State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Armond Pinson

Defendant-Appellant.

MSC No.

COA No. 356624

Ottawa County Circuit Court
Case No. 20-043663 FH

Defendant-Appellant Armond Pinson's Application for Leave to Appeal

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Date: January 26, 2023

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Judgment Appealed From and Relief Sought

Armond Pinson again seeks leave to appeal or other peremptory relief from the Court of Appeals decision holding that MCL 769.8(1) required the circuit court to impose an indeterminate sentence for Mr. Pinson's third-degree criminal sexual conduct conviction where such an offense is not probationable, and he did not have a statutory right to an intermediate sanction. *People v Pinson*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 356624) (on remand) slip op at 4, 7- attached as Appendix D.

Mr. Pinson pled guilty to one count of third-degree criminal sexual conduct and the circuit court sentenced him to a term of six months jail. The prosecution subsequently appealed Mr. Pinson's sentence which resulted in a published Court of Appeals decision holding that Mr. Pinson's six-month jail sentence for third-degree criminal sexual conduct was an invalid sentence and the trial court was required to impose a minimum and maximum sentence, either within or outside of the recommended sentencing guidelines range. *People v Pinson*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 356624) slip op at 7- attached as Appendix B. Mr. Pinson filed an application for leave to appeal in this Court and on October 7, 2022, this Court issued an order vacating the judgment of the Court of Appeals and remanding the case to the Court of Appeals for reconsideration in light of the fact that the version of 769.31(b) in effect at the time of Mr. Pinson's offense and sentencing did not exclude imprisonment in a county jail as an intermediate sanction. (MSC Order 10/7/22-attached as Appendix C).

The Court of Appeals again vacated Mr. Pinson's sentence and remanded for resentencing based on the faulty assumption that MCL 769.8(1) requires an indeterminate prison sentence for a first-time felony where the violated statute provides for imprisonment in a state prison, the offense is not probationable, and the guidelines range does not provide for a statutory right to an intermediate sanction. However, that interpretation is erroneous. Rather, MCL 769.8(1) only applies when a prison sentence is imposed. This interpretation of MCL 769.8(1) is consistent with both existing statutes that authorize jail or probation for felony offenders and the history of indeterminate sentencing and a

long-held legislative practice of authorizing jail or prison for many felony offenses.

Ultimately, this case involves issues and legal principles that are of significant interest to the state's jurisprudence and this Court should take the opportunity to clarify what MCL 769.8(1) actually requires. MCR 7.305(B)(3). Additionally, the decision is clearly erroneous and will cause material injustice to both Mr. Pinson and the criminal justice system as a whole if left to stand as precedent. MCR 7.305(B)(5)(a).

At a minimum, this Court should peremptorily reverse the Court of Appeals and affirm Mr. Pinson's sentence.

Statement of the Questions Presented

First Question

I. Does MCL 769.8 require an indeterminate sentence only when a prison sentence is imposed? Does the statute not require a prison sentence for first-time felony offenders and merely speaks to the form of a prison sentence when one is imposed? Therefore, did the sentencing court not err when it sentenced Mr. Pinson to six-months jail for third-degree criminal sexual conduct because such a sentence is valid under Michigan law?

Mr. Pinson answers: Yes.

The Court of Appeals answered: No.

Statement of Facts

Armond Pinson accepted responsibility for his actions and pled guilty as charged to third-degree criminal sexual conduct in the Ottawa County Circuit Court, the Honorable Jon H. Hulsing presiding, on September 28, 2020. (Plea 9/28/20 3-7). There was no plea or sentencing agreement with the prosecution.

Mr. Pinson's sentencing guidelines were calculated at 21 to 35 months. (Sentencing Information Report (SIR)- attached as Appendix A). On November 30, 2020, Judge Hulsing sentenced Mr. Pinson to six-months jail with credit for six days previously served. (Sent 11/30/2020 10).[1]

The prosecution subsequently filed a Motion for Resentencing in which it argued that six-months jail was a legally invalid sentence for third-degree criminal sexual conduct. (Motion Requesting Resentencing 2). Judge Hulsing held a hearing on that motion on December 21, 2020. At the hearing, the prosecution argued Mr. Pinson's six-month jail sentence is invalid under MCL 769.8(1) and cited to two unpublished opinions by this Court. (Motion 12/21/20 3).

