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State of Michigan
In the Supreme Court

People of the State of Michigan,
Plaintiff-Appellee,
v.
Joshua Lamar-James Stewart,
Defendant-Appellant.

SC No. 162497
COA No. 343755
Wayne CC. 16-005731-01-FC

Joshua Lamar-James Stewart's Reply Brief

Marilena David (P73175)
Deputy Director

Adrienne Young (P77803)
Assistant Defender

Counsel for Joshua Lamar-James Stewart

State Appellate Defender Office
3031 W. Grand Blvd., Suite 450
Detroit, MI 48202
313-670-0309
mdavid@sado.org

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Table of Contents

Index of Authorities 3

Arguments 4

I. Mr. Stewart's confession was involuntary based on the totality of the circumstances, including the fact that his *Miranda* warnings were troubling and that he was called a "nigger" throughout the interrogation 4

A. The trial court's ruling is entitled to little to no deference as it is factually and legally flawed. 4

B. The *Miranda* waiver process and the fact that Mr. Stewart was repeatedly called a "nigger" during the interrogation are only two of many factors that lead to a conclusion that his statement was involuntary. 6

II. The provision of MCL 769.34(10) requiring appellate courts to affirm within guideline sentences, whether they are reasonable or not, is invalid and must be severed. 7

A. These issues are properly before this Court. 7

B. MCL 769.34(10) violates *Lockridge* and the Sixth Amendment. 8

i. Federal case law supports Mr. Stewart's argument. 9

ii. The Washington State case relied upon by the prosecutor is not instructive where that state's guidelines share no common features with Michigan's guidelines. 11

Conclusion and Relief Requested 14

RECEIVED by MSC 9/28/2022 4:58:02 PM

Index of Authorities

Gall v US, 522 US 38, 49 (2007) 10

Miranda v Arizona, 384 US 436 (1966) 6

People v Ames, 504 Mich 899 (2019) 8

People v Lockridge, 498 Mich 358 (2015) 8, 10, 12

People v Walker, 374 Mich 331 (1965) 4

People v Conte, 421 Mich 704 (1984) 6

People v Shipley, 256 Mich App 367 (2003) 6

People v Steanhouse, 500 Mich 453 (2017)..... 7, 13

State v *Ammons*, 105 Wash.2d 175 (1986)..... 11

State v Delbosque, 195 Wash 2d 106 (2020)..... 11

United States v Booker, 543 US 220 (2005) 8

Statutes, Constitutional Provisions, Rules

MCL 769.34 .....passim

Wash Const art I, §22 11

MCR 7.305(H)(4) 8

Other

Levine et al, *Do Michigan's Sentencing Guidelines Meet the Legislature's Goals?*, Safe & Just Michigan (2021) 13

RECEIVED by MSC 9/28/2022 4:58:02 PM

Arguments

I. Mr. Stewart's confession was involuntary based on the totality of the circumstances, including the fact that his *Miranda* warnings were troubling and that he was called a "nigger" throughout the interrogation.

The police treated Mr. Stewart with disdain and disrespect throughout the interrogation and used coercion and intimidation against him to force him to make a statement. The trial court did not analyze the facts of Mr. Stewart's case when determining that his confession was voluntary, but this Court should. An analysis of the facts of the interrogation leads to one conclusion: Mr. Stewart's confession was involuntary and should have been suppressed.

A. The trial court's ruling is entitled to little to no deference as it is factually and legally flawed.

Mr. Stewart's trial attorney filed a motion to suppress his statement on his behalf and the prosecutor filed a response. (296a-324a). Neither party cited to the interrogation video or quoted from the interrogation video or discussed the specifics of the circumstances of the interrogation. Based on those pleadings alone, and without holding a *Walker*[1] hearing, the trial court denied the motion to suppress finding that Mr. Stewart's confession was voluntary. The trial court's reasoning was unsound and erroneous as laid out in full in Mr. Stewart's Supplemental Brief.

The trial court's ruling should be given no deference by this Court. It is not accurate as to the facts of the case or to Mr. Stewart's legal claims and it was issued without the benefit of a *Walker* hearing. Despite the prosecution's contention to the contrary, it is not at all clear that the trial court watched the interrogation video before rendering its decision. The trial court's ruling, 327a-332a, mentions no personalized analysis of the circumstances of the interrogation or the facts of this case. The only fact the trial court mentions from the circumstances of Mr. Stewart's

[1] *People v Walker,* 374 Mich 331 (1965).

