STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Jane M. Beckering, P.J., and Peter D. O'Connell and Douglas B. Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 149073
Plaintiff-Appellee	Court of Appeals No. 310649
v	Oakland Cir. Ct. No. 11-238930-FC
RAHIM OMARKHAN LOCKRIDGE,	
Defendant-Appellant. /	

BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan. In recognition of this role, the court rules provide that the Attorney General may file a brief as *amicus curiae* without seeking permission from this Court. MCR 7.306(D)(2). The Attorney General supports the position of the People of the State of Michigan, and joins the People in asking this Court to affirm the constitutionality of Michigan's indeterminate sentencing and guidelines scoring system.

STATEMENT OF QUESTIONS PRESENTED

In its order entered June 11, 2014, this Court granted Defendant–Appellant Lockridge's application for leave to appeal and ordered the parties 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).

In this brief, the Attorney General will address the first question presented.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

Section 321 of the Michigan penal code provides:

> MANSLAUGHTER—Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable 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.]

Chapter IX, § 34 of the code of criminal procedure provides in part:

> (2) 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 . . . .
>
> (3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. [MCL 769.34.]

INTRODUCTION

Rahim Lockridge was convicted of involuntary manslaughter and was sentenced to the statutorily required maximum of 15 years in prison, consistent with § 321 of the Michigan penal code, MCL 750.321. No one argues that this maximum sentence offends the federal Constitution.

But the Legislature has, as a matter of grace, decided to make parole available to most Michigan prisoners, including Lockridge. After Lockridge has served eight years, the parole board will consider releasing him early, before he has served his full 15-year sentence. The federal Constitution does not require Michigan to do this, but Michigan does it anyway.

When Lockridge is considered for parole, no jury will consider whether he should be released. Neither the federal Constitution nor any other law requires a jury to be involved in granting parole. And if Lockridge violates his parole, no jury will consider whether he should be returned to prison. The United States Supreme Court has never held that there is a jury-trial right applicable to any factor related to parole or any grant of leniency from a maximum prison sentence.

Lockridge argues, however, that the recent United States Supreme Court decision in *Alleyne v United States* --- US ---; 133 S Ct 2151; 186 L Ed 2d 314 (2013), which requires jury-found facts to support the imposition of "mandatory minimum" determinate sentences, applies to his minimum sentence as well. He is wrong. The concept of a "minimum sentence" means something entirely different in the context where the U.S. Supreme Court was addressing it—i.e., in a determinate sentencing scheme—than it means in an indeterminate system like Michigan's.

Alleyne, like every Supreme Court case striking down a sentence on jury-right grounds, struck down a *determinate* sentence. In a determinate sentencing system, the sentencing court must decide the specific amount of time a defendant is going to spend in prison by choosing a sentence from within the maximum and the minimum sentence range allowed by statute. If that court increases either the ceiling or the floor of that range by making factual findings (thereby changing what the possible sentence is), those facts must be admitted by the defendant or tried to a jury.

But no such rule applies to a decision regarding when a defendant will first become eligible for parole. An indeterminate sentencing system does not give the judge discretion to choose between a ceiling and a floor. Instead, it sets a specific sentence and then allows the judge to decide when a parole board may intervene to exercise grace and excuse the defendant from serving the full sentence. In Michigan, then, the minimum is not a possible sentence—it is a parole eligibility date, the point at which legislative grace might step in. Neither *Alleyne* nor any other United States Supreme Court case has required a jury to determine when parole could become available. This Court should reject Lockridge's claim and affirm his indeterminate sentence.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Attorney General Schuette adopts the People's recitation of facts and account of proceedings below.

