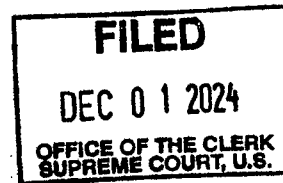


24-6411

ORIGINAL



No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

HOLLY KAYE HIBBLER-PETITIONER

VS.

JEREMY HOWARD-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HOLLY KAYE HIBBLER INMATE NO. 532358
HURON VALLEY CORRECTIONAL FACILITY
3201 BEMIS ROAD
YPSILANTI, MICHIGAN 48197

NO PHONE

QUESTION(S) PRESENTED

Whether Petitioner is entitled to resentencing where her minimum term was an unreasonable and disproportionate sentence and an unreasonable departure violating Petitioner's Constitutional right to due process and statutory rights at sentencing in violation of the United States Constitution V, VI and XIV Amendments.

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:

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Holly Kaye Hibbler v Jeremy Howard, No. 2:21-CV-19281-TGB-PTM (6th Cir. 2021)
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APPENDIX B

Holly Kaye Hibbler v Jeremy Howard, No. 2:21-cv-10291-TGB-PTM United States
District Court Eastern District of Michigan Judgment Denying Petitioner's Writ of
Habeas Corpus.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2024

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 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☒ is unpublished.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 United States district court appears as Appendix B 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☒ is unpublished.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 court**:

The opinion of the highest state court to review the merits 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 _____ court appears as 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 September 23, 2024.

☒ 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 _____.
A copy of that decision appears at Appendix _____.

☐ 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

UNITED STATES CONSTITUTION V AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION VI AMENDMENT

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, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION XIV AMENDMENT § I

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant - Appellant Holly Kaye Hibbler, was convicted of reckless driving causing death in the Emmet County Circuit Court by a plea of no-contest, and on January 8, 2019 Ms. Hibbler was sentenced by the Honorable Charles Johnson of the Emmet County Circuit Court to 10 to 15 years. As an indigent defendant, Ms. Hibbler requested the appointment of appellate counsel on January 8, 2019 (within 42 days of Judgment of Sentence), and appellate attorney Michael Kitchen was appointed on January 21, 2019. On July 5, 2019, counsel filed a Motion for Resentencing within 6 months of judgment. MCR 6.429(B)(3). A hearing commenced on July 18, 2019, upon which the trial court issued an order denying the motion on July 19, 2019.

On August 7, 2019 an Application for Leave to Appeal was filed on Ms. Hibbler's behalf by Mr. Kitchen in the Michigan Court of Appeals the following issue:

ISSUE I

THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING MS. HIBBLER BEYOND THE MAXIMUM LIMIT WITHIN HER SENTENCING GUIDELINES BECAUSE THE REASONS PROVIDED BY THE TRIAL COURT ARE CONSIDERED WITHIN THE SENTENCING GUIDELINES AND THEREFORE ARE NOT PROPORTIONAL PURSUANT TO *MILBOURN*.

The Michigan Court of Appeals denied the application on September 13, 2019.

Petitioner filed Leave to Appeal to the Michigan Supreme Court raising the

above issue. On March 18, 2020, the Michigan Supreme Court denied Petitioner's Application for Leave to Appeal in a standard order.

On or about April 15, 2022, Petitioner filed an amended Petition under 28 USC § 2254 for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan and presented the following grounds:

Ground one: MS. HIBBLER IS ENTITLED TO RESENTENCING BECAUSE HER MINIMUM TERM WAS AN UNREASONABLE AND DISPROPORTIONATE SENTENCE AND AN UNREASONABLE DEPARTURE VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND STATUTORY RIGHTS AT SENTENCINGS. US CONST, AMS VI AND XIV, CONST 1963, ART 1 § 17.

On April 9, 2024, United States District Judge Terrence G. Berg issued an Order Denying Appellant's petition for writ of habeas corpus and certificate of appealability but granted Petitioner to proceed in forma pauperis if she chooses to appeal under 28 U.S.C. § 2254, case no. 2:21-CV-10291-TGB-PTM. (ATTACHMENT B).

On or about May 4, 2024, Petitioner timely filed a Notice of Appeal in the United States District Court Eastern District of Michigan.

On or about May 24, 2024, Petitioner filed a Motion for Certificate of Appealability in the United States Court of Appeals for the Sixth Circuit. On September 23, 2024, a panel of the United States Court of Appeals for the Sixth Circuit denied Petitioner's COA application.

The legislature has provided appellate review for a sentence that is more severe than the guidelines recommendation. MCL 769.34(7). Further preservation

is not required to review such a sentence for abuse of discretion. *People v Smith*, 482 Mich 292, 300 (2008); *People v Steanhouse*, 500 Mich 453 (2017).

Defendant received a minimum sentence of 10 years to 15 years on reckless driving causing death, MCL 257.6264, which is significantly higher than her guidelines range of 36 months to 71 months. See SIR; Judgment of Sentence. The 49-month upward departure was based on six factors stated on the record. Four of the factors (impact of the crime on the community, fleeing the scene, prior conviction, excessive OV score) are already contemplated within the sentencing guidelines, one factor (Ms. Hibbler lacking remorse) is contrary to the evidence and the sixth factor, (sending a message to the defendant and community) is contrary to Michigan's indeterminate sentencing.

