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STATE OF MICHIGAN
IN THE SUPREME COURT

The People of the State of Michigan

Plaintiff-Appellee,

v.

Joshua Lamar-James Stewart

Defendant-Appellant.

MSC No. 162497

COA No. 343755

Wayne County Circuit Court
Case No. 16-005731-01-FC

The People of the State of Michigan

Plaintiff-Appellee,

v.

Dametrius Benjamin Posey

Defendant-Appellant.

MSC No. 162373

COA No. 345491

Wayne County Circuit Court
Case No. 18-000074-01-FC

BRIEF FOR RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLANT

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Statement of Interest[1]

Amicus Curiae the Roderick & Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have participated in civil rights campaigns in areas that include police misconduct, compensation for the wrongfully convicted, extreme sentences, and the treatment of incarcerated people. RSMJC has served as amicus in courts in Michigan and elsewhere concerning sentencing matters and state constitutions.

Introduction

This Court should hold that the portion of MCL 769.34(10) requiring affirmation of within-guidelines sentences violates the Michigan Constitution for two interrelated reasons. First, Michigan's constitution grants the right to appellate review for individuals convicted in the criminal courts. Const 1963, art 1, § 20; *People v Mulier*, 12 Mich App 28, 33-34 (1968). Second, in addition to the state's common-law "principle of proportionality" (*People v Milbourn*, 435 Mich 630, 636 (1990)), the Michigan Constitution bans cruel or unusual punishment, which this Court rightly interprets as a guarantee to proportionate criminal punishments. Const 1963, art 1, § 16; *People v Bullock*, 440 Mich 15, 37 (1992). These two constitutional provisions should be considered in tandem; the right to a proportionate sentence means little without the ability to appeal a disproportionate one. And these rights are essential to individuals like Mr. Stewart and Mr. Posey, whose sentences are not proportionate, despite falling within legislative guidelines.

Statutory sentencing guidelines can provide an important tool to aid proportionate sentences, but when they conflict with the state constitution—as they do here—the guidelines must yield. And appellate courts must have authority to enforce constitutional supremacy. The defendants in this case raise claims under both the federal and state constitutions. However, Michigan's constitutional right to appeal and its prohibition on cruel or unusual punishment are stronger than their federal counterparts. Accordingly, regardless of whether or not this Court holds that MCL 769.34(10) runs afoul of the federal constitution, it has an independent basis

[1] Counsel for a party did not author this brief, in whole or in part, and did not make a monetary contribution intended to fund the preparation or submission of this brief.

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to hold that the statute as written violates the Michigan Constitution by prohibiting appellate review of almost any sentence that falls within the statutory guidelines.[2]

Argument

I. The Michigan Constitution Provides a Right to Appellate Review and a Right to Proportionate Sentences That Are Broader Than the Bounds of the U.S. Constitution.

A half century ago, Justice Brennan issued a call to action:

> State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions too, are a font of individual liberties, their protections often extending beyond those required by the [U.S.] Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.

William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv L R 489, 491 (1977). In other words, the federal constitution is a floor, and it is up to the states to protect the individual rights of their citizens. States choose which rights to prioritize, and state constitutions can, and frequently do, extend broader protections than the federal Constitution, particularly in criminal cases where physical liberty is at issue.

The Michigan Constitution—unlike the nation's—guarantees proportionate criminal sentences and a right to appeal them. Const 1963, art 1, §§ 16, 20. By blocking appellate review of most within-guidelines sentences, MCL 769.34(10) violates both.

A. Unlike its federal counterpart, the 1963 Michigan Constitution conveys the right to appeal criminal convictions and sentences.

The United States Constitution does not guarantee the right to an appeal. *McKane v Durston*, 153 US 684, 687 (1894). Instead, the United States Supreme

[2] See Appellees' Br. at 50 (acknowledging that requiring affirmance "is another way of saying that it is not subject to judicial review").

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Court has instructed that "the right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper." *Id.* at 687-88. Not every state chose to grant this right via constitutional means. Indeed, although most states provide for statutory appellate review of felony convictions, only a handful of states have preserved this guarantee in their constitutions. See Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 Duke J Comparative & Int'l L 1, 32-33 (2011) (explaining that the right to appeal is purely statutory in the federal system and in most states)[3]; Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U Colo L Rev 943, 946 n 12 (2002) (noting that fewer than a quarter of states grant a constitutional right to appeal a felony conviction).

Michigan is one of that handful of states. Here, "in every criminal prosecution, the accused shall have the right . . . to have an appeal." Const 1963, art 1, § 20. See also *People v Bennett*, 20 Mich App 166, 167 (1969) (affirming that the 1963 Constitution bestowed "an absolute right to appeal [a] conviction"). The only limit to that right—which was achieved by constitutional amendment—is that rather than an absolute right to appeal, the Constitution conveys an individual who pleads guilty or *nolo contendere* entitlement to seek leave of appeal from the court. Const 1963, art 1, § 20; *Halbert v Michigan*, 545 US 605, 612, 617-19 (2005). This Court recognizes that the right to appeal confers on appellate courts the jurisdiction to review "all sentencing issues." *People v Coles*, 417 Mich 523, 535 (1983) (overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990)).

