

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Court of Appeals No. 325407

-vs-

Lower Court No. 15-4764 FH

LONNIE JAMES ARNOLD

Defendant-Appellant.

_____ /

MONROE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

MARILENA DAVID-MARTIN (P73175)

Attorney for Mr. Arnold

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: MARILENA DAVID-MARTIN (P73175)

Deputy Director
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833
mdavid@sado.org

Table of Contents

Index of Authorities i

Judgment Appealed From and Concise Allegations of Error iii

Statement of Questions Presented..... viii

Statement of Facts..... 1

Summary of Argument 4

I. The enactment of the legislative sentencing guidelines did not change the sentencing options for indecent exposure by a sexually delinquent person. 6

A. Prior to the enactment of the sentencing guidelines, the sentencing options for sexual delinquency included (a) the penalty prescribed by the statute of the predicate offense or (b) 1 day to life..... 6

B. The enactment of the sentencing guidelines did not change the sentencing options for sexual delinquency..... 9

i. Indecent exposure by a sexually delinquent person is not a distinct felony enumerated in the Penal Code and is not subject to the sentencing guidelines. 10

ii. The Legislature may not amend or revise a very specific provision of the Penal Code simply by passing a different statute (which mischaracterizes the Penal Code) in the Code of Criminal Procedure. 13

iii. The rule of lenity applies and requires this Court to apply the law in favor of Mr. Arnold and declare the sentencing guidelines an invalid sentencing option..... 18

Summary and Relief Requested..... 20

Index of Authorities

Cases

<i>People v Arnold</i> , 500 Mich 964 (2017)	3
<i>People v Arnold</i> , 502 Mich 438 (2018)	<i>passim</i>
<i>People v Arnold</i> , __ Mich App __; __ NW2d __ (2019) (Docket No. 325407)	<i>passim</i>
<i>People v Blount</i> , 87 Mich App 501 (1978)	15
<i>People v Buehler</i> , (On Remand), 271 Mich App 653 (2006)	1
<i>People v Buehler</i> , 477 Mich 18 (2007)	3
<i>People v Butler</i> , 465 Mich 940 (2001)	3, 8
<i>People v Campbell</i> , 316 Mich App 279 (2016)	2, 3
<i>People v Craig</i> , 488 Mich 861 (2010)	10
<i>People v Denio</i> , 454 Mich 691 (1997)	19
<i>People v Franklin</i> , 298 Mich App 539 (2012)	11
<i>People v Hall</i> , 499 Mich 446, 458, 464 (2016)	18
<i>People v Helzer</i> , 404 Mich 410 (1978)	11, 17
<i>People v Jahner</i> , 433 Mich 490 (1989)	19
<i>People v Johnson</i> , 302 Mich App 450 (2013)	19
<i>People v Kelly</i> , 186 Mich App 524 (1990)	<i>passim</i>
<i>People v Lockridge</i> , 498 Mich 358, (2015)	1, 3
<i>People v Mahaney</i> , 13 Mich 481 (1865)	16
<i>People v. Hall</i> , 499 Mich. 446, 884 N.W.2d 561 (2016)	iv, v, 19
<i>United States v Crosby</i> , 397 F 3d 103 (CA 2, 2005)	2
<i>Winford</i> , 404 Mich 400 (1978)	10, 11

Constitutions, Rules and Statutes

Const 1963, art 4, § 25	<i>passim</i>
MCL 750.10a	4, 10, 11
MCL 750.158	11
MCL 750.335a	<i>passim</i>

MCL 750.335a(2)(b) 5

MCL 750.335a(2)(c)*passim*

MCL 750.338..... 11

MCL 750.338a..... 11

MCL 750.338b..... 11

MCL 767.61a..... 4, 11

MCL 769.9(2) 9

MCL 777.1..... 10

MCL 777.11..... 10

MCL 777.16..... iii, iv

MCL 777.16q.....*passim*

MCL 777.19..... 10

MCL 777.62..... iv, 16

MCL 777.69..... 10

**Judgment Appealed From, Relief Sought, and Concise
Allegations of Error**

In a unanimous opinion, this Court, for the first time, gave meaning to the “1 day to life” sentencing provision in MCL 750.335a(2)(c) (indecent exposure by a sexually delinquent person). *People v Arnold*, 502 Mich 438 (2018). The Court held that 1 day to life was an *optional* and *nonmodifiable* sentence alternative. But optional to what?

Prior to the enactment of the sentencing guidelines, the answer was clear. 1 day to life was an option alongside the penalty prescribed within the penal statute, MCL 750.335a, which at that time was up to 1 year in jail. *Arnold*, 502 Mich at 482-483.

The more difficult question is what effect the enactment of the sentencing guidelines had on those options. After overruling several key cases and embracing others previously interpreting this issue, this Court remanded to the Court of Appeals “in light of the revised state of the law,” to “resolve what effect the adoption of the legislative sentencing guidelines had on the operation of the sexual-delinquency scheme as we have construed it before the guidelines were adopted.” *Arnold*, 502 Mich at 481.

