Lockridge **and Advisory Sentencing Guidelines**

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In *People v Lockridge*, 498 Mich 358 (2015), the Michigan Supreme Court concluded that the Michigan sentencing guidelines create a mandatory minimum term. Therefore, judicial fact-finding in the scoring of the offense variables violates the Sixth and Fourteenth Amendments of the United States Constitution. The Court severed or struck down portions of MCL 769.34(2) and (3) to the extent they provided that a sentence must fall within the applicable guidelines range and the sentencing court may only depart above or below the range for substantial and compelling reasons. The Court also provided a remedy of advisory guidelines to cure the constitutional error.

1. ***Hybrid System?*** There has been some debate about whether *Lockridge* created a "hybrid" model where the sentencing guidelines are advisory in most, but not all circumstances. The Michigan Supreme Court rendered the sentencing guidelines advisory by substituting the word "may" for "shall" in MCL 769.34(2) ("the minimum sentence . . . shall be within the appropriate sentence range"), and by severing the language in MCL 769.34(3) that a trial court could only depart from the recommended range for a " substantial and compelling" reason. *Lockridge*, 498 Mich at 391. Severance is a tool provided to the court by MCL 8.5 which states in part that "If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application." The argument for a hybrid system flows from the fact that judicial fact-finding does not violate the right to jury trial if it does not result in an increase in the low end of the sentencing range. In that case, there has been no mandatory increase in the floor of the sentencing range, and no *Alleyne* violation. Therefore, in those instances MCL 8.5 would not confer the power to sever the statute, and MCL 769.34 would remain fully operative. Thus, a sentencing range would be mandatory when judicial fact-finding did not increase the low end of the sentencing range, and advisory only when it did.

However, *Lockridge* does not specifically mention any sort of hybrid system, but says that the solution is to "*Booker*-ize" the sentencing guidelines, and says it is using the "same remedy adopted by the United States Supreme Court in *Booker*." *Lockridge*, at 391. In *United States v Booker*, 543 US 220 (2005), the Court rendered the federal sentencing guidelines advisory in all cases, not on a case-by-case basis. Further, the *Lockridge* Court said "we sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a 'substantial and

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compelling reason' to depart from the guidelines range in MCL 769.34(3)" without further qualification.

2. ***Unpreserved Error***: In *Lockridge*, the Court concluded that an unpreserved Sixth Amendment challenge to judicial fact-finding was subject to the plain error test. 498 Mich at 392-393. For cases involving no judicial fact-finding in the scoring of the guidelines, the defendant cannot show plain where there is no prejudice. *Id.*, at 394-395. For cases with judicial fact-finding that changed the recommended range and did not involve an upward departure, 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. *Id.*, at 395-397. The trial judge must consider "'only the circumstances existing at the time of the original sentence'" when making this initial decision. *Id.*, at 398, 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. *Id.*, at 397. For cases involving judicial fact-finding that changed the recommended range and also involved an upward departure, there is no entitlement to relief on Sixth Amendment grounds as the defendant cannot show plain error as a matter of law. *Id.*, at 394.

3. ***Preserved Error***: The *Crosby* remand procedure identified in *Lockridge* applies to preserved as well as unpreserved Sixth Amendment error. A defendant is eligible for the remand procedure identified in *Crosby* if there is judicial fact-finding that changes the applicable range. The defendant may opt out of the remand procedure as provided in *Lockridge*. The trial judge must consider whether to grant resentencing without consideration of new information. At resentencing, the trial judge may consider new information to justify an increased sentence. *People v Stokes*, ___ Mich App ___ (Docket No. 321303, 9/8/15).

4. ***Preserved Error***: Apparently disagreeing with the *Stokes* opinion without mentioning *Stokes*, a two-judge majority of the Court of Appeals recently remanded for *resentencing* in a case where the trial judge scored OV 5 based on judicial fact-finding at sentencing and the range subsequently changed. It would appear this was a pre-*Lockridge* case given the lower court docket number and the 2011 offense date supplied in the dissenting opinion. The majority noted that the error was preserved – which it observed was "a scenario *Lockridge* predicted would be rare"- and remanded for resentencing without addressing the need for a *Crosby* remand hearing. At least two possible interpretations of the opinion are as follows: (1) the majority believed the sentencing judge should have considered mandatory sentencing guidelines that did not include judicial fact-finding, or (2) there was insufficient evidence to support the scoring of OV 5 and resentencing was required for this reason. *People v Blevins*, ___ Mich App ___ (Docket No. 315774, 1/12/16).[3] **[*Note, this opinion was subsequently VACATED and replaced with an opinion that changes the remedy to a***