Expounding on these six factors, the sentencing court gave the following reasons:

1) The impact of the crime on the community:

(T)he impact of this crime on so many people as evidenced by letters from aunts and uncles and teachers, and also the fact that a whole school of little children will suffer this loss, the sort of thing that young children shouldn't have to deal with, the loss of a classmate. As the mother said here, countless lives have been harmed and impacted by the Defendant's behavior here. We have a mother who lost her only child; her large extended family that's suffering; teachers, classmates and this entire community, and again, the Court feels that a significant thing that has to be addressed is the harm done to all the other young children who are grappling with the loss of a friend and a classmate due to the Defendant's conduct. Sentencing Transcript, January 8, 2019, Page 34, Line 22 to Page 35, Line 9.

2) Lack of remorse.

While the Defendant has appropriately indicated remorse here today, it has taken way too long for her to do this, and as noted in

her presentence interview which was her opportunity to indicate her feelings about the matter, instead of focusing as she should have on the wrong that she did and the harm that she caused, she instead stated to Agent Wiederman that this was just an accident, and she didn't feel she should be punished any further by being criminally charged. She expressed her concerns about how she'd be getting too cold in the jail and then said it was really both their faults, because they shouldn't have been walking their bikes in the middle of the road, notwithstanding the fact that in discussions with the police she admitted she didn't see where they were and the Court finds far more credible the statements of Sharon that they were walking alongside the road; not in the middle of the road as she says. So she's not appropriately shown remorse. She's shown instead selfish concern for herself. Even the medical records provided just yesterday by Counsel for the Defendant include a report from a therapist that she was seeing who has been treating her since August for trauma and stress-related disorder. She's reported sleep disturbance, etc., expresses concerns for the emotional well-being of her twelve-year-old son none of that, I suppose, is inappropriate, but there is no mention of her having talked to the therapist about feelings of guilt or remorse or concern for the victims as one would have expected. Sentencing Transcript, January 8, 21019 Page 35, Line 10 to Pg. 36, Line 11.

3) Fleeing the scene.

Her conduct in fleeing the scene instead of stopping to seek help is another aggravating circumstance which supports a departure in this case, because it's not adequately counted for by the guidelines.

The guidelines do speak to interference with the administration of justice, but aside from that point, because she didn't stray, she wasn't there right away to summon help, and again luckily other did, but she didn't do this herself. Sentencing Transcript, January 8, 2019, Page 36, Lines 12-19.

4) Prior conviction.

She has a prior conviction. Prior convictions are accounted for, but her prior conviction was for impaired driving. Instead of learning a lesson, she's committed the same crime again. Sentencing Transcript, January 8, 2019, Page 36, Line 20-23.

5) Significantly scored over the Offense Variable Maximum.

The offense variable scoring in this case, as scored, comes out to 100 points, the maximum score that's accounted for in the guidelines is 75, so she's significantly over the maximum that the guidelines account for as far as the offense variable score...Sentencing Transcript, January 8, 2019, Pg. 36, Line 24 to Pg. 37, Line 3.

- 6) The Court needs to send a clear message of deterrence to the Defendant and others.

(T)he Court believes, particular at this time in our history of the State of Michigan, that it is important that this Court send a clear message of deterrence to this Defendant and to others we now have legal marijuana in the State of Michigan, and so the message must be sent and received by this Defendant and the community at large that anyone who chooses to ingest a mind altering substance, whether it's alcohol, marijuana, or a prescription drug – this Defendant ingested all of them apparently – they then have a responsibility to others to not get behind the wheel of a car; to not endanger innocent people as this Defendant did; and those who do and who injure or kill others will be subjected to harsh and appropriate punishment. Sentencing Transcript, January 8, 2019, Page 37, Lines 3-15.

Although the guidelines range is not binding, it is still an important consideration. In *People v Lockridge*, 498 Mich 358, 365 (2015), this Court concluded that the Michigan sentencing guidelines violate the federal Constitution because the sentencing scheme uses judicial fact-finding in the scoring of the offense variables. To remedy the constitutional violation, the Court severed a portion of subsection (2) MCL 769.34, which provided that the minimum sentence imposed by the court “shall be within the appropriate sentence range The Court also severed a portion of subsection (3), which provided that the sentencing court may depart from the sentencing guidelines range “if the court has a substantial and compelling reason for

that departure. . . ." *Id.* Further, this Court held that Michigan's sentencing guidelines are advisory only. 498 Mich at 391-392, 399. Sentencing courts are no longer required to articulate substantial and compelling reasons for departing from the guidelines range. However, sentencing courts are still required to consult the applicable guidelines range and take the applicable range into account when imposing a sentence. Departure sentences will be reviewed for reasonableness and proportionality. *People v Steanhouse, supra*, 500 Mich 453. The *Lockridge* Court did not articulate an exact framework for evaluating the reasonableness of a departure. Since the minimum sentence in this case was approximately twice the high end of the guidelines range, it is not proportionate, as Defendant argues below:

Milbourn proportionality analysis.

