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# Could or Must?: Apprendi's Application to Indeterminate Sentencing Systems After Alleyne

David Loudon

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*Could or Must?:*  
*Apprendi's Application to Indeterminate Sentencing Systems After Alleyne*  
by  
David Loudon

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Professor Barbara O'Brien  
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## INTRODUCTION

In a series of cases starting with *Apprendi v. New Jersey*,<sup>1</sup> the Court has held that the Sixth Amendment<sup>2</sup> requires that any fact that increases the minimum or maximum sentence that a judge can impose on an offender<sup>3</sup> be found by the jury beyond a reasonable doubt unless the fact is a prior conviction, an element of the offense for which the offender was convicted, or a fact admitted by the offender.<sup>4</sup> A common factor in all of these cases is that they involved determinate sentencing systems. This means that the offender, once sentenced, would serve his entire sentence, no more, no less.<sup>5</sup> The Court has yet to deal directly with how the *Apprendi* line of cases applies in an indeterminate sentencing system.<sup>6</sup> In an indeterminate system, a judge imposes two sentences on an offender, with the shorter sentence being the amount of time the

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<sup>1</sup> 530 U.S. 466 (2000).

<sup>2</sup> U.S. CONST. amend. VI.

<sup>3</sup> This article uses the term “offender” to refer to any defendant who has pled guilty to a crime or who has been found guilty of a crime after a trial. The Sixth Amendment protections from *Apprendi* are implicated only during sentencing of a defendant. Therefore, any person invoking the protections from *Apprendi* is an “offender” in the sense that he has either pled guilty or been convicted of the crime to which he is being sentenced.

<sup>4</sup> See *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490); *United States v. Booker*, 543 U.S. 220, 244 (2005); *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013).

<sup>5</sup> Nancy J. King, *Alleyne on the Ground: Factfinding that limits Eligibility for Probation or Parole Release*, 26 FED. SENT’G REP., 287, 289 (2014) (defining a determinate sentence as a sentence in which “defendants receive a single sentence and serve that sentence; they are not sentenced to a range within which they might or might not be released depending on decisions by paroling authorities at a later time.”). Some determinate sentencing systems give prisoners the opportunity to get out of prison early by earning “good time credits.” James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 222-24 (1982) (defining the term “good time credits” and explaining how they work in different sentencing systems). While the Supreme Court has not directly addressed whether *Apprendi* applies to the awarding or revocation of “good time credits,” most courts and commentators have concluded that *Apprendi* does not apply. See e.g., Nicholas J. Xenakis, *A Good Time with the Sixth Amendment: The Application of Apprendi to the denial of Good Time Credit*, 47 CRIM. LAW BULL. art. 3 (“There are several state courts and one federal court that have already addressed whether *Apprendi* applies to the denial of good time credit. None of them, however, have ruled that *Apprendi* does in fact apply.”); King, *supra* note 5 (“Corrections officials’ decisions . . . delaying release eligibility by refusing to grant or revoking good time credit . . . fall[s] outside of the *Apprendi* principle.”). However, at least one article has argued that “the due process and the Sixth Amendment guarantees as articulated in *Apprendi v. New Jersey* [should] apply to some factual determinations related to the denial of good time credit.” See Xenakis, *supra* note 5. Because good time credits are generally awarded or revoked by correction officials, not judges, whether *Apprendi* should apply to good-time credits is outside the scope of this article. This article instead focuses on when *Apprendi* applies to judicial sentencing of an offender.

<sup>6</sup> Bradley R. Hall, *Mandatory Sentencing Guidelines by Any Other Name: When “Indeterminate Structured Sentencing” Violates Blakely v. Washington*, 57 DRAKE L. REV. 643, 680-81 (2009) (noting that “the presence or absence of a parole mechanism has never been a determinative or even relevant factor in the constitutional equation” of an offender’s Sixth Amendment Rights in the Court’s *Apprendi* line of cases).

offender *must* serve before he is eligible for parole, and the longer sentence being the maximum amount of time he *could* serve before he must be released.<sup>7</sup>

This article argues, using the Michigan indeterminate sentencing system as a case study, that *Apprendi* should apply to the determination of the range of sentences that a judge can impose that an offender *must* serve before being considered for parole in an indeterminate sentencing system.<sup>8</sup> The Supreme Court’s 2013 decision in *Alleyne v. United States* has undermined the Michigan Supreme Court’s reasoning for holding that Michigan’s indeterminate sentencing system is constitutional.<sup>9</sup> *Alleyne* clarified that the proper inquiry in Sixth Amendment cases is whether a fact found aggravates the legally prescribed range of punishment available for a judge to impose on an offender.<sup>10</sup> Since factfinding that increases the range of sentences within which an offender *must* serve in prison aggravates the legally prescribed punishment for his crime, the reasoning of *Apprendi* should apply.

Additionally, *Alleyne* renders unconstitutional judicial factfinding that increases the *minimum* sentence that the offender *must* serve before being considered for parole.<sup>11</sup> Similar to the determinate sentencing systems involved in the *Apprendi* line of cases, an indeterminate system has only one minimum sentence.<sup>12</sup> As such, when judicial factfinding increases the

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<sup>7</sup> Gary L. Mason, *Indeterminate Sentencing: Cruel and Unusual Punishment, or Just Plain Cruel?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89, 89-90 (1990) (“Under an indeterminate sentencing system, the trial judge applies a minimum and a maximum sentence range to the convicted defendant’s prison term. Any time after the completion of the minimum term, the prisoner becomes eligible for parole; however, he must be released from prison upon the expiration of the maximum term.”). This article will sometimes refer to this lower sentence in an indeterminate system as an offender’s “mandatory sentence.” This sentence is “mandatory” in the sense that an offender *must* serve that much time in prison before being released. *Id.*

<sup>8</sup> See *infra* Part IV.

<sup>9</sup> See *infra* Subsection IV.B.1.

<sup>10</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2161-62 (2013); see *infra* Subsection IV.B.1.

<sup>11</sup> See *infra* Subsection IV.B.2.

<sup>12</sup> See *infra* Subsection IV.B.2.

minimum sentence a judge can impose that an offender *must* serve in prison in an indeterminate sentencing system, it is raising the statutory minimum in violation of *Alleyne*.<sup>13</sup>

Part I of this article defines the language of sentencing and the distinct concepts of judicial sentencing and parole availability. Part II explores the Court's Sixth Amendment jurisprudence before *Alleyne* beginning with *Apprendi*. The Court in these cases only dealt directly with determinate sentencing systems, leaving open the question of how these principles would apply in an indeterminate system. Part III describes the Michigan sentencing system, and why constitutional challenges to that system failed prior to the Court's decision in *Alleyne*. Part IV discusses the Court's decision in *Alleyne*, and argues that it renders Michigan's current indeterminate sentencing system unconstitutional. Part V of this article summarizes its contents and briefly explores what implications its conclusions would have on indeterminate sentencing systems in other states.

## I. THE LANGUAGE OF SENTENCING

A major issue that plagues court opinions and scholarly works in this area of the law is the lack of clarity in the use of particular sentencing terms.<sup>14</sup> There are two important and distinct concepts that are used in state and federal sentencing systems and court opinions on these systems: judicial sentencing and parole availability.<sup>15</sup> The confusion arises because the phrase "determinate," and its antonym "indeterminate" can refer to either concept depending

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<sup>13</sup> See *infra* Subsection IV.B.2.

<sup>14</sup> W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 906 (2009) (defining the "commonly used (and commonly confused) sentencing terms 'determinate' and 'indeterminate.'"); Jon Wool, *Beyond Blakely: Implications of the Booker Decision for State Sentencing Systems*, 17 FED. SENT'G REP. 285, 286-87 (2005) (defining the sentencing terms and describing the confusion in the case law concerning the definitions of "determinate" and "indeterminate" sentences).

<sup>15</sup> See *supra* note 14.

upon the context and who is using it.<sup>16</sup> Thus it is vital to clarify the definitions of the terms to avoid conflating these two concepts.

### A. Judicial Sentencing

The first important concept, which the Court has discussed extensively in its *Apprendi* line of cases, is judicial sentencing of an offender and the amount of discretion the judge has in imposing a sentence.<sup>17</sup> There are two basic systems that a state can enact for allowing judges to determine the sentence of an offender.<sup>18</sup> The first is a system in which the statutory scheme allows the judge to sentence an offender to any length of time within the range proscribed for the crime.<sup>19</sup> For example, a statute might permit a judge to sentence an offender convicted of armed robbery to *any* sentence between five and ten years. The judge has complete discretion to determine where within this range to sentence an offender. This article will refer to such a system, sometimes referred to as an “indeterminate” system,<sup>20</sup> as a “discretionary judicial sentencing system,” or a “discretionary system.”<sup>21</sup> This system is discretionary because the judge has complete discretion to sentence an offender within the range prescribed by statute for the crime, possibly subject to advisory guidelines that the court is not bound to follow.<sup>22</sup>

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<sup>16</sup> See *supra* note 14.

<sup>17</sup> Ball, *supra* note 14.

<sup>18</sup> Ball, *supra* note 14, at 906-07; Wool, *supra* note 14. There are also some instances in which a judge has absolutely no discretion and must sentence an offender to a specific term in prison. This is the case in Michigan for the maximum sentence that an offender could serve if not released early on parole. See MCL § 769.8(1). For that sentence, a judge has absolutely no discretion and must sentence the offender to the term of years enumerated by statute for that crime. *Id.*; People v. Drohan, 475 Mich. 140, 161 (2006) (an offender’s “maximum sentence is not determined by the trial court, but rather is set by law.”).

<sup>19</sup> Ball, *supra* note 14; Wool, *supra* note 14.

