

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN  
Plaintiff-Appellant,**

**v**

**MOHAMMAD MASROOR  
Defendant-Appellee.**

**No.**

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**L.C. No. 14-000869  
COA No. 322280, 322281, 322283**

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**APPLICATION FOR LEAVE TO APPEAL**

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B. Even the issue is viewed as properly preserved, review of sentences, including departures from the guidelines range, is for reasonableness, which is for an abuse of discretion and is not the same thing as review for proportionality under *Milbourn*, and a pre-*Lockridge* sentence that exceeds the guidelines and meets the more exacting standard of substantial and compelling reasons necessarily satisfies the abuse of discretion/reasonableness standard. . . . . -14-

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Statement of the Questions

I.

Where the minimum range of the guidelines calculation is not *enhanced* by the scoring of offense variables through judicial fact-finding, do MCL § 769.34(2) and (3) remain fully applicable to that sentence under MCL § 8.5, and so, given that the minimum range here was not enhanced by judicial fact-finding, were the guidelines mandatory, with review of the departure under the statutory standard as construed by this Court, and the departure justified?

Defendant answers: “NO”

The People answer: “YES”

II.

Should a remand occur in this case?

- A. Does the sentence imposed here, as a matter of law, constitute plain error under *People v. Lockridge*, the trial judge having sentenced the defendant in excess of the top of the guidelines range, for valid reasons?

Defendant answers: “YES”

The People answer: “NO”

further,

- B. Even if the issue is viewed as properly preserved, is review of sentences, including departures from the guidelines range, for reasonableness, which is for an abuse of discretion standard and not the same thing as review for proportionality under *People v. Milbourn*, and does a pre-*Lockridge* sentence that exceeds the guidelines and meets the more exacting standard of substantial and compelling reasons necessarily satisfy the abuse of discretion/reasonableness standard?**

**Defendant answers: “NO”**

**The People answer: “YES”**

### Statement of Facts

Defendant's sentence guideline range was 102-180 months. The trial judge sentenced defendant to concurrent terms for his convictions with a minimum of 35 years.<sup>1</sup> The Court of Appeals has remanded for a "Crosby hearing," solely because of the previous decision of that court in *People v. Steanhouse* adopting proportionality review as the standard for reasonableness review of sentences, stating it disagreed with that decision but was bound by it.<sup>2</sup> A conflict-resolution panel was ordered by the Court of Appeals, but that order then vacated, apparently due to a miscount of some sort in the polling. The People seek leave to resolve the conflict, and on other questions as set out in the accompanying brief. Further facts will be added as necessary in the argument.

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<sup>1</sup> See Sentence Transcript.

<sup>2</sup> *People v. Masroor*, \_\_ Mich. App. \_\_ (No. 322280, 322281, 322282, 11-24-2015), slip opinion, p.1 ("Because we are bound by this Court's recent decision in *People v Steanhouse*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (Docket No. 318329, issued October 22, 2015), pursuant to MCR 7.215(J)(1), we must remand this matter to the trial court for reconsideration of defendant's sentence at a hearing modeled on the procedure set forth in *United States v Crosby*, 397 F3d 103 (CA 2, 2005). Were we not obligated to follow *Steanhouse*, we would affirm defendant's sentence by applying the federal "reasonableness" standard described in *Gall v United States*, 552 US 38, 46; 128 S Ct 586; 169 L Ed 2d 445 (2007), and specifically rejected by our colleagues in *Steanhouse*").

## Argument

### I.

**Where the minimum range of the guidelines calculation is not *enhanced* by the scoring of offense variables through judicial fact-finding, MCL § 769.34(2) and (3) remain fully applicable to that sentence under MCL § 8.5, and so, given that the minimum range here was not enhanced by judicial fact-finding, the guidelines were mandatory, review of the departure was under the statutory standard as construed by this Court, and the departure was justified.**

First, it might be said that the People did not argue in the Court of Appeals that defendant's guidelines sentence range was not enhanced by judicial fact-finding. This is true. But it is true because, though the Court of Appeals said in its opinion that defendant objected under *Alleyne* at trial, and that "Appellate counsel raises the same argument,"<sup>3</sup> one searches defendant's brief in vain for *any* mention of a claim that the defendant's right to jury trial was infringed by the use of mandatory guidelines enhanced by judicial fact-finding. Defendant argued instead that the departure from the guidelines range was not justified by substantial and compelling reasons, and that the sentence constituted cruel and unusual punishment. No *Alleyne* argument of any sort was made, and so the People had no occasion to raise any contrary arguments. But the Court of Appeals having applied *Lockridge* here, though defense counsel raised no such issue, the People should now be free to raise any and all arguments against the application of that case. And *Lockridge* is in fact inapplicable because defendant's guidelines

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<sup>3</sup> *People v. Masroor*, \_\_ Mich. App. \_\_ (No. 322280, 322281, 322282, 11-24-2-15), slip opinion, p.6.

range was not, as will be explained, enhanced by judicial fact-finding. Where the application of the statutory scheme as written to a particular situation is constitutional, *it remains the law*.

It is critical here, then, both to ascertain that which this Court held in *Lockridge*, and the manner in which MCL § 8.5 applies. Surprisingly, though announcing a severance, which the People believe, as will be explained, is limited both in the opinion and necessarily by application of MCL § 8.5, this Court in its opinion *never mentioned the statute at all*. But the statute *must be applied* when severance of a portion of a statute is involved.

