STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Beckering, P.J., O'Connell and Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellee,

Supreme Court No. 149073

v.
RAHIM OMARKHAN LOCKRIDGE,
Defendant/Appellant.
_____/

Court of Appeals No. 310649
6th Judicial Circuit Court No. 2011-238930-FC
_____/

BRIEF OF THE WAYNE COUNTY PROSECUTOR'S OFFICE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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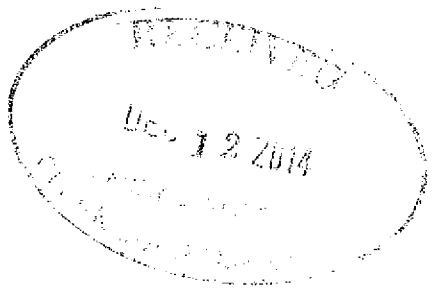

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Statement of the Question

I.

Is *Alleyne v United States* applicable to the guidelines calculation of the minimum term for an indeterminate sentence; and further, in any event, is *Alleyne* applicable in the present case?

Amicus answers "NO"

Statement of Facts

Amicus joins the Statement of Facts of the People of the State of Michigan.

Argument

I.

Alleyne v United States is inapplicable to the guidelines calculation of the minimum term for an indeterminate sentence; further, in no event is *Alleyne* applicable in the present case.

A. Introduction

1. The questions before the court, and the answers of the amicus

In its order granting leave to appeal, this court directed that "The parties shall 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 U.S. ——, 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 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)."[1]

Amicus answers that:

- Accepting, *solely for the sake of argument*, defendant's argument that calculation of the guidelines range under the Michigan statutory scheme creates a "mandatory minimum" for the minimum term of the indeterminate sentence, a range calculated only with the Prior Record Variables (PRVs) and those Offense Variables (OVs) *that have been found beyond a reasonable doubt by the verdict of the jury (here OVs 3 and 6) is*

[1] *People v. Lockridge*, 846 N.W.2d 925 (2014).

fully consistent with Alleyne,[2] there having been no judicial fact-finding (here that range is 36-71 months).

- Because a sentence at the *top* end of range calculated without scoring OVs that require judicial fact-finding is constitutional, it not being enhanced by judicial fact-finding, it is only when, even under defendant's argument, the scoring of a guidelines range that *includes* judicial fact-finding—again, accepting only for the sake of argument here that the guidelines range creates a mandatory minimum within the meaning of *Alleyne*—contains a minimum that is greater than the maximum of the range scored without judicial fact-finding that an *Alleyne* issue can even arguably arise (though even then it fails).

- Because the trial judge here departed *above* the guidelines range scored even with judicial fact-finding for reasons that were upheld by the Court of Appeals, defendant is not serving a statutory mandatory minimum sentence, even accepting defendant's argument, and *Alleyne* does not, in any event, apply to his case.

- Because under Michigan's indeterminate sentence system a defendant upon conviction is legally entitled only to the statutory maximum sentence for the crime involved, a defendant has no legal right to expect to serve any lesser sentence, and *Alleyne* is inapplicable to indeterminate sentences such as those in Michigan.

- The ability of a trial judge to depart below a guidelines range determined with judicial fact-finding where the minimum of that range exceeds the maximum of the range calculated without judicial fact-finding means that the range for the minimum term of the indeterminate sentence is not mandatory.

A necessary prerequisite to consideration of these questions is an understanding of terms.

2. Definition of terms

"The first step to wisdom is calling a thing by its right name."[3] And in calling things by their right names, short-hand expressions can become dangerous. As the Federalist "Mark

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[2] *Alleyne v. United States*, 570 U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

[3] Said to be an old Chinese proverb. Quoted in "*Roulette v. City of Seattle*, 78 F3d 1425, 1426 (CA 9, 1996).

