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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee,

v.

JOSHUA LAMAR-JAMES STEWART
Defendant-Appellant.

No. 162497

LC No. 16-5731-01
No. 343755

ANSWER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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Counterstatement of the Questions

I.
(Defendant's I and II)

A trial judge's decision on the voluntariness of a statement is to be affirmed unless the reviewing court is left with a firm and definite conviction the trial court erred. Looking to the totality of the circumstances in the video of the interview and questioning, the trial court found the statement voluntary. Should this court should be left with a firm and definite conviction the trial court clearly erred?

The People answer: NO

Defendant answers: YES

III.

Defense counsel is ineffective where he or she makes "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that undermine the reliability of the outcome; there is a strong presumption that performance was not deficient. Defense counsel objected to the admission of the video of defendant's questioning on some grounds, but did not request redaction of reference to other possible behavior of defendant. Did the Court of Appeals err in finding the prejudice standard was not met?

The People answer: NO

Defendant answers: YES

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IV.

The legislature through MCL 769.34(10) has divested appellate courts of authority to review sentences within properly scored guidelines. There is no basis on which the statute can be said to be unconstitutional, so long as understood to allow possible constitutional claims, such as the consideration of constitutionally impermissible factors in setting the sentence. Because the sentence here was within properly scored guidelines, must it be affirmed?

The People answer: YES

Defendant answers: NO

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Statement of Facts

The People accept defendant's facts with the addition of those facts stated in the argument, and the exception of any argumentative statements.

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Argument

I.

A trial judge's decision on the voluntariness of a statement is to be affirmed unless the reviewing court is left with a firm and definite conviction the trial court erred. Looking to the totality of the circumstances in the video of the interview and questioning, the trial court found the statement voluntary. This court should not be left with a firm and definite conviction the trial court clearly erred.

Standard of Review

An appellate court must give deference to the trial court's findings at a suppression hearing. "Although engaging in de novo review of the entire record . . . [a reviewing court] will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of Miranda rights 'unless that ruling is found to be clearly erroneous.'[1]

Discussion

The trial judge found, after viewing the video of the interrogation:

> The Court recognizes that for purposes of a Walker Hearing that the People bear the burden of showing by a preponderance of the evidence that the defendant made a voluntary, knowing and intelligent waiver of his Fifth Amendment and Sixth Amendment rights to make a statement.
>
> In this particular case one of the claims made by the defense is that the defendant was not appropriately informed of his rights as required by the Supreme Court decision in Miranda versus Arizona. And certainly as set forward in People versus Wells at 238 Mich App 383, a 1999 case, the use of any involuntary statement that has been forced by police offends the due process provisions of the 14th Amendment.

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[1] *People v. Cheatham*, 453 Mich. 1, 29–30 (1996).

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And the fact that this was an interrogation that lasted three hours, the three-hour time limit in and of itself is not determinative. The Court is required to examine all of the facts and circumstances in their totality to determine whether or not the length of the interrogation rendered the statement involuntary.

As a notation or bench mark, if you will, the Michigan Supreme Court in 1988 in People versus Cipriano found at 431 Michigan 315, if a defendant was interrogated on a number of different occasions over a 14-hour period, and that was found not to be an involuntary interview or interrogation session.

With regards to the notion of the defense claim that the defendant was not advised of his Miranda Rights, Michigan law is very clear that the defendant has to be apprized of his Constitutional Rights, and also the law is equally clear that the defendant does not have to be ritualistically advised of those rights as set forth in the Miranda decision.

The requirement as set forth by the Court indicating that any Court reviewing the Advice of Rights has to determine whether or not the words that were used by the officers in advising Mr. Stewart of his Constitutional Rights conveyed to him the information that is essential and required in the warnings to be given to the defendant. If the words used reasonably convey those rights as set forth in the Miranda Decision, then that is sufficient.

Not only does Michigan law stated that, but even in Florida versus Powell found at 559 United States, 50, 2010 United States Supreme Court decision it states the same thing.

An examination in this particular case indicates that the essence and the requirements of Miranda versus Arizona were conveyed to the defendant. The reasonable interpretation of the Advice of Rights made by the officers in this case does in fact establish that the defendant was advised of his Constitutional Rights, and the guarantees as set forth in Miranda versus Arizona were conveyed to the defendant.

There are two other claims that are made by the defense in terms of their claim that the confession should be suppressed. One is that the police lied to the defendant with regards to information that they had about the investigation that would incriminate the defendant, Mr. Stewart, and it

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is the defense contention that that is a justification and a basis for suppressing the statement.

