IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Jane M. Beckering, P.J., and Peter D. O'Connell and Douglas B. Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

RAHIM OMARKHAN LOCKRIDGE,

Defendant-Appellant.

_______________________________/

Supreme Court No. 149073

Court of Appeals No. 310649

Circuit Court No. 11-238930 FC

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

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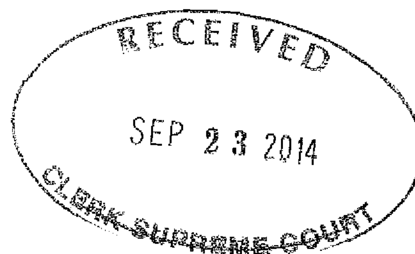

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Oakland County Circuit Court by jury trial, and a Judgment of Sentence was entered on May 31, 2012. A Claim of Appeal was filed on June 7, 2012 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated May 31, 2012, as authorized by MCR 6.425(F)(3). The Court of Appeals affirmed the sentence in a published decision issued February 13, 2014. This Court had jurisdiction to consider the application for leave to appeal pursuant to MCR 7.301(A)(2), and on June 11, 2014 granted leave to appeal.

STATEMENT OF QUESTIONS PRESENTED

I. DOES A SENTENCING JUDGE'S DETERMINATION OF THE APPROPRIATE SENTENCING RANGE UNDER THE MICHIGAN SENTENCING GUIDELINES ESTABLISH THE FLOOR OF PERMISSIBLE SENTENCES, OR A "MANDATORY MINIMUM SENTENCE," SUCH THAT THE FACTS USED TO SCORE THE OFFENSE VARIABLES MUST BE ADMITTED BY THE DEFENDANT OR ESTABLISHED BEYOND A REASONABLE DOUBT BY THE TRIER OF FACT?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. DOES THE FACT THAT A JUDGE MAY DEPART DOWNWARD FROM A SENTENCING RANGE FOR "SUBSTANTIAL AND COMPELLING" REASONS PREVENT THE MICHIGAN SENTENCING GUIDELINES FROM ESTABLISHING A "MANDATORY MINIMUM" UNDER *ALLEYNE*?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "No".

III. IS THE PROPER REMEDY TO REQUIRE FACTUAL DETERMINATIONS TO BE MADE BY A JURY OR STIPULATED TO BY A DEFENDANT?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Defendant-Appellant Rahim Omarkhan Lockridge was convicted of involuntary manslaughter, MCL 750.321, by a jury on May 4, 2012 in Oakland County Circuit Court before the Honorable Nanci J. Grant. On May 31, 2012, Mr. Lockridge was sentenced to 8 to 15 years' imprisonment. [32a-33a] Mr. Lockridge appealed as of right, and on February 13, 2014 the Court of Appeals affirmed. [34a-55a] Mr. Lockridge filed a timely Application for Leave to Appeal to this Court on April 9, 2014 which was granted on June 11, 2014. [56a]

The Trial and Sentence

Mr. Lockridge was initially charged with open murder in connection with the death of his wife, Kenyatta Lockridge. At trial, there was testimony from police and family about a pattern of violence between Mr. Lockridge and his wife that was not one-sided. Mr. Lockridge's daughters testified that the couple fought often, with Mr. Lockridge generally instigating a verbal conflict and Ms. Lockridge escalating the argument into physical confrontation and even threatening Mr. Lockridge with weapons such as a knife. [10a, 12a, 14a, 15a-16a]

On September 19, 2011, Ms. Lockridge accused Mr. Lockridge of taking money from her purse and a verbal argument ensued, which escalated with Ms. Lockridge punching Mr. Lockridge in the face twice. [23a, 30a] Mr. Lockridge tried to leave but the confrontation continued with Ms. Lockridge continuing to hit Mr. Lockridge in the face. [24a] Mr. Lockridge placed his arm around Ms. Lockridge's neck in a headlock for approximately 10 seconds to subdue her, while Ms. Lockridge continued to scratch and hit him. [9a, 11a, 13a] Once Mr. Lockridge felt that Ms. Lockridge had calmed, he released her and left the house to avoid further confrontation, unaware that his wife was hurt. [22a, 25a, 26a, 27a, 28a, 29a].

Ms. Lockridge was later declared dead at the hospital and a forensic pathologist concluded that Ms. Lockridge's death was caused by asphyxia due to neck compression. When police arrested Mr. Lockridge, they observed that he had scratches on his forehead and neck, blood in his right eye, swelling on his left eye and face, and a scratch on his leg. [17a-18a, 19a-20a].

The trial court directed a verdict of acquittal regarding first-degree murder but retained the charge of second-degree murder. [21a]. The court also granted the Prosecution's request to instruct the jury on the lesser included offense of involuntary manslaughter as a lesser charge. [31a].

The jury convicted Mr. Lockridge of involuntary manslaughter on May 4, 2012. Mr. Lockridge was sentenced on May 31, 2012. [32a-33a] His Offense Variables under the Michigan Sentencing Guidelines were scored as follows:

OV 1	OV 2	OV 3	OV 4	OV 5	OV 6	OV 7	OV 8	OV 9	OV 10
0	0	25	0	15	10	0	0	10	10
OV 11	**OV 12**	**OV 13**	**OV 14**	**OV 15**	**OV 16**	**OV 17**	**OV 18**	**OV 19**	**OV 20**
0	0	0	0	NA	0	0	0	0	0

This scoring totaled 70 Offense Variable points. Along with Mr. Lockridge's Prior Record Variable Score of 35 points, Mr. Lockridge fell into the D-V cell of the Class C grid, which yielded a sentencing range of 43 to 86 months. The trial court departed upward from the sentencing range and sentenced Mr. Lockridge to 8 to 15 years' imprisonment.

On the basis of the verdict alone, and without additional judicial fact-finding, Mr. Lockridge's Offense Variables would have been scored as follows:

OV 1	OV 2	OV 3	OV 4	OV 5	OV 6	OV 7	OV 8	OV 9	OV 10
0	0	25	0	0	10	0	0	0	0
OV 11	**OV 12**	**OV 13**	**OV 14**	**OV 15**	**OV 16**	**OV 17**	**OV 18**	**OV 19**	**OV 20**
0	0	0	0	NA	0	0	0	0	0

This scoring would total 35 Offense Variable points and would put Mr. Lockridge in the D-IV cell of the class C grid, with a sentencing range of 36 to 71 months.

The Court of Appeals' Decision

Mr. Lockridge appealed as a matter of right. In a published decision issued February 13, 2014, the Court of Appeals affirmed the trial court's departure from the sentencing range. [34a-55a] In the main opinion, Judge O'Connell declined to address Mr. Lockridge's argument that judicial fact-finding required by the Michigan Sentencing Guidelines violated *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), citing the Court of Appeals' recent decision in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013). However, Judge Beckering and Judge Shapiro each wrote separately to express their disagreement with *Herron*.

Judge Beckering summarized the line of cases running from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) to *Alleyne*, and noted that this Court's previous decisions addressing the application of *Apprendi* to the Michigan Sentencing Guidelines relied on *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), which was overruled by *Alleyne*. She considered the three rationales the *Herron* Court relied on to conclude *Alleyne* does not apply to the Michigan Sentencing Guidelines and found each of them unpersuasive. Judge Beckering concluded that "Under *Apprendi* and its progeny, the mandatory minimum in Michigan is the guidelines range itself; and the mandatory minimum permissible for

purposes of *Alleyne* is the guidelines range as determined solely on the basis of a defendant's criminal history and the facts reflected in the jury's verdict or admitted by the defendant." *People v Lockridge*, 304 Mich App 278, 285; 849 NW2d 388, 392 (2014) (BECKERING, J., concurring in part, dissenting in part). Judge Beckering added she would cure the constitutional defect by rendering the Michigan Sentencing Guidelines advisory as the United States Supreme Court did with the federal guidelines in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). *Id.* at 307.

