

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

- vs -

Supreme Court Nos. 152946
152947
152948

MOHAMMAD MASROOR,

Court of Appeals Nos. 322280
322281
322282

Defendant-Appellee.

Wayne County Circuit Court
Nos. 2014-000869-FC
2014-000858-FC
2014-000857-FC

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BRIEF OF APPELLEE,
ORAL ARGUMENT REQUESTED

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COUNTER STATEMENT REGARDING JURISDICTION

This matter is before this Honorable Court pursuant to the Order (71A-72A) issued on May 25, 2016 in which this Court granted the application of the Plaintiff-Appellant for leave to appeal the November 25, 2015 published opinion of the Court of Appeals. (Gleicher, P.J., and Sawyer and Murphy, JJ.) (21A-45A) The Court of Appeals affirmed the Defendant-Appellee's convictions but remanded the case to the trial court for further sentencing proceedings in accordance with *People v Steanhouse*, 313 Mich App 1, 880 NW2d 297 (2015). (41A-70A)

This Court, in its order granting leave to appeal, directed the parties to address the following four issues:

1. Whether -- under MCLA 8.5 - MCLA 769.34(2) and MCLA 769.34(3) remain in full force and effect where the defendant's guideline range is not dependent upon judicial fact finding;
2. Whether the Plaintiff-Appellant's application asks this Court to overrule the remedy in *People v Lockridge*, 498 Mich 358, 391, 870 NW2d 502 (2015), and, if so, how *stare decisis* should affect this Court's analysis;
3. Whether it is proper to remand a case to the Circuit Court for consideration under Part IV of this Court's opinion in *People v Lockridge*, supra, where the trial court exceeded the defendant's guidelines range;
4. The standard of appellate review to apply to sentences following the decision in *People v Lockridge*, supra.

COUNTER STATEMENT OF QUESTIONS PRESENTED

QUESTION NO. 1: DO BOTH MCLA 769.34(2) AND MCLA 769.34(3) REMAIN IN FULL FORCE AND EFFECT -- UNDER MCLA 8.5 -- WHERE THE SENTENCING GUIDELINES' MINIMUM SENTENCE RANGE APPLICABLE TO A DEFENDANT WAS NOT DETERMINED BY JUDICIAL FACT FINDING?

PLAINTIFF-APPELLANT'S ANSWER: YES

DEFENDANT-APPELLEE'S ANSWER: NO

TRIAL COURT: DID NOT ADDRESS THIS QUESTION

COURT OF APPEALS: DID NOT ADDRESS THIS QUESTION

QUESTION NO. 2: DOES THE PLAINTIFF-APPELLANT'S APPLICATION SEEK TO OVERRULE THE REMEDY IN *PEOPLE V LOCKRIDGE*, 498 MICH 358, 391, 870 NW2D 502 (2015), AND, IF SO, HOW SHOULD THE SUPREME COURT APPLY THE DOCTRINE OF *STARE DECISIS* IN THIS CASE?

PLAINTIFF-APPELLANT'S ANSWER: NO. THE DECISION IN THIS CASE WOULD CLARIFY THIS COURT'S DECISION IN *LOCKRIDGE*

DEFENDANT-APPELLEE'S ANSWER: THE DECISION IN THIS CASE COULD CLARIFY THIS COURT'S DECISION IN *LOCKRIDGE*

TRIAL COURT: DID NOT ADDRESS THIS QUESTION

COURT OF APPEALS' ANSWER: WAS BOUND, UNDER THE DOCTRINE OF *STARE DECISIS*, TO FOLLOW THE DECISION IN *PEOPLE V STEANHOUSE*

QUESTION NO. 3: IS IT PROPER UNDER *PEOPLE V LOCKRIDGE*, SUPRA, TO REMAND A CASE FOR RESENTENCING WHERE THE TRIAL COURT IMPOSED A MINIMUM SENTENCE THAT EXCEEDS THE NOW ADVISORY SENTENCING GUIDELINES' MINIMUM SENTENCE RANGE?

PLAINTIFF-APPELLANT'S ANSWER: NO

DEFENDANT-APPELLEE'S ANSWER: NO

TRIAL COURT'S ANSWER: NO

COURT OF APPEALS' ANSWER: NO

QUESTION NO. 4: WHAT IS THE STANDARD OF APPELLATE REVIEW TO BE APPLIED TO SENTENCES FOLLOWING THE DECISION IN *PEOPLE V LOCKRIDGE*, SUPRA?

PLAINTIFF-APPELLANT'S ANSWER: FOR REASONABLENESS

DEFENDANT-APPELLEE'S ANSWER: FOR REASONABLENESS

TRIAL COURT: DID NOT ADDRESS THIS QUESTION

COURT OF APPEALS' ANSWER: FOR REASONABLENESS

COUNTER CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On May 2, 2014 the Defendant-Appellee, Mohammad Masroor, was found guilty of ten counts of first degree criminal sexual conduct (CSC), contrary to MCLA 750.520b, and five counts of second degree CSC, contrary to MCLA 750.520c, following a five day jury trial conducted in the Wayne County Circuit Court. (89b-92b) The Hon. Michael M. Hathaway presided over the trial. (2b) The defendant was originally charged in three separate cases all of which were consolidated for one trial. (1b)

Each of the defendant's three cases involved a different complainant. (3b-6b) Each complainant was his biological niece. (6b) In L.C. No. 14-000858-FC the defendant was charged with four counts of first degree CSC and two counts of second degree CSC against Rashida Shikder both while she was less than thirteen years of age and between thirteen and sixteen years of age. (5b-6b)

In L.C. No. 14-000869-FC the defendant was charged with four counts of first degree CSC and two counts of second degree CSC against Musammat Khadija. (5b) In L.C. No. 14-000857-FC he was charged with two counts of first degree CSC and two counts of second degree CSC against Musammat Aysha Begum. (4b-5b) All of the sexual assaults were alleged to have occurred between February 1, 2000 and December 31, 2000. (5b) Musammat Khadija and Musammat Aysha Begum were both less than thirteen years of age throughout 2000.