For quite some time United States Supreme Court and the Michigan Appellate Courts have stated that when a defendant is falsely advised of information about the crime, and as a result of that information the defendant confesses, that that in and of itself is not a basis for suppressing the statement. It is a factor to be considered by the Court in determining whether or not the defendant's statement is involuntary. But the fact that the police may say this to a defendant, hey, we found your fingerprints at the scene, even if that is not true, or we found your fingerprints on the murder weapon, and if that's not true, but the defendant ends up confessing, that is not by any means an automatic requirement that the defendant have his statement suppressed.

In Frazier versus Cupp found at 394 Michigan 731, a 1969 United States Supreme Court decision, the United States Supreme Court indicated that false statements given to the defendant by the police is not a basis for suppressing the statement in and of itself.

That is also echoed in People versus Hicks found at 185 Mich Appeals 1990 where the Court of Appeals stated and I quote: "The fact that the police misrepresented the fact to the defendant that his fingerprints were discovered on an article retrieved from the crime scene is insufficient to make this otherwise voluntary statement involuntary.

As the Court stated in Hicks, as well as the Supreme Court Decision in Frazier, it is one factor for the Court to consider in determining whether in the totality of the circumstances the statement is voluntarily made and whether or not the People have met their burden by a preponderance of the evidence.

The other claim made by the defense is that the defendant was allegedly promised leniency and a deal if he would in fact make a statement.

In People versus Givens found at the 227 Mich Appeals 113, a 1997 case, the Michigan Court of Appeals stated and I quote: A promise of leniency is merely one factor to be considered in evaluation of the voluntariness of a defendant's statement."

In this particular case the defendant's statement was made after he was appropriately advised of the principles set forth in Miranda versus Arizona.

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> The fact that there was a misrepresentations 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 with regards to the Fifth Amendment protections extended to the defendant.[2]

Defendant now claims that the statement was involuntary for different reasons; that defendant was 18 and (it is alleged) in an alternative school; that the rights given were "minimized," and that " the record establishes only that Mr. Stewart understood the words he was reading, not that he understood their meaning or consequences,"[3] and so his waiver was not "valid," and his statement was involuntary. The People proceed in reverse order.

It is not necessary that it be shown the defendant understood the *consequences* of his waiver, and nothing suggests that when defendant read out loud that "I have the right to remain silent" and "do not have to answer any questions," that "any statement I make or anything I say will used against in the court of law"; that "I have the right to have an attorney, lawyer present during the time I answer my questions or make any ·statements'" that "[i]f I cannot afford an attorney, lawyer one will be appointed for me without cost by the court prior to any questions'" and that "I can decide at any time to exercise my rights and not answer any questions or make any statement"[4] that he did not from this reading understand that he did not have to answer questions if he did not want to. In *People v. Cheatham*[5] the Court noted that it had been established

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[2] MT, 3-8.

[3] Defendant's brief, p. 18.

[4] This rendering of defendant's reading of his rights out loud is taken from the transcript prepared as an aid to the appellate litigation; it is not itself evidence, as it was not prepared for nor admitted at trial. See Transcript of questioning, p. 5-6 (hereafter TQ).

[5] *People v. Cheatham*, 453 Mich. 1 (1996).

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by the United States Supreme Court that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law," which "eliminate[s] any subjective inquiry with regard to the voluntary prong of the waiver inquiry."[6] and also establishes that "the standard for determining whether a waiver is voluntary for Miranda purposes is the same standard for assessing whether a confession is voluntary under the Fourteenth Amendment due process inquiry."[7] With regard to whether the decision to speak after the warning of rights was "intelligent," it is not required that the suspect "understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him."[8] It need not be shown that the defendant had a "a wise or shrewd basis for waiving Miranda rights for the waiver to be valid."[9] As federal cases have put it, if the police have no basis "to think that the suspect doesn't understand them, there is nothing that smacks of abusive behavior. It would seem to follow that the question is not whether if [the defendant] were more intelligent, informed, balanced, and so forth he would not have waived his Miranda rights, but whether the police believed he understood their explanation of those rights."[10] Nothing in defendant's reading of his rights, or his participation in answering questions, gave rise to any reason to believe that he did not understood what he had read out loud. Nor does the fact that he was in an alternative school—and a senior—give rise, without more, for any such belief.

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[6] Id., at 14-15.

[7] Id., at 17.

[8] Id., at 28.