<sup>20</sup> Ball, *supra* note 14, at 907 (noting that “the Supreme Court has often conflated [the two concepts], using “indeterminate” to mean “advisory” and “determinate” to mean “binding.”); Wool, *supra* note 14, at 286 (noting that in *Blakely*, the Court used the phrase “indeterminate sentencing” to “refer[] to systems . . . where judges are free to sentence anywhere within the statutory limits.”).

<sup>21</sup> This is similar terminology to that employed by Professor W. David Ball in his article on this topic. See Ball, *supra* note 14, at 907.

<sup>22</sup> Ball, *supra* note 14; Wool, *supra* note 14. Of course, a judge does not have the discretion to impose a sentence outside of the statutory range for the crime. Some sentencing systems permit a judge to impose a sentence outside of the statutory range in some circumstances. However, a judge does not have the complete

On the other hand, there are other sentencing systems that limit a judge's sentencing discretion based upon additional facts found about that particular offender, either by the judge or the jury.<sup>23</sup> For example, such a system will set the general sentencing range for an offender convicted of larceny at one to five years. However, if the judge or jury finds that the particular offender being sentenced committed larceny with a firearm, then the range within which the judge must sentence that offender shifts from one to five years to three to five years, or from one to five year to one to seven years.<sup>24</sup> Once the factfinder finds that the offender committed larceny with a firearm, the judge's binding sentencing range is altered, and he must sentence the offender to a sentence within that new range.<sup>25</sup> This article will refer to such a system, frequently referred to as a "determinate sentencing system," as a "binding judicial sentencing range" or a "binding system." Such a system is binding because facts found by the judge or jury alter the range within which a judge *must* sentence the offender.<sup>26</sup>

## B. Parole Availability

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discretion to do so, as "departure" is generally limited to unique circumstances, and is unavailable in most cases. *See infra* note 64.

<sup>23</sup> Ball, *supra* note 14, at 907; Wool, *supra* note 14.

<sup>24</sup> Prior to *Alleyne*, the Court had distinguished between judicial factfinding that increased the *minimum* sentence a judge can impose on an offender and judicial factfinding that increased the *maximum* sentence a judge can impose on an offender, finding the former to be constitutional and the latter to be unconstitutional. *See Harris v. United States*, 536 U.S. 545, 557-68 (2002). However, in *Alleyne* the Court rejected that distinction and held that increasing the minimum sentence a judge can impose on an offender is also subject to *Apprendi*. *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013).

<sup>25</sup> When a sentencing range is shifted from one to five years to three to five years, a judge's sentencing discretion is limited, as the minimum sentence he must impose on an offender is three years. On the other hand, when the sentencing range is shifted from one to five years to one to seven years, the judge has greater discretion to impose a sentence, as he may now impose a sentence up to seven years in jail. Regardless of whether a judge has more or less discretion, both increasing the floor and the ceiling of the judicial sentencing range "aggravate" an offender's punishment because both alter the legally prescribed range of sentences a judge can impose to the detriment of the offender. *See infra* Section IV.B.

<sup>26</sup> Ball, *supra* note 14, at 907; Wool, *supra* note 14. Some binding sentencing systems allow a judge to depart from the guidelines in unique circumstances. However, the United States Supreme Court has held that the ability for a judge to depart from the guidelines if certain additional requirements are met does not immune a sentencing system from scrutiny under *Apprendi*. *See infra* note 64.

The second important concept in sentencing is whether an offender can obtain early release on parole.<sup>27</sup> A majority of states offer an offender the opportunity to obtain release prior to serving his entire term of imprisonment.<sup>28</sup> In these states, an offender receives two sentences, the first sentence constituting the amount of time he *must* serve in prison before being considered for parole, and the second constituting the amount of time he *could* serve if his parole request is not granted.<sup>29</sup> For example, an offender may be sentenced to five to ten years in prison; five years being the amount of time the offender *must* serve before he may be considered for parole, and ten years being the longest amount of time the offender *could* serve in prison if not released early on parole. This article will refer to such a system as an “indeterminate sentencing system” or “indeterminate system.”<sup>30</sup>

On the other hand, some states (and the federal system), do not offer offenders a chance to obtain early release by applying to a parole board.<sup>31</sup> In such a system, the offender must serve the entire sentence that the judge imposes upon him, nothing more, nothing less.<sup>32</sup> If a judge sentences an offender to seven years in prison, he will serve exactly seven years in prison. This article will refer to such a system as a “determinate sentencing system” or a “determinate system.”

### C. The Interaction Between The Two

Judicial sentencing involves the range of sentences available for a judge to choose from when sentencing an offender, while parole availability involves whether an offender may be

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<sup>27</sup> Ball, *supra* note 14; Wool, *supra* note 14, at 286

<sup>28</sup> King, *supra* note 5.

<sup>29</sup> Mason, *supra* note 7.

<sup>30</sup> This is similar terminology to that employed by Professor W. David Ball in his article on this topic. See Ball, *supra* note 14, at 906-07.

<sup>31</sup> King, *supra* note 5.

<sup>32</sup> King, *supra* note 5. Some determinate sentencing systems will grant prisoners early release if they earn “good time credits.” For a discussion on whether *Apprendi* applies to the awarding and revocation of “good time credits,” see *supra* note 5.



released early on parole prior to serving his total possible sentence.<sup>33</sup> While distinct, these two concepts interact in an indeterminate sentencing system.<sup>34</sup> Once a state decides that it is going to adopt an indeterminate system, it must decide how to determine how long an offender *must* serve in prison before he may be considered for parole and how long he *could* serve if denied parole.<sup>35</sup> Similar to sentencing in a determinate system, a state enacting an indeterminate system may enact a binding or discretionary system for determining the amount of time an offender *must* and *could* serve in prison. Thus, an indeterminate sentencing system may give the judge complete discretion to choose the sentences an offender must and could serve (a discretionary indeterminate sentencing system), or it could limit the judge's discretion based upon additional fact finding (a binding indeterminate sentencing system).

## II. PRE-*ALLEYNE* AND INDETERMINATE SENTENCING

These two distinct concepts, judicial sentencing and parole availability, create separate considerations when determining how the Sixth Amendment should be applied.<sup>36</sup> The Court in its *Apprendi* line has dealt extensively with the concept of judicial sentencing, ultimately concluding that in a binding determine sentencing system, any fact that increases the minimum or maximum sentence to which a judge may sentence an offender must be found by a jury

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<sup>33</sup> See *supra* note 14.

<sup>34</sup> For example, in Michigan's indeterminate sentencing system, a judge has no discretion to set the amount of time an offender *could* serve if he is not released early in parole. See *e.g.*, MCL § 769.8(1); *People v. Drohan*, 475 Mich. 140, 161 (2006) (an offender's "maximum sentence is not determined by the trial court, but rather is set by law."). However, a Michigan judge does have the discretion, within a binding sentencing range, to impose the sentence an offender *must* serve before being considered for parole. See MCL § 769.8(1); MCL § 769.34(2)(b).

<sup>35</sup> See *supra* note 34.

<sup>36</sup> Wool, *supra* note 14 ("It is critical to distinguish between these definitions because indeterminate systems under the Court's definition— that is, systems that impose no constraint on a judge's sentencing discretion— are not affected by the *Blakely* rule, whereas indeterminate systems under the second definition may well be.").

beyond a reasonable doubt.<sup>37</sup> However, the Supreme Court has not squarely dealt with whether any fact that increases the sentence an offender *must* serve before being considered for parole in an indeterminate system must also be found by a jury beyond a reasonable doubt.<sup>38</sup> Thus, this still remains an open question for the Court to consider in future cases.

#### A. The *Apprendi* Line

In *Apprendi v. New Jersey*, the Court held that “other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt.”<sup>39</sup> In *Apprendi*, the offender pled guilty to one count of “possession of a firearm for an unlawful purpose,” for which the judge must sentence the offender to a term of imprisonment between five and ten years.<sup>40</sup> At sentencing, the judge found by a preponderance of the evidence “that the crime was motivated by racial bias,” increasing the range of sentences within which the judge must imprison the offender to ten to twenty years in prison.<sup>41</sup> The Court ultimately concluded that increasing the *maximum* sentence that the judge could impose upon the offender based upon judicial factfinding violated the offender’s Sixth and Fourteenth Amendment<sup>42</sup> rights to a jury trial.<sup>43</sup>

Two years later, the Court held that a judge could find facts that increased the *minimum* sentence the judge could impose on an offender.<sup>44</sup> In *Harris v. United States*, the offender was

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<sup>37</sup> See *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490); *United States v. Booker*, 543 U.S. 220, 244 (2005); *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013).

<sup>38</sup> Hall, *supra* note 6; Wool, *supra* note 14, at 287.

<sup>39</sup> *Apprendi*, 530 U.S. at 490.

<sup>40</sup> *Id.* at 468-70 (citing N.J. STAT. ANN. § 2C:39-4(a) (West 1995); § 2C:43-6(a)(2)).

<sup>41</sup> *Id.* at 470-71 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).

<sup>42</sup> U.S. CONST. amend. XIV.

<sup>43</sup> See *id.* at 491-97.