The constitutional, universal right of appeal did not arise by chance; no such right appeared in the first three versions of Michigan's charter. Rather the right of appeal was added to the constitution just 60 years ago. In introducing the proposal to include a right of appeal at the 1961 Constitutional Convention, Vice Chairman Harold Norris expressed that it was important in criminal cases to comply with "equal justice under law," which he described as "the watchwords of [Michigan's] constitutional faith." Official Record, State of Michigan Constitutional Convention 1961, 562, available at https://quod.lib.umich.edu/g/genpub/1749827.0001.001

[3] Based on a survey of the right to appeal in various jurisdictions in the United States and abroad, Marshall concluded that "the most significant area of agreement" is that appeals must be both adequate, i.e. allowing for review of factual and legal bases, and effective, i.e. provide appellants with the practical means to accomplish them. *Id.* at 40-41.

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(accessed October 20, 2022). Mr. Norris explained that embedding this right in the constitution would facilitate several purposes of a criminal appeal, including setting and maintaining "consistent standards" of substantive and procedural law in the trial courts, and maintaining uniform interpretations of the law. *Id.* Additionally, Mr. Norris noted that by 1961, there was a unanimous consensus in the Michigan state bar that a right of appeal in criminal cases was warranted. *Id.* at 563. As further evidence of this consensus, no delegate questioned the basic need or desirability of including the right to appellate review in the constitution. *Id.* at 562-68. Michigan voters furthered the consensus, and the universal right to appeal in criminal cases was added to the 1963 Constitution. Michigan's Constitutions, Constitution of 1963.[4] This addition was one of the "major changes" to the state constitution arising out of the 1961 Constitutional Convention, and the Citizens Research Council of Michigan described it as and an example of state constitutions' ability to "supplement[] . . . the federal guarantee of basic rights." See Convention Comment, Citizens Rsch Council of Mich, An Analysis of the Proposed Constitution (December 17, 1962), available at https://crcmich.org/wp-content/uploads/apc02.pdf (accessed October 20, 2022).

At the same time, the constitutional delegates took additional steps to ensure that appellate review could be accomplished meaningfully by providing for the assistance of counsel on appeal. Const of 1963, art 1, § 20. The new constitution also established an intermediary court of appeals for the first time in the state's history. Const 1963, art 6, § 10. See also Melvin Nord, *The Michigan Constitution of 1963*, 10 Wayne L Rev 309, 339-41 (1964). That Michigan chose—fairly recently—to embed appellate review of criminal convictions into its constitution, where it is immune from the whims of changing legislatures, signals its magnitude in this State. And since the right of appeal is universal, "standards of procedural fairness forbid cutting down the right." *Mulier*, 12 Mich App at 34.

[4] Available at http://www.legislature.mi.gov/(S(hybaug5jzbffgrpwwukidlqp))/documents/mcl/pdf/michiganconstitution1963asratified.pdf (accessed October 20, 2022)

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B. The Constitutional Right to Appeal Necessarily Implicates Another State Constitutional Right: The Freedom from Cruel or Unusual Punishment.

The guarantee of a proportional sentence is even deeper engrained in Michigan's fabric than the right to appeal. Although the parties in this case focus on the principle of proportionality as discussed by this Court in *Milbourn*, 435 Mich 630, that principle flows from an even more basic tenet: the prohibition on "cruel or unusual" punishment under article I, section 20 of the Michigan Constitution. Const 1963, art 1, § 20. This court has found that Michigan's ban on cruel "or" unusual punishment sweeps more broadly and confers more protection than does the federal Eighth Amendment's ban on "cruel or unusual punishment." *People v Bullock*, 440 Mich 15, 27 (1992); *People v Lorentzen*, 387 Mich 167, 171-72 (1972).

Michigan adopted its rule against "cruel or unusual" punishment" in 1850, and that language carried through to Michigan's current constitution, which was ratified "more than 171 years after" the federal Eighth Amendment. *Bullock*, 440 Mich at 27. The text and drafting history of Michigan's provision leave no doubt that it provides greater protection than the Eighth Amendment. Indeed, in prohibiting "cruel or unusual" punishment, not only did Michigan depart from the text of the Eighth Amendment, the Virginia Declaration of Rights, and the English Constitution of 1689—Michigan also changed a prior version of its own Constitution to broaden the prohibition of unlawful penalties. Initially, Michigan followed neither model. This state's "first Constitution, adopted in 1835, provided that 'cruel *and unjust* punishments shall not be inflicted.'" *Bullock*, 440 Mich at 31 (citing Const 1835, art 1, § 18).

Fifteen years later, however, Michigan decisively adopted the sweeping language of the Northwest Ordinance—a rule against "cruel or unusual punishment"—in the Constitution of 1850. See Const 1850, art 6, § 31. The amendment was proposed at the 1850 convention by Benjamin Witherell, an experienced judge who would later serve on this Court. See Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan 68 (1850) (hereinafter "*Report of the Proceedings*") ("On motion of Mr. WITHERELL, [article I, section 17] was amended by striking 'and unjust' and inserting 'or unusual.'").[5] When this state adopted new constitutions in 1908 and

[5] Available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015071175213&view=1up&seq=7 (accessed October 20, 2022).

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1963, it maintained and reenacted a rule against "cruel or unusual punishment." See *Bullock*, 440 Mich at 31 (citing Const 1908, art 2, § 15; Const 1963, art 1, § 16).

This Court has consistently held that implicit in the broad constitutional prohibition against cruel or unusual punishment is a guarantee of proportional criminal punishments. *Bullock*, 440 Mich at 37. See also *People v Boykin*, __ Mich __ (2022) (Docket No. 157738); slip op at 15 ("[S]entences must follow the principle of proportionality[.]"). The proportionate punishment guarantee "has a lengthy jurisprudential history" in this state. *People v Steanhouse*, 500 Mich 453, 472 (2017) (citing *Milbourn*, 435 Mich at 650 (1990)); see also *Bullock*, 440 Mich at 32 (explaining that, by the time the Constitution of 1963 was adopted, the prohibition on grossly disproportionate sentences had "more than half a century" of jurisprudential pedigree).

