STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

RAHIM OMARKHAN LOCKRIDGE,

Defendant-Appellant.
_____/

Michigan Supreme Court
No. 149073

Michigan Court of Appeals
No. 310649

Oakland County Circuit Court
No. 11-238930-FC

AMICUS CURIAE BRIEF OF CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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INTEREST OF AMICUS CURIAE

Since its founding in 1976, Criminal Defense Attorneys of Michigan (CDAM) has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members.

As reflected in its by-laws, CDAM exists in part to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles on various subjects relating to criminal law and procedure, provides relevant information to the state legislature regarding contemplated changes of laws, engages in other educational activities and participates as an amicus curiae in litigation of relevance to the organization's interests. As in this case, CDAM is often invited to file briefs amicus curiae by the Michigan appellate courts.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Secondary Authorities

ARGUMENT

Amicus Curiae Criminal Defense Attorneys of Michigan (CDAM) concurs in the persuasive arguments by counsel for Defendant Rahim Omarkhan Lockridge, but files this Brief for two reasons. First, CDAM wishes to explain why the terminology employed by this Court in its prior sentencing cases—specifically the terms "indeterminate" and "statutory maximum"—has not aligned with the terminology used by the United States Supreme Court, and has led to confusion over the application of the Supreme Court's sentencing jurisprudence to Michigan's unique sentencing scheme. That confusion is on full display in the briefs filed by the State and its amici, which misunderstand the constitutional importance of parole boards and mandatory sentencing guidelines. Clarity is needed.

Second, CDAM wishes to explain why the remedy of fully-advisory guidelines sought by the State would not make sense given this Court's past interpretation of the Sixth Amendment jury trial right at sentencing. As undersigned counsel has explained elsewhere, there is a compelling argument that Michigan's sentencing scheme violated the Sixth Amendment even before the Supreme Court decided to treat mandatory minimums the same as statutory maximums. See Hall, *Mandatory Sentencing Guidelines by Any Other Name: When "Indeterminate Structured Sentencing" violates* Blakely v Washington, 57 Drake L Rev 643 (2009). But this Court has rejected that argument, insisting that the application of Michigan's mandatory sentencing guidelines does not affect the "statutory maximum." That being the case, there simply is no justification for the fully-advisory remedy proposed by the State. While CDAM endorses the remedy proposed by Defendant, if this Court does not adopt that remedy, it should declare the Michigan sentencing guidelines advisory only at the floor of sentencing judges' discretion, where a Sixth Amendment problem exists.

I. Michigan's sentencing scheme violates *Alleyne*

Much of the briefing on the State's behalf relies on the fact that Michigan employs an "indeterminate" sentencing scheme, which, the State and its amici maintain, insulates it from Sixth Amendment scrutiny. The argument is not surprising, given that the United States Supreme Court approved of indeterminate sentencing in *Blakely v Washington*, 542 US 296, 308-09; 124 S Ct 2531; 159 L Ed 2d 403 (2004), after which this Court rejected a *Blakely* challenge on the basis of that very characteristic. *People v Drohan*, 475 Mich 140, 163; 715 NW2d 778 (2006). The problem with this argument is that there is more than one definition for "indeterminate," and Michigan's sentencing scheme does not fit the definition that matters.

Professor Stephanos Bibas described the differing (and evolving) definitions of "indeterminate" as follows:

> The term "indeterminate sentences" used to refer to broad ranges set by judges (for example, five to ten years). Within these broad ranges, parole boards often determined the ultimate release dates. Determinate sentences, in contrast, were precise sentences set by judges (for example, eight years). In more modern parlance, indeterminate sentencing allows judges to set sentences anywhere below the statutory maxima (for example, anywhere from zero to twenty years for armed robbery). Determinate sentencing, in contrast, uses sentencing guidelines or statutes (such as mandatory minima) to guide or constrain judicial discretion within the statutory ranges.

Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv L Rev 2463, 2468 n.12 (2004). What complicates this and prior cases is that Michigan's unique sentencing scheme—unlike virtually any other jurisdiction except Pennsylvania—fits *both* definitions of "indeterminate sentencing": Michigan sentences take the form of "broad ranges" in which "parole boards" operate, yet those ranges are set by "sentencing guidelines" which "constrain judicial discretion," rather than simply by statute.

