

STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
BECKERING, P.J. and O'CONNELL and SHAPIRO, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 149073

-VS-

RAHIM OMARKHAN LOCKRIDGE,

Defendant-Appellant.

Court of Appeals No. 310649
Oakland County CC No. 2011-238930-FC

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

On June 11, 2014, this Court issued the following order:

On order of the Court, the application for leave to appeal the February 13, 2014 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address: (1) whether a judge's determination of the appropriate sentencing guidelines range, MCL 777.1, et seq., establishes a "mandatory minimum sentence," such that the facts used to score the offense variables must be admitted by the defendant or established beyond a reasonable doubt to the trier of fact, *Alleyne v United States*, 570 US ; 133 S Ct 2151; 186 L Ed 2d 314 (2013); and (2) whether the fact that a judge may depart downward from the sentencing guidelines range for "substantial and compelling" reasons, MCL 769.34(3), prevents the sentencing guidelines from being a "mandatory minimum" under *Alleyne*, see *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

People v Lockridge, 496 Mich 852 (2014).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether a judge's determination of the appropriate sentencing guidelines range, MCL 777.1, et seq., establishes a "mandatory minimum sentence," such that the facts used to score the offense variables must be admitted by the defendant or established beyond a reasonable doubt to the trier of fact?

The sentencing judge: was not asked to answer the question.

The Court of Appeals: affirmed the sentence.

Defendant-Appellant: answers the question, "Yes."

Plaintiff-Appellee: answers the question:

"No. The minimum sentence in an indeterminate sentencing scheme is not the equivalent of a mandatory minimum sentence in a determinate sentencing scheme."

II. Whether the fact that a judge may depart downward from the sentencing guidelines range for "substantial and compelling" reasons, MCL 769.34(3), prevents the sentencing guidelines from being a "mandatory minimum" under *Alleyne*?

The sentencing judge: was not asked to answer the question.

The Court of Appeals: affirmed the sentence.

Defendant-Appellant: answers the question, "No."

Plaintiff-Appellee: answers the question:

"Yes. The minimum sentence in a guidelines scheme from which a court can depart for appropriate reasons is not the equivalent of a mandatory minimum sentence."

III. Assuming the Court finds Michigan's guidelines structure violates *Alleyne*, what would the appropriate remedy be?

The sentencing judge: was not asked to answer the question.

The Court of Appeals: affirmed the sentence.

Defendant-Appellant: answers the question, "Requiring jury findings."

Plaintiff-Appellee: answers the question, "To render the guidelines advisory."

IV. When the evidence supporting the guidelines score as well as the departure was overwhelming, has defendant shown plain error?

The sentencing judge: was not asked to answer the question.

The Court of Appeals: affirmed the sentence.

Defendant-Appellant: answers the question, "Yes."

Plaintiff-Appellee: answers the question, "No."

COUNTERSTATEMENT OF FACTS

Defendant was charged with one count of open murder, contrary to MCL 750.316, and, on May 4, 2012, the jury convicted him of one count of involuntary manslaughter, contrary to MCL 750.321. Manslaughter carries a fifteen-year maximum sentence. He was sentenced on May 31, 2012, to 9 to 15 years incarceration, an upward departure from defendant's sentencing guidelines.

A. The Trial

On September 19, 2011, defendant strangled his wife, Kenyatta Lockridge, after a long history of marital discord. Two of the children of the victim, seventeen-year-old Kayauna Lewis and eleven-year-old Ravyn Lockridge, testified that defendant and the victim fought a lot and many times Kayauna would try to break them apart.¹ Ravyn and Kayauna had both seen defendant with their mother in a chokehold or headlock on previous occasions.² After these incidents, defendant would leave but would eventually return to live with them.³

In 2007, Detroit Police Officer Duley responded to a call and, upon arrival, made contact with defendant and the victim. Defendant had scratches and Kenyatta had a black eye and scratches on her wrist. Defendant eventually pleaded guilty to domestic violence.⁴ In 2010, Southfield Police Officer Restum responded to the victim and defendant's home. Kayauna Lewis, who was crying uncontrollably, said that defendant had just assaulted her mother and herself, and was tearing up the house. Defendant was highly intoxicated and Kenyatta Lockridge was crying and scared.⁵ As a result of this incident, defendant was placed on probation. As a

¹ 10b, 23b.

² 8b, 27b.

³ 27b.

⁴ 57b, 58b.

⁵ 60b-61b.

condition of his probation, he was not to have contact with either Ms. Lockridge or her residence.⁶

On September 19, 2011 [the day of the homicide], defendant was living in violation of his no contact order with the victim and her three children, Kayauna, Ravyn, and nine-year-old Kaelyn.⁷ In the early evening hours, Ravyn and Kaelyn heard defendant and the victim arguing. Ravyn looked into her parents' room and, when she saw both defendant and the victim pushing each other, she and Kaelyn left to get Kayauna.⁸

Kayauna saw defendant and victim coming down the stairs pushing at each other⁹ and defendant was hitting her mother.¹⁰ Defendant was saying that he wanted to leave.¹¹ Kayauna then saw defendant with her mother in a chokehold. Kayauna told him to get off her mother several times and tried to grab him by the shoulders but couldn't pull him off.¹² Ravyn saw her mother punching defendant trying to get loose from the headlock and heard defendant saying to her mother, "Get your daughter off of me." Defendant let go of the victim and she fell to the ground.¹³ When the victim fell, she was breathing very hard and then stopped breathing.¹⁴ Defendant said, "I'm out of here" and left.¹⁵

Kayauna called 911, and the dispatcher instructed her how to perform CPR which Kayauna said wasn't working.¹⁶ When police officers arrived at the home, Kaelyn blurted out,

⁶ 68b, 73b, 74b.

⁷ 1b.

⁸ 19b-20b, 28b.

⁹ 3b.

¹⁰ 17b.

¹¹ 14b.

¹² 3b-4b.

¹³ 21b.

¹⁴ 27b.

¹⁵ 5b, 21b.

¹⁶ 5b-8b, 16b.

“dad was choking mom on the bed.”¹⁷ Paramedics transported the victim to the hospital but she never regained consciousness and was pronounced dead at the hospital.¹⁸ Dr. Dragovic, who conducted the autopsy, testified that her cause of death was asphyxia due to neck compression and the manner of death was homicide.¹⁹ Police eventually had to box in the defendant’s vehicle to arrest him.²⁰

Defendant testified at trial that he and the victim had physical fights about every year and a half for the last 13 years.²¹ He admitted that in 2007 he had “picked [the victim] up out of the shower,” and broke her phone. He then followed her to a friend’s house where there was “physicality.” He was arrested²² and pleaded guilty to that offense.²³

Defendant claimed that in 2009 the victim attacked him but admitted that he did not contact the police.²⁴ He said that one evening in 2010 when he woke the victim up to confront her about “talking” with another man, she “got to hitting.” Defendant said that he was holding her shoulders when the children came into the room. Kenyatta called the police and defendant was charged with domestic violence. When he was released from jail, he went back home in violation of the no contact order.²⁵

Defendant testified that on September 19, 2011, after a verbal altercation where the victim had been accusing him of taking money from her purse, she punched him²⁶ and defendant told her he was leaving. He claimed that the victim grabbed him but he ran downstairs.

¹⁷ 51b.

¹⁸ 46b, 47b-50b.

¹⁹ 35b, 41b.

²⁰ 52b, 54b.

²¹ 65b-66b.

²² 77b.

²³ The defendant testified that the court took the case under advisement. 66b.

²⁴ 66b-67b.

²⁵ 67b-68b, 77b.

²⁶ 69b-70b.

Defendant testified that she caught him at the bottom of the stairs and hit him a number of times before he grabbed her. Kayauna started hitting the back of his head telling him to get off her mother and sometime “in the middle of that” the victim slid down the side of him. Defendant then left.²⁷

Defendant then drove to his mother’s house, obtained money for lunch, and started driving to work. He denied that he tried to elude the police.²⁸ After he was arrested, he told the detective that he did not touch his wife. He then said that if he did, it was to get her off of him. He finally admitted he had her in a chokehold and must have killed her.²⁹ Defendant admitted that on the day of the incident he was not supposed to be in the home as a condition of his probation. He conceded that he had lied to his probation officer concerning where he had been staying.³⁰

B. The Verdict

The jury convicted defendant of involuntary manslaughter.³¹ (The court had granted defendant’s motion for directed verdict on first degree premeditated murder.³²)

C. The Sentence

Defendant’s guidelines were 43 to 86 months (D-V). The judge assessed 35 points for his prior record variables (PRVs) and assessed 70 points for his offense variables (OVs). The judge assigned the following scores to defendant’s offense variables:

- | | |
|----------------|--|
| OV 3-25 points | life-threatening injury to a victim |
| OV 5-15 points | serious psychological injury sustained by a victim’s family member |

²⁷ 70b-71b.

²⁸ 72b.

²⁹ 75b-76b, 78b-80b.

³⁰ 73b-74b.

³¹ 83b-84b.

³² 63b-64b .

- OV 6-10 points acting in gross negligence
- OV 9-10 points two to nine persons placed in danger of physical injury
- OV 10-10 points exploitation of a vulnerable victim.

The Presentence Investigation Report (hereinafter “PSIR”) revealed that at the time of the incident defendant was on probation for disorderly conduct (reduced from the original charge of domestic violence), and resisting and obstructing. Defendant had been choking the victim and, when the police arrived, he fought with the officer to the point that he had to be physically restrained. Defendant was sentenced to probation and was ordered, not only to have no contact with his wife, but also not to enter the marital home. The PSIR also included a 2007 domestic violence incident with Kenyatta Lockridge as the victim.³³

At sentencing, the victim’s mother talked about the devastation defendant caused the victim’s three daughters.³⁴ The PSIR also included that the three children continued to receive mental health treatment in an attempt to help them cope with the trauma that they had suffered at the hands of defendant.³⁵ A family friend 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. She said that the children were afraid that he might kill them too.³⁶

The court eventually sentenced the defendant to a minimum of eight years (96 months), a ten-month departure from the guidelines, and imposed a maximum of 15 years as required by statute.³⁷ The court gave the following reasons for its sentence:

³³ 154b-155b.

³⁴ 93b.

³⁵ 155b.

³⁶ 158b.

³⁷ 96b; MCL 769.8(1).

[W]hile 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'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.

* * *

And in this circumstance, I don't frankly care who started it because your client clearly finished it. And . . . [the] OV's 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 OV's. None of it.

The degree of his previous altercations is not clearly reflected in the OV's. 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 OV's want to say.*

* * *

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 chokehold 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. OV's could not possibly reflect any of that that was going on.

There are substantial and compelling reasons to go above the guideline[s] in this matter and I think that they are clear.³⁸

D. The Appeals

The Court of Appeals affirmed defendant's sentence.³⁹ The Court found that the departure was appropriate.⁴⁰ The Court also found that *People v Herron*,⁴¹ which was binding on the Court, had concluded that the United States Supreme Court's opinion in *Alleyne v United States*⁴² did not affect sentencing guidelines calculations in Michigan's indeterminate sentencing system.⁴³

Defendant filed an application in this Court which this Court granted.

³⁸ 95b-96b (emphasis provided) Though the court discussed its reasons for its sentence in a fairly extensive discourse, there were four basic reasons the court departed, 1) defendant's violation of the no-contact provision on the date of the homicide, 2) defendant's previous domestic violence incidents with this specific victim, 3) the effect on not only one, but all three of the children, in witnessing their father (or adopted father) kill their mother in front of them, and 4) defendant's abandoning the children to deal with their dying mother on the floor. *People v Lockridge*, 304 Mich App 278, 282; 849 NW2d 388 (2014). Reasonably the judge could have assessed points for OV 19, interference with the administration of justice, for defendant's violation of the no contact order. MCL 777.39(b). If OV 19 had been assessed 15 points, defendant's sentence would be within the guidelines.

