STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v.

DAMETRIUS BENJAMIN POSEY **No. 162373**
Defendant-Appellant.

L.C. 18-000074-01-FC
COA No. 345491

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

*****Oral Argument Requested*****

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Counsel's performance is judged according to the law in existence at the time of the performance, counsel not being expected to anticipate changes in the law. An in-court identification following a failure to identify or a misidentification at a showup by a witness did not then and does not now bar an in-court identification by the witness. Was counsel ineffective?

Defendant answers: YES

The People answer: NO

II.

The legislature through MCL 769.34(10) has provided that sentences within properly scored guidelines are not subject to appellate review other than as to whether the sentencing court took into account inaccurate or inappropriate factors; in other words, such a sentence is, under the statute, lawful. Is there any basis on which the statute can be said to be unconstitutional on the ground that sentences must be reviewable for "proportionality," or perhaps some other standard, and, the sentence here being within properly scored guidelines without consideration of any improper factors, is it otherwise subject to review?

Defendant answers: YES

The People answer: NO

Statement of Facts

The People do not object to defendant's statement of facts, except for any argument, and with the addition of facts stated in the argument.

Argument

I.

Counsel's performance is judged according to the law in existence at the time of the performance, counsel not being expected to anticipate changes in the law. An in-court identification following a failure to identify or a misidentification at a showup by a witness did not then and does not now bar an in-court identification by the witness. Counsel was not ineffective.

Introduction

The Court has directed the parties to brief " whether the appellant was denied his right to due process when witness T. B. was allowed to identify him at trial, or denied the effective assistance of counsel when trial counsel failed to object to the witness' in-court identification testimony."[1] The People answer that defendant was not denied ineffective assistance of counsel because the in-court identification by the witness was and is permissible under the law.

Discussion

A. Counsel did not move to suppress any in-court identification by witness T.B., but cross-examined him extensively

Defense counsel did not move to suppress any possible in-court identification by the witness the Court has identified as T.B. But counsel extensively cross-examined on the subject after the witness on direct examination identified the two defendants and recounted their participation, and also testified that at photo showups he had identified two different people,[2] which requires recounting in some detail.

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[1] *People v. Posey*, 508 Mich. 940 (2021).

[2] T 7-25, 91-105.

Q. And back on the 9th of October 2017, you had an opportunity to speak with Police Officer — was it Person?

A. Yes.

Q. Officer Person. And, Officer Person showed you some photos, right?

A. Yes.

Q. And, Officer Person, he didn't say pick Number 2 or 3 or 6. He didn't say that, did he?

A. No.

Q. He just said do you see anyone there that you recognize?

A. Yes.

Q. And, so you weren't under — when you were out there on Charles Street, that was a stressful situation, right?

A. Yes.

Q. But, when you went to pick out, or identify anyone you could in the lineup, there wasn't any stress right then, was there?

A. No.

Q. It was calm and cool. The police were around. You could look. It was lighted is that correct?

A. Yes.

Q. And you looked at the lineups and you made picks, right?

A. Yes.

Q. And, when you picked it, it would be fair to say they asked you did you see anybody that [you] recognized on both of them — And, I'm referring to Exhibits Number 127 and Exhibit Number 143. Those two documents that the Prosecutor showed you before, correct?

A. Yes.

Q. You knew that you were supposed to be looking to see if you saw someone who was involved in this incident, is that correct?

A. Yes.

Q. And you weren't there joking or anything, right?

A. Yes.

Q. And, so you didn't say eenie, meenie, miney mo, or things like that, did you?

A. No.

Q. You didn't flip a coin, did you?

A. No.

Q. You picked someone in there because you though was involved in that incident, correct?

A. Yes.

Q. It was clear to you there you weren't there to say I guess I'll pick — you weren't guessing, right?

A. No.

Q. I'm going to refer to Exhibit Number 143. When you made the pick, there's circle. Did you place the circle there or did someone else?

A. I placed it.

Q. You circled it. And, in fact, there's something inside that says T.B. That doesn't stand for Tampa Bay, does it

A. No. That's my initials.

Q. Terrance Byrd?

A. Yes.

Q. So you circled it and put your initials there?

A. Yes.

Q. And, then down in the lower left corner, Officer Person wrote — where do you recognize Number 2 from, right?

A. Yes.

Q. You were able to read that. It wasn't like — you know, his handwriting is much better than mine. I mean, you could see it, and see what said [sic], right?

A. Yes.

Q. All right. And, then did you write or did he write the answer down here? It says Q and A. Answer. Did you write it or did he write it?

A. I think he rewrote it on there, but I actually wrote the answer.

Q. Okay. And, that answer right there, it says — From the store shooting?

A. Yes.

*****

Q. So, that was fresh in your mind. It wasn't like a year later, you're saying oh, that's the guy. This is, like the next day, right?

A. Yes.

Q. And, you looked at this, and you didn't say Number 2 kind of looks like the person, right?

A. Right.

Q. And, you didn't get this Exhibit Number 143 and look at it and only looked at one photo, did you?

A. No.

Q. You looked at all six photos on there, right?

A. Yes.

Q. And, out of all of those six photos, you look at 1, and you looked down at 6, and looked over at 4, and looked up at 3. You looked at all of them several times, right?

A. Yes.

Q. How long did it take you to make the identification?

A. Maybe about 15 minutes.

Q. Because you took your time?

A. Yes.

Q. You were deliberate in what you were doing to make sure that you got the person that you thought was involved in this?

A. Yes.

Q. There was no question about it, right?

A. Yes.

Q. You didn't tell anybody you weren't sure, did you?

A. Right.

Q. You didn't come back, like, on the 10th of October or October the 20th and say Officer Person, I think I want to look at some other people because I'm not certain that's the right person. You didn't do that, did you?

A. No.

*****

Q. Okay. So were you telling the truth when you made this identification?

A. Yes.

Q. You were telling the truth?

A. Yes.

Q. So, the truth is that Number 2 who is — who is Number 2?

A. I thought that was Mr. Posey at the time.

Q. Okay?

A. The person that I seen at the store.

*****

Q. Right. And, then you saw Mr. Posey in court with me, didn't you?

A. Yes.

Q. And, you saw him when he was seated before you. Before you ever told anybody else it's not Number 2, you saw Mr. Posey, right?

A. Yes.

Q. Okay. And, so once you get into court and Mr. Posey is sitting there, and he's a similar complexion to the guy there right?

A. Yes.

Q. Then you decided oh, it must be him?

A. Yes.

Q. Okay. So, you were very sure when you first made the identification, and then something happened to make you change your mind, right?

A. Yes.

Q. And, that was only once you got into court and just said oh, that's the knife guy right there?

A. I guess so, yes.

THE COURT: Don't guess.

A. Yes.[3]

[3] T 7-26, 110-121.

*****

Q. ...The question I'm asking you is before yesterday, which was the 25th of July, 2018, in a court, or a statement, you never identified Mr. Posey as having anything to do with this case, is that correct?

A. Not from the photo lineup.

Q. ... We're clear that Mr. Posey's picture is in the lineup, and you didn't pick out Mr. Posey?

A. Correct.

Q. Not only did you not pick out Mr. Posey, but you picked out another person and said that's the person, right?

A. Correct.

A. What I'm saying, and then this year later from that time, earlier from this time, you actually had an opportunity — did there come a time where you were sitting in a courtroom with Mr. Harris, Mr. Quinn, Mr. Posey and I, and you didn't say Mr. Posey — you didn't identify him then, right?

A. No. They didn't ask me to identify him.

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Q. ... You said they didn't ask you to identify him. Who do you mean?

A. The defense attorneys. You and the other attorney never asked me to identify the gentleman in court or if they were present at the scene until yesterday.

Q. I see. And, so when you're in court and they asked you if you recognize anybody or whatever, you said certainly, Mr. Posey? You certainly knew his name by that time. By October to January, you knew his name?

A. Yes.[4]

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[4] T 7-26, 11-16.

Codefendant's counsel also questioned the witness regarding his misidentification of the codefendant at the photo showup. T 7-26, 27.

Q. ...But, you just testified a moment ago that your mind was changed following a newscast, is that right?

A. Yes.

Q. What newcast?

A. From the news, from the Fox 2 News that was broadcast.

Q. So, the Fox 2 News broadcast was something that made you change your mind about who was present at the incident that we're talking about?

A. Yes. Once I seen the gentlemen in court, I knew who they were then.

*****

Q. Okay, if you knew what they looked like at the time you're making the lineup identification, then you would have picked them, right?

A. Correct.

Q. And, you didn't pick Mr. Posey, right.

A. No, sir.

Q. You picked somebody — not only did you not pick him, you didn't say I don't see the person, but you picked another person?

A. Correct.

Q. So, the other person was the person that was out there?

A. No.

*****

Q. Okay. So, that's October the 9th. So, the 9th, 10th, whatever, some date after that, you looked on the T.V. and said oh, no, that's a different person than I picked out, right?

A. Correct.

Q. You realized you picked the wrong person, right?

A. Yes.

Q. Who did you tell that to?

A. I didn't tell anyone.

*****

A. Yes. I thought I could identify the gentlemen [at the lineup].

Q. But, you couldn't, could you?

A. No, I couldn't.

Q. Because you were guessing?

A. Not guessing, but I thought I picked the gentlemen that was out at the scene at the crime that day.

Q. Okay. Were you wrong?

A. Yes, I was.

Q. So, you were wrong about your identification of Number 2 in that lineup with Mr. Posey, right?

A. (No response)

Q. Yes?

A. Yes.

Q. So, in essence, you really don't know. You just know that somebody else say oh, this is Mr. Posey, and then you kind of climbed on?

A. Didn't nobody say this is Mr. Posey. I actually seen him in court that day.[5]

And in closing, defense counsel strongly argued the misidentification at the showup to the jury.[6]

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[5] T- 7-26, 32-38.

[6] T 8-1, 45-48.

