STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION February 13, 2014
v	No. 310649 Oakland Circuit Court
RAHIM OMARKHAN LOCKRIDGE, Defendant-Appellant.	LC No. 2011-238930-FC

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

BECKERING, J. (*concurring*)

I concur with the result reached by my colleagues that defendant is not entitled to resentencing. I am required to reach this conclusion, in part, by this Court's recent decision in *People v Herron*, ___Mich App___; ___NW2d___ (Docket No. 309320, issued December 12, 2013). In *Herron*, this Court rejected defendant's argument that on the basis of *Alleyne v United States*, 570 US___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), judicial factfinding required by Michigan's sentencing guidelines to determine a minimum term of an indeterminate sentence violates the Sixth and Fourteenth Amendments of the United States Constitution. *Herron*, slip op at 3-7. *Herron* is binding on this Court and must be followed in this case. See MCR 7.215(J)(1).

I write separately because I disagree with this Court's holding in *Herron*. In *Alleyne*, 133 S Ct at 2155, the Supreme Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." Precedent from the United States Supreme Court dictates that the guidelines range within which a sentencing court in Michigan is required to fix a minimum term of imprisonment is itself a legally prescribed mandatory minimum. Further, the mandatory minimum permissible for purposes of *Alleyne* is the guidelines range as determined solely on the basis of a defendant's criminal history and the facts reflected in the jury's verdict or admitted by the defendant. Because Michigan's sentencing scheme requires trial courts to engage in factfinding to determine the guidelines range within which the court must fix a minimum term of imprisonment, facts that are neither found by a jury nor admitted by a defendant increase, by law, the minimum term of imprisonment to which a defendant is exposed and, thus, the penalty. *Alleyne* prohibits this and, therefore, renders Michigan's indeterminate sentencing scheme unconstitutional. See *Alleyne*, 133 S Ct at 2155, 2160-2162. As a remedy, I would make the sentencing guidelines in Michigan advisory as the United States Supreme Court

did with the federal sentencing guidelines in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

I. *APPRENDI* AND ITS PROGENY

A. *APPRENDI*

In *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States Supreme Court announced the now well-established rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The defendant in *Apprendi* pleaded guilty to, among other things, one count of second-degree possession of a firearm for an unlawful purpose, which by statute was punishable by imprisonment for "between five years and 10 years." *Id.* at 468-469 (quotation omitted). However, the state of New Jersey's statutory "hate crime" law provided for an extended term of imprisonment of between 10 and 20 years for second-degree offenses if the trial court found by a preponderance of the evidence that the defendant "in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* (quotation omitted). At an evidentiary hearing held after the defendant's plea, the trial court found by a preponderance of the evidence that the defendant acted with a purpose to intimidate as provided by the hate-crime statute; thus, the court applied the hate-crime enhancement to sentence the defendant to a 12-year term of imprisonment for the possession conviction. *Id.* at 471.

The Supreme Court held that New Jersey's practice of enhancing a defendant's sentence on the basis of judicial factfinding under the hate-crime statute was unconstitutional. *Id.* at 491-492, 497. The Court explained that except for the fact of a prior conviction, '"[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. It is equally clear that such facts must be established by proof beyond a reasonable doubt."' *Id.* at 490, quoting *Jones v United States*, 526 US 227, 252-253; 119 S Ct 1215; 143 L Ed 2d 311 (1999) (STEVENS, J., concurring). The Court opined that the fact of intimidation contained in the hate-crime statute was "the functional equivalent of an element of a greater offense" than the offense the defendant pleaded guilty to. See *id.* at 494 n 19. The Court emphasized that "merely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." *Id.* at 495. The Court distinguished "sentencing factors" from "elements," explaining that sentencing factors are "a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Id.* (emphasis in original). The Court stressed that it is permissible "for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Id.* at 481 (emphasis in original).

B. *HARRIS*

In *Harris v United States*, 536 US 545, 555, 568; 122 S Ct 2406; 153 L Ed 2d 524 (2002), the Supreme Court distinguished facts increasing a defendant's mandatory minimum sentence from facts extending a sentence beyond the statutory maximum; the Court limited the application of *Apprendi* to factual findings that increase the statutory maximum sentence. The trial court in *Harris* found the defendant guilty of violating various federal drug and firearms laws for when he sold illegal narcotics out of his pawnshop with an unconcealed semiautomatic pistol at his side. *Id.* at 550. One of the various statutes under which the defendant was convicted, 18 USC 924(c)(1)(A), provided as follows:

> "[A]ny person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
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> "(i) be sentenced to a term of imprisonment of not less than 5 years;
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> "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
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> "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." [*Harris*, 536 US at 550-551, quoting 18 USC 924(c)(1)(A)(i)-(iii).]

