

STATE OF MICHIGAN
 IN THE SUPREME COURT
 APPEAL FROM THE COURT OF APPEALS
Schuette, P.J., O'Connell and Owens, J.J.

SUPREME COURT

APR 2007

TERM

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD GEORGE HARPER, JR.,

Defendant-Appellant.

Supreme Court No. 130988

Court of Appeals No. 268031

Genesee Circuit Court No. 05-015648-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE GENE BURNS,

Defendant-Appellant.

Supreme Court No. 131898

Court of Appeals No. 270886

Allegan Circuit Court No. 02-12311-FH

**BRIEF OF ATTORNEY GENERAL AND PROSECUTING ATTORNEYS
 ASSOCIATION OF MICHIGAN AS AMICI CURIAE ON APPEAL**

Michael A. Cox
 Attorney General

Thomas L. Casey (P24215)
 Solicitor General
 Counsel of Record

David Gorcyca
 President
 PAAM

William E. Molner (26291)
 Assistant Attorney General
 Department of Attorney General
 Appellate Division
 P.O. Box 30217
 Lansing, MI 48909
 Telephone: (517) 373-4875

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QUESTION PRESENTED FOR REVIEW

- I. Under *Blakely v Washington*, the "statutory maximum" for purposes of the Sixth Amendment right to trial by jury 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. An intermediate sanction is not the functional equivalent of the maximum sentence for purposes of the Sixth Amendment. Because an intermediate sanction exposes the defendant to the possibility of additional incarceration based on the defendant's conduct that occurs *after* sentencing, an intermediate sanction is not a true maximum sentence, but rather a minimum sentence. Where the intermediate sanction is not the functional equivalent of a statutory maximum because of the potential for increased incarceration based on defendant's conduct after sentencing, does a departure from the sentencing guidelines for an intermediate sanction sentence, based on substantial and compelling reasons, implicate the decision in *Blakely v Washington*?

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

Amicus joins in the counterstatement of proceedings and facts of the appellee, People of the State of Michigan.

SUMMARY OF ARGUMENT

There are three reasons why an intermediate sanction—a sentence that does not include imprisonment—under the Michigan sentencing guidelines cannot be equated with the statutory maximum for purposes of the Sixth Amendment.

First, a fair reading of the federal cases demonstrates that the statutory maximum for purposes of the Sixth Amendment is the maximum sentence that the court may impose regardless of the defendant's conduct after sentencing. The United States Supreme Court in *Apprendi v New Jersey*¹ held that 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. The seminal decisions of *Blakely v Washington*,² *United States v Booker*,³ and *Cunningham v California*⁴ later applied the rule of *Apprendi* to mandatory sentencing guidelines schemes that involved fixed, determinate sentences that, once imposed, could never be enlarged based on events occurring *after* sentencing. In Michigan, by contrast, a sentence to an intermediate sanction is not equivalent to a statutory maximum because the court's jurisdiction may extend beyond 12 months and authorize the court to sentence the defendant to prison in an indeterminate sentence for the same crime depending on defendant's subsequent conduct.

The rule of *Apprendi*, as variously restated in *Blakely*, *Booker*, and *Cunningham* should be read in context with the type of sentencing system at issue, and should not be applied literally in a vacuum to all sentencing situations. A literal application of the various statements of the rule of *Apprendi* made in *Blakely*, *Booker*, and *Cunningham* would erroneously preclude *any*

¹ *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2248; 147 L Ed 2d 435 (2000).

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

³ *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

⁴ *Cunningham v California*, 549 US ___; 127 S Ct 856; 166 L Ed 2d 856 (2007).

judicial fact-finding for any type of sentencing, including indeterminate sentencing, as well as non-mandatory sentencing guidelines; but both of these sentencing schemes are constitutionally permissible under the Sixth Amendment. Defendants' argument in the present cases is erroneous because it is based on a literal application of the *Apprendi* rule without recognizing that a defendant sentenced to an intermediate sanction can lawfully face further incarceration beyond 12 months in jail.

The essential nature of a maximum sentence is that it is the longest sentence that can be applied to a defendant under any set of circumstances that can arise *after* a defendant has been sentenced. A sentence of a term of incarceration that lawfully authorizes an enlargement of the defendant's custody based on future conduct after sentencing is, by definition, not a maximum sentence. An intermediate sanction is not the "statutory maximum" because of the potential for further incarceration based on a defendant's conduct *after* sentencing.

Accordingly, the pronouncements of the rule of *Apprendi* from *Blakely*, *Booker*, and *Cunningham* should apply only where the imposition of a mandatory sentencing guidelines sentence will result in a sentence under which no further set of circumstances would permit the continued incarceration of the defendant beyond the term specified in the sentencing guidelines sentence range. In other words, the rule in *Apprendi* applies only to a truly maximum sentence—i.e., the longest sentence authorized by law to retain defendant in custody as a result of the jury's verdict under any set of circumstances that may arise *after* sentencing. Because intermediate sanctions have the potential for increased incarceration beyond the 12-month jail term specified in MCL 769.34, despite their mandatory nature, they are not true maximum sentences for purposes of the Sixth Amendment. For this reason alone, intermediate sanctions are not the equivalent of the statutory maximum for purposes of the Sixth Amendment.

The second reason why an intermediate sanction under the Michigan sentencing guidelines is permissible is that judicial fact-finding in Michigan can incorporate facts not necessarily admitted by a defendant or found by a jury, because the purpose of calculating the sentencing guidelines is to determine what defendant's *minimum* sentence should be under the guidelines. Until the trial court actually rules on the parties' objections to the scoring of the guidelines at the time of sentencing, a defendant in Michigan has no reasonable expectation of what his actual sentencing guidelines range will be when he is convicted following a guilty plea or trial, and thus has no reasonable expectation that he will receive an intermediate sanction. Therefore, a sentence to prison that departs from the guidelines but is based on substantial and compelling reasons where the guidelines fall within an intermediate sanction cell range does not violate the Sixth Amendment.

