

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**  
**APPEAL FROM THE COURT OF APPEALS**

**Schuette, P.J., and O'Connell and Owens, J.J.**

THE PEOPLE OF THE  
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

JESSE GENE BURNS,

Defendant-Appellant,  
\_\_\_\_\_ /

Supreme Court No.: 131898

Court of Appeals No.: 270886

Circuit Court No.: 02-12311-FH

**PLAINTIFF-APPELLEE'S BRIEF ON APPEAL**  
(Oral Argument Requested)

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## **STATEMENT OF JURISDICTION**

The Plaintiff agrees that this Court granted leave to appeal on November 17, 2006, and has jurisdiction over this case.

## **COUNTER- STATEMENT OF QUESTIONS PRESENTED**

### **I**

IS MICHIGAN'S STATUTORY SCHEME, WHICH CONTROLS JUDICIAL DISCRETION FOR MINIMUM SENTENCES CONSTITUTIONAL?

Plaintiff answers:	"Yes"
Trial Court answers:	"Yes"
Court of Appeals answers:	"Yes"
Defendant answers:	"No"

### **II**

MAY THE TRIAL COURT USE BOTH THE STATUTORY MINIMUM AND MAXIMUM WHEN SENTENCING ON PROBATION VIOLATION, FOLLOWING AN ORIGINAL SENTENCE TO AN INTERMEDIATE SANCTION?

Plaintiff answers:	"Yes"
Trial Court answers:	"Yes"
Court of Appeals answers:	"Yes"
Defendant answers:	"No"

### **III**

WHERE THE TRIAL COURT BASED FACT-FINDING ON THE TESTIMONY OF WITNESSES, IS THE PROBATION VIOLATION SENTENCING LAWFUL?

Plaintiff answers:	"Yes"
Trial Court answers:	"Yes"
Court of Appeals answers:	"Yes"
Defendant answers:	"No"

## IV

WHERE THE TRIAL COURT STATED OBJECTIVE AND VERIFIABLE REASONS SUPPORTING DEPARTURE UNDER THE STATUTE, SHOULD THE SENTENCE BE AFFIRMED?

Plaintiff answers:	“Yes”
Trial Court answers:	“Yes”
Court of Appeals answers:	“Yes”
Defendant answers:	“No”

## COUNTER-STATEMENT OF FACTS

The Defendant pled guilty to the charge of Attempted Breaking and Entering, a five year felony. He was originally placed on probation, but on June 23, 2005, a probation violation hearing was held for conduct that occurred the previous May at a boat ramp in Ottawa County.

A hearing involved the testimony of three witnesses. Two of the three witnesses were young ladies that had been accosted by the Defendant at the boat ramp. The third witness was a police officer who interviewed the Defendant shortly after the incident.

Sierra Ingram testified that the Defendant approached her, and asked if she gave “good head”. (17a) Shortly afterwards he reached down and touched Ms. Ingram on her “butt”, accompanying this act with a statement “that’s nice”. (17a) (19a) Ms. Ingram was clear that the Defendant reached around to touch her and that the touching of the buttocks was intentional. (19a)

Sierra Ingram’s friend, Emily Segraves confirmed this event. Defendant approached Sierra and commented on her butt. (27a) Emily heard sexual comments directed towards Sierra and described Sierra as being scared. (27a-28a)

The third witness, police officer Dana Beakman, was called to the scene to investigate the complaint. He conducted an interview of the Defendant. Officer Beakman testified the Defendant at first denied the incident, but later he admitted he had encountered the two witnesses. Defendant admitted he asked the young girls if they knew how to give a “blow job”. (35a) He further admitted to touching Sierra on the butt and touching Emily on the shoulder. (36a)

Beakman also described the Defendant as smelling of alcohol. When Beakman asked the Defendant if he had been drinking, he said yes and that he had about six beers. The Defendant

Defendant told the police officer that he was “buzzed”. The officer gave the Defendant a preliminary breath test, and recalled that the test was at least a .10 BAC. (36a-37a)