**A. This Court in *Lockridge* found the Michigan guidelines system deficient to “the extent to which the guidelines require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range, i.e. the ‘mandatory minimum’ sentence under *Alleyne*”<sup>4</sup>**

This Court did not in *Lockridge* hold that judicial fact-finding in sentencing is unconstitutional; indeed, *Alleyne*<sup>5</sup> itself disclaimed any such holding. Rather, it is only when a mandatory minimum sentence—and this Court found the minimum range of the guidelines calculated under the Michigan statutory scheme to constitute a “mandatory minimum” under *Alleyne*—is *enhanced* by judicial fact-finding, *and is mandatory*, that the right to jury trial has been compromised. Thus this Court’s holding that the constitutional deficiency of the Michigan system is “the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily increase the floor of the guidelines minimum sentence range*, i.e. the ‘mandatory minimum.’” This

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<sup>4</sup> *People v. Lockridge*, 498 Mich. 358, 364 (2015 (emphasis supplied)). In discussing the “constitutional error” identified by this Court in *Lockridge*, the People do not here concede that there *is* in fact a constitutional defect in the Michigan guidelines.

<sup>5</sup> *Alleyne v. United States*, 570 U.S. —, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

Court's limited holding is demonstrated by its repeated use of the phrase "to the extent that" in discussing the constitutional deficiency it identified, limiting its holding to those situations where the guidelines range is *enhanced* by judicial fact-finding, the Court concluding that under the statutory scheme the minimum range is mandatory. If, then, the minimum range is *not* enhanced by judicial fact-finding, there is no constitutional error in the mandatory nature of the guidelines for that sentence.

Again illustrating this point, this Court said:

From *Apprendi* and its progeny, including *Alleyne*, we believe *the following test provides the proper inquiry* for whether a scheme of mandatory minimum sentencing violates the Sixth Amendment: Does that scheme constrain the discretion of the sentencing court by *compelling an increase in the mandatory minimum sentence beyond that authorized by the jury's verdict alone*? 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. Stated differently, *to the extent that* OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury *verdict increase the floor of the guidelines range*, i.e. the defendant's "mandatory minimum" sentence, that procedure violates the Sixth Amendment.<sup>6</sup>

The mandatory nature of the guidelines scheme, then, is only unconstitutional, as this Court repeatedly said, "*to the extent that*" a minimum guidelines range is *enhanced* by judicial fact-finding. If a particular sentence is *not* so enhanced, then the statutory requirement that the sentence be within that range absent a statement of proper substantial and compelling reasons is perfectly constitutional.

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<sup>6</sup> *People v. Lockridge*, 498 Mich. at 374.

**B. This Court in *Lockridge* only severed the mandatory requirements of MCL § 769.34(2) and (3) “to the extent that [they] make[] the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory”<sup>7</sup>**

Where the guidelines range is scored in a particular case with an offense variable or variables (OV) found by judicial fact-finding, and the scoring of an OV by judicial fact-finding enhances the guidelines range, then under this Court’s holding in *Lockridge* the statutory requirement that the sentence be within that range absent a justification for departure of substantial and compelling reasons is unconstitutional. But where there is no such enhancement by judicial fact-finding, either because there is no OV scored by judicial fact-finding, or because the scoring of an OV by judicial fact-finding does not enhance the range, then application of the statutory requirements is not unconstitutional. Thus the limited nature of this Court’s remedy; the mandatory requirements in the statutory scheme are severed, said this Court, “to the extent that [they] make[] the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory.” Again, use of the phrase “to the extent that” is a limitation on this Court’s remedy for the constitutional deficiency it identified, limiting that remedy to curing the deficiency identified. But for situations outside the “extent that”—namely where the minimum range is *not* enhanced by judicial fact-finding—the statutory scheme is constitutional and remains applicable.

Though this limited severance cures the constitutional error, and though this Court said that it was severing the mandatory requirements “to the extent that” they make the sentencing

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<sup>7</sup> “To remedy the constitutional violation, we sever MCL 769.34(2) *to the extent that* it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory.” *People v. Lockridge*, 498 Mich. at 364 (emphasis supplied).

guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory, in other places of the opinion this Court used language that might be taken as suggesting that its severance remedy is to be applied even to situations where no constitutional error is occasioned by use of the statutory scheme as passed by the legislature; that is, where there is no enhancement of the minimum range of judicial fact-finding.<sup>8</sup> Leave should be granted to address this ambiguity and the confusion it has sewn, and, for reasons stated below, this Court should affirm that the severance it has directed applies only “to the extent that” the statutory scheme makes mandatory the minimum sentence range when that range is enhanced by judicial fact-finding, the Court of Appeals here having applied the severance remedy to a sentence that is not enhanced by judicial fact-finding.

**C. MCL § 8.5 requires that the severance remedy imposed by this Court be limited to those situations where the minimum range of the guidelines is enhanced by judicial fact-finding**

Though the legislature has directed the manner in which severance of provisions of statutes is to occur when a portion or application of a statutory scheme is held unconstitutional, neither this Court in *Lockridge* nor the Court of Appeals here made any mention *whatever* of the statutory requirements. MCL § 8.5 provides:

In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with *the manifest intent of the legislature*, that is to say:

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<sup>8</sup> “[W]e sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a ‘substantial and compelling reason’ to depart from the guidelines range in MCL 769.34(3).” *People v. Lockridge*, 498 Mich. at 364.

