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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ROSS AMES,

Defendant-Appellant.
_______________________________________/

Supreme Court No. 156077

Court of Appeals No. 337848

Lenawee Circuit Court Nos.
16-017887-FH
16-017888-FH

PEOPLE OF THE STATE OF MICHIGAN'S BRIEF IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

The Michigan Court of Appeals denied Ames's delayed application for leave to appeal on May 12, 2017. Ames filed his application in this Court exactly 56 days later, on July 7, 2017. This Court has jurisdiction over the application under MCR 7.303(B)(1) and MCR 7.05(C)(2).

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COUNTER-STATEMENT OF QUESTION PRESENTED

This Court has ordered the People to respond to Ames's brief and "to specifically address whether this Court's decision in *People v Lockridge*, 498 Mich 358 (2015), rendered invalid that part of MCL 769.34(10) requiring the Court of Appeals to affirm sentences that fall within the applicable guidelines range 'absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.' "

Because *Lockridge* struck down the mandatory nature of the sentencing guidelines, that portion of § 34(10) is invalid only if it makes the sentencing guidelines mandatory. The question may fairly be framed:

Does the Legislature's limitation on the appellate courts' power to review within-guidelines sentences expand or restrict the trial courts' power to impose a sentence?

Appellant's answer: Yes.

Appellee's answer: No.

The trial court was not asked this question.

Court of Appeals' answer: No.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

MCL 769.34(10) provides in part:

> If a minimum sentence is within the appropriate guidelines sentencing range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the guidelines or inaccurate information relied upon in determining the defendant's sentence.

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INTRODUCTION

David Ames, along with four others, committed a string of break-ins across several counties to steal money, and property they could pawn for money, in order to buy drugs. In Lenawee County, he and three of the others pleaded guilty to a few counts, and had many others dismissed. Ames pleaded guilty to second-degree home invasion, while his co-defendants pleaded to less serious offenses.

All four received within-guidelines sentences, but because Ames pleaded to a more serious offense and had higher guidelines, he received a higher sentence. He now wants that sentence struck down as unreasonable.

Unfortunately for Ames, our Legislature has acted to remove this question from the jurisdiction of the Court of Appeals. MCL 769.34(10) does not grant to or withdraw from the trial court any power to set a sentence within, above, or below the sentencing guidelines. But it does withdraw from the Court of Appeals the power to review a within-guidelines sentence for reasonableness.

This Court has asked the People to respond to Ames's application and answer the question whether § 34(10) is still good law in light of *Lockridge*. It is. *Lockridge* struck down the mandatory nature of the sentencing guidelines as violative of the Sixth Amendment. But § 34(10) is not part of the mandatory sentencing guidelines. It does not require the trial court to impose a within-guidelines sentence, or forbid the trial court from imposing a departure sentence, nor does it restrict or expand the power of the sentencing court or of the jury in any way. All it does is to set the standard for appellate review, and that does not implicate the Sixth Amendment jury right.

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This Court has not ordered the People to respond to the substance of Ames's claim that his sentence is unreasonable. The People will respond only to say that this Court should not answer the question. If this Court agrees with the People on the continued validity of § 34(10), the Court of Appeals had no choice but to affirm the sentence, and this Court should deny leave. If, on the other hand, Ames were to prevail on that question, and *if* this Court were to determine that the claim meets one of the grounds enumerated in MCR 7.305(B), then the appropriate course would be to remand to the Court of Appeals to consider the reasonableness of his sentence in the first instance. It would be premature for this Court to weigh in at this stage. Cf. *People v Steanhouse*, 902 NW2d 327, 338 (Mich. 2017) (remanding for reasonableness review of departure sentences under newly elucidated standard, rather than conducting reasonableness review in the first instance).