³⁹ *Lockridge*, 304 Mich App at 281.

⁴⁰ *Id.* at 282-284.

⁴¹ *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013).

⁴² *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013)

⁴³ *Lockridge*, 304 Mich App at 284.

SUMMARY OF THE ARGUMENTS

The United States Supreme Court has consistently concluded, including in *Alleyne v United States*,⁴⁴ that indeterminate sentencing systems do not violate the Sixth Amendment. Michigan, unlike the federal system and many of its sister states, has retained its indeterminate sentencing system and therefore remains unaffected by *Alleyne*. In Michigan, every defendant upon conviction by the jury is liable to serve up to his or her maximum sentence and the verdict authorizes the maximum penalty *and any lesser sentence*.

In *Alleyne*, the United States Supreme Court extended its ruling in *Apprendi v New Jersey*⁴⁵ solely to *mandatory minimums* in a determinate sentencing scheme. The *Alleyne* decision did not expand the *Apprendi* ruling to minimum sentences in an indeterminate sentencing system, which the court determines by assigning points for the guidelines and from which the court can depart in its discretion.

If this Court determines that the United States Supreme Court has retreated from its approval of indeterminate sentencing systems in its long line of cases including *Alleyne*, and extends the *Alleyne* decision to Michigan's indeterminate sentencing system, the appropriate remedy should be to render Michigan's guidelines system advisory. In any event, in this case, when the evidence supporting both the guidelines and the sentencing court's discretionary departure was overwhelming, defendant has failed to show plain error.

⁴⁴ *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

⁴⁵ *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

ARGUMENT

I. A JUDGE’S DETERMINATION OF THE APPROPRIATE SENTENCING GUIDELINES RANGE TO ESTABLISH A MINIMUM SENTENCE IN AN INDETERMINATE SENTENCING SYSTEM IS NOT THE EQUIVALENT OF A MANDATORY MINIMUM IN A DETERMINATE SENTENCING SCHEME.

Standard of Review and Issue Preservation:

The appellate court reviews de novo questions of constitutional law.⁴⁶ When the constitutionality of the statute is brought into question, “[t]he party challenging [it] has the burden of proving its invalidity.”⁴⁷ To sustain its burden, the party challenging the statute must overcome the presumption that a statute is constitutional, and the statute “will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt.”⁴⁸ 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.⁴⁹

Discussion:

The United States Supreme Court’s decision in *Alleyne* addressed a federal *mandatory minimum* sentence in a *determinate* sentencing scheme, not a minimum sentence in an indeterminate sentencing system. 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*,”⁵⁰ *Alleyne* is irrelevant.

Due process of law includes “protecting the accused against conviction except by proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is

⁴⁶ *People v Trakhtenberg*, 493 Mich 38, 47; 825 NW2d 136 (2012).

⁴⁷ *People v Carp*, 496 Mich 440, 460; 852 NW2d 801 (2014) (citation omitted).

⁴⁸ *Id.* (citation omitted).

⁴⁹ *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007) (*McCuller II*). The defendant in *Alleyne* raised his constitutional challenge in the appellate courts in 2011. See *United States v Alleyne*, 457 Fed Appx 348, 350 (CA 4, 2011). Sentencing in this case was in May of 2012.

⁵⁰ *Alleyne*, 570 US at ___; 133 S Ct at 2163; 186 L Ed 2d at 329 (emphasis provided).

charged.”⁵¹ The United States Supreme Court, through a series of opinions, established that a state legislature’s definition of the elements of the offense—which must be proven at a jury trial beyond a reasonable doubt—is usually dispositive. The United States Supreme Court also emphasized the “preeminent role of the States in preventing and dealing with crime and reluctance of the Court to disturb a State’s decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion.”⁵² The Court indicated that a state legislature’s “decision in this regard is not subject to proscription under the Due Process Clause unless ‘it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”⁵³

The Supreme Court held that if factual findings made by a judge, rather than a jury, increase the amount of time a defendant must serve *beyond that authorized by the verdict*, this fact must be treated as an element of the crime and not a mere sentencing factor.⁵⁴ The United States Supreme Court opined that problems have arisen in *determinate* sentencing schemes in which judge’s factual findings by a standard of less than beyond a reasonable doubt increased the amount of prison time that defendants must serve. A determinate sentence is “[a] sentence for a fixed length of time rather than for an unspecified duration.’ Such a sentence can either be for a fixed term from which a trial court may not deviate . . . or can be imposed by the court within a certain range.”⁵⁵ In a determinate scheme, the court imposes only one fixed number, and once

⁵¹ *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

⁵² *Martin v Ohio*, 480 US 228, 232; 107 S Ct 1098; 94 L Ed 2d 267 (1987).

⁵³ *Patterson v New York*, 432 US 197, 201-202; 97 S Ct 2319; 53 L Ed 2d 281 (1977) (citations omitted).

⁵⁴ *Almendarez-Torres v United States*, 523 US 224, 242; 118 S Ct 1219; 140 L Ed 2d 350 (1998); *Jones v United States*, 526 US 227, 240-241, 242, 243 n 6; 119 S Ct 1215; 143 L Ed 2d 311 (1999).

⁵⁵ *People v Drohan*, 475 Mich 140, 153 n 10; 715 NW2d 778 (2006) citing *Black’s Law Dictionary*, (8th ed.) (some citations omitted).

the defendant serves that number of days, months, or years, he is released. Logically the fixed term could be considered both the defendant's maximum *and* the defendant's minimum.

The United States Supreme Court has routinely concluded that *indeterminate* sentencing systems do *not* contravene the Sixth Amendment because they require that the jury determine all elements of the crime necessary to impose an indeterminate sentence. "An indeterminate sentence is one 'of an unspecified duration, such as one for a term of 10 to 20 years.' In other words, while a defendant may serve a sentence of up to 20 years, the defendant may be released from prison at the discretion of the parole board at any time after the defendant serves the ten-year minimum."⁵⁶ Therefore, in an indeterminate sentencing system, the court imposes two numbers, a minimum and maximum; the defendant must serve at least the minimum, but the verdict authorizes the parole board to hold the defendant up to the maximum.

A. Michigan, unlike the federal system and the sentencing schemes of many of its sister states, has an indeterminate sentencing system.

In the nineteenth century the United States had an indeterminate sentencing system (which had replaced a determinate scheme allowing judges no discretion regarding penalty).⁵⁷ "[U]nder this system, Congress defined the maximum, the judge imposed a sentence within the statutory range . . . , and the Executive Branch's parole official eventually determined the actual duration of imprisonment."⁵⁸ "Highly-relevant—if not essential—to [the judge's] selection of an appropriate sentence [wa]s the possession of the fullest information possible concerning the

⁵⁶ *Id.* citing *Black's Law Dictionary* (8th ed).

⁵⁷ *Apprendi*, 530 US at 481-482; *Pennsylvania ex rel. Sullivan v Ashe*, 302 US 51, 55; 58 S Ct 59; 82 L Ed 2d 13 (1937); *Williams v New York*, 337 US 241, 248; 69 S Ct 1079; 93 L Ed 1337 (1949); *United States v Grayson*, 438 US 41, 45; 98 S Ct 2610; 57 L Ed 2d 582 (1978); *Mistretta v United States*, 488 US 361, 364; 109 S Ct 647; 102 L Ed 2d 714 (1989).

⁵⁸ *Mistretta*, 488 US at 365.

defendant's life and characteristics" without "rigid adherence to restrictive rules of evidence properly applicable to the trial."⁵⁹

However, in 1984, Congress replaced its indeterminate sentencing system and the provision for parole with a determinate scheme in which the courts only impose one fixed term which the defendant must serve.⁶⁰ Many states followed suit and also passed statutes which replaced indeterminate systems with determinate ones where judges alone make factual findings increasing the fixed term that defendants serve.⁶¹

Michigan, unlike many of its sister states and the federal system, retained its indeterminate sentencing system. In response to a court decision that found indeterminate sentencing unconstitutional, the citizens of Michigan passed a constitutional amendment specifically allowing for indeterminate sentencing.⁶² The Legislature also passed statutes allowing for indeterminate sentencing and setting up the parole board.⁶³ "At the sentencing hearing, after the issue of guilt has been decided, full information regarding the defendant's character, background, and criminal record have generally been deemed admissible under concepts of individualizing punishment."⁶⁴ The specific duration of a sentence is "not fixed by the court but is left to the determination of penal authorities within minimum and maximum time

⁵⁹ *Williams*, 337 US at 247. In accord *Pepper v United States*, ___ US ___; 131 S Ct 1229, 1240; 179 LE2d 196, 212 (2011); *United States v Watts*, 519 US 148, 151-152; 117 S Ct 633; 136 L Ed 2d 554 (1997); *Witte v United States*, 515 US 389, 397-398; 115 S Ct 2199; 132 L Ed 2d 351 (1995); *United States v Tucker*, 404 US 443, 446; 92 S Ct 589; 30 L Ed 2d 592 (1972).

⁶⁰ *Neal v United States*, 516 US 284, 289; 116 S Ct 763; 133 L Ed 2d 709 (1996) (indicating that Congress was disenchanted with "the vagaries of federal sentencing and of the parole system.") See also *Payne v Tennessee*, 501 US 808, 820; 111 S Ct 2597; 115 L Ed 2d 720 (1991); *United States v Jingles*, 702 F3d 494, 503 (CA 9, 2012); *United States v Redd*, 630 F3d 649, 650 (CA 7, 2011).

⁶¹ *State v Natale*, 184 NJ 458, 473 n 4; 878 A2d 724 (2005) (listing States)

⁶² Const 1850, art 4, § 47. See also Const 1908, art 5, § 28; Const 1963, art 4, §45; *People v Lorentzen*, 387 Mich 167, 179-180; 194 NW2d 827 (1972); *People v Polus*, 447 Mich 952, 955 n 5; 530 479 NW2d (1994) (BOYLE and RILEY, J.J., dissenting from denial of leave).

⁶³ *Lane v Michigan Dep't of Corrections, Parole Board*, 383 Mich 50, 58; 173 NW2d 209 (1970); MCL 769.8; MCL 791.234.

⁶⁴ *People v Fisher*, 442 Mich 560, 577; 503 NW2d 50 (1993).

limits fixed by the court.”⁶⁵ The purpose of Michigan’s indeterminate sentencing system is to aid the Corrections Department in rehabilitating criminal offenders.⁶⁶

Though Michigan maintains an indeterminate sentencing system which continues to allow individualization of sentences, this Court also wished to give guidance to the sentencing courts across the state to equalize the punishment for truly similarly-situated offenders. This Court adopted judicial guidelines in 1988,⁶⁷ and then in 1999, the Legislature adopted statutory guidelines.⁶⁸ For the vast majority of felony offenses, sentencing courts use the legislative sentencing guidelines, MCL 777.1, *et seq.* Only a select number of offenses in Michigan carry a statutory mandatory minimum penalty.⁶⁹ If there is a mandatory minimum, the court must impose the mandatory minimum regardless of the guidelines range.⁷⁰ Under the legislative guidelines, to determine the minimum portion of a defendant’s indeterminate sentencing range, the sentencing court is required to determine the offense category.⁷¹ Then, the sentencing court must determine which offense variables (OVs) are applicable, assess points for those variables

⁶⁵ *People v Lowe*, 484 Mich 718, 721 n 3; 773 NW2d 1 (2009) citing *Black's Law Dictionary*, (5th ed.).

⁶⁶ *People v Brown*, 393 Mich 174, 184-185; 224 NW2d 38 (1974) quoting *In re Southard*, 298 Mich 75, 82; 298 NW 457 (1941). See also *People v Bullock*, 440 Mich 15, 34; 485 NW2d 866 (1992) (indicating that the principle which is rooted in Michigan’s legal tradition specifically its provision for indeterminate sentences, is the goal of rehabilitation).

