

**State of Michigan
In the Supreme Court**

Lonnie James Arnold,
Defendant-Appellant,

SC No. 160046

v.

COA No. 325407

People of State of Michigan,
Plaintiff-Appellee.

Monroe County Circuit Court
Case No. 13-040406-FH

Filed under AO 2019-6

**Appellant Lonnie James Arnold's
Brief on Appeal
— Oral Argument Requested —**

Marilena David-Martin (P73175)
State Appellate Defender Office
645 Griswold, Suite 3300
Detroit, MI 48226
313-420-2926
mdavid@sado.org

Counsel for Lonnie James Arnold

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Statement of the Questions Involved

First Question:

Is indecent exposure by a sexually delinquent person an alternate sentence option, rather than an enumerated or distinct felony?

Appellant answers: Yes.

Court of Appeals answered: No.

Second Question:

By labeling MCL 750.335a(2)(c) a felony, does MCL 777.16q function as an unconstitutional repeal of the entire sexually delinquent person statutory scheme?

Appellant answers: Yes.

Court of Appeals answered: No.

Third Question:

Does the rule of lenity apply to protect Mr. Arnold against increased punishment under the sentencing guidelines?

Appellant answers: Yes.

Court of Appeals answered: No.

Statement of Facts

Lonnie Arnold is serving a 25-to-70-year sentence for masturbating in an elevator. As of today, he has served approximately 7 years in prison. He will first become eligible for parole in 2038, when he is 70 years old.

For the past 6 years, the subject of Mr. Arnold's appeal has centered on the validity of his sentence.

The Charge

In 2013, Mr. Arnold was charged with aggravated indecent exposure, MCL 750.335a(2)(b), and indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c). (1a-2a). The prosecutor alleged Mr. Arnold was a sexually delinquent person because of guilty plea convictions that occurred a decade prior to the instant offense—a 2002 misdemeanor of indecent exposure and a 2003 felony of gross indecency between a male and female. (Confidential Presentence Investigation Report (PSIR) provided under separate cover, p. 9); MCL 750.10a.

Aggravated indecent exposure is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000, or both. MCL 750.335a(2)(b). But, “[i]f 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(2)(c). The same statutory subsection containing this sentencing provision is listed as a Class A felony offense under the purview of the sentencing guidelines. MCL 769.34(2); MCL 777.16q.

Mr. Arnold was also charged with being a fourth habitual offender. MCL 769.12.

The Conviction

Mr. Arnold's trial was bifurcated with the aggravated indecent exposure trial held on November 4 and 5, 2013 and the sexually delinquent person portion of the trial held on November 6 and 7, 2013. The prosecution's theory was that Mr. Arnold masturbated in front of a

library employee while the two of them were on the elevator, and that Mr. Arnold's history of similar transgressions proved he was a sexually delinquent person. The defense theory was that the library employee was fabricating the offense because Mr. Arnold refused her request to supply her with Vicodin, and that she had knowledge of his prior offenses, which she used against him to concoct this fabrication.

Mr. Arnold was found guilty of aggravated indecent exposure and of being a sexually delinquent person. (3a-4a).¹

The Sentence

At sentencing, Mr. Arnold objected to the use of the guidelines and argued that the appropriate prison sentence for his conviction was 1-day-to-life under the express provision of MCL 750.335a(2)(c). (11a). The trial court rejected that it had the authority to impose such a sentence and stated that "if I did that one day to life, DOC would write to me and say I cannot sentence him to life. They would say you have to set a maximum because I've had that happen on other cases already." (11a). Trial counsel noted that there may be a "conflict between MDOC . . . and the statute," but pointed out that the penalty provision of MCL 750.335a(2)(c) had not been overturned by case law and that the 1-day-to-life penalty provision was valid and expressly applicable to Mr. Arnold. (11a).

The trial court countered that, "I have to give him a tail. I can't just say life because DOC will write to me and say you can't do that. There's a statute on it that says that." (11a). Mr. Arnold's sentencing guideline range under the Class A sentencing grid was 135 to 450 months. (24a); The court sentenced Mr. Arnold to 25 to 70 years imprisonment as a habitual fourth offender for indecent exposure by a sexually delinquent person. (16a).