Even if a defendant did reasonably expect to fall within an intermediate sanction cell, there is no reasonable expectation that a defendant would receive a straight jail sentence until the court actually chooses to impose it at the sentencing hearing. The sentencing guidelines statute, however, only requires the sentencing judge to impose an intermediate sanction but not necessarily a definitive jail term. An intermediate sanction authorizes the trial court to sentence a defendant to many other sentence alternatives that have the potential to keep the defendant incarcerated well beyond the 12-month jail ceiling if the defendant violates the terms of the intermediate sanction. This fact distinguishes Michigan from *Blakely*, *Booker* and *Cunningham*.

Finally, an intermediate sanction cell is not the equivalent of the "statutory maximum," but rather is a *decrease* from the normal minimum sentence. An upward departure from an intermediate sanction cell range is therefore nothing more than an increase of a defendant's minimum sentence, which is constitutionally permissible.

ARGUMENT

I. Under *Blakely v Washington*, the "statutory maximum" for purposes of the Sixth Amendment right to trial by jury 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. An intermediate sanction is not the functional equivalent of the maximum sentence for purposes of the Sixth Amendment. Because an intermediate sanction exposes the defendant to the possibility of additional incarceration based on the defendant's conduct that occurs *after* sentencing, an intermediate sanction is not a true maximum sentence, but rather a minimum sentence. Where the intermediate sanction is not the functional equivalent of a statutory maximum because of the potential for increased incarceration based on defendant's conduct after sentencing, a departure from the sentencing guidelines for an intermediate sanction sentence, based on substantial and compelling reasons, does not implicate the decision in *Blakely v Washington*.

A. Standard of Review

Questions of constitutional law are reviewed de novo.⁵

B. Background

The main issue as framed by this Court in its order granting leave to appeal is whether the intermediate sanction described in MCL 769.31(b) and MCL 769.34(4), requiring the trial court to impose a sentence that does not include prison, constitutes a statutory maximum sentence under *Blakely v Washington*,⁶ which requires that a jury decide the reasons for departing from a sentence.⁷ Amici submits that the "statutory maximum" for purposes of the Sixth Amendment is the longest amount of time that the State is authorized to *retain* a defendant under incarceration based solely on the jury's verdict. Accordingly, an intermediate sanction under the Michigan

⁵ *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁶ *Blakely*, 542 US 296.

⁷ See *People v Burns*, order granting leave to appeal, November 17, 2006 and *People v Harper*, order granting leave to appeal, November 17, 2006. In *Burns*, the order granting leave placed the issue within the context of sentencing for a probation violation, while in *Harper*, the order granting leave framed additional issues relating to waiver of a defendant's Sixth Amendment claims by failing to object or to contest facts in the presentence investigation report. Amicus in this brief will address only the issue of whether an intermediate sanction is a statutory maximum for purposes of the Sixth Amendment, and specifically as it relates to sentencing for probation violation, but will rely upon the excellent brief for the People in *Harper* concerning the waiver issues.

sentencing guidelines is not the functional equivalent of the statutory maximum—despite its mandatory nature—because of the potential for extending a defendant's incarceration beyond the probationary term and/or the 12-month jail maximum if the defendant violates the terms of the intermediate sanction. This potential for extending incarceration is what distinguishes the Michigan sentencing scheme for intermediate sanctions from the statutory maximums in *Blakely v Washington*, *United States v Booker*, and *Cunningham v California*.⁸ In each of those decisions, the mandatory sentencing guidelines range was a determinate sentence, which resulted in an absolute, fixed time period of incarceration that could never be extended once it was imposed, and hence was a true *maximum* sentence.

1. The present cases address the issue that *People v McCuller* initially sought to address, but never reached.

In *People v Drohan*, this Court held that that the rule in *Blakely v Washington* does not apply to Michigan's indeterminate sentencing guideline system and that a trial court may engage in judicial fact-finding to impose a *minimum* term within the statutory range.⁹ In *People v McCuller*, decided the same day as *Drohan*, this Court held: (i) that a defendant is not entitled to have his sentencing guidelines scored on the basis of the prior record variables (PRV) alone and (ii) that trial courts are allowed to engage in judicial fact-finding to score the offense variables (OV), even when the defendant's PRV score alone would place defendant into an intermediate sanction cell.¹⁰ A "cell" consists of one of three possible minimum sentencing guidelines ranges:

Prison Cell: If the minimum sentence range is more than 12 months, the trial court is required, absent a departure for substantial and compelling reasons, to sentence the defendant to a term of imprisonment in the State prison.¹¹

⁸ *Blakely*, 542 US 296; *Booker*, 543 US 220; *Cunningham*, 549 US ___, 166 L Ed 2d 856.

⁹ *People v Drohan*, 475 Mich 140, 159; 715 NW2d 778 (2006).

¹⁰ *People v McCuller*, 475 Mich 176, 181-182; 715 NW2d 798 (2006), vacated and remanded by *McCuller v Michigan*, ___ US __ (2007 US Lexis 2002).

¹¹ MCL 769.34(4)(b).

Staddle Cell: If the upper limit of the guidelines range exceeds eighteen months and the lower limit of the range is twelve months or less, the trial court, may sentence the defendant to imprisonment in the State prison with a minimum term within the range, or to an intermediate sanction that may include a term of imprisonment in the county jail of not more than twelve months.¹²

Intermediate sanction Cell: If the upper limit of the recommended minimum sentence range is eighteen months or less, the court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit a defendant to the Department of Corrections.¹³ Intermediate sanctions include, but are not limited to, one or more of 15 possible dispositions including probation and jail.¹⁴

Thus, a sentence to prison when the defendant's sentencing guidelines fell in an intermediate sanction cell would be an upward departure.

