State of Michigan

In the Supreme Court

People of the State of Michigan

Plaintiff-Appellee,

v.

Dametrius Benjamin Posey

Defendant-Appellant.

MSC No. 162373

COA No. 345491

Wayne CC. 18-000074-01-FC

People of the State of Michigan

Plaintiff-Appellee,

v.

Joshua Lamar-James Stewart,

Defendant-Appellant.

MSC No. 162497

COA No. 343755

Wayne CC. 16-005731-01-FC

Amici Curiae Brief of Leslie E. Scott, Former Assistant Professor of Law and Jelani Jefferson Exum, Dean and Philip J. McElroy Professor of Law, University of Detroit Mercy School of Law in Support of Defendants-Appellants Dametrius Posey and Joshua Stewart

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First Question

Whether the requirement in MCL 769.34(10) that the Court of Appeals affirm any sentence within the now-advisory sentencing guidelines range, absent a scoring error or reliance on inaccurate information, is inconsistent with the Sixth Amendment?

Court of Appeals answers, No.

Plaintiff-Appellee answers, No.

Defendant answers, Yes.

Amici Curiae answers, Yes.

Statement of Interest of Amici Curiae[1]

Amicus Curiae Leslie E. Scott was an Assistant Professor of Law at University of Detroit Mercy School of Law from August 2019- August 2022, where she taught Evidence, Criminal Law, and Criminal Procedure. Prior to teaching, Ms. Scott served as an Assistant Federal Public Defender in the Western District of New York for six-and-a-half years, where she regularly addressed issues related to application of the Federal Sentencing Guidelines in court. On September 12, 2022, Ms. Scott will begin a new position as Sentencing Resource Counsel with the Federal Public and Community Defenders. Ms. Scott writes on a variety of topics, including, federal sentencing policy and practice, prosecutorial discretion, race and criminal justice, and the eradication of mass incarceration.

Amicus Curiae Jelani Jefferson Exum is Dean and Philip J. McElroy Professor of Law at University of Detroit Mercy School of Law. She is a nationally recognized expert in sentencing law and procedure and is a member of the Editorial Board of the *Federal Sentencing Reporter*. During her 15 years in legal Academia, Ms. Jefferson Exum has taught Constitutional Law, Criminal Law, Criminal Procedure, Sentencing, Race and American Law, and Comparative Criminal Procedure. Ms. Jefferson Exum writes mainly in the areas of federal sentencing and policing, with a focus on racial justice.

Amici believe Michigan's current two-tiered system of appellate sentencing review that treats within- and outside-guidelines sentences disparately, see MCL 769.34(10), violates the Sixth Amendment jury trial right and federal and Michigan Supreme Court precedent by discouraging individualized sentencing and strongly encouraging trial courts to sentence criminal defendants within their guidelines range. *Amici* provide this brief to give the Court background information on the evolution of federal sentencing law in light of relevant constitutional principles and to elucidate

[1] Pursuant to MCR 7.312(H)(5), amici state that no party and no counsel for a party authored this brief in whole or in part, nor did anyone make a monetary contribution intended to fund the preparation or submission of the brief. This amicus brief was entirely drafted, funded, and filed by the undersigned.

how federal law and constitutional principles should inform the Court's analysis of the continued viability of MCL 769.34(10).

Amici, as sentencing and constitutional law scholars, professors, and practitioners, have a strong interest in advocating for the adoption of a symmetrical appellate review scheme that requires appellate review of both within- and outside-guidelines sentences for substantive, as well as procedural, reasonableness. Such a scheme would encourage sentencing judges to individualize and carefully consider every sentencing decision, not just those that depart from the advisory guidelines, and comports with the requirements of the Sixth Amendment as articulated in relevant United States Supreme Court case law.

Introduction

The United States Constitution protects, *inter alia*, a criminal defendant's right to a trial by an impartial jury upon proof beyond a reasonable doubt of every element of the offense for which he or she is charged. US Const, Am V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); US Const, Am VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"); *United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995) ("We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.").

Mandatory sentencing guidelines, which require courts to find facts to enhance either the minimum (floor) or maximum (ceiling) of a defendant's sentence, violate the Constitution because they contravene the accused's right to jury determination of the essential elements of the crime beyond a reasonable doubt. See *Alleyne v United States*, 570 US 99, 103, 108; 133 S Ct 2151; 186 L Ed 2d 314 (2013) (any fact that increases the mandatory minimum sentence is by definition an element of the offense and must be submitted to the jury and proven beyond a reasonable doubt); *United States v Booker*, 543 US 220, 232-233; 125 S Ct 738; 160 L Ed 2d 621 (2005) (opinion by Stevens, J.) (the Federal Sentencing Guidelines, in their mandatory form, violate the Sixth Amendment because they require judges to find facts to legally enhance the defendant's sentence); *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (any fact that enhances the statutory maximum sentence is an element of the offense and must be submitted to the jury and proven beyond a reasonable doubt).

Before 2005, the Federal Sentencing Guidelines were mandatory and required judges to engage in fact-finding to increase the range of punishment a criminal defendant faced. *Booker*, 543 US at 233. The Supreme Court's remedy for the Sixth Amendment violation was to render the Federal Sentencing Guidelines advisory. See *id.* at 245 (opinion by Breyer, J). The Supreme Court reasoned, once advisory, judicial fact-finding may proceed because the judge-found facts are no longer essential to the punishment

and are, therefore, beyond the scope of the jury trial right. See *id*. at 233 (opinion by Stevens, J.).

As part of its remedial holding, the Court set an appellate standard of review for reasonableness for all sentences, whether within or outside of the Guidelines. *Id*. at 260-263 (opinion by Breyer, J). The reasonableness standard was to be judged against the statutory sentencing factors set out in 18 USC § 3553(a). *Id*. The Court later clarified that this standard contained both a procedural and substantive component: "Assuming the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of- discretion standard." *Gall v United States*, 552 US 38, 51; 128 S Ct 586; 169 L Ed 2d 445 (2007).

In 2015, this Court followed suit, holding that Michigan's mandatory guidelines system, which required courts to find facts that increase the floor but not the ceiling of a defendant's sentence, could not be maintained after *Alleyne*, 570 US 99. *People v Lockridge*, 498 Mich 358, 379, 388-389; 870 NW2d 502 (2015). This Court adopted the *Booker* remedial majority's approach and invalidated the provisions of Michigan law that made the guidelines binding. *Id*. at 391. However, rather than setting a "reasonableness" standard of review for all sentencing decisions, whether within or outside of the sentencing guidelines, as was done in *Booker*, the Court seemingly left intact MCL 769.34(10), making outside-guidelines sentences subject to substantive reasonableness review but within-guidelines sentences subject to review only for procedural correctness. See *id.* at 392 ("A sentence *that departs from the applicable guidelines range* will be reviewed by an appellate court for reasonableness.") (emphasis added); MCL 769.34(10) ("If a minimum sentence is within the appropriate guidelines sentencing range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."); cf. *People v Steanhouse*, 500 Mich 453, 471 n 14; 902 NW2d 327 (2017) (declining to consider whether MCL 769.34(10) can survive *Lockridge*). A review of the creation and evolution of the Federal Sentencing Guidelines and case law interpreting those Guidelines in light of the Sixth Amendment jury trial mandate reveals that Michigan's two-tiered approach to sentencing review cannot withstand constitutional scrutiny.