If any portion of an act *or the application thereof* to any person or circumstances shall be found to be invalid by a court, such invalidity *shall not affect the remaining portions or applications* of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, *and to this end acts are declared to be severable.*<sup>9</sup>

It is quite plain that this Court has found that certain applications of the statutory scheme in MCL § 769.34(2) and (3) are unconstitutional; that is, where they are applied to guidelines minimum ranges that are enhanced by judicial fact-finding. It is equally plain that where the guidelines minimum range is *not* enhanced by judicial fact-finding, application of MCL § 769.34(2) and (3) to the sentence process is not unconstitutional under *Lockridge*. Further, after severing the application of these provisions from those situations where this Court has determined their application is unconstitutional, the “remaining portion” of the scheme—its application to sentences where the minimum range is not enhanced by judicial fact-finding—is certainly “operable.” And so, the legislature having declared that where a statutory scheme has been declared unconstitutional as to certain applications that invalidity is not to affect the remaining applications of the act which can be given effect, this Court’s severance in *Lockridge* is necessary limited, as this Court said, “to the extent that” the statutory scheme applies to minimum sentence ranges that are enhanced by judicial fact-finding.

To be sure, this leaves a statutory scheme other than that enacted by the legislature, where the mandatory nature of the minimum range continues to apply to sentences not enhanced by judicial fact-finding, but not to sentences enhanced by judicial fact-finding, the latter being unconstrained, subject only to review for “reasonableness.” This cannot avoid the legislature’s

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<sup>9</sup> MCL § 8.5 (emphasis supplied).

directive in the severance statute. Of course, *whenever* a statutory scheme is found invalid as to some applications but not others, the statutory scheme as then applied is not that enacted by the legislature—but the legislature has directed that in this situation the scheme is to be applied where it can be given effect without the invalid application. To avoid limited severance on this ground is to render MCL § 8.5 a nullity. Here, the remaining “two-tiered” system is the result of this Court’s opinion in *Lockridge* and faithful application of MCL § 8.5; if the legislature is of the mind that in this situation it wishes something else, it is for the legislature to so say.

It may be argued that in *Booker*<sup>10</sup> itself the United States Supreme Court recognized that declaring the federal guidelines advisory only would apply to situations where mandatory application of the guidelines worked no constitutional wrong, yet the Court made the guidelines advisory in all circumstances nonetheless (over dissenting views). But there *is no federal severance statute*, and so the Court was free to make its “best guess” as to what Congress would have it do with the statutory scheme after the Court’s declared that its application in some situations was unconstitutional. This Court, to the contrary, is *not* free to take its best guess, but must faithfully apply MCL § 8.5.

It might also be said that this Court may make its best guess as to the will of the legislature because MCL § 8.5 says that its provisions do not apply where severance only to invalid applications of the statutory scheme “would be inconsistent with *the manifest*<sup>11</sup> *intent of the legislature.*” Again, this Court is not free to guess at the legislature’s intent in this

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<sup>10</sup> *United States v. Booker*, 543 U.S. 220, 233, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

<sup>11</sup> “Manifest” means, in this context, “easily understood or recognized.” Merriam-Webster Dictionary.

regard—whether the legislature wishes *not* to have the severance statute apply—rather, than intent must be made *manifest* by the legislature, and the legislature has not done so here. And the legislature knows how to make its intent manifest when it so desire:

Pursuant to section 8 of article 3 of the state constitution of 1963, it is the intent of the legislature to request by concurrent resolution the opinion of the supreme court as to the constitutionality of this 1976 amendatory act as amended. Notwithstanding section 5 of chapter 1 of the Revised Statutes of 1846, being section 8.5 of the Michigan Compiled Laws, if the supreme court's advisory opinion finds any portion of this act, as amended, to be invalid, *the entire act shall be invalid*.<sup>12</sup>

Enacting section 1. If any portion of this amendatory act or the application of this amendatory act to any person or circumstances is found invalid by a court, *it is the intent of the legislature that the provisions of this amendatory act are nonseverable and that the remainder of the amendatory act shall be invalid, inoperable, and without effect*.<sup>13</sup>

And, after all, applying the statutory scheme as written to *some* applications—where the guidelines range is not enhanced by judicial fact-finding—is closer to the legislative intent than applying the statutory scheme as written to *no* applications.

Here, 75 points were scored on the OV calculation. 50 points were scored under OV 13 for “continuing pattern of criminal behavior.” The OV is to be scored where “The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age, and the sentencing offense is first-degree criminal sexual conduct.”<sup>14</sup> Though an “offense variable,” the OV is actually more, at least in cases such

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<sup>12</sup>MCL. § 830.425 (emphasis supplied).

<sup>13</sup> PA 52, 2007, MCL § 168.615c (emphasis supplied) later later unconstitutional.

<sup>14</sup> MCL § 777.43(1).

as this one, a matter of counting, and is supported by the jury verdict, as the trial judge noted.<sup>15</sup> 15 points were scored for OV 10, “exploitation of a vulnerable victim.”<sup>16</sup> 10 points are scored if the defendant “exploited a victim’s . . . youth . . . or . . . abused his or her authority status,” and the points rise to 15 if “predatory conduct was involved.” For ease of analysis, it can be assumed hypothetically that the 5 additional points for predatory conduct involved judicial fact-finding, but the exploitation of the victim’s extreme youth (and even the abuse of defendant’s authority status as their uncle) are supported by the convictions here. The court scored 10 points under OV 4, psychological injury to victim<sup>17</sup>; again, for ease of analysis, it may be assumed that this scoring involved judicial fact-finding. This leaves a total of 60 points for the OVs. Defendant’s range was a C-IV when scored at 75 points. A C-IV includes OV scoring of 60-79 points. Removing the 10 points for psychological injury, and the 5 points for predatory conduct, and the defendant *remains a C-IV*. Defendant’s guideline range was *not* enhanced by judicial fact-finding. Mandatory application of the legislature’s statutory scheme in this circumstance is not unconstitutional, and under the severance statute, that scheme thus governs here.

