STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

RAHIM OMARKHAN LOCKRIDGE,

Defendant-Appellant.

_____/

Supreme Court
No._____

Court of Appeals
No. 310649

Circuit Court
No. 2011-238930-FC

PLAINTIFF'S RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

149073

(PROOF OF SERVICE)

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COUNTERSTATEMENT OF JURISDICTION AND RELIEF SOUGHT

On May 4, 2012, the defendant was convicted at a jury trial of one count of involuntary manslaughter contrary to MCL 750.321. He was sentenced on May 31, 2012 to eight to fifteen years incarceration. Defendant appealed his sentence to the Court of Appeals which affirmed his sentence on February 13, 2014. *People v Lockridge,* ___Mich App___;___NW2d___ (2014)(Appendix A) Defendant has now filed an application in this Court within 56 days of the Court of Appeals' opinion. MCR 7.302(C)(2).

Defendant is requesting leave claiming that the sentencing judge's 10-month sentencing departure was not supported by the record. Defendant has failed to show that the Court of Appeals clearly erred in finding that the judge's departure was justified. MCR 7.302(B)(5). Defendant also asserts that the published opinion of *People v Herron,* ___Mich App___:___NW2d___ (2013) which the judges in Court of Appeals followed, was incorrectly decided. Herron's application is pending in this Court. *Herron* correctly found, however, that the United States Supreme Court's opinion in *Alleyne v United States*, ___US___; 133 S Ct 2151; 186 L Ed 2d 314 (2013) did not affect sentencing guidelines' calculations in Michigan's indeterminate sentencing scheme and therefore leave should be denied on this basis as well. MCR 7.302(B)(1).

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. DID THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *ALLEYNE v UNITED STATES*, ___US___;133 S Ct 2151; 186 L Ed 2d 314 (2013) IMPACT GUIDELINES' SCORING ?

Defendant contends the answer should be, "yes."

The People submit the answer is, "no."

The sentencing judge was not asked to answer the question.

II. DID THE COURT OF APPEALS CLEARLY ERR WHEN IT FOUND THAT JUDGE GRANT DID NOT ABUSE HER DISCRETION WHEN SHE DEPARTED UPWARD TEN MONTHS FROM THE GUIDELINES (A SENTENCE WITHIN THE NEXT GUIDELINES' GRID) FOR THE DEFENDANT'S PRIOR ASSAULTIVE CONDUCT TOWARD THIS VICTIM AND HIS VIOLATION OF A NO-CONTACT PROVISION ON THE DATE OF THE HOMICIDE AS WELL AS THE PSYCHOLOGICAL DAMAGE HE INFLICTED ON HIS THREE CHILDREN WHEN THEY LOST THEIR MOTHER, WHEN THEY WITNESSED THEIR FATHER KILL HER, AND WHEN THEY UNSUCCESSFULLY ATTEMPTED TO RESCUE HER?

Defendant contends the answer should be, "yes."

The People submit the answer is, "no."

The Court of Appeals upheld the sentence.

The sentencing judge departed upward 10 months from the guidelines.

COUNTERSTATEMENT OF FACTS

The defendant was charged with one count of open murder contrary to MCL 750.316 and on May 4, 2012 he was convicted of one count of involuntary manslaughter contrary to MCL 750.321. He was sentenced on May 31, 2012 to eight to fifteen years incarceration.

Kayauna Lewis [Lockridge]-Witness

17-year-old Kayauna Lewis testified that on September 19, 2011, she was living at 21880 Potomac Street, in Southfield, Michigan with her mother, the victim Kenyatta Lockridge, the defendant, and two younger sisters, Kaelyn and Ravyn Lockridge. V I at 148, 150, 151 Her room, her parents' room, and her sisters' room were all on the upstairs floor. V I at 151 The living room, kitchen, den and the dining room were on the main floor and there was one room in the basement. V I at 152

That evening, she went with her mother and two sisters to the Oakland Mall looking for a homecoming dress. V I at 152 They didn't find a dress and her mother drove them home. V I at 153

Once they got home, her mother was going to give money to Kayauna so she could go shopping again, but her mother noticed that money was missing from her purse. V I at 153

Kayauna went to her room and then headed to the basement (V I at 154) and saw her mother go upstairs. V I at 155 Kayauna then went back upstairs to her room. V I at 155 When she walked past her parents' room, she heard them talking. V I at 156 At some point Kayauna went back to the basement. While she was in the basement, Ravyn and Kaelyn came to get her. Ravyn seemed very scared. V I at 156

Kayauna then started to go to the upstairs area and she saw her mother and the defendant coming downstairs. The defendant was coming down first and her mother was behind him. V I

at 157 Both were pushing at each other (V I at 157) and the defendant was hitting her mother. V I at 214 The defendant was saying that he wanted to leave. V I at 201

Kayauna then went upstairs with her sisters but heard a loud "bang". She then went downstairs (V I at 158) and saw the defendant with his arm around her mother's neck with her mother in a choke hold. V I at 159 Kayauna told him to get off her mother and tried to grab him by the shoulders. V I at 160 However, she couldn't pull him off. V I at 160 She told him to get off her mother multiple times and her fingernail broke while she was trying to pull him off. V I at 161 The next thing she remembered, her mother fell to the ground and the defendant left the home. V I at 164

Kayauna called a family friend, called 911, and then gave her mother CPR. V I at 165, 209, 232

When the police arrived, she told them what had transpired. V I at 177

At trial, Kayauna also testified about a previous incident which had occurred in November of 2010. V I at 177 She testified that she had been awakened by her mother and the defendant arguing. She went into her parents' room and saw the defendant holding her mother by her neck, screaming (V I at 179) while her mother was lying down in the bed. V I at 180 She pushed the defendant off her mother. V I at 179

When asked about other altercations between her parents, Kayauna testified that her parents would fight and she would often try to break her parents up. V I at 185-186 She said that many times the defendant would start the fights verbally and her mother would react physically. V I at 214 She said after many of the fights the defendant would leave for awhile and then would return. V I at 208

911 Call

The 911 call from Kayauna was played for the jury. She called 911 and told the dispatcher that her mother was not breathing. She said that her mother and the defendant had been fighting and that he had just left and Kayauna did not know what was wrong with her mother. V I at 167 The 911 dispatcher told Kayauna to turn her mother over on her back. V I at 168 Kayauna again told the dispatcher that her mother wasn't breathing. V I at 168 The dispatcher then instructed Kayauna regarding how to perform CPR which Kayauna said wasn't working. V I at 169-177

Ravyn Lockridge-Witness

11-year-old Ravyn Lockridge testified that on September 19, 2011 she went to the mall with her sisters and her mother to shop for Kayauna's homecoming dress. V I at 219 When they returned home, her mother was looking for money in her purse so Kayauna could go shopping with her friend. V I at 220 Her mother was missing money and believed that the defendant had taken it. V I at 238 Ravyn went to her room to change for bed. V I at 220-221

Ravyn testified that while she was in her room, she heard the defendant and her mother arguing. V I at 221 She looked into her parents' room and saw the defendant sitting on the bed and her mother standing up. Both of them were pushing each other. V I at 222 Once they started pushing at each other, Ravyn went to get Kayauna who was in the basement. V I at 223 She told Kayauna that the defendant and her mother were fighting. V I at 223

Kayauna then accompanied her to her parents' room. She saw the defendant leave the room first followed by her mother. V I at 224 She saw continued pushing and shoving. V I at 225 She testified that her mother did not punch the defendant, however. V I at 245

Once downstairs, she saw the defendant with her mother in a headlock (V I at 225-226) and her mother was punching him trying to get loose. V I at 229 Kayauna then tried to intervene. V I at 226 Ravyn heard the defendant saying to her mother, "Get your daughter off of me." V I at 227 The defendant then let go of her mother and her mother fell to the ground. V I at 227 When her mother fell to the ground she was breathing very hard and then stopped breathing. V I at 251 The defendant said, "I'm out of here" and left the home. V I at 228

Kayauna shut the door and eventually called the police. V I at 227 Ravyn spoke to a police officer when the police arrived and told him what had occurred. V I at 228

When asked about prior incidents, Ravyn testified that her mother and the defendant would yell and scream and would also get into physical fights. V I at 233 She had seen the defendant with her mother in a headlock on previous occasions. V I at 253 When this would happen Ravyn would then go get Kayauna to stop them. V I at 234 The defendant would then leave for awhile and then after a period of time, he would return. V I at 252