Background on Federal Sentencing

I. Pre-Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*

Prior to 1987, the bounds of federal sentences were wide-ranging and set only by statute. *Tapia v United States*, 564 US 319, 323; 131 S Ct 2382; 180 L Ed 2d 357 (2011); *Mistretta v United States*, 488 US 361, 363; 109 S Ct 647; 102 L Ed 2d 714 (1989). Judges maintained broad sentencing authority based on a "commitment to the ideal of individualized sentencing as a means of attaining fairness and justice." Exum, *Why March to a Uniform Beat? Adding Honesty and Proportionality to the Tune of Federal Sentencing*, 15 Texas J on CL & CR 141, 144–145 (2010). Judges could sentence to any amount of time within the range set by Congress, or no time at all, if there was no mandatory minimum attached to the offense. *See Mistretta*, 488 US at 364. If they stayed within statutory and constitutional limits, judges' sentencing decisions were virtually unreviewable on appeal. *Koon v United States*, 518 US 81, 96; 116 S Ct 2035; 135 L Ed 2d 392 (1996); *United States v Tucker*, 404 US 443, 447; 92 S Ct 589; 30 L Ed 2d 592 (1972).

During this time, the Executive Branch had authority to release an inmate before his or her sentence expired, through federal parole, as long as that individual had served at least one-third of his or her sentence. See *Mistretta*, 488 US at 364-365; Stith & Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 226-227 (1993). This system of highly discretionary, indeterminate, individualized sentencing with the opportunity for early release was premised on the notion that rehabilitation was a primary function of sentencing. *See Why March to a Uniform Beat?*, 15 Texas J on CL & CR at 145; *The Politics of Sentencing Reform*, 28 Wake Forest L Rev at 227. Scholars Kate Stith and Steve Koh point out, "Under the rehabilitative model, parole officials' power to determine a sentence's duration was seen both as a valuable incentive to prison inmates to rehabilitate themselves and as a vehicle to permit 'experts' to determine when sufficient rehabilitation had occurred to warrant release from prison." *The Politics of Sentencing Reform*, 28 Wake Forest L Rev at 227.

However, by the late 1950s, this system of indeterminate sentencing and "three-way sharing" of sentencing responsibility was falling out of favor due to disparate sentences for similar offenses and uncertainty about the true duration of sentences because of parole. *Mistretta*, 488 US at 365-366. Reformers also began questioning the utility of prisons and parole as rehabilitative tools. *The Politics of Sentencing Reform*, 28 Wake Forest L Rev at 227. See also *Mistretta*, 488 US at 365 ("Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases."). Key political figures decried the system of indeterminate sentencing and parole as too lenient, and by the mid- 1970s some academics and judges were also criticizing courts' and parole boards' broad indeterminate sentencing authority. See *The Politics of Sentencing Reform*, 28 Wake Forest L Rev at 227-228. A former New York City District Judge, Marvin E. Frankel was among the loudest critics of federal sentencing during this time. *Id*. at 228. He authored a book in 1972 calling for the creation of an administrative agency that would legally bind the discretion of sentencing courts. *Id*. His book is said to be the "cornerstone of the legislative effort to replace judicial discretion in criminal sentencing with certainty and administrative expertise." *Id*.

II. Passage of the Sentencing Reform Act and Implementation of Mandatory Guidelines

In 1966, Congress created the National Commission on Reform of the Federal Criminal Laws, known as the "Brown Commission," to investigate alleged sentencing disparities. *Why March to a Uniform Beat?*, 15 Texas J on CL & CR at 146. The Brown Commission reported wide and ubiquitous sentencing disparities. *Id*. Congress then enacted Senate Bill 2699, which set forth the framework for what would become the Federal Sentencing Guidelines and was heavily influenced by Judge Frankel's work. *Id*.

In 1984, Congress passed the Sentencing Reform Act (SRA) as part of the Comprehensive Crime Control Act. Sentencing Reform Act of 1984, Pub L No 98-473, 98 Stat 1987 (codified as amended at 18 USC § 3551 *et seq*, 28 USC § 991 *et seq*). The SRA created the United States Sentencing Commission ("USSC"), an independent, bipartisan body, appointed by the President, within the judicial branch of government. 28 USC § 994(a)(1), 991(a). See also Breyer, *The Federal Sentencing Guidelines and the Key*

Compromises Upon Which They Rest, 17 Hofstra L Rev 1, 5 (1988). The USSC consists of seven voting and two non-voting, *ex officio* members. United States Sent'g Comm'n Guidelines Manual 2021, at ch 1, pt A, intro cmt 1 (2021) [hereinafter USSG 2021]. The voting commissioners serve staggered six-year terms and include at least one federal judge. See Hofer et al, United States Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (Nov. 2004), ch 1, p 15, https://www.ussc.gov/research/research-and-publications/research-projects-and-surveys/fifteen-years-guidelines-sentencing (accessed August 31, 2022).

The USSC was tasked with establishing sentencing policies and practices for the federal courts that: (1) meet the purposes of punishment outlined in 18 USC § 3553(a); (2) provide certainty and fairness and avoid unwarranted disparities while ensuring individualization based on mitigating and aggravating factors; and (3) reflect "advancement in knowledge of human behavior." 28 USC § 991(a)(1). To carry out this task, Congress directed the USSC to develop guideline sentencing ranges for various combinations of relevant offender and offense characteristics, as well as general policy statements about how to apply the guidelines. 28 USC § 994(a). It also directed that the top of the guidelines range could not exceed the bottom by more than twenty-five percent. 28 USC § 994(b)(2). By passing the SRA, Congress purportedly sought to achieve "honesty in the system" (i.e., certainty of sentencing length), "reasonable uniformity in sentencing" (i.e., reduction in unjustifiably wide sentencing disparities), and "proportionality" (i.e., sentence length tied to offense severity). USSG 2021, at ch 1, pt A, intro cmt 3.