⁶⁷ Michigan Sentencing Guidelines Commission, *Report of the Michigan Sentencing Guidelines Commission*, (1997) p 1, 136b.

⁶⁸ *People v Merriweather*, 447 Mich 799, 807; 527 NW2d 460 (1994); *People v Houston*, 448 Mich 312, 326 n 8, 329 n 12; 532 NW2d 508 (1995); *People v Garza*, 469 Mich 431, 434-435; 670 NW2d 662 (2003). A succinct summary of the history of the guidelines is contained within house and senate legislative analysis and is only included as background information. See House Legislative Analysis, HB 5419, May 12, 1998 p 2, 6 (98b, 102b), September 23, 1998, p 2, 6 (110b, 114b). The Legislature has proposed reconvening the Michigan Sentencing Commission to consider yet more changes to the guidelines. 2014 HB 5928 (162b-181b).

⁶⁹ *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.”).

⁷⁰ MCL 769.34(2)(a).

⁷¹ MCL 777.21(1)(a).

and total the points to determine the total OV score.⁷² The sentencing court also must assess points for all prior record variables (PRVs).⁷³ The offender's OV score and PRV score are then used to determine the appropriate cell of the applicable sentencing grid.⁷⁴

Ordinarily, the minimum portion of a defendant's indeterminate sentence imposed should fall within the appropriate range as determined by the guidelines, but the sentencing court nonetheless retains considerable discretion to depart upward or downward from that range for a "substantial and compelling reason" articulated on the record.⁷⁵ In order to depart upward or downward from the guidelines, a sentencing 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.⁷⁶ However, the maximum remains fixed by statute with no discretion for the court to vary from that statutory maximum.⁷⁷

Since Michigan retains its indeterminate sentencing system,⁷⁸ "[t]he release of a prisoner on parole shall be granted solely upon the initiative of the parole board. . ."⁷⁹ The defendant can serve anywhere up to the maximum statutory sentence depending on the parole board's decision (using current parole board standards) regarding whether the defendant is a danger to the public.⁸⁰ In fact, "a defendant can only expect the maximum sentence set by statute."⁸¹ The only

⁷² *Id.*

⁷³ MCL 777.21(1)(b).

⁷⁴ MCL 777.21(1)(c); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

⁷⁵ MCL 769.34(2)-(3).

⁷⁶ MCL 769.34; *People v Gary Smith*, 482 Mich 292, 309 n 41, 311; 754 NW2d 284 (2008).

⁷⁷ MCL 769.8. The maximum may vary when the defendant is a habitual offender or when the guidelines place defendant in an intermediate sanction cell, circumstances not implicated in this case.

⁷⁸ *Report of the Michigan Sentencing Guidelines Commission, supra* p 2 (indicating, "Under the statute, the new guidelines will not affect Michigan's indeterminate sentencing structure.") 137b.

⁷⁹ MCL 791.235(1).

⁸⁰ MCL 791.233(1)(a); 791.234(11).

⁸¹ *McCuller II*, 479 Mich at 693.

way a defendant can receive a lesser sentence is if the parole board decides to release him.⁸² If the parole board does not believe the defendant has been rehabilitated, he continues to serve out his sentence until this goal is met.⁸³ In this case, due to the jury verdict of manslaughter, defendant is liable to serve up to his 15-year maximum and has no guarantee he will get out of prison any sooner.

B. The United States Supreme Court has consistently found that indeterminate sentence systems do not violate the Sixth Amendment.

The Supreme Court, in a recent line of cases, held that in a determinate sentencing scheme when judges increase the fixed amount of time the defendant had to serve by a making a factual finding, these factual-findings qualify as elements of the crime and not mere sentencing factors.⁸⁴ However, the Court repeatedly acknowledged that indeterminate sentencing does not violate the Sixth Amendment because the verdict authorizes the maximum sentence and any lesser sentence.

In *Jones*⁸⁵ and *Apprendi*,⁸⁶ the Supreme Court indicated that if judicial fact-finding allowed the court to increase the sentence beyond the maximum that had been set by Congress or the legislature, this fact-finding would constitute an element of the offense because the verdict did not allow for the sentence.⁸⁷ In *Jones*, the judge had increased the defendant's term at sentencing from a fixed 15-year term to a fixed 25-year term based on a finding that the victim

⁸² *Id.* at 689; *Drohan*, 475 Mich at 159, 163; *People v Harper*, 479 Mich 599, 613; 729 NW2d 523 (2007).

⁸³ MCL 791.233(1)(a); MCL 791.235(1); MCL 791.234(11).

⁸⁴ The one exception is factual findings concerning a defendant's prior record. *Almendarez-Torres*, 523 US at 242.

⁸⁵ *Jones*, 526 US at 232.

⁸⁶ *Apprendi*, 530 US at 481.

⁸⁷ *Jones*, 526 US at 243 n 6; *Apprendi*, 530 US at 476, 482 n 9.

had suffered serious bodily injury.⁸⁸ In *Apprendi*, the judge had increased the defendant's fixed term from 10 years to 12 years based on a finding that the defendant committed a "hate crime."⁸⁹

Both cases distinguished indeterminate sentencing systems, where Congress (or the legislature) defined the maximum, the judge imposed a sentence within the statutory range and the parole official eventually determined the actual duration of imprisonment.⁹⁰ *Jones* indicated that its holding applied to determinate sentencing schemes⁹¹ and *Apprendi* also explained that, as long as the verdict authorizes the maximum, any other fact-finding does not expose "the defendant to a deprivation of liberty greater than that authorized by the verdict according to the statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone."⁹²

In *Apprendi*, when discussing indeterminate sentencing systems, the Court clarified:

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. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. e.g. *Williams v New York*, 337 US 241, 246; 93 L Ed 1337; 69 S Ct 1079 (1949).⁹³

Justice Scalia also observed in his concurrence:

I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted). Will there be disparities? Of course. But the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to

⁸⁸ *Jones*, 526 US at 231.

⁸⁹ *Apprendi*, 530 at 471.

⁹⁰ *Mistretta*, 488 US at 365.

⁹¹ *Jones*, 526 US at 243 n 6, 251 n 1 (Opinion of the Court); *Id.* at 271 (KENNEDY, J., dissenting).

⁹² *Apprendi*, 530 at 490 n 16.

⁹³ *Id.* at 481 (emphasis original).

which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.*⁹⁴

Blakely v Washington,⁹⁵ *United States v Booker*,⁹⁶ and *Cunningham v California*,⁹⁷ dealt with determinate sentencing schemes where (though the fixed terms imposed by the courts were less than the maximum set by Congress or the legislature) judges' factual findings increased the fixed term that the defendants had to serve. The United States Supreme Court found that because the defendant's "statutory maximum" (i.e. "the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant") was increased by a court's factual findings, the facts had to be found by a jury and determined beyond a reasonable doubt.⁹⁸ In *Blakely* and *Booker*, the judges increased the defendants' fixed terms above the guideline range due to aggravating reasons.⁹⁹ In *Cunningham*, the judge increased the defendant's fixed term due to aggravating circumstances.¹⁰⁰ In each of the cases, the judge's factual findings increased the one number that the defendant had to serve.

Each of the cases distinguished determinate from indeterminate sentencing systems, however. As *Blakely* indicated:

- [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.*

⁹⁴ *Id.* at 498 (SCALIA J., concurring)(first emphasis provided).

⁹⁵ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

⁹⁶ *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

⁹⁷ *Cunningham v California*, 549 US 270; 127 S Ct 856; 166 L Ed 2d 656 (2007).

⁹⁸ *Blakely*, 542 US at 303, 313-314; *Booker*, 543 US at 235, 242; *Cunningham*, 549 US at 283, 284, 293.

⁹⁹ *Blakely*, 542 US at 299; *Booker*, 543 US at 234 (STEVENS, J.).

¹⁰⁰ *Cunningham*, 549 US at 275.

- In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.¹⁰¹

In *Blakely* observed that to comply with the Sixth Amendment, the state legislature could re-establish an indeterminate sentencing system.¹⁰² Justices O’Connor and Kennedy extensively criticized the majority for essentially requiring state legislatures to establish indeterminate sentencing [a sentencing system which many states had rejected], unless the legislature wanted to require jury findings for each factor which the legislature previously believed would be merely sentencing factors.¹⁰³

In *Booker*, the Court again concluded that that was a case applicable to “determinate sentencing.”¹⁰⁴ The dissent also opined that *determinate* sentencing without jury findings was at an end.¹⁰⁵ The dissent in *Cunningham* noted that California’s previous indeterminate sentencing system would have remained untouched by the application of *Apprendi*.¹⁰⁶ The *Cunningham* Court also pointed out 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.”¹⁰⁷

¹⁰¹ *Blakely*, 542 US at 309 (emphasis provided).

¹⁰² *Id.* at 309.

¹⁰³ *Id.* at 318-320 (O’CONNOR, J., dissenting) (indicating, “Over 20 years of sentencing reform are all but lost. . .”); *Id.* at 326 (KENNEDY, J., dissenting).

¹⁰⁴ *Booker*, 543 US at 236.

¹⁰⁵ *Id.* at 299 (STEVENS, J., dissenting in part).

¹⁰⁶ *Cunningham*, 549 US at 295-296 (KENNEDY, J., dissenting).

¹⁰⁷ *Id.* at 294 citing *Booker*, 543 US at 233.

C. The United States Supreme Court’s holding in *Alleyne* applies only to mandatory minimums in a determinate sentencing scheme.

In 2002, the Supreme Court in *Harris v United States*,¹⁰⁸ found that factual findings leading to imposition of a mandatory minimum sentence in a fixed, determinate sentencing scheme do not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments. Justice Breyer aptly noted in his concurrence, however, that in a determinate sentencing scheme, facts increasing the minimum and facts increasing the maximum cannot be distinguished “in terms of logic,”¹⁰⁹ because whether a court elevates the minimum or maximum, functionally the factual findings serve the same purpose—they increase the one term that a defendant has to serve.

In *Alleyne*, the Supreme Court overruled *Harris* and extended the Court’s previous rulings to factual findings which allowed courts to impose mandatory minimum sentences.¹¹⁰ In *Alleyne*, the case dealt with one of the typical mandatory minimums in the federal sentencing scheme, a mandatory minimum sentence that was imposed due to use of a firearm and did not allow for the court to individualize the defendant’s sentence by a downward departure. Alleyne was convicted of carrying a firearm in relation to a crime of violence¹¹¹ which carried a minimum sentence of 5 years¹¹² which increased to 7 years if the judge found at sentencing that a firearm is “brandished.”¹¹³ The court enhanced Alleyne’s sentence after finding by a preponderance that the defendant had brandished the weapon.¹¹⁴

¹⁰⁸ *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002).

¹⁰⁹ *Id.* at 569 (BREYER, J, concurring in part and concurring in judgment).

¹¹⁰ *Alleyne*, 570 US at ___; 133 S Ct at 2155; 186 L Ed 2d at 321.

¹¹¹ 18 USC 924(c)(1)(A).

¹¹² 18 USC 924(c)(1)(A)(i).

¹¹³ 18 USC 924(c)(1)(A)(ii)–(iii).

¹¹⁴ *Alleyne*, 570 US at ___; 133 S Ct at 2155; 186 L Ed 2d at 322.

