

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

RAHIM OMARKHAN LOCKRIDGE

Defendant-Appellant.

_____ /JK

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Supreme Court No.

Court of Appeals No. 310649

Lower Court No. 11-238930FC

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NOTICE OF HEARING
DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Rahim Omarkhan Lockridge was convicted of involuntary manslaughter on May 4, 2012, after a jury trial in Oakland County Circuit Court before the Honorable Nanci J. Grant. On May 31, 2012, Mr. Lockridge was sentenced to 8 to 15 years' imprisonment.

Mr. Lockridge appealed as a matter of right, challenging the departure from the sentencing guidelines, as well as the constitutionality of the sentencing guidelines, in light of the recent decision of the United States Supreme Court in *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

In a published decision issued February 13, 2014, the Court of Appeals affirmed the sentence. The Court denied the challenge to the trial court's departure from the sentencing guidelines. However, the Court split on the question of whether *Alleyne* applies to the Michigan Sentencing Guidelines, and thus, requires resentencing in this case. Specifically, Judge O'Connell followed the decision issued in *People v Herron*, 303 Mich App 392; ___ NW2d ___ (2013), which held that *Alleyne* does not implicate the Michigan sentencing scheme. *Herron* was the first published decision of the Court of Appeals regarding the applicability of *Alleyne* in Michigan.¹ However, in the decision below, Judge Beckering and Judge Shapiro disagreed with the outcome of *Herron*, and themselves reached two different conclusions concerning the effect of *Alleyne* in Michigan. [Opinion, Appendix B]²

Because the Court below split three ways on the *Alleyne* issue, indicating that this case involves legal principles of major significance to the state's jurisprudence, leave to appeal should

¹ An application for leave to appeal the *Herron* decision is currently pending in this Court.

² It is noteworthy also that Court of Appeals Judge Beckering recently dissented on this same basis in *People v Bailey*, unpublished decision issued March 6, 2014, Docket No 309879.

be granted. MCR 7.302 (B)(3). Alternatively, if this Court decides or has already decided to grant leave to consider this same question in *Herron*, then Mr. Lockridge prays that this case be held in abeyance pending issuance of a decision in *Herron*.

STATEMENT OF QUESTIONS PRESENTED

- I. WERE MR. LOCKRIDGE'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS VIOLATED BY JUDICIAL FACT FINDING, WHICH INCREASED THE FLOOR OF THE PERMISSIBLE SENTENCE, IN VIOLATION OF *ALLEYNE V UNITED STATES*?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- II. IS MR. LOCKRIDGE ENTITLED TO BE RESENTENCED, WHERE THE REASONS GIVEN FOR DEPARTING FROM THE GUIDELINES WERE NEITHER SUBSTANTIAL NOR COMPELLING, AND WERE ADEQUATELY ACCOUNTED FOR IN THE SCORING OF THE SENTENCING GUIDELINES. ADDITIONALLY, IS REASSIGNMENT WARRANTED UPON REMAND, WHERE THE SENTENCING JUDGE CANNOT REASONABLY BE EXPECTED TO SET ASIDE PREVIOUSLY EXPRESSED VIEWS?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The charges in this case alleged that on September 19, 2011, Defendant-Appellant Rahim Omarkhan Lockridge choked and killed his wife, Kenyatta Lockridge, during an argument. Mr. Lockridge admits that he put his wife in a headlock. However, he did so in response to her from striking him and did not intend to harm her.

Mr. Lockridge was initially charged with open murder. At the end of the Prosecution's case, the trial court directed a verdict of acquittal regarding first-degree murder but retained the charge of second-degree murder. [Trial 5/1/12, 151]. The judge later granted the Prosecution's request to instruct the jury on the lesser included offense of involuntary manslaughter as a lesser charge. [Trial 5/1/12, 231].

Mr. Lockridge was convicted of involuntary manslaughter [MCL 750.321] on May 4, 2012, after a jury trial in Oakland County Circuit Court before the Honorable Nanci J. Grant. On May 31, 2012, Mr. Lockridge was sentenced to 8 to 15 years' imprisonment.

Mr. Lockridge appealed as a matter of right. In a published decision issued February 13, 2014, the Court of Appeals affirmed the challenge to the trial court's departure from the sentencing guidelines. However, Judge Beckering and Judge Shapiro disagreed with Judge O'Connell's opinion with respect to the applicability of *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013) to the Michigan Sentencing Guidelines. [Opinion, Appendix B]

Death of Ms. Lockridge

On September 19, 2011, Ms. Lockridge took her three daughters to the mall. [Trial 4/30/12, 152 (Kayauna Lewis)]. Upon returning home, Ms. Lockridge found less cash than she

expected in her wallet. [Trial 4/30/12, 153 (Kayauna Lewis)]. She became angry about the missing money. [Trial 4/30/12, 196 (Kayauna Lewis), 238 (Ravyn Lockridge)].

