

This summary of Michigan appellate case law addresses five topics: availability of and general standards for appellate review, standards and allowable grounds for departure, constitutional requirements for proof of facts that permitting upward departure (*Blakely v. Washington*), constitutional requirements for proof of facts that increase the minimum sentence (*Alleyne v. United States*), and other important appellate sentencing decisions.

## 1. Availability of and General Standards for Appellate Review.

Michigan law allows both parties to appeal as of right in cases where a defendant is found guilty by a judge or jury. Defendants who enter a guilty or nolo contendere plea may appeal with the court's permission.<sup>1</sup>

Appellate courts are vested with the jurisdiction to review all sentencing issues.<sup>2</sup> However, a sentence pronounced by the court is final unless the sentence is either legally invalid or disproportionate.<sup>3</sup> Though the guidelines are advisory, the court of appeals must still affirm a sentence on appeal if it is within the guidelines range, unless the trial court erred in scoring the guidelines or relied on inaccurate information.<sup>4</sup>

A party may not raise an issue challenging the scoring of the sentencing guidelines or the accuracy of information used to determine the guidelines sentencing range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion for remand filed in the court of appeals.<sup>5</sup> A sentence that departs from the sentencing guidelines will be reviewed by the appellate courts for reasonableness (see section 2 for further discussion).<sup>6</sup>

Parties may also file a motion with the sentencing court (rather than an appellate motion) to correct an invalid sentence. While the trial court may correct an invalid sentence, it may not modify a valid sentence after it has been imposed.<sup>7</sup>

## 2. Standards and Allowable Grounds for Departure.

Before *Lockridge*, when the mandatory sentencing guidelines were in place and courts were required to articulate departure reasons, the reasons were required to be "substantial and compelling," and could not be based on impermissible factors such as race or religion or on offense characteristics already taken into account in determining the appropriate sentencing range.<sup>8</sup> The Michigan Supreme Court interpreted "substantial and compelling" to mean "an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases."<sup>9</sup> Upon appellate review, whether a reason existed was subject to review for clear error; whether the reason was objective and verifiable was subject to de novo review; and whether the reason was substantial and compelling was subject to review for an abuse of discretion.<sup>10</sup>

<sup>1</sup> Mich. Const. art. I § 20; Mich. Comp. Laws §§ 770.3(d); 770.12 (2019).

<sup>2</sup> *People v. Brown*, 459 N.W. 2d 38, 40 (Mich. Ct. App. 1990).

<sup>3</sup> *In re Jenkins*, 475 N.W.2d 279, 281, fn. 3 (1991) *abrogated on other grounds by People v. Mitchell*, 560 N.W.2d 600 (1997).

<sup>4</sup> Mich. Comp. Laws § 769.34(10) (2019).

<sup>5</sup> *Id.*

<sup>6</sup> *People v. Lockridge*, 870 N.W.2d 502, 520-21 (Mich. 2015).

<sup>7</sup> Mich. Ct. R. 6.429 (2019). A motion to correct a sentence may be filed before filing a timely claim of appeal; however, if the defendant fails to file a timely appeal or may only appeal by leave of the court, the motion must be filed within 6 months of sentencing.

<sup>8</sup> Mich. Comp. Laws § 769.34(3) (2016). Note that the statutory prohibition on departing based on offense or offender characteristics already taken into account could be overcome if the court found that the characteristic was given inadequate or disproportionate weight. *People v. Babcock*, 666 N.W.2d 231, 242 (Mich. 2003).

<sup>9</sup> *People v. Babcock*, 666 N.W.2d 231, 237 (Mich. 2003) (internal citations omitted).

<sup>10</sup> *Id.* at 241.

The Michigan Supreme Court's decision in *Lockridge* rendered the sentencing guidelines advisory and removed the requirement that the court articulate substantial and compelling reasons for departure. However, the Court asserted that the guidelines remain "a highly relevant consideration in a trial court's exercise of sentencing discretion," and must serve as the starting point for sentencing. Additionally, the *Lockridge* court stated that "sentencing courts must justify the sentence imposed in order to facilitate appellate review,"<sup>11</sup> and that "[a] sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness."<sup>12</sup> The *Lockridge* court did not articulate procedures for considering the reasonableness of a departure sentence. Two subsequent cases in the Michigan Court of Appeals – *People v. Steanhouse* and *People v. Masroor* – developed competing views of the reasonableness inquiry.