Faithful application of MCL § 8.5 requires that severance here be limited, as this Court said in *Lockridge*, “to the extent that” application of the guidelines in a particular case would result in a minimum range enhanced by judicial fact-finding. Because the Court of Appeals here remanded, without even addressing whether the guidelines range was enhanced by judicial fact-

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<sup>15</sup> ST, 17-19, 52.

<sup>16</sup> MCL § 777.40.

<sup>17</sup> MCL § 777.34.

finding, it erred, an error that court also made in the published opinion in *People v. Terrell*,<sup>18</sup> that panel expressly finding that a “Crosby remand” is required *even when the guidelines range is not enhanced by judicial fact-finding*. This cannot be squared with Michigan’s severance statute, not discussed in *Terrell*, and so leave should be granted.

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<sup>18</sup> *People v. Terrell*, \_\_Mich. App.\_\_, 2015 WL 5704463 (No. 321573, 2015).

## II.

No remand should occur in this case, as:

- A. The *Alleyne/Lockridge* issue was not properly preserved, and under *People v. Lockridge* the sentence imposed here was not, as a matter of law, plain error, the trial judge having sentenced the defendant in excess of the top of the guidelines range, for valid reasons, which should end review of the sentence; further,
- B. Even the issue is viewed as properly preserved, review of sentences, including departures from the guidelines range, is for reasonableness, which is for an abuse of discretion and is not the same thing as review for proportionality under *Milbourn*, and a pre-*Lockridge* sentence that exceeds the guidelines and meets the more exacting standard of substantial and compelling reasons necessarily satisfies the abuse of discretion/reasonableness standard.

### Standard of Review

If the Court views the mandatory application of the guidelines to be severed even when the statutory scheme may constitutionally be applied, then questions regarding the proper application of *Lockridge* here arise. The Court of Appeals viewed the issue as preserved, saying that “Trial counsel objected to the scoring of defendant's guideline sentence pursuant to *Alleyne v. United States*.”<sup>19</sup> But this is altogether too generous. Defense counsel stated only that he wished to make “a general objection to all of the OVs” under *Alleyne* for purposes of preservation,<sup>20</sup> and this is not sufficient to preserve a claim that any particular OV was scored by

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<sup>19</sup> *People v. Masroor*, \_\_ Mich. App. \_\_ (No. 322280, 322281, 322282, 11-24-2-15), slip opinion, p.6.

<sup>20</sup> ST, 10.

way of judicial fact-finding.<sup>21</sup> And again, the Court of Appeals statement that defendant objected under *Alleyne* at trial, and that “Appellate counsel raises the same argument,”<sup>22</sup> is simply inaccurate. No such issue was raised in defendant’s brief. The People will thus first address the issue under the standard of plain error, and then under that for preserved error. Further, the construction of the reasonableness review standard is a question of law, reviewed *de novo*.<sup>23</sup> Because *People v Steanhouse* requires, contrary to this Court’s opinion in *People v. Lockridge*, a remand even where plain error does not exist, the People begin there.

## Discussion

- A. The holding and rationale of *People v. Steanhouse*<sup>24</sup> are flatly inconsistent with *Lockridge*,<sup>25</sup> as this Court directed in *Lockridge* that as to sentences before that opinion where the *Alleyne*<sup>26</sup> issue was not preserved, plain error is *not* shown where that sentence departed from the guidelines range**

In *Steanhouse*, defendant’s guidelines range was 171-285 months, and the trial judge sentenced him to 360-720 months, a departure, then, of 85 months from the top of the range. There was no claim at sentencing that the guidelines were scored with judicially found facts as to

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<sup>21</sup> Cf. *People v. Bashans*, 80 Mich. App. 702, 705 (1978).

<sup>22</sup> *People v. Masroor*, p. 6.

<sup>23</sup> *People v. Carpentier*, 446 Mich. 19 (1994).

<sup>24</sup> *People v. Steanhouse*, No. 318329, 2015 WL 6394195 (2015).

<sup>25</sup> *People v. Lockridge*. 498 Mich. 358 (2015).

<sup>26</sup> *Alleyne v. United States*, 570 U.S. —; 133 S Ct 2151; 186 L.Ed.2d 314 (2013).

some of the offense variables. Review was thus for plain error, as the court recognized,<sup>27</sup> though it failed to apply that standard as directed in *Lockridge*.

The sentence in *Steanhouse* was a departure from the guidelines range. The sentence in *Lockridge* was a departure from the guidelines range. The *Alleyne* issue was unpreserved in *Steanhouse*. The *Alleyne* issue was unpreserved in *Lockridge*. Lockridge received no relief, this Court finding no plain error because of the departure.<sup>28</sup> Steanhouse received what is known now as a “Crosby remand”: “Defendant may elect to forego resentencing by providing the trial court with prompt notice of his intention to do so. If ‘notification is not received in a timely manner,’ the trial court shall continue with the *Crosby* remand procedure as explained in *Lockridge*.”<sup>29</sup> Something is plainly wrong with this picture.

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<sup>27</sup> “[D]efendant raises an *Apprendi/Alleyne* challenge, arguing that his Sixth and Fourteenth Amendment rights were violated because the trial court's scoring of OV 3, OV 4, OV 5, and OV 6 was based on impermissible judicial fact-finding, which increased the floor of the minimum range recommended by the sentencing guidelines. Because ‘defendant did not object to the scoring of the OVs at sentencing on *Apprendi/Alleyne* grounds, ... our review is for plain error affecting substantial rights.’ *Lockridge*, \_\_\_ Mich. at \_\_\_-\_\_\_-\_\_\_; slip op at 30.” *People v. Steanhouse*, \_\_\_ Mich. App. \_\_\_, 2015 WL 6394195 (No. 318329, 2015) (slip opinion, p. 21).

