No. _____

# In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER
v.
WILLIAM SHOULDERS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In Michigan's "indeterminate" sentencing scheme, judgments of sentence contain two numbers: the minimum number of years the defendant will have to serve before becoming eligible for parole, and the maximum number of years that he or she could be incarcerated without parole. Under Michigan law, the second number is fixed by the statutory penalty for the crime. The first, however, is determined in reference to statutory sentencing guidelines. This Court has held that increasing the second number—the maximum sentence—by reference to facts not found by a jury violates the Sixth Amendment right to trial by jury. But this Court has also held that the first number—a convict's early release date—is not subject to that provision.

In *People v. Lockridge*, the Michigan Supreme Court invalidated this state's sentencing guidelines statute—which pertains only to the first number—because the guidelines operate off judge-found, rather than jury-found, facts. The court grounded its 2015 decision in this Court's Sixth Amendment sentencing jurisprudence: *Alleyne v. U.S.*, *Apprendi v. New Jersey*, and *U.S. v. Booker*.

**The question presented is whether—in determining the offense-related facts which establish a criminal defendant's earliest parole date—the Sixth Amendment requires a state to impanel a jury.**

## PARTIES TO THE PROCEEDING

The petitioner is the State of Michigan, which was the appellant in the Michigan Supreme Court. The respondent is William Shoulders, who was the appellee in the Michigan Supreme Court.

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## JURISDICTION

The Michigan Supreme Court entered its order denying leave to appeal on April 17, 2020. App. 1a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), because "the validity of a statute of [a] State is drawn into question on the ground of its being repugnant to the Constitution … of the United States[.]"

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; … .

Mich. Comp. Laws § 769.34 provides in part:

> (2) Except as otherwise provided … the minimum sentence imposed by a court of this state for a felony … shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. …

(3) A court may depart from the appropriate sentence range under the sentencing guidelines … if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.

Mich. Comp. Laws § 791.234 provides in part:

(1) Except as provided in [Mich. Comp. Laws § 791.234a], a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years … is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits, if applicable.

## INTRODUCTION

The Sixth Amendment provides a criminal defendant with the right to have a jury determine, beyond a reasonable doubt, any fact that increases his *sentence*—that is, the amount of time he must serve before he will have a *legal right to be released*. When there is a range of years within which a sentencing judge may determine a defendant's ultimate sentence, this right applies to facts that increase either the *maximum* possible sentence, *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), or the *minimum* possible sentence, *Alleyne* v. *United* States, 133 S. Ct. 2151 (2013). In other words, the question — "when *must* a defendant's liberty be restored?"— cannot be determined by judge-found facts.

But this Court has never required that a jury determine the facts relating to a defendant's *parole eligibility date*—when he *"may"* be released from custody. Quite unlike a sentence, a parole eligibility date is not a right to be released; indeed, it is not a *right* at all, but rather a date on which the government may exercise *grace* by releasing the convicted defendant before the law requires such release. As this Court explained in *Blakely* v. *Washington*, such "indeterminate" sentencing does not infringe on the province of the jury for a simple reason: "the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." 542 U.S. 296, 308–09 (2004).

Here, Michigan's statutory guidelines required respondent to serve at least three years of the 15-year penalty for the drunk-driving death that he caused,

but the Michigan Supreme Court nullified that provision based on its misapplication of the Sixth Amendment and this Court's precedents. As a result, respondent got off with only 39 days incarceration. This Court should grant certiorari, reverse the Michigan Supreme Court's *Lockridge* decision, and thereby vindicate both the state's democratic process and its efforts to promote an equitable and uniform sentencing scheme.

## STATEMENT OF THE CASE

### A. Indeterminate sentencing in Michigan

Michigan's statutory regime for sentencing is an indeterminate sentencing system, in which the defendant is given a sentence with both a minimum and a maximum. Except for life offenses (in which the judge can give any term of years), the maximum is not determined by the sentencing court but is set by law. Mich. Comp. Laws § 769.8. The minimum is based on guidelines ranges and sets the defendant's earliest parole eligibility date. The trial judge sets the minimum but can never exceed the statutory maximum. See *People v. Drohan,* 715 N.W.2d 778 (2006).

