No. ____ - _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____ Term Of _____

HARRY LONZO-BOLTON ERVIN,

Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

APPENDIX/ORDERS

BY: HARRY LONZO-BOLTON ERVIN (#482984)
Petitioner *In Pro Se*
Kinross Correctional Facility
4533 West Industrial Park Drive
Kincheloe, Michigan 49788

SOLICITOR GENERAL'S OFFICE
Of The United States
Department of Justice - Rm. 5616
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

APPENDIX #1

Berrien County/Michigan Trial Court's
Opinion & Order Denying Sentencing Relief

STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT CRIMINAL DIVISION
811 Port Street, St. Joseph, MI 49085 / (269) 983-7111

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-vs-

HARRY LONZO-BOLTON ERVIN,
Defendant.

Case No. 2008-402766-FH

HON. DENNIS M. WILEY

ELIZABETH A. WILD P32264	JOHN T. BURHANS P32176
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At a session of the Berrien County Trial Court, held
On the 9th day of November, 2016, in the city of
St Joseph, Berrien County, Michigan

OPINION AND ORDER DENYING DEFENDANT'S SECOND MOTION FOR RELIEF FROM JUDGMENT UNDER MCR 6.501 et seq.

I. Background

On July 23, 2008, Defendant entered a plea of no contest to the charge of assault with intent to murder in exchange for the dismissal of related charges of torture, attempted murder, and interfering with electronic communications. On August 18, 2008, this Court sentenced Defendant to a term of imprisonment of 30 to 90 years. On April 27, 2009, Defendant filed a Delayed Application for Leave to Appeal which was denied by both the Court of Appeals and the Supreme Court. See *People v Ervin*, Order of the Court of Appeals issued May 29, 2009, Docket No. 291668; *People v Ervin*, Order of the Michigan Supreme Court issued October 26, 2009, Docket No. 139305. On January

28, 2010, Defendant filed a Motion for Relief from Judgment under subchapter 6.500 of the Michigan Court Rules which this Court denied on February 26, 2010.[1]

II. Standard of Review

Subchapter 6.500 provides the appropriate standard of review for a successive motion for relief from judgment. MCR 6.502(G)(1) in particular states in pertinent part that "***one and only one*** motion for relief from judgment may be filed with regard to a conviction." (emphasis added). However, MCR 6.502(G)(2) adds that "[a] defendant may file a . . . subsequent motion based on a ***retroactive change in law***. . . or a claim of new evidence that was not discovered before the first such motion." (emphasis added). Additionally, it is Defendant who bears the burden of establishing entitlement to relief. MCR 6.508(D).

III. Analysis

In his Motion, Defendant argues that he is entitled to a resentencing pursuant to the Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2016). Defendant argues that *Lockridge* should be applied retroactively to his case both under federal and state law. This Court will address Defendant's retroactivity argument under both federal and state law.

1. Does Federal Law Permit Retroactive Application of *Lockridge*?

The *Lockridge* Court decided that Michigan's sentencing guidelines scheme unconstitutional. *Lockridge*, 498 Mich at 389-92. Specifically, the Court determined that the guidelines violate the general Sixth Amendment principle from *Apprendi v New*

[1] Both the Court of Appeals and the Supreme Court denied Defendant's Application for Leave to Appeal the denial of Defendant's Motion for Relief from Judgment. See *People v Ervin*, Order of the Court of Appeals, issued December 2, 2010, Docket No. 300448; *People v Ervin*, Order of the Michigan Supreme Court issued July 25, 2011, Docket No. 142454.

