

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN  
Plaintiff-Appellee

v

LEONARD JACKSON

NO. 138988

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COA No. 281380  
L.C. No. 07-010097

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138988  
PLAEE's SUPPL

PEOPLE'S SUPPLEMENTAL BRIEF

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## **Supplemental Counterstatement of Issue Presented for Review**

### **I.**

**A defendant “shall not raise on appeal” an issue challenging the scoring of the guidelines or the accuracy of the information relied upon in imposing a sentence that falls within the appropriate guidelines range unless the defendant has raised the issue at sentencing, in motion for resentencing, or a motion for remand in the Court of Appeals. Here, defendant did not challenge the guidelines scoring at sentencing, in a motion for resentencing, or in a remand motion, and defendant’s minimum sentence remained within the corrected minimum guidelines range. Did the Court of Appeals correctly conclude it was required to affirm defendant’s armed robbery sentence?**

**The People answer: “YES.”**

**Defendant answers: “NO.”**

**The Court of Appeals answered: “YES.”**

## **Supplemental Counterstatement of Factual and Procedural History**

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The People accept defendant's statement of facts and procedural history.

## Argument

### I.

**A defendant “shall not raise on appeal” an issue challenging the scoring of the guidelines or the accuracy of the information relied upon in imposing a sentence that falls within the appropriate guidelines range unless the defendant has raised the issue at sentencing, in motion for resentencing, or a motion for remand in the Court of Appeals. Here, defendant did not challenge the guidelines scoring at sentencing, in a motion for resentencing, or in a remand motion, and defendant’s minimum sentence remained within the corrected minimum guidelines range. The Court of Appeals correctly concluded that it was required to affirm defendant’s armed robbery sentence.**

#### *Standard of Review*

The interpretation and application of the statutory sentencing guidelines presents of question of law that this Court reviews de novo.<sup>1</sup>

#### *Discussion*

Defendant argues that the Court of Appeals erred when it concluded that it was required to affirm his armed robbery sentence because defendant’s minimum sentence remained within the corrected guidelines and defendant did not raise the issue “at sentencing, in a proper motion for resentencing, or in a proper motion to remand.”<sup>2</sup>

MCL 769.34(10) directs:

If a minimum sentence is within the appropriate guidelines 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

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<sup>1</sup>*People v Kimble*, 470 Mich 305, 308-309 (2004); *People v Francisco*, 474 Mich 82, 88 (2006).

<sup>2</sup>MCL 769.34(10).

guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines 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.

Thus, MCL 769.34(10) contains two components, contained in two separate sentences. One component is directed to the parties and restricts the circumstances under which relief can be requested from an appellate court. The other component is directed to appellate courts and restricts the circumstances under which relief may be granted. Taking them in the reverse order from which they appear in the statute, they are:

- 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.
- 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.<sup>3</sup>

If the prerequisite specified in the statute has not been met—if the appealing party has not raised the challenge to the scoring of the guidelines or the accuracy of information relied on in determining the sentence sought to be reviewed on appeal—then the statute expressly precludes the party from even raising the issue before the appellate court. In other words, the statute expressly forbids the party from raising the issue if the preservation prerequisite is not met.

In *People v Kimble*, this Court held that a guidelines-scoring challenge that has not been first

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<sup>3</sup> MCL 769.34(10)(emphasis added).

forbids the party from raising the issue if the preservation prerequisite is not met.

In *People v Kimble*, this Court held that a guidelines-scoring challenge that has not been first preserved in the manner expressly required by the statute may nonetheless be “raised on appeal” if success on the challenge would result in a changing of the guidelines range to the extent that the sentence imposed would then stand *outside* of the “appropriate guidelines sentence range.”<sup>4</sup> In other words, this Court interpreted “appropriate guidelines sentence range” to mean the “properly scored guidelines sentence range.”<sup>5</sup> For an appellate court to determine whether the challenge would so result it will, then, have to resolve the claim on the merits, considering the scoring challenge though it was never presented to the trial court in any of the ways specified by the statute.<sup>6</sup> Review, under *Kimble*, is for plain error; but every time a scoring error is found that causes a defendant’s minimum guidelines range to change and the defendant’s sentence falls outside that minimum range, it appears that a defendant is automatically entitled to relief.