The crux of *Milbourn* proportionality is that the "sentences imposed by the trial court must be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636 (1990). A sentence outside the recommended range that is not justified by factors not adequately reflected in the guidelines range will trigger proportionality review. 435 Mich at 659-660.

In *Milbourn*, the Court noted "the concerns of Judge Shepherd, concurring in *People v Rutherford* [citation omitted] which were:

If the guidelines did set binding limits on the trial court's discretion, I would be constrained to remand when the judge states reasons for departing from the guidelines which are already considered therein. The problem we face in these cases is that the guidelines include factors such as the severity of the offense, the past record of the defendant, and the sentences historically imposed throughout the state. If the trial judge justifies a departure from the guidelines by stating that he does so

because of the nature of the offense and the record of the offender, the trial court has considered these factors twice. If we say that the trial judge may, in an individual case, place greater emphasis on any given factor by simply announcing on the record his intention to do so the guidelines become nothing more than a litany of magic words used to mask the imposition of subjective, arbitrary and disparate sentences – the very problem which *Coles* and the guidelines were designed to eliminate. If the sentencing judge is not held to have abused his discretion by emphasizing a factor already included in the guidelines as a basis for departing from them, and if the record is devoid of evidence showing whether a sentence beyond the guidelines is disparate, we are furnished with no basis other than our own subjective reactions upon which to base a decision. The risk of imposing an arbitrary and disparate sentence is thus shifted from the trial courts to the Court of Appeals. *Milbourn*, 435 Mich at 658-659.

Extent of departure. Even in cases where there are reasons for departure, the appellate court must review the extent of the deviation. *People v Smith, supra*, 482 Mich 292. The departure length must correspond to the severity of the crime and an offender's positive and negative history. *Id.* See *Solem v Helm*, 463US 277, 103 S Ct 3001, 77 L Ed 2d 637 (1983), US Const, Ams V, VII, XIV, Const 1963, art 1, §§ 16, 17. See also, *People v Smith*, 482 Mich 292 (2008).

As applied. In 1984, the Michigan Supreme Court issued its first edition of sentencing guidelines which required trial courts to use in setting minimum sentences for felony offenses. Sheila Robertson Deming, *Michigan's Sentencing Guidelines*, MICHIGAN BAR JOURNAL, June, 2000. The guidelines took into account less than 100 criminal offenses and were a statistical reflection of actual sentencing being imposed by trial courts. *Id.* In 1988, the Supreme Court issued a second edition of guidelines based on sentencing data, and though the court continued to collect data on sentencing, it did not issue any further editions. *Id.*

The Michigan Legislature sought the development of sentencing guidelines by establishing the Sentencing Commission in 1994. *Id.* The Commission, which included senators, representatives, directors of the Department of Corrections, a prosecutor, a defense attorney, circuit and recorder's court judges, and others, met from May 1995 through November 2397 and proposed sentencing guidelines to the Legislature at the end of 1997. *Id.* The guidelines were enacted by 1998 PA 317 and was to be utilized in sentencing for all felony offenses committed on or after January 1, 1999. *Id.* The Legislature directed the Commission to create guidelines which would serve the purpose of achieving certain goals:

- 1) provide for the protection of the public
- 2) treat offenses against the person more severely than other offenses
- 3) include guidelines for habitual offenders
- 4) be "proportionate to the seriousness of the offense and the offender's prior criminal record."
- 5) "reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences"
- 6) "specify the circumstances under which a term of imprisonment is proper and the circumstances under which intermediate sanctions are proper" MCL 769.33 *id.*

The Commission first categorized all felony offenses into six crime groups based

on the nature of the social harm involved. *Id.* Then it ranked all felonies in nine levels of offense severity – class A through H in descending order, with second-degree murder in a class unto itself – to reflect the appropriate minimum sentence for a crime within that class. *Id.* Ranges included to increase the maximum within a range based on the habitual offender notice. *Id.*

Guidelines measure the defendant's criminal history based on seven categories to determine a Prior Record Variable (PRV) score and nineteen variables related to the offense itself to create an Offense Variable (OV) score. *Id.* "The guidelines *structure* judicial sentencing discretion but do not eliminate it. Sentencing judges retain discretion both within the guidelines, which provide a sentence range and not a single fixed term, and outside the guidelines by virtue of the ability to 'depart' from the guidelines' range for substantial and compelling reasons. MCL 769.43(3)" *Id.*

As discuss in *Milbourn*, this should alert the Court that the sentence violates the principles of proportionality and is, therefore, unreasonable.

