

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES JEROME DOUGLAS,

Defendant-Appellant.

Supreme Court No. 150789

Court of Appeals No. 315027

Wayne Cir. Ct. No. 12-010051-FH

**BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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STATEMENT OF QUESTIONS PRESENTED

1. Is this Court authorized to make the guidelines advisory in cases where mandatory guidelines are constitutional?

The appellant has not addressed this question.

Appellee's answer: No.

The courts below did not address this question.

Amicus's answer: No.

Authority: MCL 8.5.

2. Does *Lockridge* affect how defendants can bring ineffective-assistance claims to obtain review of scoring errors they have failed to preserve?

Appellant's answer: No.

Appellee's answer: Yes.

The courts below did not address this question.

Amicus's answer: Yes.

3. Does *Lockridge* otherwise affect review of scoring errors?

Appellant's answer: No.

Appellee's answer: Yes.

The courts below did not address this question.

Amicus's answer: Yes.

STATUTES INVOLVED

MCL 8.5 provides:

In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:

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, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

MCL 769.34 provides in part:

(2) Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. . . .

(3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. . . .

* * *

(10) 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. 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 a 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.

INTRODUCTION

Michigan's Legislature has limited the ability of courts, including this Court, to strike down *all* applications of statutes based on a finding of invalidity in *some* applications. In spite of this restriction, in *People v Lockridge*, 498 Mich 358 (2015), this Court struck down *all* applications of Michigan's laws providing for mandatory sentencing guidelines, even as it correctly held that some applications of mandatory sentencing guidelines do not violate the Constitution. Because the *Lockridge* remedy violated Michigan's severability statute, MCL 8.5, the Attorney General joins the People in asking this Court to vacate that portion of *Lockridge*, and clarify that the sentencing guidelines are advisory *only* when judge-found facts are used to score offense variables. If the Legislature prefers guidelines that are advisory in all applications, then it is up to the Legislature to make that preference manifest. Because the guidelines in this case were not scored using judge-found facts other than a prior conviction, mandatory guidelines are consistent with the Sixth Amendment, and *Lockridge* has no application.

This Court has asked how *Lockridge* affects whether a defendant may obtain review of a challenge to offense variable scoring in spite of his failure to preserve such a claim by arguing that his counsel was constitutionally ineffective. In this case, *Lockridge's* holding that the guidelines are advisory has no effect because that holding does not apply to this case. But where it applies, *Lockridge* should make such claims harder to prove in cases where the guidelines are advisory. An ineffective-assistance claim is always a fact-specific claim, and a defendant always bears the burden of showing a reasonable probability that his counsel's deficient

performance affected the result of the proceedings. Because *Lockridge* has lessened the force with which the guidelines apply to the trial court, that prejudice inquiry may be more difficult in close cases.

In addition, *Lockridge*'s remedy of a *Crosby* remand is more suitable than a costly and time-consuming resentencing proceeding. By first asking the trial court whether the scoring error affected the sentence imposed, a reviewing court can conserve judicial resources. That aspect of *Lockridge* should apply to all claims, whether the guidelines are mandatory or advisory. Here, however, no remand is necessary because on these facts, it is clear that no inquiry is necessary—Douglas was not prejudiced by a small change to the bottom of his minimum-sentence range (from an incorrect range of 7 to 46 months to a correct range of 5 to 46 months) where he was sentenced in the middle of that range (24 months).

This Court has also asked how *Lockridge* affects review of scoring errors, whether preserved or not, and whether the sentence falls outside the correctly scored guidelines or not. Again, in this case, the advisory guidelines do not affect the inquiry because the guidelines here were properly mandatory. In cases in which that holding applies, however, again, they may affect the inquiry in close cases. Also, in close cases, a *Crosby* remand to determine the effect of a small change in guidelines range is a better use of judicial resources than full resentencing.

This Court should deny leave to appeal, and should make clear in its order denying leave that, under MCL 8.5, guidelines are only advisory in cases in which mandatory guidelines would violate the Sixth Amendment.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS BELOW

The Attorney General accepts Douglas's statement of facts for purposes of this appeal.