At the end of the probation violation hearing, Plaintiff asked the trial court to find the Defendant guilty of probation violation for Criminal Sexual Conduct in the Fourth Degree, because the Defendant used the element of surprise to accomplish his touching. (40a-41a) Plaintiff also asked for a guilty verdict based on the Defendant’s assaultive, intimidating, and abusive behavior toward the young ladies, as well as the count involving the use of alcohol. (40a-41a)

Defense counsel argued that the Defendant’s behavior was not assaultive, abusing, threatening, or intimidating, but acknowledged that he was “probably” “crude” to the two young girls that testified. (41a) Defense counsel told the court that the Defendant was charged with Criminal Sexual Conduct Fourth Degree, and was awaiting resolution. He also indicated Defendant admitted he used alcohol, but left that determination to the court’s discretion. (42a)

The trial judge found by the preponderance of the evidence that the Defendant was intoxicated, committed Criminal Sexual Conduct in the Fourth Degree, and that he acted in a very intimidating, aggressive manner. The court found Defendant guilty of all three counts. (42a)

The sentencing was held on July 15, 2005. At the sentencing, Plaintiff pointed out that the original offense was serious, and the probation agent was asking the court to exceed the original guidelines of 0-11 months. (47a).

Defendant’s counsel countered that the Defendant was violated because he was drinking and because he was “basically being extremely rude”. (47a) Defense counsel asked the court not to go over the guidelines. He argued that although the Defendant’s conduct was “extremely

offensive”, he had not harmed anyone. This justified the court staying within the guidelines.

(48a)

The Defendant emphasized to the court that he had found Jesus Christ and was active in the AA program in the Allegan County Jail. The Defendant asked the court for mercy. (48a-49a)

The trial judge told the Defendant that the probation violation had not been a close case and it was clear that he was abusive to the girls. The court also emphasized that the Defendant scared the young ladies. The court expressed concern that the Defendant did that to two young girls in a public place, and described the Defendant’s behavior as very gross and very intimidating. (49a-50a) The court emphasized that this behavior had not been contemplated in the original guidelines, given its nature, there were compelling reasons to exceed the guidelines. (50a) The trial judge then went on to sentence the Defendant to a prison term of 18 months to five years, with credit for 142 days. (50a)

Defendant never challenged the trial court’s authority to proceed during the probation violation hearing and sentencing. The Defendant never argued for a jury trial or for the decision on the merits to be by “a reasonable doubt” standard. The Defendant never argued that the court could not sentence the Defendant outside the original guidelines on the basis of any recent federal constitutional authority.

The Defendant first raised the constitutional issue, in a motion for resentencing, filed on February 23, 2006, in the Allegan County Circuit Court. (55a-57a)

The court took this newly-raised argument under advisement, and issued its opinion on May 19, 2006. The trial court denied the Defendant resentencing. (70a-72a)

The Court of Appeals denied leave. This Court granted leave on November 17, 2006.

## ARGUMENT I

(ANSWERS DEFENDANT’S ARGUMENT I, A AND B)

STATUTORY STRUCTURE CONTROLS JUDICIAL DISCRETION IN SENTENCING. ONLY INDETERMINATE SENTENCING STATUTES SATISFY CONSTITUTIONAL REQUIREMENTS. BECAUSE MICHIGAN HAS INDETERMINATE SENTENCING STATUTES, WHICH ONLY ALLOW THE JUDGE TO SET THE MINIMUM SENTENCE, DEFENDANT’S SENTENCE TO AN INDETERMINATE SENTENCE WAS CONSTITUTIONAL.

### STANDARD OF REVIEW

The standard of review for constitutional determinations is de novo.<sup>1</sup>

### ARGUMENT

The Defendant claims that an intermediate sanction cell under the Michigan statutory scheme is a maximum sentence. He argues that it is a statutory maximum because it is “the maximum sentence a judge may impose solely on the basis of the facts reflected in a jury verdict or were admitted by the Defendant.”<sup>2</sup>

### FEDERAL CASES ESTABLISH CONSTITUTIONAL CRITERIA

The United States Supreme Court has allowed significant fact-finding for judicial discretion in sentencing, when the State provides an indeterminate sentencing scheme. In *Blakely*, the Court indicated that discretion in adding time to a minimum sentence is not a

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<sup>1</sup> *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004); *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006)

