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A Guide for Criminal Defendants and Prisoners Following *People v Lockridge,* the decision that ruled Michigan's Sentencing Guidelines Unconstitutional[1]

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Why did the Michigan Supreme Court hold that Michigan's sentencing guidelines were unconstitutional?

In *People v. Lockridge*, ___ Mich. ___ (Docket No. 149073, 7/29/15), the Michigan Supreme Court held that Michigan's statutory sentencing guidelines scheme violates the U.S. Constitution. Specifically, the Court held that the statutes that control Michigan's sentencing guidelines violate the Sixth and Fourteen Amendments of the U.S. Constitution. This is because the sentencing guidelines range for the minimum sentence is considered a *mandatory* minimum sentence as defined by the U.S. Supreme Court.

In order to assess points for the offense variables of the guidelines, judges often have to find facts that were not a part of the conviction itself. By statute and case law, the assessment of points for offense variables only needs to be supported by a preponderance of the evidence standard of proof. (Preponderance of the evidence is a much lower standard of proof than beyond a reasonable doubt. Preponderance means "more likely than not" that the fact exists. This is not a very hard standard to meet. On the other hand, beyond a reasonable doubt is a much higher standard and requires the fact finder to have no reasonable doubt in order to find facts). Since an individual's sentencing guidelines range (mandatory minimum sentence) can be increased by this judicial-fact finding and because that fact-finding is not held to a beyond a reasonable doubt standard, the Michigan Supreme Court held that Michigan's statutory sentencing guidelines scheme violates the constitutional requirements explained in the U.S. Supreme Court's decisions in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Alleyne v. United States,* 133 S. Ct. 2151 (2013).

Will the sentencing guidelines still be scored or were they thrown out completely?

The sentencing guidelines will still be scored. The Supreme Court did not throw them out completely. It only severed (cut out) a few portions of MCL 769.34.

Generally, when a court finds that a statute is unconstitutional, that court tries to save as much of the statute as it can because the statute itself represents the collective will of the Legislature. This means that the court will try to carve out the unconstitutional parts and make the rest of the statute still function in the way the Legislature wanted as much as it can.

In *Lockridge*, the Court did not throw out the sentencing guidelines completely; it only cut out (severed) portions of MCL 769.34. The Court cut out a portion of subsection (2) of MCL 769.34, which previously stated that the minimum sentence imposed by the court "shall be within the appropriate

[1] The answers in this guide provide preliminary analysis of *Lockridge*, as of September 23, 2015. Several issues remain unsettled, and defendants are advised to consult with an attorney prior to taking any action in their case following *Lockridge.*

sentence range . . . ." The Court also cut out 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 cut out 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.

This means that going forward from now on, the sentencing judge will still score the sentencing guidelines, and is still allowed to score the offense variables based on facts found by the judge under the preponderance of the evidence standard of proof. But the guidelines range that results from the scoring will no longer be *binding* or *mandatory* on the sentencing judge. The guidelines range will only be *advisory*, like a suggestion. If the judge wants to impose a minimum term of sentence that is either above or below the guidelines range (also known as a departure), the judge is no longer required to give a "substantial and compelling" reason for doing that. Now, the length of the minimum sentence imposed, whether it is within the sentencing guidelines range, above it, or below it, will be reviewed by the appellate courts for "reasonableness."

Since the sentencing guidelines will still be scored, does the judge have to consider them at sentencing?

Yes, the judge still has to consider the sentencing guidelines range. The Supreme Court in *Lockridge* said the guidelines still "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. But remember, as explained above, the guidelines range is no longer binding on the judge, it is just advisory (a suggestion) and the judge does not have to offer a substantial and compelling reason to impose a minimum term of sentence that is above or below the sentencing guidelines range.

Can a sentencing judge still do his or her own fact-finding and score the guidelines based on the preponderance of the evidence standards?

Yes. There is nothing in the *Lockridge* decision that directs sentencing judges to limit their fact-finding or to apply a different standard of proof. *Lockridge* directs that the judge must still assess the highest number of points possible. *Id.* at 29 n 28.