<sup>44</sup> *Harris v. United States*, 536 U.S. 545, 568 (2002).

found guilty of selling illegal narcotics while in possession of a weapon.<sup>45</sup> The statutory minimum sentence that the judge could impose was five years imprisonment.<sup>46</sup> However, the sentencing judge, pursuant to 18 U.S.C. § 924(c)(1)(A), found by a preponderance of the evidence that the offender had “brandished” the firearm, increasing the minimum sentence the judge could impose to seven years in prison.<sup>47</sup> A majority of the Court ultimately concluded that this did not violate the offender’s Sixth Amendment rights.<sup>48</sup>

The plurality opinion distinguished this case, in which the mandatory *minimum* sentence a judge could impose was increased by judicial factfinding, from *Apprendi*, in which the mandatory *maximum* sentence a judge could impose was increased by judicial factfinding, and concluded that the former did not violate the Sixth Amendment.<sup>49</sup> It reasoned that, unlike increasing the maximum sentence an offender could receive, increasing the mandatory minimum sentence a judge can impose on an offender does not “extend the offender’s sentence beyond that authorized by the jury’s verdict.”<sup>50</sup> Instead, once a jury finds the offender guilty, it has “already found all the facts necessary to authorize the Government to impose the sentence.”<sup>51</sup> Since the jury has authorized a sentence anywhere within that statutory range, an offender’s Sixth Amendment rights are not violated.<sup>52</sup> Justice Breyer, while admitting that he could “not easily

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<sup>45</sup> *Id.* at 550 (citing 18 U.S.C. § 924(c)(1)(A)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 550-51.

<sup>48</sup> *Id.* at 568.

<sup>49</sup> *Id.* at 557-68.

<sup>50</sup> *Id.* at 557.

<sup>51</sup> *Id.* at 565.

<sup>52</sup> *Id.* at 557. The plurality also noted that *Apprendi* did not limit the judge’s ability to exercise his broad discretion to sentence an offender within the statutory range. *Id.* at 560. Since “the judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from” a jury, it makes no difference constitutionally that the state requires that judge to do sentence the offender to a lengthier sentence within that range. *Id.* at 565. Therefore, since increasing the minimum sentence to which a judge can sentence the offender does not “swell the penalty above what the law has provided for the acts charged,” it is distinguishable from increasing the maximum sentence a judge can impose and therefore does not violate the offender’s Sixth Amendment Rights. *Id.* at 562 (citing Bishop, Criminal Procedure § 85, at 54).

distinguish *Apprendi* from this case in terms of logic,” nevertheless concurred in the Court’s judgment based upon his belief that *Apprendi* had been wrongly decided.<sup>53</sup>

In *Blakely v. Washington*, the Court expanded on the doctrine announced in *Apprendi*.<sup>54</sup> In *Blakely*, the offender pled guilty to kidnapping his wife, a class B felony.<sup>55</sup> While the maximum sentence for a class B felony in Washington was ten years, for the specific facts to which the offender pled guilty, Washington law provided a sentencing range of 49 to 53 months.<sup>56</sup> Nevertheless, the judge found by a preponderance of the evidence that the offender committed the act with “deliberate cruelty,” and based upon this finding sentenced the offender to 90 months in prison.<sup>57</sup> Washington law allowed judges who found that an offender in a domestic violence case committed the crime with deliberate cruelty to enhance the offender’s sentence beyond the general statutory range.<sup>58</sup> The Court held that the judge’s sentence violated the offender’s Sixth Amendment right to a trial by jury.<sup>59</sup>

The Court determined that the relevant statutory maximum in this case for *Apprendi* purposes was not the ten year maximum sentence for class B felonies, but the 53 month maximum for the offender’s crime.<sup>60</sup> The Court held that the statutory maximum for purposes of the Sixth Amendment is not the maximum possible sentence a judge could statutorily impose on an offender who committed that particular crime, but rather is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the*

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<sup>53</sup> *Id.* at 569-72 (Breyer, J., concurring in part and concurring in the judgment).

<sup>54</sup> 542 U.S. 296, 301 (2004) (“This cases requires us to apply the rule we expressed in *Apprendi v. New Jersey* . . .”).

<sup>55</sup> *Id.* at 298-99.

<sup>56</sup> *Id.* at 299.

<sup>57</sup> *Id.* at 300.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 314

<sup>60</sup> *Id.* at 303-04.

offender.”<sup>61</sup> Since the maximum possible sentence the judge could impose on that offender without making any additional findings of fact was 53 months, that was the relevant statutory maximum, and any finding that increased the offender’s sentence above 53 months must be submitted to the jury and found beyond a reasonable doubt.<sup>62</sup>

In two subsequent cases, the Court applied the framework announced in *Apprendi* and expanded in *Blakely* to strike down sentencing systems in which judges found facts that increased the maximum sentence an offender could receive for his crime.<sup>63</sup> In *United States v. Booker*, the Court struck down the federal sentencing guidelines, which imposed a binding judicial sentencing range based upon judicial factfinding that was constitutionally indistinguishable from the Washington system struck down in *Blakely*.<sup>64</sup> Similarly, in *Cunningham v. California*, the Court held that California’s Determinate Sentencing law (DSL), which allowed a judge to increase an offender’s sentence above the sentence authorized by the jury’s verdict based upon a judicial finding of “aggravating factors,” also violated the offender’s

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<sup>61</sup> *Id.* at 303 (emphasis in original).

<sup>62</sup> *Id.* at 304-05.

<sup>63</sup> *See infra* text accompanying notes 64-65.

<sup>64</sup> 543 U.S. 220, 233 (“As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case.”) The federal sentencing system allowed a judge to depart from the binding sentencing range if he or she found “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” *Id.* at 234. The Court held that this did not immunize the federal sentencing guidelines from an *Apprendi* problem, explaining that:

Importantly . . . departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. It was for this reason that we rejected a similar argument in *Blakely*, holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for “substantial and compelling reasons,” that exception was not available for *Blakely* himself.

*Id.* at 234 (citing *Blakely v. Washington*, 542 U.S. 296, 299 (2004)).

Sixth Amendment rights.<sup>65</sup> These two cases reaffirmed the Court’s holdings in *Apprendi* and *Blakely*.

In sum, the Court’s pre-*Alleyne* jurisprudence repeatedly held that, in a determinate binding judicial sentencing system, any fact that increases the statutory maximum sentence that a judge can impose on an offender must be found by a jury and proven beyond a reasonable doubt.<sup>66</sup> The Court further clarified that the “statutory maximum” for purposes of the Sixth Amendment is the maximum sentence that the judge may impose on the particular offender based solely upon the jury’s verdict or his guilty plea.<sup>67</sup> On the other hand, the Court held that this restriction did not apply to the statutory minimum sentence that a judge can impose on an offender.<sup>68</sup> In other words, if a statute stated that an offender convicted of a particular crime must receive a sentence between five and ten years in prison, any additional fact that increased the maximum sentence a judge could impose beyond ten years must be found by a jury. On the other hand, any fact that increased the minimum sentence a judge could impose above five years, with the maximum staying the same, did not need to be found by a jury.

All of these cases involved judicial sentencing.<sup>69</sup> Specifically, they all involved binding judicial sentencing systems.<sup>70</sup> The Court repeatedly stated in its cases that a discretionary

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<sup>65</sup> 549 U.S. 270, 277, 293 (2007). California’s sentencing system proscribed three possible terms of imprisonment for a crime, “a lower, middle, and upper term sentence.” *Id.* at 277. The judge was forced by statute to sentence the offender to the middle term unless it found “circumstances in aggravation or mitigation” that justified the lower and upper sentence. *Id.* The Court held that for *Apprendi* purposes, the middle sentence constitutes the statutory maximum because the “aggravating circumstances [necessary to sentence an offender to the upper term] depend on facts found discretely and solely by the judge.” *Id.* at 288. Therefore, the Court held that allowing the judge to find an aggravating factor that was not part of the jury’s verdict or the offender’s plea to increase the offender’s sentence violated his Sixth Amendment rights. *Id.* at 288-89, 293.

<sup>66</sup> See *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490); *United States v. Booker*, 543 U.S. 220, 244 (2005).

<sup>67</sup> *Blakely*, 542 U.S. at 303.

<sup>68</sup> *Harris v. United States*, 536 U.S. 545, 557 (2002).

<sup>69</sup> See *Hall*, *supra* note 6, at 675 (“In sum, the Supreme Court’s constitutional sentencing cases establish that a defendant’s Sixth Amendment rights are violated when the sentencing judge ‘impose[s] a sentence greater than the maximum he could have imposed under state law without the challenged factual finding.’”).

sentencing system does not violate the Sixth Amendment, as judges historically have had broad discretion to sentence an offender within the range proscribed by statute.<sup>71</sup> Furthermore, in none of these cases did the Court address the issue of parole availability.<sup>72</sup> Thus, it still remains to be seen what effect, if any, the availability of parole has on an offender's Sixth Amendment rights under *Apprendi*.

## B. Justice Scalia's Dictum

While the Court's holdings have not yet addressed the issue of parole eligibility, there was discussion around the edges that provided some insight into the views of the Justices on this issue.<sup>73</sup> Particularly, Justice Scalia included language in his concurring opinion in *Apprendi* and the majority opinion in *Blakely* that would seem to argue against applying *Apprendi* to an indeterminate sentencing system.<sup>74</sup> Justice Scalia's arguments were not binding authority, as they constituted *dictum* in *Blakely*,<sup>75</sup> and were part of a concurring opinion in *Apprendi* that was not joined by a majority of the Court.<sup>76</sup> Nevertheless, following *Blakely*, it provided persuasive authority that lower courts could draw from when determining the constitutionality of judicial sentencing in an indeterminate sentencing system.

In *Apprendi*, Justice Scalia joined the opinion of the Court<sup>77</sup> and wrote a separate two-page concurrence in response to Justice Breyer's dissenting opinion.<sup>78</sup> Justice Scalia's reasoning

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<sup>70</sup> See Hall, *supra* note 6, at 675 (concluding that the Court has held that any sentencing system that allows a judge to impose a harsher sentence based upon judicial factfinding must be advisory).

