No. _____

In the Supreme Court of the United States

ERICA HUSS, PETITIONER

v.

LOREN ROBINSON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Linus Banghart-Linn
Assistant Attorney General
Criminal Appellate Division

Attorneys for Petitioner

QUESTION PRESENTED

1. Whether it is clearly established federal law, as is required to grant relief in a federal habeas case, that the Sixth Amendment jury right applies not only to a definite sentence (which creates an entitlement to be released at the end of that sentence) but also to a parole-eligibility date.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Erica Huss, warden of a Michigan correctional facility. The respondent is Loren Robinson, an inmate. In the proceedings below, the habeas respondent was Jeffrey Woods. Huss is Robinson's current warden.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Introduction 3

Statement of the Case 4

A. Facts surrounding Robinson's crimes and convictions 4

B. Robinson's conviction and sentencing under Michigan law 4

C. Direct appeal proceedings in state court 6

D. Habeas proceedings below 6

Reasons for Granting the Petition 8

I. The Sixth Circuit erred in extending this Court's holdings to apply to decisions that only affect the date on which a prisoner becomes eligible for parole. 8

A. No case in the *Apprendi* line, including *Alleyne*, applies the Sixth Amendment jury right to facts that bear on a parole-eligibility determination. 8

B. The overruling of *McMillan* is not clearly established federal law. 11

C. Because the term "indeterminate" is ambiguous, the State has not relied on that word to defend Michigan's sentencing scheme. 13

Conclusion 15

PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals
for the Sixth Circuit
Opinion in 16-2067
Issued August 24, 2018..... 1a–16a

United States District Court
Western District of Michigan
Case No. 2:14-cv-50
Memorandum and Order
Issued June 14, 2016 ..... 17a–63a

Michigan Supreme Court
Case No. 147721
Order
Issued December 23, 2013 ..... 64a

State of Michigan
Court of Appeals
Case No. 303236
Opinion
Issued July 30, 2013 ..... 65a–91a

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. amend. VI 1

Cases

Alleyne v. *United States*,
570 U.S. 99 (2013) ..... passim

Apprendi v. *New Jersey*,
530 U.S. 466 (2000) ..... passim

Blakely v. *Washington*,
542 U.S. 296 (2004) 6, 9

Harrington v. *Richter*,
562 U.S. 86 (2011) 14

Harris v. *United States*,
536 U.S. 545 (2002) 6, 7, 12

McMillan v. *Pennsylvania*,
477 U.S. 79 (1986) 11, 12, 13

People v. *Drohan*,
715 N.W.2d 778 (Mich. 2006)..... 6

People v. *Lockridge*,
870 N.W.2d 502 (Mich. 2015)..... 5, 10, 11

Rodriguez de Quijas v. *Shearson/American Express*, *Inc.*,
490 U.S. 477 (1989) 13

United States v. *Booker*,
543 U.S. 220 (2005) 9

Virginia v. *LeBlanc*,
137 S. Ct. 1726 (2017) 11

White v. *Woodall*,
572 U.S. 415 (2014) 10, 11

Woods v. *Donald*,
135 S. Ct. 1372 (2015) 10, 11

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241 *et seq*..... 1

28 U.S.C. § 2254..... 8

28 U.S.C. § 2254(d)(1)..... 3, 11

Mich. Comp. Laws § 333.7401(2)(a)(iv)..... 5

Mich. Comp. Laws § 333.7413(1) 5

Mich. Comp. Laws § 750.213..... 4

Mich. Comp. Laws § 750.349b..... 5

Mich. Comp. Laws § 769.10..... 4

Mich. Comp. Laws § 769.34(3) 5

Mich. Comp. Laws § 791.233(1)(b) 5

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, App. 1a–16a, is reported sub nom. *Robinson* v. *Woods* at 901 F.3d 710 (6th Cir. 2018). The opinion of the district court denying habeas relief, App. 17a–63a, is not reported but is available at 2016 WL 3256837. The order of the Michigan Supreme Court denying leave to appeal, App. 64a, is reported at 840 N.W.2d 352 (Mich. 2013). The opinion of the Michigan Court of Appeals affirming Robinson's convictions, App. 65a–91a, is not reported but is available at 2013 WL 3942387.

