Michigan State Appellate Defender Office (SADO)
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# FREQUENTLY ASKED QUESTIONS ABOUT *PEOPLE v LOCKRIDGE*[1]

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In *People v Lockridge*, ___ Mich ___ (Docket No. 149073, 7/29/15), the Michigan Supreme Court concluded that the Michigan sentencing guidelines create a mandatory minimum sentence range that violates the rule of *Apprendi v New Jersey*, 530 US 466 (2000), and *Alleyne v United States*, 133 S Ct 2151 (2013), and thus violates the Sixth and Fourteenth Amendments, because the sentencing scheme uses judicial fact-finding in the scoring of the offense variables.

To remedy the constitutional violation, the Court severed a portion of subsection (2) of MCL 769.34, which previously provided that the minimum sentence imposed by the court "shall be within the appropriate sentence range . . . ." The Court also severed a portion of subsection (3), which provided that the sentencing court may depart from the sentencing guidelines range "if the court has a substantial and compelling reason for that departure . . . ." The Court additionally noted that other portions of MCL 769.34 or another statute might need to be severed as well: "To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." *Id.*, at 2 and n 1.

The Court also provided for advisory sentencing guidelines, concluding that "a straightforward application of the language and holding in *Alleyne* leads to the conclusion that Michigan's sentencing guidelines scheme violates the Sixth Amendment." *Id.*, at 16. The Court rejected the suggestion that it create a system for the jury to make findings of fact relevant to the scoring of the sentencing guidelines, and rejected a remedy that would render advisory only the floor of the applicable guidelines range. *Id.*, at 26-28.

Answers to frequently asked questions follow:[2]

1. *Must the sentencing guidelines be scored and considered at sentencing?* Yes. The sentencing guidelines "remain a highly relevant consideration in a trial court's exercise of sentencing discretion." *Id.*, at 28. The trial court "must" determine the applicable range and take that range into account when imposing sentence. *Id.*, at 2, 28. The Court reiterated the

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[2] The answers in this memo provide preliminary analysis of *Lockridge*, as of August 7, 2015. Several issues remain unsettled, and defense attorneys are advised to raise any claims deemed appropriate in an individual case.

rule that the sentencing court must assess "the highest number of points possible" for each offense variable, whether judicial fact-finding is involved or not. *Id.* at 29.

2. *Does the preponderance of the evidence standard still apply?* The answer appears to be yes. There is nothing in the *Lockridge* decision that refers to a different standard of proof. The Court also did not overturn the case of *People v Hardy*, 494 Mich 430, 438 (2013), where the Supreme Court stated: "The circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence."

3. *Must the court specifically refer to the range when imposing sentence within the range?* Generally yes. The *Lockridge* Court specified that the sentencing court must "justify" the sentence imposed to facilitate appellate review, relying on its previous decisions in *People v Coles*, 417 Mich 523, 549 (1983) and *People v Milbourn*, 435 Mich 630, 644 (1990). Slip op at 29. Under the judicial sentencing guidelines, reference to the guidelines range was considered sufficient to comply with the articulation requirement. *People v Broden*, 428 Mich 343, 354 (1987); *In re Jenkins*, 438 Mich 364, 375-376 (1991). Moreover, where a sentence was within the guidelines range as mentioned by counsel but not the court, no further articulation was required because reliance on the guidelines range was apparent from the record. *People v Lawson*, 195 Mich App 76 (1992).

   Under the legislative sentencing guidelines – before *Lockridge* – there remained an articulation requirement that could be satisfied by explicit reliance on the sentencing guidelines range or implicit reliance that was clear from the context of remarks made at sentencing. *People v Johnson*, 309 Mich App 22 (2015), reversed in part on other grounds 864 NW2d 147 (Mich, 2015); *People v Conley*, 270 Mich App 301, 312 (2006).

4. *Must the trial court state reasons for sentencing outside the range?* Yes. The trial judge must "justify" the sentence in order to facilitate appellate review. A sentence that departs from the recommended range will be reviewed on appeal for "reasonableness." Resentencing is required when the appellate court determines the sentence is unreasonable. *Lockridge*, slip op at 29.

5. *Are the sentencing guidelines now advisory for all cases or only those cases where there is judicial fact-finding in the scoring?* There appears to be some debate on this issue. There is language in the opinion that ties the remedy to the constitutional violation, but there is also language that refers to the invalidity of the Michigan sentencing guidelines "scheme." Further, the Michigan Supreme Court expressly adopted the *Booker* remedy, and the federal courts have treated the federal sentencing guidelines as completely advisory. The answer here is unclear.