Adopting the reasoning of this Court's prior cases, the State and its amici rely on the traditional ("broad parolable ranges") definition of indeterminate sentencing. But every single time the United States Supreme Court has spoken approvingly of indeterminate sentencing, it has used the newer ("non-guidelines") definition. There is an obvious reason: in a "non-guideline" sentencing scheme, a judge's sentencing discretion will never be enhanced or constrained by facts not proven to the jury beyond a reasonable doubt. But the same cannot necessarily[1] be said of a "parolable ranges" sentencing scheme—and certainly cannot be said of Michigan's mandatory guideline regime.

A. The United States Supreme Court has always used "indeterminate" to refer to non-guideline sentencing schemes which do not limit sentencing courts' discretion based on facts that were not proven to the jury beyond a reasonable doubt

The State says indeterminate sentencing necessarily survives *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), because "*Alleyne* specifically cited *Williams v New York*, [377 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949),] which extensively discussed indeterminate sentencing, with approval on two separate occasions . . . ." (Appellee's Brief at 21.) *Williams* is indeed a good starting point, as it commenced "[t]he modern line of precedents marking the Supreme Court's hands-off jurisprudence concerning sentencing," Berman, *Foreword: Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J Crim L & Criminology 653, 662 (2005), and because it reveals with clarity what distinguishes indeterminate sentencing schemes for Sixth Amendment purposes.

In *Williams*, a jury convicted the defendant of murder and recommended a sentence of natural

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[1]Because most sentencing schemes relying on "broad parolable ranges" do not also include a sentencing guidelines component, the disharmony in these definitions is seldom apparent. It is only in Michigan and Pennsylvania that both characteristics come into play.

life imprisonment. But under New York law, the sentencing judge was permitted (even encouraged) to consider "information . . . obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine," including facts "about . . . past life, health, habits, conduct, and mental and moral propensities." *Id.* at 244-45. Relying on those considerations, the court overruled the jury's recommendation and sentenced the defendant to death. *Id.* at 242.

The Supreme Court upheld the death sentence, ironically embracing the then-"[m]odern changes in the treatment of offenders," *id.* at 248, which focused on individualized sentencing within "fixed statutory or constitutional limits" but was *not* subject to additional constraints on discretion, such as guidelines. *Id.* at 247. "Here, for example, the judge's discretion was to sentence to life imprisonment or death." *Id.* at 244-45. Because that discretion fully vested at the moment of conviction—and was not dependent upon the judge's unguided consideration of additional factors at sentencing—there was no constitutional problem.

Thus, *Williams*, which "epitomized the indeterminate ideal," Miller, *Sentencing Equality Pathology*, 54 Emory LJ 271, 272 (2005), approved of indeterminate sentences not because their "ultimate termination [is] *sometimes* decided by nonjudicial agencies" (i.e., parole boards), *Williams*, 337 US at 248 (emphasis added), but rather because "trial judges are allowed but not required to engage in freeform factfinding before selecting punishment within broad statutory ranges." Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 Colum L Rev 1082, 1094-95 (2005). The Court's acknowledgment that parole boards "sometimes" play a role in indeterminate sentencing obviously had nothing to do with the outcome of the case, since the only possible sentences were death or "natural life." *Id.* at 242 n.2 (citing N Y Penal Law 1045). Parole was never a factor.

Other cases confirm that the Supreme Court has never viewed "indeterminate" as synonymous with "parolable." In *Mistretta v United States*, 488 US 361, 363; 109 S Ct 647; 102 L Ed 2d 714 (1989), the Court said that "*[b]oth* indeterminate sentencing *and* parole were based on concepts of . . . rehabilitation," and explained the history of federal sentencing as follows:

> For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion . . . . This indeterminate-sentencing system *was supplemented by* the utilization of parole, by which an offender was returned to society under the "guidance and control" of a parole officer.

Id. at 362 (emphasis added). Just as in *Williams*, therefore, the Court in *Mistretta* saw parole as a complementary but nonessential (for constitutional purposes) feature of indeterminate sentencing.

But by far the most telling illustration of this point—and also the most important precedent for purposes of this case—is *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986). *McMillan* is revealing not for what it *says* about "indeterminate" sentencing, but rather for what does *not* say—anything at all. Not once did the Supreme Court use the word "indeterminate" to describe a set of Pennsylvania sentences that were functionally identical to most Michigan sentences. Hall, *Mandatory Sentencing Guidelines by Any Other Name*, 57 Drake L Rev at 650-53. See also *Drohan*, 715 NW2d at 788 (noting that Pennsylvania's sentencing scheme "bear[s] a strong resemblance to Michigan's").

