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Alleyne on the Ground: Factfinding that Limits Eligibility for Probation or Parole Release

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This article addresses the impact of *Alleyne v. United States*[1] on state statutes that restrict an offender's eligibility for release on parole or probation. *Alleyne* is the latest of several Supreme Court cases applying the rule announced in the Court's 2000 decision, *Apprendi v. New Jersey*.[2] In *Apprendi* the Court held that the government must establish beyond a reasonable doubt to a jury any fact (other than prior conviction) that permits the judge to impose a higher maximum sentence. For thirteen years, the Court used this ceiling-raising metric each time it applied its rule to a new context. In *Alleyne*, the Court modified that principle, and declared that the *Apprendi* rule not only applies to findings that *permit* a higher *maximum* sentence, but also applies to findings that *mandate* a higher *minimum* sentence. Because federal law required that the judge in Alleyne's case impose a sentence of no less than seven years' incarceration for the crime of "using or carrying a firearm in relation to a crime of violence" if Alleyne had "brandished" a firearm, Alleyne had a right to seek a jury's determination of that aggravating fact.

To apply *Alleyne*, courts must for the first time determine what constitutes a minimum sentence and when that minimum is mandatory. These questions have proven challenging for judges in states that authorize indeterminate sentences (subject to discretionary release on parole) and have statutes that delay the timing of eligibility for release based upon judicial findings at sentencing. *Alleyne* also raises similar questions, in both determinate and indeterminate sentencing jurisdictions, for statutes that deny or restrict the option of imposing probation or a suspended sentence instead of incarceration upon judicial fact finding. Disagreement about *Alleyne*'s application is understandable; extending *Alleyne* to findings that alter eligibility for release has the potential to disrupt significantly the sentencing systems in several states.

In this Article, we argue that *Alleyne* invalidates any state statute that, upon a judicial finding of fact at sentencing (other than prior conviction), requires a judge to delay or deny eligibility for release on probation or parole. The floor of the sentencing range for an indeterminate sentence is the period of incarceration the offender must serve before he can be considered for release on parole. In states such as Michigan and Pennsylvania, statutes that require the judge to impose a longer term prior to eligibility once certain facts are found operate just like the statute in *Alleyne*, increasing the minimum sentence. Precluding probation based on a judicially found fact also raises the floor of the penalty range under *Alleyne*, aggravating it from a noncustodial sentence to incarceration.

Alleyne's threat to existing statutes varies by state. Some states will avoid the problem entirely. Arkansas, Mississippi, and New York, for example, can essentially ignore *Alleyne* because statutes that delay or deny parole or probation eligibility apply to every defendant convicted of specified offenses; no additional factfinding (with the exception of prior conviction[3]) must occur at sentencing before those minimum sentences apply. A number of other states, including California, Colorado, Hawaii, and West Virginia, do have statutes restricting eligibility for release on parole or probation upon judicial findings of particular facts, but will escape post-*Alleyne* challenges to these particular statutes because state law already requires juries to decide those facts. Presently, however, sixteen states—Alaska, Arizona, Florida, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, and Rhode Island—have one or more statutory provisions that limit either parole or probation eligibility based on additional judicial findings at sentencing, provisions we argue are unconstitutional after *Alleyne*.

This count of affected states would have included Kansas as well, but Kansas lawmakers, prompted by a remand from the Supreme Court,[4] swiftly recognized the vulnerability under *Alleyne* of state statutes limiting parole eligibility for convicted murderers. In an emergency legislative session, they amended the law to require jury findings.[5] Other states have been slower to react. New Jersey's high court has agreed to review the issue.[6] Lower courts in Pennsylvania have admitted *Alleyne*'s probable impact on statutes in that state.[7] By contrast, in Michigan, with a sentencing system built upon minimum parole-eligibility ranges, state courts have confronted and rejected arguments that *Alleyne* renders the state's sentencing scheme unconstitutional.

Remarkably, although dozens of state laws limiting probation or parole release are unconstitutional after *Alleyne*, sentencing scholars seem not to have noticed. One explanation for this blind spot may be that much of the academic writing about sentencing focuses on federal law, and federal courts have not yet grappled with this issue.

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Federal defendants prosecuted today would not encounter a judge-found parole limitation at sentencing; discretionary release on parole was abolished for federal defendants in the 1980s.[8] As for probation, federal statutes limiting probation eligibility upon a finding of fact other than conviction are rare.[9] The Federal Sentencing Guidelines contain many such provisions, but they are now advisory.[10] And although *Alleyne* is a constitutional rule that state defendants are already raising in federal habeas proceedings, as a "new" rule it will be available only to those prisoners whose convictions were not yet final in 2013. As a consequence, it may be some time before the lower federal courts address the application of *Alleyne* to parole and probation eligibility provisions in the states.[11] For the time being, judicial discussion of the issue has been limited to state decisions.