6. *What is the effect on intermediate sanction cells?* There is nothing in *Lockridge* that addresses intermediate sanctions. Although the Court did expressly sever portions of the guidelines statute, the Court did not address MCL 769.34(4)(a) which refers to an intermediate sanction range and sets forth a requirement that the sentencing court "shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of

corrections." The Court did speak to the need to strike "any part of MCL 769.34 or another statute [that] refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines," slip op at 2 n 1, however there is no need for a remedy regarding the requirement of an intermediate sanction since that requirement is not a "floor of a sentencing range," as described by *Alleyne*, 133 S Ct 2160-2161, and as recognized by the *Lockridge* Court. Slip op at 13 n 15. Counsel should continue to argue that prison sentences for intermediate sanction cell ranges require substantial and compelling reasons stated on the record, but recognize the risk that, until the Supreme Court issues a clarifying opinion, such sentences might be imposed or upheld even in the absence of substantial and compelling reasons.

7. *How will this new sentencing scheme affect plea bargaining?* There is nothing that precludes the parties from bargaining over the sentence. See generally *People v Killebrew*, 416 Mich 189 (1982). Likewise, there is nothing that precludes a judge from offering a preliminary evaluation of the sentence under *People v Cobbs*, 443 Mich 276 (1993). Should the court choose not to follow a sentence agreement or *Cobbs* evaluation, there is still a right of plea withdrawal.

   Best practice: Know your judge and consider requesting a *Cobbs* evaluation for greater certainty in sentencing.

8. *May a defendant object to the scoring of the guidelines at sentencing, by means of a proper motion for resentencing or a proper motion to remand?* Presumably yes to all three. The Supreme Court did not address appellate review of scoring errors with the now-advisory guidelines. The Court also did not expressly invalidate MCL 769.34(10), which provides: "A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining the sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals."

   Likewise, the Court did not invalidate language in MCL 769.34(10) that refers to sentences based on inaccurate information: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." In *People v Francisco*, 474 Mich 82, 89-90 (2006), the Court repeatedly insisted on the consideration of *accurate* information vis-à-vis the guidelines range: "It would be in derogation of the law, and fundamentally unfair, to deny a defendant in the instant circumstance the opportunity to be resentenced on the basis of accurate information."

9. *May a defendant raise an unpreserved scoring error on appeal?* The question here is whether the decision in *People v Kimble*, 470 Mich 305 (2004), survives after *Lockridge*. In *Kimble*, the defendant was permitted to raise an unpreserved scoring error on appeal because the sentence as previously imposed represented an unknowing departure from the correctly scored guidelines range. While the *Kimble* decision focused on the resulting departure

sentence and the *Lockridge* Court has now altered the departure provisions of MCL 769.34(3), the two cases do not necessarily go hand and hand. *Lockridge* involved a constitutional error relating to the right to jury trial and also an acknowledged departure from the sentencing guidelines range. *Kimble* involved traditional scoring decisions and the rules for issue preservation of a scoring error. *Lockridge* said nothing about the latter. It would appear *Kimble* survives *Lockridge.*

Best practice: If a scoring error was not preserved at sentencing, appellate counsel should preserve the objection by means of a proper motion for resentencing or proper motion to remand. See MCR 6.429; MCL 769.34(10).

10. *What is the standard of review for scoring errors on appeal?* The Court did not overturn the case of *People v Hardy*, 494 Mich 430, 438 (2013), where the Supreme Court stated: "The circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo."

    It would also appear the decision in *People v Francisco*, 474 Mich 82 (2006), remains good law. In *Francisco*, the Supreme Court remanded for resentencing based on error in the scoring of the sentencing guidelines that changed the range. The Court spoke of the right to be sentenced "on the basis of accurate information." *Id.*,at 90. The Sixth Circuit has similarly concluded that when "the district court misinterprets the Guidelines or miscalculates the Guidelines range, then the resulting sentence is procedurally unreasonable." *United States v Stubblefield*, 682 F3d 502, 510 (CA 6, 2012).

11. *What is the standard of review for preserved Alleyne* error on appeal? The *Lockridge* opinion does not speak to *preserved Alleyne* error. Do these cases require the prosecutor to prove the error was harmless beyond a reasonable doubt? We can expect some guidance soon as the Michigan Supreme Court has pending cases before it that involve preserved *Alleyne* error.

    Note, there is language in *People v Moore*, 391 Mich 426, 439 (1973), that supports resentencing in lieu of the traditional harmless error analysis: "While a harmless error rule might also be applied to a Tucker claim [uncounseled prior conviction considered at sentencing], from a practical point-of-view in contrast to a Loper claim [improper impeachment at trial with counselless prior conviction] which if meritorious requires a new trial, in most cases a judge can more readily resentence a convicted person than determine whether whatever consideration was given an invalid conviction at sentencing was harmless."

12. *What is the standard of review for unpreserved Alleyne error on appeal?* The *Lockridge* Court found four types of cases involving unpreserved *Alleyne* error. For cases involving no judicial fact-finding in the scoring of the guidelines and a sentence imposed on or before July 29, 2015, the defendant cannot show plain error as the defendant has suffered no prejudice. Slip op at 31.