McMillan upheld a Pennsylvania statute under which certain felonies subjected defendants to a mandatory five-year "minimum sentence" upon a sentencing court's finding, by a preponderance of the evidence, that they "'visibly possessed a firearm' during the commission of the offense." 477 US at 80-81 & n.1. Without the mandatory minimum, the defendants were subject to parolable sentences of 3-10 years, 1-6 years, 11½-23 months, and 4-8 years, *id.* at 82 n.2, but with the

mandatory enhancement, those sentences rose to 5-10 years on the lead charges for each defendant. *Id.* at 88 n.4 ("the shortest maximum term permissible under the Act is 10 years"). Just as in Michigan, therefore, the sentencing judges were required to increase the minimum terms of parolable ranges based on facts that were not admitted or proven beyond a reasonable doubt. The Supreme Court approved of this process because it "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it . . . ." *Id.* at 87-88. Put differently, it was permissible for judge-found facts to raise the *floor* in the sentencing judges' discretion, so long as they did not also raise the *ceiling*—meaning the judges' preexisting authority to impose greater maximum sentences even in the absence of contested factual findings.

Finally, in *Blakely*, when the Supreme Court spoke approvingly of indeterminate sentencing, 542 US at 308-09, it did not envision anything resembling Michigan's mandatory sentencing guideline scheme. For example, rejecting Washington's comparison of its own mandatory sentencing guidelines to the regimes approved in *McMillan* and *Williams*, the Court said,

> *McMillan* involved a sentencing scheme that imposed a statutory minimum if a judge found a particular fact. We specifically noted that the statute "does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. The judge could have "sentenced [the defendant] to death giving no reason at all."

Id. at 304–05 (citations omitted). Again, the Court was using "indeterminate" to mean "unguided" rather than "parolable." Perhaps most tellingly, the Court used this term to refer to the sentence in *Williams*, which involved neither parole nor guidelines, but *not* the sentence in *McMillan*, which involved both features and thus mirrored a typical Michigan sentence.

The *Blakely* majority was not alone in its understanding of "indeterminate" as "non-

guideline," but not necessarily "parolable." In dissent, Justice O'Connor (joined by Justice Breyer) said that in indeterminate schemes, "judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range, including probation . . . ." *Id.* at 315 (O'Connor, J, dissenting). She decried this "system of unguided discretion [that] inevitably resulted in severe disparities," *id.*, and lamented that the majority's holding "casts constitutional doubt over" modern schemes using guidelines to harness judicial discretion—specifically citing Michigan's sentencing scheme as constitutionally suspect. *Id.* at 323 (citing MCL 769.34).[2]

In sum, although the Supreme Court has repeatedly suggested that "indeterminate" sentencing schemes pose no Sixth Amendment problem, the relevant feature of these schemes is that they vest sentencing judges with full discretion at the moment of conviction, and not that they sometimes utilize parole boards. Michigan does not, therefore, have an "indeterminate" sentencing scheme—at least not in the sense that has ever mattered to the United States Supreme Court.

B. Even assuming that Michigan's mandatory sentencing guideline scheme was ever constitutionally permissible after *Blakely*, its legality depended upon the *Harris/McMillan* exception for mandatory minimums, which no longer exists after *Alleyne*

After overcoming the confusion about "indeterminate sentencing," this is a simple case on the merits. The issue is whether it is constitutionally permissible to increase the mandatory floor of a parolable sentencing range based on facts not admitted by the defendant or proven to a jury beyond a reasonable doubt. In *McMillan*, the Supreme Court said it is. The dispositive question

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[2]The State also discusses Justice O'Connor's *Blakely* dissent (Appellee's Brief at 18), apparently not realizing that Justice O'Connor would disagree that Michigan's so-called "indeterminate" scheme survives constitutional scrutiny.

here—which, to its credit, the Michigan Attorney General's Office appears to recognize (Attorney General's Brief at 8-9)—is whether *McMillan* remains good law. It does not.