Rashida Shikder testified that she was born on March 1, 1987 and that in January of 2000 she lived with her parents and siblings at 6148 Georgia St. in Detroit when the defendant, her father's brother, came from Bangladesh to live with her family. (7b-9b) She stated that she was being home schooled at the time and that, within a few days of his arrival, the defendant fondled her breast. (10b) She said that he inserted his finger and his penis into her vagina within one week of the day he moved into her home. (11b)

Ms. Shikder testified that when she asked her parents to allow her to attend public school the defendant convinced them to keep her at home and to remove her younger sister, Khadija, from public school. (12b-13b) She stated that during 2000, 2001 and 2002 he had sex with her whenever he had the chance. (14b-15b) She said that he touched her almost every day while he lived with her family during 2000. (14b) She said that she was married and that in 2006, at the time of her engagement, she told her husband what the defendant had done to her. (16b) She said that she then told her parents. (16b-17b)

Musammat Khadija testified that she was born on August 5, 1988 and that she first met the defendant, her uncle, in January of 2000 when he came to live with her family at 6148 Georgia St. in Detroit. (18b-21b) She stated that, at first, he fondled her breast over her clothing but then started touching her breast under her clothing. (22b) She said that during 2000 he began to insert his finger into her vagina. (23b-24b) She said that he also put

his penis into her vagina. (25b) She said that she was removed from public school, and home schooled by the defendant, during 2000. (26b-27b) She said that he told her parents that she must not attend public school because she was at the age of puberty. (26b)

Musammat Khadija testified that the sexual assaults occurred during 2000, 2001 and 2002. (28b) She stated that the defendant told her that, if she told anyone about them, no one would believe her and that she kept quiet because she believed him. (29b) She said that he made her feel it was her fault that he was doing the sexual things with her. (30b-31b) She said that when the defendant moved out of her home with his own family he continued to see her and to have sexual intercourse with her. (32b-33b) She said that she eventually told her sister, Rashida, what was happening to her. (33b)

Musammat Aysha Begum testified that she was the youngest of herself and her two sisters, Rashida Shikder and Musammat Khadija, and that the defendant was her uncle. (34b) She stated that she was born on November 25, 1990 and that she first met the defendant in 2000 when he came to live with her family on Georgia St. in Detroit. (35b) She said that in the beginning of 2000 she fell asleep in his room and woke up while he was placing his penis in her hand. (36b-37b) She said that he touched her more than ten times in both her own home and in the house where the defendant lived after his family arrived in the middle of 2000. (37b-38b)

Ms. Begum testified that the defendant approached her from behind in the computer room at her house while she was standing behind her father as he sat at the computer. (39b-40b) She stated that he inserted his finger into her vagina and fondled her breast while her father's back was turned. (39b-40b) She said that she did not tell her father because she was not sure how he would react. (41b) She said that she was taken out of public school when she was nine to be home schooled by the defendant. (42b)

Ms. Begum testified that when she thought she broke her family's computer she asked the defendant to help her fix it. (43b) She stated that she learned it was not really broken but, at that time, she thought it was. (43b) She said that the defendant fixed it in exchange for her oath to do what he asked of her. (43b-44b) She said that she honored her oath and allowed him to touch her without telling until he moved away. (43b-45b)

Mohammad Masroor testified that he was fifty-one years of age and had been born in Bangladesh. (46b) He stated that he had a degree in theology from Kumla University in Bangladesh. (46b) He said that he became an imam when he was twenty-four years old. (48b) He said that the Koran prohibits sex with his own children and other family members. (48b) He said that when he lived in Toronto he worked as an imam at a mosque where he led prayers and taught children. (50b-51b)

Mr. Masroor testified that he never committed any sexual abuse against the children he taught at the mosque. (52b) He stated

that he never abused any of the children that he taught in their own homes. (55b)

Mr. Masroor denied having any sexual contact or intercourse with Rashida Shikder. (85b) He denied ever touching Musammat Khadija in a sexual way. (85b) He denied ever touching Musammat Ashya Begum in a sexual way. (85b)

The jury began its deliberations, after first hearing the arguments of counsel and the court's instructions on the law, at 10:01 am on May 2, 2014. (88b) It returned with its verdicts of guilty as charged on every count in all three cases at 12:11 pm on that same date. (89b-92b)

The Michigan Department of Corrections' Bureau of Probation (MDOC) conducted a presentence investigation in anticipation of the defendant's sentencing hearing that was held on May 21, 2014. (75A) It prepared a written Presentence Investigation Report (PIR) which was submitted to the court prior to that hearing. (78A) A Sentencing Information Report (SIR), which purported to calculate the minimum sentence range applicable to the defendant pursuant to his convictions for ten counts of first degree CSC, was also prepared. (78A) That range, in the A-VI cell on the Class A felony grid, was from 108 months to 180 months. (106A) (A copy of the PIR is found in the Appellee's Appendix at 93b-110b. A copy of the SIR is found in the Appellee's Appendix at 111b.)