<sup>28</sup> “Assuming arguendo that the facts necessary to score OV 5 at 15 points and OV 9 and OV 10 at 10 points each were not established by the jury's verdict or admitted by the defendant, and yet those facts were used to increase the defendant's mandatory minimum sentence, violating the Sixth Amendment, the defendant nevertheless is not entitled to resentencing. Because he received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for *departing* from that range), the defendant cannot show prejudice from any error in scoring the OVs in violation of *Alleyne*.” *People v. Lockridge*, 498 Mich. at 393-394

<sup>29</sup> *Steanhouse*, slip opinion, p. 25.

The flaw is that the *Steanhouse* panel—as cogently demonstrated by Judge O’Connell in his dissent in *People v. Shank*<sup>30</sup>—failed to follow this Court’s binding precedent when it remanded. As Judge O’Connell said in *Shank*, “[t]he answer to this question [whether Shank was entitled to resentencing] hinges on whether Shank, who failed to preserve an *Alleyne* claim below, has shown plain error. I conclude that *Lockridge* addresses the question in this case perfectly and answers it in the negative. Shank is not entitled to resentencing.”<sup>31</sup> So here. Judge O’Connell viewed the error in *Steanhouse* as so clear he did not see the need for a conflict panel, saying the court

need not convene a conflict panel to follow a rule articulated by the Supreme Court, even if a decision of this Court conflicts with the Supreme Court's decision. . . . Until the Supreme Court's decision is overruled by the Supreme Court itself, the rules of stare decisis require this Court to follow its decision. . . . Under the rule of stare decisis, this Court must follow a decision of the Supreme Court even if another panel of this Court decided the same issue in a contrary fashion. . . . Because *Steanhouse* ignored the clear directives of the Michigan Supreme Court, it is against the rules of stare decisis to follow the procedures in that case. I cannot in good conscience violate the rules articulated in *Lockridge*.

A remand under *United States v. Crosby*, 397 F 3d 103 (CA 2, 2005), is necessary to determine whether prejudice resulted from an error. *People v. Stokes*, \_\_\_ Mich.App \_\_\_; \_\_\_ NW2d \_\_\_; (2015) slip op at 11. The *Lockridge* court stated that no prejudice could result from the type of “error” involved in this case.<sup>32</sup>

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<sup>30</sup> *People v. Shank*, No. 321534, 2015 WL 7262670 (2015).

<sup>31</sup> *People v. Shank*, No. 321534, 2015 WL 7262670 (O’Connell, J., dissenting).

<sup>32</sup> *People v. Shank*, No. 321534, 2015 WL 7262670.

Judge O’Connell is quite correct, and the *Steanhouse* error is curious. The panel itself said that review was for plain error, and that under *Lockridge* defendant *could not* show plain error.<sup>33</sup> But rather than that being the end of the matter—as it was in *Lockridge*—defendant not having, as the court said, shown plain error, the panel continued on to treat the matter as though the error were preserved, saying “However, under *Lockridge*, this Court must review defendant’s sentence for reasonableness,”<sup>34</sup> saying in an accompanying footnote that “Because a trial court is no longer required to provide a substantial and compelling reason for a departure from the sentencing guidelines under *Lockridge*, we need not review defendant’s argument specifically concerning whether the reasons articulated by the trial court were substantial and compelling.”<sup>35</sup> But this is *not* what this Court did in *Lockridge* when considering plain error and a departure from the guidelines. The Court in fact considered the reasons for the departure, saying “we agree with the Court of Appeals that the reasons articulated by the trial court adequately justified the minimal

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<sup>33</sup> “The trial court departed from the minimum range recommended by the sentencing guidelines. Therefore, even if we assume that the facts necessary to score OV 3, OV 4, OV 5, and OV 6 were not established by the jury’s verdict or admitted by defendant, defendant cannot establish plain error. . . . defendant received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for departing from that range), . . . defendant cannot show prejudice from any error in scoring the OVs in violation of *Alleyne*. [*Id.* at —\*—\*—\*—\*; slip op at 31.]” *People v. Steanhouse*, slip opinion, p. 21. The statement that the guidelines were “improperly scored” if some OVs were scored with judicial fact-finding is incorrect. The guidelines become advisory under *Lockridge*, but judicial fact-finding of OVs continues. The error *Lockridge* identified was mandatory ranges employing judicially found facts, not judicial fact-finding.

<sup>34</sup> *People v. Steanhouse*, slip opinion, p. 21.

<sup>35</sup> *People v. Steanhouse*, slip opinion, p. 21, accompanying footnote 14.

(10–month) departure above the top of the guidelines minimum sentence range.”<sup>36</sup> In *Lockridge*, then, because the sentence was a justified departure, plain error was not shown, and the inquiry *was at an end*. That was precisely the situation in *Steanhouse*, and the panel should have left the question of how the reasonableness inquiry is to be undertaken to another case with the issue properly preserved. The panel failed, as pellucidly laid out by Judge O’Connell in *Shank*, to follow *Lockridge*. This Court said there that “We conclude that all defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) *whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry.*”<sup>37</sup> And perhaps even more plainly revealing the error in *Steanhouse*, this Court said specifically that:

In cases such as this one that involve a minimum sentence that is an upward departure, a defendant *necessarily cannot show plain error* because the sentencing court has already clearly exercised its discretion to impose a *harsher* sentence than allowed by the guidelines and expressed its reasons for doing so on the record. It defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory. Thus, *we conclude that as a matter of law, a defendant receiving a sentence that is an upward departure cannot show prejudice and therefore cannot establish plain error.*<sup>38</sup>

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<sup>36</sup> *People v. Lockridge*, 498 Mich. at 456 (footnote 2).