ARGUMENT

I. The Sixth Amendment does not require a state to involve a jury in setting a parole eligibility date.

Lockridge attacks Michigan's sentencing system as violative of *Alleyne* and the Sixth Amendment right to jury trial. The Court of Appeals rejected the same argument in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), held in abeyance pending this Court's decision in *People v Lockridge* (Docket No. 149073), 846 NW2d 924 (2014). The chief reasoning the *Herron* court used to uphold Michigan law was that the scoring of sentencing guidelines "falls within the 'wide discretion' accorded a sentencing court 'in the sources and types of evidence used to assist [the court] in determining the kind and extent of punishment to be imposed within limits fixed by law[.]'" 303 Mich App at 405, quoting *Alleyne*, 133 S Ct at 2163 n 6 (alterations in original; further internal quotations omitted).

But there is a more fundamental flaw in Lockridge's argument. He fails to recognize that the bottom number of an indeterminate sentence is fundamentally different from a determinate sentence, which has only one number. While a determinate sentence starts with a statutory maximum and minimum range, the judge exercises discretion to select a specific term, and the defendant is *entitled* to release upon completion of that term. In contrast, Lockridge's minimum sentence is nothing more or less than a parole eligibility date. Lockridge is not constitutionally entitled to parole, and no holding of the United States Supreme Court requires involving a jury in any decision relating to when, whether, or how to grant leniency through legislative grace. This Court should affirm.

A. From *Apprendi* to *Alleyne*, every sentence the United States Supreme Court has overturned as violative of the right to a jury trial has been a determinate, not indeterminate, sentence.

Alleyne v United States is the most recent in a series of decisions by the United States Supreme Court that extend the right to jury trial to the imposition of a determinate sentence. The *Alleyne* Court held, in effect, that any fact, other than a prior conviction, that constrains a judge's discretion in setting a determinate sentence by increasing the possible sentence must be admitted by the defendant or proved to a jury beyond a reasonable doubt. In earlier cases, beginning with *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the Court applied this rule to facts that allowed the sentencing judge to impose a determinate sentence above the maximum allowed by the jury's verdict alone. But one crucial distinction separates *Alleyne* and the rest of the *Apprendi* line from the case now before this Court: This case does not involve a determinate sentence, but the minimum term of an indeterminate sentence.

Although under Michigan law Lockridge's sentence is described as 8 to 15 years, only the 15-year maximum sentence implicates the Sixth Amendment and the *Apprendi* line of cases. If some provision of Michigan law allowed a trial court to sentence Lockridge to more than 15 years for the crime of involuntary manslaughter (based on a fact other than a prior conviction), *Apprendi* would require that fact to be tried to a jury beyond a reasonable doubt.

But Lockridge's 8-year "minimum sentence" raises no such constitutional concerns. Lockridge has no constitutional right to parole *at all*—having been fairly convicted of involuntary manslaughter, which carries a 15-year penalty, he has no

constitutional right to serve even one day less than his full 15 years. *Greenholtz v Inmates of Neb Penal & Corr Complex*, 442 US 1, 7; 99 S Ct 2100; 60 L Ed 2d 668 (1979). But Michigan, like most states, has chosen to extend the *possibility* of parole to most prisoners. And it has enacted a system governing the grant of parole that involves players from all branches of government. The ultimate determiner of when and whether Lockridge is paroled is the parole board. But the board may not consider Lockridge for parole until he has served a certain amount of time in prison. That amount of time, called a "minimum sentence," is set by the circuit judge. But the circuit judge is bound in his decision (except where substantial and compelling reasons allow otherwise) by the sentencing guidelines range. That range is determined by the application of certain facts to the offense variables and prior record variables. The facts are found by the judge by a preponderance standard, while the variables are statutes enacted by the Legislature.

And if Lockridge does not receive parole before he has served his maximum 15-year sentence, then he will be released at that time (assuming he has not been convicted of any other crimes). Neither the parole board nor any other body can extend Lockridge's imprisonment beyond this maximum sentence. Thus, the parole board is always working within the maximum sentence imposed by law, here 15 years.

