STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALEXANDER JEREMY STEANHOUSE and MOHAMMAD MASROOR,

Defendants-Appellees.
_____/

Supreme Court Nos. 152849, 152946-48

Court of Appeals Nos. 318329, 322280-82

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AMICUS CURIAE **BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN**

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STATEMENT OF APPELLATE JURISDICTION

Criminal Defense Attorneys of Michigan agrees with the statement of jurisdiction of the Appellant.

STATEMENT OF INTEREST

Since its founding in 1976, Criminal Defense Attorneys of Michigan ("CDAM") has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members.

As reflected in its bylaws, CDAM exists in part to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws."

This appeal involves just such an erosion of guaranteed rights. The Legislature enacted mandatory sentencing guidelines to promote fairness and consistency and stem the insidious influence of implicit racial bias in sentencing. Tighter control over sentencing minimums was a prophylactic remedy for these everyday violations of defendants' Fourteenth Amendment right to due process in our criminal justice system. *Lockridge*'s remedy undermines the Legislature's intent more than is necessary to remedy the Sixth Amendment concern raised in that case. As in *Lockridge*, CDAM continues to advocate for a remedy that protects Sixth Amendment rights *without* undermining the Legislature's equally important protections against discriminatory and arbitrary sentencing practices.

STATEMENT OF QUESTIONS PRESENTED

1. Following *Lockridge*, do MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding?

Trial court did not answer.
Court of Appeals did not answer.
Appellant People of Michigan answers: Yes.
Appellee Steanhouse answers: Yes.
Appellee Masroor answers: No.
Amicus Attorney General answers: No.
Amicus CDAM answers: No.

2. Should this Court overrule the remedy in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), in light of MCL 8.5's requirement to preserve "the remaining portions or applications of [MCL 769.34(2) and (3)] which can be given effect without the invalid portion or application"?

Trial court did not answer.
Court of Appeals did not answer.
Appellant People of Michigan answers: Yes.
Appellee Steanhouse answers: Yes.
Appellee Masroor answers: No.
Amicus Attorney General answers: Yes.
Amicus CDAM answers: Yes.

3. Is it proper to remand a case to the circuit court for consideration under Part VI of this Court's opinion in *Lockridge* where the trial court exceeded the defendant's guideline range?

Trial court did not answer.
Court of Appeals did not answer.
Appellant People of Michigan answers: No.
Appellee Steanhouse answers: Yes.
Appellee Masroor answers: No.
Amicus Attorney General answers: No.
Amicus CDAM answers: No.

4. Following the decision in *Lockridge*, should the appellate courts review the sentence for abuse of discretion under the principle of "proportionality" enunciated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990)?

Trial court did not answer.
Court of Appeals did not answer.
Appellant People of Michigan answers: No.
Appellee Steanhouse answers: Yes.
Appellee Masroor did not answer this question.
Amicus Attorney General answers: Yes.
Amicus CDAM answers: Yes.

INTRODUCTION

This case presents the Court with an opportunity to take a close second look at the Sixth Amendment remedy adopted in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), which severed MCL 769.34(2), (3), and (11)[1] ("the mandatory guideline provisions") in order to render the Michigan Sentencing Guidelines advisory in virtually all cases.

Lockridge went too far by imposing an across-the-board remedy to a constitutional problem that does not exist in most circumstances. Specifically, as explained by the parties and the Attorney General, there is nothing wrong with mandatory application of the sentencing guidelines when the scoring is not dependent on judge-found facts. Moreover, as this Court acknowledged in *Lockridge*, 498 Mich at 390, the Sixth Amendment does not forbid mandatory application of the sentencing guidelines to constrain a sentencing judge's discretion to depart upward from the judge-found guidelines, since doing so does not affect the defendant's exposure, or the "Sixth Amendment ceiling." See *People v Drohan*, 475 Mich 140, 163–164; 715 NW2d 778 (2006). Lastly, there is nothing wrong with mandatory application of the sentencing guidelines to constrain a sentencing judge's discretion to depart downward below the floor of the jury-supported guidelines, which this brief will refer to as the "Sixth Amendment floor." Because the mandatory guideline provisions *can* operate constitutionally in each of these scenarios, MCL 8.5 requires that they *must* apply as written, and existing sentencing standards should continue to apply.

[1] MCL 769.34(11) provides that "[i]f . . . the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter." Although this Court did not explicitly sever this subsection in *Lockridge*, it did make clear that "[t]o the extent that any part of MCL 769.34 . . . refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." 498 Mich at 365 n 1.

That leaves one narrow circumstance in need of a Sixth Amendment remedy: downward departures above the Sixth Amendment floor, which this brief will refer to as "variances." For this class of sentences, strict application of the mandatory guideline provisions would violate the Sixth Amendment by "compel[ling] a trial judge to impose a mandatory minimum sentence beyond that authorized by the jury verdict." *Lockridge*, 498 Mich at 373.

There is a straightforward remedy to this problem that is appropriately narrow under MCL 8.5. The Court may redefine the term "departure" in MCL 769.34 to exclude any downward "variance" that must be permitted under the Sixth Amendment, thereby bifurcating the sentencing standards to eliminate the substantial and compelling reasons requirement only where necessary.[2] For all other sentences, the guidelines would continue to operate just as they did before *Lockridge*.

While there are several constitutionally adequate solutions to the Sixth Amendment problem presented by Michigan's sentencing guidelines, CDAM's primary interest is that the Court leave MCL 769.34 intact to the fullest extent possible. Mandatory sentencing guidelines serve the critically important function of protecting criminal defendants from excessive sentences for arbitrary or insidious reasons, while also serving as a check against excessive and unjustified leniency. To the extent that the Court is concerned about the need for precise symmetry in the encroachment on these two goals, it should not be. After all, the Sixth Amendment jury trial right belongs to defendants and will therefore naturally operate in their favor to some extent.

[2] Or, if the Court would prefer not to redefine the term "departure," it may simply declare the mandatory guideline provisions unenforceable to the extent that they would apply to downward variances. Either approach would have the same effect, but for purposes of simplicity, this brief will distinguish between traditional departures and variances that are required by the Sixth Amendment.

BACKGROUND

To set a complete stage for analysis of the issues before the Court, this section provides an overview of (1) the evolution of Michigan sentencing standards and guidelines, (2) the United States Supreme Court opinions recognizing and remedying Sixth Amendment flaws in various sentencing schemes, and (3) this Court's mixed response in light of the differences between the Michigan and federal sentencing schemes. This initial discussion will demonstrate the importance and feasibility of maintaining the existing sentencing standards and guidelines to the fullest extent allowed by the Sixth Amendment.

I. The evolution of Michigan sentencing standards to advance a policy of uniform and objective sentencing.

Until 1983, Michigan trial courts were largely left to their own devices in selecting minimum sentences within broad ranges authorized by statute, with no control or guidance from the Legislature or appellate courts. Under this Court's decision in *Cummins v People*, 42 Mich 142, 144; 3 NW 305 (1879), appellate courts had no authority to review criminal sentences within the statutory range. *Id.*; *People v Stevens*, 128 Mich App 354, 357–358; 340 NW2d 852 (1983) (holding that because "[t]he sentence in the instant case falls within the statutory limits prescribed by the Legislature" . . . . this Court is without power to review the exercise of the trial judge's sentencing discretion."). The Court would consider the sentencing procedures and the reasons for the sentence to ensure they complied with the law, but not the exercise of discretion in determining what punishment to impose. *People v Whalen*, 412 Mich 166, 169–170; 312 NW2d 638 (1981).[3]

[3] In the 1970s, this Court established numerous grounds for holding a sentence invalid, see *People v Whalen*, 412 Mich 166, 169–170; 312 NW2d 638 (1981), but the Court still was not prepared to take the step of authorizing appellate review of the chosen sentence. *People v Burton*, 396 Mich 238, 243; 240 NW2d 239 (1976).

Only when a sentence constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution would the appellate court reverse the sentence as unwarranted. See, e.g., *People v Lorentzen*, 387 Mich 167, 176; 194 NW2d 827 (1972).[4] But the dominant test for constitutionally excessive punishment was difficult to satisfy: "the [statute's] minimum punishment . . . [had to] be regarded as so unusual and cruel, and so disproportionate to the offense as to shock the moral sense of the public." *People v Mire*, 173 Mich 357, 362; 138 NW 1066 (1912); see also *Lorentzen*, 387 Mich at 180–181 (identifying other tests such as the "decency test" and whether the long sentence advances modern policies of rehabilitation, deterrence, and prevention). And relief under this difficult standard was correspondingly rare. *People v Coles*, 417 Mich 523, 543; 339 NW2d 440 (1983), holding modified by *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

The lack of appellate review prevented the development of legal principles to structure the exercise of sentencing discretion, leaving the door wide open for great disparities from one court to another, and to the influence of "impermissible considerations such as the race of the defendant, his economic status, or the personal bias and attitude of the individual sentencing judge." *Coles*, 417 Mich at 545, holding modified by *Milbourn*, 435 Mich 630. As this Court observed in *Coles*, "sentencing judges have demonstrated a significant variety of attitudes when it comes to deciding what constitutes an appropriate sentence." *Id.* The injustice of suffering a disproportionate punishment for reasons beyond the defendant's control, such as skin color,