ARGUMENT

- I. Because MCL 8.5 prevents courts from striking down valid applications of statutes even when other applications are found invalid, this Court's remedy in *Lockridge*, striking down valid and invalid applications of Michigan's mandatory guidelines scheme, must be reversed.**

In its recent *Lockridge* opinion, this Court held, relying chiefly on *Apprendi v New Jersey*, 530 US 466 (2000), and *Alleyne v United States*, 133 S Ct 2151 (2013), that it violates the Sixth Amendment to score offense variables using facts not proven to the jury nor admitted by the defendant, and then to use those offense variables to determine sentencing guidelines that are mandatory on the trial court.¹ 498 Mich at 388–389. But *Lockridge* also correctly recognized that there is no constitutional violation when mandatory guidelines are determined *without* using judge-found facts. *Id.* at 364; see also *id.* at 374–375, 383, 394–395. From a number

¹ The Attorney General adheres to the view that *Lockridge* was wrongly decided, but does not, in this case, challenge *Lockridge*'s central constitutional holding. This argument challenges only the remedy this Court chose.

of potential remedies for the perceived violation, this Court chose to make sentencing guidelines advisory in all cases. *Id.* at 389–392.

This remedy violates the plain language of Michigan law. MCL 8.5 provides that, “[i]f any . . . application [of an act] to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining . . . applications of the act which can be given effect without the invalid . . . application,” While this Court had a free hand to make the guidelines advisory in cases where it believed mandatory guidelines would violate the Constitution, it was not permitted to allow that invalidity to affect valid applications of Michigan sentencing law.

A. Neither of the exceptions to MCL 8.5 allows the *Lockridge* remedy.

MCL 8.5 admits of two stated exceptions. First, the statute requires severance to preserve valid applications “unless such construction would be inconsistent with the manifest intent of the legislature[.]” Second, it requires severance “provided such remaining portions are not determined by the court to be inoperable.” Neither exception applies here.

The first exception of MCL 8.5 does not allow a court to attempt to divine the Legislature’s intent regarding severability. Rather, the exception only applies when the Legislature has made this intent “manifest.” The Legislature did not choose a different severability rule for MCL 769.34, nor did it make its intent manifest in any other way.

The second exception of MCL 8.5 does not apply here either, because, unlike elsewhere in 8.5, it does not refer to “portions or applications,” but only to “remaining portions.” Because only some applications were invalid, not portions of the statute, this exception is not implicated, and the *Lockridge* remedy wrongly barred valid *applications* of §§ 34(2) and 34(3).

And even if “applications” were read into the statute, this Court would have had to determine valid applications of §§ 34(2) and 34(3) to be “inoperable” without the invalid applications. The *Lockridge* Court made no such finding. Nor should it have. The sentencing system is perfectly operable if courts apply §§ 34(2) and 34(3) when they are constitutional and do not apply them when they are not. A sentencing court needs to add only one more step to the process: after scoring offense variables, the court must determine whether any of those variables were scored greater than 0 using facts not inherent in the verdict (i.e., proved to the jury) or admitted by the defendant. If so, the guidelines are advisory. If not, §§ 34(2) and 34(3) may be constitutionally applied, and therefore must be applied.

B. In an example that should be followed, the Michigan Court of Appeals has properly severed § 34(10), allowing constitutional applications while barring unconstitutional applications.

Comparison with *People v Conley*, 270 Mich App 301, lv den 477 Mich 931 (2006), is instructive. In that case, the Michigan Court of Appeals concluded that the trial judge violated the defendant’s Fifth Amendment right against self-incrimination by imposing a higher sentence because the defendant refused to admit that he was guilty. *Id.* at 314–315. The Court of Appeals then considered

MCL 769.34(10), which requires the Court of Appeals to affirm a within-guidelines sentence absent an error in guidelines scoring or the use of inaccurate information at sentencing. *Id.* at 315–316. On its face, this statute would require the court to affirm a within-guidelines sentence (like Conley’s) even if the trial court violated constitutional rights (like the right against self-incrimination) because the facts the court relied on were accurate and did not include an error in guidelines scoring. But the *Conley* court recognized that a statute “cannot authorize action in violation of the federal or state constitutions,” so it held that § 34(10) was inapplicable to claims of constitutional error. *Id.* at 316.

If the *Conley* court had, like the *Lockridge* Court, wished to do “the least judicial rewriting of the statute,” 498 Mich at 391, as a means to prevent future constitutional violations, it could have simply replaced two words, leaving the portion of the statute to read, “If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *may* [instead of *shall*] affirm that sentence and *need* [instead of *shall*] not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.” Thus rewritten, § 34(10) would be just a suggestion to the Court of Appeals, allowing it to reverse within-guidelines sentences not only when there was constitutional error, but also whenever else it felt such reversal was called for.