In *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986), the Supreme Court considered a "mandatory minimum" sentencing law from Pennsylvania, which, like Michigan, imposes indeterminate sentences. The law in

question required a trial court to impose a minimum five-year sentence when convicted of certain enumerated crimes "if the person visibly possessed a firearm during the commission of the offense . . . ." *Commonwealth v Wright*, 508 Pa 25, 29; 494 A2d 354 (1985) (quoting 42 Pa CSA § 9712). The statute only affected the minimum sentence (i.e., the parole eligibility date); the maximum sentence was set by statute and unaffected by the "mandatory minimum" statute. *Id.* at 40 ("The maximum permissible term of imprisonment remains unaffected. The defendant has no cognizable right to leniency.") The Supreme Court also noted that the statute does not, by its own terms, change the maximum penalty for the crime.[1] *McMillan*, 477 US at 87–88. The Court concluded that it "ha[d] no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line." *Id.* at 91.

In *Apprendi v New Jersey*, the trial court imposed a determinate sentence of 12 years after finding by a preponderance of the evidence that the defendant's crime of possession of a firearm for an unlawful purpose was also a "hate crime." 530 US

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[1] The *McMillan* Court did point out that "the Act incidentally serves to restrict the sentencing court's discretion in setting a maximum sentence," because "Pennsylvania law provides that a minimum sentence of confinement 'shall not exceed one-half of the maximum sentence imposed.' 42 Pa Cons Stat § 9756(b)(1982). Thus, the shortest maximum term permissible under the Act is 10 years." 477 US at 88 n 4.

The *McMillan* Court did not find this to be a constitutional problem. To the extent that aspect of *McMillan* may be in doubt after *Alleyne*, it has no effect on Michigan's sentencing guidelines. In most cases, the maximum sentence is determined by statute, MCL 769.8. And Michigan's "two-thirds rule," MCL 769.34(2)(b), will only serve to keep minimum sentences down, rather than push maximum sentences up. In cases in which the statutory sentence is "life or any term of years," the two-thirds rule does not apply. *People v Lewis*, 489 Mich 939; 798 NW2d 15 (2011).

466, 468–471; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Without the hate-crime enhancement, the trial court could not have imposed a determinate sentence above 10 years. *Id.* at 468. The Supreme Court held that this procedure violated the Sixth Amendment right to jury trial, and that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

In the cases that followed *Apprendi*, *every sentence* the Supreme Court reversed on Sixth Amendment grounds was a determinate sentence. In *Ring v Arizona*, the Court held that because Arizona required particular findings of fact before imposing the death penalty, those facts needed to be found by a jury beyond a reasonable doubt. 536 US 584, 603–604; 122 S Ct 2428; 153 L Ed 2d 556 (2002). In *Blakely v Washington*, the defendant received an "exceptional" determinate sentence of 90 months, exceeding the statutory maximum of 53 months, because the trial court found the defendant had acted with "deliberate cruelty." 542 US 296, 298; 124 S Ct 2531; 159 L Ed 2d 403 (2004). The Court held this violated the Sixth Amendment. *Id.* at 313–314. In *United States v Booker*, the Court struck down the mandatory nature of the federal sentencing guidelines on Sixth Amendment grounds, allowing respondent Booker to be resentenced from his determinate sentence of 30 years, and respondent Fanfan to seek resentencing from his determinate sentence of 78 months. 543 US 220, 226–229; 125 S Ct 738; 160 L Ed 2d 621 (2005). In *Cunningham v California*, the Court reversed a determinate

sentence of 16 years which was only available to the trial court if certain facts were found to allow the court to depart from the default 12-year determinate term. 549 US 270; 127 S Ct 856; 166 L Ed 2d 856 (2007).

B. *Alleyne* broke new ground by applying the *Apprendi* rule to facts that increased the "floor" of the allowable determinate sentence, rather than the "ceiling" as in other cases.