The People contend, on the other hand, that when the legislature expressly commanded that: “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*,” it meant that provided the sentence, under the guidelines that *were* scored and not objected to on grounds later sought to be raised on appeal, was within the

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<sup>4</sup>*Kimble, supra*, 470 Mich 310-311 (emphasis added).

<sup>5</sup>*Id.* at 311-312.

<sup>6</sup> The reviewing court would not have to consider the claim on the merits if it assumed for the sake of argument that it was correct, and the correction did not change the guidelines range. But as this circumstance will never result in relief, there is no point in the defendant bringing challenges that make no difference to the guidelines range.

specified. Requiring litigation of guidelines-scoring issues in the trial court *first*, the People believe, was designed by the legislature to place responsibility for correct scoring in the trial court, where, if the issue is litigated in one of the delineated methods, it will often be resolved, requiring no appellate litigation at all. But as it stands, under *Kimble*, no trial court preservation of any sort is required for appellate review of a guidelines-scoring issue where, if the challenge is assumed to be correct, the range would change in a manner that places the sentence imposed outside of the “new” range.

In *People v Francisco*, this court considered a second situation, this one concerning the statutory limitation on the granting of relief rather than the limitation on the raising of the scoring issue by a party. There, the defendant properly preserved his claim in a manner expressly provided for in MCL 769.34(12), by objecting to the scoring in the trial court.<sup>7</sup> The scoring was found to be improper and changed the defendant’s minimum guidelines’ range, but the sentence remained within the newly-calculated range, and the Court of Appeals affirmed. This Court disagreed and held that this situation required remand for reconsideration of the sentence even though the sentence was within the “appropriate guidelines sentence range,” because an error in scoring occurred and the defendant objected to the scoring error as required by MCL 769.34(10).<sup>8</sup> The Court held that the harmless-error rule<sup>9</sup> is inapplicable in this situation, stating: “What is the point in applying a harmless error rule if the error is always going to be harmless?”<sup>10</sup>

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<sup>7</sup>*Francisco, supra*, 474 Mich at 84.

<sup>8</sup>*Id.* at 88-89, 91n8.

<sup>9</sup> Though not cited, the People assume reference is to MCL 769.26.

<sup>10</sup> *Francisco, supra*, 474 Mich at 92n10.

The instant case presents yet a third situation, one considered by this Court in *Kimble*, and one distinguishable from *Francisco*. Here, as in *Francisco*, defendant's sentence is *within* the "newly" scored guidelines once adjusted for the scoring error found; however, unlike *Francisco*, the scoring error in the instant case was *not* preserved. This distinction should make a difference. In *Kimble*, this Court stated that unlike a sentence which, when adjusted for error, falls *outside* the new guidelines range, "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 in sentencing, or in a motion for resentencing, or in a motion to remand.*"<sup>11</sup> Similarly, in a footnote in *Francisco*, this Court stated "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."<sup>12</sup> If this remains true, then the sentence here should be affirmed; if it does not remain true, then there is little, if anything, left of MCL 769.34(10) or stare decisis.

In this case, defendant's minimum guidelines range was scored at 108 to 270 months. Defendant did not object to the scoring of the guidelines variables at sentencing. Based upon these guidelines, the trial court sentenced defendant as a habitual third offender to 108 months to 22.5 years for his armed-robbery conviction. Defendant did not raise the issue of the guidelines scoring in a motion for resentencing before the trial court or by moving for remand in the Court of Appeals. Instead, contrary to the express preservation requirements set forth in MCL 769.34(10), defendant

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<sup>11</sup> *Kimble*, at 310-311 (emphasis added).

<sup>12</sup> *Francisco*, at 91 n8.

did not raise these issues until he filed his brief on appeal in the Court of Appeals, thereby bypassing three opportunities to raise and resolve this issue in the trial court as expressly provided for by the Legislature.

