

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

- vs -

Supreme Court No. 152946

MOHAMMAD MASROOR,

Court of Appeals Nos. 322280
322281
322282

Defendant-Appellee.

Wayne County Circuit Court
Nos. 2014-000869-FC
2014-000858-FC
2014-000857-FC

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_____ /

DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

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COUNTER STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

The Plaintiff-Appellant filed its Application for Leave to Appeal, pursuant to MCR 7.302, from a published Per Curiam Opinion issued by the Court of Appeals on November 24, 2015 in which that Court vacated the Defendant-Appellee's sentences and remanded his case to the Wayne County Circuit Court for resentencing pursuant to the decision previously made by another panel of the Court of Appeals in *People v Steanhouse*, Docket No. 318239, issued on October 22, 2015. (Gleicher, P.J., Sawyer and Murphy, JJ.)

The Appellee was convicted, following a jury trial, of ten counts of first degree criminal sexual conduct (CSC), contrary to MCLA 750.520b, and five counts of second degree CSC, contrary to MCLA 750.520c. He was sentenced to serve ten concurrent terms of from thirty-five years to fifty years in prison pursuant to his ten convictions for first degree CSC. He was also sentenced to serve five concurrent terms of from ten years to fifteen years in prison pursuant to his five convictions for second degree CSC.

The Plaintiff-Appellant has argued in its application that the decision of the Court of Appeals is erroneous and that it should be reversed.

The Defendant-Appellee seeks relief in the form of an opinion and order from this Court which will affirm the decision of the Court of Appeals, vacate the ten sentences issued by the Wayne County Circuit Court pursuant to his ten convictions for first

degree CSC and remand this matter to the Wayne County Circuit Court for a resentencing hearing to be conducted consistent with the ruling made in *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015). That decision requires that sentences be reviewed for reasonableness and that they not constitute an abuse of discretion.

The Defendant-Appellee believes that the decision of the Court of Appeals to remand his case to the trial court for resentencing - - even though it issued that order only to conform with the precedent set in *People v Steanhouse*, supra, -- should be upheld because he should have the benefit of a sentencing hearing conducted without judicial fact finding in accordance with this Court's decision in *People v Lockridge*, supra.

COUNTER STATEMENT OF QUESTION PRESENTED

QUESTION NO. 1: DID THE TRIAL COURT JUDGE ABUSE HIS DISCRETION WHEN HE IMPOSED UNREASONABLE SENTENCES OF FROM THIRTY-FIVE YEARS TO FIFTY YEARS IN PRISON PURSUANT TO THE DEFENDANT-APPELLEE'S TEN JURY TRIAL BASED CONVICTIONS FOR FIRST DEGREE CRIMINAL SEXUAL CONDUCT, WHERE THE MINIMUM SENTENCES EXCEEDED THE HIGH END OF THE NOW ADVISORY SENTENCING GUIDELINES' MINIMUM SENTENCE RANGE BY TWENTY YEARS?

PLAINTIFF-APPELLANT'S ANSWER: NO

DEFENDANT-APPELLEE'S ANSWER: YES

TRIAL COURT'S ANSWER: NO

COURT OF APPEALS' ANSWER: NO

COUNTER CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On May 2, 2014 the Defendant-Appellee, Mohammad Masroor, was found guilty of ten counts of first degree criminal sexual conduct (CSC), contrary to MCLA 750.520b, and five counts of second degree CSC, contrary to MCLA 750.520c, following a five day jury trial conducted in the Wayne County Circuit Court. (T 5-2-14 pp 38-41) The Hon. Michael M. Hathaway presided over the trial. (T 4-28-14 p 24) The defendant was originally charged in three separate cases all of which were consolidated for one trial. (T 4-18-14 p 22)

Each of the defendant's three cases involved a different complainant. (T 4-28-14 pp 49-52) Each complainant was his biological niece. (T 4-28-14 p 52) In L.C. No. 14-000858-FC the defendant was charged with four counts of first degree CSC and two counts of second degree CSC against Rashida Shikder both while she was less than thirteen years of age and between thirteen and sixteen years of age. (T 4-28-14 pp 51-52) In L.C. No. 14-000869-FC he was charged with four counts of first degree CSC and two counts of second degree CSC against Musammat Khadija. (T 4-28-14 p 51) In L.C. No. 14-000857-FC he was charged with two counts of first degree CSC and two counts of second degree CSC against Musammat Aysha Begum. (T 4-28-14 pp 50-51) All of the sexual assaults were alleged to have occurred between February 1, 2000 and December 31, 2000. (T 4-28-14 p 51)

