No. ______________________

______________________

IN THE

SUPREME COURT OF THE UNITED STATES

______________________

ROGER BROWER — PETITIONER
(Your Name)

vs.

STATE OF MICHIGAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Michigan Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Roger Brower #180003
(Your Name)

G. Robert Cotton Correctional Facility
3510 N. Elm Street
Jackson, Michigan 49201-8877
(Address)



Jackson, Michigan 49201-8877
(City, State, Zip Code)

None
(Phone Number)

## QUESTION(S) PRESENTED

BECAUSE OF THE COURT'S RULING IN MONTGOMERY V. LOUISIANA, WHICH SETS THE STANDARDS FOR APPLYING ITS RULINGS RETROACTIVELY, CAN THE COURT'S RULING IN ALLEYNE V. UNITED STATES BE APPLIED RETROACTIVELY TO CASES ON COLLATERAL REVIEW BECAUSE IT HAS A SUBSTANTIVE COMPONENT?

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES



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**CASES** **PAGE NUMBER**

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ ] For cases from **federal courts**: N/A

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "C" to the petition and is

[ ] reported at ______; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Michigan Court of Appeals court appears at Appendix "B" to the petition and is

[ ] reported at ______; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the State trial court appears at Appendix "A". It is unpublished.

## JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

[ ] No petition for rehearing was timely filed in my case. **N/A**

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was 10/03/17.
A copy of that decision appears at Appendix "C".

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. Constitution, Fifth amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### U.S. Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining in his favor, and to have the Assistance of Counsel for his defense.

### U.S. Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

## STATEMENT OF THE CASE

Petitioner was convicted, by way of a guilty plea to second-degree murder, and sentenced to life in prison with the possibility of parole, in 1985.

The mandatory sentencing guidelines at the time of his sentencing, scored by the presentence investigator, and accepted by the state trial judge, set Petitioner's sentencing guidelines at 10 years to life, based on some facts not admitted by Petitioner, and elements of other crimes not committed by Petitioner. Petitioner, on direct appeal, attacked the scoring of his sentencing guidelines based on state law, and a claim of ineffective assistance of trial counsel for failing to object to the claimed misscoring, prior to the Court's ruling in Alleyne and Montgomery.

The Court, on June 17, 2013, issued its ruling in Alleyne v. United States, 577 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). and on January 25, 2016, the Court issued its ruling in Montgomery v. Louisiana, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

Petitioner, based on the Court's Montgomery ruling, on April 26, 2016, filed a successive motion for relief from judgment in the state trial court, pursuant to Michigan Court Rule (M.C.R.) 6.502(G), which permits the filing of a subsequent collateral attack on a sentence, based on a retroactive change in the law. It was Petitioner's claim that because of the standards set forth in Montgomery for determining which of the Court's rulings may be applied retroactively, the Court's ruling of Alleyne could now be applied to him.

The State trial court, on August 25, 2016, issued its "ORDER RETURNING WITHOUT FILING DEFENDANT'S SECOND MOTION FOR RELIEF FROM JUDGMENT" (ORDER), stating that because Montgomery did not present a claim of sentencing guidelines, it did not apply to Petitioner. Under the "CONCLUSION" section of the trial court's "ORDER", it states: "Having considered the issues Defendant raised in Defendant's Second Motion for Relief from Judgment, this Court finds them to be meritless." (Emphasis added). (Appendix "A"). Under Michigan procedures, any time a trial court issues an "ORDER", it is appealable to the Michigan Court of Appeals, whether by right or leave. MCR 7.203(A), or (B), or MCR 7.205.

Petitioner then filed his application for leave to appeal, timely, to the Michigan Court of Appeals. The Chief Judge of that court, on December 21, 2016, issued its "ORDER", stating: "The delayed application for leave to appeal is DISMISSED. No appeal may be taken from the denial or rejection of a successive motion for relief from judgment. MCR 6.502(G)(1)." (Appendix "B").

Petitioner next filed a timely application to the Michigan Supreme Court. That court, on October 3, 2017, issued it "Order" stating that Petitioner's application was "DENIED, because the defendant's motion for relief from judgment is prohibited by MCR 6.502(G)."

Petitioner's presented claim is that because the trial court relied upon facts that Petitioner did not admit, and the trial court concluded that he had committed other crimes, which were not found by a jury beyond a reasonable doubt, and used these to sentence him to a sentence that was outside the mandatory, minimum range proscribed by law, in violation of the Sixth Amendment, as stated in Alleyne.

## REASONS FOR GRANTING THE PETITION

**RELEVANT FACTS THAT PERTAIN TO PETITIONER'S CLAIM THAT ALLEYNE V. UNITED STATES SHOULD BE APPLIED RETROACTIVELY TO HIM, BECAUSE OF THE COURT'S RULING OF MONTGOMERY V. LOUISIANA**

Petitioner, a first time offender, was convicted, by way of a guilty plea, to second-degree murder, and sentenced to life in prison with the possibility of parole, in 1985.