Judge Shapiro agreed with Judge Beckering as to the impact of *Alleyne* on the low end of sentencing ranges produced by the Michigan Sentencing Guidelines, but disagreed as to the impact of *Alleyne* on the high end of sentencing ranges. He noted that, just as before *Alleyne*, ". . . the upper end of the Michigan guidelines has absolutely no bearing on the maximum term of imprisonment to be imposed, as that is set by statute. And, at the same time, it does not set a minimum term above which the court must sentence." *Id.* at 315 (SHAPIRO, J., concurring in part, dissenting in part). Judge Shapiro would also render the Michigan Sentencing Guidelines advisory, but only the low end of sentencing ranges, as he concluded the high end was not impacted.

On June 11, 2014, this Court granted leave to appeal to address:

> (1) whether a judge's determination of the appropriate sentencing guidelines range, MCL 777.1, et seq., establishes a "mandatory minimum sentence," such that the facts used to score the offense variables must be admitted by the defendant or established beyond a reasonable doubt to the trier of fact, *Alleyne v United States*, 570 US ___, 133 S Ct 2151, 186 L Ed 2d 314 (2013); and (2) whether the fact that a judge may depart downward from the sentencing guidelines range for "substantial and compelling" reasons, MCL 769.34(3), prevents the sentencing guidelines from being a "mandatory minimum" under *Alleyne*, see *United States v Booker*, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621 (2005). [56a]

INTRODUCTION

Preservation of the right to a jury trial was one of the very reasons for the founding of this country. *See* THE DECLARATION OF INDEPENDENCE, para. 3 (US 1776) ("For depriving us in many cases, of the benefits of Trial by Jury"). The founders understood the jury to be a check the people impose directly on government. *Apprendi v New Jersey*, 530 US 466, 498; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (SCALIA J., concurring) ("The founders of the American Republic were not prepared to leave [criminal justice] to the State . . ."). To the extent there was any debate about the value of jury trials at the founding, it was between two positions: "the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." THE FEDERALIST NO 83 (Alexander Hamilton). The right to a jury trial has received new vitality in the United States Supreme Court's line of cases which began with *Apprendi*.

A. **Apprendi** *and Statutory Maximum Cases*

In *Apprendi*, the United States Supreme Court considered a New Jersey statute which allowed for enhancement of a criminal penalty if a judge found the underlying offense was committed with a biased purpose. *Apprendi*, 530 US at 469-470. With such a finding, the penalty for second degree possession of a firearm for an unlawful purpose escalated from 5 to 10 years, to 10 to 20 years. *Id.* The Court reiterated that a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 477 quoting *United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995).

The Court noted that at the Nation's founding, the notion of a "sentencing factor" would have been an enigma. At that time, an indictment contained all the facts the prosecution needed

to prove in order to obtain a conviction and have sentence imposed. *Id.* at 478. Still, there was no constitutional bar to judges considering factors when "imposing judgment *within the range* prescribed by statute." *Id.* at 481 (emphasis in original). However, judicial fact-finding which altered that range was prohibited: "Other than the fact of a prior conviction . . . [I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 490 (quotation omitted). Regarding a sentencing judge's discretion, the Court emphasized "The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id.* at 482 n 10. The Court held the New Jersey statute and similar measures violative of the Sixth Amendment right to a jury trial, and Fourteenth Amendment right to due process. *Id.* at 476.

The Court applied *Apprendi* to Arizona's death penalty in *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002). The Arizona scheme called for judges to find aggravating and mitigating circumstances, and impose the death sentence only if there was at least one aggravating circumstance, and no mitigating circumstances sufficient for leniency. *Ring*, 536 US at 592. Even though Arizona's first degree murder statute listed the possible penalties as "death or life imprisonment," the Court noted that death was not available absent judicial fact-finding beyond the jury's verdict, and inquiry into what constitutes an element of a crime is "one not of form, but of effect." *Id.* at 603-604 quoting *Apprendi*, 530 US at 494. The Court struck down the Arizona death penalty scheme.

In *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the Court applied *Apprendi* to Washington's sentencing scheme. In *Blakely*, the defendant was convicted of kidnapping, a Class B felony where state law provided that terms could not exceed 10 years.

Blakely, 542 US at 299. Washington's Sentencing Reform Act also specified a standard range of 49 to 53 months for that specific offense. *Id.* However, the Washington statute also allowed for departures from the standard range if a judge found "substantial and compelling reasons justifying an exceptional sentence." *Id.* The judge did so and sentenced the defendant to 90 months. The state argued the relevant "statutory maximum" for *Apprendi* purposes was the 10-year cap for Class B felonies, but the Court concluded 53 months was the relevant limit because "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." *Id.* at 303-304. The Court remanded for resentencing.

The Court applied *Apprendi* to the Federal Sentencing Guidelines in *Booker v United States*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). There, the maximum sentence authorized by the jury without additional findings was a range of 210 to 262 months. *Booker*, 543 US at 227. After judicial fact-finding, the Federal Sentencing Guidelines produced a range of 360 months to life. *Id.* The Court concluded that the federal system, like the Washington system, was constitutionally infirm. The features common to the two systems, and fatal to them both, were that "the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." *Id.* at 233. The Court held that the availability of upward departures did not save the upper end of a federal sentencing range from being the applicable statutory maximum. The Court noted that if departures meant that sentencing judges were bound only by the statutory maximum contained in an offense statute, "there would be no *Apprendi* problem." *Id.* at 234. However, the Court noted:

> . . . departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into

> account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. [*Id.*]

The majority elected to sever the portions of the Federal Sentencing Guidelines which made them mandatory, as advisory guidelines do not implicate *Apprendi*. *Id.* at 265.

California's Determinate Sentencing Law was subjected to *Apprendi* scrutiny in *Cunningham v California*, 549 US 270; 127 S Ct 856; 166 L Ed 2d 856 (2007). In *Cunningham*, the defendant was convicted of continuous sexual abuse of a child under the age of 14, and California's Determinate Sentencing Law provided for a lower term of 6 years, a middle term of 12 years, or an upper term of 16 years. *Cunningham*, 549 US at 275. However, the judge was obliged to sentence to the middle term unless he found one or more additional facts in aggravation. *Id.* The Court held that because the middle term was all that was authorized by a jury verdict, judicial fact-finding which elevated the permissible sentence to the upper term violated *Apprendi*. *Id.* at 288.

B. **Apprendi** *and Mandatory Minimum Cases*

The United States Supreme Court's line of modern mandatory minimum cases actually starts before the Court re-examined the right to a jury trial in *Apprendi*, with *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986). In *McMillan*, the Court considered Pennsylvania's Mandatory Minimum Sentencing Act which set a mandatory minimum term of five years imprisonment if a judge found by a preponderance of the evidence a defendant visibly possessed a firearm under certain circumstances. *Id.* at 81. Put otherwise: "The Act operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony; it does not authorize a sentence in excess of that otherwise allowed for

that offense." *Id.* Petitioners argued the fact of possessing a gun was an element of the offense, but the Court held otherwise, saying states defined the elements of crimes. *Id.* at 93.