<sup>2</sup> *Blakely v Washington*, 542 US 296, 301; 124 S Ct 2531; 159 L Ed 2d 403 (2004)

problem.<sup>3</sup> Justice Scalia, writing for the Court, noted that although an indeterminate sentencing scheme increases judicial discretion, that increase is not at the expense of a defendant's Sixth Amendment rights. The Justice stated that although judicial fact-finding is involved in an indeterminate sentencing scheme, that fact-finding does not create a legal right to a lesser sentence.<sup>4</sup>

The United States Supreme Court came back to this principle when examining the federal sentencing guidelines.<sup>5</sup> The Court said a trial judge may exercise broad discretion in imposing a sentence within a statutory range.<sup>6</sup> The Court in *Booker* looked at the structure of the sentencing guidelines. In *Blakely*, the Washington statutory structure was examined. In other words, it was the statutory structure which controlled the decision on whether or not the respective schemes are determinate or indeterminate.<sup>7</sup>

In the Washington statutory scheme or the federal sentencing system, a defendant pleading guilty or being found guilty of the criminal offense could expect a sentence within very narrow ranges. In *Blakely*, 49–53 months; in *Booker*, a 210-262 month term. In each case, the expectation of the defendant was frustrated by eventual fact-finding that lead to much longer maximum terms. In *Blakely*, an increase of almost 70 percent, and in *Booker*, almost 10 years longer.<sup>8</sup>

In *Apprendi v New Jersey*, Justice Stevens writing for the United States Supreme Court emphasized their approval of broad discretion within statutory limits. “We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion -- taking

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<sup>3</sup> *Blakley v Washington*, supra 305, 309

<sup>4</sup> *Blakley v Washington*, supra 309

<sup>5</sup> *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005)

<sup>6</sup> *United States v Booker*, supra 233

<sup>7</sup> *United States v Booker*, supra 233

<sup>8</sup> *Blakley v Washington*, supra 307; *United States v Booker*, supra 235

*within the range* (emphasis by the Court) prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* (emphasis by the Court) in the individual case.”<sup>9</sup> *Apprendi* dealt with a statutory scheme that increased the maximum penalty on the basis of a judge’s finding of a racial hatred enhancement factor. The Court made it clear that an indeterminate sentencing scheme is permissible, and commented favorably on indeterminate schemes, as they did later, in both *Blakely* and *Booker*.

Very recently the Court again examined this concept in *Cunningham v California*.<sup>10</sup> Justice Ginsburg, writing for the Court, wrote that California utilized a determinate sentencing law, and that this sentencing scheme replaced an indeterminate sentencing regime. For the offense at issue, the statute mandated three precise maximum prison terms, either 6 years, 12 years, or 16 years. The California statute directed the sentencing judge to start with the middle term, 12 years. In *Cunningham*, judicial fact-finding escalated defendant’s sentence from 12 years to 16 years. But it was only the *increase* in the maximum that was prohibited by the United States Supreme Court.<sup>11</sup> Judicial fact-finding could decrease the sentence from 12 to 6 years, and again, the Court resolved that sentencing schemes permitting judges to exercise broad discretion within a defined statutory ranges are constitutional.<sup>12</sup>

In *Apprendi*, *Blakely*, *Booker*, and *Cunningham*, the Court recognized the validity of indeterminate sentencing, and commented favorably on judicial fact-finding in both increasing and decreasing the minimum sentence under such a system. The Court consistently

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<sup>9</sup> *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000)

<sup>10</sup> *Cunningham v California*, 1-22-07, 05-6551, 549 US \_\_\_\_ (2007)

<sup>11</sup> *Cunningham v California*, supra, slip opinion pg 9

<sup>12</sup> *Cunningham v California*, supra, slip opinion pg 22

distinguished *McMillan v Pennsylvania*.<sup>13</sup> In *McMillan*, the Court had allowed judicial fact-finding to increase the minimum sentence a total of five years for the possession of a weapon.

All these federal cases prove that only determinate sentencing systems are subject to constitutional failure.

### MICHIGAN SENTENCING STATUTES

The issue in the instant case is whether or not the intermediate sanctions provided for by Michigan statutes are determinate or indeterminate.