The *Conley* court did no such judicial rewriting. Although it did not cite MCL 8.5, it hewed to that statute’s command in crafting the remedy, holding that

§ 34(10) simply no longer applied to claims of constitutional error. In other words, where application of § 34(10) would require affirmance of constitutional error, such application would henceforth be invalid, but where § 34(10)'s command could bind the Court of Appeals *without* violating the Constitution, that application would continue to apply in full force. No rewriting was necessary.

This Court should have chosen a similar remedy in *Lockridge*. Rather than minimizing judicial rewriting of the statute and relaxing the commands of §§ 34(2) and 34(3) in *all* applications, it should have obeyed MCL 8.5, and only relieved trial courts of those restraints on discretion that it actually held to be unconstitutional, not those restraints that were undisputedly constitutional.

C. The *Booker* Court was unconstrained by a severability statute, and the remedy that Court chose was permissible in that case, but not available to this Court in *Lockridge*.

It may be contended that the *Lockridge* remedy is permissible because that was the remedy chosen by the United States Supreme Court in *United States v Booker*, 543 US 220, 244–268 (2005). Indeed, that was one of the reasons this Court selected that remedy. *Lockridge*, 498 Mich at 391 (“We agree that [rendering the guidelines advisory] is the most appropriate remedy. First, it is the same remedy adopted by the United States Supreme Court in *Booker*.”). But one simple difference explains why the remedy that was valid in *Booker* is not valid here: the United States Code contains no equivalent to MCL 8.5. The *Booker* Court held (based on case law, not statutes) that its job was to divine the intent of Congress

and craft a constitutionally sound sentencing scheme as close to possible to what it believed Congress would have liked. 543 US at 246–249.

Our Legislature has provided otherwise. MCL 8.5 does not ask courts to speculate about legislative intent, but to examine only the “*manifest* intent of the Legislature.” (Emphasis added.) Simply, the remedy that was within the *Booker* Court’s authority was not within this Court’s authority.

D. Despite disadvantages with a system that is sometimes advisory, MCL 8.5 must be followed unless the Legislature indicates to the contrary.

Admittedly, a bifurcated sometimes-advisory-sometimes-mandatory guidelines system is not without its drawbacks. As noted above, it introduces an additional step, albeit a small one, into a scheme that some already find difficult to navigate. And this system means that some defendants will be sentenced by judges who are bound by the guidelines, and others will be sentenced by judges who are not so bound. But that is an understandable result of a Sixth Amendment violation: if the defendant is sentenced based solely on facts (other than the fact of a prior conviction) found by the jury or admitted by the defendant, then no Sixth Amendment violation has occurred, so the Legislature’s intent of creating uniform sentences can be given effect. Under *Lockridge*, the only time mandatory guidelines cannot be applied constitutionally is if a court increases the guidelines range based on its own fact finding, and in that instance this Court’s decision in *Lockridge* will mean that the guidelines must be advisory only, averting any potential Sixth Amendment violation. In the end, though, this is similar to the reality that some

defendants may be freed from culpability (even if they are in fact guilty) if a constitutional error (such a speedy-trial violation) occurs during the judicial process. E.g., *Strunk v United States*, 412 US 434, 440 (1973) (describing dismissal as “ ‘the only possible remedy’ ” for a denial of a speedy trial).

Because no one can know, *ex ante*, whether judicial factfinding will occur at sentencing, the result is that a defendant will almost never know before trial, whether, if convicted, the trial court imposing sentencing will be bound by mandatory guidelines, or free to depart from those guidelines without substantial and compelling reasons. Indeed, it is not uncommon for the parties to present arguments on OV scoring at the sentencing hearing, and the mandatory or advisory nature of the guidelines might not be known until after those arguments are resolved. But that too is a common result of errors that occur during proceedings; for example, a defendant also will not know *ex ante* if some constitutional error is going to cause a mistrial and subject him to a second trial.