Rashida Shikder testified that she was born on March 1, 1987

and that in January of 2000 she lived with her parents and siblings at 6148 Georgia St. in Detroit when the defendant, her father's brother, came from Bangladesh to live with her family. (T 4-29-14 pp 36-38) She stated that she was being home schooled at the time and that, within a few days of his arrival, the defendant fondled her breast. (T 4-29-14 p 42) She said that he inserted his finger and his penis into her vagina within one week of the day he moved into her home. (T 4-29-14 p 47)

Ms. Shikder testified that when she asked her parents to allow her to attend public school the defendant convinced them to keep her at home and to remove her younger sister, Khadija, from public school. (T 4-29-14 pp 48-49) She stated that during 2000, 2001 and 2002 he had sex with her whenever he had the chance. (T 4-29-14 pp 69-70) She said that he touched her almost every day while he lived with her family during 2000. (T 4-29-14 p 69) She said that she was married and that in 2006, at the time of her engagement, she told her husband what the defendant had done to her. (T 4-29-14 p 72) She said that she then told her parents. (T 4-29-14 pp 72-73)

Musammat Khadija testified that she was born on August 5, 1988 and that she first met the defendant, her uncle, in January of 2000 when he came to live with her family at 6148 Georgia St. in Detroit. (T 4-29-14 pp 157-160) She stated that, at first, he fondled her breast over her clothing but then started touching her breast under her clothing. (T 4-29-14 p 161) She said that during

2000 he began to insert his finger into her vagina. (T 4-29-14 pp 162-163) She said that he also put his penis into her vagina. (T 4-29-14 p 164) She said that she was removed from public school, and home schooled by the defendant, during 2000. (T 4-29-14 pp 166-167) She said that he told her parents that she must not attend public school because she was at the age of puberty. (T 4-29-14 p 166)

Musammatt Khadija testified that the sexual assaults occurred during 2000, 2001 and 2002. (T 4-29-14 p 169) She stated that the defendant told her that, if she told anyone about them, no one would believe her and that she kept quiet because she believed him. (T 4-29-14 p 172) She said that he made her feel it was her fault that he was doing the sexual things with her. (T 4-29-14 pp 174-175) She said that when the defendant moved out of her home with his own family he continued to see her and to have sexual intercourse with her. (T 4-29-14 pp 177-178) She said that she eventually told her sister, Rashida, what was happening to her. (T 4-29-14 p 178)

Musammatt Aysha Begum testified that she was the youngest of herself and her two sisters, Rashida Shikder and Musammatt Khadija, and that the defendant was her uncle. (T 4-30-14 p 46) She stated that she was born on November 25, 1990 and that she first met the defendant in 2000 when he came to live with her family on Georgia St. in Detroit. (T 4-30-14 p 47) She said that in the beginning of 2000 she fell asleep in his room and woke up while he was

placing his penis in her hand. (T 4-30-14 pp 48-49) She said that he touched her more than ten times in both her own home and in the house where the defendant lived after his family arrived in the middle of 2000. (T 4-30-14 pp 49-50)

Ms. Begum testified that the defendant approached her from behind in the computer room at her house while she was standing behind her father as he sat at the computer. (T 4-30-14 pp 52-53) She stated that he inserted his finger into her vagina and fondled her breast while her father's back was turned. (T 4-30-14 pp 52-53) She said that she did not tell her father because she was not sure how he would react. (T 4-30-14 p 55) She said that she was taken out of public school when she was nine to be home schooled by the defendant. (T 4-30-14 p 56)

Ms. Begum testified that when she thought she broke her family's computer she asked the defendant to help her fix it. (T 4-20-14 p 58) She stated that she learned it was not really broken but, at that time, she thought it was. (T 4-30-14 p 58) She said that the defendant fixed it in exchange for her oath to do what he asked of her. (T 4-30-14 pp 58-59) She said that she honored her oath and allowed him to touch her without telling until he moved away. (T 4-30-14 pp 59-60)

