

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAHIM OMARKHAN LOCKRIDGE,

Defendant-Appellant.

FOR PUBLICATION
February 13, 2014

No. 310649
Oakland Circuit Court
LC No. 2011-238930-FC

Advance Sheets Version

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*, 303 Mich App 392; 845 NW2d 533 (2013), does not comport with the constitutional mandate of *Alleyne v United States*, 570 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 545, 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 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.” *Alleyne*, 570 US at ___; 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 ___; 133 S Ct 2160 (emphasis added).

Nevertheless, *Herron* concluded that the low end of a Michigan guidelines minimum sentence range is not “a mandatory minimum floor of a sentencing range.” *Herron*, 303 Mich App at 403. This conclusion is difficult to understand since a trial court is statutorily barred from sentencing a defendant to a lesser term, a circumstance that is the *sine qua non* of a mandatory minimum sentence. *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.* at 402, quoting *Alleyne*, 570 US at ___; 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 trial court retains broad discretion to impose a minimum sentence “within limits fixed by law,” but *Alleyne* makes it absolutely clear that the trial court does not have the authority to *set* those limits on the basis of its own fact-finding.

Moreover, the definition of “mandatory” that must govern our analysis was set forth in *Booker*, 543 US at 234. There, the Supreme Court ruled that sentencing guidelines are mandatory when a sentencing court is required to apply them, even if departures may be made in limited circumstances.

Herron suggests that the only sentencing factors that fall within *Alleyne* are those that are also elements of the crime. However, 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.” . . . “[T]he characterization of a fact or circumstance as an ‘element’ or a ‘sentencing factor’ is not determinative of the question ‘who decides,’ judge or jury[.]” [*Booker*, 543 US at 231, quoting *Ring v Arizona*, 536 US 584, 602, 605; 122 S Ct 2428; 153 L Ed 2d 556 (2002) (emphasis added).]

While I reject *Herron*, I do not agree with Judge BECKERING’s conclusion in her concurrence that the top end of the applicable Michigan guidelines 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

guidelines 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 guidelines "range" is constitutionally infirm. However, under the federal system the "range" in question is different than the one in Michigan. Under the federal determinate 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 guidelines 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 guidelines range. However, the upper end of the federal guidelines range 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 earlier 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 constitutes 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 because a trial court has full discretion to impose a sentence well below it, as long as that sentence is not below the floor of the guidelines range. Further, it has no relevancy to the maximum term of imprisonment. In sum, while it limits a court'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 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 that 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 guidelines 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 guidelines 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 ruling a portion of an act unconstitutional, courts are required, when possible, to 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 when 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 courts would continue to score the guidelines on the basis of findings 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 when 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. This 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] Guidelines and taken them into account when sentencing." *Booker*, 543 US at 264.

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 guidelines 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