The Michigan Supreme Court cured or fixed the constitutional problem with the sentencing guidelines system by making them advisory rather than binding. Because the guidelines range is no longer binding, it no longer results in the equivalent of a "mandatory" minimum and it no longer violates the federal constitution to have the judge score the guidelines based on his or her own fact-finding by a preponderance of evidence standard of proof. The Michigan Supreme Court is using the same cure that the U.S. Supreme Court came up with in *United States v Booker*, 543 US 220, 233; 125 S Ct 738; 160 L Ed 2d 621 (2005), after it held that the federal sentencing guidelines were unconstitutional.

Must the sentencing judge state reasons for imposing a sentence that is outside of the guidelines range?

Yes. The sentencing judge must still justify or explain his or her reasoning for the sentence imposed in order to allow for proper appellate review. But the judge no longer has to satisfy the "substantial and compelling" reason test before departing from the guidelines range. In theory, this should make it easier for the sentencing judge to impose a sentence that departs above or below the sentencing guidelines range.

The length of the sentence imposed, whether it is within the sentencing guidelines range or a departure from the guidelines range, either above it or below it, will be reviewed on appeal for "reasonableness." Resentencing is required when the appellate court determines the sentence is unreasonable. *Lockridge,* slip op at 29.

What is this new "reasonableness" review?

We do not know yet what the Michigan appellate courts will consider reasonable or unreasonable or how that test will be applied. Michigan has historically used different terms like "shock the conscious" or "proportionality." See *People v. Coles*, 417 Mich 523, 549 (1983); *People v. Milbourn,* 435 Mich. 630, 661 (1990). This new term, "reasonableness," comes from the test that the U.S. Supreme Court adopted in *Booker, supra*, which the Michigan Supreme Court adopted in *Lockridge.*

The *Lockridge* Court spoke of appellate review for "reasonableness" without distinguishing between sentences falling within the guidelines range and those that do not. *Lockridge,* slip op at 29. However, historically in Michigan, a sentence that is within the guidelines range of accurately scored sentencing guidelines was presumed to be 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 may not give us an exact comparison because there are many differences between sentencing in the federal system and the Michigan system, see 18 USC § 3553(a), a trial judge may *not* presume that a sentence falling within the sentencing guidelines range is reasonable, but the appellate court reviewing the sentence *may* presume that such a sentence is reasonable. *Booker, supra* at 259-260; *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.*

Will a defendant still be entitled to resentencing if the sentencing guidelines were scored wrong?

Probably, yes. In *Lockridge*, the Supreme Court did not sever subsection (10) of M.C.L. 769.34, which is the part of the sentencing guidelines statute that allows for challenging a sentence on appeal based upon a mistake in scoring the guidelines or the consideration of inaccurate information. Likewise, the Court did not overrule its own prior cases of *People v. Kimble*, 470 Mich. 305 (2004) and *People v. Francisco*, 474 Mich. 82 (2006), which provide the legal framework for determining when a defendant is entitled to resentencing because of a mistake made in scoring the sentencing guidelines. Further, it appears that after *Booker*, the federal courts still grant resentencing where there was error in scoring the federal sentencing guidelines, and the Michigan Supreme Court was trying to follow the *Booker* decision's remedy.

Whether the guidelines were accurately scored appears to be a separate and distinct question from whether the sentence imposed was "reasonable." Ensuring the sentencing guidelines were accurately scored goes toward *procedural* fairness, while evaluating whether the length of the sentence imposed goes toward *substantive* fairness. It appears that a defendant will be able to challenge his sentence for being either procedurally unfair or substantively unfair or both.

Does Lockridge apply to me if I was sentenced <u>before</u> it was issued on July 29, 2015?

It will likely depend on whether or not your direct appeal is over.

