

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**CHARLES JEROME DOUGLAS**

Defendant-Appellant.

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**Supreme Court No. 150789**

**Court of Appeals No. 315027**

**Lower Court No. 12-10051-01**

**WAYNE COUNTY PROSECUTOR**

Attorney for Plaintiff-Appellee

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**PETER JON VAN HOEK (P26615)**

Attorney for Defendant-Appellant

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**SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL**

**STATE APPELLATE DEFENDER OFFICE**

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**STATEMENT OF JURISDICTION**

Jurisdiction is proper in this Court due to this Court order of October 30, 2015, directing supplemental briefs to be filed.

**STATEMENT OF QUESTIONS PRESENTED**

- I. DOES THIS COURT’S DECISION IN *PEOPLE V LOCKRIDGE*, 498 MICH 358; 870 NW2D 502 (2015), PRECLUDE A DEFENDANT FROM SEEKING RELIEF FOR AN OTHERWISE UNPRESERVED, BUT MERITORIOUS, CHALLENGE TO THE SCORING OF MICHIGAN’S LEGISLATIVE SENTENCING GUIDELINES THROUGH A CONSTITUTIONAL CLAIM, UNDER THE SIXTH AMENDMENT, THAT HE OR SHE WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL AND/OR APPELLATE COUNSEL, AND SHOULD THIS COURT ADOPT THE *LOCKRIDGE* REMAND REMEDY FOR MISSCORINGS THAT RAISE THE GUIDELINES RANGE?**

Court of Appeals made no answer.  
Defendant-Appellant answers, "No".

## STATEMENT OF FACTS

Defendant-Appellant Charles Jerome Douglas was convicted, at a jury trial in Wayne County Circuit Court, the Hon. Ulysses W. Boykin presiding, of one count of carrying a concealed weapon, MCL 750.227; one count of being a felon in possession of a weapon, MCL 750.224f; and one count of possession of a firearm in the commission of a felony (felon in possession), MCL 750.227b. The trial occurred on January 16-17, 2013. On February 7, 2013, Judge Boykin sentenced Mr. Douglas, as a fourth felony offender, to a prison term of five years (second felony-firearm conviction), with a concurrent prison term of two to ten years and a consecutive term of two to ten years. He appealed as of right from the convictions and sentences. He is currently incarcerated at the Gus Harrison Correctional Facility in Adrian, Michigan.

The trial essentially consisted of testimony from several Detroit Police officers asserting they saw Mr. Douglas in possession of a handgun, which he allegedly sought to dispose of during a foot chase with the officers. The handgun itself was not admitted into evidence during the trial, despite allegedly having been recovered by the police and sent for testing. The defense theory in the case was that Mr. Douglas did not possess any weapon prior to his arrest, and that the officers were either lying about seeing him with a gun or mistaken.

The parties stipulated that Mr. Douglas has previously been convicted of a felony, and has not had his right to legally possess a firearm reinstated. (II, 63).

In his direct appeal, Mr. Douglas raised two issues in his initial brief.<sup>1</sup> One dealt with the convictions in the matter, arguing he was denied his constitutional right to the effective assistance of counsel due to his trial attorney's failure to impeach the police witnesses with prior

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<sup>1</sup> Mr. Douglas personally filed a Standard 4 supplemental brief raising additional issues concerning the conviction. None of those issues are relevant to or presented in the present brief.

inconsistent statements, and the other asserted he was erroneously scored with ten points under Offense Variable 13, as he does not have three or more crimes against a person during the five year period encompassing the offense date of the current charges, as required for a scoring of ten points under OV 13. While no objection was made to this scoring at the resentencing, or either through a motion for resentencing filed in the trial court or by way of a motion to remand filed in the Court of Appeals, Mr. Douglas expressly argued in his brief to the Court of Appeals that he was denied the effective assistance of his trial counsel, in violation of the Sixth Amendment, due to the failure to object to this plain and unambiguous error. Defendant-Appellant's Brief on Appeal at 12-13. The assessment of the ten points under OV 13 raised his OV level to II, which when combined with his Prior Record Variable level resulted in a recommended range for the minimum sentence, for the felon in possession conviction, of 7 to 46 months. Appendix A – Sentencing Information Report. Without those ten points, Mr. Douglas would have scored into OV level I, with a range of 5 to 46 months for this Class E conviction, as a fourth felony offender.

On August 7, 2014, the Michigan Court of Appeals affirmed Mr. Douglas' convictions and sentences. Appendix B. In their opinion, the Court agreed the trial court clearly erred in scoring ten points under OV 13, but refused to remand the matter to the trial court for a resentencing. Appendix B at 3-4.

Mr. Douglas timely sought rehearing in the Court of Appeals, primarily on the Court's refusal to order a resentencing. On November 14, 2014, the Court of Appeals denied reconsideration of the opinion. Appendix C.

Mr. Douglas timely sought leave to appeal in this Court. In an order entered on October 30, 2015, this Court directed the Clerk's office to schedule oral arguments on whether to grant

leave to appeal or take other action, pursuant to MCR 7.305(H)(1), and ordered the parties to submit supplemental briefs on two questions:

[W]whether *People v Lockridge*, 498 Mich 358 (2015), by rendering the sentencing guidelines advisory and/or by employing a remedy that does not mandate resentencing, affects (1) whether a defendant can be afforded relief for 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).

Mr. Douglas now files his Supplemental Brief in this Court.

- i. **THIS COURT’S DECISION IN *PEOPLE V LOCKRIDGE*, 498 MICH 358; 870 NW2D 502 (2015), DOES NOT PRECLUDE A DEFENDANT FROM SEEKING RELIEF FOR AN OTHERWISE UNPRESERVED, BUT MERITORIOUS, CHALLENGE TO THE SCORING OF MICHIGAN’S LEGISLATIVE SENTENCING GUIDELINES THROUGH A CONSTITUTIONAL CLAIM, UNDER THE SIXTH AMENDMENT, THAT HE OR SHE WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL AND/OR APPELLATE COUNSEL, AND THIS COURT SHOULD NOT ADOPT THE *LOCKRIDGE* REMAND REMEDY FOR MISSCORINGS THAT RAISE THE GUIDELINES RANGE?**

**Standard of Review:**

The appropriate appellate standard of review for this constitutional question is *de novo*.

See *People v Lockridge, supra*.

**Argument:**

**Ineffective assistance of counsel**

In *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), the Michigan Supreme Court, after ruling the defendant had been misscored under Offense Variable 13 of the Michigan legislative sentencing guidelines, and that misscoring added enough offense variable points to raise the defendant into a higher OV level and the resulting higher recommended range for the minimum sentence, considered the appropriate remedy for this violation. The Court held a defendant is entitled to a resentencing under the correctly calculated range, even if the actual minimum sentence imposed in the case still falls within the lower, corrected range, unless the trial judge has already, on the record, indicated the sentence would have been the same had the lower range been used:

A defendant is entitled to be sentenced by a trial court on the basis of accurate information. MCL 769.34(10) states, “[i]f 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.” (Emphasis added.) In other words, if a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon. As we explained in *People v Kimble*, 470 Mich 305, 310–311; 684 NW2d 669 (2004), “if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.”

474 Mich at 88-89.

The *Francisco* Court pointed out on the facts of the case the defendant preserved the scoring error by objecting to the scoring of OV 13 at the sentencing. *Id.* at 89. In a footnote, the Court again noted the different statutory methods by which a defendant could preserve a guidelines scoring issue, but notted a further vehicle for such an issue to be raised:

Finally, if the defendant failed to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal **except where otherwise appropriate, as in a claim of ineffective assistance of counsel.** MCL 769.34(10).

*Id.* at 89, fn. 8. (Emphasis added).

In *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004), this Court found that an offense variable in the case was clearly misscored, that that error raised the range for the minimum sentence, and that the precise issue of this error was not raised until the defendant filed an application for leave to appeal in the Court of Appeals. The Court held that because the actual minimum sentence imposed in the case fell outside the correctly calculated range, the defendant could raise the issue for the first time on appeal without having raised it at the

sentencing, in a motion for resentencing in the trial court, or by way of a motion to remand in the Court of Appeals.