The terms "maximum sentence" and "minimum sentence" have different meanings in determinate sentencing schemes versus indeterminate ones such as Michigan's. For example, consider a sentence of "10 to 20 years." In an indeterminate system like Michigan's, that range means a prisoner will not have a *right* to be released until he has served a fixed term of 20 years (his "maximum sentence"), but he will be *eligible for parole* consideration after 10 years (his "minimum sentence"). In contrast, a *determinate* sentence

of 10 to 20 years means that a judge will select a fixed term somewhere within that range; if the judge selects a 12-year sentence, then the prisoner may be incarcerated for up to 12 years. In the determinate scheme, both the 10-year minimum possible sentence and the 20-year maximum possible sentence fall away, and the prisoner has an actual sentence of 12 years.

For an indeterminate sentence, then, the maximum sentence *is* the actual sentence for Sixth Amendment purposes, and the minimum sentence is the parole eligibility date; for a determinate sentence, the maximum and minimum sentences are simply the outer bounds of the actual fixed term the judge will impose.

### B. Shoulders' crime and punishment

The facts of the underlying crime are not critical to the legal question presented and so are only briefly recited here.

Despite being legally intoxicated, respondent drove sixty or seventy miles an hour on a surface street after midnight, ran a red light, and t-boned a car crossing the intersection in front of him, killing the driver and seriously injuring the passenger. Shoulders had a blood-alcohol content of at least .10, and on-the-scene witnesses said he had slurred speech, glassy eyes, and smelled of intoxicants. After respondent waived his right to a jury trial, a judge found him guilty of two offenses: operating under the influence of alcohol, causing death; and operating under the influence of alcohol, causing serious injury.

The statutory penalty for count one (OUIL causing death) was up to 15 years imprisonment; for count two (OUIL causing serious injury) respondent faced up to five years. See Mich. Comp. Laws §§ 257.625(4) and (5). Michigan's statutory sentencing guidelines required that he serve a minimum prison sentence of at least three years before parole consideration on count one; nevertheless, the trial judge initially gave him only *12 weeks* jail time, which the court later reduced to *39 days*. This drastic downward departure from the legislative scheme had been enabled by the Michigan Supreme Court's decision in *People v. Lockridge,* 870 N.W.2d 502 (Mich. 2015), which held that mandatory application of the guidelines statute was unconstitutional.

Specifically, *Lockridge* struck down Michigan's guidelines statute as contrary to the Sixth Amendment guarantee of trial by jury, as this Court had interpreted the right in *Alleyne* and *Apprendi*. The court's remedy was similar to the remedy this Court imposed in *United States* v. *Booker*, 543 U.S. 220 (2005): the guidelines would henceforth be advisory only. (The Court concluded that Lockridge himself had suffered no Sixth Amendment violation, and denied him any relief. *Id.* at 521–22.)

The State filed a petition for certiorari in *Lockridge* (No. 15-416). In opposition, Lockridge pointed out that Michigan was the prevailing party in the Michigan Supreme Court and that he himself had received no relief. This Court denied the petition. *Michigan* v. *Lockridge*, 136 S. Ct. 590 (2015).

### C. Preservation of the Sixth Amendment claim

In the present case, the State appealed respondent's below-guidelines sentence on both state and federal grounds, arguing that (a) the trial court had imposed an unreasonably low minimum sentence under state law, and (b) the mandatory guidelines should have governed the minimum sentence (that is, *Lockridge* was wrongly decided under this Court's precedent and thus the guidelines do not violate the Sixth Amendment).

The Michigan Court of Appeals initially found an abuse of discretion and remanded for resentencing. But instead of sending respondent to prison, the trial judge actually *reduced* his sentence to time served (39 days). Petitioner again appealed, and again raised both a state issue and the federal Sixth Amendment issue. The Michigan Court of Appeals affirmed respondent's sentence and the Michigan Supreme Court denied leave to appeal.

Thus, in both the first and second appeal, petitioner preserved the claim that respondent was subject to mandatory prison, and that Michigan's statutory guidelines *do* pass constitutional muster—that the Michigan Supreme Court's decision in *People v. Lockridge* was wrongly decided under both the text of the Sixth Amendment and this Court's precedent.

## REASONS FOR GRANTING THE PETITION

### I. The Michigan Supreme Court's decision is contrary to *Blakely*, where this Court recognized that indeterminate sentencing does not infringe on the role of the jury.