Antony" said in reply to the antifederalist "Brutus" regarding a suggested redrafting of a provision of the new Constitution so as to be more "concise," but which in fact changed the meaning of the provision, "[i]t frequently happens that precision is lost in conciseness."[4] Involved in the discussion here are:

Determinate sentence:	A determinate sentence is a set or flat sentence selected, ordinarily selected from within a statutory range.
Indeterminate sentence:	An indeterminate sentence is a sentence that has no determinate set end date, but establishes a range of incarceration, with, in Michigan, a set minimum and a set maximum.
Mandatory minimum sentence:	When this term is used by the United States Supreme Court it does not refer to the minimum term of an indeterminate sentence, but to the minimum flat or determinate sentence—that is, the *entire* prison term the defendant must serve—that the law allows a trial judge to impose.
Sentencing range:	When this term is used by the United States Supreme Court, it does not refer to a range for the minimum term of an indeterminate sentence, but the statutory range within which a flat or determinate sentence, must, by law, be imposed, the judge to exercise discretion, including through judicial fact-finding, to determine where within that range to set the sentence.
Minimum sentence range:	In Michigan, this refers to the range scored by the guidelines for the minimum term of the indeterminate sentence.[5]
Minimum-minimum:	In Michigan, this refers to the bottom end of the guidelines range for the minimum term of the indeterminate sentence.

[4] Boston Independent Chronicle, January 10, 1788, in

[5] See e.g. *People v. Richardson,* 490 Mich. 115, 127 (2011).

Maximum-minimum:	In Michigan, this refers to the top end of the guidelines range for the minimum term of the indeterminate sentence.[6]
Mandatory minimum-minimum:	In Michigan, this would be a set term for the minimum term of the indeterminate sentence that could not in any circumstances be departed from to a lower minimum term.

B. Defendant's Argument Rests on a Mistaken Premise

1. *Alleyne* is only even arguably applicable when the minimum of the guidelines range as scored *with* judicial fact-finding exceeds the *maximum* of the guidelines range as scored *without* judicial fact-finding

Assuming, solely for argument's sake at the moment, that the Michigan guidelines system establishes a "mandatory minimum" sentence, the question becomes, what is the "maximum-minimum" sentence, not the "minimum-minimum" sentence, that a judge may impose *absent* judicial fact-finding, as *Alleyne* can have no application to a mandatory legislative enhancement of a minimum sentence *unless* that enhancement is based on judicial fact-finding, which can only occur beyond the *top* end, or maximum, of the range for the minimum determined without judicial fact-finding. Defendant's position is that the *bottom* end of the guidelines scored for a particular case based only on prior record variables (PRVs) and those offense variables (OVs) that can be said to have been found by the jury beyond a reasonable doubt through its verdict is the "mandatory minimum" sentence for the offense— "a minimum 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."[7] But this looks through the telescope from the wrong end—and the confusing feature is that Michigan, unlike the federal system, has an

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[6] See e.g. *People v. Gardner* 482 Mich. 41, 47-48 (2008).

[7] Defendant's Brief, p. 14 (emphasis supplied).

indeterminate-sentencing system, which produces a range for the minimum term—for in considering the *Alleyne* question one must look to the *"maximum minimum"* of the minimum range, not the "minimum minimum," that may be imposed *without* judicial fact-finding in determining whether the right to jury trial has been infringed. It is only when that *permissible* maximum-minimum sentence—one established without judicial fact-finding—is aggravated, and *mandatorily* so,[8] by the scoring of OVs through judicial fact-finding that it can be said that the bottom of the statutory range of sentencing has been moved up or enhanced by facts not found by the jury, in derogation of the right to jury trial.

It will in fact often be the case that through conviction by the jury of a particular crime offense variables have been found beyond a reasonable doubt. Here, two of the scored offense variables were found beyond a reasonable doubt by the verdict of the jury—OV 3, and OV 6,[9] a point defendant concedes—so that, removing the points scored for OV 5 and OV 9,[10] which cannot be said to have been found by the jury through its verdict, defendant's minimum range

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[8] "Any fact that, *by law*, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 133 S.Ct. at 2155 (emphasis supplied). *Alleyne* has no application unless the minimum of the statutory sentence range is, *by law*, enhanced by judicial fact-finding; the case has no application to judicial fact-finding employed to determine, as an exercise of judicial discretion, an appropriate sentence within a statutory range.

[9] OV 3 is scored for "Life threatening or permanent incapacitating injury occurred to a victim," see *People v. Houston*, 473 Mich. 399 (2005), and OV 6 is scored for gross negligence, see MCL § 777.36(c), both found beyond a reasonable doubt by the verdict of guilty of involuntary manslaughter. Defendant agrees that this scoring is supported by the verdict itself.