¹ On appeal, the aggravated indecent exposure conviction and sentence was vacated as a violation of double jeopardy. *People v Lonnie James Arnold*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2016 (Docket No. 325407).

Procedural Facts

On appeal in 2015, Mr. Arnold challenged his sentence on various grounds, including the invalid application of the sentencing guidelines to his offense. He argued that 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 guidelines yielded to 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 that 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 that Mr. Arnold was entitled to a *Crosby*² remand so the trial court could articulate whether it would have sentenced him under the guidelines or under the 1-day-to-life sentence provision if it had known that the guidelines were merely advisory. *Id.*

Mr. Arnold filed a Motion for Reconsideration, arguing that the court's reliance on *Buehler II* was misplaced because *Buehler II* analyzed a previous version of MCL 750.335a(2)(c) that was 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

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

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 with the Court of Appeals 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 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. This 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 delved deeply into the history and purpose of sexual delinquency legislation and found that sexual delinquency was originally conceived as a mental illness that required treatment and flexibility rather than a fixed sentence. *People v Arnold*, 502 Mich 438, 453 (2018) (*Arnold I*) citing *People v Helzer*, 404 Mich 410, 420-421 (1978), overruled on other grounds by *People v Breidenbach*, 489 Mich 1 (2011).

This history and legislative intent formed the basis of this Court's unanimous opinion with 4 key holdings: (1) 1-day-to-life is an “alternate”

sentencing option “alongside and not to the exclusion of other available options,” (2) the) 1-day-to-life term is non-modifiable, (3) a) 1-day-to-life sentence is an exception to the indeterminate sentencing statute’s ban on “life tails,” and (4) the 2005 amendment to the indecent exposure statute was “merely stylistic, and had no effect on the meaning of the statute.” *Arnold I*, 502 Mich 438. This Court did not speak to whether the other available sentencing options included a guideline sentence.

This Court overruled *People v Butler*, 465 Mich 940 (2001) and *People v Campbell*, 316 Mich App 279 (2016), disavowed *People v Buehler*, 477 Mich 18 (2007) (*Buehler III*) and *People v Murphy*, 203 Mich App 738 (1994), and embraced *People v Kelly*, 186 Mich App 524 (1990). In light of the new legal landscape, this Court asked the Court of Appeals on remand to consider “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 I*, 502 Mich at 483. As construed by *Arnold*, 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: jail, and/or a fine, or a prison term of 1-day-to-life. *Id.* at 451-452, 482-483.³ 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.

This Court asked the Court of Appeals to determine whether the enactment of the sentencing guidelines in 1998 changed the available sentencing options for a sexually delinquent person. *Id.* at 481. It was left “to the parties and the Court of Appeals to decide what questions must be addressed to resolve that issue.” *Id.* at 481-482, n 20. This Court proposed several “questions that may be helpful” to these legal questions:

- “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

³ Probation may also have been a sentencing option but was and is not an issue directly before this Court. *Id.* at 481, n 19.

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?)”

- “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?)”
- “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?”
- “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* [286 Mich 51 (1938)] and *Boulanger* [295 Mich 152 (1940)], dealing with the first Goodrich Act, relevant to answering these questions, or distinguishable?”
- “Is the rule of lenity implicated? See *People v. Hall*, 499 Mich. 446, 458 n. 38, 884 N.W.2d 561 (2016).”

Arnold I, 502 Mich at 481-482, n 20.

On June 11, 2019, the Court of Appeals issued a published decision with 4 holdings: (1) MCL 750.335a(2)(c) can be harmonized with MCL 777.16q because both provide alternate sentencing options; (2) there are only two sentencing options following a conviction of MCL 750.335a(2)(c): 1-day-to-life or a sentence within the sentencing guidelines; (3) the rule of lenity is inapplicable because there is no ambiguity when “the Legislature clearly intended to include indecent exposure by a sexually delinquent person as an offense within both the Penal Code and the Code of Criminal Procedure”; and (4) “MCL 750.335a and MCL 777.16q, are independent and complete and do not necessitate reference to another statute to ascertain their meaning,” so there is no violation of Const 1963, art 4, sect. 25. *People v Arnold (On Remand)*, 328 Mich App 592, 611-615 (2019) (*Arnold I*).