In *People v. Steanhouse*, the Michigan Court of Appeals held that reasonableness should be determined in accord with the standard of review from *People v. Milbourn* that existed prior to the enactment of the statutory sentencing guidelines.<sup>13</sup> Under *Milbourn*, "a given sentence [could] be said to constitute an abuse of discretion if that sentence violate[d] the principle of proportionality, which require[d] sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."<sup>14</sup> The court elaborated that proportionality has included consideration of factors such as the seriousness of the offense, factors inadequately considered by the guidelines (such as the relationship between the victim and aggressor), the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation.<sup>15</sup> But rather than determine the reasonableness question itself, the *Steanhouse* court remanded the case to determine what effect the *Lockridge* decision would have on the sentence, concluding, "this is the proper remedy when, as in this case, the trial court was unaware of, and not expressly bound by, a reasonableness standard rooted in the *Milbourn* principle of proportionality at the time of sentencing."<sup>16</sup>

In contrast, a different panel of the Court of Appeals in *People v. Masroor* disagreed with the analysis in *Steanhouse*, stating that proportionality "is but one concept that should figure into departure sentencing."<sup>17</sup> Instead, after a detailed analysis of federal sentencing case law, the *Masroor* court articulated a sentencing procedure wherein "a sentencing court would make underlying factual findings carefully drawn from the record to properly calculate the guidelines, treating the guidelines as advisory only and not mandatory," and then "consider the fundamental principles that have historically animated sentencing decisions in Michigan" including "proportionality, the potential for reformation or rehabilitation of the defendant, deterrence, the protection of society from further crimes by the defendant, and the need to appropriately punish the defendant for the crimes of which the defendant was convicted, while avoiding sentence disparities between similarly situated defendants."<sup>18</sup> Thus, reasonableness to the *Masroor* court was measured not only by proportionality, as articulated in *Steanhouse*, but also by other traditional sentencing purposes. Similar to *Lockridge*, the *Masroor* court made clear that the court's explanation of the reasons for departure "must include detail sufficient to facilitate meaningful appellate review."<sup>19</sup> The *Masroor* court also remanded the case to the trial court because it felt compelled to do so under *Steanhouse* but stated that ordering such a hearing "unnecessarily complicates and prolongs the sentencing process" in a departure case.<sup>20</sup>

<sup>11</sup> *People v. Lockridge*, 870 N.W.2d 502, 520-21 (Mich. 2015).

<sup>12</sup> *Id.* at 521.

<sup>13</sup> *People v. Steanhouse*, 880 N.W.2d 297, 325 (2015).

<sup>14</sup> *Id.* at 327.

<sup>15</sup> *Id.* at 326. (referencing *People v. Houston*, 532 N.W. 2d 508, 512-13 (Mich. 1995) and *Milbourn*, 461 at 13-14).

<sup>16</sup> *Id.* at 327.

<sup>17</sup> *People v. Masroor*, 880 N.W. 2d 812, 836 (Mich. Ct. App. 2015).

<sup>18</sup> *Id.* at 834.

<sup>19</sup> *Id.*

<sup>20</sup> *People v. Masroor*, 880 N.W. 2d 812, 836-838.

In 2017, the Supreme Court of Michigan considered *Steanhouse* and *Masroor* as a consolidated case.<sup>21</sup> Although both the *Steanhouse* and *Masroor* panels agreed that the standard of review for departure sentences was abuse of discretion, they disagreed on which rule of decision to use in determining whether an abuse had occurred. The Supreme Court reached three important holdings. First, the court reaffirmed that the sentencing guidelines are advisory in all applications. Second, it acknowledged that *Lockridge* did not “elaborate on the proper standard for [...] reasonableness review” and held that the proportionality standard in *Steanhouse*, derived from *Milbourn*, is the correct standard for review in Michigan courts. It rejected the use of the federal factors test put forth in *Masroor* because the factors were intended for use in federal courts, and referenced “policy statements” with no counterpart in Michigan law. Conversely, the principle of proportionality has a long history of use in the state of Michigan. The Court also disavowed any prior dicta that would seem to construe the principle of proportionality to require an impermissible presumption of unreasonableness for out-of-guidelines sentences.<sup>22</sup> Finally, the Court held that remands are inappropriate for review of departure sentences. Instead, such review should be conducted by the appellate court using the proportionality standard articulated above. However, if the appellate court finds that the trial court “has abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed,” it must remand for resentencing.<sup>23</sup>