Although the indictment did not mention brandishing or subsection (ii), the trial court at the defendant's sentencing hearing found by a preponderance of the evidence that the defendant had brandished a firearm, so the court sentenced the defendant to seven years' imprisonment. *Id.* at 551.

The Supreme Court upheld the defendant's sentence, concluding "that, as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense. The statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." *Id.* at 556. In upholding the defendant's sentence, the Court reaffirmed its prior decision in *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986), where the Court "sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm." *Id.* at 550, 568.

C. *BLAKELY*

In *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004) (emphasis in original), the Supreme Court clarified the "statutory maximum" for *Apprendi* purposes, explaining that it is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" The defendant had pleaded guilty to second-degree kidnapping, a class B felony, involving domestic violence and use of a firearm. *Id.* at 298-299. Washington law provided for a maximum sentence of 120 months' imprisonment for a class B felony. *Id.* at 299. Significantly, Washington's Sentencing Reform

Act further limited the range of sentence for the defendant's conviction of second-degree kidnapping with a firearm, providing a "standard range" of 49 to 53 months' imprisonment. *Id.* However, the act also permitted a judge to "impose a sentence above the standard range if he finds substantial and compelling reasons justifying an exceptional sentence"; the act provided an illustrative list of aggravating factors; an exceptional sentence could not be on the basis of a factor already considered when computing the standard range. *Id.* The trial court in *Blakely* sentenced the defendant to 90 months' imprisonment, 37 months above the standard maximum, after finding that the defendant acted with "deliberate cruelty," which was a statutorily enumerated ground for departure. *Id.* at 300.

The Supreme Court held that the state of Washington's sentencing procedure violated the Sixth Amendment and that the defendant's sentence was invalid. *Id.* at 305. The Court rejected the state of Washington's argument that there was no *Apprendi* violation because the statutory maximum was 10 years for class B felonies, explaining that the "statutory maximum" for *Apprendi* purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original). The Court emphasized that the trial court did not have the authority to impose the exceptional 90-month sentence because a finding of deliberate cruelty was neither made by a jury nor admitted by the defendant. See *id.* at 303-304. The law only allowed a maximum sentence of 53 months' imprisonment for the crime to which the defendant confessed. See *id.* at 303, 313.

D. *BOOKER*

In *Booker*, 543 US at 226, the Supreme Court, in two opinions, held that the Sixth Amendment as construed in *Apprendi* and *Blakely* applies to the federal sentencing guidelines and, to ensure the guidelines' compliance with the Sixth Amendment, invalidated two provisions of the Sentencing Reform Act of 1984 that effectively made the guidelines mandatory. Defendant Booker was charged with possession with intent to distribute at least 50 grams of crack. *Id.* at 226. After evidence was presented at trial that Booker possessed 92.5 grams of crack, a jury convicted him of violating 21 USC 841(a)(1), which provided for a minimum sentence of 10 years' imprisonment and a maximum sentence of life imprisonment. *Id.* Solely on the basis of the facts found by the jury and Booker's criminal history, the federal sentencing guidelines provided for a "base" sentence of "not less than 210 nor more than 262 months in prison." *Id.* However, the trial court held a post-trial sentencing hearing and found by a preponderance of the evidence that Booker both possessed an additional 566 grams of crack and obstructed justice. *Id.* Mandatory application of the sentencing guidelines using these judicially found facts required the trial court to select a sentence between 360 months and life imprisonment; the court sentenced Booker to 30 years' (i.e., 360 months') imprisonment. *Id.* The United States Court of Appeals for the Seventh Circuit held that Booker's sentence violated the Sixth Amendment and remanded to the trial court to either sentence Booker within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury. *Id.* at 228.