Judge Hulsing ultimately denied the prosecution's Motion for Resentencing. (Motion 12/21/20 12). In doing so, Judge Hulsing noted the legislature created an exception to MCL 769.8(1) when it classified third-degree criminal sexual conduct as a class B offense for which the sentencing grid allows for intermediate sanctions. *Id.* at 9-10.

Appellate Procedural History

The prosecution subsequently filed an application for leave to appeal in the Court of Appeals which the Court of Appeals granted on June 17, 2021. On April 7, 2022, the Court of Appeals issued a published decision vacating Mr. Pinson's sentence and remanding for resentencing. *People v Pinson*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 356624).[2]

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[1] Mr. Pinson has since served his jail sentence and has been out for almost a year.

[2] This opinion is attached as Appendix B.

Specifically, the Court of Appeals held that Mr. Pinson's six-month sentence for third-degree criminal sexual conduct was an invalid sentence and the trial court was required to impose a minimum and maximum sentence, either within or outside of the recommended sentencing guidelines range. *Id.* at slip op 7.

Mr. Pinson subsequently filed an application for leave to appeal in this Court. On October 7, 2022, this Court issued an order vacating the judgment of the Court of Appeals and remanding the case to the Court of Appeals for reconsideration. (MSC Order 10/7/22-attached as Appendix C). Specifically, this court ordered the following:

> The Court of Appeals relied in part on its conclusion that "jailtime is not an intermediate sanction pursuant to MCL 769.31(b)." But the prohibition of jailtime as an intermediate sanction was implemented by 2020 PA 395, which did not become effective until March 24, 2021. At the time of the defendant's offenses around November 2017 and his sentencing on November 30, 2020, MCL 769.31(b), as amended by 2004 PA 220, did not explicitly exclude "imprisonment in a county jail" from its definition of an intermediate sanction. In fact, former MCL 769.31(b)(viii) explicitly listed jail as an example of an intermediate sanction. Accordingly, the Court of Appeals inappropriately applied the current version of MCL 769.31(b). On remand, the Court of Appeals shall reconsider its decision in light of this correction. (Appendix C).

On December 1, 2022, the Court of Appeals issued a published opinion again vacated Mr. Pinson's sentence and remanded for resentencing. *People v Pinson*, ___ Mich App ___; ___ NW2d ___ (2022) (on remand), slip op at 1.[3] The Court of Appeals again held that MCL 769.8(1) required the sentencing court to impose an indeterminate sentence. (Appendix D 7). Specifically, the Court of Appeals concluded that even though the version of MCL 769.31(b) in effect at the time of

[3] This opinion is attached as Appendix D.

Mr. Pinson's offense and sentencing did not preclude imprisonment in the county jail as an intermediate sanction, because third-degree criminal sexual conduct is not probationable and because Mr. Pinson's did not have a statutory right to an intermediate sanction, the sentencing court was required to impose an indeterminate sentence. *Id.* at 4, 7.

Mr. Pinson now asks this Court to grant leave to appeal or take other appropriate action.

Argument

I. MCL 769.8 requires an indeterminate sentence only when a prison sentence is imposed. The statute does not require a prison sentence for first-time felony offenders and merely speaks to the form of a prison sentence when one is imposed. Therefore, the sentencing court did not err when it sentenced Mr. Pinson to six-months jail for third-degree criminal sexual conduct because such a sentence is valid under Michigan law.

Standard of Review

This Court reviews the interpretation of a statute, including the application of facts to the law, de novo. *People v Calloway,* 500 Mich 180, 186; 895 NW2d 165 (2017).

