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# STATEMENT OF JURISDICTION

 Defendant-Appellant was convicted in the Genesee County Circuit Court by plea of guilty and was sentenced on February 23, 2015. Defendant-Appellant requested the appointment of appellate counsel on March 3, 2015. The offenses occurred after the effective date of the November, 1994 ballot Proposal B which eliminated the right to file a claim of appeal from plea-based convictions. But this Court has jurisdiction to consider the Defendant-Appellant's application for leave to appeal as it is being filed within six months of judgment. MCR 7.203(B); MCR 7.205(G).

**STATE OF MICHIGAN**

 **IN THE COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN,**

 **Court of Appeals No.**

 Plaintiff-Appellee,

 **Circuit Court No.**

-vs-

**DEFENDANT,**

 Defendant-Appellant.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_/

# STATEMENT EXPLAINING REASONS FOR DELAY

 CHRISTOPHER M. SMITH says that the following is correct to his belief and knowledge:

 1. Defendant-Appellant was sentenced on February 23, 2015. The Judgment of Sentence was signed on the same date.

 2. Defendant-Appellant requested the appointment of appellate counsel on March 3, 2015.

 3. The State Appellate Defender Office was appointed on March 6, 2015; the transcripts were filed on April 15, 2015.

 4. Counsel could not file a timely application for leave to appeal because more than 21 days from the original Judgment had passed before the transcripts were filed.

 5. The delay in filing this application for leave to appeal since that time is not due to Defendant-Appellant's culpable negligence, but due to counsel's responsibility relative to other indigent felony appeals.

 /s/ Christopher M. Smith

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 CHRISTOPHER M. SMITH

August 20, 2015

# STATEMENT OF QUESTION PRESENTED

I. IS MR. DEFENDANT ENTITLED TO A *LOCKRIDGE* REMAND NOW THAT THE MANDATORY SENTENCING GUIDELINES HAVE BEEN DECLARED UNCONSTITUTIONAL?

Trial Court made no answer.

Defendant-Appellant answers, "Yes".

# STATEMENT OF FACTS

This appeal stems from a judgment entered by the Honorable Judith A. Fullerton of the Genesee County Circuit Court. On January 21, 2015, Defendant-Appellant DEFENDANT pled guilty to unarmed robbery in violation of MCL 750.530. (PT 8).[[1]](#footnote-1) On February 23, 2015, the trial court imposed a prison term of 100 months to 15 years. (ST 9).[[2]](#footnote-2) Mr. DEFENDANT now seeks leave to appeal to this Court.

**A. Factual Background**

The events giving rise to this case took place on August 4, 2015. (PSR 4).[[3]](#footnote-3) Mr. DEFENDANT stole a pair of jeans from the Buckle store in the Genesee Valley Mall. (PSR 4). He then left the store with a female companion, setting off a security alarm. (PSR 4). Two of the store’s employees asked them to stop so their shopping bags could be examined, but the pair refused. (PSR 4). The employees followed the couple out to the parking lot, but they continued to refuse to return to the store. (PSR 4). According to one employee, the defendant produced what appeared to be a knife and took a couple of swings at him before driving off. (PSR 4).

The employees took down the car’s license plate number and relayed it to the police. (PSR 4). The police linked the license plate number to a rental car agency, which led them to Mr. DEFENDANT. (PSR 4). A folding knife with a two-inch blade was recovered from the trunk of his rental car. (PSR 4). When the police interviewed Mr. DEFENDANT, he admitted to the larceny and to taking a swing at the employee. (PSR 4). But he was adamant that he had been holding a cell phone in his hand and not a knife. (PSR 4).

**B. Procedural History**

The prosecution initially charged Mr. DEFENDANT with armed robbery based in the knife he denied using. (PT 3). The prosecution also filed notice of its intent to seek the enhancement for fourth habitual offenders, which carries a 25-year mandatory minimum. See *Appendix B: Circuit Court Docket Entries*, p. 2. Mr. DEFENDANT ultimately agreed to plead guilty to the lesser offense of unarmed robbery. (PT 3-4, 8). In return, the prosecution withdrew the habitual notice. (PT 3).

Sentencing took place on February 23, 2015. (ST 1, 3). The defense offered no objections to the presentence report, which calculated the guidelines range as falling between 58 and 114 months. (ST 3); (PSR 15). The trial court sentenced Mr. DEFENDANT near the top of this range, ordering him to serve 100 months to 15 years in prison. (ST 9). This appeal follows.