This Court proposed several “questions that may be helpful” to addressing the issue. *Arnold*, 502 Mich at 481-482, n. 20:

- “For example, MCL 777.16 says that the sentencing guidelines apply ‘to felonies enumerated in [the Penal Code] as set forth in sections 16a to 16bb of this chapter.’ Given our interpretation of the offense, is indecent exposure by a sexually delinquent person a distinct felony ‘enumerated’ in

the Penal Code? (While we conclude that the change in language from 2005 PA 300 is immaterial, could its reorganization of MCL 750.335a constitute making this a distinct offense ‘enumerated’ by the Penal Code if it was not before, or was this a mere stylistic change to improve readability?)” *Id.* at 482, n. 20.

- “Does it matter if indecent exposure by a sexually delinquent person is ‘enumerated’ in the Penal Code, given that the offense is ‘set forth’ in MCL 777.16q as a listed felony? (If it does not matter, what is the function of MCL 777.16, or is it surplusage?)” *Id.*
- “If many of the sentences provided for in the Class A sentencing grid, MCL 777.62, would not have been legal for this offense under the Penal Code (including the sentence defendant received), can such sentences be made legal because the offense is listed in the Code of Criminal Procedure as a Class A felony?” *Id.*
- “That is to say, where, as here, the legislative sentencing guidelines provide for a penalty that contradicts the penalty provided in the Penal Code for an offense, are the sentencing guidelines an amendment (or repeal) of inconsistent provisions of the Penal Code by implication such that the guidelines control? If so, are there any constitutional problems with such an arrangement; for example, does it comport with Const 1963, art 4, § 25? Are our decisions in *Frontczak* and *Boulanger*, dealing with the first Goodrich Act, relevant to answering these questions, or distinguishable?” *Id.*
- “Is the rule of lenity implicated? See *People v. Hall*, 499 Mich. 446, 458 n. 38, 884 N.W.2d 561 (2016).” *Id.*

On remand, the Court of Appeals held that the only two sentencing options for a sexually delinquent person are 1 day to life or a sentence under the guidelines. *People v Arnold*, __ Mich App __; __ NW2d __ (2019) (Docket No. 325407); slip op at 10, attached as Appendix A. The court provided no analysis as to why the sentencing guidelines applied, other than stating the obvious—that the sentencing guidelines say they apply, so they do. *Id.* at __; slip op at 7, 10. The court provided no analysis as to why the sentencing guidelines took away a sentencing option that existed before

the enactment of the guidelines. Without analysis, the court concluded that even though a sentence under the guidelines would have been illegal at the time of the enactment of the guidelines, “the tie-barred amendments to MCL 777.16q and MCL 750.335a remedied any potential conflict.” *Id.* at __; slip op at 12. And because the “legislative sentencing guidelines do not amend or change the language of . . . MCL 750.335a,” the court held that the inclusion of MCL 750.335a within MCL 777.16q does not violate Const 1963, art 4, § 25. *Id.* Finally, the court concluded the rule of lenity does not apply because there is no ambiguity here. *Id.* at __; slip op at 11.

The Court of Appeals was wrong. The sentencing guidelines do not apply to a sexually delinquent person because the enactment of the sentencing guidelines cannot treat a sentence alternative (sexual delinquency punishable by 1 day to life) as an enumerated felony offense punishable by the guidelines. If the enactment of the guidelines did what the Court of Appeals says it did—got rid of one sentencing option and replaced it with another that is contrary to the intent of the Legislature at the time of the enactment of the sexual delinquency statute—then the enactment of the guidelines violates Michigan’s constitutional prohibition against revising or amending one law by reference. Const 1963, art 4, § 25.

Not only do the guidelines make an illegal sentence legal, but with one sentence (“This chapter applies to the following felonies enumerated in chapter 750 of the Michigan Compiled Laws”), it seemingly undoes decades of history, intent, and purpose behind the sexually delinquent person legislation and dismantles the case

law interpreting the legislation. This is exactly the sort of mischief the Michigan Constitution seeks to prevent.

Further, the guidelines do not apply to a sexually delinquent person because a sentence under the guidelines is antithetical to the history and purpose of the sexual delinquency sentencing scheme as determined by this Court. A sentence under the guidelines is equivalent to a *modifiable* 1 day to life prison term, which is contrary to this Court's holding that 1 day to life is *nonmodifiable*. A sentence under the guidelines gives trial court judges complete control over how long an individual must serve before eligible for release. But the Legislature intended sentencing of sexually delinquent persons to be "therapeutic and open-ended" and for trial court judges to "[g]ive up control over the amount of time the defendant served." *Arnold*, 502 Mich at 471.

If there is ever a situation where the rule of lenity should apply, it is here. The statutes at issue here are 67 and 21 years old, respectively, and their interplay is still not settled. The Court of Appeals has issued 3 opinions in this case on the same sentencing issue, each with a different result. Ambiguity abounds and triggers the rule of lenity.