In addition, the bifurcated system may create incentives for savvy defendants, and for those with alert counsel. A defendant knowing that his sentencing judge is “Lenient Larry”² may choose not to contest a contestable OV, knowing that, if that OV is scored based on facts not found by the jury, it will render his guidelines advisory, allowing the lenient judge to depart downward. Another defendant, sensing her judge is “Maximum Mike,”³ may choose to *admit* to

² See *Lockridge*, 498 Mich at 461 (MARKMAN, J., dissenting); *People v Smith*, 482 Mich 292, 323 (2008) (MARKMAN, J., concurring).

³ *Id.*

OVs under oath, which would remove any Sixth Amendment issue from the application of § 34(3), preventing the judge from departing upward. One can even imagine a sentencing hearing before Lenient Larry, in which the prosecutor seeks to concede multiple OVs at 0 points to keep the guidelines mandatory, while defense counsel argues that at least one should be scored (but only based on a preponderance of the evidence—never based on the jury’s verdict) in order to preserve the Sixth Amendment violation. But even this strategic maneuvering is part of the adversarial system, where parties are free to refrain from asserting all of the rights to which they might be entitled and even to willingly waive arguments.

But none of these potential problems render the bifurcated guidelines system “inoperable,” nor has the Legislature made “manifest” its intent not to have such a system. Regardless of potential problems the bifurcated system may present, it is the system that invalidates *only* those applications §§ 34(2) and 34(3) that this Court has held violate the Sixth Amendment, while continuing to allow those statutes to have effect when they are valid. In short, it has one overriding virtue: it follows the Legislature’s command in MCL 8.5.

In one respect, this case is similar to *Booker*. As the Supreme Court pointed out in that case, “Ours, of course, is not the last word: The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.” 543 U.S. at 265. The same is true here. If adherence to MCL 8.5 results in a sentencing system the Legislature does not prefer, the

answer is not to violate MCL 8.5, but to allow the Legislature to replace the system with one it does prefer.

II. In light of *Lockridge*, it is more difficult for defendants to meet the prejudice prong of an ineffective-assistance inquiry.

This Court has asked how *Lockridge* affects the ability of a defendant to circumvent the preservation requirements of a claim of scoring error by raising the claim through ineffective assistance. *Lockridge* does not change *whether* a defendant can make such a claim, but it may affect how difficult such a claim is to show. At the outset, however, there are several reasons why this case is not an appropriate one to answer such questions.

A. Numerous vehicle problems plague this application.

First, this case is unaffected by *Lockridge*. For the reasons given in Argument I above, MCL 8.5 does not allow this Court to bar constitutional applications of the mandatory sentencing guidelines. Here, the only offense variable scored was OV 13, and that was scored based on Douglas's prior convictions. Thus, no judge-found fact other than a prior conviction was used to increase Douglas's sentencing range, and it would not violate the Sixth Amendment to have mandatory sentencing guidelines. Thus, the answer to how *Lockridge* affects an ineffective-assistance claim in *this* case is simple: it does not affect the claim because it does not apply.

Second, Douglas did not properly raise a claim of ineffective assistance of counsel in the Court of Appeals. Although a conclusory assertion that trial counsel

was ineffective for failing to object to the scoring of OV 13 appears in the body of Douglas's brief below, the issue does not appear in the statement of questions presented, and it may be for this reason that the court below chose not to address the question. See *People v Brown*, 239 Mich App 735, 748 (2000).

Third, on the facts of this case, it is impossible for Douglas to make the prejudice showing required for an ineffective-assistance claim. Regardless of how *Lockridge* affects the analysis (whether it applies or not), the claim is patently meritless because the scoring error only affected the bottom end of the guidelines, only affected it slightly, and the trial court did not sentence Douglas near the bottom of the guidelines.

B. The unpreserved scoring error in this case could have been reviewed only through an ineffective-assistance claim, and the Court of Appeals was correct to affirm because there was no prejudice.

When a claim of scoring error is unpreserved, and where the defendant's sentence is within the guidelines as correctly scored, any claims of scoring error are unreviewable, although a defendant may raise a claim of ineffective assistance of trial counsel for failure to preserve the claim, and thereby circumvent the preservation requirement. MCL 769.34(10); *People v Francisco*, 474 Mich 82, 89 n 5 (2006); *People v Kimble*, 470 Mich 305, 311 (2004).