In contrast, "the Eighth Amendment contains no proportionality guarantee." *See Harmelin v Michigan*, 501 US 957, 965 (1991). Because "the set of punishments which are *either* 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' and 'unusual'," (*Bullock*, 440 Mich at 30 n 11), article I section 16 commands a different approach to sentencing review. Under a state constitutional analysis, this Court considers "the gravity of the offense and the harshness of the penalty," a comparison of the penalty to penalties for other crimes in Michigan, a comparison of the penalty to penalties imposed for the same offense in other states, *and the goal of rehabilitation*. *Bullock*, 440 Mich at 874 (emphasis added). This framework is grounded in state jurisprudence dating back to the 1870s. Michigan's focus on rehabilitation in sentencing "suggests that a broader range of punishments is excessive under the Michigan constitution than the U.S. constitution." Robert J. Smith, Zoe Robinson, & Emily Hughes, *State Constitutionalism & the Crisis of Excessive Punishment*, Iowa L Rev (forthcoming 2022), https://ssrn.com/abstract=4215577 (accessed October 20, 2022).

Because Michigan guarantees proportional sentencing, judges must account for both the crime and the defendant's personal attributes when imposing sentences. See *Bullock*, 440 Mich 15, 38 (analyzing proportionality in terms of the crime, the defendant's age, and the defendant's personal background); see also *Milbourn,* 435 Mich at 651 (proportionality review "must take into account the nature of the offense and the background of the offender.") This longstanding constitutional principle interacts with the statutory sentencing guidelines in two ways: it informs them, but it also overrides them to the extent that the guidelines conflict with constitutional

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provisions. The rejection of a "cruel and unusual" standard and the adoption of a "cruel or unusual" standard in Michigan's constitution means that a sentence that does not consider mitigating characteristics of a defendant or the defendant's rehabilitation potential—as did not occur for Mr. Stewart or Mr. Posey—fails to meet the guarantee of proportionality. Minimum sentences of 23 years (for Mr. Stewart) and 22 years (for Mr. Posey), without consideration of their personal characteristics or rehabilitative potential, is cruel, even if not unusual in the state of Michigan. A legislative prohibition on appellate review leaves them with no recourse for the infringement of their constitutional rights.

Michigan's statutory sentencing guidelines purport to incorporate the principle of proportionality, see *Milbourn*, 435 Mich at 635, but even a within-guidelines sentence may be disproportionate. See *People v Houston*, 448 Mich 312, 320 (1995) ("[I]t is possible that a sentence within the guidelines could be disproportionately high or low."). In that case, the need for proportionality overrides the presumption of validity for within-guidelines sentences. This Court has said as much: while "the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion,' . . . '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.'" *Steanhouse*, 500 Mich at 474-75 (quoting *People v. Lockridge*, 498 Mich 358, 391 (2015) and *Milbourn*, 435 Mich at 661). For this reason, for example, trial courts consider whether a within guidelines sentence would be proportionate—and, if it wouldn't, they depart from the guidelines to craft "a more proportionate criminal sentence." *People v Babcock*, 469 Mich 247, 264 (2003); see also *id.* at 256 n 10 (rejecting the contention "that proportionality is irrelevant under the statutory sentencing guidelines").

Because "the people of Michigan, speaking through their constitution," require proportional punishments, that enduring requirement prevails over "the passing judgments of temporary legislative or political majorities." *Bullock*, 440 Mich at 41. Thus, as this Court recognizes, adherence to proportionality will occasionally require "overrid[ing] a democratically expressed judgment of the Legislature." *People v Parks*, __ Mich __ (2022) (Docket No. 162086); slip op at 11 (quoting *Bullock*, 440 Mich at 40-41). Applied here, that principle leads to an obvious conclusion. As the Michigan Constitution requires proportionate sentences, and some sentences that fall within the guidelines may *also* be disproportionate, those sentences are subject to review.

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Where the Constitution promises a right, appellate review enforces it. This is especially true where, as in these cases, the alleged constitutional violation emanates from the trial court. In this circumstance, appellate review provides the first and only line of defense. Because the legislature may not "statutorily impose[ ]" a procedural requirement that "divests a claimant of his or her right to pursue a constitutional claim," *Mays v Snyde*r, 323 Mich App 1, 33 (2018), it may not forbid appellate review of sentences—in or out of statutory guidelines.

II. Appellate Review is Essential to Ensuring Proportional Punishment.

The right to appeal was added to the Constitution, in part, to guarantee proportionate sentences. When composing Michigan's current charter, the delegates discussed "reduc[ing]" the "disparity in sentences . . . in cases involving substantially similar offenses and offenders" as one basis for the new right. Official Record, State of Michigan Constitutional Convention 1961 at 562. Proportionality review furthers that goal. *See Milbourn*, 435 Mich at 636 (explaining that proportionality review protects against "unjustified sentence disparity"). Absent the availability of appellate review, then, proportionality is an empty promise—hence, for instance, this Court's insistence that trial courts justify a departure from the guidelines "in order to facilitate appellate review" for proportionality. *Steanhouse*, 500 Mich at 470, 472. Therefore, this Court should recognize that because the constitutional right to appellate review provides an essential check on the sentencing judge and the legislature, any statute that curtails that right is unconstitutional.

A. This Court should recognize that a rule prohibiting appellate review of within-guideline sentences eviscerates both the right to appeal and the right to proportionate sentences.