In 1987, the USSC promulgated the Federal Sentencing Guidelines. With the advent of the Guidelines, federal parole was abolished; instead of being granted early release on parole, a federal prisoner's sentence could only be reduced by "good time" credit earned for good behavior, making his sentence "determinate." *Mistretta*, 488 US at 367. The Guidelines contain a comprehensive set of rules (called sections) for judges to follow to calculate a range of determinate sentences for various categories of offenders based on specified factors the commissioners (or Congress) deem relevant to sentencing. *See generally* USSG 2021. These rules instruct judges to take

account of certain specific offender characteristics (or to ignore certain characteristics) and criminal history to calculate this range. *Id.*

Once this range is calculated, courts can adjust an individual's sentence upward or downward by granting a "variance" or "departure." United States Sent'g Comm'n, Office of the General Counsel, Primer: Departures and Variances 1 (2021) [hereinafter USSC Primer]. A departure involves adjusting a sentence based on the language of the Guidelines, themselves. *Id.*; *United States v Cruz-Perez*, 567 F.3d 1142, 1146 (CA 9, 2009). To guide this determination, the Guidelines Manual sets forth "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentencing implementation," including whether and when to depart. 28 USC § 994(a)(2). See also USSG 2021 § 5K2.0 (grounds for departure policy statement). Variances, on the other hand, are not dependent on language specifically set forth in the Guidelines manual. See USSC Primer at 1. A variance occurs when the court imposes a sentence below or above the applicable Guidelines range based on the federal statutory sentencing factors listed in 18 USC § 3553(a). *Id.*

In developing the original Guidelines, the USSC primarily took an "empirical approach that used as a starting point data estimating pre-guidelines sentencing practice." USSG 2021, at ch 1, pt A, intro cmt 3. One of the original commissioners, then-First Circuit Judge (later Supreme Court Justice) Stephen Breyer, described this approach in a 1988 law review article:

> [The Commission] decided to base the Guidelines primarily upon typical, or average, actual past practice. The distinctions that the Guidelines make in terms of punishment are primarily those which past practice has shown were actually important factors in pre- Guideline sentencing. The numbers used and the punishments imposed would come fairly close to replicating the average pre- Guidelines sentence handed down to particular categories of criminals. Where the Commission did not follow past practice, it would consciously articulate its reasons for not doing so. The Commission was able to determine which past factors were important in pre-Guideline sentencing by asking probation officers to analyze 10,500 actual past cases in detail, and then compiling this information, along with almost 100,000 other less detailed

> case histories, in its computers. When the Commission decided which 'specific offense characteristics' to use in cases of robbery, for example, the Commission learned from its data base of 1,100 actual robbery cases that forty robbery convictions involved injury to others, while only three involved death. It therefore included 'physical injury' as a specific offense characteristic while excluding 'death.' The Commission assumed that a sentencing judge would depart from the Guidelines and impose a longer sentence if he or she were actually faced with a robbery conviction where a victim had been killed. The Commission's intent was to allow the judge to depart from the Sentencing Guidelines in unusual cases. [*Key Compromises*, 17 Hofstra L Rev at 17-18.]

The Commission occasionally abandoned this data-driven method of setting Guidelines ranges. See, e.g., *Fifteen Years of Guideline Sentencing*, p 15. For instance, the Commission abandoned past practice for certain crimes and categories of offenders, such as fraud and drug crimes and recidivist drug or violent offenders. *Id*. at 15, 133. These decisions were based on various considerations, including the SRA's requirement that the Commission set high penalties for certain categories of offenders, the passage of statutory mandatory minimum and heightened maximum penalties for drug trafficking, and the Commission's perception that white collar criminals were treated too leniently in the past. *Id*.; see also USSG 2021, at ch 1, pt A, intro cmt 3 ("[The Commission] departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.").

Likewise, for sex offenders, the Commission responded to specific Congressional directives to make penalties more severe. *Fifteen Years of Guideline Sentencing*, p 72; *United States v Dorvee*, 616 F3d 174, 184 (CA 2, 2010) ("[T]he Commission did not use [its] empirical approach in formulating Guidelines for child pornography. Instead, at the direction of Congress, the

Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties."); cf. Vinegrad, *The New Federal Sentencing Law*, 15 Fed Sent R 310, 315 (2003) (criticizing Congress for adopting punitive Sentencing Guidelines reforms in the PROTECT Act of 2003 without consulting the Sentencing Commission and without regard for the statutorily prescribed Guidelines amendment process).

As originally promulgated, the Guidelines were almost entirely binding on sentencing judges. *Why March to a Uniform Beat?*, 15 Texas J on CL & CR at 147. See also *Koon*, 518 US at 92 ("A district judge now must impose on a defendant a sentence falling within the range of the applicable Guideline, if the case is an ordinary one."). Courts could depart only after concluding "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 USC § 3553(b)(1). See also *Key Compromises*, 17 Hofstra L Rev at 5-6. Departures under this provision were meant to be rare. Indeed, the legislative history of the SRA reveals that Congress did not intend for courts to depart from the Guidelines if the Commission's own policy statements, Guidelines, and comments indicated the Commission already considered the salient factor. See *The Politics of Sentencing Reform*, 28 Wake Forest L Rev at 248, citing 133 Cong Rec, part 31 (1987). Likewise, the Guidelines manual instructs, "The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes, when a Court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." USSG 2021, at ch 1, pt A, intro cmt 4(b).

When the Guidelines were originally promulgated, defendants and the government had the right to appeal a sentence for procedural incorrectness. 18 USC § 3742(a), (b), (e). Likewise, defendants could appeal an upward departure and the government could appeal a downward departure. *Id.*; *Koon*, 518 US at 96. Otherwise, there was no substantive review of sentencing decisions. Thus, the former federal sentencing review system, which has since been invalidated and held unconstitutional, as explained

infra, was like the current two-tiered system employed in Michigan where all sentences are subject to appellate review for procedural correctness but only sentences outside the Guidelines are reviewed for substantive correctness.

In *Koon*, the Supreme Court addressed the standard of review to be applied on appeal of departures from the mandatory Guidelines range, holding that the abuse of discretion standard applied. 518 US at 96-100. However, in 2003, Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act. PROTECT Act of 2003, Pub L No 108-21, 117 Stat 650 (2003). The PROTECT Act, § 401(d)(2), required appeals courts to exercise *de novo* review of departures to determine whether the departure was justified by the facts of the case and purposes of punishment. See 18 USC § 3742(e). That said, even after the PROTECT Act, appellate courts reviewed the extent or degree of a properly imposed departure for abuse of discretion and reviewed factual findings supporting the departure for clear error. 18 USC § 3742(e); *United States v Kostakis*, 364 F3d 45, 51 (CA 2, 2004).

III. United States Supreme Court Precedent on the Sixth Amendment at Sentencing

Mandatory adherence to Guideline sentencing began to unravel in the early 2000s when the Supreme Court considered a string of cases raising questions about the constitutionality of various state sentencing schemes. In *Apprendi v New Jersey*, the Court held that a New Jersey sentencing enhancement that raised the statutory maximum penalty for firearm possession if the possession was racially motivated violated the Sixth Amendment. 530 US at 491-497, citing *Jones v United States*, 526 US 227; 119 S Ct 1215; 143 L Ed 2d 311 (1999). The Court stated, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Because the sentencing judge made the hate crime enhancement determination without input from the jury, using only a preponderance of the evidence standard, the statute violated Apprendi's Sixth Amendment right to "a jury determination that [he] is guilty of every element of the crimewith which he is charged, beyond a reasonable doubt." *Id.* at 477 (citations omitted).