The Court found that “facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.”¹¹⁵ The Court indicated that “*Apprendi*’s definition of ‘elements,’ necessarily includes not only facts that increase the ceiling but also those that increase the floor.”¹¹⁶ As a matter of logic, in a determinate scheme, fact-finding which increases the maximum (as in *Blakely* or *Booker*) necessarily also increases the minimum (as in *Harris* and *Alleyne*) and the Sixth Amendment should apply whether the term is labeled a ceiling or a floor.¹¹⁷

Alleyne again distinguished findings of fact that both alter the legally prescribed range and do so in a manner that increases the statutory penalty from “factfinding used to guide judicial discretion in selecting a punishment ‘within limits fixed by law.’”¹¹⁸ 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.”¹¹⁹

D. *Alleyne* does not apply to fact-finding shaping the minimum portion of an indeterminate sentence.

In almost all of the previously-discussed Sixth Amendment opinions, the United States Supreme Court acknowledged that its holdings do *not* apply to indeterminate sentencing systems.¹²⁰ In *Dillon v United States*,¹²¹ the dissent emphasized, “*Over a series of cases, we arrived at our present understanding of determinate sentencing schemes: They are*

¹¹⁵ *Id.* at ___; 133 S Ct at 2158; 186 L Ed 2d at 324 citing *Apprendi*, 530 US at 483 n 10.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at ___; 133 S Ct at 2160; 186 L Ed 2d at 327.

¹¹⁸ *Id.* at ___; 133 S Ct at 2161 n 2; 186 L Ed 2d at 328 n 2 quoting *Williams* 337 US at 246.

¹¹⁹ *Id.* (emphasis original).

¹²⁰ *Jones*, 526 US at 271 (KENNEDY, J., dissenting); *Apprendi*, 530 US at 481; *Blakely*, 542 US at 309; *Booker*, 543 US at 236; *Cunningham*, 549 US at 295-296 (KENNEDY, J., dissenting).

¹²¹ *Dillon v United States*, 560 US 817, 836; 130 S Ct 2683; 177 L Ed 2d (2010).

constitutionally infirm if they mandate enhanced punishments based on facts found only by a judge by a preponderance of the evidence”¹²² (a comment not countered by the majority).

Though the Court in *Alleyne* extended its previous holdings to mandatory minimum schemes, it did not also opine that it was retreating from its previous understanding of indeterminate sentencing systems. In fact, *Alleyne* specifically cited *Williams v New York*, which extensively discussed indeterminate sentencing,¹²³ with approval on two separate occasions¹²⁴ and cited *Apprendi* with approval when it referenced the concept of indeterminate sentencing discussed in *Williams*.¹²⁵ Moreover, *Alleyne* observed that it was still permissible for judges to

¹²² *Dillon*, 560 US at 836. (STEVENS, J., dissenting) (emphasis provided).

¹²³ New York like many states at the time had an indeterminate sentencing system with the court setting the minimum and maximum and the parole board responsible for release. See *People ex re Sedlak v Foster*, 299 NY 291, 292; 86 NE2d 752 (1949); *Hines v State Board of Parole*, 293 NY 254, 257; 56 NE2d 572 (1944).

¹²⁴ *Alleyne* stated:

Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from fact-finding used to guide judicial discretion in selecting a punishment “within limits fixed by law.” *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing. *Infra*, at ___ - ___, 186 L Ed 2d, at 330-331, and n 6.

See also *United States v Tucker*, 404 US 443, 446; 92 S Ct 589; 30 L Ed 2d 592 (1972) (judges may exercise sentencing discretion through “an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come”); *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949) (“[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law”).

Alleyne, 570 US at ___; 133 S Ct at 2160 n 2, 2163 n 6; 186 L Ed 2d at 328 n 2, 330 n 6.

¹²⁵ *Id* at ___; 133 S Ct at 2163; 186 L Ed 2d at 330 citing *Apprendi*, 530 US at 481. As stated in the portion of *Apprendi* referenced by *Alleyne*:

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. We have
(footnote continued next page)

make findings on sentencing factors, “Our 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 fact-finding does not violate the Sixth Amendment.”¹²⁶ *Alleyne* was referencing its discussion in previous cases which, when talking about these sentencing factors, referenced indeterminate sentencing systems.

The United States Supreme Court had repeatedly stated that indeterminate sentencing does *not* run afoul of the Sixth Amendment. It is not reasonable to interpret *Alleyne*, when extending its ruling to mandatory minimums (a sentencing reform that had been highly criticized due to its failure to individualize sentences), as also somehow invalidating indeterminate sentencing systems which not only *promote individualization* of sentences by judges¹²⁷ but also had been previously cited with approval by the Court on numerous occasions. Mandatory sentencing schemes that allow the court no discretion and individualized sentencing systems had long been viewed by the Court as incompatible.¹²⁸ Therefore, solely because the Court invalidated determinate or mandatory minimum sentencing schemes does not signify that it also was invalidating indeterminate sentencing systems. It would not be reasonable that Justice

often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case. See, e.g., *Williams v New York*, 337 US 241, 246; 93 L Ed 1337; 69 S Ct 1079 (1949)

* * *

As in *Williams*, our periodic recognition of judges’ broad discretion in sentencing -- since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range, . . . -- has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature.

¹²⁶ *Id.* at ___; 133 S Ct at 2163; 186 L Ed 2d at 330 citing, *Dillon*, 560 US at 828-829 (emphasis provided).

¹²⁷ Indeterminate sentencing schemes with the parole board fixing the time of release are referred to as the “rehabilitation model” of sentencing. *Grayson*, 438 US at 48 n 6.

¹²⁸ As stated by Justice Kennedy in *Harmelin v Michigan*, 501 US 957, 999; 111 S Ct 2680; 115 L Ed 2d 836 (1991), “*competing* theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic.” *Id.* at 999 (KENNEDY, J., concurring in part and concurring in judgment) (emphasis provided).

Breyer, a proponent of guidelines regimes,¹²⁹ would join the majority without at least a comment on the systemic effect that striking down indeterminate sentencing systems would entail. Nothing in the *Alleyne* dissent indicates that a repercussion from the majority’s opinion was invalidation of indeterminate sentencing systems.

Moreover, in a determinate sentencing scheme, whether a court elevates a minimum or maximum, functionally the factual findings serve the same purpose—they elevate the one term that a defendant has to serve. Therefore, it is true that in a determinate scheme “facts increasing the minimum and facts increasing the maximum cannot be distinguished ‘in terms of logic.’”¹³⁰

Ultimately nothing in *Alleyne* indicates the Court’s desire to invalidate fact-finding in an indeterminate sentencing scheme such as Michigan’s. This Court has observed that Michigan “has a true indeterminate sentencing scheme”¹³¹ and that “our system mirrors the *Blakely* Court’s hypothetical indeterminate system.”¹³² This Court concluded, 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.¹³³ Nothing in *Alleyne* changes any of these holdings.

¹²⁹ *Harris*, 536 US at 570-571 (BREYER J.) (Justice Breyer commented that *unlike sentencing guidelines*, “statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. They rarely reflect an effort to achieve sentencing proportionality.”) (citations omitted).

¹³⁰ *Alleyne*, 570 US ___; 133 S Ct at 2160; 186 L Ed 2d at 327 citing *Harris*, 536 US at 569 (BREYER, J., concurring in part and concurring in judgment).

¹³¹ *Harper*, 479 Mich at 603.

¹³² *Id.* at 636.

¹³³ *Drohan*, 475 Mich at 162-163; *People v McCuller*, 475 Mich 176, 180; 715 NW2d 798 (2006) (*McCuller I*). See also *Commonwealth v Junta*, 62 Mass App 120, 128 n 11; 815 NE2d 254 (2004) (indicating, “The recent United States Supreme Court decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), has no application here, as the Massachusetts sentencing scheme provides for indeterminate sentences. See: *Id.*, at 2538 citing *Williams v New York*, 337 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949).”); *State v Garner*, 2008 UT App 32 *p 24; 177 P3d 637, 643 (2008)

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E. *Alleyne* is not applicable to findings on the Michigan sentencing guidelines since the jury verdict authorizes all sentences up to the statutory maximum.

Though this Court mentioned *Harris* when previously evaluating Michigan’s sentencing system, in *People v Drohan*,¹³⁴ *People v McCuller I*,¹³⁵ *People v Harper*,¹³⁶ and *People v McCuller II*,¹³⁷ this Court also determined that Michigan’s indeterminate sentencing system is compliant with *Blakely* and *Cunningham*. *Alleyne* did not overrule *Apprendi*, *Cunningham*, *Blakely*, or *Booker*, and in fact, specifically cited *Apprendi* with approval. Therefore, *Alleyne*’s overruling of *Harris* does not imply that this Court’s previous holdings are constitutionally suspect.¹³⁸

In Michigan’s sentencing system, the minimum sentence in an indeterminate sentencing system is a *lesser* sentence and the default sentence without any factual findings is the maximum sentence.¹³⁹ This Court emphasized, “Upon conviction, a defendant is legally entitled only to the

(indicating that *Cunningham* did not impact Utah’s indeterminate sentencing scheme, “Unlike California’s sentencing system Utah’s statutory sentencing scheme involves three *ranges* of sentences, rather than three fixed terms. Importantly, the upper end of the range, the maximum, does not change based on judicial fact finding. As the Supreme Court indicated in *Cunningham*, a sentencing system that “permit[s] judges genuinely ‘to exercise broad discretion . . . within a statutory range,’ . . . encounters no Sixth Amendment shoal.” *Id.* (first omission in original) (quoting *United States v Booker*, 543 US [at] 233 [].”); *Garcia v State*, 2007 WY 48 *p 14; 153 P3d 941, 945 (2007) (indicating that *Apprendi* and its progeny did not affect Wyoming’s indeterminate sentencing scheme, “When a defendant pleads guilty, he immediately exposes himself to criminal liability up to, and including the maximum sentence for each of his crimes. The conviction itself triggers the availability of all penalties enumerated in the applicable criminal state[t]e.”)

¹³⁴ *Drohan*, 475 Mich at 140.

¹³⁵ *McCuller I*, 475 Mich at 176.

¹³⁶ *Harper*, 479 Mich at 599.

¹³⁷ *McCuller II*, 479 Mich at 672.

¹³⁸ In fact, though defendant relies on *Apprendi* to support his arguments, he asserts that this Court’s precedent is suspect due to this Court’s reliance on *Blakely* and *Apprendi*. Appellant’s Brief at 12, 13, 17, 18, 19, 20, 21

¹³⁹ See: MCL 769.8(1) (indicating, “The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the
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statutory maximum sentence for the crime involved”¹⁴⁰ (which in most cases is mandated by statute¹⁴¹) and “does not have a right to anything less than the maximum sentence authorized by the jury’s verdict”¹⁴² This Court also observed that “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.”¹⁴³ Therefore, “judges may make certain factual findings to select a specific minimum sentence from within a defined range.”¹⁴⁴ This Court cited *Blakely* as supporting this proposition, “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 *Blakely* principles by engaging in judicial fact-finding to score the OV’s to calculate the recommended minimum sentence range.”¹⁴⁵

This Court also cited Justice Scalia’s concurrence in *Apprendi*, indicating that a defendant receiving a *lesser sentence* “may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early).”¹⁴⁶ The defendant’s only entitlement is that he will serve no greater than the maximum sentence *i.e.* a sentence which the court *must* impose in the absence of fact-finding.¹⁴⁷ This Court found, “the trial court’s power to impose a sentence is always derived from the jury’s verdict,

sentence.”); *Harper*, 479 Mich at 621-622 (indicating, “Michigan’s sentencing laws clearly require that the maximum portion of every indeterminate sentence be no less than the ‘maximum penalty provided by law.’”).

¹⁴⁰ *McCuller II*, 479 Mich at 689.

¹⁴¹ *Drohan*, 475 Mich at 159, 161; *Harper*, 479 Mich at 603, 612.

¹⁴² *Drohan*, 475 Mich at 159.

¹⁴³ *Id.* at 163.

¹⁴⁴ *Id.* at 159.

¹⁴⁵ *McCuller II*, 479 Mich at 689, citing *Blakely*, 542 US at 309 (emphasis provided).

¹⁴⁶ *Harper*, 479 Mich at 604 n 2 citing *Apprendi*, 530 US at 498-499.