To resolve this question this Court should turn to the statutes, as the United States Supreme Court did in reviewing the statutory schemes in Washington, California, and New Jersey. The federal sentencing system at issue in *Booker* was a Congressionally-created commission that promulgated a sentencing scheme with the force of law.

In two recent cases, this Court ruled that significant parts of the Michigan sentencing scheme are an indeterminate system.<sup>14</sup>

Michigan statutes require the sentencing judge to set the minimum sentence.<sup>15</sup>

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

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<sup>13</sup> *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1976)

<sup>14</sup> *People v Drohan*, supra; *People v McCullar*, 475 Mich 176; 714 NW2d 798 (2006)

<sup>15</sup> MCL 769.34(2)

Michigan statutes warn the defendant about the maximum sentence. Statutes do not promise a lesser penalty.

In the instant case, the trial court would have told Defendant the maximum was five years. MCR 6.302(B)(2) provides that a defendant shall be told on the record, by the trial court, the maximum punishment, and any mandatory minimum.<sup>16</sup> Under Michigan plea practice, the only expectation Defendant had when he pled was that he could face imprisonment for five years. This is in sharp contrast to the California, Washington, New Jersey or federal systems, where the expectation was a specific sentence or a very narrow incarceration range.

In *Drohan*, this Court indicated Michigan is an indeterminate sentencing state for prison cells. In *Drohan*, judicial fact-finding by Michigan trial judges in sentencing was found to be constitutional. In another case, *McCuller*, this Court ruled fact-finding in straddle cells was constitutional, *McCuller* was vacated on February 20, 2007 by the United States Supreme Court and remanded for further consideration in light of *Cunningham*. It is significant that in *Drohan*, certiorari was denied. Since *Drohan* identified Michigan as an indeterminate sentencing state and allowed judicial fact-finding, Michigan's sentencing scheme passed constitutional muster. The United States Supreme Court in the *McCuller* order was unaware of the full Michigan sentencing scheme, which is indeterminate through out its provisions.

Plaintiff and Defendant agree the guidelines at Defendant's initial sentencing were appropriately scored and that he was properly placed into the intermediate sanction cell. The sentence for an intermediate sanction cell is found in at least two statutory provisions. First, it is made clear that when setting a minimum sentence, if the term of imprisonment is 18 months or

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<sup>16</sup> MCR 6.302(B)(2); which provides the judge must determine the pleading defendant understands "... the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law;..."

less, than an intermediate sanction shall be imposed.<sup>17</sup> However, the Legislature has allowed the trial judge to depart from that grid, if substantial or compelling reasons existed for a term above the 18 months. But more importantly, at this point the statutory scheme provides for an intermediate sanction to mean a wide range of possible sentences.<sup>18</sup>

- (i) Inpatient or out patient drug treatment or participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082.
- (ii) Probation with any probation conditions required or authorized by law.
- (iii) Residential probation.
- (iv) Probation with jail.
- (v) Probation with special alternative incarceration.
- (vi) Mental health treatment.
- (vii) Mental health or substance abuse counseling.
- (viii) Jail
- (ix) Jail with work or school release.
- (x) Jail, with or without authorization for day parole under 1962 PA 60, MCL 801.251 to 801.258
- (xi) Participation in a community corrections program.
- (xii) Community service.
- (xiii) Payment of a fine.
- (xiv) House arrest.
- (xv) Electronic monitoring.

As defined in this statute, a defendant faces 15 separate possibilities or a combination of these possibilities. Many of these options would put obligations, and restrictions on a defendant's freedom for periods well in excess of the 18 months identified as the upper limit for the intermediate sanction cell.

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<sup>17</sup> MCL 769.34(4)(a); which provides: “ (4) Intermediate sanctions shall be imposed under this chapter as follows: (a) If the upper limit of the recommendation minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months whichever is less.”

<sup>18</sup> MCL 769.31b

This wide discretion in sentencing under an intermediate sanction cell was recognized by this Court in a recent case.<sup>19</sup> This Court noted that a large range of sentences were possible for a Defendant under the intermediate sanction cell.