[10] OV 5 concerns serious psychological injury to a family member, and thus would not have been found by the jury in finding the elements proven beyond a reasonable doubt, see MCL § 777.35(1)(a), and the same is true for OV 9, which is scored for number of victims, as defined (2-9), see MCL § 777.39(1)(c).

moves from 43-86 months to 36-71 months. Because that range is obtained without judicial fact-finding, then, a minimum sentence term of the required indeterminate sentence of anywhere between 36 and 71 months, *inclusive*, cannot rule afoul of *Alleyne*, even if departure below 71 months were absolutely prohibited. The "mandatory minimum" is not the bottom of the range, but the *range* as calculated without the scoring of OVs found by the sentencing judge by judicial fact-finding.[11] A minimum term of the indeterminate sentence of 71 months is constitutional because it "moves up" or enhances the statutory minimum of probation *without* judicial fact-finding. Assuming, again only for argument, the point that the guidelines *as scored without OVs requiring judicial fact-finding* establish a "mandatory minimum" range for the minimum of the indeterminate sentence, *Alleyne* cannot come into play until a guidelines *range* is calculated with judicially fact-found OVs that exceeds the *range* calculated using only OVs found beyond a reasonable doubt by the verdict of the jury. The *range* determined by calculating only OVs found beyond a reasonable doubt by the verdict is only exceeded when the *minimum* of the range calculated *with* judicial fact-finding in the scoring of OVs exceeds the *maximum* of the range scored without judicial fact-finding, for a sentence at the maximum of *that* range is, even if compelled by the legislature, fully consistent with *Alleyne*, it being imposed without any judicial fact-finding.

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[11] Defendant quotes with approval Judge Beckering's statement that "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" (emphasis supplied). Defendant's Brief, p. 3-4.

Were 36 months established as the minimum for an indeterminate sentence, and that term established without judicial fact-finding, then even an absolute prohibition on sentences below 36 months would be consistent with the right to jury trial. But where instead of a set number a range is established without judicial fact-finding, and that range is 36 to 71 months, inclusive, then *also* constitutionally permissible is a minimum term on the indeterminate sentence of 37 months, 38 months, on through 71 months. It is *only* when a sentence of 72 months or more, calculated with judicial fact-finding, is *required*—not simply permitted—that *Alleyne* is implicated. *And even then defendant would not necessarily prevail.*

Take the present case. If amicus is correct, then a minimum term on the indeterminate sentence of 71 months would be permissible as a result of the jury verdict, and even if the judge could not depart below 36 months, either with or without substantial and compelling reasons, that would be of no moment at all, as *every* minimum sentence imposed from 36 months through 71 months would be supported by the jury verdict. In the instant case the range was 43 months to 86 months because two OVs were scored with judicial fact-finding. It might then be said, assuming that amicus argument thus far is correct, that any minimum term of 72 through 86 months would run afoul of *Alleyne* (again, assuming for the sake of argument the application of *Alleyne* to indeterminate sentences), as that sentence would involve judicial fact-finding. But this is not so. Judicial fact-finding is *not* prohibited. While any minimum term of the indeterminate sentence of 72 months through 86 months might involve judicial fact-finding, so long as those sentences are *not mandatory* then judicial fact-finding is entirely appropriate. And no choice of sentence for the minimum term of the indeterminate sentence that is within the range is mandatory. Because a sentence of *anywhere* from 43 months through 71 months is

permissible, and its imposition would be supported by the verdict alone, and because a sentence *above that amount and within the range was/is not mandatory, but within the judge's discretion* after judicial fact-finding, which is perfectly permissible to inform discretion,[12] *Alleyne* is still not implicated.

It is only when the *range* calculated without judicial fact-finding is exceeded by a *range* calculated *with* judicial fact-finding that *Alleyne* even arguably comes into play. The range without judicial fact-finding here is 36-71 months. If the range *with* judicial fact-finding was, say 72-105 months, or any range with 72 as the minimum, so that the "mandatory minimum" *range* for the minimum of the indeterminate term had been enhanced by judicial fact-finding, then *Alleyne* would be implicated, once again, assuming for the sake or argument only that the guidelines range as scored without judicial fact-finding constitutes a mandatory minimum. Only then would the effect of *Alleyne* on an indeterminate-sentencing scheme, if any, and the effect of a system allowing departures of substantial and compelling reasons, be presented. But this is not such a case. And amicus doubts there will be many such cases.

