STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2020
v	No. 343755 Wayne Circuit Court
JOSHUA LAMAR-JAMES STEWART, Defendant-Appellant.	LC No. 16-005731-01-FC

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur, but write separately to note my view that MCL 769.34(10), which requires us to affirm any sentence within the guidelines range,[1] is inconsistent with the Sixth Amendment, the due-process right to appellate review and the holding in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). *Lockridge* made clear that mandating a sentence within the sentencing guidelines range—even when permitting departures for substantial and compelling reasons—is unconstitutional. How then can it be constitutional to mandate that appellate courts affirm any sentence that falls within the guidelines?

No such deprivation of sentence review exists under federal law. Following the United States Supreme Court's decision in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), there was a split in the federal circuits whether it was constitutional to apply a presumption of reasonableness to sentences within the guidelines. That split was resolved by the Supreme Court in *Rita v United States*, 551 US 338, 347; 127 S Ct 2456; 168 L Ed 2d 203 (2007), where it held that a presumption of reasonableness was constitutionally permissible. In explaining its holding that the "Sixth Amendment . . . [does] not forbid appellate court use of the presumption," *id*. at 353, the Court began by observing that "*the presumption is not binding*. It does not, like a trial-related evidentiary presumption, insist that one side or the other, shoulder a particular burden of persuasion or proof," *id*. at 347 (emphasis added). This principle has a long history in Michigan jurisprudence as well. In *People v Milbourn*, 435 Mich 630, 661; 461 NW2d

[1] Absent a scoring error or reliance on inaccurate information.

1 (1990), the Michigan Supreme Court stated 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." (Emphasis added).

To remedy this problem, as was done by *Lockridge* with MCL 769.34(2), we "need only substitute the word 'may' for 'shall' " in MCL 769.34(10). *Lockridge*, 498 Mich at 391. See also *People v Schrauben*, 314 Mich App 181, 194; 886 NW2d 173 (2016) ("Consistently with the remedy explained in *Lockridge* we replace the word 'shall' in MCL 769.34(4)(a) with the word 'may.' "). In other words, the directive, "If a minimum sentence is within the reveals guidelines sentence range, the court of appeals *shall* affirm that sentence and *shall not* remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence," MCL 769.34(10) (emphasis added), becomes the premise, "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *may* affirm that sentence and *not* remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Indeed, *Lockridge* has mandated such a remedy: "To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Lockridge*, 498Mich at 365 n 1.

In *People v Ames*, 501 Mich 1026 (2018), the Michigan Supreme Court granted oral argument on the application to consider whether we are compelled to affirm all guidelines sentences. Unfortunately, the Court ultimately denied leave in a brief order without discussion of the issue. *People v Ames*, 504 Mich 899 (2019). I respectfully suggest that it would be helpful to both bench and bar for the Court to issue a full opinion on the question in this or some future case. The persistence of confusion concerning the question is demonstrated by a case cited by the majority, *People v Jackson*, 320 Mich App 514, 527; 907 NW2d 865 (2017), rev'd in part on other grounds, 504 Mich 929 (2019), in which this Court stated: "The court's minimum sentence was within the appropriate guidelines range and thus, it is *presumptively proportionate* and *must be affirmed*." (Emphasis added). A sentence cannot be both only *presumptively* proportionate and yet beyond review. And it is unconstitutional for the guidelines, now merely advisory, to bind a court, including appellate courts.

/s/ Douglas B. Shapiro