If you are still in your direct appeal period, then **yes** *Lockridge* applies to you. This generally means that if one of the following is true, then *Lockridge* applies to you:

a). Your case is currently in the Michigan Court of Appeals or in the Michigan Supreme Court *on your first appeal following sentencing*, and you have not yet had to file a motion for relief from judgment (6.500 motion). If you are in this circumstance, then *Lockridge* applies to you whether you were convicted at a trial or you pled guilty or no contest. **OR**

b). If you were convicted by a guilty or no contest plea rather than a trial and you are still within 6 months of the date that you were sentenced, then *Lockridge* applies to you. **OR**

c). If you were convicted at a trial, you did not ask to appeal, but you are still within 6 months of the date that you were sentenced, then *Lockridge* applies to you.

If you already finished your direct appeal or if you did not request an appeal and you are more than 6-months past the date that you were sentenced, then **no** *Lockridge* will not likely apply to you. This is because there are legal principles that limit when appellate decisions are *retroactive* to cases that are already final. A case is final if the direct appeal is over or the time for taking a direct appeal passed without the defendant requesting an appeal. The U.S. Court of Appeals for the Sixth Circuit, which covers Michigan, held that *Booker* is not retroactive to federal prisoners in *Humphress v. U.S.*, 398 F.3d 855, 859 (6th Cir.2005), and the Michigan Supreme Court based the cure or fix for the constitutional violation in *Lockridge* on the *Booker* cure. The Michigan Supreme Court recently held that the U.S. Supreme Court's opinion in *Miller v. Alabama*, __ U.S. __; 132 S. Ct. 2455 (2012), which held that mandatory sentences of life without the possibility of parole for juvenile offenders was unconstitutional, was not retroactive So *Lockridge* will likely also not be retroactive. This means it will likely not apply to you if you can only raise it in a collateral appeal, such as in a motion for relief from judgment/6.500 motion or an appeal following the trial court's denial of a motion for relief from judgment/6.500 motion. But the question of whether *Lockridge* is retroactive has not yet been decided by an appellate court at the time this guide was drafted (September 2015).

If Lockridge does apply to me, as a prisoner still in my direct appeal period as explained above, how do I raise it in my case if it was not already raised?

If your case is currently in the Michigan Court of Appeals or in the Michigan Supreme Court, and you are represented by an attorney, you can contact your attorney to discuss whether it is in your best interests to seek to add a *Lockridge* claim through a supplemental pleading, such as a supplemental brief on appeal or supplement to an application for leave to appeal. It may be necessary for the attorney to file a motion seeking to file a supplement before the court will accept the *Lockridge* issue for consideration.

If you are currently not represented by an attorney, but your case is pending on direct appeal in the Court of Appeals or Supreme Court, you can file a *pro per* motion to supplement your existing brief or application with the *Lockridge* issue [tip: file the supplemental issue with its own cover sheet along with your motion asking the court to accept it (at the same time together), so that if the court grants your motion, it already has the *Lockridge* supplement on hand and you don't have to do another separate filing]. Please be sure to see the section below on the possible risks of seeking resentencing after *Lockridge*.

If you were convicted by a guilty plea or no contest plea rather than a trial and you are still within 6 months of the date that you were sentenced OR if you were convicted at a trial, you did not ask to appeal, but you are still within 6 months of the date that you were sentenced, ask for the appointment of an appellate attorney as soon as possible (or hire one if you have the funds to so). If you are afraid that the 6-month time period after your sentencing date will pass before you are able to get an attorney, you may want to file a *pro per* motion to correct an invalid sentence (for resentencing) in the circuit court where you were convicted and request counsel at the same time. Please be sure to see the section below on the possible risks of seeking resentencing after *Lockridge*.

What if the sentence imposed on me before the date of the Lockridge decision was an upward departure from the sentencing guidelines range?