<sup>71</sup> See *United States v. Booker*, 543 U.S. 220 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within the statutory range.") (citing *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000)).

<sup>72</sup> Hall, *supra* note 6.

<sup>73</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 498 (Scalia, J., concurring); *Blakely v. Washington*, 542 U.S. 296, 309 (2004).

<sup>74</sup> *Id.*

<sup>75</sup> See *infra* text accompanying note 84.

<sup>76</sup> See *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

<sup>77</sup> See *id.* at 468.

<sup>78</sup> See *id.* at 498-99 (Scalia, J., concurring).

indicates that he believes that the Sixth Amendment does not apply to the lesser sentence in indeterminate sentencing systems.<sup>79</sup> In response to Justice Breyer’s assertions that a system in which a judge finds facts that affect an offender’s sentence is the only fair way to determine sentences, Justice Scalia argued:

I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a prison sentence of 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted). . . . the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*.<sup>80</sup>

This is strikingly similar to the language Justice Scalia used two years later in his majority opinion in *Blakely v. Washington*.<sup>81</sup> In *Blakely*, Justice Scalia, in response to Justice O’Connor’s dissent, explained why an indeterminate sentencing system does not implicate the Sixth Amendment.<sup>82</sup> Justice Scalia argued:

Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the offender has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in prison. In a system that punishes burglary with a 10–year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10–year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.<sup>83</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 498 (emphasis in original).

<sup>81</sup> *Blakely v. Washington*, 542 U.S. 296, 309 (2004).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*



This language was clearly *dictum*, as the Court did not base its opinion upon whether the Washington sentencing system was determinate or indeterminate.<sup>84</sup> Nevertheless, it provides persuasive authority for the Court’s view on the subject.

Justice Scalia’s *dicta* provide two main arguments against applying *Apprendi* to the sentence an offender must serve before being considered for parole in an indeterminate sentencing system. First, he argues that an offender has no legal right to a sentence less than the maximum sentence authorized by the jury, and therefore the Sixth Amendment does not apply to factfinding that results in a sentence that is less than or equal to that maximum.<sup>85</sup> This position is supported by the Court’s opinion in *Harris* that a judge may find facts that increase the mandatory minimum sentence a judge can impose on an offender.<sup>86</sup> If an offender has no Sixth Amendment right to a sentence below the maximum sentence authorized by a jury’s verdict, then factfinding that increases the amount of time the offender *must* serve would not be subject to *Apprendi* because the jury’s sentence authorizes any sentence up to the maximum the offender *could* serve for that crime.

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<sup>84</sup> In fact, that Court never even stated in its opinion whether Washington’s system was indeterminate or not. *Id.* at 298-331. “*Obiter dictum*” (*dictum* for short) is “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).” *Obiter Dictum*, BLACK’S LAW DICTIONARY (10th ed. 2014), available at Westlaw BLACKS. Since the Court did not even mention whether Washington’s system was determinate or indeterminate when making its decision, it clearly could not have been necessary for their decision and therefore Justice Scalia’s statements on indeterminate sentencing is *dictum*.

<sup>85</sup> *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (“I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a prison sentence of 30 years . . . the criminal will never get *more* punishment than he bargained for when he did the crime.”) (emphasis in original); *Blakely*, 542 U.S. at 309 (“Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the offender has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.”) (emphasis in original).

<sup>86</sup> See *supra* text and accompanying notes 50-52.

Secondly, Justice Scalia argues that in an indeterminate system an offender has no reasonable expectation of receiving a sentence below the statutory maximum for that crime.<sup>87</sup>

When an offender commits a crime, he knows that he is risking a sentence up to the statutory maximum.<sup>88</sup> Thus, since “the criminal will never get *more* punishment than he bargained for when he did the crime,” the Sixth Amendment does not apply.<sup>89</sup>

The Michigan Supreme Court relied heavily on Justice Scalia’s arguments when it upheld Michigan’s indeterminate sentencing system from a constitutional challenge after *Blakely*.<sup>90</sup> However, this persuasive authority that indicated that *Apprendi* does not apply in an indeterminate system has been undermined by binding authority from the Court’s 2013 decision in *Alleyne v. United States*.<sup>91</sup> Thus, courts will need to reconsider *Apprendi*’s application to indeterminate sentencing systems post-*Alleyne*.

### III. CHALLENGES TO MICHIGAN’S SENTENCING SYSTEM PRE-*ALLEYNE*

Michigan has an indeterminate sentencing system in which the judge has discretion, within a binding sentencing range, to impose the sentence that an offender must serve before being considered for parole.<sup>92</sup> The binding sentencing range within which the judge must impose a sentence is determined by judicial factfinding.<sup>93</sup> The Michigan Supreme Court in *People v. Drohan* held that *Apprendi* does not apply to the maximum sentence a judge can impose that an

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<sup>87</sup> *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (“the criminal will never get *more* punishment than he bargained for when he did the crime.”); *Blakely*, 542 U.S. at 309 (“In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in prison.”).

<sup>88</sup> *See supra* note 87.

<sup>89</sup> *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)

<sup>90</sup> *See infra* text and accompanying notes 134-139, 143-146, 161-164, 172-180.

<sup>91</sup> *See infra* Sections IV.A-B.

<sup>92</sup> MICH. COMP. LAWS ANN. (hereinafter “MCL”) § 769.8(1); MCL § 769.34(2)(b).

<sup>93</sup> *People v. Drohan*, 475 Mich. 140, 142-43 (2006) (stating that Michigan’s sentencing system “allows a trial court to set an offender’s minimum sentence on the basis of factors determined by a preponderance of the evidence.”).

offender *must* serve before being considered for parole.<sup>94</sup> The Michigan Supreme Court based its decision primarily upon the assumption that the Sixth Amendment only protects an offender's right to a sentence *within* the range authorized by the jury's verdict.<sup>95</sup> Therefore, the Michigan Supreme Court concluded that the Sixth Amendment does not protect an offender's sentence that he *must* serve before being considered for parole because the jury's verdict authorizes a sentence up to the statutory maximum that the offender *could* serve.<sup>96</sup>

#### A. Michigan's Indeterminate Binding Sentencing System

The Michigan sentencing system is an indeterminate system, meaning that a prisoner is eligible for early release on parole prior to serving his full sentence.<sup>97</sup> Thus, an offender in Michigan receives two sentences, one for the length of time he *must* serve before being considered for parole, and one for the maximum amount of time he *could* serve if parole is not granted.<sup>98</sup> The sentencing judge has no discretion in determining the maximum amount of time a prisoner *could* serve, as that sentence is fixed by statute based upon the felony class of the conviction.<sup>99</sup> However, a sentencing judge does have discretion, within a particular guideline range, to choose the minimum sentence a prisoner *must* serve before he will be considered for parole.<sup>100</sup>

In order to determine the proper sentencing range within which the judge must sentence an offender that the offender *must* serve in prison, the court assigns the offender a Prior Record

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<sup>94</sup> 474 Mich. 140, 164 (2006).

<sup>95</sup> Apprendi v. New Jersey, 530 U.S. 466, 498 (Scalia, J., concurring); Blakely v. Washington, 542 U.S. 296, 309 (2004); Harris v. United States, 536 U.S. 545, 557-68 (2002).

<sup>96</sup> Drohan, 475 Mich. at 162-63.

<sup>97</sup> See MCL § 769.8(1); Drohan, 475 Mich. at 161 (“[I]n all but a few cases, a sentence imposed in Michigan is an indeterminate sentence.”).

<sup>98</sup> Mason, *supra* note 7.

<sup>99</sup> MCL § 769.8(1); Drohan, 475 Mich. at 161 (an offender's “maximum sentence is not determined by the trial court, but rather is set by law.”).

<sup>100</sup> MCL § 769.8(1); MCL § 769.34(2)(b).

Variable (PRV) score, and an Offense Variable (OV) score.<sup>101</sup> The judge calculates an offender's PRV score by examining the nature and number of the offender's prior convictions and comparing them to the requirements of multiple PRVs.<sup>102</sup> For example, a judge determines an offender's PRV 1 score based upon the number of "high severity" felony convictions he has on his record.<sup>103</sup> If the offender has one prior "high severity" felony conviction, the court assesses him 25 points; if he has two prior "high severity" felony convictions, the court assesses him 50 points; and if he has three or more prior high severity felony convictions, the court assesses him 75 points.<sup>104</sup> Other Michigan PRVs that the court must score against an offender include: the number of prior low severity convictions (PRV 2),<sup>105</sup> the number of prior high severity adjudications (PRV 3),<sup>106</sup> and the number of prior misdemeanor convictions (PRV 5).<sup>107</sup>

In order to determine an offender's OV score, a judge must find, by a preponderance of the evidence,<sup>108</sup> that the offender committed his crime in a particular way or that the crime caused a particular result.<sup>109</sup> For example, a judge determines an offender's OV 1 score based upon what kind of weapon the offender used when committing the crime and how he used it.<sup>110</sup> If the judge finds that "[a] weapon was displayed or implied" during the commission of the felony, he scores the offender five points.<sup>111</sup> However, if the judge finds that "[a] firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other

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<sup>101</sup> MCL § 777.21.

<sup>102</sup> *Id.*

<sup>103</sup> MCL § 777.51.

<sup>104</sup> *Id.*

<sup>105</sup> MCL § 777.52

<sup>106</sup> MCL § 777.53

<sup>107</sup> MCL § 777.55.

<sup>108</sup> *People v. Drohan*, 475 Mich. 140, 142-43 (2006) (stating that Michigan's sentencing system "allows a trial court to set an offender's minimum sentence on the basis of factors determined by a preponderance of the evidence.").