Kaelyn Lockridge-Witness

Nine-year-old Kaelyn Lockridge testified that on September 19, 2011 she went shopping with her mother and sisters for Kayauna's homecoming dress. V I at 254, 257 They did not find a dress and went home. V I at 257-258

When they returned home, her mother went to her room and a short time later Kaelyn heard her mother and the defendant yelling. V I at 258 Kaelyn then went to her mother's room and saw her mother standing up and heard her mother and the defendant arguing very loudly. V I at 259 Ravyn then left to get Kayauna V I at 260

Kaelyn then also went down to the basement to get Kayauna. V I at 260 When she came up to the main floor, she saw Kayauna trying to get her mother and the defendant in a different

room. V I at 261 She said that there came a point in time when her mother fell to the floor. Kaelyn testified that she believed her mother had fainted. The defendant then left. V I at 263

Kaelyn testified that the ambulance and the police then arrived (V I at 263) and she told a female police officer what happened. She did not remember telling the police officer that the defendant had choked her mother on the bed in the master bedroom. She also did not recall telling the police officer that the defendant also choked her mother in the front floor entryway. V I at 264

She remembered speaking with Detective Hancock but did not remember telling him that when she looked in the bedroom her mother was half on and half off the bed. V I at 265 She also did not recall telling him that the defendant said, about Kayauna, "What is wrong with your daughter?" while he was choking her mother on the main floor. V I at 265 She remembered telling him, however, that after the defendant let go, that her mother just fell to the ground. V I at 265 She also remembered telling him that spit came out of her mother's mouth and she didn't blink. V I at 265

She remembered testifying previously but did not remember testifying that Kayauna was trying to get the defendant off her mother. V I at 266 She also did not remember showing the people in the courtroom how the defendant had his arm. Then she remembered that the defendant had her mother in a headlock. V I at 267 She said that her mother fainted when the defendant let her go. V I at 268 She later testified that she didn't see the defendant with her mother in a headlock. V I at 278

Trent Rettschlag-Paramedic

Lt. Rettschlag testified that he was a firefighter and paramedic employed by the City of Southfield. V II at 7 On September 9, 2011 he was dispatched at 9:19 p.m. to 21880 Potomac,

in Southfield, Michigan on a report of an unresponsive woman. V II at 8-9 When Lt. Rettschlag arrived on the scene, there was a woman [later identified as the victim, Kenyatta Lockridge] who was not breathing and had no pulse. Immediately the paramedics started CPR (V II at 10) and they then transported her to the hospital. V II at 11 During transport she never regained consciousness (V II at 13) and she had no pulse during the entire period of transport. V II at 14 Lt. Rettschlag handed the victim over to Dr. Kulish at Providence Hospital. V II at 12 While at the hospital the victim was pronounced dead. V II at 13

Patricia Myer-Road Patrol Officer & Evidence Technician

Specialist Myer testified that she was a road patrol officer and evidence technician employed by the Southfield Police Department. V II at 25 On September 19, 2011, she was called to the scene of the homicide at 9:45 p.m.. V II at 26

When she arrived, the paramedics were already there. She made contact with the two youngest girls, Ravyn and Kaelyn. V II at 26-27 She told them that she would stay with them until relatives could come to the home. She told them that she was sorry that her mother was sick and being taken to the hospital. V II at 27 Kaelyn blurted out, "dad was choking mom on the bed." V II at 28 Specialist Myer informed Sgt. Collins regarding Kaelyn's statement. V II at 29

Specialist Myer testified that after the girls left, she began processing the scene. She saw a broken fingernail belonging to Kayauna on the floor in the area where the victim's body had been found. V II at 33, 36, 39

Autumn Kennedy-Sergeant, Southfield Police Department

Sgt. Kennedy testified that on September 19, 2011 she was also called to the scene, and given the task of attempting to locate the defendant. Officers attempted to locate the defendant's

phone and were directed by Sprint to 7258 Prairie in Detroit. V II at 51 She and fellow officers were also informed that the defendant would be driving a tan 2000 Tahoe with a specific license plate number. V II at 53

She saw the defendant's car in the area of 7258 Prairie. V II at 58 She was driving a marked patrol car and when approaching the defendant's vehicle she saw the driver do a quick U-turn and drive in her direction. She saw another patrol car was behind the defendant's vehicle. The defendant then started accelerating (V II at 54) and eventually turned into a gas station parking lot. The patrol cars then boxed the defendant's car in. V II at 55, 63 She identified the defendant as the driver. V II at 55

Sgt. Kennedy observed fresh red bloody scratches on the defendant's right cheek. The defendant's eyes were also very red. V II at 56

Michael Meyer-Road Patrol Officer & Evidence Technician

Specialist Meyer testified that he was a road patrol officer and evidence technician and was dispatched to Providence Hospital on September 19, 2011. V II at 66 He observed the victim's body (V II at 66) and observed hemorrhaging to her eyes. V II at 68

Specialist Meyer also took photographs of the defendant and observed blood in both his eyes. V II at 71, 74 There was also a scratch on the defendant's right shin. V II at 76-77

Dr. Ljubisa Dragovic-Chief Medical Examiner

Dr. Dragovic testified as a stipulated expert in the area of forensic pathology. V I at 284 He conducted an autopsy on Kenyatta Lockridge on September 20, 2011. V I at 285 The victim was 5'7" and 183 pounds. V I at 286 He testified that there was bruising on both sides of her neck and pinpoint bleeding in the white of her eyes. V I at 287, 290-291 There was also pinpoint bleeding in both lungs. V I at 287 The victim had a blood alcohol content of .07 as well

as cannabinoids in her system. V I at 288 There was also bruising to the tongue from a fresh bite mark. V I at 289 Dr. Dragovic testified that the bite to the tongue could have occurred in the victim's struggle to breathe or could have been the result of seizure-like activity due to losing consciousness. V I at 297

He testified that the cause of death of the victim was asphyxia due to neck compression and the manner of death homicide. V I at 309 In this case there was prolonged pressure that deprived the victim of not only consciousness, but of breathing and heartbeat. V I at 323

Dr. Dragovic testified that a person could be rendered unconscious from pressure applied to the neck in 6-10 seconds if the pressure were continuously applied. V I at 292 However, if pressure were not applied continuously and instead was intermittent, it might be up to five to fifteen minutes before an individual would lapse into unconsciousness. V I at 293 Dr. Dragovic testified, however, that if an individual were rendered unconscious in a matter of seconds and then immediately released, then the individual should spontaneously regain consciousness. V I at 295 To cause death after the individual was rendered unconscious, there must be continued pressure which would eventually deprive the individual of oxygen which would cause the breathing and then the heart to stop. V I at 296 Dr. Dragovic also testified that more pressure would need to be applied the stronger the victim was. V I at 309

Dr. Dragovic testified that the injuries in this case were consistent with the victim being strangled in the crook of an individual's arm. V I at 297

Billy Hooker-Forensic Biologist, Michigan State Police Crime Lab

Ms. Hooker, a forensic biologist employed by the Michigan State Police (V II at 81), testified as a stipulated expert in forensic science with a concentration in body fluid identification. V II at 82-83

Ms. Hooker testified that she received a pink fingernail as well as fingernail scrapings which were labeled as being collected from the left and right hand of Kenyatta Lockridge. She also received ten fingernail clippings labeled as collected from the defendant. She also received a bra, buccal (DNA) swabs for the defendant as well as Kenyatta Lockridge. V II at 85 She also had [a buccal swab] for Kayauna Lockridge. V II at 86 She swabbed the clippings from both hands of Kenyatta Lockridge and had them prepared for DNA analysis. V II at 87-88 There was a reddish brown stain on the bra and she also prepared this for DNA analysis. V II at 89

Melanie Morse-Forensic Biologist, Michigan State Police Crime Lab

Ms. Morse, who worked for the Michigan State Police crime lab with a specialty in DNA analysis, testified as a stipulated expert. V II at 94-95 She testified that she received the evidence in this case previously described by Ms. Hooker (V II at 98-99) and testified that the DNA from the pink fingernail matched the DNA profile from Kayauna Lockridge. V II at 100