In a capital case, *Ring v Arizona*, 536 US 584, 592-595; 122 S Ct 2428; 153 L Ed 2d 556 (2002), the petitioner, Timothy Ring, argued his death sentence was unconstitutional because Arizona statute allowed the judge who presided at the trial to conduct a separate sentencing hearing to determine the existence of certain enumerated factors warranting a death sentence. The Supreme Court reversed the death sentence. *Id.* at 597. It held, "Because Arizona's aggravating factors operate as the 'functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* at 609, quoting *Apprendi*, 530 US at 494 n 19. It reaffirmed the principles of *Jones* and *Apprendi* that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602.

In *Blakely v Washington*, 542 US 296, 299-305; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the Court invalidated a Washington determinate sentencing scheme like the then-mandatory Federal Guidelines that allowed the judge to sentence above a mandatory standard range provided for in

the Washington Sentencing Reform Act if she found compelling reasons that merit an "exceptional sentence." The Court held that because Blakely was sentenced to more than three years above the maximum of the standard range for his offense based solely on a finding by the judge that he acted with "deliberate cruelty," the sentencing court violated his Sixth Amendment right to have a jury determine the facts that increase his penalty beyond a reasonable doubt. *Id.* at 301-305, 313-314. Importantly, the Court determined, "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 303, citing cases. "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 303-304.

These cases foreshadowed and culminated in the Supreme Court's seminal decision in *Booker*, 543 US 220. Authored by two different majorities, the *Booker* Court applied its rationale from the above cases to the Federal Sentencing Guidelines. *Id*. at 230-233 (opinion by Stevens, J.). In the Court's merits analysis, Justices Stevens, Scalia, Souter, Thomas, and Ginsburg held that the SRA violated the Sixth Amendment by requiring district courts to enhance criminal sentences using a preponderance of the evidence standard based on facts (other than a prior conviction) not found by a jury or admitted by the defendant. *Id.* at 230-36.

To remedy the Sixth Amendment problem, a separate majority, consisting of the dissenters from the merits opinion joined by Justice Ginsburg, severed and excised two provisions of the SRA that were "inconsistent with the Court's constitutional requirement:" 18 USC § 3553(b)(1), which made the Guidelines mandatory, and 18 USC § 3742(e), setting forth the appellate review standard, including *de novo* review of departures. *Id.* at 258-259 (opinion by Breyer, J.). According to the Court, in their non-binding form, the Guidelines do not present a Sixth Amendment problem because "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Id.* at 233 (opinion by Stevens, J.).

Finally, in *Alleyne*, 570 US 99, the Supreme Court applied the rationale of *Apprendi* to statutes setting forth enhanced mandatory minimums, as

opposed to enhanced maximums, based on aggravating factors. The Court concluded, "*Apprendi's* definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor." *Id.* at 108. On that basis, the Court held that facts that increase the mandatory minimum sentence are not mere sentencing factors but elements of the offense that must be submitted to the jury and proven beyond a reasonable doubt. *Id*.

IV. Appellate Review in Federal Court Post-*Booker*

As noted above, the portion of the SRA setting forth the appellate standard of review for sentencing decisions was invalidated as unconstitutional by the *Booker* remedial majority. The majority set a new standard of review on appeal for "unreasonableness," using a deferential abuse of discretion test. *Booker,* 543 US at 261; *Gall*, 552 US at 46 ("Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions."). The 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. *Booker*, 543 US at 263. In so holding, the Court conformed the Act to its Sixth Amendment remedy.

In *Gall*, 552 US at 51, the Supreme Court clarified that reasonableness review contains a substantive, as well as procedural component. The Court explained that reasonableness review entails a two-step inquiry: first, the appeals court must ensure the district court did not commit significant procedural error, such as improperly calculating the Guidelines range (among others); second, the court must ensure that the sentence is substantively reasonable under the totality of the circumstances applying a deferential abuse of discretion standard. *Id*. The appeals court is permitted to apply a presumption of reasonableness to a within-Guideline sentence, but is not permitted to apply a presumption of unreasonableness to a sentence outside of that range. *Id*., citing *Rita v United States*, 551 US 338, 347; 127 S Ct 2456; 168 L Ed 2d 203 (2007). The Court also emphasized that the sentencing judge may not apply a presumption of reasonableness to a within- Guidelines sentence. *Id*., citing *Rita*, 551 US at 351.

The "reasonableness" standard requires sentencing judges to consider the factors listed in 18 U.S.C. § 3553(a), and apply them to the individual being sentenced. *Rita*, 551 US at 366; *Booker*, 543 US at 261 ("Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable."). These factors include: the nature and circumstances of the offense; the need for the sentence to punish the defendant, protect the public, deter crime, and promote reformation; the kinds of sentences available; the applicable Guidelines range; any pertinent policy statement; the need to avoid unwarranted sentencing disparities or similarities; and the need for restitution. 18 USC § 3553(a).

Courts of appeals must evaluate each sentence individually to ensure its reasonableness, "rather than apply the cookie-cutter standards of the mandatory Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand)." *Booker*, 543 US at 312 (SCALIA, J., dissenting in part). Law professor and sentencing scholar Douglas Berman writes, "I think reasonableness review can and should be a very flexible and robust means for [a] circuit court[ ] to require resentencing whenever it has a basis for being concerned, procedurally or substantively, with any aspects of the proceedings below in light of the sentencing commands of [§] 3553(a)." Berman, Blog post, *Can a federal sentence really "be close to absurd" and yet also be affirmed as reasonable?*, https://sentencing.typepad.com/sentencing_law_and_policy/2017/09/can-a-federal-sentence-really-be-close-to-absurd-and-yet-also-be-affirmed-as-reasonable.html.

Federal courts have described "reasonableness" as a flexible concept, "generally lacking precise boundaries." *United States v Crosby*, 397 F3d 103, 115 (CA 2, 2005). The Second Circuit will reverse a sentence as substantively unreasonable when the sentence "cannot be located within the range of permissible decisions." *United States v Rigas*, 583 F3d 108, 122 (CA 2, 2009), quoting *United States v Cavera*, 550 F3d 180, 189 (CA 2, 2008) (quotation marks omitted). To make this determination, the court may consider whether a factor on which the sentencing court relied deserves the weight assigned under the totality of the circumstances. *Id.* While deferential, this standard is not toothless and should not be used to rubber stamp sentencing decisions. *Id.*; *United States v Pinson*, 542 F3d 822, 836 (CA 8, 2008)

("[A]ppellate review continues to have an important role to play and must not be regarded as a rubber stamp."). It must "provide a backstop for those cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Rigas*, 583 F3d at 123.

According to the Sixth Circuit, "A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v Conatser*, 514 F3d 508, 520 (CA 6, 2008), citing *United States v Webb*, 403 F3d 373, 385 (CA 6, 2005); accord *United States v Amezcua-Vasquez*, 567 F3d 1050, 1055 (CA 9, 2009) ("[W]e may reverse [a within-Guidelines sentence] if, upon reviewing the record, we have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors.").