The judicial sentencing guidelines, promulgated by the Michigan Supreme Court, at the time of Petitioner's sentencing, scored by the presentence investigator, and accepted by the state trial court judge, set Petitioner's sentencing guidelines range as 10 years to life, for a first time offender. The scoring of some of Petitioner's guidelines were based on some facts not admitted by Petitioner, and were not elements of the charged offense of second-degree murder, under Michigan law.

Petitioner's attorney, on his direct appeal, attacked the scoring of his sentencing guidelines based on state law at that time, and a claim of ineffective assistance of trial counsel for failing to object to the claimed misscoring, prior to the Court's ruling in Alleyne and Montgomery.

The Court, on June 17, 2013, issued its ruling of Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). On January 25, 2016, the Court issued its ruling in Montgomery v. Louisiana, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

Petitioner, based on the Court's Montgomery ruling, on April 26, 2016, filed a successive motion for relief from judgment in the stated trial court, pursuant to Michigan Court Rule (M.C.R.) 6.502(G), which permits the filing of a subsequent collateral attack on a sentence, based on a retroactive change in the law. It was Petitioner's claim, on that collateral appeal, that because of the standards set forth in Montgomery, for determining which of the Court's rulings may be applied retroactively, the Court's ruling of Alleyne could now be applied to him.

The state trial court, on August 25, 2016, issued its "ORDER RETURNING WITHOUT FILING DEFENDANT'S SECOND MOTION FOR RELIEF FROM JUDGMENT" (ORDER), stating that because Montgomery did not, specifically, address a claim based on a sentencing guidelines issue, it did not apply to Petitioner, and therefore, Alleyne could not be applied to Petitioner, either. Under the "CONCLUSION" section of the trial court's "ORDER", it states: "Having considered the issues Defendant raised in Defendant's Second Motion for Relief from Judgment, this Court finds them to be meritless." (Emphasis added). (Appendix "A"). Under Michigan procedures, any time a trial court issues an "ORDER", it is appealable to the Michigan Court of Appeals, whether by right or leave, depending on the circumstances. MCR 7.203(A), or (B), or MCR 7.205.

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Petitioner next filed a timely application to the Michigan Supreme Court. That court, on October 3, 2017, issued its "Order" stating that Petitioner's application was "DENIED" because the defendant's motion for relief from judgment is prohibited by MCR 6.502(G)." (Appendix "C").

**THE STANDARDS FOR DETERMINING IF A NEW RULE SHOULD BE CONSIDERED SUBSTANTIVE AS OPPOSED TO PROCEDURAL**

The Court has addressed, in Montgomery, at 577 U.S. ___, 136 S.Ct. 730, what constitutes a substantive rule:

> Substantive rules, then, set forth categerical constitution guarantees that place certain criminal law and

punishments altogether beyond the State's power to impose. (Emphasis added).

The Court, at 577 U.S. ____, 136 S.Ct. 730, then went on to note what constitutes procedural rules:

> ...Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating "the manner of determining the defendant's culpability." (Emphasis added). (Citation omitted).

Later, the Court, at 577 U.S. ____, 136 S.Ct. 732, added to its definition of a substantive rule, as it relates, specifically, to punishment:

> ...A substantive rule "alters the range of conduct or the class of persons that the law punishes. (Emphasis added). (Citation omitted).

One type of substantive rules are those "'of substantive categorical guarantees accorded by the constitution, regardless of the procedures followed.'" Montgomery, at 577 U.S. ____, 136 S.Ct. 729, citing Penray v. Lynaugh, 492 U.S. 302, 329, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The Court's definition of what constitutes a substantive rule, or rights, is reflected in Taylor v. Watters, 636 F.Supp. 181, 188 (E.D.Mich. 1986), citing this Court:

> Substantive due process claims fall within two categories: 1) official conduct that shocks the conscience as in Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209-210, 96 L.Ed. 183 (1952), or 2) the conduct infringes a specific constitutional guarantee. (Emphasis added).

From the above description of what constitutes substantive rights, are those that are protected under the substantive due process protection of the Fifth and Fourteenth Amendments, as opposed to procedural due process protection under the Fourteenth Amendment. The Fifth Amendment substantive due process right, like the Fourteenth's Amendment's substantive counterpart, is applied to a "fundamental right", and the government may not infringe upon that right "no matter what process is provided." Reno v. Flores, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993); Collins v. City of Harker Heights, Tex., 503

U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992). Further, the purpose of substantive due process is to prevent the government from abusing its power no matter the process used. Deshaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 194-196, 109 S.Ct. 998, 1002-1003, 103 L.Ed.2d 249 (1989); Obergefell v. Hodges, ____U.S. ____, 135 S.Ct. 2584, 2616, 192 L.Ed.2d 609 (2015).