Indeterminate sentencing schemes such as Michigan's have already been deemed by this Court not to violate the Sixth Amendment. As this Court explained in *Blakely v. Washington,* indeterminate sentencing regimes do not implicate the jury's factfinding role: "[The Sixth Amendment] limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so." 542 U.S. at 308–09. While indeterminate sentencing "increases judicial discretion," it does not do so "at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty." *Id.* at 309.

"Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion." *Id.* "But"—here is the critical reasoning—"the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence." *Id.* As this Court concluded, "*that makes all the difference* insofar as judicial impingement upon the traditional role of the jury is concerned." *Id.* (emphasis added). Indeed, the *Blakely* majority recognized that a State could eliminate "*Apprendi* infirmities" by "reestablishing indeterminate sentencing." *Id.*; accord *id.* at 332 (O'Connor, J., dissenting) ("A second option for legislators [after

*Blakely*] is to return to a system of indeterminate sentencing."). "[T]he Sixth Amendment by its terms is not a limitation on judicial power, but *a reservation of jury power*." *Id.* at 308 (emphasis added).

The Michigan Supreme Court failed to acknowledge this critical difference between Michigan's indeterminate sentencing regime and the determinate sentencing regimes at issue in *Apprendi* and its progeny, up to and including *Alleyne*. But a parole eligibility date is not a "sentence." For this reason, Michigan has an indeterminate system as that term is properly defined.

Facts relating to parole eligibility do not pertain to "a legal *right* to a lesser sentence," *id.*, but rather to an opportunity for legislative grace. Rather than recognizing that this distinction "makes all the difference" under the Sixth Amendment, the Michigan Supreme Court ignored the difference.

## II. The Michigan Supreme Court failed to grasp the differences between determinate and indeterminate sentencing.

Like most states, Michigan offers many of its prisoners the opportunity to be released on parole before they have completed their sentences and become legally entitled to release. This approach to sentencing arguably promotes rehabilitation more than determinate sentencing, because it leaves room for the government to release a prisoner if it is persuaded that he may be safely released early to become a contributing member of society. E.g., *Greenholtz* v. *Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 8 & n.3 (1979) (identifying "rehabilitation" as one of the

"traditional justifications advanced to support the adoption of a system of parole"); *Graham* v. *Florida*, 560 U.S. 48, 73, as modified (July 6, 2010) (explaining that "rehabilitation [is] a penological goal that forms the basis of parole systems").

The decision whether and when to grant parole is in the discretion of the parole board (not the judge or jury). Unlike most states, though, Michigan requires its sentencing judges, rather than simply the parole board or a statute, to determine when a prisoner becomes eligible for parole.

For most felony convictions, a Michigan judge will impose a sentence composed of two numbers, known as the "minimum sentence" and the "maximum sentence." It was confusion over these terms that led the Michigan Supreme Court to err.

### A. The "minimum sentence" at issue in this case is different from the "minimum sentence" at issue in *Alleyne*.

The main source of the *Lockridge* majority's error was confusion over the different meanings of the term "minimum sentence" in the respective sentencing systems—much like the confusion that might result if an NFL fan began talking with a European "fútbol" fan (i.e., a soccer fan). In the sentences at issue in this Court's cases—in *Harris* v. *United States*, 536 U.S. 545 (2002), in *Apprendi*, and in *Alleyne*—this Court addressed *determinate* sentencing systems, where a judge does not impose a minimum or a maximum sentence. Instead, a judge imposes a sentence that consists of one number. Thus, the "minimum sentence" discussed in *Harris* and *Alleyne* is the lowest number

of the range from which the judge is authorized to select a sentence, and it matters because, if imposed, it is the *actual* sentence the defendant must serve.

In Michigan, though, the term "minimum sentence" refers to something entirely different. It is not a possible number of years that could pass before the prisoner had a right to be released; instead, it is a parole eligibility date. Rather than leaving parole eligibility dates to be determined by a parole board or to be set by statute, the sentencing-guidelines legislation requires judges to score a number of "offense variables" (using facts about the crime) and "prior record variables" (using facts about the offender's prior record) and to use these scores to determine the number of years the defendant must serve before becoming parole eligible. The defendant's guidelines score, together with the severity of the crime being scored, results in a range of years, and the judge must choose a minimum sentence within that range, unless there are "substantial and compelling" reasons to depart, either upward or downward. Mich. Comp. Laws § 769.34(3).