RECEIVED by MSC 9/28/2022 4:58:02 PM

interrogation is that the interrogation lasted approximately 3 hours. (328a).

Other than that, the trial court's entire opinion consists of broad principles of law, none of which the trial court applied to the facts of Mr. Stewart's case. The trial court cited case law indicating that the police were permitted to lie to suspects, but the trial court never analyzed how the specific the lies the police made to Mr. Stewart factored into its analysis (330a-331a). When addressing Mr. Stewart's claim that a promise of leniency was made, the trial court declared that was only one factor and moved on. (331a-332a). The trial court never analyzed what the specific promise of leniency was in this case or how it weighed that particular factor:

> **The fact that there was a misrepresentations [sic] about the investigative facts, the statement that is alleged to be one of leniency,** this Court finds that looking at the totality of the circumstances, the duration of the interview, **the representations made by the officers**, I'm not persuaded that it is an involuntary statement. [332a].

The trial court seemed to merge the concepts of lying and promising leniency, without ever addressing or analyzing the specifics of these claims. The trial court also references "the representations made by the officers." (332a.) What representations? There was no *Walker* hearing and the officers made no representations relevant to Mr. Stewart's legal challenge. Further, the trial court seemed to believe that the officers read Mr. Stewart's *Miranda* rights aloud to him, stating that it had to analyze whether "the words that were used by the officers in advising Mr. Stewart of his Constitutional Rights conveyed to him" the required information. (329a.) But Mr. Stewart read his rights aloud to himself.

The trial court did not accurately recount the challenges Mr. Stewart was making or the facts of his case. The trial court's opinion is clearly erroneous on multiple grounds.

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B. The *Miranda* waiver process and the fact that Mr. Stewart was repeatedly called a "nigger" during the interrogation are only two of many factors that lead to a conclusion that his statement was involuntary.

Whether a confession is voluntary is determined by reviewing the totality of the circumstances. *People v Conte,* 421 Mich 704, 754 (1984). *People v Shipley,* 256 Mich App 367, 373-74 (2003). Although Mr. Stewart raised numerous factors legally relevant to his legal claim, the prosecutor only addressed two of those in its answer: the adequacy of the *Miranda*[2] warnings and the use of the "N-word."

Mr. Stewart is not asking this Court to find that his *Miranda* warnings were invalid. But this Court does have to consider the waiver process as part of a totality of circumstances analysis for determining whether the confession was voluntary. *Conte,* 421 Mich at 754-755. For the reasons set out in his Supplemental Brief, the *Miranda* waiver process was lacking and adds to the circumstances that rendered his confession involuntary.

The prosecution attempts to make an issue out of the fact that this is the first time Mr. Stewart is complaining about being called a "nigger" by Officer MacDonald during the 3-hour interrogation. This is not a new legal claim or issue. This is a fact that is relevant in a totality of the circumstances analysis. An individual never waives their right to rely on the facts of their case in support of a consistent legal theory.

Further, the prosecution seems to contend that it is not a big deal that Mr. Stewart was called a "nigger" during the interrogation since both he and the officer were people of color. Prosecutor Supplemental Brief, p. 9. This argument is troubling. Mr. Stewart and Officer MacDonald were not friends, they did not have an understanding, and they cannot be said to be part of the same community just because of the color of their skin. Officer MacDonald's use of the word during a contentious interrogation where there was a clear power imbalance contributed to a coercive interrogation atmosphere.

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[2] *Miranda v Arizona,* 384 US 436 (1966).

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II. The provision of MCL 769.34(10) requiring appellate courts to affirm within guideline sentences, whether they are reasonable or not, is invalid and must be severed.

In order to be a valid sentence in Michigan, the sentence must be proportionate. This is without regard to whether the sentence is within the guidelines or outside of the guidelines. "'[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range,' *Milbourn*, 435 Mich. at 661, 461 N.W.2d 1." *People v Steanhouse*, 500 Mich 453, 475 (2017). Thus, a sentence within the guidelines range must also be reviewed for proportionality, and the provision of MCL 769.34(10) that requires appellate courts to affirm within guideline sentences, in absence of any proportionality review, is invalid and must be severed.