2. Where a judge exceeds a minimum range for reasons within his or her discretion under the law, the manner in which the minimum range was established becomes irrelevant, as in such a case the defendant is not serving a statutory mandatory minimum sentence

One final point. There is even more reason why *Alleyne* has no application here. *Alleyne* prohibits mandatorily aggravating the minimum sentence *required* by law (there, in a determinate sentence scheme, and with no departures permitted) by judicial fact-finding; it does not prohibit the use of judicial fact-finding to impose a *greater* sentence than the minimum required, even as

[12] See footnote 13, infra.

so aggravated by law, so long as the sentence given is within the statutory range. Return again to *Alleyne*. The sentence range allowed under the statute for conviction there is 5 years to life (a *determinate* sentence within that range), with a minimum flat sentence of 7 years *required* by law as a minimum on judicial fact-finding that the gun possessed during the crime was brandished. But this is a required *minimum* determinate term; it is not a required sentence. Through judicial fact-finding the judge may certainly in any case impose a *greater* sentence than 5 years in the exercise of his or her discretion, and that the judge finds facts in exercising that discretion to sentence within the statutory range is unquestionably permissible.[13] If a judge found brandishing by a preponderance of evidence, and in the exercise of his discretion, rather than as compelled by statute, gave a sentence of 7 years, or, because of other facts found by the judge, such as the number of victims or psychological injury to the victim, gave, as an exercise of his or her discretion, a sentence of 10 years, the sentence would be valid,[14] for *Alleyne* does not prohibit the use of judicial fact-finding to determine an appropriate exercise of discretion to sentence within a

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[13] "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. . . . See, e.g., Dillon v. United States, 560 U.S. ——, ——, 130 S.Ct. 2683, 2692, 177 L.Ed.2d 271 (2010) ("[W]ithin established limits[,] ... the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); Apprendi, 530 U.S., at 481, 120 S.Ct. 2348 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute"). *Alleyne v. United States*, 133 S.Ct. at 2163.

[14] See *United States v. Ramirez-Negron*, 751 F.3d 42, 51 (CA 1, 2014); *Griffin v. Warden, FCI Miami*, 572 Fed.Appx. 758, 761 -762 (CA 11, 2014) (Here, Griffin's sentence is 360 months, which is 240 months above the statutory minimum penalty of 120 months' imprisonment. *Thus, Griffin is not serving a statutory mandatory minimum sentence, and Alleyne does not apply to his case*" (emphasis supplied)).

range, and the *Alleyne* issue would be moot. The judge here sentenced to *10 months above the guidelines* as scored *with* judicial fact-finding, and his finding of substantial and compelling reasons to do so was found to be an appropriate exercise of discretion.[15] This is not a case, then, where the trial judge sentenced to a certain guidelines minimum range, even one involving judicial fact-finding, because he or she arguably was compelled to do so, as the judge found that range *inadequate*, and was affirmed. For this additional reason, *Alleyne* has no application here.

C. Because under Michigan's Indeterminate Sentence System upon Conviction a Defendant Is Legally Entitled Only to the Statutory Maximum Sentence for the Crime Involved, a Defendant Has No Legal Right to Expect to Serve Any Lesser Sentence, and *Alleyne* Is Inapplicable to Indeterminate Sentences Such as Those in Michigan

All of the jury-right/sentencing-fact cases decided by the United States Supreme Court—*Apprendi*, *Blakely*, *Booker*, *Cunningham*, *Alleyne*—have concerned determinate-sentencing schemes. They have never been held applicable to indeterminate-sentencing schemes. Indeed, the Court has said, when considering the question of top-range sentencing, that indeterminate sentencing is consistent with the Sixth Amendment:

> the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. *Indeterminate sentencing does not do so.* 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

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[15] *People v. Lockridge*, 304 Mich.App. 278, 281-284 (2014).

> that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.[16]

This Court has said that under Michigan's indeterminate-sentencing scheme a defendant when convicted "is legally entitled only to the statutory maximum sentence for the crime involved. A defendant has no legal right to expect any lesser maximum. . . . Thus, a sentencing court does not violate *Blakely* principles by engaging in judicial fact-finding to score the [offense variables] to calculate the recommended minimum sentence range."[17] Because the defendant has no expectation to receive—or to serve—anything less than the maximum, the computation of a minimum range, even one enhanced based on judicial fact-finding to a higher range (its minimum exceeding the maximum of the range scored without judicial fact-finding) does not violate the defendant's right to jury trial even under *Alleyne*.