Just as the right to appeal secures the guarantee of proportionality, proportionality review is central to the right to appeal. The question presented in this case parallels that presented in *Lockridge*, but at the appellate level. *Lockridge* recognized that the Sixth Amendment requires discretion in sentencing; this Court similarly should recognize that article I, section 20's guarantee to appeal requires discretion to review a sentence on appeal.

The Sixth Amendment to the U.S. Constitution guarantees trial by jury. US Const, Am VI. In *Lockridge*, this Court addressed whether mandatory sentencing guidelines, which required judges to increase sentences based on facts not found by the jury, violated that guarantee. 498 Mich at 364. This Court recognized that the

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right to trial by jury is not satisfied simply because a jury rendered a conviction. Instead, that right also limits the legislature's ability to constrain the judge's sentencing discretion; the legislature could not require judges to sentence based on facts not found by the jury, lest the jury right be eroded entirely. The Court concluded: "[J]udicial discretion . . . is in," while "legislative constraints on that discretion . . . are out." *Id.* at 375.[6]

This case mirrors that one, one rung up the appellate ladder. Article I, section 20 of the Michigan Constitution guarantees not just the right to a jury trial, but also the right to appeal all criminal convictions. The *Lockridge* court held that the legislature could not usurp the role of the jury by mandating that judges sentence based on facts not found by the jury; here, the legislature cannot usurp the role of the appellate court by mandating that it affirm sentences even if the court otherwise would find them disproportionate. Just as the existence of a trial by jury could not satisfy the Sixth Amendment, neither can the mere existence of an appeal satisfy the right to appeal. Instead, the appeal must have *content*, the appellant must have *grounds* to appeal, and the appellate court must retain discretion to grant relief on those grounds. As in *Lockridge*, permitting the legislature to eliminate judicial discretion risks neutering the constitutional right altogether.

The State's arguments elucidate the danger that MCL 769.34(10) poses to both the right to appeal and the guarantee of proportionality. The State offers two reasons why MCL 769.34(10) is consistent with the constitutional rights to proportionate sentences and to appeal. The first erases the proportionality guarantee; the second erases the right to appeal.

First, the State argues that the legislature may require affirmance of a within-guidelines sentence because such a sentence "is lawful." Appellees' Br. at 46.[7] According to the State, there "is no proportionality or reasonableness issue to be reviewed in the legislative scheme for a guidelines sentence" because "the

[6] In the process, the Court also instructed that, "[t]o the extent that any part of MCL 769.34 or another statute refers to the 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 506 n 1.

[7] Citations to "Appellee's Br." refer to Plaintiff-Appellee's Supplemental Brief, filed in this Court under *People v. Stewart* on September 14, 2022.

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legislature has said no such thing." *Id.* Quite right: the proportionality guarantee is constitutional, not statutory.

The State seems to recognize this point, noting that "there is no legal requirement that a guidelines sentence *be* reasonable or proportionate . . . , other than that it not constitute cruel or unusual punishment" under the state constitution. Appellees' Br. at 49. But a disproportionate sentence *is* cruel or unusual, and therefore it is unconstitutional. See, e.g., *Bullock*, 440 Mich at 30 ("[T]he penalty at issue [is] unjustifiably disproportionate to the crime for which it is imposed, and therefore 'cruel or unusual.'"); *Parks*, __ Mich at __; slip op at 10 (explaining that the Constitution's ban on cruel or unusual punishment requires "that sentencing decisions be proportional"). See also William W. Berry, III, *Cruel State Punishments*, 98 NC L Rev 1201, 1210 (2020) (defining a cruel punishment as "disproportionate to the conduct and the character of the defendant in light of the purpose of the punishment in question."). Legislative silence on a constitutional requirement does not undercut the requirement's existence. If it did, the Constitution would serve no purpose at all.

Next, the State points to article 6, Section 10's provision that "[t]he jurisdiction of the court of appeals shall be provided by law." Const 1963, art 6, § 10. The State takes this section to grant the legislature plenary authority to restrict "the issues available for consideration [on] appeal." Appellees' Br. at 46. That is wrong: the legislature "may not eradicate a constitutional guarantee in reliance on the language 'as provided by law.'" *Midland Cogeneration Venture Ltd P'ship v Naftaly*, 489 Mich 83, 94 (2011).

Instead, as this Court has already instructed, the constitutional delegation of authority to the legislature to "provide[] by law" the "jurisdiction of the court of appeals" "must be read in the context in which the court was established." *Reist v Bay Cnty Cir Judge*, 396 Mich 326, 338 n 16 (1976). That context is as follows: the Michigan Constitution established the court of appeals in 1963, at the same time it granted a universal right of appeal from criminal convictions. Nord, *The Michigan Constitution of 1963*, at 339. Because all appeals had previously gone directly to the state supreme court, concerns arose that the new right would overwhelm its docket. *Reist*, 396 Mich at 338 n 16; see also *In re Court of Appeals*, 372 Mich 227 (1964) ("The constitutionally granted appeal of right in every criminal case, and our status as the only appellate Court combine to require us presently to hear every criminal appeal . . . the constitutionally required court of appeals is imminently requisite."). To reduce the supreme court's burden, the 1961 Convention established a court of

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appeals, and left it to the Legislature to determine that court's jurisdiction. *Reist*, 396 Mich at 338 n 16.