Thus, the *Lockridge* majority was correct in *some* sense, when it said, "*Alleyne* now prohibits increasing the *minimum* as well as the maximum sentence …," 870 N.W.2d at 512; when it referred to "*Alleyne*'s extension of the *Apprendi* rule to minimum sentences," *id.* at 513; and when it said, "In *Alleyne* the United States Supreme Court overruled *Harris* and held for the first time that the *Apprendi* rule applied with equal force to minimum sentences," *id.* True, those cases did use those words. But it was not correct in the sense that matters. *Alleyne* extended *Apprendi*—and

the Sixth Amendment—to minimum sentences in the sense of the "floor" of a sentencing range because that floor is an *actual* sentence—a period of time after which the prisoner is entitled to release. But it did not extend *Apprendi* or the Sixth Amendment to parole eligibility dates, which is what minimum sentences are under Michigan sentencing law.

In Michigan, a "minimum sentence" is nothing more or less than a determination of when a defendant will become eligible to be considered by the parole board for release on parole. And Michigan is not required, under the federal Constitution, to provide *any* opportunity for parole. *Greenholtz*, 442 U.S. at 7 ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.").

Further, there is no right to a jury determination on parole eligibility at all; it is often controlled by statute, such that a prisoner must serve a certain percentage of his sentence before becoming eligible. E.g., *Carroll* v. *Hobbs*, 442 S.W.3d 834, 836 (Ark. 2014) (statute required prisoner "to serve at least seventy percent of his sentence before being eligible for parole").

Nor is Michigan required to leave the determination of when a prisoner becomes parole eligible to a jury, as opposed to a judge or a parole board or a department of corrections. In other words, a state could—without offending the Sixth Amendment—adopt a system where parole eligibility was determined solely by prison officials, which confirms that parole eligibility is not a jury question.

### B. *Alleyne* broke no new ground on the question whether Michigan minimum sentences are subject to *Apprendi*.

In light of the distinction between the two uses of the term "minimum sentence," the Michigan Supreme Court erred when it held that *Alleyne* extended *Apprendi* to cover Michigan minimum sentences.

After *Apprendi*, and especially after *Blakely*, defendants brought several cases challenging the constitutionality of Michigan's sentencing guidelines. At the time of these challenges, *Harris*, which held that an increase to a minimum sentence based on a judicial finding of fact did not violate the Sixth Amendment, 536 U.S. at 568, was still good law. Accordingly, there would be no basis to claim that raising the floor of a guidelines range based on judge-found facts would present any Sixth Amendment issue. But a guidelines range has a ceiling as well as a floor, and that ceiling could be subject to attack based on *Apprendi*.

But the Michigan Supreme Court rejected such challenges four times, in *People* v. *Claypool*, 684 N.W.2d 278, 286 n.14 (Mich. 2004), in *People* v. *Drohan*, 715 N.W.2d 778 (Mich. 2006), in *People* v. *Harper*, 739 N.W.2d 523 (Mich. 2007), and in *People* v. *McCuller*, 739 N.W.2d 563 (Mich. 2007). In other words, the Michigan Supreme Court previously recognized that indeterminate-sentencing regimes do not infringe on the Sixth Amendment because they do not displace jury factfinding. E.g., *Claypool*, 684 N.W.2d at 286 n.14; see generally *Drohan*, 715 N.W.2d 778.

As noted, the new ground broken by *Alleyne* was not that it extended *Apprendi* from definite prison

terms to early release dates. The new ground was that it extended *Apprendi* from ceilings of determinate-sentence ranges to floors of determinate-sentence ranges. In the face of repeated holdings that *Apprendi* does not apply to a Michigan minimum sentence range at all—floor *or* ceiling—the Michigan Supreme Court erred in holding that *Alleyne* had any impact on the question.

### C. The *Lockridge* decision is a significant break from precedent.

In every case in the *Apprendi* line in which this Court has struck down a sentence based on a Sixth Amendment violation, the sentence has either been a term-of-years sentence at the end of which the defendant had a right to release (*Apprendi*, *Blakely*, *United States* v. *Booker*, 543 U.S. 220 (2005), *Alleyne*), a life sentence (*Cunningham* v. *California*, 549 U.S. 270 (2007)), or a death sentence (*Ring* v. *Arizona*, 536 U.S. 584 (2002), *Hurst* v. *Florida*, 136 S. Ct. 616 (2016)).