Discussion

Communication sometimes fails when the reader misperceives the written word. That appears to be the case with several judicial decisions, including the one below, that misinterpret the language of MCL 769.8. Although it is true the legislature intended to mandate an indeterminate sentence by application of MCL 769.8, that rule only applies *when* a prison sentence is imposed. The statute does not require a prison sentence for all first-time felony offenders, and any contrary holding disregards existing statutes that authorize jail or probation for felony offenders. It also disregards the history of indeterminate sentencing and a long-held legislative practice of authorizing jail or prison for many felony offenses.

The statute in question, MCL 769.8, provides that a court must fix a minimum term when imposing a prison sentence for a first-time felony offender:

> Sec. 8. (1) When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as

> otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.
>
> (2) Before or at the time of imposing sentence, the judge shall ascertain by examining the defendant under oath, or otherwise, and by other evidence as can be obtained tending to indicate briefly the causes of the defendant's criminal character or conduct, which facts and other facts that appear to be pertinent in the case the judge shall cause to be entered upon the minutes of the court.

This Court has previously recognized that a person "convicted for the first time" refers to an individual who is being sentenced as a non-habitual offender. "[A] court must treat as a first offender a defendant not charged as an habitual criminal." *Brinson v Genesee Circuit Judge*, 403 Mich 676, 684; 272 NW2d 513 (1978).

In *Brinson*, the Court construed an earlier version of MCL 769.8, one apparently stemming from 1927, that began: "When any person shall hereafter be convicted for the first time of crime committed after this act takes effect . . . ." *Brinson*, 403 Mich at 680. The question before the Court was whether a repeat offender not charged as a habitual offender should be sentenced to an indeterminate or determinate sentence. Relevant to the Court's analysis was the history of habitual offender sentencing and determinate sentences (at least prior to a 1978 amendment in which the legislature expressly authorized indeterminate sentencing for habitual offenders, 1978 PA 77, § 1). *Brinson*, 403 Mich at 680-683; *People v Wright*, 432 Mich 84, 91; 437 NW2d 603 (1989). In reaching the conclusion that repeat offenders not charged as habitual offenders were subject to an indeterminate rather than a determinate sentence, the Court held: "[D]efendants who are not charged as a habitual criminal . . . are to be given indeterminate sentences under MCL s 769.8 . . . ." 432 Mich at 684.

The *Brinson* Court was not asked whether MCL 769.8 *requires* a prison sentence for a first-time (non-habitual) felony offender. Instead, the question posed to the Court went to the form of the prison sentence.

In two other opinions (one before *Brinson* and one after), individual judges similarly concluded that indeterminate sentencing was required for non-habitual offenders without contemplating the full scope of MCL 769.8. See *People v Redwine*, 73 Mich App 83, 87; 250 NW2d 550 (1973) (Anderson, J.,[4] dissenting) ("The sentencing options available to a court are: (1) an indeterminate sentence (mandatory) for a first offense . . . ."); *People v Wright*, 432 Mich at 95 (Boyle, J., concurring) ("For offenders charged as first offenders, the only punishment authorized by the Legislature was an indeterminate sentence where the maximum was imposed by law and the minimum was to be determined by the sentencing courts.").

In more recent decisions, the Court of Appeals has assumed that a prison sentence (one that would be indeterminate) is required under MCL 769.8, at least when probation is unavailable See *People v Frank*, 155 Mich App 789, 791; 400 NW2d 718 (1986) (because third-degree criminal sexual conduct is not a probationable offense, MCL 769.8 requires a 15-year maximum sentence); *People v Austin*, 191 Mich App 468, 469; 478 NW2d 708 (1991) (because armed robbery is not a probationable offense, when the court imposes a term of years it must be an indeterminate sentence under MCL 769.8 and MCL 769.9). See also *People v Martin*, 257 Mich App 457, 461; 668 NW2d 397 (2003) (intermediate sanctions constitute an exception to MCL 769.8).