Ms. Lockridge went upstairs to the master bedroom and accused Mr. Lockridge of taking money from her purse. [Trial 4/30/12, 221, 239 (Ravyn Lockridge)]. She knocked a game controller out of his hand. [Trial 5/1/12, 174 (Mr. Lockridge)] They had a loud verbal argument. [Trial 4/30/12, 222, 241 (Ravyn Lockridge), 258 (Kaelyn Lockridge)].

Ms. Lockridge was a "big woman," at 5'7" tall and 183 pounds, about the same size as Mr. Lockridge, who was 5'11" or 6' and 195 pounds. [Trial 4/30/12, 286 (Dr. Dragovic); Trial 5/1/12, 176 (Mr. Lockridge)]. She punched him in the face twice. [Trial 5/1/12, 175 (Mr. Lockridge)]. Mr. Lockridge tried to leave the bedroom, but Ms. Lockridge grabbed his leg to prevent him from leaving. [Trial 5/1/12, 178 (Mr. Lockridge)]. Mr. Lockridge managed to escape the bedroom, but Ms. Lockridge followed him down the stairs. [Trial 4/30/12, 157, 199, 203 (Kayauna Lewis), 224 (Ravyn Lockridge); Trial 5/1/12, 178 (Mr. Lockridge)]. While coming down the stairs, the couple pushed and hit each other as Mr. Lockridge struggled to get away. [Trial 4/30/12, 157, 199 (Kayauna Lewis)].

At the bottom of the stairs, Ms. Lockridge hit Mr. Lockridge in the face several more times. [Trial 5/1/12, 180 (Mr. Lockridge)]. Mr. Lockridge placed his arm around Ms. Lockridge's neck in a headlock, to subdue her while Ms. Lockridge continued to scratch and hit him. [Trial 4/30/12, 159, 205 (Kayauna Lewis), 229 (Ravyn Lockridge)]. Kayauna Lewis, their eldest daughter, attempted to break up the fight. [Trial 4/30/12, 160 (Kayauna Lewis), 226 (Ravyn Lockridge)]. Mr. Lockridge held Ms. Lockridge for approximately ten seconds. [Trial 4/30/12, 229 (Ravyn Lockridge)]. Finally, once Mr. Lockridge felt that Ms. Lockridge had calmed, he released her and she slid down. [Trial 4/30/12, 164, 206, 216 (Kayauna Lewis), 227

(Ravyn Lockridge); Trial 5/1/12, 182 (Mr. Lockridge)]. He left the house to avoid further confrontation, unaware that his wife was hurt. [Trial 5/1/12, 185, 187 (Mr. Lockridge)]. He recalled that she was still breathing when he left. [Trial 5/1/12, 82]

Kayauna called 911. [Trial 4/30/12, 165 (Kayauna Lewis)]. Ms. Lockridge was declared dead at the hospital. Dr. Ljubisa J. Dragovic, a forensic pathologist, opined that Ms. Lockridge's death was caused by asphyxia due to neck compression. [Trial 4/30/12, 310 (Dr. Dragovic)]. Aside from symptoms of asphyxiation, Dr. Dragovic found no other injuries on Ms. Lockridge's body. [Trial 4/30/12, 312-13 (Dr. Dragovic)]. The autopsy revealed that Ms. Lockridge had alcohol and cannabis in her system at the time of her death, both of which could have affected her behavior. [Trial 4/30/12, 288-89, 321-22 (Dr. Dragovic)].

When the police arrested Mr. Lockridge later that night, they observed that Mr. Lockridge had "fresh red bloody scratches on his right cheek" and red eyes. [Trial 5/1/12, 56 (Officer Kennedy)]. Specialist Meyer, who photographed Mr. Lockridge, observed that he had scratches on his forehead and neck, blood in his right eye, swelling on his left eye and face, and a scratch on his leg. [Trial 5/1/12, 71-72, 75-76 (Specialist Meyer)].

Prior Acts of Domestic Violence

At trial, the Prosecution examined two police officers who had previously arrested Mr. Lockridge for domestic violence. Officer Duley described the 2007 incident in which he arrested Mr. Lockridge, observing that Mr. and Ms. Lockridge both had injuries. [Trial 5/1/12, 116 (Officer Duley)]. Officer Restum testified that he arrested Mr. Lockridge for domestic violence again in 2010. [Trial 5/1/12, 130 (Officer Restum)]. Though the 2007 charge was dismissed, Mr. Lockridge was convicted of disorderly conduct and resisting arrest after the 2010 incident.

[Presentence Investigation Report³, 10-11 (hereinafter "PSIR")]. As a result of the conviction, Mr. Lockridge received probation and was ordered to have no contact with his wife. [PSIR, 11]. At the time of the instant incident, Mr. Lockridge had two days left of his probation. [Sentencing 5/31/12, 38].