### 3. Constitutional Requirements for Proof of Facts that Permit Upward Departure

In *Blakely v. Washington*, decided in 2004, the U.S. Supreme Court held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime *beyond the statutory maximum* must be submitted to a jury and proven beyond a reasonable doubt.<sup>24</sup> The *Blakely* decision did not affect Michigan’s sentencing guidelines system because the guidelines establish the *minimum* rather than *maximum* sentence, which is authorized in statute.

### 4. Constitutional Requirements for Proof of Facts That Increase the Minimum Sentence

In *People v. Lockridge*, the Michigan Supreme Court held that under the *Alleyne* decision, Michigan’s mandatory sentencing guidelines scheme was unconstitutional because the guidelines required judges to set the minimum term of the sentencing range based on facts not found by a jury.<sup>25</sup> Specifically, the guidelines require the court to score offense variables, which include contextual factors like weapon use, injury to the victim, and the offender’s role in the crime.<sup>26</sup> The *Lockridge* court addressed the constitutional infirmity at issue by rendering the state’s sentencing guidelines advisory only.<sup>27</sup>

For cases sentenced before *Lockridge* was decided, the court determined that “in cases in which a defendant’s minimum sentence was established by application of the sentencing guidelines in a manner that violated the Sixth Amendment, the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error.”<sup>28</sup> In other words, the court on remand was tasked with determining whether it would have imposed the same sentence in the absence of the facts used to score the offense variables. However, the court also directed that the defendant be given an opportunity to avoid resentencing by promptly notifying the court of that intent.<sup>29</sup>

<sup>21</sup> *People v. Steanhouse*, 902 N.W. 2d 327 (Mich. 2017).

<sup>22</sup> *Id.* (referencing *Gall v. United States*, 552 U.S. 38, 47 (2007)).

<sup>23</sup> *Id.* at 338.

<sup>24</sup> *Blakely v. Washington*, 542 U.S. 296 (2004).

<sup>25</sup> *People v. Lockridge*, 870 N.W. 2d 502, 506 (Mich. 2015).

<sup>26</sup> See Mich. Sentencing Guidelines Manual Step II (May 1, 2016); see also *Lockridge*, 870 at 506.

<sup>27</sup> *Lockridge*, 870 N.W.2d at 519-21.

<sup>28</sup> *Id.* at 523. This is known as a “Crosby remand” because the process comes from *U.S. v. Crosby*, 397 F.3d 103 (2d Cir. 2005), in which the Second Circuit Court of Appeals wrestled with the problem of how to resentence a criminal defendant in the wake of a Sixth Amendment error.

<sup>29</sup> *Lockridge*, 870 N.W.2d at 524.

It should be noted that the *Lockridge* court also held the remand procedure was not the proper remedy for defendants who had received an upward departure because “the court [had] already clearly exercised its discretion to impose a *harsher* sentence than allowed by the guidelines.”<sup>30</sup> The court elaborated, “It defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory.”<sup>31</sup> Instead, the court held that departure sentences should be reviewed for reasonableness under an abuse of discretion standard (see further discussion in section 2).