For cases with judicial fact-finding that changed the recommended range, did not involve an upward departure and involved sentences imposed on or before July 29, 2015, the defendant is entitled to remand to the trial court for a decision by the trial judge as to whether the sentence would change knowing the guidelines range is now advisory. Slip op at 32-34. The trial judge must consider "'only the circumstances existing at the time of the original sentence'" when making this initial decision. Slip op at 35-37, quoting *United States v Crosby*, 397 F3d 103, 117 (CA 2, 2005). If the trial judge concludes that the sentence would have been materially different (i.e., there would be more than a nontrivial difference), the defendant has shown plain error and is entitled to resentencing. *Lockridge*, slip op at 32-34.

For this second group (altered range, no departure, sentenced on or before July 29, 2015), there must be an opportunity for the defendant to avoid resentencing by "promptly" notifying the trial court that resentencing is not sought. Slip op at 35. If the defendant does not notify the court that he or she declines resentencing, the trial judge must obtain the views of counsel, at least in writing but also possibly in person but without the presence of the defendant, before making its decision. *Id.* If the trial judge grants resentencing, the defendant must be present. *Id.*

For cases involving judicial fact-finding that changed the recommended range and also involved an upward departure for sentences imposed on or before July 29, 2015, there is no entitlement to relief as the defendant cannot show plain error as a matter of law. Slip op at 32-33 n 31.

For cases involving a sentence imposed after July 29, 2015, the traditional plain error standard will apply. Slip op at 35.

13. *What is the standard of review on appeal for sentences falling within the guidelines range?* The *Lockridge* Court spoke of appellate review for "reasonableness" without differentiating between sentences falling within the recommended range and those that do not. Slip op at 29. Under the judicial sentencing guidelines, a sentence falling within the recommended range of accurately scored sentencing guidelines was considered presumptively proportionate, *People v Broden*, 428 Mich 343, 354 (1987), although "even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." *People v Milbourn*, 435 Mich 630, 661 (1990). There is no case law in Michigan addressing appellate review of sentences under a "reasonableness" standard. Under federal law, which affords an inexact comparison as there are multiple statutory factors at play in the federal sentencing decision, see 18 USC § 3553(a), a trial judge may *not* presume that a sentence falling within the sentencing guidelines range is reasonable, while the appellate court *may* presume reasonableness in this setting. *United States v Booker*, 543 US 220, 259-260 (2005); *Rita v United States*, 551 US 338, 347-351 (2007). It is unclear whether the Michigan appellate courts will adopt the appellate presumption of reasonableness for within-guideline sentences as allowed by *Rita*.

14. *What is the standard of review on appeal for sentences falling outside the guidelines range?* The *Lockridge* Court spoke of appellate review for "reasonableness" without differentiating between sentences falling within the recommended range and those that do not. Slip op at 29. Under the judicial sentencing guidelines, a sentence falling outside the recommended range, at least where the judge did not articulate reasons that were not considered within the range, was considered suspect: "[D]epartures from the guidelines, unsupported by reasons not adequately reflected in the guidelines variables, should nevertheless alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme." *People v Milbourn*, 435 Mich 630, 659 (1990). In the federal system, the district judge must consider the extent of the deviation as well, and must "ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall v United States*, 552 US 38, 50 (2007).

15. *Does the rule of People v Tanner*, 387 Mich 683 (1972), *still apply?* Presumably yes, as the Supreme Court said nothing about *Tanner* in the *Lockridge* opinion.

16. *Do we still have an "indeterminate sentencing" scheme in Michigan*? The answer is "Yes," as that term is used and understood in Michigan (although the term is used differently by the United States Supreme Court). *Id.*, at 17 and n 18.

17. *May the judge at resentencing consider post-sentence conduct?* According to the *Lockridge* decision, the judge may not consider post-sentence information in the decision to grant or deny resentencing based on a challenge to judicial fact-finding in the scoring of the guidelines. Slip op at 36. This is consistent with the federal rule. Once the court grants resentencing, however, it would appear the standard rules apply and the court may consider new conduct and must consider an updated presentence report unless the report is waived by a party and the previous report is not manifestly outdated. *People v Triplett*, 407 Mich 510 (1980) (need for updated presentence report at resentencing); *People v Hemphill*, 439 Mich 576 (1992) (defendant or prosecutor may waive the right to an updated presentence report where the original report is accurate and not manifestly outdated).

18. *If the judge increases the sentence at resentencing, is there a presumption of vindictiveness?* First, and as true with any resentencing, there is no presumption of vindictiveness if there are new facts that would justify an increased sentence, such as prison misconduct tickets. Second, it is unclear whether the move from mandatory to advisory guidelines, standing alone, would allow a judge to increase the sentence at resentencing, particularly a sentence that had not been at the top of the guidelines range at the earlier proceeding, without creating a presumption of vindictiveness. There are some federal courts that have found no presumption of vindictiveness where the sentence was increased following a *Booker* remand. See *United States v Singletary*, 458 F3d 72 (CA 2, 2006); *United States v Reinhart*, 442 F3d 857 (CA 5, 2006).

    Best practice: If there is evidence of ACTUAL vindictiveness in the judge's decision to increase the sentence, the attorney should object for the record and state for the record anything that was said on or off the record that would support this conclusion.