State of Michigan
In the Michigan Supreme Court

People of the State of Michigan

Plaintiff-Appellee,

v.

Dametrius Benjamin Posey

Defendant-Appellant.

Case No. 162373
Court of Appeals No. 345491

Wayne County Circuit Court
Case No. 18-000074-01-FC

Filed under AO 2019-6

Reply Brief

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STATEMENT OF THE QUESTIONS PRESENTED

First Question

Was counsel was ineffective for failing to object to an unreliable in-court identification?

Mr. Posey answers: Yes.

The trial court did not answer.

Second Question

Is the provision of MCL 769.34(10) require appellate courts to affirm with guideline sentences, whether they are reasonable or not, unconstitutional and inconsistent with Lockridge?

Mr. Posey answers: Yes.

The trial court did not answer.

I. Counsel was ineffective for failing to object to an unreliable in-court identification.

Mr. Posey argues that TB's identification was wholly unreliable. Mr. Posey's counsel failed not only in ignoring the constitutional implications of that moment, but in failing to object under the rules of evidence. Nevertheless, in his responsive pleading, the prosecutor argues that ineffective assistance of counsel arguments consider the "then-existing law that the in-court identification was inadmissible" and the existing laws protect the missteps of Mr. Posey's counsel. Prosecutor Brief, 11. The prosecutor goes on to argue that Mr. Posey seeks "a change in the law" and thus, counsel's performance cannot be ineffective for the same.

Yes, Mr. Posey posits that this Court could have a more robust reliability assessment for in-court identifications. But, Mr. Posey also argues that under the existing law, the in-court identification of Mr. Posey was implemented by a state actor and was unnecessarily suggestive and thus violative of his existing, long-standing, constitutionally-protected due process rights.

But Mr. Posey also separately argues that counsel was ineffective for failing to object under the Michigan Rules of Evidence. Supplemental pleading, 18, 21. This goes entirely unaddressed by the prosecutor, but not for lack of an opinion on the matter. As Amicus Innocence Project highlights,

> The Prosecuting Attorneys Association of Michigan concurs that blind administration of lineups—where neither the administrator nor the witness knows the suspect's identity—mitigates against impermissible suggestiveness.

Brief of Amici Curiae Eric Anderson and The Innocence Project, p. 7 n. 4 filed August 16, 2022.

The Innocence Project goes on to point out the impermissible suggestiveness permeating an in-court identification by comparison:

> In an in-court identification, however, everyone in the room knows who the accused is, including the eyewitness on the stand. Witnesses are thus highly likely, essentially compelled, to identify the defendant even if they previously had doubts—or, as here, previously identified someone else—because witnesses regard the prosecution of the defendant as itself being a confirmation that the defendant is the true perpetrator.

Amicus Innocence Project, 7.

Because in-court identifications are similar to, but even more suggestive than stationhouse showups, they are less reliable than the same, and could, can, and should be excluded under the Michigan Rules of Evidence. Existing law dictates that counsel should have objected and the failure to object to the single identification of Mr. Posey at trial was ineffective assistance.

II. The provision of MCL 769.34(10) requiring appellate courts to affirm within guideline sentences, whether they are reasonable or not, is unconstitutional and inconsistent with *Lockridge*.

In order to be a valid sentence in Michigan, the sentence must be proportionate. This is without regard to whether the sentence is within the guidelines or outside of the guidelines. "'[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range,' *Milbourn*, 435 Mich. at 661, 461 N.W.2d 1." *People v Steanhouse*, 500 Mich 453, 475 (2017). Thus, a sentence within the guidelines range must also be reviewed for proportionality, and the provision of MCL 769.34(10) that requires appellate courts to affirm within guideline sentences, in absence of any proportionality review, is invalid and must be severed.