Prior to the enactment of the sentencing guidelines, the trial court had discretion to sentence a sexually delinquent person to the penalty prescribed by the underlying offense, which at that time was up to 1 year in jail. *Arnold*, 502 Mich at 482-483. Mr. Arnold was convicted of conduct that, before the guidelines, could have been punishable by up to 2 years imprisonment. Here, the Court of Appeals took away

that option and replaced it with a worse, more severe option that was never contemplated when the sexual delinquency statutes were enacted—sentencing under the guidelines with a life maximum. For the Court of Appeals to switch out one sentencing option and replace it with a life maximum option, without clear legislative intent, contravenes the rule of lenity.

This Court should grant leave to appeal or enter a peremptory order holding that the sentencing guidelines do not apply to sexually delinquent persons and that the sentencing options for a person convicted of indecent exposure by a sexually delinquent person, include: (a) a sentence of imprisonment for not more than 2 years or a fine of not more than \$2,000 or both, or (b) 1 day to life imprisonment. This outcome is consistent with this Court’s holding in *People v Arnold*, 502 Mich 438 (2018).

Statement of Questions Presented

- I. Did the enactment of the legislative sentencing guidelines change the sentencing options for indecent exposure by a sexually delinquent person?**

Court of Appeals answers, "Yes."

Mr. Arnold answers, "No."

Standard of Review and Issue Preservation

Questions of law, including the correct interpretation and application of statutes and constitutions, are reviewed de novo. *People v Babcock*, 469 Mich 247, (2003). This issue is preserved.

Statement of Facts

Lonnie Arnold is currently serving a 25 to 70-year sentence for masturbating in an elevator. As of today, he has served six and a half years in prison for this offense. Under his current sentence, he will first become eligible for parole in 2038, when he is 70 years old.

For nearly five years, the subject of Mr. Arnold's direct appeal has centered on the appropriate sentence for the offense of aggravated indecent exposure by a sexually delinquent person. MCL 750.335a(2)(c).

Procedural Facts

On direct appeal in 2015, Mr. Arnold challenged his sentence on various grounds, including the applicability of the sentencing guidelines to his offense. He argued the trial court sentenced him under the sentencing guidelines based on a misconception of law and a failure to recognize its authority to sentence him to 1 day to life under MCL 750.335a(2)(c).

While Mr. Arnold's appeal was pending, this Court issued *People v Lockridge*, 498 Mich 358, (2015), holding the sentencing guidelines are advisory. Following *Lockridge*, Mr. Arnold supplemented his sentencing challenge and argued that the now-advisory nature of the guidelines eliminated any conflict with the mandatory nature of the 1 day to life sentencing provision of MCL 750.335a(2)(c).

In its first opinion dated April 12, 2016, the Court of Appeals held the sentencing guidelines controlled over the 1 day to life sentencing provision, relying on the holding in *People v Buehler (On Remand)*, 271 Mich App 653 (2006) (*Buehler*

II. People v Lonnie James Arnold, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2016 (Docket No. 325407). As to the *Lockridge* argument, the court held Mr. Arnold was entitled to a *Crosby*¹ remand so the trial court could articulate whether it would have sentenced him under the guidelines or under the 1 day to life penalty provision if it had known that the guidelines were merely advisory. *Id.*

Mr. Arnold filed a Motion for Reconsideration arguing the court's reliance on *Buehler II* was misplaced because *Buehler II* analyzed a previous version of MCL 750.335a(2)(c), *i.e.*, one different than the version in effect at the time of Mr. Arnold's sentencing.

While that motion was pending, a different panel of the court decided *People v Campbell*, 316 Mich App 279 (2016). *Campbell* addressed precisely the same issue raised by Mr. Arnold—the conflict between MCL 750.335a(2)(c) and the sentencing guidelines. The *Campbell* court held that because *Lockridge* declared the guidelines advisory while MCL 750.335a(2)(c) was stated in mandatory terms, trial courts were required to sentence individuals convicted of indecent exposure by a sexually delinquent person to 1 day to life. *Id.* at 299-300.

Mr. Arnold filed a letter of supplemental authority citing *Campbell's* holding. The court granted Mr. Arnold's Motion for Reconsideration, issued a new opinion, found *Campbell* was correctly decided, and ordered Mr. Arnold resentenced to 1 day to life under the mandatory penalty provision of MCL 750.335a(2)(c). *People v Lonnie*

¹ *United States v Crosby*, 397 F 3d 103 (CA 2, 2005)

James Arnold, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 325407).

The prosecutor filed an application for leave to appeal. The Michigan Supreme Court granted the application and asked the parties to address:

(1) whether MCL 750.335a(2)(c) requires the mandatory imposition of “imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life” for a person who commits the offense of indecent exposure by a sexually delinquent person, or whether the sentencing court may impose a sentence within the applicable guidelines range, see MCL 777.16q; (2) whether the answer to this question is affected by this Court’s decision in *People v Lockridge*, 498 Mich 358 (2015), which rendered the sentencing guidelines advisory; and (3) whether *People v Campbell*, ___ Mich App ___ (2016) (Docket No. 324708), was correctly decided. [*People v Arnold*, 500 Mich 964 (2017)].