[9] *People v. Daoud*, 462 Mich. 621, 642 (2000).

[10] *Rice v. Cooper*, 148 F.3d 747, 750–51 (CA 7, 1998). See also *Garner v. Mitchell*, 557 F.3d 257, 262–63 (CA 6, 2009).

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Defendant also says that the waiver was involuntary because the police "minimized" the warnings by saying "All right. Let's go through some paperwork real quick."[11] But this preceded the detective taking defendant's *personal information*, as he then asked the spelling of defendant's name, whether he could read and write (he said he could), what grade was in at school,[12] and where this was. It was *after* this that the detective then said "All right. So, this is a certificate of your constitutional rights. So all I want you to do is read one through five and then next to each one you's (sic) going to put your initials. And all your initials indicates means you understand what you're reading *and then if you have any questions you just ask me*."[13] Defendant then read the rights out loud, and the detective did nothing to diminish the rights read. There is no basis to find the waiver involuntary, which turns on the use of coercive police conduct,[14] and there is nothing coercive here.

Nor was the trial court's finding that the statement given was not involuntary clearly erroneous. The trial court looked to the claims of "a misrepresentations about the investigative facts, the statement that is alleged to be one of leniency, ... [] the duration of the interview, the representations made by the officers," and, "looking at the totality of the circumstance," found the statement voluntary under a preponderance of the evidence standard. The record does not support a finding that the seasoned trial judge's decision was clearly erroneous. The Court of Appeals correct affirmed.

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[11] TQ, 3.

[12] Defendant said he was a senior, and was in a "kinda like a little alternative" school. TQ, 4.

[13] TQ, 5.

[14] See *Cheatam* and *Daoud*, supra.

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III.

Defense counsel is ineffective where he or she makes "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that undermine the reliability of the outcome; there is a strong presumption that performance was not deficient. Defense counsel objected to the admission of the video of defendant's questioning on some grounds, but did not request redaction of reference to other possible behavior of defendant. The Court of Appeals did not err in finding that the prejudice standard was not met.

Standard of Review

Defendant alleges his counsel was ineffective. The bar for such a showing is high. The United States Supreme Court has repeatedly said that defendant must establish that "counsel's representation fell below an objective standard of reasonableness,"and that in light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant" the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances. . . . At all points, '[j]udicial scrutiny of counsel's performance must be *highly deferential*."[15] Further, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time" so that "a defendant must overcome the "*strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance."[16]

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[15] *Wong v. Belmontes*, 558 US 15, 130 S.Ct. 383, 384 -385, 175 L Ed 2d 378 (2009) (quoting *Strickland*, infra)(emphasis supplied). See also *Bell v Cone*, 535 US 685, 122 S Ct 1843, 152 L Ed 2d 914 (2002).

[16] *Strickland v Washington*, 466 US 668, 689, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76 (1999).

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Discussion

Defendant argues that his counsel should have arranged to have the video of the defendant's questioning redacted. It is understandable that counsel would reasonably have wished the entire video to be seen by the jury as going to the weight of defendant's statement, as rough language was used in the interrogation. In the questioning Officer McDonald said to defendant that he made "dumb" decisions, such as being caught with a "burner" phone, which defendant said was several years previous; "hanging with these little Bang Bang Poony Gang mother fuckers," to which defendant responded "that's family"; the officer also said defendant was "affiliated" with a crew or a gang or rap group that did "dumb shit," such as carry guns and sell dope, but the defendant did not admit to this conduct.[17]

Defendant argues now that his counsel should have had this language, most from the officer, not the defendant, redacted, arguing it constitutes improper character or uncharged misconduct evidence. But there was never any reference to any of this by the prosecutor, and thus no attempt to argue defendant's guilt based on character or prior acts; indeed, as the prosecutor argued in rebuttal, defendant's statement was not a "confession"—he's not owning up to what he has done. He knows what he's done. He knows what he did,4 but eventually they do get him to admit that he was there for both robberies."[18] Deficient performance requires a showing of "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"[19] a standard not met here, nor can it be said that, had the statement

[17] "I don't sell dope." TQ, 75. Defendant did admit he had previously been caught with a gun. TQ, 127.

[18] T 11-9, 22.

[19] *Strickland*, 104 S. Ct. at 2064.

