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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

EVAN TAYLOR ARMOGEDA ,

Defendant-Appellant.
_____/

SC No. 167760

COA No. 365184

Ingham CC No. 21-000260-FC

AMICUS CURIAE BRIEF – CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

IN SUPPORT OF
DEFENDANT-APPELLANT ARMOGEDA

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Statement of Questions Presented

I. Is Mr. Armogeda entitled to resentencing where the sentencing judge rejected his obligation to act in conformity with the statutory sentencing guidelines scheme that remains in place post-*Lockridge?*

CDAM answers, "Yes."

II. Are defendants always entitled to resentencing where the original minimum term of sentence imposed was within the incorrect guidelines range used at sentencing but exceeds the actual correct sentencing guidelines range? Does any contrary holding violate this Court's binding sentencing jurisprudence that was not displaced by *Lockridge*?

CDAM answers, "Yes."

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Statement of Facts

The sentencing guidelines range for the conviction of assault with intent to murder (AWIM) used at Mr. Armogeda's sentencing hearing was 270-450 months/Life. (31a, 40a).[1] The trial judge sentenced Mr. Armogeda to prison with a 360-month minimum term, which was in the middle of the guidelines range. (3a, 40a).

Mr. Armogeda filed a motion seeking resentencing, asserting that the correct range was 171-285 months, meaning the sentence imposed would exceed the correct range. (40a). In response, the prosecutor agreed that the guidelines range used at sentencing was incorrect, but asserted that the correct range was 225-375 months, making the sentence fall at the high end of the correct range. (41a, 126a).

The trial judge acknowledged the competing ranges as presented at the motion hearing but declined to resolve the scoring issue and denied resentencing. (42a, 131a). The judge indicated that determining the correct range was irrelevant to him as the guidelines range was only advisory and he would have imposed the same sentence regardless of any error. (41a, 131a-132a).

The judge gave little explanation for why his sentence would have been the same beyond his opinion that it was lucky that the victim did not die. And he gave no explanation for departing or the extent of any departure from the defense's calculation of the range. (41a, 131a-132a).

On appeal, the Court of Appeals affirmed the sentence based on the trial judge's statement that the sentence would have been the same regardless of the

[1] Record citations are to the Defendant-Appellant's appendix.

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proper range, although it remanded for the guidelines to be correctly calculated. (41a-42a). On remand, it was determined that the correct range was 171-285 months, as Mr. Armogeda had proffered in his motion for resentencing. (43a-44a). Thus, the sentence imposed exceeded the correct range by 75 months (6 years, 3 months).

Arguments

I. Mr. Armogeda is entitled to resentencing where the sentencing judge rejected his obligation to act in conformity with the statutory sentencing guidelines scheme that remains in place post-*Lockridge*.

This case is not about whether any error in the scoring of the sentencing guidelines was harmless because the sentencing judge in Mr. Armogeda's case failed to properly consult the sentencing guidelines and otherwise rejected the statutory scheme, thus creating a pervasive error that requires resentencing. See *People v Hegwood,* 465 Mich 432 (2001). The sentencing judge, a district judge sitting by assignment, essentially rejected the strictures of the statutory guidelines. The judge failed to determine the correct sentencing guidelines range and stated in essence that the appropriate range was not relevant to the sentence that he chose. The judge also failed to articulate departure reasons for what ultimately became a departure sentence and failed to articulate any reason for the extent of the departure. Resentencing is necessary, as "[a] defendant is entitled to be sentenced in accord with the law, and is entitled to be sentenced by a judge who is acting in conformity with such law." *People v Francisco*, 474 Mich 82, 90-91 (2006).

When confronted with competing ranges at the hearing on Mr. Armogeda's motion seeking resentencing, the judge declined to resolve the scoring issue and

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denied resentencing. (42a, 131a). The judge indicated that determining the correct range was irrelevant to him as the guidelines range was only advisory and he would have imposed the same sentence regardless of any error. (41a, 131a-132a). The judge stated:

> Well, I'm going to deny resentencing for the following reasons:
>
> First of all, as judges always say, the guidelines are advisable [sic]. Even if the guidelines had been, and are -- were appropriately 170 to 285, I think 360 months is the lowest minimum sentence that I felt, in my discretion, was appropriate.
>
> This act didn't kill the victim by a confluence of a lot of very fortuitous things…
>
> I -- the harm to the victim just didn't -- just in my discretion, then and now, regardless of these scores, I'm just not able to go any lower than that on the minimum. So I deny the motion for new trial, deny the motion for resentencing. And those are the reasons.
>
> It's nothing scientific, honestly. It's just not a scientific thing. It's because there was a -- there was a video that probably got played several times in the car. And -- but for just the confluence of a lot of fortuitous circumstances [the victim would have died]. (131a-132a)