The Court of Appeals concluded that the trial court's factual findings were insufficient to support its conclusion that defendant was guilty of two counts of felonious assault despite testimony that defendant pointed what the victims believed to be a silver handgun at them because the trial court found insufficient evidence that the item pointed at the victims, including two young children, was actually a firearm. The Court of Appeals also noted that the trial court incorrectly concluded that the prosecution is not required to prove that existence of a dangerous weapon to sustain a conviction for felonious assault. It is noteworthy that the Court of Appeals did not conclude that the **evidence** itself presented was insufficient, but rather that the trial court's factual findings were insufficient to support its ultimate legal conclusion that defendant was guilty of two counts of felonious assault. Interestingly, if a jury had found defendant guilty of two counts of felonious assault based on the evidence presented at trial, defendant's convictions for these offenses would not have been vacated, there would be no guidelines scoring errors, and defendant's appropriate minimum guidelines range would not have changed.

Yet, because this was a waiver trial and the trial court's factual findings were found to be deficient, defendant's two convictions for felonious assault were vacated. The guidelines scoring errors found by the Court of Appeals were based solely on the vacation of these two convictions. First, the Court of Appeals concluded that defendant was improperly scored 20 points for PRV 7<sup>13</sup> for his two, concurrent convictions for felonious assault, and should have been scored 0 points

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<sup>13</sup>MCL 777.57(1)(a).

because the trial court's findings were insufficient to support these convictions. Next, the Court of Appeals concluded that defendant was improperly scored 15 points for OV 1<sup>14</sup> for "aggravated use of a weapon" because the trial court found that defendant did not possess an actual firearm. Rather, the Court found that defendant should have been scored 5 points because defendant used an object to suggest the presence of a weapon or displayed or implied that he had a weapon. Next, the Court of Appeals concluded that the trial court improperly scored 5 points on OV 2<sup>15</sup> regarding the "lethal potential of the weapon possessed or used" because the trial court found that there was insufficient evidence to believe that defendant actually possessed a firearm.

The guidelines scoring challenges were presented, considered, and resolved for the first time by the Court of Appeals and resulted in defendant's minimum guidelines range changing from 108 to 270 months to 51 to 127.5 months. The 108 month minimum sentence imposed by the trial court remains within the corrected guidelines range. Thus, under the plain, express language of MCL 769.34(10), defendant is statutorily prohibited from raising this issue on appeal, and the Court of Appeals was statutorily required to affirm this sentence and statutorily prohibited from remanding the matter for resentencing. Moreover, pursuant to this Court's decisions in *Kimble* and *Francisco*, defendant is not entitled to resentencing because his sentence is within the appropriate minimum guidelines range and he did not raise the issue of the guidelines scoring at sentencing, in a motion for resentencing, or in a motion for remand in the Court of Appeals. Accordingly, the Court of Appeals did not err when it concluded that it was required to affirm defendant's armed robbery sentence.

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<sup>14</sup>MCL 777.31(1)(c).


<sup>15</sup>MCL 777.32(1)(d).

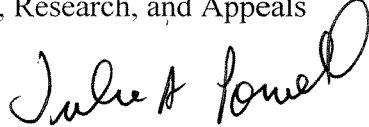
**Relief**

**WHEREFORE**, this Court should affirm the Court of Appeals' decision.

Respectfully submitted,

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Dated: December 23, 2009

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v

LEONARD LEPPEL JACKSON,  
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Third Circuit Court No. 07-010097  
Court of Appeals No. 281380

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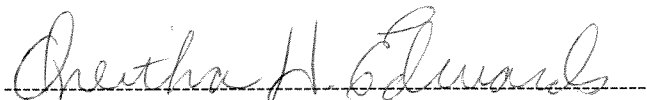
STATE OF MICHIGAN)  
COUNTY OF WAYNE )ss

The undersigned deponent, being duly sworn, deposes and says that she caused to have served a true copy of PEOPLE'S SUPPLEMENTAL BRIEF

Upon: KIM MCGINNIS

the within named defendant by depositing in the U. S. Mail on December 23, 2009, plainly addressed as follows:


Kim McGinnis  
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✓ said pleading was filed in the Supreme Court, by U. S. Mail, to the following address:

CORBIN R. DAVIS, Clerk  
Michigan Supreme Court  
925 W. Ottawa Street  
Lansing, MI 48915

Subscribed and sworn to before me  
this 23<sup>rd</sup> day of December, 2009

  
JOYCELYN SHARP  
Notary Public, Wayne County, Michigan  
My Commission Expires: 03-08-2015