<sup>109</sup> MCL § 777.22.

<sup>110</sup> MCL § 777.31.

<sup>111</sup> MCL § 777.31(1)(e).

cutting or stabbing weapon,” he scores the offender 25 points.<sup>112</sup> Other OV factors that judges find to determine an offender’s OV score include: whether the offense caused psychological injury to a member of the victim’s family (OV 5),<sup>113</sup> the number of victims to the crime (OV 9),<sup>114</sup> and whether or not “the offender was a leader in a multiple offender situation” (OV 14).<sup>115</sup>

Once the court has scored all the individual PRVs and OVs, those individual scores are added to make one total PRV score and one total OV score. The court applies these scores to the sentencing grid that correlates with the grade of felony for the crime.<sup>116</sup> The court then locates the offender’s PRV score on the horizontal axis of the grid, and his OV score on the vertical axis.<sup>117</sup> At the intersection of the offender’s OV and PRV score is the sentencing range within which the court must sentence the offender.<sup>118</sup> For example, for a class A felony, a judge must sentence an offender with a PRV score of 30 and an OV score of 25 to a mandatory term of imprisonment between 81 and 135 months.<sup>119</sup> The longest amount of time the judge can sentence an offender that he *must* serve in prison, in this example 135 months, is sometimes referred to as the offender’s “maximum-minimum” sentence.<sup>120</sup>

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<sup>112</sup> MCL § 777.31(1)(a).

<sup>113</sup> MCL § 777.35.

<sup>114</sup> MCL § 777.39.

<sup>115</sup> MCL § 777.44.

<sup>116</sup> MCL § 777.21(1)(c).

<sup>117</sup> See e.g., MCL § 777.62 (the minimum sentencing grid for class A felonies).

<sup>118</sup> *Id.* Both axes on the grid are subdivided into smaller categories. *Id.* For example, for a class A felony, an offender with 15 PRV points is placed in the C category of PRV scores, which is the category for any offender with a PRV score between 10 and 24 points. *Id.* Additionally, an offender with an OV score of 25 points is placed in category II, which is the category for any offender with an OV score between 20 and 39 points. *Id.* These subcategories determine where on the x-axis and y-axis an offender’s scores are, which ultimately determines his minimum sentencing range. *Id.*

<sup>119</sup> MCL § 777.62; MCL § 769.34(2). “A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL § 769.34(3). However, as the Court explained in *United States v. Booker*, the ability of a judge to depart from the guidelines does not immunize a sentencing system from an *Apprendi* challenge. See *supra* note 64. Therefore, the fact that a Michigan judge may depart from the guidelines in certain individual circumstances is irrelevant for *Apprendi* purposes. See *supra* note 64.

<sup>120</sup> See *People v. Drohan*, 475 Mich. 140, 162, 163 (2006).

In sum, the Michigan sentencing system is an indeterminate system in which the maximum sentence an offender *could* serve is fixed by statute, while the amount of time the offender *must* serve before being considered for parole is determined by the judge based upon a binding judicial sentencing range.<sup>121</sup> In order to determine the proper sentencing range, the judge makes findings of facts to determine the offender's OV and PRV score.<sup>122</sup> The judge then applies those scores to the sentencing grid for the applicable felony class to find the range within which he can impose the offender's mandatory sentence.<sup>123</sup>

Because the United States Supreme Court has held that the fact of an offender's prior convictions need not be found by a jury beyond a reasonable doubt, judicial factfinding of an offender's PRV score in Michigan does not implicate *Apprendi*.<sup>124</sup> However, Michigan's OV scoring system is similar to Washington's sentencing system that was struck down in *Blakely*. The only constitutionally significant difference between the two sentencing system is that the Michigan sentencing system is indeterminate.<sup>125</sup> Thus, considering the similarities, Michigan's sentencing system was ripe for a legal challenge in the years following *Blakely*.

#### B. The Challenge to Michigan's Indeterminate Sentencing System after *Blakely*.

The Michigan Supreme Court addressed the constitutionality of Michigan's sentencing system after *Blakely* in the 2006 case *People v. Drohan*.<sup>126</sup> In *Drohan*, the offender was

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<sup>121</sup> See *supra* text accompanying notes 99-100.

<sup>122</sup> See *supra* text accompanying notes 101-115.

<sup>123</sup> MCL § 769.34(2).

<sup>124</sup> See *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490); *United States v. Booker*, 543 U.S. 220, 244 (2005).

<sup>125</sup> See *infra* text accompanying notes 149-151.

<sup>126</sup> *People v. Drohan*, 475 Mich. 140 (2006). The Michigan Supreme Court had briefly addressed the issue two years earlier in a footnote. See *People v. Claypool*, 470 Mich. 715, 730 n.14 (2004). However, this language was *dictum*, and therefore was not binding precedent. *Drohan*, 475 Mich. at 167 (2006) (Kelly, J., concurring in part and dissenting in part); Christopher M. Thompson, *Redefining "Statutory Maximum": The Demise of Michigan's Presumptive Indeterminate Sentencing Guidelines at the Hands of Blakely v. Washington*, 83 U. DET. MERCY L. REV. 137, 150 (2006).

convicted of third-degree criminal sexual conduct (CSC) and two counts of fourth degree sexual conduct.<sup>127</sup> During sentencing, the judge scored the offender ten points for OV 4 (psychological injury to a victim) and 15 points for OV 10 (exploitation of a vulnerable victim).<sup>128</sup> This judicial factfinding increased the offender’s mandatory minimum sentencing range from 36 to 90 months in prison,<sup>129</sup> to 51 to 127 months in prison.<sup>130</sup> The judge ultimately sentenced the offender to a mandatory sentence of 127 months in prison, with 360 months serving as the fixed statutory maximum sentence.<sup>131</sup> The offender challenged the sentence, arguing that the judicial factfinding that increased the maximum sentence that the judge could impose that he *must* serve before being considered for parole (his “maximum-minimum” sentence) violated his Sixth Amendment rights.<sup>132</sup> The Michigan Supreme Court ultimately concluded that this judicial factfinding did not violate the offender’s Sixth Amendment rights.<sup>133</sup>

The Michigan Supreme Court held that because Michigan’s sentencing system was an indeterminate system, judicial factfinding that increased an offender’s “maximum-minimum” sentence was not unconstitutional under *Blakely*.<sup>134</sup> The Court offered three main reasons why increasing an offender’s “maximum-minimum” sentence based upon judicial factfinding did not violate his Sixth Amendment rights.<sup>135</sup> First, the Court argued that because an offender knows that he could face a term of imprisonment up to the statutory maximum, the Sixth Amendment does not entitle him to a jury determination of his “maximum-minimum.”<sup>136</sup> This argument echoes the “reasonable expectation” argument raised by Justice Scalia in *Apprendi* and

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<sup>127</sup> 475 Mich. 140, 144 (2006).

<sup>128</sup> *Id.* at 145.

<sup>129</sup> *Id.* at 167.

<sup>130</sup> *Id.* at 145 n.3

<sup>131</sup> *Id.* at 145.

<sup>132</sup> *Id.*

<sup>133</sup> *People v. Drohan*, 475 Mich. 140, 164 (2006).

<sup>134</sup> *Id.* at 159-65

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 163.

*Blakely*.<sup>137</sup> The Court reasoned that the offender in this case committed his crime, “knowing that he was risking 30 years in prison. When [he] was, in fact, sentenced to a maximum of 30 years in prison, he received all the protections he was entitled to under the Sixth Amendment.”<sup>138</sup> Thus, because an offender knows that he could serve up to the full statutory maximum, he is not entitled to a jury determination of any sentence below that.<sup>139</sup>

Second, the Court argued that a jury need not find facts that determine the offender’s “maximum-minimum” sentence because an offender may not be released immediately after serving his mandatory sentence.<sup>140</sup> After an offender serves his mandatory sentence, the parole board has the discretion to keep him in prison until he has served the entire statutory maximum.<sup>141</sup> Since the offender is not entitled to release at any point prior to serving the full statutory maximum, a jury finding is not required to increase the sentence at which the offender is eligible for parole.<sup>142</sup>

Finally, the Court reasoned that, unlike the sentences overturned in the *Apprendi* line of cases, the “maximum-minimum” sentence imposed in the Michigan sentencing system “will always fall within the range authorized by the jury’s verdict.”<sup>143</sup> Since a conviction authorizes a sentence up to the fixed statutory maximum, any sentence below that is “derived from the jury’s verdict,”<sup>144</sup> and the Sixth Amendment does not entitle an offender to a sentence below that

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<sup>137</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 498 (Scalia, J., concurring); *Blakely v. Washington*, 542 U.S. 296, 309 (2004); *see supra* text accompanying notes 87-89.

<sup>138</sup> *Drohan*, 475 Mich. at 163.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 163-64.

<sup>143</sup> *Id.* at 162.