In response to a further argument from the prosecution that under MCR 6.429(C) this issue was not timely raised either at or before the sentencing, or as soon as the error could have been discovered, this Court agreed the court rule precluded raising the issue for the first time on appeal, but still affirmed the Court of Appeals' remand of the case for resentencing, holding the defendant would have been entitled to a resentencing upon a filing of a Motion for Relief From Judgment pursuant to MCR 6.508:

Although defendant did not raise the precise scoring error at or before sentencing, defendant is clearly entitled to relief under MCR 6.508(D)(3). In order to be entitled to relief under MCR 6.508(D)(3), both "good cause" and "actual prejudice" must be established. "Good cause" can be established by proving ineffective assistance of counsel. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995). To demonstrate ineffective assistance, it must be shown that defendant's attorney's performance fell below an objective standard of reasonableness and this performance prejudiced him. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). At oral argument, the prosecutor conceded that defendant would be entitled to relief on the basis of ineffective assistance of counsel and defendant's appellate counsel, who was also his trial counsel, admitted that OV 16 was scored where it obviously should not have been, that he failed to bring this error to the court's attention, and that this failure ultimately resulted in a minimum sentence that exceeds the upper limit of the appropriate guidelines sentence range by five years. Under these circumstances, it is clear that both "good cause" and "actual prejudice" have been established.

470 Mich at 313-314. (Footnotes omitted).

As pointed out above, in the subsequent *Francisco* decision this Court expanded on *Kimble* in that the defendant is entitled to a resentencing if the trial court relied on an inaccurately scored range, even if the actual minimum sentence fell within the lower, correct range. The Court further agreed the error could lead to relief through a claim of ineffectiveness

of the trial and/or appellate counsel to preserve the issue by objection in the trial court, either directly or through a remand.

In *People v Gardner*, 482 Mich 41, 50 fn 11; 753 NW2d 78 (2008), this Court, in Justice Corrigan’s majority opinion, expounded on why a sentencing issue can be raised on appeal via a claim of ineffective assistance of counsel, even if not preserved in the trial court or as part of a motion to remand:

11 Defendant's appointed attorneys did not raise the error at sentencing, in a motion for resentencing, or in a motion for remand in the Court of Appeals. Accordingly, defendant properly raises his argument in connection with a claim that he was denied his Sixth Amendment right to effective assistance of counsel. *Francisco, supra* at 90 n 8, 711 NW2d 44. An attorney is ineffective for Sixth Amendment purposes if his performance fell below an objective standard of reasonableness and the defendant was prejudiced as a result. *Strickland v Washington*, 466 US 668, 688, 692; 104 S Ct 2052; 80 L Ed2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Any amount of additional prison time imposed as a result of an attorney's deficient performance has Sixth Amendment significance. *Glover v United States*, 531 US 198, 203; 121 S Ct 696; 148 L Ed 2d 604 (2001). Although we accord substantial deference to an attorney's strategic judgments, we can identify no strategic reason for the failure of defendants' attorneys here to raise such an obvious point of error that increased the possible minimum prison sentence to which defendant was exposed. Therefore, defendant has properly stated a claim of ineffective assistance of counsel.

For the same reasons, defendant has also properly alleged good cause and actual prejudice, as is necessary to seek relief in a motion for relief from judgment. MCR 6.508(D)(3). A defendant may establish good cause for not raising an argument for relief sooner by showing that his appellate attorney rendered ineffective assistance by failing to raise the issue in a proper post-trial motion or first-tier appeal. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995) (opinion by Boyle, J.). Appellate counsel's failure to “assert all arguable claims” or decision to “winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance.” *Id.* at 391, 535 NW2d 496. Here, however, as noted, we cannot identify any excuse for counsel's failure to raise an obvious error that would have guaranteed resentencing under *Francisco*. Because the

nature and strength of the argument are obvious, the omission is not evidence of a reasonable professional decision to winnow out weaker arguments.

Subsequent to the release of the *Francisco* decision, Michigan cases have remanded for possible resentencings, following a finding that the guidelines were misscored, where the issue was raised on appeal via a claim that the failure to object to the misscoring at the sentencing denied the defendant his or her Sixth Amendment right to the effective assistance of counsel. US Const, Amend VI. For example, see *People v Wilding*, 497 Mich 1032; 863 NW2d 324 (2015) (case remanded by order for evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922(1973), to determine if the trial attorney was ineffective for failing to object to the misscorings of OV 8 and 10). As with all claims of constitutionally deficient representation, the appellate courts utilized the standards set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); and *People v Armstrong*, 490 Mich 281; 806 NW2d 676 (2011).

In the case at bar, Mr. Douglas' trial counsel did not object to the erroneous scoring of OV 13 at the sentencing. No motion for resentencing was brought in the trial court, either by trial counsel shortly after the sentencing or by appointed appellate counsel during the concurrent jurisdiction period under MCR 7.208(B)(1), and no motion to remand was filed pursuant to MCR 7.211(C). However, Mr. Douglas did expressly assert in his brief on appeal that he was denied his Sixth Amendment right to effective counsel by his trial attorney's failure to recognize and object to the manifest error in scoring OV 13.<sup>2</sup>

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<sup>2</sup> The Court of Appeals below, even while citing directly to footnote 8 of the *Francisco* opinion, failed to recognize that Mr. Douglas **did** raise an ineffective assistance of counsel claim in his Brief on Appeal. Appendix B at 4. That error by the Court of Appeals' panel was the primary grounds for the motion for reconsideration filed in the case.

In the order issued in this case, this Court has asked the parties to first brief whether the decision in *People v Lockridge, supra*, has impacted on the right of a defendant to challenge an otherwise unpreserved but meritorious claim of a misscoring of the guidelines by way of a Sixth Amendment claim of ineffective assistance of counsel. For the reasons detailed below, the *Lockridge* decision, which does not concern misscoring of the guidelines, which was the issue in *Francisco, supra* and *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004), did not alter in any fashion the procedural or constitutional routes available to a defendant to raise an issue, in the trial court or on appeal, asserting the guidelines were miscalculated.

In *Lockridge, supra*, this Court considered whether the Michigan sentencing guidelines statutory scheme violates a defendant's Sixth Amendment right to jury trial. US Const, Amend VI. Relying primarily on the prior decisions of the United States Supreme Court in *Apprendi v New Jersey*, 530 US 466; 120 S CT 2348; 147 L Ed 2d 435 (2000); *Alleyne v United States*, 570 US \_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013); and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), the Court held the right to jury trial is violated if the recommended range for the minimum sentence is dependent on points assessed in particular variables by way of a judicial fact-finding, under the preponderance of the evidence standard that applies at sentencing, rather than on either a required jury finding under the proof beyond a reasonable doubt standard or an admission by the defendant. This Court, as the United States Supreme Court did with the Federal guidelines system in *Booker, supra*, held the constitutional error resulted from the guidelines being mandatory, in that they constrained the sentencing judge's discretion as to the minimum sentence.

To the cure the error, the *Lockridge* Court held the guidelines system must be altered in two respects – and two respects only. First, the guidelines statute was changed to make the

guidelines' ranges advisory rather than mandatory. Second, the sentencing judge is no longer required to state substantial and compelling objective reasons to depart either above or below this advisory range. The Court expressly wrote that only these two alterations to the statutory system were needed to eliminate the constitutional jury trial violation, while retaining all of the other portions of the legislative guidelines system:

Third, the prosecution, in turn, asks us to *Booker*-ize the Michigan sentencing guidelines, i.e., render them advisory only. We agree that this is the most appropriate remedy. First, it is the same remedy adopted by the United States Supreme Court in *Booker*. Second, it requires **the least judicial rewriting of the statute**, as we need only substitute the word “may” for “shall” in MCL 769.34(2) and remove the requirement in MCL 769.34(3) that a trial court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure.

\* \* \*

Accordingly, we sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a “substantial and compelling reason” to depart from the guidelines range in MCL 769.34(3). When a defendant's sentence is calculated using a guidelines minimum sentence range in which OV's have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. *Booker*, 543 U.S. at 261, 125 S.Ct. 738. Resentencing will be required when a sentence is determined to be unreasonable. Because sentencing courts will hereafter not be bound by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court's discretion. **Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence.**

*Id.* at 391-392. (Footnotes omitted). (Emphasis added).