The trial judge, the assistant prosecutor and defense counsel then addressed certain errors committed by the MDOC in calculating

the minimum sentence range. (81A-106A) The parties agreed that the defendant should be assessed twenty points for Prior Record Variable (PRV) 7, *Subsequent or Concurrent Felony Convictions*. (82A) That placed him in PRV Level C rather than PRV Level A as had been scored by the MDOC. (106A)

The trial judge then went on to make the following changes to the scoring of the applicable Offense Variables (OV):

<u>Offense Variable</u>	<u>MDOC</u>	<u>Court</u>
OV 4: <i>Psychological Injury to Victim</i>	0	10
OV 9: <i>Number of Victims</i>	10	0
OV 10: <i>Exploitation of Vulnerable Victim</i>	10	15
OV 11: <i>Criminal Sexual Penetration</i>	50	0
OV 13: <i>Continuing Pattern of Criminal Behavior</i>	25	50
OV 17: <i>Degree of Negligence Exhibited</i>	<u>5</u>	<u>0</u>
TOTAL:	100	75

(83A-106A)

The seventy-five OV points placed the defendant in OV Level IV. (106A) The minimum sentence range in the C-IV cell on the Class A felony grid is from 108 months to 180 months. (106A and 111a)

The trial judge then addressed the issue of departing upward from the minimum sentence range. (107A) The assistant prosecutor argued that the scoring of PRV 7 was inadequate because it allowed

twenty points for two or more subsequent or concurrent felonies where the defendant had been convicted of fifteen felonies. (109A) He said that the assessment of ten points for OV 4, regarding psychological injury to a victim, was inadequate because there were three victims and two of them had attempted suicide. (109A) He asked that the court exceed the minimum sentence range and impose sentences of from thirty-five years to fifty years in prison pursuant to the defendant's convictions for first degree CSC. (112A)

Defense counsel argued that the guidelines' scoring gave adequate weight to any psychological injury sustained by the complainants. (114A) He said that if the Legislature believed that the assessment of ten points for OV 4 was inadequate it could change the statute but that it had not chosen to do so. (114A) He said that the assistant prosecutor's suggestion of a thirty-five year minimum sentence, "[W]as just a number that was pulled out of the sky." (114A)

The defendant addressed the court and maintained his innocence. (119A) He asked for mercy. (119A)

The trial judge adopted the assistant prosecutor's argument and found that the assessment of twenty points for PRV 7 was inadequate. (123A) He stated that the defendant should be assessed ten points for each of his concurrent or subsequent felony convictions which totaled 140 points. (123A-124A) He said that

scoring placed him in PRV Level F rather than PRV Level C. (123A-124A)

The trial judge also found that the defendant should be assessed ten points for each complainant under OV 4 for a total of thirty points. (124A) He found further that the assessment of fifty points for OV 13 was also inadequate because those points were assessed for a total of three criminal sexual penetrations of a person under thirteen years of age. (124A) He said that in this case there were more than three such penetrations. (124A)

The trial judge stated that by simply adding twenty-five points to the defendant's actual OV score he would have a total of 100 points which placed him in OV Level VI. (125A) He noted that the minimum sentence range, in the F-VI cell on the Class A felony grid, was from 270 months to 450 months. (125A) He stated that a minimum sentence of thirty-five years was within that range. (125A)

The trial judge then imposed ten concurrent sentences of from thirty-five years to fifty years in prison pursuant to the defendant's ten convictions for first degree CSC. (126A) He then imposed five concurrent sentences of from ten years to fifteen years in prison pursuant to the defendant's five convictions for second degree CSC. (126A) He awarded the defendant 188 days credit against all fifteen of his concurrent prison sentences for the time he served in jail prior to the date of sentence imposition. (126A)

The defendant appealed his convictions and sentences to the Court of Appeals. He argued there that his convictions were defective because the admission of evidence of other acts of criminal sexual conduct against minors, under MCLA 768.27a, constituted reversible error and that he had received the ineffective assistance of trial counsel. He argued that the ten concurrent sentences of from thirty-five years to fifty years, imposed pursuant to his convictions for ten counts of first degree CSC, violated the principle of proportionality and constituted cruel and/or unusual punishment.

On November 24, 2015 the Court of Appeals issued a published Per Curiam Opinion in which it affirmed the defendant's convictions. However, the Court vacated the ten thirty-five year to fifty year sentences imposed pursuant to the defendant's ten convictions for first degree criminal sexual conduct and remanded his case to the trial court for a resentencing hearing. (21A-44A)

The Court stated that it was remanding the defendant's case to the trial court in compliance with the previous decision made by another panel of the Court of Appeals in *People v Steanhouse*, 313 Mich App 1, 880 NW2d 297 (2015). (21A) The Court ordered that the defendant's resentencing hearing be conducted in accordance with the procedure set forth by the United States Court of Appeals for the Second Circuit in *United States v Crosby*, 397 F3d 103 (CA 2, 2005). (21A)

On January 4, 2016 the Plaintiff-Appellant, People of the

State of Michigan, filed an application for leave to appeal the Court of Appeals' November 24, 2015 Opinion. This Court granted that application in the order it issued on May 25, 2016. This Court directed the parties to address four issues which are set forth in the Counter Statement Regarding Jurisdiction, supra, and the Counter Statement Of Questions Presented, supra. (71A-72A)

COUNTER STANDARDS OF REVIEW

QUESTION NO. 1:

The standard of review for the interpretation of a statute is *de novo*. See *Aroma Wines & Equipment, Inc. v Columbian Distribution Services, Inc.*, 497 Mich 337, 871 NW2d 136 (2015), *Whitman v City of Burton*, 493 Mich 303, 831 NW2d 223 (2013), *People v Chavis*, 468 Mich 84, 658 NW2d 469 (2003), and *People v McGee*, 258 Mich App 683, 672 NW2d 191 (2003).

QUESTION NO. 2:

The Plaintiff-Appellant stated that it does not ask this Court to overrule the decision in *People v Lockridge*, but rather to clarify that decision as it is affected, as a matter of constitutional law, by MCLA 8.5.

