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 REPLY BRIEF

STATE APPELLATE DEFENDER OFFICE

BRETT DEGROFF (P74898)
Attorney for Defendant-Appellant
Assistant Defender
101 North Washington, 14th Floor
Lansing, MI 48913
(517) 334-6069

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **i**

STATEMENT OF QUESTIONS PRESENTED ..... **ii**

STATEMENT OF JURISDICTION ..... **iii**

ARGUMENT **1**

I. THE PROSECUTION'S ASSERTION THAT INDETERMINATE SENTENCING SCHEMES ARE CATEGORICALLY INSULATED FROM *APPRENDI* AND *ALLEYNE* IMPLICITLY RELIES ON *HARRIS*, THE VERY CASE *ALLEYNE* OVERRULED. **1**

II. THIS COURT SHOULD REJECT THE PROSECUTION'S INVITATION TO REWRITE THE SENTENCING GUIDELINES TO MAKE THEM DISCRETIONARY RATHER THAN MANDATORY. RULES OF STATUTORY CONSTRUCTION, CONSTITUTIONAL PRINCIPALS, AND THE VERY PURPOSE OF THE GUIDELINES REQUIRE INCORPORATING *ALLEYNE'S* JURY FINDING REQUIREMENTS INTO EXISTING PROCEDURES. **3**

III. DEFENDANT IS ENTITLED TO RELIEF SINCE THE VIOLATION OF HIS RIGHT TO JURY TRIAL CONSTITUTES PLAIN ERROR THAT AFFECTED HIS SUBSTANTIAL RIGHTS AND SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS. **8**

SUMMARY AND RELIEF REQUESTED **10**

TABLE OF AUTHORITIES

Decisions

Alleyne v United States, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013) .....*passim*
Almendarez-Torres v United States, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998) 4
Apprendi v New Jersey, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) 1-3
Blakely v Washington, 542 US 269; 124 S Ct 2531; 159 L Ed 2d 403 (2004) .....*passim*
Harris v United States, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002).....1
Johnson v Zerbst, 304 US 458 ; 58 S Ct 1019; 82 L Ed 1461 (1938).....8-10
Old Chief v United States, 519 US 172; 117 SC. 644; 136 L.Ed.2d 574 (1996).....7
People v Carines, 460 Mich 750; 597 NW2d 130 (1999).....9
People v Garza, 469 Mich 431; 670 NW2d 662 (2003).....8
People v Houston, 473 Mich 399; 702 NW2d (2005). 6
People v Nyx, 479 Mich 112 ; 734 NW2d 548 (2007) 5
People v Smith, 482 Mich 292; 754 NW2d 284 (2008) 8
Sahr v Bierd, 354 Mich 353 ; 92 NW2d 467 (1958).....7-8
United States v Booker .543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005) 3-4
United States v Olano, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993) 9

Constitutions, Statutes, and Court Rules

Former MCL 769.33(1) 7
MCL 769.34.....4, 5, 6
MCL 777.31.....4
MCL 777.43.....4
MCL 8.5.....5
Revised Code of Washington 9.94A.535(3)) 8
Revised Code of Washington 9.94A.537 8
MCR 2.515(A).....8

STATEMENT OF QUESTIONS PRESENTED

I. IS THE PROSECUTION CORRECT IN ASSERTING THAT INDETERMINATE SENTENCING SCHEMES ARE CATEGORICALLY INSULATED FROM *APPRENDI* AND *ALLEYNE*, WHEN THAT ASSERTION IMPLICITLY RELIES ON *HARRIS*, THE VERY CASE *ALLEYNE* OVERRULED?

Plaintiff-Appellee answers, "Yes".

Defendant-Appellant answers, "No".

II. SHOULD THIS COURT REJECT THE PROSECUTION'S INVITATION TO REWRITE THE SENTENCING GUIDELINES TO MAKE THEM DISCRETIONARY RATHER THAN MANDATORY, WHERE RULES OF STATUTORY CONSTRUCTION, CONSTITUTIONAL PRINCIPALS, AND THE VERY PURPOSE OF THE GUIDELINES REQUIRE INCORPORATING *ALLEYNE'S* JURY FINDING REQUIREMENTS INTO EXISTING PROCEDURES?