Mohammad Masroor testified that he was fifty-one years of age and had been born in Bangladesh. (T 5-1-14 p 68) He stated that he had a degree in theology from Kumla University in Bangladesh. (T 5-1-14 p 68) He said that he became an imam when he was twenty-

four years old. (T 5-1-14 p 70) He said that the Koran prohibits sex with his own children and other family members. (T 5-1-14 p 70) He said that when he lived in Toronto he worked as an imam at a mosque where he led prayers and taught children. (T 5-1-14 pp 72-73)

Mr. Masroor testified that he never committed any sexual abuse against the children he taught at the mosque. (T 5-1-14 p 74) He stated that he never abused any of the children that he taught in their own homes. (T 5-1-14 p 77)

Mr. Masroor denied having any sexual contact or intercourse with Rashida Shikder. (T 5-1-14 p 104) He denied ever touching Musammat Khadija in a sexual way. (T 5-1-14 p 104) He denied ever touching Musammat Ashya Begum in a sexual way. (T 5-1-14 p 104)

The jury began its deliberations, after first hearing the arguments of counsel and the court's instructions on the law, at 10:01 am on May 2, 2014. (T 5-2-14 p 32) It returned with its verdicts of guilty as charged on every count in all three cases at 12:11 pm on that same date. (T 5-2-14 pp 38-41)

The Michigan Department of Corrections' Bureau of Probation (MDOC) conducted a presentence investigation in anticipation of the defendant's sentencing hearing that was held on May 21, 2014. (T 5-21-14 p 3) It prepared a written Presentence Investigation Report (PIR) which was submitted to the court prior to that hearing. (T 5-21-14 p 6) A Sentencing Information Report (SIR), which purported to calculate the minimum sentence range applicable

to the defendant pursuant to his convictions for ten counts of first degree CSC, was also prepared. (T 5-21-14 p 6) That range, in the A-VI cell on the Class A felony grid, was from 108 months to 180 months. (T 5-21-14 p 34) (A copy of the PIR is attached as Appellee's Appendix B. A copy of the SIR is attached as Appellee's Appendix A.)

The trial judge, the assistant prosecutor and defense counsel then addressed certain errors committed by the MDOC in calculating the minimum sentence range. (T 5-21-14 pp 9-34) The parties agreed that the defendant should be assessed twenty points for Prior Record Variable (PRV) 7, *Subsequent or Concurrent Felony Convictions*. (T 5-21-14 p 9) That placed him in PRV Level C rather than PRV Level A as had been scored by the MDOC. (T 5-21-14 p 34)

The trial judge then went on to make the following changes to the scoring of the applicable Offense Variables (OV):

<u>Offense Variable</u>	<u>MDOC</u>	<u>Court</u>
OV 4: <i>Psychological Injury to Victim</i>	0	10
OV 9: <i>Number of Victims</i>	10	0
OV 10: <i>Exploitation of Vulnerable Victim</i>	10	15
OV 11: <i>Criminal Sexual Penetration</i>	50	0
OV 13: <i>Continuing Pattern of Criminal Behavior</i>	25	50

OV 17: <i>Degree of Negligence</i>		
<i>Exhibited</i>	<u>5</u>	<u>0</u>
TOTAL:	100	75
		(T 5-21-14 pp 11-34)

The seventy-five OV points placed the defendant in OV Level IV. (T 5-21-14 p 34) The minimum sentence range in the C-IV cell on the Class A felony grid is from 108 months to 180 months. (T 5-21-14 p 34 and Appendix A)

The trial judge then addressed the issue of departing above the minimum sentence range. (T 5-21-14 p 35) The assistant prosecutor argued that the scoring of PRV 7 was inadequate because it allowed twenty points for two or more subsequent or concurrent felonies where the defendant had been convicted of fifteen felonies. (T 5-21-14 p 37) He said that the assessment of ten points for OV 4, regarding psychological injury to a victim, was inadequate because there were three victims and two of them had attempted suicide. (T 5-21-14 p 37) He asked that the court exceed the minimum sentence range and impose sentences of from thirty-five years to fifty years in prison pursuant to the defendant's convictions for first degree CSC. (T 5-21-14 p 40)