Mr. Lockridge's daughters described a pattern of violence that was not one-sided. All three testified that their parents had several physical fights prior to the instant offense. [Trial 4/30/12, 184 (Kayauna Lewis), 233 (Ravyn Lockridge), 271-72 (Kaelyn Lockridge)]. In these fights, Mr. Lockridge generally instigated the verbal conflict while Ms. Lockridge escalated the argument into physical confrontation. [Trial 4/30/12, 214 (Kayauna Lockridge)]. Once a fight began, Mr. Lockridge would leave the home to avoid further physical attack from his wife. [Trial 4/30/12, 208 (Kayauna Lewis), 252-53 (Ravyn Lockridge); Trial 5/1/12, 160 (Mr. Lockridge)]. Mr. Lockridge described one fight in 2009 in which his wife hit him repeatedly and threatened him with a knife. [Trial 5/1/12, 162-63 (Mr. Lockridge)]. He did not call the police because he did not want to get his wife into trouble. [Trial 5/1/12, 164-650 (Mr. Lockridge)]. He also recalled that she had hurled a dog cage at him once, hitting him in the head. [Trial 5/1/12, 179]

Sentencing

In the Sentencing Information Report, Mr. Lockridge was placed in the D-V cell of the C grid, with a recommended minimum sentencing range of 43 to 86 months. [Sentencing Information Report, Appendix A] Those guidelines, in turn, were based in part on 25 points under OV 3, for "life threatening or permanent incapacitating injury occurred to a victim"; 15 points under OV 5, for "serious psychological injury requiring professional treatment occurred to

³ The Presentence Investigation Report is being sent to the Court separately from this pleading.

a victim's family member"; and 10 points under OV 9, for "2 to 9 victims were placed in danger of injury or death or 4 to 19 victims were placed in danger of property loss"; and 10 points under OV 10, for "the offender exploited a victim's physical disability, mental disability, or youth or agedness, or a domestic relationship or the offender abused his or her authority status."

Judge Grant departed upward from the guidelines, sentencing Mr. Lockridge to an 8 year (96 month) minimum term. [Sentencing 5/31/12, 47]

In explaining the reasons for exceeding the guidelines, Judge Grant

- Held that Mr. Lockridge's attorney was unfairly "blaming the victim" by explaining that Mr. Lockridge unintentionally killed his wife while defending himself from her attack. [Sentencing 5/31/12, 41].
- Cited her experience dealing with other domestic violence cases, observing that women were usually the victims of abusive men. [Sentencing 5/31/12, 43, 44].
- Concluded that the fight was entirely Mr. Lockridge's fault because he violated the court order prohibiting contact with his wife. [Sentencing 5/31/12, 43].
- Opined that Mr. Lockridge was guilty of second degree murder rather than involuntary manslaughter. [Sentencing 5/31/12, 46].
- Summarily stated that "based on everything that [she] saw, based on the prosecutor's argument..., based on [the defendant's] prior record, based on the extreme violence that was happening, based on the fact that [the defendant left the home after the incident], based on the fact that she may have hit him but he put her in a chokehold," there were "substantial and compelling" reasons for an upward departure from the statutory sentencing guidelines. [Sentencing 5/31/12, 46-47].

I. MR. LOCKRIDGE'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY JUDICIAL FACT FINDING, WHICH INCREASED THE FLOOR OF THE PERMISSIBLE SENTENCE, IN VIOLATION OF *ALLEYNE V UNITED STATES*.

Standard of Review. This issue raises a constitutional challenge, which is reviewed de novo. Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Issue Preservation. This challenge was not raised in the trial court below. It could not have been raised, because the precedent upon which it relies is of recent vintage. It is still reviewable, however, because it constitutes plain error that affected the Defendant's substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750 (1999).

Discussion

Mr. Lockridge's sentencing violates the Sixth and Fourteenth Amendments to the United States Constitution because the trial court engaged in judicial fact-finding that increased the floor of the range of permissible sentence in violation of the rule of *Alleyne v United States*, 133 S Ct 2151 (2013); US Const Amends VI & XIV.

Judges have discretion to find facts which influence judicial discretion *within* the range of permissible sentences authorized by the jury verdict or admissions of a defendant. However, the Sixth and Fourteenth Amendments constrain judges from finding facts which increase either the floor or the ceiling of the range of permissible sentences. Here, the court's scoring of Offense

Variables 3, 5, 9 and 10 required it to find facts beyond those established by Mr. Lockridge's jury. These findings and their influence on Mr. Lockridge's sentencing guideline range increased the floor of the permissible sentence and thus invaded the province of the jury, as protected by the Sixth and Fourteenth Amendments. For this reason, Mr. Lockridge is entitled to resentencing.

A. Apprendi and its Progeny

The Sixth Amendment to the United States Constitution provides, in part, that criminal trials shall be "by an impartial jury." The Fourteenth Amendment to the United States Constitution provides, in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law" The United States Supreme Court has held that, taken together, "these rights indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v New Jersey*, 530 US 466, 477 (2000) (internal quotation omitted). Regarding sentencing, the power reserved by the jury to determine every element of the crime means the judge's role "is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id.* at 482 n 10.