The Court of Appeals made this same assumption below:

> To summarize, the indeterminate sentencing statute, MCL 769.8(1), requires a court to impose an indeterminate sentence with a minimum and a maximum term when a defendant is convicted for a first-time felony and the violated statute provides for imprisonment in a state prison. A court may depart from the recommended minimum guidelines range as provided in MCL 769.34(3)(a). But a court is limited in the departure sentence it may impose. MCL 771.1(1) precludes the court

[4] Donald T. Anderson, Kalamazoo County Circuit Judge sitting by assignment.

> from imposing a probationary sentence for a defendant convicted of CSC-III. MCL 769.34(4)(c) limits the imposition of an "intermediate sanction" by right to situations where the low end of the defendant's minimum sentencing guidelines range is below 12 months. (Appendix D 7).

In all of the above decisions, the courts did not address the more nuanced question: Does MCL 769.8 require a prison sentence or does it merely provide that a prison sentence, when imposed, must be indeterminate?

The answer to that question may prove surprising to some, but an indeterminate prison sentence is required only *when* a prison sentence is imposed. This conclusion finds overwhelming support within the language of MCL 769.8, within the language of earlier versions of that statute, within the historical practice from the mid-1800s through at least the 1920s, with the advent of MCL 750.506 in 1931, and with reference to current statutes authorizing a jail and/or probationary sentence for many felony convictions, first offense or otherwise.

As an initial matter, the conclusion that MCL 769.8 speaks to how a prison sentence should look flows from the language of the statute itself: "When . . . the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment . . . ." Stripped to its essence, the meaning of the statute becomes clear.

The statute also includes, by its terms, a general exception: "except as otherwise provided in this chapter." That exception appears to address life sentences (see MCL 769.9) and habitual offender sentences (see MCL 769.10-12).

A review of the historical antecedents of MCL 769.8 also supports the conclusion that an indeterminate prison sentence is required only when a prison sentence was imposed. The first indeterminate sentencing law of 1903 provided that every sentence to the state prison shall be an indeterminate sentence:

Every sentence to the State Prison at Jackson, to the Michigan Reformatory at Ionia, to the State House of Correction and Branch of the State Prison in the Upper Peninsula, and to the Detroit House of Correction, of any person hereinafter convicted of a crime, except of a person sentenced for life, or a child under fifteen years of age, shall be an indeterminate sentence as hereinafter provided. The term of imprisonment of any person so convicted and sentenced shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced, and no prisoner shall be discharged until after he shall have served at least the minimum term as provided by law for the crime for which he was convicted: Provided, that in all cases where the maximum sentence, in the discretion of the court, may be for life or any number of years, the court imposing sentence shall fix the maximum sentence: Provided further, that in all cases where no minimum sentence is fixed by law, the court imposing sentence shall fix such minimum, which minimum shall not be less than six months.' [1903 PA 136.] [5]

This law was enacted following voters' approval of a constitutional amendment authorizing indeterminate sentencing in 1902,[6] and it addressed the form of a prison sentence, i.e., how it should look. Notably, there was no exception for repeat or habitual offenders.

A revised version from 1905 contained language that is similar in style to the current version of MCL 769.8, but it does not appear from the revised language that the legislature intended to create mandatory prison sentences. The 1905 version provided:

That when any person shall hereafter be convicted of crime committed after this act takes effect, the punishment for which prescribed by law, may be imprisonment in the State Prison at Jackson,

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[5] The 1903 act was the first indeterminate sentencing law to be upheld in Michigan, although there was an earlier indeterminate sentence law of 1889 that was struck down by this Court as unconstitutional in 1891. See *People v Cummings*, 88 Mich 249; 50 NW 310 (1891) (separation of powers error).