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been redacted, there is a reasonably probability defendant would have been acquitted,[20] particularly given the matters now objected to were never mentioned as evidence against the defendant. While the Court of Appeals found that defense counsel should have requested redaction, it found that defendant could not meet the rigorous prejudice requirements:

> Multiple eyewitnesses placed Stewart as the driver of a stolen getaway car in a crime spree that resulted in the death of one victim, the shooting of a second victim, and the shooting of Stewart's codefendant.
>
> While Stewart claimed ignorance of his companions' plans or even their possession of weapons, he did not leave his companions after the first incident. Ultimately, the jury credited Stewart to some extent as it acquitted Stewart of first-degree murder and convicted Stewart of a lesser assault offense rather than the charged assault with intent to murder. Given the record evidence, however, we cannot conclude that the jury would have been more lenient absent the problematic information.[21]

[20] Id., at 2068.

[21] Slip opinion, at 6-7.

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IV.

The legislature through MCL 769.34(10) has divested appellate courts of authority to review sentences within properly scored guidelines. There is no basis on which the statute can be said to be unconstitutional, so long as understood to allow possible constitutional claims, such as the consideration of constitutionally impermissible factors in setting the sentence. The sentence here was within properly scored guidelines, and thus must be affirmed.

Standard of Review

Involved is a question of law, which is reviewed de novo.[22]

Discussion

Defendant recognizes that statute requires that his sentence be affirmed,[23] but argues the statute is unconstitutional. This Court previously ordered a MOAA on this question,[24] but after argument then denied leave to appeal.[25] It is inconceivable that this Court would order briefing and argument on the question, and then deny leave, allowing the statute to be applied in hundreds and hundreds of cases after that time, if it harbored any doubt as to the statute's constitutionality. In any event, the statute is constitutional.

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[22] *People v. Hall*, 499 Mich. 446, 452 (2016).

[23] *People v. Schrauben*, 314 Mich. App. 181 (2016).

[24] The question was "whether MCL 769.34(10) has been rendered invalid by this Court's decision in *People v. Lockridge* . . . to the extent that the statute requires the Court of Appeals to affirm sentences that fall within the applicable guidelines range 'absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence'" *People v. Ames*, 501 Mich. 1026 (2018).

[25] *People v. Ames*, 504 Mich. 899 (2019).

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> *[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.*[26]
>
> *The ball is in the Legislature's court.*[27]

Unless the Constitution compels the setting aside of the legislative judgment, it stands. Indeed, this Court said in *Lockridge* that its goal in fashioning a remedy was to "preserve as much as possible the legislative intent in enacting the guidelines."[28] As Chief Justice, then Justice, Markman said in dissent in *Lockridge*, "Striking down statutes that reflect such a considered judgment of the people and their representatives is something to be done only when the incompatibility of a state law with the federal or state Constitution is manifest and our duty to preserve and maintain these charters of government is therefore directly and necessarily implicated."[29] There is no basis on which to void the legislative judgment here. Sentences within the guidelines, assuming the guidelines were correctly scored and the court did not consider anything inappropriate in setting sentence, are not subject to review under the legislative scheme, except for a claim, however unlikely, of constitutional cruel and unusual punishment. If the legislature wishes to change MCL 769.34(10) in light of *Lockridge*, then in the words of Justice Larsen, "the ball is in the Legislature's court," and not that of this Court. That this Court has altered the legislative review standard for sentences *outside* properly scored guidelines as part of its remedy for the Sixth Amendment violation it found with regard to mandatory guidelines scored with judicial fact-

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[26] *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 5 Wheat. 76 (1820).

[27] *People v. Steanhouse*, 500 Mich. 453, 484 (2017) (Larsen, J., concurring); see also *United States v. Booker*, 543 U.S. 220, 265, 125 S.Ct. 738, 768, 160 L.Ed.2d 621 (2005).

[28] *People v. Lockridge*, 498 Mich. 358, 365 (2015).

[29] Id., at 429–430 (Markman, J., dissenting).

finding[30] says nothing at all as to a sentence that is *within* properly scored advisory guidelines. So long as a judge is not *required* to sentence within the guidelines range, even if that range is enhanced by judicial fact-finding, that the judge sentences within the range raises no constitutional issue, nor does the legislative preclusion of judicial review of such a sentence (again, laying aside improper scoring or consideration of constitutionally prohibited factors). Now, as before, a sentence within properly scored guidelines—now advisory guidelines—is not subject to appellate review, and this raises no constitutional issue whatever.