The substantive due process amendment, the Fifth, sets the parameters for determining when substantive due process is violated. The relevant parts of the Fifth Amendment, states:

> ...No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War as public danger;...nor to be deprived of life, liberty, or property, without due process of law.... (Emphasis added).

Substantive due process applies to substantive "fundamental rights" enumerated in the United States Constitution. Obergefell, at ____U.S. ____, 135 S.Ct. 2616. These fundamental rights are those "'deeply rooted in this Nation's history and tradition....'" (Citation omitted). Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997).

**THE APPLICATION OF THE AUTHORITY THAT SHOWS THAT ALLEYNE HAS A SUBSTANTIVE COMPONENT, AND THEREFORE, CAN BE APPLIED ON COLLATERAL REVIEW UNDER THE STANDARDS ENUNCIATED IN MONTGOMERY**

Petitioner is aware that Alleyne is the progeny of the Court's ruling of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and thus, the application of Alleyne is dependent, partially, on some of the rationale applied in that case.

Apprendi notes that: "The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is." Apprendi, at 530 U.S. 475, 120 S.Ct. 2354. See also, Apprendi at 530 U.S. 476, n. 3, 120 S.Ct.

2355, n. 3. However, later on, the Court used language that implicates substantive due process. Apprendi, at 530 U.S. 478, 120 S.Ct. 2356, states:

> As we have, unanimously, explained, Gaudin, 515 U.S., at 510-511, 115 S.Ct. 2310, the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]e guard against a spirit of oppression and tyranny on the part of rulers,.... (Emphasis added).

The Court, in Deshaney, at 489 U.S. 196, 109 S.Ct. 1003, used similar language when describing the substantive due process component of the Fourteenth Amendment. It notes:

> ...Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," Davidson v. Cannon, supra, at 348; see also Daniels v. Williams, at 331 ("'"to secure the individual from the arbitrary exercise of powers of government,"'" and "to prevent governmental power from being 'used for purposes of oppression'") (internal citations omitted in original); Pratt v. Taylor, 451 U.S. 527, 549 (1981) (Powell, J., concurring in result) (to prevent the "affirmative abuse of power").

See also, County of Sacramento v. Lewis, 523 U.S. 833, 840-847, 118 S.Ct. 1708, 1713-1717, 140 L.Ed.2d 1043 (1989). Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996), citing this Court's ruling of Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986), also describes substantive due process violations, in relation to unconstitutional actions of the government, as follows: "Substantive due process serves as a vehicle to limit various aspects of potentially oppressive government action." (Emphasis added). Grinage, at 1349, goes on to note:

> ...For example, it can serve as a check on legislative enactments thought to infringe on fundamental rights otherwise not explicitly protected by the Bill of Rights; or as a check on official misconduct which infringes on a 'fundamental right;'...." (Emphasis added).

The "fundamental right" addressed in Apprendi was the Sixth Amendment right to a jury trial, and the right to have a jury determine, beyond a reasonable doubt, that a defendant is guilty of the crimes that a trial judge is considering to use to determine the mandatory maximum sentence. Apprendi, at 530 U.S. 476-477, 120 S.Ct. 2355-2356.

In Alleyne, the issue was the same as in Apprendi, but applying it to a mandatory minimum sentence. Alleyne at 570 U.S. ____, 133 S.Ct. 2156, 2158. Citing Apprendi, the Alleyne Court, at 570 U.S. ___, 133 S.Ct. 2161, noted:

> Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment. (Emphasis added).

The above shows that Alleyne is addressing the finding of that defendant's guilt of an additional "substantive offense", without a finding of facts, by a jury, beyond a reasonable doubt, and then using the finding of guilt of other crimes to increase the sentence for the original conviction. This is why the Alleyne Court stated, at 570 U.S. ___, 133 S.Ct. 2162:

> 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. (Emphasis added).

Finding a defendant guilty of a crime for which he was not charged constitutes a substantive violation, and not procedural. Only a jury can find facts of other charges, unless a defendant requests a trial before a judge, on those charges. This is a substantive violation of the Sixth Amendment, under the Fifth and Fourteenth Amendments of the Constitution. The Sixth Amendment is a "fundamental right". Duncan v. Louisiana, 391 U.S. 145, 148-149, 88 S.Ct. 1444, 1449, 20 L.Ed.2d 491 (1958). The Sixth Amendment is, also, one of those substantive rights enumerated in the Bill of Rights. Gideon v. Wainwright, 372 U.S. 335, 341-342, 83 S.Ct. 792, 794-795, 9 L.Ed.2d 799 (1963). See also, Strumpf v. Robinson, 722 F.3d 739, 748 (6th Cir. 2013), citing Patterson v. New York, 432

U.S. 197, 201-202, 92 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

**BASED ON THE PREMISE THAT ALLEYNE IS A CHANGE IN SUBSTANTIVE, CONSTITUTIONAL LAW, HOW ALLEYNE FULFILLS THE REQUIREMENTS SET OUT TO BE APPLIED RETROACTIVELY ON COLLATERAL APPEALS, PURSUANT TO MONTGOMERY**

The Court, in Montgomery, at 577 U.S. ___, 136 S.Ct. 729, notes:

> ...The Court now notes that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. (Emphasis added).
>
> * * *
>
> This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have effect regardless of when a conviction became final. (Emphasis added).

