No. 20-5170

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RUSSELL WILLIAMS — PETITIONER
(Your Name)

vs.

PEOPLE OF THE STATE OF MICHIGAN —

RESPONDENT(S) ON PETITION FOR A WRIT OF

CERTIORARI TO

STATE OF MICHIGAN – COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

WILLIAM RUSSELL WILLIAMS
(Your Name)

BELLAMY CREEK CORRECTIONAL FACILITY
1727 West Bluewater Highway
(Address)

Ionia, MI 48846
(City, State, Zip Code)

(616) 527-2510
(Phone Number)

QUESTION(S) PRESENTED

I. Was William Williams denied his right to due process, to present a defense, and to a properly instructed jury where the trial court refused to provide a mitigation instruction, thereby removing the primary factual issue in dispute at trial from the province of the jury?

Mr. Williams answers: "Yes."
The prosecution answered: "No."
The Court of Appeals answered: "No."
The trial court answered: "No."

II. Did the prosecutor's argument that assault with intent to murder should be decided based on the actus reus and not the mens rea deny Mr. Williams a fair trial? Alternatively, did defense counsel render ineffective assistance of counsel by failing to fully articulate the grounds for his objection to the prosecutor's improper argument, prejudicing Mr. Williams and necessitating a new trial?

Mr. Williams answers: "Yes."
The prosecution answered: "No."
The Court of Appeals answered: "No."
The trial court answered: "No."

III. Was Mr. Williams sentenced on the basis of inaccurate information and in violation of his right to due process where several offense variables were incorrectly scored, thus inflating the minimum guideline range? Is resentencing therefore required?

Mr. Williams answers: "Yes."
The prosecution answered: "No."
The Court of Appeals answered: "No."
The trial court answered: "No."

IV. Is Mr. Williams entitled to be resentenced where the trial court imposed a sentence for assault with intent to murder that was more the twice as long as the top of his recommended guideline range, and its stated basis for the sentence imposed largely recited the elements of the offenses Mr. Williams had been convicted of and the facts that caused his guideline range to be so high in the first place?

Mr. Williams answers: "Yes."
The prosecution answered: "No."
The Court of Appeals answered: "No."
The trial court answered: "No."

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[√] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TUSCOLA COUNTY PROSECUTOR - Attorney for Plaintiff-Appellee

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix_____to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The opinion of the United States district court appears at Appendix_____to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

[√] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,

[√] is unpublished.

The opinion of the_____court appears at Appendix_____to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:_____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No.____A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[√] For cases from **state courts**:

The date on which the highest state court decided my case was December 26, 2019 .
A copy of that decision appears at Appendix C .

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No.____A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. A defendant accused of a crime has the right under the federal and state constitutions to the effective assistance of counsel. **US Const, Amend VI; Const 1963, Art 1, § 20; *Strickland v Washington*, 466 US 668 (1984).**

II. Due process requires that a defendant be sentenced on the basis of accurate information. *Townsend v Burke*, 334 US 736 (1948); *People v Francisco*, 474 Mich 82, 86 (2006). **US Const Amends V, XIV; Mich Const 1963, art 1, §17.**

III.

Judgment Appealed From and Relief Sought

William Williams was charged with assault with intent to murder (AWIM), lying to police, and falsely reporting a felony after making a number of false statements to authorities before confessing that he got into a fight with his wife after she woke him up, threatened to hit him with a maul, then either reached for it or held it up. He admitted he had no excuse, that he "just lost it," and "grabbed it and then went stupid," hitting her in the head with the maul.

Mr. Williams requested that the mitigating circumstances instruction be provided so that his jury could decide if it believed he "lost it," and if an ordinary person might act in the heat of passion when woken up in the middle of the night and then verbally and physically threatened with a maul. The trial court would not read the instruction.

In closing, Mr. Williams' counsel argued that the prosecution had failed to prove that Mr. Williams had intended to kill his wife, so the jury should find him guilty of the lesser included offense of assault with intent to commit great bodily harm (GBH). The trial court overruled defense

counsel's objection when the prosecutor began to give "some examples of what might be [GBH]," in rebuttal, endorsing the prosecutor's assertion that GBH and AWIM are differentiated based on the physical act, not the defendant's intent. The prosecutor then argued GBH is where the defendant hits someone in the leg with a bat or in the hand or arm with a crowbar, or kicks someone in the ribs; what Mr. Williams did simply did not qualify as GBH.

Mr. Williams, who at 59 years old had no prior interactions with the criminal justice system, was assessed 20 points under PRV 7 because of his concurrent convictions for initially lying to police about what had happened. This added years to his recommended minimum sentence. His guideline range was further increased by the trial court's novel scoring of several offense variables, which resulted in a minimum guideline range of 135 to 225 months.

The trial court more than doubled the high end of that guideline range, sentencing Mr. Williams to 40 to 80 years in prison. Even though his wife was "very much alive," the court imposed what would have constituted a departure sentence under the guidelines for murder. The court justified its sentence based on its conclusion that he had treated his wife with excessive brutality, that he intended to kill her, and that he tried to cover up what he did by lying to police and not coming forward right away.

Mr. Williams appealed, but the Court of Appeals found no error in his trial or sentence. It concluded that he was not entitled to a mitigating circumstances instruction based on its apparent view that the instruction should not be provided unless the victim first accomplishes a physical assault on the defendant. It held the prosecutor was simply arguing the defendant's intent could be inferred based on the nature of the attack when he gave a laundry list of GBH-offenses, even though the prosecutor said the opposite in front of the jury when he responded to the objection.

After affirming the scoring of several of the Offense Variables (OVs) Mr. Williams challenged, the Court of Appeals affirmed the reasonableness and proportionality of his 40 to 80 year sentence, finding that the trial court had adequately explained its sentence by articulating the specific facts that caused the jury to convict him of AWIM and lying to police, and which caused the court to assess points under OVs 1s, 2, 3, 4, 5, 6, 7, 10, and 19.

Mr. Williams seeks leave to appeal so that the Court can pass on the important issues raised herein, and specifically clarify that trial courts do not adequately explain why a grossly excessive sentence is more proportionate than a within guideline sentence by noting the seriousness of the defendant's commission of a Class A Offense, and citing the underlying facts that caused the defendant's guideline range to be so high in the first place.

STATEMENT OF THE CASE

I. William Williams

William Williams was born in 1958. Before being convicted of multiple felonies in this case, he had never been convicted of any crime. (PSI, 1, 12) He worked for Palace Sports and Entertainment ("PSE"), doing general handyman work at the different properties owned by PSE, such as the Palace of Auburn Hills and Meadowbrook. 1988. PSI, 15; TII[1], 192-93.