Mr. Arnold filed an application for leave to appeal arguing that MCL 750.335a(2)(c) was a sentencing option, not a felony, and that the enactment of the sentencing guidelines did not change the sentencing options as they existed prior to the guidelines. Mr. Arnold argued that MCL 777.16q violates Const. 1963, art 4, sect. 25 as an unconstitutional repeal of MCL 750.335a(2)(c), and that because ambiguity abounds, the rule of lenity should apply in favor of Mr. Arnold. The prosecutor did not file an answer.

This Court granted Mr. Arnold’s application for leave to appeal and asked the parties to address:

- (1) whether indecent exposure by a sexually delinquent person is a distinct felony “enumerated” in the Michigan Penal Code and subject to the sentencing guidelines, or whether the offense is subject to the sentencing guidelines regardless because it is set forth in MCL 777.16q as a listed felony; (2) whether, when the legislative sentencing guidelines provide for a penalty that is inconsistent with the penalty provided in the Penal Code for an offense, the sentencing guidelines are an amendment or repeal of inconsistent provisions of the Penal Code by implication such that the guidelines control, and if so, whether this comports with Const 1963, art 4, § 25; and (3) whether the

rule of lenity is implicated, see *People v Hall*, 499 Mich 446, 458 n 38 (2016).

Summary of the Argument

A person convicted of indecent exposure is guilty of a misdemeanor punishable by imprisonment of up to 1 year, or 2 years if the exposure involved a fondling. If the indecent exposure is committed by a sexually delinquent person, there is a second sentencing option of 1-day-to-life. This alternate sentence of 1-day-to-life is part of a larger sexual delinquency statutory scheme that the Legislature enacted to provide therapeutic, flexible, and open-ended treatment for people found to be sexually delinquent.

In 1998, when the Legislature enacted the sentencing guidelines, it listed indecent exposure by a sexually delinquent person as a Class A felony subject to sentencing under the guidelines. This act is invalid and unconstitutional because it functions as a repeal of the intent, purpose, and plain language of sexual delinquency legislation.

Since 2015, the question for Mr. Arnold on appeal has been: what can he be sentenced to? In *People v Arnold*, 502 Mich 438 (2018) (*Arnold I*), this Court nearly answered that question, but remanded to the Court of Appeals for final consideration.

On remand, the Court of Appeals got it wrong, holding that the only sentencing options for Mr. Arnold included (a) 1-day-to-life or (2) a sentence under the guidelines. A nonmodifiable 1-day-to-life sentence cannot live in harmony alongside a sentence under the guidelines as the two are irreconcilable. *Arnold I*, 502 Mich at 453.

This Court should hold that the options for sentencing Mr. Arnold include (a) a sentence for the principal offense (in this case, a maximum of two years), or (b) a 1-day-to-life sentence. This outcome is consistent with the findings of *Arnold I*, the intent and purpose behind the sexual delinquency legislation, and the Michigan Constitution.

Legal Standard

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

Argument

- I. Indecent exposure by a sexually delinquent person is an alternate sentence option, not an enumerated or distinct felony.**
- A. Sexual delinquency is part of a larger statutory scheme enacted and intended to provide a nonmodifiable, therapeutic, and open-ended alternative sentence option.**

“The sexually-delinquent-person scheme dates back to a series of statutes adopted in 1952.” *People v Arnold*, 502 Mich 438, 453 (2018) (*Arnold I*). The unified statutory scheme includes three components: (1) the definition of a sexually delinquent person, MCL 750.10a; (2) the procedure for charging, defending, and sentencing a sexually delinquent person, MCL 767.61a; and (3) the principal offenses eligible for a finding of sexual delinquency, MCL 750.158, MCL 750.335a, and MCL 750.338, *et al. Arnold I*, 502 at 447-448. “[T]he basic functioning of the sexual-delinquency scheme is that certain sex offenses are identified as being eligible for different treatment if the defendant is accused and convicted of having been a ‘sexually delinquent person’ at the time of the offense.” *Id.* at 465.