Under MCL 769.31(b), a sentence is constitutional. Broad statutory sentencing options are indicative of an indeterminate system. The statute directs the trial judge to set the minimum sentence. When the statute is coupled with the fact that this Defendant only had an expectation that his sentence could not exceed five years, that leads to the conclusion that Michigan is an indeterminate sentencing system.

The only time that an intermediate cell can be argued to be a determinate sentence, is under the very narrow instance when a trial judge chooses to sentence the defendant to a jail term within the guidelines. In this instance the Court of Appeals labeled this action a determinate sentence.<sup>20</sup> However, that label is really dicta. The statute allows the trial court under an intermediate sanction cell to simply impose a jail term.<sup>21</sup> The Court of Appeals approved the use of one of the statutory options, straight jail, and ruled that the trial judge could follow the statute.

But the same statute allowed for the sentence that was imposed in the instant case, a term of probation and jail.<sup>22</sup> Furthermore, this sentence put the Defendant on notice that his behavior would be monitored and that specific standards were expected.

Given the lack of expectation by a defendant for a set determinate sentence, given that wide discretion is given to the sentencing judge by statute, and given that these statutes identify the Michigan scheme as “indeterminate”, (with the sentencing judge setting the minimum) it is

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<sup>19</sup> *People v Stauffer*, 465 Mich 633, 640; 640 NW2d 69 (2002)

<sup>20</sup> *People v Martin*, 257 Mich App 457; 668 NW2d 397 (2003)

<sup>21</sup> MCL 769.31(b)(viii)

<sup>22</sup> MCL 769.31(b)(iv)

clear Michigan is an indeterminate sentencing state and that an intermediate sanction cell is part of an indeterminate sentencing scheme.

The Supreme Court of the United States found fault only in those sentencing systems that have a determinate sentence, within a narrow range, that a defendant can expect he will get after a finding of guilt or by his guilty plea. Nothing in the instant case triggers the United States Supreme Court's concern that a trial judge is infringing on the province of a jury when making sentencing decisions. A jury verdict would have resulted in the same five year maximum penalty (actually since this was a plea bargain, dismissing two ten year felonies at the time of 2002 initial sentencing, it may have been an even higher maximum penalty, if found guilty at trial [see 8a]). Therefore, this Court should find that an indeterminate sentencing cell is part of the Michigan indeterminate sentencing scheme, and that the Defendant's original, intermediate cell sentence was lawful and appropriate.

## ARGUMENT II

(THIS ARGUMENT ADDRESSES DEFENDANT’S ARGUMENT I, C AND D).

ONCE THE TRIAL COURT SENTENCES A DEFENDANT TO JAIL AND A TERM OF PROBATION UNDER INTERMEDIATE SANCTION CELL, IS THE ENFORCEMENT OF PROBATION LIMITED TO A TWELVE MONTH MAXIMUM SENTENCE IN JAIL.

### STANDARD OF REVIEW

The resolution of constitutional issues is de novo.<sup>23</sup> The interpretation of statutes is de novo. Statutes should be read together, for purposes of giving effect to the intention of the Legislature.<sup>24</sup>

Where error is not preserved, review is for “plain error”, unless the constitutional error is structural.<sup>25</sup> *Blakely* sentencing issues are not structural error, if the defendant had counsel and was tried by an impartial adjudicator.<sup>26</sup>

### ARGUMENT

In this case the Defendant claims that once the trial court uses the option of a jail term with probation, that the sentence transforms an indeterminate sentence with a five year maximum into a determinate sentence offense with a new maximum punishment of 12 months in jail. His interpretation is legally and constitutionally incorrect.

### ENFORCEMENT OF PROBATION IN THE FEDERAL CASES

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<sup>23</sup> *People v Nutt*, supra; *People v Drohan*, supra

<sup>24</sup> *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998)

<sup>25</sup> *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999)

<sup>26</sup> *Washington v Recuenco*, \_\_\_ US \_\_\_; 126 S Ct 2546, 2551-2552; 165 L Ed 2d 466 (2006)

The United States Supreme Court never implied that *Blakely* applies to probation violations. Justice Scalia (in *Blakely*) indicates that the Court's intent is just the opposite. In describing the permissibility of judicial fact-finding in an indeterminate sentencing system, the Court likens it to the power of a parole board. The Court said: "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 that exercise of his sentencing discretion. But those 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."<sup>27</sup> The Court then goes on to make the point that a defendant when committing a crime should have some idea that the crime involves a certain maximum sentence.