After briefing and oral argument, this Court issued a unanimous opinion setting aside *People v Campbell*, 316 Mich App 279 (2016), overruling *People v Butler*, 465 Mich 940 (2001), disavowing *People v Buehler*, 477 Mich 18 (2007) (*Buehler III*), embracing *People v Kelly*, 186 Mich App 524 (1990), and remanding the case back to the Court of Appeals in light of the new legal landscape. *People v Arnold*, 502 Mich 438, 481 (2018).

On June 11, 2019, the Court of Appeals issued a published decision holding that there are only two sentencing options following a conviction of MCL 750.335a(2)(c): (a) 1 day to life or (b) a sentence within the sentencing guidelines. *People v Arnold*, ___ Mich App ___; ___ NW2d ___ (2019) (Docket No. 325407); slip op at 10. This is Mr. Arnold’s appeal from that decision.

Summary of Argument

As confirmed by this Court, prior to the guidelines, the sentencing options available following a conviction of indecent exposure by a sexually delinquent person included the penalties authorized by the penal statute itself: (a) jail and/or a fine, or (b) a prison term of 1 day to life. *Arnold*, 502 Mich at 451-452, 482-483.² These options are consistent with the history of the sexually delinquent person statutory scheme, which was enacted to provide more flexibility in sentencing. *Id.* at 453-454, 469.

On remand, the Court of Appeals was tasked with determining whether the enactment of the sentencing guidelines changed the sentencing options available pre-guidelines. The court determined it did and held that the only two sentencing options following a conviction of indecent exposure by a sexually delinquent person are: (a) a sentence under the guidelines, or (b) a prison term of 1 day to life.

The Court of Appeals was wrong.

Sexual delinquency is not a “felon[y] enumerated in [the Penal Code],” MCL 777.16q, and falls outside the scope of the guidelines. Sexual delinquency is an alternative sentencing scheme that attaches only after conviction of a specified predicate felony. Treating sexual delinquency as an “enumerated” felony under the guidelines would directly contradict the history, intent, and purpose of the sexual delinquency legislation, MCL 767.61a, MCL 750.10a, and MCL 750.335a. The legislation was meant to allow for flexible, therapeutic, and open-ended terms of incarceration where a sexually delinquent person could receive immediate treatment

² Probation may also have been a sentencing option but is not an issue directly before this Court. *Id.* at 481, n 19.

and regular reviews of his mental state prior to release. *Arnold*, 502 Mich at 471. The Legislature intended for trial court judges to “*g[i]ve up* control over the amount of time the defendant served.” *Arnold*, 502 Mich at 471. Sentencing under the guidelines does not serve that purpose. Under the guidelines, the trial court judge alone determines the amount of time the individual must serve before parole eligibility and sets the cap on the amount of time the individual must serve before going home.

The portion of MCL 777.16q including sexually delinquent person offenses as enumerated felonies subject to the sentencing guidelines violates the Michigan Constitution by acting as an improper revision to pre-existing law. Const 1963, art. 4, § 25. Prior to the adoption of the sentencing guidelines, “no sentence on the Class A sentencing grid would even have been legal for a judge to impose on a sexually delinquent person.” *Arnold*, 502 Mich at 477. A guideline sentence is antithetical to a flexible, therapeutic, and open-ended sentence and frustrates the purpose of the sexually delinquent person alternate sentencing scheme. The portion of MCL 777.16q listing indecent exposure by a sexually delinquent person as a felony subject to the guidelines violates Michigan’s Constitution and must be severed.

This Court should hold that the adoption of the sentencing guidelines did not alter the available sentencing options following a conviction of indecent exposure by a sexually delinquent person. At resentencing, the trial court should have the discretion to sentence him to imprisonment for not more than 2 years, a fine, or both, MCL 750.335a(2)(b), or 1 day to life in prison. MCL 750.335a(2)(c).

Argument

I. **The enactment of the legislative sentencing guidelines did not change the sentencing options for indecent exposure by a sexually delinquent person.**

Sexual delinquency is punishable by a prison term of 1 day to life and is not itself a distinct enumerated felony. The sentencing guidelines directly contradict the sexually delinquent person sentencing scheme. The enactment of the guidelines, if intended to repeal the sentencing option of imprisonment for not more than 2 years and/or a fine within MCL 750.335a(2)(c), is an unconstitutional revision of pre-existing law and cannot stand. If ambiguity remains, the rule of lenity requires this Court to find that the sentencing guidelines do not apply in this case.

A. **Prior to the enactment of the sentencing guidelines, the sentencing options for sexual delinquency included (a) the penalty prescribed by the statute of the predicate offense or (b) 1 day to life.**

In *Arnold*, this Court defined the sentencing options following a conviction of indecent exposure by a sexually delinquent person prior to the enactment of the 1998 sentencing guidelines. This Court found that those options were properly defined in *People v Kelly*, 186 Mich App 524 (1990). Following a conviction of indecent exposure by a sexually delinquent person, the sentencing court was free to sentence an individual to (a) jail and/or a fine, or (b) 1 day to life in prison. *Arnold*, 502 Mich at 468-472.