A sexually delinquent person is defined in pertinent part as “any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others.” MCL 750.10a. A person can be charged as being a sexually delinquent person in connection with only five principal offenses: “(1) sodomy, MCL 750.158, (2) indecent exposure, and (3) gross indecency between (a) two males, MCL 750.338, (b) two females, MCL 750.338a, or (c) between a male and a female, MCL 750.338b.” *Arnold I*, 502 Mich at 464-465. Sexual delinquency was originally conceived as a mental illness that required treatment and flexibility rather than a fixed sentence. *Id.* at 453 citing *People v Helzer*, 404 Mich 410, 420-421 (1978), overruled on other grounds by *People v Breidenbach*, 489 Mich 1 (2011).

To ensure flexibility, the Legislature authorized a nonmodifiable 1-day-to-life alternate sentence option for sexually delinquent persons

convicted of a principal charge:

In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. . . Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense. [MCL 767.61a; 1952 PA 234; See also MCL 750.158; MCL 750.338, *et al.*, MCL 750.335a(2)(c) (each principal offense statute authorizes an alternate 1-day-to-life sentence).]

Courts interpreting the sexually delinquent person statutory scheme have been clear and consistent: 1-day-to-life is an alternative sentence provision for the principal offense; it is not a separate offense. In *People v Winford*, 404 Mich 400, 408 (1978), this Court held that “a charge of sexual delinquency is totally dependent for its prosecution upon conviction of the principal offense” and that “the penalty for conviction of sexual delinquency represents an alternate form of sentencing.” *Winford*, 404 Mich at 408, n 10.

In *People v Helzer*, 404 Mich 410, 417 (1978), this Court held that “sexual delinquency is a matter of sentencing, unrelated to proof of the principal charge. No additional element of ‘sexual delinquency’ need be proven in order to convict on the principal charge.” Further, sexual delinquency is “a separate, alternate form of sentencing” and is “an alternate sentencing provision tied to a larger statutory scheme.” *Id.* at 419.

In *People v Kelly*, 186 Mich App 524, 528 (1990), the Court of Appeals reached the same conclusion. In *People v Franklin*, 298 Mich App 539, 547 (2012), the Court of Appeals held that “sexual delinquency is not an actual element of that offense. Rather, a finding of sexual delinquency merely allows for an enhancement of the sentence for the indecent exposure offense.” (Cf. *Helzer*, 404 Mich at 419, finding sexual

delinquency to be more than “a simple penalty enhancement.”)

In *Arnold I*, this Court held that a 1-day-to-life sentence was a non-mandatory, alternative sentence option. *Arnold I*, 502 Mich at 466. A finding of sexual delinquency creates an alternative sentencing scheme that allows for a sentence of 1-day-to-life if the individual is first convicted of the principal offense. *Id.* at 464-465, 449; MCL 767.61a. A person convicted of the principal offense as a sexually delinquent person can also be sentenced with the penalty authorized for the principal offense. *Id.* at 453-454 citing *Helzer*, 404 Mich at 420-421. This is consistent with the intent of the sexual delinquency legislation to provide an “additional method of disposition in a particular case” alongside other available sentences. *Id.* at 468, citing Governor’s Commission Report, p. 137.

This Court recognized that the “history of sexual delinquency legislation clearly indicates the Legislature’s intent to create a comprehensive, unified statutory scheme . . . enacted to provide an alternate sentence for certain specific sexual offenses where evidence appeared to justify a more flexible form of incarceration.” *Id.* at 447 quoting *Winford*, 404 Mich at 405-406 (1978). Punishment is not the purpose of sexual delinquency legislation. The nonmodifiable 1-day-to-life optional sentence is the “separate, alternate form of sentencing” that allows for flexibility and treatment. *Id.* at 571, citing *Helzer*, 404 Mich at 419.

B. The plain language and structure of the indecent exposure statute following its 2005 amendment shows the Legislature’s continued intent to treat indecent exposure by a sexually delinquent person as an alternate sentence option rather than a distinct offense.

At the time of its enactment, the indecent exposure statute read 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.]

In 2005, the Legislature amended MCL 750.335a to read as follows:

(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)].

In *Arnold I*, this Court considered whether the amendment to the *language* of the statute was meaningful and concluded it was not:

When adopted, it said that a sexually delinquent person who committed indecent exposure “*may be punishable ... for an indeterminate term, the minimum of which shall be*

1 day and the maximum of which *shall be life*.” 1952 PA 73. After 2005 PA 300, it now says that indecent exposure by a sexually delinquent person “*is* punishable ... for an indeterminate term, the minimum of which *is* 1 day and the maximum of which *is* life.” In our view, this change in wording has no effect on the meaning of the statute and is merely stylistic.