A corollary of the above rule is this: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* at 490. For *Apprendi* purposes, the "statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v Washington*, 542 US 296, 303 (2004) (emphasis in original). *Apprendi* and *Blakely* established

the rule that judges may not find facts which increase the ceiling of permissible sentences and this includes a sentencing guidelines range.

For a time, the United States Supreme Court held that *Apprendi* did not prohibit judicial fact-finding which increased the minimum sentence. See *Harris v United States*, 536 US 545, 557 (2002). However, *Harris* was recently overruled by *Alleyne v United States*, 133 S Ct 2151 (2013). After *Alleyne*, “it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment.” 133 S Ct at 2161.

In *Alleyne*, the defendant was convicted by a jury of offenses including robbery affecting interstate commerce. 18 USC 1951(a). The jury indicated on the verdict form that the defendant “[u]sed or carried a firearm during and in relation to a crime of violence,” but made no indication the defendant had “brandished” the firearm. The penalty for the offense was 5 years of imprisonment, but was elevated to 7 years where a defendant had brandished a firearm. Because there was no jury finding on this point, the judge made the finding and sentenced the defendant with the elevated minimum. *Id.* at 2155-2156. The *Alleyne* Court noted *Apprendi* only concerned statutory maximums, and that *Harris* had declined to extend *Apprendi* to statutory minimums. The *Alleyne* Court agreed “*Harris* was wrongly decided and that it cannot be reconciled with our reasoning in *Apprendi*.” *Id.* at 2158. The Court concluded “Just as the maximum of life marks the outer boundary of the range, so seven years marks its floor. And because the legally prescribed range *is* the penalty affixed to the crime, *infra*, this page, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.” *Id.* at 2160 (emphasis in original, internal citation omitted). Further, “It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime.” *Id.* *Alleyne* overruled *Harris* and extended *Apprendi* to minimum sentences. *Alleyne*

establishes the rule that judges may not find facts which increase the floor of permissible sentences.

B. Alleyne and Michigan's Sentencing Guidelines.

The *Alleyne* case should apply in Michigan because Michigan's sentencing guidelines produce a mandatory sentencing range which is the equivalent of a mandatory minimum term. Although there is a departure provision under MCL 769.34(3), this does not preclude application of the *Alleyne* rule to Michigan's sentencing guidelines.

As an initial matter, our statutory sentencing guidelines produce a range that is mandatory in nearly all respects. The trial court *must* consider the sentencing guidelines range and *must* sentence within that range absent substantial and compelling reasons. MCL 769.34 (2).

The limited departure provision available under MCL 769.34 (3) does not diminish the mandatory nature of the guidelines range. In the cases leading up to the *Alleyne* decision, the United States Supreme Court concluded there was no problem with application of the *Apprendi* rule to a sentencing scheme that contained a departure provision similar to that in Michigan. The cases illustrating this point are *Booker v United States*, 543 US 220, 233-235 (2005) (departure provision under federal guidelines did not preclude relief); *Cunningham v California*, 549 US 270, 289 (2007) (availability of departure from middle term did not preclude relief); and *Blakely v Washington*, 542 US 296, 305 (2004) (departure provision for substantial and compelling reasons did not preclude relief).

As the Court explained in *Booker*, the availability of a departure provision is limited to a very small subset of cases:

The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. The Guidelines permit departures from the prescribed sentencing range in cases in which the judge "finds that there exists

an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV). At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. It was for this reason that we rejected a similar argument in *Blakely*, holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for “‘substantial and compelling reasons,’ ” that exception was not available for *Blakely* himself. 542 U.S., at 299, 124 S.Ct. at 2535. The sentencing judge would have been reversed had he invoked the departure section to justify the sentence. *Booker*, 543 US at 234-235.

In *Cunningham v California*, *supra*, the Supreme Court similarly concluded that a state law departure provision did not convert an otherwise presumptive sentence into a discretionary sentence to which the *Apprendi* rule did not apply:

The *Black* court's [*People v Black*, 35 Cal 4th 1238 (2005)] conclusion that the upper term, and not the middle term, qualifies as the relevant statutory maximum, rested on several considerations. First, the court reasoned that, given the ample discretion afforded trial judges to identify aggravating facts warranting an upper term sentence, the DSL

“does not represent a legislative effort to shift the proof of particular facts from elements of a crime (to be proved to a jury) to sentencing factors (to be decided by a judge)... Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury.” *Id.*, at 1256, 29 Cal. Rptr. 3d 740, 113 P.3d. at 544 (footnote omitted).

We cautioned in *Blakely* however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. 542 U.S., at 305, and n. 8, 124 S. Ct. 2531. [549 US at 289.]

Blakely, *Cunningham* and *Booker* make clear that a presumptive sentencing range with a limited departure provision qualifies as the statutory maximum sentence (or here, the statutory minimum sentence) for *Apprendi* purposes.