The standard of review for a constitutional question is *de novo*. See *People v Shahideh*, 482 Mich 1156, 758 NW2d 536 (2008), *People v LeBlanc*, 465 Mich 575, 640 NW2d 246 (2002), *People v Herron*, 464 Mich 593, 628 NW2d 528 (2001), and *People v Johnson*, 293 Mich App 79, 808 NW2d 815 (2011).

The standard of review for the interpretation of a statute is *de novo*. See *Aroma Wines & Equipment, Inc. v Columbian Distribution Services, Inc.*, *supra*, *Whitman v City of Burton*, *supra*, *People v Chavis*, *supra*, and *People v McGee*, *supra*.

QUESTION NO. 3:

The standard of review for this question is set forth in *People v Lockridge*, supra, in which this Court held that remand for resentencing is not an available remedy where the minimum sentence imposed exceeded the guidelines' minimum sentence range.

QUESTION NO. 4:

The standard of review for a sentence that exceeds the now advisory sentencing guidelines' minimum sentence range is for reasonableness. See *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015).

An unreasonable sentence constitutes an abuse of the sentencing judge's discretion. See *Gall v United States*, 552 US 38, 128 S Ct 586, 169 L Ed2d 445 (2007), *Rita v United States*, 551 US 338, 127 S Ct 2456, 168 L Ed2d 203 (2007), and *United States v Booker*, 543 US 220, 125 S Ct 738, 160 L Ed2d 621 (2005).

COUNTER SUMMARY OF ARGUMENT

In *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015), this Court held that Michigan's statutory -- and mandatory -- sentencing guidelines are constitutionally deficient under *Apprendi v New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed2d 435 (2000), as extended by *Alleyne v United States*, 570 US ___, 133 S Ct 2151, 186 L Ed2d 314 (2013). That is because the guidelines require the sentencing judge to make factual findings beyond the facts found by the jury or admitted to by the defendant, which constitutes a violation of the Sixth Amendment to the United States Constitution.

This Court determined that the appropriate remedy was to declare that the statutory sentencing guidelines are advisory, rather than mandatory, and to strike -- as unconstitutional -- MCLA 769.34(2) and MCLA 769.34(3). Those subsections of the statute, respectively, made the sentencing guidelines mandatory and limited the sentencing judge's discretion to depart -- either above or below -- the minimum sentence range to those circumstances where the court found substantial and compelling reasons to do so.

The appellant argues that, under MCLA 8.5, MCLA 769.34(2) and MCLA 769.34(3) remain in full force and effect in those cases where the sentencing guidelines are not calculated and determined on the basis of judicial fact finding beyond the facts found by the jury or admitted to by the defendant.

The appellee submits that the appellant's argument has no

application to his case as the trial judge did engage in judicial fact finding to manipulate the scoring of both the Prior Record Variables (PRVs) and the Offense Variables (OVs) applicable to him. However, he submits that the facts found by a jury will always be limited to the findings of the elements of the crime for which a defendant has been convicted. Further, the OVs in total almost always go beyond the limited factual findings made by a jury. Therefore, the number of cases in which such a circumstance would present itself is minute.

The appellant has incorrectly asserted that the issue presented in both *Apprendi v New Jersey*, supra, and *Allenye v United States*, supra, was not properly preserved by the appellee's counsel in the trial court. The Court of Appeals noted that trial counsel objected to the scoring of the guidelines contrary to *Alleyne v United States*, supra. It stated further that appellate counsel raised the same argument. See *People v Masroor*, 313 Mich App 358, 880 NW2d 812 (2015), at p 823. Therefore, the plain error analysis that the appellant stated should be applied to the appellee's case is not applicable pursuant to *People v Carines*, 460 Mich 750, 597 NW2d 130 (1999), because the issue was preserved for appellate review in the trial court.

The appellee agrees that the standard of review for the sentences imposed in his case, after a remand for resentencing conducted according to the procedure outlined in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), is for reasonableness.

ARGUMENT

QUESTION NO. 1: DO BOTH MCLA 769.34(2) AND MCLA 769.34(3) REMAIN IN FULL FORCE AND EFFECT -- UNDER MCLA 8.5 -- WHERE THE SENTENCING GUIDELINES' MINIMUM SENTENCE RANGE APPLICABLE TO A DEFENDANT WAS NOT DETERMINED BY JUDICIAL FACT FINDING?

PLAINTIFF-APPELLANT'S ANSWER: YES

DEFENDANT-APPELLEE'S ANSWER: NO

TRIAL COURT: DID NOT ADDRESS THIS QUESTION

COURT OF APPEALS: DID NOT ADDRESS THIS QUESTION

On May 21, 2014 the Defendant-Appellant, Mohammad Masroor, appeared before the Hon. Michael M. Hathaway of the Wayne County Circuit Court and was sentenced pursuant to his ten jury trial based convictions for first degree CSC and his five jury trial based convictions for second degree CSC. (75A) During that hearing the trial judge reviewed and revised the Sentencing Information Report (SIR) on which the minimum sentence range applicable to the defendant pursuant to his convictions for first degree CSC had been calculated.

The trial judge determined the scoring of the Offense Variables (OVs) applicable to the defendant as follows:

<u>Offense Variable</u>	<u>MDOC</u>	<u>Court</u>
OV 4: <i>Psychological Injury to Victim</i>	0	10
OV 9: <i>Number of Victims</i>	10	0
OV 10: <i>Exploitation of Vulnerable Victim</i>	10	15

OV 11: <i>Criminal Sexual Penetration</i>	50	0
OV 13: <i>Continuing Pattern of Criminal Behavior</i>	25	50
OV 17: <i>Degree of Negligence Exhibited</i>	<u>5</u>	<u>0</u>
TOTAL:	100	75

(83A-106A)

The trial judge found that the defendant was in Prior Record Variable (PRV) Level C and OV Level IV. The minimum sentence range in the C-IV cell on the Class A felony grid was from 108 months to 180 months. (106A) He also found reasons why the defendant belonged in the F-VI cell where the minimum sentence range was from 270 months to 450 months or life. (123A-124A) It was from that starting point that the trial judge then made the findings upon which he based his decision to exceed the applicable guidelines' minimum sentence range and impose concurrent minimum sentences of thirty-five years pursuant to each of the defendant's ten convictions for first degree CSC. (123A-125A)

A. Appellant's Constitutional/Statutory Argument.

MCLA 8.5, entitled *Severability*, provides as follows:

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.

