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.

SHAPIRO, J. (*concurring*)

I concur with the lead opinion's conclusions that the trial court did not abuse its discretion by departing upward from defendant's sentencing guidelines range and that defendant's presentence investigation report (PSIR) must be corrected on remand. I write separately because, like Judge Beckering, I believe that the analysis in *People v Herron*, __ Mich App __; __ NW2d __ (Docket No. 309320, issued December 12, 2013) does not comport with the constitutional mandate of *Alleyne v United States*, __ US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013). *Alleyne* explicitly bars judicial fact-finding that results in an increased mandatory minimum sentence, i.e. a sentencing "floor," and it does so whether that mandatory minimum is defined within the statutory offense or by applicable statutory sentencing guidelines.

In *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), the United States Supreme Court held that the Sixth Amendment bars the use of judicial fact-finding that results in an increase in the maximum term of the sentence that may be imposed on a defendant. In other words, the "ceiling" applicable to a defendant's sentence may not be increased as a result of judicial fact-finding. However, as the Michigan Supreme Court noted in *People v Drohan*, 475 Mich 140, 161-162; 715 NW2d 778 (2006) and *People v McCuller*, 479 Mich 672, 677-678; 739 NW2d 563 (2007), under Michigan's sentencing system, the maximum term is fixed by statute and cannot be affected by judicial fact-finding. Accordingly, because the Michigan guidelines do not set maximum terms of incarceration, these cases held that the guidelines were not subject to a Sixth Amendment challenge. This was surely the case under the controlling federal caselaw. Indeed, the only United States Supreme Court decision that addressed the Sixth Amendment's application to mandatory minimum terms at that time was *Harris v United States*, 536 US 546, 568; 122 S Ct 2406; 153 L Ed 2d 524 (2002) (Kennedy, J.), in which the Court specifically held

that the setting of a mandatory minimum through the use of judicial fact-finding "does not evade the requirements of the . . . Sixth Amendment[]."

This situation was, however, wholly altered by the Court's 2013 decision in *Alleyne*, which unequivocally held that that the Sixth Amendment is violated when judicial fact-finding is used to set a mandatory minimum. Indeed, *Alleyne* explicitly stated that "*Harris* is overruled" and went on to hold that "*any fact that increases the mandatory minimum* is an 'element' that must be submitted to the jury." 133 S Ct at 2155 (emphasis added). It is difficult to imagine language more definitive. *Alleyne* further concluded in absolute terms: "It is *impossible* to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id*. at 2160 (emphasis added).[1]

Nevertheless, *Herron* concluded that the low end of a Michigan guidelines range is not "a mandatory minimum floor of a sentencing range." *Herron*, slip op at 6. This conclusion is difficult to understand since a trial court is statutorily barred from sentencing a defendant to a lesser term, a circumstance which is the *sine qua non* of a mandatory minimum. *Herron's* best attempt at an explanation is that, while judicial fact-finding may not set a sentencing floor, it may be used "to guide judicial discretion in selecting a punishment within limits fixed by law." *Id*., slip op at 5, quoting *Alleyne*, 133 S Ct at 2161 n 2, quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949) (quotation marks omitted). It is obviously correct that the sentencing judge retains broad discretion to impose a minimum sentence "within the limits fixed by law," however, *Alleyne* makes it absolutely clear that the trial court does not have the authority to *set* those limits based on its own fact-finding.

Moreover, the definition of "mandatory" that must govern our analysis was set forth in *Gall v United States*, 552 US 38; 128 S Ct 586; 169 L Ed 2d 445 (2007). In *Gall*, the federal district court imposed a sentence below the guidelines minimum. *Id*. at 40-41. The Eighth Circuit Court of Appeals reversed, concluding that the grounds for departure from the guidelines were insufficient. *Id*. at 45-46. The United States Supreme Court reversed that decision, holding that if the statute defines a standard or test that must be met in order to depart from the guidelines, the guidelines are still considered mandatory. *Id*. at 46-53; see also *United States v Grossman*, 513 F3d 592, 595 (CA 6, 2008).

The lead opinion in the instant case incorrectly suggests that the only sentencing factors that fall within *Alleyne* are those that are also elements of the crime. Whether a state labels a sentencing factor as an element or a sentencing guideline is irrelevant. The United States Supreme Court has been absolutely clear on this issue:

> "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – *no matter how the State labels it* – must be found by a jury beyond a reasonable doubt." . . . "the characterization of a fact or

[1] As will be discussed below, the fact that departures from the guidelines are permitted under limited circumstances does not alter this analysis. See *Gall v United States*, 552 US 38; 128 S Ct 586; 169 L Ed 2d 445 (2007).

> circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury[.]" [*United States v Booker*, 543 US 220, 231; 125 S Ct 738; 160 L Ed 2d 621 (2005), quoting *Ring v Arizona*, 536 US 584,602-605; 122 S Ct 2428; 153 L Ed 2d 556 (2002) (citations omitted and emphasis supplied).]