In *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), the Court reconsidered *McMillan's* holding in light of *Apprendi*. There, a federal statute was at issue, 18 USC 924(c)(1)(A), which set mandatory minimums for crimes involving guns. *Harris*, 536 US at 550-551. Where a gun was possessed while committing a crime of violence or drug trafficking, the statute provided a mandatory minimum of 5 years, and if the gun was brandished, a mandatory minimum of 7 years. *Id.* The government proceeded as if the elements of the crime were established by carrying the gun, and brandishing the gun was a mere sentencing factor. *Id.* The sentencing judge in *Harris* found that the defendant had brandished the weapon by a preponderance of the evidence and imposed a seven-year sentence. *Id.* The Court ultimately concluded that once a defendant has been convicted of a crime, and the facts determining the maximum sentence have been found, guarantees to due process and a jury trial "have been observed; and the Government has been authorized to impose any sentence below the maximum." *Id.* at 565. The Court held that judicial fact-finding could establish a mandatory minimum sentence. *Id.* at 568-569.

Last year the Court decided *Alleyne v United States*, 570 US ___; 133 S Ct 2161; 186 L Ed 2d 314 (2013). In *Alleyne*, the Court revisited its decision in *Harris*. The defendant in *Alleyne* was convicted by a jury of violating the same statute in question in *Harris*. The jury indicated on the verdict form that the defendant "[u]sed or carried a firearm during and in relation to a crime of violence," but made no indication the defendant had "brandished" the firearm. The penalty for the offense was 5 years of imprisonment, but was elevated to 7 years where a defendant had brandished a firearm. Because there was no jury finding on this point, the

judge made the finding and sentenced the defendant with the elevated minimum. *Id.* at 2155-2156. The *Alleyne* Court concluded "*Harris* was wrongly decided and that it cannot be reconciled with our reasoning in *Apprendi.*" *Id.* at 2158. The Court concluded "Just as the maximum of life marks the outer boundary of the range, so seven years marks its floor. And because the legally prescribed range *is* the penalty affixed to the crime . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id.* at 2160 (emphasis in original, internal citation omitted). Further, "It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id.* *Alleyne* overruled *Harris* and extended *Apprendi* to minimum sentences. *Alleyne* establishes the rule that judges may not find facts which increase the floor of permissible sentences. After *Alleyne*, "it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment." 133 S Ct at 2161; US Const, Ams VI, XIV.

ARGUMENT

I. A SENTENCING JUDGE'S DETERMINATION OF THE APPROPRIATE SENTENCING RANGE UNDER THE MICHIGAN SENTENCING GUIDELINES ESTABLISHES THE FLOOR OF PERMISSIBLE SENTENCES, OR A "MANDATORY MINIMUM SENTENCE," SUCH THAT THE FACTS USED TO SCORE THE OFFENSE VARIABLES MUST BE ADMITTED BY THE DEFENDANT OR ESTABLISHED BEYOND A REASONABLE DOUBT BY THE TRIER OF FACT.

Issue Preservation and Standard of Review

This issue raises a constitutional challenge, which is reviewed *de novo. People v Rapp*, 492 Mich 67, 72; 821 NW2d 452, 454 (2002). This issue was not raised in the trial court, and could not have been raised, because the precedent upon which it relies is of recent vintage. However, Mr. Lockridge is entitled to relief since the violation constitutes plain error that affected his substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130, 137-138 (1999).

Analysis

Judicial discretion in sentencing must be exercised within two constraints—a minimum and a maximum. *Apprendi*, *Blakely*, *Booker*, and *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), dealt with what constitutes a maximum and what factors may influence a maximum. After *Alleyne*, this Court must grapple with what constitutes a minimum.

The phrase "mandatory minimum" has, in recent years, become shorthand for a specific type of statutory provision: a minimum penalty codified alongside the elements of a particular offense. But modern shorthand does not and cannot impose a limit on the Sixth Amendment right to a jury trial nor the Fourteenth Amendment right to due process. Rather, the United States Supreme Court's line of cases starting with *Apprendi* delineates the boundaries of those

rights, and current practices in applying the Michigan Sentencing Guidelines cross those boundaries.

The United States Supreme Court's formulation for what constitutes a permissible mandatory minimum is revealed by consulting *Blakely* and *Alleyne*. In *Blakely*, the Court discussed a lawful statutory maximum:

> . . . the "statutory maximum" for *Apprendi* purposes 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.* In other words, 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. *Blakely*, 542 US at 303-304 (emphasis in original) (internal citation omitted).

Harris stood for the proposition that minimum sentences were not of Sixth Amendment jury-trial-right import. *Alleyne* changed that, but said little about what constituted a minimum sentence. Based on *Blakely*, we can see the Court's operative definition of a lawful "mandatory minimum":

> The "~~statutory maximum~~ **mandatory minimum**" for *Apprendi* purposes is the ~~maximum~~ **minimum** sentence a judge ~~may~~ **must** impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "~~statutory maximum~~ **mandatory minimum**" is not the ~~maximum~~ **minimum** sentence a judge ~~may~~ **must** impose after finding additional facts, but the ~~maximum~~ **minimum** he ~~may~~ **must** impose *without* any additional findings.

The low end of a defendant's sentencing range produced by the Michigan Sentencing Guidelines sets the floor of permissible sentences for a particular defendant, and constitutes a mandatory minimum for that defendant. To the extent that today in Michigan sentencing ranges may be, and were in this case, produced by judicial fact-finding, they violate *Alleyne*.

A. The low end of a sentencing range is the minimum sentence for Alleyne *purposes*

A minimum is "The least amount attainable, allowable, usual, etc. ..." *The Oxford English Dictionary* (2nd ed) (1989). The low end of a sentencing range produced by the Michigan Sentencing Guidelines defines the lower boundary of the sentencing court's discretion. The low end of a sentencing range is the "least amount [of incarceration] ... allowable" and consequently constitutes the minimum sentence for the defendant.

When considering the boundaries of judicial discretion in the context of maximums, the United States Supreme Court was clear that "the relevant inquiry is one not of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 US at 494. In the context of statutory maximums, schemes that *allow any sentence* above the permissible statutory maximum move the *top* end of the range of punishment. This sets a *new* maximum, not authorized by the verdict. Said another way, a maximum is a constraint on judicial discretion where the ultimate sentence must be equal to or less than the longest sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

Alleyne tells us what this means in the context of mandatory minimums: ". . . because the legally prescribed range *is* the penalty affixed to the crime, . . . it follows that a fact increasing either end of the range produces a new penalty . . . ." *Alleyne*, 133 S Ct at 2160. In the context of mandatory minimums, schemes that *foreclose some sentences* above the lawful minimum move the *bottom* end of the range of punishment. This sets a *new* minimum not authorized by

the verdict.[1] Said another way, a minimum is a constraint on judicial discretion where the ultimate sentence must be equal to or greater than the shortest sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

The *Apprendi* inquiry applied to minimums asks—does the required finding foreclose some sentences permitted by the jury's guilty verdict? Of course, that is exactly what the low end of a sentencing range produced by the Michigan Sentencing Guidelines does when judicial fact-finding is used. In this case, judicial fact-finding produced a sentencing range for Mr. Lockridge of 43 to 86 months. A sentence of imprisonment of 43 months to 15 years was "The least amount [of punishment] ... allowable" for Mr. Lockridge. The Michigan Sentencing Guidelines foreclosed a sentence of 42 months to 15 years, or any lesser sentence. Consequently, the sentencing range established the "minimum" sentence available to Mr. Lockridge.

However, under *Blakely* and *Alleyne,* the relevant mandatory minimum is not the minimum sentence a judge may impose after finding additional facts beyond a jury's findings, but the minimum he may impose *without* any additional findings. Here, the *permissible* mandatory minimum sentence without judicial fact-finding was produced by the D-IV cell of the Class C grid, a sentence of 36 months to 15 years. This sentence was foreclosed by the Michigan Sentencing Guidelines because the scoring of Offense Variables and application of sentencing ranges is mandatory. Judicial fact-finding to do that scoring violates *Alleyne*.