The Supreme Court affirmed and remanded the case, instructing the trial court to impose a sentence in accordance with its opinion. *Id.* at 267. The Court reaffirmed its holding in *Apprendi* that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict

must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244. The Court held that *Apprendi* and its progeny applied to the federal sentencing guidelines, opining that there was not a distinction of constitutional significance between the federal sentencing guidelines and the state of Washington's procedures at issue in *Blakely*—both systems were mandatory and imposed binding requirements on sentencing courts.[1] *Id.* at 229, 233. The Court explained that "just as in *Blakely*, 'the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.'" *Id.* at 235, quoting *Blakely*, 542 US at 305. Specific to Booker's sentence, the Court opined:

> The jury convicted him of possessing at least 50 grams of crack in violation of 21 U.S.C. § 841(b)(1)(A)(iii) based on evidence that he had 92.5 grams of crack in his duffel bag. Under these facts, the Guidelines specified an offense level of 32, which, given the defendant's criminal history category, authorized a sentence of 210–to–262 months. See USSG § 2D1.1(c)(4). Booker's is a run-of-the-mill drug case, and does not present any factors that were inadequately considered by the Commission. The sentencing judge would therefore have been reversed had he not imposed a sentence within the level 32 Guidelines range.
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> Booker's actual sentence, however, was 360 months, almost 10 years longer than the Guidelines range supported by the jury verdict alone. To reach this sentence, the judge found facts beyond those found by the jury: namely, that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely*, the jury's verdict alone does not authorize the sentence. [*Id.* at 235 (internal quotation marks omitted).]

The Court opined that if the federal sentencing guidelines could be read as advisory provisions recommending, rather than requiring, the selection of a particular sentence in response to a set of particular facts, use of the guidelines would not implicate the Sixth Amendment. *Id.* at 233. In such a case, a sentencing court would be exercising discretion to impose a sentence within a statutory range. See *id.* "[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Id.* The Supreme Court explained that the availability of a departure from the guidelines range did not foreclose an *Apprendi* violation:

> The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. The Guidelines permit departures from the prescribed sentencing range in cases in which the judge "finds

[1] Subsection (a) of the sentencing statute, 18 USC 3553, listed the sentencing guidelines as one factor to consider when imposing a sentence, but subsection (b) provided that "the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific limited cases." *Booker*, 543 US at 233-234, quoting 18 USC 3553(b) (emphasis added in *Booker*).

> 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." At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. [*Id.* at 234 (internal citation omitted).]

As a remedy to ensure the guidelines' compliance with the Sixth Amendment, the Supreme Court severed and excised two provisions from the sentencing act: (1) the provision requiring sentencing courts to impose a sentence within the applicable guidelines range (in the absence of circumstances justifying a departure), 18 USC 3553(b)(1), and (2) the provision setting standards of review on appeal, 18 USC 3742(e). *Id.* at 245, 259, 265. The Court opined that without these two provisions, the remainder of the federal sentencing act satisfied constitutional requirements. *Id.* at 259. The Court stated that trial courts, "while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at 264. In the future, appellate courts would review sentencing decisions for unreasonableness. *Id.* The Court opined that the advisory nature of the sentencing guidelines, "while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-265.

E. *ALLEYNE*

In *Alleyne* 133 S Ct at 2155, the Supreme Court overruled *Harris* and held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." Just as in *Harris*, *Alleyne* involved a defendant convicted of using or carrying a firearm in relation to a crime of violence, 18 USC 924(c)(1)(A), which provided for a mandatory minimum sentence of five years under subsection (i) but a mandatory minimum sentence of seven years under subsection (ii) if the firearm was brandished. *Id.* at 2155-2156. Although the jury's verdict form did not indicate a finding that the defendant brandished a firearm, the trial court found by a preponderance of the evidence that the firearm was brandished. *Id.* at 2156. The court concluded that brandishing was a sentencing factor under *Harris* and sentenced the defendant to seven years' imprisonment. *Id.*

The Supreme Court held that the defendant's sentence on the basis of the court's finding of brandishing violated the defendant's Sixth Amendment rights. *Id.* at 2163-2164. In so holding, the Court reaffirmed the rule of *Apprendi*: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Id.* at 2155. The Court concluded that "[w]hile *Harris* limited *Apprendi* to facts increasing the statutory maximum, the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." *Id.* at 2160. The Court explained the basis for this conclusion as follows:

> It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed. . . . And because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.
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> It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime. Indeed, criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty. . . . A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense.
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> Moreover, it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment. Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's expected punishment has increased as a result of the narrowed range and the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish.
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> In adopting a contrary conclusion, *Harris* relied on the fact that the 7–year minimum sentence could have been imposed with or without a judicial finding of brandishing, because the jury's finding already authorized a sentence of five years to life. The dissent repeats this argument today. While undoubtedly true, this fact is beside the point.
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> As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. [*Id.* at 2160-2162 (internal citations and quotation marks omitted and emphasis in original).]