* * *

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.” [*Id.* at 479-480.]

Mr. Arnold takes no issue with this Court’s finding that the change in language to “is” was immaterial.

This Court should, however, recognize the significance of the reorganization of MCL 750.335a into subsections and the Legislature’s intentional use of language in each subsection. The reorganization demonstrates the Legislature’s intent that the 1-day-to-life provision remain an alternative sentence option, rather than a separate offense.

In subsection (2)(a), the Legislature specified that a person who violates subsection (1) “*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.” (Emphasis added.) In subsection (2)(b), the Legislature created a new misdemeanor offense (aggravated indecent exposure) and specified that a person who was fondling while violating subsection (1) “*is guilty of a misdemeanor* punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.000, or both.” (Emphasis added.) In both subsections, the Legislature penalizes conduct it expressly labeled “a misdemeanor.”

The Legislature treated subsection (2)(c) very differently. MCL 750.335a(2)(c) states in full: “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.” The violation referred to here is

indecent exposure, the principal offense. MCL 750.335a(1). This subsection dictates that if an individual was a sexually delinquent person at the time he committed an indecent exposure, then the indecent exposure may be punished by 1-day-to-life. This is consistent with the history of sexual delinquency legislation creating an alternate sentence option for sexually delinquent persons who commit specified principal offenses. See MCL 767.61a, *Winford, Helzer, Kelly, and Arnold I.*

The Legislature knows how to specify or create new, separate crimes because it did so in (2)(a) and (2)(b) and has done so in hundreds of other statutes where it regularly and expressly creates and identifies offenses. If the Legislature had intended for indecent exposure by a sexually delinquent person to be a distinct offense, it would have tracked the language it used in (2)(a) and (2)(b) to do just that. For example, the Legislature could have said: “If the person was at the time of the violation a sexually delinquent person, *the person is guilty of a felony* punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life.” But the Legislature did not do so.

The 2005 amendment to MCL 750.335a shows the Legislature’s continued intent to preserve the purpose of sexual delinquency as an alternate sentence option, not a separate offense, never mind a felony. See *People v Allen*, 499 Mich 307, 330 (2016) (Vivano, J., concurring) (recognizing that “the Legislature has clearly demonstrated that it knows how to exclude certain offenses from habitual-offender enhancement,” so its failure to make that exclusion for other offenses is intentional.)

This Court should hold that MCL 750.335a(2)(c) is an alternate form of sentencing for a violation of indecent exposure and is not a separate felony offense.

II. By labeling MCL 750.335a(2)(c) a felony, MCL 777.16q functions as an unconstitutional repeal of the entire sexually delinquent person statutory scheme.

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) (emphasis added).]

MCL 777.16q violates § 25 because it revises the sexually delinquent person statutory scheme by reference only, and because it is not “an act complete in itself.”

A. If MCL 750.335a(2)(c) is a felony subject to the guidelines because of MCL 777.16q, then MCL 777.16q has repealed the entire sexually delinquent person statutory scheme by rendering it null and void.

Prior to the enactment of the sentencing guidelines, punishment for indecent exposure by a sexually delinquent person included: (1) punishment for the principal offense, or (2) the alternate sentence of 1-day-to-life. *Arnold I*, at 482-483; MCL 750.335a.

But, under the guidelines, enacted in 1998, indecent exposure by a sexually delinquent person is listed in MCL 777.16q as a Class A felony subject to the guidelines. See MCL 777.1 – MCL 777.69. MCL 777.16q states: “This chapter applies to the following felonies enumerated in chapter 750 of the Michigan Compiled Laws” and lists MCL 750.335a(2)(c) as a Class A felony with a statutory maximum of “Life.”