Sixteen years later, the Michigan Supreme Court changed the requirement of "substantial and compelling reasons" for trial courts to depart from the guidelines. In *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), the Michigan Supreme Court held that when a court exercises its discretion to depart from the guidelines, that sentence will be reviewed by an appellate court for reasonableness and directed sentencing courts to justify the sentence imposed to facilitate appellate review." *Lockridge* at 392. In *People v Steanhouse*, 500 Mich 453; 920 NW2d 327 (2107), the Supreme Court reiterated its holding from *Lockridge* that departures no longer require

a substantial and compelling reason, but that the trial court must still articulate its reasoning for the sentence it imposes and it must impose a reasonable sentence. *Steanhouse* at 476. In *Steanhouse*, the Court explained that a "reasonable" sentence is one that adheres to the principle of proportionality articulated by the Supreme court in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Id.* Michigan's principle of proportionality requires "sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *Milbourn*, at 636. The *Steanhouse* Court repeated its directive from *Lockridge* that the guidelines "remain a highly relevant consideration in a trial court's exercise of sentencing discretion 'that trial court 'must consult'" and "'take ... into account when sentencing'" and its holding from *Milbourn* that "the 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." *Steanhouse supra* at 479. In the context of proportionality review, if the guidelines adequately reflect the seriousness of the circumstances of the offense and the offender, then an upward departure from the guidelines would be disproportionate.

The touchtone of *Milbourn* proportionality is that the "sentences imposed by the trial court must be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, *supra* at 636. Factors previously considered by Michigan courts under the proportionality standard included, among others "(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, 238-239; 911 NW2d 253 (2107). As noted in *Milbourn*, a sentence outside the recommended range that is not justified by factors not adequately reflected in the guidelines range will alert the appellate court to a possible violation of the principle of proportionality. *Milbourn, supra* at 659-660. Even in cases where there are reasons not adequately reflected in the guidelines range, the appellate court must review the extent of the deviation. *Id.*

Steanhouse made clear that the sentencing court's discretion is not unfettered and the sentence must still be reasonable and proportionate. In the context of a proportionality review, if the guidelines adequately reflect the seriousness of the circumstances of the offense and the offender, then an upward departure would be disproportionate.

When considering whether a factor is contemplated within the sentencing guidelines, it is instructive to consider MCL 769.33a(f) for the foundational philosophy behind their creation and modifications.

(f) Develop modification to the sentencing guidelines for recommendation to the legislature. Any modifications to the sentencing guidelines shall accomplish all of the following:

- (i) Provide for the protection of the public.
- (ii) consider offenses involving violence against a person or serious and substantial pecuniary loss as more severe than other offenses.
- (iii) Be proportionate to the seriousness of the offense and the offender's prior criminal record.
- (iv) Reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive

substantially similar sentences.

(v) Specify the circumstances under which a term of imprisonment is proper and the circumstances under which intermediate sanctions are proper.

(vi) Establish sentence ranges for imprisonment that are within the minimum and maximum sentences allowed by law for the offenses to which the ranges apply.

(vii) Maintain separate sentence ranges for convictions under the habitual offender provisions in sections 10, 11, 12, and 13 of this chapter, which may include as an aggravating factor, among other relevant considerations, that the accused has engaged in a pattern of proven or admitted criminal behavior.

(viii) Establish sentence ranges that the commission considers appropriate.

(ix) Recognize the availability of beds in the local corrections system and that the local corrections system is an equal partner in corrections policy, and preserve its funding mechanisms.

In the present case, the trial court cited six reasons for departing 169% over the high-end of Ms. Hibbler's guideline range, to sentence her to the maximum sentence a trial court could impose.

A. Impact of the crime on the community is factored within the guidelines.

One of the factors considered in the upward departure from the sentencing guidelines was the impact of the crime on the community.

(T)he impact of this crime on so many people as evidenced by letters from aunts and uncles and teachers, and also the fact that a whole school of little children will suffer this loss, the sort of thing that young children shouldn't have to deal with, the loss of a classmate. As the mother said here, countless lives have been harmed and impacted by the Defendant's behavior here. We have a mother who lost her only child; her large extended family that's suffering; teachers, classmates and this entire community, and again, the Court feels that a significant thing that has to be addressed is the harm done to all the other young children who are grappling with the loss of a friend and a classmate due to the Defendant's conduct. Sentencing Transcript, January 8, 2019, Pg. 34, Line 22 to Pg. 35, Line 9.

The trial court did not deter from that reasoning when Ms. Hibbler's Motion for Resentencing was hearsay.

With regard to the first reason articulated by the Court; that being the impact of the crime on the community, Defendant says that that's been factored into the sentencing guidelines through the scoring of OV-9. The Court agrees that that is a factor taken into account by the guidelines, but disagrees that the guidelines adequately accounted for the seriousness of the impact to the community due to the reasons articulated at the time of sentencing, which the Court won't – doesn't find necessary to repeat at this time, because the Court articulated that at the time of sentencing. There were a large number of people, and the entire community was affected by this tragic crime. Motion for Resentencing Transcript, July 18 2019, Page 3, Line 3-14.

OV-9 scores for the number of victims resulting from the crime. The Michigan Court of Appeals held that the community at large is not the victims in a crime. *People v Carrigan*, 297 Mich App 513, 516; 824 NW2d 283 (2012).

The Court acknowledging that "countless lives have been harmed and impacted by Defendant's behavior here" and that it "feels that a significant thing has to be addressed is the harm done to all the other young children" is essentially including the community as a victim. The Michigan Court of Appeals has clearly stated that "the community as a whole always indirectly suffers when a crime is committed." *Id.* The wisdom within the Sentencing Guidelines to score only direct victims, and the Court of Appeals in recognizing that with all crimes, the community indirectly suffers, contemplates the impact of a crime on the community. Furthermore, to infer that a criminal defendant should be punished more harshly due to the number of members of the community who write letters to the court supporting or expressing feelings about the victim, over that of a victim without anyone writing letters on his/her behalf,

suggests that discrimination that one victim's life is more valuable than another's.