Most recently, in *Alleyne*, a jury found the defendant guilty of using or carrying a firearm in relation to a crime of violence, and the trial court imposed a determinate sentence of 7 years after finding by a preponderance of the evidence that the defendant brandished the firearm he carried. --- US ---; 133 S Ct 2151, 2155–2156; 186 L Ed 2d 314 (2013). The trial court could have imposed the 7-year determinate sentence without the brandishing finding, but, having found brandishing, the court was required by statute to impose a determinate sentence of at least 7 years. 18 USC § 924(c)(1)(A)(ii). The Supreme Court overruled *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), and held that, because "[m]andatory minimum sentences increase the penalty for a crime[, i]t follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to a jury." 133 S Ct at 2155.

Harris was virtually indistinguishable from *Alleyne*. The defendant was convicted of selling illegal narcotics, and, like Alleyne, would have been subject to a determinate sentence of at least 5 years, but because the judge found that he had brandished a gun, the law required a sentence of at least 7 years. 536 U.S. at 550–551. Like Alleyne, Harris received the mandatory minimum of 7 years. *Id.* at 551.

The *Harris* Court considered the question to be very close to that in *McMillan*—indeed, the Court framed the question as "whether *McMillan* stands after *Apprendi*." *Id.* at 550.

Harris and *McMillan* did have one fact in common that set them apart from *Apprendi*: In both *Harris* and *McMillan*, judge-found facts were being used *not* to allow the court to impose a sentence it otherwise would have been forbidden to (as in *Apprendi*), but to forbid the court from imposing sentences it otherwise would have been allowed to. In other words, in *Harris* and *McMillan*, the facts raised the floor, while in *Apprendi*, they raised the ceiling. The lead opinion in *Harris* found that this distinction between extending and constraining the power of the sentencing judge was important, and that "[i]t is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be." 536 US at 567 (opinion of KENNEDY, J.).

In *Alleyne*, however, that particular distinction—that is, the distinction between "facts that raise the maximum [and] facts that increase the minimum" was held to have "no basis in principle or logic." 133 S Ct at 2163. And although *Alleyne* did discuss *McMillan* as historical background, it did not discuss an additional, key distinction between *McMillan* and *Harris*, *Apprendi*, and *Alleyne*—the fact that *McMillan* dealt with the lower number of an indeterminate sentence, while the

latter three cases all dealt with determinate sentences. Notably, *Alleyne* did not overrule *McMillan*; it only overruled *Harris*.[2]

This case is not controlled by *Alleyne* or any other case in the *Apprendi* line, because here, the trial court imposed an indeterminate, rather than a determinate sentence. In *McMillan*, the only case in which the United States Supreme Court considered an indeterminate sentence, it upheld that sentence. The *Alleyne* majority did not overrule *McMillan*, and it remains good law.

C. Other determinations that affect the fact, timing, or possibility of early release are not subject to jury findings.

For Sixth Amendment purposes, the setting of a minimum sentence, which functions as a parole eligibility date, is no different from other decisions that affect what portion of a defendant's total sentence he or she will serve. In no other circumstance is a fact relevant to leniency submitted to a jury on a reasonable-doubt standard. Michigan guidelines scoring should be no different.

1. A prisoner being considered for parole is not entitled to jury determination of any facts relevant to the parole decision.

A prisoner being considered for parole is not entitled to any hearing at all. See generally *Greenholtz*, 442 US at 14–16. The decision whether to hold a hearing may be based on various facts not only of the crime of conviction, but also of factors

[2] Justice SOTOMAYOR's concurrence opined that *McMillan* was wrongly decided, 133 S Ct at 2164, and Justice ALITO's dissent suggested that the majority was "cast[ing *McMillan*] aside," *id.* at 2172. But the *Alleyne* majority never claimed to overrule *McMillan*. But see *Commonwealth v Newman*, 99 A3d 86, 96 (Pa Superior Ct, 2014) ("The *Alleyne* court directly overruled *Harris*, and by implication, *McMillan* also.")

such as the prisoner's behavior in prison, acceptance of responsibility, or expression of remorse. The prisoner has no Sixth Amendment right to have a jury determine any of these facts beyond a reasonable doubt. Moreover, if a hearing is held, the ultimate decision whether to grant or deny parole is made based on facts that are not tried to a jury beyond a reasonable doubt.