Unlike most of the cases cited by the prosecutor and Amicus-PAAM, the correct sentencing guidelines range was not determined by the district judge before he affirmed the original sentence. The judge acknowledged that the parties had proposed competing lower ranges but did not resolve the dispute. Instead, the judge explained that his decision was "not scientific," and that the applicable range was irrelevant to him. He also did not follow the statutory scheme for imposing a sentence in excess of the applicable guidelines range, which would have allowed for the proper appellate review guaranteed by the Legislature and this Court.

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The overall error here is a failure to properly consult and utilize the statutory sentencing guidelines scheme as required by the Michigan Legislature and Michigan Supreme Court. That pervasive error entitles Mr. Armogeda to resentencing. See *Hegwood, supra.*

To fully appreciate this error, consider the sentencing process from the Legislature's perspective. Sentencing guidelines were adopted effective January 1, 1999, and they were designed to curtail the judge's sentencing discretion. Although those guidelines were later rendered advisory in *People v Lockridge,* 498 Mich 358 (2015), the Legislature made only minimal changes to the statutory scheme post-*Lockridge*. It is clear from the present statutory language that a judge must still determine the "appropriate" range based on the guidelines in effect on the date of the offense, even if the judge ultimately chooses not to sentence within that range: "Except as otherwise provided in this subsection or for a departure from the *appropriate* minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony . . . may be within the *appropriate* sentence range under the version of those sentencing guidelines in effect on the date the crime was committed." MCL 769.34(2) (emphasis added). Likewise, the Legislature retained subsection (7) relating to departures from the "appropriate" guidelines range: "If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the *appropriate* sentencing range . . . he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the *appropriate* sentence range." MCL 769.34(7) (emphasis added).

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This Court has likewise made clear that an initial part of the sentencing process is review of the sentencing guidelines. "To preserve as much as possible the legislative intent in enacting the guidelines, however, we hold that a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence." *Lockridge,* 498 Mich at 365. "Sentencing courts . . . must continue to consult the applicable guidelines range and take it into account when imposing sentence." *Lockridge,* 498 Mich at 392. As the United States Supreme Court recognized, "Of course, to consult the applicable Guidelines range, a district court must first determine what that range is." *Rosales v Mireles*, 585 US 129, 133 (2018).

In other words, whether the guidelines range is mandatory or advisory, the legally relevant factors and recommended range set a baseline for the sentencing judge's exercise of discretion, as well for later appellate review. "Michigan's sentencing guidelines are no longer mandatory, but they 'remain a highly relevant consideration in the trial court's exercise of sentencing discretion.'" *People v Posey*, 512 Mich 317, 347, quoting *People v Lockridge*, *supra.* "The guidelines remain important as an advisory resource for sentencing courts and continue to be a 'highly relevant consideration on appeal." *People v Posey*, 512 Mich at 352, quoting *People v Lockridge*, *supra.*

Although analogy to decisions addressing the judicial sentencing guidelines is somewhat imperfect (the judicial sentencing guidelines not having the force of law, although they too were advisory), at least one case illustrates the point that the guidelines range must be determined as a starting point for the sentencing decision.

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In *People v Boucher*, 165 Mich App 361 (1987), the circuit judge at a resentencing declined to resolve a challenge to the scoring of two variables of the judicial guidelines, remarking that the scoring was "somewhat uncertain" and "questionable." The judge selected a sentence that was "an average between the two grid ranges" and indicated on the departure form, "This is a departure high or a departure low, depending on the scoring of OV 7 and OV 13." The Court of Appeals reversed, concluding the judge's handling of the matter was "inappropriate" where the judge had not resolved challenges to the scoring.

Here, as in *Boucher*, the district judge failed to resolve scoring challenges. Instead, the district judge affirmed the original sentence, commenting that it was applying no "scientific" approach and that no mechanical scoring of the guidelines would change the sentence. Thus, the judge failed to resolve how the guidelines should be scored and effectively did not consult the guidelines when making its decision.