Moreover, Michigan's sentencing guidelines ranges can only be viewed as a "mandatory minimum sentence" as that term is understood. Before March 1, 2003, Michigan had a series of "mandatory minimum" sentences under the former drugs laws, and those mandatory minimum terms contained a departure provision for substantial and compelling reasons. MCL 333.7401 (3) (pre-2003). Yet the Michigan Supreme Court referred to these sentences as "mandatory minimum" sentences, as did virtually all parties within the criminal justice system. See *People v Fields*, 448 Mich 58, 76, 77 (1995).

And Michigan's "mandatory minimum" sentencing guidelines ranges are comparable to the mandatory minimum term struck down in *Alleyne*. The sentencing judge in *Alleyne* had the authority to sentence below the seven-year mandatory minimum term if the defendant provided substantial assistance to the government. See United States Sentencing Guidelines § 5k1.1; Fed Rule Crim Pro 35(b). Yet the trial judge's ability to depart below the mandatory minimum term in *Alleyne* did not preclude application of the *Apprendi* rule. No one ever questioned this premise.

In short, Michigan's departure valve under MCL 769.34 (3) does not preclude an *Alleyne* challenge. And the Michigan sentencing guidelines range constitutes the "floor" for *Alleyne* purposes.

C. Drohan Does not Speak to Minimum Sentences

Michigan courts have operated on the premise that the *Apprendi* rule, applied to sentencing guidelines via *Blakely*, does not apply to Michigan's sentencing scheme. However, the rationale behind that premise relied on aspects of maximum sentences in Michigan's scheme which are not common to minimum sentences in Michigan's scheme. Whether or not maximum sentences, the "ceiling" of permissible sentences, continue to be unaffected by *Apprendi* and *Blakely* in Michigan, minimum sentences, the "floor" of permissible sentences, clearly are affected by *Alleyne*.

In *People v Drohan*, 475 Mich 140 (2006), the Michigan Supreme Court held *Blakely* did not apply to Michigan's sentencing scheme. However, the Court *only* dealt with the definition of a "maximum sentence." The defendant in *Drohan* argued the upper end of the guidelines range, referred to as the "maximum-minimum" by the *Drohan* Court, constituted the "statutory maximum" for *Blakely* purposes. *Id.* at 162. The Court concluded to the contrary, and relied on the fact that Michigan's indeterminate sentencing scheme sets a maximum term, determined by statute. The *Drohan* Court concluded this is the "maximum sentence," or ceiling, for *Blakely* purposes. *Id.* at 163-164. The *Drohan* Court noted that a defendant has no guarantee of release at the completion of his minimum sentence, and may well remain in prison until completion of the maximum sentence. *Id.* at 163-164.

Since no judicial fact-finding impacts the "maximum sentence" defined in this manner, and because *Apprendi* had not been extended to minimum sentences at that time, the *Drohan*

Court was able to conclude that when a defendant received a sentence under the “statutory maximum,” the defendant “received all the protections he was entitled to under the Sixth Amendment.” *Id.* at 163. We now know that statement was erroneous.

The Sixth Amendment also protects a defendant from having the floor of the permissible sentences escalated by judicial fact-finding. *Alleyne*, 133 S Ct at 2161. As discussed above, the floor of permissible sentences in Michigan’s sentencing scheme is the low end of the sentence or the range produced by the sentencing guidelines. The rationale which the *Drohan* Court used to hold the upper end of the “sentencing range” is not a “statutory maximum” for *Blakely* purposes is inapplicable to the question of whether the lower end of the “sentencing range” is a “statutory minimum” for *Alleyne* purposes. Given that there is no guidance from a higher Michigan court on this issue, this Court should apply the straightforward language of *Apprendi* and *Alleyne* and conclude, as demonstrated above, that *Alleyne* applies in Michigan.

D. The Impact on Mr. Lockridge’s Sentence

Mr. Lockridge’s sentencing guideline range should be 19 to 38 months, but it was raised to 43 to 86 months based on the finding of several facts by the judge that elevated the total Offense Variable score. Mr. Lockridge’s jury found him guilty of involuntary manslaughter. The jury did not find that the decedent suffered life threatening or permanent incapacitating injury (OV 3), or that a family member suffered serious psychological injury (OV 5), or that 2 to 9 victims were placed in danger of physical injury or death (OV 9), or that Mr. Lockridge exploited a vulnerable victim (OV 10). The scoring of these variables required additional factual findings from the sentencing judge. If OV 3, 5, 9 and 10 were scored at zero, the sentencing

guidelines range would be 19 to 38 months.⁴ For this reason, Mr. Lockridge should be resentenced within a range of permissible sentences in which the floor is not elevated by judicial fact finding.

⁴ 10 points under OV 6 are not being challenged, because they are consistent with the jury verdict. Based on these points, Mr. Lockridge's total OV points are 10, which results in the D-II cell, with guidelines of 19 to 38 months.