2. A parolee is not entitled to jury determination of any facts relevant to the decision to revoke parole.

A parolee who is accused of violating parole is entitled to significantly more due-process protection than a prisoner being considered for parole. *Greenholtz*, 442 US at 9 ("parole *release* and parole *revocation* are quite different"); *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972). Among those due-process rights are a preliminary hearing by a neutral decision-maker and a revocation hearing if the parolee desires it, which need not include the full panoply of due process required in a criminal trial, but requires at a minimum,

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. [*Morrissey*, 408 US at 489.]

The *Morrissey* Court stopped short of holding that a state is required to impanel a jury to determine if the facts support a revocation of parole. That

determination can be made by a "traditional parole board" without violating the Sixth Amendment. *Id.*

3. A prisoner is not entitled to a jury determination of any facts relevant to the decision to revoke good-time credits.

Some states award credit to prisoners who behave themselves in prison, which ultimately reduces the time spent in prison below the sentence imposed. E.g., Neb Rev Stat § 83-1,107(2). When the state revokes those credits (sometimes called "good-time" credits) based on sufficiently serious misconduct, it increases the amount of time until the prisoner's release. The United States Supreme Court has held that the revocation of statutorily guaranteed good-time credits deprives a prisoner of a cognizable liberty interest, and thus implicates the Due Process Clause. *Wolff v McDonnell*, 418 US 539, 556–557; 94 S Ct 2963; 41 L Ed 2d 935 (1974). But the *Wolff* Court held that a state may, consistent with the Sixth Amendment, revoke good-time credits without impaneling a jury. *Id.* at 570–571 (upholding Nebraska's procedure of allowing an "Adjustment Committee" to determine the revocation of good-time credits).

4. A defendant is not entitled to a jury determination of any facts relevant to the decision to impose life without parole or a parole-eligible sentence.

Following the United States Supreme Court's decision in *Miller v Alabama*, states must afford individualized sentencing hearings to juveniles convicted of murder, and may not automatically impose a sentence of life without parole, as they may do with adult prisoners. --- US ---; 132 S Ct 2455, 2469; 183 L Ed 2d 407

(2012). At those hearings, a judge decides whether to sentence the defendant to life without parole or a lesser sentence (in Michigan, an indeterminate minimum sentence of 25 to 40 years to a maximum sentence of 60 years, MCL 769.25). Although the United States Supreme Court has not squarely addressed whether the facts must be tried to a jury, the *Miller* majority repeatedly refers to the ability of a "*judge or* jury" to make the determination. 132 S Ct at 2467, 2474, 2475 (emphasis added). And courts that have addressed the question have held that no jury is required. *State v Fletcher*, --- So 3d ---, 2014 WL 4853122, *13–15 (La Ct App 2d Cir, 2014); *Bear Cloud v State*, 294 P 3d 36, 47–48 (2013) (crafting a *Miller*-compliant sentencing procedure with no mention of a jury); *Geter v State*, 115 So 3d 375, 381 (Dist Ct App Fla, 3d Dist, 2012) ("*Miller* does not require jury submission of factors to be found beyond a reasonable doubt.").

And *Ring*, in which the United States Supreme Court held that jury sentencing is required before Arizona courts applied the death penalty, is not to the contrary. The *Ring* holding depended on the fact that Arizona law required certain facts to be found before imposing the death penalty; otherwise, only a life sentence was available to the court. But *Miller* does not require a default term-of-years sentence with life without parole being available only on the finding of particular facts. Rather, *Miller* requires states to consider the defendant's youth, and all that goes along with it, as a set of potential mitigating factors—that is, the state must consider whether considerations of youth require bringing a sentence *down from* life

without parole, not whether some aggravating factors bring a sentence *up to* life without parole.[3]

D. This Court should follow Kentucky, not Kansas or Pennsylvania, by declining to extend *Alleyne* to indeterminate sentencing regimes.