<sup>37</sup> *People v. Lockridge*, 498 Mich.at 393-394.

<sup>38</sup> *People v. Lockridge*, 498 Mich.at 395.

After all, a departure that is justified by the stringent measure of substantial and compelling reasons is reasonable.<sup>39</sup>

Here, the top end of the guidelines range was 15 years (180 months). The trial judge sentenced to a minimum of 35 years (420 months), saying the case “cried out” for a departure.<sup>40</sup> While, the judge said, every sexual assault on a child under 13 is horrible, the present case was “uniquely vile and horrible for many reasons,” including that there were three victims, not one, who were family members, and who trusted the defendant.<sup>41</sup> MCL § 769.34(3)(b) provides that departures from the guidelines cannot be based “on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range *unless* the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given *inadequate* or disproportionate weight” (emphasis supplied). The trial judge said that “there are any number of these guidelines variables that could be said to have been inadequately counted or insufficiently counted in this case,”<sup>42</sup> and began with PRV 7.

As the trial judge noted, “there’s a maximum of 20 point awarded for contemporaneous criminal acts.”<sup>43</sup> The court viewed that scoring as inadequate given the number of

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<sup>39</sup> On the other hand, however, in order to be reasonable, a departure after *Lockridge* need not be justified by substantial and compelling reasons.

See *infra*.

<sup>40</sup> ST, 47.

<sup>41</sup> ST, 48.

<sup>42</sup> ST, 50.

<sup>43</sup> ST, 50.

contemporaneous convictions here, and said “if we were to give the defendant ten points for each of the contemporaneous criminal acts that he committed, and this is objective and verifiable . . . . on the basis of the verdict alone we can easily score 140” points.<sup>44</sup> But, said the judge, “there are other OVs.” 10 points are scored for a psychological injury; there were three victims, and so defendant could be given “30 points if we were using OV 4 as a springboard for a *proportionality description* of a departure reason. And that’s objective and verifiable. There were three victims.”<sup>45</sup> Further, with regard to OV 13, concerning scoring for “three or more sexual penetrations against a person,” the trial judge said that “consistent with the jury’s verdict . . . . there were vastly more those acts that they [the jury] found. And that’s objective and verifiable.”<sup>46</sup>

Moving to whether a departure was justified, the trial judge said “And is it compelling and substantial? Well, I don’t know how it isn’t in this case,”<sup>47</sup> describing the case as “one of the most horrific and horrible sexual abuse crimes I’ve seen on so many levels.”<sup>48</sup> Determining a proportionate departure, the trial judge looked to those objective and verifiable factors he had identified by way of finding that certain statutory factors had been given inadequate weight, as MCL § 769.34(3)(b) authorizes, and added points to those variables to reach a guidelines range to guide the departure, that range being 250-450 months. The judge found that a sentence of 35

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<sup>44</sup> ST, 51.

<sup>45</sup> ST, 52.

<sup>46</sup> ST, 52.

<sup>47</sup> ST, 52.

<sup>48</sup> ST, 53, the court describing the relationship between the defendant and the victims.

years, which was within that range, was the appropriate sentence, noting that the “guidelines for a variety of reasons that I’ve already said don’t even begin to adequately address the heinous nature of the crimes the defendant was convicted of.”<sup>49</sup>

And so the trial judge identified objective and verifiable factors, going directly to the guidelines to find, as the statute permits, that certain guidelines variables were inadequately scored. The judge cabined his departure by using these guidelines factors as re-scored to take account of the objective and verifiable factors he had identified, and gave a sentence within that range. This complies with *People v. Smith*<sup>50</sup> by explaining the degree of departure reached, and cannot be said to be an abuse of discretion. The Court of Appeals found that

the trial court's explanation for defendant's departure sentence is more than adequate. The court considered the sentence called for under the guidelines, and explained in considerable detail why a harsher sentence was needed for someone who had committed the number of serious sex crimes as had defendant. The court highlighted the highly unusual circumstances presented in this case, particularly that defendant had abused three sisters, threatened all of them in different and terrifying ways, and used the complainants' deeply-held religious beliefs to both conceal and further his illicit behavior.

The trial court's observation that this was not an ordinary criminal sexual conduct case is well-supported by the record, as is the continuing emotional toll of defendant's misconduct endured by the three complainants. The guidelines do not take into account the seriousness of a longstanding pattern of sex crimes committed against three minors living together in the same home, or a defendant who uses his position as a religious and cultural leader and simultaneously as an instructor in the complainants' family to perpetrate his abuse. The record is rife with evidence that defendant's sexual abuse of all three complainants devastated their

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<sup>49</sup> ST, 53-54.

<sup>50</sup> *People v. Smith*, 482 Mich. 292 (2008).

teenage years, and triggered tragic emotional repercussions that have continued into their adulthood. It is obvious to us that in selecting its sentence, the trial court was motivated by the need to impose a sentence that truly fit defendant's crimes, rather than to sensationalize the surrounding circumstances or to appease community sentiments. Taking into account the totality of the circumstances, defendant's sentence is reasonable.<sup>51</sup>

The departure, reviewed under the statutory scheme created by the legislature, was appropriate.