The Court took care to distinguish judicial factfinding that "both alters the legally prescribed range *and* does so in a way that aggravates the penalty" from "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" *Id.* at 2161 n 2, quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 2d 1337 (1949). The Court emphasized:

> Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e.g.*, *Dillon v. United States*, 560 U.S.___, ___, 130 S. Ct. 2683, 2692, 177 L. Ed. 2d 271 (2010) ("[W]ithin established limits[,] . . . the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal

> quotation marks omitted)); *Apprendi*, 530 U.S., at 481, 120 S. Ct. 2348 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute").
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> "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Apprendi*, *supra*, at 519, 120 S.Ct. 2348 (THOMAS, J., concurring). Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law. [*Id.* at 2163.]

Applying these principles to the case before it, the Court concluded that the defendant's Sixth Amendment rights were violated. *Id.* at 2163-2164. The Court explained that "the sentencing range supported by the jury's verdict was five years' imprisonment to life." *Id.* at 2163. The trial court's imposition of the 7–year mandatory minimum sentence on the basis of its finding of brandishing "increased the penalty to which the defendant was subjected"; thus, the fact of brandishing was an element that had to be found by the jury beyond a reasonable doubt. *Id.* The Court remanded the case for resentencing consistent with the jury's verdict. *Id.* at 2164.

II. MICHIGAN'S SENTENCING SCHEME

"Michigan has an indeterminate sentencing scheme." *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007). "[I]n all but a few cases, a sentence imposed in Michigan is an indeterminate sentence."[2] *People v Drohan*, 475 Mich 140, 161; 715 NW2d 778 (2006). In other words, a defendant is given a sentence with a minimum and a maximum. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). "The maximum sentence is not determined by the trial court, but rather is set by law." *Drohan*, 475 Mich at 161; see also MCL 769.8(1). "Michigan's sentencing laws clearly require that the maximum portion of every indeterminate sentence be no less than the 'maximum penalty provided by law . . . .'" *People v Harper*, 479 Mich 599, 621-622; 739 NW2d 523 (2007), quoting MCL 769.8(1). A trial court is prohibited from imposing a sentence that is greater than the statutory maximum.[3] *Drohan*, 475

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[2] Determinate sentences are required for first-degree murder, MCL 750.316 (life in prison without the possibility of parole), and carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b (two years in prison for the first conviction, five years for the second conviction, and ten years for a third or subsequent conviction). See also *McCuller*, 479 Mich at 683 n 9.

[3] "[T]he statutory maximum sentence is subject to enhancement based on Michigan's habitual offender act, MCL 769.12." *Drohan*, 475 Mich at 162 n 13. "Thus, the statutory maximum sentence of a defendant who is convicted of being an habitual offender is as provided in the habitual offender statute, rather than the statute he or she was convicted of offending." *Id.*

Mich at 161. Michigan's sentencing guidelines create a range within which the sentencing court *must* set the *minimum* sentence. *McCuller*, 479 Mich at 683; see also MCL 769.8; MCL 769.34(2). The sentencing court determines the range by considering together "the defendant's record of prior convictions (the PRV score), the facts surrounding his crime (the OV score), and the legislatively designated offense class." *Harper*, 479 Mich at 616; see also MCL 777.21(1). "Generally, once the sentencing court calculates the defendant's guidelines range, it must . . . impose a minimum sentence within that range." *McCuller*, 479 Mich at 684-685, citing MCL 769.34(2).

A court may depart from the appropriate guidelines sentence range if it has "a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A court is prohibited from departing on the basis of "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). "[T]he Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). The guidelines provide that a "court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence." MCL 769.34(2)(b). "While the sentencing judge fixes the minimum portion of a defendant's indeterminate sentence, a defendant is still liable to serve his maximum sentence and may only be released before the maximum term has expired at the discretion of the parole board." *Harper*, 479 Mich at 613.