Montgomery, at 577 U.S. ____, 136 S.Ct. 729, cited, with approval, the definition of a "substantive constitutional rule," as stated by Justice Harlan:

> ...Justice Harlan defined substantive constitutional rules as "those that place as a matter of constitutional interpretation certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."

For Alleyne to fulfill the Montgomery standards to show that it should be applied retroactively on collateral review, Alleyne must constitute a "new substantive rule of constitutional law." Montgomery, at 577 U.S. ___, 136 S.Ct. 729. Alleyne fulfills these standards, as the following illustrates.

First, Alleyne is "new". For the first time, the Court decided, as it relates to mandatory minimum sentences, that facts that are actually elements of other crimes must be found by a jury beyond a reasonable doubt. Alleyne, at 570 U.S. ___, 133 S.Ct. 2156-2158.

The second Montgomery requirement is fulfilled because Petitioner has shown that Alleyne not only addressed the procedure for determining a mandatory minimum sentence, it also contains a substantive component, which Petitioner is seeking application. (See the previous presentation setting out Petitioner's position that there is a substantive component to Alleyne).

Next, the last Montgomery standard is that the new rule has to be one of "constitutional law". It is clear that Alleyne is one of "constitutional law," the Sixth Amendment, as well as the Fifth Amendment, which is substantive, and the substantive component of the Fourteenth Amendment.

Lastly, the new rule announced in Alleyne "controls the outcome of a case". When a trial court takes on the role of the jury, and uses facts, which are really elements of other crime, to determine a sentence, and it alters the mandatory minimum sentence beyond what is permitted, it "controls the outcome of a case".

Petitioner points out that even if the Court notes that Alleyne has a procedural component, the fact that it also, as shown, has a substantive component, does not change the fact that it should be treated as substantive, as the Court notes. Montogomery, at 577 U.S. ___, 136 S.Ct. 734-735. Alleyne shows how to, procedurally, fulfill the substantive part of the Sixth Amendment, via, the Fifth and Fourteenth Amendments. As noted by the Court, "There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." Montgomery, at 577 U.S. ___, 136 S.Ct. 735, applying Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), retroactively. Again, Alleyne contains both a procedural and substantive component.

Petitioner believes that he has shown that Alleyne fulfills the requirements of the Court's criteria set forth in Montgomery to apply Alleyne retroactively, on his collateral review. Petitioner now applies Alleyne to his specific sentencing issue.

**HOW PETITIONER FULFILLS THE ALLEYNE STANDARDS, WHICH PERMITS THE COURT TO REMAND**

**HIM TO THE STATE TRIAL COURT FOR RESENTENCING**

**A. The Alleyne standards that must be met before Petitioner may be granted relief.**

According to Alleyne, one of the requirements to apply its concept to Petitioner is that there be a mandatory, minimum sentence range and, the sentence "alter[ed] the prescribed range of sentences to which a criminal defendant is exposed. Alleyne, at 570 U.S. ___, 133 S.Ct. 2160.

Also, Petitioner must show that his sentencing court considered "facts" that were really "'elements' of a separate legal offense'". Alleyne, at 570 U.S. ___, 133 S.Ct. 2160, 2162.

**B. The facts and authority that show that the sentencing guidelines under which Petitioner was sentenced were mandatory, and set mandatory minimums.**

Petitioner is aware that the Michigan Supreme Court has stated that the judicial sentencing guidelines, under which he was sentenced, are not "mandatory". People v. Milbourn, 435 Mich. 630, 656-657, 461 N.W.2d 1 (1990). However, this Court has noted that it is not what a rule is called that determines what it is, but the "function" of a rule that determines what it is. In Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257, 1265-1266, 194 L.Ed.2d 387 (2016), the Court noted:

> ...As described above, this Court has determined whether a new rule is substantive or procedural by considering the function of the rule, not its underlying constitutional source....That balance turns on the function of the rule at issue, not the constitutional determining culpability.... (Emphasis added).

As an illustration of the concept that a rule, or rules, are not determined by what the Michigan Supreme Court calls them, but what their function is, is the entire indeterminate sentencing scheme, as defined by that court. For many years, the Michigan Supreme Court stated that Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) did not apply to Michigan, because

Michigan's sentencing scheme is indeterminate. The Michigan Supreme Court, in People v. Drohan, 475 Mich. 140, 159, 715 N.W.2d 778 (2006), adopted what it had previously stated in People v. Claypool, 470 Mich. 715, 730, n. 14, 684 N.W.2d 278 (2004):

> Blakely concerned the Washington state determinate sentencing system, which allowed a trial judge to elevate the maximum sentence permitted by law on the basis of facts not found by the jury but the judge. Thus, the trial judge in that case was required to set a fixed sentence imposed within a range determined by guidelines and was able to increase the maximum sentence on the basis of judicial fact finding. This offended the Sixth Amendment, the United States Supreme Court concluded, because the facts that led to the sentence were not found by the jury. Blakely, supra at [305].
>
> Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. MCL 769.8 The minimum is based on guidelines ranges as discussed in the present case and in [People v. Babcock, 469 Mich. 247, 666 N.W.2d 231 (2003)]. The trial judge sets the minimum but can never exceed the maximum (other than in the case of a habitual offender, which we need not consider because Blakely specifically excluded the fact of a previous conviction from its holding). Accordingly, 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. [Id.]