[3] There is similar "blending" of the Sixth Amendment argument and a sentencing guidelines scoring challenge in the recent unpublished case of *People v Walker*, unpublished opinion per curiam of the Court of Appeals, issued January 7, 2016 (Docket No. 322133) (in response to a challenge to the scoring of OV 19 based on judicial fact finding, the panel concludes that there was improper fact finding and notes further that "the possible reduction of ten points may have reduced defendant's minimum sentencing guidelines range . . . ," before remanding to the trial court for a determination whether the trial court would have imposed "the same sentence absent the unconstitutional constraint on its discretion.")

remand for a Crosby hearing. People v Blevins, ___ Mich App ___ (Docket No. 315774, 2/22/16).]

5. ***Issue Preservation****:* Defendant properly preserved his *Lockridge* claim by filing a post-conviction motion to correct the sentence. Defense counsel's agreement to the scoring at sentencing did not constitute an admission since counsel was merely agreeing that the facts supported the scoring under a preponderance of the evidence standard. *People v Terrell*, ___ Mich App ___ (Docket No. 321573, 9/29/15). **[*Not Stokes case as previously reported.*]**

5.a. ***Issue Preservation:*** There is no issue preservation requirement for appellate review of a departure sentence. *People v Smith*, 482 Mich 292, 300 (2008) (departure from legislative guidelines); *People v Cain*, 238 Mich App 95, 129 (1999) (departure from judicial guidelines). **[*Note, this paragraph was added to the handout*.]**

6. ***No Change in Range, but Remand Due to Compulsory Use of Guidelines***: Where there is judicial fact-finding in the scoring of the guidelines, even if the fact-finding does not change the range, defendant is entitled to the *Crosby* hearing because "the trial court's compulsory use of the guidelines was erroneous in light of *Lockridge.*" *Terrell, supra.*

7. ***No Change in Range Brings No Relief***: Judicial fact-finding that does not change the range does *not* entitle defendant to a *Crosby* remand hearing as the *Lockridge* plain error test cannot be satisfied. *People v Jackson (On Reconsideration),* ___ Mich App___ (Docket No 322350, 12/3/15).

8. ***Jury Verdict Supported Scoring***: In the *Terrell* case above, the Court of Appeals concluded that the jury verdict supported the assessment of ten points under OV 9 for multiple victims as the jury found defendant guilty of assaulting three police officers. *Terrell, supra*.

9. ***Jury Verdict Supported Scoring***: Another panel of the Court of Appeals similarly concluded that the scoring of OV 3 (50 points for drunk driving causing death) and OV 9 (100 points for multiple deaths) was supported by the jury's verdict of two counts second degree murder and two counts OUIL Causing Death. Because this placed the defendant in the highest offense severity level, defendant could not show a recommended range that was *enhanced* by improper judicial fact-finding *People v Bergman*, ___ Mich App ___ (Docket No. 320975, 9/29/15).

9a. ***Defendant Admitted Prior Convictions for OV 13 Scoring***: Where defendant pled guilty to two prior offenses, thus admitting them, and defense counsel in the instant matter stipulated to the existence of the two prior convictions, the defendant could not show improper judicial fact-finding under OV 13. *Jackson, supra*. **[*Note, this paragraph was added to the handout.*]**