MCLA 769.34(2) and MCLA 769.34(3) which this Court struck as unconstitutional in *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015), provide as follows:

(2) Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. Both of the following apply to minimum sentences under this subsection:

(a) If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section. If the Michigan vehicle code 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section.

(b) The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.

(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.

(emphasis added)

The appellant argues that, under MCLA 8.5, the provisions of both MCLA 769.34(2) and MCLA 769.34(3) remain in full force and effect if the minimum sentence range is not determined by judicial fact finding. The appellee submits that almost every scoring of the sentencing guidelines is based, in part, on judicial fact finding. Therefore, as a practical matter, the number of cases where the appellant's argument here might apply is minute.

B. The prohibition of judicial fact finding.

The concept of judicial fact finding versus jury fact finding as applied to the calculation of the sentencing guidelines was specifically explained by the United States Supreme Court in *Alleyne v United States*, 570 US ___, 133 S Ct 2151, 186 L Ed2d 314 (2013). The Court recognized that the jury's findings are limited to the elements of the crime charged. If the jury is convinced beyond a reasonable doubt that each individual element has been proven the jury will then find the defendant guilty.

Any fact found by the trial judge beyond the elements of the

specific crime for which a defendant is being sentenced, employed in the calculation of the sentencing guidelines, violates the Sixth Amendment. Justice Thomas wrote the opinion for the Court. He said:

As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

(at p 2162)
(emphasis added)

In *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015), this Court held that the statutory sentencing guidelines, which became effective in 1998, are now advisory rather than mandatory just as the United States Sentencing Guidelines became advisory pursuant to the holding of the United States Supreme Court in *United States v Booker*, 543 US 220, 125 S Ct 738, 160 L Ed2d 621 (2005). It held further that a criminal defendant could only be assessed points for those OVs -- other than OVs related to his prior criminal record -- which were based upon facts found by the jury at trial or admitted to by the defendant.

This Court framed the essential question presented and provided its answer as follows:

From *Apprendi* and its progeny, including *Alleyne*, we believe the following test provides the proper inquiry for whether a scheme of mandatory minimum sentencing violates the Sixth Amendment: Does that scheme constrain the discretion of the sentencing court by compelling an increase in the mandatory minimum sentence beyond that authorized by the jury's verdict alone? Michigan's sentencing guidelines do so to the extent that the floor of the guidelines range compels a trial judge to impose a mandatory minimum sentence beyond that authorized by the jury verdict. Stated differently, to the extent that OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e., the defendant's "mandatory minimum" sentence, that procedure violates the Sixth Amendment.

(at pp 373-374)
(emphasis added)

C. Judicial fact finding in the case at bar.

The first adjustment made to the guidelines' score by the trial judge in the appellee's case affected his total PRV score. That was done by increasing the maximum allowable assessment for PRV 7, *Subsequent or Concurrent Felony Convictions*, from twenty points to 140 points.

That assessment increased the appellee's PRV level from C to F. The trial judge went on to increase the scoring of the OVs from seventy-five points to 100 points which elevated his OV level from IV to VI. The minimum sentence range in the F-VI cell is from 270 months to 450 months or life. (125A and MCLA 777.62) The ten concurrent minimum sentences imposed pursuant to the appellee's convictions for first degree CSC, for thirty-five years, were within that range. (125A)

The judicial fact finding caused a substantial increase in the

minimum sentence range. The minimum range in the C-IV cell on the Class A felony grid is from 108 months to 180 months. MCLA 777.62.

The holding in *People v Lockridge*, supra, which follows *Alleyne v United States*, supra, and applied to the case at bar, requires a review of the scoring of the sentencing guidelines to determine whether the defendant was assessed points for OV's where the facts to support those assessments were not found by the jury or admitted to by the defendant.

Here the appellee testified during the trial and maintained his innocence regarding all of the allegations brought against him by Rashida Shikder, Musammat Khadija and Musammat Aysha Begum. (46b-87b) He did not make an admission of wrongdoing regarding any fact addressed by the OV's and scored by the trial judge in the calculation of the sentencing guidelines applicable to him pursuant to the fifteen crimes for which he was convicted at the conclusion of his trial. (46b-87b) The jury found him guilty as charged on all fifteen counts for which he was prosecuted and tried. (89b-92b)

On May 2, 2016 the appellee's jury was instructed on first degree CSC and on second degree CSC according to Chapter 20 of the Michigan Criminal Jury Instructions (M Crim JI). The instructions given, M Crim JI 20.1, 20.2, 20.3 and 20.4, all set forth the elements that the jury had to find beyond a reasonable doubt in order to find the defendant guilty of the fifteen crimes with which he was charged.

Those elements included penetration of the complainants' genital openings, anal openings or mouths by the appellee's penis, finger, tongue or an object; the ages of the complainants -- either under thirteen or between thirteen and sixteen; the familial relationship between the appellee and the complainants and/or the authority of the appellee over the complainants; and the intentional touching by the appellee of the complainants' genital areas, groins, inner thighs, buttocks or breasts for the purpose of sexual gratification.

The facts found by the jury were the elements of the fifteen individual crimes with which the appellee was charged. The jury was instructed on the elements only and not on the OV's that are a part of the sentencing guidelines' calculation.

