STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellee,

v.

ERIC LAMONTEE BECK,
Defendant/Appellant
_____/

Supreme Court Case No.: 152934
Court of Appeals Case No.: 321806
Saginaw Circuit Case No.: 13-039031-FC

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APPELLANT ERIC LAMONTEE BECK'S
SUPPLEMENTAL REPLY BRIEF ON APPEAL

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REPLY

I. The Sixth Circuit's issuance of *Robinson v Woods* renders a majority of the pending question resolved.

On August 24, 2018, the United States Court of Appeals for the Sixth Circuit issued its published decision in *Robinson v Woods*, __ F3d ___ (CA 6, 2018)(Docket No. 16-2067) answering the question of whether Michigan's criminal sentencing scheme was contrary to clearly established federal law under the Sixth Amendment. After acknowledging that "the [US] Supreme Court has grappled with various components of modern sentencing schemes, to determine whether they complied with the original understanding of the Sixth Amendment," *Robinson, supra*, at __, slip op at *6, the Sixth Circuit confirmed that an increase in criminal sentence based on judge-found facts violated the Sixth Amendment's jury guarantee, *id.*, at __; slip op at *7.

This is precisely what happened in this case. Michigan's Guidelines set a minimum and maximum sentence of 7 to 46 months for Appellant Beck. Instead, the trial judge found by the preponderance of the evidence—while the jury expressly rejected—that Appellant Beck murdered Hoshea Pruitt, and imposed 25 extra points as part of OV 1 (aggravated use of a weapon) and 100 extra points for OV 3 (degree of physical injury to a victim). This judge-found "fact," in turn, was incorporated to increase Appellant Beck's sentencing range to 24 to 76 months. **Appendix #55a.** The same impermissible judge-found "fact" was also improperly used as the basis to again increase the sentence from 24 to 76 months upward to 240 to 400 months. **Appendix #62a.**[1] Under *Robinson*, these

[1] Based upon the same factual finding by the judge at the lower evidentiary standard, the trial court *further* exceeded the already improper calculation to impose a final sentence of 240 to 400 months. **Appendix #62a-63a.**

actions both violate the Sixth Amendment because "[a]ny fact that, by law, increases the penalty for a crime . . . must be submitted to the jury and found beyond a reasonable doubt." *Robinson, supra*, at __, slip op at *1 (citing *Alleyne v. United States*, 570 U.S. 99, 103 (2013)). Thusly, *Robinson* clearly establishes that, as a constitutional baseline, facts used to increase Appellant Beck's Guideline range must be submitted to the jury and found beyond a reasonable doubt. Neither was done in this case. Thusly, a trial court may not permissible make "independent finding of defendant's guilt," as such would be a judge-found fact not submitted to the jury and not found beyond a reasonable doubt contrary to the requirements under the Sixth Amendment.

The Saginaw County Prosecutor may argue that *Robinson* is not legally binding on this Court as only US Supreme Court precedence controls. See *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). However, the uniqueness of federal habeas relief blunts the sharpness of such a state rule. The practical reality is that every convicted individual found guilty and sentenced using judge-found facts would be automatically entitled to a writ of habeas corpus under 28 U.S.C. § 2254 as *Robinson* is now binding mandatory precedence on all trial-level federal district courts for future habeas corpus petitions. It would be a "bizarre result" if this Court adopted one interpretation when in another courthouse in the same state looking to the same state law, being the federal court bound by the Sixth Circuit precedence, must apply a different one. *Red Maple Properties v Zoning Comm'n of Brookfield,* 610 A2d 1238, 1242 fn7 (Conn 1992). The Supremacy Clause of the US Constitution—the same governing document which contains the Sixth Amendment—provides that

> This Constitution, and *the Laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

> Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

US Const, art VI, cl 2. A plain text reading of the phrase "the Laws of the United States" easily includes federal courts of appeals' decisions regarding the federal Constitution. *State v Burnett*, 755 NE2d 857, 861 (Ohio 2001). Anything less would create a jurisprudential mess of the criminal laws of this state. Thus "in the interests of existing harmonious federal-state relationships, it is a wise policy that a state court of last resort accept, so far as reasonably possible, a decision of its federal circuit court on such a federal question." *Littlefield v Maine Dep't of Human Servs*, 480 A2d 731, 737 (Me 1984). To the extent this Court would still defer to *Abela*, this Court is invited to overrule that practice for habeas corpus cases and instead follow *Robinson* as precedence to be followed—either mandatorily or persuasively—by this Court going forward.