JURISDICTION

The Sixth Circuit's opinion was entered on August 24, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq*.), provides in part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant

to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . .

INTRODUCTION

As this Court has repeatedly admonished the courts of appeals, in habeas cases governed by 28 U.S.C. § 2254(d)(1), courts are to apply only clearly established federal law as already determined by this Court and are not to extend those holdings to new factual and legal situations. The Sixth Circuit erred in this case by holding that the Sixth Amendment jury right applies not just to the determination of when a prisoner becomes entitled to release at the end of a definite sentence, but also extends to when a prisoner becomes eligible for parole, even though this Court has never made such a holding.

Perhaps on direct review as a matter of first impression, this Court would hold that the Sixth Amendment applies to factual findings that govern parole-eligibility determinations. Perhaps it would not. This is a question that divided the Michigan courts, with reasonable judicial minds on both sides of it—for example, the Michigan Supreme Court split 5 to 2 on it. But as long as fairminded disagreement exists, it is not for a court of appeals, in a habeas case, to extend this holding before this Court has done so.

This Court should summarily reverse the decision below because the Michigan courts' rejection of Robinson's Sixth Amendment sentencing claim was neither contrary to nor an unreasonable application of clearly established federal law, as determined by this Court's constitutional holdings.

STATEMENT OF THE CASE

A. Facts surrounding Robinson's crimes and convictions

The facts surrounding Robinson's crimes are not relevant to the narrow legal question presented here. For purposes of this petition, it suffices to present the summary of facts given by the court below:

> Petitioner and two of his cohorts sold the victim a large amount of crack cocaine on credit, beat the victim when he was unable to repay petitioner, and, eventually, extorted from the victim's parents the roughly $1,000 petitioner felt he was owed for the drugs. As a result, a Michigan jury convicted petitioner of extortion, M.C.L. § 750.213, delivery of a controlled substance, § 333.7413(2), unlawful imprisonment, § 750.349b, and aggravated assault, § 750.81a(1). *People* v. *Robinson*, No. 303236, 2013 WL 3942387, at *1 (Mich. Ct. App. July 30, 2013) (per curiam). [App. 3a.]

B. Robinson's conviction and sentencing under Michigan law

The trial court set Robinson's maximum sentences (which dictate when he is entitled to release) by applying the relevant Michigan statutes. Extortion carries a sentence of 20 years, Mich. Comp. Laws § 750.213, and the trial court exercised its discretion to enhance that to 30 years based on Robinson's status as a second-offense habitual offender, § 769.10. Similarly the trial court enhanced the 15-year statutory maximum sentence for unlawful imprisonment,

§ 750.349b, to 22-and-a-half years. And because Robinson's controlled substance conviction was a second offense, the trial court enhanced the default maximum sentence of 20 years, § 333.7401(2)(a)(iv), to a maximum of 40 years, § 333.7413(1). Because these sentences run concurrently, Robinson effectively received a 40-year maximum sentence for these crimes; he is entitled to release after 40 years.

The trial court also set Robinson's minimum sentence (which is the focus of this petition). Under Michigan law, his minimum sentence is not a period after which he is entitled to release; instead, it represents the portion of his maximum sentence he is required to serve before being considered for parole. Mich. Comp. Laws § 791.233(1)(b). The court began by scoring Robinson's offense variables (OVs) and prior record variables (PRVs) to arrive at a guidelines range for the minimum sentence. Robinson's guidelines were 84 to 175 months for extortion, 50 to 125 for unlawful imprisonment, and 19 to 38 months for the controlled substance conviction.

At the time of Robinson's sentencing, the sentencing guidelines were mandatory, and the trial court was required to sentence within the guidelines unless it found "a substantial and compelling reason" to sentence outside the guidelines. Mich. Comp. Laws § 769.34(3), held unconstitutional by *People* v. *Lockridge*, 870 N.W.2d 502 (Mich. 2015).