10. ***Review of Departure Sentence for Reasonableness***: With respect to unconstitutional judicial fact-finding in the scoring, the Court of Appeals finds no plain error as the trial court departed above the recommended range and presumably was not influenced by the guidelines range. See *Lockridge* at 394, 395 n 31. However, when reviewing the length of the sentence under the new "reasonableness" standard set forth in *Lockridge*, the Court of Appeals concludes that the old standard from *People v Milbourn*, 435 Mich 630, 651 (1990), applies. The sentence must be proportionate to the seriousness of the offense and the circumstances of the offender. A short list of

factors previously approved for consideration under *Milbourn* and now appropriate for review under a reasonableness test includes: (1) the seriousness of the offense, (2) factors not considered by the guidelines, (3) defendant's misconduct while in custody, (4) expressions of remorse, (5) potential for rehabilitation, and (6) factors inadequately considered by the guidelines. As noted in *Milbourn*, a sentence outside the recommended range that is not justified by factors not adequately reflected in the guidelines range will alert the appellate court to a possible violation of the principle of proportionality. 435 Mich at 659-660. Even in cases where there are reasons not adequately reflected in the guidelines range, the appellate court must review the *extent* of the deviation. *Id.* As the trial court did not sentence using the appropriate standard, the Court of Appeals remands to the trial court for reconsideration of its sentence. The reconsideration process must include an opportunity for the defendant to avoid resentencing. *People v Steanhouse*, ___ Mich App ___ (Docket No. 318329, 10/22/15).[4]

11. ***Review of Departure Sentence for Reasonableness***: Following *Steanhouse*, a split panel of the Court of Appeals remanded for a *Crosby* hearing in a case where the trial judge found substantial

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[4] In the wake of the September 11, 1990 *Milbourn* decision, the Michigan Supreme Court remanded a number of cases to the Court of Appeals for "reconsideration in light of *Milbourn*." See e.g., *People v Clark*, 436 Mich 883 (1990) (one of six orders remanding for reconsidering in light of *Milbourn* on October 30, 1990); *People v Clay*, 437 Mich 852 (1990) (same, one of two orders dated November 6, 1990); *People v Crockett*, 437 Mich 860 (1990) (same, one of sixteen orders dated November 16, 1990). The Court of Appeals varied in its handling of post-*Milbourn* cases, sometimes reviewing for proportionality on the existing record, and sometimes remanding to the trial court for resentencing with reconsideration in light of *Milbourn*. See *People v Murph*, 185 Mich App 476 (1990) (addendum to opinion indicating sentence did not violate the new principle of proportionality); *People v Schnepp*, 185 Mich App 767 (1990) (sentence shocks the conscience and violates the principle of proportionality); *People v Edgley*, 187 Mich App 211 (1990) (no abuse of discretion under *Milbourn* standard); *People v Duprey*, 186 Mich App 313 (1990) ("our first inclination" would be to remand for resentencing in light of *Milbourn*, but the reasons for departure are easily susceptible to appellate review on this record and sentence was proportionate); *People v Krajenka*, 188 Mich App 661 (1990) ("defendant's sentence was imposed without an opportunity for the sentencing court to apply the principle of proportionality . . . [a]ccordingly, we vacate defendant's sentence and remand for resentencing consistent with the considerations set forth in *Milbourn.*); *People v Cross*, 186 Mich App 216 (1990) (same); *People v Todd*, 186 Mich App 625 (1990) (same); *People v Armendarez*, 188 Mich App 61, 75 (1991) (because trial court did not have the benefit of *Milbourn* and we are unable to apply the new standard of appellate review to the defendants' sentences, cases remanded for resentencing "consistent" with the principle of proportionality).

Judge Shepherd, writing on behalf of one panel, offered a three-part test for application of the *Milbourn* standard on resentencing: (1) where within the range should the sentence fall, if the range is found sufficient, (2) what unique facts not considered by the guidelines would justify a departure and why, and (3) if there is to be a departure, what should be its magnitude and justification? *People v Harris*, 190 Mich App 652, 668-669 (1991).

At least two Michigan Supreme Court justices grumbled in 1991 about the continued remands for resentencing in light of *Milbourn*, see *People v Randles*, 437 Mich 1003 (1991), but the Supreme Court did not stop the process until a year later when it entered a series of orders in July of 1992 that modified the judgment of the Court of Appeals to remand for "reconsideration" in light of *Milbourn* rather than "resentencing." See *People v Martin*, 440 Mich 868 (1992); *People v Herron*, 440 Mich 868 (1992); *People v Austin*, 440 Mich 886 (1992).

and compelling reasons to depart from the sentencing guidelines range, but the judge did not have the benefit of the new *Lockridge* decision which makes the guidelines range advisory. The court noted that the sentence might be more severe on remand, but the defendant could opt out of the hearing. In dissent, one judge disagreed that any hearing would be necessary under *Lockridge* and opined that *Steanhouse* was wrongly decided although there would be no cause for convening a conflict panel as the Court of Appeals is bound to follow the *Lockridge* case. *People v Shank*, ___ Mich App ___ (Docket No. 321534, 11/17/15).