In this case, the maximum sentence is five years. It would be impossible for a defendant at the time he committed the crime, or plead guilty, or was found guilty by a jury, to know under the Michigan system that he would be subject to a jail term of either 0-11 months or later 12 months as argued by the Defendant. It was only after his original sentence that the Defendant had any idea that he even fit into an intermediate sanction cell. Therefore, when the trial court sentenced the Defendant to a jail term and probation, the sentence did not touch upon the area of concern for the United States Supreme Court.

Parole and probation are treated in similar ways by the United State Supreme Court. A defendant has certain due process rights (notice primarily) and the right to be represented by an attorney, but no right to a finding beyond a reasonable doubt or a right to a jury trial.<sup>28</sup> Nothing in *Blakely* suggests the Court wants to apply it to parole or probation violation proceedings. If in

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<sup>27</sup> *Blakely* supra 309

<sup>28</sup> *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972); *Gagnon v Scarpelli*, 411 US 778; 93 S Ct 1756; 36 L Ed 2d 656 (1973)

fact they did, the Court would not have compared enforcement by a parole board (and its inevitable fact-finding and possible further imprisonment), with the imposition of an indeterminate sentence by the original sentencing judge. Since this comparison was made, it is clear the majority in *Blakely* did not intend its decision to limit the strict supervision of probationers. Furthermore, if the Defendant is right in his argument about the enforcement of probation, it seems to logically follow that the parole board would similarly be confined in their decisions in releasing prisoners kept beyond their minimum sentence. Clearly, nothing of the sort was intended by the United States Supreme Court. The Court has never said jury trials or proof beyond a reasonable doubt are part and parcel to parole or probation supervision and enforcement.

Only sentences that increase the statutory maximum are in danger under *Blakely*, *Booker*, *Apprendi* or *Cunningham*. These cases only looked to the initial finding of guilt and not the enforcement of probation or parole, where juries have never had a role.

#### MICHIGAN'S STATUTES ABOUT PROBATION VIOLATIONS ARE CONSTITUTIONAL

Michigan's statutory scheme for handling probation violations is intended to be part of an indeterminate sentencing scheme. First, the Defendant was placed on probation by statutory authority.<sup>29</sup> Second, the conditions of probation included conditions that were both required or permissive by statute.<sup>30</sup> Finally, probation is a matter of grace that conferred no particular right to its continuance. The trial court can revoke probation for offensive or criminal conduct or for

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<sup>29</sup> MCL 771.1(1) and MCL 769.31(b)(iv)

<sup>30</sup> MCL 777.3(1)(a) and MCL 777.3(3); for instance (1)(a) provides: "During the term of his or her probation, the probationer shall not violate any criminal law of this state, the United States, or another state or any ordinance of any municipality in this state or another state."

other reasons in the sound discretion of the trial court.<sup>31</sup> A prohibition against violating criminal laws or ordinances is a mandatory probation condition.

Because the Defendant pled guilty and had already subjected himself to a potential sentence of five years imprisonment, the trial judge could proceed to a hearing and sentencing of the Defendant for the probation violation. Nothing in the statutory scheme required the trial court, if the charged conduct is criminal, to wait for the resolution of the criminal case in another jurisdiction. Given the mandatory probation order forbidding subsequent criminal behavior, the Legislature was interested in having sentencing judges (through probation agents) closely monitoring defendants' conduct, and swiftly dealing with violations. All defendants on probation must conform their behavior to the requirements of their probation. In this case, the Defendant was given a probation order that prohibited the conduct the trial court later found he had committed.<sup>32</sup> If probation is revoked, as was done in the instant case, the relevant statute provides a probationer may be sentenced in "...the same manner and to the same penalty..." as if no probation had been ordered, MCL 771.4.

Yet the trial court was still limited under the Michigan indeterminate sentencing law. Since the trial court proceeds as if no probation had been ordered, the statutory scheme again requires that the sentence on probation violation be no more than two-thirds of the statutory

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<sup>31</sup> MCL 771.4; provides in part: "It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance. If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation."