While at first blush it may appear that MCL 777.16q merely lists and refers by reference to felonies already enumerated in the Penal Code, in effect, the statute does much more than that. The Court of Appeals found that because of MCL 777.16q, the penalty prescribed in the statute (up to 2 years imprisonment and/or a fine), is no longer an available sentencing option for Mr. Arnold. *Arnold II*, 328 Mich App at 612. Instead, the only options are 1-day-to-life or a sentence within the guidelines. *Id.* 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 II*, 328 Mich App at 615. But that is exactly the problem. The language of MCL 750.335a(2)(c) may not have changed after the enactment of the guidelines, but the sentencing options and purpose behind the statute sure did.

A 1-day-to-life sentence option cannot exist in harmony as an option alongside a sentence under the guidelines. In *Arnold I*, one argument advanced by the prosecutor and Attorney General’s Office was that the only way to square MCL 750.335a(2)(c) with MCL 777.16q was to view the 1-day-to-life sentence as *modifiable*, i.e., encompassing any sentence so long as the minimum was 1 day and the maximum was life.

This Court rejected that argument.

After thoroughly exploring the history and purpose of the sexually delinquent person statutory scheme, this Court held that the 1-day-to-life sentence is *nonmodifiable*; it authorizes a minimum term of 1 day and a maximum term of life, but nothing in-between. *Arnold I*, 502 Mich at 471. “Construing ‘1 day to life’ as being nonmodifiable is also consistent with the history of the sexual-delinquency scheme, which was clearly intended to be therapeutic and open-ended.” *Id.* 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.* The sexually delinquent person legislation was designed as an alternate sentencing scheme that would “preclud[e] a fixed sentence.” *Id.* at 453 citing *Helzer*, 404 Mich at 420-421.

The only type of sentence available under the guidelines is a fixed, modifiable sentence. 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. MCL 777.16q; MCL 777.62. Or, as applied to Mr. Arnold, a sentence of 25 to 70 years. This type of sentence gives the judge increased control over the time an individual would serve in prison before eligible for release, compared to the purpose of a 1-day-to-life sentence. *Arnold*, 502 Mich at 453.

A nonmodifiable 1-day-to-life sentence is irreconcilable with a fixed sentence under the guidelines. Thus, the adoption of the sentencing guidelines effectively repealed the sexually delinquent person statutory scheme, leaving it with no meaning, purpose, or authority.

B. MCL 777.16q is not “an act complete in itself,” and its repeal of MCL 750.335a(2)(c) is therefore unconstitutional.

After finding that MCL 777.16q did not amend MCL 750.335a, the Court of Appeals further held that 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.” *Arnold II*, 328 Mich App at 615. This is 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.”

In *Nalbandian v Progressive Michigan Ins Co*, 267 Mich App 7, 14 (2005), the Court of Appeals considered an amendment by implication issue and whether the enacted statute in question was “an act complete in itself” and thus not subject to Const. 1963, art. 4, § 25. The court identified the following as the standard for whether an act was complete:

The character of an act, whether amendatory or complete in itself, is to be determined [...] by comparison of its provisions with prior laws left in force, and if it is complete on the subject with which it deals it will not be subject to the constitutional objection, but if it attempts to amend the old law by intermingling new and different provisions with the old ones or by adding new provisions, the law on that subject must be regarded as amendatory of the old law and the law amended must be inserted at length in the new act. [*Nalbandian*, 267 Mich App at 15, *citing* Potter, J., dissenting in *People v Stimer*, 248 Mich 272, 293 (1929), leave to appeal denied in *Nalbandian v Progressive Michigan Ins Co*, 474 Mich 1019 (2006).]

The court held that the vehicle code was not an act complete in itself where it amended an “existing comprehensive statutory scheme” of the insurance code:

Under this analysis, 1987 PA 154 was not an “act complete in itself.” The subject matter of the contested vehicle code § 628(11), the imposition of insurance eligibility points, is not addressed comprehensively within 1987 PA 154.6. Instead, vehicle code § 628(11) is a piecemeal amendment to an existing comprehensive statutory scheme regarding insurance eligibility points and speed limit infractions. 1987 PA 154 “attempt[ed] to amend the old law by intermingling new and different provisions with the old ones” found in the Insurance Code. Thus, 1987 PA 154 was not an act complete in itself, and Const. 1963, art. 4, § 25 applied to its enactment. [*Nalbandian*, 267 Mich App at 15-

16, *citing Alan v Wayne Co*, 388 Mich 210, 281 (1972) (internal citations omitted).]