The cited rationale of Claypool/Drohan was accepted as Michigan law until 2015. In 2015, the Michigan Supreme Court made a complete "180°" change when it issued its ruling in People v. Lockridge, 498 Mich. 358, 870 N.W.2d 502 (2015), which reflects what the Court meant in Whelch, where it notes that it is the function of a rule, and not what a court designates it is, that determines what it actually is. ____U.S. ____, 136 S.Ct. 1265-1266. When the Michigan Supreme stated its premise, in Lockridge, it noted that, by function, the Michigan sentencing scheme was, really, always determinate, and not indeterminate, as it stated in Claypool/Drohan. The Michigan Supreme Court, stated, in Lockridge, at 498 Mich. 383:

> Accordingly, the relevant distinction between constitutionally permissible "indeterminate" sentencing

> schemes and impermissible "determinate" sentencing schemes, as the United States Supreme Court has used those terms, turns not on whether the sentences produced by them contain one or two numbers; rather, it turns on whether judge-found facts are used to curtail judicial sentencing discretions by compelling an increase in the defendant's punishment. (Emphasis added). (Footnote omitted).

After much discussion, the Michigan Supreme Court, applying Alleyne overturned Claypool/Drohan, and stated that, in function, and application, Michigan's sentencing scheme was, and is not, "indeterminate", but "determinate". Lockridge, at 498 Mich. 383.

Petitioner must now show that the judicial sentencing guidelines he was sentenced under were mandatory to apply Alleyne to him, because that is one of the Alleyne requirements. Alleyne, at 570 U.S. _____, 133 S.Ct. 2160. As previously pointed out, the Michigan Supreme Court, in Milbourn, has stated that they are not mandatory. The following shows that they were actually, by "function", mandatory, as was the statutory sentencing guidelines noted in Lockridge, at 498 Mich. 373-474. Thus, Petitioner will compare the application of the judicial sentencing guidelines, under which he was sentenced, and the statutory sentencing guidelines, which were mandatory until the Lockridge ruling.

The first similarity between the judicial and statutory sentencing guidelines is that, prior to Alleyne, the trial courts were permitted to consider facts not found by a jury beyond a reasonable doubt. [Statutory guidelines: M.C.L.A. 769.34(3)(b); People v Wilkens, 267 Mich.App. 728, 743-744, 705 N.W.2d 728 (2005); People v. Light, 290 Mich.App. 717, 722-723, 803 N.W.2d 720 (2010)]; [Judicial guidelines: People v. Naugle, 152 Mich.App. 227, 238, 393 N.W.2d 592 (1986); People v. Ratkov (Aft Rem), 201 Mich.App. 123, 125-126, 505 N.W.2d 886 (1993)].

The next similarity between the two guidelines systems is that both require a finding of facts by a "preponderance of the evidence" to support their scoring, and not "beyond a reasonable doubt," as required by Alleyne. [Statutory guidelines: People v. Hunt, 290 Mich.App. 317, 322-323, 810 N.W.2d 588 (2010)]; [Judicial guidelines: Ratkov (Aft Rem), at 201 Mich.App. 125-126].

Both guidelines permit a sentencing court to sentence outside a scored guidelines range, under certain circumstances stated on the record. [Statutory guidelines: M.C.L.A. 769.34(3); People v. Petri, 279 Mich.App. 407, 421-422, 760 N.W.2d 882 (2008)]; [Judicial guidelines: Michigan Supreme Court Administrative Order 1984-1, 418 Mich. lxx, as extended by Administrative Order 1985-2, 420 Mich. lxii; People v. Fleming, 428 Mich. 408, 417, 410 N.W.2d 266 (1987)].

Also, both guidelines systems require an objection to any claimed miscoring to be raised at the trial court level, or they are waived on appeal. [Statutory guidelines: Michigan Court Rule (M.C.R.) 6.429(C); People v. Wilson, 252 Mich.App. 390, 392, 652 N.W.2d 488 (2002)]; [Judicial guidelines: People v. Latzman, 153 Mich.App. 270, 274, 395 N.W.2d 56 (1986)].