II. The Saginaw County Prosecutor did not address and has otherwise conceded the standards suggested by Appellant.

This Court asked the Saginaw County Prosecutor to answer a straightforward question: where is the line between distinguishing between permissible trial court consideration of acquitted conduct and the impermissible independent finding of defendant's guilt by a trial court on acquitted charges? *People v Beck*, __ Mich __; 2018 Mich. LEXIS 854, at *1 (2018). Its answer was surprising: there is no line. Instead, the Saginaw County Prosecutor took the position that *People v Ewing*, 435 Mich 443; 458 NW2d 880 (1990) and *United States v Watts*, 519 US 148 (1997) provides trial courts unlimited discretion to use any fact—even contrary to a prior factfinding-jury's determination—so long as it was proven by the preponderance of the evidence to the sentencing judge. That simply cannot be right.

First, *Watts* was undisputedly gutted by Footnote 4 in *United States v Booker*, which held—

> *Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines *with the Double Jeopardy Clause*, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these [Sixth Amendment] cases.

543 US 220, 240 fn4 (2005). The Saginaw County Prosecutor had no response or justification to ignore the later-imposed gutting of *Watts* by the US Supreme Court in *Booker* for Sixth Amendment purposes. The Prosecutor's belief that the best way to view *Watts* is to overlook and ignore *Booker* as binding US Supreme Court precedence. Obviously, that is erroneous.

Second, the Saginaw County Prosecutor ran up against a legal wall with Appellant Beck's argument that the constitutional presumption of innocence, plainly and clearly, prevents trial courts from using any acquitted conduct given that every person "is presumed innocent of the offense with which he is charged till (sic) he is proved to be guilty…" *People v Richardson*, 409 Mich 126, 143; 293 NW2d 332 (1980); see also *Nelson v Colorado*, 581 US __; 137 S Ct 1249, 1252 (2017). Again, the Saginaw County Prosecutor's response is silence, suggesting this Court should simply ignore this bedrock constitutional principle contrary to the precedence of this Court and the United States Supreme Court. Again, that is not satisfactory.

Third, the Saginaw County Prosecutor cites *Ewing* but failed to do a proper headcount. Only two other justices, Riley and Griffin, signed onto Justice Boyle's opinion allowing for the use of acquitted conduct in sentencing. *Id.*, at 473. Justices Cavanagh and Levin took no position. *Id.*, at 461-462. Justice Archer disavowed any reliance on a trial court being allowed to consider prior acquittals in sentencing." *Id.*, at 459. The swing

vote comes down to Justice Brickley. If a particular principle fails to obtains "four signatures," it is not "binding under the doctrine of stare decisis." *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973).

Justice Brickley was "unable to agreed entirely with the analysis adopted" by Justice Boyle and her supporting colleagues and held "it is important to bear in mind that we are not presented with the issue of whether a defendant may be punished for a crime for which no conviction was obtained; this is clearly unconstitutional." *Ewing, supra*, at 454. This is the instant circumstance with Appellant Beck. Moreover, *Ewing* involves a procedurally different case than the one at hand. John Ewing stood before the sentencing court having "pled nolo contendere to the first-degree criminal sexual conduct charge involving complainant No. 1[;]… acquitted of charges arising from the violent sexual assault alleged by complainant No. 3[;]… [and] was never charged with the crime alleged by complainant No. 6…" *Id.,* at 447. "The prosecutor not only emphasized the defendant's convictions... on complainant No. 1 and in the present case, but also insisted that the court rely on allegations against the defendant which had not resulted in convictions," i.e. the cases involving complainant No. 3 and 6. *Id.* Justice Brickley concluded that facts underlying prior convictions, pending charges, and uncharged offenses could not be used unless and until further proceedings are first provided to the defendant to challenge the factual grounds sought to be utilized.