In several cases decided before the United States Supreme Court's decision in *Alleyne*, the Michigan Supreme Court addressed the effect of *Apprendi* and its progeny on Michigan's indeterminate sentencing system. First in *Claypool*, the Court stated in a footnote that the holding in *Blakely* does not affect Michigan's indeterminate sentencing system. *Claypool*, 470 Mich at 730 n 14. The *Claypool* Court explained that *Blakely* involved a determinate sentencing system and that the *Blakely* Court made clear that its decision "did not affect indeterminate sentencing systems." *Id.*

Later in *Drohan*, the Court reaffirmed its statement in *Claypool* that '"the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment."' *Drohan*, 475 Mich at 164, quoting *Claypool*, 470 Mich at 730 n 14. In holding that this state's indeterminate sentencing scheme does not violate the Sixth Amendment, the *Drohan* Court, relying on *Blakely*, explained that "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict." *Id.* at 159, citing *Blakely*, 542 US at 308-309. "Thus, the trial court's power to impose a sentence is always derived from the jury's verdict, because the 'maximum-minimum' sentence will always fall within the range authorized by the jury's verdict." *Id.* at 162. The Court emphasized that "the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum. . . . As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially

ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 164.

Finally in the companion cases of *McCuller* and *Harper*, the Court reaffirmed its holding in *Drohan* that Michigan's indeterminate sentencing scheme is valid under *Blakely*. *McCuller*, 479 Mich at 683; *Harper*, 479 Mich at 615. In *McCuller*, the Court explained that

> "[u]pon conviction, a defendant is legally entitled only to the statutory maximum sentence for the crime involved. A defendant has no legal right to expect any lesser *maximum* sentence. . . . Thus, a sentencing court does not violate *Blakely* principles by engaging in judicial fact-finding to score the OVs to calculate the recommended *minimum* sentence range . . . . The sentencing court's factual findings do not elevate the defendant's maximum sentence, but merely determine the defendant's recommended minimum sentence range . . . . [*McCuller*, 479 Mich at 689-690.]

Additionally, the Supreme Court held that an intermediate sanction[4] is not a maximum sentence governed by *Blakely* for which the facts supporting a departure must be found by a jury beyond a reasonable doubt or admitted by the defendant. *Harper*, 479 Mich at 603. Rather, it is a conditional limit on incarceration and a matter of legislative leniency, "giving a defendant the opportunity to be incarcerated for a period that is *less* than that authorized by the jury verdict or the guilty plea, a circumstance that does not implicate *Blakely*." *Id.* at 604; see also *McCuller*, 479 Mich at 677-678.

These decisions of our Supreme Court addressing the effect of *Apprendi* and its progeny on Michigan's indeterminate sentencing system predate *Alleyne*. As such, the Court's holding that this state's sentencing scheme is constitutionally sound was made without the benefit of the *Alleyne* Court's ruling that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Alleyne*, 133 S Ct at 2155. Instead, the basis for the Court's decision was limited to *Harris*—now overruled by *Alleyne*—and *Blakely*, which together stood for the principle that a sentencing court does not run afoul of the Constitution by engaging in factfinding to determine the minimum term of a defendant's indeterminate sentence unless the factfinding increases the statutory maximum sentence to which the defendant had a legal right. *McCuller*, 479 Mich at 682 & n 8. Because *Alleyne* now requires a court to consider whether judicial factfinding increases a legally prescribed minimum, as opposed to looking solely to whether such factfinding increases the legally prescribed maximum, to assess the validity of a sentencing scheme, a reassessment of the validity of Michigan's indeterminate sentencing system

[4] "If the upper limit of the minimum sentence range is 18 months or less, . . . the cell containing the range is an 'intermediate sanction cell.'" *Harper*, 479 Mich at 617. "A defendant falling within an intermediate sanction cell must be sentenced, absent a substantial and compelling reason for departure, to an intermediate sanction that does not include a prison term." *McCuller*, 479 Mich at 676 n 1, citing MCL 769.34(4)(a).

is necessary, despite our Supreme Court's previous decisions addressing the effect of *Apprendi* and its progeny on Michigan's scheme.