The defendant in *Kelly* was sentenced to life imprisonment following a conviction of indecent exposure by a sexually delinquent person under MCL 750.335a.

At the time, a violation of MCL 750.335a was “punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than \$500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.” 1952 PA 73. The court found the life sentence to be invalid under the statute, reasoning that “[s]exual delinquency is not merely a penalty enhancement provision related to the principal charge; it is an alternate sentencing provision tied to a larger statutory scheme.” *Id.* at 528. The “alternate sentence is an indeterminate term of one day to life imprisonment.” *Id.* A life sentence is invalid. *Id.*

The court in *Kelly* made three findings, which were upheld by this Court in *Arnold*. First, the 1 day to life sentencing provision is an *optional* alternative sentence available alongside other penalties prescribed within the offense statute, which at the time included: “imprisonment in the county jail for not more than one year [or] a fine of not more than \$500.” *Kelly*, 186 Mich App at 531; *Arnold*, 502 Mich at 451-452.³ Treating the 1 day to life sentence as an *optional* alternative sentence instead of a *mandatory* alternative sentence is consistent with the language of the statute directing that this offense “may be punishable” by 1 day to life. *Arnold*, 502 Mich at 466. Further, characterizing 1 day to life as an optional alternate sentence is consistent with the intent of the sexual delinquency legislation to provide an

³ Thus, *People v Butler*, 465 Mich 940 (2001), holding that if imprisonment was imposed, a sentence of 1 day to life was required, was incorrect and overruled. *Arnold*, 502 Mich at 473.

“additional method of disposition in a particular case” in addition to other available sentences. *Arnold*, 502 Mich at 468, citing Governor’s Commission Report, p. 137.

Second, the 1 day to life prison term is unmodifiable and does not authorize any other term of years sentence; it authorizes a minimum term of 1 day and a maximum term of life, but nothing in-between. *Kelly*, 186 Mich App at 528-529; *Arnold*, 502 Mich at 471. The 1 day to life sentence is unmodifiable (*i.e.*, 2 days to life or any sentence in between is not permitted) because that is “consistent with the history of the sexual-delinquency scheme, which was clearly intended to be therapeutic and open-ended.” *Arnold*, 502 at 471. “The purpose of the scheme was to create a *different* sentencing option, one in which the judge *gave up* control over the amount of time the defendant served.” *Id.*

Third, the 1 day to life penalty provision is an exception to MCL 769.9(2), which bans “life tails.” *Kelly*, 186 Mich App at 531; *Arnold*, 502 Mich at 472. MCL 769.9(2) only applies to “cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years.” *Arnold*, 502 Mich at 472, quoting MCL 769.9(2). Sexual delinquency is exempt from MCL 769.9(2) because its maximum sentence may not be “life or any term of years.” *Id.* Further, even if there is a conflict, under principles of statutory construction, the more specific statute, MCL 750.335a, controls over the more general statute, MCL 769.9(2). *Id.*

In sum, following a conviction of indecent exposure by a sexually delinquent person, the sentencing court was free to sentence an individual to (a) jail and/or a

fine, or (b) 1 day to life in prison. *Arnold*, 502 Mich at 468-472. Whether probation was available remained an open question. *Id.* at 481 n 18.

B. The enactment of the sentencing guidelines did not change the sentencing options for sexual delinquency.

In 1952, the Legislature enacted a specific sentencing scheme for the offense of indecent exposure by a sexually delinquent person. MCL 750.335a; 1952 PA 73. The enactment of the sentencing guidelines in 1998 did not change that sentencing scheme.

Sexual delinquency legislation “was enacted to provide an alternate sentence for certain specific sexual offenses where evidence appeared to justify a more flexible form of incarceration.” *Arnold*, 502 Mich at 447 quoting *Winford*, 404 Mich 400, 405-406 (1978). This alternate sentencing scheme allowed for “therapeutic and open-ended” sentencing. *Id.* at 471.

The legislative sentencing guidelines were enacted in 1998 (MCL 777.1 – MCL 777.69). The guidelines were intended to establish sentences “that would treat crimes of violence more severely than other crimes, consider prison resources, incorporate intermediate sanctions as a means of keeping low-level offenders out of the prison system, and apply to all felony offenses including habitual offenders. Sentences were to be ‘proportionate to the seriousness of the offense and the offender’s prior criminal record.’” Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U Mich JL Reform, 645, 650 (2014).

Part 2 of the sentencing guidelines (MCL 777.11 – MCL 777.19) lists the felonies that are subject to the guidelines. Indecent exposure by a sexually delinquent

person is listed in MCL 777.16q as a Class A felony subject to the guidelines. That portion of the provision should be invalidated.

- i. *Indecent exposure by a sexually delinquent person is not a distinct felony enumerated in the Penal Code and is not subject to the sentencing guidelines.*

Sexual delinquency, MCL 750.10a, is not a felony and cannot be charged as such and cannot result in an independent conviction. See *People v Craig*, 488 Mich 861 (2010) (MCL 750.10a is “a definitional statute and does not carry the possibility of a separate conviction or sentence independent of other charges in the Criminal Code.”)