A. These issues are properly before the Court.

The prosecution claims this Court should be prohibited from hearing these arguments on whether MCL 769.34(10) violates Mr. Posey's due process right to an appeal. The prosecution argues that this Court should set standards for when to ask the parties to brief new issues. The prosecution points to case examples where the Court has decided issues that were not previously raised, briefed, or argued by the parties, and similarly, instances where the Court has decided issues based on grounds that were not previously raised, briefed, or argued by the parties. But that is not this.

Mr. Posey's legal claim has always been that MCL 769.34(10) is invalid and that he is entitled to appellate review of his within guideline sentence. He has consistently asked for one remedy for this violation: resentencing. Nothing has changed. Mr. Posey is not raising brand new issues for the first time in this appeal. But he is advancing the quality and type of arguments in support of his main legal claim: that MCL 769.34(10) is invalid. Furthermore, not only is this Court *authorized* to ask the parties to brief additional grounds that have bearing on the legal claim that is once again before this Court, but it is the Court's

responsibility to do so. The citizens of Michigan are entitled to an answer on this legal question that is being constantly and continuously raised in our appellate courts. If this Court believed it would be aided by an analysis on the due process right to appeal, then it is well within its authority to ask for and allow briefing on that argument. MCR 7.305(H)(4).

Whether one calls this due process *dispute* a new issue, argument, claim, or basis for relief, should not matter. This due process argument is consistent with the legal claim and requested relief Mr. Posey has been seeking since his Court of Appeals briefing in 2020. And, both parties have had more than a fair opportunity to fully brief the issue and will have an opportunity to argue it before the Court.

B. MCL 769.34(10) violates *Lockridge* and the Sixth Amendment.

The prosecution argues that MCL 769.34(10) is not inconsistent with *People v Lockridge,* 498 Mich 358 (2015), because *Lockridge* never mentions that provision and because *Lockridge* involved a sentence that was outside of the guidelines. This avoids the problem.

To be fair, perhaps one of the reasons MCL 769.34(10) has withstood the massive sea changes in sentencing this Court underwent in *Lockridge* is in part because this Court was confronted with sentences that departed from the correctly-scored guidelines, and thus, was not presented with factual circumstances that required thoughtful consideration of MCL 769.34(10) and its existence in a *Booker*-ized[1] Michigan sentencing scheme. But, *Lockridge's* key holding was that the mandatory guideline scheme violated the Sixth Amendment. This holding was not limited to departure sentences. To overcome the Sixth Amendment violation, the *Lockridge* remedy of making the guidelines advisory was applied to all cases and sentences. The Court in *Lockridge* severed provisions of the sentencing guidelines that were at the time directly before the Court based on the facts of that case (i.e., MCL 769.34(2) and (3)). *Id.* at 364. The Court acknowledged the possibility

[1] *United States v Booker*, 543 US 220 (2005).

that other provisions of the sentencing guidelines—that were not at issue in that case—may need to be struck down if they are not consistent with an advisory scheme. *Id.* at 365, n 1. MCL 769.34(10) is such a provision.

i. Federal case law supports Mr. Posey's argument.

Mr. Posey concurs with the prosecutor that "history helps make the point" with respect to the validity of MCL 769.34(10). Prosecutor brief, 20. To that end, Mr. Posey points to the federal case law history detailed in the Amicus Brief submitted by sentencing experts Leslie Scott and Dean Jelani Jefferson Exum. Brief of Amicus Curiae Leslie E. Scott and Jelani Jefferson Exum, filed September 2, 2022.

In that amicus, the sentencing experts acknowledge the statutory differences between the federal sentencing scheme and that in Michigan. In the Federal system,

> the portion of the SRA setting forth the appellate standard of review was invalidated as unconstitutional by the *Booker* remedial majority. The majority set a new standard of review on appeal for 'unreasonableness'…[t]he Court inferred this standard of review from the text and structure of the SRA…[and] in so holding, the Court conformed the Act to its Sixth Amendment remedy.