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[1] For example, if a hypothetical lawful minimum for a particular defendant is 100 months, a constraint on judicial discretion which compels a sentence of 105 months would foreclose the lawful sentences of 100, 101, 102, 103 and 104 months.

B. The minimum set by a sentencing range is mandatory for Alleyne *purposes*

Further, the minimum set by the low end of the sentencing range is mandatory. Mandatory is defined as "Obligatory in consequence of a command." *The Oxford English Dictionary* (2nd ed) (1989). Once factual findings are made, trial courts have no discretion in setting the sentencing range. Except in cases with grounds for a departure, sentencing judges are obliged to sentence at or above the minimum. This obligation is enforceable by prosecutors through appellate review.

This Court has explicitly held that once the facts are established, sentencing courts have no discretion in scoring Offense Variables in the Michigan Sentencing Guidelines. In *People v Gratsch*, 299 Mich App 604; 831 NW2d 462 (2013), the Court of Appeals wrote, ". . . the trial court has discretion in assessing a particular score for a sentencing variable when there is evidence in the record to support it." *Id.* at 623. This Court summarily rejected that notion, vacating "that part of the Court of Appeals judgment holding that Offense Variable scoring errors are reviewed to determine whether there is adequate evidentiary support for a particular score and whether the sentencing court properly exercised its discretion." *People v Gratsch*, 495 Mich 876; 838 NW2d 686 (2013). This Court then reiterated that "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

The Michigan Sentencing Guidelines prohibit judges from sentencing below the low end of the mandatory sentencing range, and enforce this prohibition through appellate review:

> If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court *shall*

> remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter. [MCL 769.34(11) (emphasis added).]

Sentencing judges do not have authority to sentence below the sentencing range absent substantial and compelling reasons for a downward departure.

In *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127, 131-132 (2001) this Court said, ". . . a judge's discretion to depart from the range stated in the legislative guidelines is limited to those circumstances in which such a departure is allowed by the Legislature." In *People v Garza*, 469 Mich 431, 434; 670 NW2d 662, 663-664 (2003) this Court noted that before the Michigan Sentencing Guidelines took effect, "the Legislature provided sentencing discretion that in many instances was virtually without limit." But after the Michigan Sentencing Guidelines took effect, "discretion may be exercised under the terms set forth in the sentencing guidelines legislation." *Id.* In *People v Smith*, 482 Mich 292, 312; 754 NW2d 284, 296 (2008), the trial court did depart from the sentencing range, and even provided substantial and compelling reasons for the departure. However, the trial court failed to justify the extent of the departure, and this Court reiterated the mandatory nature of the Michigan Sentencing Guidelines enforced through appellate review, saying upholding a sentence without justification for a departure "would be akin to immunizing sentencing decisions from review for proportionality." *Id.* This is how the United States Supreme Court has defined "mandatory" for *Apprendi* purposes.

In *Booker*, the United States Supreme Court held that the Federal Sentencing Guidelines violated *Apprendi* because each sentencing range that scheme produced set a new maximum which was the product of judicial fact-finding. In explaining why the Federal Sentencing Guidelines were "mandatory," the Court pointed to the appellate enforceability of the scheme:

"[t]he sentencing judge would therefore have been reversed had he not imposed a sentence within the level 32 Guidelines range." *Booker*, 543 US at 235.

C. **Drohan** ***does not speak to minimums, and cannot be relied on in application of*** **Alleyne**

Application of *Apprendi* to the Michigan Sentencing Guidelines and other schemes previously incorporated *Harris's* holding that *Apprendi* had no force regarding fact-finding which affected the lower boundary of judicial discretion. Consequently, analysis in post-*Harris* applications of *Apprendi* discussed only the upper boundary, maximums, and ignored the lower boundary, minimums. Such was the case in Michigan, where the rationale that *Apprendi* did not affect the Michigan Sentencing Guidelines relied on aspects of maximum sentences in Michigan's scheme which are not common to minimum sentences in Michigan's scheme. Now, that determination must be made anew, and without regard to the *sui generis* aspects of maximum sentences under the Michigan Sentencing Guidelines.

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

Because no judicial fact-finding impacts the "maximum sentence" defined in this manner, and because *Apprendi* had not been extended to minimum sentences, the *Drohan* Court was able to conclude that when a defendant received a sentence under the "statutory maximum," the defendant "received all the protections he was entitled to under the Sixth Amendment." *Id.* at 163. *Alleyne* changed that.

The Sixth Amendment now also protects a defendant from having the floor of his permissible sentences escalated by judicial fact-finding. *Alleyne*, 133 S Ct at 2161. As discussed above, the floor of permissible sentences in Michigan's sentencing scheme is the low end of the sentencing range produced by the Michigan Sentencing Guidelines. The rationale which the *Drohan* Court used to hold the upper end of the sentencing range is not a "statutory maximum" for *Blakely* purposes, is inapplicable to the question of whether the lower end of the sentencing range is a "mandatory minimum" for *Alleyne* purposes.

In *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), the Court of Appeals held that the Michigan Sentencing Guidelines are not impacted by *Alleyne*, apparently relying on the *Drohan* rationale regarding maximum sentences and applying it to minimum sentences. The *Herron* Court reasoned that "judicial fact-finding and the sentencing guidelines were utilized to inform the trial judge's sentencing discretion *within the maximum* determined by statute and the jury's verdict." *Id.* at 403 (emphasis added). This conclusion seems to rely on the assertion from *Drohan* that a defendant who received a sentence under the "statutory maximum," has "received all the protections he was entitled to under the Sixth Amendment." This was true when the Sixth Amendment protected only maximums. Now it protects more.

It is true that the statute authorized the maximum which bounded the *upper end* of the judge's discretion in *Herron*. But, the *Herron* analysis does not consider how the Michigan

Sentencing Guidelines constrain the *lower end* of the judge's discretion. Again, the minimum and maximum are two entirely separate restrictions on judicial discretion. The *Herron* Court's suggestion that the low end of a sentencing range does not constitute a minimum because it was "within the maximum" conflates these two constraints. This analysis is simply reliance on a now defunct corollary of *Harris*.

D. Herron *and other arguments to the contrary*

Various arguments have been offered by the *Herron* Court and by the prosecution in this case as to why *Alleyne* does not apply to the Michigan Sentencing Guidelines. All of these arguments ultimately, in one way or another, fail to grapple with *Apprendi's* direction that the pertinent question is "not one of form, but of effect." *Apprendi*, 530 US at 494.

1. Where a penalty is codified is of no Sixth Amendment import

The *Herron* Court also reasoned "[t]he statutes defendant was convicted of violating do not provide for a *mandatory minimum* sentence on the basis of any judicial fact-finding," *Id.* at 539 (underline emphasis added, italicized emphasis in original). While it is true that MCL 750.321, the statute Mr. Lockridge was convicted of violating, does not contain a mandatory minimum, this observation is of no importance. The Michigan Sentencing Guidelines set the minimum term, and those statutes have the force of law just as MCL 750.321 does.

As described above, while "mandatory minimum" may sometimes be used as shorthand for a penalty which appears in an offense statute, *Apprendi* and its progeny are certainly not limited to that artificial distinction. Rather, the formulation from *Apprendi* "is one not of form, but of effect" and asks "does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict alone?" *Apprendi*, 530 US at 494. The United

States Supreme Court has repeatedly applied *Apprendi* to statutes other than the one the defendant was convicted of violating.