Defense counsel argued that the guidelines' scoring gave adequate weight to any psychological injury sustained by the complainants. (T 5-21-14 p 42) He said that if the Legislature believed that the assessment of ten points for OV 4 was inadequate it could change the statute but that it had not chosen to do so. (T 5-21-14 p 42) He said that the assistant prosecutor's

suggestion of a thirty-five year minimum sentence, "[W]as just a number that was pulled out of the sky." (T 5-21-14 p 42)

The defendant addressed the court and maintained his innocence. (T 5-21-14 p 47) He asked for mercy. (T 5-21-14 p 47)

The trial judge adopted the assistant prosecutor's argument and found that the assessment of twenty points for PRV 7 was inadequate. (T 5-21-14 p 51) He stated that the defendant should be assessed ten points for each of his concurrent or subsequent felony convictions which totaled 140 points. (T 5-21-14 pp 51-52) He said that scoring placed him in PRV Level F rather than PRV Level C. (T 5-21-14 pp 51-52)

The trial judge also found that the defendant should be assessed ten points for each complainant under OV 4 for a total of thirty points. (T 5-21-14 p 52) He found further that the assessment of fifty points for OV 13 was also inadequate because those points were assessed for a total of three criminal sexual penetrations of a person under thirteen years of age. (T 5-21-14 p 52) He said that in this case there were more than three such penetrations. (T 5-21-14 p 52)

The trial judge stated that by simply adding twenty-five points to the defendant's actual OV score he would have a total of 100 points which placed him in OV Level VI. (T 5-21-14 p 53) He noted that the minimum sentence range, in the F-VI cell on the Class A felony grid, was from 270 months to 450 months. (T 5-21-14 p 53) He stated that a minimum sentence of thirty-five years was

within that range. (T 5-21-14 p 53)

The trial judge then imposed ten concurrent sentences of from thirty-five years to fifty years in prison pursuant to the defendant's ten convictions for first degree CSC. (T 5-21-14 p 54) He then imposed five concurrent sentences of from ten years to fifteen years in prison pursuant to the defendant's five convictions for second degree CSC. (T 5-21-14 p 54) He awarded the defendant 188 days credit against all fifteen of his concurrent prison sentences for the time he served in jail prior to the date of sentence imposition. (T 5-21-14 p 54)

The defendant appealed his convictions and sentences to the Court of Appeals. He argued there that his convictions were defective because the admission of evidence of other acts of criminal sexual conduct against minors under MCLA 768.27a constituted reversible error and that he had received the ineffective assistance of trial counsel. He argued that the ten concurrent sentences of from thirty-five years to fifty years, imposed pursuant to his convictions for ten counts of first degree CSC, violated the principle of proportionality and constituted cruel and/or unusual punishment.

On November 24, 2015 the Court of Appeals issued a published Per Curiam Opinion in which it affirmed the defendant's convictions. However, the Court vacated the ten thirty-five year to fifty year sentences imposed pursuant to the defendant's ten convictions for first degree criminal sexual conduct and remanded

his case to the trial court for a resentencing hearing. The Court stated that it was remanding the defendant's case to the trial court in compliance with the previous decision made by another panel of the Court of Appeals in *People v Steanhouse*, Docket No. 318329. The Court ordered that the defendant's resentencing hearing be conducted in accordance with the procedure set forth by the United States Court of Appeals for the Second Circuit in *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

The Plaintiff-Appellant, People of the State of Michigan, now seeks to leave to appeal the Court of Appeals' November 24, 2015 Per Curiam Opinion that remanded the Defendant-Appellee's case to the trial court for resentencing.

COUNTER STANDARD OF REVIEW

QUESTION NO. 1:

The standard of review for a sentence that exceeds the now advisory sentencing guidelines' minimum sentence range is for reasonableness. See *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015).

An unreasonable sentence constitutes an abuse of the sentencing judge's discretion. See *Gall v United States*, 552 US 38, 128 S Ct 586, 169 L Ed2d 445 (2007), *Rita v United States*, 551 US 338, 127 S Ct 2456, 168 L Ed2d 203 (2007), and *United States v Booker*, 543 US 220, 125 S Ct 738, 160 L Ed2d 621 (2005).