B. Counsel need not be prescient to function as the "counsel for the accused"; performance is reviewed in light of the then-current law

Defendant argues that counsel should have moved to suppress any in-court identification where that identification was made first in-court, the witness having identified someone else at the photo showup. But to constitute ineffective assistance, the law must be that such a motion would necessarily have been successful; that is, that under the then-existing law the in-court identification was inadmissible. Otherwise, there is no counsel error. But that was not and is not the law. First, the standard for counsel performance.

A reviewing court must indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." The defendant must show "that counsel's performance was deficient," which "requires showing that counsel made errors so serious that counsel was *not functioning as the 'counsel'* guaranteed the defendant by the Sixth Amendment." And "defendant must show that the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[7] In examining whether counsel erred—much less erred so grievously as not to be functioning as the counsel guaranteed by the Sixth Amendment—it is the law that prevails at the time of the trial in question that must be examined. The United States Supreme Court, as well as other courts, has made the point clear. A court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct "viewed as of the time of counsel's conduct."[8] And

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[7] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052,2064, 2065, 80 L. Ed. 2d 674 (1984) (emphasis supplied).

[8] Id., 104 S. Ct. at 2066. See also *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993) (in *Strickland* the Court "adopted the rule of contemporary assessment of counsel's conduct"); *Maryland v. Kulbicki*, 577 U.S. 1, 4, 136 S. Ct. 2, 4, 193 L. Ed. 2d 1 (2015).

counsel need not anticipate or urge a change in the law; prescience is not required for counsel's effectiveness.[9] Counsel here, then, cannot be faulted if the law at the time of the trial—indeed, the law now—provides no due-process basis for suppression of a "first in-court" identification. And it does not.

The United States Supreme Court in *Perry v. New Hampshire*[10] said that a fair trial for those criminally accused is secured by guarantees to the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. The reliability of evidence presented at trial is ordinarily within the province of the jury to determine, save "a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime."[11] In this circumstance, the trial judge must, pretrial, screen the evidence for reliability, and if there is a very substantial likelihood of irreparable misidentification the evidence must be excluded.[12] But the *sine qua non* of this required screening is police use of a suggestive identification procedure. The due process check for reliability" comes into play only after the

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[9] See e.g. *Alcorn v. Smith*, 781 F.2d 58, 62 (CA 6, 1986); *Resnick v. United States*, 7 F.4th 611, 623 (CA 7, 2021); *Tucker v. United States*, 889 F.3d 881, 885 (CA 7, 2018) ("failure to anticipate a change or advancement in the law does not qualify as ineffective assistance"); *Powell v. United States*, 430 F.3d 490, 491 (CA 1, 2005) ("the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law"); *Clark v. Arnold*, 769 F.3d 711, 72 (CA 9, 2014) (we do not expect counsel to be prescient about the direction the law will take"); *Lowry v. Lewis*, 21 F.3d 344, 346 (CA 9. 1994) (a lawyer is not ineffective for failing to anticipate a decision in a later case); *State v. Armstead*, 178 A.3d 556, 573 (Md. Ct. Spec. App., 2018) ("It has long been established that an attorney is not required ordinarily to be prescient as to changes in the law and act accordingly").

[10] *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

[11] Id., 132 S. Ct. at 720.

[12] Id.

defendant establishes improper police conduct. . . . The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness."[13] After all, "the jury, not the judge, traditionally determines the reliability of evidence," and the defendant's counsel can explore and "expose the flaws in the eyewitness' testimony during cross-examination."[14]

Courts both before and after *Perry* have held that "first in-court" identifications, including those following a misidentification at a showup, are not subject to any reliability screening by the trial court, their reliability to be examined through cross-examination and determined by the jury.

- [B]ecause the lineup was not impermissibly suggestive, petitioner's counsel did not err in failing to object to the in-court identification of petitioner by victims who had failed to identify petitioner during the lineup. As recognized by the district court, the victims' failure to identify the petitioner during the lineup went to the credibility of the in-court identifications, not their admissibility. . . . Consequently, petitioner's counsel was not ineffective for failing to object to the admission of the in-court identifications.[15]

- Bennett argued that, because DT was unable to identify him at a corporeal lineup but then identified him at the preliminary examination, her identification of him at trial "was based on the unduly suggestive pre-trial confrontation that occurred during the preliminary examination." But as the Michigan Court of Appeals and the district court explained, Bennett did not point to any act of the police officers or the prosecution that rendered the pre-trial identification procedure suggestive . . . Further, although DT did not identify Bennett at the lineup, this goes to the credibility of the in-court identification, not its admissibility.[16]

- Monroe's first claim is ineffective assistance of counsel. He argues that his counsel was deficient in failing to object to the bank teller's identification of

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[13] Id., 132 S. Ct. at 725-726, 728.

[14] Id., 132 S. Ct. at 728.

[15] *Millender v. Adams*, 376 F.3d 520, 525 (CA 6, 2004).

[16] *Bennett v. Christiansen*, 2020 WL 1550652, at 4 (CA 6,2020).

Monroe at trial, because she had failed to identify him in a lineup following the robbery. As the district court properly noted, the teller's failure to identify Monroe in the lineup was not a basis for excluding her in-court identification. . . . Therefore, counsel was not ineffective in this regard.[17]

- Perry makes clear that, for those defendants who are identified under suggestive circumstances not arranged by police, the requirements of due process are satisfied in the ordinary protections of trial. . . . Whatley argues that the in-court identifications were unnecessarily suggestive because he was seated at the defense counsel table, he was the only African–American man in the courtroom other than courtroom personnel, he had never been identified in a line-up or array of photographs before trial, and he was first seen by the bank employee witnesses during their testimony. But these circumstances were not the result of improper police conduct. Whatley had a constitutional right to be present at his trial, . . . and it is customary for the defendant to be seated at the table with his counsel. . . . Whatley received the same process that the Supreme Court identified in Perry as constitutionally sufficient for defendants who are the subject of identifications not influenced by improper police conduct. Whatley was able to confront all of the eyewitnesses who identified him in court. His counsel ably highlighted the frailties of the in-court identifications, including the discrepancies between the testimony given at trial and the witnesses' previous statements to police, the length of time that had passed between the witnesses' initial statements—when the bank robberies were fresh in their minds—and their testimony at trial, and the past misidentifications by the witnesses of other men as the bank robber.[18]

- We find most persuasive the approach taken by the Eleventh Circuit in *United States v. Whatley*, where the court held that the Supreme Court's decision in *Perry* applies not only to pretrial identifications but also to in-court identifications.[19]

- [W]here an in-court identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where nothing beyond the inherent suggestiveness of the ordinary courtroom setting made the in-court identification itself constitutionally suspect, due

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[17] *Monroe v. Smith*, 41 F. App'x 730, 732 (CA 6, 2002).

[18] *United States v. Whatley*, 719 F.3d 1206, 1216–1217 (CA11, 2013).

[19] *United States v. Thomas*, 849 F.3d 906, 910 (CA 10, 2017).

process does not require the trial court to assess the identification for reliability.[20]

- Traditional in-court identifications of the type Walker complains of . . . . are not the result of improper conduct, but rather, occur in the normal and wholly ordinary course of a criminal trial. Indeed, in-court identifications are necessary in the ordinary, if not absolute, meaning of the word because the identity of the perpetrator always will be an element of the offense that the government must prove to a jury beyond a reasonable doubt. . . . the United States Supreme Court rejected the notion that due process requires suppression of such identifications or that trial courts adopt the special procedures Walker seeks here. Rather, the *Perry* Court concluded that a defendant sufficiently is protected from the dangers of misidentification resulting from normal, in-court identifications by the normal protections the Constitution provides a criminal defendant[.][21]

- The *Perry* Court detailed how Perry's counsel used "the safeguards generally applicable in criminal trials," quoting from her opening statement, cross-examination, and closing argument that highlighted the unreliability of the witness's identification. . . . Given those trial safeguards, the Court held "the introduction of [the eyewitness's] testimony, without a preliminary judicial assessment of its reliability, did not render Perry's trial fundamentally unfair." . . . We reach the same conclusion here, for the same reasons.[22]

It cannot be said that counsel's thorough and searching cross-examination of the witness with regard to his identification left him not functioning as the counsel for the accused,[23] nor that he should have argued for the change in the law that defendant now seeks, one rejected by many courts, *even if* it were later to be adopted, counsel's performance being examined under the law extant at the time of the performance.

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[20] *Garner v. People*, 436 P.3d 1107, 1119 (Colo, 2019).

[21] *Walker v. Commonwealth*, 870 S.E.2d 328, 341–342 (Va. Ct. App., 2022).

[22] *State v. Doolin*, 942 N.W.2d 500, 510 (Iowa, 2020).

[23] At resentencing, defendant said to the court that "I want this court to know that during the trial I did not take the stand. I did not make no statements, but my intentions was never to hurt anyone. I just wanted to say that things got out of control. If I could change it, I would. I wish I could." Resentence, p.30.

II.

The legislature through MCL 769.34(10) has provided that sentences within properly scored guidelines are not subject to appellate review other than as to whether the sentencing court took into account inaccurate or inappropriate factors; in other words, such a sentence is, under the statute, lawful. There is no basis on which the statute can be said to be unconstitutional on the ground that sentences must be reviewable for "proportionality," or perhaps some other standard. The sentence here was within properly scored guidelines without consideration of any improper factors, and is not otherwise subject to review.

[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.[24]

The jurisdiction of the court of appeals shall be provided by law.[25]

We do not agree that the constitutionally guaranteed right of appeal mandates review of the trial court's exercise of discretion in sentencing in order to comport with due process of law. The expansion of the scope of appellate review of sentencing is a matter of public policy within this Court's power to adopt; it is not constitutionally required.[26]

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

[25] Mich. Const. 1963, Art. 6, § 10.

[26] *People v. Coles*, 417 Mich. 523, 542 (1983).