If this Court were to find the issue preserved, then the Court of Appeals erred in *Steanhouse* in adopting—re-adopting, as it were—the *Milbourn* proportionality standard. The panel here followed that holding only because required to, and, curiously, after having entered an order for a conflict-resolution panel, vacated that order as having been premised on a “clerical error.”<sup>52</sup>

**B. The *Booker*<sup>53</sup> remedy for the Sixth Amendment “problem”: “in for a penny . . . .”<sup>54</sup>**

To be clear at the outset, the People believe *Lockridge* was wrongly decided. That case treats the minimum term of the required indeterminate sentence as though it were the sentence itself—as in the federal system, where a determinate term is given—with the maximum term of the sentence meaningless in the inquiry. But the conviction itself authorizes service of the maximum of the indeterminate term, and release any time before service of the maximum is an executive determination by the Parole Board, not a judicial one, the minimum term being simply

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<sup>51</sup> *People v. Masroor*, slip opinion, p. 20-21.

<sup>52</sup> See orders of December 17, 2015, and December 18, 2015, the latter vacating the former, “a clerical error having been made in the polling.” A miscount, perhaps?

<sup>53</sup> *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

<sup>54</sup> See e.g. Charles Dickens, *The Old Curiosity Shop*: “Now, gentlemen, I am not a man who does things by halves. Being in for a penny, I am ready as the saying is to be in for a pound.”

the first date at which the prisoner may receive parole consideration (and many serve past it). But be that as it may, this Court held otherwise, and has, to remedy the Sixth Amendment violation it perceives exists to “the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily increase the floor of the guidelines minimum sentence range*, i.e. the ‘mandatory minimum,’” adopted the remedy employed by the United States Supreme Court to cure the Sixth Amendment deficiency that Court found with the federal guidelines system: “*Consistently with the remedy imposed by the United States Supreme Court in United States v. Booker . . . we hold that a guidelines minimum sentence range calculated in violation of Apprendi and Alleyne is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness.*”<sup>55</sup> If the reasonableness review under *Lockridge* is intended to be consistent with that mandated by *Booker* in the federal system,<sup>56</sup> how is reasonableness ascertained there?

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<sup>55</sup> *People v. Lockridge*, 498 Mich. at 365 (emphasis supplied).

<sup>56</sup> See also *People v. Lockridge*, 498 Mich. at 392, citing *Booker*: “A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. *Booker*, 543 U.S. at 261, 125 S.Ct. 738.”

**1. *Booker, Rita*,<sup>57</sup> *Gall*,<sup>58</sup> and *Kimbrough*<sup>59</sup>: reasonableness review is not proportionality review, but review for an abuse of discretion**

**a. *Booker***

After finding the federal guidelines violative of the Sixth Amendment because mandatory, the Court made them advisory, but maintained a standard of review. The Court severed 18 U.S.C. § 3553(b)(1), providing that the guidelines were mandatory, and also severed 18 U.S.C. § 3742(e), which provided standards of review on appeal, including *de novo* review of departures from the applicable guidelines range. This left, however, 18 U.S.C. § 3553(a), concerning factors to be considered by the sentencing judge:

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

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<sup>57</sup> *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007).

<sup>58</sup> *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007).

<sup>59</sup> *Kimrough v. United States*, 552 U.S. 85 128 S.Ct. 558, 169 L.Ed.2d 481 (2007).

- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
    - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
    - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
  - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
  - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
  - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

From this statute, and the fact that until 2003 the statutory standard for reviewing departures had been reasonableness, the Court teased out a reasonableness standard of review for all sentences,

with the guidelines, and the factors listed in § 3553(a), to be considered, and guiding “appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”<sup>60</sup>

**b. Rita**

Another facet was added to federal reasonableness review here. After *Booker*, several circuits held that an appellate court may presume that a sentence *within* the guidelines range is reasonable. Rita argued at sentencing for a sentence below the guidelines range, and the trial judge said that he could not find that the range was inappropriate, and sentenced near the bottom of the range. The Fourth Circuit on review said that “a sentence imposed within the properly calculated Guidelines range. . . is presumptively reasonable,” noting that while in an individual case a sentence outside the guidelines range might be appropriate, it had “no reason to doubt that most sentences will continue to fall within the applicable guideline range,” rejecting Rita’s arguments that the sentence was unreasonable.<sup>61</sup>

The Court held use of this rebuttable presumption permissible, emphasizing that it is an appellate presumption, not a trial one—“Given our explanation in *Booker* that appellate ‘reasonableness’ review merely asks *whether the trial court abused its discretion*, the presumption applies only on appellate review.” At sentencing itself,

The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. . . .He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the “heartland” to which the Commission intends individual Guidelines to apply, . . . perhaps because the Guidelines sentence

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<sup>60</sup> *United States v. Booker*, 125 S. Ct. at 765-766.

<sup>61</sup> *Rita v. United States*, 127 S. Ct. at 2462.

itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless . . . Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. . . . In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.<sup>62</sup>

**c. Gall**

In *Gall* the Court considered reasonableness review applied not to a sentence within the guidelines, as in *Rita*, but at variance with—a departure from—the guidelines range. The Government appealed a sentence substantially below the bottom of the range, and the Eighth Circuit applied proportionality review to the variance; that is, in that circuit's view, a “sentence outside of the Guidelines range must be supported by a justification that ‘is proportional to the extent of the difference between the advisory range and the sentence imposed.’” Because the sentence imposed was a 100% downward variance, the court held that such a dramatic variance “must be—and here was not—supported by extraordinary circumstances.”<sup>63</sup>

The Supreme Court rejected proportionality review of departures from the guidelines range, saying “we shall explain why the Court of Appeals' rule requiring ‘proportional’ justifications for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker* . . . .”<sup>64</sup>

In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from

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<sup>62</sup> *Rita v. United States*, 127 S. Ct. at 2465 (emphasis supplied).