Another similarity is that both guidelines contain language, by their authors, that they are "recommended" as opposed to mandatory. [Statutory guidelines: M.C.L.A. 769.34(4)(a); Lockridge, at 498 Mich. 387]; [Judicial guidelines: Supreme Court Administrative Order 1984-1, 418 Mich. lxxx, People v. Broden, 428 Mich. 343, 348, 408 N.W.2d 787 (1987)].

Further, both guidelines schemes contain language of a mandatory nature, by their authors, which courts have interpreted as such. [Statutory guidelines: M.C.L.A. 769.34(2); Lockridge, at 498 Mich. 387]; [Judicial guidelines: Supreme Court Administrative Order 1984-1 notes that trial courts "shall" "use the guidelines when imposing a sentence for an offense that is included in the guidelines," 418 Mich. lxxx (Emphasis added)); People v. Jannifer Williams, 147 Mich.App. 1, 4, 382 N.W.2d 191 (1985)].

Petitioner points out that Lockridge has stated that the reason that the statutory sentencing guidelines are unconstitutional, under Alleyne, is because of their mandatory nature. Lockridge, at 498 Mich. 373, in its "CONCLUSION", states:

> Because Michigan's sentencing guidelines scheme allows judges to find by a preponderance of the evidence facts that are then to compel an increase in the mandatory minimum punishment a defendant receives, it violates the Sixth Amendment to the United States Constitution under Alleyne. (Emphasis added).

Petitioner believes that the previously cited similarities between the statutory and judicial guidelines, show, by "function", that the judicial sentencing guidelines fulfill the Alleyne, because they "compel" the sentencing court to sentence to a "mandatory minimum". This becomes apparent when one reviews the instructions for applying the judicial sentencing guidelines that controlled the calculation of Petitioner's Offense Variables (OVs), when it comes to deciding what facts to apply. Under the instructions designated as "II. Scoring a Conviction," paragraph "3" of Petitioner's guidelines, it notes:

> Where the facts are proven or acknowledged and are not consistent with the conviction offense (e.g., use of a weapon coupled with a conviction for unarmed robbery), the actual facts are still to be applied in scoring the appropriate variables. (Emphasis added).

From the above, it can be concluded that: (1) A court may disregard what a defendant was convicted of, and make factual determinations inconsistent with that verdict, or admission at a plea taking, and (2) after this is done, it compels the court to score them because those facts "are still to be applied". This is mandatory language.

The mandatory nature of the guidelines Petitioner was scored can also be seen by the Michigan Court of Appeals ruling the year he was sentenced. In People v. Ridley, 142 Mich.App. 129, 133, n. 3, 369 N.W.2d 274 (1985), that court noted the above instruction, when addressing the application of the guidelines, and whether or not they are mandatory. Also, in People v. Romano, 181 Mich.App. 204, 221-222, 448 N.W.2d 795 (1989), as in Ridley, it was made clear that it is "mandatory" that sentencing courts "use" the judicial sentencing guidelines, and then noted that they are not required to follow them if they cite reasons for going outside the properly scored guideline, and file a "departure" form stating why it is not adhering to the sentence range in the scored guideline. Ridley, at 142 Mich.App. 133-134. Otherwise, without a valid departure reason, the sentencing court is expected to adhere to those guidelines. This is "mandatory".

There are many other cases where the language of Michigan Courts, in their rulings on the judicial sentencing guidelines, which is at issue, indicate that they are mandatory. In People v. Boucher, 165 Mich.App. 361, 363-365, 418 N.W.2d 464 (1987), that court stated: "[The] Sentence [is] vacated and [the] case [is] remanded for resentencing." What is very telling, as to the "mandatory" nature of the judicial sentencing guidelines, in Boucher, is the fact that the Court of Appeals also noted, at 363: "Although the drafters of the guidelines may have intended to cover the instant situation, the language does not include such circumstances as are presented in the instant case." The nature of the guidelines are of such a "mandatory" nature that even that court had no alternative but to remand for resentencing when they are incorrectly scored, even if the Court of Appeals would have preferred not to.

The court in People v. Reddish, 181 Mich.App. 625, 450 N.W.2d 16 (1989), remanded that defendant to the trial court for resentencing on OV-25, because that OV was misscored. The court did not, after noting the error, simply let the misscoring stand. After all, the trial court "used" the sentencing guidelines as required. Thus, if a proper scoring was not mandatory, the Court of Appeals would not have remanded for a resentencing, because the trial court "used" them, as required by Michigan Supreme Court Administrative Order 1984-1, 418 Mich. lxxx.

In People v. Szczesniak, 186 Mich.App. 492, 465 N.W.2d 22 (1990), the trial court scored that defendant "0" points for OV-5. The plaintiff, the prosecutor, appealed, claiming that the trial court was obligated to score the defendant points because of the facts that supported a scoring. That defendant was remanded for the required resentencing. The Court of Appeals stated, at 493-494:

> First, plaintiff [the prosecutor] challenges the trial court's scoring of zero for offense variable No. 25, contemporaneous criminal acts. A sentencing judge has discretion in determining the number of points to be scored, provided there is adequate evidence to support a particular score. Where the established facts clearly do not permit the trial court's scoring to stand, the appellate court will intervene. (Emphasis added).