Given this, the Saginaw County Prosecutor's proposition that a sentencing court can use acquitted conduct without further process actually lacks four signatures and lacks stare decisis treatment. *Jackson, supra*, at 627. Nevertheless, *Ewing* failed to address or analyze the constitutional right of the presumption of innocence. When properly reviewed,

Ewing—no matter how we read the concurring and plurality decisions—will no longer be able to stand against *Nelson* and *Richardson*. As requested in the supplemental brief, to the extent *Ewing* and any other case suggests acquitted conduct may be utilized for sentencing purposes the face of the presumption of innocence, Michigan jurisprudence must be and should be corrected by this Court.

Lastly, as a final note, Appellant Beck declined to be resentenced after *Lockridge*[2] was decided. This Court has recently held that *Lockridge*'s new sentencing scheme only applies prospectively. *People v Barnes*, __ Mich __; __ NW2d __ (2018)(Docket No. 156060, issued July 9, 2018). Upon this Court agreeing with the arguments herein, Appellant Beck seeks to be sentenced as existing prior to *Lockridge* given his sentence date of May 1, 2014. **Appendix #62a**

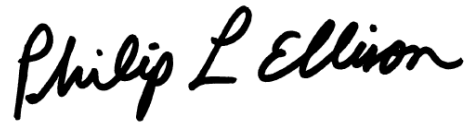
RELIEF REQUESTED

WHEREFORE, the Court is requested to issue a preemptory decision reversing the sentence of Appellant Eric Lamontee Beck and remand for resentencing with a new judge who is instructed not to use acquitted charges or acquitted conduct as a basis for its sentencing decision, and using the correct Guidelines calculations. MCR 7.305(H)(1). Otherwise, full leave is requested to fully present these important legal questions. *Id.*

[2] *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015)

Date: August 29, 2018

RESPECTFULLY SUBMITTED:



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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOREN T. ROBINSON,

Petitioner-Appellant,

v.

JEFFREY WOODS, Warden,

Respondent-Appellee.

No. 16-2067

Appeal from the United States District Court
for the Western District of Michigan at Marquette.
No. 2:14-cv-00050—R. Allan Edgar, District Judge.

Argued: June 7, 2018

Decided and Filed: August 24, 2018

Before: BOGGS and GRIFFIN, Circuit Judges; HOOD, District Judge.*

COUNSEL

ARGUED: Kristin Cope, BAKER BOTTS, L.L.P., Dallas, Texas, for Appellant. Linus Banghart-Linn, OFFICE OF THE ATTORNEY GENERAL OF MICHIGAN, Lansing, Michigan, for Appellee. **ON BRIEF:** Kristin Cope, BAKER BOTTS, L.L.P., Dallas, Texas, for Appellant. Linus Banghart-Linn, OFFICE OF THE ATTORNEY GENERAL OF MICHIGAN, Lansing, Michigan, for Appellee.

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*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

GRIFFIN, Circuit Judge.

The Supreme Court has interpreted the Sixth Amendment's jury guarantee to mean that "[a]ny fact that, by law, increases the penalty for a crime . . . must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013). In this appeal, petitioner Loren Robinson seeks a writ of habeas corpus under 28 U.S.C. § 2254, arguing that the Michigan trial court violated his Sixth Amendment right to a jury trial by using judge-found facts to score sentencing variables that increased his mandatory minimum sentence. Because *Alleyne* clearly established that mandatory minimum sentences may only be increased on the basis of facts found by a jury or admitted by a criminal defendant, *Alleyne*, 570 U.S. at 108, the Michigan Court of Appeals' disposition of Robinson's case "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). Accordingly, we reverse the judgment of the district court, conditionally grant Robinson's petition limited to his sentence, and remand to the district court with instructions to remand to the state sentencing court for further proceedings consistent with this opinion and the United States Constitution.

I.

Petitioner and two of his cohorts sold the victim a large amount of crack cocaine on credit, beat the victim when he was unable to repay petitioner, and, eventually, extorted from the victim's parents the roughly $1,000 petitioner felt he was owed for the drugs. As a result, a Michigan jury convicted petitioner of extortion, M.C.L. § 750.213, delivery of a controlled substance, § 333.7413(2), unlawful imprisonment, § 750.349b, and aggravated assault, § 750.81a(1). *People v. Robinson*, No. 303236, 2013 WL 3942387, at *1 (Mich. Ct. App. July 30, 2013) (per curiam).