[6] See *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972).

the Michigan Reformatory at Ionia, the State House of Correction and Branch of the State Prison in the Upper Peninsula, or the Detroit House of Correction, the court imposing sentence, shall not fix a definite term of imprisonment, but shall fix a minimum term of imprisonment which shall not be less than six months in any case. The maximum penalty provided by law shall be the maximum sentence in all cases except as herein provided and shall be stated by the judge in passing sentence. The judge shall at the time of pronouncing such sentence recommend and state therein what, in his judgment, would be a proper maximum penalty in the case at bar not exceeding the maximum penalty provided by law. He shall before or at the time of passing such sentence ascertain by examination of such convict on oath, or otherwise, and in addition to such oath, by such other evidence as can be obtained tending to indicate briefly the causes of the criminal character or conduct of such convict, which facts, and such other facts as shall appear to be pertinent in the case, he shall cause to be entered upon the minutes of the court. [1905 PA 84.]

In fact, when this Court compared the 1903 and 1905 acts in 1911, it concluded that "[t]he general purpose of these statutes is the same[.]" *Ex parte Forscutt*, 167 Mich 438, 443; 133 NW 315 (1911).[7] The Court also included as part of its analysis the title of both acts, and the 1905 title reflects the legislature's intention that an indeterminate sentence was "*a*" punishment for crime: "An act to provide for the indeterminate sentence as a punishment for crime . . . ." *Id*., at 441. The 1903 title did not address this point: " An act to provide for the indeterminate sentence and for the disposition, management and release of criminals under such sentence, and for the expense attending the same." *Id.*, at 440.

[7] The full quote in *Forscutt* is: "The general purpose of these statutes is the same, but there are many provisions in the later law which are not found in the one repealed." In context, the second half of the sentence appears to refer to differences in language relating to the length of the minimum and maximum terms.

The 1921 and 1927 versions appear stylistically similar to the 1905 act (and similar to the current version of MCL 769.8). The 1921 law provided:

> Sec. 1. That when any person shall hereafter be convicted of crime committed after this act takes effect, the punishment for which prescribed by law, may be imprisonment in the State Prison at Jackson, the Michigan Reformatory at Ionia, the State House of Correction and Branch of the State Prison in the Upper Peninsula, or the Detroit House of Correction, the court imposing sentence, shall not fix a definite term of imprisonment, but shall fix a minimum term of imprisonment which shall not be less than six months in any case. The maximum penalty provided by law shall be the maximum sentence in all cases except as herein provided and shall be stated by the judge in passing sentence. The judge shall, at the time of pronouncing such sentence, recommend and state therein, what, in his judgment, would be a proper maximum penalty in the case at bar not exceeding the maximum penalty provided by law. He shall before or at the time of passing such sentence ascertain by examination of such convict on oath, or otherwise, and in addition to such oath, by such other evidence as can be obtained tending to indicate briefly the causes of the criminal character or conduct of such convict, which facts, and such other facts as shall appear to be pertinent in the case, he shall cause to be entered upon the minutes of the court. [1921 PA 259.]

The 1927 version added the language "convicted for the first time":

> Sec. 8. When any person shall hereinafter be convicted for the first time of crime committed after this act takes effect, the punishment for which prescribed by law may be imprisonment in the state prison at Jackson, the Michigan reformatory at Ionia, the state house of correction and branch of the state prison in the upper peninsula, the Detroit house of correction, or any other prison, the court imposing sentence shall not fix a definite term of

> imprisonment, but shall fix a minimum term except as hereinafter provided. The maximum penalty provided by law shall be the maximum sentence in all cases except as herein provided and shall be stated by the judge in passing sentence. He shall before or at the time of passing such sentence ascertain by examination of such convict on oath, or otherwise, and by such other evidence as can be obtained tending to indicate briefly the causes of the criminal character or conduct of such convict, which facts and such other facts as shall appear to be pertinent to the case, he shall cause to be entered upon the minutes of the court. [1927 PA 175.][8]

The 1978 version, similar to the 1927 version, included the language "convicted for the first time":

> Sec. 8. When a person is convicted for the first time for the commission of a felony, and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence. Before or at the time of imposing the sentence the judge shall ascertain by examination of the convict on oath, or otherwise, and by other evidence as can be obtained tending to indicate briefly the causes of the criminal character or conduct of the convict, which facts and other facts which appear to be pertinent to the case, the judge shall cause to be entered upon the minutes of the court. [1978 PA 77.]