In *Apprendi,* the defendant was charged with violating NJS § 2C:39-4a and NJS § 2C:39-4a, with penalties provided for by NJS § 2C:43-6(a)(2) and NJS § 2C:43-6(a)(3) respectively, while the statute ultimately struck down was NJS § 2C:44-3(e). *Apprendi*, 530 US at 468-469. In *Blakely*, the defendant was convicted of violating Wash Rev Code §§ 9A.40.030(1), 10.99.020(3), and 9.94A.125. *Blakely*, 542 US at 298-299. However, the challenged statutory scheme was the Washington Sentencing Reform Act and its provisions codified at Wash Rev Code §§ 9.94A.320, 9.94A.390, and 9.94A120(3) among others. *Id.* at 299. In *Booker* the defendant was convicted of violating 21 USC § 841(a)(1). *Booker*, 543 US at 228. That statute provided for a minimum of 10 years and a maximum of life. 21 USC § 841(b)(1)(A)(iii). However, the Court found that the applicable statutory maximum was provided by the Federal Sentencing Guidelines. *Booker*, 543 US at 233-234.

While the United States Supreme Court has not yet had occasion to further interpret *Alleyne,* state courts have. No state has found any import in the arbitrary distinction of whether an offense and penalty are codified together. The Supreme Court of Kansas struck down that state's "hard 50" law even though the sentencing provision was codified at KS 21-4635 while first degree murder is codified at KS 21-5402. *State v Soto*, 299 Kan 102; 322 P 3d 334, 348 (2014). Louisiana applied *Alleyne* to foreclose use of an enhancement provision for use of a firearm as a mandatory minimum though the conviction offense, armed robbery, was codified at LSR § 14:64, while the enhancement was codified under a separate section, LSR § 14:64.3. In *Commonwealth v Munday*, the Superior Court of Pennsylvania held that a mandatory minimum

codified at 42 PaCS § 9712.1 violated *Alleyne* even though the sentencing offense was codified in separate statutes.[2]

As Judge Beckering said in her concurrence in this case, "the essential constitutional inquiry is not whether a statute the defendant has been convicted of violating contains a maximum or minimum sentence but, rather, how statutorily required judicial fact-finding is being used in relation to the application of the sentencing guidelines." *Lockridge*, 304 Mich App at 303. It is of no import where the mandate for that fact-finding is codified.

2. The "within the bounds" argument assumes its own conclusion

Alleyne explicitly emphasized that the Sixth Amendment still allows judicial fact-finding that informs judicial discretion within the range authorized by law, just as it did under *Apprendi* and *Blakely:*

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. . . . [E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things. Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law. [*Alleyne*, 133 S Ct at 2163 (internal citation and quotation omitted).]

Prosecutors and courts, including the court below, have seized on this passage to claim that it supports judicial fact-finding to calculate the Michigan Sentencing Guidelines. This argument

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2 Delivery of a controlled substance, 35 PS § 780–113(a)(30); Person not to possess firearms, 18 Pa CS § 6105; Possessing instruments of crime, 18 Pa CS § 907; Possession of a controlled substance (cocaine), 35 PS § 780–113(a)(16).

reasons that the statute a defendant is convicted of violating demarcates the "bounds that the law has prescribed," so any fact-finding within this range is permissible under *Apprendi* and *Alleyne*.

However, this argument is foreclosed by *Booker*. In *Booker*, the defendant was convicted of violating 21 USC § 841(a)(1). *Booker*, 543 US at 226. That statute prescribed a minimum sentence of 10 years in prison and a maximum sentence of life. *Id.* citing 21 USC § 841(b)(1)(A)(iii). By the rationale of the "within the bounds" argument, the applicable "statutory maximum" would have been life. However, Court observed that while the statute the defendant was convicted of violating authorized a wide range of punishment, that authority was constrained by the Federal Sentencing Guidelines. Such is the case with the Michigan Sentencing Guidelines.

Those who claim that guideline calculation in Michigan merely sets a sentence "within the bounds set by law" fail to recognize a key distinction made in *Alleyne*. The Court noted, "establishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Alleyne*, 133 S Ct at 2163. Scoring Offense Variables and calculating a sentencing range under the Michigan Sentencing Guidelines constitutes "establishing what punishment is available by law." The Offense Variable score and sentencing range are not merely factors a judge considers when selecting a sentence. A judge does not determine what weight to give each Offense Variable. Rather, the effect of a sentencing range is to *limit* judicial discretion. In the absence of a departure, the sentencing range is the "punishment is available by law."

An example of the "within bounds" argument taken to its logical conclusion exposes its fundamental flaw. Mr. Lockridge was convicted of violating MCL 750.321, which provides for punishment by "imprisonment in the state prison, not more than 15 years or by fine of not more

than 7,500 dollars, or both, at the discretion of the court." MCL 750.321. Under the rationale of the "within the bounds" argument, the lower bound of punishment for Mr. Lockridge was a $1 fine. Of course, it's absurd to argue the sentencing court's discretion included the ability to impose only a $1 fine. This was certainly not "within the bounds" of judicial discretion, and if the trial court had sentenced Mr. Lockridge to only a $1 fine without substantial on compelling reasons for a departure the sentence would have been summarily reversed. Neither was a sentence of 36 months to 15 years, or any other sentence less than 43 months to 15 years available. Rather, the lower bound of punishment for Mr. Lockridge was a sentence of 43 months to 15 years, and was set by judicial fact-finding.

Invoking the "within the bounds" argument to determine whether the low end of a sentencing range produced by the Michigan Sentencing Guidelines constitutes a mandatory minimum really is no more than begging the question. However a mandatory minimum is defined, unless it is superseded by a higher mandatory minimum, it must demarcate the lower bound that the law has prescribed. To argue the lower end of a sentencing range is not a mandatory minimum because is "within the bounds that the law has prescribed," is an argument which assumes its own conclusion.

II. THE FACT THAT A JUDGE MAY DEPART DOWNWARD FROM A SENTENCING RANGE FOR "SUBSTANTIAL AND COMPELLING" REASONS DOES NOT PREVENT THE MICHIGAN SENTENCING GUIDELINES FROM ESTABLISHING A "MANDATORY MINIMUM" UNDER *ALLEYNE*.

Issue Preservation and Standard of Review

This issue raises a constitutional challenge, which is reviewed *de novo*. *Rapp*, 492 Mich at 72. This issue was not raised in the trial court, and could not have been raised, because the precedent upon which it relies is of recent vintage. However, Mr. Lockridge is entitled to relief since the violation constitutes plain error that affected his substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines*, 460 Mich at 761-764.

Analysis

That the Michigan Sentencing Guidelines contain a departure provision does not prevent the low end of Mr. Lockridge's sentencing range from being a "mandatory minimum" under *Alleyne*.

The availability of departures in a sentencing scheme was dealt with in *Booker*. The Federal Sentencing Guidelines also had a departure mechanism. Under the federal scheme, sentencing judges could depart from the sentencing range if the judge "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *Booker*, 543 US at 234 quoting 18 USC § 3553(b)(1). The Court noted that it was possible to conclude from this language that a judge was bound only by the statutory maximum, and that in that case, "there would be no *Apprendi* problem." *Id.* However, the Court concluded:

> Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. [*Id.*]

Of course, the Court went on to conclude that, despite the departure provision, a sentencing range calculated under the Federal Sentencing Guidelines constituted a maximum and violated *Apprendi.*

The departure provision in the Michigan Sentencing Guidelines is very similar to the departure in the federal scheme. The Michigan provision reads:

> (3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII2 if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:
>
> > (a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
> >
> > (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34.]

There is no meaningful difference between the two departure provisions. Like in the federal scheme, in most cases, as a matter of law, no departure will be permissible. Like in the federal scheme, in those cases, the judge is "bound to impose a sentence within the Guidelines range."