12. ***Review of Departure Sentence for Reasonableness***: In another decision disagreeing with *Steanhouse* and calling for a conflict panel, two judges expressed the opinion that they would not have remanded for a *Crosby* hearing where the trial court imposed a sentence above the sentencing guidelines range before *Lockridge*. The two judges would have found the sentence reasonable and supported by a sufficient articulation of reasons by the trial judge. The third judge concurred in the result only. The panel nevertheless followed *Steanhouse* and remanded for *resentencing* (although indicating in a footnote that it was not an automatic resentencing) with a *Crosby*–type reconsideration of the sentence after offering a 24-page opinion discussing the reasonableness standard under federal law. *People v Masroor*, ___ Mich App ___ (Docket No. 322280, 11/24/15).[5]

13. ***Intermediate Sanctions and Affirmance of Guidelines Sentence***: A three-judge panel recently affirmed a minimum prison sentence of 16 months where the sentencing guidelines range was 0 to 17 months. Rather than treating the sentence as a departure and reviewing for reasonableness under the now-advisory sentencing guidelines scheme, the panel concluded that the sentence falls "within the appropriate range authorized by law" given the discretionary nature of an intermediate sanction range. Further, the Court of Appeals concluded that it "must" affirm the sentence under MCL 769.34(10) because the sentence falls within the applicable range and there was no scoring error or the consideration of inaccurate information. *People v Schrauben*, ___ Mich App ___ (Docket No. 323170, 1/26/16).[6]

14. ***Cert Denied***: The State's petition for certiorari in the *Lockridge* case was denied on December 7, 2015. *Michigan v Lockridge*, 136 S Ct 590 (2015) (petition filed by Oakland County Prosecutor). A subsequent petition filed by the Michigan Attorney General on January 25, 2016, is still pending in the case of *Michigan v Sidney Edwards*. In the *Edwards* case, the State asks "Whether the Sixth Amendment requires a state to impanel a jury to find facts relating to a determination of parole eligibility?" The State argues that the Supreme Court has "never

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[5] On a similar note, a panel recently remanded for a *Crosby* hearing and *resentencing* in an unpublished opinion where the panel found judicial fact-finding that increased the recommended range. *People v Haymer*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2016 (Docket No. 323612).

[6] Note, the Michigan Supreme Court continues to refer to a sentence that falls outside the recommended sentencing guidelines range as a "departure." *Lockridge*, 498 Mich 365, 391-392; *People v Nacarrato*, ___ Mich ___; 871 NW2d 195 (11-24-15). The statutory definition of a "departure" refers to a sentence "that is not within the appropriate minimum sentence range. . . ." MCL 769.31(a). The statutory definition of an intermediate sanction cell refers to a range that authorizes a jail sentence of up to 12 months, but not a prison sentence. MCL 769.31(b); MCL 769.34(4)(a). See also *People v Stauffer*, 465 Mich 633; 640 NW2d 869 (2002) (prison sentence of 16 to 24 months does not fall within sentencing guidelines range that has a top number of 17 months).

required that a jury determine facts relating to the parole eligibility date of an indeterminate sentence." [The *Edwards* argument appears similar to the one advanced by Justices Markman and Zahra in the *Lockridge* dissent.]

15. ***Retroactivity***: Michigan appellate courts have not yet ruled on whether *Lockridge* will have retroactive effect. Under *Teague v Lane*, 489 US 288 (1989), a new rule is given retroactive effect only if it is "substantive" or a "watershed rul[e] of criminal procedure." *Teague*, 489 US at 311. The decision in *Apprendi v New Jersey*, 530 US 466 (2000), was held not retroactive, see *Blakely v Washington*¸ 542 US 296, (2004) (". . . despite the fact that we hold in *Schriro v. Summerlin*, . . . that *Ring* (and a fortiori *Apprendi*) does not apply retroactively . . ."), and every federal court appellate court which has reached the question has held *Alleyne* is not retroactive, see *Hughes v United States*, 770 F3d 814 (CA 9, 2014); *In re Mazzio*, 756 F3d 487, 489-91 (CA 6, 2014); *Owens v United States*, 598 Fed Appx 736, 737 (CA 11, 2015) (collecting cases).