ARGUMENT

QUESTION NO. 1: DID THE TRIAL COURT JUDGE ABUSE HIS DISCRETION WHEN HE IMPOSED UNREASONABLE SENTENCES OF FROM THIRTY-FIVE YEARS TO FIFTY YEARS IN PRISON PURSUANT TO THE DEFENDANT-APPELLEE'S TEN JURY TRIAL BASED CONVICTIONS FOR FIRST DEGREE CRIMINAL SEXUAL CONDUCT, WHERE THE MINIMUM SENTENCES EXCEEDED THE HIGH END OF THE NOW ADVISORY SENTENCING GUIDELINES' MINIMUM SENTENCE RANGE BY TWENTY YEARS?

PLAINTIFF-APPELLANT'S ANSWER: NO

DEFENDANT-APPELLEE'S ANSWER: YES

TRIAL COURT'S ANSWER: NO

COURT OF APPEALS' ANSWER: NO

FACTUAL BACKGROUND

On May 21, 2014 when the Defendant-Appellee, Mohammad Masroor, appeared before the Hon. Michael M. Hathaway of the Wayne County Circuit Court for the purpose of sentencing he was fifty-one years of age. (Appendix B, p 1) He had absolutely no prior criminal record. (Appendix B, p 1) He had no substance abuse history. (Appendix B, p 1) He held a master's degree in theology and was employed in Toronto, Ontario as a clergyman when he was arrested in the three cases for which he was being sentenced. (Appendix B, p 1)

The MDOC calculated the minimum sentence range applicable to the defendant pursuant to his convictions for ten counts of first degree CSC and his five convictions for second degree CSC. (T 5-21-

14 p 6) While the trial judge revised the scoring of various OVs in the SIR his ultimate calculation placed the defendant in the same minimum sentence range as had been calculated by the MDOC, of from 108 months to 180 months. (T 5-21-14 p 34 and Appendix A)

However, the trial judge then ruled that the assessment of points for PRV 7, *Subsequent or Concurrent Felony Convictions*, OV 4, *Psychological Injury to Victim*, and OV 13, *Continuing Pattern of Criminal Behavior* set forth in the then mandatory statutory sentencing guidelines were all inadequate under the facts of the instant cases. (T 5-21-14 pp 50-53) Therefore, he assessed ten points for each of the defendant's concurrent or subsequent felony convictions under PRV 7 for a total of 140 points. He also found that the defendant could be assessed thirty points for OV 4 because there were three victims and additional points for OV 13 because it allowed a maximum of fifty points for three or more criminal sexual penetrations of a person under thirteen years of age. (T 5-21-14 pp 50-53)

The trial judge ruled that by adding twenty-five points to the defendant's OV score of seventy-five points he would be placed in OV Level VI. (T 5-21-14 p 53) The PRV score of 140 points placed him in PRV Level F. The minimum sentence range in the F-VI cell on the Class A felony grid is from 270 months to 450 months. (T 5-21-14 p 53) The minimum sentences imposed, of thirty-five years each, equal to 420 months. That amount of months is within the minimum sentence range of the F-VI cell. (T 5-21-14 p 53)

The problem with all of the assistant prosecutor's argument and the trial judge's ruling which adopted it, is that the Legislature could have -- but did not -- put into the statutory guidelines the scoring formula imposed upon the appellant in the cases at bar.

Indeterminate sentences whose minimums were within the actual minimum sentence range provided by law would have imposed more than adequate punishment upon the now fifty-three year old appellee. The sentences that were actually imposed pursuant to his ten convictions for first degree CSC constitute an unreasonable abuse of discretion. They exceed the high end of the actually applicable minimum sentence range by two and one-third times. Accordingly, those sentences must be vacated.

LAW AND ARGUMENT

In *People v Snow*, 386 Mich 586, 194 NW2d 314 (1972), this Court noted that the proper issues for determining a particular defendant's sentence include the following:

1. The disciplining of the wrongdoer;
2. The protection of society;
3. The potential for reformation of the defendant;
4. The deterring of others from committing like offenses.

In *People v Coles*, 417 Mich 523, 339 NW2d 440 (1983), this Court stated that the standard for appellate review of a sentence was whether the sentence imposed shocked the conscience of the appellate court.