In contrast, when this Court has considered decisions affecting whether and when a prisoner might be released without serving his full sentence, it has never held that there is a right to have facts found by a jury.

For example, in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), this Court examined Nebraska's system of good-time credits—credit awarded to prisoners who behave themselves in prison, which ultimately reduces the time spent in prison below the sentence imposed. E.g., Neb Rev Stat § 83-1,107(2). When a state revokes those credits based on sufficiently serious misconduct, it increases the amount of time until the prisoner's release. This Court held that the revocation

of statutorily guaranteed good-time credits deprives a prisoner of a liberty interest, and thus implicates the Due Process Clause. 418 U.S. at 556–57. But this Court also held that a state may revoke good-time credits without impaneling a jury. *Id.* at 570–71 (upholding Nebraska's procedure of allowing an "Adjustment Committee" to determine the revocation of good-time credits). And even though the Court specifically mentioned the Sixth Amendment in the opinion, *id.* at 575–76, it did not give *any* indication that this early release mechanism implicated the right to a jury trial and deprived a prisoner of that process specifically required by the Constitution.

The *Lockridge* majority gave *Wolff* short shrift, dismissing it as merely "involv[ing] a criminal defendant's rights in parole proceedings." 870 N.W.2d at 517 n. 23. But *Wolff* did not involve a criminal defendant's rights in parole proceedings. It involved a permutation of the very question at issue in *Lockridge* and here. The revocation of good-time credits in *Wolff* and the increase of a guidelines range here have the same effect: they increase the amount of time a prisoner must serve before being released *early*.

*Morrissey* v. *Brewer*, on the other hand, did involve a criminal defendant's rights in parole proceedings. 408 U.S. 471 (1972). Significantly, *Morrissey* held that no jury is required in parole revocations, but that factual findings can be made by a "traditional parole board" without violating due process. *Id.* at 489. Again this Court mentioned the Sixth Amendment in the opinion without concluding that this factfinding by someone other than the jury violated the Amendment. Because a revocation of parole increases the

portion of a sentence that is served in prison, the fact that no jury is required is relevant here. And as noted earlier, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz*, 442 U.S. at 7.

By injecting a jury-trial right into an early release question, the Michigan Supreme Court did something remarkable in Sixth Amendment jurisprudence. Whether this was error, as the State contends, or not, this extraordinary expansion of a fundamental federal constitutional right deserves this Court's close examination.

## III. Review is also warranted because the lower court struck down an important state statute based on federal law.

Michigan's sentencing regime is an important state law, governing every felony sentence Michigan imposes. The regime is authorized by the State constitution, which provides:

> The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences.

Mich. Const. Art. 4, § 45. A court has now struck that statutory regime down, based on its misinterpretation of federal law. Just as this Court routinely reviews decisions by lower courts when they strike down *federal* statutes based on federal law, States also deserve this Court's careful review when lower courts strike down

*state* statutes based on federal law. (Indeed, until 1988, Congress required this Court to review decisions by federal courts of appeal that struck down state statutes. Compare 28 U.S.C. § 1254(2) (1982 ed.) (providing that review in such instances was "[b]y appeal"), with 28 U.S.C. § 1254(2) (1988 ed.)). While this Court's review of such decisions is discretionary, that discretion should be exercised to recognize that democratically enacted laws at the state level deserve just as much respect as those at the federal level.

Further, decisions like this, if left uncorrected, will affect other states with indeterminate sentencing regimes and will discourage other states from adopting a system like Michigan's. Rather than leaving states free to establish different penological goals (such as promoting rehabilitation through the parole process, and promoting uniform treatment through mandatory guidelines concerning parole-eligibility dates) as this Court contemplated in *Blakely*, the reasoning of the Michigan Supreme Court will eliminate this valid and constitutional sentencing regime and in so doing improperly deprive the people of their authority to govern themselves in this area.

## IV. Unlike *Michigan* v. *Lockridge*, this case presents a case and controversy.

When the State of Michigan filed a petition for certiorari directly attacking the Michigan Supreme Court's *Lockridge* decision, respondent Lockridge did not argue that the Michigan courts correctly decided his case, nor did he argue that the question was not significant enough to merit a place on this Court's docket. His only argument was that the petitioner was

the *prevailing party* in the Michigan Supreme Court. This Court denied certiorari.