D. The Ability of a Trial Judge to Depart below a Guidelines Range Determined with Judicial Fact-finding Where the Minimum of That Range Exceeds the Maximum of the Range Calculated Without Judicial Fact-finding Means That the Range for the Minimum Term of the Indeterminate Sentence Is Not Mandatory

Even where computation of the guidelines including the scoring of OVs requiring judicial fact-finding results in a range higher than that computed without such scoring—that is, as amicus has argued, where the minimum of the guidelines range so scored exceeds the maximum of the guidelines range scored without judicial fact-finding—that the judge may depart below that range means that the range is not mandatory. To speak of a mandatory rule that may be departed from is an oxymoron, as the term "mandatory" denotes a rule or principle that permits no option, and

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[16] *Blakely v. Washington*, 542 U.S. 296, 124 S Ct 2531, 2540, 159 L.Ed.2d 403 (2004).

[17] *People v McCuller*, 479 Mich. 672, 689–690 (2007).

cannot be disregarded or modified.[18] A rule or principle that is not, for all practical purposes, universally applicable, is simply not mandatory.

Departures from the guidelines range—and here the concern is with departures *below* the guidelines range to a minimum term calculated without judicial fact-finding—are permissible in two circumstances, one concerning factors *not* covered by the guidelines, and one concerning factors *included* in the guidelines scoring:

> 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. 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.*[19]

This Court has held that a departure, either above or below the guidelines as accurately computed, must, under the statute, be supported by substantial and compelling reasons that are

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[18] See e.g. Merriam-Webster: "required by a law or rule; obligatory"

[19] MCL § 769.34(3)(b) (emphasis supplied).

objective and verifiable, keenly attract the court's attention, and are of considerable worth in deciding the terms of the sentence.[20] The trial judge's determination and explanation in this regard is reviewed for an abuse of discretion.[21]

In *Blakely v Washington*[22] the Court found that the top end of a range computed by sentence guidelines from which a determinate or "flat" sentence was to be imposed constituted the statutory maximum for the offense, though the statutory range for the offense included a higher maximum than that computed, because sentencing within the range was *mandatory*. In *United States v Booker*[23] the Court observed that, as to the similar federal system, "one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem."[24] But the Court found this not to be true for the same reason "that we rejected a similar argument in *Blakely*, holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for 'substantial and compelling reasons,' that exception was not

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[20] *People v. Babcock*, 469 Mich. 247, 257 (2003). Further, why those reasons justify the degree of departure undertaken must be explained. *People v. Smith*, 482 Mich. 292, 299–300 (2008).

[21] "A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. . . . An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v. Babcock,* 469 Mich. at 274.

[22] *Blakely v. Washington,* 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004).

[23] *United States v. Booker*, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621 (2005).

[24] *United States v. Booker*, 125 S.Ct. at 750.

available for Blakely himself."[25] And why not? The Court's citation to *Blakely*[26] provides the reason: in the Washington sentencing scheme "[a] reason offered to justify an exceptional sentence can be considered *only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.*"[27] Not so in Michigan. Those factors, which include the scoring of OVs found beyond a reasonable doubt by the verdict of the jury, *may* support a downward departure in Michigan under MCL § 769.34(3)(b). The discretion of the trial judge is cabined, to be sure, but hardly eliminated, as the trial judge is free to find that a factor used in scoring the guidelines is, under the circumstances of the case, "given disproportionate weight," and may find that to be a substantial and compelling reason for departure, with review of that determination being for abuse of discretion. And so, where the guidelines range scored with judicial fact-finding results in a range the minimum of which exceeds the maximum of the range computed without judicial fact-finding, the judge may depart from that range and impose a lower minimum term, even based on factors already taken into account by the guidelines. It is not the limitation of discretion—which, after all, is not unfettered in any event, lest it be unbridled power[28]—by establishing that which *is* the "principled range of outcomes," the departure from which constitutes abuse, that, under *Alleyne*, violates the right to

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[25] *United States v. Booker*, 125 S.Ct. at 750-751.