<sup>144</sup> *People v. Drohan*, 475 Mich. 140, 162 (2006).



statutory maximum.<sup>145</sup> Therefore, judges have the discretion to sentence an offender anywhere below that set statutory maximum for the offender's crime.<sup>146</sup>

While stated a number of different ways, the Michigan Supreme Court's opinion was based upon one main assumption, that the Sixth Amendment only protects an offender from an increase in the amount of time he *could* serve in prison. Since a Michigan offender *could* always serve the full statutory maximum, imposition of a lesser sentence for the time he *must* serve is not protected by the Sixth Amendment. The Court drew support for this conclusion from Justice Scalia's concurring opinion in *Apprendi* and *dictum* in *Blakely*.<sup>147</sup> Thus, prior to *Alleyne*, the Michigan Supreme Court concluded that *Apprendi* does not apply to the sentence an offender must serve before being considered for parole in an indeterminate system.<sup>148</sup>

### C. Two Statutory Maximums?

To determine the persuasiveness of the Michigan Supreme Court's conclusion, it is helpful to compare Michigan's indeterminate system with the Washington determinate system that was invalidated in *Blakely*. In both systems, the range of sentences that a judge may impose is increased due to judicial factfinding.<sup>149</sup> In other words, both constitute a binding judicial sentencing range.<sup>150</sup> The only relevant difference between the two sentencing systems is that one

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<sup>145</sup> *Id.* at 163 ("In short, the Sixth Amendment ensures that an offender will not be incarcerated for a term longer than that authorized by the jury upon a finding of guilt beyond a reasonable doubt. However, the Sixth Amendment does not entitle an offender to a sentence *below* that statutory maximum.") (emphasis in original) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring)).

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 159-64. In its analysis section, the Michigan Supreme Court cites twice to Justice Scalia's concurrence in *Apprendi* and once to his *dictum* in *Blakely*. *See id.* In contrast, the Michigan Supreme Court cites to other United States Supreme Court decisions in its analysis section five times, twice in support of a quote from Justice Scalia's concurrence in *Apprendi*, once simply citing the holding of *Blakely*, and two other times citing the history of the Sixth Amendment. *Id.* These citations show how much weight the Michigan Supreme Court gave Justice Scalia's views on the Sixth Amendment when determining the outcome of this case.

<sup>148</sup> *People v. Drohan*, 475 Mich. 140, 164 (2006).

<sup>149</sup> *Compare Blakely v. Washington*, 542 U.S. 296, 299-300, with MCL § 769.34(2)(b), and MCL § 777.21.

<sup>150</sup> *See supra* note 149.

is determinate and the other is indeterminate.<sup>151</sup> The United States Supreme Court has repeatedly held that in binding judicial sentencing system, a judge may not increase the statutory maximum based upon judicial fact-finding.<sup>152</sup> Thus, the first issue is what constitutes a statutory maximum in an indeterminate system.

In a determinate sentencing system, like the one in *Blakely*, there is only one statutory maximum. The statutory maximum in a determinate system is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the offender.*”<sup>153</sup> Since a judge in a determinate system imposes only one sentence, the sentence an offender will spend in prison, the maximum sentence a judge can impose based upon the jury’s verdict is the statutory maximum for *Apprendi* purposes.

However, in an indeterminate system, there are two potential statutory maximums for *Apprendi* purposes. A judge in an indeterminate system imposes two sentences, one for the amount of time the offender *must* serve in prison, and one for the amount of time the offender *could* serve in prison.<sup>154</sup> Thus, an indeterminate system contains two “maximum sentence[s] the judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the offender,”<sup>155</sup> the maximum sentence a judge can impose that the offender *must* serve, and the maximum sentence a judge can impose that the offender *could* serve if not released on parole.<sup>156</sup>

Once we determine that there are two statutory maximums in an indeterminate system, the next issue is whether both statutory maximums are protected by the requirements set forth in *Apprendi*. If *Apprendi* applies to the maximum sentence a judge can impose that an offender

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<sup>151</sup> Compare *Blakely*, 542 U.S. at 298-300, with MCL § 769.8(1), and *People v. Drohan*, 475 Mich. 140, 161 (2006).

<sup>152</sup> See *Blakely*, 542 U.S. at 301 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490); *United States v. Booker*, 543 U.S. 220, 244 (2005).

<sup>153</sup> *Blakely*, 542 U.S. at 302 (emphasis in original).

<sup>154</sup> Thompson, *supra* note 126.

<sup>155</sup> *Blakely*, 542 U.S. at 302.

<sup>156</sup> Mason, *supra* note 7; Thompson, *supra* note 126.

must serve, Michigan’s sentencing system violates the Sixth Amendment because judicial fact finding increases the maximum sentence the judge may impose on the offender.<sup>157</sup> However, if *Apprendi* applies only to the maximum amount of time an offender *could* serve if not released on parole, Michigan’s sentencing system prior to *Alleyne* did not violate the Sixth Amendment because that maximum is fixed by statute and may not be increased by judicial factfinding.<sup>158</sup>

The Michigan Supreme Court in *Drohan* concluded that the maximum amount of time an offender *could* spend in prison was the only statutory maximum protected by *Apprendi*.<sup>159</sup> However, it is not clear why this should be the case. In *Blakely*, the Court determined that the sentencing range for the particular offender was the statutory maximum under *Apprendi*, not the maximum the judge could impose for that crime under statute.<sup>160</sup> Of the three main reasons provided by the Michigan Supreme Court for its conclusion, only one of them logically flows from Supreme Court precedent from the *Apprendi* line of cases.

First, the Michigan Supreme Court argued that, because an offender who commits a crime can “expect” to receive a sentence as high as the maximum sentence he could serve under statute, the Sixth Amendment does not apply to his “maximum-minimum.”<sup>161</sup> This argument echoes Justice Scalia’s concurring opinion in *Apprendi* and *dictum* in *Blakely*.<sup>162</sup> However, the Court’s *Apprendi* line has never indicated that a prisoner’s “reasonable expectations” were relevant to the application of the Sixth Amendment. In fact, this “expectation” argument, if

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<sup>157</sup> Thompson, *supra* note 126.

<sup>158</sup> Thompson, *supra* note 126.

<sup>159</sup> People v. Drohan, 475 Mich. 140, 164 (2006); Thompson, *supra* note 126, at 151 (“The Michigan Supreme Court has adopted one possible, reasonable definition of the term: that a ‘statutory maximum’ is simply the period a defendant *may* serve.”) (emphasis added).

<sup>160</sup> Blakely v. Washington, 542 U.S. 296, 303-04 (2004); Hall, *supra* note 6, at 685 (arguing that the Michigan Supreme Court’s definition of statutory maximum in *Drohan* “mirrors the argument that the Supreme Court rejected in *Blakely*.”)

<sup>161</sup> *Drohan*, 475 Mich. at 163.

<sup>162</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 498 (Scalia, J., concurring); *Blakely v. Washington*, 542 U.S. 296, 309 (2004); *see supra* text accompanying notes 87-89.

accepted as convincing, could similarly be applied to undo the entire line of *Apprendi* jurisprudence. Is it not true that when the offender in *Apprendi* committed his crime due to racial bias he did so knowing that he was risking 20 years in prison? After all, New Jersey statute clearly stated that an offender who committed an offense that was “motivated by racial bias” would receive a heightened sentence.<sup>163</sup> Nevertheless, the Court held that the offender’s Sixth Amendment rights were violated because a fact that enhanced the maximum sentence that the judge could impose was not found by a jury.<sup>164</sup> Thus, the relevant issue under *Apprendi* is not whether an offender can “expect” to receive up to a particular sentence when he commits a crime, but rather whether a jury must find a fact that increases the maximum sentence that a judge can impose on an offender.

In addition, even if an offender’s expectation is a relevant consideration in determining an offender’s Sixth Amendment rights, the Michigan Supreme Court’s “expectation” argument ignores an offender’s expectation in the possibility of parole. It is inescapable that an offender in the Michigan system should expect that he *could* spend up to the fixed statutory maximum in prison.<sup>165</sup> However, it is not reasonable for an offender to “expect” that he *must* serve additional time before being considered for parole based upon judicial factfinding. By ignoring an offender’s “expectation” of the amount of time he must serve before being eligible for parole, the Michigan Supreme Court’s “expectation” argument presumes its own conclusion. For these two reasons, the “expectation” argument does not support the conclusion that the maximum sentence a judge can impose that an offender *must* serve in prison in an indeterminate sentencing system should be exempt from *Apprendi* protections.

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<sup>163</sup> *Apprendi*, 530 U.S. at 468-70 (citing N.J. STAT. ANN. § 2C:39-4(a) (West 1995); § 2C:43-6(a)(2)).

<sup>164</sup> *Id.* at 491-97.

<sup>165</sup> *Drohan*, 475 Mich. at 163.

Additionally, the Michigan Supreme Court argued that because an offender has no guarantee that he will be released before he serves the fixed statutory maximum for that crime, the judicial determination of the amount of time the offender must serve in prison is not subject to *Apprendi*.<sup>166</sup> In essence, the Court is saying that because the sentence a judge imposes that the offender *must* serve may not ultimately affect the total time he actually spends in prison, a judge may find facts that increase that range.<sup>167</sup> However, this argument is contrary to the Court's *Apprendi* jurisprudence, as increasing the range of sentences an offender is subject to in a determinate system does not "guarantee" that he will receive a greater sentence either.<sup>168</sup>

For example, when the range of sentences that a judge may impose on an offender is increased from five to ten years to five to fifteen years, the judge is not obligated to sentence the offender to a term of imprisonment longer than the original maximum; he could still impose a sentence that is ten years or less.<sup>169</sup> Even though increasing the maximum sentence a judge may impose in a determinate system does not "guarantee" a longer sentence for the offender, the Court would still find that any increase violated the offender's Sixth Amendment rights.<sup>170</sup> Similarly, while increasing the time an offender *must* spend in prison does not "guarantee" that an offender will spend more time in prison than he would have without the increase, doing so still increases the maximum sentence that a judge could impose on an offender.<sup>171</sup> Therefore, this

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<sup>166</sup> *Id.* at 164.

<sup>167</sup> *Id.*

<sup>168</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2162 & n.3 (2013) ("[I]f a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range (*i.e.*, the range applicable without that aggravating fact.") (citing *Apprendi v. New Jersey*, 530 U.S. 466, 474 (2000)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See King*, *supra* note 5 ("That a paroling authority may ultimately decide not to release the defendant when he first becomes eligible is irrelevant. What is crucial is that the legislature has narrowed the penalty range available to the trial judge once the specified fact is determined.").

argument does not adequately differentiate a determinate from an indeterminate system for *Alleyne* purposes.