McCuller, however, does not fully answer the question presented in these cases. While defendant McCuller's PRV placed him in the intermediate sanction cell, his sentencing guidelines score after considering the OV's placed him within a straddle cell. The trial court in *McCuller* therefore had a choice to impose either a prison term or an intermediate sanction. In these cases, by contrast, defendants' sentencing guidelines score placed them into an intermediate sanction cell. The cases now before the Court, therefore, squarely present the issue that *McCuller* initially sought to address, but did not reach. This is because defendant McCuller's sentencing guidelines score placed him into a straddle cell, and his sentence to prison was not a departure sentence, as it was in the present cases.

On February 20, 2007, the United States Supreme Court granted the petitioner's writ for certiorari in *McCuller*, vacated the judgment, and remanded the case to the Michigan Supreme Court "for further consideration in light of *Cunningham v California*, 549 U.S. ____ (2007)."¹⁵ As

¹² MCL 769.34(4)(c).

¹³ MCL 769.34(4)(a).

¹⁴ MCL 769.31(b).

¹⁵ *McCuller v Michigan*, ___ US ___ (2007 US Lexis 2002).

will be addressed later in this brief, Amici submits that this Court's decision in *McCuller* fully comports with the Sixth Amendment as well as the *Cunningham* decision.

2. The cases of *Blakely*, *Booker*, and *Cunningham* are sufficiently distinguishable from the intermediate sanction scheme in the Michigan sentencing guidelines.

The United States Supreme Court has issued three landmark decisions concerning the constitutionality of State and Federal Sentencing Guidelines under the Sixth Amendment. Each of these decisions is distinguishable from the intermediate sanction scheme under the Michigan sentencing guidelines, and Amici will present an analysis of them seriatim.

***Blakely v Washington*¹⁶**

Blakely involved two Washington State sentencing statutes, one broad and one specific, which set forth various maximum penalties for criminal offenses. The broad sentencing statute prescribed maximum sentences depending on whether a crime is a Class A felony (life maximum), Class B (ten years), or Class C (five years).¹⁷ The second, more specific statute categorized individual crimes by "seriousness level" that, along with an offender's criminal history score, yields a "presumptive sentencing range," which is set forth in the State code in the form of a sentencing grid.¹⁸

Another Washington statute authorized a court to impose a sentence above the presumptive range if it finds "substantial and compelling reasons justifying an exceptional

¹⁶ *Blakely*, 542 US 296.

¹⁷ Wash Rev Code § 9A.20.021(1).

¹⁸ See Wash Rev Code § 9.94A.310(1) (now revised and codified at Wash Rev Code § 9.94A.510).

sentence."¹⁹ The statute included an illustrative, non-exhaustive list of possible aggravating factors justifying an exceptional sentence.²⁰

Defendant Blakely pleaded guilty to second-degree kidnapping involving domestic violence and use of a firearm, a Class B felony and a ten-year offense under Washington law. The sentencing court did not sentence him to the presumptive range set by the statutory guidelines (49-53 months) for his crime, but imposed an "exceptional sentence" of 90 months based upon its finding that Blakely had acted with "deliberate cruelty" in committing the offense.²¹

The United States Supreme Court in *Blakely* held that the State of Washington's *determinate* sentencing regime does not constitutionally permit a trial court to impose an "exceptional sentence" on the *maximum* statutory standard sentence range, based on facts that were neither admitted by the defendant nor determined by a jury. In rejecting the State's claim that 10 years was the true statutory maximum, the Court explained that the "standard maximum" of 49-to-53 months was the real maximum under the rule in *Apprendi*.²²

Under Washington law, the statutory standard sentence range was in effect the maximum term that the State could have retained defendant Blakely in prison, because once a defendant completed his standard sentence range of 53 months, he must be released from custody of the State. Regardless of defendant Blakely's behavior or commission of other crimes while he was serving his sentence, there was nothing that defendant Blakely could have done while in prison that would have authorized the State of Washington to extend his incarceration beyond the sentencing guidelines range of 53 months. There is no parole system in place in the State of

¹⁹ *Blakely*, 542 US at 299.

²⁰ *Blakely*, 542 US at 299.

²¹ *Blakely*, 542 US at 300.

²² *Blakely*, 542 US at 303-304.

Washington. In contrast, under the Michigan system, the parole board can extend a defendant's incarceration beyond the maximum-minimum sentencing guidelines range up to the maximum provided by statute. Accordingly, when the trial court in *Blakely* found exceptional circumstances to increase defendant Blakely's standard sentence of 53 months to 90 months, the trial court in fact was increasing the defendant's *maximum* prison term.

The Supreme Court in *Blakely*, moreover, confirmed the constitutionality of indeterminate sentencing schemes because judicial fact-finding under an indeterminate sentencing scheme does not impinge on the province of the jury²³:

[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. *Indeterminate sentencing does not do so. It 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.* 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.

*United States v Booker*²⁴

In a five-justice majority opinion, the United States Supreme Court in *Booker* extended the holding of *Blakely* to the Federal Sentencing Guidelines.²⁵ In so doing, the Supreme Court stressed that they were dealing with a *determinate* sentencing scheme ("In *Blakely v Washington*, [] we dealt with a *determinate* sentencing scheme similar to the Federal Sentencing

²³ *Blakely*, 542 US at 308-309 (Emphasis added).

²⁴ *Booker*, 543 US 220.

²⁵ *Booker*, 543 US 220.

Guidelines.")²⁶ Hence, when a defendant is sentenced under the Federal Sentencing Guidelines, the guidelines sentence marks the outer bounds of authority for the government to keep the defendant incarcerated under any set of circumstances.