Scott and Jefferson Exum Amicus, p 25

The prosecutor contrasts the federal statute, which had always provided for some appellate review of sentences, with the statutory provision in Michigan that excises appellate review of within-guidelines sentences. Prosecutor brief, 28. The prosecutor argues that MCL 769.34(10) is merely a declaration by the Legislature that a sentence within in the guidelines range is *lawful*, and therefore, the Legislature is permitted to require the appellate court to affirm all within guideline sentences. There are several problems with this argument.

To start, while it is within the Legislature's authority to establish laws and punishment, it is within the Court's authority to interpret

those laws and to make the ultimate determination of whether laws are lawful or whether their *application* is lawful. Every day, this Court and others find that statutes passed by the Legislature are illegal, invalid, overbroad, unconstitutional, or otherwise applied unlawfully. MCL 769.34(10) is one of those statutes. The Legislature can declare within guideline sentences lawful if it so chooses. But it cannot prevent the appellate courts from reviewing whether a sentence is truly lawful under proportionality standards adopted by this Court in *Lockridge*. As discussed elsewhere in full, this is a violation of the right to an appeal and violates the separation of powers doctrine.

In addition to the due process and separation of powers concern that MCL 769.34(10) presents, a blanket declaration that a sentence within the guidelines is lawful, absent the same declaration for a sentence outside of the guidelines, mirrors the mandatory guideline scheme that *Gall* warned against. The Supreme Court in *Gall v US*, 522 US 38, 49 (2007), cautioned that a "'proportional review'—of applying a heightened standard of review to sentences outside the Guidelines range" compared to those inside of the range runs afoul of the Sixth Amendment. But that is exactly what is happening here because of MCL 769.34(10). As Amicus from sentencing experts explains:

> Michigan's two-tiered review system inevitably invites and encourages trial judges to sentence within the guidelines ranges determined by facts found by them alone. The explicit appellate sanctioning of within-guidelines sentencing replicates the unconstitutional sentencing scheme this Court struck down in *Lockridge*, 498 Mich 358. The new system is different in form, but not in substance….This is the epitome of *de facto* mandatory guidelines sentencing. [Scott and Jefferson Exum Amicus, p. 31-32].

Outside of guideline sentences in Michigan are subject to a standard of review for proportionality while within guideline sentences are not subject to review at all. This is a heightened standard of review for

outside of guideline sentences, which is an unmistakable characteristic of a mandatory guideline system.

ii. The Washington State sentencing guidelines relied upon by the prosecutor are meaningfully different than Michigan's guidelines.

The prosecutor points to the state of Washington to disprove the conclusion that sentences within guidelines must be reviewed to comply with the Sixth Amendment. He observes, correctly, that Washington's state constitution provides a right to appeal. Wash Const art I, §22. Washington state also has a statute that precludes appellate review for a sentence within the guidelines. 9.94A.585(1). The Washington Supreme Court held that "[t]his provision of the SRA does not violate the constitutional right to appeal because '[w]hen the sentence given is within the presumptive sentence range then as a matter of law there can be no abuse of discretion.'" *State v Delbosque,* 195 Wash 2d 106, 126; 456 P3d 806, 817 (2020) (citing *State* v. *Ammons*, 105 Wash.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)). Without recognizing the distinct features of Washington's system, the prosecutor concludes the same must be true in Michigan: that a statutory ban on appealing within guideline sentences is unproblematic, even where a constitutional right to appeal exists. This is wrong and ignores relevant context.

Washington operates using a system at sentencing where judges arrive at a guidelines range based on the conviction and the defendant's prior record variables. There is no judicial fact-finding in the Washington system.

Assault First Degree

RCW 9A.36.011
CLASS A – SERIOUS VIOLENT/CRIMES AGAINST PERSONS
OFFENDER SCORING RCW 9.94A.525(9)

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Serious Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 249.