The *Lockridge* opinion did not consider any issue as to the accuracy of the scoring of the guidelines, but rather only the Sixth Amendment jury trial issue of who scores them, and under

which burden of proof. In the case itself, the Court did not find the guidelines applied to Mr. Lockridge's minimum sentence were misscored. At all post-*Lockridge* sentencings, under the new advisory system, the trial judge may still score particular guidelines based upon judicial fact-finding, using the preponderance of the evidence standard, and must consider the resulting range, regardless of whether the total scoring was premised on judicial and/or jury based scorings, but can deviate from that range without having to state specific reasons for the departure, with that decision being reviewable on appeal under the "reasonableness" standard.

Having amended the system to make it advisory rather than mandatory, in order to preclude violations of the right to jury trial in all future sentencings, the Court then turned to how to resolve the numerous cases, in addition to Mr. Lockridge's, in which this issue may have been raised on appeal and was pending on review, or might in the near future be raised in appeals where the sentencing occurred prior to the release date of the opinion. Recognizing that in many if not most of these cases the *Alleyne/Apprendi* issue had not been preserved, the Court fashioned a remedy for those cases in which the sentencing occurred prior to the release date of the opinion (July 29, 2015), but a right to jury trial violation may have impacted on the range actually considered by the sentencing judge.

The Court, adopting a remedy created in the Second Circuit Court of Appeals for Federal sentencings which occurred prior to the *Booker* ruling, held that where a defendant can establish plain error by showing the guidelines range used in the trial court was impacted by the assessment of points under one or more variables premised on judicial fact-findings, and the trial court did not depart upwards from that range, the matter will be remanded to the trial court for the judge first to state, in consideration of the lower range that would have been applicable had the judicial fact-findings scores not be calculated into the totals, whether the judge would have

imposed a materially different sentence under an advisory system. See *United States v Crosby*, 397 F3d 103 (CA 2, 2005). Only if the judge first makes that determination would the defendant be entitled to resentencing under the new system, with the defendant given the option to opt out of any resentencing due to a fear of receiving a higher sentence, given that the requirement of substantial and compelling reasons for departure no longer would apply.

At no point of the *Lockridge* opinion did this Court consider, let alone rule upon, any issues concerning misscoring of the sentencing guidelines, or consider the procedural rules on a defendant challenging the scoring on grounds other than the *Alleyne/Apprendi* right to jury trial question. This Court did not overrule, nor even cite to, the holding or any language in *Francisco, supra*, particularly the footnote in which the Court stated that scoring issues could be raised through a constitutional claim of ineffective counsel. The two statutory changes to the guidelines system are not related to the obligation of the sentencing court to insure that the guidelines are accurately scored and calculated, and the Court clearly retained the requirement that a sentencing court both calculate the applicable guidelines and take into account the recommended range for the minimum sentence. The fact that in the future the system will be advisory rather than mandatory, and that review of departures will be under the reasonableness standard rather than the compelling and substantial reasons test, is not relevant to the related but distinct question of whether the guidelines range was accurately determined. In either system, accuracy is fundamental and necessary. Review of that accuracy, whether or not the judge made a factual finding in support of a score or it was premised on the jury's verdict or admissions from the defendant, should be under the same standards and procedures as previously applied under the mandatory system.

Mr. Douglas understands that appellate review under a claim of constitutionally ineffective counsel is different than review of an alleged error that was raised at the sentencing or via a later motion in the trial court or for remand. Any review under this Sixth Amendment guarantee is by its nature different than review of a preserved error. The defendant must meet both *Strickland* tests – he or she must show deficient representation and must show the requisite degree of prejudice. While that standard may be more difficult for a defendant to meet than had the issue been raised and decided in the trial court, having a higher standard of review is not the same as preclusion of the opportunity of a defendant to even make the constitutional claim. The question asked by this Court in their order is not whether Mr. Douglas can or should prevail on his ineffective assistance claim, on the facts of this case, but whether the *Lockridge* decision has altered, on a systematic basis regardless of the particular facts of any case, the right of a defendant to raise a scoring error issue by way of an ineffective assistance claim. That question should be answered in the negative.

Where the claim of a scoring error under the guidelines is not raised and decided in the trial court, any consideration by an appellate court would be under a plain error analysis. In *Lockridge*, this Court wrote that where an *Alleyne/Apprendi* objection to the scoring of guidelines variables through judicial fact-finding was not made in the trial court, the matter should be evaluated by the plain error standards expressed in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). 498 Mich at 392-393. Those standards require the defendant to show that the error occurred, it was clear or obvious, and that it affected the substantial rights of the defendant. To meet this third prong of the plain error test, the defendant had to demonstrate sufficient prejudice – that the error affected the outcome of the proceedings. In effect, these standards are similar to the constitutional standard under *Strickland, supra*. In order to show a

deprivation of the Sixth Amendment right to effective assistance of counsel, the defendant must show the attorney made an error sufficient to demonstrate deficient performance – commonly in the failure to object to clearly inadmissible or improper evidence – and show prejudice – that the error made a different result probable on re-trial. *Armstrong, supra*, 490 Mich at 289-290. The role of the appellate court in reviewing an otherwise unpreserved scoring error under either a general plain error analysis or an ineffective assistance of counsel claim requires a showing of prejudice. Accordingly, the *Lockridge* decision provides no basis for this Court to preclude raising a scoring error under an ineffective assistance claim, or for this Court to effectively overrule those portions of the *Francisco* and *Kimble* opinions.

No one can, or does, dispute that a criminal defendant in Michigan has the right to counsel under the Sixth Amendment both at the sentencing and on direct appeal. Both are critical stages of the prosecution. Concurrently, the right to counsel carries with it the right to the effective assistance of that counsel. *Strickland, supra*. The failure of either the trial attorney or the appellate attorney to preserve a meritorious guidelines scoring issue, to the detriment of his or her client, cannot and should not be ignored or insulated from review. Nothing in the Sixth Amendment limits its protections to only a trial itself, particularly since the overwhelming number of criminal convictions arise from guilty or no contest pleas. If it is held that a defendant cannot on appeal argue his prior counsel[s] were ineffective for failing to preserve a meritorious scoring error, which raised the recommended range for the minimum sentence, even in an

advisory guidelines system, the defendant will bear the brunt of that error while the attorney escapes any review.<sup>3</sup>

This Court should hold that its decision in *Lockridge* did not alter the language or precedent from *Francisco* and *Kimble* that a meritorious guidelines scoring error claim can be raised by a claim of constitutionally ineffective counsel.

### Remedy

The second question posed by this Court's order is whether the *Lockridge* decision affects the scope of relief to which a defendant is entitled where there is a meritorious challenge to the scoring of the guidelines, either preserved or unpreserved, and that erroneous scoring changed the range, whether or not the actual minimum sentence imposed falls within the correct range. Again, since the *Lockridge* decision did not deal directly with a claim of a misscoring of the guidelines, as compared to the issue of which entity did the scoring and under which burden of proof, any application of *Lockridge* to this question would have to be by analogy.

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<sup>3</sup> Present counsel for Mr. Douglas, who has handled this appeal from its outset, is not immune from review of his handling of the case. Counsel could have sought to file a motion for resentencing directly in the trial court, within 56 days of the filing of the transcripts, under MCR 7.208(B)(1), or could have filed a Motion to Remand in the Court of Appeals under MCR 7.211(C). Relying on the indisputable nature of the error here (Mr. Douglas was assessed 10 points under Offense Variable 13, even though he has **no** convictions for crimes against a person, including the instant offenses, during the relevant five year time span, and that scoring raised his Offense Variable level – the prosecution in their brief to the Court of Appeals did not argue the variable was correctly scored, but only that the issue was not properly preserved – the Court of Appeals readily agreed that “no points should have been assessed for OV 13.” Appendix B at 3.), and the precedent of the *Francisco* decision that this error could be raised via a claim of ineffective assistance of counsel, present counsel, as he had other issues in the case that would have rendered a remand moot if the convictions were reversed, elected to raise the scoring error by the ineffective assistance claim. If this Court holds that the failure to make a motion in the trial court or a motion to remand has waived all substantive review of the error, then Mr. Douglas should be able, via a Motion for Relief From Judgment under MCR 6.500 *et seq*, to argue that present counsel as well as trial counsel was ineffective for failing to preserve the issue, and thus there is cause for the failure to properly raise the issue in the direct appeal. See *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995), *Kimble, supra*. It makes little sense to bar an ineffectiveness claim during the direct appeal of right, only to have the same claim raised in a collateral motion.