> *In our judgment, it is appropriate—if not unavoidable—to conclude that, with regard to the judicial selection of an individual sentence within the statutory minimum and maximum for a given offense,* ***the Legislature similarly intended*** *more serious commissions of a given crime by persons with a history of criminal behavior to receive harsher sentences than relatively less serious breaches of the same penal statute by first-time offenders. We believe that* ***the Legislature's purpose*** *is best served by requiring judicial sentencing discretion to be exercised according to the same principle of proportionality that has guided the Legislature in its allocation of punishment over the entire spectrum of criminal behavior.*[27]

> *If a minimum sentence is within the appropriate guidelines sentence 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.*[28]

Introduction

This Court in its order directing supplemental briefing and oral argument on the application specified that to be addressed is "whether the requirement in MCL 769.34(10) that the Court of Appeals affirm any sentence within the guidelines range, absent a scoring error or reliance on inaccurate information, is consistent with (1) the Sixth Amendment, (2) the due-process right to appellate review, and (3) *People v Lockridge*, 498 Mich 358 (2015)," and, if not, "(4) whether the appellant's sentence is reasonable and proportionate."[29] The People answer that the Court in *Lockridge* severed from the legislative sentencing scheme two statutory provisions, neither of which was MCL 769.34(10)[30]; further, the Court's remedy for the Sixth Amendment violation it found in

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[27] *People v. Milbourn*, 435 Mich. 630, 635–636 (1990).

[28] MCL § 769.34(10).

[29] *People v. Posey*, 964 N.W.2d 362 (2021) (numbering added). (STEWART)

[30] "[W]e sever MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory. We also strike down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *People v. Lockridge*, 498 Mich. 358, 364–365 (2015).

the legislative scheme carefully excluded sentences *within* the guidelines. These sentence are lawful under MCL 769.34(10) and not subject to appellate review, other than as to the scoring of the guidelines, consideration of inaccurate information, and constitutional claims regarding the consideration of inappropriate factors—there is simply nothing else to review that would render the sentence unlawful under the statutory scheme. The *Lockridge* requirement that out-of-guidelines sentences be subject on appeal to "reasonableness review for an abuse of discretion informed by the 'principle of proportionality'"[31] did not and does not touch guidelines sentences. This makes sense; the proportionality review of *Milbourn*[32] which the Court in *Lockridge* reinstated for out-of-guidelines sentences, having struck the legislative review scheme, was itself not something compelled by the constitution, but determined by this Court in that decision to be review implicity commanded by the legislative penal and sentencing scheme, a review standard which the legislature is free to change, end, or limit, and it *is* limited by MCL 76934(10).

Further, the Court's order appears to assume that there *is* a "due-process right to appellate review," at least of all issues a defendant wishes to raise, disabling a legislature from removing issues from appellate consideration; the People submit there is no such right. Nothing in the constitution compels any alteration of the legislative command that within-guidelines sentences are not subject to review so long as certain predicates are met—that there is no consideration of

[31] *People v. Steanhouse*, 500 Mich. 453, 476 (2017). Both in its Remedy section, and its introductory section summarizing its holdings, the Court in *Lockridge* excluded guidelines sentences from review for reasonableness: "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 appellate courts for reasonableness," *People v. Lockridge*, 498 Mich. at 365 (emphasis supplied); "A sentence *that departs from the applicable guidelines range* will be reviewed by an appellate court for reasonableness. *Booker*, 543 U.S. at 261, 125 S.Ct. 738. Resentencing will be required when a sentence is determined to be unreasonable." *People v. Lockridge*, 498 Mich. at 392 (emphasis supplied).

[32] *People v. Milbourn*, 435 Mich. 630 (1990).

inappropriate material or inaccurate information, nor scoring errors affecting the range. Appellate review is thus available, but these are the only factors that affect the lawfulness of the sentence; there are simply no other issues to be reviewed by an appellate court. And 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."[33] As Chief Justice, then Justice, Markman said in dissent in *Lockridge*, "[s]triking 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."[34] 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 lawful under the legislative scheme, and thus not subject to further review. 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,"[35] and not that of this Court. Defendant's assertion that "certain unique features of Michigan's sentencing guideline scheme provide no reassurance that the guideline ranges provide a proportionate sentencing option"[36] implicitly postulates that, to be constitutional, a sentence must

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[33] *People v. Lockridge*, 498 Mich. at 365 (emphasis supplied)..

[34] Id., at 429–430 (Markman, J., dissenting). See also *People v. Betts*, 507 Mich. 527, 576 (2021) (Viviano, J., concurring in part and dissenting in part) (the Court must consider "the presumption that statutes are constitutional, that the Legislature intended its enactment to be constitutional, and that legislation should not be declared unconstitutional 'except for clear and satisfactory reasons'").

[35] *People v. Steanhouse*, 500 Mich. at 484 (Larsen, J., concurring).

[36] Defendant's Brief, p. 24.

be "proportionate," and must be so within the eyes of a reviewing court, the legislature being prohibited from precluding such review in certain circumstances—and rendering the federal cruel and unusual punishment constitutional prohibition and Michigan's cruel or unusual constitutional prohibition nugatory, these prohibiting "grossly disproportionate" sentences.[37] But this is not so.

Discussion

A. A brief history of sentence review

1. Sentencing in the federal system: Congressional creation of appellate review of sentences, and abolition of mandatory guidelines

Defendant's thesis is built upon the foundation that sentences must not only not be "grossly proportionate" (perhaps) in order to be constitutional, but "proportionate," and, to be constitutional, reviewable by an appellate court as to whether they are.[38] But there is no constitutional requirement that the legislature provide such a statutory scheme. History, as is often the case, helps make the point.[39]

By way of context and comparison with Michigan sentencing, historically, so long as within the statutorily established sentence limitations an imposed sentence was unreviewable in the federal

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[37] *Solem v. Helm*, 463 U.S. 277, 288, 103 S. Ct. 3001, 3008, 77 L. Ed. 2d 637 (1983); *People v. Bullock*, 440 Mich. 15, 37 (1992). If sentences *must* be reviewable for proportionality—and thus set aside if not "proportionate" in the view of the reviewing court—there is no point to constitutionally required review for *gross* disproportionality.

[38] One would not think it possible for a sentence below the mid-point of the guidelines range to constitute cruel or unusual punishment under the Michigan Constitution, and defendant has not so claimed; even this Court's holding that a discretionary and paroleable sentence of life for a double murderer constitutes cruel or unusual punishment would not reach this case. See *People v. Stovall*, —Mich.— (No. 162425, 7-28-2022).

[39] See *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963 (1921) ("a page of history is worth a volume of logic") (Holmes, J., for a unanimous Court).

system, save for consideration of inaccurate information or inappropriate factors.[40] Initially, a specific sentence was required by statute, but later federal statutes came to provide for "indeterminate" sentences,[41] though that term means something different than it does in Michigan. Federally, an indeterminate sentence means that the *statute* includes a range instead of a specific sentence, within which the sentencing judge is to impose a specific term of years.[42] In Michigan, an indeterminate sentence means that the actual sentence set by the sentencing judge is itself indeterminate, with a minimum and a maximum, the maximum being the maximum set by law, and the minimum—the earliest parole eligibility date of the defendant, as actual service of up to and including the maximum sentence is authorized by the verdict—set by the sentencing judge, except for sentences carrying life or any term of years, where the sentencing judge also sets the maximum.[43] It is still the case in the federal system that a determinate sentence is ordinarily imposed from an indeterminate legislative range, the sentencing judge to consider the now-advisory federal sentencing guidelines. Before the guidelines were promulgated, because Congress had set out no provision for

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[40] "Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal. *Dorszynski v. United States*, 418 U.S. 424, 431, 94 S.Ct. 3042, 3047, 41 L.Ed.2d 855 (1974) (reiterating 'the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end'); *United States v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972) (same)"). *Koon v. United States*, 518 U.S. 81, 96, 116 S. Ct. 2035, 2045–46, 135 L. Ed. 2d 392 (1996).

[41] "Congress early abandoned fixed-sentence rigidity . . . and put in place a system of ranges within which the sentencer could choose the precise punishment." *Mistretta v. United States*, 488 U.S. 361, 364, 109 S. Ct. 647, 651, 102 L. Ed. 2d 714 (1989).

[42] "For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long." *Mistretta v. United States*, 109 S. Ct. at 650.

[43] MCL 769.9; MCL 769.34.

appellate review of sentences "Congress [had] delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected."[44]

Because of the wide statutory range for sentencing provided by Congress for most offenses, Congress became concerned with disparate sentencing, as "[s]erious disparities in sentences . . . were common."[45] The ultimate result was the Sentencing Reform Act, creating the Sentencing Commission, which established the federal sentencing guidelines.[46] Sentences within the guidelines were mandatory, though departures were allowed: "the court shall impose a sentence of the kind, and within the range . . . unless the court finds 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. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."[47] A departure from the guidelines range was permitted only if "reasonable, and the court [had to] offer reasons justifying the departure in terms of the policies underlying the sentencing guidelines."[48] Sentences that departed from the guidelines were subject to appellate review to determine if the sentencing judge departed "to an unreasonable degree from the applicable guidelines

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[44] *Mistretta v. United States*, 109 S. Ct. at 651.

[45] Id.

[46] 28 U.S.C.A. § 991 et seq.

[47] 18 U.S.C.A. § 3553(b)(1).

[48] See e.g. *United States v. Rangel*, 319 F.3d 710, 715 (CA 5, 2003).

range, having regard for the factors to be considered in imposing a sentence."[49] Review thus considered whether the *departure* was reasonable, not whether the *sentence imposed* was reasonable[50] (which is precisely that which the Michigan Court of Appeals is requiring now).[51] Though a sentence within the guidelines was thus not mandatory in the sense that no other could be imposed, because a departure was only permitted if justified as reasonable, the Supreme Court found that the guidelines were, for purposes of the Sixth Amendment, mandatory.[52]

Because the guidelines were in this sense mandatory, and included in their calculation facts concerning the manner of the commission of the crime or its effects not necessarily found by the jury beyond a reasonable doubt in its verdict, the United States Supreme Court found a violation of the Sixth Amendment in mandatory guidelines sentencing. The remedy was to strike the mandatory nature of the guidelines, not its fact-finding, so that they became advisory only. Appellate review of a sentence, once the guidelines were advisory, was problematic—did sentencing return to its previously unreviewable state? The Court found in the legislative scheme *statutory* justification for review of a sentence for unreasonableness: "a statute that does not explicitly set forth a standard of review may nonetheless do so implicitly . . . . 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 unreasonable."[53] In short, the review standard

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[49] 18 U.S.C.A. § 3742(e)(3)(C).