ADULT HISTORY:		
Enter number of serious violent felony convictions	_____ x 3 =	_____
Enter number of violent felony convictions	_____ x 2 =	_____
Enter number of nonviolent felony convictions	_____ x 1 =	_____
JUVENILE HISTORY:		
Enter number of serious violent felony dispositions	_____ x 3 =	_____
Enter number of violent felony dispositions	_____ x 2 =	_____
Enter number of nonviolent felony dispositions	_____ x ½ =	_____
OTHER CURRENT OFFENSES:		
(Other current offenses that do not encompass the same conduct count in offender score)		
Enter number of other violent felony convictions	_____ x 2 =	_____
Enter number of other nonviolent felony convictions	_____ x 1 =	_____
STATUS:		
Was the offender on community custody on the date the current offense was committed?	_____ + 1 =	_____
Total the last column to get the **Offender Score** (Round down to the nearest whole number)		_____

Take, for example, Mr. Posey's convictions for assault. In Washington, when a jury finds someone guilty of the most serious form of assault, the judge next scores that person's guidelines based only on their criminal history using the scoresheet for that offense. [2] Once an individual's criminal history is scored for first-degree assault, the judge would get an offender score which would then correspond to a guidelines range:

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL XII	108m 93 - 123	119m 102 - 136	129m 111 - 147	140m 120 - 160	150m 129 - 171	161m 138 - 184	189m 162 - 216	207m 178 - 236	243m 209 - 277	279m 240 - 318

It is notable that the ranges from within which a sentence is chosen by a judge in Washington state are, at its broadest here, 78-months wide. Mr. Posey's sentencing range is over 20-*years* wide. Second, Mr. Posey's unwieldly sentencing range was arrived at only after (unreviewable) judicial fact-finding beyond that supported by Mr. Posey's conviction or criminal history. This is wholly absent from Washington's sentencing scheme. This is the ongoing Sixth Amendment problem with MCL 769.34(10). This is the procedure out-of-step with *Lockridge* and all but ensuring *Milbourn* proportionality remains just words on a page.

The prosecutor also points to the fact that trial court judges depart from guidelines as evidence that the guidelines are not operating as mandatory in nature. In support, the prosecutor points to the Safe and Just Michigan November 2021 study that shows "[s]entencing judges have departed from the guidelines in a great man [sic] cases." (Pros. Supp., p. 53.) But the November 2021 research study examined only sentences imposed under the advisory judicial guidelines in place prior to 1998 and sentences imposed under the mandatory guideline scheme between 1999 and 2012. Levine et al, *Do Michigan's Sentencing*

[2] Source: 2021 Washington State Adult Sentencing Guidelines Manual. Available at, http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2021.pdf

Guidelines Meet the Legislature's Goals?, Safe & Just Michigan (2021), p. 34. The report says nothing about the impact of sentencing departures post-*Lockridge* under a so-called advisory scheme.

The prosecutor further points to nearly 200 cases that resulted from a Boolean Westlaw search he ran with certain search terms. (Pros. Supp., p. 53.) This information is not helpful because, without reading those cases, the fact that they contained certain search terms is meaningless. Also, the numbers do not advance the prosecution's point that departures are common. The search results were from 2015 to present, which means that over a 7-year period, there were an average of about 28 cases per year that reference the prosecutor's search terms. When compared to the number of sentences that are imposed against individuals in any given year—an average of 44,000 felony convictions per year[3]—the number of departures can hardly be said to be frequent. Even if departures were common, that would not help answer the question of whether MCL 769.34(10) is unconstitutional. It is not.

As the prosecutor himself quotes more than once, "the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines 'recommended range.'" Prosecutor brief, 35; *see also, Steanhouse*, 500 Mich at 475. Mr. Posey is asking that the appellate court review his sentence under that precise standard. The only complete relief to Sixth Amendment concerns is by way of the individual review of every sentence for substantive reasonableness. Amicus Brief, 35.

[3] Michigan Department of Corrections 2015-2020 Statistical Reports, Table A1, located at Statistical Reports (michigan.gov).

Conclusion and Relief Requested

For the reasons set forth above and in his supplemental brief and application for leave to appeal, Dametrius Posey respectfully requests that this Honorable Court grant leave and remand for a new trial or resentencing in the Wayne County Circuit Court.

Respectfully submitted,

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