In *Booker*, the Supreme Court held that defendants have a right to a jury trial on any disputed factual subject that increases the maximum punishment, and that the Federal Sentencing Guidelines come within this rule to the extent that their operation is mandatory. The Court then applied the definition of "statutory maximum" set forth in *Blakely* to the federal guidelines and found that they suffered from the same defect as did the Washington guidelines. The Court determined that there was no functional difference between the Federal Sentencing Guidelines and the State of Washington's sentencing guidelines.²⁷

The majority opinion authored by Justice Stevens also ended with a paragraph that reaffirmed the holding in *Apprendi*, which makes clear that the "maximum" referred to is the maximum lawful penalty.²⁸ The Stevens majority opinion also acknowledged that "[w]e have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range . . . when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."²⁹

A different five-Justice majority led by Justice Breyer held that the federal guidelines would thereafter be discretionary with the sentencing judge, and would no longer be binding. That majority opinion considered the question whether, "the Guidelines 'as a whole' would be

²⁶ *Booker*, 543 US at 231-232 (emphasis added).

²⁷ *Booker*, 543 US at 233.

²⁸ See *Apprendi, v New Jersey*, 530 US 466, 490; 120 S Ct 2248; 147 L Ed 2d 435 (2000) ("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."); *Booker*, 543 US at 231.

²⁹ *Booker*, 543 US at 233.

inapplicable . . . such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction."³⁰ The Court answered the remedial question by severing and excising the provision of the federal sentencing statute that makes the guidelines mandatory, thus rendering the guidelines effectively advisory.³¹

The Court, as part of its remedy under Justice Breyer's majority opinion, struck two provisions from the Sentencing Reform Act of 1984 (the act that created the mandatory Federal Sentencing Guidelines).³² It excised from the statute the provision that had mandated that a judge must sentence within the guidelines range.³³ It also excised the provision that gave the courts of appeal de novo review over certain aspects of sentencing, 18 USC § 3742(e), replacing it with appellate review of sentencing under the "reasonableness" standard.³⁴ The remainder of the Sentencing Reform Act, however, remained intact and the Federal Sentencing Guidelines must be considered by the district courts in sentencing.³⁵

*Cunningham v California*³⁶

Cunningham is simply a straight application of *Blakely* to the California Determinate Sentencing Law (DSL), which the United States Supreme Court observed "resembles pre-*Booker* federal sentencing in the same ways that Washington's sentencing system did [in *Blakely*]."³⁷ California's determinate sentencing law for the offense under which defendant stood convicted

³⁰ *Booker*, 543 US at 229.

³¹ *Booker*, 543 US at 245-247.

³² *Booker*, 543 US at 259.

³³ See 18 USC § 3553(b)(1) ("The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [which in turn referred to the guidelines] . . .").

³⁴ *Booker*, 543 US at 260-262.

³⁵ *Booker*, 543 US at 264.

³⁶ *Cunningham*, 549 US ___; 166 L Ed 2d 856.

³⁷ *Cunningham*, 549 US ___; 166 L Ed 2d at 871, n 10.

prescribed three precise terms of imprisonment: a lower, middle, and upper term sentence, of 6, 12, or 16 years respectively.³⁸ These were determinate, fixed sentences. Another California statutory section controlled the trial judge's choice by providing that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."³⁹ Consequently, the middle term is the mandatory term unless the trial court judge makes the requisite factual findings that would authorize the judge to impose the upper term. In *Cunningham*, the trial judge held a sentencing hearing and found by a preponderance of the evidence that aggravating circumstances did exist that would justify imposing a sentence in the upper term.

The California Supreme Court had held that the DSL passed constitutional muster under the Sixth Amendment because it permitted the trial judges to exercise its discretion in the same way that the United States Supreme Court in *Booker* permitted federal courts to exercise when applying the Federal Sentencing Guidelines. But the United States Supreme Court noted a major difference between the two systems, namely that the post-*Booker* Federal Sentencing Guidelines were no longer mandatory but only *advisory*. And because the Federal Sentencing Guidelines were only advisory and not mandatory, there was no constitutional prohibition against discretionary judicial fact-finding in selecting a particular sentence based upon a range of sentences.⁴⁰ The key was that the post-*Booker* Federal Sentencing Guidelines were not mandatory, while the middle term in California's DSL was, and that made all the difference according to the majority opinion in *Cunningham*. Therefore, the California Supreme Court's attempt to have the DSL pass constitutional scrutiny based on similarity to the post-*Booker* judicial discretionary fact-finding was unavailing simply because the middle term under the DSL

³⁸ Cal Penal Code, 288.5(a).

³⁹ Cal Penal Code, 1170(b).

⁴⁰ *Cunningham*, 166 L Ed 2d at 875.

was mandatory. And because the middle term was a fixed, determinate term, it was a true statutory maximum sentence to which defendant was entitled to receive based upon the jury's verdict.

C. Analysis

The issue presented in these cases is whether a trial court can depart from the sentencing guidelines for substantial and compelling reasons, after the trial court scores the guidelines and the defendant falls within an intermediate sanction cell, without violating the Sixth Amendment. Amici submits that it can because an intermediate sanction is not the "statutory maximum" because of the potential for further incarceration based on a defendant's conduct *after* sentencing.

- 1. The essential nature of a maximum sentence for purposes of the Sixth Amendment is the longest sentence that can be applied to a defendant under any set of circumstances that can arise after a defendant has been sentenced.**

Federal Cases

In *Apprendi v New Jersey*, the United States Supreme Court held that "[o]ther 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."⁴¹ The Court observed that "when the term 'sentence enhancement' is used to describe an increase beyond the *maximum* authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."⁴² The relevant inquiry under *Apprendi* is not how the aggravating factor is designated in a statute, but rather its effect,

⁴¹ *Apprendi*, 530 US at 490.