[4] Though *People v Lorentzen* identified "Michigan cases [that] either directly or by inference apply the test of proportionality to the sentence imposed," 387 Mich 167, 176; 194 NW2d 827 (1972), this Court did not reverse on that basis in any of those cases, see *People v Huntley*, 112 Mich 569; 71 NW 178 (1897); *People v Cramer*, 247 Mich 127; 225 NW 595 (1929); *Steele v Sexton*, 253 Mich 32; 234 NW 436 (1931); *In re Southard*, 298 Mich 75; 298 NW 457 (1941); but see *People v Dumas*, 161 Mich 45, 50; 125 NW 766 (1910), and all but one (*Dumas*) looked solely at whether the statute itself violated the Eighth Amendment rule against cruel and unusual punishment.

poverty, or even mere geography, "promote[d] disrespect for the criminal justice system and resentment among prisoners, thus impairing their morale and motivation for rehabilitation." *Id.*

It is no coincidence that after riots broke out in three state prisons in 1981, the Court took its first step toward remedying the situation.[5] In *Coles*, 417 Mich 523, the defendants asserted a constitutional right to sentence review, and this Court agreed unanimously that such a right exists, overruling *Cummins* and ending a century of appellate court abstention. *Id*. at 534–535. After considering arguments on either side of the issue, the Court concluded that "a wider scope of sentence review will promote honesty and clarity in criminal appeals rather than unduly burden appellate courts with an increasing number of appeals." *Id*. at 544. It would also increase uniformity in sentencing, "in keeping with our constitutional concept of a unified judiciary in this state." *Id*.

Recognizing that "[i]ndeterminate sentencing, by its very nature, requires the trial court to exercise a certain degree of discretion in the imposition of a sentence," *id*. at 539, the Court chose an "abuse of discretion" standard of review, *id*. at 550. But it also acknowledged this imprecise phrase could "mean anything from a virtually *de novo* sentencing to an almost total preclusion of relief." *Id*. at 547. The Court therefore clarified that the "starting point" for this new field of appellate review—which might very well "evolve, by means of case law or statutory enactment, into something more definite or even different," *id*. at 548–549—would be extreme deference: the defendant could obtain relief only "if the appellate court [found] that the trial court, in imposing the sentence, abused its discretion to the extent that it shock[ed] the conscience of the appellate court." *Id*. at 550.

[5] See *Coles*, 417 Mich at 546 n 26 (noting the Report of the Special Committee on Prison Disturbances to Governor William G. Milliken, Aug 4, 1981, p 37, had identified sentencing disparities as a cause of unrest).

Soon after its decision in *Coles*, this Court provided trial courts with "an invaluable tool for gauging the seriousness of a particular offense by a particular offender, as well as the disparity in sentencing between courtrooms . . . ." *Milbourn*, 435 Mich at 655. Through administrative orders in 1984 and 1985, the Court issued the first edition of the Michigan Sentencing Guidelines. Administrative Order No. 1984–1, 418 Mich lxxx (1984); Administrative Order No. 1985–2, 420 Mich lxii (1985). In 1988, after further analysis and refinement, the Court issued the second edition of the judicial sentencing guidelines, Administrative Order No. 1988–4, 430 Mich ci, which provided the "best 'barometer' of where on the continuum from the least to the most threatening circumstances a given case falls." *Milbourn*, 435 Mich at 656. In spite of their significant value in helping harmonize sentencing practices among different judges, these judicial sentencing guidelines were not mandatory on the trial courts:

> This Court's sentencing guidelines were "mandatory" only in the sense that the sentencing court was obliged to follow the procedure of "scoring" a case on the basis of the circumstances of the offense and the offender, and articulate the basis for any departure from the recommended sentence range yielded by this scoring. However, because the recommended ranges found in the judicial guidelines were not the product of legislative action, a sentencing judge was not necessarily obliged to impose a sentence within those ranges. [*People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001) (citing *Milbourn*, 435 Mich at 656–657; *People v Raby*, 456 Mich 487, 496–497; 572 NW2d 644 (1998)).]

As the guidelines themselves provided, "[w]henever the judge determines that a minimum sentence outside the recommended minimum range should be imposed, the judge may do so." Michigan Sentencing Guidelines, 2d ed (1988), p 7.

In part for this reason, it quickly became "evident that the 'shock the conscience' test"—*Coles*' articulation of the abuse of discretion standard—could not "effectively combat unjustified [sentencing] disparity." *Milbourn*, 435 Mich at 648. As one vocal appellate judge put it: "It is one thing to say that trial and appellate courts must be given a degree of flexibility so

that each case may be adapted to its circumstances; it is quite another to base that flexibility upon a foundation no more solid than the personal consciences of individual judges." *People v Rutherford*, 140 Mich App 272, 281–282; 364 NW2d 305 (1985) (Shepherd, J, concurring), quoted in *Milbourn*, 435 Mich at 648.

Out of this dissatisfaction arose *Milbourn*. True to *Coles*' prediction of further development, the Court in *Milbourn* sought to establish "[a] new rule . . . less subjective than the old rule . . . [that] offer[ed] more effective protection against unjustified sentence disparity." *Milbourn*, 435 Mich at 649. The rule it chose was "proportionality," the rather uncontroversial proposition that the "punishment should be made to fit the crime and the criminal." *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003).

Fittingly, the Court extracted this new rule from the very statutory sentencing scheme that had granted the courts sentencing discretion in the first place. Having reviewed "thousands of sentences" since *Coles*, the Court found that "different sentencing judges often subscribe to markedly different sentencing philosophies." *Milbourn*, 435 Mich at 652. But it rejected the notion that the Legislature had granted courts sentencing discretion "to accommodate subjective, philosophical differences among judges." *Id.* at 652–653. Instead, the Court found that the Legislature "creat[ed] sentence ranges and, thereby, provid[ed] for discretion in sentencing . . . to allow the principle of proportionality to be put into practice." *Id.* at 652. In other words, proportionality was tied to the judicial sentencing guidelines, which, while not mandatory, "represent[ed] the sentencing practices of the great majority of our state's sentencing judges" and provided "a useful tool in carrying out the legislative scheme of properly grading the seriousness and harmfulness of a given crime and given offender . . . ." *Id.* at 657–658.

Importantly, the *Milbourn* court concluded its discussion by explaining that proportionality was to guide the *trial court*'s exercise of its sentencing discretion: "The trial court appropriately exercises the discretion left to it by the Legislature *not* by applying its own philosophy of sentencing, but by determining where, on the continuum from the least to the most serious situations, an individual case falls and by sentencing the offender in accordance with this determination." *Id*. at 653–654. In this sense, *Milbourn*'s "principle of proportionality" was not a pure replacement for *Coles*' "shocks the conscience" test. While the latter was an appellate standard of review, the former was a rule of decision to guide the trial court's exercise of discretion, which would remain subject to appellate review under an abuse of discretion standard. *Id*. at 654.

Applying that standard, the appellate court would discern the boundaries of sentencing discretion by reference to both the guidelines and the principle of proportionality. It would be the "unusual" case where a within-guidelines sentence could be deemed an abuse of discretion. But if a sentencing court departed from guidelines absent "factors not adequately reflected in the guidelines," this signaled a "possibility" that the lower court had "violated the principle of proportionality and thus abused its sentencing discretion." *Id*. at 659–660. The Court also said that "[e]ven where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality." *Id*. at 660.

The dissent in *Milbourn* objected that such review would "drastically curtail the discretion and flexibility of our sentencing judges," *id*. at 664 (Boyle, J, dissenting), and argued that it would allow the appellate courts to strike sentences that do not comport with their own subjective notions of what is proportionate. *Id*. at 680–687. One can certainly find support for this

notion in the majority opinion. But the majority insisted it was "not suggest[ing] . . . appellate courts should simply substitute their judgment for that of the trial court," as that would be "at odds with any reasonable construction of the term 'abuse of discretion.' " *Id*. at 666.

In 1998, the judicial sentencing guidelines were replaced by legislative sentencing guidelines "with sentencing ranges that *do* require adherence." *Hegwood*, 465 Mich at 439 (citing MCL 777.1 *et seq*.). These mandatory guidelines changed the contours of sentencing discretion and review in two important respects. First, whereas *Milbourn* acknowledged that "even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances," 435 Mich at 661, the new statute made clear that a sentence within the guidelines is no longer reviewable for proportionality. Under MCL 769.34(10), "[i]f 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."

Second, "a judge's discretion to depart from the [guidelines] range . . . is limited to those circumstances in which such a departure is allowed by the Legislature"—namely where "there is a 'substantial and compelling reason' for doing so." *Id.* (citing MCL 769.34(3)). This new requirement supplemented the rule of decision that had been articulated in *Milbourn*. As this Court recognized in *People v Babcock*, the "substantial and compelling reasons" requirement "altered" "the role of the trial court" at sentencing—and "[c]onsequently . . . the role of the Court of Appeals" as well. 469 Mich at 255. There has been a shift "from reviewing the trial court's sentencing decision for 'proportionality' to reviewing the trial court's sentencing decision to determine, first, whether it is within the appropriate guidelines range and, second, if it is not, whether the trial court has articulated a 'substantial and compelling' reason for departing from

such range." *Id.* The Court explained that the "phrase 'substantial and compelling reason' " in the legislative guidelines context "must be construed to mean an 'objective and verifiable' reason that 'keenly or irresistibly grabs our attention'; is 'of considerable worth in deciding the length of a sentence'; and 'exists only in exceptional cases.' " *Babcock*, 469 Mich at 258–259 (quoting *People v Fields*, 448 Mich 58, 62, 66–67; 528 NW2d 176 (1995) (defining "substantial and compelling reasons" for purposes of departures from statutory mandatory minimum sentences for controlled-substance offenses).