V. *Rita* and the "Presumption" of Reasonableness for Within-Guideline Sentences

Shortly following *Booker*, a circuit split developed over how appeals courts should apply the reasonableness standard. In particular, some circuits applied a rebuttable presumption of reasonableness for within-Guideline sentences, whereas others did not. See *Rita*, 551 US at 346. The Supreme Court addressed this split in *Rita* and ultimately upheld the constitutionality of the presumption against the petitioner's Sixth Amendment challenge. *Id.* at 352. It reasoned that the presumption does not violate the Sixth Amendment because it does not mandate the sentencing judge to sentence within the Guidelines and does not prohibit the sentencing judge from imposing a higher sentence unless she finds facts the jury did not, and that the defendant did not concede. *Id.* at 352-353.

Importantly, in sanctioning the presumption of reasonableness for within-Guidelines sentences that some circuits recognize, the Supreme Court emphasized that the presumption must be truly rebuttable. See *Rita*, 551 US at 347 ("For one thing, the presumption is not binding."); 353 ("A

nonbinding appellate presumption that a Guidelines sentence is reasonable does not require the sentencing judge to impose that sentence.") (emphasis added); 366 (STEPHENS, J., concurring) ("As the Court acknowledges . . . *presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable.").

Argument

I. Substantive appellate review of sentences both inside and outside of the Guidelines is necessary to avoid encouraging trial courts to default to within-Guidelines and thus effectively mirroring the pre-*Booker* unconstitutional mandatory Guideline system.

In *Lockridge*, this Court held that Michigan's then-mandatory sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial. 498 Mich at 364, citing *Apprendi*, 530 US 466 and *Alleyne*, 570 US 99. This Court explained that the Michigan sentencing guidelines were constitutionally defective because they required "judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variances (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne*." *Id.*

To remedy the violation, this Court invalidated MCL 769.34(2) and (3), which made the Michigan guidelines mandatory and required sentencing courts to articulate a substantial and compelling reason to depart from those guidelines. *Id.* at 364-365. Relying on *Booker*, this Court held that the guidelines must be properly calculated and considered at sentencing but are only advisory. *Id.* at 365. Outside- guidelines sentences are reviewed for reasonableness applying an abuse of discretion standard. *Id.* at 365, 391-392.

In a subsequent case, *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017), the Court discussed the contours of the *departure sentence* reasonableness review. It affirmed the principle of proportionality articulated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Steanhouse,* 500 Mich at 471. This principle requires sentences imposed by the trial court to be proportionate to the seriousness of the offense and the offender. *Id.* at 471-475.Importantly, it closely resembles the reasonableness standard applied in federal court, as articulated by the Sixth Circuit. For instance, in *Vowell*, the Sixth Circuit explained, "For a sentence to be substantively reasonable, it must be *proportionate to the seriousness of the circumstances of the offense and the offender*, and sufficient but not greater than necessary, to comply with the purposes of § 3553(a)." 516 F3d at 512

(quotation marks and citations omitted) (emphasis added). Indeed, the Sixth Circuit *has quoted this Court* when describing its "[m]odern-day" approach to sentencing: "Modern-day sentencing should be guided by 'the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *United States v Smith*, 505 F3d 463, 470 (CA 6, 2007), quoting *Milbourn*, 435 Mich at 636. See also *Weems v United States*, 217 US 349, 367; 30 S Ct 544; 54 L Ed 793 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.").

The federal sentencing statute, 18 USC § 3553(a), guides the sentencing judge's discretion in federal court. Although Michigan does not have a sentencing statute that is the functional equivalent of 18 U.S.C. § 3553(a), in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), this Court held that sentencing decisions should satisfy four primary purposes: rehabilitation of the offender, public safety, disciplining the wrongdoer, and general deterrence. These factors must also inform federal sentencing decisions and are listed in 18 USC § 3553(a)(2). Thus, this Court has recognized that "[i]n light of the substantial overlap and the identical standard of review for appellate courts, little likely separates [the federal and Michigan state] approaches [to reasonableness review] in terms of the outcomes they would produce in a given case." *Steanhouse,* 500 Mich at 471. Resultantly, the Michigan Court of Appeals would be able to apply an across-the-board substantive reasonableness test to sentences within and outside of the guidelines—just as federal courts do—without referencing § 3553(a).

However, the principle of proportionality that guides substantive reasonableness determinations in Michigan currently applies only to outside-guidelines sentences. In *Lockridge*, 498 Mich 358, this Court did not explicitly strike down MCL 769.34(10), which restricts appellate review of within-guidelines sentences to procedural accuracy. Thus, in Michigan, as opposed to federal court, within-guidelines sentences are not reviewed for substantive reasonableness and are not appealable absent procedural error. Before now, this Court has not considered whether MCL 769.34(10) can survive *Lockridge* and a Sixth Amendment challenge. See, e.g., *Steanhouse*, 500 Mich at 471 n 14 ("Because both defendants received

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

This Court's remedial holding in *Lockridge*, 498 Mich at 389-392, tracks that of *Booker* in every significant way except for the decision to leave MCL 769.34(10) intact. *Booker's* substantive reasonableness standard applies "across the board" to sentences within and outside of the Guidelines range. 543 U.S. at 263. But this Court created an asymmetrical system of appellate review whereby properly calculated within-guidelines sentences are deemed automatically (per se) reasonable and outside-guidelines sentences are scrutinized for "reasonableness." Thus, sentencing judges must provide explicit justifications based on specific, articulable criteria, on the record, for outside-guidelines sentences to facilitate meaningful appellate review of those sentences, but need not justify unreviewable within-guidelines sentences at all. See *Lockridge*, 498 Mich at 391; *People v Coles*, 417 Mich 523, 549-550; 339 NW2d 440 (1983) (requiring sentencing courts to articulate specific criteria informing the length and type of sentence imposed and how those criteria justify the sentence), overruled in part on other grounds by *Milbourn*, 435 Mich at 644; *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017) (noting that a trial court must adequately explain why a departure sentence imposed is more proportionate to the offense and offender than a within-guidelines sentence would have been by reference to specific factors).

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. Trial judges are assured if they follow proper procedure, a within-guidelines sentence is immune from attack, while a sentence outside the guidelines may lead to reversal on appeal. Risk-averse judges would surely sentence within the guidelines to avoid the prospect of a reversal and resentencing. Moreover, busy and overburdened trial judges may take solace in the fact that it's easier to sentence withi the guidelines, since they need not provide justifications for doing so. Further, this

approach may signal to trial judges that within-guidelines sentences are automatically reasonable. This is the epitome of *de facto* mandatory guidelines sentencing.

In his concurrence in *Rita*, Justice Stevens directly addressed the question of whether the kind of purely procedural review of within- Guidelines sentences currently employed in Michigan is consistent with *Booker*, and thus, the Sixth Amendment. He opined, "I believe that . . . purely procedural review . . . is inconsistent with our remedial opinion in *Booker*, which plainly contemplated that reasonableness review would contain a substantive component." *Rita*, 551 US at 365 (STEVENS, J. concurring).

Justice Souter, who dissented in *Rita*, believed that even an appellate *presumption* of substantive reasonableness for a within- Guidelines sentence violates the Sixth Amendment. See *Rita*, 551 US at 391-392 (SOUTER, J., dissenting). He prognosticated the presumption would exert a "substantial gravitational pull to the now-discretionary Guidelines" and would "preserve the very feature of the [pre-*Booker*] Guidelines that threatened to trivialize the jury right." *Id.* at 390.