This case is reminiscent of the error committed in *People v Hegwood,* 465 Mich 432 (2001). In *Hegwood,* a case addressing the then-mandatory and at the time very new legislative sentencing guidelines, the trial judge "ignored" the sentencing guidelines range, commenting that "I could care less what the legislature through its rule making authority says as to the guidelines that I could impose, or what kind of sentence I would impose." 465 Mich at 435. The trial judge reflected on his role as the elected county official with the authority to impose sentence. 436 Mich at 434 n 6. This Court reversed, diplomatically noting that the 1999 transition from advisory

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(judicial) sentencing guidelines to mandatory (legislative) sentencing guidelines "may have misled some courts into believing that application of the current guidelines is governed by previous principles." 465 Mich at 439. More importantly, the Court clarified that it is "the responsibility of the circuit judge to impose sentence, but only *within the limits* set by the Legislature." *Hegwood*, 465 Mich at 437 (emphasis in the original), quoting *People v Milbourn,* 435 Mich 630, 651(1990).

In *Hegwood*, this Court expressly recognized the power of the legislature to set limits on the sentencing decision: "[T]the legislature may impose restrictions on a judge's exercise of discretion in imposing sentence." *Hegwood,* 465 Mich at 440. This Court recently restated the same principle in *People v Posey*, 512 Mich 317, 343-344 (2023): "The Michigan Constitution vests sentencing authority in the Legislature . . . [although] the Legislature has assigned discretionary authority to trial courts to sentence a defendant within a given range, with . . . sentencing guidelines [used] to help accomplish the task of individualizing sentences . . . ."

In Mr. Armogeda's case, the trial judge effectively disregarded one of the most important restrictions on sentencing in Michigan: that the sentencing guidelines range must be calculated and considered before sentence is imposed. In essence, the judge sentenced without utilizing the appropriate sentencing guidelines range.

To be clear, the argument is not that the Legislature's sentencing guidelines are mandatory, but that consideration of the "appropriate" guidelines range is mandatory and channels the sentencing judge's discretion through the consideration of legally relevant factors. What the judge did here was to decide what he thought

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was the right sentence for someone who had suffered the injury the victim did in this case, without any regard whatsoever to the full panoply of factors the Legislature determined a judge should consider when imposing sentence. But this is not what the law requires. Failing to correctly calculate and/or ignoring the statutory guidelines range was not sanctioned in *Lockridge,* violates the statutory sentencing guidelines scheme, and entitles Mr. Armogeda to resentencing.

Additionally, by statute, "a minimum sentence that is longer or more severe than the *appropriate* sentence range" is appealable "on grounds that it is longer or more severe than the *appropriate* sentence range." MCL 769.34(7) (emphasis added). This Court did not strike subsection (7) in *Lockridge* and the Legislature choose to retain it when it later amended the statute in 2021. In *Lockridge,* this Court explained that, despite the guidelines range no longer being mandatory, a judge who decides to exceed the applicable guidelines range must justify the sentence imposed to facilitate appellate review. *Lockridge*, 498 Mich at 392; see *People v Steanhouse*, 500 Mich 453, 470 (2017).

To date, this justification must include "'an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.'" *People v Dixon–Bey*, 321 Mich App 490, 478 (2017)

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(quoting *People v Smith*, 482 Mich 292, 311(2008)). The applicable range remains relevant to appellate review in the now advisory system. *Posey*, 512 Mich at 352.[2]

At the hearing on the motion to correct invalid sentence here, the judge stated that he would have imposed the same sentence regardless of whichever proposed guidelines range was correct, gave little explanation for that decision beyond his belief that it was just happenstance that the victim did not die, and gave no explanation for the extent of any departure. The judge deprived Mr. Armogeda of the ability to receive full and proper appellate review of the sentence imposed, which was guaranteed to him by the statutory scheme and this Court's jurisprudence. Again, such was not approved in *Lockridge,* violates the statutory sentencing guidelines scheme, and entitles Mr. Armogeda to resentencing.

As a final note, the decision in *People v Mutchie,* 468 Mich 50 (2003), is not on all fours and not controlling law. In *Mutchie*, the sentencing judge originally imposed an upward departure sentence after articulating reasons for departing. 468 Mich at 51-52. In response to a later motion to correct invalid sentence challenging the scoring of OV 11, the circuit court judge ruled that OV 11 was correctly scored and stated

[2] In *Lockridge*, this Court explained that maintaining the upper end of the range as mandatory would not be unconstitutional (aka the Shapiro remedy), but this Court choose the *Booker* remedy instead. 498 Mich at 389-392. The Legislature was free to amend the statute within constitutional limits in response to *Lockridge*. When the Legislature amended MCL 769.34 in 2021, it adopted much of the approach this Court took in *Lockridge*. Importantly, the Legislature maintained subsection (7), which is consistent with the requirement from *People v Smith*, 482 Mich 292, 311 (2008), that sentencing judges articulate why the departure sentence imposed is more proportionate to the offense and the offender than a different sentence would have been. Such a requirement is not inconsistent with this Court's *Posey* decision as to the review of proportionality for within guidelines sentences. Additionally, the import of the retention of subsection (7) was not an issue in *Posey*.