An individual cannot be charged as being a sexually delinquent person independently without also being charged with one of five specific predicate offenses.⁴ MCL 767.61a. “[A] charge of sexual delinquency is totally dependent for its prosecution upon conviction of the principal offense” and “the penalty for conviction of sexual delinquency represents an alternate form of sentencing.” *Winford*, 404 Mich at 408. See also *Arnold*, 502 Mich at 447; and *People v Helzer*, 404 Mich 410, 419 (1978); *People v Kelly*, 186 Mich App 524 (1990); and *People v Franklin*, 298 Mich App 539, 547 (2012).

This “reflects legislative intent to construe sexual delinquency as a separate, alternate form of sentencing,” *Arnold*, 502 at 571 citing *Helzer*, 404 Mich at 419, rather than a distinct enumerated felony. A finding of sexual delinquency creates an

⁴ The five predicate offenses include: sodomy, MCL 750.158, indecent exposure, gross indecency between males, MCL 750.338, between females, MCL 750.338a, and between a male and a female, MCL 750.338b. *Arnold*, 502 Mich at 464-465. MCL 777.16q also lists MCL 750.338, 338a and 338b. Sodomy by a sexually delinquent person, MCL 750.158, is the only sexually delinquent person offense not included in the sentencing guidelines.

alternative sentencing scheme that allows for a sentence of 1 day to life *if and only if* the individual is first convicted of the predicate offense. MCL 767.61a; *Arnold*, 502 Mich at 464-465, 449.

The Court in *Arnold* suggested that the Court of Appeals consider on remand whether the 2005 amendment to MCL 750.335a had any effect on whether indecent exposure by a sexually delinquent person is a distinct, enumerated felony. It does not. At the time of its enactment, indecent exposure by a sexually delinquent person was punishable as follows:

Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than \$500.00, or if such person was at the time of the said offense a sexually delinquent person, *may be punishable* by imprisonment in the state prison for an indeterminate term, the minimum of which *shall be* 1 day and the maximum of which *shall be* life. [MCL 750.335a; 1952 PA 73 (emphasis added)].

In 2005, the Legislature amended MCL 750.335a, changing the language from “may be punishable” to “is punishable” and added sub-sections:

- (1) A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.
- (2) A person who violates subsection (1) is guilty of a crime, as follows:
 - (a) Except as provided in subdivision (b) or (c), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than \$1,000.00, or both.
 - (b) If the person was fondling his or her genitals, pubic area, buttocks, or, if the person is female, breasts, while violating

subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

(c) If the person was at the time of the violation a sexually delinquent person, the violation *is punishable* by imprisonment for an indeterminate term, the minimum of which *is* 1 day and the maximum of which is life. [MCL 750.335a; 2005 PA 300 (emphasis added)].

As the *Arnold* Court pointed out, the 2005 amendment to MCL 750.335a was “merely stylistic” and intended to improve readability. *Arnold*, 520 Mich 479, 482, n. 20. “All signs point to the 2005 amendment adding only the aggravated indecent-exposure offense and making no substantive changes to the ‘1 day to life’ alternative sentence.” *Arnold*, 520 Mich at 480. This amendment had no effect on whether MCL 750.335a(2)(c) is an enumerated felony. It is not.

Given the *Arnold* Court’s interpretation of sexual delinquency as developed through case law over the decades, indecent exposure by a sexually delinquent person cannot be a distinct felony “enumerated” in the Penal Code. Preserving the portion of MCL 777.16q listing MCL 750.335a(2)(c) as an enumerated felony would be inconsistent with what the appellate courts have held in *Winford*, *Helzer*, *Kelly*, *Craig*, *Franklin*, and *Arnold*—that sexual delinquency is not a crime; it is an alternative sentence. Sexual delinquency is not an enumerated felony and as a sentence alternative, it cannot attach to a predicate offense to create a new felony; the inclusion of MCL 750.335a(2)(c) in MCL 777.16q is erroneous and must be severed.

The Court of Appeals seems to agree that sexual delinquency is not a stand-alone offense, but it is not persuaded that matters. Instead, the court found it

persuasive that in “enacting the legislative sentencing guidelines, it is presumed that the Legislature was aware of the existence of the sexual delinquency sentencing scheme.” *Arnold*, __ Mich App __; slip op at 7. The court reasons that because the Legislature knew about MCL 750.335a when it enacted the guidelines, it intended for indecent exposure by a sexually delinquent person to be an enumerated felony within the guidelines. *Id.*

That may be so. But it only makes Mr. Arnold’s argument stronger. The enactment of the guidelines turned the sexually delinquent person sentencing scheme on its head. According to the Court of Appeals, it made an illegal sentence legal. It got rid of a more lenient sentencing option and replaced it with a life maximum sentencing option under the guidelines. And it contradicted the intent of the Legislature to give judges less control of a person’s prison term. Just because the Legislature may have known what it was doing when it enacted the sentencing guidelines, does not mean that what it did was constitutional. It was not.