[50] "In determining whether the degree of a departure from the Guidelines is reasonable, ..." *United States v. Hurlich*, 348 F.3d 1219, 1221 (CA 10, 2003).

[51] See note 100, and accompanying text.

[52] *United States v. Booker*, 543 U.S. 220, 227, 125 S. Ct. 738, 745, 160 L. Ed. 2d 621 (2005).

[53] Id., 125 S. Ct. at 766.

is implicit, the Court found, in the statutory scheme, but it became the *sentence*, rather than any departure, that is reviewed for reasonableness, as review of the departure for reasonableness would have left the guidelines mandatory. And the reasonableness of the sentence is reviewed under an abuse of discretion standard: "[a]s a result of our [*Booker*] decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are 'reasonable.' 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."[54] Federal appellate decisions have thus said that "appellate review is to determine whether the sentence is reasonable; only a procedurally erroneous or substantively unreasonable sentence will be set aside."[55] This means that a sentence is to be affirmed "unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided."[56]

And because "advisory" truly means advisory, the Supreme Court held in the *Kimbrough* case that "courts may vary [from Guidelines ranges] based solely on policy considerations*, including disagreements with the Guidelines*."[57] Federal circuit courts have thus held since *Kimbrough* that to prohibit sentencing judges from weighing factors that are included within the guidelines differently than does the statutory scheme—though the guidelines themselves must be calculated in

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[54] *Gall v. United States*, 552 U.S. 38, 46, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

[55] *United States v. Dunn*, 728 F.3d 1151, 1157–58 (CA 9, 2013).

[56] *United States v. Tomko*, 562 F.3d 558, 568 (CA 3, 2009).

[57] *Kimbrough v. United States*, 552 U.S. 85, 97, 128 S.Ct. 558, 570, 169 L.Ed.2d 481 (2007) (emphasis added).

the manner set for in the statute—"would essentially render the Guidelines mandatory."[58] Thus, "the sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case *or as a matter of policy*. . . . the sentencing 'judge may determine . . . that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing.' . . . Obviously, the sentencing court may also conclude in a particular case that a sentence within the Guidelines range is not lengthy enough to serve the objectives of sentencing."[59]

Finally, on appellate review of a sentence, an appellate court is free to presume that a within-guidelines sentence is reasonable. The Fourth Circuit on review of a sentence held that a sentence imposed within the properly calculated Guidelines range is presumptively reasonable,[60] noting that while in an individual case a sentence outside the guidelines range might be appropriate, it had "'no reason to doubt that most sentences will continue to fall within the applicable guideline range,'" rejecting the defendant's arguments that the sentence was unreasonable.[61] The Supreme Court agreed that such an appellate presumption is permissible, for "by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case.

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[58] *United States v. Williams*, 517 F.3d 801, 809-810 (CA 5, 2008), the court also noting that "The Supreme Court reminded us that 'the Guidelines are only one of the factors to consider when imposing sentence.'"

[59] Id. (emphasis supplied).

[60] In Michigan, by statute there is no issue concerning the reasonableness of a guidelines sentence—it is not "presumed" to be reasonable, but is simply unreviewable as to its length as a matter of legislative determination. MCL 769.34(10).

[61] *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 2462, 168 L. Ed. 2d 203 (2007).

That double determination significantly increases the likelihood that the sentence is a reasonable one."[62]

2. Sentencing in Michigan: judicial creation of appellate review of sentences, legislative creation of judicial review of sentences, and abolition of mandatory guidelines

Until 1983 it was the understanding in this State, as it had been in the federal system before creation of the sentencing guidelines, that review of the length of a sentence—laying aside the use of impermissible considerations in sentencing—went only to whether it was within the limits allowed by law. For example, the Court of Marston, Graves, Cooley, and Campbell said in 1879 that there "[t]he sentence was not in excess of that permitted by statute, and when within the statute this court has no supervising control over the punishment that shall be inflicted. The statute gives a wide discretionary power to the trial court, upon the supposition that it will be judicially exercised in view of all the facts and circumstances appearing on the trial."[63] In 1894, the Court said that the sentence there "was authorized by law, and was one within the exclusive province of the legislature to prescribe. This court will not review the discretion of the trial court in such matters."[64] And the Court in 1971 said the same.[65] All of this changed in 1983 with the *Coles*[66] decision.

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[62] Id., 127 S. Ct. at 2462-63.

[63] *Cummins v. People*, 42 Mich. 142, 144 (1879), overruled by *People v. Coles*, 417 Mich. 523 (1983).

[64] *People v. Kelly*, 99 Mich. 82, 86 (1894).

[65] *People v. Malkowski*, 385 Mich. 244, 247–48 (1971).

[66] *People v. Coles*, 417 Mich. 523, 528 (1983), holding modified by *People v. Milbourn*, 435 Mich. 630 (1990).

The Court in *Coles* decided to reconsider the venerable *Cummins* decision; surprisingly, the Court gave no consideration whatever to stare decisis in reconsidering so established a precedent, discussion of which appears nowhere in the opinion—the term is not even mentioned. Though noting that *Cummins* appeared to "stand for the proposition that there should be no appellate review of sentences imposed within statutory limits," the Court said this understanding was overstated, for the Court had and would undertake to determine if a sentence was unconstitutional as constituting cruel and unusual punishment, or statutorily illegal as outside statutory limits.[67] Further, the Court continued, review of sentences "historically ha[d] encompassed more than the limited considerations whether the sentence imposed was within the statutory limits and whether it constituted cruel or unusual punishment in violation of the constitution," as relief had also been granted if the appropriate amount of credit for time served had not been included in the judgment,[68] and if the sentence imposed was not actually for the offense for which the defendant had been convicted.[69] And, the Court continued, basing a sentence on inappropriate considerations, such as punishment for going to trial instead of pleading guilty, or consideration of inaccurate information, had justified relief, as had the imposition of a sentence that violated the 2/3 rule of *People v. Tanner*.[70] The Court

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[67] Id., at 529-530.

[68] But to require that statutory commands regarding sentence credit be met is not a review of the length of the sentence imposed.

[69] Again, that the sentence imposed must be for the offense for which defendant was actually convicted is not a review of the exercise of discretion of the judge in sentencing for the appropriate offense within the proper statutory limits.

[70] *People v. Tanner*, 387 Mich. 683 (1972). *Coles*, at 530-532. *Tanner* is also not a case involving review of the discretionary sentencing decision of a trial judge, but a determination—whether correct or not—that a sentence was not indeterminate unless the minimum is not more than 2/3 of the maximum, so that, as construed by *Tanner*, a sentence with a minimum of more than 2/3 of the maximum was simply statutorily illegal. The 2/3 rule is now actually part of the statutory scheme. MCL 769.34(2)(b). Nor is

concluded that it was thus "clear that appellate review of sentences to date has included both the procedural consideration of how the defendant was sentenced as well as a consideration of whether the substance of the sentence was statutorily or constitutionally permissible."[71] While this is surely so, it says nothing about review of the sentencing decision made by a trial judge within statutory and constitutional limits, and without procedural irregularity, and provided no basis for overruling *Cummins*. But the Court in fact understood that review of sentences for legal error was not the same as review of the exercise of sentencing discretion; as the Court put it, the question was whether the Court should *turn aside* from *Cummins*, and "*expand* the scope of appellate review to include a review of the trial court's exercise of discretion in sentencing a defendant when the sentence falls within statutory limits which do not constitute cruel or unusual punishment, when the sentence does not violate the rule established in *Tanne*r, . . .when the trial court has not relied upon impermissible considerations, and when the court rules relating to sentencing procedures were properly followed."[72]

The Court determined so to do. While agreeing that there was no constitutional or statutory authority vesting the appellate courts with jurisdiction to engage in this sort of review of sentencing, the Court also noted with approval the defendant's argument that *"*no constitutional *or statutory provision exists which limits the review power of this Court or precludes it from passing upon the propriety of sentences imposed by trial courts*"[73]—and there *is* now, as to within-guidelines

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review for consideration of an inappropriate factor a review for the exercise of discretion.

[71] Id.

[72] Id., at 532-533 (emphasis supplied).

[73] Id., at 533-534 (emphasis added). As will be argued subsequently, the current situation is distinct, as MCL 769.34(10) *is* a legislative prohibition on review of a sentence within properly scored guidelines (so long as the constitution is not violated in the setting of the sentence, such as by consideration of an impermissible factor), as the sentence must then be affirmed.

sentences. The Court thus determined that both it and the Court of Appeals had authority to review a sentencing decision by a trial court even where no statutory or constitutional irregularity had occurred either in the procedure in setting sentence or in the substance of the sentence. The standard that the Court decided to employ was whether the sentence imposed "shocked the conscience" of the reviewing court.[74]

Seven years later, the Court adhered to appellate review of sentence length, but, having by then promulgated the judicial sentencing guidelines, modified the standard of review[75] (again, without mention of stare decisis). The Court adopted a principle of "proportionality," which it teased out of the fact that the "Legislature in establishing differing sentence ranges for different offenses across the spectrum of criminal behavior has clearly expressed its value judgments concerning the relative seriousness and severity of individual criminal offenses."[76] From the legislative gradation of offenses and penalties the Court inferred that "with regard to the judicial selection of an individual sentence within the statutory minimum and maximum for a given offense *the Legislature similarly intended* more serious commissions of a given crime by persons with a history of criminal behavior to receive harsher sentences than relatively less serious breaches of the same penal statute by first-time offenders."[77] And so a given sentence could be said "to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the

[74] Id., at 550.

[75] *People v. Milbourn*, 435 Mich. 630, 650–51 (1990).

[76] Id., at 635.

[77] Id. (emphasis supplied).

trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender"[78] for the reason that such a sentence was against the intent of the legislature.