If the sentence imposed on you at the original sentencing was an upward departure from the sentencing guidelines range, then you are likely not entitled to resentencing. In *Lockridge*, the Supreme Court held that Mr. Lockridge was not entitled to resentencing because the sentencing judge had departed upward from the then-binding and mandatory sentencing guidelines range. The Supreme Court found that the defendant thus could not show that he was prejudiced by the constitutional error "because the sentencing court has already clearly exercised its discretion to impose a harsher sentence than allowed by the guidelines and expressed its reasons for doing so on the record. It would not make sense to argue that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory." *Id.* at p 32 n 31. If your original sentence was an upward departure, you will need to come up with a good argument for why you were prejudiced when Mr. Lockridge was found not to be prejudiced.

It is unclear at this time if the *Lockridge* decision applies to upward departures from intermediate sanction cells (which call for a non-prison sentence), since they were not at issue in *Lockridge*. There may be an argument to be made that *Apprendi* and *Alleyne* do not apply to intermediate sanction cells (remember an intermediate sanction cells top out at 18 months and are marked by an asterisk (*) in the sentencing grids found toward the back of the sentencing guidelines manuals).

Are there risks I should know about before I raise a Lockridge issue asking for resentencing?

Yes, definitely. This is why it is important to discuss the circumstances in your individual situation and the possible benefits versus the possible risks with an attorney before deciding whether or not to seek resentencing under *Lockridge*.

Remember, going forward, the sentencing guidelines range will no longer be binding on the sentencing judge. The sentencing judge could impose an upward departure sentence and will not be required to give a reason that rises to the level of the substantial and compelling reason test that we are familiar with under the statutory sentencing guidelines system before *Lockridge*. You should be especially concerned about this if at your original sentencing, you received a sentence that was at the top of the sentencing guidelines range or somewhere in the higher end of the range; there is a real risk that a judge could grant you resentencing and then impose a higher sentence at the resentencing hearing.

Even if there has been no change in your circumstances since the original sentencing, (for example, you have not gotten any misconduct tickets,) the judge still might choose to give you a higher sentence at a resentencing because he or she is no longer bound by the sentencing guidelines range. A significant intervening change in law (i.e., the *Lockridge* decision), or a changed understanding of the law, might be enough to justify a higher sentence on remand without the usual presumption of vindictiveness protection. 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 F.3d 72 (C.A. 2, 2006); *United States v. Reinhart*, 442 F3d 857 (CA 5, 2006). And, as explained above, *Lockridge* is based on *Booker*.

The risk of a bad outcome at resentencing increases if you have received serious misconduct tickets while incarcerated since the original sentencing or if you have been convicted of additional crimes, etc, because the presumption of vindictiveness definitely does not apply then. This is true

whether you received an upward departure sentence originally or you received a sentence with the sentencing guidelines range originally.

On the other hand, if your sentence was at the bottom of the sentencing guidelines range or near the bottom, and you have not had behavioral problems since the original sentencing hearing, you may have a good hope of getting some sort of time cut at a resentencing conducted pursuant to *Lockridge*. Of course, there are no guarantees.

What if my appeal was held in abeyance pending the Lockridge decision or my attorney raised this issue in my appeal which has not been decided yet, and now I am not sure that I want to be resentenced?

In *Lockridge*, the Michigan Supreme Court provided an "opt-out" provision for criminal defendants who no longer wish to be resentenced. After you are notified that you are scheduled for a resentencing, you may promptly notify the circuit court that you no longer want to be resentenced. *Lockridge,* slip op, p 35. The Court of Appeals also recognized this opt-out provision in a recent published opinion examining *Lockridge* due to the potential risks. *People v. Stokes*, __ Mich. App. __ (9/8/15; Docket No. 321303), slip opinion, pp 11-12. You should be allowed the opportunity to consult with an attorney before making that decision.

Principal author of this guide is Jacqueline McCann, Assistant Defender and principal author of SADO's Defender Plea & Sentencing book. Acknowledgment also goes to Anne Yantus, Manager of SADO's Special Unit on Pleas and Sentencing, Brett DeGroff (counsel in Lockridge), Desiree Ferguson (counsel in Lockridge), SADO Assistant Defender Randy Davidson and to the many attorneys who generously contributed their thoughts and ideas.