She also testified that the fingernail scrapings from the left hand of Kenyatta Lockridge were consistent with the victim's own DNA type. V II at 100 She testified that the fingernail scrapings from the right hand of Kenyatta Lockridge were consistent with DNA from two donors, the major donor of which was the defendant. There was an insufficient sample to determine the minor donor. V II at 102-103

There was no foreign DNA on the defendant's fingernail clippings. V II at 103 The DNA from the bloodstain on the victim's bra matched that of the victim, herself. V II at 103-104

Prior Acts Witnesses

Jeffrey Duley-Police Officer, Detroit Police Department

Officer Duley, who worked for the Detroit Police Department, testified that he was working on February 20, 2007 when he received a dispatch at around 7:00 p.m. to 15011 Washburn in Detroit, concerning a fight in progress. V II at 114-115, 121 He made contact with the defendant who smelled strongly of intoxicants and was walking to his truck. The defendant stated that he had just gotten into a fight with his wife. The defendant had scratches to his right ear, left cheek, and on his chest. V II at 116

Officer Duley also spoke with Kenyatta Lockridge who was crying. She had a swollen black left eye, scratches on her left wrist, and a red mark on the left side of her face. V II at 116 Ms. Lockridge did not smell of alcohol. V II at 118

The defendant eventually pled to domestic violence. V II at 117 A certified copy of the defendant's domestic violence conviction from the incident was entered into evidence. V II at 117

Daniel Restum-Police Officer, Southfield Police Department

Officer Restum testified that on November 5, 2010, he was employed by the Southfield Police Department and was dispatched at 12:22 a.m. to 21880 Potomac in the City of Southfield on an assault-in-progress call. V II at 124-125 While he was outside in his patrol car, waiting for back-up, a younger black female, later identified as Kayauna Lewis [Lockridge], exited the home and ran over to his squad car visibly upset. V II at 125-126 She was crying uncontrollably and said that her father had just assaulted her mother and was tearing up the house. V II at 126 She said that he shoved her mother and herself. V II at 130

A short time later the defendant exited the home. V II at 126 He looked in the officer's direction and then walked briskly to a vehicle parked in the driveway. He had some items in this hand. V II at 127

When Officer Restum approached the defendant, the defendant appeared to be highly intoxicated. V II at 128 Officer Restum also had contact with Kenyatta Lockridge. She was visibly shaken, crying, and scared. V II at 128

Defendant

Defendant testified that he and Kenyatta Lockridge married on May 22, 1999. V II at 157 Kayauna was Ms. Lockridge's daughter and Ravyn and Kaelyn were daughters of both the defendant and Ms. Lockridge. V II at 157-158

The defendant testified that he and the victim would sometimes fight. (The defendant said that he was about six feet tall and weighed 195 lbs. V II at 176) He alleged that a lot of times the victim would "jump at" him and other times he tried to grab and fight her. He claimed that he lost almost every fight they had. V II at 158 He testified that they would have a physical fight about every year and a half for the last 13 years. V II at 159

The defendant said that on one occasion in 2007 he had been drinking too much and he "picked [the victim] up out of the shower", walked into the bedroom and he broke her phone. He claimed that she was not in a headlock. V II at 203 He then followed her to a friend's house and there was "physicality" when he got to the home. Then the police arrived and he was arrested. V II at 203-204 He pled guilty to that offense. V II at 159 The defendant claimed that after the incident in 2007, the victim would at times hit him but he would avoid her. V II at 160

He testified that in 2009 the victim grew angry regarding what one of his customers wrote on his Facebook page. V II at 161-162 He asserted that she attacked him and hit him over

and over (V II at 162) and eventually pulled a knife on him. V II at 163 He said that he did not contact the police because he didn't want to get her in trouble (V II at 164) and knew that they would make up. V II at 165

The defendant said that one evening in November of 2010, he and the victim went to a bar in Detroit and had a number of shots. After they returned home, the victim fell asleep and the defendant looked at her telephone and believed that she had been talking to another man. The defendant said that he was packing up to leave the home and when he woke her up to confront her she "got to hitting." The defendant said that he was holding her down when the children came into the room. The defendant said that after he got off of her, she called the police. The defendant said that he also called the police. V II at 166-167 He claimed that there was no choking involved; he just had his hands around her shoulders not her throat. V II at 206

The defendant said that he was charged with domestic violence out of that incident. When he was released from jail he went back home even though he wasn't supposed to. V II at 167 He said that by that time, the victim wanted him to return. V II at 168

The defendant testified that on September 19, 2011 he and the victim went to a bar and had a couple drinks and ate pizza. After they returned home, the victim went to the mall with the children to get Kayauna a homecoming dress. V II at 170

The victim and children returned around 9:15 or 9:30 p.m. when he was upstairs playing video games. V II at 171-172 The defendant said that the victim came up to their room and accused him of taking money out of her purse. He told her that he did not take the money and continued playing the game. V II at 173 She then knocked the controller out of his hand and a verbal altercation ensued. V II at 174-175 The defendant claimed that she punched him in the right eye two times. V II at 175 The defendant said that he then told her that he was leaving (V

II at 176) and started to make for the door. V II at 177 He said that the victim then fell to the ground and grabbed his leg, scratching it. V II at 178 He shook his leg free and then ran down the stairs. V II at 178 He claimed that he was running away because he thought the victim might grab the dog cage, like she had done before, and throw it at his head. V II at 179 He did not know whether she was pushing him while he was going down the stairs. V II at 179

The defendant said that she caught him at the bottom of the stairs and claimed that she hit him a number of times before he grabbed her. V II at 180 He testified that then Kayauna ran up to him and started hitting the back of his head telling him to get off her mother. V II at 181 The defendant testified that he was shielding his face to protect himself from Kayauna. V II at 181 The defendant said that sometime "in the middle of that" the victim slid down the side of him. The defendant then left. He claimed that he knew that she was breathing when he left. V II at 182 He said that he went to the 711 to get a bag of ice for his face. V II at 182

The defendant claimed that he had never restrained the victim previously in the manner he used that day (V II at 187) and asserted that he did not mean to harm his wife. V II at 188 The defendant claimed that he did not know the victim had died. V II at 185 He also alleged that if he thought that something was wrong with her, he wouldn't have left. V II at 187

The defendant then drove to his mother's house, 7250 Prairie. V II at 183 His grandmother gave him $20 (V II at 184) and he left the house and intended to drive to the gas station to buy lunch on the way to work. V II at 183 He said that he saw a bunch of police officers at one gas station and then drove to another gas station. He claimed that as soon as he believed that the police were following him, he stopped. V II at 184 He denied that he accelerated when he saw the patrol cars. V II at 194 He was then arrested. V II at 185

Once at the police station he spoke to Detective Hancock (V II at 185) and claimed that he found out that the victim had died during the interview. V II at 186 The defendant said that it was possible that he told the detective that he did not touch his wife. V II at 196 The defendant then testified that when he first claimed to the detective that he didn't touch his wife, he was under duress, not intentionally lying. V II at 199 He admitted that he later told the detective that he didn't think he choked his wife but if he did it was to get her off of him. V II at 196-197 He also told him at one point in the interview that he didn't remember how he defended himself. V II at 197 He also told the detective that he didn't know if the victim had been breathing when he left. V II at 198 He admitted that he said that if she died he probably killed her. V II at 198 He also admitted that he told the detective that if he had not put his hands on her she would not be dead. V II at 198 He also admitted that he probably told the detective that it was his fault if the victim had died. V II at 200 He conceded that he had admitted that he had the victim in a headlock only after he was confronted with his children's statements. V II at 200 He claimed that his memory was then refreshed. V II at 201

He claimed that he did not cut off the victim's air supply, but admitted that he said that he had his wife in a "choke hold." V II at 207, 214 In his statements he said that he was being attacked by his wife so "I guess I detained her with a choke hold, while my oldest daughter was hitting me." V II at 217

The defendant admitted that on the day of the incident he was not supposed to be in the home as a condition of his probation. V II at 190-191 He also admitted that he lied to his probation officer regarding where he was staying. V II at 191

At the conclusion of the People's case, the court had granted defendant's motion for directed verdict on first degree premeditated murder. The charge of second degree murder went

to the jury. V II at 150-151 The jury convicted the defendant of involuntary manslaughter. V IV at 5

Defendant appealed his sentence to the Court of Appeals which affirmed his sentence on February 13, 2014. *People v Lockridge, supra.* The Court of Appeals found that the defendant failed to show that Judge Grant abused her discretion in imposing a 10-month sentencing departure. *Id.* (O'Connell, J.,)(Slip. Op. at 1-2). The Court also found that the previous published decision of *People v Herron,* ___Mich App___:___NW2d___ (2013), which was binding on the Court, had concluded that the United States Supreme Court's opinion in *Alleyne v United States,* ___US___; 133 S Ct 2151; 186 L Ed 2d 314 (2013) did not affect sentencing guidelines' calculations in a Michigan's indeterminate sentencing scheme. *Lockridge, supra* (O'Connell, J.,)(Slip. Op. at 3), (Beckering, J., ,concurring)(Slip. Op. at 1).