The Court looked to the guidelines it had promulgated as an aid, though not necessarily an outcome-determinative one in a given case, saying that a departure from the recommended range provided an alert to an appellate court that the sentence was possibly in violation of the principle of proportionality and thus an abuse of sentencing discretion. And, continued the Court, where departure was appropriate, its extent or degree might itself constitute a violation of the principle of proportionality.[79] In fact, said the Court, "even a sentence within the [judicial] sentencing guidelines could be an abuse of discretion in unusual circumstances."[80] But in the end, the Court continued, "the key test is whether the sentence is proportionate to the seriousness of the matter, *not whether it departs from or adheres to the guidelines' recommended range*."[81]

Justice Boyle cogently dissented, joined by Justice Riley. Justice Boyle found authority for appellate review of sentences that are substantively and procedurally regular lacking; "[d]espite the fact that the Legislature has not chosen to limit the trial court's discretion, the majority holds that trial judges are to sentence within court-created guidelines on pain of reversal, and that appellate judges may reverse sentences by substituting their judgment for that of the trial court. Hereafter, the plea of the defendant who seeks a more lenient sentence than that called for by the guidelines as well

[78] Id., at 635-636.

[79] Id., at 660.

[80] Id., at 661.

[81] Id. (emphasis supplied).

as that of the prosecutor who seeks a harsher sentence, is to be filtered through the opaque lens of appellate review."[82] But, said Justice Boyle,

> [t]he Michigan Constitution gives the Legislature the authority to provide for sentencing, a power which the people gave to that department of government. Pursuant to that authority, the Legislature enacted statutes which set the maximum punishment and gave the authority to set the minimum punishment to the trial court judiciary. Thus, indeterminate sentencing is a legislative delegation of constitutional authority to trial judges to tailor their sentences to the particular offender and the particular offense "within the legislatively prescribed range" of punishment for each felony. . . . *The Court has no authority to amend a statute*. Nor can that authority be manufactured by taking the principle of proportionality between penalties for different crimes and converting it into an authorization to internally restrict the legislatively delegated authority of a trial judge to determine the sentence "within the ... prescribed range" of punishment.[83]

And in *People v. Merriweather*, writing then for the majority, Justice Boyle noted, in concluding that the sentence there was not disproportionate, that she did not retreat from the view that *People v. Milbourn*'s holding constituted a violation of separation of powers and usurped the authority confided by the legislature to the trial courts.[84] She also aptly observed that "[m]ore importantly, that this Court could seriously debate the justice of the sentence imposed in this case is proof of the ultimate dehumanization of the sentencing process initiated by the decision. Both the Court of Appeals decision and the dissenting opinion vividly evidence that elaborate rationalizations for lowering sentences distance the appellate judiciary from meaningful connection with reality and distort the concept of individualized justice. As Marie Green's tragedy is mediated through the

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[82] Id., at 671-672.

[83] Id., at 680-681 (emphasis supplied).

[84] *People v. Merriweather*, 447 Mich. 799, 805 (1994).

processes of proportionality and guidelines' evaluation, the focus of the reviewing court shifts from the horror of her blood, feces, and burned flesh, to the image of an enfeebled and sympathetic defendant, incarcerated at great cost to the state."[85]

With the promulgation by the legislature of statutory guidelines displacing the judicial guidelines and, unlike the judicial guidelines, having the force of law,[86] the scheme for appellate review of sentences became explicitly *statutory*, rather than *implicitly* so, "teased" out of the legislative gradation of offenses and penalties as among crimes. Sentences were required to be within the properly scored guidelines range, but departures were allowed if the sentencing court had "a substantial and compelling reason for that departure and state[d] on the record the reasons for departure." The sentencing court was not permitted to consider inappropriate factors as reasons for departing—indeed, the factors prohibited cannot be used for setting any sentence[87]—and could not "base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic ha[d] been given inadequate or disproportionate weight."[88] Where the sentence was without the guidelines, then, if "the [reviewing court found] the trial court did not have a substantial and compelling reason for

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[85] Id.

[86] See, with regard to the judicial guidelines, *People v. Mitchell*, 454 Mich. 145, 173–75 (1997), holding that "because this Court's guidelines do not have the force of law, a guidelines error does not violate the law. Thus, the claim of a miscalculated variable is not in itself a claim of legal error."

[87] "The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range." MCL 769.34(3)(a).

[88] MCL 769.34(3)(b).

departing from the appropriate sentence range, the court [was to] remand the matter to the sentencing judge or another trial court judge for resentencing."[89] Statute required, and requires, that with a sentence within properly scored guidelines, with no procedural error, "the [reviewing court] shall affirm that sentence." Put another way, there was a particular review standard for out-of-guidelines sentences—substantial and compelling reasons—and there was *no* review of within-guidelines sentences as to their length (assuming in both situations properly scored guidelines, and no use of impermissible factors in sentencing). And then came *Lockridge*.

Based on *Apprendi v. New Jersey*[90] and *Alleyne v. United States*[91] the Court in *Lockridge* found that, though the judgment of conviction in Michigan, given our system of indeterminate sentencing, justifies incarceration of the defendant up to and including the statutory maximum, Michigan's system of mandatory guidelines with departures allowed on a showing of substantial and compelling reasons violated the Sixth Amendment because of judicial fact-finding in the scoring of the guidelines, and applied the same remedy as in the federal system: "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 appellate courts for reasonableness."[92]

Later, in the *Steanhouse* decision, the Court was careful to avoid any presumption that out-of-guidelines sentences are unreasonable, as this would restore the guidelines as mandatory. In *Gall*

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[89] MCL 769.34(11). This Court construed substantial and compelling reasons under the statute as being reasons that are objective and verifiable, and which keenly grab the attention.

[90] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[91] *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

[92] *People v. Lockridge*, 498 Mich. 358, 364–65 (2015).

v. United States[93] the United States Supreme Court rejected any requirement that deviations from the guidelines range be justified in proportion to the extent of the deviation, or that the sentencing court must justify a sentence outside the guidelines by articulating "extraordinary" circumstances, as these approaches would come "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.'"[94] This Court found no such problem in the principle of proportionality that informs the appellate court's review of the trial judge's exercise of sentencing discretion to sentence outside the guidelines in Michigan, because, held the Court, the "Michigan principle of proportionality . . . *does not create such an impermissible presumption*."[95] And it does not precisely because "[r]ather than *impermissibly measuring proportionality by reference to deviations from the guidelines*, our principle of proportionality requires 'sentences imposed by the trial court to be proportionate *to the seriousness of the circumstances surrounding the offense and the offender*.'"[96] The concern that "dicta in our proportionality cases could be read to have 'urg[ed] that the guidelines should almost always control,' thus creating a problem similar to that identified in *Gall,*"[97] was thus obviated. The Court disavowed the former notion from *Milbourn* concerning the judicial guidelines that an out-of-guidelines sentence "should 'alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme'"

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[93] *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

[94] *Steanhouse*, at 474..

[95] Id. (emphasis supplied).

[96] Id. (emphasis supplied).

[97] Id.

as "inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness for out-of-guidelines sentences."[98] The bottom line for this Court was that, as it had said in *Lockridge*, "the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion' that trial courts "'must consult'" and "'take . . . into account when sentencing,'" but the "'the key test is whether the sentence is proportionate to the seriousness of the matter, *not whether it departs from or adheres to the guidelines, 'recommended range*.'"[99] Appellate review of an out-of-guidelines sentence, under this Court's decisions, then, is for whether the trial judge abused his or her discretion in imposing a sentence that in the judge's judgment was proportionate, not whether the trial judge demonstrated that the departure was proportionate, with guidelines sentences carefully excluded by *Lockridge* from reasonableness review.

But the Court of Appeals has restored the guidelines to their mandatory nature; they are, as construed by the Court of Appeals, in the same posture as were the federal guidelines before *Booker* when the United States Supreme Court held that the mandatory nature of those guidelines was unconstitutional. The federal guidelines were mandatory except that departures could be made if the extent of the departure was reasonable, and it was *this* system that the Court found unconstitutional, rendering the guidelines advisory, with review of *sentences*—not departures—for reasonableness. As the Court of Appeals now reviews out-of-guidelines sentences in Michigan, these sentences are presumptively disproportionate, as rather than reviewing for whether the sentence is an abuse of discretion, guided by the principle of proportionality, the Court of Appeals reviews whether the

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[98] Id.

[99] Id. (emphasis supplied). The Court of Appeals has fallen into the error of treating an out-of-guidelines sentence as presumptively unreasonable.

departure is reasonable—precisely that which this Court prohibited in *Steanhouse*—asking whether the out-of-guidelines sentence imposed is *more proportionate* than would be a guidelines sentence.[100] This re-establishes the guidelines as mandatory, as it puts them in precisely the same position as the federal guidelines before *Booker*—an out-of-guidelines sentence is reviewed to determine whether the extent of the departure is reasonable.[101] This Court should at some time restore the guidelines

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[100] See e.g. *People v. Dixon-Bey*, 321 Mich. App. 490, 525 (2017). A Westlaw search of the phrase "more proportionate than a sentence within the guidelines" results in 185 published and unpublished cases using that test, and there are others imposing that test but without that precise language.

Interestingly, defendant also says that *Dixon-Bey* requires that judges imposing out-of-guidelines sentence must provide reasons justifying "why the sentence imposed is more proportionate than a guidelines sentence," and that the result is to create "a preference for within guideline sentences and a presumption of unreasonableness for outside of guideline sentences." Defendant's brief at 27. But the problem is not caused by MCL 769.34(10), but the failure of the Court of Appeals to follow *Steanhouse* and review out-of-guidelines *sentences* for an abuse of discretion; that is, for unreasonableness, guided by the principle of proportionality, instead creating the very presumption that *Steanhouse* insists the Michigan system does not have because it does *not* "impermissibly measur[e] proportionality by reference to deviations from the guidelines," but instead "requires 'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *People v. Steanhouse*, 500 Mich. at 474. The Court of Appeals routinely flouts *Steanhouse* by measuring proportionality by reference to deviations from the guidelines.