The Court did not abandon the principle of proportionality, however; it found room for it in the new statutory scheme. Now, "the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Id.* at 262. "[T]he trial court must consider whether its [departure] sentence is proportionate to the seriousness of the defendant's conduct and his criminal history because, if it is not, the trial court's departure is necessarily not justified by a substantial and compelling reason." *Id.* at 264. In short, the Court incorporated the principle of proportionality into the new substantial and compelling reasons requirement, such that a proper finding of substantial and compelling reasons to justify a departure will necessarily encompass a finding that the departure sentence is proportional to the offense and the offender. (It does not follow, however, that all proportionally appropriate sentences will necessarily be supported by substantial and compelling reasons to depart from the guidelines.)

Under *Babcock*, appellate review of sentencing decisions proceeds in three steps. First, "the existence or nonexistence of a particular factor is a factual determination . . . reviewed by an appellate court for clear error." *Id.* (quoting *Fields*, 448 Mich at 77–78). Second, "[t]he det-

ermination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law." *Id.* (quoting *Fields*, 448 Mich at 77–78). Finally, the trial court's decision "that the objective and verifiable factors . . . constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." *Id.* at 264–265 (quoting *Fields*, 448 Mich at 77–78).

Although the Court confirmed that abuse of discretion remains the appropriate standard of review for the sentence ultimately imposed, it rejected the "extremely high level of deference" articulated for that standard elsewhere, *id.* at 268 (citing *Spalding v Spalding*, 355 Mich 382, 384–385; 94 NW2d 810 (1959)), which would be inconsistent with the level of review contemplated by the Legislature. *Babcock*, 469 Mich at 266–268 (citing MCL 769.34(11) ("If . . . the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand . . . ."). The Court announced that for purposes of sentencing review, "[a]n abuse of discretion occurs . . . when the trial court chooses an outcome falling outside th[e] principled range of outcomes," noting that "there will be more than one reasonable and principled outcome" *Id.* at 269. The Court placed this standard into context in *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008):

> Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, *as is the amount of the departure*. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*Id.* at 300 (emphasis added) (footnotes omitted).]

In sum, appellate review of Michigan sentencing decisions has evolved considerably in three general phases. First, prior to *Coles*, sentencing decisions were virtually unreviewable on appeal. Second, in *Coles* and *Milbourn*, the Court sanctioned the appellate review of sentences for abuse of discretion, and established a principle of proportionality to be applied by sentencing courts and reviewed by the Court of Appeals. Under this principle, sentences must be

proportional to the seriousness of the offense and the characteristics of the offender, and must account for (if not conform with) the non-mandatory judicial sentencing guidelines. Third, after enactment of the mandatory judicial sentencing guidelines, sentencing decisions were restricted to the guidelines in the absence of "substantial and compelling reasons." Non-guideline sentences need not only be proportional to the offense and offender, but must also be supported by substantial and compelling reasons to depart from the guidelines.

II. Recognition of Sixth Amendment jury trial rights at sentencing.

To understand how Michigan's evolving sentencing doctrine has contributed to a Sixth Amendment problem—as well as the appropriate reach of any remedy under MCL 8.5—it is helpful to summarize the most pertinent federal cases, with an eye toward two related concepts underlying Sixth Amendment sentencing jurisprudence, the "Sixth Amendment ceiling" and the "Sixth Amendment floor."

A. *Apprendi* and recognition of the Sixth Amendment ceiling.

In *Apprendi v New Jersey*, 530 US 466, 490 (2000), the United States Supreme Court signaled a sea change in its Sixth Amendment sentencing jurisprudence by holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Put differently, " '[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' " *Id.* (quoting *Jones v United States*, 526 US 227, 252–253 (1999) (Stevens, J, concurring)).

Importantly, the Court limited its holding in *Apprendi* to facts that increase a defendant's exposure, or *ceiling*. The Court explicitly declined to overrule its prior decision in *McMillan v Pennsylvania*, 477 US 79, 80–81 (1986), that juries need not find all facts necessary to the appli-

cation of a mandatory minimum sentence, or *floor*. Indeed, two years after *Apprendi*, in *Harris v United States*, 536 US 545 (2002), the Court reiterated that there "is a fundamental distinction" between judicial fact-finding that "extend[s] the defendant's sentence beyond the maximum authorized by the jury's verdict" (the ceiling) and judicial fact-finding that merely "increase[es] the mandatory minimum" (the floor) because as to the latter, "the jury's verdict has authorized the judge to impose the minimum with or without the finding." *Id*. at 557.

In *Blakely v Washington*, the Court extended the *Apprendi* rule to account for mandatory sentencing guidelines, holding that for constitutional purposes, the term "statutory maximum" refers to "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 US 296, 303 (2004) (citing *Ring v Arizona*, 536 US 584, 602 (2002)) (emphasis omitted). By (re)defining the term "statutory maximum" in this manner, the Court caused a good deal of confusion, because in some cases (as in *Blakely* itself), the statutory maximum in the traditional sense (the maximum under the statute of conviction) will differ from the statutory maximum in the Sixth Amendment sense (the maximum under the mandatory jury-supported guidelines). What ultimately matters for Sixth Amendment purposes is the defendant's punishment exposure as determined by jury-found facts—regardless of whether this "Sixth Amendment ceiling" is set by statute or guidelines.

Not surprisingly, *Blakely* raised immediate concerns about the constitutionality of the United States Sentencing Guidelines, under which trial courts were required to sentence defendants to a sentence within the mandatory sentencing guideline range.

B. The *Booker* remedy and reasonableness review of sentences.

The Supreme Court confronted this latter issue in *United States v Booker*, 543 US 220 (2005), finding "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]." *Id*. at 233. The Court affirmed

that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id*. at 244. As such, the Court found the Guidelines unconstitutional as written because their mandatory application will frequently increase a defendant's maximum exposure based on judge-found facts beyond his Sixth Amendment ceiling, or maximum exposure based on jury-found facts.

To remedy the problem, the Court opted to "sever[] and excis[e] . . . two provisions" to "make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve." *Id*. at 246. "So modified," the Court explained, "the federal sentencing statute . . . requires a sentencing court to consider Guidelines ranges . . . , but . . . permits the court to tailor the sentence in light of other statutory concerns as well . . . ." *Id*. at 245 (citations omitted). Specifically, the sentencing court's obligation—or rule of decision—is now to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of the Sentencing Reform Act, including to reflect the seriousness of the offense, promote respect for the law, and provide just punishment, deterrence, and protection to the public. 18 USC 3553(a)(2).

By removing an important barrier to sentencing judges' upward discretion, the Court effectively raised the Sixth Amendment ceiling in all cases from the guidelines maximum to the true statutory maximum. And although there was not (at the time) any Sixth Amendment

problem with the bottom of the Federal Sentencing Guidelines range,[6] the *Booker* remedy removed the same barrier to judges' downward sentencing discretion.

For appellate review of sentencing decisions, the Court "inferred the appropriate standard of review "from related statutory language," 18 USC 3742(e)(3), as well as "the structure of the statute, and the 'sound administration of justice.' " *Id.* at 260–261 (quoting *Pierce v Underwood*, 487 US 552, 559–560 (1988)). "[I]n this instance," the Court explained, "those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness].' " *Id.* at 261. Although the Court said little to explain this new standard, it appeared to resemble the deferential abuse of discretion standard of review that is familiar to appellate courts. Nevertheless, Justice Scalia lamented in dissent that "appellate review for 'unreasonableness' " might simply "preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges[.]" *Id.* at 313 (Scalia, J, dissenting in part).

In three subsequent cases, the Court shed some light on the contours of "reasonableness" review for appellate courts. The first was *Rita v United States*, 551 US 338, 347 (2007), in which the Court approved of an appellate court "presumption of reasonableness to a district court sentence that [falls within] a proper application of the Sentencing Guidelines," provided that "the presumption before us is an *appellate* court presumption," *id.* at 351, and that courts may *not* "adopt a presumption of *unreasonableness*" for sentences falling outside of the guidelines. *Id.* at

[6] Almost immediately after the *Booker* decision, the Department of Justice recommended a new "topless" guidelines system in which the bottom-end of the sentencing guidelines range would remain mandatory, but the top-end would be removed, raising all defendants' sentencing exposure to the maximum set by the statute of conviction. Gonzales, US Attorney Gen, *Is a Booker Fix Needed?*, Federal Sentencing Guidelines Speech Before National Center for Victims of Crime (June 21, 2005), in 17 Fed Sentencing Rep 324, 326 (2005). See also Bowman, Memorandum to the US Sentencing Commission (June 27, 2004), in 16 Fed Sentencing Rep 364, 367 (2004).