Jersey, as extended by *Alleyne*. *Id.*, citing *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). To remedy this constitutional violation, the Court adopted the remedy from *United States v Booker* by rendering the guidelines advisory. *Lockridge*, 498 Mich at 391, citing *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

The US Supreme Court in *Teague v Lane*, 489 US 288, 311; 109 S Ct 1060, 1075-76; 103 L Ed 2d 334 (1989) wrote that there is a general rule of nonretroactivity of cases on collateral review unless a case falls within one of two exceptions: that (1) "a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) "a new rule should be applied retroactively if it requires the observance of those procedures that ... are implicit in the concept of ordered liberty." *Id.* (internal quotations omitted). The *Teague* Court wrote that the second exception is "reserved for watershed rules of criminal procedure."[2] *Id.*

In *Schriro v Summerlin*, 542 US 348, 351-52; 124 S Ct 2519, 2522–23; 159 L Ed 2d 442 (2004), the US further explained federal retroactivity law when it wrote, regarding the first exception to the general rule of nonretroactivity, that "[n]ew *substantive* rules generally apply retroactively" because "they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." (internal quotations omitted). Regarding the second exception, the *Schriro* Court wrote that

[2] As an example of a watershed rule of criminal procedure, the Court lists "the right to counsel . . . [as a] necessary condition precedent to any conviction for a serious crime." *Teague*, 489 US at 311–12.

"[n]ew rules of procedure, on the other hand, . . . merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352. Moreover, in order for a new rule of procedure to satisfy the second exception, "the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'"[3] *Id.*

Defendant argues that the *Lockridge* decision is not a new rule and therefore seems to argue that *Teague* is not controlling. Defendant in his brief writes that "*Lockridge* was compelled by the United States Supreme Court's decision in *Alleyne*" and that it "was uniformly directed by past decisions of the United States Supreme Court and is [therefore] not 'new.'" Defendant's Brief, p. 8. However, the Michigan Sentencing Guidelines were mandatory prior to *Lockridge* and now, after the decision in *Lockridge*, they are advisory; therefore *Lockridge* does appear to be a new rule. Moreover, Defendant was sentenced in 2008 which was nearly five years prior to the decision in *Alleyne v United States*, 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013) which Defendant writes compelled the *Lockridge* decision. As such, this Court finds that Defendant indeed seeks retroactive application of a new rule, and therefore it is necessary to see whether *Lockridge* falls within one of the two exceptions to the general rule of nonretroactivity as described in *Teague*.

First, the *Lockridge* decision is not a substantive rule; rather it is procedural. See *Lockridge*, 498 Mich at 394 n 30 ("the right at issue is a procedural one."). Second, it is very unlikely that *Lockridge* represents a "watershed rules of criminal procedure." See *Teague*, 489 US at 211. Despite argument to the contrary, Defendant has failed to

[3] The *Schriro* Court, citing *Tyler v Cain*, 533 US 656, 667, n. 7; 121 S CT 2478; 150 L Ed 2d 632 (2001), wrote that "[t]his class of rules is extremely narrow, and "it is unlikely that any . . . 'ha[s] yet to emerge." *Schriro*, 542 US at 352.

establish that the rule in *Lockridge* is watershed.[4] As such, considering that Defendant has failed to demonstrate that the rule in *Lockridge* satisfies either of the two *Teague* exceptions, under federal law, the general rule of nonretroactivity applies to the Michigan Supreme Court's decision in *Lockridge*.[5]

Even though this Court has determined that *Lockridge* shall not be retroactively applied under federal law, it is important to note that "[f]ederal law simply "sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Danforth v Minnesota*, 552 US 264, 288; 128 S Ct 1029, 1045; 169 L Ed 2d 859 (2008). States have the authority to give broader effect to new rules of criminal procedure than required under *Teague*. *Id.* at 266. As such, it is necessary for this Court to determine whether *Lockridge* should be retroactively applied under Michigan law

2. Does Michigan Law Permit Retroactive Application of *Lockridge*?

Defendant's request for a remand, under state law, pursuant to *People v Lockridge* is without merit as *Lockridge* is not retroactive. First, it should be noted that

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[4] There are two requirements in order for a new rule to qualify as watershed: (1) "the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction" and (2) "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v Bockting*, 549 US 406, 418; 127 S Ct 1173, 1182; 167 L Ed 2d 1 (2007) (internal quotations omitted). The *Whorton* Court noted that "in the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status." *Id.* at 418. Defendant has not provided argument in attempt to satisfy either requirements, and it is this Court's opinion that *Lockridge* neither (1) creates a large risk of an inaccurate conviction nor (2) alters our understanding of bedrock procedural matters.