B. Finding Ms. Hibbler lacking remorse is contrary to the evidence.

At sentencing, the trial court stated that "(w)hile the Defendant has appropriately indicated remorse here today, it has taken way too long for her to do this, and as noted in her presentence interview which was her opportunity to indicate her feelings about the matter, instead of focusing as she should have on the wrong that she did and the harm that she caused, she instead stated to Agent Wiederman that this was just an accident, and she didn't feel she should be punished any further by being criminally charged." Sentencing Transcript, January 8, 2019, Page 35, Lines 3-18. The trial court echoed its position at the hearing of Ms. Hibbler's Motion for Resentencing.

Regarding number two, the Defendant argues that finding Ms. Hibbler lacked remorse is contrary to the evidence on the record. The Court respectfully disagrees with counsel's argument in that regard.

She expressed remorse at the time of sentencing, but a number of things that she did and said prior to that time failed to demonstrate sincere remorse, and again that's documented in the record, so the court won't go into further detail at this time. Motion for Resentencing Transcript, July 18, 2019, Page 8, Lines 15-23.

Forgotten in this assessment is the fact that once charged with the crime, Ms. Hibbler immediately turned herself in, waived her preliminary exact and pled no contest to the charge on the very same day. Her willingness to accept responsibility for her actions and cooperate with the prosecutor to achieve the conviction is evident.

Prior to sentencing, the prosecutor turns and calls himself "ignorantly impressed" by this in his January 4, 2019 Sentencing Memorandum. Sentencing

Memorandum, Page 12. "The Defendant's true self emerged after she pled in this case. She has demonstrated no remorse, no genuine concern, and no degree of empathy for the harm she has done. Rather she is fixated only on herself and her personal future." Sentencing Memorandum, Page 12. Without personal contact with Ms. Hibbler, the Prosecutor based this turn of opinion on the Presentence Investigation Report. "Rather than revisiting the specifics, the Prosecutor simply refers this Court to page two of the PSI with one exception. That one exception is the Defendant's clear refusal to take full responsibility for her wrong. This is primarily shown when she impudently casts blame on her victims: 'She stated that it was really both their faults because they (Sharon and Samuel) shouldn't have been walking their bikes in the middle of the road.'" Sentencing Memorandum, Page 12.

The PSIR does not contain any statements made by Ms. Hibbler. Ms. Hibbler pled no contest to the crime, and appropriately, in the PSIR under the Defendant's description of the Offense, states that "(t)he defendant did not wish to make a written statement as she pled no contest." Her right not to incriminate herself and protect herself from civil litigation – an agreement that the Prosecutor entered into by allowing her take a no-contest plea – was held against her. The Prosecutor relied on cherry-picked hearsay statements inserted into a PSIR by a probation agent.

Furthermore, the Prosecutor added, "(o)ne thing this writer has noticed, which is not more particularly addressed in the PSI is the Defendant's failure to identify with Sharon Myers. The prosecution believes there has never been an instance where the Defendant placed herself in the "shoes" of the decedent's mother. Perhaps she has done

so, but if true it is not found in the PSI.” sentencing Memorandum, Page 12. How can the prosecutor know whether Ms. Hibbler placed herself in Ms. Myers’ shows without having made contact with Ms. Hibbler since the plea was taken? This is not factual, but opinion, based upon a hearsay report, containing cherr-picked information provided by a single interview of Ms. Hibbler by a probation agent. Ms Hibbler couldn’t even reach out to Ms. Myers to express her remorse because her bond was conditioned upon having no contact with Ms. Myers. It was only at sentencing Ms. Hibbler could express her remorse directly, and this Court deemed that expression appropriate. Based on this record, the trial court lacks the evidence it opines that Ms. Hibbler failed to show remorse. By using this as a factor to impose a sentence four years above her maximum guideline range, the trial court has abused its discretion.

C. Fleeing the scene is factored within the guidelines.

The trial court noted Ms. Hibbler’s driving away from the accident as a factor for the upward departure of her sentence. “Her conduct in fleeing the scene instead of stopping to seek help is another aggravating circumstance which supports a departure in this case, because it’s not adequately counted for by the guidelines. The guidelines do speak to interference with the administration of justice, but aside from that point, because she didn’t stray, she wasn’t there right away to summon help, and again luckily others did, but she didn’t do this herself.” Sentencing Transcript, January 8, 2019, Page 36, Lines 12-19.

The sentencing guidelines, through the scoring of OV-19, does address the interference with the administration of justice, in which Ms. Hibbler was scored ten

points. MCL 777.49(c). But the sentencing guidelines also address the degree of negligence exhibited the defendant displayed during the offense. OV-17 scores ten points for a wanton or reckless disregard for the life or property of another person. MCL 777.47(1)(a).