As is standard in Michigan criminal practice, the Michigan Department of Corrections prepared, and the trial court considered, a "Presentence Investigation Report" (PSIR) in

conjunction with petitioner's sentencing. *See, e.g.*, *People v. Harper*, 739 N.W.2d 523, 548 n.72 (Mich. 2007) ("Michigan courts have long held that a sentencing court may presume that unchallenged facts contained in a PSIR are accurate.").[1] In general, the Department sets guidelines ranges by scoring offense and offender variables, M.C.L. §§ 777.22, 777.50–.57, many of which do not reflect the mere elements of the offenses for which a defendant was convicted, *see, e.g.*, M.C.L. § 777.44 (directing the sentencing court to score 10 points if "[t]he offender was a leader in a multiple offender situation"). The parties agree, and the PSIR reflects, that the sentencing court scored multiple variables that went beyond the mere elements of the offenses for which Robinson was convicted, *see, e.g.*, M.C.L. § 777.39 (number of victims); § 777.40 (exploitation of a vulnerable victim), which resulted in higher minimum-sentence ranges than would have been warranted without the judge-found facts.

The PSIR provided the following sentencing guidelines ranges for the minimum sentence of each conviction: between 84 and 175 months for the extortion conviction (with a 30-year-maximum sentence), between 19 and 38 months for the delivery-of-a-controlled-substance conviction (with a 40-year-maximum sentence), between 50 and 125 months for the unlawful-imprisonment conviction (with a 22-years-and-6-months-maximum sentence), and no recommended range for the aggravated-assault conviction (which comes with a one-year-maximum sentence). The Department recommended that the court give petitioner a minimum sentence near the bottom of each range. At the time of petitioner's sentencing, the ranges were mandatory, allowing a trial judge to "depart" from them only with a showing of "substantial and compelling" reasons. M.C.L. § 769.34(3).

The sentencing judge reviewed and accepted the recommended scores for the guidelines variables but disagreed with the Department's "low end" recommendation. Instead, he sentenced petitioner to a minimum of 150 months to a maximum of 30 years for the extortion conviction,

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[1]Petitioner's unopposed motion for this court to take judicial notice of his PSIR, which was not included in the lower court record, is granted. This court has the power to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," and may do so on appeal. Fed. R. Evid. 201(b), (d). We have previously noted that we can "take judicial notice of facts contained in state court documents pertaining to [a petitioner]'s prior conviction so long as those facts can be accurately and readily determined." *United States v. Davy*, 713 F. App'x 439, 444 (6th Cir. 2017) (citing *United States v. Ferguson*, 681 F.3d 826, 834–35 (6th Cir. 2012)). And we find no reason not to do so in this case.

38 months to 40 years for the delivery-of-a-controlled-substance conviction, 10 years to 22 years and 6 months for the unlawful-imprisonment conviction, and one year for the aggravated-assault conviction, all to be served concurrently.

The Michigan Court of Appeals affirmed his convictions and sentences. *Robinson*, 2013 WL 3942387, at *1. Petitioner argued, in relevant part, that the sentence violated his Sixth Amendment rights because it was based on judge-found facts. *Id*. at *5. On that issue, the court held:

> Defendant claims that the trial court improperly scored the offense variables because the facts used to support the scoring of them were not found beyond a reasonable doubt by the jury, contrary to the holding of *Blakely v. Washington*, [542 U.S. 296] (2004). However, our Supreme Court has definitively held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v. Drohan*, [715 N.W.2d 778, 791–92] ([Mich.] 2006). We are required to follow the decisions of the Supreme Court. *People v. Strickland*, [810 N.W.2d 660, 665] ([Mich. Ct. App.] 2011). Accordingly, defendant's argument is without merit.

Id. This brief discussion failed to address whether the United States Supreme Court's then-recent opinion in *Alleyne*, 570 U.S. 99 (issued roughly a month and a half prior), affected the court's analysis. Petitioner then filed an application for leave to appeal to the Michigan Supreme Court, which denied leave in a boilerplate order. *People v. Robinson*, 840 N.W.2d 352 (Mich. 2013) (order).