III. *HERRON* & THE EFFECT OF *ALLEYNE* ON MICHIGAN'S SENTENCING SCHEME

Recently in *Herron*, a panel of this Court held that the judicial factfinding required by Michigan's sentencing scheme for the determination of the minimum term of an indeterminate sentence range does not violate the Sixth and Fourteenth Amendments of the United States Constitution. *Herron*, slip op at 3-7. The *Herron* panel reached its conclusion primarily on three grounds, none of which justifies the panel's holding.

First, the panel opined that "[t]he statutes defendant was convicted of violating do not provide for a *mandatory minimum* sentence on the basis of any judicial fact-finding." *Id.* at 6. Although true, the panel's identification of this fact that distinguishes *Herron* from *Alleyne* is constitutionally insignificant in light of *Blakely* and *Booker*. Both *Blakely* and *Booker* involved statutes that imposed maximum sentences for the crimes for which the defendants were convicted: 120 months' imprisonment in *Blakely* and life imprisonment in *Booker*. But the Supreme Court in these cases did not view these as the statutory maximums for *Apprendi* purposes; instead, the Court focused on the maximum sentence that the law would allow in each case solely on the basis of the facts reflected in the jury's verdict or admitted by the defendant. In both cases, the relevant statutory maximum was dictated by the application of statutory guidelines to determine a sentence range: a "standard range" of 49 to 53 months solely on the basis of the facts admitted by the defendant in *Blakely* and a "base" federal guidelines range of 210 to 262 months solely on the basis of the facts found by the jury and the defendant's criminal history in *Booker*. In *Blakely*, the Court held that it was unconstitutional to depart from the "standard range" and impose a sentence above 53 months, i.e., the maximum sentence permitted by law under *Apprendi*, on the basis of judicial factfinding. Similarly in *Booker*, the Court held that although required by the mandatory application of the federal sentencing guidelines, it was unconstitutional to use judicially found facts to score the guidelines and, thus, come to a sentence range not supported by the jury verdict alone. As in *Blakely* and *Booker*, Michigan's sentencing scheme provides for the mandatory application of statutory guidelines to determine a sentence range, within which a sentencing court is required to fix a sentence. As can be gleaned from *Blakely* and *Booker*, the essential constitutional inquiry is not whether a statute the defendant has been convicted of violating contains a maximum or minimum sentence but, rather, how statutorily required judicial factfinding is being used in relation to the application of sentencing guidelines.

Second, the *Herron* panel emphasized that "judicial fact-finding in scoring the sentencing guidelines . . . does not establish a mandatory minimum." *Herron*, slip op at 6. In light of *Blakely* and *Booker*, I must disagree. Again, the *Blakely* Court concluded that the statutory maximum permitted by law under *Apprendi* in the case before it was 53 months—the ceiling of the "standard range" of 49 to 53 months determined through the application of sentencing guidelines solely on the basis of the facts admitted by the defendant. In *Booker*, the Court determined that the maximum sentence authorized by law for *Apprendi* purposes was the ceiling of the sentence range authorized by the federal sentencing guidelines solely on the basis of the facts found by the jury and Booker's criminal history: 262 months imprisonment. As in *Blakely* and *Booker*, the sentencing guidelines in Michigan create a range within which the sentencing

court must fix a sentence. The sentence that must be fixed is the minimum sentence. Thus, Michigan's sentencing guidelines establish a mandatory minimum. The mandatory minimum is the guidelines range itself because the range is a sentencing range prescribed by law within which a sentencing court is required to fix a minimum sentence.

Admittedly, the nature of the floor and the ceiling of the guidelines range under Michigan's sentencing scheme differ from those at issue in *Blakely* and *Booker*. In *Blakely* and *Booker*, the floor of the guidelines range represented the legally prescribed minimum, and the ceiling represented the legally prescribed maximum. In contrast, the floor of the guidelines range in Michigan is the lowest minimum sentence a court can impose, and the ceiling is the maximum minimum sentence a court can impose. Yet, this difference does not change the following facts: Michigan's guidelines range is a sentencing range prescribed by law, the ceiling and floor of the range are legally prescribed limits to a minimum sentence that can be imposed, and a minimum sentence falling within the guidelines range is mandatory. Both the floor and the ceiling of the sentencing range define the legally prescribed minimum. Cf. *Alleyne*, 133 S Ct at 2160 ("Indeed, criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty.").

Significantly, the availability of a departure does not extinguish the "mandatory" nature of the guidelines range. As previously discussed, the Court stated the following in *Booker*:

> The availability of a departure in specified circumstances does not avoid the constitutional issue . . . . [D]epartures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. [*Booker*, 543 US at 234.]