Mr. Williams married his wife, Christine, in 1990. PSI, 14. The couple was somewhat isolated from their families. TI 143; TIII 176, 183-85. They argued "a lot" about money. (Appendix D – People's Exhibit 57 ("Px 57"), 2-3) They did not have children, and owned a home in Indianfields Township. TII 9.

Mr. and Ms. Williams' relationship was strained. They slept in separate bedrooms, PSI, 11, and in 2015, Mr. Williams met a woman – Sarah Schorsch – on an online dating site, who he paid to have sex with him the first time that they met. TII 207, 218. Mr. Williams and Ms. Schorsch were never intimate again, but from the time they met until he was arrested in this case, Ms. Schorsch continued to lead Mr. Williams to believe there was a possibility of a romantic relationship. TII 219-20. Ms. Schorsch took advantage of Mr. Williams' apparent infatuation with her, asking him for money for things such as groceries, rent, or money for her probation. TII 208-09. In reality, Ms. Schorsch was using this money to feed the heroin addiction she and her boyfriend shared. TII 212. In the two years that they knew each other, Mr. Williams gave Ms. Schorsch approximately $10,000. TII 209. By May 2017, Mr. Williams was beginning to run out

[1] Transcripts are identified as follows: 4/10/18 Trial Transcript = TI; 4/11/18 Trial Transcript = TII; 4/12/18 Trial Transcript = TIII; 4/13/18 Trial Transcript = TIV; 5/4/18 Sentencing Transcript = ST.

of money. TIII 181-82. He would later tell a detective, "[Ms. Williams] was mad at me because I spent all our money." Px 57, 10.

In the Spring of 2017, there was a good deal of anxiety among PSE employees about their job security. While Mr. Williams was a good worker, did not have any attendance problems or any issues with his coworkers, TII 194, the Detroit Pistons were moving to Little Caesars Arena in Detroit, PSE was about to cease to exist, and all employees were being asked to reapply for their positions with the new corporate entity. TII 194-198. Future employment was not guaranteed, TII 196, and it would have been a more than 100 mile drive each way from Indianfields to the Pistons' new arena in Detroit if Mr. Williams was retained, though he was certain he would not be. Px 57, 26.

II. The Events of May 25 and 26, 2017

When Mr. Williams got home from work on May 25, he drank a few beers with Ms. Williams. Px 57, 31. They ate dinner and watched some TV, then he went to bed. Px 57, 31.

At around 3:00 a.m. on May 26, Mr. Williams was woken up by the sound of the television in Ms. Williams' bedroom, so he told her to turn it down. Px 57, 4, 35, 39. Ms. Williams had brought a splitting maul or axe into her bedroom. Px 57, 4. "She had it in there ... Cause she had it laying ... and she was in the bed ... and she grabbed for it." Px 57, 11-12. "She said I'll hit you with the axe." Px 57, 35.

> She was just super mad at me. She told me not to come in there, the bedroom, but I went in there anyways. She held up the axe and I grabbed it from her and smacked her. ... I just grabbed it from her. ... She had [the maul] with her. She sat up in the bed because ... she said you need to get ... out of here and I'm like give me that thing. And then she was cussing at me and I just wacked her with it.
>
> She said something about I'll get this axe after you. So I went and grabbed it and then went stupid. [Px 57, 3-4, 15]

"I just lost it." Px 57, 12. "I think [I hit her] just once and then I tossed the axe at her." Px 57, 5.

Mr. Williams then went outside and sat in his car for a little more than an hour. Px 57, 39. He went back inside at around 4:30 a.m., got ready for work, and left the house to go to work at around 5:00 a.m. Px 57, 17-19, 39-40. He worked until around 8:00 a.m., then drove to Dearborn to give Ms. Schorsch money that she told him she needed for court. He went back to work, then at lunch time he put went to put flowers on his father's grave. Px 57, 20-22, 43-45. He went back to work for a few more hours, then left for the day at around 3:30 p.m. Px 57, 22; TIII. 149.

On his way home from work he started to think about what had happened and asking himself what he had done to his wife. When he got home he panicked and attempted to stage a break-in by busting open the door with a prybar and by emptying some cupboards. Px 57, 23. He went to Ms. Williams' bedroom to check on her, and, believing she was dead, went outside. TIII. 149; Px 26, 57, 18. Mr. Williams called 9-1-1 and reported that his home had been broken into, and that his wife was bleeding in her bed with an axe nearby. TIII 133-34; Px 57, 48; Px 59.

When officers arrived, Mr. Williams claimed that when he got home from work he discovered "that someone had broken into his house and that he'd found his wife in the back bedroom and she was in a pool of blood, unresponsive." TII 11, 31, 59.

The officer who found Ms. Williams in her bed pulled the blanket covering her back, but Ms. Williams rolled over and grunted, "and then she pulled the blanket up back over her head and rolled back over." TII 12-13. Once she rolled over, he noticed the maul "on top of the blanket lying next to her on the other side of the bed." He radioed for EMS. TII 13-14; TIII 39.

The EMTs who arrived noticed that the blood on the bed was dark and clotted. TII 108, 138. "She had a pretty large laceration on the left side of her head in the temporal region." TII 139. "She was covered in what I believed to have been a sleeping bag. .... I pulled it down, and

almost immediately she pulled it back up." TII 139-40. Ms. Williams was put into an ambulance and taken to McLaren Lapeer Regent hospital for emergency treatment. TII 111-12, 128.

Officers were immediately suspicious of Mr. Williams because the door that he used a prybar to break could have easily been forced open with a kick or shoulder, and the drawers that he pulled open seemed to have been "ransacked with care"—they "were just kind of pulled out and sat on the floor, weren't necessarily ransacked." TII 39-40. Mr. Williams' demeanor, which multiple officers described as "calm" or "emotionless," increased their suspicions. TII 11, 31, 75-76, 79, 85-86, 95. "I didn't know if he was in shock or if he was suicidal or what he was thinking." TII 76. "Just based on the emotionless, ghost appearance, I didn't ... know what he was thinking, if he ... wanted to harm himself or if he was in shock." TII 79.