⁴² *Apprendi*, 530 US at 494 n 19.

i.e., "does the required finding expose the defendant to a greater punishment than authorized by the jury's guilty verdict?"⁴³

While the term "statutory maximum" as used in *Apprendi*, may appear to have undergone a metamorphosis by the time the high court issued its opinion in *Cunningham*, closer examination shows this not to be the case. Regardless of how the term "statutory maximum" is used in the various high court's opinions, the fact remains that a maximum sentence means just what it implies: the maximum or uppermost amount of time that the State can keep a defendant under incarceration after sentencing as a result of the jury verdict or defendant's guilty plea. If it were otherwise—as defendants' analysis would have it—the Supreme Court's language in *Blakely* that approved of judicial discretion within indeterminate sentencing, as well as its holding in *Booker* that specifically authorized the exercise of judicial discretion to increase the now "advisory" sentencing guidelines ranges without a jury determination, would be rendered nugatory.⁴⁴

In *Harris v United States*, the Court noted that "*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights."⁴⁵

The Court's decision in *Blakely* further elucidated the wording of the Sixth Amendment's proscription on judicial fact-finding in the following way: "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's

⁴³ *Apprendi*, 530 US at 494.

⁴⁴ See *Blakely*, 542 US at 308-309; *Booker*, 543 US at 233.

⁴⁵ *Harris v United States*, 536 US 545, 557; 122 S Ct 2406; 153 L Ed 2d 524 (2002).

verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority."⁴⁶

In *Booker*, the Court restated the rule of *Blakely* in the following way: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."⁴⁷ The absence of the qualifying term "statutory maximum" did not change the Court's definition of what the relevant maximum sentence is for purposes of the Sixth Amendment. One of the arguments advanced by the government in *Booker* was that the Federal Sentencing Guidelines are not statutorily based but rather promulgated by the Sentencing Commission and thus *Apprendi* would not apply. In disposing of the government's argument, the Supreme Court observed that it used the term "statutory maximum" in *Apprendi* because it was dealing with a statute there as opposed to the Federal Sentencing Guidelines in *Booker*, which was promulgated by the Sentencing Commission rather than by Congress.⁴⁸

Finally, in *Cunningham*, the Court defined the Sixth Amendment requirement this way: "[A]ny fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."⁴⁹ The Court also stated it another way: "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."⁵⁰

⁴⁶ *Blakely*, 542 US at 303 (citations omitted).

⁴⁷ *Booker*, 543 US at 244.

⁴⁸ *Booker*, 543 US at 238.

⁴⁹ *Cunningham*, 166 L Ed 2d at 868.

⁵⁰ *Cunningham*, 166 L Ed 2d at 874.

A literal application of the above statements of the Sixth Amendment requirement could essentially terminate *any* discretionary judicial fact-finding under indeterminate sentencing or under the post-*Booker* "advisory" Federal Sentencing Guidelines. But the high court in both *Blakely* and *Booker* made it clear that is not the case with either indeterminate sentencing or the post-*Booker* federal sentencing scheme because judicial fact-finding under those conditions is permitted under the Sixth Amendment. Thus, the various statements of the Sixth Amendment requirement from the high court must be read in context with the type of sentencing system under examination in any given case. *Blakely*, *Booker*, and *Cunningham* all concerned determinate sentencing systems, where the maximum sentence (i.e., the longest sentence that could be applied to a defendant under any set of subsequent circumstances) for purposes of the Sixth Amendment was the sentencing guidelines range. In other words, in all three of those decisions, once the defendant was sentenced under the particular sentencing guidelines grid based on the jury's verdict or a plea of guilty, there could be no further set of circumstances under which the government could extend the defendant's incarceration *after* the defendant began his sentencing term under the determinate sentencing guidelines. Hence, in *Blakely*, *Booker*, and *Cunningham* the sentencing guidelines range was the true maximum sentence and accordingly was treated as the "effective statutory maximum" for purposes of the Sixth Amendment.

Michigan indeterminate sentencing scheme

By contrast, as this Court in *Drohan* concluded, in an indeterminate sentencing scheme, like Michigan's, the maximum lawful penalty for purposes of the Sixth Amendment is the statutory maximum authorized by statute for the substantive offense because Michigan's guidelines impose only a *minimum* sentence as part of an indeterminate sentencing scheme that

also imposes, as a matter of course, the statutory maximum sentence for defendant's conviction.⁵¹ The maximum sentence fixed by statute in Michigan is therefore the statutory maximum sentence for purposes of the Sixth Amendment because the Department of Corrections is authorized to retain a defendant in prison up to the maximum term under the substantive criminal statute, even when the defendant's minimum term under the sentencing guidelines has expired. It is, therefore, the *potential* for increased incarceration beyond the sentencing guidelines sentence that governs the statutory maximum sentence for purposes of the Sixth Amendment.

With regard to the intermediate sanction under the sentencing guidelines, there is a similar potential for increased incarceration beyond the sentencing guidelines, unlike the determinate sentencing schemes involved in *Blakely*, *Booker*, and *Cunningham*, where there was no potential for increased incarceration. In sum, an intermediate sanction is not the functional equivalent of a maximum sentence simply because it does not denote finality of incarceration and does not fit the definition of a maximum sentence.

While an intermediate sanction under the Michigan sentencing guidelines is mandatory where the under upper limit of the recommended minimum sentence range is eighteen months or less, there are a range of sentencing options granted to the trial court besides a determinate jail term. None of those other sentencing options can be equated to a true maximum sentence because of the potential for an indeterminate amount of increased incarceration depending upon defendant's performance of the probationary intermediate sanction. As a consequence, an intermediate sentence is effectively a *minimum* sentence that is bordered by an upper limit of the statutory maximum depending on defendant's performance.