II. MR. LOCKRIDGE IS ENTITLED TO BE RESENTENCED, WHERE THE REASONS GIVEN FOR DEPARTING FROM THE GUIDELINES WERE NEITHER SUBSTANTIAL NOR COMPELLING, AND WERE ADEQUATELY ACCOUNTED FOR IN THE SCORING OF THE SENTENCING GUIDELINES. ADDITIONALLY, REASSIGNMENT IS WARRANTED UPON REMAND, WHERE THE SENTENCING JUDGE CANNOT REASONABLY BE EXPECTED TO SET ASIDE PREVIOUSLY EXPRESSED VIEWS.

Standard of Review and Issue Preservation

A trial court must have a substantial and compelling reason to depart from the sentencing guidelines and must state that reason on the record. MCL 769.34(3). The reason must be objective and verifiable. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008).

Each step of the departure analysis requires a different standard of review. First, the reason given for the departure is reviewed for clear error. *Id.* at 300. Second, the determination that a reason is objective and verifiable is reviewed *de novo*. *Id.* Finally, the determination that the reason is sufficiently substantial and compelling to justify the departure is reviewed for abuse of discretion. *Id.* The amount of the departure is also reviewed for abuse of discretion. *Id.*

There is no preservation requirement for challenging a sentencing departure. *Smith*, *supra* at 482 Mich at 300. An incorrect sentence is never “harmless error,” even where “the difference between the mistaken and the correct guidelines ranges is relatively small.” *People v Francisco*, 474 Mich 82, 91; 711 NW2d 44 (2006).

Mr. Lockridge also requests that resentencing take place before a different judge. This issue is properly raised for the first time before the appellate court. In general, legal questions are decided *de novo*. *People v Doxey*, 263 Mich App 115, 118; 687 NW2d 360 (2004).

Discussion

Judge Grant sentenced Mr. Lockridge to 8 to 15 years in prison for involuntary manslaughter. [Sentencing 5/31/12, 47]. The sentence is an upward departure from the applicable guidelines range of 43 to 86 months (approximately 3.6 to 7.2 years).

Judge Grant justified the upward departure based on “everything that [she] saw,” including the prosecutor’s statement at sentencing; the defendant’s prior record; the “extreme violence that was happening”; the fact that the defendant left the home after the incident; and the fact that he responded to his wife’s violence with a headlock. [Sentencing 5/31/12, 46-47]. She also accused Mr. Lockridge and his attorney of “blaming the victim” because they explained that Mr. Lockridge unintentionally killed his wife after she attacked him. [Sentencing 5/31/12, 41, 43]. She relied upon her experience in other domestic violence cases in which men were usually the aggressors. [Sentencing 5/31/12, 43, 44]. She also implied that she did not agree with the jury’s verdict in the case. [Sentencing 5/31/12, 46].

Judge Grant abused her discretion by basing the sentencing departure on reasons that were neither substantial nor compelling and on factors already accounted for in the sentencing guidelines. Moreover, Judge Grant’s reasons for the upward departure suggest that she would have substantial difficulty setting aside her previously expressed opinions about Mr. Lockridge. Therefore, Mr. Lockridge is entitled to resentencing before a different judge.

A. Judge Grant’s Reasons for Departing from the Guidelines Were Neither Substantial nor Compelling

As a general matter, a sentencing judge must impose a minimum sentence within the appropriate sentencing guidelines range. MCL 769.34(2). However, a judge may depart from the guidelines range if she provides substantial and compelling reasons for the departure on the record. MCL 769.34(3). A substantial and compelling reason for an upward departure is “an

objective and verifiable” reason that “keenly or irresistibly grab[] [the appellate Court’s] attention”; is “of considerable worth in deciding the length of a sentence”; and “exists only in exceptional cases.” *People v Babcock*, 469 Mich 247, 257-58; 666 NW2d 231 (2003) (internal citations omitted). A court cannot base a departure on a status characteristic, such as race, religion, gender, or national origin. MCL 769.34(3)(a).

If an appellate court determines that some of the reasons are proper and some are not, and it cannot determine whether the trial court would have departed to the same degree based only on the proper reasons, “the [appellate Court] must remand the case to the trial court for resentencing or rearticulation.” *Id.* at 271. Where all of the reasons are improper, the defendant must be resentenced. *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127 (2001).

Substantial and compelling reasons must also justify the *extent* of the departure. A departure must be proportionate to the factors that necessitate it. *Id.* at 437, n. 10. When a judge departs from the sentencing guidelines, he must articulate a “justification for the *particular* departure made.” *Smith, supra* at 482 Mich at 303 (emphasis in original). When considering a departure, “the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range.” *Babcock, supra* at 469 Mich at 264.