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[8] See also *People v Tanner*, 387 Mich at xx (Brennan, J., dissenting (analyzing the indeterminate sentence law from 1903 through 1927).

The 1994 version added language addressing disciplinary time as a potential extension of the minimum sentence, 1994 PA 322, but this language was eliminated in 1998. 1998 PA 317.

From the history of MCL 769.8 and its antecedents, the Court can see how the first indeterminate sentence law was created to specify the form of a prison sentence when one was imposed (i.e., an indeterminate sentence), and later versions continued this tradition. While later versions used language that is somewhat less direct than that found in the 1903 statute, there does not appear to be any reason to assume the legislature was creating a mandatory prison sentence with the 1905 act, and contextual clues (namely the title of the 1905 statute and how the 1903 and 1905 acts were interpreted) suggest it was not.

That a mandatory prison sentence was not intended is also consistent with the legislative practice of the day. For many felony offenses, the legislature authorized a sentence to the state prison *or* the county jail, and this language was included within many penal statutes. [9] The practice appears to date from the 1800s through the 1920s, if not later.

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[9] See e.g., *O'Neil v People*, 15 Mich 275, 279 (1867) (larceny from the person punishable by maximum five years in prison or maximum one year in the county jail); *People v Calvin*, 60 Mich 113, 120-121; 26 NW 851 (1886) (same); *McDade v People*, 29 Mich 50, 51 (1874) (arson of building punishable by maximum 15 years in prison or fine and maximum one year in the county jail); *People v Chimovitz*, 237 Mich 247, 249; 211 NW 650 (1927) (arson of building, maximum 15 years in prison or fine or maximum one year in the county jail); *People v Schultz*, 85 Mich 114, 115; 48 NW 293 (1891) (embezzlement, maximum two years in prison or fine or maximum six months in the county jail); *In re Downs*, 147 Mich 477, 478; 111 NW 81 (1907) (attempted burglary, maximum three years in prison or maximum one year in the county jail); *People v Stickler*, 156 Mich 557, 565; 121 NW 497 (1909) (desertion and abandonment, state prison of not more than three years and not less than one year or county jail not more than one year and not less than three months); *People v Jefferson*, 161 Mich 621, 622; 126 NW 829 (1910)

In 1931, the legislature created an all-purpose statute that specified an "optional" jail sentence for first offenders convicted of a felony where the maximum penalty was five years or less. 1931 PA 328, § 506. It is unclear whether this statute was meant to replace the earlier practice of authorizing a prison or jail sentence for specific felony offenses, but whatever the legislative intent, the statute continues in the same form today as MCL 750.506:

> Sec. 506. OPTIONAL JAIL SENTENCE FOR FIRST OFFENDERS CONVICTED OF FELONIES--Whenever any person shall be convicted of a first offense herein declared to be a felony, punishable by imprisonment for a term of not more than 5 years, the court may instead of imposing the sentence provided, sentence such convicted person to the county jail for a period not to exceed 6 months. [MCL 750.506.].[10]

(possession of burglar tools, maximum ten years in state prison or maximum one year in jail, or fine); *People v Loomis*, 161 Mich 651, 654; 126 NW 985 (1910) (child cruelty, maximum five years in prison and not less than three months, or imprisonment in the county jail); *People v Bennett*, 205 Mich 95, 99-100; 171 NW 363 (1919) (carnal knowledge with consent of 14 to 15 year old girl, maximum five years in prison or maximum one year in jail or fine); *People v Larson*, 225 Mich 355, 358; 196 NW 412 (1923) (false pretenses over $25, maximum 10 years state prison or fine and maximum one year county jail); *People v Gourd*, 237 Mich 156, 159; 211 NW 346 (1926) (fraud or embezzlement by treasury officials, maximum 14 years in state prison or fine or maximum 2 years in county jail or both). See also, *People v Elliott*, 13 Mich 365 (1865) (generally discussing alternative punishments of state prison or county jail).