In short, when the Court of Appeals stated that "the appellate court will intervene," it is indicating that it is mandatory that the trial court judge score an OV properly, or the appellate court must intervene, by remanding for the scoring. Thus, this is a "mandatory" directive.

In People v. Tyler, 188 Mich.App. 83, 468 N.W.2d 537 (1991), that defendant was "entitled to resentencing" where the Court of Appeals determined that "there was an insufficient factual bases on the record before this Court." (Emphasis added). Tyler, at 188 Mich.App. 87. Notice that the court stated that the defendant was "entitled" to a resentencing. It was mandatory because the trial court did not correctly score his guidelines. Thus, properly scoring the guidelines was "mandatory".

Yet, in another case, the Court of Appeals, in People v. Hannan (Aft Rem), 200 Mich.App. 123, 127, 504 N.W.2d 189 (1983), stated, where the trial court misscored PRV-1:

> A defendant is entitled to have the sentencing guidelines' range correctly calculated so that a court may

determine an appropriate sentence in light of that range.

The Court of Appeals remanded the above defendant for a "resentencing", because that defendant was "entitled" to have his guidelines "correctly calculated" because it is mandated. This is another indication that they are "mandatory".

The Court of Appeals, in People v. Polus, 197 Mich.App. 197, 202, 495 N.W.2d 402 (1992), makes it clear that no matter the terminology, why it must correct an inaccurate score, when it is "erroneous":

> ...The dissents myopic approach to guidelines review would suggest that we should turn a blind eye to a trial court's scoring decision, regardless of how outrageous or erroneous it is. Absent appellate review, a sentencing judge could arbitrarily score points to achieve a desired sentence recommendation. (Emphasis added).

The above language is clear, Petitioner believes. It forbids a trial court from making and "erroneous" scoring to reach its desired sentence, even if it is incorrect. It is, therefore, "mandatory" that the trial court score the guidelines correctly. Polus, at 197 Mich.App. 203, goes on even further to show that it is "mandatory" that the guidelines be correctly scored, or there will be a mandated resentencing:

> Moreover, while we must afford the sentencing judge a great deal of discretion in scoring, if we fail to intervene where that scoring is erroneous, the guidelines will be rendered meaningless.... In other words, each variable in the guidelines comes with instructions for a reason, and it is our responsibility to ensure that those instructions are followed. (Emphasis added).

The above cited Polus statements make it clear that the sentencing courts are required to follow the "instructions" for scoring the guidelines. Petitioner believes this language, and instruction, is "mandatory", because the Court of Appeals notes that, as stated above, it was their "responsibility to ensure that those instructions are followed. (Emphasis added).

Petitioner's position that to state that the "use" of the judicial sentencing guidelines are "mandatory", as stated by the previously cited Michigan Administrative Orders, and state that the sentencing courts cannot deviate from them unless they give substantial and compelling reasons for the departure, and still say that they are not "mandatory", is a distinction that does not really exist. The logical conclusion is that the judicial sentencing guidelines were "mandatory", unless a sentencing court cites adequate reasons for a departure. There was no departure claimed in Petitioner's case, because the area for noting a departure on his guidelines score sheet did not note it. Thus, they were considered and applied by the trial court in a fashion it believed was "mandatory". This departure concept is very important in determining what constitutes "mandatory", for purposes of <u>Alleyne</u>. When addressing the statutory sentencing guidelines, the <u>Lockridge</u> court eliminated the M.C.L.A. 769.34(3) requirement that before a sentencing court may ignore a properly scored guidelines range, it must give "substantial and compelling" reasons for doing so, on the record. This was one of the steps the Michigan Supreme Court took to make the statutory sentencing guidelines nonmandatory, to escape the application of <u>Alleyne</u>. This is the exact same concept of the judicial sentencing guidelines Petitioner was sentenced under. A trial court must also give reasons, on the record, for a departure of a properly scored guidelines. Supreme Court Administrative Order 1984-1, 418 Mich. lxxx; <u>Fleming</u>, at 428 Mich. 417.

Petitioner contends that the record shows that his sentencing judge knew that his sentencing guidelines were "mandatory", and had to be adhered to. The court stated:

> The presentence report is full and complete in this matter and the <u>Court is mindful of the parameters provided for by the sentencing guidelines promulgated</u> by our Supreme Court <u>to provide a minimum sentence ranging from 120 months to life</u>. (Emphasis added). (Sentence Transcript, p 10).

* * *

> This Court, based upon the contents of the presentence report, based upon the guidelines -- sentencing guidelines promulgated by our Supreme Court.... (Emphasis added). (Sentence Transcript, p 19).