However, the appellee was assessed points in the scoring of the sentencing guidelines for OV's that are not elements of the crimes for which he was convicted, to wit: OV 4, *Psychological Injury to Victim*, and OV 10, *Exploitation of Vulnerable Victim*.

OV 4, *Psychological Injury to Victim*, is found at MLA 771.36.

It provides as follows:

(1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) Serious psychological injury requiring professional treatment occurred to a victim 10 points
- (b) No serious psychological injury requiring professional treatment occurred to a victim 0 points

(2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

The jury did not find a psychological injury to any of the complainants' because psychological injury is not an element of the crimes for which the defendant was convicted. Further, he did not admit that he caused such an injury.

OV 10, *Exploitation of Vulnerable Victim*, is found at MCLA 777.40. It provides as follows:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Predatory conduct was involved 15 points

(b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status 10 points

(c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious 5 points

(d) The offender did not exploit a victim's vulnerability 0 points

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

(a) "Predatory conduct" means preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization.

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes.

(c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

(d) "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.

While the argument can logically be made that the youth, authority status and domestic relationships involved with the complainants and the defendant were elements of the crimes charged and found by the jury that finding did not extend to the fifteen point assessment for predatory conduct. Instead, the assessment for OV 10 should have been ten points for the exploitation that the jury actually found.

The appellee submits that he should have been assessed zero points for OV 4 and, at most, ten points for OV 10 rather than the ten and fifteen points assessed by the trial judge, respectively, for those two OVs. That correction would reduce the total OV score by fifteen points, from seventy-five points to sixty points. That score is the lowest number of points required to be placed in OV Level IV.

The appellee is not objecting to the assessment of fifty points for OV 13, *Continuing Pattern of Criminal Behavior*, because that assessment is based upon his criminal record. Further, the jury found him guilty of the three counts of first degree CSC with a person under thirteen years of age necessary to make that assessment. (89b-92b)

However, the correction of the assessment for PRV 7, by

reducing it from the inflated 140 points to the correct twenty points would place the appellee in the C-IV cell on the Class A felony grid. The minimum sentence range there is from 108 months to 180 months.

Here the minimum sentences imposed upon the appellee were within the minimum sentence range determined by the judicial fact finding conducted by the trial judge. That circumstance entitles the appellee to relief because the judicial fact finding violated the Sixth Amendment's guarantee to a trial by jury. Neither MCLA 769.34(2) or MCLA 769.34(3) remain in full force and effect under the circumstances presented in the case at bar because MCLA 8.5 is not implicated.

QUESTION NO. 2: DOES THE PLAINTIFF-APPELLANT'S APPLICATION SEEK TO OVERRULE THE REMEDY IN *PEOPLE V LOCKRIDGE*, 498 MICH 358, 391, 870 NW2D 502 (2015), AND, IF SO, HOW SHOULD THE SUPREME COURT APPLY THE DOCTRINE OF *STARE DECISIS* IN THIS CASE?

PLAINTIFF-APPELLANT'S ANSWER: NO. THE DECISION IN THIS CASE WOULD CLARIFY THIS COURT'S DECISION IN *LOCKRIDGE*

DEFENDANT-APPELLEE'S ANSWER: THE DECISION IN THIS CASE COULD CLARIFY THIS COURT'S DECISION IN *LOCKRIDGE*

TRIAL COURT: DID NOT ADDRESS THIS QUESTION

COURT OF APPEALS' ANSWER: WAS BOUND, UNDER THE DOCTRINE OF *STARE DECISIS*, TO FOLLOW THE DECISION IN *PEOPLE V STEANHOUSE*

The Plaintiff-Appellant expressly answered this question in its brief when it stated, "The People are not asking the Court to overrule the remedy stated in *Lockridge* ...". (*Appellant's Brief On Appeal*, p 26) Instead the appellant asked this Court to maintain MCLA 769.34(2) and MCLA 769.34(3) in full force and effect in those case where the guidelines' calculation is not based in any part upon judicially found facts.

In *People v Lockridge*, supra, this Court ordered that MCLA 769.34(2) and MCLA 769.34(3) be severed to the extent that the guidelines are mandatory and that a minimum sentence that falls outside of the guidelines' minimum sentence range can only be imposed upon the finding by the trial judge of substantial and compelling reasons to do so. This Court said:

Accordingly, we sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a "substantial and compelling reason" to depart from the guidelines range in MCL 769.34(3). When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury,²⁸ the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. *Booker*, 543 U.S. at 261, 125 S. Ct. 738. Resentencing will be required when a sentence is determined to be unreasonable. Because sentencing courts will hereafter not be bound by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court's discretion. Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence. Further, sentencing courts must justify the sentence imposed in order to facilitate appellate review. *People v Coles*, 417 Mich. 523, 549, 339 N.W.2d 440 (1983), overruled in part on other grounds by *People v Milbourn* 435 Mich. 630, 644, 461 N.W.2d 1 (1990).

(at pp 391-392)
(emphasis added)

This part of the opinion was followed by Footnote 28 which stated:

Our holding today does nothing to undercut the requirement that the highest number of points possible *must* be assessed for all OVs, whether using judge-found facts or not. See MCL 777.21(1)(a) (directing that the offense variables applicable to the offense category at issue be scored); see also, e.g., MCL 777.31(1) (directing that the "highest number of points" possible be scored); MCL 777.32(1) (same); etc.

(emphasis added)

This direction regarding how to apply the guidelines going forward obviously calls for the inclusion of judge found facts in the calculation of the guidelines. Yet this Court recognized that such judicial fact finding violates the right to a trial by jury

guaranteed by the Sixth Amendment.