Plaintiff-Appellee answers, "No".

Defendant-Appellant answers, "Yes".

III. IS DEFENDANT ENTITLED TO RELIEF SINCE THE VIOLATION OF HIS RIGHT TO JURY TRIAL CONSTITUTES PLAIN ERROR THAT AFFECTED HIS SUBSTANTIAL RIGHTS AND SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS?

Plaintiff-Appellee answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF JURISDICTION

This Court has jurisdiction over this case as set forth at Page V of Defendant-Appellant's Brief on Appeal, and this Reply Brief is submitted pursuant to MCR 7.306(C) and MCR 7.212(G).

ARGUMENT

I. THE PROSECUTION'S ASSERTION THAT INDETERMINATE SENTENCING SCHEMES ARE CATEGORICALLY INSULATED FROM *APPRENDI* AND *ALLEYNE* IMPLICITLY RELIES ON *HARRIS*, THE VERY CASE *ALLEYNE* OVERRULED.

The prosecution erroneously views *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) through the lens of *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002) rather than through *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). The *Harris* lens shows a view into the past where courts relied on the implicit premise that *Apprendi* affects maximums but not minimums. But after *Alleyne*, holdings based on that premise have no authority on the question of what constitutes a minimum—the central question of this case. Rather than grapple with how *Alleyne* impacts the Michigan Guidelines, the prosecution is left using the outdated tools of *Harris* on this new problem.

The prosecution's basic argument is that *Alleyne* doesn't apply to the Michigan Sentencing Guidelines because they are an indeterminate sentencing scheme. However, while there are differences between indeterminate and determinate sentencing schemes regarding the *upper* bounds of judicial discretion, there are no such differences in the *lower* bounds of judicial discretion. Pre-*Alleyne* cases which approved of indeterminate sentencing schemes as unaffected by *Apprendi* were speaking only about the upper bound of judicial discretion and relied on *Harris* for the implicit premise that *Apprendi* simply had no application to the lower bound of judicial discretion. But after *Alleyne*, that premise is false. As this Court grapples with the question of whether the lower end of a sentencing range produced by the Michigan Sentencing Guidelines constitutes a minimum for *Alleyne* purposes, holdings which assume minimums have no constitutional significance are unhelpful.

The crux of the prosecution's argument is reliance on some variant of the notion that "the [United States Supreme] Court repeatedly acknowledged that indeterminate sentencing does not violate the Sixth Amendment because the verdict authorizes the maximum sentence and any lesser sentence." *Appellee's Brief* at 15. This proposition was articulated in *Blakely v Washington*, 542 US 269; 124 S Ct 2531; 159 L Ed 2d 403 (2004):

> It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10–year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10–year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. [*Blakely*, 542 US at 308-309.]

After *Harris* all of this was true—until *Alleyne*.

All of this discussion is about the effect of *Apprendi* on the *upper* bound of judicial discretion. The Court said that where a judge is authorized by statute to impose an indeterminate sentence of 10 to 40 years, nothing of Sixth Amendment relevance happens below the 40-year point because the maximum for *Apprendi* purposes is 40 years. So, whatever might limit a judge's discretion in setting the lower term of an indeterminate sentence passes constitutional muster so long as it doesn't allow anything above the 40-year maximum. The implicit premise in this argument is that the upper bound on judicial discretion is the *only* limit on judicial discretion of Sixth Amendment importance.

When *Blakely* was decided in 2004 this was true. *Harris*, decided in 2002, had held that the lower bound of judicial discretion had no Sixth Amendment protection. But that is exactly

what *Alleyne* changed. Now, the question before this Court is whether the lower end of a sentencing range produced by the Michigan Sentencing Guidelines is affected by *Apprendi* and *Alleyne*. The prosecution is trying to answer that question with authority, like the above passage from *Blakely*, which rejects the premise of the question and assumes no minimum has constitutional significance. Those tools do no work on this problem.