1. MR. DEFENDANT IS ENTITLED TO A *LOCKRIDGE* REMAND NOW THAT THE MANDATORY SENTENCING GUIDELINES HAVE BEEN DECLARED UNCONSTITUTIONAL.

***Issue Preservation***

The defense did not raise this issue at sentencing. This Court must therefore review for plain error under the standard articulated in *People v Lockridge*, \_\_ Mich \_\_; \_\_ NW2d \_\_ (July 29, 2015) (Docket No. 149073).

***Standard of Review***

 This issue presents a constitutional question subject to *de novo* review. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004).

***Analysis***

The sentencing procedures used below violated Mr. DEFENDANT’ rights under the Sixth and Fourteenth Amendments to the United States Constitution. US Const, Ams V, VI, XIV. Judges are permitted to find facts which influence judicial discretion within the range of permissible sentences authorized by the jury verdict or admissions of a defendant. *Alleyne v United States*, \_\_ US \_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013); *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (1999). But facts which increase either the floor or the ceiling of the range of permissible sentences must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. *Alleyne*, 133 S Ct at 2165.

Here, Mr. DEFENDANT’ guidelines range increased from 36-71 months to 58-114 months based on the finding of facts used to score OV-1, OV-2, and OV-14. (PSR 15); MCL 777.64. Specifically, Mr. DEFENDANT received points for threatening a victim with a knife and for playing a leadership role in a multi-offender situation. (PSR 15); MCL 777.31; MCL 777.31; MCL 777.44. None of these findings was included among the facts that Mr. DEFENDANT admitted as part of his guilty plea; in fact, he expressly denied possessing a weapon. (PT 15-16). Because these facts were neither admitted by Mr. DEFENDANT nor proven beyond a reasonable doubt, it was error to use them to increase his punishment.

After sentencing, the Michigan Supreme Court decided *Lockridge*, *supra*. The Court reasoned that the requirement of “a substantial and compelling reason” for a downward departure created a barrier that effectively transformed the low end of any guidelines range into a mandatory minimum. *Id.* at 25. Other statutory provisions then required judges to increase this mandatory minimum by finding facts that were never admitted by the defendant or submitted to a jury and proven beyond a reasonable doubt. *Id.* at 13-16 (discussing MCL 777.21(1)(a) and MCL 777.22(1)). Such a procedure violated defendants’ Sixth Amendment right to a jury trial under the rule set forth in *Alleyne.*

To remedy this constitutional violation, the *Lockridge* Court made the guidelines advisory by eliminating the requirement of “a substantial and compelling reason.” *Lockridge*, slip op at 2. The Court further held that defendants whose cases are pending on appeal can establish plain error if (1) the use of judge-found facts increased the guidelines range and (2) the defendant did not receive an upward departure. *Id.* at 33-34. If both conditions are met, “the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error.” *Id.* at 34. “If the trial court determines that the answer to that question is yes, the court shall order resentencing.” *Id.* (citing *United States v Crosby*, 397 F3d 103, 118 (CA 2, 2005)).

Mr. DEFENDANT is entitled to a *Lockridge*/*Crosby* remand. As discussed above, the trial court used judge-found facts to increase the guidelines range from 36-71 months to 58-114 months. (PSR 15); MCL 777.64. The trial court did not upwardly depart from the enhanced range, but it did impose an 100-month sentence that would have required a departure but for the use of judge-found facts. (ST 9). This Court should therefore remand this case to the trial court for a determination of whether it would have imposed a materially different sentence but for the Sixth Amendment violation. *Lockridge*, slip op at 37.

# SUMMARY AND REQUEST FOR RELIEF

 WHEREFORE, for the foregoing reasons, Defendant-Appellant asks this Honorable Court to remand this case so the Genesee County Circuit Court can evaluate whether it would have imposed the same sentence but for the Sixth Amendment violation. If the answer is yes, Defendant-Appellant is entitled to resentencing.

 Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

 /s/ Christopher M. Smith

 BY: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**CHRISTOPHER M. SMITH** **(P70189)**

 **Assistant Defender**

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Dated: August 20, 2015

1. “PT” refers to the transcript of the plea-taking proceedings of January 21, 2015, which is appended as Appendix D. [↑](#footnote-ref-1)
2. “ST” refers to the transcript of the sentencing proceedings of February 23, 2015, which is appended as Appendix E. [↑](#footnote-ref-2)
3. “PSR” refers to the presentence investigation report, which has been filed separately with this Court as required by MCR 7.212(C)(7). [↑](#footnote-ref-3)