16. Crosby ***Remand Procedure***: According to the *Lockridge* decision, the sentencing judge must determine whether it "would have imposed a materially different sentence but for the constitutional error." *Lockridge*, 498 Mich at 396. The Court did not specify whether the sentencing judge should consider an advisory sentencing guidelines range with judicial fact-finding or a mandatory range without judicial fact-finding. In a footnote, however, the Court quoted language from a Seventh Circuit case that spoke of appellate review following the sentencing judge's determination that the sentence would have been different "had he known that the guidelines were merely advisory." *Id.*, at 396 n 34, quoting *United States v Coles*, 365 US App DC 280, 286; 403 F 3d 764 (2005), quoting *United States v Paladino*, 401 F3d 471, 484 (CA 7, 2005). The Court of Appeals has assumed the same, arguably in dicta as the case did not involve judicial fact-finding that necessitated a *Crosby* remand. See *People v Jackson (On Reconsideration)*, ___ Mich App ___ (Docket No. 322350, 12/3/15) ("If the answer is "no," then a remand to the trial court is required to allow it to determine whether, now aware of the advisory nature of the guidelines, the court would have imposed a materially different sentence.")

17. ***Materially Different Sentence***: The Court of Appeals has not explored what it means for a trial court to conclude that it would have imposed a "materially different sentence." The Michigan Supreme Court adopted with approval language found in the *Crosby* decision that refers to a sentence that differs in "a nontrivial manner" from the original sentence and is not "essentially the same." *Lockridge*, 498 Mich at 396, quoting *Crosby*, 397 F3d at 118.

As a practical matter, a single sentence may consist of multiple components: fines, costs, jail credit, consecutive sentencing, the length of jail or prison incarceration, etc. The definition of a "materially different sentence" may or may not be satisfied when the amount of a criminal fine is changed by $1. On the other hand, a "materially different sentence" should arguably be found when there is *any* change in the length of incarceration. In the related context of ineffective assistance of counsel claims, the Michigan Supreme Court said that "[a]ny amount of additional prison time imposed as a result of an attorney's deficient performance has Sixth Amendment significance." *People v Gardner*, 482 Mich 41, 50 n 11 (2008). The United States Supreme Court has held the same: "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice [for ineffective assistance of counsel claims]. Quite to the

contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." *Glover v United States*, 531 US 198, 203 (2001).]

18. ***Appellate Review of Scoring Errors After Lockridge***: The Court of Appeals applies the existing standard of review for sentencing guidelines scoring challenges as set forth in *People v Hardy*, 494 Mich 430 (2013). *People v Steanhouse*, ___ Mich App ___ (Docket No. 318329, 10/22/15).

19. ***Remedy for Pure Scoring Errors After Lockridge***: In an order dated October 30, 2015, the Michigan Supreme Court granted mini oral argument on two questions: "(1) whether a defendant can be afforded relief from an unpreserved meritorious challenge to the scoring of offense variables through a claim of ineffective assistance of counsel, see *People v Francisco*, 474 Mich 82, 89 n 8 (2006); and (2) the scope of relief, if any, to which a defendant is entitled when the defendant raises a meritorious challenge to the scoring of an offense variable, whether preserved or unpreserved, and the error changes the applicable guidelines range, whether the defendant's sentence falls within the corrected range or not. See *id.* at 89-90; see also *People v Kimble*, 470 Mich 305, 310 (2004)." *People v Douglas*, ___ Mich ___; 870 NW2d 730 (2015).

Douglas involves a challenge to the scoring of the sentencing guidelines that would appear to be meritorious, but neither trial nor appellate counsel properly preserved the challenge by one of the three methods specified in MCL 769.34(10) (at sentencing, by proper post-conviction motion, or by proper motion to remand). The first question asked by the Supreme Court relates to the availability of a claim of ineffective assistance of counsel to raise an unpreserved but otherwise meritorious guidelines challenge. The second question appears to ask whether the rule of *People v Mitchell*, 454 Mich 145 (1997) (claim of miscalculated sentencing guidelines variable is not a reviewable claim of legal error as the judicial sentencing guidelines do not have the force of law), applies to challenges to the now-advisory but legislatively-enacted sentencing guidelines.