In this case, Judge Grant based her decision to depart from the guidelines on reasons that do not satisfy the *Babcock* requirements. First, Judge Grant relied upon impermissible factors as a basis for the departure. One of the principal justifications for the departure was Judge Grant’s perception that men usually cause domestic violence, even though evidence established that indeed the violence between the couple in the instant case was typically and on the instant occasion precipitated by Mr. Lockridge’s wife. Specifically, Judge Grant stated:

And for whatever reason there are still women—and it's primarily women. I understand there are other sorts of relationships and sometimes it's a woman attacking a man, whatever. But primarily it's a woman allowing back in either the partner or the husband. And whether it's for emotional security or financial security, I don't know.

And as far as we have come in this country, quite frankly, in the education of domestic violence and of women taking control of their lives and not placing themselves in the danger that we had here, I don't know—as far as, as far as we have come, we are still sometimes in the Dark Ages.

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

And in these circumstances I don't frankly care who started it because your client clearly finished it.

[Sentencing 5/31/12, 42-44].

By making this statement, Judge Grant focused on the defendant's status as a man and the victim's status as a woman, in direct contravention to the statutory prohibition against "us[ing] an individual's gender...to depart from the appropriate sentence range." MCL 769.34(3)(a). In *People v McKernan*, the Court held that resentencing was justified where the trial court improperly used a status characteristic—in that case, age—as a basis for a sentencing departure. 185 Mich App 780, 781; 462 NW2d 843 (1990).

Judge Grant also based her departure on her opinion that Mr. Lockridge was guilty of more than the crime for which he was convicted. While discussing her reasons for the departure, Judge Grant implied that she did not agree with the jury's verdict:

Now, whether it was second degree [murder] or what the -- or involuntary manslaughter is what the jury came up with and I would respect the jury's decision. Whether or not I agree with their

decision has nothing to do with it, but I respect their decision and that's why we have this system.

[Sentencing 5/31/12, 46].

“A trial judge is not entitled to make an independent finding of a defendant's guilt on another charge and assert that as a basis justifying sentence, especially where a defendant was found not guilty of that charge.” *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986) (overruled on other grounds by *People v Hawthorne*, 474 Mich 174 (2006)) (citing *People v Grimmett*, 388 Mich 590, 608; 202 NW2d 278 (1972)). Several Michigan courts have found that a trial judge abuses her discretion when she departs from the guidelines for a manslaughter conviction based on her belief that the defendant was guilty of first- or second-degree murder. *See, e.g., People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993); *Glover, supra* at 154 Mich App at 45. In the instant case, the jury specifically considered and rejected the charge of second-degree murder. By substituting her own judgment about the appropriate verdict for that of the jury, Judge Grant impermissibly based her departure on her opinion that Mr. Lockridge should have been convicted of a greater offense.

Second, the reasons given for the departure were neither objective nor verifiable. To be objective and verifiable, a reason must be “external to the minds of the trial court, the defendant, and others involved in making the decision, and...capable of being confirmed.” *People v Kahley*, 277 Mich App 182, 186; 744 NW2d 194 (2007). At sentencing, Judge Grant gave several subjective reasons for her departure. She relied on her prior experience in other domestic violence cases. [Sentencing 5/31/12, 43]. She expressed annoyance at Mr. Lockridge's description of the facts of the case, even though it was corroborated by his daughters' testimony, because she felt that he was blaming the victim. [Sentencing 5/31/12, 41]. She also accused Mr. Lockridge of having no concern for the well-being of his children. [Sentencing 5/31/12, 46].

Rather than being objective and verifiable, these reasons are subjective and unverifiable; they are internal to the mind of Judge Grant. These reasons reflect Judge Grant's personal opinion about the character of the defendant rather than facts that are capable of being evaluated and confirmed by an appellate court.

Third, the facts of the case do not "keenly or irresistibly grab[] [the appellate Court's] attention" nor do they "exist[] only in exceptional cases." As Judge Grant observed at sentencing, she has seen many domestic violence cases with similar facts. [Sentencing 5/31/12, 42-44]. The loss of a life is always a tragedy. But Mr. Lockridge's act was inadvertent, and occurred during a combative and excited moment, as evidenced by the verdict for involuntary manslaughter. His conduct is not extraordinary within the continuum of conduct encompassed by that offense. The law already accounts for the heinousness of Mr. Lockridge's crime by establishing a sentencing guidelines range for involuntary manslaughter convictions and through the prior record and offense variables. If this domestic violence and involuntary manslaughter case is considered "exceptional," the term "substantial and compelling" would "acquire a meaning that would allow trial judges to regularly use broad discretion to deviate from the statutory minimum," exactly what the Michigan legislature sought to avoid by enacting the sentencing guidelines. *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995).

Finally, Judge Grant's reasons for departure are not "of considerable worth in deciding the length of a sentence." Judge Grant's prior experience with domestic violence cases and her implication that she did not agree with the jury's verdict are not "of considerable worth" in determining the appropriate length of time for Mr. Lockridge's sentence. The factors offered by Judge Grant do not provide information about Mr. Lockridge's culpability or his likelihood of

recidivism, examples of information that would be valuable in determining an appropriate sentence.