III. Mr. Williams' Police Interviews

Mr. Williams was then interviewed by a detective at the State Police Caro Post. TII 93-94. While waiting in the lobby to be interviewed, his demeanor was "strange," and "more like somber than anything." TII 63. The detective who conducted the interview said that one or two times Mr. Williams became upset, and had to be instructed to take a breath, but during much of the interview he was "almost emotionless," and "very calm and subdued." TIV 47. He again said that he had come home that day to discover his house had been broken into. TIV 46-47.

"[A]t the conclusion of the interview, Mr. Williams told [the detective] he did not want to go back to the residence," so an officer took him to a hotel to spend the night. TII 26; TIV 49. On the way he asked to go to the hospital, but his request was not accommodated. TII 27.

The next morning, police took Mr. Williams to the Saginaw Police Department so that he could be interviewed by a different detective. TII 26; TIII 138; TIV 51. He told the detective that he and Ms. Williams got along pretty well, but were experiencing some financial issues. TIII 144.

He initially repeated his false break-in claim to the detective. TIII 139-141. After additional questioning he admitted that he hit Ms. Williams with the maul and staged the break-in. TIII 49; Px 57, 25. "[H]e started telling me about the stress. He started telling me that he had a lady friend that he was spending money on which was causing problems within the home." TIII 164.

Mr. Williams told the detective that he had not planned to assault his wife, and had never considered about doing anything like that before. TIII 156, 161-62; Px 57, 8. He "seemed like I – I wish I didn't do it, … I wish I didn't … make that choice that moment." TIII 162. He said, "I'm ruining everybody's life. I'm ruining my life, ruined her life." Px 57, 26; TIII 172.

At the conclusion of the interview Mr. Williams was arrested. TIV 53. He was charged with assault with intent to murder, four counts of false report of a felony, and one count of lying to a peace officer during a violent crime investigation.

IV. Ms. Williams' Medical Treatment and Recovery

Ms. Williams' conditions were stabilized once she arrived at McLaren, and she was then seen by a neurosurgeon, who performed surgery on her the night she arrived. TIV 11-12, 15, 35-36, 49. It was about two weeks before she began responding to doctors and acknowledging their presence. TII 171. She continued to receive treatment at McLaren Lapeer Hospital until June 15th, when she was transferred to Heartland Rehabilitation Center. TII 170; TIII 177 She was eventually released to a partially assisted living location. TIII 178

At the time of the trial Ms. Williams was able to dress herself. TIII 179. She could speak, but struggled to find words, which could be "[v]ery frustrating for her." TIII 179. "She needs assistance of a cane to walk because of her lack of feeling." TIII 179. "There are times where she has double vision." TIII 179. "She needs assistance with showering," and "is only walking short distances." TIII 179. "[S]he doesn't have any recollection of what happened to her," and only

knows that Mr. Williams did something to her because that is what she has been told by her sister. TIII 180; TII 250.

V. The only material factual issues in dispute at trial was Mr. Williams' intent and whether the assault involved mitigating circumstances

The only material factual dispute at trial was whether Mr. Williams had intended to murder Ms. Williams, and whether mitigating circumstances existed to convict Mr. Williams of the lesser offense of assault with intent to commit great bodily harm. Mr. Williams' counsel acknowledged this during his opening argument:

> [T]he statement that Mr. Williams gave was that his wife threatened him with the axe on that night in questions ... Mr. Williams in his statement said he just lost it. All this stuff building up. He lost it. He admits hitting his wife, okay?
>
> Mr. Williams was in such an excited state at that time he was not thinking. He was not thinking about what was gonna happen, what the consequences of his actions were.
>
> ...
>
> So what we will be asking for is what's called a lesser-included offense, and a lesser included offense is intent to do great bodily harm less than murder his wife on that night. That's what we'll be asking you to find him guilty of, not the charge that they brought against him. [TI 153-154]

Aside from intent, the facts were generally agreed upon. The EMTs who testified all believed that Ms. Williams had been hit once, TII 124, 132, 139, while the doctors who treated her testified that CAT scans indicated two separate blows. TII 165; TIV 20. Forensic testing revealed the presence of at least two people's DNA on the maul's handle. TIII 125-26.

Mr. Williams requested that the jury receive Michigan Model Jury Instruction 17.04 on Mitigating Circumstances, which provides that a person is not guilty of assault with intent to murder if the assault took place under circumstances that would have reduced the charge to manslaughter if the victim of the assault had died. The prosecutor objected to this instruction in writing and before closing argument. TIV 83-88.

The trial court agreed with the prosecutor and refused to give the instruction, finding that no reasonable jury could find that mitigating circumstances existed in light of the fact that "the blows had to have come from someone above her," and "I don't think that the one statement by the defendant wherein he indicates that his wife said that she should use the axe or something to that effect – and, again, we're assuming that the axe was even in her room, which is in dispute. ... That she brought the axe in her room." TIV 89. "I'm convinced that applying an objective reasonable man standard for determining provocation would indicate that a reasonable jury could not come to the conclusion that there was provocation here. I'm so I'm not going to instruct the jury as to 17.04." TIV 89-90.

During closing argument defense counsel acknowledged that the jury would convict Mr. Williams of six counts. Because Mr. Williams was prohibited from claiming mitigation, he argued in closing only that Mr. Williams did not have the intent to murder Ms. Williams, and that the jury should therefore convict him of the lesser offense of assault with intent to commit great bodily harm: "Now, did he intend to kill her with that axe? No, he did not intend to kill her with that axe." TIV 108, 113-14.

On rebuttal, the prosecutor advised the jury: "Assault/great bodily harm, the judge is going to give you the instructions. I'd like to give you some examples of what might be assault/great bodily harm. That might be where someone grabs a baseball bat and hits someone—" TIV 116. This drew an objection from the defense. The prosecutor responded that, "it is an argument by way of what could constitute assault/great bodily harm. And that's being presented to the jury, so certainly appropriate—to give examples of what might constitute that under the instructions they're about to receive and they can analyze this." TIV 116. The trial court overruled the objection. TIV 116. The prosecutor continued:

> So examples of assault/great bodily harm. When you ... hear those instructions, you'll think that fits. Somebody takes a baseball bat and hits somebody in the leg. Not in the head but in the leg. Somebody takes a ... crow bar and hits somebody in the arm or in the hand, that could be assault/great bodily harm. Somebody's engaged in a fight and they end up kicking somebody who's laying on the ground in the rib cage or somewhere else three or four times that causes some other injuries, that might be assault/great bodily harm.
>
> Picking up an 8-pound splitting maul/axe and smashing your wife's skull two times, that's as far from assault/great bodily harm as you can get. They're on two opposite ends of the globe. [TIV 117]

Mr. Williams was found guilty of assault with intent to murder and of all other charges.