354–355 (emphasis added). Significantly for present purposes, the Court's first justification for this holding was that "the presumption is not binding," *id*. at 347—a justification echoed loudly in a concurrence by Justice Stevens:

> As the Court acknowledges . . . , presumptively reasonable does not mean always reasonable; the presumption, of course, must be genuinely rebuttable. . . . Our decision today makes clear . . . that the rebuttability of the presumption is real. It should also be clear that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range (and thus potentially subject to a formal "presumption" of reasonableness) or outside that range. Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory. [*Id*. at 366–367 (Stevens, J, concurring).]

Also concurring, Justice Scalia argued against substantive reasonableness review altogether, which will "inevitably" lead to constitutional violations whenever a sentence is "upheld as reasonable only because of the existence of judge-found facts." *Id*. at 374 (Scalia, J, concurring).

Shortly after *Rita*, in *Gall v United States*, 552 US 38, 41 (2007), the Court confirmed what most appellate courts and several justices had assumed about the standard of review for sentencing decisions—that "reasonableness" is simply "a deferential abuse of discretion standard." Under this standard, the Court held, appellate courts may not require " 'extraordinary' circumstances to justify a sentence outside the Guidelines range," as such an approach would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Id*. at 47. The Court explained that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse of discretion standard." *Id*. at 41. "It must first ensure that the district court committed no significant procedural error," and "should

then consider the substantive reasonableness of the sentence imposed under an abuse of discretion standard." *Id.* at 51.

Although Justice Scalia reiterated his disagreement with the "inherently flawed" notion of substantive reasonableness review, he grudgingly approved of the "highly deferential standard" applied by the Court, under which the "door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Id.* at 60 (Scalia, J, concurring).

Finally, in *Kimbrough v United States*, 552 US 85, 111 (2007), the Court found that the trial court did not abuse its discretion by varying from the properly calculated sentencing guidelines for policy reasons, or at least certain policy reasons. The Court explained that a sentencing court "must include the Guidelines range in the array of factors warranting consideration," but "may determine . . . that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing," and "[i]n making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses." *Id.* (quoting 18 USC 3553(a)).

Since *Booker* and its progeny, the federal courts have recognized two different classes of non-guideline sentences, an understanding of which is helpful here. A "departure" is a term of art under the United States Sentencing Guidelines. *United States v Grams*, 566 F3d 683, 686 (CA 6, 2009) (citing *United States v Blackie*, 548 F3d 395, 403 (CA 6, 2008)). A departure refers either to a sentence that falls outside of the advisory sentencing guideline range or to the assignment of a different criminal history category that effects the defendant's guideline range, based on the trial court's application of a specific provision of the guidelines themselves. *Id.* A

"variance," by contrast, is the imposition of a sentence that falls outside of the defendant's sentencing guideline range based on the trial court's review of the 18 USC 3553(a) factors, and as necessary to comply with the Sixth Amendment remedy adopted in *Booker*. *Grams*, 566 F3d at 686–687. Put differently, a sentencing judge's authority to "depart" from the guidelines must come from the guidelines themselves, whereas the authority to "vary" comes from the Sixth Amendment.

C. *Alleyne* and the Sixth Amendment floor.

In *Alleyne v United States*, 133 S Ct 2151, 2155, 2261 (2013), the Supreme Court extended the rule of *Apprendi-Blakely* to mandatory minimum sentences, explaining that "criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty," and thus that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S Ct at 2155, 2161 (citations omitted). Although *Alleyne* involved a federal *statutory* mandatory minimum sentence, the Court gave no reason to doubt that its analysis would apply equally to a mandatory sentencing *guidelines* floor. Indeed, as *Apprendi* made clear, "the relevant inquiry" under the Sixth Amendment "is one not of form, but of effect . . . ." 530 US at 494.

Alleyne overruled *McMillan*, 477 US 79, and *Harris*, 536 US 545, thereby giving constitutional significance to the sentencing floor, or as this brief will refer to it, the "Sixth Amendment floor." Whereas the Sixth Amendment ceiling represents the *most* severe sentence that a court can impose based on the facts of conviction alone, the Sixth Amendment floor represents the *least* severe sentence that a court can impose based on those same facts. The basic rule from the *Apprendi-Blakely-Alleyne* line of cases is that neither the ceiling nor the floor may be increased on the basis of facts that were not admitted by the defendant or proven to a jury.

III. This Court's response to the new Sixth Amendment sentencing law.

The Michigan sentencing guidelines managed to escape collateral damage throughout much of the "*Apprendi* revolution."[7] This Court's initial response was swift and certain, taking the form of a 2004 footnote declaring that "the Michigan system is unaffected by the holding in *Blakely* . . . ." *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Two years later, the Court properly confronted the *Apprendi-Blakely* question in *People v Drohan*, 475 Mich 140, 163; 715 NW2d 778 (2006), which essentially asked where to place the Sixth Amendment ceiling in Michigan. A sentencing court in Michigan determines the parole-eligibility date based on mandatory guidelines, but "[u]ltimately, the parole board retains the discretion to keep a person incarcerated" up until a date set by the Legislature. The defendant in *Drohan* argued that the relevant Sixth Amendment ceiling is the "maximum minimum" under the guidelines—the severest parole eligibility date supported by the jury verdict alone—but the Court rejected this argument on the ground that a Michigan jury verdict *always* authorizes the defendant's incarceration until the statutory maximum. *Id.* at 162. The Court explained that "because a Michigan defendant is always subject to serving the maximum sentence provided for in the statute that he or she was found to have violated, that maximum sentence constitutes the 'statutory maximum' as set forth in *Blakely*." 475 Mich at 163–164.[8] Put another way, a

[7] Dressler, Joshua & Thomas III, George, Criminal Procedure: Principles, Policies and Perspectives 1238 (2d ed, 2003)

[8] The Court also explained that Michigan employs an "indeterminate" sentencing scheme of the type that was excused from Sixth Amendment scrutiny in *Blakely* itself. *Blakely*, 475 Mich at 308–309. Although the Court has since recognized that "Michigan's sentencing scheme is not 'indeterminate' as that term has been used by the United States Supreme Court," and therefore cannot escape Sixth Amendment scrutiny on that basis alone, *Lockridge*, 498 Mich at 383, the remainder of the analysis in *Drohan* remains controlling today (subject to subsequent developments discussed below).

Michigan defendant's maximum exposure does not change from the moment of conviction through the moment of sentencing; he is *always* exposed to the possibility of remaining in prison until the maximum date set by the statute of conviction. Therefore, that date represents the Sixth Amendment ceiling, below which Michigan is free to constrain judicial discretion through mandatory sentencing guidelines.

In spite of some criticism, see Hall, *Mandatory Sentencing Guidelines by Any Other Name: When "Indeterminate Structured Sentencing" violates* Blakely v Washington, 57 Drake L Rev 643 (2009), *Drohan* remained the law in Michigan, confirming the constitutionality of the Michigan Sentencing Guidelines. But the guidelines could only escape scrutiny as long as the United States Supreme Court continued to distinguish the sentencing floor from the sentencing ceiling for Sixth Amendment purposes. Everything changed when *Alleyne* was decided, and this Court had little choice but to revisit the issue. See Loudon, *Could or Must? Apprendi's Application to Indeterminate Sentencing Systems after* Alleyne, 72 Nat'l L Guild Rev 161 (2015).

It did so in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). There, the Court found that "the proper inquiry" is whether a sentencing scheme "constrain[s] the discretion of the sentencing court by compelling an increase in the mandatory minimum sentence beyond that authorized by the jury's verdict alone[.]" *Id.* at 373. The Court concluded that "Michigan's sentencing guidelines do so to the extent that the floor of the guidelines range compels a trial judge to impose a mandatory minimum sentence beyond that authorized by the jury verdict." *Id.* Put differently, Michigan's sentencing guidelines are unconstitutional because they depend on judicial factfinding to *require* the imposition of sentences above the Sixth Amendment floor—

the "minimum minimum," or earliest parole eligibility date that a court can impose on the basis of facts that were admitted by the defendant or proven to the jury beyond a reasonable doubt.

Among the remedies proposed in Lockridge, CDAM argued as *amicus* in favor of a bifurcated advisory sentencing guidelines scheme, whereby upward departures from the guidelines would remain dependent on the existence of substantial and compelling reasons, but the guidelines would become advisory for purposes of sentencing below the guidelines. This argument mirrored Judge Shapiro's concurring opinion below. He had explained that "[u]nder our sentencing system, the highest term of incarceration that may be imposed is set exclusively by the statutory maximum for the crime." *Lockridge*, 304 Mich App at 314 (Shapiro, J, concurring) (citing *Drohan*, 475 Mich at 161–162). Because "only the bottom of a given guidelines range . . . presents an *Alleyne* Sixth Amendment problem," there is "no constitutional impropriety" with requiring substantial and compelling reasons to exceed the top of the sentencing guidelines range. *Id*. at 315–316 (Shapiro, J, concurring). Indeed, under MCL 8.5, "courts are required, when possible, to invalidate only the portions of the act necessary to allow it to pass constitutional muster." *Id*. at 316 (Shapiro, J, concurring (citing MCL 8.5; *Blank v Dep't of Corrections*, 462 Mich 103, 122–123; 611 NW2d 530 (2000))). Therefore, Judge Shapiro would have held that "when there is a constitutional infirmity in the guidelines, their application shall be advisory rather than mandatory," but "only the lower end of a guidelines range . . . constitutes a sentencing floor under *Alleyne*, and, therefore, only the lower end of a range need be advisory only." *Id.*

This Court ultimately rejected a bifurcated remedy and adopted a fully-advisory guidelines remedy akin to the post-*Booker* federal sentencing scheme. Although the Court found that Judge Shapiro's proposal would be "a less disruptive remedy that is fairly closely tailored to

the constitutional violation," it declined to adopt this approach because "[o]pening up only one end of the guidelines range, even if curing the constitutional violation, would be inconsistent with the Legislature's expressed preference for equal treatment." *Lockridge*, 498 Mich at 390.