## 5. Other Important Sentencing Decisions

### a. Intermediate Sanctions

The *Lockridge* decision affected another important aspect of the sentencing guidelines related to the departure standard. Mich. Comp. Laws § 769.34(4) (2019) establishes rules for imposing intermediate sanctions, which are probation or other non-prison sanctions such as jail, mental health treatment, or community service.<sup>32</sup> In those instances in which the minimum sentence is less than 18 months, the law required the imposition of an intermediate sanction unless the court stated on the record substantial and compelling reasons to justify a prison sentence.<sup>33</sup> However, because the guidelines are now advisory, the court *may*, but is no longer required to, impose an intermediate sanction in this circumstance.<sup>34</sup> Interestingly, the statutory language remains unchanged in 2019 and includes the word “shall”, despite the court in *Schrauben* replacing “shall” with “may” in 2016.<sup>35</sup>

### b. Scoring Offense Variables

Under the *Lockridge* decision, it was somewhat unclear whether the past case law about scoring offense variables (OVs) would continue to be relevant. However, in *People v. Geddert*, a post-*Lockridge* case, the Michigan Supreme Court remanded a case to the trial court for re-sentencing because the court did not assign points to any OV despite a presentence report that indicated that the current crime was part of a continuing pattern of criminal behavior. *Geddert* held that while “the guidelines ranges are now advisory, the scoring of the guidelines themselves is mandatory, and the OVs must be assigned the highest number of points applicable” under *Lockridge*.<sup>36</sup> In another case that was sentenced pre-*Lockridge* but finally decided in 2017, the Court upheld the scoring of an OV but remanded the case to trial court because the judge had likely engaged in judicial-fact finding now barred by *Lockridge*.

The Michigan Supreme Court has also continued to decide post-*Lockridge* cases about how to score OVs properly (see, e.g., *People v. White* (concerning OV 4)<sup>37</sup>, *People v. Roberson* (concerning OV 7)<sup>38</sup>, *People v. Barrera* (concerning OV 8),<sup>39</sup> *People v. Gloster* (concerning OV 10)<sup>40</sup> This signals that the Michigan case law on scoring OVs is still useful post-*Lockridge*. The guidelines contain 20 separate OVs and the category of crime determines which OVs are scored (for example, for crimes involving a controlled substance, the

<sup>30</sup> *Id.* at 522, n. 31 (emphasis in the original).

<sup>31</sup> *Id.*

<sup>32</sup> Mich. Comp. Laws § 769.31(b) (2019).

<sup>33</sup> Mich. Comp. Laws § 769.34(4)(a) (2019).

<sup>34</sup> *People v. Schrauben*, 886 N.W.2d 173, 194-95 (Mich. Ct. App. 2016).

<sup>35</sup> Mich. Comp. Laws § 769.34(4)(a) (2019).

<sup>36</sup> *People v. Geddert*, 884 N.W.2d 575, 576 (2016) (mem.)

<sup>37</sup> *People v. White*, 905 N.W. 2d 228 (Mich. 2017).

<sup>38</sup> *People v. Roberson*, 889 N.W. 2d 486 (Mich. 2017) (mem.)

<sup>39</sup> *People v. Barrera*, 892 N.W. 2d 789, 793-794 (Mich. 2017).

<sup>40</sup> *People v. Gloster*, 880 N.W. 2d 776, 777 (Mich. 2016).

court scores only OVs 1, 2, 3, 12, 13, 14, 15, 19, and 20). As there are Michigan decisions related to each of the variables, the body of case law on this aspect of sentencing is extensive and it not covered here.<sup>41</sup>

### c. Scoring Prior Record Variables

Because *Blakely* and *Alleyne* do not prohibit the court from using prior record information when determining an appropriate sentence, case law relating to the scoring of prior record variables under the guidelines is likely still relevant, and is included here.

When determining whether it is appropriate to score prior felony convictions as high-severity felonies under Prior Record Variable (PRV) 1, convictions under the laws of the United States or another state may be counted.<sup>42</sup> However, “state” as used in the guideline refers to “one of the states, other than Michigan, that comprise the United States,” not a foreign state such as Canada.<sup>43</sup> Additionally, another basis by which a prior out-of-state conviction would be scored as a prior high-severity felony is if the offense is punishable by more than 10 years, even if it does not correspond to one of the crimes listed within the guidelines.<sup>44</sup> As used in the guideline, the term “corresponding” means similar or analogous, rather than exactly matching,” so an out-of-state offense may still qualify as a high-severity felony conviction even if there are minor differences between the out-of-state offense and the Michigan offense.<sup>45</sup>