The trial court, in upholding its reasoning at the Motion for Resentencing hearing stated that "Offense Variable 17 deals with the degree of negligence involved in the crime itself, so that scoring relates to the conduct of the Defendant in the commission of the crime. That does not apply to Defendant's conduct in this case after the crime, so Offense Variable 17 does not account for the conduct of the Defendant in this case in fleeing the scene, leaving and engaging in certain activities to attempt to destroy or conceal evidence before she returned." Motion for Resentencing Transcript, Page 9, Lines 3-10. This contradicts what the trial court said at sentencing. At Sentencing, the trial court's emphasis was that Ms. Hibbler didn't stay, and wasn't there right away, after the impact, to summon help for the Myers'. That's the explicit reason why Ms. Hibbler was scored ten points for OV-17. "The offender showed a wanton or reckless disregard for the life or property of another person." MCL 777.47(1)(a). The wanton or reckless disregard for the lives of the Myers' during the commission of the crime, from the impact of her vehicle to her decision to leave them in the road without aiding them immediately.

Considering that Ms. Hibbler's initial fleeing of the scene was both wanton and reckless disregard for the lives of the Myers' and to frustrate the administration of justice by removing a spilled beer can and car mats from her car, and that the

sentencing guidelines contemplate this activity under both OV-17 and OV-19, and that Ms. Hibbler was scored ten points for both OV-17 and OV-19, the sentencing guidelines adequately contemplate this activity. The trial court in stating this as a reason to sentence Ms. Hibbler to four years above the maximum of er guidelines is an abuse of discretion.

D. Ms. Hibbler's prior conviction is factored within the guidelines.

The trial court recognized that Ms. Hibbler had a prior operating while visibly impaired conviction. "Prior convictions are accounted for, but her prior conviction was for impaired driving. Instead of learning a lesson, she's committed the same crime again." Sentencing Transcript, January 8, 2019, Page 36, Line 20-23. The trial court repeated this reasoning at the Motion for Resentencing hearing. "(H)ere we had a Defendant who had a prior conviction for the very same type of dangerous conduct that led to the tragic loss of one life and serious injuries to another person, and because she failed to address and resolve her issues and failed to change her behavior, and once again, engaged in the very same criminal conduct in this case as she did previously, the Court finds that the scoring of prior record variable 5, which again could be for any misdemeanor, does not adequately account for the wrongfulness of this Defendant's behavior in this case." Motion for Resentencing Transcript, July 18, 2019, Page 10, Lines 7-16.

The conviction – one of only two misdemeanor convictions on her record – occurred on May 26, 2010, for an offense which took place over eight years ago on April 15, 2010. Her only other misdemeanor occurred over 18 years ago. Misdemeanor

convictions are factored in the scoring of PRV-5. MCL 777.55.

One of the Sentencing Commission's goals in creating the sentencing guidelines was to take into account and create guidelines that are proportionate to the seriousness of the offense and the offender's prior criminal record, thus contemplating that compounding criminal behavior would affect a defendant's scores in an upwardly mobile direction, whether they be for the same or a similar crime, or not. By using Ms. Hibbler's minor and distant criminal offenses, already contemplated within the sentencing guidelines, to contribute to the 169% upward departure in Ms. Hibbler's sentence, would be disproportionate.

E. An excessive OV score is contemplated within the sentencing guidelines.

The trial court relied on the Offense Variable score as a factor in sentencing Ms. Hibbler to the maximum possible sentence. "The offense variable scoring in this case, as scored, comes out to 100 points, the maximum score that's accounted for in the guidelines is 75, so she's significantly over the maximum that the guidelines account for as far as the offense variable score..." Sentencing Transcript, January 8, 2019, Pg. 36, Line 24 to Pg. 37, Line 3. The trial court conceded some agreement to Ms. Hibbler's argument at the motion hearing. "Defendant argues that reason number 5, the excessive OV score, was not sufficient grounds for the department or the extent of the departure. If that were true, standing alone – if that were the only reason for the departure, the Court might agree with Defense Counsel, but it is not the only reason; it's one of six, and when that factor is taken into account in addition to the other valid reasons, the Court believes that the sentence imposed was appropriate and

proportional in this case.” Motion for Resentencing Hearing Transcript, July 18, 2019, Page 10, Line 17-25.

The rule of law favors predictability. “Stare decisis is generally “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Pohutski v City of Hazel Park*, 465 Mich 67, 693; 641 NW2d 219 (2002) quoting *Hohn v United States*, 524 US 236, 251; 118 S. Ct 1961; 141 L Ed 2d 242 (1998).

As noted earlier, the creation of the sentencing guidelines allows for a court’s discretion by providing a sentence range and not a single fixed term to sentence a defendant. Even by finding that Ms. Hibbler’s OV scored is above the 75-point minimum score to achieve the VI level, is it really an outrageous score? The levels break down as follows:

I	0- points	9 points
II	10-24 points	15 points
III	25-34 points	10 pints
IV	35-49 points	15 points
V	50-74 points	25 points
VI	75+ points	

The sentencing Commission created a scoring scheme that allows for predictability should a sentence go off the grid. If the number of points exceeds 75, the diagonal flow of the sentencing ranges allow predictability for the sentencing range within a hypothetical Level VII, VIII, IX, and X. To widen the range, the higher up the level, a 25-point increase on top of the 75 points would keep the score within Level VI,

making the 71-month maximum reasonable. Or it may place it within a Level VII range which, following the diagonal flow, would be a range of 43-86 months.