To implement its remedy of fully advisory guidelines, the Court also appeared to adopt *Booker*'s appellate standard, explaining that a "sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Id*. at 392. As the United States Supreme Court has acknowledged, however, the "reasonableness" standard articulated in *Booker* is really just abuse of discretion as applied to sentencing decisions under the federal rule of decision under 18 USC 3553(a), "sufficient but not greater than necessary." See *Gall*, 552 US at 41. While Michigan's abuse of discretion standard also refers to a "reasonableness" component, see *Babcock*, 469 Mich at 269 ("an abuse of discretion standard acknowledges that . . . there will be more than one reasonable and principled outcome"), that standard is not used to assess a rule of decision arising under 18 USC 3553(a). Thus, as Justice Markman pointed out in dissent, "the standard of review summarily imposed in Michigan . . . is disconnected from any consideration of this state's prior standard of review, however irrelevantly consistent it may be with the United States Supreme Court's post-severability analysis standard." *Lockridge*, 498 Mich at 462 n 40 (Markman, J, dissenting).

ARGUMENT

I. MCL 769.34(2), (3), and (11) should remain in full force and effect when judicial fact-finding does not raise the guidelines floor or otherwise implicate the Sixth Amendment.

CDAM agrees with the parties and the Attorney General that the application of Michigan's mandatory sentencing guidelines does not always violate the Sixth Amendment, and that MCL 769.34(2), (3), and (11) should remain in full effect in at least some circumstances. CDAM parts company with the other litigants, however, on the scope of the Sixth Amendment problem. Both parties, as well as the Attorney General, seek remedies to constitutional infirmities that do not exist. The question under MCL 8.5 is not simply whether the Mandatory guideline provisions should remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding, but rather whether they should remain in full force and effect *so long as they do not violate the Sixth Amendment*.

A. Mandatory application of the Michigan Sentencing Guidelines does not implicate the Sixth Amendment so long as judicial fact-finding does not raise the Sixth Amendment ceiling or floor.

CDAM agrees that where a defendant's judge-found guidelines mirror his jury-supported guidelines, judicial fact-finding has not affected the Sixth Amendment floor (or ceiling), and there is no reason why the guidelines cannot remain mandatory, requiring substantial and compelling reasons for any upward or downward departure.[9] But that conclusion alone does not

[9] This is only so because this Court has ruled that the Sixth Amendment ceiling is the maximum penalty set by the statute of conviction, rather than the maximum parolable sentence allowable under the mandatory sentencing guidelines. If the Court had resolved this question differently in (or since) *Drohan*, then a bifurcated guidelines system would fail to remedy the constitutional problem. As in *Booker*, an appropriate remedy would require raising the Sixth Amendment ceiling in *all* cases, not just those in which the guidelines are based on judge-found facts. Otherwise, defendants whose guidelines are based on judicial fact-finding would be exposed to greater punishment than their counterparts whose guidelines are based solely on the jury verdict. This is precisely what the Sixth Amendment forbids.

end this Court's inquiry if there remain *additional* circumstances under which the Mandatory guideline provisions may be given full effect without running afoul of the Sixth Amendment. Here, there are two separate scenarios in which judicial fact-finding has affected the sentencing guidelines range, and yet the Mandatory guideline provisions may nevertheless apply as written without violating the Constitution.

The first scenario is at the top-end of the guidelines. As explained above, the basic rule from *Apprendi-Blakely-Booker* is that a defendant's exposure—the Sixth Amendment ceiling—may not increase based on judge-found facts. This Court has concluded (and nobody now questions) that mandatory application of the Michigan Sentencing Guidelines to constrain a sentencing judge's *upward* discretion does not implicate the Sixth Amendment because it does not affect a defendant's exposure. *Drohan*, 475 Mich at 163–164 ("a Michigan defendant is always subject to serving the maximum sentence provided for in the statute that he or she was found to have violated . . . ."). Thus, as Judge Shapiro explained in his *Lockridge* concurrence, 304 Mich App at 314, and as this Court itself has acknowledged, *Lockridge*, 498 Mich at 390, to declare the Michigan Sentencing Guidelines advisory at the top-end would remedy a constitutional problem that does not exist.

The second scenario is at the bottom-end of the guidelines. The basic rule from *Alleyne* is that the most lenient permissible sentence based on the jury verdict alone—the Sixth Amendment floor—may not increase on the basis of facts that were not admitted by the defendant or proven to a jury. The problem in Michigan arises where "the floor of the guidelines range compels a trial judge to impose a . . . sentence beyond that authorized by the jury verdict." *Lockridge*, 498 Mich at 373. To remedy this problem, the guidelines must be advisory—but only inasmuch as is necessary to avoid compelling the trial judge to impose a sentence "beyond that

authorized by the jury verdict," *id.*—or the Sixth Amendment floor (the most lenient guidelines sentence available without judge-found facts). Making the guidelines advisory below that point is entirely unnecessary to remedy the Sixth Amendment problem.

The Attorney General's brief illustrates these two scenarios. The Attorney General contends that in its preferred version of a bifurcated sentencing guidelines scheme, savvy litigants will engage in "strategic maneuvering" to influence the availability of these upward departures and excessive downward departures. To demonstrate, the Attorney General discusses two hypothetical judges, Maximum Mike and Lenient Larry,[10] both of whom have a penchant for departing from the guidelines whenever possible, albeit in different directions. Attorney General's Br 9. In Maximum Mike's courtroom, defendants will try to keep the guidelines mandatory (thereby preventing upward departures without substantial and compelling reasons), whereas prosecutors will try to make the guidelines advisory (thereby making it easier for the judge to impose significant upward departures). In Lenient Larry's courtroom, these roles will be reversed, with defendants angling for substantial downward departures—even below the Sixth Amendment floor—and prosecutors seeking to constrain the judge's discretion to depart at all. *Id*. The Attorney General acknowledges that maneuvering of this nature will present "problems" but is willing to tolerate this necessary evil to "invalidate only those applications [of] § 34(2) and § 34(3) that this Court has held violate the Sixth Amendment, while continuing to allow those statutes to have effect when they are valid." Attorney General's Br 10.

The irony of the Attorney General's position is that these problems are only created because the Attorney General's proposed remedy is not narrowly tailored to remedy the Sixth Amendment violation. Lenient Larry need not be free to sentence more leniently after judicial

[10] The characters originated with Justice Markman. See *Smith*, 482 Mich at 323 (Markman, J, concurring); *Lockridge*, 498 Mich at 461 (Markman, J, dissenting).

factfinding than before, and Maximum Mike need not be free to sentence above the guidelines without substantial and compelling reasons *ever*, since judicial factfinding does not affect a Michigan defendant's punishment exposure. There is no constitutional reason to tolerate the maneuvering and unfairness that the Attorney General describes.

To summarize, there is only one window in which the mandatory application of Michigan's sentencing guidelines presents a constitutional problem: sentences below the judge-found guidelines but at or above the Sixth Amendment floor. While it would violate the Sixth Amendment to require a sentencing court to articulate substantial and compelling reasons to sentence within this window, the mandatory sentencing guidelines may otherwise operatee just as they were intended.

B. MCL 8.5, the separation of powers doctrine, and Michigan's rich experience with sentencing policy all counsel in favor of leaving MCL 769.34 intact to the fullest extent possible.

The Attorney General aptly argues that "[i]f § 34(2) and § 34(3) *may* be constitutionally applied," then "under MCL 8.5 [they] *must* be applied." Attorney General's Br 5. CDAM agrees. But that reasoning not only applies to all sentences imposed using a jury-supported guidelines range, it also applies to many sentences imposed using a judge-found guidelines range.

Although the Court accepted the constitutional premise of Judge Shapiro's position—that the mandatory application of sentencing guidelines to cabin a judge's *upward* discretion does not violate the Sixth Amendment—the Court declined to limit the scope of its chosen remedy for policy reasons, explaining that it would be inconsistent with the "Legislature's expressed preference for equal treatment." *Lockridge*, 498 Mich at 390. This aspect of the Court's reasoning does not withstand close scrutiny—particularly under MCL 8.5.

First, Michigan's Legislature did not express a preference for an entirely-advisory sentencing guidelines scheme over a mostly-mandatory scheme with moderately greater downward discretion. The Court's authority for this proposition was *Booker*, which made assumptions about what Congress would have preferred as a matter of federal sentencing policy. *Id.* (citing *Booker*, 543 US at 248). This case does not concern federal sentencing policy, and there are good reasons why the federal remedy might not work best for Michigan, such as the potential influence of judicial elections on sentencing decisions, the potential influence of prosecutorial elections on charging decisions, and disparities in indigent defense delivery systems. For these or any other reasons, the Legislature may have been, or may now be, more concerned with excessively *lengthy* sentences than excessively *lenient* sentences.