Justice Souter lamented:

> For a presumption of Guidelines reasonableness would tend to produce Guidelines sentences almost as regularly as mandatory Guidelines had done, with judges finding the facts needed for a sentence in an upper subrange. It would open the door to undermining *Apprendi* itself, and this is what has happened today.
>
> Without a powerful reason to risk reversal on the sentence, a district judge faced with evidence supporting a high subrange Guidelines sentence will do the appropriate factfinding in disparagement of the jury right and will sentence within the high subrange. This prediction is weakened not a whit by the Court's description of within-Guidelines reasonableness as an "appellate" presumption. What works on appeal determines what works at trial, and if the Sentencing

> Commission's views are as weighty as the Court says they are, a trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, then to go through the unorthodox factfinding necessary to justify a sentence outside the Guideline range. The upshot is that today's decision moves the threat to the practical value of the Sixth Amendment jury right closer to what it was when this Court flagged it in *Jones*, and it seems fair to ask what has been accomplished in real terms by all the judicial labor imposed by *Apprendi* and its associated cases.
>
> Taking the *Booker* remedy (of discretionary Guidelines) as given, however, the way to avoid further risk to *Apprendi* and the jury is to hold that a discretionary within- Guidelines sentence carries no presumption of reasonableness. *Only if sentencing decisions are reviewed according to the same standard of reasonableness whether or not they fall within the Guidelines range will district courts be assured that the entire sentencing range set by statute is available to them*. *And only then will they stop replicating the unconstitutional system by imposing appeal-proof sentences within the Guidelines ranges determined by facts found alone by them*.
>
> I would therefore reject the presumption of reasonableness adopted in this case, not because it is pernicious in and of itself, but because I do not think we can recognize such a presumption and still retain the full effect of *Apprendi* in aid of the Sixth Amendment guarantee. [*Id*. at 390-392 (citations omitted) (emphasis added).]

Many leading sentencing scholars share Justice Souter's concerns. See, e.g., Hessick, *The Sixth Amendment Sentencing Right and Its Remedy*, 99 NC L Rev 1195, 1218-1219 (2021) (criticizing post- *Booker* Supreme Court opinions for developing appellate review standards that encourage within-Guidelines sentences as "inconsistent with the logic of *Booker*," and an "end run" around the Sixth Amendment); Exum, *The More Things Change: A*

Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review, 58 Cath U L Rev 115, 130 (2008) ("Though the presumption can, theoretically be rebutted by a defendant by showing that the sentence is somehow unreasonable in his particular case, it has acted as a rubber stamp, affording within-Guidelines sentences their pre-*Booker* treatment. The effect of the presumption of reasonableness for within-Guidelines sentences suggests that the possibility of rebutting the presumption is nearly non-existent."); Mullen & Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After United States v. Booker*, 41 U Rich L Rev 625, 640 (2007) ("Essentially, what the presumption of reasonableness has instituted is a mandatory Guidelines system with greater ground for departure, in the form of a variance, than before."); Berman & Bibas, *Making Sentencing Sensible*, 4 Ohio St J Crim L 37, 70 (2006) ("Existing federal reasonableness review is in danger of hardening into something close to pre-*Booker* mandatory guidelines. A majority of federal circuits strongly presume that sentences within the guideline ranges are reasonable but scrutinize out- of-range sentences far more closely. Federal district courts need offer little or no justification for within-range sentences but most offer detailed justifications for departing from the range. The farther the sentence departs from the range, the more compelling the reasoning must be to justify the departure.").

The concerns over the federal presumption animating Justice Souter's dissent in *Rita* are exacerbated in Michigan. Here, trial judges aren't lured toward the guidelines by the knowledge that their procedurally correct within-guidelines sentences are *practically appeal-proof*, as they are in the federal system; they are lured by the knowledge that they *are appeal-proof*. And while Justice Stevens was not persuaded by Souter's sensible prediction that the presumption would exert enormous pressure on district judges to sentence within the Guidelines, thereby creating a *de facto* mandatory scheme, Stevens took pains to highlight the *rebuttability* of that presumption in direct response to those concerns:

> *Booker's standard of review* allows— indeed, *requires*—district judges to consider all of the factors listed in § 3553(a) and to apply them to the individual defendants

> before them. Appellate courts must then give deference to the sentencing decisions made by those judges, whether the resulting sentence is inside or outside the advisory Guidelines range, under traditional abuse-of-discretion principles. As the Court acknowledges, moreover, *presumptively reasonable does not mean always reasonable; the presumption, of course, must be genuinely rebuttable.* I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*. . . . Our decision today makes clear, however, that the *rebuttability of the presumption is real*. It should also be clear that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range (and thus potentially subject to a formal "presumption" of reasonableness) or outside that range. *Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post- Booker interregnum will now recognize that the Guidelines are truly advisory*. [*Rita*, 551 US at 366-367 (STEVENS, J., concurring) (some emphasis added).]

This passage underscores the fallacy in the government's argument that the across-the-board reasonableness review outlined in *Booker* was justified by statute alone. See Plaintiff-Appellee's Supplemental Brief, *People v Posey* (Case No. 162373), pp 23-24 ("The Court found in the legislative scheme *statutory* justification for review of a sentence for unreasonableness In short, the review standard is implicit, the Court found, in the statutory scheme"). Notably, Justice Stevens implied that any Sixth Amendment concerns raised by the presumption were allayed by the fact that it's a nonbinding, "genuinely rebuttable" presumption, and that any sentence (whether inside or outside of the Guidelines) is subject to individual review for substantive reasonableness, *Rita*, 551 US at 366-367 (STEVENS, J., concurring), features missing from Michigan's sentencing scheme.

Several federal circuits recognize the import of the *rebuttability* of any appellate presumption of reasonableness for a within-Guidelines sentence. In *United States v Mickelson*, 433 F3d 1050, 1051-1052 (CA 8, 2006), the government argued that the Eighth Circuit lacked jurisdiction to entertain

an appeal on substantive reasonableness grounds of a within-Guideline sentence of 51 months for the defendant's receipt of child pornography. The government interpreted the post- *Booker* appellate review provisions of the SRA to foreclose substantive review of a within-Guidelines sentence, like in Michigan. *Id.* at 1052. The Eighth Circuit rejected the government's argument, stressing that adoption of this position "would have the effect of returning federal sentencing to something like the mandatory guideline system found unconstitutional in *Booker*." *Id.* at 1055. This was so because automatic affirmance of a procedurally correct sentence within the defendant's Guidelines range would "encourage[ ] [trial courts] to sentence only within the guideline range to avoid having sentences overturned on appeal." *Id*. The court cautioned, "This would effectively restore the rigidity in sentencing which the *Booker* majority held to violate the sixth amendment rights of defendants." *Id*.