The entire sentencing process is designed to fit a sentence to the needs of a particular defendant. In *People v McFarlin*, 389 Mich 557, 208 NW2d 504 (1973), this Court held that criminal punishment must fit the offender himself rather than just the offense alone.

In *People v Milbourn*, 435 Mich 630, 461 NW2d 1 (1990), this Court set forth a then new standard with which to determine whether a particular sentence constitutes an abuse of sentencing discretion. It abolished the "shocks the appellate court's conscience" standard and replaced it with the "principle of proportionality". It recognized that sentences must be proportionate to the seriousness of the crime involved as well as to the defendant's prior record. It held that sentences which are not proportionate constitute an abuse of discretion. This was a more concrete standard than the former "shocks the conscience" standard of *People v Coles*, supra.

In 1998 the Legislature enacted the sentencing guidelines, MCLA 777.1 *et seq*, and made their application mandatory. MCLA 769.34(3) and MCLA 769.34(11) provided the process for deviating from the mandatory guidelines when the sentencing judge found substantial and compelling reasons to do so.

In *Blakely v Washington*, 542 US 961, 124 S Ct 2531, 159 L Ed2d 403 (2004), the United States Supreme Court reversed the application of the State of Washington's sentencing guidelines as a violation of the Sixth Amendment guarantee to a trial by jury. In

United States v Booker, 543 US 220, 125 S Ct 738, 160 L Ed2d 621 (2005), the United States Supreme Court held that the holding in *Blakley v Washington*, supra, applied to the federal sentencing guidelines as well as to those of the states. The Court also held that the statutory federal sentencing guidelines were no longer mandatory but were advisory. They remain advisory to this day.

In *Alleyne v United States* 570 US ___, 133 S Ct 2151, 186 L Ed2d 314 (2013), the United States Supreme Court held that any fact which increased the mandatory minimum sentence for a crime is an element of that crime that must be submitted to the jury and found beyond a reasonable doubt.

In *People v Drohan*, 475 Mich 140, 715 NW2d 778 (2006), this Court held that the rulings in *Apprendi v New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed2d 435 (2000), *Blakely v Washington*, supra, and *United States v Booker*, supra, did not apply to Michigan's indeterminate sentencing system. However, this Court overruled that decision in *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015), which it issued on July 29, 2015.

Justice McCormick wrote the majority opinion. In it she applied the holding in *Alleyne v United States*, supra, and found that because the judicial fact finding conducted in applying the sentencing guidelines directly affects the defendant's minimum sentence such a practice violates the Sixth Amendment's guarantee to have such facts found by a jury beyond a reasonable doubt.

It is the appellant's position that this Court's decision in *People v Lockridge*, supra, is wrong. (See Appellant's Application for Leave to Appeal, p 23.) It is the appellee's position that this Court's decision in *People v Lockridge*, supra, was correct. The appellee also believes that this Court's decision to overrule *People v Drohan*, supra, was correct.

The essential question in this case is whether the sentences imposed -- and to which the appellee originally objected as violations of the mandatory sentencing guidelines scheme and cruel and/or unusual -- constitute unreasonable abuses of the sentencing judge's discretion. That is the standard under which sentences within or outside of the now advisory sentencing guidelines' minimum sentence range are to be reviewed. *People v Lockridge*, supra.

The appellee acknowledges that the trial judge made a record regarding why he felt that a sentence within the then mandatory sentencing guidelines' minimum sentence range was inadequate. However, the appellee submits that the trial judge's articulation of those reasons set forth above in this argument and in the *Counter Concise Statement of Material Facts and Proceedings* section supra, constitute an unreasonable abuse of discretion.

The concept of abuse of discretion was defined by this Court in *Spalding v Spalding*, 355 Mich 282, 94 NW2d 810 (1959). It said:

Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse

of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. (at pp 811-812)

See also *People v Williams*, 386 Mich 565, 194 NW2d 337 (1972).