The prosecution also draws from a grab bag of arguments dealt with in our principle brief. The prosecution argues the lower end of a sentencing range is not a "mandatory minimum" as lawyers sometimes use that phrase. As already discussed, the United States Supreme Court rejected this kind reliance on contemporary nomenclature to interpret the bounds of the right to a jury trial in *Apprendi* when it said "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 US at 494. *See also Appellant's Brief* at 13-17. The prosecution resorts to the "within the bounds" argument that scoring Offense Variables is simply an exercise of judicial discretion. As already discussed, once a court has made factual findings it is required to score the Offense Variables as written. Rather than an exercise of discretion, the guidelines are a statutory constraint on discretion. *See also Appellant's Brief* at 21-23.

II. THIS COURT SHOULD REJECT THE PROSECUTION'S INVITATION TO REWRITE THE SENTENCING GUIDELINES TO MAKE THEM DISCRETIONARY RATHER THAN MANDATORY. RULES OF STATUTORY CONSTRUCTION, CONSTITUTIONAL PRINCIPALS, AND THE VERY PURPOSE OF THE GUIDELINES REQUIRE INCORPORATING *ALLEYNE'S* JURY FINDING REQUIREMENTS INTO EXISTING PROCEDURES.

In urging this Court to follow *United States Booker* 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), by making Michigan Sentencing Guidelines purely discretionary, the prosecutor

seeks to take this Court down an unwise, unnecessary, and jurisprudentially-unsound path of rewriting the sentencing guidelines to all-but gut them and return Michigan to the era of widespread sentencing disparity. Appellee's proposed remedy is essentially supported by a series of straw man arguments that, once disposed of, reveal that Appellant's remedy is the only one that is faithful to the rules of statutory construction and constitutional principles.

The first fallacy the Appellee seeks to perpetuate is that this case concerns the facial constitutionality of the Michigan's Sentencing Guidelines, and that applying *Alleyne* accurately would mean "MCL 769.34 as it stands would violate the Sixth Amendment" *Appellee's Brief* at 35. As shown in the Brief on Appeal, that is not the case. *Appellant's Brief* at 27-29. There is nothing in the language of the guidelines statute in general or MCL 769.34 in particular that on its face requires implementation of the guidelines in an unconstitutional manner. Appellee has not pointed to a single phrase or term that needs striking or rewriting, or that does not lend itself to an interpretation consistently with *Alleyne's* jury-trial requirements. Indeed, there are many examples of how the Guidelines can be applied constitutionally applied even under existing procedures, such as conduct resulting in convictions is used to score OV 13, or where elements of the crime presented to a jury overlap with the offense variable definition, such as OV 1 in an armed robbery case. See *Appellant's Brief* at 28; MCL 777.31; MCL 777.43; *Almendarez-Torres v United States,* 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998).

Thus, the sentencing guidelines are not unconstitutional; it is only the way courts are applying them, using outdated methods developed under what was truly a purely discretionary system, that violates the Sixth Amendment. So long as facts used to score variables and to depart have been found by a jury applying a beyond a reasonable doubt standard, a practice that

in no way would stray from the plain language of MCL 769.34, the statute can be constitutionally applied.

And the prosecution fails to address or discuss this Court's responsibility to do so, both under constitutional precedent, *see People v Nyx,* 479 Mich 112, 124; 734 NW2d 548 (2007) as well as MCL 8.5 which provides that if any "application" of an act to "any person or circumstances" is found to be unconstitutional the statute must remain in effect with the invalid "application" of the statute excised and prohibit. The constitutionally invalid "application" of Michigan's Guidelines is the procedures that permit facts that raise mandatory sentence ranges to be decided by judges and not juries. Severing out such "application" by interpreting its plain language to require *Alleyne*-compliant procedures is thus required.