The Michigan Supreme Court’s final argument, however, did provide an adequate justification, prior to *Alleyne*, as to why an offender’s “maximum-minimum” should not be subject to *Apprendi*. The Court argued that a jury’s verdict authorizes any sentence for the offender up to the fixed statutory maximum.<sup>172</sup> Therefore, any sentence below that fixed maximum is derived from the jury’s verdict.<sup>173</sup> The Court cites to Justice Scalia’s *dicta* in *Apprendi* and *Blakely* to support its argument.<sup>174</sup> Furthermore, while the Court did not feature *Harris* prominently when making this argument, that case also supports their position.<sup>175</sup> In *Harris*, the United States Supreme Court held that a finding a fact that increases the minimum sentence a judge may impose on an offender does not need to be found by a jury.<sup>176</sup> The Court reasoned that increasing the mandatory minimum sentence a judge must impose does not “extend the offender’s sentence beyond that authorized by the jury’s verdict”<sup>177</sup> because the jury has “already found all the facts necessary to authorize the Government to impose” any sentence within the sentencing range.<sup>178</sup> This is also true in Michigan’s indeterminate sentencing system. Once a jury finds an offender guilty, it has authorized a term of imprisonment up to the fixed statutory maximum.<sup>179</sup> Thus, when the judge sets an offender’s “maximum-minimum,” it is not increasing the offender’s punishment from that authorized by the jury.<sup>180</sup>

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<sup>172</sup> People v. Drohan, 475 Mich. 140, 162-63 (2006).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 159, 163.

<sup>175</sup> *See id.* at 159-64.

<sup>176</sup> Harris v. United States, 536 U.S. 545, 568 (2002).

<sup>177</sup> *Id.* at 557.

<sup>178</sup> *Id.* at 565.

<sup>179</sup> People v. Drohan, 475 Mich. 140, 161-62 (2006).

<sup>180</sup> *Id.*

If the Sixth Amendment is viewed as ensuring that the sentence an offender receives is within the range authorized by the jury's verdict, then *Drohan* was correctly decided. This view is supported by Justice Scalia's *dicta* in *Apprendi* and *Blakely*<sup>181</sup> and the United States Supreme Court's decision in *Harris*.<sup>182</sup> Specifically, this reasoning derives from the Court's differentiation between a fact that increases the *minimum* sentence a judge may impose, and a fact that increases the *maximum* sentence a judge may impose.<sup>183</sup> Therefore, based upon the United States Supreme Court's decision in *Harris*, the Michigan Supreme Court's decision in *Drohan* was on solid legal ground prior to *Alleyne v. United States*.

#### IV. ALLEYNE V. UNITED STATES AND PEOPLE V. LOCKRIDGE

Prior to *Alleyne*, Michigan's sentencing system did not appear to tread on an individual's Sixth Amendment rights. However, the United States Supreme Court's opinion in *Alleyne v. United States*, overruling its previous decision in *Harris*,<sup>184</sup> effectively wiped away any foundation to differentiate the statutory maximum the offender *must* serve from the statutory maximum the offender *could* serve.<sup>185</sup> As such, the Michigan Supreme Court's opinion in *Drohan* is no longer on solid legal ground, and therefore should be overturned. In addition, *Alleyne v. United States* rendered raising the minimum sentence that the judge may impose on an offender that he must serve unconstitutional.<sup>186</sup> As such, Michigan's sentencing system is currently unconstitutional in so far as it allows the judge to find facts that increases the minimum and maximum sentence a judge may impose that the offender *must* serve in prison.<sup>187</sup>

##### A. *Alleyne v. United States*

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<sup>181</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 498 (Scalia, J., concurring); *Blakely v. Washington*, 542 U.S. 296, 309 (2004); *see supra* text accompanying notes 85-86.

<sup>182</sup> *See supra* notes 49-53.

<sup>183</sup> *See supra* notes 49-53.

<sup>184</sup> *Harris v. United States*, 536 U.S. 545, 557-68 (2002).

<sup>185</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2161-63 (2013).

<sup>186</sup> *See infra* Subsection IV.B.2.

<sup>187</sup> *See infra* Sections IV.A-B.

In *Alleyne v. United States*, Justice Breyer altered his position, and joined four other justices in overruling *Harris v. United States*.<sup>188</sup> In *Harris*, the Court had held that a finding that increased the minimum sentence that a judge could impose on an offender need not be found by a jury beyond a reasonable doubt.<sup>189</sup> The majority in *Alleyne* concluded that *Harris* was contrary to the Court’s holding in *Apprendi*, and held that “the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum.”<sup>190</sup>

The Court, citing to Justice Breyer’s concurrence in *Harris*, stated that “[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime.”<sup>191</sup> Similar to increasing the statutory maximum, increasing the prescribed floor for a sentence “aggravate[s] the punishment,”<sup>192</sup> because it narrows the offender’s sentencing range and “require[s] the judge to impose a higher punishment than he might wish.”<sup>193</sup> It is irrelevant that a judge could still impose a sentence above the new statutory minimum without the additional finding,<sup>194</sup> because raising the mandatory minimum “alters the legally prescribed punishment so as to aggravate it.”<sup>195</sup> Thus, the Court overruled *Harris* and held that any fact that increased the maximum *or* minimum possible sentence that a judge may impose must be found by a jury beyond a reasonable doubt.<sup>196</sup>

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<sup>188</sup> Compare *Harris*, 536 U.S. at 569-72 (Breyer, J., concurring in part and concurring in the judgment), with *Alleyne*, 133 S. Ct. at 2166 (Breyer, J., concurring in part and concurring in the judgment).

<sup>189</sup> *Harris*, 536 U.S. at 550-51.

<sup>190</sup> *Alleyne*, 133 S. Ct. at 2160.

<sup>191</sup> *Id.* at 2160 (citing *Harris*, 536 U.S. at 569-72 (Breyer, J., concurring in part and concurring in the judgment)).

<sup>192</sup> *Id.* at 2161 (emphasis removed).

<sup>193</sup> *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 522 (2013) (Thomas, J., concurring)).

<sup>194</sup> *Id.* at 2161-62.

<sup>195</sup> *Id.* at 2161.

<sup>196</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013)



Justice Breyer, despite his continued disagreement with the Court’s holding in *Apprendi*, cast the fifth vote to overturn *Harris*.<sup>197</sup> He argued that it was “highly anomalous to read *Apprendi* as insisting that juries find sentencing facts that permit a judge to impose a higher sentence while not insisting that juries find sentencing facts that *require* a judge to impose a higher sentence.”<sup>198</sup> Since *Apprendi* has become well established in the Court’s jurisprudence, Justice Breyer concluded that the inconsistency between *Harris* and *Apprendi* should be resolved in *Apprendi*’s favor.<sup>199</sup>

#### B. Why Michigan’s Sentencing System is Unconstitutional after *Alleyne*

The Court’s decision in *Alleyne* invalidates Michigan’s sentencing system by making judicial factfinding that increases either the minimum or maximum sentence that a judge may impose that an offender *must* serve unconstitutional. First, *Alleyne* undermines the Michigan Supreme Court’s reasoning in *People v. Drohan* that was based largely on the United States Supreme Court’s holding in *Harris*.<sup>200</sup> With that reasoning undermined, it becomes clear that increasing an offender’s “maximum-minimum” in an indeterminate system implicates the Sixth Amendment in the same way as it does in determinate ones.<sup>201</sup> Once this is established, it logically follows that increasing the minimum sentence a judge can impose that an offender must serve based upon judicial factfinding is also unconstitutional.<sup>202</sup> Alternatively, even if the Michigan Supreme Court’s decision in *Drohan* on the constitutionality of an offender’s “maximum-minimum” continues to be the proper holding, *Alleyne* still renders Michigan’s increase of the offender’s minimum sentence based upon judicial factfinding unconstitutional.<sup>203</sup>

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<sup>197</sup> *Id.* at 2166-67 (Breyer, J., concurring in part and concurring in the judgment).

<sup>198</sup> *Id.* at 2167 (Breyer, J., concurring in part).

<sup>199</sup> *Id.*

<sup>200</sup> *See infra* text accompanying notes 204-214.

<sup>201</sup> *See infra* text accompanying notes 215-220.

<sup>202</sup> *See infra* text accompanying notes 221-223.

<sup>203</sup> *See infra* text accompanying notes 224-226.

### 1. *Why Alleyne undermines Drohan*

*Alleyne*, In addition to extending *Apprendi* to raising the statutory minimum a judge can impose in a determinate sentencing system, altered the fundamental inquiry when determining an offender's Sixth Amendment rights.<sup>204</sup> Prior to *Alleyne*, the Court had held that only increasing the statutory maximum sentence a judge can impose implicated *Apprendi*.<sup>205</sup> The Court reasoned that the Sixth Amendment ensured that an offender's sentence would not be longer than the maximum sentence authorized by the jury's verdict.<sup>206</sup> As a result, the minimum sentence a judge could impose on an offender could be increased based upon judicial factfinding because that sentence was still within the range authorized by the jury's verdict.<sup>207</sup> If the Sixth Amendment only protects an offender's right to receive a sentence no longer than the maximum sentence authorized by the facts found by the jury, then the sentence that an offender must serve before being considered for parole in an indeterminate system would not be subject to the Sixth Amendment. This is true because any term of imprisonment the offender ultimately receives does not extend past the maximum sentence authorized by the jury.<sup>208</sup>

However, the Court in *Alleyne* rejected this view of the Sixth Amendment.<sup>209</sup> The Court held that it is irrelevant to the Sixth Amendment inquiry that increasing the statutory minimum sentence a judge can impose does not subject an offender to a sentence higher than that authorized by the jury's verdict.<sup>210</sup> Instead, the relevant inquiry is "whether a fact is an element of a crime,"<sup>211</sup> and "[w]hen a finding of fact alters the legally prescribed punishment so as to

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<sup>204</sup> See *Alleyne v. United States*, 133 S. Ct. 2151, 2161-63 (2013) (rejecting the Court's approach to the Sixth Amendment in *Harris v. United States*).