In subsequent *Lockridge*-challenging petitions filed before this Court, similar vehicle problems also arose: in no other case was the State aggrieved by a below-guidelines departure as petitioner has been here. Again, Michigan statutory law *requires* respondent to serve a prison sentence (absent a finding of substantial and compelling reasons to depart downward), yet the Michigan Supreme Court in *Lockridge* granted judges such as the one here the discretion to ignore the legislative mandate. The State objects to the sentencing relief granted to Shoulders—there is nothing unconstitutional about the statutory requirement that he serve prison time for driving drunk and killing another human being.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: MAY 2020

# PETITION APPENDIX

**Michigan Supreme Court Order denying leave to appeal**

941 N.W.2d 55 (Mem)

Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

William Larenzo SHOULDERS, Defendant-Appellee.

SC: 159642 COA: 342408

April 17, 2020

Wayne CC: 15-003289-FH

Order

On order of the Court, the application for leave to appeal the March 28, 2019 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Markman, J. (dissenting).

I respectfully dissent because I would not deny leave to appeal but instead would remand for resentencing. Contrary to MCL 769.34(3)(a), which provides that "[t]he court shall not use an individual's ... race ... to depart from the appropriate sentence range," the trial court here expressly referenced defendant's race in order to justify its departure sentence below the legislative guidelines. For this reason alone, resentencing is warranted. Furthermore, however, the sentence of probation imposed, in my view, constitutes an abuse of sentencing discretion in light of the intrinsic seriousness of the offense at issue—operating a motor vehicle while intoxicated causing death, MCL 257.625(4). That is, for this offense, the sentencing guidelines always provide for a sentence of imprisonment, even where all other offense variables (beyond Offense Variable 3, which is necessarily scored at 50 points) are scored at zero and all prior record variables are also scored at zero. See MCL 777.12f; MCL 777.33(2)(c); MCL 777.64.

**Michigan Court of Appeals opinion affirming sentence**

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

William Larenzo SHOULDERS, Defendant-Appellee.

No. 342408

March 28, 2019

Wayne Circuit Court, LC No. 15-003289-01-FH

Before: Murray, C.J., and Gadola and Tukel, JJ.

Opinion

Per Curiam.

Following a bench trial, the trial court found defendant guilty of operating a motor vehicle while intoxicated (OWI) causing death, MCL 257.625(4), and OWI causing a serious impairment of a body function, MCL 257.625(5). The recommended minimum sentencing guidelines range was 43 to 86 months' imprisonment; however, the trial court sentenced defendant to four years' probation and three nonconsecutive weeks in jail each year of his probationary term, as well as various other conditions, such as 365 hours of community service, enrollment in an Alcoholics Anonymous program, grief counseling, and college courses. The prosecution appealed as of right.

On appeal, this Court vacated defendant's sentence and remanded to the trial court for resentencing. *People v. Shoulders,* unpublished per curiam opinion of the Court of Appeals, issued June 27, 2017 (Docket No. 331672), p 3. This Court noted that, at sentencing, "the trial court focused exclusively on the circumstances of the offender and articulated no consideration of the circumstances of the offense and the recommended minimum sentence range under the guidelines." *Shoulders,* unpub op at 3. This Court concluded that the drastic departure from the guidelines range was not proportionate to both the circumstances of the offender and the offense, and thus, the sentence imposed by the trial court was not reasonable without further consideration by the court of the relevant factors set forth in *People v. Steanhouse (Steahhouse I ),* 313 Mich. App. 1, 46; 880 N.W.2d 297 (2015), aff'd in part and rev'd in part on other grounds by *People v. Steanhouse (Steanhouse II ),* 500 Mich. 453, 471 (2017). *Shoulders,* unpub op at 3.

At the subsequent resentencing hearings, the court considered the seriousness of the offenses, factors inadequately considered by the guidelines, and factors not considered by the guidelines in fashioning the sentence that it believed was appropriate for the offenses and the offender. At the conclusion of the hearings, the trial court sentenced defendant outside the recalculated minimum sentencing guidelines range of 36 to 71 months' imprisonment, sentencing defendant to a reduced sentence of three years' probation. Because defendant had already served nearly two years of probation, defendant was sentenced to the remaining one year and one day of probation. Defendant was also sentenced to a total of 39 days in jail, time served, discharging defendant of any remaining jail time. In addition, the trial court required that defendant complete an additional 200 hours of community service. The prosecution now appeals as of right.[1] We affirm.