Such is the case for Mr. Lockridge, where the sentencing court reviewed the presentence report in addition to the evidence from trial. The sentencing court did not find substantial and compelling reasons for a downward departure. Consequently, the sentencing range, 43 to 86 months, set a mandatory minimum sentence of 43 months to 15 years for Lockridge.

III. THE PROPER REMEDY IS TO REQUIRE FACTUAL DETERMINATIONS TO BE MADE BY A JURY OR STIPULATED TO BY A DEFENDANT.

As described above, *Alleyne* prohibits procedures currently used to apply the Michigan Sentencing Guidelines because they permit judges to find facts by a preponderance of the evidence which elevate the floor of permissible sentences. But little if anything needs to be stricken or severed from the Michigan Sentencing Guidelines statutes to ensure compliance with the Sixth and Fourteenth Amendments. Mandating changes to the procedures for scoring Offense Variables is possible and in fact required.

Offense Variable scoring actually has two components; a factual one and a legal one. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). The best way to cure the constitutional defect in the application of the Michigan Sentencing Guidelines is to simply assign each component to its proper institution. Let juries make the factual determinations required for scoring the Offense Variables if not admitted or stipulated to by the defendant, and let judges make legal determinations based on the juries' factual findings. This solution best respects the primary purpose of the Michigan Sentencing Guidelines—to reduce sentence disparity by controlling judicial discretion. It is also consistent with well-established rules of statutory construction, and it best respects the separation of powers and duties between the Legislature and Judiciary.

A. Fact-finding by Jury and Stipulation

The Michigan Sentencing Guidelines statutes are not facially unconstitutional. Applying the statutes does not violate the Sixth or Fourteenth Amendments in all cases and there are circumstances in which they can and are constitutionally applied. *See In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 n 20; 740 NW2d 444 (2007)

(a statute is facially invalid only if there is no set of circumstance in which it could be applied constitutionally); *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). Defendants may stipulate to facts needed to score variables or waive their jury trial rights with regard to those facts with no Sixth or Fourteenth Amendment problem. *See Blakely*, 542 US at 310 (providing that defendants can stipulate to sentence facts or waive their right to jury trial on those facts consistently with the Sixth Amendment). Additionally, present and prior convictions can, consistently with the Sixth and Fourteenth Amendments, be used to score variables.[3] *See Almendarez-Torres v United States*, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998) (use of convictions to increase punishment is consistent with *Apprendi* rule). Similarly, the elements of the charged offense which have been found by a jury or admitted by the defendant, may also establish the factual basis for scoring certain Offense Variables.[4]

Indeed, the Michigan Sentencing Guidelines statute itself allows for *Alleyne*-compliant application nearly across the board. Contrary to what some have asserted, the plain language of the statute does not "require[] a sentencing court to engage in fact-finding by scoring the Offense Variables." *Lockridge*, 304 Mich App at 306 (BECKERING, J., concurring in part, dissenting in part). With limited exceptions, nowhere in the statutory scheme is a judge rather than a jury identified as the proper factfinder. Nowhere is a particular burden of proof prescribed. Instead, the statute directs courts to "score" the Offense Variables applicable to the crime class of the sentencing offense. MCL 777.21. Individual variables are scored by "determining which of the"

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3 For example, OV 13, pertaining to a pattern of three or more crimes within a five year period, complies with *Alleyne* where all three crimes resulted in current or prior convictions. MCL 777.43.

4 For example, "[l]ife threatening or permanent incapacitating injury," required to score 25 points for OV, has been found when a jury has convicted the defendant of a homicide offense. MCL 777.33(1)(b); *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005).

listed aggravating conditions apply and then "assigning the number of points attributable to the one that has the highest number of points. . . ." See MCL 777.31-MCL 777.49a. The terms "score," "determine," and "assign" are not statutorily defined, and each can be applied according to its common, ordinary meaning to allow for those functions to be performed by judges to calculate guideline ranges, but only after they are presented with facts that have been admitted by the defendant or found by a jury.[5]

Thus, the guideline statute is unconstitutional only as currently applied, and the remedy is to bar its future application in the manner that allows judicial fact-finding to increase minimum sentences. *See Women's Medical Professional Corp. v Voinovich*, 130 F3d 187, 193 (CA 6, 1997); *Ada v Guam Soc'y of Obstetricians & Gynecologists*, 506 US 1011, 1011; 113 S Ct 633; 121 L Ed 2d 564 (1992) (SCALIA, J., dissenting from denial of petition for writ of *certiorari*).

This can be accomplished through an updated interpretation of existing statutory language rather than striking or rewriting provisions. A "'statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" *People v Nyx*, 479 Mich 112, 124; 734 NW2d 548 (2007) (collecting cases), *quoting United States v Jin Fuey Moy*, 241 US 394, 401; 36 S Ct 658, 60 L Ed 1061 (1916). "[I]f an otherwise acceptable construction of a statute would raise serious constitutional

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[5] The verb "assign" is defined in part by one dictionary as, "to fix or specify in correspondence or relationship <assign counsel to the defendant> <assign a value to the variable>." Webster's Online Dictionary, found at, www.merriam-webster.com/dictionary/assign. The verb "score" is defined in relevant part as "to keep a record or account of by or as if by notches on a tally. . . to determine the merit of: Grade. . . . to keep score in a game or contest." *Id,* www.merriam-webster.com/dictionary/score. Dictionary definitions of "determine" include, "to officially decide (something) especially because of evidence or facts: to establish (something) exactly or with authority. . . to learn or find out (something) by getting information. . . . to fix conclusively or authoritatively <determine national policy>. . . to decide by judicial sentence <determine a plea>." *Id.* at www.merriam-webster.com/dictionary/determining.

problems, and where an alternative interpretation of the statute is 'fairly possible,'" this Court is obligated to construe the statute to avoid such problems. *INS v St Cyr*, 533 US 289, 299-300; 121 S Ct 2271; 150 L Ed 2d 347 (2001) (internal quotations and citations omitted); *see also People v McQuillan*, 392 Mich 511, 536; 221 NW2d 569 (1974); *People v O'Donnell*, 127 Mich App. 749, 757; 339 NW2d 540 (1983).

Here, it has just been assumed based on historical practices that judges must "score" Offense Variables all on their own, independently of the process of convicting defendants of the underlying offenses. MCL 777.21. But, as already mentioned, Offense Variable scoring has two components: a factual one and a legal one. *Hardy*, 494 Mich at 438. First, facts relevant to a particular variable must be found, then the sentencing court must determine as a matter of law whether those facts are adequate to satisfy the scoring of the particular variables. *Id.* Review of the former procedure is for clear error while review of the latter is a question of law that is reviewed *de novo*. *Id.* Bifurcating that scoring process so that the first stage is performed either by admission of the defendant or by a jury using the proper burden of proof is perfectly consistent with the Michigan Sentencing Guidelines' plain language.

Some would posit that this remedy is not acceptable because, based on past practices used during prior sentencing regimes, the Legislature "really" meant to have judges engage in fact-finding. *See e.g., Lockridge* 304 Mich App at 306. But as this Court has repeatedly stressed, such considerations are not controlling. Within constitutional limits, this Court must apply the statute as written and in accord with its plain language. *People v Houston*, 473 Mich 399, 409; 702 NW2d 530 (2005). It may not add language or meaning to a statute based on some real or imagined "'legislative purpose' supposedly lurking behind that language." *Id.* at 409-410; *Mich. Ed. Ass'n v Secretary of State* (On Rehearing), 489 Mich 194, 217; 801 NW2d 35

(2011) (courts must apply statute as written and "may not speculate regarding legislative intent beyond the words expressed in [the] statute."). As written, the guideline statute allows for "scoring" decisions to be legal ones using facts that were admitted or found by a jury, and it is this Court's constitutional mandate to construe them in this way. "Any argument that enforcing the Legislature's plain language in this manner will lead to unwise policy implications is for the Legislature to review and decide, not this Court." *Halloran v Bhan*, 470 Mich 572, 579; 683 NW2d 129 (2004).