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that regardless of whether it had been scored incorrectly, the judge would have departed upward again to impose the same sentence. 468 Mich at 51-52. On appeal, the Court of Appeals determined that OV 11 had indeed been correctly scored, and it went on to hold that any scoring error would have been rendered moot because the judge in his comments at the motion hearing re-affirmed the departure sentence. *Id*. This Court found that the Court of Appeals' analysis as to the scoring of OV 11 was unnecessary dicta. The Court affirmed the sentence because the judge at the original sentencing hearing had already stated substantial and compelling reasons in support of the upward departure. 468 Mich at 52. *Mutchie*, notably, was decided before this Court required reasons for the *extent* of the departure. See *People v Smith*,482 Mich 292, 303-307 (2008).

Here, the sentence imposed on Mr. Armogeda fell within the incorrect sentencing guideline range that was used at sentencing (it fell within the middle of that range). In response to a post-conviction motion, the district judge, without determining the correct scoring of the guidelines, affirmed the sentence – a sentence that would be a departure from the corrected range as proposed by the defense and a sentence that would be near the top of the corrected range as proposed by the prosecutor. The sentencing judge did not articulate reasons for a departure or for the extent of any departure. On a later remand, the parties and the court concluded that

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the defense recommended range was the correct one. Therefore, *Mutchie,* even if still good law, does not apply.[3]

Resentencing is required when a sentencing court fails to prepare the guidelines, fails to resolve a challenge to the appropriate range when correction of the scoring would change the recommended range, or expresses that the applicable range is irrelevant to its sentencing decision. A judge cannot properly sentence an individual for a felony offense without first determining the appropriate sentencing guidelines range. Likewise, the Court of Appeals cannot properly perform the reasonableness/proportionality review called for in statute without "the appropriate sentence range" having been calculated, reasons for any departure from it articulated, and reasons for the extent of any departure from it articulated. Mr. Armogeda is entitled to resentencing.

II. Defendants are always entitled to resentencing where the original minimum term of sentence imposed was within the incorrect guidelines range used at sentencing but exceeds the actual correct sentencing guidelines range. Any contrary holding violates this Court's binding sentencing jurisprudence that was not displaced by *Lockridge.*

In *Steanhouse*, this Court made at least two points from its earlier *Locrkidge* decision even clearer, and both mean that Mr. Armogeda is entitled to resentencing in this case. First, this Court had *Booker-ized* Michigan's statutory sentencing guidelines in all applications. *People v Steanhouse,* 500 Mich 453, 465-466 (2017),

[3] Although the prosecutor similarly relies on *People v Hull*, 437 Mich 868 (1990), it is unclear in *Hull* whether the original sentence was a departure or a within-guidelines sentence.

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citing *Lockridge*, 498 Mich at 391.[4] Second, this Court had not otherwise altered Michigan's sentencing jurisprudence. *Steanhouse,* 500 Mich at 471-472. "[N]othing else in our [*Lockridge*] opinion indicated we were jettisoning any of our previous sentencing jurisprudence outside the Sixth Amendment context. Moreover, none of the constitutional principles announced in *Booker* or its progeny compels us to depart from our longstanding practices applicable to sentencing." *Steanhouse,* 500 Mich at 473. Granting resentencing relief to Mr. Armegoda is both consistent with the *Booker* line and with Michigan's longstanding sentencing jurisprudence.

This Court has long held that defendants are entitled to resentencing where the original minimum term of the sentence imposed was within the *in*correct guidelines range used at sentencing but exceeds the actual correct sentencing guidelines range, even when the error was not preserved. *People v Kimble*, 470 Mich 305, 310-314 (2004). In *Kimble*, this Court explained that the *Carines*[5] test for plain error is satisfied in this situation because "[i]t is difficult to imagine what could affect the fairness, integrity and public reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than authorized by the law" via an unacknowledged and unarticulated departure from the applicable guidelines range. *Kimble,* 470 Mich at 313.

A few years after its *Kimble* decision this Court addressed a different situation, one where the error affected the sentencing guidelines range but not so much that the sentence imposed was not within the correct range. In *Francisco,* this Court held

[4] *United States v Booker*, 543 US 220 (2005).
[5] *People v Carines*, 460 Mich 750 (1999).