The Court has also not ordered the People to respond to Ames's expression of differences of opinion with the presentence information report (PSIR), which he has framed as a claim that the PSIR contains inaccurate and irrelevant information. The People will respond only to say that the claim appears to lack merit and that Ames has not shown that it meets any of the grounds enumerated in MCR 7.305(B). The claim is one of error correction, presents no issue of jurisprudential significance, and deserves no place on this Court's small and discretionary docket.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Defendant David Ames, along with co-defendants Erika Webb, Jonathan Lewis, and Justin Foster, committed a string of break-ins through Lenawee, Hillsdale, Washtenaw, and Jackson Counties. In Lenawee County, all but Stokes pleaded guilty to some charges, in exchange for which others were dismissed.

Ames pleaded guilty in Lenawee Circuit Court to one count of second-degree home invasion, MCL 750.110a(3), and one count of larceny in a building, MCL 750.360. In exchange for this plea, the prosecutor agreed to dismiss three additional charges of second-degree home invasion, three charges of conspiracy to commit second-degree home invasion, and three charges of larceny in a building.

Ames testified that he and Webb selected a home at random, broke a sliding glass door, and stole a television, a necklace, and a radio scanner from the house. (6/29/16 Plea Tr., pp 8–10.) He testified that he and Webb were going to split the money and use it to buy heroin. (*Id.*, p 10.)

Ames further testified that on another occasion, he, Lewis, and Foster selected a house at random to burgle. (*Id.*, p 11.) Lewis broke the window, and he and Ames entered through the window, then unlocked the door for Foster to enter. (*Id.*, pp 11–12.) The three stole jewelry and money in the home. (*Id.*, p 12.) Again, they planned to split the money and use it to buy heroin. (*Id.*, p 13.)

Ames, Webb, Lewis, and Foster all received within-guidelines sentences. Ames's guidelines called for a minimum sentence between 36 and 71 months. (Sentencing Information Report; 9/13/16 Sentencing Tr, p 5.) The court sentenced Ames to a minimum sentence of 60 months. (9/13/16 Sentencing Tr., p 10.)

Ames then filed a delayed application for leave to appeal in the Michigan Court of Appeals, arguing that his sentence was unreasonable and that his PSIR contained inaccurate and irrelevant information. The Court of Appeals denied the delayed application "for lack of merit in the grounds presented."

Ames then sought leave to appeal in this Court, raising the same claims.

ARGUMENT

I. *Lockridge* struck down only those guidelines provisions that intruded on the role of the jury or impinged the sentencing judge's discretion; § 34(10) does neither and so is not affected by *Lockridge*.

A. Standard of Review

Although Ames has presented this claim to this Court as a challenge to the reasonableness of his sentence, this Court has ordered the People to respond specifically to the threshold question—whether MCL 769.34(10) bars reasonableness review of a within-guidelines sentence, in light of *Lockridge*'s holding that the guidelines are no longer mandatory. That question is one of constitutional law, which this Court reviews de novo. *Lockridge*, 498 Mich at 373.

B. Analysis

In *People v Lockridge*, this Court struck down the mandatory sentencing guidelines as a violation of the Sixth Amendment right to jury trial. As a remedy, this Court declared that the guidelines would henceforth be advisory only. *Lockridge* explicitly struck down two sections of MCL 769.34, and implicitly struck down any statute that made the guidelines mandatory or imposed restrictions on

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departures from the guidelines. Ames now asks this Court to hold that *Lockridge*'s holding invalidates the first sentence of MCL 769.34(10), which requires the Court of Appeals to affirm within-guidelines sentences absent scoring errors or inaccurate information. For the reasons that follow, § 34(10) is constitutional and survives *Lockridge*.

1. The stated remedy in *Lockridge* did not overturn MCL 769.34(10).

To remedy the Sixth Amendment violation, *Lockridge* considered several possibilities, and decided to retain the mandatory use of judge-found facts in scoring the guidelines, but to make the guidelines range merely advisory.

To make the remedy explicit, the majority explained that it was "sever[ing] MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory," and that it was "strik[ing] down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." 364–365. In a footnote, this Court also held, "To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part is also severed or struck down as necessary." *Id.* at 365 n1.