[101] In 2021 the legislature amended MCL 769.34, likely to render it consistent with *Lockridge*, but, perhaps influenced by cases such as *Dixon-Bey*, failed to do so. Though the statute now says that the minimum sentence imposed by the sentencing judge "may be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed" rather than "must" be within the guidelines, as it formerly did, MCL 769.34(1), it continues to provide, however, that *departures* from the guidelines *must* be justified as reasonable, rather than that the *sentence* imposed must be reasonable, and disallows departures for listed reasons, including disagreement with the guidelines, leaving the guidelines in precisely the same posture as the pre-*Booker* federal guidelines:

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII *if the departure is reasonable* and the court states on the record the reasons for departure. All of the following apply to a departure:
>
> > (a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
> >
> > (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the

to their advisory status by insisting that the Court of Appeals follow the holding in *Steanhouse* that "rather than *impermissibly measuring proportionality by reference to deviations from the guidelines*, our principle of proportionality requires 'sentences imposed by the trial court to be proportionate *to the seriousness of the circumstances surrounding the offense and the offender*,'" or overrule *Lockridge* and *Steanhouse*.

B. That MCL 769.34(10) provides that otherwise proper guidelines sentences imposed by trial courts are not subject to appellate review is entirely constitutional

1. The statute is not inconsistent with *Lockridge*, which carefully excluded guidelines sentences from its holding

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 *out-of-guidelines* sentences: 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 appellate courts for reasonableness"[102]; 2) "A sentence that *departs from the applicable guidelines range* will be reviewed by an appellate court for reasonableness."[103] *Lockridge* cannot, consistent with common English usage,[104] be said to have

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characteristic has been given inadequate or disproportionate weight.

[102] *People v. Lockridge*, 498 Mich. at 365 (emphasis added).

[103] Id., at 392 (emphasis added).

[104] The task here is "to read English intelligently." *Northern Securities. Co. v. United States*, 193 U.S. 197, 401, 24 S. Ct. 436, 468, 48 L. Ed. 679 (1904).

invalidated the legislature's provision that otherwise proper guidelines sentences are not subject to appellate review, nor is there any basis for the Court to have done so or so to do.

2. There is no "due-process right to appellate review" at all, and certainly not one to raise all possible issues; further, this issue is not properly before the Court

a. The issue is not properly before the Court, not having been raised in the Court of Appeals or the application for leave, and presenting a new issue not a new argument

An issue that this Court specified be briefed in its order is whether MCL 769.34(10) is inconsistent with the defendant's "due-process right to appellate review." First, this issue is not properly before the Court. Neither defendant Posey nor Stewart (in the companion case) raised such a claim in either the Court of Appeals or their applications to this Court, neither of which with regard to the sentencing issue mention either "due process" or a "right to appellate review."[105]

MCR 7.305(H)(4)(b) provides that "On motion of any party establishing good cause, the Court may grant a request to add additional issues not raised in the application for leave to appeal or not identified in the order granting leave to appeal," and MCR 7.316(A)(3) provides that the Court may "permit the reasons or grounds of appeal to be amended or new grounds to be added." Though these rules suggest that the grounds for consideration may be expanded only on motion, there is no doubt that the Court can add issues on its own motion. And the Court regularly does so,[106] on

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[105] Defendant Posey's statement of the question in the application is "Was Mr. Posey's sentence, while within the guidelines range, disproportionate to the offense and thus, unreasonable? Is he entitled to resentencing before a different judge?"; defendant Stewart's is "Is Mr. Stewart's within guideline sentence disproportionate and subject to review by an appellate court?" Both are premised on *Lockridge* and the Sixth Amendment. See application of defendant Posey at p.27-28 ("MCL 769.34(10) directs that the appellate court 'shall affirm' all sentences within the guidelines. As a result, the guidelines still have the effect of creating a binding and unreviewable sentence, and so the Sixth Amendment violation persists") ; application of defendant Stewart at p. 44 ("MCL 769.34(10) violates the rule of *Lockridge* by precluding individuals from challenging disproportionate sentences that happen to fall within a guidelines range calculated through the use of facts found by a judge, not a jury").

[106] See e.g. such cases as *People v. Wilder*, 505 Mich. 1052 (2020), directing briefing as to "whether the harmless error test of *People v. Lukity* . . . should be refined or amended in all cases . . . or where the question turns on the evaluation of conflicting testimony at trial," though no such arguments were made in either the Court of Appeals or in the application for leave to appeal.

occasion deciding a case on a ground not raised at all by the appellant,[107] sometimes even without briefing or argument on the question.[108] But when is this appropriate? And is the Court consistent in so doing?

On the flip side, concerning the appellee, MCR 7.307 provides that "A party is not required to file a cross-appeal *to advance alternative arguments in support of the judgment* or order appealed" (emphasis supplied); rather, a cross-appeal is required from the appellee only "to seek *new or different relief* than that provided by the judgment or order appealed" (emphasis added). This is because a judgment of the trial court should be affirmed for any reason supported by the record, even if not relied upon by the trial court.[109] The rule is consistent with statements of the United States Supreme Court that it is "settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."[110] Further, there is a distinction between arguments and issues. Particularly when a case advances to the highest court of the jurisdiction, "[p]arties are not confined . . . to the *same arguments* which

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[107] See *People v. Temelkoski*, 501 Mich. 960 (2018),

[108] See *People v. McKinley*, 496 Mich. 410 (2014).

[109] See *Allen v. USAA Cas. Ins. Co.*, 790 F.3d 1274, 1278 (CA 11, 2015). See *People v. Brownridge*, 459 Mich. 456, 462 (1999).

[110] *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481, 96 S. Ct. 2158, 2159, 48 L. Ed. 2d 784 (1976). See also 20 Fed. Prac. & Proc. Deskbook § 111 (2d ed.) ("An appellee may defend a judgment on any ground consistent with the record, even if rejected in the lower court. But it cannot attack the decree with a view either to enlarging its own rights thereunder or to lessening the rights of its adversary unless it files a cross–appeal, whether what it seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below"); *Reed v. Commonwealth*, 834 S.E.2d 505, 509 (Va. App., 2019).

were advanced in the courts below upon a . . . question there discussed."[111] And yet, though raising new arguments for the appellant on its own, and, as indicated, sometimes deciding the case on the new argument without an opportunity for briefing and argument, the Court has on occasion considered additional arguments in *opposition* to reversal—that is, in *support* of the judgment—to be *waived* if not raised by the prosecutor in the Court of Appeals,[112] despite MCR 7.307(B), and the

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[111] *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 86, 108 S. Ct. 1645, 1655, 100 L. Ed. 2d 62 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 197–198, 19 S.Ct. 379, 380–381, 43 L.Ed. 665 (1899).

And see Andrey Spektor, Michael A. Zuckerman, "Ferrets and Truffles and Hounds, Oh My: Getting Beyond Waiver," 18 Green Bag 2d 77, 79 (2014) (discussing the "oft-forgotten distinction between 'issues' and 'arguments': you cannot raise an entirely new issue on appeal, but you can, in some cases, make new arguments relating to an already-raised issue").

Very recently this Court noted the distinction between issues and arguments where involved was two arguments but one issue under the Fourth Amendment:

> Defendants argue that plaintiffs cannot proceed with a trespass argument because it was not properly raised before the lower courts and is therefore unpreserved. But plaintiffs have consistently raised and presented a Fourth Amendment challenge . . . .That the United States Supreme Court recognizes two separate tests for determining whether a search has occurred under the Fourth Amendment does not change the fact that the underlying constitutional argument has been preserved. See *Yee v Escondido* . . . .("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.... Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are, rather, separate arguments in support of a single claim—that the ordinance effects an unconstitutional taking.").

Johnson v. VanderKooi, —Mich.—, 2022 WL 2903868, at 7 n.5 (No. 160958, July 22, 2022).

[112] See, e.g, *People v. Walker*, 504 Mich. 267, 276 (2019) ("The prosecution argues for the first time in its supplemental brief to this Court that defendant waived any challenge to the instruction by approving of the instruction before it was given. The prosecution abandoned this theory"); *People v. McGraw*, 484 Mich. 120, 131 (2009) (but note that *McGraw* does not actually support *Walker*, which cites it, as *McGraw* said that "we do not contend that an appellee is required to file a cross-appeal to raise a waiver argument. We simply conclude that an appellee should *at some point* actually raise the waiver argument" (emphasis supplied). And so a new argument raised by the appellee in the Supreme Court in support of the judgment should be considered).

And only very recently in *People v. Jemison*, 505 Mich. 352, 359 fn 4 (2020) this Court said:

> The prosecution argues that the defendant waived appellate review of this issue by failing to object in writing when it notified the defendant that it intended to admit Cutler's written report into evidence under MCR 6.202. In other words, the prosecution argues that a defendant's failure to comply with a court rule which governs the admissibility of an expert's report waives his constitutional right to confront the witness who authored the report. Merits aside, because the prosecution did not raise this argument before the Court

general rule that the judgment may be affirmed on any ground supported by the record, along with the requirement in MCL § 769.26 that "***No*** judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice" (emphasis supplied).

In *Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch.*[113] this Court rejected Justice Markman's attempt to resolve the case on an *argument* not raised by a party as to the issue in the case, calling it a "judicial overreach," and saying that "If it is truly 'of no consequence [that the party had not made the argument],' best we ditch the adversarial system of law today, as under the dissent's approach we the Court will always know not only the better answer than any supplied by the parties *but even the better questions than those asked by the parties*."[114] And not long ago Justice Viviano, concurring in the denial of leave to appeal, responded to the dissenting justice by saying that "it is not our role to find and develop unpreserved arguments on behalf of litigants. See *Carducci v. Regan*, 230 U.S. App. D.C. 80, 86, 714 F.2d 171 (1983) (Scalia, J.) ('The premise of our adversarial system is *that appellate courts do not sit as self-directed boards of legal inquiry and*

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of Appeals, we decline to address it. [citing *Walker* and *McGraw*].

Ironically, the Court later overlooked defendant's failure to argue *Crawford v Washington*, 541 US 36, 124 S.Ct.1354, 158 L.Ed. 2d 177 (2004) in the Court of Appeals ("Perhaps because the defendant did not cite *Crawford* in his briefing in the Court of Appeals, or perhaps because this Court has cited *Craig* without the need to consider *Crawford*'s sea change to Confrontation Clause jurisprudence . . . the Court of Appeals did not address *Crawford*").