The same can be said of departures in Michigan. Departures in Michigan are not available in every case. Indeed, it is well established that the Legislature intended "substantial and compelling reasons" justifying a departure to exist only in "exceptional cases." *Fields*, 448 Mich at 68. Generally, a court must impose a minimum sentence within the guidelines range absent substantial and compelling reasons for a departure. *McCuller*, 479 Mich at 684-685.

Third, the *Herron* panel views judicial factfinding under Michigan's sentencing guidelines as falling within the wide discretion afforded to a sentencing judge identified as constitutionally permissible in *Apprendi* and its progeny. *Herron*, slip op at 7. I do not agree. To be sure, the United States Supreme Court has repeatedly emphasized that it is permissible for judges to exercise discretion to select a sentence *within a range authorized by law*. See, e.g., *Alleyne*, 133 S Ct at 2163 ("Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law."); *Apprendi*, 530 US at 481 (explaining that it is permissible "for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute."); *Booker*, 543 US at 233 ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."). In doing so, a sentencing court may consider various sentencing factors, which the Court in *Apprendi* defined as "a circumstance,

which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Apprendi*, 530 US at 495 (emphasis in original). But this simply is not what a sentencing court is doing when it engages in factfinding to determine the guidelines range for a minimum sentence.

Michigan's sentencing scheme *requires* a sentencing court to engage in factfinding by scoring the OVs to determine the applicable guidelines range for a minimum sentence. When a sentencing court in Michigan engages in such factfinding, it is not finding facts in the exercise of its discretion to select a sentence within a range authorized by law. Rather, it is finding facts to determine a sentence range authorized by law. '"[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things."' *Alleyne*, 133 S Ct at 2163, quoting *Apprendi*, 530 US at 519 (THOMAS, J., concurring). By engaging in the factfinding required by Michigan's sentencing guidelines, a sentencing court is doing the former. Only after the applicable guidelines range for a minimum sentence has been established on the basis of judicially found facts does a sentencing court then exercise discretion, i.e., the discretion to select a minimum sentence within the guidelines range.

Accordingly, I disagree with the basis for the *Herron* panel's conclusion that the judicial factfinding required by Michigan's sentencing scheme does not violate the Sixth and Fourteenth Amendments of the United States Constitution. I conclude that it does. Under *Apprendi* and its progeny, the mandatory minimum in Michigan is the guidelines range itself; and the mandatory minimum permissible for purposes of *Alleyne* is the guidelines range as determined solely on the basis of a defendant's criminal history and the facts reflected in the jury's verdict or admitted by the defendant. See *Blakely*, 542 US at 298-300, 303-304, 313; *Booker*, 543 US at 226, 235. Yet, Michigan's sentencing scheme requires trial courts to engage in factfinding to determine the guidelines range within which they must fix a minimum term of imprisonment; as a result, facts not found by a jury or admitted by a defendant are used to increase the mandatory minimum, which is a component of the penalty; *Alleyne* prohibits this and, therefore, renders Michigan's indeterminate sentencing scheme unconstitutional. See *Alleyne*, 133 S Ct at 2155, 2160-2162.

Given this conclusion, I must disagree with Judge Shapiro's view that "[i]n our sentencing system, . . . it is only the bottom of the range that presents an *Alleyne* Sixth Amendment problem." Contrary to Judge Shapiro's assertion in his concurrence, I do not conclude "that the top end of the applicable Michigan guideline's range constitutes a 'mandatory maximum.'" I wholeheartedly agree with Judge Shapiro that "the upper end of the Michigan guidelines has absolutely no bearing on the maximum term of imprisonment to be imposed, as that is set by statute. And at the same time, it does not set a minimum term above which the court must sentence." The upper end of the Michigan guidelines does, however, have a significant bearing on the minimum term of imprisonment to be imposed, which, contrary to Judge Shapiro, I find to be of Sixth Amendment import. When a trial court in Michigan engages in factfinding to score the guidelines, both the floor and the ceiling of the sentencing range increase. An increase of the ceiling enhances the maximum minimum sentence a court can impose. This undeniably increases the penalty; as the Supreme Court emphasized in *Alleyne*, "both the floor and ceiling of sentence ranges . . . define the legally prescribed penalty." *Id.* at 2160.