Second, even assuming that the Legislature did prefer "equal treatment" of the top and bottom of the guidelines, that interest is largely protected by CDAM's proposal. Just as substantial and compelling reasons should be required for upward departures from the guidelines, they should be required for downward departures beyond the guidelines range that would have applied based only on the jury verdict beyond the guidelines range that would have been supported by the jury's verdict. Accordingly, there is very little actual risk of unchecked leniency at sentencing.

Third, any concerns about "equal treatment" for the top and bottom of the guidelines—and the respective interests of criminal defendants and the prosecution—should have little influence on the Sixth Amendment remedy in the first place, as the Sixth Amendment right to a jury trial is a right belonging to "the accused," not the prosecution. US Const, Am VI.

Finally, and more to the point, MCL 8.5 takes all of this guesswork out of the equation. It contemplates the invalidation of state statutes *only to the extent necessary* to cure any constitu-

tional defects, while allowing "the remaining portions or applications" of the statute to "be given effect without the invalid portion or application . . . ." MCL 8.5. It does not allow this Court to remedy constitutional infirmities in the manner most consistent with (what the Court believes about) the Legislature's original intent, but rather requires the narrowest possible solutions, whatever the practical implications might be. The statute was enacted precisely for the purpose of preserving as much of the Legislature's discretion as possible when this Court must remedy a constitutional problem. The rule is absolute; it applies not only when the result is a statutory scheme that remains simple to apply, well-crafted, and wise, but also when it does not. The Legislature enacted MCL 8.5 to reserve to itself the broadest possible authority to recraft the legislation in a manner that would achieve its objectives within constitutional bounds, even if those objectives change.

These arguments of course apply to the bottom of the sentencing guidelines as much as they do to the top. So long as a sentencing court has discretion to go to the Sixth Amendment floor, the Mandatory guideline provisions can constitutionally be given full force and effect below that point without infringing upon defendants' Sixth Amendment rights. While CDAM can conceive of many compelling policy reasons *not* to restrict a sentencing judge's downward discretion below the Sixth Amendment floor, those considerations are for the Legislature to consider if it so chooses.

For the same reasons that redrafting the statute for the Legislature violates MCL 8.5, it also violates the separation of powers doctrine under Michigan's Constitution. MCL 8.5 is simply an additional codification of the principle that it is the Legislature's responsibility to make law and the Court's responsibility to interpret it. By adopting the *Booker* remedy of fully advisory guidelines in all cases, and freeing sentencing courts of important limitations on their

discretion even where it was not necessary to do so, the Court encroached upon the legislative sphere.

This Court has previously declined to import a federal regime or approach into Michigan jurisprudence because it disagreed with the United States Supreme Court's approach to the separation of powers issue. See, e.g., *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 111; 754 NW2d 259 (2008). In *Rovas*, this Court rejected the "unyielding deference to agency statutory construction required by *Chevron* [*USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984)]" because it did not respect the judiciary's power to interpret statutes. In this case, the adoption of fully advisory guidelines in all cases would infringe upon the Michigan Legislature's authority to devise a new scheme that holds closely to the contours of its constitutional power. In short, the more actively this Court engineers a constitutional remedy, the less authority it leaves the Legislature to address the problem.

Lastly, as fully explained at the outset of this brief, Michigan has a complicated but rich history with respect to sentencing law and policy. The Legislature and courts have learned a great deal about abuses of sentencing discretion and the ways to protect against them. As this Court has recognized, the Legislature intended the mandatory sentencing guidelines to "promote uniformity in criminal sentencing by 'ensur[ing] that offenders with similar offense and offender characteristics receive substantially similar sentences.' " *Smith*, 482 Mich at 302 (quoting *Babcock*, 469 Mich at 267 n 21). And the Court itself has developed standards, such as the principle of proportionality, to constrain judicial sentencing discretion and ensure greater uniformity where appropriate. While one narrow category of Michigan sentences must now be subject to greater discretion, that is no reason to dismantle one of the most important features of Michigan's entire sentencing scheme. The Court should hold onto what works for Michigan.

C. The Court should declare MCL 769.34(2), (3), and (11) inoperable as to the limited class of "variance" sentences for which mandatory application of the guidelines would violate the Sixth Amendment.

Given its ability—indeed, mandate—to leave the Mandatory guideline provisions untouched where possible, the Court's task is to devise an appropriately tailored remedy to increase the trial courts' discretion to sentence below the judicially calculated sentencing guidelines range but above the Sixth Amendment floor.

The Court should leave the Mandatory guideline provisions in full force and effect for "departures" from the guidelines, but render them unenforceable where necessary by recognizing a new class of non-guideline sentences called "variances," defined as below-guideline sentences above the Sixth Amendment floor. The distinction between "departures" and "variances" would roughly mirror the two types of non-guideline sentences under post-*Booker* federal sentencing law—departures permitted by the guidelines themselves, and variances permitted by the Sixth Amendment. See *Grams*, 566 F3d at 686.

Under this approach, guideline departure sentences would be subject to the same standards that have always applied under the Mandatory guideline provisions and related caselaw. In order to "depart" from the guidelines (upward at all, or downward below the Sixth Amendment floor), a sentencing court must articulate substantial and compelling reasons to justify the departure—a showing that encompasses the principle of proportionality under *Milbourn*—and its decision must survive appellate scrutiny under the *Babcock* abuse of discretion standard.

Variance sentences, however, must be subject to a different standard that ensures sufficient discretion to render the sentencing guidelines truly advisory as the Court declared them in *Lockridge*. As explained in greater detail below, the rule of decision for trial courts in this circumstance is the principle of proportionality articulated in *Milbourn*. Application of that standard in lieu of the substantial and compelling reasons requirement will resolve the Sixth

Amendment problem at the trial court level. The appellate standard will depend on a number of factors discussed in Section IV, below.

II. Stare decisis should not prevent this Court from modifying *Lockridge* to conform to MCL 8.5 and avoid encroaching upon the legislative sphere.

If the Court agrees that its prior decision overlooked and is inconsistent with MCL 8.5, the Court's own policy of stare decisis cannot justify continuing to disregard that legislative directive. Stare decisis is not an "inexorable command" but rather a "principle of policy." *People v McKinley*, 496 Mich 410, 422, 424; 852 NW2d 770 (2014) (quoting *Hohn v United States*, 524 US 236, 251 (1998)). In deciding whether to depart from that policy in a given case, this Court considers the following factors: "[1] whether [the prior opinion] was wrongly decided, [2] whether it defies practical workability, [3] whether reliance interests would work an undue hardship, and [4] whether changes in the law or the facts no longer justify the questioned decision." *Id.* at 422. The problem with *Lockridge* is not unworkability or that the law or facts have changed, it is that the Court dismantled more of the sentencing guidelines than the Sixth Amendment requires, contrary to MCL 8.5 and the separation of powers doctrine, as explained in Section I.B. above. It was wrongly decided. And there is no reliance on that overbroad remedy that would justify preserving it.

McKinley provides an apt example of the sort of reliance interests that may be relevant when the Court misinterprets a criminal statute to give the judiciary more discretion than the Legislature intended to provide. There the Court reconsidered a decision made nearly two decades ago because its previous interpretation that the statute allowed an award of restitution for crimes never charged went contrary to key language in the text that the Court had overlooked. 496 Mich at 422. The Court concluded that none of the factors weighed against overruling the

decision but two factors weighed in favor: (1) it was wrongly decided and (2) there was no reliance interest. *Id*. at 422–424. "[T]o have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Id*. at 423 (quoting *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000). The triggering event in the criminal context is the crime. *Id*. The overbroad discretion to award restitution would not have caused victims to adjust their conduct before commission of a crime, as they would have no reason to believe they would be victimized. *Id*. at 422–424. Because the Court's prior decision was contrary to the statutory text and there was no reliance interest in that decision, it overruled its 17-year-old decision.

The analysis is slightly different here because the penalty at issue is imprisonment, not restitution, but the Court should reach the same result. *Lockridge*'s remedy increased the threat of greater punishment for criminal conduct and the chances of merciful sentencing where mitigating factors are involved. If this had any influence on would-be offenders, it would be to create greater uncertainty in their minds as to the consequences of the offense. It is therefore hard to see how a would-be offender would rely on *Lockridge* in deciding whether to commit an offense, even assuming (contrary to intuition) that this is a reliance interest the Court should consider.

As for victims, *Lockridge* would have no influence because, as in *McKinley*, they would not anticipate crime. No one aims to be victimized; everyone works to avoid it. Further, nothing the Court does to increase or diminish the uncertainty in sentencing alters the incentive to avoid being victimized because, unlike restitution, imprisonment does not alter the final outcome for the victim.

Obviously, revising *Lockridge* will require some adjustment in the existing practice of attorneys and judges, but they are accustomed to adapting to changes in the law—it is their job. This is not a hardship that should ever be relevant in deciding whether to correct legal error in earlier decision, because the courts and counsel should work to reform earlier decisions that are wrongfully decided. There are no reliance interests in this instance that can overcome the statutory and doctrinal reasons for modifying the *Lockridge* decision.