[113] *Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch*., 502 Mich. 695 (2018).

[114] Id., at 710 (emphasis added).

research, but essentially as arbiters of legal questions presented and argued by the parties before them')."[115] Yet Justice Scalia, obviously a strong proponent of the party-presentation principle, concurred in the reversal of the Court of Appeals in *United States v. Burke*,[116] though his rationale was, he acknowledged, one that the United States as appellant had neither argued below nor in the Supreme Court, a rationale going to the nature of the claim raised itself. Justice Scalia emphasized the importance of the principle of party presentation, which, he said "is more than just a prudential rule of convenience," as "its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."[117] Nonetheless, he believed that deciding the case on the basis he suggested was appropriate, for the reason that "there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law *whose*

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[115] *People v. Worthington*, 503 Mich. 863 (2018) (Viviano, J., concurring).

And see *Greenlaw v. United States*, 554 U.S. 237, 243–44, 128 S. Ct. 2559, 2564, 171 L. Ed. 2d 399 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights. . . . But as a general rule, '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief')."

And only very recently in *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020) the Court reversed the 9th Circuit's "takeover of the appeal," saying that "Courts are essentially passive instruments of government. . . . They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties" (cleaned up). The Court recognized that the "party presentation principle is supple, not ironclad," but found that the actions of the panel of the 9th Circuit had gone "well beyond the pale."

[116] *United States v. Burke*, 504 U.S. 229, 246, 112 S. Ct. 1867, 1877, 119 L. Ed. 2d 34 (1992) (Scalia, J., concurring).

[117] Id., 112 S.Ct. at 1877.

nonexistence is apparent on the face of things, simply because the parties agree upon it—particularly when the judgment will reinforce error already prevalent in the system."[118]

Despite the statements in *Michigan Gun Owners* and *People v. Worthington*, the Court *does* raise arguments and issues not raised in the application,[119] sometimes, as the People have noted, deciding cases on these issues, and, on occasion without opportunity for briefing and argument. Given that this is so—and it is certainly sometimes appropriate for the Court to direct briefing on additional *arguments*—the People suggest the Court at some point consider setting out some principle for when the raising of an argument by the Court not raised by the appellant is appropriate,[120] and, most particularly, also at some point establish that the raising of additional arguments by the appellee to *support* a judgment is permissible, so long as supported by the record. It is, the People submit, inappropriate for the judiciary to act as a "self-directed board of legal inquiry and research" for the appellant, while denying to the appellee additional arguments in *support* of the judgment, arguments raised by the appellee him or herself and *not* the Court; the former should be rare, the latter should always be permissible,[121] especially given this Court's duty under MCL § 769.26.

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[118] Id.

[119] See recently *In re Baby Boy Doe*, 975 N.W.2d 486, 497 (2022) ("we directed the parties to brief the unraised and unpreserved issue of "'whether application of the [Safe Delivery of Newborns Law (SDNL), MCL 712.1 et seq.,] violates the due process rights of an undisclosed father'") (Welch, J., concurring).

[120] See Timothy A. Baughman, "Appellate Decision Making in Michigan: Preservation, Party Presentation, and the Duty to 'Say What the Law Is'," 97 U. Det. Mercy L. Rev. 223, 245-57 (2020); Robert J. Martineau, "Considering New Issues on Appeal: The General Rule and the Gorilla Rule," 40 Vand. L. Rev. 1023, 1060 (1987).

[121] And there is no unfairness to the appellant, who may respond by way of a reply brief, allowed under the rules. MCR 7.305(E); MCR 7.312(E).

Here the Court has raised not an additional *argument* but a new *issue* for the appellant, and this, the People believe, is not appropriate. As the United States Supreme Court has said, rejecting the raising of a issue raising a new statutory argument, "It is true that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' . . . But this principle stops well short of legitimizing Exxon's untimely motion. If 'statutory preemption' were a sufficient claim to give Exxon license to rely on newly cited statutes anytime it wished, a litigant could add new constitutional claims as he went along, simply because he had 'consistently argued' that a challenged regulation was unconstitutional."[122] Here a claim under the Sixth Amendment is not a claim of a "due-process right to appellate review," and this issue should not be considered, as new constitutional claims should not be added to the case "as it goes along."

b. There is no due-process right to appellate review of all issues

And the issue, in any event, lacks merit. There is no due-process right to appellate review, certainly not one of every possible issue. The United States Supreme Court has held that it is "well settled that there is no constitutional right to an appeal."[123] Nor was there a common-law right to appeal.[124] And it has further been held that a right to appeal is not an essential requirement of due

[122] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487, 128 S. Ct. 2605, 2617–18, 171 L. Ed. 2d 570 (2008).

[123] *Abney v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038, 52 L.Ed.2d 651 (1977) (citing *McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894)).

[124] *Martinez v. Court of Appeal*, 528 U.S. 152, 159, 120 S.Ct. 684, 690, 145 L.Ed.2d 597 (2000).

process.[125] The Supreme Court has expressly said that "the Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions."[126]

Though not raised by either appellant in their applications nor by this Court in its MOAA order, the state Constitution *does* provide a right to appeal: "In every criminal prosecution, the accused shall have the right to . . . have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court."[127] But nothing precludes the legislature from restricting the *issues* available for consideration in that appeal. Defendants may—and here did—appeal by right, and raise issues concerning the trial and the sentencing. They may, regarding sentences within the guidelines, raise issues concerning the appropriate scoring of the guidelines, or the consideration of inaccurate or inappropriate material by the trial judge, but there simply *is no* proportionality or reasonableness issue to be reviewed in the legislative scheme for a guidelines sentence—if the sentence is within properly scored guidelines, and not based on any inaccurate or inappropriate considerations, *it is lawful*, and there is nothing else *to be* reviewed. There is no irrebuttable "presumption of proportionality" or "presumption of reasonableness" with a guidelines sentence; the legislature has said no such thing. Indeed, there is no such thing as an irrebuttable presumption—to say there is an irrebuttable presumption is simply to describe a rule of law.[128] There is no rule of law in MCL 769.34(10) awkwardly described as an

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[125] *Reetz v. Michigan*, 188 U.S. 505, 508, 23 S.Ct. 390, 392, 47 L.Ed. 563 (1903).

[126] *Halbert v. Michigan*, 545 U.S. 605, 610, 125 S. Ct. 2582, 2586, 162 L. Ed. 2d 552 (2005).

[127] Mich. Const. 1963, Art. 1, § 20.

[128] "[C]ourts and legal scholars universally agree that any so-called 'irrebuttable presumption,' regardless of whether one chooses as a matter of semantics to call it a true presumption, is not really a rule of evidence at all, but is actually a rule of substantive law masquerading in the traditional language of a presumption. As one leading writer has observed, 'a conclusive or irrebuttable presumption is really an

irrebuttable presumption, but instead a plainly stated rule of law. The legislature has simply provided *no* standard of review for these sentences, as they are lawful if inaccurate or inappropriate information was not considered, and other than these issues are thus otherwise not subject to review. This does not deny defendant any right to appeal, but only the ability to raise a claim that is not relevant to the validity of the sentence, for the sentence need not, under the statutory scheme, be "reasonable" or "proportionate" in the eyes of an appellate court other than being within properly scored guidelines and absent the consideration of inaccurate or inappropriate factors in its imposition, and nothing in the constitution requires that the legislature provide otherwise..

At least one other state has a similar system. In Washington the state constitution provides that "In criminal prosecutions the accused shall have the right to . . . appeal in all cases."[129] And by statute a"sentence within the standard sentence range for the offense shall not be appealed."[130] The Washington Supreme Court has held that "[t]his provision of the SRA does not violate the constitutional right to appeal because '[w]hen the sentence given is within the presumptive sentence

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awkwardly expressed rule of law.'" James J. Duane, "The Constitutionality of Irrebuttable Presumptions," 19 Regent U. L. Rev. 149, 160 (2007). See 2 Graham, Handbook of Fed. Evid.§ 301:9 (9th ed.) ("A so-called presumption which cannot be rebutted by evidence is not a presumption but a rule of substantive law").

Defendants now agree with this proposition, though taking a contrary position in their applications, where it was said in the *Posey* application that "there is no doubt that Michigan's trial courts are enjoying the benefit of a legal presumption it should not have. Any and all sentences imposed within the sentencing guidelines will be automatically affirmed" (application at 27), and in the *Stewart* application that "a mandatory, non-rebuttable presumption of proportionality—fashioned by the Legislature to fit a scheme in which adherence to the guidelines was mandatory—continues even though this Court has held that the guidelines, to pass constitutional muster, must now be treated as advisory"(application at 44). Now defendant says that "there is no mere presumption of reasonableness for within- guideline sentences in Michigan because MCL 769.34(10) is a mandate, not a presumption. A presumption, by definition, is rebuttable." Defendant's Brief at 25. This is correct; the statute is a rule of law, not a presumption.

[129] Wash. Const. art. I, § 22.

[130] RCW 9.94A.585(1) .

range then as a matter of law there can be no abuse of discretion.'. . . [and the statute] does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. . . . . appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies."[131] So here. Defendant attempts to distinguish the Washington case are unavailing. Defendant says that "the Washington Legislature has determined that a sentence within the standard range is presumptively appropriate." Here the legislature has said that a sentence within properly scored guidelines, absent the consideration of inaccurate or inappropriate factors, is *lawful*—it cannot, as a matter of law, be an abuse of discretion, just as in Washington. Defendant attempts to limit this principle to what he refers to as "mandatory" guidelines, and agrees that Michigan could do the same with mandatory guidelines, but says that "[w]here there is discretion, there is generally review," and the Michigan system thus fails because "the Michigan Legislature has attempted to limit appellate review of sentencing discretion."[132] But the Washington system creates a *range* for the presumptive sentence,[133] and a sentence within that range—chosen by an exercise of the judge's discretion—is not reviewable, the sentence being, as a matter of law, lawful. MCL 769.34(10) does the same.

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[131] *State v. Delbosque*, 456 P.3d 806, 817 (Wash., 2020).

[132] Defendant's brief at 42.