If the intent of the decision in *Lockridge* is that judges should engage in fact finding when calculating the guidelines the issue raised by the appellant regarding the application of MCLA 8.5 is moot because there will be very few guidelines calculations that are not based, at least in part, on judicially found facts. But that implementation of this Court's decision in *Lockridge* -- which would encourage judicial fact finding -- would not be in harmony with the Sixth Amendment.

The appellee submits that the directive found in Footnote 28, which requires judicial fact finding in the calculation of the guidelines, would make the appellant's argument here moot. On the other hand the removal of the direction found in Footnote 28 would eliminate judicial fact finding and, perhaps, lead to a few cases where the appellant's argument here would have relevance.

The appellee asserts that this Court should reaffirm the holding in *People v Lockridge*, supra but also delete the directive set forth in Footnote 28. That adjustment would clarify the manner in which the sentencing guidelines are to be calculated and the role the guidelines will play in the imposition of sentences going forward.

Finally, the removal of Footnote 28 suggested by the appellee would bring the decision in *People v Lockridge*, supra, into harmony with the Sixth Amendment's guarantee to a trial by jury in accordance with the holdings in *Alleyne v United States*, supra,

United States v Booker, supra, and *Apprendi v New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed2d 435 (2000).

QUESTION NO. 3: IS IT PROPER UNDER *PEOPLE V LOCKRIDGE*, SUPRA, TO REMAND A CASE FOR RESENTENCING WHERE THE TRIAL COURT IMPOSED A MINIMUM SENTENCE THAT EXCEEDS THE NOW ADVISORY SENTENCING GUIDELINES' MINIMUM SENTENCE RANGE?

PLAINTIFF-APPELLANT'S ANSWER: NO

DEFENDANT-APPELLEE'S ANSWER: NO

TRIAL COURT'S ANSWER: NO

COURT OF APPEALS' ANSWER: NO

In *People v Lockridge*, supra, this Court recognized that many of the appellants in pending cases that had been held in abeyance until that case was decided did not preserve the Sixth Amendment issue in the trial court. Therefore, it set up a framework for establishing plain error in order to be entitled to relief. This Court said:

First, we consider cases in which (1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced. In those cases, because the defendant suffered no prejudice from any error, there is no plain error and no further inquiry is required.

Second, we consider the converse: cases in which facts admitted by a defendant or found by the jury verdict were *insufficient* to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced. In those cases, it is clear from our previous analysis that an unconstitutional constraint actually impaired the defendant's Sixth Amendment right. The question then turns to which of these defendants is entitled to relief, i.e., which can show plain error.

We conclude that all defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can

establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry. We reach this conclusion in part on the basis of our agreement with the following analysis from *United States v Crosby*, 397 F.2d 103, 117-118 (C.A. 2, 2005):

(at pp 394-395)
(emphasis added)

The appellant argues that, because the minimum sentences imposed upon the appellee exceeded the applicable minimum sentence range he is not entitled to an order remanding his case for resentencing. However, that argument is based upon the assertion that the minimum sentence range applicable to the appellee, in the C-IV cell on the Class A felony grid, was from 108 months to 180 months. (*Appellant's Brief On Appeal*, p 34)

Further, that argument ignores the factual findings made by the trial judge that the appropriate minimum sentence range for the appellee, due to the circumstances of his fifteen criminal convictions, was in the F-VI cell. The minimum sentence range there is from 270 months to 450 months or life. Given the trial judge's factual findings the minimum sentences imposed were within the F-VI cell. (125A) Under those circumstances -- which are the circumstances of the case at bar -- the appellee is entitled to resentencing.

The appellant cited the findings of the Court of Appeals regarding the sentences imposed upon the appellee. That Court found that the sentences were reasonable under the circumstances. (*Appellant's Brief On Appeal*, pp 38-39)

The Court of Appeals remanded the appellee's case for a

resentencing hearing to be conducted pursuant to the holding in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), solely because it was obligated, under MCR 7.215(J)(1), to follow the decision in *People v Steanhouse*, 313 Mich App 1, 880 NW2d 297 (2015).

In the event that this Court should remand the appellee's case to the trial court for a resentencing hearing he will have the opportunity, under the procedure prescribed in *United States v Crosby*, supra, to decide whether he will seek a resentencing or forego it.

QUESTION NO. 4: WHAT IS THE STANDARD OF APPELLATE REVIEW TO BE APPLIED TO SENTENCES FOLLOWING THE DECISION IN *PEOPLE V LOCKRIDGE*, SUPRA?

PLAINTIFF-APPELLANT'S ANSWER: FOR REASONABLENESS

DEFENDANT-APPELLEE'S ANSWER: FOR REASONABLENESS

TRIAL COURT: DID NOT ADDRESS THIS QUESTION

COURT OF APPEALS' ANSWER: FOR REASONABLENESS

The Court of Appeals, the Plaintiff-Appellant and the Defendant-Appellee are all in agreement that the standard of review for a sentence is for reasonableness. That is also the standard announced by this Court in *People v Lockridge*, supra. In doing so this Court employed the same standard of review that the United States Supreme Court has employed consistently since judicial fact finding was addressed in *Apprendi v New Jersey*, supra.

A. Relevant federal authority.

In *United States v Booker*, supra the United States Supreme Court held that the federal sentencing guidelines would be advisory rather than mandatory. The Court said that sentences would be reviewed for "unreasonableness".

Justice Breyer wrote the part of the opinion that set forth the remedy for the Sixth Amendment violation presented by the guidelines. He also announced the standard of review for sentences which was also identified in 18 USC §3742, entitled *Review of a sentence*. He said:

We infer appropriate review standards from related statutory language, the structure of the statute, and the "sound

administration of justice.'" *Pierce, supra*, at 559-560, 108 S. Ct. 2541. And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for "unreasonable[ness]". 18 U.S.C. § 3742(e)(3) (1994 ed.).
 (at p 261)
 (emphasis added)

This standard of review has consistently been applied by the United States Supreme Court since the decision in *United States v Booker*, *supra*, was released in 2005. In *Rita v United States*, 551 US 338, 127 S Ct 2456, 168 L Ed2d 203 (2007), the Court identified the "reasonableness" standard of review. It said:

The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The courts of appeals will determine the reasonableness of the resulting sentence.