This article provides analyses that litigants and judges might find useful as these *Alleyne* challenges make their way through the courts. It also offers a menu of options for state lawmakers who would prefer to amend their sentencing law proactively in order to minimize disruption of their criminal justice systems.[12]

I. The Ruling in *Alleyne*

Apprendi v. New Jersey,[13] the source of the rule extended by the Court in *Alleyne*, grew out of legislative efforts to structure judicial sentencing discretion. Beginning in the 1970s, new statutes tied factfinding at sentencing to higher sentencing ranges. Initially, the Court tolerated this practice. In *McMillan v. Pennsylvania*,[14] it held that a defendant's constitutional rights were not violated by a statute that raised the minimum penalty for an offense to five years if the judge found at sentencing that the defendant had a gun, noting that the finding did not change the maximum punishment the judge could impose for that conviction. A finding that raises only the floor of the sentencing range, the Court reasoned, is not an element of the offense, that is, part of the charge that must be proven beyond a reasonable doubt to a jury.[15]

Apprendi involved just the situation distinguished in *McMillan*—a statute that exposed the defendant to a higher punishment ceiling based on a judicial finding of fact at sentencing.[16] The Court held that under the Sixth Amendment, such a fact must be considered an element of what is essentially an aggravated offense, and that permitting a judge to determine that fact at sentencing deprived the defendant of his right to a jury determination of every element of an offense. Other than the fact of prior conviction, the Court held, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[17] The Court later clarified that when a finding of fact is required to impose a sentence above a binding guideline range,[18] or to impose a higher maximum fine,[19] it falls within the *Apprendi* rule.

Although confirming that the rule in *Apprendi* applied whenever a fact found by the judge raised the *ceiling* of a sentencing range, the Court in *Harris v. United States*[20] declined to overrule *McMillan* and extend the rule to judicial factfinding that raised the punishment *floor*. Not until 2013 did a new five-justice majority overrule *Harris* and *McMillan*, concluding in *Alleyne* that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum."[21]

Alleyne, like Harris, had been convicted of violating a federal statute that designated a sentence of "not less than 5 years" for anyone who "uses or carries a firearm" in relation to a "crime of violence," and "not less than 7 years" "if the firearm is brandished."[22] The jury that convicted Alleyne indicated on the verdict form that he had "[u]sed or carried a firearm" but did not indicate a finding that the firearm was "[b]randished."[23] At sentencing Alleyne argued that because the jury did not find brandishing beyond a reasonable doubt, he was subject only to the five-year mandatory minimum. Relying on *Harris*, the judge rejected this argument, found that the government had established brandishing by a preponderance of the evidence, and imposed a sentence of seven years. The Supreme Court vacated the sentence.

Justice Thomas, writing for the majority in *Alleyne*, traced the "linkage of facts with particular sentence ranges (defined by both the minimum and the maximum)" at common law, and noted "a well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment."[24] This rule, he explained, allowed the defendant to predict the judgment, if convicted, from the face of the indictment. A "fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense," he wrote. "Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's 'expected punishment has increased as a result of the narrowed range' and 'the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish.'"[25] The Sixth Amendment, he explained, "applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty."[26] He reiterated that the Constitution's protections, rooted in the common law, ensured that a criminal charge would inform the accused what the punishment will be and that all facts essential to that punishment would be proven beyond a reasonable doubt to a jury before that punishment could be imposed.[27] Justice Breyer, providing the fifth vote, noted in a separate opinion that even though he continued to disagree with *Apprendi*, he concurred with the Court's decision because it seemed "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."[28]

II: Applying *Alleyne* to Eligibility Statutes

To *determine* the scope of the new rule in *Alleyne*, courts must decide when state law conditions a "mandatory

minimum" sentence upon factfinding by the judge. Analytically, it is helpful to separate this inquiry into two parts, as the Court suggested when it stated in *Alleyne* that the rule applies when "a finding of fact *both* alters the legally prescribed range *and* does so in a way that aggravates the penalty."[29] We examine first when a restriction on a defendant's eligibility for release constitutes a more aggravated minimum sentence, and second when that restriction is mandatory, that is, when factfinding alters "the *legally prescribed* range." We also address opposing arguments based on history, implementation, and scope.