But, as this history makes clear, all that means is that the Legislature determines what sorts of cases the court of appeals (as opposed to this Court, for instance) hears, not how the court of appeals must rule. Official Record, State of Michigan Constitutional Convention 1961, 563.[8] Thus, this Court concluded, article 6 does not grant the legislature "power . . . to deny appellate review." *Reist*, 396 Mich at 338 n 16. It may divert appeals in different directions; it may not block them altogether. See *Naftaly*, 489 Mich at 94 (the "as provided by law" language simply means that the legislature may dictate "the mechanics of an appeal").

What precedent establishes, common sense confirms. If the State is correct that "nothing precludes the legislature from restricting the issues available for consideration in [an] appeal," (Appellee's Br. at 47), then the legislature could, if it wished, treat every possible ground for relief as it treats disproportionate within-guidelines sentences: it could determine that any given issue "is not subject to judicial review." Appellees' Br. at 50. However, this extreme measure would

[8] Vice Chairman Norris made this precise point during the 1961 Convention:

> While the committee on criminal jurisprudence of the state bar has advocated an intermediate court of criminal appeal, it is the recommendation of our committee that this particular insertion of [what is now article VI, § 10], be considered a constitutional right, independent of the means which this convention or the legislature might develop to implement the right.
>
> It is possible to have an intermediate court of appeal; it is possible to have an intermediate court of criminal appeal; it is possible to increase the number of supreme court justices; it is possible to maintain the present number of supreme court justices and still deal with this particular problem as discretion and wisdom may so indicate.
>
> We felt as a declaration of rights, bearing in mind the ancient and mandatory injunction that we have equal justice under law, that we ought to grant and record as one of the rights of the accused, in this particular section, the right of appeal in a criminal case, and the committee on declaration of rights, suffrage and elections so recommends . . . .

Id.

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effectively remove a right from the Constitution via statute, and although nobody would argue that this was the legislature's intent, that conclusion follows necessarily from the State's argument.

When the people of Michigan have wished to grant their legislature authority to limit the constitutional right to appeal, they have done so explicitly and through the proper channel: a constitutional amendment. In 1994, Michigan amended its Constitution to grant the Legislature authority to "define the scope" of the right to appeal for those who plead guilty or *nolo contendere*. *People v Perks*, 259 Mich App 100, 106 (2003). Const 1963 art 1, § 20. Prior to this amendment, the Legislature lacked authority to place any limits on the constitutional right to appeal. Cf. *People v Smith*, 402 Mich 72, 73 (1977) (per curiam) (holding that article 1, section 20 "guarantee[d] an appeal as a matter of right from a plea-based conviction").

Perhaps a similar constitutional amendment could limit the right to appeal for recipients of within-guidelines sentences of their right to appeal. But absent such an amendment, the Legislature may not do it alone, and even with an amendment, it is doubtful that the Legislature may eviscerate the right to appeal sentences on proportionality grounds any more than it could completely bar the review of convictions stemming from guilty or *nolo contendere* pleas. See *Halbert*, 545 US at 612, 617-19 (explaining that after the 1994 amendment, the Michigan Constitution still conveys to a defendant who pleads guilty or *nolo contendere* the right to ask leave to appeal).

B. This Court ought to join other states that allow for appellate review of within-guidelines sentences.

A number of other states—some of which have narrower constitutional guarantees than Michigan—allow for appellate review of sentences even if they fall within the sentencing guidelines. In fact, Michigan is one of very few states that has been reticent to provide appellate review of sentences. See, e.g. *Milbourn*, 435 Mich at 663 n 30 ("At present, it appears that approximately five states do not allow defendants to appeal their sentences."). Michigan's constitutional guarantee of proportionate punishment and its universal right of appeal compel a holding that within-guideline sentences are subject to appellate review as well.

For instance, the Louisiana Supreme Court considers appellate review a necessary safeguard against unconstitutional "cruel, excessive, or unusual

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punishment." La Const, art 1, § 16. [9] Like Michigan's ban on cruel or unusual punishment, Louisiana has interpreted its provision as affording broader rights than those provided by the federal Eighth Amendment. *State v Jones*, 639 So 2d 1144, 1154 (La 1994) (superseded on other grounds by constitutional amendment, La Const, art 1, § 16). Like Michigan's ban on cruel or unusual punishment, Louisiana courts interpret the ban on "excessive" punishments as meaning those which are "grossly disproportionate". See, e.g., *State v Fruge*, 179 So 3d 579, 583 (La 2015). According to the Louisiana Supreme Court, the prohibition on excessive punishment also "broadened the duty" of the appellate courts to include review of sentences, even if they are permissible by statute. See *State v Baxley*, 656 So 2d 973, 977 (La 1995) (Appellate courts are bound to "review the sentencing aspects of criminal statutes."); *State v Dorthey*, 623 So 2d 1276, 1280 (La 1993) (explaining that the state constitutional prohibition on excessive sentences "is a basis for extending the court's control over the entire sentencing process"); *State v Willis*, 420 So 2d 962, 964-65 (La 1982) ("[The] imposition of a sentence, although within the statutory limit, may violate a defendant's constitutional rights against excessive punishment that is reviewable . . . on appellate review.").