Defendant has now filed an application in this Court. Other pertinent facts may be contained throughout the body of this brief.

ARGUMENT

I. THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *ALLEYNE v UNITED STATES,* ___US___;133 S Ct 2151; 186 L Ed 2d 314 (2013) DOES NOT IMPACT GUIDELINES' SCORING WHICH IS PART OF A SENTENCING COURT'S "BROAD DISCRETION . . . TO SELECT A SENTENCE WITHIN THE RANGE AUTHORIZED BY LAW."

Standard of Review and Issue Preservation :

The appellate court reviews de novo questions of constitutional law. *People v Trakhtenberg,* 493 Mich 38, 47; 825 NW2d 136 (2012). However, defense counsel did not preserve this constitutional issue at sentencing. An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. *People v McCuller II,* 479 Mich 672, 681; 739 NW2d 563 (2007). Furthermore, the Court "exercise[s] the power to declare a law unconstitutional with extreme caution and we never exercise it where serious doubt exists with regard to the conflict." (citation omitted) *People v Harper & Burns,* 479 Mich 599, 621; 729 NW2d 523 (2007).

Defendant has also failed to show that this case meets the requirements of MCR 7.302(B).

Discussion:

The United States Supreme Court's recent decision in *Alleyne v United States,* ___US___; 133 S Ct 2151; 186 L Ed 2d 314 (2013) addressed a situation involving a federal mandatory minimum sentence in a determinate sentencing scheme, not an indeterminate minimum sentence range from which a sentencing court may still depart above or below in its discretion. Because Michigan's sentencing system does not impinge on a sentencing court's "broad discretion . . . to select a sentence within the range authorized by law," (133 S Ct at 2163), here fifteen years, the *Alleyne* decision does not render it invalid. *People v Herron,*

___Mich App___;___NW2d____ (2013) which found similarly and which the Court of Appeals in this case followed as binding precedent, was correctly decided.

Defendant asserts that the statutes which allow judges, not juries, to score a defendant's offense variables (MCL 769.34; MCL 777.21) which affect the court's minimum sentence should be struck down as unconstitutional based on the recent United States Supreme Court decision of *Alleyne v United States, supra.* Defendant asserts that because offense variables 3, 5, 6, and 10 were scored by the judge based on a preponderance of the evidence standard of proof, scoring was impermissible. Defense counsel argues that the sentencing guidelines are the equivalent of elements of a crime and therefore must be determined by a jury beyond a reasonable doubt.

Due process of law includes protecting a defendant against conviction except by proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged. *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970) The defendant also has an independent right to a jury determination of every element of a crime.[1] *Jones v United States*, 526 US 227, 232; 119 S Ct 1215; 143 L Ed 2d 311 (1999)

The Supreme Court in a recent line of cases delineated the definition of an "element" of an offense which triggers this constitutional protection. Though in *Almendarez-Torres v United States*, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998) the Court found that factors concerning recidivism which increased a defendant's maximum sentence were sentencing factors and not elements of the crime (523 US at 247), in a number of cases the Court found that

[1] The Fifth Amendment requirement that all elements be placed on the indictment has not yet been applied to the States, however. See: *Apprendi v New Jersey,* 530 US 466, 477; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

factors unrelated to recidivism which increase a defendant's maximum sentence qualify as elements of the crime.

In *Jones v United States, supra*, the defendant was charged with carjacking, a crime which possessed a 15-year maximum, and was convicted at a jury trial. 526 US at 231. However, at sentencing, Jones' maximum was elevated to 25 years because the court made a finding that the victim had suffered serious bodily injury. *Id.* (The statute allowed elevation if the court found the requisite facts.) The *Jones* Court found that "serious bodily injury" was an element of the crime which had to be found by a jury and proven beyond a reasonable doubt because defendant's maximum was increased based on this finding. 526 US at 243 n 6.

In *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) the defendant pled guilty to several counts of unlawful possession of a firearm and one count of possession of a bomb. 530 US at 469-470. Though these crimes possessed a maximum penalty of ten years, at sentencing the court elevated the defendant's maximum sentence to 12 years based on a finding by a preponderance that the defendant committed a "hate crime" which was allowed by statute. 530 US at 471. The Court held that because the sentencing judge's finding that the defendant committed a "hate crime" elevated defendant's maximum, it also must be considered an element of the crime.

In *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002) the judge made factual findings and imposed a death sentence on the defendant. The Court found that the defendant had a right to require a jury, not a judge, to make the factual findings which authorized a death sentence. 536 US at 589.

In *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), where the defendant pled guilty to the crime of second degree kidnapping, the court in accord with

Washington statutes, made factual findings which increased the defendant's sentencing maximum. 542 US at 298-300. The Court again found that because the defendant's statutory maximum was elevated by a court's factual findings, the facts had to be found by a jury and determined beyond a reasonable doubt. 542 US at 303, 313-314.

In like manner in *United States v Booker,* 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), the Court dealt with federal sentencing judges' ability to make factual findings which elevated defendants' maximum sentences based on the mandatory sentencing guidelines. The federal system is a determinate sentencing scheme and the court was required to score guidelines to determine what defendant's determinate sentence would be. The Court found that the case posed a fairly straight-forward application of *Blakely,* since it dealt with fact-finding which increased the defendant's sentencing maximum. Again, the Court found that any facts which increased a defendant's maximum must be considered elements.

Cunningham v California, 549 US 270; 127 S Ct 856; 166 L Ed 2d 656 (2007) dealt with California's determinate sentencing scheme, where the judges, not the jury, by statute were able to elevate a defendant's sentencing maximum based on factual findings made by preponderance of the evidence. 549 US at 274. Again, the case involved a straightforward application of *Apprendi, Blakely,* and *Booker* and the Court invalidated the sentencing scheme. 549 US 282.

However, the Court, within a number of its opinions either implicitly or explicitly affirmed the constitutionality of indeterminate sentencing schemes. As stated by *Jones,* "It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution." 526 US at 247. In *Apprendi,* the Supreme Court emphasized, "We should be clear

that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute." (emphasis original) *Apprendi,* 530 US at 481. The Court noted that judges had long exercised this type of discretion when imposing sentences, and indicated that since the 19th century there had been a shift from determinate sentencing schemes to "those providing judges discretion within a permissible range." *Id.* The Court, when further expostulating on the difference between elements of crimes (which had to be found by a jury beyond a reasonable doubt) and "sentencing factors" (which the judge could find by a lower standard of proof), indicated, "This is not to suggest that the term 'sentencing factor' is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." (emphasis original) 530 US at 494 n 19.

Also, the *Blakely* Court specifically distinguished determinate from indeterminate sentencing schemes indicating, "[Indeterminate sentencing] increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course, indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence-and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (emphasis original) *Blakely,* 542 US at 309.

The *Cunningham* Court also noted that several states had modified their sentencing schemes in light of recent cases, "Other States have chosen to permit judges genuinely 'to

exercise broad discretion . . . within a statutory range,' which 'everyone agrees,' encounters no Sixth Amendment shoal." 549 US at 294 citing *Booker,* 543 US at 233.