Likewise, in *United States v Mykytiuk*, 415 F3d 606, 607 (CA 7, 2005), the Seventh Circuit applied a rebuttable presumption of reasonableness and upheld a 150-month within-Guideline sentence for possession of pseudoephedrine with intent to manufacture methamphetamine and possession of a firearm in furtherance of drug trafficking as substantively reasonable, emphasizing that many Guidelines sentences will be reasonable. However, the court also said that "'many or most' sentences cannot mean 'all' sentences." *Id.*

According to the court, "a per se or conclusively presumed reasonableness test would undo the Supreme Court's merits analysis in *Booker*." *Id.* Thus, "the door [must] be left open" for the defendant (or government) to rebut the presumption of reasonableness for a within-Guideline sentence. *Id.* at 608.

In *Crosby*, 397 F3d at 114-118, a case decided on the heels of *Booker*, the Second Circuit explored the proper approach to reasonableness review. It emphasized that a "per se rule[ ] as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline" would "risk being invalidated as contrary to the Supreme Court's holding in *Booker/Fanfan*, because [it] would effectively re-institute mandatory adherence to the Guidelines." *Id.* at 115, citing *Booker*, 543 U.S. at 311 (SCALIA, J., dissenting in part).

In *Webb*, 403 F3d at 385 n 9, the Sixth Circuit relied on *Crosby* to "decline to hold that a sentence within a proper Guidelines range is per- se reasonable." See also *United States v Talley*, 431 F3d 784, 786-787 (CA 11, 2005) (dismissing the government's argument that a sentence at the low-end of the defendant's Guideline range was per se reasonable because it disregards the mandate of *Booker* that sentencing courts consider all of the factors in § 3553(a) to impose a fair sentence); *United States v Alonzo*, 435 F3d 551, 554 (CA 5, 2006) (same).

MCL 769.34(10) discourages judges from abiding by and individualistically applying the purposes of criminal sentencing—just punishment, deterrence, public protection, and rehabilitation—that are a necessary component of the sentencing process. See *Snow*, 386 Mich at 592. Instead, if the sentence is within the guidelines range, the trial judge need not consider what, if any, purposes it serves. Nor must the judge consider whether a lower sentence might serve those same functions. Indeed, she need not justify her sentence at all. Under this scheme, a within-guidelines sentence is per se reasonable, that is, reasonable as a matter of law or, in and of itself and without reference to other factors, and cannot be rebutted. See *Black's Law Dictionary* (11th ed), "per se." This is inconsistent with the federal mandate that any appellate presumption of reasonableness for a within-Guidelines sentence must be truly rebuttable to comport with the Sixth Amendment jury trial right.

In this way, MCL 769.34(10) is also inconsistent with the Supreme Court's warning that the trial court (as opposed to the appeals court) may not presume a Guidelines sentence is reasonable. *See Gall*, 552 US at 50 (explaining that the district court may not presume a defendant's Guidelines range is reasonable, but must make an individualized assessment based on all of the facts and circumstances presented and the parties' arguments); *Rita*, 551 U.S. at 351 ("In determining the merits of [the parties'] arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines should apply."). By communicating to the sentencing judge that a properly calculated within-guidelines sentence is appeal-proof no matter how the court arrived at the sentence, MCL 769.34(10) undermines individualized sentencing and effectively says to that judge, "presume away," trampling upon defendants' Sixth Amendment right, as stated in *Lockridge*, to have their sentence reflect more than just the Guidelines. See,

e.g., *Making Sentencing Sensible*, 4 Ohio St J Crim L at 70 ("[I]f the default sentence served as a safe harbor against appellate reversal, risk- averse sentencing judges would be far too tempted to abdicate their judgment. The same would be true if appellate judges almost automatically reversed deviations or did not require reasons for selecting the default sentence. Any approach that permits sentences to result from rote judicial fact-finding would be the functional equivalent of the mandatory guidelines condemned in *Blakely*.").

II. Sentencing Guidelines sometimes yield excessive ranges and substantive appellate review of within- Guidelines sentences is necessary to guard against unreasonably high sentences.

It is also helpful to consider the practical import of requiring substantive review of within-guidelines sentences. Federally, although most within-Guidelines sentences are upheld as substantively reasonable,[2] see, e.g., *Rita*, 551 US at 351 ("Indeed, even the Circuits that have declined to adopt a formal presumption also recognize that a Guidelines sentence will usually be reasonable, because it reflects both the Commission's and the sentencing court's judgment as to what is an appropriate sentence for a given offender."), the Supreme Court has emphasized that "[i]n sentencing, as in other areas, district judges at times make mistakes that are substantive." *Id.* at 354.

In *Rita*, the Court said:

> Circuit courts exist to correct such mistakes when they occur. Our decision in *Booker* recognized as much. *Booker* held unconstitutional that portion of the Guidelines that made them mandatory. It also recognized that when district courts impose discretionary sentences, *which are reviewed under normal appellate principles by courts of appeals*, such a sentencing scheme will ordinarily raise no Sixth Amendment concern. [*Id.* (emphasis added).]

Thus, the Court envisioned substantive appellate review as a necessary mechanism to correct errors that result in excessive sentences under the Guidelines. Put bluntly, sentencing guidelines systems do not always get it right.

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[2] This is especially true in circuits that apply the presumption of reasonableness. See *The More Things Change*, 58 Cath U L Rev at 130-131 (citing data gathered by the New York Council of Defense Lawyers).

Even the Federal Sentencing Guidelines, which purport to be largely empirically driven, USSG 2021, at ch 1, pt A, intro cmt 3, sometimes yield unreasonably high sentences. As discussed *supra* pp 18-19, not every Guideline was developed following the empirical method. See also *Gall*, 552 US at 46 n. 2 ("Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to statutory mandatory minimum sentences that Congress established for such crimes."); *Kimbrough v United States*, 552 US 85, 96; 128 S Ct 558; 169 L Ed 2d 481 (2007) ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme.").

A number of the Federal Guidelines have been condemned and rejected by sentencing courts for elevating political whim over empirical analysis and national experience, which can lead to draconian results. See, e.g., *United States v Seay*, 256 F Supp 3d 992, 994 (ED Wis, 2017) (rejecting the career offender guideline as "far greater than necessary" to punish the defendant); *United States v. Gardner*, 20 F Supp 3d 468, 473 (SDNY, 2014) (rejecting the 18:1 crack to powder cocaine disparity and applying a 1:1 ratio based on a lack of "rational support" for the wider disparity); *United States v Nash*, 1 F Supp 3d 1240, 1243, 1248 (ND Ala, 2014) (rejecting the child pornography guidelines because they were "cobbled together" through a "hailstorm of enhancements directed by Congress," were not empirically sound, and were "flawed in need of repair") (quotation marks and citations omitted); *United States v Hendrickson*, 25 F Supp 3d 1166, 1178 (ND Iowa 2014) (refusing to following Sentencing Guideline policy statement that disfavored addiction-based downward departures because the policy contravened other portions of the SRA); *United States v Germosen*, 473 F Supp 2d 221, 230 (D Mass, 2007) (criticizing the Sentencing Commissions' limitations on the aberrant behavior downward departure provision as illogical and inconsistent with the statutory purposes of punishment); *United States v Suarez-Reyes*, unpublished opinion of the United States District Court for the District of Nebraska, issued Dec 18, 2012 (Case No. 12-cr-67), p 8 ("In formulating this sentence, the court has considered the sentencing range established by the Guidelines, but, because the fraud offense Guidelines were promulgated pursuant to Congressional directive rather than by application of the