Kansas, Kentucky, and the Pennsylvania Superior Court have all considered how *Alleyne* affects their state courts' ability to determine parole eligibility dates. Kansas and Pennsylvania, failing to recognize the difference between a mandatory minimum determinate sentence, and a mandatory minimum parole eligibility date, have struck down sentences under *Alleyne*. Kentucky has correctly held that parole considerations are separate from questions governing determinate sentences.

1. This Court should avoid repeating Pennsylvania's and Kansas's errors in treating a mandatory minimum parole eligibility date as equivalent to a mandatory minimum sentence as discussed in *Alleyne*.

As discussed above, Pennsylvania, like Michigan, imposes indeterminate sentences. Earlier this year, Pennsylvania's Superior Court considered the effect of *Alleyne* on one of its "mandatory minimum" statutes—a statute very similar to that upheld in *Wright* (by the Pennsylvania Supreme Court) and *McMillan* (by the U.S. Supreme Court). *Commonwealth v Newman*, 99 A3d 86 (Pa Superior Court, 2014) (en banc). The statute requires a trial court to sentence someone convicted of a

[3] To be sure, a state could choose to go beyond *Miller* by making a term of years sentence the default, and requiring aggravating facts to elevate the sentence to life without parole. Under *Ring*, such a scheme might require jury sentencing. But *Miller* does not require such a scheme, and indeed the scheme Michigan has enacted in response to *Miller* does not work that way. MCL 769.25, 769.25a.

particular controlled substance offense to a minimum of five years if the offender possessed a firearm. 42 Pa CSA § 9712.1(a). The statute also specifies that the fact of possession of a firearm "shall be determined at sentencing," and "shall [be] determine[d] by a preponderance of the evidence." *Id.* § 9712.1(c).

The *Newman* court held that because *Alleyne* "repudiated the *Apprendi* and *McMillan* maximum sentence/minimum sentence dichotomy[, p]lainly, Section 9712.1 can no longer pass constitutional muster." 99 A3d at 98.

The Kansas Supreme Court recently considered their "hard 50 sentencing scheme," which imposes a life sentence with no possibility of parole for 50 years for murder committed with an enumerated aggravating circumstance. *State v Soto*, 299 Kan 102; 322 P3d 334 (2014); KSA 21-4635(d) (since repealed). Without the aggravating factor, the ordinary minimum is 25 years. *Soto*, 299 Kan at 115; KSA 22-3717(b)(2). The *Soto* Court applied *Alleyne* and held that the "hard 50" law violated the Sixth Amendment by creating a "mandatory minimum" sentence based on judge-found facts. 299 Kan at 122–124.

The Attorney General respectfully submits that the *Newman* court and the *Soto* Court both erred, and that the crux of the error lies in not distinguishing two different meanings of the term "minimum sentence."[4] In *Alleyne*, the prisoner did

[4] Even if *Newman* and *Soto* were correct, that would not mean Lockridge is entitled to relief. *Newman* involved a mandatory-minimum minimum sentence, and *Soto* involved a determinate sentence with a mandatory-minimum parole eligibility date. Lockridge received a discretionary minimum sentence within an indeterminate scheme. But the errors in *Newman* and *Soto* still bear pointing out, because of their crucial failure to recognize the difference between a mandatory-minimum determinate sentence and a mandatory-minimum minimum sentence.

not receive a minimum sentence and a maximum sentence. He simply received a *sentence*—a determinate sentence of seven years. 133 S Ct at 2156. The term "minimum sentence" in *Alleyne* refers to the lowest determinate sentence the district court *could have* imposed. But in *Newman* and *Soto*, the term "minimum sentence" refers to the bottom number of the two-part sentence that the court *did* impose. And the "mandatory minimums" at issue in *Newman* and *Soto* were not mandatory minimum determinate sentences or mandatory minimum maximum sentences, but mandatory minimum *minimum* sentences—in other words, mandatory minimum parole eligibility dates.