<sup>32</sup> Probation Order (1-2b)

maximum.<sup>33</sup> Thus, the Legislature makes clear, that defendants initially sentenced under an indeterminate sentencing cell sanction are still in an indeterminate system.

Read together, these statutes establish a system that initially sets a minimum under an indeterminate sentencing scheme, and then authorizes the trial court to proceed on probation violations with fact-finding, and then subsequent sentence, again subject to an indeterminate range, not to exceed two-thirds of the maximum. In this case, the trial judge did this, and imposed a sentence of 18 months to five years. By doing so the judge was guided by the statutory requirements for sentencing outside the guidelines.<sup>34</sup> This resentencing was appropriate under the statutes, and was not offensive to the concerns expressed by the United States Supreme Court in *Blakely*.

The Defendant did not object to the proceedings, the lack of a jury, or the impartiality of the trial court. Defendant was represented by legal counsel at his hearing and sentencing. He failed to preserve this issue for review. The Defendant falls squarely under *Carines* and *Recuenco*. The Defendant has not shown that the trial judge was not impartial. He should be denied relief.

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<sup>33</sup> MCL 769.34(2)(b); which provides: “The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.”

<sup>34</sup> MCL 769.34(3)

### ARGUMENT III

DEFENDANT IS NOT ENTITLED TO RESENTENCING BECAUSE THE SENTENCE WAS BASED UPON THE TESTIMONY OF WITNESSES APPEARING BEFORE THE TRIAL COURT, AND THE TRIAL COURT MADE FINDINGS OF FACTS BASED UPON THIS TESTIMONY.

#### STANDARD OF REVIEW

The standard of review for sentences is an abuse of discretion.<sup>35</sup> Fact-finding is reviewed for clear error.<sup>36</sup>

#### ARGUMENT

The Defendant argues the Court found him guilty of the probation violation only because criminal charges were brought in Ottawa County. Defendant also argues that since those charges were later dismissed as part of a plea agreement in Ottawa County, the sentencing at issue in this appeal was barred.<sup>37</sup> The Defendant ignores the fact that a hearing was held, and that three witnesses testified against him in Allegan Circuit Court. The Defendant was represented by counsel, and had an opportunity to present evidence and confront the witnesses against him. He ultimately chose not to present evidence but did cross-examine the witnesses. These witnesses proved the Defendant engaged in sexual assault, threatening behavior, and had been drinking. All of these activities were in violation of his probation conditions.<sup>38</sup>

Based on this record, the trial judge made rulings that the Defendant was intoxicated, committed the sexual touching that amounted to Criminal Sexual Conduct in the Fourth Degree

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<sup>35</sup> *People v Odendahl*, 200 Mich App 539; 505 NW2d 147 (1986)

<sup>36</sup> *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); and *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995)

<sup>37</sup> Ottawa County Order (3b)

<sup>38</sup> Probation Order (1-2b)

and was intimidating and aggressive.<sup>39</sup> Although the findings are succinct, the trial judge clearly considered the evidence presented. His findings were not simply the result of the charges pending in Ottawa County.

In Michigan, a probation revocation hearing consists of the factual determination that a violation or violations occurred, and then the Court's decision whether or not revoking probation is warranted.<sup>40</sup> The trial judge complied with those requirements, and at the conclusion of the hearing revoked the Defendant's probation.

The trial judge was correctly applying a preponderance of the evidence standard. This comports both with the statute,<sup>41</sup> as well as case law.<sup>42</sup> None of these findings were premised on the mere fact that the Defendant was charged with a criminal case for the same conduct in Ottawa County. Those charges were not discussed when the factual findings were made.

The credibility of the witnesses is for the trial judge to assess, and is not reconsidered on appeal.<sup>43</sup> Defense counsel essentially admitted that the witnesses had conveyed accurate information. He described the Defendant's conduct as crude and inappropriate, and argued that the trial judge should give a more lenient interpretation to the behavior. Defense counsel admitted the Defendant used alcohol in violation of his probation, but left the resolution of that issue to the trial judge's discretion.<sup>44</sup> This looks like a concession of wrong doing and plea for leniency.