* * * *

We repeat that the presumption before us is an *appellate* court presumption. Given our explanation in *Booker* that appellate "reasonableness" review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review.

(at pp 350-351)
 (emphasis added)

In *Gall v United States*, 552 US 38, 128 S Ct 586, 169 L Ed2d 445 (2007), the United States Supreme Court emphasized that the standard of review announced in *Booker*, reasonableness, is and will be the standard for reviewing sentences:

In *Booker* we invalidated both the statutory provision, 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV), which made the Sentencing Guidelines mandatory, and § 3742(e) (2000 ed. and Supp. IV), which directed appellate courts to apply a *de novo* standard of review to departures from the Guidelines. As a

result of our decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are "reasonable." Our explanation of "reasonableness" review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions. See 543 U.S., at 260-262, 125 S.Ct. 738; see also *Rita*, 551 U.S., at 361-362, 127 S., Ct. 2456 (STEVENS, J., concurring).

(at p 46)

The Court then applied the "reasonableness" standard and found that the sentence of probation imposed upon the defendant in *Gall* was, in fact, reasonable. It said:

The Court of Appeals clearly disagreed with the District Judge's conclusion that consideration of the § 3553(a) factors justified a sentence of probation; it believed that the circumstances presented here were insufficient to sustain such a marked deviation from the Guidelines range. But it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence. Accordingly, the judgment of the Court of Appeals is reversed.

(at pp 59-60)
(emphasis added)

B. Application to the Defendant-Appellee.

The appellee submits that the ten concurrent sentences of from thirty-five years to fifty years in prison imposed upon him pursuant to his ten jury based convictions for first degree CSC constitute an unreasonable abuse of the sentencing judge's discretion.

In *Gall v United States*, *supra*, the United States Supreme Court specifically rejected the use of mathematical formulas to

justify the imposition of a particular sentence. It said:

We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.

* * * *

The mathematical approach also suffers from infirmities of application. On one side of the equation, deviations from the Guidelines range will always appear more extreme -in percentage terms-when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years. Moreover, quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines gives no weight to the "substantial restriction of freedom" involved in a term of supervised release or probation.

(at pp 47-48)
(emphasis added)

In spite of the foregoing instruction that sentencing judges avoid the application of mathematical formulas the trial judge in the case at bar did exactly that when he multiplied the total number of the appellee's convictions to increase his PRV Level to F and then multiplied the ten points assessed for OV 4 by the number of victims, three, to raise the defendant's OV Level from IV to VI. (123A-124A)

The appellee submits that the ten concurrent sentences imposed here to which he is objecting, of from thirty-five years to fifty years in prison, are defective because they constitute an unreasonable abuse of discretion. The question of whether the sentences imposed are unreasonable cannot be considered in a vacuum. Here a now fifty-three year old man will spend at least

thirty-five years in prison while serving unreasonable sentences that were imposed upon the implementation of a mathematical formula whose use was discouraged by the United States Supreme Court in *Gall v United States*, supra.

The appellee will be eighty-six years of age when his minimum sentences have been completed. That thirty-five year period exceeds the high end of the now advisory applicable guidelines' minimum sentence range -- fifteen years -- by twenty years.

Justice requires that all of the appellee's ten concurrent sentences be vacated. This matter should be remanded to the Wayne County Circuit Court for a resentencing hearing to be conducted in accordance with the procedure set forth in *United States v Crosby*, supra.

CONCLUSION

This Court held in *People v Lockridge*, supra, that Michigan's statutory -- and mandatory -- sentencing guidelines are constitutionally defective because their application calls for judicial fact finding which violates the Sixth Amendment's guarantee to a trial by jury. That decision is in accord with *Apprendi v New Jersey*, supra, and *Alleyne v United States*, supra.

The question presented here is whether, under MCLA 8.5, the parts of MCLA 769.34(2) and MCA 769.34(3) which make the guidelines application mandatory and were stricken in this Court's decision in *People v Lockridge*, supra, still apply in those cases where no judicial fact finding is employed at sentencing. The appellee submits that such cases, if they exist, will combine to total a very small sum. Further, this question has no application to the facts of the instant case as substantial judicial fact finding was employed during the appellee's sentencing hearing to manipulate the scoring of the guidelines.

The appellee's sentences should be vacated and this matter should be remanded to the Wayne County Circuit Court for a resentencing hearing to be conducted in accordance with the procedure set forth in *United States v Crosby*, supra.

That remedy is appropriate because of the record made during the appellee's sentencing hearing. The trial judge manipulated the scoring of the sentencing guidelines to place the appellee in a cell where the minimum sentence range ran from 270 months to 450

months or life. The thirty-five year minimum sentences imposed were within that range, a fact that was cited by the trial judge when he imposed the appellee's sentences. (125A)

Finally, the standard of review for a sentence -- and for the sentences imposed in the case at bar -- is for reasonableness. See *United States v Booker*, supra, *Rita v United States*, supra, *Gall v United States*, supra, and *United States v Crosby*, supra.

RELIEF REQUESTED

The Defendant-Appellee, Mohammad Masroor, respectfully requests that this Court affirm the Court of Appeals' decision to vacate his sentences and remand his case to the Wayne County Circuit Court for a resentencing hearing to be conducted in accordance with the procedure set forth by the United States Court of Appeals for the Second Circuit in *United States v Crosby*, supra.

MICHAEL J. MCCARTHY, P.C.

September 22, 2016

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