Because none of Judge Grant's reasons for departure are substantial or compelling, Mr. Lockridge is entitled to resentencing. Even if this Court determines that some of the factors are proper and some are not, it is impossible to determine the weight that Judge Grant gave to each factor based on the record. Therefore, this case must be remanded to the trial court for resentencing or rearticulation.

B. Judge Grant's Reasons for Departure Were Adequately Accounted for in the Scoring of the Sentencing Guidelines

Under MCL 769.34(3)(b), a trial court may not base a departure "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record...that the characteristic has been given inadequate or disproportionate weight." Before a trial court can find that a characteristic was given inadequate or disproportionate weight, "the trial court must determine how that characteristic affected the defendant's minimum sentence range." *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007).

The prior record and offense variables account for the factors Judge Grant cited in support of her decision to depart from the guidelines range. Specifically, the guidelines address Judge Grant's stated reasons for the departure, including Mr. Lockridge's prior record, his relationship with the victim, the psychological injury to the children, and the "extreme violence that was happening." [Sentencing 5/31/12, 46-47].

The prior record variables adequately account for Mr. Lockridge's criminal record. "[T]he sentencing guidelines make elaborate provision for a defendant's criminal record and base the minimum sentence in part on those provisions...." *Young, supra* at 276 Mich App at

454. Mr. Lockridge received 25 points for PRV 1 (prior high severity felony convictions, MCL 777.51) and 5 points for PRV 5 (prior misdemeanor convictions, MCL 777.55) for his prior convictions. Mr. Lockridge also received 5 points for PRV 6 (offender's relationship to the criminal justice system, MCL 777.56) because he was on probation at the time of the instant offense.

The other reasons for Judge Grant's departure -- the domestic relationship and the impact of the offense on the children -- are directly addressed by the offense variables. Mr. Lockridge received a score of 25 for OV 3 (degree of physical injury to the victim, MCL 777.33); 15 for OV 5 (psychological injury sustained by a member of a victim's family, MCL 777.35); 10 for OV 9 (number of victims, MCL 777.39), which was intended to address the children's presence; and 10 for OV 10 (exploitation of a victim's vulnerability, MCL 777.40), which was intended to address taking advantage of a domestic relationship. MCL 777.40.

Even if this Court finds that OV 5 was inadequate to reflect the degree of psychological injury to Mr. Lockridge's children, given Judge Grant's concern that they actually witnessed the incident, the law still requires that Mr. Lockridge be resentenced. Though Judge Grant stated that the "OVs could not possibly reflect any of that that [sic] was going on," she did not explain the degree to which the offense variables were inadequate or what the appropriate weight for each factor should be. [Sentencing 5/31/12, 47]. Under the sentencing guidelines, the aforementioned factors increased Mr. Lockridge's sentence from a minimum range of 0 to 11 months (the range if Mr. Lockridge had no prior record or offense variables) to 43 to 86 months (the range with the prior record and offense variables). MCL 777.64. Judge Grant did not explain why this additional time was inadequate to account for the offense and offender

characteristics, nor did she articulate how each factor affected the departure. For these reasons, Judge Grant abused her discretion by departing from the sentencing guidelines.

C. If this Court Remands For Resentencing, Resentencing Should Take Place Before a Different Judge

When giving her reasons for the upward departure, Judge Grant expressed disdain for Mr. Lockridge. She accused Mr. Lockridge of “blaming the victim” when he explained that he was trying to escape his wife’s violent attack. [Sentencing 5/31/12, 41]. She based this accusation on her opinion that men usually caused domestic violence [Sentencing 5/31/12, 43], even though that was not relevant to the relationship in this case, in which the decedent, who was the same size as Mr. Lockridge, often attacked Mr. Lockridge, in which she punched and pushed him and chased him down the stairs on the instant occasion, and in which she was still attacking him when he responded by putting her in a headlock. Judge Grant also implied that she did not agree with the jury’s verdict. [Sentencing 5/31/12, 46].

Resentencing before a different judge is appropriate where “warranted by the circumstances.” *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986). To determine whether reassignment is warranted, appellate courts consider: “(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.” *Id.*

The circumstances here warrant resentencing before a different judge. Judge Grant’s comments strongly suggest that she could not reasonably be expected to set aside her previously expressed views about the necessity of a sentencing departure. In particular, Judge Grant’s

generalizations about men's roles in instigating domestic violence and her opinion that the jury erred by convicting Mr. Lockridge of involuntary manslaughter suggest that Judge Grant would have substantial difficulty in putting aside her opinions about Mr. Lockridge. Reassignment is also advisable to preserve the appearance of justice. Finally, because the issues on remand would be limited to resentencing reassignment would not entail waste or duplication out of proportion to any gain in preserving the appearance of fairness.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court remand his case to the trial court for resentencing before a different judge.

Respectfully submitted,

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