The court below made two contradictory statements on the reviewability of Douglas's sentencing claim, one correct and one incorrect. First, the court said that it could review the claim, though unpreserved, for plain error. Slip op. at 3, citing *People v Loper*, 299 Mich App 451, 457 (2013). Later, the court said that an

unpreserved claim could not be reviewed if the defendant's sentence was within the appropriate guidelines range. Slip op. at 4, citing MCL 769.34(10) and *Francisco*, 474 Mich at 89 n 8.

The first statement is contrary to § 34(10), *Francisco*, and *Kimble*. Although the *Loper* court did not err, the Court of Appeals in this case erred in relying on *Loper*. The defendant in that case brought two challenges to the scoring of OV 12: one preserved claim of scoring error, and one unpreserved *constitutional* claim. 299 Mich App at 455–456. The *Loper* court properly reviewed the preserved claim for error and the unpreserved constitutional claim for plain error. As noted above, § 34(10) does not bar constitutional claims. *Conley*, 270 Mich App at 317.

The second statement of the court below is correct. Douglas's sentencing claim was (a) not constitutional, (b) not preserved, and (c) did not change the guidelines range such that the sentence he received was outside the range as correctly scored. As such, review was barred except through a claim of ineffective assistance of trial counsel, which Douglas did not properly raise below.

C. Post-*Lockridge*, an ineffective-assistance claim may still be brought based on counsel's failure to object to guidelines scoring, but in close cases where *Lockridge* applies, the fact that guidelines are advisory will make such claims harder to prove.

The prejudice analysis of an ineffective-assistance claim will often be a fact-intensive one. The reviewing court is required to determine whether the defendant has shown a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland v Washington*, 466

US 668, 693–694 (1984); *People v Trakhtenberg*, 493 Mich 38, 51–52 (2012). In some cases, the question might be easy. For example, in this case, the trial court scored Douglas’s guidelines at 7 to 46 months, and imposed a minimum sentence of 24 months. Correctly scored, the guidelines would have been 5 to 46 months. Under these circumstances, it cannot be said that a reasonable probability exists that the trial court would have imposed a shorter sentence if it had been working with the correct guidelines. Douglas would not be entitled to relief even if he had properly raised an ineffective-assistance claim, and *Lockridge* would not change the analysis, even if *Lockridge* applied to this case. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Strickland*, 466 US at 693.

On the other hand, suppose the trial court had imposed a 7-month minimum sentence. This would be evidence that the trial court intended to sentence Douglas at the bottom of the guidelines. If the trial court had been considering a lower guidelines minimum, there is at least a reasonable probability that the trial court would have imposed a lower sentence. The prejudice standard would be met—with *Lockridge* or without it.

Where *Lockridge* may have an effect is in the closer cases. Consider a pre-*Lockridge* case in which the guidelines, as scored by the trial court, run from 50 to 100 months, and the trial court imposes a minimum sentence of 54 months. On appeal, however, it turns out that the *correctly* scored guidelines run from 29 to 57 months. There is a certain logic in saying that this change does not matter—the

trial court felt 54 months was the optimal minimum sentence for this defendant, and that optimal sentence was authorized under both the guidelines as scored and the guidelines as correctly scored, so there is no need for resentencing, as the trial court will again impose the same optimal 54-month sentence.

This logic, though, ignores how guidelines typically work in sentencing. The trial court's determination that 54 months was the optimal minimum sentence may have been tied into its perception that 54 months was near the low end of the guidelines range. If the trial court had been faced with a 29-to-57-month range, it is reasonable to think that the court would not have imposed a 54-month sentence—near the top of the guidelines. In other words, OV scoring errors are important not because of the way the guidelines expand or limit the trial court's discretion, but because of the way they provide guideposts to inform the trial court's understanding of what the appropriate minimum sentence is.

It follows then, that the weaker the influence the guidelines have, the less likely a change in the guidelines will affect the court's sentencing decision. And advisory guidelines will inherently have a weaker influence on a trial court's thinking than mandatory guidelines, all else being equal. Thus, an error in scoring guidelines is inherently less likely to be prejudicial under an advisory-guidelines regime than under a mandatory-guidelines regime.

Again, in the easy cases like this one, this will not make a difference, because prejudice is already impossible to prove. And in cases where prejudice is obvious, the slight change does not alter the outcome. But in cases where the question

appears close, and where the guidelines are advisory, the fact that they are advisory is one factor to consider, and it may make prejudice harder to prove.

D. *Lockridge's* remedy is well-suited to cases in which it is unclear whether scoring error, or counsel's deficiencies, had an impact on the sentence imposed.