In Michigan as well, this Court has found that Michigan's indeterminate sentencing system was unaffected by the *Apprendi* line of cases. In *People v Drohan,* 475 Mich 140; 715 NW2d 778 (2006) this Court addressed whether Michigan's indeterminate sentencing scheme, which allows a trial court to set a defendant's minimum sentence on the basis of factors determined by a preponderance of the evidence, violated the Sixth Amendment. *Id.* at 142-143. This Court found, consistently with *Blakely,* that findings made regarding the guidelines were facts which supported a specific sentence within the range authorized by the jury's finding that the defendant was guilty of a particular offense and were sentencing factors which did not implicate the Sixth Amendment. *Id.* at 162-163. *Drohan* found that in Michigan the Sixth Amendment did not entitle a defendant to a sentence below the statutory maximum. *Id.* at 159, 161. This Court concluded, "As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 164.. This Court indicated, "there is no guarantee that any incarcerated person will be released from prison after the person has completed his or her minimum sentence. Ultimately the parole board retains the discretion to keep a person incarcerated up to the maximum sentence authorized by the jury verdict." *Id.* at 163.

In *People v McCuller,* 475 Mich 176; 715 NW2d 798 (2006), when the question was whether the elevation of the guidelines from an intermediate sanction cell to a straddle-cell violated *Blakely,* this Court reiterated its findings in *Drohan,* This Court found, "In regard to indeterminate sentencing schemes such as Michigan's, the *Blakely* Court re-affirmed that a

sentencing court may engage in judicial fact-finding in order to impose a minimum term within the statutory range. *Id.* at 180.

In *People v Harper & Burns supra*, this Court again dealt with the question of intermediate sanction cell sentences. This Court reiterated that in Michigan the maximum is prescribed by MCL 769.8 (and was in most cases the statutory maximum). *Id.* at 603, 612. ***This Court indicated that any limit on incarceration is a matter of "legislative leniency" which gives a defendant the opportunity to be incarcerated for a period that is less than that authorized by the jury verdict or guilty plea.*** *Id.* at 604, 611, 616, 622-623. This Court indicated that the trial court's power to impose a sentence is always derived from the jury's verdict, because the maximum-minimum sentence will always fall within the range authorized by the jury's verdict. *Id.* at 615, 622-623. The Court in *Harper & Burns,* indicated, "our system mirrors the *Blakely* Court's hypothetical indeterminate system." *Id.* at 636. This Court again indicated that "[w]hile the sentencing judge fixes the minimum portion of a defendant's indeterminate sentence, a defendant is still liable to serve his maximum sentence and may only be released before the maximum term has expired at the discretion of the parole board." *Id.* at 613.

In *People v McCuller II, supra* (which was decided after the United States Supreme Court remanded after *Cunningham v California, supra*), this Court again indicated that Michigan has a "true indeterminate sentencing scheme" which as a matter of "legislative leniency" gives the defendant the opportunity to be incarcerated for a period that is *less* than that authorized by the jury's verdict or guilty plea. *Id.* at 677- 678, 683. ***This Court noted that Michigan's system was compliant with the comment made by the United States Supreme Court in Cunningham, "[o]ther states have chosen to permit judges genuinely 'to exercise***

broad discretion . . .within a statutory range,' which 'everyone agrees,' encounters no Sixth Amendment shoal.'" Id. at 688 citing Cunningham, 549 US at 294. This Court indicated, "Upon conviction, a defendant is legally entitled only to the statutory maximum sentence for the crime involved . . . As the *Blakely* Court stated, whether a defendant has a legal right to a lesser sentence 'makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.' Thus a sentencing court does not violate *Blakley* principles by engaging in judicial fact-finding to score the OVs to calculate the recommended minimum sentence range. . ." *Id.* at 689, citing *Blakely,* 542 US at 309. This Court indicated that the findings of fact made by judges concerning the guidelines are the equivalent of finding certain mitigating facts at sentencing. *Id.*at 692-693. The Court indicated that a sentence less than the maximum was "a matter of legislative leniency" giving a defendant the opportunity to be incarcerated for a period of time that is *less* than that authorized by the jury's verdict or guilty plea, and a circumstance which did not implicate *Blakely, supra. Id.* at 694 citing *Harper & Burns, supra* at 603-604.

The United States Supreme Court's recent opinion in *Alleyne v United States, supra* extended the Court's previous rulings in *Apprendi et al,* to factual findings which allowed courts to impose mandatory minimum sentences. The Court overruled its previous decision in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002) which had found that *Apprendi's* rule was inapplicable to mandatory minimums. 536 US at 568-569. However, again, the Court applied *Apprendi's* rule to elevation of a determinate sentence.

In *Alleyne* the defendant was convicted of carrying a firearm in relation to a crime of violence, 18 USC § 924(c)(1)(A). A conviction under that section carries a minimum sentence of 5 years. 18 USC § 924(c)(1)(A)(*i*). However, that minimum increases to 7 years if the

firearm is "brandished," and 10 years if it is "discharged." 18 USC § 924(c)(1)(A)(*ii*)–(*iii*). The court enhanced Alleyne's sentence after finding by a preponderance that the defendant had brandished the weapon. 133 S Ct at 2155 The Court found that "[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense.'" 133 S Ct at 2159 citing *Apprendi,* 530 US at 490. Since federal schemes are determinate, the elevation of the minimum term in the federal system, doesn't look much different from elevation of the maximum term. See: *United States v Jingles,* 702 F3d 494, 503 (CA 9, 2012)(indicating, "Parole, however, has not been a feature of criminal justice in the federal system for some time. See Comprehensive Crime Control Act of 1984, Pub. L. 98, 473, 98 Stat. 1976 (replacing parole system with system of determinate sentence followed by supervised release for crimes committed after November 1, 1987)); *United States v Redd,* 630 F3d 649, 650 (CA 7, 2011)(indicating, "The 1984 Act converted the federal system to one of determinate sentences.")

The *Alleyne* Court, however, again distinguished findings of fact that both alter the legally prescribed range and do so in a manner that aggravates the penalty from "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" 133 S Ct 2161 n 2 quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). The Court noted that the latter method of fact-finding may lead a judge to select a more severe sentence than he or she otherwise would have without the facts, but "the Sixth Amendment does not govern that element of sentencing." *Id.* The Court expanded on this distinction noting that "[o]ur ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." 133 S Ct at 2163

Quoting Justice Thomas' concurring opinion in *Apprendi, supra,* the Court stated that "establishing what punishment is available by law and setting a specific punishment *within the bounds that the law has prescribed* are two different things." (emphasis original) *Id.* quoting *Apprendi*, 530 US at 519 (Thomas, J, concurring). The *Alleyne* Court concluded that its decision "is wholly consistent with the broad discretion of judges to select a sentence *within the range authorized by law*." (emphasis original) *Id.*

As found by the Court of Appeals in *Herron, supra,* the *Alleyne* decision does not affect Michigan's sentencing guidelines. The *Alleyne* Court repeatedly emphasized that its decision addressed "mandatory minimums" (in a determinate sentencing scheme) *not* a "guidelines range" which implicates a defendant's minimum sentence in an indeterminate sentencing scheme. *Alleyne*, 133 S Ct at 2159, 2161, 2163. See also: *Jones,* 526 US at 247; *Apprendi,* 530 US at 481, 494 n 19; *Blakely,* 542 US at 309; *Cunningham,* 549 US at 294.

For the vast majority of felony offenses, sentencing courts use the legislative sentencing guidelines, MCL 777.1, *et seq.*[2] The scoring of these guidelines allows a sentencing court to determine the "recommended minimum sentencing range." MCL 777.21(3). See: *People v Morson,* 471 Mich 248, 255; 685 NW2d 203 (2004)(indicating, "To determine a minimum sentence range under the legislative sentencing guidelines, the sentencing court must first determine the offense category. MCL 777.21(1)(a). The sentencing court must then determine

[2] Only a select number of offenses in Michigan carry a statutory mandatory minimum penalty. *See, e.g.*, MCL 750.520b(2)(b) ("For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years."); MCL 750.529 ("If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.").

which offense variables (OV) are applicable, score those variables, and total the points to determine the offender's offense variable level. *Id.* ")

Ordinarily, the minimum sentence imposed must fall within the appropriate range as determined by the guidelines, but the sentencing court nonetheless retains considerable discretion to depart from that range for a "substantial and compelling reason" articulated on the record. MCL 769.34(2)–(3). In this case, for example, the court departed upward from the guidelines. The guidelines called for a minimum falling within the range of 43 to 86 months but the court departed upward for substantial and compelling reasons and imposed a 96 month to 15 year sentence. In order to depart upward from the guidelines the court does not have to make findings based on discrete statutory criteria. Instead, the factual findings are left largely to the sentencing judge after considering the circumstances of the offense and offender. MCL 769.34[3]; *People v Gary Smith,* 482 Mich 292; 754 NW2d 284 (2008). Furthermore, the minimum

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[3] MCL 769.34 states in pertinent part:

> (3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:
>
> > (a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
> >
> > (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

sentence is ultimately up to the Parole Board and the defendant can serve anywhere up to the maximum sentence depending on the Parole Board's decision regarding whether the defendant is a danger to the public. MCL 791.233(1)(a); 791.234(11); MCL 795.235(1).