The trial court did not depart but sentenced within the guidelines range—to 150 months for extortion, 120 months for unlawful imprisonment, and 38 months for the controlled substance convictions. App. 5a. These terms, like Robinson's maximum sentences,

run concurrently, so that Robinson will be eligible for parole (but not entitled to release unless the parole board grants him parole) when he has served 150 months of his sentence.

C. Direct appeal proceedings in state court

Robinson appealed his convictions and sentences, including an argument that the court erred in scoring the guidelines using facts that had not been found by a jury beyond a reasonable doubt, which Robinson argued violated this Court's holding in *Blakely* v. *Washington*, 542 U.S. 296 (2004). The Michigan Court of Appeals rejected the argument, citing *People* v. *Drohan*, 715 N.W.2d 778 (Mich. 2006), in which the Michigan Supreme Court "definitively held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme." App. 74a.

Robinson sought leave to appeal in the Michigan Supreme Court, which denied leave because it was "not persuaded that the questions presented should be reviewed by" it. App. 64a.

D. Habeas proceedings below

Robinson filed a habeas petition in the district court, raising eleven grounds for relief, including the sentencing claim at issue here. The district court rejected all claims and dismissed the petition. App. 62a. The district court held that the claim at issue here was barred by *Harris* v. *United States*, 536 U.S. 545 (2002), which held that *Apprendi* did not apply to sentences below the statutory maximum. App. 42a. The district court recognized that *Alleyne* had overruled *Harris*,

but applied *Harris* because Robinson had been sentenced before this Court decided *Alleyne*. App. 42a–43a. (The State concedes here, as it conceded in the Sixth Circuit, that the district court erred in relying on *Harris*, because *Alleyne* was decided before the Michigan Court of Appeals decided Robinson's appeal.)

The district court denied a certificate of appealability as to all claims, App. 63a, but the Sixth Circuit granted a certificate of appealability as to the Sixth Amendment sentencing question presented here. On appeal, the Sixth Circuit reversed the district court and held that "*Alleyne* requires us to hold that the Michigan trial court's use of judge-found facts to score mandatory sentencing guidelines that resulted in an increase of petitioner's minimum sentence violated petitioner's Sixth Amendment rights." App. 16a. The court remanded the case "to the district court with instructions to remand to the state sentencing court for sentencing proceedings consistent with this opinion and the Constitution." *Id.*

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit erred in extending this Court's holdings to apply to decisions that only affect the date on which a prisoner becomes eligible for parole.

A criminal defendant has a clearly established constitutional right to have a jury determine the facts that lead to his punishment. But in every case in which this Court has enforced that right, the punishment in question has been a definite sentence—a term which entitled the prisoner to release at its end. In this case, the Sixth Circuit impermissibly extended this rule to cover not the determination of when Robinson is entitled to release, but of when he may be considered for parole.

Because this case arises under 28 U.S.C. § 2254, the Sixth Circuit was not permitted to ask as a matter of first impression whether the Sixth Amendment jury right applies to this parole-eligibility determination. Instead, the court was restricted to asking whether this Court had clearly established that it was. Because no holding of this Court clearly established this principle, this Court should summarily reverse.

A. No case in the *Apprendi* line, including *Alleyne*, applies the Sixth Amendment jury right to facts that bear on a parole-eligibility determination.

In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that the Sixth Amendment right to a jury trial requires jury determination of facts that enhance a punishment—i.e., facts that allow a

sentencing court to impose a sentence greater than the maximum allowed by the verdict for the crime alone. And in *Alleyne* v. *United States*, 570 U.S. 99 (2013), this Court extended that rule to cover factual findings that restrict a judge's discretion by eliminating available punishments at the low end of the sentencing range.

But in *Apprendi* and *Alleyne* and every case in that line, every sentence this Court has struck down as violating the Sixth Amendment's right to a jury trial has been a definite sentence—a single number that entitles the prisoner to release at its end. This Court has never held that a state must also submit factual questions to a jury when determining what portion of a sentence a prisoner must serve before becoming eligible for parole.