- ii. *The Legislature may not amend or revise a very specific provision of the Penal Code simply by passing a different statute (which mischaracterizes the Penal Code) in the Code of Criminal Procedure.*

The portion of MCL 777.16q listing MCL 750.335a(2)(c) as a felony subject to sentencing as a Class A offense under the guidelines, cannot live in harmony with the intent, purpose, and history of the sexually delinquent person statutory scheme. As this Court pointed out, “at least until the adoption of the sentencing guidelines, no sentence on the Class A sentencing grid would even have been legal for a judge to

impose on a sexually delinquent person who was found guilty of indecent exposure.”
Arnold, 502 Mich at 477.

This prompted this Court to suggest the Court of Appeals on remand consider whether “the sentencing guidelines [act as] an amendment (or repeal) of inconsistent provisions of the Penal Code by implication such that the guidelines control? If so, are there any constitutional problems with such an arrangement; for example, does it comport with Const 1963, art 4, § 25?”

If MCL 750.335a(2)(c) is an enumerated felony subject to sentencing under the guidelines because of its inclusion in MCL 777.16q, then the sentencing guidelines have functioned as an unconstitutional revision, amendment, or repeal of MCL 750.335a. Prior to the guidelines, indecent exposure by a sexually delinquent person was punishable by (a) up to 1 year in jail or (b) 1 day to life. After the guidelines, according to the Court of Appeals, the offense is punishable by (a) a maximum of life under the sentencing guidelines or (b) 1 day to life. Such a sweeping revision to MCL 750.335a, simply by including it by reference in MCL 777.16q is unconstitutional.

The Michigan Constitution prohibits revising, altering, or amending other statutes by implication:

No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length. [Const 1963, art 4, § 25].

This constitutional provision exists to prevent the enactment of misleading and confusing legislation that purports only to make small changes in the law, but which has bigger effects:

An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent. [*People v Blount*, 87 Mich App 501, 504 (1978), citing Advisory Opinion re Constitutionality of 1972 P.A. 294, 389 Mich 441, 208 (1973), citing Justice Cooley in *People v Mahaney*, 13 Mich 481, 497 (1865).]

While at first blush it may appear that MCL 777.16q purports to merely list and refer by reference to felonies already enumerated in the Penal Code, in effect, the statute does much more than that. It takes a sentence alternative (sexual delinquency), attaches it to a predicate offense (indecent exposure), creates a new Class A felony, takes away a sentencing option, and replaces it with a more severe option. In doing so, it creates the “mischief designed to be remedied” by Const 1963, art 4, § 25. *Id.*

Assuming for the sake of argument that the sentencing guidelines did not exist at the time of Mr. Arnold’s sentencing, the trial court would have had the discretion to impose (1) a sentence with a maximum of 2 years, a fine, or both, or (2) the alternative sentence of 1 day to life. MCL 750.335a. *Arnold*, 502 Mich at 468-472. Consistent with *Arnold’s* holding, it is undisputed those would have been *the only* permissible incarceration sentences for this conviction (prior to the adoption of the guidelines). *Id.* at 482-483.

The enactment of the guidelines drastically expanded those sentencing options to allow sentences that are inconsistent with MCL 750.335a and that would have otherwise been invalid. Under the guidelines, indecent exposure by a sexually delinquent person would be subject to a minimum term of anywhere from 21 months to 900 months to life. MCL 777.16q; MCL 777.62. In effect, this renders the 1 day to life penalty provision “modifiable,” which is contrary to the Court’s decision in *Arnold*. The imposition of an inflexible term of years sentence is antithetical to the purpose of the 1 day to life provision, which “was to create a *different* sentencing option, one in which the judge *gave up* control over the amount of time the defendant served.” *Arnold*, 502 Mich at 471. Allowing a court to impose a sentence of 25 to 70 years under the guidelines defeats the purpose of the sexually delinquent person legislation. It gives the judge increased control over the time an individual would serve in prison before eligible for release, compared to that of a 1 day to life sentence.

The sexually delinquent person legislation was designed as an alternate sentencing scheme that would “preclud[e] a fixed sentence.” *Arnold*, 502 Mich at 453 citing *Helzer*, 404 Mich at 420-421. Under the guidelines, the sentence would be fixed. This Court encouraged the Court of Appeals to consider on remand whether the enactment of the guidelines could make legal a sentence that would otherwise have been illegal prior to the enactment of the guidelines. The answer is no.

Not only does MCL 777.16q purport to make an illegal sentence legal, but with one sentence (“This chapter applies to the following felonies enumerated in chapter 750 of the Michigan Compiled Laws”), it seemingly undoes decades of history, intent,

and purpose behind the sexually delinquent person legislation and dismantles the case law interpreting the legislation. This is exactly the type of “mischief” the Michigan Constitution sought to prevent in article 4, § 25.

The Court of Appeals concluded there was no constitutional problem here because the “legislative sentencing guidelines do not amend or change the language of the Penal Code, specifically MCL 750.335a.” *Arnold*, __ Mich App at __; slip op at 12. Further, the “statutory provisions at issue, MCL 750.335a and MCL 777.16q, are independent and complete and do not necessitate reference to another statute to ascertain their meaning.” *Id.* This analysis is flawed.