VII. Sentencing

Before the judge pronounced sentence, Mr. Williams expressed his remorse for what he had done:

> I'd like to apologize to Christine for all the suffering and pain I've done to her. ... I did a terrible thing. I'm sorry. A lot of people I've let down. I'm sorry. I let down Christine. I let down Christine's family. I let down my family. I let down myself. I let down God. I'm sorry.
> ...
> I'd like to apologize to Christine. I'm sorry. I love you, I miss you, and I hope one day you will forgive me. [S 7-8]

Mr. Williams also apologized to the Michigan State Police, the Tuscola County Sheriff's deputies, the Tuscola County courthouse, and Ms. Williams' individual family members by name. S 7-8. He thanked the Tuscola County Jail for taking care of his medical needs, the Forgotten Men Ministry, and the chapel at the jail. S 7-8.

While explaining her substantial departure, Judge Gierhart cited "lack of remorse" as a substantial factor. S 19. She pointed to his "vigorous" defense of a divorce action brought by the complainant. S 19-20. She added that he seemed "oddly ... unaffected" by the "carnage" he'd caused, and seemed remorseful only that he'd been caught. S 20.

Judge Gierhart also pointed to the circumstances of his crime, commenting that "every single human being who has touched this case" were "all scarred by the brutality and cruelty of [his] actions," and could not "unsee" the "horrific photos" of what he had done to his wife. S 20. She also noted Dr. Nunnally's testimony that the person-to-person violence he usually saw consisted of "gunshot wounds, stabbings, things like that," that he had never before "seen anyone sustain a direct blunt force object to the head," and that "the kinetic energy that had to be transferred ... was very impressive." S 23. She also noted the assault was "completely intentional," S 20, and asserted that Ms. Williams' family and the community "deserve the peace of mind ...that come from you being incarcerated until you take your final breath." S 24.

Judge Gierhart then pronounced sentence. For assault with intent to murder she imposed a prison term of forty-to-eighty years—a sentence whose minimum term was more than double the high end of his guidelines, as they were scored.

Judge Gierhart did not explain whether or nor the reasons she gave for sentencing so harshly were accounted for by the guidelines, nor even that she was exceeding the guidelines. Instead, she merely commented that the guidelines were now advisory, and that a sentence must meet the test for proportionality set out in *People v Milbourn*. She described that test as requiring her to "determin[e] ... the location of an individual case ... on the continuum from the least to the most serious situations ... and sentencing the offender in accordance with this determination." S 24. She "summarize[d]" the test as asking the question, "does the crime perpetrated by the defendant shock the conscience?" She found that it did. S 24.

Mr. Williams appealed by right, seeking a new due to the instructional error and the prosecutor's improper argument, and in the alternative, resentencing under the standard set forth

in *People v Milbourn*, 435 Mich 630 (1990) and its progeny, and under corrected sentencing guidelines. The Court of Appeals denied all relief.

Mr. Williams now seeks leave to appeal.

REASONS FOR GRANTING THE PETITION

William Williams was denied his right to due process, to present a defense, and to a properly instructed jury where the trial court refused to provide the requested mitigation instruction, thereby preventing the primary factual issue at trial from being decided by the jury

Standard of Review and Issue Preservation

The trial court sustained to the prosecutor's objection to Mr. Williams' request that his jury receive the mitigating circumstances instruction provided in M Crim JI 17.04. TIV 88-90. The issue is preserved.

This Court reviews a claim of instructional error de novo. *People v Hawthorne*, 474 Mich 174, 179 (2006).

Discussion

If the evidence presented would support a conviction of a cognate lesser offense, the trial court, if requested, must instruct on it." *People v Sullivan*, 231 Mich App 510, 517–18 (1998).

The trial court's refusal to instruct the jury on mitigating circumstances incorrectly and unfairly removed a primary theory of defense from the rightful purview of the jury. Mr. Williams acknowledged that he struck Ms. Williams in then head with a maul and sought conviction of assault with intent to do great bodily harm less than murder (GBH), the lesser of the charged offense of assault with intent to murder (AWIM), under two theories: (1) that he had acted in the heat of passion when he assaulted her, thus mitigating his criminal responsibility; and (2) that he had not intended to murder Ms. Williams when he struck her in the head with the maul. The failure to provide the mitigating circumstances instruction denied Mr. Williams the ability to prevail on what was likely the stronger of the two theories.

Mr. Williams was entitled to have the jury instructed on M Crim JI 17.04, which provides:

> (1) The defendant can only be guilty of the crime of assault with intent to commit murder if [he] would have been guilty of murder had the person [he] assaulted actually died. If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the defendant is not guilty of assault with intent to commit murder.
>
> (2) Voluntary manslaughter is different from murder in that for manslaughter, the following things must be true:
>
> (3) First, when the defendant acted, [his] thinking must have been disturbed by emotional excitement to the point that an ordinary person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been caused by something that would cause an ordinary person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide.
>
> (4) Second, the killing itself must have resulted from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and before reason took over again. The law does not say how much time is needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.
>
> (5) If you find that the crime would have been manslaughter had the person died, then you must find the defendant not guilty of assault with intent to murder [and decide whether he is guilty assault with intent to commit great bodily harm].

The trial court held that the instruction was not appropriate because "applying an objective reasonable man standard for determining provocation would indicate that a reasonable jury could not come to the conclusion that there was [adequate] provocation there." TIV 89-90.

An intentional killing is manslaughter and not murder where, "at the time of the act, [the defendant is] disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment." *Maher v People*, 10 Mich 212, 220 (1862). Michigan courts have held adequate provocation could be found in cases where the victim threatened to beat defendant's

ass, then hit him with a bat,[2] and where the defendant learned that his wife may have committed adultery some thirty minutes before assaulting the adulterer.[3]

The Court of Appeals opinion appeared to hold that as a matter of law, the adequate provocation element of the mitigation defense is only available to defendants who are first physically assaulted by their victim or have just learned about a spouse's adultery. But this is simply not the case. "The determination of what is reasonable provocation is a question of fact for the factfinder." *People v Pouncey*, 437 Mich 382, 390 (1991). A reasonable jury could have certainly concluded that the actions of Ms. Williams, "would cause an ordinary person to act rashly or on impulse." M Crim JI 17.04.

