

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

R-4R. Smith

Date: January 2, 2018

Appendix A

Court of Appeals, State of Michigan

ORDER

People of MI v Randy R Smith

Docket No. 335033

LC No. 2003-193910-FC

Henry William Saad
Presiding Judge

Deborah A. Servitto

Elizabeth L. Gleicher
Judges

The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this appeal only.

The delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

The motion for judgment on the pleadings is DENIED.



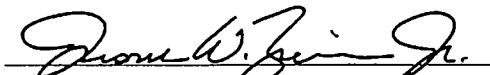
Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 12 2016

Date


Chief Clerk

Appendix B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

Case No. 03-193910-FC
Hon. James M. Alexander

RANDY SMITH, MDOC #494672,

Defendant.

**OPINION AND ORDER DENYING
DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT**

This matter is before the Court on Defendant's Motion for Relief from Judgment. In his motion, Defendant asks the Court to resentence him in light of the claim that *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015) announced a retroactive change in the law that applies to his case. It plainly appears from the face of the materials examined pursuant to MCR 6.504(B)(1) that Defendant is not entitled to relief. MCR 6.508(B).

As stated, Defendant claims that *Lockridge* announced a retroactive change in the law that and requires that he be resented. Defendant, however, admits in his motion that *Lockridge* "has not yet been given retroactive effect."

In *Lockridge*,

the Michigan Supreme Court held the Michigan sentencing-guidelines scheme unconstitutional in part. The Court held that the guidelines minimum range constitutes a "mandatory minimum," and when calculated including offense variables [OVs] "scored on the basis of facts not admitted by the defendant [i.e., at a guilty plea] or found beyond a reasonable doubt by the jury," that mandatory nature of the range violates the defendant's right to jury trial. To remedy this problem, the Court held that in this situation the guidelines are advisory only, and so in this situation "the

sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so.” The sentence is reviewed on appeal for “reasonableness.” Gillespie Mich. Crim. L. & Proc. Prac. Deskbook § 20:115.

Defendant now concludes that *Lockridge* constitutes a retroactive change in the law that, if applied, would have resulted in a different (presumably better) sentence.

In *People v Maxson*, 482 Mich 385, 387-388; 759 NW2d 817 (2008), our Supreme Court explained the federal test for retroactivity:

“New legal principles, even when applied retroactively, do not apply to cases already closed.” *Reynoldsville Casket Co v Hyde*, 514 U.S. 749, 758; 115 S Ct 1745; 131 L Ed 2d 820 (1995). This is because “at some point, ‘the rights of the parties should be considered frozen’ and a ‘conviction . . . final.’” *Id.*, quoting *United States v Estate of Donnelly*, 397 U.S. 286, 296; 90 S Ct 1033; 25 L Ed 2d 312 (1970) (Harlan, J., concurring). There are, however, “certain special concerns-- related to collateral review of state criminal convictions-- that affect which cases are closed, for which retroactivity-related purposes, and under what circumstances.” *Id.*

The *Maxson* Court then cited to *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989), which “set forth the federal standard for determining whether a rule regarding criminal procedure should be applied retroactively to cases in which a defendant's conviction has become final.” *Maxson*, 482 Mich at 388.

The United States Supreme Court in *Beard v Banks*, 542 US 406, 413; 124 S Ct 2504; 159 L Ed 2d 494 (2004) summarized the *Teague* process as follows:

Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process. First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually new. Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity. *Beard*, 542 US at 411 (internal quotations and citations omitted).

Under the first step, the Court finds that Defendant's conviction and sentence were final when the Supreme Court denied his application for leave to appeal in 2004 (Docket No. 125532). *Beard*, 542 US at 411 (reasoning "State convictions are final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'" (quoting *Caspari v Bohlen*, 510 US 383, 390, 127 L Ed 2d 236, 114 S Ct 948 (1994))).

With regard to the second step of the *Teague* analysis, the real inquiry is whether *Lockridge*'s outcome was "susceptible to debate among reasonable minds." *Butler v McKellar*, 494 US 407, 415; 110 S Ct 1212; 108 L Ed 2d 347 (1990). Further,

[b]ecause 'it is more difficult . . . to determine whether [the Supreme Court] announce[d] a new rule when a decision extends the reasoning of [its] prior cases,' the 'new rule' principle is designed to 'validate [] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" *Maxson*, 482 Mich at 389-390; quoting *Saffle v Parks*, 494 US 484, 488; 110 S Ct 1257; 108 L Ed 2d 415 (1990) and *Butler v McKellar*, 494 US at 414.