Sentencing Commission's unique area of expertise, the court affords them less deference than it would to empirically-grounded Guidelines."); *United States v Torres-Gomez*, unpublished opinion of the United States District Court for the Eastern District of Wisconsin, issued Apr 24, 2012 (Case No. 11-CR-237), pp 3-4 (declining to impose the illegal re-entry Guideline's 16-level enhancement for prior conviction because the enhancement was not empirically based and resulted in double counting); *United States v Bennett*, unpublished opinion of the United States District Court for the District of Nebraska, issued May 30, 2008 (Case No. 07-cr-235), pp 4-6 (sentencing a defendant convicted of felon in possession with a Guidelines range of 30-37 months to "time served," in part because the base offense levels for weapons crimes were set pursuant to Congressional directive, rather than data, research, and experience). In Michigan, as noted in Defendant Posey's Supplemental Brief on Appeal, *People v Posey* (Case No. 162373), pp 31-34, and Defendant Stewart's Supplemental Brief on Appeal, *People v Stewart* (Case No. 162497), pp 51-54, the sentencing guidelines are even less studied, less proportional to offense severity, and riper for yielding to political pressures and abuses than the Federal Guidelines. Thus, they are even less deserving of the deference that Michigan law affords them.

While some federal trial courts have recognized and refused to follow inordinately harsh guidelines, others have not. Federal courts of appeals have, at times, been willing to reign in excessive within- Guidelines sentences, even applying the deferential abuse of discretion standard. In *United States v Freeman*, the Fourth Circuit reversed, on ineffective assistance of counsel and substantive unreasonableness grounds, a district court's imposition of a presumptively reasonable within-Guideline sentence of 210 months for Precias Freeman, who developed an opioid addiction following a tailbone injury as a teenager and began selling opioids to support her habit. 992 F3d 268, 271-272 (CA 4, 2021), reh gtd 847 Fed Appx 186 (CA 4, May 7, 2021). The panel concluded that the overriding § 3553(a) factors—most notably Freeman's severe hydrocodone addiction—rebutted the presumption of reasonableness of her nearly twenty-year within-Guidelines sentence for distribution of hydrocodone and oxycodone.[3] *Id.* at 279-280.

[3] The Fourth Circuit agreed to rehear the case *en banc*, and on rehearing, it

In another drug case, *United States v Lazenby*, 439 F3d 928,929, 933-934 (CA 8, 2006), the Eighth Circuit held that defendant Goodwin's 87-month sentence for conspiracy to manufacture and distribute methamphetamine, which was at the bottom of her Guidelines range, was substantively unreasonable. The court primarily relied on the disparity between Goodwin's sentence and that of her equally culpable co-defendant and Goodwin's early and full cooperation with the government. *Id.* at 933-934.

Non-production child pornography sentences within the Guidelines have also been struck down on substantive unreasonableness grounds. In *Dorvee*, 616 F3d at 176, 185, the Second Circuit reversed a 240-month within-Guideline sentence for distribution of child pornography as substantively unreasonable. The defendant Justin Dorvee's sentencing Guidelines yielded a range above the statutory maximum such that the district court's sentence to the statutory maximum of 20 years was considered a within-Guideline sentence. *Id.* at 181. In criticizing the sentence as unduly severe, the Second Circuit observed that the child pornography Guidelines are problematic because they were developed at the direction of Congress rather than through an empirical approach, and routinely led to ranges for non-contact offenses that were higher than if the defendant had engaged in illicit sexual contact with a minor. *Id.* at 184-188. See also *United States v Jenkins*, 854 F.3d 181, 189 (CA 2, 2017) ("[H]ere, as in *Dorvee*, § 2G2.2 cannot 'bear the weight assigned it' because the cumulation of repetitive, all-but-inherent, enhancements yielded, and the district court applied, a Guideline range that failed to distinguish between Jenkins's conduct and other offenders whose conduct was far worse. It was substantively unreasonable for the district court to have applied the § 2G2.2 enhancements in a way that placed Jenkins at the top of the range with the very worst offenders where he did not belong.") (citation omitted).

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upheld the *Freeman* panel's decision that Freeman received ineffective assistance of counsel at sentencing, but it vacated the portion of the panel opinion that held her sentence was substantively unreasonable, stating only, "Because Freeman received ineffective assistance of counsel, we do not reach the substantive reasonableness of her sentence." *United States v Freeman*, 24 F4th 320, 332 (CA 4, 2022) (en banc).

Finally, the illegal immigration Guidelines have led to erroneously high sentences for what amounts to a status offense. In *Amezcua-Vasquez*, 567 F.3d at 1050-1051, the Ninth Circuit overturned as substantively unreasonable Amezcua's 52-month within-Guideline sentence for attempting to reenter the United States following a deportation. The high Guidelines range was the result of a properly applied 16-level sentencing enhancement based on an old felony conviction. *Id.* at 1054. The court held that although it was not per se unreasonable for the district court to apply the enhancement despite the staleness of the conviction, under the totality of the circumstances and in light of Amezcua's subsequent history, the district court should have varied downward from the Guidelines range. *Id.* at 1054-1056.

As these cases demonstrate, although it is rare for a within- Guidelines sentence to be reversed as unreasonably high under an abuse of discretion standard, it is not entirely unheard of. In this way, substantive review of sentencing decisions on appeal retains both constitutional and practical significance for appellants faced with daunting within-Guidelines sentences, whether in federal court or in Michigan state court.

Conclusion and Relief Requested

These cases present the opportunity for this Court to correct a fundamental flaw in Michigan sentencing law, and to align the law with this Court's remedial holding in *Lockridge*, 498 Mich 358, as well as federal case law and the Sixth Amendment. As long as Michigan sentencing law requires substantive reasonableness review of outside- guidelines sentences and automatic affirmance of procedurally-correct within-guidelines sentences, criminal defendants' Sixth Amendment jury right will be undermined in this state. Therefore, *Amici* respectfully urge this Court to remain faithful to the precedent it set in *Lockridge*, when it invalidated two constitutionally-violative provisions of Michigan sentencing law, by taking the step now that it failed to then– striking down MCL § 769.34(10) and requiring across-the-board substantive reasonableness review for all sentencing decisions. Defendants Dametrius Posey and Joshua Stewart are entitled to resentencing on this basis.

Respectfully submitted,

/s/*Leslie E. Scott*

Amicus Curiae

/s/*Jelani Jefferson Exum*

Amicus Curiae

Date: September 2, 2022

Certificate of Compliance

I hereby certify that this document contains 10,359 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

/s/Leslie E. Scott

Amicus Curiae

/s/Jelani Jefferson Exum

Amicus Curiae

Date: September 2, 2022