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[1] Defendant raises two jurisdictional challenges, each of which is without any merit. First, defendant contends that, in regard to the prosecution's argument that *People v. Lockridge,* 498 Mich. 358, 399; 870 N.W.2d 502 (2015), should be reversed and defendant sentenced to prison, this Court lacks jurisdiction to hear this appeal. However, the existence of binding Supreme Court precedent that says nothing about jurisdiction does not deprive this Court of jurisdiction. Second, defendant contends that, because he has been discharged from probation, this appeal is moot. However, this Court has jurisdiction to determine whether the sentence was not proportionate.

The prosecution first argues that the Supreme Court erred when it struck down mandatory sentencing guidelines in *People v. Lockridge,* 498 Mich. 358, 399; 870 N.W.2d 502 (2015), because mandatory guidelines are not unconstitutional, and therefore, the trial court erred in resentencing defendant outside of the guidelines range. The prosecution also recognizes that we are bound by *Lockridge,* and has merely made the argument to preserve it for later use. We need say nothing more.

The main thrust of the prosecution's appeal is that defendant's sentence should be vacated and the case remanded for resentencing because the sentence was not proportionate to the offense and the offender.

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Lockridge,* 498 Mich. at 392. "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion." *Steanhouse II,* 500 Mich. at 471. "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v. Waterstone,* 296 Mich. App. 121, 131-132; 818 N.W.2d 432 (2012).

When determining whether a trial court abused its discretion by departing from the sentencing guidelines, this Court looks to whether the trial court conformed to the principle of proportionality set forth in People v. Milbourn, 435 Mich. 630, 661; 461 N.W.2d 1 (1990). *Steanhouse II,* 500 Mich. at 476-477. The principle of proportionality requires that the sentence imposed be proportionate to the " 'seriousness of the circumstances surrounding the offense and the offender.' " *Steanhouse II,* 500 Mich. at 460, quoting *Milbourn,* 435 Mich. at 636. "[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *People v. Dixon-Bey,* 321 Mich. App. 490, 521; 909 N.W.2d 458 (2017) (quotation marks and citations omitted). In *Steanhouse I,* 313 Mich. App. at 46, this Court set forth several factors to be considered in determining whether a departure sentence is proportionate, including: "(1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation." (Citations omitted.) When sentencing a defendant, "a trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Dixon-Bey,* 321 Mich. App. at 525 (quotation marks and citations omitted).

On remand, the trial court acknowledged this Court's directive to address the seriousness of the offense, the factors that are not adequately considered by the guidelines, and the factors not considered by the guidelines. Looking to the seriousness of the offense, the trial court—after first discussing the theoretical aspects of "seriousness"—ultimately weighed the seriousness by looking to defendant's intent, noting that, other than the intent to drink alcohol, there was no intent or premeditation present, and therefore it was ultimately a general intent crime.

The trial court also considered factors not adequately considered by the guidelines. Contrary to the original sentencing hearing, during the resentencing hearing the trial court found that defendant's prior record was not adequately considered. The trial court found that prior record variables (PRVs) 1 through 6, all assessed at zero points, were not adequately considered by the guidelines because they do not take into consideration the environment in which a person lives, and essentially, the effect that the environment has on an individual's life.[2] Because defendant had not acquired any kind of record, even for noncriminal conduct, the trial court found that, based on the environment in which he lived, a completely clear record spoke highly of defendant's character.

[2] The court found that it is reasonable to consider the fact that defendant was a young black man who had grown up in a difficult area without any prior criminal record or even traffic violations. The prosecutor argues in one sentence—thus with no development at all—that the trial court erred in this regard, citing *People v. Gjidoda,* 140 Mich. App. 294, 300-301; 364 N.W.2d 698 (1985). Although the trial court mentioned defendant's race (in a positive manner), the court was ultimately reflecting on defendant's law-abiding character, in light of the community in which he was raised. We do not consider this to be "a sentence... based upon an arbitrary classification, such as race or religion." *Id.* at 300.