The language of the statute may not have changed after the enactment of the guidelines, but the sentencing options sure did. No longer is the penalty prescribed in the statute (up to 2 years imprisonment and/or a fine) an available sentencing option for Mr. Arnold. Instead, the guidelines apply or 1 day to life applies. The sentencing guidelines might not change the language of MCL 750.335a, but under the Court of Appeals’ holding, it changes the *effect* of the language of the statute.

The Court of Appeals’ contention that MCL 750.335a and MCL 777.16q are “independent and complete” and do not require “reference to another statute to ascertain their meaning” is also false. MCL 777.16q literally refers the reader back over to the Penal Code: “This chapter applies to the following felonies enumerated in chapter 750 of the Michigan Compiled Laws.” As to, MCL 750.335a, according to the plain language, a 25 to 70 year sentence is not authorized by the statute. The statute says the offense is punishable by up to 2 years imprisonment or 1 day to life. It is only

by referencing the Code of Criminal Procedure that a 25 to 70 year sentence becomes a possibility.

If the Legislature wishes to expand the range of available sentencing options for indecent exposure by a sexually delinquent person, it must amend MCL 750.335a(2)(c). Const 1963, art 4, § 25. It cannot expand those options simply by passing an inconsistent statute. But that is exactly what it did when it passed MCL 777.16q and listed MCL 750.335a(2)(c) as a felony under the guidelines. The Legislature is not permitted to revise MCL 750.335a(2)(c) by reference through MCL 777.16q and this Court should find such a revision unconstitutional.

- iii. *The rule of lenity applies and requires this Court to apply the law in favor of Mr. Arnold and declare the sentencing guidelines an invalid sentencing option.*

This Court suggested the Court of Appeals consider whether the rule of lenity is implicated. *Arnold*, 502 Mich at 482, n. 20. “The ‘rule of lenity’ provides that courts should mitigate punishment when the punishment in a criminal statute is unclear.” *People v Denio*, 454 Mich 691, 699 (1997), citing *People v Jahner*, 433 Mich 490, 499-500 (1989). “The rule of lenity applies only if the statute is ambiguous or ‘in absence of any firm indication of legislative intent.’” *People v Johnson*, 302 Mich App 450, 462 (2013). The rule of lenity is a “tie-breaking canon[] of statutory interpretation” that does “not apply unless . . . seemingly conflicting statutes are in fact ambiguous.” *People v Hall*, 499 Mich 446, 458, 464 (2016).

If there is ever a situation where the rule of lenity should apply, it is here. Ambiguity abounds between MCL 750.335a(2)(c) and MCL 777.16q. These statutes

are 67 and 21 years old, respectively, and their interplay is still not settled. The Court of Appeals has issued 3 opinions in this case on the same sentencing issue, each with a different result. The effect of the interaction between the statutes here is ambiguous and triggers the rule of lenity. *Hall*, 499 Mich 446 (2016).

Prior to the enactment of the sentencing guidelines, the trial court had discretion to sentence a sexually delinquent person to the penalty prescribed by the underlying offense, which at that time was up to 1 year in jail. *Arnold*, 502 Mich at 482-483. Mr. Arnold was convicted of conduct that, before the guidelines, could have been punishable by up to 2 years imprisonment. Here, the Court of Appeals took away that option and replaced it with a worse, more severe option that was never contemplated when the sexual delinquency statutes were enacted—sentencing under the guidelines with a life maximum. The Court of Appeals has switched out one sentencing option and replaced it with a life maximum option, without clear legislative intent. This contravenes the rule of lenity.

The Court of Appeals determined the sentencing guidelines apply to Mr. Arnold's sentencing options. For Mr. Arnold, this could result in a prison term of 25 to 70 years. Programming within the Michigan Department of Corrections is prioritized based on a prisoner's earliest release date. Mr. Arnold's earliest release date is not until January 23, 2038.

If the guidelines were not applicable, Mr. Arnold would have been subject to only a maximum prison term of 2 years or the alternative prison sentence of 1 day to life. Both options are more lenient than the 25 to 70-year sentence he has received. If

he were resentenced to 1 day to life, he would become immediately eligible for parole and for programming, classes, and treatment. That approach satisfies the purpose and reason the sexually delinquent person statute was enacted. *Arnold*, 502 Mich at 471. The rule of lenity requires a finding that the sentencing guidelines do not apply in this case.

Summary and Relief Requested

This Court should find that the adoption of the 1998 sentencing guidelines did not change the available sentencing options for a person convicted of indecent exposure by a sexually delinquent person. Mr. Arnold is entitled to resentencing where the trial court should be instructed to choose a sentence of: (1) a maximum of 2 years, a fine of no more than \$2,000, or both, or (2) a term of 1 day to life.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Marilena David-Martin

BY: _____
MARILENA DAVID-MARTIN (P73175)
Deputy Director
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833
mdavid@sado.org

Dated: August 6, 2019