20. ***Juvenile LWOP and Jury Fact-Finding*****:** There is a Sixth Amendment right to jury trial to determine whether a juvenile offender should be sentenced to life without parole for first-degree murder. The default sentence for a juvenile convicted of first-degree murder in Michigan is a term of years. See MCL 769.25. Additional fact finding to support a sentence of life without parole violates the Sixth Amendment if made by the judge alone, absent waiver by the defendant. In order to enhance a sentence to life without parole for a juvenile offender, the jury must make findings based on the *Miller* factors and other relevant considerations under MCL 769.25(6), and must conclude that the juvenile's crime reflects "irreparable corruption" beyond a reasonable doubt. This hearing may occur in front of the original jury or the trial court may impanel a new jury. *People v Skinner*, ___ Mich App __ (Docket No. 317892, 8/20/15).

21. ***Juvenile LWOP and Jury Fact-Finding***: Disagreeing with the *Skinner* decision, another panel of the Court of Appeals would hold that there is no right to jury trial in the context of a juvenile life without parole sentence because the jury's verdict of first degree murder authorized the sentence and the sentencing judge did not determine facts not already determined by the jury's verdict. The panel nevertheless followed *Skinner* and remanded for resentencing "so that a jury may determine whether he should receive life in prison without the possibility of parole." The panel also noted in a footnote that while it was declaring a conflict, the defendant in *Skinner*

had filed an application for leave to appeal with the Michigan Supreme Court (i.e., the issue might become moot if resolved by a higher court). *People v Perkins*, ___ Mich App ___ (Docket No. 323454, 323876, 325741; 1/19/16). [***Note, this portion of the opinion was subsequently VACATED as the Court voted to convene a special conflict panel on 2-12-16.***]

22. ***Alleyne and CSC First Mandatory Minimum Term***: While the Michigan Supreme Court denied leave to appeal in this case involving two convictions of CSC first-degree with a victim under 13 years of age, a defendant 17 or older, and sentences of *23* to 50 years imprisonment (rather than the mandatory minimum term of 25 years), Justice Markman wrote a long concurring opinion pointing out the questionable plea bargain that amended the charge to delete the defendant's age from the felony information in order to avoid the mandatory minimum term. He concurred in the denial of leave to appeal, however, because under *Alleyne v United States*, 133 S Ct 2151 (2013), the defendant's age was an element of the offense and had to be alleged in the information in order to support the mandatory minimum term. *People v Keefe*, 872 NW2d 688 (2015). See also *People v Gardner*, unpublished opinion per curiam of the Court of Appeals, issued December 29, 2015 (Docket No. 323883) (defendant's age of 17 or older is an element of the crime that must be submitted to the jury in order to support the 25-year mandatory minimum term for CSC first degree with victim under the age of 13).

23. ***Appeal following* Crosby *Remand***: This question has not been addressed by the Michigan appellate courts.

Trial judges would be wise to advise a defendant of his or her appellate rights at the conclusion of the *Crosby* remand hearing, and arguably should provide a copy of the Notice of Right to Appeal form. Under MCR 7.202(6)(b)(iv), the trial court's decision on remand from the Court of Appeals in a case involving an appeal of right is considered a "final order" that is once again subject to review as an appeal by right: "'final judgment ' or 'final order' means: . . . (iv) a sentence imposed, *or order entered*, by the trial court following a remand from an appellate court in a prior appeal by right." See also MCR 7.203(a)(1) (jurisdiction of Court of Appeals includes appeal of right from final judgment or order of the circuit court that is not on appeal from any other court or tribunal and does not follow a conviction based on a plea of guilty or nolo contendere; appeal from order described in MCR 7.202(6)(a)(iii)-(v) "is limited to the portion of the order with respect to which there is an appeal of right.")

In a case involving remand from the Court of Appeals where the original appeal was pursued by leave to appeal rather than by right, it would appear there is another opportunity to file an application for leave to appeal following the *Crosby* remand decision. See MCR 7.203(B)(1) (Court of Appeals may grant leave to appeal from "1) a judgment or order of the circuit court and court of claims that is not a final judgment appealable of right[.]")]

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