¹⁴⁷ MCL 769.8(1).

because the ‘maximum-minimum’ sentence will always fall within the range authorized by the jury’s verdict.”¹⁴⁸

In *Harper*, this Court observed that specifically considering Michigan’s system of sentencing for violations of probation, the constitutionality of our guidelines system was apparent. This Court noted that the United States Supreme Court had re-affirmed that probation revocation hearings may be hearings in which the trial rights of a jury and proof beyond a reasonable doubt do not apply.¹⁴⁹ This Court stated, “When statutes, such as those listed in MCL 777.11 *et seq.*, establish absolute maximum sentences on the basis of the elements of the offense, it is entirely within a legislature’s province to authorize judges to exercise their discretion and expertise when sentencing defendants below those maximum limits, as they do by sentencing and monitoring probationers, as well as by subsequently revoking a probationary sentence, if appropriate.”¹⁵⁰ The Court concluded, “accepting the defendants’ arguments in these cases would require us to conclude that *Blakely* guarantees them a right to sentences that are *less than* those authorized by a jury verdict or guilty plea; to the contrary, *Blakely* prohibits a sentencing judge from *exceeding* the sentence authorized by the verdict or plea.”¹⁵¹

In *McCuller II*, (which was decided after the United States Supreme Court remanded after *Cunningham*), this Court again observed that Michigan has a “true indeterminate sentencing

¹⁴⁸ *Drohan*, 475 Mich at 162; *Harper*, 479 Mich at 615.

¹⁴⁹ *Harper*, 479 Mich at 615 citing *Samson v California*, 547 US 843, 849; 126 S Ct 2193; 165 L Ed 2d 250 (2006). The Kentucky Supreme Court in *Biederman v Commonwealth*, 434 SW3d 40, 46 (Ky, 2014) indicated that even in their determinate scheme, if the fact-finding solely concerned parole eligibility, it did not violate *Alleyne* indicating, “There is no constitutional right to parole, but ‘rather parole is a matter of legislative grace or executive clemency.’ . . . So while the trial court’s sentencing of Biederman as a violent offender ensured he would serve a longer portion of the sentence in prison, it did not expose him to a larger punishment than authorized by the jury verdict.” (citation omitted).

¹⁵⁰ *Harper*, 479 Mich at 632.

¹⁵¹ *Id.* at 645 (emphasis original).

scheme”¹⁵² that is valid under *Blakely*¹⁵³ and determined 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.”¹⁵⁴

Alleyne does not undermine these conclusions. Unlike the defendants in *Apprendi*, *Blakely*, *Booker*, *Cunningham*, *Harris*, and *Alleyne*, who were each sentenced to a determinate term and were absolutely entitled to be released upon the expiration of their terms, a minimum term of a prison sentence does not entitle a defendant an absolute right to be discharged under Michigan’s sentence scheme.¹⁵⁵ This Court noted that the critical difference in our sentencing system from those which the United States Supreme Court had opined were problematic, was that our scheme is an indeterminate one.¹⁵⁶ Ultimately, in an indeterminate sentencing system, every defendant upon conviction by the jury is liable to serve up to his or her maximum sentence. *Alleyne only applies to findings which aggravate the fixed term a defendant must serve in a determinate sentence, not to a minimum sentence in an indeterminate sentencing scheme that the jury has already authorized by its verdict. The verdict authorizes the maximum penalty and all lesser sentences.*

Therefore, in an indeterminate sentencing scheme such as Michigan’s, findings on the guidelines are already authorized by the jury verdict and pose no Sixth Amendment problem.

¹⁵² *McCuller II*, 479 Mich at 677.

¹⁵³ *Id.* at 683.

¹⁵⁴ *Id.* at 688 citing *Cunningham*, 549 US at 294. The United States Supreme Court denied certiorari. *McCuller v Michigan*, 552 US 1314 (2008).

¹⁵⁵ *Harper*, 479 Mich at 634-636 (indicating, “In contrast, the defendant in *Cunningham* did not have the same expectation [as Harper did] under California’s DSL. California’s determinate scheme was premised on a defendant’s right to a fixed, middle term sentence. . . . Therefore, the DSL is like the hypothetical determinate system described in *Blakely* . . . our system mirrors the *Blakely* Court’s hypothetical indeterminate system . . .”)

¹⁵⁶ *Id.* at 611, 613.

ARGUMENT

II. THERE IS NO MANDATORY MINIMUM SENTENCE WHEN A COURT CAN INDIVIDUALIZE THE SENTENCE BY DEPARTING FROM THE GUIDELINES FOR APPROPRIATE REASONS.

Standard of Review and Issue Preservation:

See Argument I

Discussion:

The United States Supreme Court in *Alleyne* dealt with mandatory minimum sentences. The Michigan sentencing guidelines do not impose mandatory minimum sentences.

“From 1984 to 1990, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime and over one hundred mandatory minimum penalty provisions were operative in sixty criminal statutes. The purpose of these mandatory penalties was to deter—through the prospect of certain and lengthy prison terms—potential offenders from engaging in these offenses.”¹⁵⁷ These mandatory minimums were focused primarily on drug quantity and firearms, and the drug and gun mandatory minimums were responsible for about 94 percent of the cases in which mandatory minimums were used.¹⁵⁸

Both the plurality and concurrence in *Harris* noted that mandatory minimum sentencing acts were a specific type of sentencing reform that had provoked wide-spread criticism.¹⁵⁹ Across the political spectrum, countless judges—including several United States Supreme Court

¹⁵⁷ Orrin Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L Rev 185, 192, 193 (1993). See also Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L Rev 200, 201 (1993).

¹⁵⁸ *The Role of Congress in Sentencing*, 28 Wake Forest L Rev at 193; *Rethinking Mandatory Minimums*, 28 Wake Forest L Rev at 201; Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif Law Rev 61, 86, 97 (1993).

¹⁵⁹ *Harris*, 536 US at 568 (Plurality opinion); *Id.* at 570 (BREYER J., concurring in part and concurring in judgment).

justices—legislators, academics and policy experts, had criticized mandatory minimums for increasing disparity and undermining proportionality.¹⁶⁰

By the time *Alleyne* was decided, the term “mandatory minimum” had acquired a unique meaning¹⁶¹ to mean a statute which provides that a fact, such as repeat offender status, use of a firearm or other dangerous weapon during the offense, or the amount of drugs involved in the narcotics offenses, “give[s] rise both to a special stigma and a special punishment”¹⁶² and

¹⁶⁰ See *Almendarez-Torres*, 523 US at 243 (indicating that a mandatory minimum “binds a sentencing judge . . . [and] can eliminate a sentencing judge’s discretion in its entirety. . . . And it can produce unfairly disproportionate impacts on certain kinds of offenders.”); *Harmelin*, 501 US at 1007 (KENNEDY, J., concurring) (indicating, “Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse or acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum.”); Chief Justice William H. Rehnquist, *Luncheon Address at the Inaugural Symposium on Crime and Punishment in the United States* (June 18, 1993); Kennedy, *Hearings before a Subcommittee of the House Committee on Appropriations 103d Cong., 2d Sess.*, 29 (Mar. 9, 1994); Breyer, *Federal Sentencing Guidelines Revisited*, 14 *Crim Justice* 28 (Spring 1999).

See also United States Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) [hereinafter Sentencing Commission Report]; *The Role of Congress in Sentencing*, 28 *Wake Forest L Rev* at 193 (indicating the Federal Courts Study Committee in 1990 as well as the Judicial Conference also questioned the merits and efficacy of the mandatory minimum sentences); Vincent & Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, Federal Judicial Center (1994); Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich L Rev* 505, 595 (2001) (“[A]bolishing mandatory minima would be a great gain”); *Rethinking Mandatory Minimums*, 28 *Wake Forest L Rev* at 201; Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 *J Crim L & Criminology* 709, 721-22, 758 (2010); *Mandatory Sentencing Laws*, 81 *Calif Law Rev* at 121-122 (“Isolating a single aggravating circumstance for a harsh mandatory sentence enhancement without regard for the total mix of facts in individual cases can lead to grossly unfair penalties . . .”)

¹⁶¹ A specific criminal procedure can come to acquire a unique meaning. See *United States v Castleman*, ___ US ___; 134 S Ct 1405, 1411; 188 L Ed 2d 426, 435 (2014) (indicating for example, “‘Domestic violence’ is not merely a type of ‘violence’; it is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.”); *Miss ex rel Hood v AU Optronics Corp.*, ___ US ___; 134 S Ct 736, 743; 187 L Ed 2d 654, 664-665 (2014) (indicating that the term “plaintiff” was a legal term of art which had acquired a specific meaning); *Madugula v Taub*, 496 Mich 685, 701; 853 NW2d 75 (2014) (indicating “‘actual damages’ is a term of art and is generally considered a legal remedy that is traditionally tried by a jury.”); *People v Douglas*, 496 Mich 557, 604; 852 NW2d 587 (2014) (VIVIANO, J., concurring in part and dissenting in part) (indicating “‘Reasonable probability’ is a term of art in the domain of criminal procedure.”).

¹⁶² *McMillan v Pennsylvania*, 477 US 79, 103; 106 S Ct 2411; 91 L Ed 2d 67 (1986) (STEVENS, J., dissenting). See also *Harris*, 536 US at 567; *Blakely*, 542 US at 304 (defining the statutory scheme at issue in *McMillan*, as “a sentencing scheme that imposed a statutory minimum if a judge found a

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departures were either non-existent or exceedingly rare.¹⁶³ Black’s Law Dictionary for instance defined “mandatory sentence” at the time as “[a] sentence set by law with no discretion for the judge to individualize punishment. . . .”¹⁶⁴ In *McMillan v Pennsylvania*,¹⁶⁵ when the Court was discussing Pennsylvania’s Mandatory Minimum Sentencing Act, it indicated, “[t]he Act operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony. . . .” In *Almendarez-Torres*, *Apprendi*, and *Harris*, justices contrasted “mandatory minimums” to “permissive maxima” which were at issue in the other Sixth Amendment cases and indicated that, unlike the maximum sentences, the mandatory minimums were mandated.¹⁶⁶

particular fact.”); *Mandatory Sentencing Laws*, 81 Calif Law Rev at 61, 66, 69, 70-71 and n 37-48; *Sentencing Commission Report; Rethinking Mandatory Minimums*, 28 Wake Forest L Rev at 201; *The Consequences of Mandatory Minimum Prison Terms*, Federal Judicial Center p 12, 13.

¹⁶³ See *United States v O’Brien*, 560 US 218, 238; 130 S Ct 2169; 176 L Ed 2d 979 (2010)(STEVEN, J., concurring, “Mandatory minimums may have a particularly acute practical effect . . . there is [] a floor below which a sentence cannot fall.”); *Melendez v United States*, 518 US 120, 132; 116 S Ct 2057; 135 L Ed 2d 427 (1996)(STEVENS, J., concurring in judgment)(indicating, “The law does not normally permit a departure below such mandatory statutory minimums. But cf. 18 USC § 3553 (f) . . . The law does permit such a departure, however, for one special reason, namely, ‘substantial assistance,’ but only if the Government makes a ‘motion . . . so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.’ 18 USC § 3553(e)”); *Dorsey v United States*, ___ US ___, 132 S Ct 2321, 2327; 183 L Ed 2d 250, 261 (2012)(indicating, “[O]rdinarily no matter what range the Guidelines set forth, a sentencing judge must sentence an offender to at least the minimum prison term set forth in a statutory mandatory minimum.”); *United States v Robinson*, 404 F3d 850, 862 (CA 4, 2005)(indicating, “*Booker* did nothing to alter the rule that judges cannot depart below a statutorily provided minimum sentence [included in 18 USC § 924(c)(1)(A)(ii)–(iii)]. Except upon motion of the Government on the basis of substantial assistance, a district court still may not depart below a statutory minimum.”); *United States v Ford*, 761 F3d 641 (CA 6, 2014) (indicating, “Even when a district court considers the mandatory minimum sentences to be ‘draconian’ and ‘inappropriate,’ nonetheless ‘[w]hen a court and a mandatory minimum are in conflict, the minimum wins.’”); *The Consequences of Mandatory Minimum Prison Terms*, Federal Judicial Center p 6, 7 (indicating, in the federal system, “a judge can never depart from a statutory minimum . . . to take account of mitigating circumstances . . . neither the guidelines nor the judge can go below the statutory ‘floor’”); *Rethinking Mandatory Minimums*, 28 Wake Forest L Rev at 222.