The intent of the question appears to be whether this Court should apply the relief they adopted in *Lockridge* to cases in which the defendant has established a meritorious claim that the sentencing guidelines were misscored to the extent that the sentencing judge considered an inaccurate range when deciding on the minimum sentence. That relief, a remand to the trial court for the sentencing judge to first determine whether consideration of the presumably lower range would have resulted in a materially different sentence, and, if so, only then a full resentencing,<sup>4</sup> should not be applied to all future or pending cases in which there were sufficient scoring errors which changed the range utilized at the initial sentencing. For several reasons, application of a *Lockridge/Crosby* remand relief to cases in which the guidelines were misscored would be inappropriate, unwise, and fundamentally unfair.

First, the *Lockridge/Crosby* remand relief was designed to apply only to a small and discrete set of cases – those cases pending on appeal in which a *Lockridge* error, in which the trial court considered a guidelines range which was actually impacted by variable scoring on the basis of judicial fact-finding, occurred on a sentencing date prior to the July 29, 2015 release date of the opinion.<sup>5</sup> This Court recognized there was a violation of the defendant’s constitutional right to jury trial in those cases, and thus adopted a remedy that would allow for resentencings in the cases in which that constitutional error materially changed the sentence imposed. However, implicit in the adoption of this remedy was the reality that in the near future the use of this remedy would become obsolete. Since the Court reacted to the constitutional problem in Michigan’s statutory guidelines system by making the two changes to that system – altering the system from a mandatory to an advisory system and eliminating the requirement that a

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<sup>4</sup> See *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

<sup>5</sup> “Although we have held that the defendant in this case cannot satisfy the plain-error standard, we nevertheless must clarify how that standard is to be applied in the many cases that have been held in abeyance for this one.” 498 Mich at 394.

sentencing judge state substantial and compelling reasons to depart from the recommended range for the minimum sentence – there is no possibility for *Lockridge* errors to occur in any case in which the initial sentencing date is subsequent to July 29. Accordingly, when the last of the pre-*Lockridge* cases wends its way through the appellate system, no further *Crosby* remands will be necessary or appropriate. While the Court of Appeals has issued post-*Lockridge* decisions seeking to clarify such questions as whether the relief remedy applies to all such cases, or only to ones in which the right to jury trial issue was not preserved in the trial court,<sup>6</sup> all of those questions to be resolved are in relation to pre-*Lockridge* sentencings.

The *Lockridge/Crosby* relief remedy was designed for a limited number of cases with a discrete and specific constitutional violation. The potential for that violation to recur in future cases has been eliminated as long as the *Lockridge* opinion and its amendments to the statutes remains valid precedent. While some may argue that this was not the appropriate remedy for violations of the right to jury trial, what cannot be disputed is that this is a short-term relief that will expire by its very nature within a relatively short period of time.

On the other hand, application of the *Lockridge/Crosby* relief remedy to cases in which the guidelines were misscored, regardless of whether the misscoring was based on judicial fact-finding, the jury's verdict, or admissions by the accused, would not be limited to any discrete class of prior cases, but presumably would apply without end into the future. The application of this relief remedy to this clearly more numerous class of cases would not expire on its own, out of necessity, but instead would be an extremely significant change in Michigan sentencing law.

Nothing in the *Lockridge* decision changed the statutory or constitutional requirement that a sentencing judge accurately calculate the guidelines range. To the contrary, the opinion

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<sup>6</sup> See *People v Stokes*, \_\_ Mich \_\_; \_\_ NW2d \_\_ (Docket No. 321303, rel'd 9/8/15).

stressed the continued need for the sentencing court to not only calculate the range, but consider that range as a critical factor in the judge’s discretionary decision on the minimum sentence:

Like the Supreme Court in *Booker*, however, we conclude that although the guidelines can no longer be mandatory, **they remain a highly relevant consideration in a trial court’s exercise of sentencing discretion.** Thus, we hold that trial courts “must consult those Guidelines and take them into account when sentencing.” *Booker*, 543 US at 264, 125 S Ct 738. Such a system, while “not the system [the legislature] enacted, nonetheless continue[s] to move sentencing in [the legislature’s] preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.” *Id.* at 264–265, 125 S Ct 738.

\* \* \*

Because sentencing courts will hereafter not be bound by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court’s discretion. Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence.

\* \* \*

Our holding today does nothing to undercut the requirement that the highest number of points possible must be assessed for all OVs, whether using judge-found facts or not. See MCL 777.21(1)(a) (directing that the offense variables applicable to the offense category at issue be scored); see also, e.g., MCL 777.31(1) (directing that the “highest number of points” possible be scored); MCL 777.32(1) (same); etc.

498 Mich at 391, 392, footnote 29. (Emphasis added).

Misscorings of the sentencing guidelines will continue to occur, and sentencing judges will continue to consider ranges that are inaccurate and prejudicial to the accused. Even though the legislative guidelines have been in existence for many years, errors in the calculations required under that system still occur in a significant number of cases, and Michigan courts have issued a substantial number of published and unpublished opinions finding that such errors have occurred. Nothing in the *Lockridge* opinion will prevent such errors from occurring in future cases, as compared to the absence of right to jury trial errors in post-*Lockridge* sentencings. On

its face, application to the limited and soon to be obsolete *Crosby* remedy to the incalculable number of guidelines scoring errors in the future is illogical.

This Court has already decided the proper, and fair, remedy for when a sentencing court misscores the guidelines range, and considers an inaccurate range for the minimum sentence. In *Francisco, supra*, Justice Markman’s majority opinion expressly held that in this situation, even where the actual minimum sentence would fall within the correct, lower range,<sup>7</sup> the necessary remedy in a remand for a full resentencing, where the trial judge may **only** consider the correct and accurate range. The decision in *Francisco* was not premised merely on a policy decision of this Court, but was a remedy based upon the clearly expressed intent of the Legislature in enacting the statutory guidelines system:

A defendant is entitled to be sentenced by a trial court on the basis of accurate information. MCL 769.34(10) states, “[i]f 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.**” (Emphasis added.) In other words, if a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon.

\* \* \*

MCL 769.34(10) makes clear that **the Legislature intended to have defendants sentenced according to accurately scored guidelines** and in reliance on accurate information (although this Court might have presumed the same even absent such express language).<sup>6</sup> Moreover, we have held that “a sentence is **invalid** if it is based on inaccurate information.” *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).<sup>7</sup> In this case, there was a scoring error, the scoring error altered the appropriate guidelines range, and defendant preserved the issue at sentencing. **It would be in derogation of the law, and fundamentally unfair, to deny a defendant in the instant circumstance the opportunity to be resentenced on the basis of accurate information. A defendant is entitled to be sentenced in accord with the law, and is entitled to**

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<sup>7</sup> See 474 Mich at 90, fn 9.

**be sentenced by a judge who is acting in conformity with such law.**

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6 Even if MCL 769.34(10) does not, as suggested by the dissent, require a remand, a remand is required by MCR 2.613(A), which provides that an error does not justify disturbing a judgment “unless refusal to take this action appears to the court inconsistent with substantial justice.” **It is difficult to imagine something more “inconsistent with substantial justice” than requiring a defendant to serve a sentence that is based upon inaccurate information.**

7 Unlike the dissent, we conclude that when a trial court sentences a defendant in reliance upon an inaccurate guidelines range, it does so in reliance upon inaccurate information.

474 Mich at 88-91. (Footnotes omitted). (Emphasis added in part).

The *Francisco* decision was not cited at any part of the majority decision in *Lockridge*, even in any of the numerous footnotes. That is not surprising, in that the issue in *Lockridge*, as pointed out above, is not related to question of a misscoring of the guidelines. The resentencing remedy from *Francisco* for scoring errors which changed the range was not considered or compared in *Lockridge* to the *Crosby* remand remedy. Again, that remedy was by definition designed to impact on only a limited and discrete number of cases, where the only issue is the Sixth Amendment right to jury trial. Clearly, it cannot be argued that *Lockridge*, on its face, in any way overruled or limited the *Francisco* opinion or this Court’s decision that a full resentencing is required, in the interests of justice, where a sentencing judge considered an inaccurately long range.