According to Mr. Williams, Ms. Williams yelled at him after the volume of her television woke him up in the middle of the night when he told her to turn it down because he had to work. She had bizarrely brought a splitting maul from the garage into her bedroom, told him that she ought to hit him with it, and then reached for it and grabbed it immediately before he assaulted her took it away from her and hit her with it. Ms. Williams' threat combined with her overt steps towards carrying out that threat could cause a reasonable person to act rashly and without due deliberation or reflection under those circumstances.

A "verdict is undermined when the evidence clearly supports the requested lesser included instruction that was not given to the jury." *People v Cornell*, 466 Mich 335, 365 (2002).

Mr. Williams is entitled to a new trial with a properly instructed jury.

The prosecutor's improper rebuttal argument that assault with intent to murder should be determined based on the nature of the

[2] *People v Mitchell*, 301 Mich App 282 (2013).

[3] *Maher v People*, 10 Mich 212 (1862).

assault and not the defendant's intent, which the trial court appeared to endorse and agree with, denied Mr. Williams a fair trial. Alternatively, defense counsel performed deficiently in failing to fully articulate the grounds for his objection to the prosecutor's improper argument and Mr. Williams was prejudiced as a result.

Standard of Review and Issue Preservation

When the prosecutor began to offer examples of assaults that he asserted would qualify as GBH, Mr. Williams' counsel objected that the prosecutor was "going off something that wasn't presented during the trial." TIV 116. The objection is preserved. *See People v Brown*, 294 Mich App 377, 382 (2011).

"Issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v Bennett*, 290 Mich App 465, 475 (2010).

To the extent that defendant's stated basis for objection was insufficient to put the trial court on notice as to the basis for his objection, defense counsel rendered ineffective assistance of counsel, necessitating a new trial. *People v Pickens*, 446 Mich 298, 314 (1994).

Ineffective assistance of counsel claims are reviewed de novo on the existing record. *Id.* at 359; *People v Ginther*, 390 Mich 436, 443 (1973).

Discussion

Reversible error occurs where the prosecutor misstates the law in closing argument. *People v Quinn*, 194 Mich App 250, 253 (1992) (defendant was entitled to a new trial, even absent objection, where the prosecutor argued that evidence admitted for a limited purpose under MRE 404b could be used as substantive evidence of defendant's guilt); *People v Vaughn*, 128 Mich App 270, 272-73 (1983) (defendant was entitled to a new trial, even absent objection, where the prosecutor suggested in closing argument that the jury utilize his prior convictions as substantive evidence of his assaultive nature, in violation of MRE 609).

Where, as in this case, mitigating circumstances could not be considered by the jury, whether a defendant is guilty of AWIM or GBH is determined based on whether the defendant intended to murder the victim when he committed the assault. MCL 750.83; MCL 750.84. During his closing defense counsel argued only that the prosecutor had failed to establish beyond reasonable doubt that Mr. Williams intended to murder Ms. Williams, and that Mr. Williams should therefore be convicted of GBH. In rebuttal the prosecutor argued that Mr. Williams had not committed GBH by listing examples of assaults that he believed would constitute GBH that were less violent than the assault Mr. Williams had committed, and also claimed: "Picking up an 8-pound splitting maul/axe and smashing your wife's skull two times, that's as far from assault/great bodily harm as you can get. They're on two opposite ends of the globe." TIV 117. This argument was intended to, and did, cause the jury to focus solely on the nature of the assault Mr. Williams committed, and to ignore Mr. Williams' argument that intent to murder had not been established.

The Court of Appeals found nothing improper about the argument, concluding that the prosecutor was simply arguing that Mr. Williams' intent to kill could be inferred from his actions, and the prosecutor was allowed to respond to the defendant's closing argument.

On the first point, the prosecutor's offer for why he should be allowed to provide the jury of list of offenses that he claimed would qualify as GBH was provided in front of the jury, and makes explicit that his point was not that intent could be inferred from Mr. Williams' actions: "it is an argument by way of what could constitute assault/great bodily harm. And that's being presented to the jury, so certainly appropriate to give examples of what might constitute that under the instructions they're about to receive." TIV 116. He told the jury that GBH did not "fit" the assault Mr. Williams committed, TIV 117, not that it could infer Mr. Williams' intent from the nature of the assault. Further, the assaults the prosecutor listed are more readily characterized as

felonious assaults or aggravated assaults than GBH. However, because the intent of the defendant is what is relevant in determining which assaultive crime the defendant is guilty of, the examples provided could very well constitute aggravated assault, felonious assault, GBH, or AWIM. The nature of the assault does not in itself determine the defendant's intent or alleviate the prosecutor of his burden to establish intent beyond reasonable doubt.

Regarding the Court of Appeals' second defense of the argument, that prosecutors are allowed to respond to a defendant's argument, defense counsel argued only that Mr. Williams did not intend to kill his wife when he assaulted her. TIV 108, 113-14. Counsel did not open the door to the prosecutor's improper rebuttal by simply asserting that an element of the charge had not been proven. Counsel did not claim that a defendant can never be convicted of AWIM unless he admits his intent to kill or uses a firearm, or his victim becomes braindead as a result of the assault.

A properly instructed jury can often be said to mitigate improper argument. In this case, however, the trial court's ruling admitting this argument and instruction of how to construe the parties' arguments actually increased the prejudice Mr. Williams sustained because it indicated that the prosecutor's legal argument that GBH is determined based on the nature of the assault was proper, and further confused the actus reus and the mens rea requirements in the minds of the jury. The trial court accepted the following reasoning for the validity of the prosecutor's argument in overruling Mr. Williams' objection: "it is an argument by way of example of what could constitute assault/great bodily harm. .... [T]o give examples of what might constitute that under the instructions they're about to receive and they can analyze that." TIV 116. By accepting this as a basis, the trial court endorsed as valid the prosecutor's position the Mr. Williams' assault could not constitute GBH under the instructions they were about to receive. The trial court later instructed the jury that "the lawyer's statements and arguments are not evidence. They are only meant to help

you understand the evidence and each side's legal theories." TIV 123. Since the trial court had previously ruled it was proper for the prosecutor to give examples of that "might constitute" GBH, this instruction actually amplified the prejudice caused by the prosecutor's improper argument, rather than diminishing it.

Because the prosecutor and, indirectly, the trial court incorrectly instructed Mr. Williams' jury that the difference between GBH and AWIM can be determined by the nature of the assault committed without regard to the defendant's intent, Mr. Williams was denied his right to a fair trial. He is therefore entitled to a new trial.