A. These issues are properly before this Court.

The prosecution claims this Court should be prohibited from hearing these arguments on whether MCL 769.34(10) violates Mr. Stewart's due process right to an appeal. The prosecution points to case examples where the Court has decided issues that were not previously raised, briefed, or argued by the parties, and similarly, instances where the Court has decided issues based on grounds that were not previously raised, briefed, or argued by the parties. But that is not this.

Whether one calls this due process *dispute* a new issue, argument, claim, or basis for relief, should not matter. This due process argument is consistent with the legal claim and requested relief Mr. Stewart has been seeking since his appeal began in 2018. Mr. Stewart is not raising brand new issues for the first time in this appeal. But he is advancing the quality and type of arguments in support of his main legal claim: that MCL 769.34(10) is invalid. Furthermore, not only is this Court *authorized* to ask the parties to brief additional grounds that have bearing on the legal claim that is once again before this Court, but it is the Court's *responsibility* to do so. The citizens of Michigan are entitled to an answer on this legal question that is being constantly and

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continuously raised in our appellate courts. (See *People v Ames,* 504 Mich 899 (2019)). If this Court believed it would be aided by an analysis on the due process right to appeal, then it is well within its authority to ask for and allow briefing on that argument. MCR 7.305(H)(4). Both parties have had more than a fair opportunity to fully brief the issue and will have an opportunity to argue it before the Court.

B. MCL 769.34(10) violates *Lockridge* and the Sixth Amendment.

The prosecution argues that MCL 769.34(10) is not inconsistent with *People v Lockridge,* 498 Mich 358 (2015), because *Lockridge* never mentions that provision and because *Lockridge* involved a sentence that was outside of the guidelines. This avoids the problem.

To be fair, perhaps one of the reasons MCL 769.34(10) has withstood the massive sea changes in sentencing this Court underwent in *Lockridge* is in part because this Court was confronted with sentences that departed from the correctly-scored guidelines, and thus, was not presented with factual circumstances that required thoughtful consideration of MCL 769.34(10) and its existence in a *Booker*-ized[3] Michigan sentencing scheme. But, *Lockridge's* key holding was that the mandatory guideline scheme violated the Sixth Amendment. This holding was not limited to departure sentences. To overcome the Sixth Amendment violation, the *Lockridge* remedy of making the guidelines advisory was applied to all cases and sentences. The Court in *Lockridge* severed provisions of the sentencing guidelines that were at the time directly before the Court based on the facts of that case (i.e., MCL 769.34(2) and (3)). *Id.* at 364. The Court acknowledged the possibility that other provisions of the sentencing guidelines—that were not at issue in that case—may need to be struck down if they are not consistent with an advisory scheme. *Id.* at 365, n 1. MCL 769.34(10) is such a provision.

[3] *United States v Booker*, 543 US 220 (2005).

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i. Federal case law supports Mr. Stewart's argument.

Mr. Stewart concurs with the prosecutor that "history helps make the point" with respect to the validity of MCL 769.34(10). Prosecutor Supplemental Brief, p. 20. To that end, Mr. Stewart points to the federal case law history detailed in the Amicus Brief submitted by sentencing experts Leslie Scott and Dean Jelani Jefferson Exum. Brief of Amicus Curiae Leslie E. Scott and Jelani Jefferson Exum, filed September 8, 2022.

In that amicus, the sentencing experts acknowledge the statutory differences between the federal sentencing scheme and that in Michigan. In the Federal system,

> the portion of the SRA [Sentencing Reform Act] setting forth the appellate standard of review was invalidated as unconstitutional by the *Booker* remedial majority. The majority set a new standard of review on appeal for 'unreasonableness'…[t]he Court inferred this standard of review from the text and structure of the SRA, and held that the standard applies 'across the board,' whether the district judge sentences within or outside of the Guidelines range. . . In so holding, the Court conformed the Act to its Sixth Amendment remedy. [Scott and Jefferson Exum Amicus, p. 25].