Other states similarly grant appellate courts the power to review within-guidelines sentences. See, e.g., *Wright v State*, 670 P2d 1090, 1091 (Wyo 1983) ("We do not follow the common-law rule that a sentence is not subject to appellate review if it is within the limits set by the legislature."); *State v Fortes*, 330 A2d 404, 410 (RI 1975) ("We hold . . . that this court has the power to review a sentence when it is alleged to be excessive although within statutory limits."); *McCleary v State*, 182 NW2d 512, 518-19 (Wis 1971) (concluding, "consonant with practices that are well nigh universal outside of the United States," that Wisconsin appellate courts review sentencing "in the same manner that all discretionary acts are to be reviewed"); *People v Morrow*, 163 AD3d 1265, 1265-66 (NY 2018) (reviewing a sentence for excessiveness); *Commonwealth v Coulverson*, 34 A3d 135, 146 (Pa Super 2011) (explaining that Pennsylvania appellate courts vacate and remand sentences that "fall[] within the guidelines, but [are] 'clearly unreasonable' based on the circumstances of the case"). These states acknowledge that appellate review is needed to reduce sentencing disparities and ensure that sentences are not excessive. See *Ballweber v State*, 457 NW2d 215, 217 (Minn Ct App 1990) ("Vindication of

[9] Louisiana's guidelines model tracks Michigan's closely, which only underscores the parallel. See *State v Smith*, 629 So 2d 333, 337 (La 1993) (explaining Louisiana sentencing procedure).

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the Guidelines' stated goals of establishing 'rational and consistent sentencing standards,' of reducing sentencing disparity, and providing uniformity in sentencing requires appellate review of trial court sentencing decisions."); *State v Johnson*, 170 A2d 830, 940 (NJ Super App Div 1961) (concluding, because "[i]t would . . . be an anachronism if it were true today that no appellate court may review a trial judge's exercise of his discretion in sentencing," New Jersey appellate courts "have the right to revise a sentence where it is manifestly excessive, even though within authorized statutory limits").

And state courts that conclude otherwise often do so for reasons inapplicable in Michigan, and indeed underscore the argument for appellate sentence review here. For instance, Kansas courts have upheld an identical statute to the one at issue here, "because the right to appeal in Kansas is limited to what is provided by statute; *Kansas courts have not recognized any constitutional right to an appeal*." *State v Dillon*, 253 P3d 383 (Kan App 2011) (emphasis added). See also *State v Clemons*, 45 P3d 384, 395 (Kan 2002) ("The right to appeal is entirely statutory[.]"); *State v Lewis*, 998 P2d 1141, 1146-47 (Kan App 2000) ("[N]o appellate review is required by the United States Constitution, or the Kansas Constitution.") (internal citations omitted). Thus, the Kansas courts have concluded, "absent express constitutional limitations, the legislative branch has the power to limit the jurisdiction of all inferior courts." *Lewis*, 998 P2d at 1147.

Of course, Michigan's constitution departs from Kansas's in this respect: it guarantees a near-absolute right to appeal all criminal convictions. Appellate courts should be permitted to review sentences to ensure they meet the constitutional guarantee of proportionality. One right implies the other.[10]

[10] This position is consistent with this Court's holding in *People v Coles*, 417 Mich 523, (1983) before Michigan's legislative sentencing guidelines were in place. This Court recognized that appellate review was crucial to ensuring proportionate sentences, stating, "statutory sentences must be subject to judicial review in order to ensure that the constitutional prohibition against cruel or unusual punishment is not violated." *Id.*at 529-30.

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III. Absent Appellate Review of Within-Guideline Sentences, Disproportionate Sentences Persist Unchecked.

One purpose of appeals raised at the 1961 Constitutional Convention was "to determine and maintain consistent standards in the trial courts." Official Record, State of Michigan Constitutional Convention 1961, 562. There, it was recognized that the right to appeal encourages uniformity in the substantive and procedural law. The prohibition of appellate review for within-guidelines sentences prevents the accomplishment of this function. Without appellate review, sentencing varies widely from courthouse to courthouse, and even from judge to judge, in ways that are not based on permissible sentencing factors. These sentencing disparities run afoul of the goals of the implementation of sentencing guidelines, and in doing so they violate defendants' constitutional right to proportionate sentencing.

Michigan has maintained advisory sentencing guidelines in some form since 1983. See Mich Sup Ct Admin Order No. 1988-4, Sentencing Guidelines, as amended July 13, 2005.[11] An initial set of guidelines were enacted by the Supreme Court Sentencing Guidelines Advisory Committee without any legislative mandate, so this Court has not required adherence to them. *Milbourn*, 435 Mich at 656-57. Since that time, the Michigan Legislature has enacted its own set of sentencing guidelines, which this Court determined are also advisory. *Lockridge*, 498 Mich 358. There is no basis to prohibit review of guidelines that are not mandatory, especially since, as this Court noted decades ago, "[c]onceivably, even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." *Milbourn*, 435 Mich at 661. For this reason, judges are permitted to depart from the guidelines to ensure proportionate sentences, with appellate review to follow. *Id.*

Michigan's sentencing guidelines alone do not ensure proportionality and, as the State acknowledges, the legislative guidelines do not even address it. Appellees' Br. at 49. Now, research suggests that the very disparities in sentencing that have long been of concern in this State persist in spite of the existence of sentencing guidelines.

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[11] The history of Michigan's sentencing guidelines is discussed at length in chapter one of Safe & Just Michigan's 2021 report on the effects of the guidelines over time. Barbara Levine, Anne Mahar, & Justin Smith, *Do Michigan's Sentencing Guidelines Meet the Legislature's Goals? A Historical & Empirical Analysis of Prison Terms for Life-Maximum Offenses*, Safe & Just Michigan 6-19 (November 2021), https://www.safeandjustmi.org/wp-content/uploads/2021/12/Do_Michigans_Sentencing_Guidelines_Meet_The_Legislatures_Goals.pdf (accessed October 20, 2022).