III. A *Crosby* remand was unnecessary in this instance, but not for the reasons given by the prosecution.

CDAM agrees with the parties and the Attorney General that in both cases the Court of Appeals erred in ordering a *Crosby* remand,[11] but only for the reasons given by Defendant Steanhouse and the Attorney General. There was no need for a remand to determine whether application of the proportionality standard would make a difference in the extent of the upward departure because that standard already applied to upward departures under *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). See also *Babcock*, 469 Mich at 263 ("[W]hile 'substantial and compelling' sets forth the quality of the reasons that must be set forth in support of a departure from the guidelines, the principle of 'proportionality' defines the standard against which the decision to depart, and the particular departure imposed, must be assessed."). Put another way, the "substantial and compelling" reasons standard encompasses a proportionality component. Whatever uncertainty *Lockridge* created in this review standard, it could not have impacted the trial court's decision-making, since the trial court issued its sentence before *Lockridge* was decided. Because the Court of Appeals has only confirmed that the proportionality standard still applies to upward departure sentences post-*Lockridge*, it has only confirmed what the trial court would have already known—that the sentence must be proportionate.

[11] See *United States v Crosby*, 397 F3d 103 (CA2, 2005).

The prosecution's argument that there should be no review for reasonableness of the sentence at all because a *Lockridge* error was not preserved is incorrect on two levels. First, the Court of Appeals did not remand to cure a potential *Lockridge* error. Second, there is no particular objection that must be lodged in the trial court for the appellate court to review that decision for abuse of its sentencing discretion under the principle of proportionality. See MCL 769.34(7) (providing that an above-guidelines departure may be appealed "on grounds that it is longer or more severe than the appropriate sentence range"). Again, under the "substantial and compelling" reasons standard that applied before *Lockridge*, the trial court was required to consider whether the sentence it selected was proportionate. See *Babcock*, 469 Mich at 263. Because that issue was necessarily raised and decided when the parties argued over the sentence and the court selected one, the issue is preserved for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

IV. *Milbourn* and *Babcock* articulate the relevant standards no matter what Sixth Amendment remedy the Court selects.

The final question—"what standard applies to appellate review of sentences following the decision in *People v Lockridge*?"—is a loaded question, and unpacking it will simplify this case considerably.

Appellate review always involves applying at least two legal standards: (1) the rule of decision—i.e., the substantive legal principle governing the trial court's decision—and (2) the "standard of review," which dictates the level of deference (if any) given to the trial court's decision. The proportionality principle articulated in *Milbourn*—that the punishment must fit the offense and the offender—is a rule of decision applied in the first instance by the trial court; it is

not an appellate review standard.[12] The standard of appellate review applied to that decision is "abuse of discretion," which means examining whether the decision falls within the range of "reasonable and principled outcomes." *Babcock*, 469 Mich at 267.

The Court of Appeals and the other litigants seem to be struggling over whether Michigan's proportionality principle articulated in *Milbourn* should be replaced by the federal reasonableness standard articulated in *Booker*. But the former is a rule of decision for the trial courts, while the latter is a standard of review for appellate courts. So when reconsidering Michigan's rule of decision for purposes of Sixth Amendment compliance, the real question is not whether the principle of proportionality should be replaced with "reasonableness," but whether it should be replaced with "sufficient but not greater than necessary" to satisfy the sentencing objectives of a federal statute, 18 USC 3553(a). For a number of reasons, the answer should be no. Our own rule of decision has served us well, and is not based on a federal statute.

As to the appellate standard, the real question is whether to replace this Court's articulation of the abuse of discretion standard in *Babcock* with the federal courts' articulation of the same standard in *Booker* and its progeny as "reasonableness" review. Again, the answer is no. The federal rule adds nothing to *Babcock*, which already includes a "reasonableness" component.

The most difficult question is the extent to which this abuse of discretion review should apply to within-guideline sentences and Sixth Amendment variances. MCL 769.34(10), which currently insulates within-guidelines from appellate review of proportionality, must be reinterpreted so as not to distinguish between within-guidelines sentences and Sixth Amendment

[12] By purporting to replace the "shocks the conscience" abuse of discretion standard with "proportionality," the Court led many to refer to proportionality as an appellate review standard, when it is not. See *Milbourn*, 435 Mich at 661.

variances, except where the guidelines are calculated without judge-found facts. This means the Court must either (1) insulate variances from appellate review of proportionality, or (2) make within-guidelines sentences reviewable on appeal for proportionality.

A. *Milbourn*'s "principle of proportionality" is a rule of decision (not an appellate review standard) and always applies; the punishment should still fit the crime and the criminal after *Lockridge*.

Despite all of the consternation over *Milbourn*, the principle of proportionality that it espouses it not controversial: it merely calls for "persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record are less threatening to society." *Milbourn*, 435 Mich at 653–654. This principle is evident in and derived from Michigan's sentencing scheme. See *id.* at 635–636. Indeed, the legislative purpose of giving courts a range of minimum sentences to choose from is "to allow the principle of proportionality to be put into practice." *Id.* at 652. When the Legislature enacted the mandatory sentencing guidelines to require "substantial and compelling" reasons for a departure, this Court concluded that the principle of proportionality still applied—the punishment still had to fit the crime and the criminal. *Babcock*, 469 Mich at 262. Thus, proportionality has long been an indispensable standard for sentencing, both when the guidelines were mandatory and when they were not.

Lockridge does nothing to change this. If the requirement of substantial and compelling reasons for a guidelines departure cannot be enforced, this merely gives the trial court more discretion to select a proportional sentence outside of the guidelines. Making the sentencing guidelines advisory does not remove the policy of proportionality from a sentencing scheme, and it certainly does not make it less appropriate for trial courts to enter a sentence that fits the offense and the offender. Indeed, it is difficult to imagine a rational sentencing scheme where the trial court should *not* tailor the punishment to fit the offense and the offender.

The Prosecution and the *Masroor* majority propose tossing-out *Milbourn*'s well-accepted and well-developed principle because it is not sufficiently deferential to the trial court's sentencing decision. Appellant's Br 47–48. This objection confuses proportionality with an appellate standard of review. See, e.g., *People v Knight*, 473 Mich 324, 344; 701 NW2d 715 (2005) (applying the "clearly error" standard to a trial court's ultimate factual findings because they are entitled to "deference"); *cf. Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 492; 697 NW2d 871 (2005) (explaining that *Chevron* deference is not jurisdictional; rather, it is a doctrine that is in the nature of a *standard of review*). Unlike appellate standards of review, such as "de novo," "clear error," and "abuse of discretion," the principle of proportionality has nothing to do with affording deference to a lower court's decision. It is a principle of law the trial court applies to the facts to determine the sentence in the first instance. *Milbourn*, 435 Mich at 635; *Babcock*, 469 Mich at 263–264. It is a "rule of decision," "[a] rule . . . that provides the basis for deciding or adjudicating a case." *Black's Law Dictionary* (10th ed). It defines the two elements that matter in determining how severe the sentence should be: the nature of the offense and the characteristics of the offender.

The prosecution is also wrong to equate *Milbourn*'s proportionality principle with the standard rejected in *Gall v United States*, 552 US 38, 46 (2007). The *Milbourn* court did not say that guidelines departures require "extraordinary circumstances" or endorse a mathematical formula such as the equation rejected in *Gall*. Indeed, *Gall* ultimately endorsed a practice that looks very much like *Milbourn* proportionality:

> [A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. *Gall*, 552 US at 46.

Under federal law, those justifications come from 18 USC 3553(a), which incorporates the two elements of *Milbourn*'s proportionality principle—the seriousness of the crime and the offender's characteristics.

In fact, and for all practical purposes, *Milbourn* proportionality looks very much like the central principle at work in 18 USC 3553(a). The very first factors a federal trial court must consider are "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 USC 3553(a)(1). And every other factor necessarily relates back to those two elements at some level. For instance, how does a trial court determine that a shorter sentence is adequate to deter criminal conduct? See 18 USC 3553(a)(2)(B). It looks to the nature of the offense and the defendant's characteristics. How does a trial court determine that a longer sentence is necessary to protect the public? See 18 USC 3553(a)(2)(C). It looks, at least in part, to the seriousness of the offense and the offender's criminal history. The *Masroor* majority complains that proportionality does not allow a Michigan court to consider many factors in 18 USC 3553(a), but its elements in fact tie into these policies.

The fact that the proportionality principle is less specific only gives Michigan courts *more* flexibility to consider policies relevant to sentencing, including those identified in 18 USC 3553(a) and reflected in the guidelines. See, e.g., *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995) (holding that the trial court could consider the relationship between the victim and the defendant even though not accounted for in the guidelines). As such, the principle of proportionality is fully capable of carrying out the advisory guidelines remedy adopted in *Lockridge*, whatever its reach. Abandoning *Milbourn* to adopt only the policies set by Congress in 18 USC 3553(a) means unnecessarily giving up substantial control over Michigan sentencing policy.

Even where there is an additional rule of decision for the trial court—namely, whether there exist "substantial and compelling reasons" to justify an upward departure or a downward departure below the Sixth Amendment floor—the trial court must necessarily adhere to the principle of proportionality as well. This Court made clear in *Babcock* that a departure sentence that fails the principle of proportionality has "necessarily" also failed the substantial and compelling reasons requirement. 469 Mich at 264. This is just another way of saying that the substantial and compelling reasons rule incorporates the principle of proportionality.