And, again, the current, unconstitutional procedures, are not statutorily prescribed. Instead, they are remnants of judicially-created rules designed for the former, judicial guidelines. *See e.g., People v Walker*, 428 Mich 261, 267; 407 NW2d 367 (1987) (noting that "there has been little authoritative guidance available concerning the allocation and nature of the burdens of proof" under the judicial guidelines, and adopting the ABA standard for establishing sentencing facts); *see also People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991) ("[W]e are aware of no requirement that a jury find the facts that form the basis for the scoring of the [judicial] guidelines.") The judicial guidelines had no force of law and allowed judges very broad discretion in how to score variables and impose sentences. *Hegwood*, 465 Mich at 438; *see also People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1998) ("Simply stated, because this Court's guidelines do not have the force of law, a guidelines error does not violate the law.") Those procedures were designed to uphold only minimal due process standards and regulate fact-finding that was merely used to "guide judicial discretion in selecting a punishment within limits fixed by law". *Alleyne*, 133 S Ct at 2161 n. 2; *see also Raby*, 456 Mich at 498 (requiring record support for guidelines decisions is necessary to ensure "the accuracy of the factual information on which the sentence was based, a challenge grounded in the due process clause under

Townsend [*v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948)]."). *Alleyne* makes clear that such procedures are inappropriate where, as here, mandatory guidelines have made the existence of certain facts necessary prerequisites to judges' authority to impose a certain penalties. *Apprendi*, 530 US at 466; *Alleyne*, 133 S Ct at 2155-2156. This Court has the constitutional duty and statutory authority to incorporate constitutional procedures into the implementation of those guidelines.

B. Rejecting Advisory Guidelines

Some have argued that the appropriate remedy in light of *Alleyne* is to declare the Michigan Sentencing Guidelines purely "advisory" or "discretionary," thus returning Michigan to the age of the much maligned judicial sentencing guidelines. *See e.g., Lockridge*, 304 Mich App at 306-308. For the most part, the impetus for this remedy appears to be little more than a reflexive urge to follow the United States Supreme Court's lead in *Booker,* combined with concerns over the practicality of requiring jury fact-finding in this setting. But the *Booker* remedy is far from one-size-fits all and has been rejected in other states.[6] There are several reasons why it is wrong for Michigan as well.

First, the *Booker* remedy would clash with the Michigan Sentencing Guidelines' plain language. MCL 777.21 explicitly requires the court to score the prior record and Offense Variables to calculate an offender's minimum sentence range. MCL 769.34(2) mandates that the court sentence the defendant within the calculated guideline range unless additional, substantial

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[6] The State of Washington itself, after *Blakely* invalidated its practice of judicial fact-finding to increase sentences, amended its sentencing statutes to accommodate jury trials with regard to aggravating factors. *See* 2005 Laws of Washington ch. 68 (amending terms of Washington Sentencing Guidelines to provide for presenting questions on the existence of aggravating factors to juries); Revised Code of Washington 9.94A.537; *State v Pillatos,* 159 Wn2d 459, 150 P 3d 1130 (2007).

and compelling reasons exist. Changing those sections from mandatory to permissive would essentially rewrite them, a legislative function that this Court must "strive to avoid." *United States v National Treasury Employees Union*, 513 US 454, 478; 115 S Ct 1003; 130 L Ed 2d 964 (1995); *see also Byker v Mannes*, 465 Mich 637, 646–647; 641 NW2d 210 (2002) ("It is a well-established rule of statutory construction that this Court will not read words into a statute."). In contrast, the above-discussed remedy preserves all or most of the provisions of the Michigan Sentencing Guidelines and is most consistent with the scheme's plain language.

The different language and complexity of the federal guidelines further render Justice Breyer's solution in *Booker* a poor fit for our state. In *Booker,* Justice Breyer observed that several provisions of the federal guidelines required the "court" to consider certain evidence and make necessary findings, and the context of that term made clear Congress's intent that it be the "the judge without the jury" performing those functions. *Booker,* 543 US at 249-250 (discussing 18 USC § 3553(a)(1), and 18 USC § 3661 (2000 ed. and Supp. IV)). In contrast, our state's guideline statute does not explicitly direct a "court" to take particular action in the context of Offense Variable scoring. MCL 777.21-MCL 777.49a. Instead, the Offense Variable provisions are written in the second person without specifying the entity being directed. *Id.* It is the minimum sentence "imposed by the court" that must be within the applicable range "unless the court has" substantial and compelling reasons to depart. MCL 769.34(2)-(3). Clearly, imposing sentence is a legal function reserved for "the court" [read "the judge"]. *See Hegwood,* 465 Mich 436-437. But that does not mean the process by which the judge derives the authority to impose a particular sentence cannot have a jury fact-finding component. Absent language similar to the federal system clearly directing judges to find facts, the Michigan Sentencing Guidelines allow

for *Alleyne* compliant procedures without re-writing the statute as Justice Breyer felt compelled to do in *Booker*.

Justice Breyer also felt that the federal guidelines "read to include the Court's Sixth Amendment requirement, would create a system far more complex than Congress could have intended." *Booker*, 543 US at 254. It is true that the federal guidelines complex, often-byzantine system of numerous offense variables, upward and downward adjustments, and departure provisions, could prove difficult and unwieldy if jury fact-finding were incorporated into the calculation. The Michigan Sentencing Guidelines, however, are far simpler. There are a maximum of 20 Offense Variables and, depending on the crime group and circumstances, far fewer than that to be considered in the typical case. MCL 777.21-49a. Indeed, Mr. Lockridge's judge had only five variables to score, only three of which were based on facts that the jury had not already found. Michigan's straightforward list of guideline factors can be easier presented to juries to conduct the fact finding component of Offense Variable scoring.[7]

Furthermore, Justice Breyer's remedy in *Booker* is entirely repugnant to a most basic and overriding premise of Michigan's statutory guidelines—that judges' discretion needed to be reduced to address widespread sentence disparity and ensure more uniform and properly-graduated punishment throughout the state. *See Garza*, 469 Mich at 435; *Smith*, 482 Mich at 311–312 & n. 46; *former* MCL 769.33(1).[8] Resurrecting that discretion would defeat that

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[7] MCR 2.515(A) specifically allows for the use of special verdict forms requiring juries to issue a verdict on "each issue of fact"; *see also Sahr v Bierd*, 354 Mich 353, 365; 92 NW2d 467 (1958) (approving use of special jury verdict requiring detailed findings of fact)

[8] In fact there currently is a movement and strong momentum behind an effort to impose even more limits on judicial discretion to address the continued sentence disparity that has plagued the Legislative Guidelines. See "Applying a Justice Reinvestment Approach to Improve Michigan's Sentencing System; Summary Report of Analyses and Policy Options", Council of

purpose and return Michigan to the very system that was found to be unsatisfactory and inequitable due to the wide sentence disparity it produced. *Id; People v McCuller* (McCuller I), 475 Mich 176, 213; 715 NW2d 798 (2006) ("More than likely, this solution [of declaring the Guidelines discretionary], would ensure sentence disparity.") (KELLY, J., dissenting), *vacated and remanded by* 549 US 1197; 127 S Ct 1247; 167 L Ed 2d 62 (2007), *aff'd on remand, People v McCuller* (McCuller II), 479 Mich 672; 739 NW2d 563 (2007).