In addition, the *Lockridge* decision did not amend or sever any of the statutory or court rule justifications for the *Francisco* decision that a resentencing is required for substantive scoring errors. Even under the now-advisory system, a sentencing judge is required to score the guidelines in full, assess the maximum number of legally and factually appropriate points in each

variable, and consider the resulting range as a crucial piece of information relevant to the setting of the minimum sentence. The language of MCL 769.34(10) and MCR 2.613(A), upon which the *Francisco* decision is premised, was not altered in any fashion in *Lockridge*. The only statutory provisions that were expressly amended by the *Lockridge* decision were MCL 769.343(2) and (3). The general rule applied consistently by this Court of upholding the intent of the Legislature, as expressed unambiguously in the statutory language used, leads to the conclusion that the provisions requiring defendants to be sentenced according to accurately scored guidelines, and that “substantial justice” requires a defendant to serve a sentence that is based upon accurate information, remain fully in effect.

In *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997), this Court held that a defendant is not entitled to a resentencing due to a misscoring of the judicial guidelines that were in effect prior to the enactment of the present legislative guidelines. While the *Mitchell* Court noted these guidelines were advisory only, as the legislative guidelines now are pursuant to *Lockridge*, the basis for the *Mitchell* Court’s decision that resentencing was not available as a remedy for misscoring was the fact those guidelines were not enacted by the Legislature:

More fundamentally, reference to the constitutional guarantee of procedural due process at sentencing does not address the principal question presented, which is whether either a defendant or a prosecutor has a substantive right to challenge a guideline miscalculation or misinterpretation, **which does not have the force of law**. Unlike the federal system, in which the sentencing guidelines are substantive law promulgated pursuant to an act of Congress, 28 U.S.C. § 994(a) (authorizing promulgation of federal sentencing guidelines by United States Sentencing Commission), or those sister states in which guidelines have been adopted by the legislature, **current guidelines used by the trial courts in Michigan exist solely as a result of Administrative Order No. 1988-4.34** As explained in *People v Milbourn*, 435 Mich 630, 656-657; 461 NW2d 1 (1990):

[W]e believe that the second edition of the sentencing guidelines is the best “barometer” of where on the continuum from the least to the most threatening circumstances a given case falls.

Nevertheless, because our sentencing guidelines do not have a legislative mandate, we are not prepared to require adherence to the guidelines. [Emphasis in the original.]

Simply stated, **because this Court's guidelines do not have the force of law, a guidelines error does not violate the law.** Thus, the claim of a miscalculated variable is not in itself a claim of legal error.

454 Mich at 174-175. (Footnotes omitted). (Emphasis added).

As the current guidelines were enacted by the Legislature, they have the “force of law” that was lacking in the prior judicial guidelines. Michigan cannot revive the ruling in *Mitchell* – that since the guidelines were not enacted by the Legislature, and were only advisory, neither party could seek relief due to misscoring of those guidelines – as the situation is vastly different today. The decision in *Francisco* clearly understood that a sentencing judge is required, **under law**, to correctly and accurately score the guidelines, and that relief is not only available but required for consideration of a miscalculated range for the minimum sentence.

The requirement that the sentencing judge accurately score the guidelines is the basic reason why application of the *Lockridge/Crosby* remand remedy would be an inadequate and unfair solution to a misscoring situation. In a *Lockridge* case, the trial judge is asked to consider two guidelines ranges – one scored through both judicial findings of facts and the jury verdict or admissions from the accused, and one scored without any points assessed by judicial fact-findings. While these two ranges will by definition be different (under *Lockridge* if the points assessed by judicial fact-findings were not enough to raise the range, no remand is required), neither range is presumably inaccurate. The issue in a *Lockridge* case is not whether the judge’s

fact-findings were erroneous under the preponderance of the evidence standard, but only the fact that the judge made this finding rather than a jury or the accused. Accordingly, the judge must consider whether his or her consideration of this presumptively accurate higher range impacted on the sentence imposed.

In a *Francisco* situation, however, the task facing the judge is very different. The range the sentencing judge considered in determining the minimum sentence was inaccurate, not merely a violation of the right to a jury trial. If the *Lockridge/Crosby* relief procedure is applied, the trial court on remand would be considering the two ranges, and determining whether consideration of the lower range would have made a material difference to the sentence, but the judge still would be taking into account the inaccurately higher range. That range, had the guidelines being correctly scored at the outset, **never** should have been calculated and placed within the judge's consideration. It hardly cures the error for the judge to compare the sentence he or she imposed based on inaccurate information to that which might have been imposed had not the error occurred. The inaccurately scored guidelines range should play **no** role in the cure for that error. If the goal of appellate review is to place the parties back at the point prior to the reversible error occurring, the only reasonable and fair remedy for a scoring error is a full resentencing, where the judge **cannot** take the inaccurately scored range into any consideration.

The rationale for this conclusion is that the constitutional error at issue in the *Francisco* situation is different than that considered by *Lockridge* or *Crosby*. Reliance on inaccurate information at sentencing violates the accused's Due Process rights under the Fifth and Fourteenth Amendments. US Const, Amends V, XIV. In *Townsend v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948), the United States Supreme Court considered the sentencing of a defendant that was based in part on false assertions he had been convicted of several prior

offenses, when the fact he had been acquitted or the charges had been dismissed. The Court held they could not assume that with the emphasis given by the sentencing court to this inaccurate information, the sentence imposed was not influenced by the errors. The Court then wrote:

We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus. It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence **on a foundation so extensively and materially false**, which the prisoner had no opportunity to correct by the services which counsel would provide, that **renders the proceedings lacking in due process.**

*Id.* at 741.

This Due Process requirement that a judge consider only accurate information when deciding on a sentence was clearly written into Michigan law in MCL 769.34(10). That statute states that a sentence imposed that is within the sentencing guidelines range shall be affirmed, and no resentencing granted, “absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.” Thus, where the trial judge considers inaccurate information that creates an error in scoring the guidelines, resulting in an improperly high range, resentencing under the correct and accurate range is the appropriate remedy under Michigan law, if not also Federal constitutional mandate. As the calculation of the range, even under the current advisory system set out by *Lockridge*, is both required by the statute and a “highly relevant consideration in a trial court's exercise of sentencing discretion,”<sup>8</sup> a sentence premised on consideration of an inaccurately scored range should always be construed as a sentence premised on an “extensively and materially false” foundation. This Court in *Francisco*, *Kimble*, and *Gardner* recognized that a sentence based in any part on an inaccuracy in

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<sup>8</sup> *Lockridge, supra* at 391.

scoring the guidelines is “invalid,” contrary to the clear intent of the Legislature, and in “derogation of the law, and fundamentally unfair.” *Francisco, supra* at 90. “It is difficult to imagine something more ‘inconsistent with substantial justice’ than requiring a defendant to serve a sentence that is based upon inaccurate information.” *Id.* A full resentencing, absent any substantive consideration of the erroneously scored range, is the only appropriate and fair remedy that is consistent with substantial justice and compliance with the law.

A remand for resentencing where there has been a misscoring of guidelines is the majority rule within the Federal districts, even after the *Booker* decision made the Federal guidelines advisory rather than mandatory. See, for example, *United States v Wernick*, 691 F3d 108 (CA 2, 2012); *United States v Langford*, 516 F3d 205 (CA 3, 2008). In *Langford, supra* at 219-220, the Third Circuit wrote:

At Langford's sentencing, the District Court said that the Sentencing Guidelines “have been deemed to be advisory in nature. They still, however, remain a factor that Court is required to consider in imposing sentence.” App. 122. The District Court did an admirable job of considering the 3553(a) factors and evaluating the characteristics specific to Langford and his offense. The Court then imposed a sentence at the lowest point in the advisory Guidelines range it had calculated.

The government is correct that the 46-month sentence was within the Guidelines range in either case. However, if the criminal history point had not been added, the Court could have imposed a 37-month sentence without departing from the Guidelines, and the 46 months it did impose would have been at the top, not at the bottom, of the proper range.

