we erred in our

be read as rendering the guidelines "fully advisory," as the concurrence asserts, it violated Michigan's separation-of-powers doctrine by invalidating a portion of the guidelines that the Court was not empowered to invalidate-- because this portion had not been determined to violate the Sixth Amendment. Because *Lockridge* implicates the Constitution, this Court "has a duty to review the decision under *less* deferential standards of stare decisis in light of our role as the final judicial arbiter of this Constitution." *Id*. at 251 (emphasis added).[26] I do not believe that the majority's conclusory statement that "finality interests strongly support adherence to our holding in *Lockridge*" even minimally satisfies this duty of review.

Finally, *Lockridge* was decided a mere two years ago, and thus it has hardly "become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations."

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determination of the "legislative will" under MCL 8.5; however, the Legislature cannot correct us by declaring that we violated separation-of-powers principles by striking down a greater part of the guidelines than was necessary to remedy the Sixth Amendment violation because constitutional questions lie finally within the judiciary's authority.

[26] The high level of deference afforded to *Lockridge* by the concurrence is evidenced by the fact that it asserts several times that *Lockridge* has already clearly held that the guidelines are "fully advisory." Although, as noted, I disagree with this proposition, a fuller response would inquire whether the majority in *Lockridge* had acted within the scope of its constitutional authority in transforming mandatory guidelines into advisory guidelines. That is, if the majority in that case conceivably *had* impinged upon the Legislature's authority in adopting the remedy that the concurrence asserts it "clearly" did, the concurrence's response should be something more than "We already decided that." Instead, it should afford at least *some* consideration to rectifying the Court's error precisely because of its constitutional dimension. While the principle of deference to stare decisis is a venerable principle, it is not one by which the judiciary should be facilitated in its exercise of powers that do not belong to it.

Robinson v Detroit, 462 Mich 439, 466; 613 NW2d 307 (2000).[27] This is especially true given that all of the parties and all of the amici are now asking this Court to overrule *Lockridge* (at least with regard to what the majority today clearly establishes as its chosen remedy). The concurrence asserts that "[a]ny changes to the remedy adopted in *Lockridge* would require upending criminal sentencing in this state for a second time in two years and would set off another round of litigated questions, including whether and how to resentence the resentenced."[28] The concurrence then proceeds to inquire, "Against the prospect of this turbulence, we should ask: What is to be gained?"

To respond to the concurrence's inquiry, the following are among the things that might possibly be "gained" as a result of "any changes" in what the concurrence views as the "clear" *Lockridge* remedy:

- Separation-of-powers principles of the state constitution might be afforded greater consideration than in *Lockridge* and be more faithfully acted upon;

- Legislative intentions concerning the severance of constitutional, and unconstitutional, parts of laws struck down by this Court might be afforded greater consideration than in *Lockridge* and be more faithfully acted upon;

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[27] Concerning the other stare decisis factors, *Lockridge* does not "def[y] practical workability," nor have there been any "changes in the law or facts [that] no longer justify the questioned decision." *Robinson*, 462 Mich at 464 (quotation marks and citation omitted). However, for the reasons cited throughout this section, I would hold that these stare decisis factors are not strong enough to counsel in favor of retaining it.

[28] The "turbulence" and "upending" feared by the concurrence will almost certainly be a lesser "turbulence" and "upending" than that occasioned by *Lockridge* itself, if only because what is at stake here is not whether our criminal sentencing process should be *restored* to what it was before *Lockridge* but merely whether it should be restored in *part*-- specifically that part of the law as to which even *Lockridge* did not deem the sentencing guidelines to be unconstitutional.

- The nature and breadth of the "judicial power" under the Michigan Constitution, the only power possessed by this Court, might be better assessed and exercised in the specific context of our state's criminal sentencing system;

- Some greater measure of self-government and popular control with regard to our state's criminal sentencing system might be restored;

- Legislative progress in reducing criminal sentencing disparities might again proceed, wherein criminal sentences are again determined, at least to a greater degree, by rules democratically enacted by the Legislature rather than by the decisions of hundreds of trial court judges throughout the state with widely divergent views and attitudes regarding criminal justice;

- Legislative progress in reducing criminal sentencing disparities might again proceed, wherein criminal sentences are again determined, at least to a greater degree, by a perpetrator's criminal conduct and criminal record rather than by the serendipitousness of whether the perpetrator is sentenced by Maximum Mike or Lenient Larry;

- The "ironic" outcomes arising out of *Lockridge* and identified in Part V of my dissent in that decision, such as defendants being incarcerated for lengthier periods than the Legislature intended as a direct result of *Lockridge*'s understanding of a defendant's Sixth Amendment right to a jury trial, might be forestalled or corrected to some degree. See *Lockridge*, 498 Mich at 458-462 (MARKMAN, J., dissenting); see also note 14 of this opinion.

IV. CONCLUSION

For the foregoing reasons, I believe that *each* of the five proposed alternative remedies is significantly more compatible with the Legislature's intentions in enacting mandatory sentencing guidelines than the majority's "fully advisory" remedy, and none of these is "inoperable." While undoubtedly none of these alternatives would likely be viewed as favorably by the Legislature as its own mandatory guidelines, the latter were deemed unconstitutional in *Lockridge*, and the only question today is whether the Legislature that enacted those guidelines would have preferred as an alternative the majority's "fully advisory" guidelines-- effectively no guidelines at all-- or an alternative

that retains those parts of the guidelines that are indisputably constitutional and that limit excessive judicial sentencing discretion and unjustified sentencing disparities at least in *part* but not in *full*-- at least in *part* rather than *never*. Therefore, I respectfully dissent.[29] In this position, I am notably in agreement with *all* of the parties and *all* of the amici.[30]

Stephen J. Markman
Brian K. Zahra

WILDER, J., took no part in the decision of this case.

[29] To the extent that this Court reaffirms its holding that a defendant receiving a sentence that represents an upward departure is not entitled to a *Crosby* remand and holds that "the proper inquiry when reviewing a [departure] sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990)," I concur.

[30] It should clearly be understood by our Legislature that, notwithstanding that aspects of its guidelines have been struck down by the Court, it retains the constitutional authority to restore such aspects to the law of this state that are not incompatible with *Lockridge*. See, e.g., *Booker*, 543 US at 265 ("Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.").