The prosecutor contrasts the federal statute, which had always provided for some appellate review of sentences, with the statutory provision in Michigan that excises appellate review of within-guidelines sentences. Prosecutor Supplemental Brief, p. 28. The prosecutor argues that MCL 769.34(10) is merely a declaration by the Legislature that a sentence within in the guidelines range is *lawful*, and therefore, the Legislature is permitted to require the appellate court to affirm all within guideline sentences. There are several problems with this argument.

To start, as discussed in Mr. Stewart's Supplemental Brief, this is a violation of the right to an appeal and violates the separation of powers doctrine. Further, while it is within the Legislature's authority to

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establish laws and punishment, it is within the Court's authority to interpret those laws and to make the ultimate determination of whether laws are lawful or whether their *application* is lawful. Every day, this Court and others find that statutes passed by the Legislature are illegal, invalid, overbroad, unconstitutional, or otherwise applied unlawfully. MCL 769.34(10) is one of those statutes. The Legislature can declare within guideline sentences lawful if it so chooses. But it cannot prevent the appellate courts from reviewing whether a sentence is truly lawful under proportionality standards adopted by this Court in *Lockridge*.

In addition to the due process and separation of powers concern that MCL 769.34(10) presents, a blanket declaration that a sentence within the guidelines is lawful, absent the same declaration for a sentence outside of the guidelines, mirrors the mandatory guideline scheme that *Gall* warned against. The Supreme Court in *Gall v US*, 522 US 38, 49 (2007), cautioned that a "'proportional review'—of applying a heightened standard of review to sentences outside the Guidelines range" compared to those inside of the range runs afoul of the Sixth Amendment. But that is exactly what is happening here because of MCL 769.34(10). As Amicus from sentencing experts explains:

> Michigan's two-tiered review system inevitably invites and encourages trial judges to sentence within the guidelines ranges determined by facts found by them alone. The explicit appellate sanctioning of within-guidelines sentencing replicates the unconstitutional sentencing scheme this Court struck down in *Lockridge*, 498 Mich 358. The new system is different in form, but not in substance.…This is the epitome of *de facto* mandatory guidelines sentencing. [Scott and Jefferson Exum Amicus, p. 31-32].

Outside of guideline sentences in Michigan are subject to a standard of review for proportionality while within guideline sentences are not subject to review at all. This is a heightened standard of review for outside of guideline sentences, which is an unmistakable characteristic of a mandatory guideline system.

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ii. The Washington State case relied upon by the prosecutor is not instructive where that state's guidelines share no common features with Michigan's guidelines.

The prosecutor points to the state of Washington to disprove the conclusion that sentences within guidelines must be reviewed to comply with the Sixth Amendment. He observes, correctly, that Washington's state constitution provides a right to appeal. Wash Const art I, §22. Washington state also has a statute that precludes appellate review for a sentence within the guidelines. 9.94A.585(1). The Washington Supreme Court held that "[t]his provision of the SRA does not violate the constitutional right to appeal because '[w]hen the sentence given is within the presumptive sentence range then as a matter of law there can be no abuse of discretion.'" *State v Delbosque,* 195 Wash 2d 106, 126; 456 P3d 806, 817 (2020), citing *State* v. *Ammons*, 105 Wash.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986). Without recognizing the distinct features of Washington's system, the prosecutor concludes the same must be true in Michigan: that a statutory ban on appealing within guideline sentences is unproblematic, even where a constitutional right to appeal exists. This is wrong and ignores relevant context.

Washington operates using a system at sentencing where judges arrive at a guidelines range based on the conviction and the individual's prior record variables. There is no judicial fact-finding in the Washington system. Take, for example, Mr. Stewart's convictions for armed robbery.

In Washington, when a jury finds an individual guilty of the most serious form of armed robbery, the judge next scores the individual based only on their criminal history using the scoresheet for that offense.[4]

[4] Source: 2021 Washington State Adult Sentencing Guidelines Manual. Available at ScoringForms.docx (wa.gov).

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Robbery First Degree

RCW 9A.56.200
CLASS A – VIOLENT/CRIMES AGAINST PERSONS
OFFENDER SCORING RCW 9.94A.525(8)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/1/2006, use the General Violent Offense with a Sexual Motivation Finding scoring form on page 254.