When determining whether to score an out-of-state conviction as a prior low severity felony conviction under PRV 2, an offense that is classified as a felony in another state but that would be classified as a misdemeanor in Michigan remains a felony for purposes of scoring the prior record.<sup>46</sup>

For purposes of scoring convictions as prior misdemeanors or juvenile adjudications under PRV 5, a prior conviction for underage drinking and operating a motor vehicle will be scored even though it is a zero-tolerance provision that merely requires proof of alcohol in the body rather than proof that the individual was “under the influence” or “impaired.”<sup>47</sup> Additionally, offenses involving drug paraphernalia qualify as controlled substance convictions under this provision.<sup>48</sup> When considering whether the defendant has a relationship with the criminal justice system under PRV 6, it is sufficient if the defendant has another case in process when the current offense is committed.<sup>49</sup> This variable will also be scored for a defendant who is on probation for a juvenile adjudication when the offense is committed.<sup>50</sup>

### d. Concurrent Sentencing of Multiple Offenses

Prior to *Lockridge*, the Court of Appeals held that when sentencing multiple offenses concurrently, the court is not required to independently score the guidelines sentence for and sentence the defendant on each of

<sup>41</sup> See, e.g., 2 Gillespie Mich. Crim. L. & Crim. Proc. § 22:99 (2d ed., Apr. 2018 update) (discussing the case law on scoring of offense variables for many of the variables).

<sup>42</sup> Mich. Comp. Laws § 777.51(2)(b) (2019).

<sup>43</sup> *People v. Price*, 723 N.W.2d 201, 202 (Mich. 2006).

<sup>44</sup> Mich. Comp. Laws § 777.51(2)(c)-(d) (2019).

<sup>45</sup> *People v. Crews*, 829 N.W.2d 898, 902-05 (Mich. Ct. App. 2013).

<sup>46</sup> *People v. Meeks*, 808 N.W.2d 825, 826-27 (Mich. Ct. App. 2011); see also Mich. Comp. Laws § 777.52(2)(c)-(d) (2019).

<sup>47</sup> *People v. Bulger*, 804 N.W.2d 341 (Mich. Ct. App. 2010).

<sup>48</sup> *People v. Stevens*, 858 N.W.2d 98, 100-03 (Mich. Ct. App. 2014).

<sup>49</sup> See *People v. Endres*, 711 N.W.2d 398, 403 (Mich. Ct. App. 2006) (defendant was charged with a misdemeanor before the offense was committed, and the case was still pending sentencing at the time of the offense); *People v. Johnson*, 808 N.W.2d 815, 819-22 (Mich. Ct. App. 2011) (defendant forfeited an appearance bond but was still answerable for a pending misdemeanor charge).

<sup>50</sup> *People v. Anderson*, 825 N.W.2d 678, 682-83 (Mich. Ct. App. 2012).

# Case Law Summary: Michigan

the concurrent convictions if the court properly scored and sentenced the conviction with the highest crime classification.<sup>51</sup> This principle remains in effect post-Lockridge.<sup>52</sup>

### e. Retroactive Application on Collateral Review

Neither *Lockridge* nor *Alleyne* qualify for the extraordinary remedy of retroactive application to cases on collateral review.<sup>53</sup>

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<sup>51</sup> *People v. Lopez*, 854 N.W.2d 205, 209 (Mich. Ct. App. 2014).

<sup>52</sup> See, e.g., *People v. Mann*, 2017 Mich. App. LEXIS 197, \*13 (Mich. Ct. App. 2017), *People v. Cameron*, 2015 Mich. App. LEXIS 1415, \*5 (Mich. Ct. App. 2015), *People v. Myers*, Mich. App. LEXIS 351, \*11-12 (Mich. Ct. App. 2015), *People v. Chappel*, Mich. App. LEXIS 1778, \*4-5 (Mich. Ct. App. 2015) (abrogated on other grounds).

<sup>53</sup> *People v. Barnes*, 917 N.W. 2d 577, 584 (Mich. 2018).