The second straw man argument raised by the prosecution is that Appellant's remedy seeks to impose "jury sentencing" on Michigan, akin to death penalty schemes. *Appellee's Brief* at 35-36. To the contrary, juries will not be deciding how the guidelines are ultimately calculated, or where within those guideline ranges individual defendants belong. Juries will not be tasked with hearing mitigating evidence, allocution, or reviewing the intricacies of presentence reports. Instead, they simply will be asked to decide the issues of fact necessary for the judges to perform their legal functions of scoring the variables and calculating the guideline ranges. Judges, not juries will retain their exclusive constitutional authority to impose sentences and to administer the sentencing statutes, just as they had before *Alleyne.* Such a remedy preserves the balance between judges' constitutional sentencing authority and juries' "control that the Framers intended" within the judicial process. *Blakely v Washington*, 542 US 296, 304 (2004) (citations omitted). Contrary to what the Appellee suggests, Appellant is not pushing to expand the jury's role sentencing, *See*

Appellee's Brief at 25-26, but to *restore* that role that had been improperly diminished by practices that infringed upon their exclusive authority and duty to find any fact that "the law makes essential to the punishment." *Blakely, supra.*

The prosecution claims that Mr. Lockridge is asking this Court to legislate from the bench, when in fact it is the prosecutor's remedy of discretionary guidelines that would require redrafting the Guidelines. *Appellee's Brief* at 33-36. As explained in Appellant's Brief on Appeal, the remedy outlined by Mr. Lockridge leaves all of the language in the Guidelines statute completely or mostly untouched. *Appellant's Brief* at 29-32. In contrast, the prosecution asks this Court to change the key term "shall" in MCL 769.34 to "may" or "should", thereby completely revamping the guidelines. *See Appellee's Brief* at 35, 40. The prosecution's extensive discussion of the policy justifications for making this sweeping change, postulation over the type of system "the Legislature intended," and speculation that the "Legislature would not have enacted sentencing statutes that allowed certain departures but not others" (all without citation to authority), betrays the very type of overreaching that this Court abhors. *Appellee's Brief* at 37-43. Because such debate is for the Legislature and not the Judiciary, this Court has remained loyal to the proposition that a statute's plain language is the first and –where unambiguous – last place to look in interpreting and implementing a law. *People v Houston,* 473 Mich 399, 409; 702 NW2d (2005). The relevant statute here is unambiguous and no further "interpretation" is needed: the guidelines are mandatory and the plain language lends itself to *Alleyne*-compliant OV scoring and departures. See *Appellant's Brief* at 29-31. This Court should not further speculated about what the Legislature meant to do or would have done, and it certainly cannot accept the prosecutor's invitation to change or add language to the statute based on some real or imagined "'legislative purpose'" *Houston, supra* 409-410.

Even a look beyond the Guidelines' plain language for a policy-driven remedy would compel this Court to reject the prosecution's solution. The prosecution claims that discretionary guidelines is needed to prevent sentence disparity. *Appellee's Brief* at 42-43. Such a suggestion is curious to say the least, as Michigan has been down the road of discretionary guidelines before. That experiment failed, precisely because the broad sentencing discretion that judges retained resulted in far *too much* sentencing disparity. *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003); *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008).Seeking to address that disparity, the Legislature took that discretion away from judges. *Id; Former* MCL 769.33(1). Now the prosecution wants to give it back to them. Thus, rather than fulfilling the Legislature's goal, the prosecution's remedy would completely undermine it.

The prosecution's alarmist prediction that *Alleyne*-compliant procedures would have a cataclysmic impact on the system appears to be little more than speculative hyperbole. *Appellee's Brief* at 42-46. Although identifying the norm is difficult, it is unrealistic to suggest, as the prosecution does, that juries will routinely be called upon to decide up to 50 issues relating to the Offense Variables. *Id.* at 39-40. Rather, there will never be more than 20 variables to score and it is safe to say that far fewer than that typically will be at issue. Of those that are appropriate for a given case, many are likely to overlap with the elements of the offenses (such as OV's 1 and 2 in an armed robbery case) and will therefore be covered by the juries' underlying guilty verdict. Still others are likely to be uncontested or stipulated through plea bargaining, or strategic trial reasons. *See, e.g., Old Chief v United States,* 519 US 172; 117 SC. 644; 136 L.Ed.2d 574 (1996) (providing that defendants can and must in some circumstances, stipulate to the existence of facts relevant to sentence to avoid trial prejudice). Rules and procedures are in place for special verdicts and

jury interrogatories to handle contested variables, just as they are in currently used in civil trials. See MCR 2.515(A); *Sahr v Bierd*, 354 Mich 353, 365; 92 NW2d 467 (1958) (approving use of special jury verdict with detailed findings of fact).

