

## BULLETIN

### Critical Sentencing Guidelines Development - MSC Grants Leave in *Lockridge*, *Herron* held in abeyance

By Marti Tieber

On June 11, 2014 the Michigan Supreme Court granted leave to appeal in the *Lockridge* case, outlined below and in section E of the June 2013 through June 2014 materials at [www.tieberlaw.com](http://www.tieberlaw.com) (click on Criminal Law Update) , and held *Herron*, also outlined below, in abeyance. It is critical that the issue be preserved in any case where facts not proved to a jury or admitted are used to increase the minimum guidelines range.

***Apprendi*, Enhancement by Facts Not Found by Jury, Mandatory Minimum.** *Alleyne v. United States*, \_\_ US \_\_; 133 S Ct 2151 (2013)(**June'13**). Defendant was charged with using/carrying a firearm in relation to a crime of violence under 18 USC §924(C)(1)(A). This crime carries a mandatory 5 year minimum which increases to a mandatory 7 year minimum if the weapon is "brandished." Overruling *Harris v United States*, 536 US 545 (2002), the Court held that the logic of *Apprendi v New Jersey*, 530 US 466 (2000) demanded that facts impacting the mandatory minimum of a sentence range, like facts increasing the maximum sentence, are "elements" of the crime charged and must be determined by a jury. Because Alleyne's jury did not find that he brandished a weapon in this case, it was error for the district court to add 2 years to the mandatory minimum for this conduct. While the Court repeatedly referenced the mandatory minimum aspect here, there is language in the four-justice plurality, and in a three-justice concurrence, that suggests facts that alter a statutory range (as in Michigan's guidelines) may have to be determined by a jury. However the 5<sup>th</sup> vote to overrule *Harris* was reluctantly cast by Justice Breyer who underscored the mandatory nature of the increase in the floor of the permissible sentencing range as pivotal to his decision.

***Apprendi*, Enhancement by Facts Not Found by Jury, Mandatory Minimum.** *People v Herron*, 303 Mich App 392; \_\_ NW2d \_\_ (2013)(**dec'13**). In the wake of the United States Supreme Court's decision in *Alleyne v United States*, \_\_ US \_\_; 133 S Ct 2151 (2013), Defendant argued that *Apprendi* should now apply to statutory minimum sentencing ranges. The court of appeals disagreed, largely on the basis that because of the departure ability, the minimum ranges set by Michigan's statutory guidelines are not mandatory.

***Apprendi*, Enhancement by Facts Not Found by Jury, Mandatory Minimum.** *People v Lockridge*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (No. 310649, 2014 WL 563648, decided February 13, 2014)(**feb'14**). In two separate and complex concurrences in this manslaughter case, Judges Beckering and Shapiro firmly disagree with the conclusion in *People v Herron*, 303 Mich App 392; \_\_ NW2d \_\_ (2013) that *Apprendi* remains inapplicable to sentencing guidelines in Michigan in the wake of *Alleyne v United States*, \_\_ US \_\_; 133 S Ct 2151 (2013). Both concurring judges agreed, however, that they were bound to follow *Herron*.