Lockridge has another impact on ineffective-assistance claims in this context. Before *Lockridge*, two courses were available to a reviewing court, assuming scoring error and deficient performance were found: either find a reasonable probability that the deficiency was outcome determinative, vacate the sentence, and remand for resentencing, or find no reasonable probability and affirm. Because the "reasonable probability" standard is lower than a "more probable than not" standard, *Strickland*, 466 US at 693, this procedure required resentencing even in cases where it was more probable than not that the deficiency did not result in prejudice.

And a resentencing is not a cost-free affair. It is a complete do-over. The trial court is required to generate a new presentence investigation report and a new sentencing information report. In cases that involve victims, the prosecutor must contact them and seek new victim-impact statements. Victims will need to decide whether to appear at the resentencing proceeding. Though intangible, the reopening of old wounds is a serious cost that must not be ignored. Further, the defendant will often need to be brought to the trial court from prison, requiring a writ of habeas corpus and transportation arrangements with the Department of Corrections. In some cases, the defendant will need to travel hundreds of miles to

appear. Offense variable scoring (other than those already determined on appeal) are reopened, and the parties are free to relitigate them.

The *Crosby* remand ordered in *Lockridge* is an improvement—perhaps an ideal solution. Where the case is close and the reviewing court does not know whether the error was prejudicial, the reviewing court may, rather than ordering a full-dress resentencing just to be safe, simply *ask* the trial court what it would have done if it had known that the guidelines were one range instead of another. Without holding a hearing, the trial court may decide that it would have imposed the same guidelines, hold that the defendant had failed to show prejudice, and deny the ineffective-assistance claim. Or it can hold that it would have imposed a different sentence (or, if the trial court is unsure, it can decide whether there is a reasonable probability that it would have imposed a different sentence), hold that the defendant has shown prejudice, and order resentencing.

III. By rendering the guidelines advisory in some cases, *Lockridge* makes it more difficult for defendants to demonstrate plain error for unpreserved claims, and easier for the prosecutor to demonstrate harmless error for preserved claims.

This Court has also asked whether *Lockridge* affects “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 . . . whether the defendant’s sentence falls within the corrected range or not.” This question is best broken down into four subparts, with four answers.

- A. For a *preserved* meritorious challenge to an OV score, if the sentence imposed falls *within* the correctly scored guidelines, *Lockridge* makes it possible that the error does not require reversal.

Before *Lockridge*, when a reviewing court found a preserved meritorious claim of scoring error that changed the guidelines range, it was required to order resentencing regardless of the original sentence or how much the scoring error affected the guidelines. *Francisco*, 474 Mich at 89–92. Even if this per se reversal rule made sense when *Francisco* was decided, the intervention of *Lockridge* and the softening of the guidelines give this Court occasion to revisit the issue, and to revise the rule to require the defendant to demonstrate a miscarriage of justice. MCL 769.26; *People v Lukity*, 460 Mich 484, 492–496 (1999). For the reasons discussed in Argument II above, advisory guidelines are inherently less influential than advisory guidelines. Thus, in cases in which *Lockridge* applies and the guidelines are advisory, a reviewing court should recognize that the guidelines are only one factor out of several the trial court considered, and allow for the possibility that the error was not outcome-determinative, based on the facts and circumstances of the case.⁴

For example, here, if Douglas had preserved his scoring challenge (and if *Lockridge* applied) a court should consider that, in light of the small guidelines

⁴ To be clear, the amicus agrees with *Francisco*'s rejection of "the premise that a *de minimis* violation of a defendant's rights has occurred, and that resentencing is unnecessary because an error is 'harmless,' where a defendant is deprived of his or her liberty for 'only' a few more months." 474 Mich at 92 n 12. The harmless-error argument is not that the *sentence* would only be slightly higher, but rather that the *guidelines* would only be slightly higher, such that it is reasonable to think that the sentence based on those slightly higher guidelines would be no higher at all.

change, the fact that only the low end changed, the fact that Douglas was not sentenced near the low end, and the fact that the guidelines are only suggestions, the error was harmless. There is no reasonable likelihood the trial court would have imposed a different sentence, and a reviewing court should deny relief.

And, as discussed in Argument II.D above, where the question is close, a *Crosby* remand will be preferable to a remand for resentencing, to allow the trial court to decide whether the error was harmless, and to conserve scarce judicial resources for those cases in which a resentencing truly is required.