That is what makes this case different. Robinson received an effective 40-year "maximum sentence," and he has the right to be released at the end of that 40 years, if he has not been released already. (For purposes of simplicity, this discussion ignores Robinson's subsequent conviction of prisoner possessing weapons and the consecutive sentence imposed for that offense.) That makes Robinson's 40-year maximum sentence the constitutional equivalent of Charles Apprendi's 12-year sentence, Ralph Blakely's 90-month sentence, Freddie Booker's 30-year sentence, and Allen Alleyne's 7-year sentence. *Apprendi*, 530 U.S. at 471; *Blakely* v. *Washington*, 542 U.S. 296, 298 (2004); *United States* v. *Booker*, 543 U.S. 220, 227 (2005); *Alleyne*, 570 U.S. at 104.

Robinson's 150-month "minimum sentence," however, represents the portion of his 40-year sentence he

must serve before becoming eligible for parole. This 150-month term has no equivalent in *Apprendi* or *Alleyne* or any case in which this Court has struck down a sentence as violating the Sixth Amendment jury right.

The State is not asking this Court to decide whether the *Apprendi–Alleyne* line of cases applies to Michigan's sentencing scheme. The Michigan Supreme Court has already answered that question in the affirmative, *People* v. *Lockridge*, 870 N.W.2d 502 (Mich. 2015), and this Court has denied at least two petitions for certiorari raising the question. *Michigan* v. *Lockridge*, No. 15-416; *Michigan* v. *Uyeda*, No. 15-950. The question presented in this question is a simpler one: did *Alleyne* (or any other holding of this Court) extend the jury right to a parole-eligibility determination?

This Court has not hesitated to reverse the courts of appeals when they impermissibly extend this Court's holdings in habeas cases. For example, in *White* v. *Woodall*, this Court reversed the Sixth Circuit's extension of this Court's precedent into a new rule that the Fifth Amendment requires the jury at a penalty-phase trial to be instructed not to draw an adverse inference from the defendant's decision not to testify. 572 U.S. 415, 421–24 (2014). In *Woods* v. *Donald*, this Court summarily reversed the Sixth Circuit's extension of this Court's precedent into a new rule that a conviction must be reversed when counsel is briefly absent during a multidefendant trial during the taking of testimony that relates only to other defendants. 135 S. Ct. 1372, 1377–78 (2015). In *Virginia* v. *LeBlanc*, this Court summarily reversed the Fourth

Circuit's extension of this Court's precedent into a new rule that a geriatric release program does not constitute a meaningful opportunity to obtain early release. 137 S. Ct. 1726, 1728–29 (2017).

In each of these cases, this Court has made clear that it is not deciding the correctness of the underlying constitutional holding. *Woodall*, 572 U.S. at 427 ("Perhaps the logical next step from [this Court's precedent] would be to hold that the Fifth Amendment requires a penalty-phase adverse-inference instruction . . . ; perhaps not."); *Donald*, 135 S. Ct. at 1378 ("[W]e 'expres[s] no view on the merits of the underlying Sixth Amendment principle.' "); *LeBlanc*, 137 S. Ct. at 1729 (" 'Perhaps the logical next step from' [this Court's precedent] would be to hold that a geriatric release program does not satisfy the Eighth Amendment, but 'perhaps not.' ").

And so here. "Perhaps the logical next step" would be to apply *Apprendi* and *Alleyne* to a parole-eligibility determination like a Michigan minimum sentence. See *Lockridge*, 870 N.W.2d at 502–25. And "perhaps not." See *id*. at 525–60 (MARKMAN, J., dissenting). The important thing for a case governed by 28 U.S.C. § 2254(d)(1) is that this Court has not extended the rule yet.

B. The overruling of *McMillan* is not clearly established federal law.

The only case in which this Court has considered the right to jury determination of facts that governed the setting of parole-eligibility date at sentencing is *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986).

McMillan involved a five-year mandatory minimum sentencing provision for defendants who " 'visibly possessed a firearm' during the commission of the offense." *Id*. at 81. This mandatory minimum delayed the defendant's parole eligibility.