Between the previously cited guidelines instructions, what the trial court stated at Petitioner's sentencing, as well as the cited cases, Petitioner believes that he has shown that his judicial sentencing guidelines were "mandatory". Thus, he fulfills the Alleyne requirement that what is at issue must be a mandatory, minimum sentence range. Alleyne, at 570 U.S. ___, 133 S.Ct. 2160, citing Apprendi, at 530 U.S. 490, 120 S.Ct. 2362-2363.

**C. The facts and authority that show that Petitioner's sentencing court relied on facts that were actually "elements" of other crimes to determine Petitioner's mandatory, minimum sentence.**

Alleyne, at 570 U.S. ___, 133 S.Ct. 2160, citing Apprendi, goes to the core of Petitioner's proof that Alleyne was violated in his case:

> Consistent with common-law and early American practice, Apprendi concluded that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime. (Citation omitted).
>
> * * *
>
> ...("Facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense"). (Emphasis added). (Citation and footnote omitted).

Petitioner has previously shown that the judicial sentencing guidelines under which he was scored and sentenced, set mandatory minimums. Thus, Alleyne applies to him. The Alleyne Court, at 570 U.S. ___, 133 S.Ct.2162, emphasizes, once again, that when a trial court judge uses facts that alters the "legally prescribed punishment", it constitutes "a new offense":

> As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of facts 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. (Emphasis added).

The following reveals that Petitioner's sentencing judge found "facts" that "necessarily form[ed] a constituent part of a new offense," and they were not "submitted to the jury".

Central to what facts may, and may not, be considered, pursuant to Alleyne, is what constitutes the "elements" of second-degree murder, which Petitioner pled guilty. Under Michigan law, the elements of second-degree murder are shown if the defendant caused "(1) a death; (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." People v. Aldrich, 246 Mich.App. 101, 123, 631 N.W.2d 67 (2001), quoting People v. Goecke, 457 Mich. 442, 463-464, 579 N.W.2d 868 (1998).

Petitioner contends that it was error, pursuant to Alleyne, to score him "3" points for Offense Variable (OV) 7. OV-7 addressed "OFFENDER EXPLOITATION OF VICTIM'S VULNERABILITY". This is adding an element as to what constitutes second-degree murder under Michigan law, and then using it to increase Petitioner's mandatory, minimum sentence. The instructions state:

> A. Score "3" where the victim lacks substantial capacity to defend against the offense and the victim's vulnerability is apparent at the time of the offense.

After this instruction, twelve examples were given, and none are included in what Michigan law has determined is an "element" of second-degree murder, or applies to Petitioner's situation. After this, the instructions give the following:

> B. Exploitation refers to the manipulation of the victim for selfish or unethical purposes.
>
> C. Vulnerability refers to the readily apparent susceptibility of the victim to injury, physical attack, persuasion or temptation.
>
> D. Abuse of authority status refers to situations where a victim is exploited out of fear or deference to an authority figure. Examples of this relationship include: parent-child, teacher-student, doctor-patient.

As can be seen by the above, none of these "elements" would have been required to be found by a jury beyond a reasonable doubt, to find Petitioner guilty of second-degree murder. This is because they are not an element of second-degree murder. They, therefore, constituted "elements" of another crime for which Petitioner was not found guilty, beyond a reasonable doubt, by a_ jury, as required. Alleyne, at 570 U.S. ____, 133 S.Ct. 2160, 2162. Thus, these "facts" could not have been considered for sentencing Petitioner, and this OV should have been scored "0" points.

The next Alleyne violation was where Petitioner was scored "2" points for OV-25, "CONTEMPORANEOUS CRIMINAL ACTS". To score Petitioner "2" points, there had to be "three or more contemporaneous criminal acts." The instructions describe these "contemporaneous criminal acts" as:

> A. A criminal act is contemporaneous if: (1) it occurs within twenty four hours of the offense upon which the defendant is being sentenced or within six months if it is identical to or similar in nature; and (3) it has not and will not result in a separate conviction. (Emphasis added).

Petitioner contends that it is obvious that using any "facts" to score OV-25 are actually "elements" of other crimes. This OV is taking into account, by its very verbiage, "criminal acts" that "will not result in a separate conviction". This permitted the trial court to consider, and score, any other perceived crimes the sentencing court thought occurred, but Petitioner was not charged. This violates Alleyne, at 570 U.S. ____, 133 S.Ct. 2158, 2160, 2162. Thus, Petitioner's trial court judge should not have considered the "elements" of other criminal acts to score him "2" points. This OV should have been scored "0" points.

Once the Alleyne rules are applied to the "facts" the trial court used against him to score "elements" of other crimes, because they were not "elements" of second-degree murder, Petitioner's total OV score should have been scored at "3" points. This reduces Petitioner's "prescribed [mandatory] range of sentences to which [Petitioner] is exposed" from grid A-II, "120-LIFE", to A-1, "12-84" months. Alleyne, at 570 U.S. ___, 133 S.Ct. 2160, 2162.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Roger Brower

Date: February 26, 2018