2. This Court should instead follow the Kentucky Supreme Court's reasoning, and respect the difference between parole and a minimum determinate sentence.

Kentucky's Supreme Court has also considered the effect of *Alleyne* on its courts' ability to set parole eligibility dates based on judge-found facts. In Kentucky, a "violent offender" is not eligible for parole until that offender has served 25 years of their sentence. KRS § 439.3401(2). While some offenders may be deemed violent offenders based solely on the jury's verdict, *id.* § 3401(1)(a), (b), (e), et al., others may only be found only after certain facts are determined, such as a finding that the victim suffered death or serious physical injury, *id.* § 3401(1)(c). Although the statutes do not *call* this 25-year minimum parole eligibility date a "mandatory-minimum sentence," it is no different in substance from a mandatory-minimum minimum sentence like those at issue in *Newman* and *Soto*. Cf. MCL 750b(2)(b).

Thomas Biederman was sentenced as a violent offender under § 3401(1)(c), having been convicted of a class B felony causing death or serious injury. *Biederman v Commonwealth*, 434 SW3d 40, 42–43 (2014). He challenged his sentence under *Alleyne*, arguing that setting a 25-year parole eligibility date based on the judge-found fact of serious physical injury violated his right to jury trial. *Id.* at 46. The Kentucky Supreme Court correctly rejected this claim, recognizing that "[a] trial court's increase in mandatory minimum sentences from five to seven years is wholly separate and apart from the issue of parole eligibility. There is no constitutional right to parole, but rather parole is a matter of legislative grace or executive clemency." *Id.* at 46. The Court continued, "So while the trial court's sentencing of Biederman as a violent offender ensured he would serve a larger portion of the sentence in prison, it did not expose him to a larger punishment than authorized by the jury's verdict." *Id.*, citing *Apprendi*, 530 US 466.

As discussed above, whether, when, and how a state decides to grant leniency through parole does not implicate the Sixth Amendment jury trial right. Newman had no constitutional right to serve less than his 10-year sentence. Biederman had no right to serve less than 40 years. Soto had no constitutional right to ever leave prison. The fact that their trial courts could not set their parole eligibility dates below 5, 25, and 50 years respectively based on judge-found facts does not violate the rule of *Alleyne*. Respectfully, this Court should reject the faulty reasoning and erroneous conclusions of Pennsylvania and Kansas on this question, and hold, with

Kentucky, that parole considerations need not be submitted to a jury, whether termed a "mandatory-minimum sentence" or a "parole eligibility date."

E. This Court should reaffirm its prior holdings that Michigan's indeterminate sentencing system complies with the Sixth Amendment.

This Court has repeatedly held that our indeterminate sentencing system does not run afoul of the rules that *Apprendi*, *Cunningham*, *Blakely*, and *Booker* established relating to determinate sentencing systems. *People v McCuller*, 479 Mich 672; 739 NW2d 563 (2007) (*McCuller I*), cert den 552 US 1314 (2008); *People v Harper*, 479 Mich 599; 739 NW2d 523 (2007), cert den 552 US 1232 (2008); *People v Drohan*, 475 Mich 140; 715 NW2d 778, cert den 549 US 1037 (2006). *Alleyne* broke no new ground *relevant to indeterminate sentences*. To the extent this Court's earlier holdings have relied in part on *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), that foundation is admittedly undermined by *Alleyne*'s overruling of *Harris*. But *Harris*, like *Alleyne*, was a challenge to a *determinate* sentence. So to the extent that this Court's holdings have rested on *McMillan*, and on the correct observation that an indeterminate sentence—and particularly, the bottom number of an indeterminate sentence—is fundamentally different from a determinate sentence, *Alleyne* did not disturb the validity of those holdings.