Robinson filed a timely habeas petition under 28 U.S.C. § 2254, asserting eleven separate grounds for relief. Our concern is his contention relating to "improper scoring of the legislatively imposed sentencing guidelines." After ordering a response to the petition, the district court denied Robinson's petition outright and declined to issue a certificate of appealability (COA). *Robinson v. Woods*, No. 2:14-cv-50, 2016 WL 3256837, at *18 (W.D. Mich, June 14, 2016). This court granted petitioner's motion for a COA, limited to his Sixth Amendment sentencing issue.

II.

"In an appeal from the denial of habeas relief, we review the district court's legal conclusions de novo and its factual findings for clear error." *Scott v. Houk*, 760 F.3d 497, 503

(6th Cir. 2014) (citation omitted). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a state conviction may be overturned for an issue adjudicated on the merits in state court if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). To prevail under the "contrary to" clause of § 2254(d)(1), a petitioner must show that the state court "arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or that it "confront[ed] facts that are materially indistinguishable from a relevant Supreme Court precedent and arrive[d] at a result opposite" to that reached by the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). "[B]ecause the purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction," *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (internal quotation marks omitted), "[t]his is a difficult to meet, and highly deferential standard for evaluating state-court rulings," *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted).

III.

Petitioner challenges his sentence as violative of the Sixth Amendment. Because we hold that *Alleyne* clearly established the unconstitutionality of Michigan's mandatory sentencing regime, we reverse the district court and conditionally grant petitioner habeas relief, limited to his sentence.

A.

As an initial matter, the district court erred in its analysis of petitioner's Sixth Amendment claim. The court held that the claim was meritless because, under *Harris v. United States*, 536 U.S. 545, 566 (2002), the Sixth Amendment prohibited only sentences beyond the statutory maximum that were based on judge-found facts. *Robinson*, 2016 WL 3256837, at *11. Though the court acknowledged that *Alleyne* overruled *Harris*, it reasoned that *Harris* still controlled because *Alleyne* did not apply retroactively on collateral review. *Id*. at *11 n.1.

But the district court failed to appreciate that the Supreme Court issued *Alleyne* while petitioner's direct appeal was pending—*Alleyne* was decided a little more than a month before

the Michigan Court of Appeals issued its opinion in this case.[2] And Supreme Court opinions apply to all criminal cases pending on direct review, no matter how much of a departure the decision represents from prior caselaw. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."); *see also United States v. Booker*, 543 U.S. 220, 268 (2005) (Opinion of BREYER, J.) (applying the Court's Sixth Amendment holding to all cases pending on direct review). Therefore, the district court erred in holding that *Harris* controlled. We thus must now examine whether Michigan's scheme, as applied to Robinson, was contrary to clearly established federal law as embodied in *Alleyne*.

B.

The Sixth Amendment of 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 . . . ." U.S. CONST. amend. VI. By operation of the Sixth Amendment, "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also Jones v. United States*, 526 U.S. 227, 253 (1999) (SCALIA, J., concurring). This rule applies equally to the states through the Due Process Clause of the Fourteenth Amendment. *Apprendi*, 530 U.S. at 476.

Over the course of the last 30 years, the Supreme Court has grappled with various components of modern sentencing schemes, to determine whether they complied with the original understanding of the Sixth Amendment. *See, e.g.*, *Alleyne*, 570 U.S. at 103; *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 248–49; *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

[2]We must "look through" the Michigan Supreme Court's standard denial order to the Michigan Court of Appeals' opinion because the Court of Appeals opinion is the last reasoned state-court judgment. *Ylst v. Nunnemaker*, 501 U.S. 797, 803–05 (1991). The Supreme Court recently clarified that this look-through "rule" is a rebuttable presumption. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("[T]he State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed."). However, neither party argues that the Michigan Supreme Court's boilerplate denial order relied on reasons different from the Court of Appeals opinion.

In *Alleyne*, the Court applied, for the first time, its previous conclusions regarding the imposition of penalties beyond the statutory maximum to determinations of mandatory minimum sentences, holding that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." 570 U.S. at 103. *Alleyne* was a watershed opinion, overruling two prior precedents—*Harris*, 536 U.S. at 566, and *McMillan*, 477 U.S. at 93—which had held that the Sixth Amendment allowed increases in mandatory *minimum* sentences on the basis of judge-found facts.