The foregoing point is illustrated by the following example. A defendant who commits an assault with intent to commit sexual penetration is guilty of a class D offense under the

⁵¹ *Drohan*, 475 Mich at 159-161.

sentencing guidelines. Despite the ten year statutory maximum for that offense,⁵² a defendant convicted of that offense with no prior criminal record could fall into an intermediate sanction cell at grid A-III even though the defendant stalked the victim who suffered serious psychological injury as a result of the sexual assault.⁵³ The sentencing guidelines range for cell A-III is 0-11 months, an intermediate sanction cell. If sentencing the defendant within the guidelines, the trial court would sentence the defendant to an intermediate sanction of a term of probation, which may include a jail sentence of up to 11 months. But this is *not* the maximum sentence. If the defendant later commits two acts of rape during the probationary period, and is convicted of those offenses, the trial court may revoke the defendant's probation after holding a probation violation hearing, and resentence the defendant on the original offense of assault with intent to commit penetration as if probation had never been granted.⁵⁴ The ten-year maximum remains the maximum sentence.

This is so because the trial court is permitted to sentence the defendant as if probation had never been granted, and the updated sentencing guidelines would now reflect two prior high severity felonies under PRV 1, with the addition of 50 points on the PRV. The defendant's updated sentencing guidelines score would yield a grid score at E-III, which is a prison cell with a sentencing guidelines range of 19-to-38 months in prison. The sentencing after probation revocation based on an updated sentencing guidelines score at E-III would not be a departure sentence so long as the trial court imposes a minimum sentence no higher than 38 months in prison. Again, the defendant would be sentenced on the original offense to a prison sentence and the statutory maximum would be the ten-year maximum under MCL 750.520g(1). And the

⁵² MCL 750.520g(1); MCL 777.16y.

⁵³ OV 10 scored at 15 points for predatory conduct; OV 4 scored at 10 points for serious psychological injury requiring professional treatment. The total OV score would be 25 points.

⁵⁴ *People v Hendrick*, 472 Mich 555, 561, 560; 697 NW2d 511 (2005).

parole board has the authority to retain the defendant in custody up to the ten-year maximum if it so desires.

The upshot is that a sentence to an intermediate sanction that does not consist of a straight jail term is not the true maximum sentence because defendant's conduct during any of the probationary and probationary-type intermediate sentence options can change the recalculated sentencing guidelines range for the resentencing after probation is revoked. Because of this potential for increased incarceration based on defendant's conduct that may occur *after* sentencing, an intermediate sanction cannot be equated with the maximum sentence for purposes of the Sixth Amendment.

- 2. A defendant has no reasonable expectation of receiving an intermediate sanction sentence where the determination of the appropriate guidelines range is the product of intensive judicial fact-finding on which reasonable minds might differ.**

Another factor that distinguishes Michigan's intermediate sanction cell from being the functional equivalent of the "statutory maximum" determinate sentence range in *Blakely* is that in Michigan, a defendant will not know that he is entitled to be placed into an intermediate sanction cell when pleading guilty, or when convicted after trial. This lack of notice is rooted in judicial fact-finding that the Legislature entrusted to judges to determine where a defendant's *minimum* sentence falls in the sentencing guidelines grid. A comparison between the Washington sentencing guidelines scheme and Michigan's illustrates this point.

In the State of Washington, the determination of the initial standard guideline range entails much less exercise of judicial discretion than does Michigan's determination of the sentencing guidelines. While the scoring of Michigan's sentencing guidelines offense variables (OV) involves a complex "post-mortem" dissection of the entire criminal episode, Washington's "offense seriousness" level is initially determined solely by the offense of conviction. At the time

defendant Blakely pleaded guilty, the Washington sentencing guidelines scheme divided felony offenses into 15 levels of seriousness.⁵⁵ Thus, a defendant in Washington could easily determine his crime's seriousness level by merely finding the conviction offense on a list. Next, in Washington, enhancements are added to the standard guideline range for felony traffic offenses, deadly weapons, and drug-related activity committed during an offense. In the case of defendant Blakely, because he specifically pleaded guilty to committing the offense with a firearm, a deadly weapon enhancement added 36 months to his standard range, resulting in a determinate sentencing range of from 49-to-53 months.⁵⁶ There, even though defendant Blakely would reasonably have expected a sentence between 49 and 53 months when he pleaded guilty and the court accepted his plea, the trial court later imposed an "exceptional sentence" after specifically determining that defendant had acted with deliberate cruelty. The constitutional infirmity in *Blakely* was that the trial court tacked on the 30-month exceptional sentence based on facts not admitted by defendant in his guilty plea, and not determined by a jury beyond a reasonable doubt, where the defendant had a reasonable expectation that the 53-months would be his maximum sentence (i.e., the absolute limit on the lawful authority of the State to retain him under incarceration under any conceivable set of circumstances that could arise after sentencing).⁵⁷

⁵⁵ RCW 9.94A.320 (now 9.94A.515). Parts of Washington's criminal code were recodified and amended. Amicus in this brief will cite the provisions from Washington that were in effect at the time Blakely was sentenced. See *Blakely*, 542 US at 299 n 1.

⁵⁶ The instructions for deadly weapon enhancement in the Washington sentencing guidelines manual state in pertinent part that "if. . . a jury returns a special verdict that the accused . . . was armed with a deadly weapon at the time of the commission of the crime, the sentence must be increased." State of Washington Adult Sentencing Manual, 1998, p I-18. Defendant Blakely, however, admitted the facts for the deadly weapon enhancement during his guilty plea. *Blakely*, 542 US at 298-299.