¹⁶⁴ *Black’s Law Dictionary*, (9th ed.).

¹⁶⁵ *McMillan v Pennsylvania*, 477 US at 81-82.

¹⁶⁶ See *Almendarez-Torres*, 523 US at 244-245 (contrasting the mandatory minimum at issue in *McMillan* to the elevation of the “permissive maximum” in the federal system); *Apprendi*, 530 US at 563 (BREYER J., dissenting) (“ . . . a legislated mandatory ‘minimum’ is far more important to an actual defendant. A judge . . . [is] free to select any sentence below a statute’s maximum but [he/she] is not free to subvert at

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In *Harris*, Justice Thomas, who later wrote the decision in *Alleyne*, referenced to “mandatory minimum sentences schemes” as specific “phenomena” of “fairly recent vintage.”¹⁶⁷

Before *Alleyne* was decided, a number of justices and legal commentators, contrasted guidelines’ regimes with mandatory minimums.¹⁶⁸ Justice Breyer observed, “Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward no matter how unusual the special circumstances that call for leniency . . . They rarely reflect an effort to achieve sentencing proportionality.”¹⁶⁹ Also, in 2011, the Sentencing Commission had submitted a report to Congress about mandatory minimum penalties, concluding that “the most efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of the sentencing guidelines, permitting the sophistication of the guidelines structure to work, rather than through mandatory minimums.”¹⁷⁰

It was against this backdrop that the United States Supreme Court decided *Alleyne*. No one contested that the statute at issue in *Alleyne* qualified as a mandatory minimum. *Alleyne* involved a mandatory minimum sentence which required that a minimum sentence be imposed

statutory minimum.”); *Harris*, 536 US at 565-566 (“[W]hen a fact increasing the statutory maximum is found, the judge may still impose a sentence far below that maximum; but when a fact increasing the minimum is found, the judge has no choice but to impose that minimum even if he or she otherwise would have chosen a lower sentence.”)

¹⁶⁷ *Harris*, 536 US at 581 n 5. (THOMAS, J., dissenting).

¹⁶⁸ *Harris*, 536 US at 570-571 (BREYER, J., concurring); *Harmelin*, 501 US at 999 (KENNEDY, J., concurring in part and concurring in judgment); *Neal v United States*, 516 US 284, 291, 292; 116 S Ct 763; 133 L Ed 2d 709 (1996) (“ . . . the Commission itself has noted that ‘mandatory minimums are both structurally and functionally at odds with sentencing guidelines and functionally at odds with sentencing guidelines and the goals the guidelines seek to achieve.’”); *Muscarello v United States*, 524 US 125, 141 n 1; 118 S Ct 1911; 141 L Ed 2d 111 (1998) (GINSBERG, J., dissenting). See also *The Consequences of Mandatory Minimum Prison Terms*, Federal Judicial Center p 28; *Rethinking Mandatory Minimums*, 28 Wake Forest L Rev at 22; *The Role of Congress in Sentencing*, 28 Wake Forest L Rev at 194-195 (indicating “Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases.”).

¹⁶⁹ *Harris*, 536 US at 570-571 (BREYER J., concurring in part and concurring in judgment).

¹⁷⁰ See Sentencing Commission Report.

once the court found an aggravating factor at sentencing by a preponderance. The statute did not permit a departure downward.¹⁷¹ In fact, *Alleyne* repeatedly emphasized during its opinion that its decision applied to facts increasing the “mandatory minimum.”¹⁷² Justice Breyer, who had filed a concurrence in *Harris* and approved of guidelines’ regimes but criticized mandatory minimums, joined the majority in *Alleyne*. The *Alleyne* Court noted the distinctive feature of mandatory minimum penalties: “an increased mandatory minimum” triggered by a “particular aggravating fact.”¹⁷³ Also, the Court’s opinion contrasted discretionary sentencing schemes with mandatory minimum sentences, “In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail.

¹⁷¹ 18 USC 924(c)(1)(A)(ii)–(iii) states as follows:

(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

¹⁷² *Alleyne*, 570 US at ___; 133 S Ct at 2155, 2158, 2160, 2161, 2163, 2164; 186 L Ed 2d at 321, 325, 327, 328, 330. As stated by *Alleyne*:

Harris drew a distinction between facts that increase the statutory maximum and facts that increase only the *mandatory minimum*. . . . *Mandatory minimum* sentences increase the penalty for a crime. It follows, then, that any fact that increases the *mandatory minimum* is an “element” that must be submitted to the jury. Accordingly, *Harris* is overruled.

* * *

While *Harris* limited *Apprendi* to facts increasing the statutory maximum, the principle applied in *Apprendi* applies with equal force to facts increasing the *mandatory minimum*.

* * *

. . . “the prosecution is empowered, by invoking the *mandatory minimum*, to require the judge to impose a higher punishment than he may wish.” (citations omitted)(emphasis supplied)

Id at ___; 133 S Ct at 2155, 2160, 2161; 186 L Ed 2d at 321, 327, 328.

¹⁷³ *Id.* at ___; 133 S Ct at 2161; 186 L Ed 2d at 328.

Our 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.”¹⁷⁴

Defendant wants this Court to extend *Alleyne* in a manner which is not merited. When the United States Supreme Court applied its decision to mandatory minimum sentences, it was applying its ruling to the specific type of sentence which had prompted widespread criticism.¹⁷⁵ This case, on the other hand, concerns a guidelines system geared to individualize sentences by multiple factors and which specifically permits departures from the guidelines if adequately articulated by the court. Michigan also treats mandatory minimum sentences differently than guidelines sentences. MCL 769.34(2) indicates, “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.”¹⁷⁶ The Michigan Sentencing Commission, when drafting the sentencing guidelines, evaluated the “usefulness of *mandatory minimum sentences* in a sentencing guidelines scheme.”¹⁷⁷ This Court recognized that, “[t]he Legislature has singled out these crimes as rare instances in which the sentencing court retains no discretion in sentencing.”¹⁷⁸

¹⁷⁴ *Id.* at ___; 133 S Ct at 2163; 186 L Ed 2d at 330.

¹⁷⁵ Defendant agrees that the term “mandatory minimum” had acquired a specific meaning by the time *Alleyne* was decided, but argues that *Alleyne* does not solely apply to the traditional definition of mandatory minimums. Appellant’s Brief at 11

¹⁷⁶ (emphasis provided)

¹⁷⁷ *Report of the Michigan Sentencing Commission, supra* p 8 (emphasis provided) 143b. The Commission ultimately concluded that “mandatory minimum sentences cannot be adequately debated and the issue resolved before a set of guidelines are developed and recommended to the Legislature.” *Id.*, p 9. 144b.

¹⁷⁸ *McCuller II*, 479 Mich at 683 n 9.

For a guidelines sentence, despite finding certain factors, the court is permitted to depart downward if a judge finds that there were factors that further individualize a defendant's case and merit consideration. In this case, the court happened to find that further individualization of the defendant's case supported an upward departure and gave a six-page, highly-involved, multi-faceted rationale for its decision.¹⁷⁹ The guidelines *structure* judicial sentencing discretion, but they do not eliminate it. Sentencing judges retain discretion both within the guidelines, which provide a sentence range and not a single fixed term, and outside the guidelines by virtue of the ability to depart from the guidelines' range for substantial and compelling reasons. These sentences are fundamentally different from mandatory minimum sentences, especially mandatory minimums in a determinate sentencing scheme.

Alleyne does not affect Michigan's sentencing guidelines. This Court "exercise[s] the power to declare a law unconstitutional with extreme caution and [it] never exercises it where serious doubt exists with regard to the conflict."¹⁸⁰ Moreover, as stated by the United States Supreme Court, courts should not intrude on the power of the Legislature "absent impelling reason to do so" because "administration of the justice system is among the basic sovereign prerogatives states retain."¹⁸¹ 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 from which the court may depart. As the Supreme Court observed, "The jury trial right is best honored through a 'principled rationale' that applies the rule of the *Apprendi* cases 'within the central

¹⁷⁹ 95b-96b.

¹⁸⁰ *Harper*, 479 Mich at 621 (citation omitted).

¹⁸¹ *Oregon v Ice*, 555 US 160, 168, 171; 129 S Ct 711; 172 L Ed 517 (2009) (indicating that fact-finding allowing consecutive sentences does not implicate the Sixth Amendment).

sphere of their concern,”¹⁸² not to invalidate a guidelines regime in an indeterminate sentencing state, a system which had been cited with approval in almost every Sixth Amendment Supreme Court opinion including *Alleyne* itself. This is not a circumstance where the sentencing system chosen by the Michigan Legislature “offends some principle of justice so rooted in the traditions and conscience of our people.”¹⁸³

ARGUMENT

III. EVEN ASSUMING THE COURT FINDS THAT THE UNITED STATES SUPREME COURT IMPLICITLY REPUDIATED ITS APPROVAL OF INDETERMINATE SENTENCING SYSTEMS AND HOLDS THAT MICHIGAN’S PRESENT GUIDELINES STRUCTURE VIOLATES *ALLEYNE*, THE APPROPRIATE REMEDY IS TO RENDER THE GUIDELINES ADVISORY.

Standard of Review and Issue Preservation:

See Argument I

Discussion:

If this Court determines that the United States Supreme Court has implicitly repudiated its approval of indeterminate sentencing systems, so that findings on the guidelines as well as factual findings supporting departures must be made by the jury based on proof beyond a reasonable doubt, MCL 769.34 as it stands would violate the Sixth Amendment. However, not only would the remedy defendant requests violate the separation of powers by requiring this Court to engage in comprehensive legislative action, the remedy would also have a system-shattering effect and would establish a procedure that the Legislature never intended. Even if this Court were to agree with defendant’s conclusion that mandatory minimums in a determinate sentencing scheme are the same as guidelines in an indeterminate sentencing system, then and only then, the appropriate remedy is to render the guidelines advisory.

¹⁸² *Id.* at 172.

¹⁸³ *Patterson*, 432 US at 201-202.

Contrary to defendant's claim, the Legislature has allowed no role for the jury at sentencing. "The authority to impose sentences and to administer the sentencing statutes enacted by the Legislature, lies with the judiciary"¹⁸⁴ and only the Legislature may circumscribe a trial judge's sentencing authority.¹⁸⁵ MCL 769.1(1) indicates, "*A judge of a court* having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court." The Legislature also requires "the court" or "a court" to impose both the maximum and minimum sentence.¹⁸⁶ MCL 769.34 lists a number of tasks specifically for "the court" including determining the minimum sentence by assessing the guidelines scores¹⁸⁷ and articulating substantial and compelling reasons to justify a departure.¹⁸⁸

Fact-finding is an essential component of sentencing. Sentencing is the community's response to crime, and the Legislature empowered the judiciary with the "unique role as the link between a defendant and a victim and between community values and the goals of the criminal justice system."¹⁸⁹ Indeterminate sentencing is a legislative delegation of constitutional authority to trial judges to tailor their sentences to the particular offender and the particular offense.¹⁹⁰ As stated by the Legislature, it is the responsibility of "the judge . . . by examining the defendant under oath, or otherwise, and by other evidence as can be obtained tending to indicate briefly the causes of the defendant's criminal character or conduct . . ."¹⁹¹ Moreover, "[b]efore the court

¹⁸⁴ *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001).

¹⁸⁵ *Houston*, 448 Mich at 327 n 10.

¹⁸⁶ MCL 769.9(2),(3). See also MCL 769.10, MCL 769.11, MCL 769.12. Also if "a probation order is revoked, *the court* may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made." MCL 771.4 (emphasis provided). The Legislature also indicated that if there were not substantial and compelling reasons for a departure from the guidelines, "the sentencing judge" must resentence the defendant. MCL 769.34(11).