The question before us is whether *Alleyne*'s holding rendered Michigan's then-mandatory sentencing regime unconstitutional, such that the Michigan Court of Appeals decision in Robinson's case was contrary to clearly established federal law. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

In *Alleyne*, the Supreme Court addressed the constitutionality of 18 U.S.C. § 924(c)(1)(A), which provided a five-year sentence for any person who "uses or carries a firearm" in relation to a "crime of violence," and increased the minimum sentence to seven years if the judge found that the firearm was brandished and to ten years if it was discharged. 570 U.S. at 103–04 (quoting 18 U.S.C. § 924(c)(1)(A)(i)–(iii)). While the defendant was indicted and jury-convicted under the five-year "use[] or carr[y] provision," the judge sentenced him to seven years for brandishing, as was authorized by the statute. *Id*. at 104. However, the Supreme Court held that the increased minimum sentence based on judge-found facts violated the defendant's Sixth Amendment jury guarantee, applying its *Apprendi* line of cases to mandatory minimums. *Id*. at 111–12. In doing so, the Court reasoned that, because *Apprendi* held "that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime," "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." *Id*. (quoting *Apprendi*, 530 U.S. at 490).

This rationale applies equally to Michigan's mandatory minimum sentences. At all relevant times, Michigan's sentencing regime operated through the use of offense categories,

M.C.L. § 777.5, dual axis scoring grids, *e.g.*, M.C.L. § 777.61, minimum ranges, *id.*, and a holistic focus on offender and offense characteristics. Generally speaking, the guidelines operate by "scoring" offense-related variables (OVs) and offender-related, prior-record variables (PRVs).[3] These OV and PRV point totals are then inputted into the applicable sentencing grid to yield the guidelines range, within which judges choose a minimum sentence. *See* Sentencing Manual, p. 10. And at the time of Robinson's sentencing, Michigan's sentencing guidelines were mandatory—arguably more so than the previously mandatory federal sentencing guidelines. *Compare* M.C.L. § 769.34(2)–(3) ("[T]he minimum sentence imposed by a court of this state for a felony . . . shall be within the appropriate sentence range[.] . . . A court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure[.]"), *and People v. Babcock*, 666 N.W.2d 231, 237 (Mich. 2003) (defining "substantial and compelling" as "an objective and verifiable reason that keenly or irresistibly grabs [a court's] attention" (citation omitted)), *with* 18 U.S.C. § 3553(b) ("[T]he court shall impose a sentence of the kind, and within the range, referred to in [the sentencing guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."), *and Koon v. United States*, 518 U.S. 81, 95 (1996) (allowing departures without reference to "objective and verifiable" requirements).

At bottom, Michigan's sentencing regime violated *Alleyne*'s prohibition on the use of judge-found facts to increase mandatory minimum sentences. 570 U.S. at 111–12. And, although we are not bound by its decision, we note that the Michigan Supreme Court recently so held in *People v. Lockridge*, 870 N.W.2d 502, 513–14 (Mich. 2015) ("[A] straightforward application of the language and holding in *Alleyne* leads to the conclusion that Michigan's sentencing guidelines scheme violates the Sixth Amendment."). While Michigan's regime uses a

[3]Each of the seven PRVs is scored in every case. M.C.L. § 777.21(1)(b); *see also* Michigan Sentencing Guidelines Manual, pp. 4–5, available at https://mjieducation.mi.gov/documents/sgm-files/94-sgm/file (hereinafter "Sentencing Manual"). Not every OV is scored in every case. Instead, only certain OVs are scored depending on the "crime group" (person, property, etc.) the conviction offense falls under. M.C.L. § 777.22; *see also* Sentencing Manual, pp. 6–7.