Alternatively, while defense counsel objected to the prosecutor's argument, the grounds he provided for his objection were not precise. To the extent counsel's failure to clearly articulate the objection caused the trial court to overrule his objection, Mr. Williams was prejudiced by counsel's failure. A defendant accused of a crime has the right under the federal and state constitutions to the effective assistance of counsel. US Const, Amend VI; Const 1963, Art 1, § 20; *Strickland v Washington*, 466 US 668 (1984). To prevail on an ineffective assistance of counsel claim, a defendant must first "show that counsel's performance was deficient," and that "there is a reasonable probability that, but for counsel's error, the result of the trial would have been different." *Id.* at 687-88.

Defense counsel clearly recognized that the prosecutor's argument was improper and sought to have it excluded from the jury. Counsel's failure to clearly object was not strategic, but rather an apparent misapprehension of the law. In failing to clearly specify the correct grounds for the objection defense counsel rendered deficient performance. *See, e.g., People v Dixon*, 263 Mich App 393, 397–98 (2004) (failure to lay proper foundation for evidence sought to be admitted constitutes deficient performance).

To the extent that counsel's failure to adequately object caused the trial court to allow the prosecutor to present improper argument to the jury, defense counsel's errors prejudiced Mr. Williams by all but eliminating any chance he would be acquitted. Mr. Williams is entitled to a new trial. *See, e.g., People v Stanaway*, 446 Mich 643, 687 (1994).

Mr. Williams is entitled to resentencing where several offense variables were incorrectly scored, resulting in an incorrect minimum guideline range.

Standard of Review and Issue Preservation

Mr. Williams sought remand in the Court of Appeals for correction of his guidelines and resentencing under the corrected guideline range. The issue is preserved. MCL 769.34(10).

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, *i.e.*, the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438 (2013).

Discussion

Due process requires that a defendant be sentenced on the basis of accurate information. *Townsend v Burke*, 334 US 736 (1948); *People v Francisco*, 474 Mich 82, 86 (2006). US Const Amends V, XIV; Mich Const 1963, art 1, §17.

Based on mistakes in the scoring of Offense Variables ("OV") 1, 2, 5, 7, and 10, Mr. Williams' minimum guideline range was incorrectly set at 135 to 225 months. Correction of these Offense Variables will lower Mr. Williams' guidelines to 126 to 210 months. Even though the trial court exceeded the incorrectly scored guidelines in sentencing Mr. Williams, he is still entitled to resentencing so that the trial court can incorporate the properly scored guidelines in its sentencing decision. *People v Geddert*, 500 Mich 859 (2016).

A. OV 1 – Aggravated Use of Weapon

Mr. Williams was incorrectly assessed 25 points under OV 1, indicating that "a victim was cut or stabbed with a knife or other cutting or stabbing weapon." MCL 777.31(1)(a).

Dr. Nunnally, a surgeon who treated Ms. Williams at McLaren Lapeer, and who was qualified as an expert at trial, testified that "[g]oing by the CAT scan and the ... reconstructions that we did, it was at least two ***blows*** to the skull based on the fracture pattern." TII 165. Regarding Ms. Williams' injury, Dr. Nunnally testified, "[i]t's ***not*** a laceration. It's ***not*** a stabbing wound. It's ***not*** a knife injury." TII 177. Dr. Nunnally compared the wound to Ms. Williams' head to the type of injury that would be caused by a hammer, as opposed to the type of injury that would be caused by a knife. TII 177-78. He also described the cause of injury as "a direct blunt force object to the head." TII 164-65. Thus, Ms. Williams was not "cut or stabbed with a knife or other cutting or stabbing weapon."

Therefore, OV 1 should have been scored 10 points, indicating that the "victim was touched by any ... type of weapon," other than a firearm, knife, or other cutting or stabbing weapon. MCL 777.31(1)(c).

B. OV 2 – Lethal Potential of Weapon Possessed or Used

Mr. Williams was incorrectly assessed 5 points under OV 2, indicating that Mr. Williams "possessed or used a ... knife or other cutting or stabbing weapon." MCL 777.32(1)(d).

A splitting maul or axe, as it was sometimes referred, is not a cutting or stabbing weapon. It is a wedge, that when used as a weapon, as it was here, causes injury by way of "a direct blunt force object to the head." TII 164-65.

Therefore, OV 2 should have been scored 1 point, indicating that Mr. Williams "possessed or used any other potentially lethal weapon." MCL 777.32(1)(e).

C. OV 5 – Psychological Injury to Victim's Family

Mr. Williams was incorrectly assessed 15 points under OV 5, indicating that "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a).

There is nothing in the Presentence Investigation Report about Ms. Williams' family sustaining any psychological injury. Ms. Williams' sister, Janine Moran, testified at trial and said nothing about psychological injury to anyone other than Ms. Williams. TIII 175-192. Ms. Moran also provided a statement at the sentencing hearing, and said nothing about having endured a psychological injury requiring professional treatment, only that "Christine's family has been traumatized by Williams' actions," they are "less trusting of others," and that Ms. Moran feels "profound sadness" when she considers Ms. Williams' future. S 10-11. From this, there is simply insufficient evidence for the court to have determined that Ms. Williams' family endured psychological injuries that would necessitate professional treatment. *See People v Lockett*, 295 Mich App 165, 182-83.

Therefore, OV 5 should have been scored at 0 points. MCL 777.35(1)(B).

D. OV 7 – Aggravated Physical Abuse

Mr. Williams was incorrectly assessed 50 points under OV 7, indicating that "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety suffered by during the offense." MCL 777.37(1)(a).

"OV 7 is designed to respond to particularly heinous instances in which the criminal acted to increase [a victim's] fear by a substantial or considerable amount." *People v Glenn*, 295 Mich App 529, 536 (2012), rev'd on other grounds by *People v Hardy*, 494 Mich 430, 434 (2013).

All conduct that could potentially warrant scoring OV7 at 50 points requires a showing of the defendant's intent to increase their victim's pain, suffering, fear, etc.,[4] with the possible exception of the defendant's treatment of a victim with excessive brutality. There was no such intent here. There is no evidence that Mr. Williams brandished the maul and threatened Ms. Williams with it before striking her. To the contrary, he grabbed it and immediately hit her with it. The trial court "was sure" that Mr. Williams was "confident that she was dead" after striking Ms. Williams with the maul, so it did not conclude that he left Ms. Williams alive and unattended to increase her suffering. S 21.[5]

Nor does the record show excessive brutality. For purposes of OV 7, "excessive brutality means savagery or cruelty beyond even the 'usual' brutality of a crime." *Glenn*, 295 Mich App at 533. Mr. Williams' assault can properly be characterized as brutal and cruel, but so can nearly all assaults committed with the intent to murder. If the jury was correct that Mr. Williams did intend to murder Ms. Williams, then he attempted to do so swiftly, using the most effective instrument to do so at his disposal. His assault was not an "excessively brutal" method of achieving the goal of murder, as it would have been had he struck Ms. Williams in multiple places other than her head or used a smaller instrument, such as a hammer. See, e.g., *People v Wilson*, 265 Mich App 386, 397-99 (2005) (trial court correctly found excessive brutality where defendant convicted of GBH attacked victim with several weapons, including a knife and broken glass candle holder, choked her until she lost consciousness, dragged her around, beat her, and kicked her in the head, back and face).