Observe the pattern of the Class C grid, as a whole.

Sentencing Grid for Class C Offenses—MCL 777.64
Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c))

OV Level	PRV Level						Offender Status
	A 0 Points	B 1-9 Points	C 10-24 Points	D 25-49 Points	E 50-74 Points	F 75+ Points	
I 0-9 Points	0	0	10	12	19	29	
	11*	17*	19	24	38	57	
	13*	21	23	30	47	71	HO2
	16*	25	28	36	57	85	HO3
	22*	34	38	48	76	114	HO4 ¹
II 10-24 Points	0	5	12	19	29	36	
	17*	17*	24	38	57	71	
	21	21	30	47	71	88	HO2
	25	25	36	57	85	106	HO3
	34	34	48	76	114	142	HO4 ¹
III 25-34 Points	10	12	19	29	36	43	
	19	24	38	57	71	86	
	23	30	47	71	88	107	HO2
	28	36	57	85	106	129	HO3
	38	48	76	114	142	172	HO4 ¹
IV 35-49 Points	12	19	29	36	43	50	
	24	38	57	71	86	106	
	30	47	71	88	107	125	HO2
	36	57	85	106	129	150	HO3
	48	76	114	142	172	200	HO4 ¹
V 50-74 Points	19	29	36	43	50	58	
	38	57	71	86	106	114	
	47	71	88	107	125	142	HO2
	57	85	106	129	150	171	HO3
	75	114	142	172	200	228	HO4 ¹
VI 75+ Points	29	36	43	50	58	62	
	57	71	86	106	114	114	
	71	88	107	125	142	142	HO2
	85	106	129	150	171	171	HO3
	114	142	172	200	228	228	HO4 ¹

¹ Certain fourth habitual offenders may be subject to a mandatory minimum sentence of 25 years' imprisonment. See MCL 769.12(1)(a).

Intermediate sanction cells are marked by asterisks, straddle cells are shaded, and prison cells are unmarked.

The statutory percentage increases for habitual offenders are rounded down to the nearest whole month. The cell range may be less than the maximum possible minimum sentence by a fraction of a month.

The 36-71 month range within B-VI (yellow) is repeated diagonally upward as the PRV Level increases. That is, the 36-71 month range is found in cells C-V, D-IV, E-III, F-II (orange). A prediction can easily be made as to what the next cell would be in a hypothetical B-VII cell by looking at the C-VI range. The C-VI range is 43-97 months

(green). And a hypothetical B-VIII cell would look like the D-VI range. The C-VI range is 50-100 months (blue). Even at this worst-case scenario, the maximum sentence is still 20-months LESS than the sentence imposed. By these measures, an OV score of 100 points is high, but not as outrageously high as the sentence imposed.

F. Sending a message to a defendant and community is contrary to Michigan's individualized sentencing.

A factor relied upon to impose a sentence 169% the maximum guideline sentence was for the purpose of 'sending a message.'

(T)he Court believes, particular at this time in our history in the State of Michigan, that it is important that this Court send a clear message of deterrence to this Defendant and to others. We now have legal marijuana in the State of Michigan, and so the message must be sent and received by this Defendant and the community at large that anyone who chooses to ingest a mind altering substance, whether it's alcohol, marijuana or a prescription drug – this Defendant ingested all of them apparently – they then have a responsibility to other to not get behind the wheel of a car; to not endanger innocent people as tis Defendant did; and those who do and who injure or kill others will be subjected to harsh and appropriate punishment. Sentencing Transcript, January 8, 2019, Page 37, Lines 3-15.

The trial court affirmed its reasoning at the Motion for Resentencing Hearing. "Deterrence is an entirely proper consideration in sentencing. The issue of deterrence goes to the Defendant and to others, and it's a recognized and legitimate function of sentencing in a criminal case to attempt to bring about deterrence of others from committing similar crimes." Motion for Resentencing Hearing Transcript, July 18, 2019, Page 11, Line 1-8.

From the creation of the Sentencing Commission, the protection of the public sat at the top of the list of factors to be considered when creating the Sentencing

Guidelines. It is arbitrary and contrary to Michigan's individualized sentencing to single out a defendant and set as an example for deterrence. "This state is committed to the policy of indeterminate sentencing and it is incumbent upon the sentencing judge to exercise his discretion so as to individualize the sentence to the particular circumstances of the case and the offender. The sentencing judge is not permitted to abdicate his discretion to individualize the sentence to either local policy or his own preconceived notions." *People v Munson*, 109 Mich App 39, 41; 310 NS2c 810 (1981). Therefore, upwardly departing from the sentencing guidelines by using Ms. Hibbler as an example of deterrence to a community that has recently legalized the use of marijuana is an abuse of the trial court's discretion.

G. The trial court's sentence and its reasons for departure do not comport to the principle of proportionality under the *Milbourn* standard.