In *People v Babcock*, 469 Mich 247, 666 NW2d 231 (2003), this Court discussed the concept of abuse of discretion in the context of sentencing. It said:

At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. See *People v. Talley*, 410 Mich. 378, 398, 301 N.W.2d 809 (1981) (LEVIN, J., concurring), quoting *Langnes v. Green*, 282 U.S. 531, 541, 51 S.Ct. 243, 75 L.Ed. 520 (1931) ("The term "discretion" denotes the absence of a hard and fast rule."). When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. See *Conoco, Inc., v. JM Huber Corp.*, 289 F.3d 819, 826 (C.A. Fed., 2002). (at p 269)

Here, the trial judge placed the appellee in a higher minimum sentence range by assessing 140 points for PRV 7, *Subsequent or Concurrent Felony Convictions*. He also assessed thirty points for OV 4, *Psychological Injury to Victim*. (T 5-21-14 pp 51-52) He also said that he could add additional points for OV 13, *Continuing Pattern of Criminal Behavior*. (T 5-21-14 p 52)

Those calculations placed the appellee in the F-VI cell where the minimum sentence range is from 270 months to 450 months. The thirty-five year minimum sentences actually imposed -- which equal to 420 months each -- are within the range found in the F-VI cell.

The problem with the procedure followed by the trial judge is that the guidelines' instructions limit the number of points that can be assessed for PRV 7 at twenty and for OV 4 at ten. The increased assessments, made contrary to the guidelines' instructions, unreasonably manipulated the guidelines' scoring to justify sentences that constitute an abuse of discretion.

While the principle of proportionality identified in *People v Milbourn*, supra, to be the yardstick by which challenged sentences were to be measured is no longer the applicable standard of review, proportionality is still considered as one aspect of the test to be applied when determining whether a sentence is reasonable.

In the case at bar the Court of Appeals included proportionality among the factors for consideration when reviewing a sentence for reasonableness. It said:

Drawn from Michigan case law, those principles include proportionality, the potential for reformation or rehabilitation of the defendant, deterrence, the protection of society from further crimes by defendant, and the need to appropriately punish the defendant for the crimes of conviction while avoiding sentence disparities between similarly-situated defendants. This procedure equates with a federal trial court's consideration of 18 USC 2552(a) and the reasonableness principles and requirements articulated in *Gall*. A court's explanation of the reasons for departure must include sufficient detail to facilitate meaningful appellate review. A sentence fulfilling these criteria is procedurally reasonable.

Substantively, we believe that a sentencing court should be governed by the following principles and requirements: (1) the guidelines themselves supply the starting point or initial benchmark of the analysis; (2) extraordinary or exceptional circumstances are not required to justify a sentence outside of the guidelines; (3) no presumption of unreasonableness attends a departure sentence; (4) a rigid mathematical formula is not to be applied; (5) the sentencing court must engage in an individualized assessment on the basis of the facts presented, taking into consideration mitigating or aggravating factors and the totality of the circumstances; (6) the extent of a departure must be considered and sufficiently justified, with a major departure supported by a more significant justification than a minor departure; (7) substantive findings regarding reformation or rehabilitation, society's protection, punishment, and deterrence can potentially support a departure; and (8) if sufficient and sound justification is presented, a court may depart from the guidelines on the basis of a disagreement with the guidelines, or by finding that a guidelines variable is given inadequate or disproportionate weight. Ultimately, the touchstone of the departure analysis is reasonableness.

(at p 19)

See *Gall v United States*, 552 US 38, 128 S Ct 586, 169 L Ed2d 445 (2007).

The appellee submits that the Court of Appeals' articulation of the factors to be considered when reviewing a sentence for reasonableness set forth above is correct. However, the appellee further asserts that the sentences imposed upon him -- when considered in light of those factors -- are unreasonable and abusive.

Accordingly, the order vacating the appellee's sentences issued by the Court of Appeals should be affirmed. This matter should be remanded to the Wayne County Circuit Court for a resentencing hearing to be conducted in accordance with the

procedure set forth by the United States Court of Appeals for the Second Circuit in *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

RELIEF REQUESTED

The Defendant-Appellee, Mohammad Masroor, respectfully requests that this Court grant the Plaintiff-Appellant's Application for Leave to Appeal so that the legal issues raised in that application can be decided. The Defendant-Appellee requests further that the Court of Appeals' decision to vacate his sentences and remand his case to the Wayne County Circuit Court for a resentencing hearing to be conducted in accordance with the procedure set forth by the United States Court of Appeals for the Second Circuit in *United States v Crosby*, supra, be affirmed.

MICHAEL J. McCARTHY, P.C.

February 1, 2016

/s/Michael J. McCarthy

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