[26] *Blakely v. Washington*, 124 S.Ct., at 2535.

[27] *Blakely v. Washington,* 124 S.Ct. at 2535 (emphasis supplied)

[28] "We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.' Cardozo, The Nature of the Judicial Process, 139, 141 (1921). Discretion without a criterion for its exercise is authorization of arbitrariness." *Daniels v. Allen,* 344 US 443, 496, 73 S Ct 437, 441, 97 L Ed 469 (1953).

jury trial. Rather, it is the *elimination* of such discretion, which is what occurred in *Alleyne*—upon finding brandishing by a preponderance of the evidence, a fact not having been found by the jury verdict, the judge had no discretion but to sentence to at least 7 years, where previously that discretion had been limited to exercise to 5 years and above. And Justice Robert's observation in dissent has great force; the Sixth Amendment does not have a purpose to safeguard the power of the judge against the legislature, but to protect the right of the defendant.[29] Certainly this Court must follow *Alleyne*, but it need not expand it. In Michigan, even where the guidelines range as scored with judicial fact-finding exceeds the range of the guidelines scored without judicial fact-finding (that is, the minimum of the range so scored exceeds the maximum of the range scored without judicial fact-finding), a trial judge may depart below the scored guidelines range, and such departures are in no sense rare. Because the guidelines, scored with or without OVs involving judicial fact-finding, do not set a mandatory minimum range for the minimum term of the indeterminate sentence, *Alleyne* has no application.

E. There Is No Plain Error Here

Amicus would here simply note agreement with the People on the point. There was no trial objection to the scoring of OVs 5 and 9; indeed, there was agreement to scoring of OV 5. Review is for plain error at most, and where *Alleyne* error does occur it is not "structural" error.[30]

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[29] "The Framers envisioned the Sixth Amendment as a protection for defendants from the power of the Government. The Court transforms it into a protection for judges from the power of the legislature." *Alleyne v. United States*, 133 S.Ct. at 2168 (Roberts, C.J., dissenting). It is interesting, at least, to observe that Justice Scalia, perhaps the most vociferous proponent of the *Apprendi/ Blakely/ Booker* cases (indeed, the author of *Blakely*), joined the dissent here.

[30] Cf. *Washington v. Recuenco*, 548 US 212, 222, 126 S Ct 2546, 2553, 165 L Ed 2d 466 (2006): "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error."

For the reasons stated by the People, if error occurred it was not plain (and that the trial judge departed above the guidelines range, and appropriately so, is an additional reason why, as amicus has previously argued, no error occurred at all, *even if* the guidelines range is viewed as a mandatory minimum for the minimum term of the indeterminate sentence).

F. The Appropriate Remedy Should *Alleyne* Error Be Found

Should this Court find that that Michigan's current statutory scheme runs afoul of *Alleyne* by creating a mandatory minimum sentence based on judicial fact-finding at least in some cases, depending on the scoring of the guidelines in individual cases, then MCL § 8.5 comes into play. The statute requires that "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."[31] As amicus has argued, clearly the *maximum* of a sentencing range calculated *without* scoring OVs that require judicial fact-finding may be imposed without, under any construction, running afoul of *Alleyne*. If a sentencing range is calculated including judicial fact-finding to score additional OVs that produces a minimum that exceeds that maximum of the guidelines scored without these OVs,[32]

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[31] This rule applies unless "such construction would be inconsistent with the manifest intent of the legislature."

[32] As explained in B.1, above, where the guidelines scored with judicial fact-finding *overlaps* the guidelines as scored without judicial fact-finding, no *Alleyne* issue arises, for part of the guidelines are supported by guidelines scored without judicial fact-finding, and the remainder, requiring judicial fact-finding, result in a range that *is not mandatory*, but only within the discretion of the judge to impose, and judicial fact-finding within a discretionary range is not unconstitutional.

so that imposing a sentence within the guidelines calculated without judicial fact-finding (or even lower) constitutes a departure, *and* if the Court finds that the guidelines so calculated constitute a "mandatory minimum" under *Alleyne* despite the ability to depart for substantial and compelling reasons, and despite that Michigan has an indeterminate-sentencing scheme, then the minimum term of the sentence guidelines scored with judicial fact-finding should be lowered to the maximum term of the guidelines scored without judicial guidelines, eliminating the "gap" between the two.