B. For a *preserved* meritorious challenge to an OV score, if the sentence imposed falls *outside* the correctly scored guidelines, *Lockridge* eliminates one basis for automatic reversal, but harmless error is still a difficult showing.

Before *Lockridge*, if a preserved scoring error affected the guidelines such that the sentence imposed was outside the guidelines as correctly scored, reversal would be required because the trial court unknowingly imposed a departure sentence, without stating substantial and compelling reasons to justify the departure. Post-*Lockridge*, substantial and compelling reasons for departure are no longer required, so this rationale for automatic resentencing must be abandoned.

Still, absent some extraordinary circumstances, a defendant who shows error will usually be entitled to relief. Even after *Lockridge*, sentencing guidelines “remain a highly relevant consideration in a trial court’s exercise of sentencing discretion.” *Lockridge*, 498 Mich at 391. “[T]rial courts ‘must consult those Guidelines and take them into account when sentencing.’” *Id.*, quoting *Booker*, 543 US at 264. Where a trial court believes it is sentencing within the guidelines, but

the sentence imposed is actually a departure, unless the trial court has said on the record that it intends to impose the same sentence regardless of the guidelines, the defendant will be entitled to resentencing.

- C. For an *unpreserved* meritorious challenge to an OV score, if the sentence imposed falls *within* the correctly scored guidelines, *Lockridge* does not affect the fact that the defendant is not entitled to relief except through a claim of ineffective assistance of counsel.**

The rule that a defendant may not bring an unpreserved challenge to OV scoring when the sentence falls within the guidelines as correctly scored does not have anything to do with the mandatory nature of the guidelines, but comes from the second sentence of MCL 769.34(10). That is unchanged after *Lockridge*, although, as discussed in Argument II above, the ineffective-assistance analysis may change, making prejudice more difficult to show.

- D. For an *unpreserved* meritorious challenge to an OV score, if the sentence imposed falls *outside* the correctly scored guidelines, *Lockridge* does not change the analysis.**

When a defendant brings an unpreserved challenge to an OV score, and the sentence imposed falls outside the guidelines as correctly scored, review is for plain error. *Kimble*, 470 Mich at 312. The question assumes that the claim is meritorious, i.e., that the defendant can show error, but plain-error review requires the defendant to also show that the error was plain, that the plain error affected substantial rights, and that the error “seriously affected the fairness, integrity or

public reputation of judicial proceedings.” *Id.* (quotation marks, alterations, and citation omitted).⁵

There is no reason to think that *Lockridge* will affect the second or fourth prong of the plain-error analysis. As to the third prong, the fact that the trial court imposed a departure sentence without realizing it will generally establish prejudice, again unless the trial court has made statements on the record showing otherwise.

In sum, where a defendant is sentenced within the guidelines as scored by the trial court, and raises a meritorious challenge, the following matrix shows

Lockridge’s effect on review of the claims:

	Challenge is <i>preserved</i>	Challenge is <i>unpreserved</i>
Sentence is <i>within</i> guidelines correctly scored	Where <i>Lockridge</i> applies, the prosecution should be allowed to attempt to show harmless error. This Court should abrogate the automatic reversal rule of <i>Francisco</i> . In close cases, a <i>Crosby</i> remand is preferable to a resentencing remand.	Review remains barred. (A defendant may argue ineffective assistance of counsel. Where <i>Lockridge</i> applies, prejudice may be more difficult to show. In close cases, a <i>Crosby</i> remand is preferable to a resentencing remand.)
Sentence is <i>outside</i> guidelines correctly scored	Where <i>Lockridge</i> applies, reversal remains automatic, because harmless error can never be shown unless the sentencing court indicates to the contrary.	Review remains for plain error. Where <i>Lockridge</i> applies, the third prong can generally be shown unless the trial court indicates to the contrary. The other two prongs will be unaffected.

⁵ The fourth prong of plain-error review can also be met by showing that the error resulted in the conviction of an actually innocent defendant. An error in OV scoring can never meet this standard.

CONCLUSION AND RELIEF REQUESTED

This Court should deny leave to appeal, but should clarify that *Lockridge's* holding that the guidelines are henceforth advisory does not apply in cases like this one, where no judge-found facts other than a prior conviction were used to score the defendant's offense variables.

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