The trial court offered several other factors not considered by the guidelines that assisted the court in fashioning an individualized sentence for defendant, such as defendant's employment history and his academic achievements. The trial court highlighted the fact that defendant has a successful employment history as witnessed by the fact that he was the owner of a landscaping business that he started in 2013 and the owner of a tax expert business, and the fact that he employed 10 people and provided for others. The court also considered the fact that defendant had been on the honor roll in high school and voted most likely to succeed.

Furthermore, although this Court noted in the previous appeal that defendant's prior criminal conduct was already taken into consideration by the guidelines and that the trial court had not found that the prior criminal record was not adequately considered, on remand the trial court expanded on this issue, noting that the guidelines do not take into consideration defendant's overall record of law abidingness. The court took into consideration the fact that defendant did not have any traffic tickets, had no gang affiliation, paid his taxes, had no instances of being a minor in possession or drunk and disorderly, and had no history of alcohol or substance abuse.

On remand, the trial court weighed heavily defendant's remorse, expressing that defendant's remorse reflected positively not only on defendant's character but his potential for rehabilitation. The trial judge emphasized his belief that defendant's remorse was genuine, and recounted listening to the police recording on which defendant was heard in anguish over having been responsible for the death of the victim, stating that in "forty years of being a lawyer and a Judge, [he had] never heard something that, that touched with anguish and remorse and sadness like listening to that."

In fashioning the sentence, the trial court also considered defendant's postcrime conduct, which the guidelines do not consider, but which reflect on his character. The court focused on the fact that, after the accident, defendant did not flee or make up excuses, but rather, he went to the aid of the injured, he admitted that he had committed the crime, and he cooperated with the police. The court opined that many young men make excuses, but rather than make excuses, defendant took responsibility for his actions.

The trial court also considered defendant's postsentence conduct in determining the appropriate sentence, looking to defendant's conduct during the two years between his first sentencing and his resentencing. The trial court properly considered the updated Presentence Investigation Report (PSIR), *People v. Triplett,* 407 Mich. 510, 515; 287 N.W.2d 165 (1980), and looked to the fact that defendant had completed over 300 hours of community service, attended over 100 AA meetings, was in the process of establishing his own AA group, and had enrolled in colleges courses.

Also taken into consideration was the probation department's findings, which are not considered by the guidelines, that defendant was remorseful and a good candidate for community supervision, and upon resentencing, defendant should be sentenced to his remaining term of probation. The trial court agreed with the probation department's recommendation that defendant was in fact a good candidate for community supervision due to the fact that, since his original sentencing, defendant had been in the community and there were no reports of probation violations.

The trial judge also articulated that, in considering defendant's postsentence conduct, defendant had done everything that he was required to do, as witnessed by the fact that he showed up to all of his required obligations on time, he never tried to reschedule, and he had never been delinquent or tardy. The trial court noted that all of the information gathered regarding defendant's postcrime conduct assists in determining defendant's potential for rehabilitation.

Upon a thorough review of the record, and in light of the great deference we give to the trial court's finding and conclusions, we conclude that defendant's sentence is reasonable. This Court has held that "a sentence that fulfills the principle of proportionality under *Milbourn,* and its progeny, constitutes a reasonable sentence under *Lockridge*." *Steanhouse II,* 313 Mich. App. at 47-48. The trial court articulated consideration of all of the relevant factors set forth under the principle of proportionality. In fashioning the appropriate sentence, the court considered the seriousness of the offense, looking to the fact that there was no premeditation on the part of defendant, other than the intent to drink alcohol. While the court noted that this was ultimately an accident, the court took into consideration the fact that the loss of life and injury are very serious concerns. Aside from the trial court's consideration of defendant's race, the trial court provided ample other reasons for imposing the sentence that it did, including the fact that the guidelines do not consider defendant's reputation for completely obeying the laws, defendant's past achievements, such as his employment and academic history, defendant's postcrime and postsentence conduct, defendant's remorse and rehabilitative nature, and the probation department's recommendation that defendant be sentenced to probation because he is a good candidate for community supervision. Thus, the trial court, upon review of the appropriate factors, determined that a probationary sentence was a proportionate sentence, taking into consideration this particular offense and the circumstances of this offender. The trial court did not abuse its discretion.

Affirmed.