The trial court's six reasons do not comport to the principle of proportionality, and instead reflect the trial court's policy of imposing the maximum possible sentence above the advisory calculations of the sentencing guidelines.

In this case, the trial court stated six reasons. At the Motion for Resentencing hearing, the trial court, in response to the fifth reason – Ms. Hibbler's total OV points going above the guidelines table – that "it is not the only reason; it's one of six, and when that factor is taken into account in addition to the other valid reasons, the Court believes that the sentence imposed was appropriate and proportional in this case." Motion for Resentencing Hearing Transcript, July 18, 2019, Page 10, Line 21-25. If some factors weighed more than others, the trial court failed to distinguish how much

each factor weighed in the additional 49 months imposed above the guideline range to reach sentencing Ms. Hibbler to the highest possible sentence a trial court judge could impose under *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972).

REASONS FOR GRANTING THE PETITION

This petition should be granted because the United States District Court for the Eastern District of Michigan issued an Order denying Ms. Hibbler's petition under 28§ 2254 for Writ of Habeas Corpus which was in error. The Petitioner has shown that her United States Constitutional rights have been violated and the decisions of the state courts resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court of the United States in their interpretation of the United States Constitution for fair and impartial, due process and equal protection in criminal trials.

Petitioner's United States Constitutional rights were violated when the trial court's sentencing analysis was unfair and unreasonable. MCL 769.34(10) does not *just* create an appellate presumption that within-guidelines sentences are reasonable as authorized in the federal system by *Rita v US*, 551 US 338 (2007). Instead, it completely insulates from appellate review any challenge that a within-guideline sentence is unreasonable or disproportionate and requires the Court of Appeals to affirm sentences without consideration. MCL 769.34(10) violates the Sixth Amendment by prohibiting appellate courts from reviewing a trial court's exercise of sentencing discretion, thereby creating an incentive to impose a within-guideline sentence that is appeal-proof regardless of whether that sentence is reasonable or proportionate. Within-guideline sentences cannot be immune from appellate review under an advisory sentencing scheme. *Rita*, 551 US at 351.

When a sentencing court imposes a within-guideline sentence, the question is

not whether that court understood the guidelines were advisory and that it was not required to impose a within-guideline sentence. Rather, the question is whether the sentencing court understood that it could not presume the sentencing guideline range was reasonable before imposing sentence. *Nelson v United States*, 555 US 350, 351 (2009).

In *Nelson*, the United States Supreme Court remanded for resentencing where the appellate court affirmed the sentence of the district court after finding only that the district court “did not treat the Guidelines as ‘mandatory’ but rather understood that they were only advisory.” 555 US at 351. The Court explained that it is “beside the point” whether a sentencing court understands the advisory nature of the guidelines. *Id.* at 352. What is important is that the sentencing court may not impose a sentence within the guidelines while believing the guidelines are presumed reasonable. “The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.” *Id.* (emphasis added).

“[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.” *Id.* citing *Rita*, 551 US at 351. Here, however, under MCL 769.34(10), Michigan’s trial courts are enjoying the benefit of a legal presumption they should not have. Michigan courts impose sentence understanding that any within-guidelines sentence will be automatically affirmed pursuant to MCL 769.34(10). This scheme violates the Sixth Amendment and can only be remedied by appellate review of reasonableness and proportionality of all sentences, including those within the guidelines.

Continuing to enforce the first sentence of MCL 769.34(10) perpetuates the constitutional harm the Michigan Supreme Court sought to cure in *Lockridge*. Even though the guideline range is “advisory” according to *Lockridge*, it maintains its mandatory directive in MCL 769.34(10). Without appellate review of within-guideline sentences, Michigan’s sentencing guidelines cannot truly be advisory.

This is precisely the problem the US Supreme Court confronted in *US v Booker*, 543 US 220 (2005) when it invalidated the federal sentencing guidelines after concluding they were mandatory. The Court noted, the “Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court ‘shall impose a sentence of the kind, and within the range’ established by the Guidelines, subject to departures in specific, limited cases.” *Id.* at 233–234 (internal citations omitted).

Similarly, while *Lockridge* held that the guidelines are only advisory and one factor to be consulted when imposing sentence, albeit an important factor, MCL 769.34(10) directs that the appellate court “shall affirm” all sentences within the guidelines. As a result, the guidelines still have the effect of creating a binding and unreviewable sentence, and so the Sixth Amendment violation persists.

If an appellate court applies a presumption of proportionality to sentences within the sentencing guidelines range, individuals must have the ability to rebut that presumption of proportionality. *Rita v US*, 551 US at 351 (an appellate court

presumption of reasonableness is constitutional only if it is rebuttable).

In this case, Ms. Hibbler could rebut that presumption as her present sentence is disproportionate to her and her offense. Her current sentence is disproportionate to her as it fails to account for her rehabilitative potential and other mitigating factors. She has had no previous felonies and while she has had two misdemeanors. By themselves, the judge's findings justify neither the departure itself, not the extent of almost to the highest sentence possible, 10 years to 15 years. Where Defendant was sentenced to 169% over the high end of her guidelines, it was grossly disproportionate to the crime.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Holly Kaye Hibbler-Petitioner

Date: November 23, 2024