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[4] Sadism, by its terms, requires the intent to produce suffering or to gratify the defendant. MCL 777.37(3). Torture requires "the intent to cause cruel or extreme … pain and suffering." MCL 750.85(1). The fourth catch-all provision requires that the defendant's conduct be "designed to increase the fear and anxiety of a victim." MCL 777.37(1)(a).

[5] Further, courts may not consider defendant's "conduct after completion of the sentencing offense." *People v McGraw*, 484 Mich 120, 134 (2009).

While certainly more shocking given its rarity, there is no reason that hitting someone in the head with a maul is any more brutal than shooting someone in the head or stabbing someone in the heart. If the object is murder, the assault is inherently brutal.

Therefore, OV 7 should have been scored at 0 points. MCL 777.37(1)(b).

E. OV 10 – Exploitation of Domestic Relationship

Mr. Williams was incorrectly assessed 10 points under OV 10, apparently indicating that he "exploited ... a domestic relationship," when he assaulted Ms. Williams. MCL 777.40(1)(b). "'Exploit' means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

While Mr. Williams and Ms. Williams were in a domestic relationship, there was no showing that he exploited this relationship to commit the sentencing offense. Surprisingly, there is no existing precedent deciding whether the mere existence of a domestic relationship is sufficient to assess 10 points under OV 10 whenever a domestic partner is assaulted, but MCL 777.40(1)(b) explicitly requires ***exploitation of*** the domestic relationship.

The assault occurred because of Mr. and Ms. Williams' domestic relationship, but did not involve the exploitation of their domestic relationship or the manipulation of Ms. Williams. Mr. Williams was in the home with Ms. Williams because he lived there. He went into her bedroom because they were in an argument. He assaulted her because she threatened him and he "lost it." There was simply no exploitation or manipulation demonstrated in the record.

Therefore, OV 10 should have been scored at O points. MCL 777.40(1)(d).

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Resentencing is required because correcting the scoring errors will reduce the minimum guideline range. *See Francisco*, 474 Mich at 91. This is true even though the trial court exceeded the incorrectly scored guidelines because Mr. Williams is entitled to be resentenced with consideration of accurate information, including the correct guideline range. *Geddert*, 500 Mich 859. As the guidelines are presently scored, the OV total is 175, the OV Level is VI, and the sentencing range (for cell C-VI) is 135 to 225 months. Correction of OVs 1, 2, 5, 7, and 10 as requested above would lower Mr. Williams total OV Score to 81, and lower his OV Level to V. MCL 777.62. This will reduce Mr. Williams' recommended minimum sentence range (for cell C-V) to 126 to 210 months. MCL 777.62.

Mr. Williams is entitled to resentencing because the trial court violated the principle of proportionality when it sentenced him

Standard of Review

Sentences that depart from the guidelines are reviewed for reasonableness. *People v Lockridge*, 498 Mich 358 (2015). "[A]ppellate review of departure sentences for reasonableness requires review of whether the trial court abused its discretion by violating the principle of proportionality set forth in . . . [*People*] *v Milbourn*[, 435 Mich 630 (1990)]." *People v Steanhouse*, 500 Mich 453, 477 (2017).

Discussion

Without explaining why the sentencing guidelines did not adequately account for the considerations that caused her to depart in sentencing Mr. Williams, Judge Gierhart imposed a departure sentence more than twice the high end of the AWIM guidelines—a sentence so long that it would have exceeded even the guidelines for murder. This sentence was unreasonable because it violated *Milbourn's* requirement that a sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender," *Steanhouse*, 500 Mich at 460, quoting *Milbourn*, 435 Mich at 636. Judge Gierhart apparently based its departure on the brutality of Mr. Williams' crime, and her belief that he lacked remorse for his actions, which she believed were intentional. These factors, to the extent they bear any record support, were already taken into account in Mr. Williams' sentencing guidelines. Judge Gierhart provided no explanation as to why the offense variables were inadequately accounted for in the guidelines. Moreover, while she accounted for the seriousness of the offense—half of *Milbourn*'s proportionality inquiry—she neglected entirely to take account of the other half, the seriousness of the offender.

Factors that may be considered under the principle of proportionality include, but are not limited to: (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 expression of remorse, and the defendant's potential for rehabilitation. *People v Steanhouse (On Remand)*, 322 Mich App 233, 238-39 (2017) (citing *People v Lawhorn*, 320 Mich App 194, 207 (2017)).

Even though sentencing within the guidelines is recommended rather than compulsory, "departures from the guidelines, unsupported by reasons not adequately reflected in the guidelines variables, should nevertheless alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme." *Milbourn*, 435 Mich at 659. "Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines." *Id.* at 659–60. Where considerations are already accounted for in the guidelines, those same considerations cannot justify an upward departure absent sufficient "explanation for why they were given inadequate weight by the guidelines." *Steanhouse (On Remand)*, 322 Mich App at 258.

Almost all the reasons Judge Gierhart gave for her sentence were already "adequately embodied within the variables used to score the guidelines." *Milbourn*, 435 Mich at 659–60. A prime example is what the Judge Gierhart called the "brutality and cruelty" of Mr. Williams' actions. S 20. That same conduct had already led her to impose the maximum 50-point score for OV 7, which should only be scored in cases where there is "savagery or cruelty beyond even the 'usual' brutality of a crime," and which by itself is enough to raise a Class A offender from OV

Level I to Level III. *Glenn*, 295 Mich App at 533; see MCL 777.37(1)(a). Thus, the guidelines already took into account the "brutality and cruelty" of Mr. Williams' crime.

That the offense was a "completely intentional act" S 20, was also, of course, fully accounted for by the guidelines. Had the jury concluded that Mr. Williams had not acted intentionally, and with the specific intent to murder, it would not have convicted him of AWIM and his sentencing guidelines would not have been scored for a Class A Offense, but instead scored for a less serious one.[6] Thus, the guidelines had also already taken into account the intentional nature of Mr. Williams' crime.