In sum, the Court should not displace Michigan's sensible rule of decision for sentencing courts with a federal rule that was developed under a federal statute and which is no more Sixth Amendment compliant. In all cases, the rule of decision at sentencing (or *a* rule of decision for departure sentences) should remain the principle of proportionality.

B. *Babcock*'s standard for "abuse of discretion" ensures reasonableness and affords adequate deference.

In *Lockridge*, this Court proposed that Michigan's appellate courts review departures from the guidelines for "reasonableness," citing *Booker*, 543 US at 264. Our appellate courts have already been doing this for quite some time. Since *Babcock*, one of the central tenets of abuse of discretion review of sentences has been reasonableness. *Babcock* recognized that "there will be no single correct outcome; rather, there will be more than one *reasonable* and principled outcome." *Babcock*, 469 Mich at 269 (emphasis added). "An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Babcock*, 469 Mich at 269 (internal citations omitted).

To illustrate how reasonableness is at the core of this standard, it helps to walk through how it applies to sentencing review. The appellate court begins by looking at the trial court's explanation for why departing from the guidelines makes the sentence more proportional.

Babcock, 469 Mich at 269. When the trial court articulates reasons for the sentence which relate to the nature of the offense and the offender (proportionality), and which appropriately take into account the correctly-calculated guidelines, the sentencing decision will be "principled." *Id*. at 269. The question then remains whether the punishment imposed is also "reasonable," with the recognition that "there will be more than one *reasonable* and principled outcome." *Id*. at 269 (emphasis added). This standard gives respect to "the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender," and calls for the court to "proceed with a caution grounded in the inherent limitations of the appellate perspective." *Babcock*, 469 Mich at 270. Because *Babcock*'s standard was derived from "[t]he structure and content of the sentencing guidelines, as well as the organization of the appellate system itself," 469 Mich at 267, preserving the Legislature's intent in the guidelines to the maximum extent possible should mean preserving the *Babcock* standard.

Viewed this way, the similarities between Michigan's analytical framework and the federal "reasonableness" standard are striking. The first step of federal reasonableness review is for "procedural reasonableness," which means

> ensuring that the sentencing court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range.

Gall, 552 US at 51. This roughly mirrors Michigan review for "principled" sentencing decisions.

The second step in federal reasonableness review is for "substantive reasonableness," which means ensuring (under an abuse of discretion standard) that the sentence ultimately imposed is proportional: "[a] substantively reasonable sentence is proportionate to the

seriousness of the offense and the circumstances of the offender, and sufficient, but not greater than necessary, to comport with the purposes of 18 USC 3553(a)." *People v Masroor*, 313 Mich App 358, 386; 880 NW2d 812 (2015) (citing *United States v Vowell*, 516 F3d 503, 512 (CA 6, 2008). If the sentencing court gives an "unreasonable amount of weight to any pertinent factor" in 18 USC 3553(a), the sentence may be substantively unreasonable. *Vowell*, 516 F3d at 507. Further, the federal appellate court " 'must ensure that when there is a variance, the greater from the variance from the range set by the Sentencing Guidelines,' the more compelling the necessary justification must be." *Masroor*, 313 Mich App at 389 (quoting *United States v Aleo*, 681 F3d 290, 299–300 (CA 6, 2012)). This roughly mirrors Michigan review under *Babcock* to ensure "reasonable" sentencing outcomes.

Given these similarities, Michigan's existing abuse of discretion standard is fully capable of serving the goals of an advisory sentencing guidelines scheme, and there is no purpose in jettisoning the *Babcock* appellate review standard. To do so would be to address a problem that does not exist, in turn creating even more problems. Stare decisis strongly counsels against displacing a workable standard that is consistent with existing law. See *McKinley*, 496 Mich at 422 (setting forth the stare decisis factors).

The Court of Appeals should apply this abuse of discretion standard to whatever rule of decision the trial court has applied. For departures above the guidelines or below the Sixth Amendment floor, the trial court must articulate substantial and compelling reasons, a standard which encompasses proportionality. Thus, the appellate court must determine whether the trial court abused its discretion in finding that the substantial and compelling reasons articulated justify the particular departure sentence imposed. This is precisely how *Babcock* applied the abuse of discretion standard. Babcock, 469 Mich at 270–271. For Sixth Amendment variances

and within-guideline sentences, however, the trial court will apply the principle of proportionality, and the appellate court will either review *that* decision for an abuse of discretion or will not review the decision at all. This will depend on how this Court addresses a remaining constitutional concern with MCL 769.34(10), as explained below.

C. The Court should interpret MCL 769.34(10) in a manner that most closely adheres to the Legislature's intent by allowing abuse of discretion review of within-guideline sentences.

Whatever remedy this Court ultimately chooses should not alter the standards above, which will continue to apply just as they did before *Lockridge*. It will, however, determine *when* the various standards will apply. Most of these questions are addressed above, but there remains one important question about the class of sentences for which appellate review of proportionality is foreclosed *entirely* under MCL 769.34(10). The Court must define that class of cases.

The first sentence of MCL 769.34(10) provides that "[i]f a minimum sentence is within the appropriate guidelines 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." This provision protects the trial court's exercise of discretion to decide what sentence is proportional within the (properly calculated) guidelines by insulating the decision from appellate review altogether. MCL 769.34(10).

The problem with this provision is that it is akin to an unrebuttable presumption of reasonableness. As the United States Supreme Court made abundantly clear in *Rita* and *Gall*, because the federal guidelines must be advisory, a presumption of reasonableness is only permissible if it "is not binding." *Rita*, 551 US at 347. The presumption "must be genuinely rebuttable," *id*. at 366–367 (Stevens, J, concurring), so that the "door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines

range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 552 US at 60 (Scalia, J, concurring). Otherwise, the guidelines impermissibly bind the appellate court.

Thus, to adopt CDAM's proposed remedy—or any other remedy involving advisory guidelines (including the existing *Lockridge* remedy)—the Court must do one of two things with the first sentence of MCL 769.34(10). Either the court must treat Sixth Amendment variance sentences the same as within-guideline sentences, such that neither is reviewable for proportionality on appeal, or the court must find this provision unenforceable whenever the guidelines are dependent on judge-found facts, making all sentences (except within-jury-supported-guideline sentences) reviewable on appeal for abuse of discretion.

While perhaps more advantageous for criminal defendants, the first option would go further than necessary to cure the Sixth Amendment problem with MCL 769.34(10), and would therefore be inconsistent with MCL 8.5. It would give sentencing judges unchecked discretion to sentence not only within the original guidelines range (as calculated on the basis of judge-found facts), but also within the range calculated solely on the basis of the jury verdict or guilty plea. While this would no doubt cure the constitutional problem by making variances sentences just as (un)appealable as within-guideline sentences, it would go further than necessary, as the Legislature obviously did not intend for the proportionality of non-guideline sentences to be insulated from appellate review.

The remedy most consistent with the Legislature's intent is to hold that the first sentence of MCL 769.34(10) is unenforceable as to any sentence involving a guideline range based on judge-found facts. The Court of Appeals is still permitted to apply a *presumption* of proportionality for within-guideline sentences, so long as "the rebuttability of the presumption is

real." *Rita*, 551 US at 366–367 (Stevens, J, concurring). A rebuttable presumption of proportionality for within-guideline sentences would seem to be more in keeping with the legislative intent than an unrebuttable presumption of proportionality for certain non-guideline sentences.

With these principles in mind, appellate proportionality review of non-departure sentences would take two forms. Where the sentencing guidelines are not calculated on the basis of judge-found facts, the proportionality of a within-guideline sentence would remain unreviewable under MCL 769.34(10). Where the sentencing guidelines *are* based on judge-found facts, however, appellate review for proportionality would be subject to the abuse of discretion standard articulated in *Babcock* and applied to the correct rule of decision. Put differently, the Court of Appeals would not ask whether the sentence was supported by substantial and compelling reasons, but rather would ask whether the sentencing court made a "reasonable" finding that the sentence ultimately imposed is proportional to the offense and offender under *Milbourn*, regardless of whether substantial and compelling reasons exist, and keeping in mind that "there will be more than one reasonable" finding as to the proportionality. *Babcock*, 469 at 269. And the appellate court (but not the trial court) is permitted to apply a rebuttable presumption of proportionality for within-guideline sentences.

CONCLUSION AND REQUESTED RELIEF

The Sixth Amendment does not displace state sentencing policy unless that policy "infringes on the province of the jury." *Lockridge*, 498 Mich at 380 (quoting *Blakely*, 542 US at 308). And MCL 8.5 requires the Court to preserve all constitutional applications of that policy. Respect for legislative intent means not only preserving as much of it as possible in the sentencing guidelines, but also following the directive in MCL 8.5. CDAM proposes a solution

that merely modifies the appropriate guidelines sentencing range and thereby preserves as many applications of the guidelines as possible, consistent with MCL 8.5 and the Legislature's intent to promote uniformity in sentencing. It also recommends that the Court preserve the principle of proportionality which was derived from Michigan's statutory sentencing scheme and developed to achieve the important end of reducing impermissible sentencing disparities. Finally, CDAM advocates for continued use of the abuse of discretion standard announced in *Babcock,* which has proven so workable that it is ubiquitous in Michigan jurisprudence.

Respectfully submitted,

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