Lockridge never mentions § 34(10). Nor does footnote 1 of *Lockridge* apply: subsection 10 does not "refer[ ] to use of the sentencing guidelines as mandatory,"

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and it does not "refer[ ] to departures from the guidelines." Thus, *Lockridge* did not, by its own terms, strike down § 34(10), explicitly or implicitly.

2. MCL 769.34(10) does not make the guidelines mandatory, nor does it violate the Sixth Amendment.

The constitutional violation identified by this Court in *Lockridge* is that of using judge-found facts to increase a mandatory sentencing range. This violation is a form of that identified by the United States Supreme Court in *Apprendi v New Jersey*, 530 US 466 (2000), and its progeny, most notably *Alleyne v United States*, 570 US 99 (2013). *Apprendi* held that the Sixth Amendment is violated when judge-found facts are used to make more severe punishments available to the sentencing judge. *Alleyne* extended this, holding that the Sixth Amendment is violated when judge-found facts are used to make *less* severe punishments *un*available to the sentencing judge. In other words, it is the use of judge-found facts to expand (by raising the ceiling) or restrict (by raising the floor) the range of available sentences that violates the Sixth Amendment.

And this Court's *Lockridge* holding was largely consistent with that. Although *Lockridge* did break new ground in the sense that no decision by the United States Supreme Court had ever extended the Sixth Amendment jury right to determinations of parole eligibility, it was otherwise a straightforward application of *Alleyne*. When judge-found facts are used to score mandatory sentencing guidelines, minimum sentences below the guidelines range become unavailable to

the sentencing court (except where substantial and compelling reasons exist to depart). And that raising of the floor is the *Alleyne* violation.

But MCL 769.34(10) does not raise the floor—it does not make any lenient sentence unavailable to the sentencing court. Nor does it raise the ceiling, by making any harsh sentence available to the sentencing court. It does not restrict or expand the discretion of the sentencing court in any way. And it does not take any factual finding away from the jury. Whether § 34(10) is valid or not, the sentencing court must still score the guidelines and use them as a starting point in setting a sentence, and may still impose a sentence below, within, or above the guidelines as it sees fit.

Ames argues that § 34(10) raises Sixth Amendment problems, because it "ensures that 'some sentences . . . will be upheld as reasonable only because of the existence of judge-found facts.' " (Application for Leave to Appeal, p 9, quoting *Rita v United States*, 551 US 338; 373 (2007) (SCALIA, J., concurring). There are a few problems with this line of attack.

First, the fact that a different standard of *appellate* review exists for within-guidelines sentences and departure sentences does not offend the Sixth Amendment. Justice Scalia's view in *Rita* commanded only two votes, and is not binding on this Court.[1] The *Rita* six-justice majority opinion, however, is binding on

[1] Justice Scalia opined that it violates the Sixth Amendment to allow full reasonableness review of departure sentences while applying a presumption of reasonableness to guidelines sentences. Justice Scalia's solution was to eliminate *all* substantive reasonableness review of sentences below the statutory maximum. Presumably, Ames does not ask this Court to adopt Justice Scalia's view in full.

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this Court as it relates to the federal constitutional question presented here. *Rita* held that the presumption at issue in that case "does not *require* the sentencing judge to impose that sentence. Still less does it *prohibit* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone." 551 US at 353. The same is true of § 34(10), which neither requires a sentencing judge to impose a within-guidelines sentence, nor prohibits a departure. "Thus, our Sixth Amendment cases do not forbid appellate court use of the presumption." *Rita*, 551 US at 353.

The second problem with Ames's reliance on the *Rita* concurrence is that the concern it raises is one of judge-found facts being used to increase the available sentence—in other words, it is an *Apprendi* problem of raising the ceiling, not an *Alleyne* problem of raising the floor. But the "ceiling" of a *minimum* sentence range does not implicate the Sixth Amendment, because "[u]nder Michigan's sentencing scheme, the maximum sentence that a trial court may impose on the basis of a jury's verdict is the statutory maximum." *People v Drohan*, 475 Mich 140, 164 (2006), overruled in part on other grounds by *Lockridge*, 498 Mich at 378.