There is absolutely nothing in the record to indicate that the District Court would have imposed the same sentence under a lower Guidelines range. We must decline the government's invitation to affirm on the theory that the District Court might have imposed the same sentence. See *Thayer*, 201 F.3d 214; *United States v. Duckro*, 466 F.3d 438 (6th Cir.2006) (holding that, even where the district court departed downward significantly from the originally (incorrectly) calculated range, one could not presume that the court

would have departed less under a correct and lower Guidelines range). We are not persuaded that the record is clear that the sentence imposed was not a result of the erroneous sentencing Guidelines range.

We will remand for the District Court to determine the sentence that should be imposed in light of the correct Guidelines range, considering the 3553(a) factors. *Solem v. Helm*, 463 U.S. 277, 290 n. 16, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (“[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.”).

The goals of uniformity and sentencing discretion are furthered by a remand. Where we conclude that the District Court might have ended up with a different sentence had it started at the right point, **giving the Court the opportunity to reconsider the sentence and start at the right place in resentencing actually affords deference and respect for the District Court judge.** Our failure to do so would be presumptuous on our part; it is not our role to say that the sentencing judge would consider the sentence he gave, which was at the low end of the incorrectly calculated range, to be appropriate when the correct Guideline range is lower than was assumed. Moreover, insisting on a uniform point of departure from which all sentencing courts can exercise their discretion promotes uniformity in the sentencing of defendants with similar criminal history and offense levels. **Surely, a remand with opportunity for reasoning anew is required in order to further both goals.**

(Emphasis added).

Similarly, remanding for a full resentencing where the sentencing judge considered an inaccurately high range will further the goals of uniformity and discretion in Michigan. This Court in *Francisco* recognized the necessity of a resentencing, with full input from the parties, where the sentence relied on inaccurate information. The *Lockridge/Crosby* remand procedure would fail to meet those goals, would allow the trial judge to refuse resentencing in partial or full consideration of the erroneous range, and would not cure the Due Process error. A *Lockridge/Crosby* remand would cut off the right to resentencing from the middle of the

proceedings – the only proper remedy is one that “start[s] at the right place” and requires a full resentencing, absent any consideration of the improper range.

Mr. Douglas acknowledges that in *Francisco* this Court did state an exception to their rule requiring resentencing when the trial judge considered an inaccurately scored range:

Resentencing is also not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range. *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003).

474 Mich at 89, fn. 8. In *Mutchie*, the case cited for this exception, not only did the trial judge state on the record that he would have imposed the same sentence regardless of how the disputed offense variable was scored, the sentence he imposed was an upwards departure from either guidelines range. 468 Mich at 52. The Supreme Court, relying on this fact, refused to even rule on whether the variable was correctly scored. Similarly, in *Lockridge* no remand is required if the sentence actually imposed was an upward departure from the guidelines range, even if that range was increased due to judicial fact-findings at a pre-*Lockridge* sentencing. 498 Mich at 394-395. Where a case in a pure *Lockridge* situation would not require even the *Crosby* remand, let alone a resentencing, that situation should not be used to find that a *Crosby* remand is the proper remedy for a scoring violation under *Francisco*, particularly, as in the case at bar, the actual sentence imposed was not an upwards departure.

Resentencings are important proceedings for both the defendant and to the State. Both the statute and this Court have recognized the requirement that sentences be determined only on accurate information, including the calculation of the guidelines. Sentences that are premised on any consideration of inaccurate guidelines are presumptively invalid, and a violation of Due Process. A procedure that permits a trial judge, without input from either party, to essentially

reaffirm the sentence that was decided upon in reliance on this inaccurate information, without going through the necessary process of sentencing – calculation of the proper guidelines, allocution from the defendant, input from the victims of the crime, argument from counsel for both sides – creates the danger that trial judges, under extreme docket and financial pressures, will not give full and complete consideration to the impact of the inaccurate information. Little meaningful review could be done by an appellate court as to the reasons a trial judge denies resentencing after a *Crosby* remand. While the ultimate sentence will be reviewable under the “reasonableness” standard as to its length, a decision by a trial judge that no resentencing will be granted, despite the extent of the inaccuracies of the prior range, may be immune from any real review.

In *Wernick*, *supra* at 177-188, the Second Circuit noted that remands for resentencings do not create the degree of time and cost burdens on trial courts that reversals and retrials entail:

We are mindful that a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does, see, e.g., *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir.2007), and this fact weighs in our assessment of the fourth prong, cf. *Williams*, 399 F.3d at 454–57 (discussing relative costs of plain error review for trial and sentencing errors). Given the dramatic impact on the Guidelines calculation, with the resulting possibility that the error resulted in the defendant's being imprisoned for a longer time, and **the relatively low cost of correcting the miscalculation**, we believe that failure to notice the error would adversely affect the public perception of the fairness of judicial proceedings. Having found plain error, we remand the case for resentencing.

(Emphasis added).

In Michigan, remands for resentencings, pursuant to *Francisco*, following errors in the calculating of the guidelines range have resulted in numerous reductions in sentences, with a

concurrent substantial savings to the state due to reduced costs of incarceration.<sup>9</sup> Those resentencings, and the time reductions and cost savings, were full proceedings, where the parties had the opportunity to argue to the sentencing court as to what the appropriate sentence should be in relation to the accurately scored guidelines. The sentencing court then gave careful and meaningful consideration to **all** the relevant information, including the corrected range, before deciding on the appropriate and proportional sentence. Certainly nothing in *Francisco* requires a court to give a reduced sentence on remand, unless the prior sentence was illegally long, and it is acknowledged that at some resentencings the trial judge has reimposed the same minimum sentence, despite whatever error caused the need for resentencing. It is further acknowledged that a resentencing is not by definition only beneficial to the defendant. Since a sentencing judge can consider subsequent conduct of the defendant at a resentencing, a judge is not generally precluded from raising the prior sentence if that increase is based on detrimental subsequent conduct. Allowing the trial judge to instead foreclose any detailed consideration of a resentence, and to do so without any meaningful input from either party, is neither a fair or equitable solution to a Due Process violation and the statutory requirement of a sentence based only on accurate information.

Further, the likelihood of a resentencing if the guidelines range is misscored is a clear incentive for probation officers (who generally prepare a guidelines scoring report for the court and parties), trial judges, and attorneys to carefully calculate the appropriate and accurate range.

If that remedy is taken away in a large number of cases, the message undoubtably will go out

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<sup>9</sup> The State Appellate Defender Office has tracked the reduction in operative minimum sentences in cases in which it achieved resentencings over the past few years. The reports of these reductions are too voluminous to attach to this pleading as an appendix, but are public record and available for review at the office's web site – [www.sado.org](http://www.sado.org). The annual report for 2014 show a reduction of 225 years in minimum sentences in SADO cases alone, with an estimated savings to the state, at the current yearly cost of incarceration, of over seven million dollars. Similar if not greater savings due to corrected sentences are reported since 2008, when this tracking began.

that it is no longer as important to get the guidelines right. That danger already exists now that the guidelines are advisory rather than mandatory. Confusion over the meaning of *Lockridge* is already apparent in both the trial courts and the Court of Appeals. Diminishing the remedy for scoring errors will only add to that confusion, and will very likely lead to even more examples of inaccurate scoring, and invalidly long sentences, than already existed under the mandatory system.

In the case at bar it is not a foregone conclusion that Judge Boykin will impose the same sentences on Mr. Douglas if his case is remanded for a full resentencing. While it cannot be denied that the correct range in this case is not significantly different than the inaccurate range the trial court considered at the initial sentencing, and that the 24 month minimum sentence imposed at that time is near the middle of both ranges, that is a decision that can and should only be made by the trial court. In *Francisco, supra* at 91, this Court wrote:

The trial court here sentenced defendant to a minimum of 102 months under the misapprehension that the statutory sentencing guidelines called for a minimum sentence of 87 to 217 months; instead, the guidelines, correctly scored, called for a minimum sentence of 78 to 195 months. While the difference between the mistaken and the correct guidelines ranges is relatively small, the fundamental problem nonetheless is illustrated. The actual sentence suggests an intention by the trial court to sentence defendant near the bottom of the appropriate guidelines range—specifically, fifteen months or 17 percent above the 87-month minimum. Had the trial court been acting on the basis of the correct guidelines range, however, we simply do not know whether it would have been prepared to sentence defendant to a term 24 months or 30 percent above the new 78-month minimum. Indeed, appellate correction of an erroneously calculated guidelines range will always present this dilemma, i.e., the defendant will have been given a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court's intention. Thus, requiring resentencing in such circumstances not only respects the defendant's right to be sentenced on the basis of the law, but it also respects the trial court's interest in having defendant serve the sentence that it truly intends.