Thus, whether a sentencing court imposes a minimum sentence within the recommended range derived from the scoring of the sentencing guidelines or departs—either upward or downward—from that range, there has been no imposition on the court's discretion "to select a sentence within the range authorized by law." *Alleyne, supra.* Again, this Court has indicated that findings on the guidelines solely allowed the sentencing judge to select a sentence within the range authorized by law. *McCuller II, supra* at 688. See also: *Herron, supra.* Fact-finding which may reduce the time that the defendant has to serve does not implicate *Alleyne.* In *Alleyne,* the court found facts which increased the one-determinate–number. Whether labeled maximum or minimum the court's fact-finding increased the time that a defendant had to serve. In Michigan when scoring the guidelines, the courts find facts which may decrease the ultimate time that the defendant is ultimately incarcerated; the guidelines are ultimately matters of legislative leniency. See: *McCuller II, supra* at 688-689 (indicating that scoring of the guidelines gives a defendant the opportunity to be incarcerated for a period that is less than that authorized by the jury's verdict or guilty plea). See also: *Drohan, supra* at 164.

In any event, defendant requests the wrong remedy. In *Booker* for instance, instead of invalidating the entire federal guidelines system, the Court solely struck down the requirement that the sentencing guidelines were mandatory (as well as the appellate standard of review).See: 18 USC §3553(b)(1). The Court found that the guidelines served an essential purpose of diminishing sentencing disparity (543 US at 250-251) to ensure that offenders would receive similar sentences for those who have committed similar crimes in similar ways. 543 US at 252,

253, 254. The Court also found that "to engraft the Court's constitutional requirement onto the sentencing statutes, however would destroy the system" since the guidelines would be absolutely unworkable. 543 US at 252, 254. However, the Court held that if the sentencing guidelines were merely discretionary, there was no constitutional problem. 543 US at 244-266.

In this case, even if this Court found the court's scoring of the guidelines violated *Alleyne*, the correct remedy would be excision of the mandatory provision of the guidelines, MCL 769.34(2). MCL 8.5.[4] See: *Lockridge, supra,* (Beckering, J., concurring) (Slip. Op. at 14-15) Clearly the Legislature desired the guidelines to decrease disparity in sentences.[5] Also, the application of the jury-trial requirements to the guidelines would be unworkable for all the reasons expressed by the Supreme Court in *Booker, supra.*

Also, defendant has failed to show plain error in this case. The jury's verdict alone supported the scoring of OV 3, MCL 777.33(1)(c), life-threatening injury to the victim because

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[4] MCL 8.5 states:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> > If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

[5] In the mission statement of the Michigan Sentencing Guidelines Commission, the Commission stated that its goal was, to "[d]evelop sentencing guidelines which provide protection for the public, are proportionate to the seriousness of the offense and the offender's prior record, and which reduce disparity in sentencing throughout the state." Michigan Sentencing Guidelines Commission, *Report of the Michigan Sentencing Guidelines Commission,* (1997) p 6.

the defendant killed the victim. See: *People v Houston,* 473 Mich 399, 402; 702 NW2d 530 (2005)(indicating, "The defendant not only killed the victim, but in the process also caused a physical injury--a gunshot wound to the head. Consequently, although the court did not have the option of assessing one hundred points for OV 3, it properly assessed twenty-five points on the basis of the next applicable variable element: 'Life threatening or permanent incapacitating injury.'") See also: *People v Portellos,* 298 Mich App 431, 447; 827 NW2d 725 (2012)(indicating, "But the trial court may not assess zero points for OV 3 if the defendant is convicted of a homicide offense and the victim is killed. If the victim is killed, the trial court must assign 25 points unless a higher score applies.")

There was also overwhelming evidence that serious psychological injury was inflicted on the victim's children. MCL 777.35(1)(a). This was supported by the trial as well as the Presentence Report. See: PSR at 6 Michigan courts have long held that a sentencing court may presume that unchallenged facts contained in the Presentence Report are accurate. *Harper & Burns, supra* at 642 n 72. In fact the sentencing judge departed because the psychological injury to the victim's children was inadequately considered in the guideline. See: Argument II

Defendant also does not dispute the scoring of OV 6, MCL 777.36(1)(c), an offender's intent (consistent with a manslaughter conviction).

With the scoring of OV 3, 5, and 6, the guidelines would remain the same. Defendant has failed to demonstrate that he could show plain error in the scoring of the guidelines. If the jury had been presented with the same questions, the jurors would have found similarly. See: *McCuller, supra* at 695, 697. And if the guidelines would remain the same, the departure would be permitted because no statutory factors governed the court's decision to depart.

Ultimately, Michigan's indeterminate sentencing scheme does not impose a flat, statutory mandatory minimum as the federal statute at issue in *Alleyne* did, but rather provides full judicial discretion to sentence within the range authorized by law. *Alleyne,* 133 S Ct at 2163. As the *Alleyne* Court readily recognized, "broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Id.* Accordingly, *Alleyne* does not impact Michigan's indeterminate sentencing scheme as defendant contends and *People v Herron, supra* was correctly decided.

ARGUMENT

II. THE COURT OF APPEALS DID NOT CLEARLY ERR WHEN IT FOUND THAT JUDGE GRANT DID NOT ABUSE HER DISCRETION WHEN SHE DEPARTED UPWARD TEN MONTHS FROM THE GUIDELINES (A SENTENCE WITHIN THE NEXT GUIDELINES' GRID) FOR THE DEFENDANT'S PRIOR ASSAULTIVE CONDUCT TOWARD THIS VICTIM AND HIS VIOLATION OF A NO-CONTACT PROVISION ON THE DATE OF THE HOMICIDE AS WELL AS THE PSYCHOLOGICAL DAMAGE HE INFLICTED ON HIS THREE CHILDREN WHEN THEY LOST THEIR MOTHER, WHEN THEY WITNESSED THEIR FATHER KILL HER, AND WHEN THEY UNSUCCESSFULLY ATTEMPTED TO RESCUE HER.

Standard of Review:

The existence or nonexistence of a particular sentencing factor is a factual determination for the sentencing court to determine which is reviewed for clear error. *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003). The determination that the sentencing factor is objective and verifiable is reviewed de novo. *Id.* A sentencing court's determination that objective and verifiable factors constitute substantial and compelling reasons to depart is reviewed for abuse of discretion. An abuse of discretion occurs when the sentencing court chooses an outcome falling outside the permissible principled range of outcomes. *Id.*

Defendant has also failed to show that the Court of Appeals clearly erred in its decision. MCR 7.302(B)(5).

Issue Preservation:

At sentencing, defense counsel requested a sentence which would have fallen within the guidelines. ST at 30-32 Defendant may also raise the issue of a departure from the guidelines on appeal. MCL 769.34(7),(11); *People v Gary Smith,* 482 Mich 292, 300; 754 NW2d 284 (2008).

Discussion:

The judge did not abuse her discretion when she departed upward ten months from the guidelines (a sentence within the next guidelines' grid) for the defendant's prior assaultive conduct toward this victim and his violation of a no contact order on the date of the homicide as well the psychological damage he inflicted on his three children when they lost their mother, when they witnessed their father kill her, and when they unsuccessfully attempted to rescue her.

A court may depart from the appropriate sentence range if it has substantial and compelling reasons for the departure and states those reasons on the record. Substantial and compelling reasons are those that keenly or irresistibly grab the court's attention and have considerable worth in determining the length of the sentence. The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered in the guidelines or have been given inadequate weight in the guidelines. *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003); MCL 769.34(3)(a),(b).

Once the court determines that substantial and compelling reasons to depart from the guidelines have been established, the extent of the departure is evaluated for an abuse of

discretion. *Gary Smith, supra* at 295, 300. For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history. *Gary Smith, supra* at 300. However, the sentencing court is accorded deference because of its "familiarity with the facts and its experience in sentencing, [and because] the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case." *Babcock, supra,* at 268-269. In fact the legislature has recognized that "the trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case." *Id.* at 267. This standard of review "acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Id.* at 269. The trial court abuses its discretion when the sentence imposed is not within the range of principled outcomes. *Id.* at 269, 274.