[5] It is also important to note, considering that *Lockridge* adopted the remedy from *Booker*, that the Sixth Circuit Court of Appeals determined that, under the *Teague* rule, *Booker* does not apply to collateral proceedings. *Humphress v United States*, 398 F3d 855, 860 (CA 6 2005), citing *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989). Moreover, given that *Lockridge* applied both *Apprendi* and *Alleyne* to its decision, it is also noteworthy that both cases have been deemed nonretroactive to collateral review. See *Goode v United States*, 305 F3d 378, 382-385 (CA 6 2002); see also *In re Mazzio*, 756 F3d 487, 491 (CA 6 2014).

Lockridge instructs that the proper procedure for a defendant sentenced under the pre-*Lockridge* sentencing guidelines is a *Crosby* Remand. *People v Lockridge*, 498 Mich at 395-97. The *Lockridge* Court, citing *United States v Crosby*, 397 F3d 103, 117-18 (CA2 2005), wrote:

> we conclude that the "further sentencing proceedings" generally appropriate for pre-*Booker/Fanfan* sentences ***pending on direct review*** will be a remand to the district court, not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine whether to resentence, now fully informed of the new sentencing regime, and if so, to resentence. [*Lockridge*, 498 Mich at 396 (emphasis added).]

Consistently with *Crosby*, the *Lockridge* Court held that "*Crosby* remands are warranted only in cases involving sentences imposed on or before July 29, 2015." *Id.* at 397. Furthermore, in Section VI of the *Lockridge* opinion – titled Application to Other Defendants – the Court wrote that it "must clarify how [the plain error] standard is to be applied in the many cases that have ***been held in abeyance for this one.***" *Id.* at 394 (emphasis added). Ultimately, given that (1) the remedy in *Crosby* applied only to cases pending on direct review and (2) the *Lockridge* Court expressed the need to clarify the proper application for cases held in abeyance, it thus follows that *Lockridge* only applies to cases that were pending on direct review at the time *Lockridge* was decided.

Additionally, *Lockridge* fails the *Maxson* Test that Michigan courts use in determining retroactive application. The *Maxson* Test consists of three factors:

> (1) the purpose of the new rule[]; (2) the general reliance on the old rule; and (3) the effect of retroactive application of the new rule on the administration of justice. [*People v Maxson*, 482 Mich 385, 393; 759 NW2d 817, 822 (2008), citing *People v Sexton*, 458 Mich 43, 60-61; 580 NW2d 404, 413 (1998).]

The *Maxson* Court wrote that "[u]nder the 'purpose' prong, a law may be applied retroactively when it 'concerns the ascertainment of guilt or innocence;' however, 'a new rule of procedure ... which does not affect the integrity of the fact-finding process should be given prospective effect.'" *Maxson*, 482 Mich at 393. *Lockridge* has no bearing on a defendant's guilt or innocence; rather, the defendant has already been found guilty at the time of sentencing. Additionally, the *Lockridge* Court specifically noted that "the right at issue is a procedural one." *Lockridge*, 498 Mich at 394 n 30.

The second factor of Michigan's retroactivity test is reliance on the old rule. The *Maxson* Court stated that "[t]o be considered to have detrimentally relied on the old rule, a defendant must have relied on the rule in not pursuing an appeal and have suffered harm as a result of that reliance." *Maxson*, 482 Mich at 394. In *Maxson*, the Court concluded that defendants did not appeal not because of reliance on the old rule, but "because of factors unrelated to, and existing before, the old rule." *Id.* at 395-96. Furthermore, in order to have "detrimentally relied," a defendant must have suffered actual harm from not filing an appeal. *People v Maxson*, 482 Mich at 396. The *Maxson* Court considered the number of defendants who pled guilty before the old rule, how many appealed the plea, and how many actually obtained relief on appeal, and concluded that, based on their analysis, detrimental reliance was "remarkably minimal." *Id.* at 396-97. The only defendants who would benefit by retroactive application of *Lockridge* would be those who would have received materially different sentences but for the constitutional violation.[6] Using the same analysis, and considering that the pre-