A. Defining When a Restriction on Eligibility for Release Constitutes the "Minimum" Sentence

The minimum term in *Alleyne* was clear; the statute stated the sentence as "not less than 5 years" or, with brandishing, "not less than 7 years." Alleyne's federal sentence was determinate—that is, the term of incarceration was set at sentencing and not subject to early release by paroling authorities. Federal 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.

1. Term Before Release Eligibility as "Minimum"

Unlike the federal courts, a majority of states continue to impose indeterminate sentences. In these states, where a parole board or other paroling authority retains the option of releasing an offender before the maximum sentence imposed is served, what is the "minimum" sentence for purposes of *Alleyne*? Logically, the minimum, or floor of the sentencing range, is the period of incarceration that must be served before a defendant may first be considered for release. For example, if release is barred until after the offender has served fifty years, then the minimum sentence is fifty years. Many states equate eligibility dates with minimum sentence.[30] The parole eligibility date in a system of discretionary release is just as impermeable a floor as the minimum seven-year term in the determinate sentencing system in *Alleyne*.

The rule in *Alleyne* comes into play whenever a more severe or "aggravated" minimum sentence is triggered by a factual finding at sentencing. Thus, if a statute requires the judge who finds a specified fact at sentencing to impose a term of incarceration with a release eligibility date that is *later* than the date that would apply in the absence of that finding, the defendant has a right to a jury determination of that specified fact. By delaying eligibility for release, the finding "[e]levat[es] the low-end of a sentencing range and heightens the loss of liberty associated with the crime."[31] The same is true if the fact eliminates eligibility for release.

Although some states do not delegate decisions about the timing of parole eligibility to the sentencing judge,[32] many states do expect judges to select the minimum term, and have enacted statutes that require the judge to delay or deny eligibility for release on parole based on a finding of fact at sentencing. All of these statutes are potentially unconstitutional under *Alleyne*. These provisions include restrictions on release for offenders whose offense occurred while on release for another crime,[33] whose crime involved gangs[34] or weapons,[35] victimized police officers,[36] children, or the elderly,[37] or involved other circumstances not proven as part of the underlying offense.[38] For example, before it was amended after *Alleyne* to require jury findings, a statute in Kansas required the judge to order a defendant convicted of premeditated murder to serve at least forty years before becoming eligible for release on parole ("a hard-40" sentence)[39] if the judge found that the defendant committed the murder "in an especially heinous, atrocious or cruel manner,"[40] or had a previous felony conviction "in which the defendant inflicted great bodily harm."[41]

One difference between the determinate sentence in *Alleyne* and an indeterminate sentence is that once a federal sentence is served, the offender is always released, but once an offender serving an indeterminate sentence reaches eligibility for parole, he need not be released. One might argue that in an indeterminate system, the minimum sentence is *not* the earliest eligibility date that the law allows the judge to set, but instead is whatever term the paroling authority later decides the offender must serve. But this would miss the point of the *Apprendi*/*Alleyne* line of cases. The *Apprendi* rule targets statutes that essentially short-circuit the Bill of Rights requirements of notice and proof beyond a reasonable doubt to a jury by shifting factfinding that determines the sentencing range away from the trial to the sentencing phase. The minimum sentence that matters in *Alleyne* is the floor of the *range available to the sentencing judge*, the penalty "affixed to the crime,"[42] not the sentence that might *actually be served* by the offender. 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.

Similarly, because *Alleyne* is concerned only with factfinding that legislatures have given to judges rather than juries, delays in release eligibility that result from the decisions of corrections officials made after initial sentencing, even when such decisions depend upon findings of fact, are not affected by *Alleyne*.[43] Corrections officials' decisions denying release on parole after eligibility, delaying release eligibility by refusing to grant or revoking good time credit (also called earned or gain time credit),[44] reclassifying the prisoner so that his ability to earn good time credit is reduced,[45] as well as findings by corrections officials regarding satisfaction of statutory criteria for release after the date of first eligibility,[46] including medical conditions[47] and overcrowding,[48] all fall outside of the *Apprendi* principle. These decisions may change the actual sentence served, but they do not "increase[] either end of the range" available to the sentencing judge.