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The right to appellate review of all criminal sentences—within or outside of the guidelines—helps to ensure that the sentencing guidelines are utilized in a uniform manner, and that sentences are proportionate in light of the crime and the defendant's individual characteristics.

A. Without appellate review, the legislative sentencing guidelines allow for disproportionate sentences.

Michigan's sentencing guidelines still permit trial judges broad discretion. Appellate review ensures that sentences may be reviewed in a uniform way, and develops a body of law to guide trial courts in determining how best to exercise their discretion. See *Coles*, 417 Mich at 529-30 (explaining the importance of appellate review where trial courts have "wide discretionary power," notwithstanding statutory limits on sentencing). Without that review, neither occurs.

Sentencing guidelines in Michigan were first promulgated after this Court denounced racial and other disparities in sentencing in *Coles*, 417 Mich at 523. *Milbourn*, 435 Mich 630, 642-43, 654. Following the implementation of the Supreme Court's initial sentencing guidelines, some evidence showed statistically significant decreases in racial disparity. *Id.* at 654 (citing James A. McComb, *An Overview of the Second Edition of the Michigan Sentencing Guidelines*, 67 Mich B J 863, 864 (1988)). In 1998, the Legislature enacted a new legislative sentencing guideline scheme. See 1998 PA 317. These guidelines, a version of which are in use today, were the result of work by a sentencing commission convened by the Legislature four years earlier. Barbara Levine, Anne Mahar, & Justin Smith, *Do Michigan's Sentencing Guidelines Meet the Legislature's Goals? A Historical & Empirical Analysis of Prison Terms for Life-Maximum Offenses*, Safe & Just Michigan, 15 (November 2021), https://www.safeandjustmi.org/wp-content/uploads/2021/12/Do_Michigans_Sentencing_Guidelines_Meet_The_Legislatures_Goals.pdf (accessed October 20, 2022). The Legislature tasked the Sentencing Commission with crafting guidelines that were "proportionate to the seriousness of the offense and the offender's prior criminal record", and that would "reduce 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." *Id.* (citing MCL 769.33 (e)).

The Sentencing Commission did develop a set of sentencing guidelines, after which it was supposed to study how they worked in practice and recommend

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modifications based on the commission's findings. Levine, Mahar, & Smith at 15. However, after submitting the guidelines to the Legislature in 1997, the commission never reconvened, and ultimately it was disbanded. *Id.* Therefore, "[t]he assumptions that were used to develop the guidelines went untested." *Id.* Furthermore, with no entity to provide a check on its actions (having already passed MCL 769.34(10)), the Legislature continued to amend the sentencing guidelines on an ad hoc basis. *Id.* (citing Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan & the Need for Sentencing Reform*, 47 U Mich J L Reform 645, 685 n 273 (2014)).

Now, there is no longer evidence that the statutory sentencing guidelines that are in effect today actually ensure that sentences are proportionate to the offense or to the offender. Instead, one-off legislative changes undermined the principle of proportionality by re-working punishments in a way that increased sentences and incarceration rates without adhering to proportionality and other factors initially considered by the Sentencing Commission. Levine, Mahar, & Smith at 16. As a result, the unreviewable sentencing guidelines allow for the very disparities that prompted this Court to call for sentencing guidelines in the first place.

A 2005 article on sentencing outcomes in Michigan reviewed cases involving drug offenses, crimes against persons, and property crimes in all of Michigan's circuit courts in the year 1999, with the goal of ascertaining whether race affected sentencing outcomes. Homer C. Hawkins, *Race & Sentencing Outcomes in Michigan*, 3 J Ethnicity Crim Just 91 (2005). Hawkins found that race was associated with a higher length of sentence for Black and Mexican-American defendants convicted of violent crimes and drug crimes. *Id.* at 99-102.[12] He concluded that although mandatory sentencing guidelines might have had some effect on reducing racial decisions for certain crimes, being Black or Mexican-American increased both the probability of being incarcerated, and the probability of receiving more prison time than white defendants. *Id.* at 105. Hawkins noted that a defendant's prior record also plays a large role in sentencing decisions. *Id.* However, Hawkins explained that

> "[i]t is well documented that Blacks and Mexican-Americans have a greater opportunity for interaction with the police. Thus it is reasonable to assume that when an individual has a greater opportunity for interaction with the police and for arrest, more prior

[12] Black defendants received fewer months in prison than white defendants for larceny and manslaughter. *Id.* at 104-05.

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> convictions are a distinct possibility. This, by definition, meant that the Black or Mexican-American offender had a greater chance of receiving a longer sentence . . .”

Id. at 105.

Unjustified sentencing disparities at the county level emerged through a 2020 report released by the Citizens for Racial Equity in Washtenaw (“CREW”). Citizens for Racial Equity in Washtenaw, *Race to Justice: Citizens for Racial Equity in Washtenaw’s Report on Racial Disparities in the Washtenaw County Criminal Legal System*, (August 2020), https://www.citizensforracialequitywashtenaw.org/crew-s-report (accessed October 20, 2022). CREW pulled and analyzed more than 3,600 felony charges in the Washtenaw County Circuit Court between 2013 and 2019. *Id.* at 5. CREW found 23 instances of judicial decision-making at the individual level that resulted in racial disparities in sentencing within that county over just the 6-year period of its study. CREW Report at 8-9, 27-35. Importantly, the CREW Report attributes these disparities in large part to the lack of appellate review of sentences, which would provide a critical oversight mechanism to curb racial disparities in sentencing. *Id.* at 14. It is difficult to imagine that the disparities observed in Washtenaw County trial courts only exist in one county.