This increase in penalty is best shown by illustration. Suppose a defendant's criminal history and facts found by a jury produced an appropriate Michigan guidelines range of 42 to 70 months' imprisonment. However, after engaging in statutorily required factfinding, the appropriate guidelines range becomes 51 to 85 months' imprisonment, and the court imposes a minimum term of imprisonment of 85 months. Because of the judicial factfinding, the maximum possible minimum sentence to which the defendant was exposed increased from 70 months to 85 months. See, generally, *Apprendi*, 530 US at 490 ("It 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."). Indeed, the court imposed a minimum sentence that it could not have imposed without judicial factfinding. The defendant's minimum sentence clearly became more severe—the penalty indisputably increased. But, most significantly, the 85-month minimum sentence was not authorized by the jury as it did not fall within the 42 to 70 month range that the jury authorized. As the Supreme Court so plainly yet emphatically put it in *Blakely*, and then again in *Booker*, "the jury's verdict alone does not authorize the sentence." *Blakely*, 542 US at 305; *Booker*, 543 US at 235. This is the Sixth Amendment import. Therefore, although Judge Shapiro correctly recognizes that the United States Supreme Court has not expressly extended its Sixth Amendment jurisprudence so as to bar judicial factfinding that is statutorily required to determine a "maximum minimum," I believe such factfinding is constitutionally invalid under the principles articulated in *Apprendi* and its progeny.

In *Booker*, 543 US at 246, the Supreme Court considered two potential remedies to the invalidity of the federal sentencing guidelines: (1) retain the sentencing scheme as written and engraft the Sixth Amendment jury-trial requirement into the scheme or (2) make the guidelines advisory. The Court chose the latter approach. *Id.* In rejecting the former as incompatible with the Sentencing Reform Act, the Court explained that shifting the fact-finding role for sentencing from a court to a jury would eliminate the use of a presentence report containing factual information uncovered after trial that is relevant to sentencing; it would result in a trial reflecting less completely the real conduct underlying the offense and, thus, weakening the vital link between an offender's real conduct and the sentence; and it would undermine the legislative goal of ensuring uniformity in sentencing. *Id.* at 250-254. Further, the Court emphasized that reading the jury requirement into the federal sentencing system would create a variety of complex issues, beginning with the allegations in the indictment and spilling into the trial itself, raising various concerns about the remedy's workability. *Id.* at 254-255.

These same concerns exist when considering what remedy should be adopted to ensure that Michigan's sentencing scheme passes constitutional muster. I would adopt an approach in line with *Booker* that makes the guidelines in Michigan advisory. Under such an approach, a sentencing court must still determine the appropriate guidelines range as provided in MCL 777.21 for purposes of fixing a minimum term of an indeterminate sentence as provided in MCL 769.8(1). The preparation and use of a presentence investigation report remains to assist the court. See, generally, MCL 771.14. The court must then consider the appropriate guidelines range as an aid; however, it will no longer be required under MCL 769.34(2) to impose a minimum sentence within the appropriate guidelines range. Like the federal sentencing guidelines, the purpose of the Michigan sentencing guidelines is to promote uniformity and consistency in sentencing. *Booker*, 543 US at 250, 253; *People v Peltola*, 489 Mich 174, 189 n 30; 803 NW2d 140 (2011); see also MCL 769.34(2)-(3). Additional purposes include "elimination of certain inappropriate sentencing considerations" and "encouragement of the use

of sanctions other than incarceration in the state prison system." *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003); see also MCL 769.34(3)-(4). Making the guidelines advisory, although not what our Legislature intended, furthers these goals.

In sum, I believe that *Herron* was wrongly decided. Under *Apprendi* and its progeny, which now includes *Alleyne*, the judicial factfinding required by Michigan's sentencing guidelines to determine a guidelines range within which a sentencing court must fix a minimum term of imprisonment violates the Sixth and Fourteenth Amendments of the United States Constitution. As a remedy, I would make the sentencing guidelines in Michigan advisory as the United States Supreme Court did with the federal sentencing guidelines in *Booker*. However, notwithstanding my disagreement with the decision in *Herron*, *Herron* is binding on this Court and must be followed in this case. See MCR 7.215(J)(1). Therefore, I must concur with the result reached by my colleagues that defendant is not entitled to resentencing.

/s/ Jane M. Beckering