The guidelines were scored at 43 to 86 months. ST at 30 Defense counsel objected to any departure from the guidelines. ST at 30-32 Probation requested a top-of-the guidelines sentence. PSR at 2 The prosecution requested departure from the guidelines. The prosecution argued that the extent of the psychological injury was not taken into consideration in the guidelines since the three children witnessed the homicide. ST at 33 The prosecution also asked for a departure based on the defendant's escalation of violence with this particular victim. ST at 33-34 The prosecution argued that, though the guidelines reflected that the defendant was on probation and had prior convictions, they didn't take into consideration that the defendant was not supposed to have any contact with the victim in this case and that his previous incidents of violence were against this particular victim. ST at 33-34 The prosecution requested a ten-year minimum. ST at 34

The court eventually sentenced the defendant to a minimum of eight years (96 months), a ten-month departure from the guidelines. ST at 47

The court gave the following reasons for its sentence:

> There is a reason, I think especially in the district courts, that they struggle with domestic violence cases—of course, when they become domestic violence third it becomes a felony and then the circuit court see sees it-and that's as close to blaming the victim as you can get.
>
> The reason they struggle is because they say to the defendant, don't go back into that home. You are not allowed to go back into the home.
>
> And for whatever reason there are still women—and it's primarily women. I understand there are other sorts of relationships and sometimes it's a woman attacking a man, whatever. But primarily it's a woman allowing back in either the partner or the husband. And whether it's for emotional security or financial security, I don't know.
>
> And as far as we have come in this country, quite frankly, in the education of domestic violence and of women taking control of their lives and not placing themselves in the danger that we had here, I don't know—as far as, as far as we have come, we are still sometimes in the Dark Ages.
>
> I don't understand why anyone lets someone in their home who has already proven even once that they have raised a hand to them. So while you [defense counsel] said had she not attacked him, he wouldn't be here; had he listened to the court orders, had he understood the ramifications that when a court says don't be somewhere and he does it anyhow, then we wouldn't be here. This is not her fault. Because even if he wants to violate the court orders and had she not attacked him, he didn't have to do anything. He could have gone down the stairs and kept going out the front door.
>
> I still don't understand why he somehow feels that because she was going after him, to place her in a headlock is the way that you fight someone off? Or that you step away from the mother of your children? And then you do that with all three of your children . . .
>
> What I . . . found heartbreaking was the testimony of . . . Kaelyn. She was so poised. I think she was just turning ten or she was nine at the time. At the time she was eight. She's nine now. And she was so poised on the witness stand. And my fear for her was that as poised as she was, as smart as she comes up being, as innocent seeming as she can be, she will always have the fact that she watched her father kill her mother.

I can only hope that at some point all three of the daughters understand that there are good men out there who never lay a hand, never raise a hand to the person they love, ever. No matter what's going on.

And in this circumstance, I don't frankly care who started it because your client clearly finished it. And there is no way that these guidelines taken into as at least not the guidelines, but certainly OVs don't take into account three children standing around trying desperately to stop their father from killing their mother.

And three children calling 911 and desperately trying to figure out how it is they can keep their mother alive, not realizing that she's already dead. Trying to do chest compressions, trying to breathe for her. Getting excited because she somehow moves and they think that that is a sign of life. They literally watched her die.

And he's out—there's questions of whether he went to his mother's house, why he smelled of intoxicants when he was picked up. None of this would be reflected in the OVs. None of it.

The degree of his previous altercations is not clearly reflected in the OVs. They're scored, certainly. But that's why we still have trials and that's why we still have judges that are paying attention and we're just not black and white and plug it into some computer program. Because there's always more to it than what the OVs want to say.

***

Now, whether it was second degree murder or what the—or involuntary manslaughter is what the jury came up with and I would respect the jury's decision. Whether or not I agree with their decision has nothing to do with it, but I respect their decision and that's why we have this system.

I think based on everything I saw, based on the prosecutor's argument here today, based on his prior record, based on the extreme violence that was happening, based on the fact that he walks out, based on the fact that she may have hit him but he put her in a choke hold until she was limp in his arms in front of three minor children that were his children. No concern for what they were seeing. No concern for their emotional well-being.

And, quite frankly, no concern for their physical well-being. He left them in a—in that house with his wife, who was clearly on the floor and unresponsive. Whether or not he thought she was breathing, he left three little girls in that room, in that foyer while he walked out because he needed to get out of there. OVs could not possibly reflect any of that that was going on.

> There are substantial and compelling reasons to go about the guideline[s] in this matter and I think that they are clear.

ST at 41-47

Though the court discussed its reasons for its sentence in a fairly extensive discourse, the court's reasons for departure can be categorized in the following manner:

a) the defendant's violation of the no-contact provision on the date of the homicide,

b) the defendant's previous domestic violence incidents with this specific victim,

c) the effect on not only one but all three of the children in experiencing the loss of their mother and witnessing their father (or adopted father) kill their mother in front of them, as well as their unsuccessful attempt to rescue her and preserve her life,

d) the defendant's leaving the scene, leaving his daughters to deal with their dead mother on the floor.

The Court of Appeals agreed that this list accurately categorizes the reasons the sentencing judge departed. *Lockridge, supra* (O'Connell, J.)(Slip. Op. at 2)

The Court of Appeals found that each of these factors were objective and verifiable, keenly or irresistibly grabbed a court's attention, and were of considerable worth. *Id.*

<u>The Defendant's Prior Offenses and Violation of the No Contact Order</u>

The defendant's commission of prior offenses against the victim and violation of the no contact order against the victim and her home were supported by the record. Probation noted that when the defendant committed the homicide he was on probation for disorderly conduct and resisting and opposing. The disorderly conduct conviction had been reduced from the original charge of domestic violence. The police report for that incident revealed that the defendant's daughter saw the defendant choking her mother and ran to call 911 and when the

police arrived the defendant fought with the officer to the point that he had to be physically restrained. PSR at 1; ST at 12-13 The defendant was sentenced to probation on November 15, 2010 and was ordered not only to have no contact with his wife but also not to enter the marital home located at 21880 Potomac in Southfield. The defendant admitted that on the date of the incident he had been residing at that home and was in violation of the no contact provision. PSR at 1 Probation also noted that there had been a 2007 domestic violence incident with Kenyatta Lockridge as the victim for which the defendant received a delayed sentencing. PSR at 2

The defendant's prior offenses and violation of the no contact order keenly or irresistibly grab the court's attention and are of considerable worth. Michigan courts have found that a defendant's commission of similar offenses as well as successive acts against the same victim appropriately supported departure from the guidelines. As the Court stated in *People v Horn,* 279 Mich App 31, 45-46; 755 NW2d 212 (2008):

> [T]he factor of repetitive acts of escalating violence against a specific victim is not adequately considered by the guidelines. Neither offense variable (OV) 7, MCL 777.37, aggravated physical abuse, nor OV 13, MCL 777.43, continuing pattern of criminal behavior, considers that the defendant's aggression targeted a specific individual, or that the degree of violence increased. Similarly, none of the prior offense variables, MCL 777.50-777.57, takes into consideration the defendant's recurring and escalating course of violence against a selected victim.

See also: *People v Solmonson,* 261 Mich App 657, 671-672; 683 NW2d 761 (2004) (upholding the court's departure from the guidelines due in part to the fact that the defendant continued to commit similar offenses) In accord: *People v Armstrong,* 247 Mich App 423, 426; 636 NW2d 785 (2001); *People v Geno,* 261 Mich App 624, 636; 683 NW2d 687 (2004). Also, any probation violation "represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer" and can

provide a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005).