[10] The 1931 version is identical to the current version except the number "6" is spelled "six." 1931 PA 328, § 506 (Chapter LXXIII). It is unknown whether there was some earlier version of MCL 750.506 in existence prior to 1931.

As the Court might note, MCL 750.506 does not fall within the same chapter as MCL 769.8 and thus cannot be read as an incorporated exception to the latter statute.

Today's penalty statutes also include two additional examples of where a jail sentence is authorized for a felony offense. Both trace their existence to the early 1900s if not earlier, and both authorize a jail or prison sentence:

Attempted crimes[11]

Felony desertion and non-support[12]

Further, there are two broad exceptions to a prison sentence for many felony offenders (first-offense or otherwise). These are found within 1) the probation statutes, and 2) the legislative sentencing guidelines. When the legislature first created indeterminate sentencing in 1903, it also created a statute permitting probationary sentences for most felonies. 1903 PA 91[13]; *People v McFarlin*, 389 Mich 557, 568; 208

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[11] MCL 750.92 ("If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year[.]")

[12] MCL 750.161(1) ("is guilty of a felony, punishable by imprisonment in a state correctional facility for not less than 1 year and not more than three years, or by imprisonment in the county jail for not less than 3 months and not more than 1 year.").

[13] 1903 PA 91 states:

> Provided the defendant has never before been convicted in this State or elsewhere, of a crime or misdemeanor, after a plea or verdict of guilty in any case where the commission of a crime or misdemeanor is charged and where a discretion is conferred upon the court as to the extent of the punishment, the several circuit courts of this State . . . shall have power to place the defendant on

NW2d 504 (1973). Probation, with or without a jail term, remains an available sentence for most felonies in 2023. See MCL 771.1.

A jail sentence was also authorized as part of the legislative sentencing guidelines under MCL 769.31 and 769.34. effective January 1, 1999. 1994 PA 445; 1998 PA 317. Although a jail sentence is no longer described within the definition of intermediate sanction as of 2021, see 2020 PA 395, it continues to exist as an available departure from an intermediate sanction range under MCL 769.34(4)(a), and as an available sentence for a straddle cell under MCL 769.34(4)(c)(ii).

If, as the Court of Appeals concluded below, an indeterminate prison sentence is always required for a first-time felony offender, there would be no explanation for the many statutes described above that currently authorize a jail or probation sentence. Further, there would be no way to harmonize MCL 769.8 with the historical practice or the history behind MCL 769.8. The language that creates a caveat within MCL 769.8, "except as otherwise provided in this chapter," could not be used to explain the probation statute, the attempt statute, the desertion statute, or MCL 750.506.

The only logical interpretation of MCL 769.8 is that it requires an indeterminate prison sentence *when* a prison sentence is imposed. An echo of this conclusion can be found in *People v Ungurean,* 51 Mich App at 267, where Judge Michael D. O'Hara (former Michigan Supreme Court justice sitting by assignment) explained that "[a]ccording to the tenor of its own language the indeterminate sentence act is only potentially applicable when the accused is 'convicted for the first time' and clearly does not comprehend situations [involving the sentencing of habitual offenders]."

A contrary holding by this Court would be incorrect and would offer untenable implications. An interpretation of MCL 769.8 requiring a prison sentence for all or nearly all first-time felony offenders (i.e., unless an exception could be found in Chapter IX) would work a vast change in our understanding of Michigan felony sentencing law. It

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probation under the charge and supervision of a probation officer in the following manner . . . ."

would also create a more severe sentencing scheme than required for habitual offenders second-offense, where probation is an authorized sentence:

> Sec. 10. (1) If a person has been convicted of a felony or an attempt to commit a felony, whether the conviction occurred in this state or would have been for a felony or attempt to commit a felony in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13[1] of this chapter as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court, except as otherwise provided in this section or section 1 of chapter XI,[2] may place the person on probation or sentence the person to imprisonment for a maximum term that is not more than 1- ½ times the longest term prescribed for a first conviction of that offense or for a lesser term.
>
> (b) If the subsequent felony is punishable upon a first conviction by imprisonment for life, the court, except as otherwise provided in this section or section 1 of chapter XI, may place the person on probation or sentence the person to imprisonment for life or for a lesser term.
>
> (c) If the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461. [MCL 769.10(1).]