First, the reasoning of *McMillan* cannot survive *Alleyne*. The entire point of *McMillan* was that it is permissible to increase the bottom end of a sentencing judge's discretion—the "floor"—based on facts not admitted or proven to a jury beyond a reasonable doubt. When the Supreme Court attached constitutional significance to the "ceiling" in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), "the logic of *Apprendi* prompted questions about the continuing vitality, if not validity, of *McMillan*'s holding . . . ." *Alleyne*, 133 S Ct at 2157. The Court addressed this uncertainty in *Harris v United States*, 536 US 545, 550; 122 S Ct 2406; 153 L Ed 2d 524 (2002), in which "[t]he principal question . . . [wa]s whether *McMillan* stands after *Apprendi*." The Court held that *McMillan* withstood *Apprendi*, thereby permitting the distinction between mandatory minimums and statutory maximums—but treating as identical the *parolable* mandatory minimum in *McMillan* and the *flat* mandatory minimum in *Harris*. See *id.* at 568.

Alleyne overruled *Harris*, and by necessary implication, *McMillan* as well. For one thing, the Court said nothing to suggest a departure from its identical treatment of parolable and nonparolable sentences in *McMillan* and *Harris*, respectively. For another, the Court did not limit its reasoning to the particular federal statute at issue in *Harris* and *Alleyne*, 18 USC 924(c)(1)(A), or treat the "concept of a 'minimum sentence' [as] something entirely different in the context . . . [of] a determinate sentencing scheme[ ]than . . . in an indeterminate system like Michigan's." (Attorney General's Brief at 1.) To the contrary, the Court held in broad terms that "*Apprendi*'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor," *Alleyne*, 133 S Ct at 2158, and that "[i]t is impossible to dissociate the floor of a

sentencing range from the penalty affixed to the crime." *Id.* at 2160. In Michigan just as anywhere else, "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime . . . ." *Id.* at 2161.

Second, although the *Alleyne* majority did not explicitly say that it intended to overrule *McMillan* in addition to *Harris*, the other opinions had no difficulty confirming this obvious implication. For instance, Justice Sotomayor, joined by Justices Ginsburg and Kagan, said that "the opinion of the Court . . . persuasively explains why *Harris* . . . and *McMillan* . . . were wrongly decided," and that "[t]he Court overrules *McMillan* and *Harris* because the reasoning of those decisions has been thoroughly undermined by intervening decisions and because no significant reliance interests are at stake that might justify adhering to their result." *Id.* at 2164, 2166 (Sotomayor, J., concurring). And in dissent, Justice Alito chided the majority for "cast[ing] aside" both "*Harris* . . . and *McMillan* . . . simply because a majority . . . now disagrees with them . . . ." *Id.* at 2172 (Alito, J., dissenting).[3]

Finally, every other court to have considered this question, including most significantly the Pennsylvania Superior Court, has recognized that *McMillan* is no longer good law. E.g., *Commonwealth v Newman*, 99 A3d 86, 97 (Pa Superior Court, 2014) (en banc) ("*Alleyne* . . . finally repudiated the *Apprendi* and *McMillan* maximum sentence/minimum sentence dichotomy"); *State v Soto*, 299 Kan 102, 120; 322 P3d 334 (2014) ("*Alleyne* . . . overruled both *Harris* and *McMillan*"). The only case cited by the Attorney General's Office in support of its argument that *McMillan*

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[3]The State argues that "[n]othing in the *Alleyne* dissent indicates that a repercussion from the majority's opinion was invalidation of indeterminate sentencing systems." (Appellee's Brief at 23.) This is technically correct—but only because Justice Alito would not consider *McMillan* (or this case) to involve an "indeterminate sentencing system" as the Supreme Court has used that term.

remains good law, *Biederman v Commonwealth*, 434 SW3d 40, 46 (Ky 2014), does not even cite *McMillan*, and contains only a passing reference to *Alleyne*.

As explained by counsel for Mr. Lockridge, Michigan's sentencing guidelines are mandatory in the Sixth Amendment sense. (Appellant's Brief at 24-27.) Given that a mandatory *guideline* minimum in Michigan is functionally identical to a mandatory *statutory* minimum elsewhere, Hall, *Mandatory Sentencing Guidelines by Any Other Name*, 57 Drake L Rev at 650 (citing *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001)), the Michigan Sentencing Guidelines must fall right alongside the Pennsylvania statute at issue in *McMillan*.

II. A remedy of fully-advisory guidelines would be inconsistent with this Court's prior cases

This brings us to the question of remedy, and another misused term of consequence in the Supreme Court's Sixth Amendment sentencing jurisprudence: "statutory maximum."