⁵⁷ *Blakely*, 542 US at 303-304.

In Michigan, by contrast, a trial court may constitutionally engage in judicial fact-finding to arrive at a defendant's sentencing guidelines score, and that a defendant is not entitled to an intermediate sanction until the guidelines are fully scored. In Michigan, a defendant upon conviction must wade through the various OVs (ranging from such factors as the type of weapon used and its potential lethality, intent involved, psychological and physical injury to the victims, contemporaneous acts, defendant's continuing criminal behavior and defendant's role in the offense) before determining the appropriate offense severity level. The OV factors are fact-specific and are often the subject of vigorous debate before sentencing. In scoring the guidelines, "a sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score."⁵⁸ "Scoring decisions for which there is any evidence in support will be upheld."⁵⁹

More significantly, the scoring of the variables for the sentencing guidelines is for the purpose of determining the *minimum* sentence.⁶⁰ A trial court in Michigan, therefore, is constitutionally permitted to engage in judicial fact-finding to determine the applicable sentencing guidelines range of the *minimum* sentence.⁶¹ The recent United States Supreme Court decision in *Cunningham* did nothing to undercut this Court's decision in *McCuller*.

In Michigan, unlike the situation in *Blakely* and *Cunningham* where a defendant in Washington or California can easily discern the standard guideline range when he pleads guilty or has been convicted after a trial, the determination of a defendant's guideline range here is the

⁵⁸ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

⁵⁹ *Hornsby*, 251 Mich App at 468, quoting *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

⁶⁰ *McCuller*, 475 Mich at 180; see MCL 769.34(2) ("the minimum sentence imposed by a court of this state for a felony. . . shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed."). The Michigan Sentencing Guidelines Manual defines the term "grid" as providing "a recommended minimum sentence range for combinations of the OV and PRV levels for each crime classification."

⁶¹ *Drohan*, 475 Mich at 163-164; *McCuller*, 475 Mich at 180-181.

product of intensive judicial fact-finding, where reasonable minds can differ. But this is constitutionally permissible precisely because its aim is to calculate the appropriate range to determine what a defendant's *minimum* sentence should be.

A defendant in Michigan, therefore, receives no reasonable notice or expectation of receiving an intermediate sanction cell range when he commits the offense, pleads guilty, or is convicted after a trial. The scoring of the sentencing guidelines is not complete until judicial fact-finding concludes at the time of sentencing, when objections to the sentencing guidelines scoring are made and adjudicated by the sentencing court. This is unlike the situation in *Blakely* where the defendant Blakely knew that when he pleaded guilty to second-degree kidnapping involving use of a firearm, the maximum determinate sentence he would receive was in the range of 49-to-53 months.

Even when the sentencing guideline score falls within an intermediate sanction cell, a defendant has no reasonable expectation that he will receive a fixed jail term. Rather, intermediate sanctions include, but are not limited to, one or more of the following possible dispositions⁶²:

- Inpatient or outpatient drug treatment
- Probation with any probation conditions required or authorized by law
- Residential probation
- Probation with jail
- Probation with special alternative incarceration
- Mental health treatment
- Mental health or substance abuse counseling
- Jail

⁶² MCL 777.1(d); MCL 769.31(b).

- Jail with work or school release
- Jail with or without authorization for day parole
- Participation in a community corrections program
- Community service
- Payment of a fine
- House arrest
- Electronic monitoring

Other than a straight jail term—which a defendant does not know he will receive up until the time the judge actually imposes the sentence—an intermediate sanction cell probationary punishment still subjects a defendant to the jurisdiction of the court and parole board beyond the term imposed by the court at sentencing if the defendant fails to honor the terms of his intermediate sanction. If a defendant violates the terms of the intermediate sanction (e.g., violates the terms of his probation), the trial court can then recalculate the sentencing guidelines to consider the defendant's subsequent conduct during the term of the intermediate sanction.⁶³ "[R]evocation of probation simply clears the way for a resentencing on the original offense."⁶⁴ Any increase in the defendant's sentencing guidelines score could push the guidelines range into a straddle or prison cell because the guidelines consider all of the defendant's conduct up to the time of sentencing.

The result is that defendant could be resentenced to an indeterminate prison sentence within the guidelines, with the parole board retaining jurisdiction up to the statutory maximum, which in *Burns* is ten years;⁶⁵ *Harper*, five.⁶⁶ The sentencing guidelines intermediate sanction

⁶³ *Hendrick*, 472 Mich at 557.

⁶⁴ *Hendrick*, 472 Mich at 562.

⁶⁵ MCL 750.110.

cell range in this instance is not equivalent to a maximum sentence as it was in *Blakely*; the defendant may still be subject to the statutory maximum for his punishment depending on his conduct while on probation. This was not true in Washington. Defendant Blakely's 53-month prison term could in no way be extended, no matter what his conduct was in prison, and thus he had a reasonable expectation that when he pleaded guilty that the State of Washington could not extend his incarceration beyond 53 months.⁶⁷ The same can be said for defendant Cunningham in California who was entitled to a sentence in the "middle term" with no basis for extension once it was imposed.

Therefore, unlike the situation in *Blakely*, where the defendant had a reasonable expectation upon pleading guilty that he would serve no more than 53 months in prison, no matter what his subsequent conduct in prison, a defendant in Michigan has no reasonable expectation that the judge will sentence him to a straight jail term within an intermediate sanction cell. Once the defendant knows that his sentencing guidelines score falls in the intermediate sanction cell range, he obtains no promise of receiving a straight jail sentence. Before imposing a departure sentence, the trial court need only acknowledge to a defendant that his sentencing guidelines score falls within an intermediate sanction cell range, that the court finds substantial and compelling reasons why an intermediate sanction punishment is not appropriate, and that a departure sentence is warranted. There is no requirement that the trial

⁶⁶ MCL 750.360.