Lockridge's proposed new rule would, for the first time, require the involvement of a jury in a state's decision regarding when and whether to exercise leniency in granting discretionary parole. This unprecedented rule is not required

by *Alleyne* or any other decision of the United States Supreme Court. This Court should reject the argument, and affirm.

II. Even if *Alleyne* applies to Michigan's indeterminate sentencing system, this Court should not afford resentencing relief to defendants who, like Lockridge, were sentenced above the bottom of the guidelines.

Lockridge's argument as to why *Alleyne* applies to a Michigan minimum sentence amounts to this: The bottom of a guidelines range represents a "mandatory minimum" below which a judge may not sentence, absent substantial and compelling reasons to depart downward. (Def's Br on Appeal, pp 13–14 & n 1.) For example, in this case, the bottom number of Lockridge's guidelines range was 43 months, and the trial court was constrained not to sentence Lockridge to a minimum sentence of 42 months, or 41 months, or lower. But the minimum sentence Lockridge actually received was *96* months. Even if the bottom number of Lockridge's guidelines had been 36 months, as he argues it should have been (*id.*, p 3), there is no reason to think that the court would have sentenced him to a minimum sentence between 36 and 42 months.

Judge SHAPIRO's concurrence below correctly recognizes this fact as a practical reason to hold that Lockridge's Sixth Amendment rights were not violated. 304 Mich App at 317 ("Defendant was sentenced to a minimum term of 96 months, well above the mandatory minimum of 43 months set by the lower end of the applicable guidelines range. The factual findings made by the trial court, therefore, did not prevent defendant from receiving a minimum sentence below that floor.").

If this Court agrees with Lockridge that *Herron* was wrongly decided and that *Alleyne* applies to Michigan's indeterminate sentencing system, it will need to determine whether Lockridge is entitled to relief. It will also need to dispose of dozens of other cases that have been held in abeyance pending the decision in this case. Rather than remand each of those for a resentencing hearing, requiring the impaneling of many dozens of juries, this Court should adopt Judge SHAPIRO's sensible conclusion.

The United States Supreme Court has held that a failure to submit a fact relevant to sentencing to the jury is not a structural error, but is subject to harmless-error analysis. *Washington v Recuenco*, 548 US 212, 220; 126 S Ct 2546; 165 L Ed 2d 466 (2006).

If a defendant was not sentenced at the bottom of the guidelines range, then it does not make sense to believe that the sentencing court's discretion was in any way constrained by the "mandatory minimum" imposed by the bottom guidelines number. For any defendant sentenced above the bottom of the guidelines range (including Lockridge himself), the sentence makes evident that the trial court did not wish to sentence below the bottom of the guidelines range. Thus, the bottom number put no constraint on the court's discretion. In addition, for any defendant sentenced *below* the bottom of the guidelines range, the sentence makes evident that the trial court was not constrained by the guidelines. For both of these groups of defendants, this Court should hold that the error (if any) was harmless beyond a reasonable doubt, and deny leave to appeal.

CONCLUSION AND RELIEF REQUESTED

Lockridge received a two-number indeterminate sentence, the lower number of which constitutes a parole eligibility date. The Sixth Amendment right to jury trial does not apply to whether, when, or how a state grants leniency through discretionary parole from prison. For these reasons, the Attorney General supports the People's request to affirm the judgment of the Court of Appeals.

In the alternative, if this Court adopts a new rule either making the guidelines advisory or requiring jury determination of facts, the Attorney General requests that, for those whose sentences are currently pending on direct review, this Court only order resentencing for those who were sentenced at the bottom of the guidelines.

Respectfully submitted,

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