That *Lockridge* did not abrogate MCL 769.34(10) follows ineluctably from *Lockridge* itself, which, while severing other provisions of MCL 769.34, never mentions MCL 769.34(10). More importantly, this Court's remedy excludes from its reach sentences within properly scored guidelines, as the Court both in its introductory summary of the opinion and its remedy section limits reasonableness review to sentences that are *departures* from the guidelines range: 1) "we hold that a guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and that sentences that depart from that threshold are to be reviewed by

[30] This is a remarkable exercise of power itself. The legislative standard for appellate review of sentences outside the guidelines was for whether substantial and compelling reasons justified the departure. This Court did not simply strike that standard, leaving no appellate review of such sentences, it being up to the legislature to alter that circumstance if it so desired, but *re-wrote* it to provide for review for "reasonableness," now meaning "abuse of discretion informed by the principle of proportionality." *People v. Steanhouse*, 500 Mich. 453 (2017). Justice Larsen, concurring in *Steanhouse*, said that as to sentencing after *Lockridge* "The ball is in the Legislature's court." But the Court took the legislature's ball out of play, and substituted a new one. When a court severs a portion of a statute or a part of a statutory scheme, it is not to substitute something different; "although a court may permissibly sever some provisions of a statute and leave others intact, a court may not rewrite a statute to render it constitutional." *Planned Parenthood Affiliates of Michigan v. Engler*, 73 F.3d 634, 640 (CA 6, 1996). The legislature having determined that *it* was establishing the standards of review for sentences, and this Court having stricken the standard applicable to outside-guidelines sentences, the ball was then in the legislature's court, not the Court's, to determine what, *if any*, review standard should then apply.

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appellate courts for reasonableness"[31]; 2) "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness."[32] *Lockridge* cannot, consistent with common English usage, be said to have invalidated the legislature's prohibition on appellate review of the length of within guidelines sentences, nor is there any basis for the Court to have done so or so to do.

It has argued that the statute creates an unrebuttable "presumption" of the reasonableness of a guidelines sentence. But there is no "mandatory presumption of reasonableness" in the statute, as there is no "reasonableness" to be "presumed"; there is, rather, a legislative prohibition on appellate review of sentences within properly scored guidelines, which may be forced to yield only if the constitution so demands, as when a judge sets the sentence where he or she does within the guidelines based on an unconstitutional criterion, such as race or ethnicity. *Lockridge* itself expressly limited review for reasonableness to out-of-guidelines sentences, and unless MCL 769.34(10)'s prohibition on review of guidelines sentences is for some reason unconstitutional, it stands. Defendant presents no reason why the statute is unconstitutional; that under this Court's review scheme in *Milbourn* sentences within the judicial guidelines were subject to review does not affect the legislative scheme. Appellate review is only applicable under the *statutory* scheme for out-of-guidelines sentences, where the Court has changed the standard of review to abuse of discretion, informed by proportionality. And appellate review is only permissible under the *statutory* scheme if the legislature so allows; it has not done so for guidelines sentences, and there is no reason why its prohibition on review is unconstitutional. So long as the guidelines are advisory, there being no requirement to sentence within them, no problem can arise from the

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[31] *People v. Lockridge*, 498 Mich. at 365. The phrase limiting the remedy to cases where the "guidelines minimum sentence range" was "calculated in violation of *Apprendi* and *Alleyne*" was held to be of no import whatever in *People v. Steanhouse*.

[32] Id., at 392.

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legislative choice.[33] The statute is simply a form of or analogue to a jurisdiction-stripping statute,[34] and is constitutional.

Judges are not compelled to sentence within the guidelines, but if they do, under MCL 769.34(10) that sentence must be affirmed. There is no basis to set aside the statute, and defendant's sentence, being within the guidelines, is not subject to review.

[33] Nothing would prevent the legislature from providing that no otherwise proper sentence is reviewable for the appropriateness of its length, other than for constitutional cruel and unusual principles.

[34] Defendant argues that because he has an appeal by right under our state constitution, jurisdiction must exist. Defendant's Supplemental Brief in the Court of Appeals, at 5-6. But while 1963 Mich. Const. Art. 1, § 20 entitles defendant convicted at trial to an appeal by right (but only by leave when convicted by way of plea), nothing precludes the legislature from restricting the *issues* available for consideration in that appeal. Defendant may raise issues concerning the appropriate scoring of the guidelines, or the consideration of inappropriate material by the trial judge, in a sentence within the guidelines, but there is simply no proportionality or reasonableness issue in the legislative scheme for a guidelines sentence, unless the defendant can make a *constitutional* proportionality argument.

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Relief

Wherefore, the People request that the Court deny leave to appeal.

Respectfully submitted,

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