Further, if MCL 769.8 were to require a prison sentence for all or nearly all first-time felony offenders, it would create a mandatory minimum term:

> Definite sentencing [what we think of as determinate sentencing] does not necessarily imply that judges must sentence convicted defendants to a term of imprisonment. It simply means that *if* a prison term is handed down it must be certain. 'Mandatory minimum sentencing" laws, on the other hand, do provide that persons convicted of specified crimes or crimes within specified categories *must* serve a prison term of some designated length. Mandatory minimums imply that probation is unavailable but that sentences may be reduced by good time credits. [Zalman, *The Rise and Fall of the Indeterminate Sentence: Part III*, 24 Wayne L Rev 857, 859 (1978).]

Should MCL 769.8 create a mandatory minimum term, the Court would have to conclude that trial judges are required to warn of this consequence when accepting a guilty plea. See MCR 6.302(B)(2) (requiring advice of any "mandatory minimum sentence required by law").

In sum, the history of indeterminate sentencing, the historical practice of authorizing a jail or prison sentence for many felony offenses, the language of MCL 769.8 itself, and the many instances in which a jail or probationary sentence may now be imposed all support the conclusion that MCL 769.8 requires an indeterminate sentence only *when* a prison sentence is imposed. The statute does not require a prison sentence for first-time felony offenders and merely speaks to the *form* of a prison sentence when one is imposed. See *Brinson*, 403 Mich at 683 (twice referring to the legislature's intention as to the "form" of a prison sentence for non- habitual offenders).

Given all of the above, Mr. Pinson's six-month jail sentence for third-degree criminal sexual conduct was a valid sentence under Michigan law. The version of MCL 769.31(b) in effect at the time of Mr. Pinson's offense and his sentencing expressly authorized a jail sentence without probation as part of the legislative guidelines scheme.[14] MCL 777.16y

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[14] MCL 769.31(b) provided:

> "Intermediate sanction" means probation or any sanction, other than imprisonment in a state prison or state

classifies third-degree criminal sexual conduct as a class B offense. Grid A-I in the sentencing grid for class B offenses is 0 to 18 months and is an intermediate sanction cell. MCL 777.63. Additionally, grids A-II and B-I are straddle cells which also allow for an intermediate sanction. *Id.* Thus, intermediate sanctions were authorized for the lowest ranges as well as straddle cells.

Further, the legislature created a departure scheme that would authorize an intermediate sanction as a departure from a prison cell. MCL 769.34(3) provides that a "court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the departure is reasonable and the court states on the record the reasons for departure." This is precisely what the sentencing court did in Mr. Pinson's case.

What the court did in Mr. Pinson's case is analogous to when a sentencing court gives an individual probation as a departure from a prison cell when on offense is probationable. While MCL 777.1(1) precludes probation for third-degree criminal sexual conduct, the principle is the same. Because as discussed above, Mr. Pinson's sentence was not required to be indeterminate, and while probation was not an authorized departure option, the intermediate sanction of a six-month jail sentence was an authorized departure at the time.

> reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:
>
> ***
>
> (iv) Probation with Jail.
>
> ***
>
> (viii) Jail.
>
> (ix) Jail with work or school release.

Therefore, at a minimum, this Court should peremptorily reverse the Court of Appeals and affirm Mr. Pinson's sentence.

Conclusion and Relief Requested

For the reasons stated above, Armond Pinson respectfully requests that this Honorable Court grant leave to appeal or any other peremptory relief the Court deems just and appropriate.

Respectfully submitted,

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Respectfully submitted,

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