number of OVs and PRVs to come to a guidelines range, rather than the slightly more straightforward three-tier scheme addressed in *Alleyne*, 570 U.S. at 103–04, this distinction does not except the Michigan regime from *Alleyne*'s fundamental principles. In sum, *Alleyne* proscribed exactly that which occurred at petitioner's sentencing hearing—the use of "[f]acts that increase the mandatory minimum sentence" that were never submitted to the jury and found beyond a reasonable doubt. 570 U.S. at 108. The Michigan Court of Appeals' conclusion that Michigan's sentencing scheme did not violate the Sixth Amendment was, therefore, "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Respondent argues, in part, that the scheme is constitutional because sentences in Michigan are "indeterminate," in that the sentencing judge sets the minimum sentence using judge-found facts to score a number of OVs and PRVs, while the criminal statute for the particular offense sets the maximum sentence. *See* M.C.L. § 769.8(1) ("[T]he court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence[.]"). This argument of "indeterminacy" is based upon the fact that criminal defendants in Michigan do not know how long they will serve in prison, because, between the minimum sentence and statutory maximum sentence, prisoners are subject to the jurisdiction of the parole board and have no right to parole. M.C.L. § 791.234(1), (11); *Morales v. Mich. Parole Bd.*, 676 N.W.2d 221, 236 (Mich. Ct. App. 2003). Given that the Supreme Court has never retreated from its position that indeterminate sentencing poses no constitutional issue, *Blakely*, 542 U.S. at 308–09; *see also Lockridge*, 870 N.W.2d at 514 ("It is certainly correct that the United States Supreme Court has repeatedly distinguished between 'determinate' and 'indeterminate' sentencing systems and referred to the latter as not implicating Sixth Amendment concerns and that *Alleyne* did nothing to alter or undermine that distinction."), it may initially appear that Michigan's scheme is constitutional.

But, as acknowledged by the Michigan Supreme Court, the United States Supreme Court has never used the phrase "indeterminate sentencing" in the same manner as the Michigan courts. *See Lockridge*, 870 N.W.2d at 515–16. Instead, the Supreme Court uses the term

"indeterminate" to refer to regimes that "involve judicial factfinding . . . [b]ut [where] the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence." *Blakely*, 542 U.S. at 309; *id*. at 332 (O'Connor, J., dissenting) ("Under indeterminate systems, the length of the sentence is entirely or almost entirely within the discretion of the judge or of the parole board, which typically has broad power to decide when to release a prisoner."). Thus, though before *Lockridge* the Michigan courts considered their sentencing regime to be "indeterminate" because it produces a sentence with a minimum and a maximum with parole-board discretion in between, it is clear this is not how the Supreme Court uses that term in the Sixth Amendment context.[4] Moreover, regardless of how the Michigan Supreme Court previously characterized its system, it is clear that Michigan did not have indeterminate sentencing under the prevailing Supreme Court caselaw.

Respondent also argues that *Alleyne* does not implicate Michigan's sentencing regime because the minimum sentence in Michigan criminal practice is nothing more than a parole-eligibility date, and the Supreme Court has maintained that there is no constitutional right to parole. *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."). But this argument misses the mark. While an increase in a Michigan minimum sentence may delay only the date on which a defendant becomes eligible for parole, the lack of a constitutional right to parole is wholly unrelated to the right to have a jury find the facts that "alter the prescribed range of sentences to which a defendant is exposed." *Alleyne*, 570 U.S. at 108. This right arises at sentencing, well before parole (or the denial thereof) comes into play. And that is the right addressed in the *Apprendi* and *Alleyne* line of cases. *See, e.g.*, *id*. Accordingly, *Alleyne* requires us to hold that the Michigan trial court's use of judge-found facts to score mandatory sentencing guidelines that resulted in an increase of petitioner's minimum sentence violated petitioner's Sixth Amendment rights. *Id*.

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[4]In other contexts, this court has explicitly referred to Michigan's sentencing regime as an indeterminate one. *See, e.g.*, *Shaya v. Holder*, 586 F.3d 401, 403 (6th Cir. 2009) (describing, in dicta, an immigration petitioner as having received "an indeterminate sentence of nine months to ten years" "under Michigan law"). But *Shaya* was not a Sixth Amendment sentencing case, and it certainly was not a determination "by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

IV.

For these reasons, we reverse the judgment of the district court and conditionally grant Robinson's petition for a writ of habeas corpus, as it pertains to his Sixth Amendment sentencing claim. We remand this case to the district court with instructions to remand to the state sentencing court for sentencing proceedings consistent with this opinion and the Constitution. The district court shall grant a writ of habeas corpus unless the state initiates, within 180 days, such sentencing proceedings.