Although *Drohan* is no longer good law applied to the Michigan sentencing system as a whole, *Lockridge* did not overrule it on the point that the top end of the guidelines does not implicate the Sixth Amendment. In fact, one of the remedies *Lockridge* considered was to leave the top end of the guidelines mandatory, while making the bottom end of the guidelines advisory. 498 Mich at 389–390. *Lockridge* rejected this remedy not because of constitutional problems, but because it would be

contrary to the intent of the Legislature. *Id.* at 390. Thus, to the extent that § 34(10) might be seen to raise the ceiling of available punishments, it is not a ceiling of constitutional magnitude.

But the most important distinction between the presumption at issue in *Rita* and § 34(10) is that § 34(10) does not create a presumption of reasonableness. Rather, it removes a class of claims from the jurisdiction of the Court of Appeals. This is within the Legislature's legitimate constitutional power. "The jurisdiction of the court of appeals shall be provided by law[.]" Const 1963, art 6 § 10. For example, the Legislature may direct that the Court of Appeals has jurisdiction over only certain prosecutor appeals in criminal cases. *People v Cooke*, 419 Mich 420, 426 (1984). And the Legislature may direct that Court of Appeals jurisdiction over appeals from plea-based convictions shall be only by application, not by right. *People v Perks*, 259 Mich App 100, 105–107 (2003), discussing MCL 770.3(d).

This is no different. One tool the Legislature used to achieve its goal of uniformity in sentencing is to require adherence to the legislative guidelines. But because that tool restricted the discretion of sentencing courts on the basis of judge-found facts, *Lockridge* struck it down as a Sixth Amendment violation. But § 34(10), which restricts the jurisdiction of the Court of Appeals, is a different tool, one which is within the Legislature's constitutional authority to enact, and one which does not offend the Sixth Amendment. It is still valid after *Lockridge*, and Ames's sentence must be affirmed.

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3. The Court of Appeals has settled this question correctly in a published opinion, and this Court need not weigh in on the question.

Finally, it is worth correcting an error that appears in Ames's application for leave to appeal. Ames says that "neither [*People v Schrauben*, 314 Mich App 181, lv den 500 Mich 860 (2016)] nor any other decision of the Court of Appeals or this Court addresses whether MCL 769.34(10) survives [this Court's] ruling in [*Lockridge*]." (Def's Application for Leave to Appeal, pp iii–iv.) Later, Ames says that *Schrauben* "simply assumed" that § 34(10) barred appellate review of the defendant's sentence. (*Id.*, p 8.) These statements suggest that the question presented here is unsettled and that bench and bar require this Court's guidance.

But *Schrauben* squarely addressed the question presented here, *holding* in a published opinion, "Notably, *Lockridge* did not alter or diminish MCL 769.34(10)[.]" 314 Mich App at 196 n1. It is true, as Ames points out, that *Schrauben* did not include analysis on the point. Perhaps the majority believed that the answer was self-evident, in that *Lockridge* struck down mandatory sentencing guidelines, while § 34(10) does not impose any requirements at all on a sentencing court. In any event, the holding of *Schrauben* binds future panels of the Court of Appeals.

For this reason, and contrary to Ames's suggestion, this question is settled as a matter of Michigan law. The Court of Appeals has had no difficulty understanding and applying *Schrauben*'s holding in subsequent cases, and rejecting reasonableness challenges to within-guidelines sentences. There is no need for the Court to step in to affirm the manifestly correct *Schrauben* holding—rather, this Court should deny leave here as it denied leave in *Schrauben* itself.

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CONCLUSION AND RELIEF REQUESTED

This Court should deny Ames's application for leave to appeal.

Respectfully submitted,

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