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that in that less egregious situation the defendant needs to have preserved the scoring error to be entitled to resentencing, absent a successful, related ineffective assistance of counsel claim. *People v Francisco*, 474 Mich 82, 88-89 n 8 & n 9 (2006). And, in a footnote in *Francisco,* relying on *Mutchie,* this Court stated in these situations where the error affected the range but not so some much that the sentence imposed is not within the correct range *and* the sentencing court has clearly indicated that it would have imposed the same sentence regardless of the scoring error, then resentencing is not required.

Francisco is more restrictive than the federal system post-*Booker*. In the federal system a defendant is entitled to resentencing on plain error review where an unpreserved scoring error alters the range even where the sentence imposed still falls within the correct range. *Rosales-Mireles,* 585 US 129, 135-136 (2018).

This Court's recent opinion in *Posey*, 512 Mich at 356-357, striking the language from MCL 769.34(10) that required an appellate court to affirm a within guidelines range sentence, may require this Court to re-examine the different treatment given unpreserved and preserved scoring error in *Kimble* and *Francisco* given the reasons for the disparate treatment articulated in those cases. This Court would need to require resentencing for plain errors even where an unpreserved scoring error alters the range but where the sentence imposed still falls within the correct range to maintain consistency with the *Booker* line, as in *Rosales-Mireles*.

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But, as *Rosales-Mireles* proceeded on plain error review directly to the appellate court, there was no statement from the sentencing judge at a post-conviction motion hearing that the different range would not have affected the sentence imposed. Still, in Mr. Armegado's case, the error was of such magnitude that the sentence imposed exceeds the correct range, so he is entitled to resentencing under Kimble. The *Francisco* carve-out from its footnote 8 does not apply. And regardless of whether this Court chooses to alter *Francisco* to be consistent with *Rosales-Mireles*, Mr. Armegado is entitled to relief under *Kimble*.

At this point, it bears repeating that *People v Mutchie,* 468 Mich 50 (2003), is not on all fours and not controlling here. (See Issue I). In *Mutchie*, the sentencing judge had originally imposed an upward departure sentence after articulating reasons departing. 468 Mich at 51-52. In response to a later motion to correct invalid sentence challenging the scoring of OV 11, the circuit court judge ruled that OV 11 was correctly scored and stated that regardless of whether it had been scored incorrectly the judge would have departed upward again to impose the same sentence. 468 Mich at 51-52. An articulated departure sentence imposed at the original sentence is a stark contrast to a post-hoc explanation at a motion hearing where the defendant may not even be present. And here the judge had not even determined the correct range and gave no explanation for any departure. (See Issue I).

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Granting resentencing here is entirely consistent with other areas of Michigan's sentencing jurisprudence beyond *Kimble*. It serves Michigan's right to meaningful allocution, guaranteed by common law and court rule. See *People v Petty*, 469 Mich 108 (2003); *People v Petit,* 466 Mich 624 (2002); MCR 6.425(D)(1)(c). A defendant cannot meaningfully allocute where the sentencing guidelines range that is being used and that he could address with the sentencing judge before sentence is imposed was so egregiously miscalculated. And having a judge who refuses to reconsider the sentence he imposed earlier after being confronted with a mistake of law or correction to inaccurate information, or who cannot be expected to do so fairly, is grounds for resentencing before a different judge.[6] *People v Evans*, 156 Mich App 68, 71-73 (1986), *People v Hicks*, 485 Mich 1060 (2010) (adopting the *Evans* test); see *People v Dixon-Bey,* 340 Mich App 292, 304 (2022).

Mr. Armogeda is entitled to be sentenced in accordance with the law and by a judge acting in conformity with the law. This Court should reverse and remand for resentencing.

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[6] While the guidelines range is no longer mandatory, this Court did not strike the entirety of the statutory sentencing guidelines scheme and the remaining portions still have the force of law. See *Lockridge;* see *Posey.*

The value of the statutory sentencing guidelines, with that force of law, can be measured in the *unlawful* years of incarceration that their enforcement has saved people from serving and in the resulting dollars saved by the State of Michigan on *unlawful* incarceration. SADO's records from 2008 to 2023, *excluding* juvenile lifer resentencings, reflected in annual reports, indicate that it has gotten relief measurable in over 3000 years of sentence reductions for people and worth over $121 million in savings to the State not spent on unlawful incarceration costs. SADO only receives 25% of indigent appeals, meaning the full numbers are much higher.

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Summary and Request for Relief

For the foregoing reasons, **CDAM** asks that this Honorable Court reverse and remand for resentencing.

Respectfully submitted,

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