The federal system, in contrast, had no similar experience. The federal guidelines were mandatory from their inception. *See* Sentencing Reform Act of 1984, 18 USC. § 3551 et seq., 28 USC § 991 et seq. And though it was motivated by similar concerns when it enacted those guidelines, Congress had not gone through the same, failed experiment of a discretionary scheme that Michigan tried and rejected as inadequate. Accordingly, even if this Court were inclined and permitted to look beyond the plain statutory language of Michigan's guidelines to try and figure out what the Legislature was thinking, it would be hard pressed to posit, as Justice Breyer did, that "had it been faced with the constitutional jury trial requirement, [the Legislature] likely would not have passed the same Sentencing Act." *Booker,* 543 US at 258.

Separation of powers principles further compel this Court to reject Justice Breyer's *Booker* remedy. Under Const 1963, art 6, § 5, the judiciary has exclusive authority to prescribe rules that govern matters of practice and procedure. *People v Watkins*, 491 Mich 450, 472-473; 818 NW2d 296, 308 (2012). In contrast, the judiciary has no authority to enact rules that "establish, abrogate, or modify the substantive law," as this is exclusively a legislative function. *Id.* (internal quotations omitted). *Alleyne*'s rule transfers the fact-finding role from judge to jury

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State Governments Report, September 2014, *found at http://csgjusticecenter.org/wp-content/uploads/2014/05/Applying-a-JR-Approach-to-Improve-Michigans-Sentencing-System.pdf.*

for sentencing purposes. "Rules that allocate decision-making authority in this fashion are prototypical procedural rules" that fall squarely within the judiciary's province. *Schriro v Summerlin*, 542 US 348, 353-354; 124 S Ct 2519; 159 L Ed 2d 442 (2004); *Alleyne,* 133 S Ct at 2163 n. 5 (THOMAS, J.) (indicating that its ruling falls into the class of "procedural rules that implicate fundamental constitutional protections.") and *Alleyne,* S Ct at 2164 (GINSBERG J., concurring) (indicating that applying *Apprendi* to mandatory minimums is a procedural rule that does not govern primary conduct.) Imposing the *Booker* remedy, in contrast, would fundamentally alter available penalties that the Legislature sought to prescribe. The ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. Const 1963, art 4, § 45; *Hegwood*, 465 Mich at 436-437. "Although the authority to administer the sentencing statutes enacted by the Legislature lies with the judiciary, it must do so only within the limits set by the Legislature." *Id.* As this Court has explained, setting the bounds of available punishment and determining the amount of sentencing discretion judges have, all are "for the Legislature to decide" and not for the judiciary. *Garza*, 469 Mich at 434. Returning to judges the discretion that the Legislature intended to remove, to impose sentences different from what the Legislature intended to prescribe, based on facts different from those the Legislature wanted considered, is at its core a fundamental substantive act that is not appropriate for this Court take. *Cf Schiro,* 542 US at 354-355 (adding or removing facts that are essential to the imposition of a certain sentence punishment is a substantive change to the law). Instead, the procedural remedy of interpreting the guidelines in accordance with constitutional requirements rather than rewriting legislation is required.

And finally, the *Booker* remedy would violate MCL 8.5, which provides in part:

> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

As explained above, no particular "portion" of the guidelines statute runs afoul of the Sixth Amendment. Certainly there is nothing unconstitutional about MCL 777.21, mandating the scoring of variables, or MCL 769.34 (2), requiring that sentences be within the calculated range, as both are perfectly acceptable methods of setting punishment. *See Blakely,* 542 US at 308 (noting that the relevant question "is only about how [sentencing guidelines] can be implemented in a way that respects the Sixth Amendment" not about the constitutionality of the guidelines themselves.) Thus, the *Booker* remedy would call for the unnecessary severance of statutory sections that are not invalid. It is only the current, judicially-prescribed "application" of MCL 777.21 through MCL 777.49a that violates the Sixth Amendment. Under MCL 8.5, it is only such "application" which must be "severed" through a remedy that replaces judicial fact-finding with *Alleyne*-compliant procedures.[9]

C. Application to Mr. Lockridge

In the instant case, Mr. Lockridge's Offense Variables under the Michigan Sentencing Guidelines were scored as follows:

[9] Concededly, certain language in a very small portion of the offense variables sections either calls for or could be read as calling for scoring based in violation of *Alleyne.* See e.g., MCL 777.42(2)(a)(ii) (calling for scoring points under OV 12 for certain contemporaneous criminal act that "has not and will not result in a separate conviction); MCL 777.42(2)(a) (calling for using the commission of three offenses within a five year period to score OV 13 "without regard to whether the offense resulted in a conviction.) Those variables can be rendered constitutional either by surgically severing the potentially offending language as MCL 8.5 requires or mandating jury findings as to the commission of those criminal acts even if they do not result in the entry of formal "conviction."

OV 1	OV 2	OV 3	OV 4	OV 5	OV 6	OV 7	OV 8	OV 9	OV 10
0	0	25	0	15	10	0	0	10	10
OV 11	**OV 12**	**OV 13**	**OV 14**	**OV 15**	**OV 16**	**OV 17**	**OV 18**	**OV 19**	**OV 20**
0	0	0	0	NA	0	0	0	0	0

The jury's verdict established the factual basis to score 25 points for Offense Variable 3 and 10 points for Offense Variable 6. However, the jury's verdict did not establish the factual basis for a non-zero score of Offense Variables 5, 9, or 10. Mr. Lockridge was entitled to a jury determination of those facts. Since there is no jury finding, he is entitled to a score of zero, which would move his sentencing range from the D-V cell of the Class C grid, yielding a sentencing range of 43 to 86 months, to the D-IV cell of the class C grid, with a sentencing range of 36 to 71 months.

Mr. Lockridge is entitled to a remand for resentencing, even though the trial court opted to depart above his guidelines for substantial and compelling reasons, because his 96-month minimum sentence is a greater departure from his correctly scored guidelines of 36 to 71 months than it is from the incorrect guidelines of 43 to 86 months. That is, his current minimum sentence "stands differently in relationship to the correct guidelines range than may have been the trial court's intention." *People v Francisco,* 474 Mich 82, 92; 711 NW2d 44 (2006) (holding that resentencing is mandated whenever the existing minimum sentence stands differently in relation to the corrected guidelines).

SUMMARY AND RELIEF REQUESTED

WHEREFORE, Mr. Lockridge prays for a remand for resentencing based on his properly scored sentencing guidelines.

Respectfully submitted,

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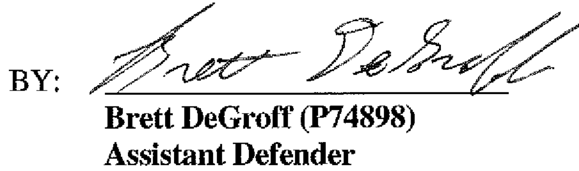
BY: 

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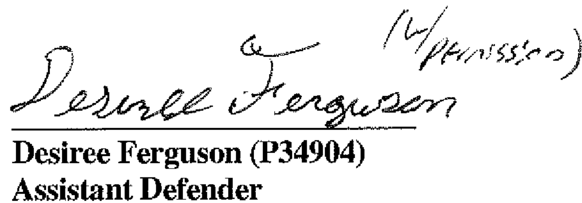

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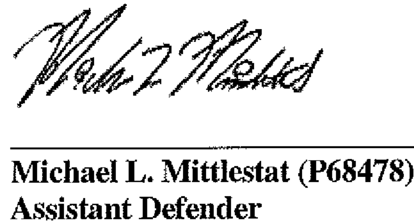

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Dated: September 23, 2014