¹⁸⁷ MCL 769.34(2).

¹⁸⁸ MCL 769.34(3).

¹⁸⁹ *People v Babcock*, 244 Mich App 65, 68; 624 NW2d 479 (2000) citing *People v Milbourn*, 435 Mich. 630, 670; 461 NW2d 1 (1990) (BOYLE, J., dissenting).

¹⁹⁰ *Id.*

¹⁹¹ MCL 769.8(2).

sentences a person charged with a felony . . . the probation officer shall inquire into the antecedents, character, and circumstances of the person, and shall report in writing to the court.”¹⁹² “The court” must also resolve challenges to the PSIR.¹⁹³ In fact, defendant notes that Justice Breyer in *Booker* cited very similar federal statutes when indicating that it was the courts, not juries, which possess the power to score the federal guidelines.¹⁹⁴

Booker rejected the argument that the defendant is making, that the guidelines as written could be constitutionally construed by engrafting a jury component onto the statutory language.¹⁹⁵ The state supreme courts in New Jersey and Ohio, after finding that their determinate sentencing schemes violated *Booker* or *Blakely*, also rejected defendants’ claims that their Legislatures intended that the juries would serve a role at sentencing.¹⁹⁶ The Ohio Supreme court noted that because its sentencing statutes do not provide for jury trials, the courts “lack[ed] jurisdiction to conduct a jury-sentencing hearing pursuant to the current statutes.”¹⁹⁷

In Michigan, there is no statutory authorization for the jury to sentence a defendant or to serve any role in sentencing and no mechanism for jury trials on sentencing guidelines. When Michigan allowed jury-findings on habitual offender informations, for example, the Legislature specifically granted this authority to juries and laid out the specific procedure for jury trials.¹⁹⁸

¹⁹² MCL 771.14(1).

¹⁹³ MCL 771.14(6).

¹⁹⁴ See Appellant’s Brief at 33 citing 18 USC 3553(a)(1) (indicating, “The court, in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant . . . ”); 18 USC 3661 (indicating, “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”) See also *Booker*, 543 US at 249 (BREYER, J.).

¹⁹⁵ *Booker*, 543 US at 250, 267.

¹⁹⁶ *Natale*, 184 NJ at 473 n 4; *State v Foster*, 109 Ohio St 3d 1, 26; 2006 Ohio 856; 845 NE2d 470 (2006) [abrogated in part by *Oregon v Ice*, 555 US at 160].

¹⁹⁷ *Foster*, 109 Ohio 3d at 26.

¹⁹⁸ MCL 769.11 was amended in 1994 by Public Act No. 110 to no longer allow jury trials on habitual offender informations.

Though defendant asserts that the statute is constitutional on its face, he requests that this Court legislate a role for a jury that presently does not exist.¹⁹⁹

In *United States v Jackson*,²⁰⁰ for instance, the Court rejected the Government's proposal that the statute could be saved from constitutional infirmity by reading it to authorize "by implication" the "convening [of a] special jury . . . for the sole purpose of deciding whether [the defendant] should be put to death" in a case in which the defendant had pleaded guilty or waived jury trial.²⁰¹ Noting that there was not "the slightest indication that Congress contemplated any such scheme," the Court rejected the Government's proposal.²⁰² The Court explained that "it would hardly be the province of the courts to fashion [such a] remedy" and that "any attempt to do so would be fraught with the gravest difficulties."²⁰³

The Court noted that among the difficult questions for courts to resolve would be: "If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy?"²⁰⁴ The Court explained that "it is one thing to fill a minor gap in a statute," but "quite another thing to create from whole cloth a complex and completely novel procedures . . . for the sole purpose of rescuing a statute from unconstitutionality."²⁰⁵ The Court observed, "The complex problems presented by separate penalty proceedings have frequently been noted . . . It

¹⁹⁹ In neither *Schriro v Summerlin*, 542 US 348; 124 S Ct 2519; 159 L Ed 2d 442 (2004) (a case cited by defendant) nor *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002) did the Court indicate that the Arizona sentencing scheme would be constitutional if the Court wrote in a jury trial component. Instead, the Court indicated that Arizona's sentencing scheme violated the Sixth Amendment and did not discuss remedy.

²⁰⁰ *United States v Jackson*, 390 US 570, 576-579; 88 S Ct 1209; 20 L Ed 2d 138 (1968).

²⁰¹ *Id.* at 576-577.

²⁰² *Id.* at 578.

²⁰³ *Id.* at 579.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 580.

is not surprising that courts confronted with such problems have concluded that their solution requires ‘comprehensive legislative and not piecemeal judicial action.’”²⁰⁶

The United States Supreme Court, mindful that “its constitutional mandate and institutional competence [are] limited,” has found that it must restrain itself from “rewrit[ing] state law to conform it to constitutional requirements” even as the Court “strive[s] to salvage it.” It stressed that the Court should “devise a judicial remedy that does not entail quintessentially legislative work.”²⁰⁷ It is defendant’s requested remedy which would violate the separation of powers by requiring that this Court engage in actions when any such actions are within the proper purview of the Legislature. Moreover the defendant’s remedy would establish a procedure the Legislature never intended and would be absolutely unworkable. As observed by the Supreme Court in *Booker*, to superimpose the constitutional requirement that the Court announced, would radically affect every case from decisions about whether to go to trial and plea negotiations, to the jury’s role in sentencing.²⁰⁸

Engrafting a role for juries at sentencing would create a system far more complex than our Legislature intended. For instance, for a crime against a person, a jury might have to answer as many as 50 different questions concerning the various subsections of offense variables 1-20. Moreover, facts which justify upward departure under Michigan’s sentencing guidelines are limited only by one’s imagination. In this case, the jury would have to apparently determine whether the defendant violated a no-contact provision on the date of the homicide, whether the

²⁰⁶ *Id.* at 578 n 15 (citations omitted).

²⁰⁷ *Ayotte v Planned Parenthood*, 546 US 320, 329; 126 S Ct 961; 163 L Ed 2d 812 (2006) (citation omitted). See also *Skilling v United States*, 561 US 358, 416, 423; 130 S Ct 2896; 177 L Ed 2d 619 (2010)(SCALIA, J., concurring in part and concurring in judgment) (indicating, “But I do not believe we have the power, in order to uphold an enactment, to rewrite it.”); *People v Cohen*, 467 Mich 874, 876; 651 NW2d 69 (2002)(CORRIGAN, J., concurring in denial of leave) (indicating that Courts are not allowed to write words into a statute to save it).

²⁰⁸ *Booker*, 543 US at 248.

defendant engaged in previous domestic violence incidents with this specific victim, the effect on not only one, but all three of the children, in witnessing their father (or adopted father) kill their mother in front of them, and whether the defendant abandoned the children to deal with their dying mother on the floor.²⁰⁹

The *Booker* Court also pointed out that “the sentencing statutes, read to include the Court’s *Sixth Amendment* requirement, would create a system far more complex than Congress could have intended.”²¹⁰ Justice Breyer had earlier noted the unworkability of jury decisions on the guidelines indicating in a given case the jury would have to determine the following:

A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.” Sentencing Guidelines, Part A, at 1.2.²¹¹

These are similar to many of the questions juries would have to resolve in Michigan.

As the United States Supreme Court noted in *Jackson*, this Court, under the guise of remedying the unconstitutionality of the guidelines, would also be forced to act as a super-legislature by creating rules to answer the following questions:

- Would a defendant be entitled to the same jury or a new jury?
- Would the prosecutor have to list all potential guidelines in the general information? A supplemental information?
- Since facts in the PSIR might provide a basis for an upward departure, is a defendant entitled to a jury trial regarding any alleged inaccuracies in a PSIR?

²⁰⁹ 95b-96b.

²¹⁰ *Booker*, 543 US at 254.

²¹¹ *Apprendi*, 530 US at 557 (BREYER J., dissenting).

- When would the trial judge articulate proposed reasons for an upward departure and how would those reasons be submitted to a jury?
- What if the trial judge wanted to depart but the People did not?
- Would discovery be required?
- How would jury trials in probation violations work? If a defendant were incarcerated, would a probation violation hearing in the form of a jury trial be required within fourteen days pursuant to MCR 6.445(C)?²¹² Or would the time limits need to be extended?
- Whether the rules of evidence would apply at the sentencing hearing?
- Whether the jury's inability to agree on a guideline or departure factor would require retrial on the entire case, on all sentencing-enhancing facts, or just the sentencing factor that caused disagreement?

Each of these questions raises issues of policy. The drastic effect of imposing such a remedy would involve a systemic overhaul.

Engrafting a jury-trial requirement also would put a defendant to a set of difficult strategic choices as to which prosecutorial claims he would contest such as, “I did not have any sexual contact with the victim at all (but I definitely did not penetrate her three times in a five year period and she was thirteen years old, not twelve²¹³) but if I did, I did not engage in predatory conduct with her and she wasn't a vulnerable victim.”²¹⁴ The Court in *Booker* also noted these problems indicating, “How could a defendant mount a defense against some or all such specific claims should he also try simultaneously to maintain that the Government's evidence failed to place him at the scene of the crime?”²¹⁵ The most obvious remedy could be bifurcated trials, but bifurcated jury trials in Michigan would lead to both an incredible back-log

²¹² This would conflict with MCL 771.4 which states that probation violation proceedings “shall be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials.” The Court would have to re-write yet another statute.

²¹³ MCL 777.43(1)(a).

²¹⁴ MCL 777.40(1)(a),(b).

²¹⁵ *Booker*, 543 US at 254, 256. See also *Apprendi*, 530 US at 557.

and high administrative costs since a defendant would be entitled to two juries on each felony.²¹⁶ For instance, in 2013 there were 12,078 felonies pending in Michigan's circuit courts according to the statistics kept by the State Court Administrative Office.²¹⁷

Engrafting a constitutional requirement on the guidelines would thwart the central goal of the guidelines, to ensure uniform sentencing.²¹⁸ This goal is met when judges base sentences on “real conduct” that underlies a conviction. If constitutional requirements would be engrafted on the guidelines, however, the court could not individualize the sentences based on real conduct but would have to depend on which aggravating factors the prosecution chose to charge or to which aggravating factors the defendant chose to plead to in the course of negotiations. The *Booker* Court noted these same problems²¹⁹ and found that “plea bargaining would likely lead to sentences that gave greater weight not to real conduct, but rather to the skill of counsel, the policies of the prosecutor, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime.”²²⁰

Also, judges in Michigan traditionally have sentenced after considering “full information regarding the defendant's character, background, and criminal record” without being hampered by restrictive rules of evidence. This has allowed the courts to make an informed judgment as to possibilities for rehabilitation, and to effectively utilize sentencing alternatives.”²²¹ Clearly,

²¹⁶ *Apprendi*, 530 US at 557; *Blakely*, 542 US at 336 (BREYER, J., dissenting)(“Our experience with bifurcated trials in the capital punishment context suggests that requiring them for run-of-the-mill sentences would be costly, both in money and in judicial time and resources.”); See also *Natale*, 184 NJ at 486-488.

²¹⁷ <http://www.Courts.mi.gov/education/stats/Caseload/Documents/Caseload/2013/Statewide.pdf>. (accessed November 7, 2014)

²¹⁸ *People v Peltola*, 489 Mich 174, 189 n 30; 803 NW2d 140 (2011); *Garza*, 469 Mich at 435; *Report of the Michigan Sentencing Guidelines Commission*, p 1, 6 (136b, 141b); MCL 769.33 repealed by 2002 PA 31 (after the Sentencing Guidelines Commission had completed its task).

²¹⁹ *Booker*, 543 US at 252-253, 256.

²²⁰ *Id.* at 256.