Here, MCL 777.16q revises, alters, or amends by reference the operation and purpose of MCL 750.335a(2)(c) and the sexually delinquent person statutory scheme. By reference only, MCL 777.16q seemingly undoes decades of history, intent, plain language, and purpose behind the sexually delinquent person legislation and dismantles the case law interpreting the legislation.

With one sentence, (“This chapter applies to the following felonies enumerated in chapter 750 of the Michigan Compiled Laws”), MCL 777.16q does the following: takes a sentence alternative aimed at treatment (sexual delinquency), attaches it to a predicate offense (indecent exposure), creates a new Class A felony aimed at punishment rather than treatment, takes away a sentencing option (punishment for the principal offense), and replaces it with a sentence option that was previously illegal. All of this is accomplished by one sentence and by a single reference to MCL 750.335a(2)(c). See *Arnold II*, 328 Mich App 592. This is exactly the type of “mischief” the Michigan Constitution sought to prevent through Const 1963, art 4, § 25. *Id.*

If the Legislature wishes to eliminate or change the available sentencing options for indecent exposure by a sexually delinquent person, and make it a felony, it must amend MCL 750.335a(2)(c). Const 1963, art 4, § 25. As this Court stated in *Alan*, 388 Mich at 285, “[i]f a bill under consideration is intended whether directly or indirectly to Revise, alter, or amend the operation of previous statutes, then the Constitution, unless and until appropriately amended, requires that the Legislature do in fact what it intends to do by operation.” Here, the Legislature cannot dismantle the sexually delinquent person statutory scheme 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 to protect Mr. Arnold against increased punishment under the sentencing guidelines.

“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 could apply, it is here. Ambiguity abounds in the interaction between MCL 750.335a(2)(c) and MCL 777.16q. These statutes are 68 and 22 years old, respectively, and their interplay is still unsettled. The Court of Appeals has issued 3 opinions in this case on the same sentencing issue, each with a different result. In *Arnold I*, this Court overruled several cases that missed the point, purpose, and significance of sexual delinquency legislation when analyzing the sentencing options over decades. The effect of the interaction between the statutes here is ambiguous and triggers the rule of lenity.

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. *Arnold I*, 502 Mich at 482-483. 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 intent behind the sexually delinquent person statute. *Arnold I*, 502 Mich at 471.

Here, the Court of Appeals determined that the sentencing guidelines apply to Mr. Arnold and that he is no longer eligible for a sentence for the principal offense. A sentence under the guidelines for Mr. Arnold is a worse, more severe sentence than what was contemplated when the sexual delinquency statutes were enacted.

This violates the rule of lenity, which in the context of sentencing, “means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.” *People v Sawyer*, 410 Mich 531, 536 (1981), quoting *Ladner v United States*, 358 US 169, 178, (1958), quoting *Whalen v United States*, 445 US 684, 695 n 10 (1980).

The rule of lenity requires a finding that Mr. Arnold cannot be sentenced under the sentencing guidelines.

Conclusion and Relief Requested

This Court should reach the following holdings: (1) that indecent exposure by a sexually delinquent person is not punishable by the sentencing guidelines; (2) that MCL 750.335a(2)(c) is a sentence alternative, not an offense; (3) that the portion of MCL 777.16q listing MCL 750.335a(2)(c) as a Class A felony by reference is inoperable; (4) that the portion of MCL 777.16q listing MCL 750.335a(2)(c) as a Class A felony by reference is an unconstitutional repeal of MCL 750.335a(2)(c) and the sexual delinquency statutory scheme in violation of Const 1963, art. 4, § 25.

This Court should further hold that Mr. Arnold is entitled to resentencing where the trial court has two sentencing options: (1) a sentence of up to 2 years imprisonment and/or a fine, or (2) a sentence of 1-day-to-life.

Respectfully submitted,

State Appellate Defender Office

/s/ Marilena David-Martin (P73175)

645 Griswold, Suite 3300

Detroit, MI 48226

313-420-2926

mdavid@sado.org

Counsel for Lonnie James Arnold

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Certificate of Compliance

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/s/ Marilena David-Martin (P73175)
State Appellate Defender Office
645 Griswold, Suite 3300
Detroit, MI 48226
313-420-2926
mdavid@sado.org