In fact, in 2021, Safe & Just Michigan released the results of an in-depth study on sentencing patterns in the state of Michigan under the judiciary’s advisory guidelines, and between 1999 and 2012 under the Michigan Legislature’s mandatory guidelines. Levine, Mahar, & Smith at 34. That study looked at more than 38,000 sentences in 13 counties, for second-degree murder, assault with intent to murder, first-degree criminal sexual assault, and armed robbery. *Id.* It found that sentencing ranges across courts were not standardized: “identical ranges produce[d] widely different median sentences.” *Id.* at 40, 92. Additionally, defendants who had similar backgrounds and offenses received sentences that varied significantly based on county of conviction. *Id.* at 40. Some counties routinely gave significantly longer sentences than others. *Id.* at 40-41. And even judges within the same county gave significantly different sentences for the same types of offenses. *Id.* at 42, 113. Ultimately, disparities appeared along identity lines. The study revealed that non-white defendants in Michigan as a whole receive much longer minimum sentences for almost every offense. *Id.* at 123-24. Some counties experienced significant racial disparities in sentencing, while others did not. *Id.* at 45, 124. Men received longer sentences on average than women for the same offenses, for reasons that could not be ascertained by the authors. *Id.* at 44. At bottom, the researchers here posited that

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the broad nature of the guidelines promotes, not rectifies, disparity in sentencing within the same offenses. *Id.* at 39.

Sentencing data from Michigan's courts show the presence of inequity in sentencing at the state, county, and even courthouse level. The original intent of sentencing guidelines in Michigan was to alleviate an observed problem of racial discrimination in sentencing. *Milbourn*. However, disparate sentencing based on race or other impermissible factors is not proportionate. Absent appellate review, it is very difficult to identify and address these disparities that take place at the trial level, and are not directly tied to the crime or to the offender's history render sentences constitutionally disproportionate. Without sentencing review, "[t]he aider and abettor may be held accountable for unintended acts of the perpetrator; the prescribed punishment may be the same whether the offender is age 12 or age 38; and a numerical score cannot capture the heart of the offender . . . ." Sheila Robertson Deming, *Michigan Sentencing Guidelines*, Mich B J, available at https://www.michbar.org/journal/Details/Michigans-Sentencing-Guidelines?ArticleID=92 (accessed October 20, 2022).

B. Appellate review of within-guidelines sentences is particularly important to ensuring proportionate sentences for youthful offenders.

The mandatory affirmation of within-guideline sentences disregards the evolution of jurisprudence in this state concerning cruel or unusual punishments for youthful offenders under article I, section 16. In light of emerging jurisprudence in this area, it is particularly important that sentencing judges at trial—and appellate courts on review—take stock of the characteristics of individuals at sentencing. Without such review, there is a high risk of disproportionate sentencing, particularly for youthful offenders.

During the last year alone, this Court has expanded its prohibition on cruel or unusual punishment to recognize additional protections for youth facing extreme sentences. For instance, it now prohibits mandatory sentences of life without parole for 18-year-olds. *Parks*, __ Mich __. In so finding, this Court reasoned that a mandatory life without parole sentence for an 18-year-old was disproportionate and constituted cruel or unusual punishment. *Id.* at *15. In *People v Stovall*, __ Mich __ (2022) (Docket No. 162425); slip op at 10, this Court held that even a parole-eligible life sentence for a juvenile violated the prohibition against cruel or unusual punishment. *Id*.

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Changes in the law such as these reflect this State's evolving standards of decency. *People v Lorentzen*, 387 Mich 167, 170 n 1, 172. See also *Parks*, __ Mich at __; slip op at 10. Although this new jurisprudence takes steps to insulate youth from the most extreme sentences, these cases do not address sentences that are less than life which nevertheless might be disproportionate when balancing the offense with the characteristics of the defendant. Appellate review provides a check for proportionality as standards of decency continue to evolve.

Joshua Stewart's case is the perfect example of the disproportionality in sentences that can persist when appellate review is unavailable. Mr. Stewart—who was 18 years old at the time of the crime, received a combined sentence of 23 to 46 years in prison. The sentencing range for armed robbery alone is broad, spanning from just over 14 years to nearly 24 years. (Def. Supp. Br. at 67). Additionally, the other offenses for which Mr. Stewart was convicted brought his minimum sentence to 23 years. Despite his age at the time of the crime, Mr. Stewart received a sentence near the top of the permissible sentencing range. However, as this Court recognizes, scientific principles of development suggest that the same characteristics that render 17-year-olds less culpable than adults apply to late adolescents at age 18. *Parks*, __ Mich at __; slip op at18-19.[13]

Conclusion and Relief Requested

Ultimately, in cases like the ones at bar, it is crucial that the Court of Criminal Appeals be permitted to review defendants' sentences for proportionality in light of their personal characteristics, and their rehabilitative potential. Therefore, for the reasons stated above, this Court should hold that MCL 769.34(10), to the extent that it requires the affirmation of within-guidelines criminal sentences, restricts the right to appeal in contravention of article 1, section 20 of the Michigan Constitution.

[13] This Court also recently held in *Boykin*, __ Mich __ that sentencing courts must consider youth as a mitigating factor when imposing a term-of-years sentence on a juvenile. Amicus posits that because late adolescents share pertinent developmental characteristics with individuals under the age of 18, this State's evolving standards of decency also dictate that age be considered for young adolescents at the time of sentencing, and that those sentences should be subject to proportionality review on appeal.

Respectfully submitted,

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I hereby certify that this document contains 7,867 countable words. The document is set in Times New Roman, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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