Before *Lockridge*, it was entirely reasonable for courts to score Offense Variables without basing the same on facts not admitted by the defendant or found beyond a reasonable doubt by the jury. This was, in fact, common.¹

Further, the existence of a dissenting opinion in *Lockridge* supports the notion that reasonable minds could have had an opposite interpretation of the eventual rule announced therein. *Maxson*, 482 Mich at 390. As a result, the Court concludes that *Lockridge* does not represent a new rule.

And the Court's conclusion that *Lockridge* does not represent a "new rule" is consistent with similar findings in courts addressing the issue. United States District Court Judge Robert Holmes

¹ Before *Lockridge*, Michigan courts followed *People v Herron*, 303 Mich App 392, 405; 845 NW2d 533 (2013) that *Alleyne* did not implicate Michigan's sentencing scheme.

Bell (Western District of Michigan) similarly concluded, reasoning in *Weissert v. Palmer*, No. 1:10-CV-851, 2015 WL 5680149, at *7 (W.D. Mich. Sept. 25, 2015):

In July 2015, the Michigan Supreme Court agreed with Petitioner's argument from 2010, finding Michigan's sentencing guidelines constitutionally deficient under *Apprendi* and *Alleyne*. See *People v. Lockridge*, — Mich. —, 2015 WL 4562293 (Mich. July 29, 2015). Unfortunately for Petitioner, however, *Alleyne* and *Lockridge* were decided after Petitioner's sentencing. Because the constitutional deficiency of Michigan's sentencing guidelines was not "clearly established Federal law" at the time of Petitioner's sentencing, even if a court today would find that a Sixth Amendment violation did occur, Petitioner is not entitled to relief under 28 U.S.C. § 2254(d)(1). See *Floyd v. Palmer*, No. 13-10050, 2015 WL 4877423, at *9 (E.D.Mich. Aug. 14, 2015).

Similarly, in this case, Defendant was sentenced years before *Lockridge* and *Alleyne* were decided. Defendant ignores that, assuming arguendo that *Alleyne* announced a new rule that applies to his case through *Lockridge*, he was also sentenced long before *Alleyne* was decided. As a result, it would not have applied to him.

Because the Court has concluded that *Lockridge* does not represent a new rule, it need not determine "whether it falls within either of the two exceptions to nonretroactivity" under the *Teague* analysis. *Beard*, 542 US at 411.

This is the same conclusion as reached by the Michigan Court of Appeals in *People v. Brickford*, unpublished Order of the Court of Appeals, issued January 12, 2016 (Docket No. 329351) (holding "The rule announced in *People v. Lockridge*, 498 Mich 358; _ NW2d _ (2015) has no retroactive application to sentences on collateral review." citing *Butterworth v. United States*, 775 F3d 459, 468 (CA 1, 2015); and *Simpson v. United States*, 721 F3d 875, 876 (CA 7, 2013)).

(Remainder of page intentionally left blank.)

For the foregoing reasons, Defendant has failed to establish that *Lockridge* represents retroactive change in the law, which would require its application to his case. MCR 6.508(G)(2).

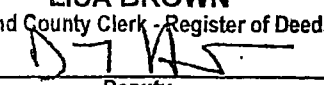
As a result, Defendant's Motion for Relief from Judgment is DENIED. It is further Ordered that the Oakland County Clerk accept Defendant's Motion for filing and waive any filing fee for said motion.

IT IS SO ORDERED.

August 11, 2016
Date

Hon. James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

PROOF OF SERVICE

A TRUE COPY
LISA BROWN
Oakland County Clerk - Register of Deeds
By 
Deputy

I certify that a true copy of this Order was served upon Defendant via first class mail addressed to: Randy Smith, MDOC #494672; G. Robert Cotton Correctional Facility; 3510 N. Elm Street. Jackson, MI 48846 on the ___ day of August, 2016.

Date

Court Clerk/Staff Attorney

Appendix C

Order

Michigan Supreme Court
Lansing, Michigan

October 31, 2017

Stephen J. Markman,
Chief Justice

155073

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 155073
COA: 335033
Oakland CC: 2003-193910-FC

RANDY R. SMITH,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the December 12, 2016 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).



s1023

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 31, 2017

Clerk