<sup>63</sup> *Gall v. United States*, 128 S. Ct. at 594.

<sup>64</sup> *Gall v. United States*, 128 S. Ct. at 594.

the Guidelines. We reject, however, an appellate rule that requires “extraordinary” circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.<sup>65</sup>

The Court held that the approach of the Eighth Circuit came “too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”<sup>66</sup>

The Court also disapproved of “*quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines. . . .*”<sup>67</sup>; further, these approaches, said the Court, “reflect a practice—common among courts that have adopted ‘proportional review’—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing *decisions—whether inside or outside the Guidelines range.*”<sup>68</sup>

In the end,

[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district 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

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<sup>65</sup> *Gall v. United States*, 128 S. Ct. at 594.

<sup>66</sup> *Gall v. United States*, 128 S. Ct. at 595.

<sup>67</sup> *Gall v. United States*, 128 S. Ct. at 595 (emphasis supplied).

<sup>68</sup> *Gall v. United States*, 128 S. Ct. at 596 (emphasis supplied).

sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court *should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard*. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. . . . But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.<sup>69</sup>

The Court emphasized that the sentencing judge may not presume that the Guidelines range is reasonable, but must make an individualized assessment based on the facts presented. If the sentencing judge determines that a departure from the range is appropriate, the sentencing judge must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. The Court found it ‘uncontroversial that a major departure should be supported by a more significant justification than a minor one.’<sup>70</sup> But in all cases, review is for abuse of discretion.

**d. *Kimbrough***

Here, the question was whether a sentence can be reasonable if the sentencing judge rejects a guidelines policy. Under federal statute, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine, and the Fourth

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<sup>69</sup> *Gall v. United States*, 128 S. Ct. at 597 (emphasis supplied)..

<sup>70</sup> *Gall v. United States*, 128 S. Ct. at 597.

Circuit held that a departure from the guidelines was unreasonable when based on a disagreement with scoring in this fashion. The Supreme Court disagreed. The Court upheld the departure as reasonable, noting that even the Government agreed that “courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines,”<sup>71</sup> finding no reason to reach a different result in the circumstances of crack cocaine versus powder cocaine.

## 2. Federal circuit court applications of *Booker* reasonableness review

The Supreme Court has said that reasonableness review is review for abuse of the sentencing court’s discretion, whether the sentence imposed is inside or outside of the guidelines range. The reviewing court may presume that a guidelines sentence is reasonable, but that is an appellate presumption, and not one to be indulged by the trial court. Neither a proportionality review, nor a requirement of compelling circumstances, is appropriate for review of departures from the guidelines range, although a more significant explanation of reasons for the sentence is expected the greater the departure. Review remains, however, for abuse of discretion.

Federal courts have recognized that proportionality review is not appropriate.<sup>72</sup> Review is for abuse of discretion, a familiar concept to the federal courts, as well as to Michigan courts. “[A]n abuse of discretion occurs only when no reasonable person could take the view adopted

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<sup>71</sup> *Kimbrough v. United States*, 128 S. Ct. at 570.

<sup>72</sup> See e.g. *United States v. Richert*, 662 F.3d 1037 (CA 8, 2011); *United States v. Irely*, 612 F.3d 1160 (CA 11, 2010); *United States v. Guest*, 564 F.3d 777, 779 (CA 6, 2009) (“See *Gall*, . . . rejecting proportionality as an aspect of appellate review”); *United States v. Tomko*, 562 F.3d 558, 590 (CA 3, 2009) (“*Gall* . . . invalidated the ‘proportionality principle’”).

by the trial court.”<sup>73</sup> And so in the sentencing context, when a sentence under the federal guidelines, whether inside or outside the guidelines range, is reviewed, review is “highly deferential,”<sup>74</sup> and the sentence must be affirmed “unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.”<sup>75</sup>

**3. The panel here was correct in the approach it would have taken but for *Steanhouse***

The People will not reiterate the majority’s analysis in depth here, but the approach the panel majority *would* have taken but for *Steanhouse* is consistent with the federal approach, and rightly rejects proportionality review.<sup>76</sup> Given the conflict between the two opinions, and the Court of Appeals setting aside of its conflict-resolution order, this Court should grant leave to resolve the conflict, and also grant leave in *Steanhouse* and *People v. Terrell*.

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<sup>73</sup> *United States v. Torres*, \_\_\_ F.3d \_\_\_, 2015 WL 7770068, at 2 (CA 7, 2015). And see *United States v. Green*, 617 F.3d 233, 239 (CA 3, 2010) (An abuse of discretion occurs only where the decision is “arbitrary, fanciful, or clearly unreasonable—in short, where no reasonable person would adopt the district court’s view”). It is often said in Michigan that an abuse of discretion occurs when the result is outside the “principled range of outcomes.” See e.g. *People v. Blackston*, 481 Mich. 451, 460 (2008).

<sup>74</sup> *United States v. Bungar*, 478 F.3d 540, 543 (CA 3, 2007).

<sup>75</sup> *United States v. Tomko*, 562 F.3d 558, 568 (CA 3, 2009) (en banc).

<sup>76</sup> *People v. Masoor*, slip opinion, p. 19-21.

**Relief**

Wherefore, the People respectfully request that leave to appeal be granted.

Respectfully submitted,

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