²²¹ *Fisher*, 442 Mich at 577.

engrafting the jury-trial requirements on the guidelines would inhibit the ability of courts to individualize the sentences which was a central goal of the guidelines.”²²²

Moreover, the Michigan Legislature would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* (which jury findings beyond a reasonable doubt would entail) than to adjust than *downward* because this would be at odds with the intent to appropriately individualize sentences. Departures upward and downward are especially important to the statutory scheme. Only the defendant would be able to appeal the decision of the jury since Double Jeopardy principles would be implicated.²²³ Permitting only lenient sentences without jury findings, but not more severe ones, destroys the fine legislative compromises that were necessarily involved in enacting such complex and comprehensive legislation.²²⁴

In *Booker*, the Court held that in light of the Court’s constitutional ruling, Congress would have intended that the guidelines serve an advisory purpose rather than engrafting the jury trial right onto the guidelines because *Booker*’s holding was “fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law.”²²⁵ The Court concluded that “[w]ithout the ‘mandatory’ provision [which the Court severed], the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.”²²⁶ In like manner, in New Jersey, the supreme court also found that the proper remedy for its determinate system

²²² *Booker*, 543 US at 251(indicating, “[f]ederal judges have long relied upon a presentence report, prepared by a probation officer, for information (often unavailable under *after* the trial) relevant to the manner in which the convicted offender committed the crime of conviction.) (emphasis original) See also *Natale*, 184 NJ at 487.

²²³ See: *Evans v Michigan*, ___US___; 133 S Ct 1069, 1074-1075; 185 L Ed 2d 124, 132 (2013). In rejecting a double-jeopardy attack on government appeals from sentences, for instance, the United States Supreme Court noted that the authority for such appeals “should lead to a greater degree in consistency in sentencing.” *United States v DiFrancesco*, 449 US 117, 143; 101 S Ct 426; 66 L Ed 2d 328 (1980).

²²⁴ See also *Booker*, 543 US at 257; *Foster*, 109 Ohio St 3d at 27.

²²⁵ *Booker*, 543 US at 246.

²²⁶ *Id.* See also *Rita v United States*, 551 US 338, 352; 127 S Ct 2456; 168 L Ed 2d 203 (2007)(affirming *Booker*’s remedy); *United States v Jones*, 574 US ___ (2014)(denying writ of certiorari when petitioners were challenging *Booker*’s remedy regarding acquitted counts).

which the Court had found violated *Blakely*, was to sever the part of the statute establishing a presumptive sentence because this remedy “will best preserve the major elements of our sentencing code and cause the least disruption to our criminal justice system: eliminating the presumptive terms.”²²⁷ Likewise the Ohio Supreme Court found that “[s]everance also is the remedy that will best preserve the paramount goals of community safety and appropriate punishment and the major elements of our sentencing code.”²²⁸ The state legislatures in Indiana and Tennessee, consistent with *Booker*, also changed their presumptive ranges in their determinate schemes to advisory ranges.²²⁹

In Michigan as well, if the guidelines are found to be the equivalent to mandatory minimums, severing the mandatory provision of MCL 769.34(2) would cure any constitutional infirmity rather than invalidating the entirety of the guidelines.²³⁰ “This Court has long recognized that ‘[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an [act] and still leave it complete and operative then such remainder of the ordinance be permitted to stand.’”²³¹ Therefore, the preferred remedy is severance of the offending statute.²³² When the general object of the act can still be achieved without the invalid

²²⁷ *Natale*, 184 NJ at 487.

²²⁸ *Foster*, 109 Ohio St 3d at 30.

²²⁹ *State v Pollard*, 432 SW3d 851, 858 (Tenn, 2013); *Anglemyer v State*, 868 NE2d 482, 487-488 (Ind, 2007).

²³⁰ See: *Lockridge*, 304 Mich at 286, 309-311 (BECKERING, J., concurring); *Id.* at 316 (SHAPIRO J., concurring).

²³¹ *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 345; 806 NW2d 683 (2011) quoting *Eastwood Park Amusement Co v East Detroit Mayor*, 325 Mich 60, 72; 38 NW2d 77 (1949).

²³² 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

(footnote continued next page)

part, the act will be upheld.²³³

Ultimately, even if this Court decides that judge-made findings on the guidelines are unconstitutional, engrafting the Sixth Amendment requirement onto the guidelines not only would require wholesale re-writing of our sentencing code, but it would also be infeasible. This “remedy” would not only affect a large volume of cases but would create new crimes with multiple components which would complicate trials for juries. Moreover, many fine-grain determinations are collateral to the basic question of guilt and better addressed at sentencing. The least invasive remedy (assuming that any remedy is needed) would be to render the guidelines advisory.

Moreover, Michigan has experience with advisory guidelines because the pre-1999 judicial guidelines were advisory.²³⁴ The primary flaw of these guidelines was not that they were discretionary, but that rather than providing a considered statement of public policy regarding criminal sentencing, the guidelines merely mirrored the sentencing practices of judges across the state, only accounted for about 100 offenses, and were criticized as being overly simplistic. These problems were fixed by the legislative guidelines.²³⁵ What remains of the act will fulfill the Legislature’s purpose underpinning the guidelines.²³⁶ It cannot be forgotten that the citizens, by passing a constitutional amendment, specifically indicated that they wanted indeterminate

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.

²³³ *Republic Airlines, Inc. v Department of Treasury*, 169 Mich App 674; 427 NW2d 182 (1988) citing 2 Sutherland, *Statutory Construction* (4th ed) § 44.07, p 503. Even under defendant’s approach he agrees severance of some portions of the guidelines’ statutes would be required. See Appellant’s Brief at 37

²³⁴ *Hegwood*, 465 Mich at 438-439 (indicating, “At the time it enacted these guidelines, the Legislature opted for a system with many features that were easily recognizable by courts familiar with the format previously employed in Michigan.”).

²³⁵ *Garza*, 469 Mich at 434 n 7; *Houston*, 228 Mich at 326 n 8, 329 n 12; *Merriweather*, 447 Mich at 807; House Legislative Analysis, HB 5419, May 12, 1998 p 2, 8 (98b, 104b), September 23, 1998 p 2, 9 (110b, 117b); Senate Fiscal Agency Bill Analysis, SB 826, October 23, 1998, p 9 (129b).

²³⁶ *In re Request for Advisory Opinion*, 490 Mich at 346.

sentencing²³⁷ and in the past the Legislature specifically dispensed with jury trials on habitual offender informations,²³⁸ strong indications that the Legislature would not chose jury trials on facts supporting the guidelines and departures.

Ultimately, if this Court finds that MCL 769.34 violated *Alleyne*, the remedy which would best effectuate the goals of the Legislature and would avoid the system-shattering remedy suggested by defendant, would be to render the guidelines advisory as the United States Supreme Court did with the federal guidelines in *Booker*.

ARGUMENT

IV. WHEN THE EVIDENCE SUPPORTING THE GUIDELINES SCORE AS WELL AS THE DEPARTURE WAS OVERWHELMING, DEFENDANT HAS FAILED TO SHOW PLAIN ERROR.

Standard of Review and Issue Preservation:

Defense counsel did not preserve his claim at sentencing. As stated by this Court:

Blakely errors are not structural, but are subject to harmless error analysis. See also *Washington v Recuenco*, 548 US 212; 126 S Ct 2546, 2551; 165 L Ed 2d 466 (2006). Here, defendant did not raise any constitutional challenge during sentencing. Therefore, defendant must show plain error affecting substantial rights. [*People v*] *Carines*, [460 Mich 750] 763-764[; 597 NW2d 130 (1999)] see also *United States v Trujillo-Terrazas*, 405 F3d 814, 817-818 (CA 10, 2005) (applying the same plain error standard to an unpreserved claim of a *Blakely* violation). “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.”” *Carines*, [460 Mich] at 763, quoting *United States v Olano*, 507 US 725, 736; 113 S Ct 1770; 123 L Ed 2d 508 (1993).²³⁹

Discussion:

In any event, defendant has failed to show plain error. As defendant acknowledges, the jury verdict supports the scoring of OV 3, MCL 777.33(1)(c), and OV 6, MCL 777.36(1)(c).

²³⁷ *Lorentzen*, 387 Mich at 179-180.

²³⁸ MCL 769.11 amended by 1994 PA 110. The proposed bill concerning changes to the sentencing guidelines, does not even anticipate jury findings. 2014 HB 5928 (162b-181b).

²³⁹ *McCuller II*, 479 Mich at 695.

Defense counsel specifically agreed with the score on OV 5 for serious psychological injury to the children, MCL 777.35(1)(a),²⁴⁰ and therefore waived any claims in the scoring of this variable.²⁴¹ There was also overwhelming evidence that serious psychological injury was inflicted on the victim's children which would support the OV 5 score. This was supported by the trial evidence as well as the PSIR.²⁴² Michigan courts have long held that a sentencing court may presume that unchallenged facts contained in the PSIR are accurate. In fact, the sentencing judge departed because the psychological injury to the victim's children was inadequately considered in the guideline.²⁴³ With the points assessed for OV 3, 5, and 6, the guidelines would remain the same.²⁴⁴

Moreover, the facts justifying the departure were overwhelmingly supported by the record.²⁴⁵ Defense counsel already acknowledged that he was not disputing OV 5, that serious psychological injury occurred to the children, counsel just disputed that the court should depart based on these facts.²⁴⁶ The defendant also admitted that he was in violation of the no contact provision.²⁴⁷ Clearly the domestic violence escalated because the victim was killed during this incident.²⁴⁸ Defendant also admitted that the children were present when he took the victim in a chokehold, and admitted that he left the children with their mother.²⁴⁹ Defendant does not

²⁴⁰ 89b.

²⁴¹ *Harper*, 479 Mich at 642 n 72.

²⁴² See 155b, 158b.

²⁴³ *Lockridge*, 304 Mich App at 283 (Opinion of the Court).

²⁴⁴ See *McCuller II*, 479 Mich at 695, 697.

²⁴⁵ *Lockridge*, 304 Mich at 283 (Opinion of the Court). See *McCuller II*, 479 Mich at 698 (indicating that defendant failed to demonstrate plain error when "the factors underlying the scoring of the OVs were uncontested and supported by overwhelming evidence.")

²⁴⁶ 89b.

²⁴⁷ 68b, 73b-74b, 94b, 154b, 157b.

²⁴⁸ 8b, 10b, 22b, 27b, 57b-59b, 65b-68b, 154b-155b, 159b-161b.

²⁴⁹ 71b, 76b, 78b, 79b, 154b-155b, 156b See also 3b-8b, 20b-21b, 29b.

suggest that he would offer contrary evidence if given the opportunity to do so.²⁵⁰ Whether the facts merited a departure was ultimately up to the judge.²⁵¹

Accordingly, even if the court had violated *Alleyne* at sentencing, “defendant would not be entitled to resentencing because he has not shown that the error ‘seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.’”²⁵² Thus, if any error, it was not plain.

²⁵⁰ *McCuller II*, 479 Mich at 697.

²⁵¹ See *United States v Runyon*, 707 F3d 475, 516 (CA 4, 2013) cert den ___US___ (2014) (indicating that the ultimate legal decision to impose the death penalty was not a factual determination, but a complex moral judgment and therefore could be decided by the judge); In accord *United States v Barrett*, 496 F3d 1079, 1107-1108 (CA 10, 2007).

²⁵² *McCuller II*, 479 Mich at 698 citing *Carines*, 460 Mich at 763.

RELIEF

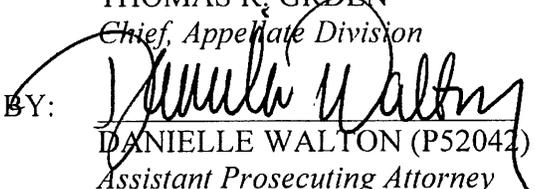
WHEREFORE, the People respectfully request that this Honorable Court affirm the Court of Appeals' decision.

Respectfully submitted,

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