The *Francisco* Court was unwilling to assume the trial judge would impose the same minimum sentence on remand even though the difference between the accurate and inaccurate guidelines ranges was small, as in the case at bar. The solution this Court chose, which this Court should continue to choose, is to send the case back to the trial court for a full resentencing, where the trial judge can fully and with input from the parties re-decide the appropriate and fair sentence.

The scoring error in Mr. Douglas' case was plain and indisputable. It raised the guidelines range, and made this crucial and requisite information to the court inaccurate. Mr. Douglas' trial counsel provided him constitutionally ineffective assistance by failing to recognize this clear error and object to the scoring of OV 13. The trial judge, in violation of Michigan statutory law and Due Process, relied on that inaccurate information to impose the discretionary sentence. Under the authority and precedent of *Francisco*, this case must be remanded for a resentencing. Nothing in the *Lockridge* opinion either overrules the *Francisco* remedy, or logically supports a change to the *Crosby* remand relief. This Court should not import that remedy, which was designed and intended for only a small and different class of cases, and which by its own definition will cease to exist for that class of cases in the near future, into all future Michigan scoring cases.

**JUDGMENT APPEALED FROM AND RELIEF SOUGHT**

Defendant-Appellant asks this Honorable Court to either grant this application for leave to appeal, or any appropriate peremptory relief.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Peter Jon Van Hoek

BY:

\_\_\_\_\_  
**PETER JON VAN HOEK (P26615)**

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Date: January 15, 2016

**APPENDIX A**

SENTENCING INFORMATION REPORT

RECEIVED by MSC 1/15/2016 3:49:24 PM

Offender: Douglas, Charles Jerome SSN: 385-88-5812 Workload: 1929 Docket Number: 12010051-01-FH

Judge: The Honorable Ulysses W. Boykin Bar No.: P11082 Circuit No.: 03 County: 82

Conviction Information

Conviction PACC: 750.224F Offense Title: Weapons - Firearms - Possession by Felon  
Crime Group: Public Safety Offense Date: 10/09/2012  
Crime Class: Class E Conviction Count: 1 of 3 Scored as of: 10/09/2012  
Statutory Max: 60 Habitual: No Attempted: No

Prior Record Variable Score

PRV1: 0 PRV2: 30 PRV3: 0 PRV4: 0 PRV5: 5 PRV6: 0 PRV7: 10  
Total PRV: 45  
PRV Level: D

Offense Variable

OV1: 0 OV3: 0 OV4: 0 OV9: 0 OV10: 0 OV12: 0 OV13: 10  
OV14: 0 OV16: 0 OV18: 0 OV19: 0 OV20: 0  
Total OV: 10  
OV Level: II

Sentencing Guideline Range

Guideline Minimum Range : 7 to ~~28~~ 46 *WMB*

Minimum Sentence

	Months	Life
Probation:	<u>          </u>	<input type="checkbox"/>
Jail:	<u>          </u>	<input type="checkbox"/>
Prison:	<u>24</u>	<input type="checkbox"/>

Sentence Date: 2-7-13  
Guideline Departure: NO Consecutive Sentence: FFA & FIP  
Concurrent Sentence: Yes CCW & FFA

Sentencing Judge: Ulysses W. Boykin Date: 2-7-13

Prepared By: TOWNLEY, MICHAEL W

**APPENDIX B**

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RvH  
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STATE OF MICHIGAN  
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

CHARLES JEROME DOUGLAS,

Defendant-Appellant.

UNPUBLISHED  
August 7, 2014

No. 315027  
Wayne Circuit Court

DC No. 12-01105-TH  
**RECEIVED**

AUG 11 2014

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

APPELLATE DEFENDER OFFICE

PER CURIAM.

Defendant appeals by right his jury-trial convictions of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 2 to 10 years in prison for the felon-in-possession and CCW convictions, and five years in prison for the felony-firearm conviction. We affirm.

On October 9, 2012, at about 12:00 a.m., Detroit Police Officers Ibrahimovic and Lewis were on patrol in the area of 19410 St. Marys Street in Detroit. When the officers heard gunshots, they canvassed the area and saw defendant walking in the middle of the street. When defendant began running, Ibrahimovic and Lewis chased him on foot to the rear of a home on St. Marys Street. Ibrahimovic saw defendant pull out a silver handgun and toss it over a six-foot wooden fence. While Ibrahimovic retrieved the handgun, Lewis and Detroit Police Department (DPD) Sergeant Michael Osman apprehended defendant. DPD Sergeant Todd Eby sent the gun to the Michigan State Police (MSP) crime lab for testing, but because the gun "was stuck in back-log" at the lab due to higher-priority requests from homicide cases, it was not available for defendant's trial.

Defendant first argues that his trial attorney rendered ineffective assistance of counsel when she did not mention a particular discrepancy in the officers' testimony during cross-examination or make reference to it during her closing argument. We disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move, in the trial court, for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Defendant did not move for a new trial or seek a *Ginther* hearing in the trial court. Therefore,

defendant's claim of ineffective assistance of counsel is not preserved for appeal. "Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish that a defendant's trial counsel was ineffective, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Lockett*, 295 Mich App at 187. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Vaughn*, 491 Mich at 670. Moreover, there is a strong presumption that counsel's assistance constitutes sound trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). Decisions regarding what evidence to present and which issues to raise during closing argument are presumed to be matters of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Defendant argues that, because there was no physical evidence introduced at trial in the form of the gun that he was charged with possessing, the jury was left to consider only the credibility of the officers. He asserts that his attorney was ineffective because she failed to cross-examine Ibrahimovic and Lewis about a singular discrepancy in their testimony or refer to it during her closing argument. This alleged "glaring discrepancy" involves Ibrahimovic's testimony that, as he and Lewis initially pulled up near defendant, when Ibrahimovic asked defendant whether he had heard any shots fired in the area, defendant looked at Ibrahimovic and "began running westbound between the houses." In contrast, Lewis later testified that defendant was "running eastbound."

The record shows that Ibrahimovic was otherwise subjected to cross-examination on various points by defendant's lawyer. During one such exchange, defendant's lawyer successfully impeached Ibrahimovic's credibility by pointing out an overt inconsistency between his direct testimony at trial and his earlier, preliminary examination testimony, regarding whether defendant was wearing a coat on the night of the incident. Defense counsel also challenged Ibrahimovic's ability to observe in the midnight lighting conditions, and attempted to impeach Ibrahimovic's testimony concerning whether he actually saw the gun under defendant's clothing during the short chase. Lewis was likewise subjected to cross-examination by defendant's lawyer, who challenged Lewis's perception of events and failure to interview the homeowner on the adjoining property where the gun was found. Defense counsel thus had a presumptively sound strategy to seek to undermine the credibility of Ibrahimovic and Lewis.

The record further shows that, in her closing argument, defense counsel challenged the credibility of Ibrahimovic, Lewis, and Osman when she asked rhetorically, "Can we really count on what they said?" In light of the officers' otherwise nearly consistent testimony, however, it was sound trial strategy for defense counsel to focus her closing argument on the lack of physical evidence, including the prosecution's failure to produce the gun, any fingerprints, or the lack of a complete investigation that might have included an interview with the neighbor. *Russell*, 297

Mich App at 716. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Payne*, 285 Mich App at 190. We perceive no errors on the existing record. See *Lockett*, 295 Mich App at 187. Defendant has failed to establish a reasonable probability that the outcome of his trial would have been different in the absence of counsel's allegedly deficient performance.

Defendant next argues that the trial court improperly assessed 10 points when scoring offense variable (OV) 13. We agree that the trial court erred, but conclude that defendant is not entitled to resentencing.