By way of example, in the current case the guidelines scored without judicial fact-finding yields a range for the minimum of the indeterminate sentence of 36 to 71 months, while with judicial fact-finding that range is 43 to 81 months. In this situation, which amicus believes is exceedingly common, there is no *Alleyne* issue even if the guidelines are taken as establishing a mandatory minimum range for the minimum term, for, as amicus has argued, even an absolutely mandatory minimum of anywhere between 36-71 months is completely permissible, having been determined without judicial fact-finding, and a sentence range of 72-86 months is, in this situation, also permissible, despite judicial fact-finding, as no sentence of anywhere from 72-86 months is *mandatory*, but is instead permissive, and judicial fact-finding to set a sentence within a range is permissible so long as not mandatory.

But assume a situation where, if this Court find that *Alleyne* can apply to the Michigan guidelines system, the minimum of the sentence scored with judicial guidelines scored with judicial fact-finding exceeds the maximum of the range scored without judicial fact-finding. In this situation only would the minimum sentence the judge was required to impose be enhanced by judicial fact-finding (assuming, again, that the ability to depart does not matter in the Court's

view, and that the Court finds *Alleyne* applicable to indeterminate sentences). The only difficulty is with the "gap"; that is, that period of time between the maximum of the guidelines scored without judicial fact-finding and the minimum as scored with judicial fact-finding, for it is only that period of time that constitutes an enhancement based on judicial fact-finding, the remaining sentence below that term being supported by the jury verdict, and that above that term being discretionary, not mandatory.

An alteration of the present case illustrates the point. If there were no PRV points in the present case (and lay aside issues involving intermediate sanctions and the like), defendant's minimum range without judicial fact-finding would be 12-24 months (A-IV of the C gird). Suppose defendant were scored additional points than in the instant case by judicial fact-finding, so that his OV score was 75+, with, as here, only 35 of those points scored without judicial fact-finding. Defendant would move to A-VI of the grid, and his range would be 29–57 months, so that the minimum of the range scored with judicial fact-finding would exceed the maximum of the range computed without judicial fact-finding by 5 months. Only that 5-month period would constitute a *mandatory* enhancement of the maximum-minimum sentence as scored without judicial fact-finding, just as only the enhancement from 5 years to 7 years constitutes the enhancement in *Alleyne*. A judge in the federal system still had and has the discretion to sentence above the 7 years, and to employ judicial fact-finding in so doing, because he or she is employing discretion to set a sentence within a range. So here. In *Alleyne* the mandatory minimum returns to that supported by the jury verdict—5 years. In Michigan, then, the minimum of the guidelines range calculated with judicial fact-finding would have to return to the maximum-minimum of the range determined without judicial fact-finding; in our example, that

would be 24 months, anything above that being discretionary. This would also be best in keeping with the legislative system currently in place. The minimum of the range calculated with judicial fact-finding would simply be lowered to eliminate the "gap" between that minimum and the maximum of the range scored without judicial fact-finding (a sentence perfectly constitutional given the absence of judicial fact-finding). Departures below that new minimum would require substantial and compelling reasons as now, and departures above the guidelines range scored with judicial fact-finding would require substantial and compelling reasons, as now. The inefficiency would, of course, be in scoring the guidelines both ways (without and with judicial fact-finding), but that is less inefficient than jury trials on all OVs not supported by the jury verdict alone, *and*, since so doing is constitutional, comports with MCL § 8.5.

As a remedy, then, if *Alleyne* is found applicable in Michigan, the guidelines should be scored without and with judicial fact-finding, and where there is a gap between the two—the minimum of the guidelines scored with judicial fact-finding exceeds the maximum of the guidelines scored without judicial fact-finding—the gap should be eliminated by reducing the minimum term of the guidelines range scored with judicial fact-finding to the maximum term of the guidelines scored without judicial fact-finding, and the system should otherwise proceed in the ordinary fashion.

Relief

WHEREFORE, the amicus requests that the Court of Appeals be affirmed.

Respectfully submitted,

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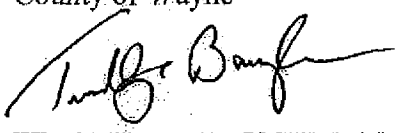

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