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<sup>39</sup> (42a)

<sup>40</sup> *People v Hall*, 138 Mich App 86, 92; 359 NW2d 259 (1984)

<sup>41</sup> MCL 771.4

<sup>42</sup> *People v Ison*, 132 Mich App 61-66; 346 NW2d 894 (1984); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990)

<sup>43</sup> *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990)

<sup>44</sup> (42a)

The trial judge made appropriate determinations based upon evidence presented. This was a situation where credibility could be assessed and findings made. Nothing suggests that the fact criminal charges were pending on the same conduct, had the slightest role in the trial judge's ruling.

This claim is lacking in factual and legal support and should be denied.

## ARGUMENT IV

THE TRIAL COURT STATED OBJECTIVE AND VERIFIABLE REASONS SUPPORTING THE SENTENCING DEPARTURE UNDER THE GUIDELINES AND AS REQUIRED BY STATUTE AND CASELAW.

### STANDARD OF REVIEW

The Court's decision to go outside the guidelines is reviewed for clear error.<sup>45</sup>

### ARGUMENT

In this case the sentence outside of the guidelines range was appropriate. The trial court was required to state on the record its reasons.<sup>46</sup> That was done by the trial judge. The Defendant portrays the trial court's reasons as "subjective". However, this argument is undercut by the defense counsel, who described the Defendant's behavior as "crude".<sup>47</sup> It is a concession that the behavior was seriously inappropriate.

The trial court found at the probation revocation hearing that the offense of Criminal Sexual Conduct Fourth Degree occurred.<sup>48</sup> The sentencing judge may consider conduct that occurred during the term of probation for purposes of assessing the need to exceed the guidelines.<sup>49</sup>

The statute permits the trial court to depart from the guidelines when there are "substantial and compelling reasons" for the departure.<sup>50</sup> The standard applied by this Court in reviewing this type of decision by the trial judge, indicates that the sentencing court should have

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<sup>45</sup> *People v Babcock*, supra, 264

<sup>46</sup> MCL 769.34(3)

<sup>47</sup> (47a)

<sup>48</sup> (42a)

<sup>49</sup> *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005)

<sup>50</sup> MCL 769.34(3)

an objective and verifiable reason that keenly or irresistibly grabs the judge's attention and is of considerable worth.<sup>51</sup>

In this case the Defendant's drunken conduct was directed at two young ladies. He was in a public place. This is the type of behavior that keenly grabbed the trial court's attention. The sentencing judge heard directly from the two witnesses about Defendant's behavior. The judge heard from a police officer who testified the Defendant confirmed much of what was claimed. Certainly, for a person under the supervision of the court, by an order of probation, offending behavior in a place of public recreation is unacceptable, offensive and serious. It deserved significant punishment. Compounding the violation was the fact that Defendant was consuming alcohol. This behavior violated his probation order too. Through his attorney, he claimed this alcohol consumption was, in part, as responsible for his admitted crude behavior. But a fair reading of the evidence shows he behaved in a way that was fairly characterized by the sentencing judge as "aggressive and offensive". The trial court found the sexual touching occurred and amounted to criminal sexual conduct. These facts and findings are sufficient to justify the departure. As pointed out above, these issues were not seriously contested at the hearing, just minimized by argument.

Therefore the Defendant failed to make out his claim that the court made subjective judgments, based upon behavior that was not sufficiently proven in court. The Plaintiff asks that the Court reject this argument on appeal.

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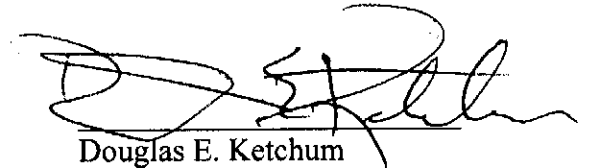
<sup>51</sup> *People v Babcock*, supra 257

**SUMMARY AND RELIEF**

The Plaintiff asks that this Court affirm Defendant's sentence and the departure from the guidelines.

Dated:

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. E. Ketchum', written over a horizontal line.

Douglas E. Ketchum  
Assistant Prosecutor

DEK:plc