[133] In a pre-*Alleyne* decision, the Washington Supreme Court in *State v. Clarke*, 134 P.3d 188, 192 (2006) held that, where state law allows an indeterminate decision, judicial fact-finding in determining the minimum is permissible ("Because Clarke is serving an indeterminate life sentence . . . the relevant 'statutory maximum' that the sentencing court may impose without any additional findings is life imprisonment. The standard range for minimum sentences under [the statute] provides a guideline for when the ISRB should consider release, but the standard range does not in any way establish Clark''s maximum sentence. Because Clarke's sentence is indeterminate, his exceptional minimum sentence, although part of his punishment, is irrelevant under *Blakely* analysis because the relevant statutory maximum for *Apprendi* purposes is life imprisonment"). The Court has not revisited the decision, which is contrary to what this Court decided in *Lockridge*.

There is no review of a within-guidelines sentence for "reasonableness" or "proportionality" as viewed within the eyes of an appellate court, then, because there is no legal requirement that a guidelines sentence *be* reasonable or proportionate within the eyes of an appellate court, other than that it not constitute cruel or unusual punishment. Review is provided for scoring of the guidelines, and consideration of inaccurate or inappropriate factors, and if the within-guidelines sentence given does not run afoul of these, it is not otherwise subject to review because there is nothing left *to* review. No relevant issue as to the validity of the sentence is thus precluded from appellate review.

The statutory language is that "If a minimum sentence is within the appropriate guidelines sentence 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." The legislature, then, has excepted from appellate review the exercise of discretion by a sentencing judge who chooses to sentence within the guidelines, so long as two predicates are met: the guidelines are properly scored, and inaccurate information—within which the People include inappropriate information[134]—was not employed in making the sentencing judgment. This is a form of jurisdiction-stripping statute, and our state constitution in Article 6, § 10 provides that "The jurisdiction of the court of appeals shall be provided by law," which means jurisdiction is provided by the legislature by statute.[135] A comparison

[134] MCL 769.34(3)(b) provides that "The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range." The People would also take it that considering one of these factors to aggravate the placement of the sentence even *within* the guidelines would constitute constitutional error.

[135] See e.g. *D.C. v. Georgetown & T. Ry. Co*., 41 F.2d 424, 426 (CA DC, 1930) ("We assume that no one will question that the term 'provided by law' means provided by statute law"); *Nebraska Pub. Serv. Comm'n v. Nebraska Pub. Power Dist*., 590 N.W.2d 840, 847 (Neb., 1999) ("The phrase 'provided by law' means prescribed or provided by statute"); *State v. Pacheco*, 850 P.2d 1028, 1029 (N.M. Ct. App., 1993)

with 8 USC § 1252(a)(2) is instructive. The statute has three jurisdiction-stripping provisions which provide that certain discretionary decisions are "not subject to judicial review," but further provide that predicate legal questions on which the jurisdiction-stripping depends remain subject to appellate review.[136] So also here. The discretionary decision as to the sentence to be imposed is "not subject to judicial review" where the sentence is within the guidelines, so long as the predicate legal questions are satisfied; namely, the guidelines are properly scored, and no inaccurate or inappropriate matter is considered. The predicates *are* subject to review, but the sentencing decision made within the guidelines is not, as it must be affirmed (and that it must be affirmed is another way of saying that it is not subject to judicial review—the two mean the same thing). The statute creates no presumption of reasonableness, which, in defendant's terms, must be rebuttable (there being no other kind of presumption); rather, it renders a sentence within properly scored guidelines, where no improper matter was considered, *lawful*, and thus not otherwise subject to judicial review.

("every aggrieved party has the right to one appeal; however, appellate jurisdiction shall be exercised as provided by law. . . . The phrase 'provided by law" means 'provided by statutes'").

[136] See, e.g., *Privett v. Sec'y, Dep't of Homeland Sec*., 865 F.3d 375 (CA 6, 2017) (holding that the predicate legal question of whether a conviction of a citizen who seeks an immigrant visa for an immediate family member qualifies as a specified offense against a minor is not within the Secretary of Homeland Security's discretion, and thus the jurisdiction-stripping provision does not preclude judicial review of the determination); *Zheng v. Gonzales*, 422 F.3d 98, 111 (CA 3, 2005) ("8 U.S.C. § 1252(a)(2)(B)(i) strips courts of jurisdiction to review 'any judgment regarding the granting of relief under' 8 U.S.C. § 1255. This provision plainly forecloses review of the Attorney General's exercise of discretion in granting adjustment of status in individual cases, but we are satisfied that it does not foreclose review of the BIA's interpretation of the legal standards for eligibility for such adjustment").

3. That under MCL 769.34(10) a sentence within properly scored guidelines that was not based on any inappropriate factors is valid, these being the only matters thus subject to appellate inquiry, does not render the guidelines mandatory and therefore in violation of the Sixth Amendment

Defendant Posey says in his application for leave that because "MCL 769.34(10) directs that the appellate court 'shall affirm" all sentences within the guidelines" the "guidelines still have the effect of creating a binding and unreviewable sentence, and so the Sixth Amendment violation persists."[137] But this is a *non sequitur*. That where the sentencing judge considers no inaccurate or inappropriate factors a sentence that is within properly scored guidelines is *lawful*, and therefore must be affirmed *by an appellate court*, does not in any sense render the sentencing guidelines binding on the *sentencing court*, where, because the guidelines are advisory, the judge may depart from the range computed so long as the *sentence* imposed—not the departure—is not an abuse of discretion; that is, is one, guided by the principle of proportionality, a reasonable sentencing judge could impose for the reasons given.

Defendant can only mean that because a sentence within the guidelines is lawful without appellate review for an abuse of discretion as unreasonable, while a sentence that is outside the guidelines *is* reviewed for an abuse of discretion as unreasonable, guided by the principle of proportionality (at least is should be, but, as the People have shown, is actually reviewed by the Court of Appeals as to whether the departure from the guidelines and its degree are an abuse of discretion), the guidelines are somehow mandatory, apparently because the statutory provision that a properly scored guidelines sentence is lawful necessarily has the effect of inducing sentencing

[137] Defendant Posey's application, p. 27-28.

judges to abandon their sentencing discretion in favor of guidelines sentences without consideration of the individual factors involved in the cases before them.

This is empirically untrue. Sentencing judges have departed from the guidelines in a great many cases, as demonstrated by one empirical study.[138] Appellate decisions also show out-of-guidelines sentences litigated many times since *Lockridge* was decided.[139] And it is of course understandable that the great bulk of sentences will be within the guidelines, just as they are in the federal system. As the Supreme Court said in *Rita*, regarding the federal *appellate* presumption of reasonableness of a guidelines sentence, "[a]n individual sentence reflects the sentencing judge's determination that [application of the guidelines] is appropriate in the mine run of cases, [and] that the individual case does not differ significantly . . . . The 'reasonableness' presumption simply recognizes these real-world circumstances. It applies only on appellate review. The sentencing court does not enjoy the presumption's benefit when determining the merits of the arguments by prosecution or defense that a Guidelines sentence should not apply."[140] And even if, said the Court, the appellate presumption—here, the legislative mandate that a guidelines sentence is lawful, if

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[138] See "Do Michigan's Sentencing Guidelines Meet the Legislature's Goals," prepared by safeandjustmi.org, at: https://www.safeandjustmi.org/wp-content/uploads/2021/12/Do_Michigans_Sentencing_Guidelines_Meet_The_Legislatures_Goals.pdf. The paper has a policy position concerning the guidelines and sentence disparity, which is a subject for the legislature and not the Court, but its study of the percentage of out-of-guidelines sentences is revealing.

[139] A Westlaw search of "sentence /s departure /s reasonable unreasonable & lockridge steanhouse" results in almost 200 responses. While most of these are above-guidelines sentences, this is likely because prosecutors rarely appeal below-guidelines sentences (though do so on rare occasion; see e.g. *People v. Lydic*, 335 Mich. App. 486 (2021)).

[140] *Rita v. United States*, 127 S. Ct. at 2458.

properly scored and no inappropriate factors are considered—"increases the likelihood that the judge, not the jury, will find 'sentencing facts,'[it] does not violate the Sixth Amendment."[141]

C. Conclusion: defendant's sentence must be affirmed under the statute

For over five generations the rule in this State was that sentencing is committed to the authority of the trial court, so long as within legislatively set limits, and procedurally proper. Without consideration of principles of stare decisis, the Court in *Coles* set aside that rule, observing that *"*no constitutional or statutory provision exists which limits the review power of this Court or precludes it from passing upon the propriety of sentences imposed by trial courts." The legislature then created a comprehensive sentencing scheme, including two principles of appellate review: 1)sentences within properly scored guidelines were not subject to appellate review (must be affirmed); that is, the legislature enacted a "statutory provision precluding appellate courts from passing upon the propriety of sentences" as to their length; and 2)sentences outside of the guidelines were reviewed for whether the trial judge's expressed substantial and compelling reasons that justified the departure did so. The Court has now made the guidelines advisory, and altered the standard of review for out-of-guidelines sentences to abuse of discretion, informed by the principle of proportionality, rather than, having struck the legislative standard of review, leaving the "ball in the legislative court" as to what a new standard of review, if any, should be. Judges are not compelled to sentence within the guidelines, but if they do, under MCL 769.34(10), which was not touched by this Court's decision in *Lockridge*, which appears quite deliberately to have avoided doing so, 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.

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[141] Id., at 2465.

D. Defendant's sentence is lawful

This Court has asked whether, if the sentence is reviewed other than for whether the guidelines were properly scored or inappropriate material or factors were considered by the sentencing judge, the sentence was proportionate and reasonable. The People can give no answer other than the sentence is lawful as within properly scored guidelines, with no consideration of improper material. The People would note only that the guidelines range for the minimum in this case is 171 to 427 months. Defendant received a minimum sentence of 264 months (22 years), lower than the midpoint of the guidelines (299 months).

Relief

Wherefore, the People request that this Court deny defendant's application for leave to appeal, or affirm that MCL 769.34(10), not being unconstitutional, is to be followed by appellate courts.

Respectfully submitted,

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