[6] To warrant a *Lockridge* remand, defendants must show that "(1) . . . their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment, and [that] (2) [their] sentences were not subject to an upward departure." *Lockridge*, 498 Mich at 397. Finally, the *Lockridge* Court instructed that the remedy for defendants who meet the required

Lockridge Sentencing Guidelines applied to all current inmates sentenced before July 19, 2015, it is likely that detrimental reliance was also "remarkably minimal." Moreover, courts after *Lockridge* are still required to score offense variables whether using judge found facts or not; however, now the guidelines are merely advisory as opposed to mandatory, see *Lockridge*, 498 Mich at 392 n 28, and considering that the Guidelines are still required to be scored and considered, it appears unlikely that pre-*Lockridge* Defendants detrimentally relied on the old rule in forgoing an appeal.

The third factor to consider is the adverse effect on the administration of justice. The *Maxson* Court wrote that "[t]he state's interest in finality discourages the advent of new rules from 'continually forc[ing] the State[] to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards...." *Maxson*, 482 Mich at 398. By its very nature, *Lockridge* implicates every defendant sentenced under the old sentencing guideline scheme. So making the new law retroactive could in theory give rise to every defendant sentenced under the pre-*Lockridge* Sentencing Guidelines filing a post-conviction motion for relief.

In sum, Defendant's argument that the *Lockridge* decision rendered his sentence invalid fails as *Lockridge is* not retroactive. The purpose of the *Lockridge* rule is procedural rather than substantive, it is unlikely that there was significant detrimental reliance under the old sentencing guideline scheme, and retroactive application would have a significantly burdensome effect on the administration of justice.

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threshold is a "remand[] to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error." *Id.*

III. Conclusion

In conclusion, because *Lockridge* is not retroactive, Defendant has failed to satisfy the requirements for bringing a successive motion for relief from judgment as stated in MCR 6.502(G)(2). Therefore, in light of the above, Defendant's Successive Motion for Relief from Judgment is **DENIED**.

DATE: November 9, 2016

HON. DENNIS WILEY (P28314)
Berrien County Trial Court

A TRUE COPY

Maureen Pomeroy
DEPUTY CLERK

CERTIFICATE OF MAILING

I certify that on this date I mailed/faxed a copy of the foregoing instrument to the party(ies) at the address stated above.

Date: November 9, 2016

Signature: Maureen Pomeroy
Maureen Pomeroy

cc: Elizabeth A. Wild
John T. Burhans

APPENDIX #2

Michigan Court of Appeals' Order
Denying Leave to Appeal

Court of Appeals, State of Michigan

ORDER

People of MI v Harry Lonzo-Bolton Ervin

Docket No. 335901

LC No. 2008-402766-FH

Mark T. Boonstra
Presiding Judge

Jane E. Markey

Douglas B. Shapiro
Judges

The Court orders that the 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.

Presiding Judge

Defendant's Copy

Admin Order 1983

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

DEC 14 2016
Date

Chief Clerk

APPENDIX #3

Michigan Supreme Court's Order
Denying Leave to Appeal

Order

November 29, 2017

155220

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

HARRY LONZO-BOLTON ERVIN,
Defendant-Appellant.

/

Michigan Supreme Court
Lansing, Michigan

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

SC: 155220
COA: 335901
Berrien CC: 2008-402766-FH

On order of the Court, the application for leave to appeal the December 14, 2016 order of the Court of Appeals is considered, and it is DENIED, because the defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

CLEMENT, J., did not participate.

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.

November 29, 2017

Clerk

a1120