Although *Apprendi* was a case involving a true "statutory maximum" by any definition, *Blakely* was not—it involved a mandatory sentencing *guideline* scheme. Thus, when the Supreme Court harmonized the reasoning of *Apprendi* to the facts of *Blakely*, it "tweaked the meaning of the term 'statutory maximum' to mean something slightly different . . . ." Hall, *Mandatory Sentencing Guidelines by Any Other Name*, 57 Drake L Rev at 667. The Court said that "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*" —even if it is provided under a mandatory guidelines scheme rather than a traditional statute. *Blakely*, 542 US at 303. The Court said that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds

his proper authority." *Id.* at 303-04.

In a mandatory guidelines scheme, therefore, the term "statutory maximum" refers to the most severe sentence "a judge may impose" within the guideline range supported by a jury verdict. Under this definition, a "statutory maximum" in Michigan should be understood as a two-dimensional sentence consisting of *both* the most severe possible parole eligibility date *and* the statutory mandatory release date:

> Sentencing judges in [Michigan] enjoy discretion within a range of severity, but that range does not include the mandatory-release date, because judges cannot order defendants incarcerated until that date. Rather, they must account for a two-dimensional sentence consisting of both a parole-eligibility date and a mandatory-release date. Therefore, the "upper bound on a *judge*'s . . . discretion" and the "outer limits of . . . the *judicial* power" is a sentence containing a parole-eligibility date.

Hall, *Mandatory Sentencing Guidelines by Any Other Name*, 57 Drake L Rev at 685 (emphasis added) (quoting *Blakely*, 542 US at 318 (O'Connor, J., dissenting); *Harris*, 536 US at 567).

But that is not the definition this Court has used. Instead of defining "statutory maximum" as "the maximum sentence *a judge may impose*," *Blakely*, 542 US at 303 (emphasis added), this Court has defined it as the severest sentence "a . . . defendant is . . . *subject to serving*," which means simply "the maximum sentence provided for in the statute that he or she was found to have violated . . . ." *Drohan*, 475 Mich at 163-64. By defining "statutory maximum" in this manner, and by relying on the *McMillan* and *Harris* mandatory minimum exception, the Court was able to avoid the implications of *Blakely* and reject any Sixth Amendment challenges to the Michigan Sentencing Guidelines—but only so long as *McMillan* and *Harris* remained the law.

Whether the Court was correct to reject *Blakely* challenges in the past, there is no need to revisit the issue now, given what *Alleyne* says about mandatory minimums. But this Court's

reasoning in prior cases gives rise to an interesting question as to the proper remedy today: if no Sixth Amendment violation ever exists at the *top* end of the Michigan Sentencing Guidelines, then it is unclear why, as the State argues, this Court should make the guidelines *fully* advisory. Unless the State is prepared to acknowledge that *Drohan* was wrongly decided, its proposal remedies a problem that does not exist, and appears grounded more in political expediency than constitutional necessity.

As Judge Shapiro explains below, a more appropriate cure would be to render the Michigan Sentencing Guidelines advisory only where a Sixth Amendment problem exists—at the bottom. *People v Lockridge*, 304 Mich App 278, 316-17; 849 NW2d 388 (2014) (Shapiro, J, concurring). Sentencing courts would still be required to find facts by a preponderance of the evidence and calculate the guidelines accurately, and would still be permitted to "depart" upward or downward from the guidelines for "substantial and compelling reasons" as provided in MCL 769.34(3). In addition, however, sentencing courts would be given substantially greater latitude to "vary" downward from the guidelines for legitimate reasons that are not specifically permitted by statute, subject to reasonableness review on appeal. *Lockridge*, 304 Mich App at 316-17.

Even more sensible yet, however, would be to adopt the remedy proposed by counsel for Mr. Lockridge—"fact-finding by jury and stipulation." (Appellant's Brief at 27.) This would fix the constitutional problem, ensure sentencing consistency as intended by the legislature, and avoid the need to revisit whether *Drohan* was correctly decided.

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed above, this Court should reverse the decision of the Court of Appeals and declare the Michigan Sentencing Guidelines unconstitutional in light of *Alleyne*. As a remedy, the Court should either require fact-finding by jury and stipulation or permit downward variances from the guidelines for reasons not specifically authorized by statute.

Respectfully submitted,

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