

Appendix: The “Lockridge Issue”

One additional stakeholder issue requires a bit more explanation: the challenge to a key feature of the sentencing guidelines that is currently before the Michigan Supreme Court in *People v. Lockridge*.¹ This pending constitutional challenge has been cited by some stakeholders as a reason to delay any changes to the sentencing guidelines, and while the second draft does remove changes to the guidelines, the legislature should understand the situation and remain open to sentencing revisions.

Michigan’s Offense Variable (OV) scoring raises the constitutional issue, which involves the right to a jury finding on factual issues affecting the range of punishment. For each offense, there is a list of OVs that are scored to arrive at the proper row in the sentencing grid. For example, OV 14, Offender’s Role, asks ‘was the defendant a leader, or not, in a multiple offender situation?’ If yes, he gets 10 points, if no he gets zero (as a nuanced factual determination becomes a binary decision). This score can, but does not always, lift the floor of the minimum punishment. For example on Grid B, the 10 point score on OV 14 would move the sentencing decision from cell A-I to cell A-II, which means that the minimum punishment for someone with no (scoreable) criminal history goes from the possibility of probation only to a minimum of 12 months in jail or in prison. (And, in Michigan’s indeterminate system, the defendant who is sent to prison could, depending on the parole board, serve the maximum statutory sentence for his offense, which on Grid B is 20 years.) So, OV scoring does not always make a difference in the minimum sentence, but it definitely *can* make a difference in the minimum. OV scoring does not currently affect the maximum sentence (which is why the Michigan Supreme Court has upheld the guidelines under prior right to a jury challenges), but the maximum and minimum would have been linked under the first draft proposal, raising stakeholder concerns that the guidelines will be even more vulnerable to a challenge.

The right to a trial by jury entitles the accused to take the case away from the judge and ask a jury of regular people to resolve the factual issues, with the state bound to prove those issues to the jury beyond a reasonable doubt. This means that each factual element of the criminal offense, unless admitted to, must be proved. The Supreme Court of the United States has reinvigorated the right to a jury with regard to sentencing factors that elevate the *maximum* punishment in the “*Apprendi* revolution” starting in 2000.² Among other holdings, the high court subsequently overturned Arizona’s death penalty procedure and Washington’s aggravating factors affecting sentencing, and made the federal sentencing guidelines advisory instead of mandatory.

In June of 2013, the Supreme Court decided *Alleyne v. United States*.³ This time, the issue was an increase in the *minimum* sentence based on judicial fact-finding, leading to the challenge in *People v. Lockridge*. The Court in *Alleyne* held (emphasis added and citations omitted):

¹ Order granting leave to appeal at: http://publicdocs.courts.mi.gov:81/SCT/PUBLIC/ORDERS/20140611_S149073_59_149073_2014-06-11_or.pdf.

² See *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 549 U.S. 270 (2007); *Southern Union Co. v. United States*, 132 S.Ct. 2344, 567 U.S. ____ (2012).

³ 133 S. Ct. 2151, 570 US ____ (2013).

The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an “element” or “ingredient” of the charged offense. Apprendi’s definition of “elements” *necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment.* Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.

OV scoring appears vulnerable under this test. Worse, if the Michigan Supreme Court or the Supreme Court of the United States does find a constitutional violation in such a basic feature of the sentencing guidelines, their remedy will almost certainly be to make the guidelines voluntary (as happened to the federal guidelines in *Booker*). This would be a huge setback for the state and can be avoided in at least one of two ways, either now or after a ruling.

The state could abandon OV scoring entirely: rather than having 9 different grids with OV scoring in each one, the guideline rows could reflect a more nuanced ranking of purely offense severity, as guidelines do in other states (which have from 10-16 severity levels). But, OVs are an important catalogue of aggravating factual circumstances that can accompany the commission of crimes, with obvious relevance to sentencing, e.g., premeditation, being a leader in a crime, using a weapon, physical and psychological injury to a victim, and aggravated physical abuse. The simpler solution, to maintain the OV concept, is to provide a procedure for notice and the right to take a contested OV scoring issue to a jury, if it would lift the minimum punishment. It will seldom be invoked, as plea bargaining will continue to dispose of the vast majority of cases. This issue should not be a barrier to other reforms.