To be preserved for appellate review, a challenge to the scoring of the sentencing guidelines must have been raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. MCL 769.34(10); MCR 6.429(C); *People v Jones*, 297 Mich App 80, 83; 823 NW2d 312 (2012). Because defendant did not so challenge the scoring of OV 13, this issue is not preserved for appeal. However, this Court may review an unpreserved scoring issue for plain error affecting defendant's substantial rights. *People v Loper*, 299 Mich App 451, 457; 830 NW2d 836 (2013).

OV 13 addresses a continuing pattern of criminal behavior. MCL 777.43; *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013). Under MCL 777.43(1)(d), the trial court may assess 10 points for OV 13 if "the offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of MCL 333.7401(2)(a)(i) to (iii) or section MCL 333.7403(2)(a)(i) to (iii) of the Public Health Code . . . ." Under MCL 777.43(1)(g) the trial court must assess zero points for OV 13 if "no pattern of felonious criminal activity existed."

When scoring OV 13, all crimes within a five-year period, including the sentencing offense, must be counted, regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a); *People v Earl*, 297 Mich App 104, 110; 822 NW2d 271 (2012). But only those crimes that occurred within the five-year period encompassing the sentencing offense may be considered. *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006). The circuit court's findings of fact must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

Defendant was assessed 10 points for OV 13. Taken together with defendant's other Prior Record Variable (PRV) and OV scores, this placed him in cell D-II on the sentencing grid for Class E felonies, with a recommended minimum sentence range of 7 to 46 months. MCL 777.66; see also MCL 777.21(3)(c). However, defendant's Presentence Investigation Report (PSIR) reveals that, beyond the current offenses, he had no felony convictions within the five years immediately preceding the instant offenses that could properly be scored under OV 13. Further, the sentencing offense of felon-in-possession is classified as a crime against public safety, as is the offense of CCW, and the sentencing guidelines do not apply to the offense of felony-firearm. MCL 777.16m. Because defendant's instant convictions of felon-in-possession and CCW were for crimes against public safety, and his prior convictions were outside the five-year period immediately preceding the sentencing offense, no points should have been assessed for OV 13.

A reduction in points from 10 to zero for OV 13 would change defendant's recommended minimum sentence range. Had the trial court properly assessed zero points for OV 13 in this case, defendant would have been placed in cell D-I rather than cell D-II on the sentencing grid for Class E felonies. This would have resulted in a recommended minimum sentence range of 5 to 46 months instead of 7 to 46 months. MCL 777.66; see also MCL 777.21(3)(c). In general, a defendant is entitled to resentencing on the basis of a scoring error if the error changes the recommended minimum sentence range under the legislative guidelines. *Francisco*, 474 Mich at 89 n 8.

In this case, however, the trial court's scoring error does not warrant resentencing. Defendant cannot establish that the trial court's unpreserved scoring error resulted in prejudice or otherwise affected his substantial rights. Defendant received a minimum sentence of 24 months—well within the correct minimum sentence range of 5 to 46 months. Moreover, there is no indication that the trial court would have imposed a shorter minimum sentence had the guidelines been scored correctly. *Id.* “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.” MCL 769.34(10). If a defendant has failed to preserve his challenge to the trial court's scoring decision, and his sentence is within the appropriate guidelines range, “the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel.” *Francisco*, 474 Mich at 89 n 8. We therefore conclude that defendant is not entitled to be resentenced. *Id.*

In a supplemental brief filed *in propria persona*, defendant argues that because no physical evidence was presented to the jury at trial, there was insufficient evidence to establish that he possessed the gun and to convict him of the charged offenses. We disagree.

“Criminal defendants do not need to take any special steps to preserve a challenge to the sufficiency of the evidence.” *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). We review the evidence de novo in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012); *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

We do not interfere with the factfinder's role in determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). Questions of credibility are left to the trier of fact. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). “Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of a crime.” *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The elements of felon-in-possession are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) the defendant's right to possess a firearm has not been restored. MCL 750.224f; see also *People v Perkins*, 473 Mich 626, 630-631; 703 NW2d 448 (2005). The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). To prove the offense of CCW, the prosecution must show that the defendant knowingly possessed a concealed weapon without a license. MCL 750.227; see also *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 1 (2007). Possession of a firearm can be actual or constructive, and can be shown by direct or circumstantial evidence. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011).

The evidence supporting defendant's convictions of felon-in-possession, CCW, and felony-firearm came from the testimony of Ibrahimovic, Lewis, and Osman. Ibrahimovic and Lewis testified that they saw defendant flee, grab his waistband, run up a driveway off St. Marys Street, reach into his waistband, pull out a gun, and throw it over a nearby fence. All three officers testified that the gun they saw defendant throw was recovered from the area of the fence. Osman corroborated the testimony of Ibrahimovic and Lewis in this regard. The jury, as the trier of fact, found the three police eyewitnesses credible and chose to believe their testimony. See *Harrison*, 283 Mich App at 378.

In addition, there was other circumstantial evidence of defendant's guilt of the crimes charged. All three police witnesses testified that defendant "took off running" upon seeing them and being asked about the gunfire. Flight can constitute evidence of a defendant's consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Further, Lewis testified that when he searched defendant incident to his arrest, he found a plastic baggie with five live rounds of ammunition that matched the round Lewis found in the gun. Defendant's possession of ammunition matching the round taken from the gun that he was seen throwing, and later recovered by the police, was circumstantial evidence that defendant had possessed the gun. See *United States v Prudhome*, 13 F3d 147, 149 (CA 5, 1994) (holding that a reasonable jury could have inferred that the defendant knowingly possessed the firearm in question from the fact that the defendant "had three rounds of matching ammunition in his waist pouch"). We conclude that the prosecution presented sufficient evidence to support defendant's convictions of felon-in-possession, CCW, and felony-firearm.

Defendant next argues that the prosecutor committed misconduct by failing to produce the firearm at trial and provide it to the defense. Again, we disagree.

To preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010); *Unger*, 278 Mich App at 235. No contemporaneous objection was made to the prosecutor's failure to produce the actual firearm at trial. Therefore, this issue is not preserved. *Id.* Our review is thus limited to ascertaining whether there was plain error that affected the defendant's substantial rights. *Id.*; see also *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

The prosecution's suppression of evidence favorable to the accused violates due process when the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *People v Banks*, 249 Mich App 247, 254-255; 642 NW2d 351 (2002); see also *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Defendant contends that the failure produce the actual firearm at trial constituted prosecutorial misconduct. The record shows that the pistol was sent to the MSP crime lab for testing, but that it "was stuck in back-log" and not available to be produced at defendant's trial. The prosecution's failure to produce the gun cannot fairly be called "suppression" of that evidence. Moreover, even if the gun had been produced, it could hardly be considered "favorable to the accused." *Banks*, 249 Mich App at 254-255. Indeed, the physical evidence would have further corroborated the testimony of the police witnesses. We cannot conclude that the prosecutor's failure to produce the actual firearm at trial violated defendant's right to due process. *Id.*

In addition, we note that defense counsel made no contemporaneous objection to the prosecutor's failure to produce the firearm at trial; nor did defense counsel ask for a curative instruction. See *Bennett*, 290 Mich App at 475. Such a curative instruction could have alleviated any prejudice here. *Unger*, 278 Mich App at 235. The prosecutor's failure to produce the firearm at trial did not rise to the level of outcome-determinative plain error. See *id.*

Affirmed.

/s/ Kathleen Jansen  
/s/ Henry William Saad  
/s/ Pat M. Donofrio

**APPENDIX C**

**APPENDIX D**

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Michigan Supreme Court  
Lansing, Michigan

Robert P. Young, Jr.,  
Chief Justice

Stephen J. Markman  
Brian K. Zahra  
Bridget M. McCormack  
David F. Viviano  
Richard H. Bernstein  
Joan L. Larsen,  
Justices

# Order

# RECEIVED

October 30, 2015

NOV 02 2015

150789

APPELLATE DEFENDER OFFICE

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

SC: 150789  
COA: 315027  
Wayne CC: 12-010051-FH

CHARLES JEROME DOUGLAS,  
Defendant-Appellant.

On order of the Court, the application for leave to appeal the August 7, 2014 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing whether *People v Lockridge*, 498 Mich 358 (2015), by rendering the sentencing guidelines advisory and/or by employing a remedy that does not mandate resentencing, affects (1) whether a defendant can be afforded relief for 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). The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 30, 2015

Clerk