These factors were not adequately taken into consideration in the guidelines. A trial court must not base its departure on "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range ***unless*** the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." (emphasis provided) MCL 769.34(3)(b). Though the defendant's prior record and relationship with the criminal justice system were taken into consideration in the guidelines, his previous crimes against the same victim were not and the violation of a no contact provision with this specific victim was not. Furthermore, though it is true the defendant exploited a domestic relationship, his past history is not taken into consideration in OV 10, exploitation of a vulnerable victim (MCL 777.40). The sentencing judge made a finding that these factors were not clearly reflected in the guidelines. ST at 45 The Court of Appeals also found that these factors were not adequately reflected in the guidelines. *Id.*

<u>The Psychological Injury to the Victim's Children</u>

The psychological damage inflicted on the defendant's three children was also based on demonstrable facts that are part of the record. Clearly the records showed that the children witnessed the defendant killing their mother while they unsuccessfully attempted to rescue her. The record also shows that the defendant left the home, leaving his daughters to summon 911 and attempt CPR on their deceased mother. Kayauna was clearly distraught during the 911 call when her efforts at CPR were not reviving her mother. V I at 169-177 These were events that naturally would cause serious mental harm. At sentencing, the victim's mother talked about the

devastating experience the defendant caused his three daughters. ST at 36 The probation officer also noted that three children continued to receive mental health treatment in an attempt to help them cope with the trauma that they suffered at the hands of their father. PSR at 2 The probation officer had contacted Danielle Dozier [who Kayauna had called after the defendant's attack] and she stated that the children continued to suffer, had breakdowns all the time, and were currently in mental health treatment trying to cope with the trauma of their mother's death. PSR at 6 She indicated that the children did not wish to have contact with the defendant and were afraid that he might kill them too. PSR at 6

Psychological injury caused by the defendant to the victim's family is an objective and verifiable reason to depart from the guidelines. See: *People v Corrin,* 489 Mich 855; 795 NW2d 13 (2011)(indicating, "The psychological injury suffered by the victim's family members . . . w[as] properly considered by the trial court as [a] substantial and compelling reason[] that justif[ies] a departure from the statutory sentencing guidelines.")

The psychological injury to the victim's children also keenly or irresistibly grabs a court's attention and is of considerable worth and was not adequately considered in the guidelines. Although the offense variables account for psychological injuries suffered by victims and their families, they do not always account for the unique psychological injuries suffered by individual victims. See *Smith, supra* at 302 (finding that the trial court did not err by citing the unique circumstances of the victim and her unique psychological injuries as reasons for departing from the guidelines.) They also do not always account for the subsequent change of the familial relationships due to defendant's conduct. As stated by this Court, for example in *People v Armstrong*:

> Further, the guidelines take into account psychological injury to the victim requiring therapy, MCL 777.34, but do not take into account the violation of the victim's parents' trust in defendant, the effect on the family occasioned by the victim's loss of trust in all men, including his own father, or the effect on the victim and his sister from having to learn about sexual matters at such a young age.

Id. at 425-426

The Court recently found similarly in *People v Anderson,* 298 Mich App 178, 189 ; 825 NW2d 678 (2012) when the sentencing judge departed from the guidelines due to the victims' psychological injuries:

> Beyond the trauma associated with the fire, his mother stated that she has had to endure her family members' "horror of realizing that the pain was the result of the actions of family member [sic] that they loved and cared for." She continued to feel "frightened, vulnerable, heart-broken, angry, confused, embarrassed, and sad most of the time." She was not sure if her family would ever be the same and was "not even comfortable being with my other family members other than my husband." At sentencing, she testified that she felt as if she had failed defendant. Although OV 4 accounts for psychological injuries suffered by victims, it does not adequately consider the ways in which an offense affects familial relationships nor does it always account for the unique psychological injuries suffered by individual victims. (citation omitted)

Also, though OV 5 considers psychological injury to a member of the victim's family, it does not account for the fact that multiple members of the victim's family may have suffered psychological injury. See: MCL 777.35 (scoring for "psychological injury to a member of a victim's family.") Also, as the court found, OV 9, multiple victims (MCL 777.39), only took into consideration the risk of physical injury to Kayauna, not the other children. ST at 21, 22-25 The court again made a finding that this factor was not appropriately accounted for in the guidelines. ST at 44, 47

In this case again not only did three children experience psychological damage due to the loss of their mother but also due to the fact that they saw the homicide committed at the

hands of their father. Furthermore, this harm was exacerbated since they had to deal with the ramifications of their unsuccessful attempt to intervene and rescue their mother. The Court of Appeals found that these factors were not adequately considered in the guidelines. *Id.*

Response to the Defense

Defense counsel asserts that the court factually erred by departing from the guidelines finding that the incident was entirely defendant's fault. The court instead indicated that regardless of who started the incident, the defendant ended it, and ended it with the homicide of the victim. ST at 44, 46 (the court indicating, "I don't frankly care who started it because your client clearly finished it. . . .she may have hit him but he put her in a choke hold until she was limp in his arms.") The court also indicated, in response to defense counsel's assertion that but for the victim's actions the incident would not have occurred, if defendant had abided by the no contact provision ordering him to stay away from the victim the homicide would not have occurred. ST at 34, 41-42 The court indicated, "So while you said had she not attacked him, he wouldn't be here; had he listened to the court orders, had he understood the ramifications that when a court says don't be somewhere and he does it anyhow, then we wouldn't be here." ST at 42-43 Therefore, the court's departure was not based on a factual error that the victim was not at all at fault but instead on the defendant's violation of a court order of no contact with the victim which is an objective and verifiable reason that supports departure.

Defense counsel's assertion that the judge departed from the guidelines due to the gender of the perpetrator is not supported by the record. The judge instead commented on the phenomenon that often occurs, which happened in this case, that victims of domestic violence, many times women, oftentimes let the offenders back into their lives and the perpetrators re-

offend in a violent fashion. ST at 42-44 See: *People v Christel,* 449 Mich 578, 587-588, 592-593; 537 NW2d 194 (1995)(discussing common features of the battered woman syndrome). The court departed, not due to defendant's gender, but due to the defendant's previous commission of crimes against this victim which was an objective and verifiable reason that supports departure.

Defense counsel also asserts that the court departed from guidelines because the facts showed that he was in actuality guilty of second degree murder. However, the court did nothing of the kind. In fact the judge stated, after commenting that she had directed a verdict on the count of first degree murder, "Now, whether it was second degree or what the—or involuntary manslaughter, is what the jury came up with ***and I would respect the jury's decision.***" (emphasis provided) ST at 46

The Court of Appeals found that the sentencing judge did not take impermissible factors into consideration when departing from the guidelines. *Id.*

Extent of the Departure

Not only were the reasons expressed by Judge Grant for departing from the guidelines objective and verifiable, those that keenly or irresistibly grab a court's attention, and were of considerable worth, but also, the departure from the guidelines was proportionate. The court departed for reasons related to both the offense and offender and these reasons would justify a sentence in the next sentencing grid which would be 50-100 months. MCL 777.64. (In fact if the guidelines had been scored five points higher, defendant would be in the next grid.) The defendant's sentence of 96 months fell within the next grid. See: *People v Cline,* 276 Mich App 634, 650-651; 741 NW2d 563 (2007); *Gary Smith, supra* at 310 (indicating, "a

comparison of a defendant's characteristics and those of a hypothetical defendant whose recommended sentence is comparable to the departure sentence is a valuable exercise.")[6]

The judge did not abuse her discretion when she departed upward ten months from the guidelines (a sentence within the next guidelines' grid) for the defendant's prior assaultive conduct toward this victim and his violation of a no contact order on the date of the homicide as well the psychological damage he inflicted on his three children when they lost their mother, when they witnessed their father kill her, and when they unsuccessfully attempted to rescue her.

[6] Though defense counsel requests resentencing in front of a different judge, not only has counsel failed to demonstrate that defendant's sentence was invalid, but has failed to show that the standards articulated in *People v Hill,* 221 Mich App 391, 398; 561 NW2d 862 (1997) were met. Defense counsel has failed to show that the trial court could not abide by the dictates of an appellate court. Also having a resentencing before a judge who did not preside over the trial and would be totally unfamiliar with the facts would "entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Id.*

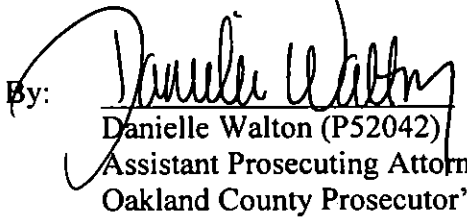
RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Danielle Walton, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court DENY defendant's application for leave to appeal.

Respectfully Submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY
OAKLAND COUNTY

THOMAS R. GRDEN
CHIEF, APPELLATE DIVISION

By: 

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