The judge's belief that Mr. Williams had displayed no "genuine remorse" and thus "would do the same thing all over again ... if ... given a similar opportunity," S 19, was partly accounted for by the guidelines, but the main problem with this issue as a justification for the sentence was that it was not supported, and was actually contradicted by the record. Mr. Williams' allocution was an expression of remorse. The judge may not have believed it, but the detective that Mr. Williams confessed to testified that Mr. Williams "seemed like" – not that he "said that" – he wished he had not assaulted his wife and wished he had not "ma[d]e that choice that moment." TIII 162. He volunteered to the detective that he ruined his wife's life when he was asked if he was sorry. TIII 172; Px 57, 26.

The evidence the judge cited in support of her view that Mr. Williams did not have remorse was that he "vigorously contest[ed] the divorce case." S 19-20. All that exists in the record relating to Mr. Williams' and Ms. Williams' divorce is that "[a]ll marital assets will go to Christine." PSI,

[6] Assault with Intend to do Great Bodily Harm is a Class D Offense, for which the guidelines-scoring used here would have yielded a 29-57-month minimum-sentence range. His maximum possible sentence would have been ten years, one-quarter of his current minimum sentence. MCL 750.84; MCL 777.16d; MCL 777.65.

16. In other words, the record does not show that the divorce was contested, much less "vigorously" contested, and fails to show lack of remorse.

The other evidence the judge cited in support of her view that Mr. Williams was not remorseful were his "emotionless" manner and his "laughable and pathetic ... story that there was a home invasion." Mr. Williams' pathetic story was accounted for by the guidelines: it resulted in 10 points being assessed under OV 19, and also raised Mr. Williams' Prior Record Variable Level from A to C (by causing Prior Record Variable 7 to be scored 20 points instead of 0). S 22. MCL 777.49(c); MCL 777.57. This added years to Mr. Williams' recommended guidelines range. MCL 777.62. His stoic or mechanical manner—described by the judge as "emotionless"—offers little support for the judge's conclusion of remorselessness. His actions after the assault, which included sitting in his car for more than an hour before heading to work, and then going about his day as though nothing had happened, were consistent with a man in shock who could not process what he had done. Nor, considering the judge's determination that Mr. Williams was already "confident she was dead," S 21, was his failure immediately to call 9-1-1 evidence of remorselessness. S 21.

The judge's concern for community safety was also inconsistent with the record, which showed a 59-year-old defendant with no previous criminal convictions, S 24, who had committed a single assault against a single person and shown no indication of general criminality.

The judge's failure even to mention Mr. Williams' previously spotless criminal record was also indicative of her failure to engage in the entirety of *Milbourn*'s command: that is, to consider not just the seriousness of the offense but also the seriousness of the offender. *Milbourn*, 435 Mich at 636. As the *Milbourn* court observed, "the Legislature, in setting a range of allowable punishments for a single felony, intended persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal

behavior and prior record are less threatening to society." *Id.* at 651. Thus, where the guidelines do not take into account risk to society posed by a "a one hundred-time repeat offender," the individual circumstances of the offender may warrant a substantial upward departure. *Id.* at 657. Conversely, "the facts of [*Milbourn*] did not ... justify such a severe sentence" as was imposed by the trial court given that "Mr. Milbourn was a young man, and at the time the instant offense was committed, he had no criminal record." *Id.* at 668. Mr. Williams, who at age 59 had many more opportunities than Milbourn to amass a criminal record, had nevertheless never before been convicted of any crime. The judge gave that mitigating factor no consideration at all, and thereby ignored one-half of the *Milbourn* proportionality equation.[7]

Even if a departure were warranted, the extent of Judge Gierhart's departure would not have been. The extent of a guideline departure must also conform to the principle of proportionality. "Therefore, even in cases in which reasons exist to justify a departure sentence, the trial court's articulation of the reasons for imposing a departure sentence must explain how the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Steanhouse (On Remand)*, 322 Mich App at 239, citing *People v Smith*, 482 Mich 392, 304 (2008). *Smith*, 482 Mich at 304 requires: "When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence with the guidelines recommendation would have been."

The judge here committed error warranting resentencing simply by providing no explanation as to how the extent of the departure was proportionate, or how it was more

[7] The judge offered one other consideration that appears to reflect a fundamental misreading of *Milbourn*. She summarized *Milbourn* as asking "does the crime perpetrated by the defendant shock the conscience?" ST, 24. But while *Milbourn* does mention the phrase "shock the conscience," it does so in a very different context: by abandoning the "shock the conscious" test that formerly had guided an appellate court's review of a judge's choice of sentence. *Milbourn*, 435 Mich at 636.

proportionate than a sentence within the recommended guidelines would have been. *See People v Dixon-Bey*, 321 Mich App 490, 525-26 (2017). And given that, as discussed above, the guidelines already took into account most or all of the circumstances cited by the judge in support of her sentencing decision, it is difficult to imagine how the substantial extent of the departure did not violate the principle of proportionality.

Comparison to the murder guidelines illustrates the point. Mr. Williams was sentenced above what his guidelines would have been if his wife had died and he had been convicted of second-degree murder. Had his wife died, Mr. Williams' guidelines as currently scored would have yielded a second-degree-murder sentencing range of 270 months to 450 months to life. MCL 777.61. The minimum term he received here—480 months—thus would have been a guidelines departure even for a murder sentence.[8] The circumstances of this case do not justify sentencing Mr. Williams more harshly than if he had actually killed Ms. Williams. Ms. Williams is far from dead. According to her sister, she is disabled, but functional. At the time of the trial, she could carry on conversations, walk for short distances, and watch television, one of her favorite activities, TIII 175, though "[t]here are times where she has double vision." TIII 179. She has no memory of being assaulted. TIII 180.

The trial court's sentencing decision violated the principle of proportionality. It was excessive, was not justified by the circumstances of the offense and the offender, and constituted an abuse of discretion.

[8] While, as the Court of Appeals noted, Mr. Williams could have received a life sentence, this would have provided him the opportunity for early release after fifteen years. MCL 791.234(7)(a). Judge Gierhart acknowledged that her intent was to impose a sentence that ensured Mr. Williams would be "incarcerated until you take your final breath." S 24. A life sentence would have likely allowed the Parole Board to make this decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William Russell Williams

Date: July 10 2020