The lead opinion asserts that "mandatory" minimum terms are limited to those where the minimum sentence is contained within the criminal statute defining the offense and not to minimum sentencing ranges set by statutory guidelines. The majority's reliance on *People v Wilcox*, 486 Mich 60, 68-69; 781 NW2d 784 (2010) for this proposition is misplaced. That case is, at best, only tangentially related to the question now before us. In *Wilcox*, the statute defining the applicable criminal offense provided for a mandatory five-year minimum sentence. *Id*. at 66; MCL 750.520f(1). The trial court concluded that the statute provided for a minimum sentence of *no less* than five years and imposed a 10-year minimum sentence on the defendant. *Wilcox*, 486 Mich at 63-64. The Michigan Supreme Court reversed, concluding that only a five-year minimum sentence could be imposed. *Id*. at 73. Thus, the Court concluded, the 10-year minimum imposed by the trial court constituted an upward departure from the sentencing guidelines for which the court did not articulate substantial and compelling reasons. *Id*. The Court's analysis was wholly limited to the statutory interpretation of MCL 750.520f(1) and did not address the application of *Blakely* or its progeny to the sentencing guidelines.

While I reject *Herron*, I do not agree with Judge Beckering's conclusion in her concurrence that the top end of the applicable Michigan guideline's range constitutes a "mandatory maximum." First, this proposition was rejected by our Supreme Court in *Drohan*, 475 Mich at 161-162, and *McCuller*, 479 Mich at 677-678. Moreover, the upper end of the guideline range in a particular case does not place a cap on the defendant's period of incarceration. Under our sentencing system, the highest term of incarceration that may be imposed is set exclusively by the statutory maximum for the crime. Judge Beckering refers to the federal guidelines cases as holding that the guideline "range" is constitutionally infirm. However, under the federal system the "range" in question is different than the one in Michigan. Under the federal determinative sentencing scheme, in which a defendant is given a single term rather than a minimum term and a maximum term, the low end of the guideline range represents the least amount of time for which the defendant may be incarcerated. Thus, it has the same function and effect as the low end of the Michigan guideline range. However, the upper end of the federal guidelines represents the maximum term of imprisonment that the defendant may be required to serve. That is not what the upper end of the Michigan guidelines represents. As discussed above and by the Michigan Supreme Court in *Drohan*, 475 Mich at 161-163, 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.

Judge Beckering correctly observes that the upper end of the Michigan guidelines constitute a "maximum-minimum," but there is no case that establishes that category as being of Sixth Amendment import. See *id*. at 162-163; *McCuller*, 479 Mich at 689-691. And, the United States Supreme Court has never applied its Sixth Amendment analysis to a "maximum-minimum," only to "maximums" and "minimums." The top end, or "maximum-minimum" of a Michigan sentencing guidelines range, is a *sui generis* creature. It does not create a mandatory

minimum, as a trial court has full discretion to impose a sentence well below it, so long as that sentence is not below the floor of the guideline range. Further, it has no relevancy to the maximum term of imprisonment. In sum, while it limits a judge's ability to sentence above a certain minimum term, it does not trigger a constitutional issue. While the United States Supreme Court may at some point consider extending its Sixth Amendment jurisprudence so as to bar judicial fact-finding that places a cap on the minimum term that may be imposed, it has not done so to date.

I therefore disagree with Judge Beckering's view that *Alleyne* renders the entirety of Michigan sentencing guidelines constitutionally infirm. *Alleyne* bars judicial fact-finding only to the degree such fact-finding is used to set a sentencing "floor," i.e., a mandatory minimum. In our sentencing system, it is only the bottom of a given guideline range that constitutes a "floor" and so it is only the bottom of the range that presents an *Alleyne* Sixth Amendment problem. The top of a given guideline range does not set a mandatory minimum and thus setting it through judicial fact-finding presents no constitutional impropriety, at least under the present state of the law. Moreover, when finding a portion of an act unconstitutional, courts are required to, when possible, invalidate only the portions of the act necessary to allow it to pass constitutional muster. MCL 8.5; *Blank v Dep't of Corrections*, 462 Mich 103, 122-123; 611 NW2d 530 (2000).

While judicial fact-finding may be constitutionally used to set an upper limit on a minimum term, it may not be constitutionally used to set a lower limit, as that limit constitutes a sentencing "floor" as defined in *Alleyne*. Like Judge Beckering, I would follow the United States Supreme Court's approach to the remedy in such a setting, i.e., by holding that where there is a constitutional infirmity in the guidelines, their application shall be advisory rather than mandatory. However, contrary to Judge Beckering's view, only the lower end of a guidelines range, or "minimum-minimum," constitutes a sentencing "floor" under *Alleyne*, and, therefore, only the lower end of a range need be advisory only. Under this approach, trial judges would continue to score the guidelines based on findings that made under a preponderance of the evidence standard. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Upper limits of the guidelines would remain mandatory, with upward departures permitted only where there are "substantial and compelling" reasons for them. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008); MCL 769.34(3). Downward departures from the lower end of a range would be subject to appellate review for reasonableness. Such an approach does not imply that the lower end of the guidelines should be ignored. As the United States Supreme Court stated, even when not mandatory, trial courts "must consult th[e] [g]uidelines and taken them into account when sentencing." *Booker*, 543 US at 264.

The instant defendant was sentenced to a minimum term of 96 months, well above the mandatory minimum of 43 months set by the low end of the applicable guideline range. The factual findings made by the trial court, therefore, did not prevent defendant from receiving a minimum sentence below that floor. Accordingly, the factual findings made by the trial court did not violate defendant's Sixth Amendment rights and he is not entitled to resentencing.

/s/ Douglas B. Shapiro