Contrary the prosecution's claim then, there is no indication that Appellant's remedy will bring the system to its knees. Indeed, the State of Washington, where *Blakely* originated, saw no problem in allowing for jury factfinding in a guideline system involving as many as 25 statutory aggravating facts, many of which mirror Michigan's Offense Variables. *See* Revised Code of Washington, 9.94A.537. (providing for jury trials to decide aggravating factors set forth in "RCW 9.94A.535*(3)(a) through (y)*")(emphasis added). There is no evidence that Washington's system came crashing down as a result of those measures, and there is nothing to support the prosecution's claim that it will happen in Michigan.

This Court must honor the Legislature's clear intent as exhibited in the guideline statute's plain language by requiring that facts needed to score offense variables and to depart be either found by a jury or stipulated to.

III. DEFENDANT IS ENTITLED TO RELIEF SINCE THE VIOLATION OF HIS RIGHT TO JURY TRIAL CONSTITUTES PLAIN ERROR THAT AFFECTED HIS SUBSTANTIAL RIGHTS AND SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS.

The prosecution argues Mr. Lockridge waived this issue by agreeing with the scoring of Offense Variable 5 at sentencing. Defense counsel never agreed with findings necessary to support Offense Variable 5. Courts "indulge every reasonable presumption against waiver of fundamental constitutional rights," and do not "presume acquiescence in the loss of fundamental rights." *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). A waiver is

"an intentional relinquishment or abandonment of a known right or privilege." *Id*. Nothing of the kind took place here.

Defense counsel failed to argue that Offense Variable 5 could not be shown by a preponderance of the evidence to a judge, but that is far from "intentional relinquishment" of the right to have Offense Variable 5 proven beyond a reasonable doubt to a jury. Further, for Mr. Lockridge to waive his right to a jury trial on Offense Variable 5, he would have to be aware he had such a right. Otherwise there could be no "*intentional* relinquishment or abandonment of a *known* right or privilege." *Johnson*, 304 US at 464. In *People v Holt*, Supreme Court Docket No. 128034 (2007) Justice Corrigan explained that "A party does not waive error that, because of a change in the law, could not have been recognized until the party's case was pending on appeal." She emphasized Johnson's definition of waiver and explained that because of the change of law in that case, the "prosecution did not intentionally abandon a *known* right." *Id*. (emphasis in original). No one contends Mr. Lockridge was aware of *Alleyne* and its possible application to his case, but that he made an intentional decision not to pursue the argument.

Because Mr. Lockridge failed to raise this objection in the trial court, he must satisfy the plain error test and show (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999) citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). If this Court concludes that *Alleyne* applies to the Michigan Sentencing Guidelines, then clearly the error occurred as there was judicial factfinding involved in calculating Mr. Lockridge's sentencing range, satisfying the first prong. The error is "clear or

obvious" from the record satisfying the second prong. The error resulted in increasing the guidelines range from 36-71 months to 43-86 months, thus satisfying the third prong. The result of the error is that Mr. Lockridge was denied his right a jury trial on an element of an offense he was convicted of. Clearly this affected the fairness and integrity of the judicial proceeding. The right to have the jury determine the elements of the charged offense is the very core of our criminal justice system. The jury's determination *is* the trial, and was understood by the founders as "the very palladium of free government." THE FEDERALIST NO 83 (Alexander Hamilton). This satisfies the fourth prong.

SUMMARY AND RELIEF REQUESTED

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

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Brett DeGroff
_____
Brett DeGroff (P74898)
Assistant Defender

/s/ Desiree Ferguson
_____
Desiree Ferguson (P34904)
Assistant Defender

/s/ Michael L. Mittlestat
_____
Michael L. Mittlestat (P68478)
Assistant Defender

Dated: December 10, 2014