⁶⁷ The State of Washington has a fixed term, determinate sentencing system, and there is no parole system. Defendant Blakely could, for instance, commit any number of crimes during his 53-month incarceration (even murder), and the State of Washington would be without authority to extend his prison term unless it brought new criminal charges and defendant Blakely were convicted of those new offenses. Thus, for defendant Blakely, a 53-month prison term was effectively the maximum sentence he could have received upon conviction. This would not be true, however, for a defendant who falls within an intermediate sanction cell in Michigan. The California DSL operated similarly as a fixed, determinate sentence.

court first impose a straight jail sentence before choosing to depart and sentence defendant to a prison sentence.

The intermediate sanction cell is therefore not the equivalent of a statutory maximum as in *Blakely* because the court, in appropriate circumstances, may sentence the defendant for the same crime to an indeterminate sentence where the crime's statutory maximum is also the required maximum sentence.

3. Because an intermediate sanction cell is essentially a decrease in the minimum sentence, a departure sentence into a straddle or prison cell does not violate the rule in *Blakely*.

The trial court's calculation of the sentencing guidelines is a calculation to determine the defendant's minimum sentence. Under Michigan's indeterminate sentencing scheme, the maximum sentence is set by statute—in all cases—as the maximum penalty provided by law.⁶⁸ MCL 769.8 provides in pertinent part: "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 sentence." The trial court therefore has absolutely no discretion to determine the length of the maximum sentence. The judge also makes no findings of fact (outside of habitual offender sentencing concerning a defendant's prior criminal record—a permissible finding not requiring a jury verdict⁶⁹) to impose this mandatory maximum sentence in all cases.

An intermediate sanction cell jail sentence is therefore nothing more than a decrease in defendant's minimum sentence, because it *initially* eliminates the statutory maximum sentence and relieves the defendant from being subjected to the jurisdiction of the parole board up to the

⁶⁸ MCL 769.8.

⁶⁹ *Apprendi* 530 US at 490.

normal statutory maximum.⁷⁰ In all other sentences in Michigan, a minimum term still subjects the defendant to the jurisdiction of the parole board up to the normal statutory maximum. An intermediate sanction cell jail sentence therefore is a lesser type of minimum sentence than other prisoners receive for their minimum terms because there is no longer any continuing oversight of the parole board up to the statutory maximum, at least initially.

The point is also demonstrated by the fact that intermediate sanctions apply whenever a sentencing guidelines grid is 18 months or less, but a jail sentence is not to exceed 12 months.⁷¹ Limiting incarceration to 12 months despite a minimum guideline upper limit of 18 months shows the legislative intent to decrease the severity of the minimum sentence. To interpret the intermediate sanction provision as creating a maximum sentence would render meaningless the Legislature's determination that some guideline calculations call for a minimum sentence greater than 12 months, but less than 19 months. The Legislature has made a determination that despite facts warranting a prison term, it has chosen to *decrease* a defendant's minimum sentence to only a jail confinement. An intermediate sanction cell is not, therefore, the equivalent of the "statutory maximum" under *Blakely*; it is, rather, a decrease from the minimum. And because an intermediate sanction cell is a minimum sentence, a judge can depart from that sentence without violating the holding in *Blakely*.

Intermediate sanction cells are designed primarily for the low-level felony offender, and reflect a legislative preference that low-level felony offenders be housed in county jails, apart from the more dangerous offenders in the State prison system. The option of departing from an intermediate cell is a way for the trial court to ensure that the more dangerous offenders can be

⁷⁰ An intermediate sanction cell jail term is also a decrease from the statutory *maximum* sentence because it initially eliminates the maximum statutory term from the sentence. A decrease from the maximum sentence by definition does not violate rule in *Blakely*.

⁷¹ MCL 769.34(4)(a).

placed into the State prison system. Intermediate sanctions were never intended to repeal existing sentence ranges or create new sentence maximums. "When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature."⁷²

⁷² *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

CONCLUSION

A "maximum" sentence, for purposes of the Sixth Amendment, is the longest sentence that can be applied to a defendant under any set of circumstances that arise after a defendant has been convicted by a jury beyond a reasonable doubt. Because an intermediate sanction exposes the defendant to potentially additional incarceration based on defendant's conduct that occurs after sentencing, an intermediate sanction is not a true maximum sentence.

A defendant in Michigan receives no reasonable expectation of receiving an intermediate sanction cell range when he commits the offense, pleads guilty, or is convicted after a trial. Rather, a defendant must await the determination of the appropriate guidelines range after intensive judicial fact-finding on which reasonable minds might differ. Judicial fact-finding here is constitutionally permitted because the purpose of scoring the sentencing guidelines is to determine a defendant's minimum sentence. Minimum sentences do not fall within the scope of the Sixth Amendment. Even where a defendant's sentencing guidelines score falls within an intermediate sanction cell, this is not the functional equivalent of a statutory maximum because the defendant receives neither a promise nor reasonable expectation of a straight jail term, not to exceed 12 months.

Finally, an intermediate sanction is essentially a decrease of the standard minimum sentence in an indeterminate sentence. Nevertheless, it is still a minimum sentence and a judge may constitutionally depart from a minimum sentence without violating the Sixth Amendment.

RELIEF SOUGHT

WHEREFORE, for all the foregoing reasons, Amici Curiae, in support of the People of the State of Michigan, Plaintiff-Appellee, respectfully request that this Honorable Court affirm defendants-appellants' sentence.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

David Gorcyca
President
PAAM



William E. Molner (26291)
Assistant Attorney General
Department of Attorney General
Appellate Division
P.O. Box 30217
Lansing, MI 48909
Telephone: (517) 373-4875

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