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 252.

ADULT HISTORY:

Enter number of serious violent and violent felony convictions ..... _____ x 2 = _____

Enter number of nonviolent felony convictions ..... _____ x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions ..... _____ x 2 = _____

Enter number of nonviolent felony dispositions ..... _____ x ½ = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions ..... _____ x 2 = _____

Enter number of other nonviolent felony convictions ..... _____ x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? ..... _____ + 1 = _____

Total the last column to get the **Offender Score** (Round down to the nearest whole number)..... _____

Once an individual's criminal history was scored for first-degree assault, the judge would get an offender score, which would then correspond to a guidelines range:

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL IX	36m 31 - 41	42m 36 - 48	47.5m 41 - 54	53.5m 46 - 61	59.5m 51 - 68	66m 57 - 75	89.5m 77 - 102	101.5m 87 - 116	126m 108 - 144	150m 129 - 171

First, the ranges from within which a sentence is chosen by a judge in Washington state are, at its broadest here, 42-months wide. Mr. Stewart's sentencing range is 9 ½ *years* wide. Second, Mr. Stewart's unwieldly sentencing range was arrived at only after (unreviewable) judicial fact-finding beyond that supported by Mr. Stewart's conviction or criminal history. This is wholly absent from Washington's sentencing scheme. This is the ongoing Sixth Amendment problem with MCL 769.34(10). This is the procedure out-of-step with *Lockridge* and all but ensuring *Milbourn* proportionality remains just words on a page.

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The prosecutor also points to the fact that trial court judges depart from guidelines as evidence that the guidelines are not operating as mandatory in nature. In support, the prosecutor points to the Safe and Just Michigan November 2021 study that shows "[s]entencing judges have departed from the guidelines in a great man [sic] cases." Prosecutor Supplemental Brief, p. 53. But the November 2021 research study examined only sentences imposed under the advisory judicial guidelines in place prior to 1998 and sentences imposed under the mandatory guideline scheme between 1999 and 2012. Levine et al, *Do Michigan's Sentencing Guidelines Meet the Legislature's Goals?*, Safe & Just Michigan (2021), p. 34. The report says nothing about the impact of sentencing departures post-*Lockridge* under a so-called advisory scheme.

The prosecutor further points to nearly 200 cases that resulted from a Boolean Westlaw search he ran with certain search terms. Prosecutor Supplemental Brief, p. 53.[5] This information is not helpful. Without reading those cases, the fact that they contained certain search terms is meaningless. Also, the numbers do not advance the prosecution's point that departures are common. The search results were from 2015 to present, which means that over a 7-year period, there were an average of about 28 cases per year that reference the prosecutor's search terms. When compared to the number of sentences that are imposed against individuals in any given year—an average of 44,000 felony convictions per year[6]—the number of departures can hardly be said to be frequent. Even if departures were common, that would not help answer the question of whether MCL 769.34(10) is unconstitutional. It is not.

As the prosecutor himself quotes more than once, "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.'" Prosecutor Supplemental Brief, p. 35; see also *Steanhouse,* 500 Mich at 475. Mr. Stewart is asking that the appellate court review his

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[5] Undersigned counsel ran the same Westlaw search and it resulted in 137 cases.

[6] Michigan Department of Corrections 2015-2020 Statistical Reports, Table A1, located at Statistical Reports (michigan.gov).

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sentence under that precise standard. The only complete relief to Sixth Amendment concerns is by way of the individual review of every sentence for substantive reasonableness. Scott and Jefferson Exum Amicus, p. 35.

Conclusion and Relief Requested

Mr. Stewart asks this Court to grant a new trial on the basis that his confession was involuntary as it was the product of coercive interrogation techniques. Further, Mr. Stewart asks that this court strike down the first portion of MCL 769.34(10) as invalid and grant a resentencing.

Respectfully submitted,

/s/ Marilena David (P73175)
Deputy Director

/s/ Adrienne Young (P77803)
Assistant Defender

Counsel for Joshua Lamar-James Stewart

State Appellate Defender Office
3031 W. Grand Blvd, Suite 450
Detroit, MI 48202
313-670-0309
mdavid@sado.org

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