<sup>205</sup> See *Harris v. United States*, 536 U.S. 545, 557-68 (2002).

<sup>206</sup> *Id.* at 557, 565.

<sup>207</sup> *Id.* at 557.

<sup>208</sup> *People v. Drohan*, 475 Mich. 140, 161-62 (2006).

<sup>209</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2161-62 (2013).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 2161.

aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.”<sup>212</sup> Since “it is impossible to dispute that facts increasing the legally prescribe floor *aggravate* the punishment,” it is an element of the crime that must be found by a jury.<sup>213</sup> Thus, the proper inquiry under *Alleyne* when determining an offender’s Sixth Amendment rights is not whether the sentence is authorized by the jury’s verdict, but rather whether a finding of fact “alters the legally prescribed punishment so as to aggravate it.”<sup>214</sup>

Under this new framework, it is clear that increasing an offender’s “maximum-minimum” is unconstitutional. In the same way that increasing the “mandatory minimum” a judge may impose in a determine system “alters the legally prescribed punishment so as to aggravate it,”<sup>215</sup> so does increasing the maximum sentence an offender must serve.<sup>216</sup> Judicial factfinding “produce[s] a higher range”<sup>217</sup> of sentences that an offender *must* serve, thereby aggravating the punishment.<sup>218</sup> It is irrelevant that increasing an offender’s “mandatory minimum” may not actually result in a longer sentence served, in the same way that it is irrelevant in a determinate system that an offender’s actual sentence received when the statutory minimum is increased may be the same sentence he would have received without the increase.<sup>219</sup> All that is relevant is that the legally prescribed range for the crime is aggravated based upon judicial factfinding.<sup>220</sup> When the maximum sentence a judge can impose that an offender *must* serve in prison is increased, the

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013).

<sup>216</sup> *King*, *supra* note 5.

<sup>217</sup> *Alleyne*, 133 S. Ct. at 2162-63.

<sup>218</sup> *King*, *supra* note 5.

<sup>219</sup> *See Alleyne*, 133 S. Ct. at 2162.

<sup>220</sup> *King*, *supra* note 5 (“That a paroling authority may ultimately decide not to release the defendant when he first becomes eligible is irrelevant. What is crucial is that the legislature has narrowed the penalty range available to the trial judge once the specified fact is determined.”).

legally prescribed range for the crime has increased and therefore any fact that does so must be found by the jury.

If increasing an offender's "maximum-minimum" sentence based upon judicial factfinding is unconstitutional, it also follows logically that increasing the minimum sentence a judge can impose upon an offender based upon judicial factfinding is unconstitutional as well.<sup>221</sup> In the same way that the Court could find no logical reason to differentiate the statutory maximum and minimum in a determinate sentencing system, there would be no logical reason to differentiate the maximum and minimum sentence that a judge may impose that an offender must serve before being considered for parole.<sup>222</sup> Both alter the legally prescribed range within which a judge must impose a sentence that the offender *must* serve in prison.<sup>223</sup> Thus, *Alleyne* renders unconstitutional both increasing the minimum and maximum sentence that an offender must serve.

## 2. *One Statutory Minimum*

However, even if the Michigan Supreme Court's conclusion in *Drohan* that *Apprendi* does not apply to the maximum sentence a judge can impose that an offender must serve is still good law, *Alleyne* renders raising the minimum sentence a judge can impose that an offender must serve based upon judicial factfinding unconstitutional. As argued above, there are two potential statutory maximums in an indeterminate sentencing system, the maximum sentence a judge can impose that he *must* serve, and the maximum sentence a judge can impose that he *could* serve.<sup>224</sup> However, in an indeterminate system, like a determinate system, there is only one

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<sup>221</sup> See *Alleyne*, 133 S. Ct. at 2160 (citing *United State v. Harris*, (Breyer, J., concurring)).

<sup>222</sup> *Alleyne*, 133 S. Ct. 2151, 2160 (2013); *id.* at 2166 (Breyer, concurring in part and concurring in the judgment).

<sup>223</sup> King, *supra* note 5.

<sup>224</sup> See *supra* Section III.C.

statutory *minimum*. The minimum sentence a judge can impose that an offender *must* serve and the minimum sentence a judge can impose that the offender *could* serve are identical. For example, in an indeterminate system, if the sentencing guidelines prescribe a range of 25 to 40 months in prison, the minimum sentence that a judge can impose that the offender *must* serve is 25 months, and the minimum sentence the offender *could* serve in prison is also 25 months. Thus, the offender's minimum sentence, like that in a determinate system, is the sentence that the offender must serve in prison.

Therefore, while the existence of two maximums in an indeterminate sentencing system arguably distinguishes it from a determinate system,<sup>225</sup> that same distinction does not exist when we look at the statutory minimum. When a judge finds facts that increase the minimum sentence he can impose in an indeterminate system, he is increasing the amount of time an offender must serve in exactly that same way as a judge in a determinate sentencing does when he increases an offender's mandatory minimum.<sup>226</sup> Therefore, if it is unconstitutional for a judge in a determinate system to increase the mandatory minimum sentence for offender based upon judicial fact finding, it is also unconstitutional for a judge to do so in an indeterminate sentencing system.

## V. CONCLUSION

After the Court's decision in *Alleyne*, it is clear that *Apprendi* should apply to both sentences a judge imposes on an offender in an indeterminate sentencing system. This is because *Apprendi* overturned the Court's decision in *Harris*, which provided a basis for differentiating indeterminate from determinate sentencing systems.<sup>227</sup> Additionally, *Alleyne* altered the

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<sup>225</sup> See *supra* Section III.C.

<sup>226</sup> King, *supra* note 5.

<sup>227</sup> See *supra* text accompanying notes 204-214.

fundamental inquiry in a Sixth Amendment sentencing case.<sup>228</sup> The Court held in *Alleyne* that *Appendi* applies to facts that increase an offender’s statutory minimum sentence because those facts “alter[] the legally prescribed punishment so as to aggravate it.”<sup>229</sup> Since it is inescapable that increasing the range of sentences a judge can impose that constitutes an offender’s *mandatory* term of imprisonment also “aggravates” an offender’s “legally prescribed punishment,”<sup>230</sup> it follows that any fact that alters that range must be found by a jury beyond a reasonable doubt.

Currently sixteen states have sentencing systems that “have one or more statutory provisions that limit either parole or probation eligibility based on additional judicial findings at sentencing.”<sup>231</sup> Should the Court officially adopt the position of this article, these sixteen states will need to adapt their laws accordingly. Some states, like Michigan, would have to overhaul their entire sentencing system, while others would only need to repeal or alter a few individual statutes.<sup>232</sup> States would have a number of options to choose from if forced to alter their sentencing systems to comply with such a ruling, including submitting questions of fact that raise the offender’s sentencing range to a jury, making their sentencing guidelines advisory, or giving a judge total discretion to sentence an offender within the minimum and maximum set for the time the offender could serve in prison.<sup>233</sup>

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<sup>228</sup> See *supra* text accompanying notes 211-214.

<sup>229</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013).

<sup>230</sup> *Id.*

<sup>231</sup> King, *supra* note 5, at 287. Those states are Alaska, Arizona, Florida, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, and Rhode Island. *Id.*

<sup>232</sup> King, *supra* note 5, at 292.

<sup>233</sup> King, *supra* note 5, at 292 & n.84.

In 2014, the Michigan Supreme Court granted leave to appeal to consider a challenge to Michigan’s sentencing system after *Alleyne*.<sup>234</sup> However the Michigan Supreme Court rules on the issue, the United States Supreme Court should resolve this issue nationally to clarify this murky area of the law for the sixteen states that have statutory provisions that might be vulnerable. The United States Supreme Court should ultimately conclude that it is unconstitutional to increase the minimum or maximum sentence that a judge must impose on an offender that the offender *must* serve in prison before being considered for parole based upon judicial factfinding. Such a holding is consistent with the Court’s approach to the Sixth Amendment enunciated in *Alleyne*,<sup>235</sup> and to the important role of the jury as a check on government power,<sup>236</sup> by ensuring that the government cannot aggravate the legally proscribed punishment for an offender without the authorization of a jury of his peers.

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<sup>234</sup> See *People v. Lockridge*, 496 Mich. 852 (2014) (granting leave to appeal to consider “whether a judge’s determination of the appropriate sentencing guidelines range, MCL 777.1, *et seq.*, establishes a ‘mandatory minimum sentence,’ such that the facts used to score the offense variables must be admitted by the defendant or established beyond a reasonable doubt to the trier of fact.”)

<sup>235</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013).

<sup>236</sup> See *e.g.*, *United States v. Cotton*, 535 U.S. 625, 626 (2002) (noting that the Sixth Amendment right to a jury “serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power.”); Randolph N. Jonakait, *Confrontation Clause Curiosities: When Logic and Proportion Have Fallen Sloppy Dead*, 20 J.L. & POL’Y 485, 492 (2012) (“The Sixth Amendment jury trial right acts as a check on . . . judges and prosecutors.”).