It is true that the reasoning underlying the *McMillan* decision has been undermined by subsequent decisions. This Court upheld the mandatory minimum in part because "States may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense[.]" *Id*. at 91. That holding is no longer good law after *Apprendi*, which erased the distinction between "sentencing factors" and "elements" and applied the Sixth Amendment jury right to "any fact," other than a prior conviction, that increases the available penalty. 530 U.S. at 490. *McMillan* also pointed out that the statute in question does not make a higher sentence available to the sentencing judge, but that "it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." 477 U.S. at 88. That reasoning fell to *Alleyne*, which said, "It is no answer to say that the defendant could have received the same sentence with or without" the sentencing enhancement. 570 U.S. at 115.

But even though *Alleyne* repudiated the reasoning of both *Harris* (the fact pattern of which is virtually indistinguishable from *Alleyne*) and *McMillan*, it overruled only *Harris*. 570 U.S. at 103, 116. Although one concurring opinion and one dissenting opinion in *Alleyne* said that the majority had overruled

McMillan, 570 U.S. at 121 (SOTOMAYOR, J., concurring), 133 (ALITO, J., dissenting), the relevant question is what the majority held. Until a majority of this Court overrules *McMillan*, it has not been overruled. The courts of appeals should respect this Court's "prerogative of overruling its own decisions," even where, as here, the decision in question "appears to rest on reasons rejected in some other line of decisions[.]" *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Thus it was error for the Sixth Circuit to declare, without explanation, that this Court had overruled *McMillan*. App. 10a. And despite its reasoning having been undermined by *Apprendi* and *Alleyne*, it remains true that in the only case in which this Court has considered a sentence that functions as a parole-eligibility determination against a Sixth Amendment challenge, this Court upheld the sentence. In short, it does not violate clearly established federal law to follow *McMillan* (as *Rodriguez* requires) by upholding a parole-eligibility determination against a Sixth Amendment challenge, as the Michigan Court of Appeals did here.

C. Because the term "indeterminate" is ambiguous, the State has not relied on that word to defend Michigan's sentencing scheme.

The Sixth Circuit erred by considering an argument the State never made. For example, the court rebutted an argument that Michigan's sentencing statutes are constitutional because Michigan sentences are "indeterminate." App. 13a–15a. The State

never raised such an argument below. The description of a sentence as "determinate" or "indeterminate" is apt to cause confusion, as those terms can be used to mean different things in different contexts.

To make things clear—this Court has never held that a determination of how long a prisoner must serve before becoming eligible for parole is subject to the Sixth Amendment. The questions whether the term "indeterminate" applies to Michigan's sentencing scheme and whether the term "indeterminate" holds constitutional significance to this question are beside the point. What is important is not what words are used to describe Michigan's sentencing scheme, but how the scheme actually functions.

Regardless of what a Michigan minimum sentence is *called*, what matters for the Constitution is what a Michigan minimum sentence *is*—and it is simply a determination of when a prisoner will become eligible for parole. It is *not* a determination of when a prisoner is entitled to release. The decision below never grapples with that critical distinction between the sentence here and the sentence at issue in *Alleyne*.

* * *

Federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). That is why this Court regularly finds it necessary to reverse lower federal courts when they overstep the statutory boundaries Congress imposed, which are designed to limit that review to only those instances that amount to an "extreme malfunction" of the state criminal-justice system. *Id.* at 102. Here, the

Sixth Circuit overruled the Michigan Court of Appeals decision in this case even though fairminded jurists could disagree—as the Michigan Supreme Court did when it confronted this issue in another case—as to whether the Sixth Amendment right to a jury trial extends to reach a parole-eligibility date. Out of respect for both state sovereignty and the statutory limitations Congress imposed in AEDPA, certiorari is warranted.

CONCLUSION

This Court should summarily reverse or grant certiorari.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record

Linus Banghart-Linn
Assistant Attorney General
Criminal Appellate Division

Attorneys for Petitioner

Dated: NOVEMBER 2018