2. Alternatives to Incarceration as "Minimum"

Probation eligibility statutes in both determinate and indeterminate sentencing jurisdictions are vulnerable after

Alleyne as well. Courts have already found that when state law designates probation as the presumptive sentence *maximum* for a minor offense, judicial factfinding that authorizes incarceration operates to raise the ceiling of the penalty range and thus triggers the rule in *Apprendi*.[49] This is because incarceration is a more severe sentence than probation, making the additional fact permitting incarceration an element of a more aggravated offense. Similarly, if, upon a specified finding at sentencing, a statute removes the judge's ability to impose probation, suspend a sentence, or impose an alternative to incarceration, that finding raises the floor of the penalty range under *Alleyne*, aggravating it from a potential noncustodial penalty to required incarceration.

Examples of such statutes include provisions denying probation for those who have refused drug treatment,[50] victimized children or family members,[51] committed their offenses while on release from or awaiting trial on another crime,[52] or used firearms.[53] All of these provisions are threatened by the holding in *Alleyne*. Also implicated are statutes that upon a finding of fact by the judge mandate higher minimum terms of supervised release after serving a term of incarceration[54] or higher minimum fines as part of the sentence.[55]

3. Rebutting Opposing Arguments

To oppose the characterization of eligibility restrictions as minimum sentences, we anticipate states will raise three arguments, drawing from the reasoning in the Court's *Apprendi* cases.

a. Lack of Historical Basis. First, states may argue that both parole and probation are relatively modern inventions, lacking the historical pedigree of the graded terms of incarceration that appeared in early American criminal codes. Decisions affecting eligibility for parole or probation would have been completely unknown in the eighteenth and early nineteenth centuries. Discretionary parole release and the option of using community supervision in lieu of incarceration swept the nation only in the early twentieth century.[56] If the meaning of the Sixth Amendment's Jury Clause is limited to the historical context surrounding its adoption, then it may not regulate factfinding that alters eligibility for probation or parole.[57] Indeed, Justice Thomas, the author of *Alleyne*, has been one of the most consistent voices on the Court for adherence to historical context in interpreting the Jury Clause.[58]

The Court did rely upon history to derive its general rule in *Apprendi*,[59] but it has refused to use history as a litmus test for each and every application of that general rule. Early American criminal codes appeared not to include statutes like the one in *Alleyne*, for example, that keyed a higher minimum sentence to a particular fact, but did not at the same time raise the maximum sentence.[60] Sentencing guidelines like those in *Blakely* or *Booker* were also creatures of the late twentieth century, but this novelty did not exempt them from the *Apprendi* rule either. As Justice Thomas explained in his dissent in *Harris*, "The Court has not previously suggested that constitutional protection ends where legislative innovation or ingenuity begins. Looking to the principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum."[61]

Justice Breyer, providing the fifth vote in *Alleyne*, agreed the application of *Apprendi* to mandatory minimum statutes was compelled by "principle" and "logic." He found it "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."[62] It would be even more "anomalous" to hold that a defendant has a right to a jury determination of a fact that raises the penalty floor for his crime from five to seven years, but not if it raises the floor from life with the possibility of parole after 20 years to life *without* the possibility of parole. In both circumstances the defendant is unable to predict the legally authorized penalty range "from the face of the felony."[63]

b. Disruption and Prejudice. Another potential objection to the application of *Alleyne* to factfinding that alters parole and probation eligibility is the practical difficulty states may face if they were required to implement the jury right in this context. Accommodating *Alleyne* could require the abandonment of appellate oversight of formerly enforceable limits on judicial sentencing discretion, or the injection of additional, possibly prejudicial, factfinding into jury trials. But this argument, like the historical claim, is unlikely to succeed in defeating what is otherwise a principled application of the *Apprendi* rule. In *Alleyne*, *Booker*, *Blakely*, *Southern Union*, *Cunningham*, and *Apprendi* itself, advocates opposing the rule have described a similar "parade of horribles," but the Court, as Justice Scalia has observed, has repeatedly watched that parade pass by without "salut[ing]."[64]

c. Probation and Parole as Mitigated Penalties. A final argument against applying *Alleyne* in this context is that a judicial decision to permit release rather than incarceration *mitigates* the penalty that would otherwise apply, and *Apprendi* does not apply to factfinding that *mitigates* the legally prescribed range of punishment.[65] The statutes collected here, however, do not involve factfinding that mitigates the penalty.

Certainly some state statutes that regulate when a judge may impose a sentence of probation or a suspended sentence do designate incarceration as the presumptive sentence, and then assign to the defendant the burden of proving at sentencing those facts required for probation eligibility. If a statute is set up this way, the judge's determination of those facts at sentencing does not *aggravate* the penalty range. Rather, incarceration is already within the range of penalties prior to the judge's factfinding; that factfinding only *mitigates* or *lowers* the floor of the range.[66] But the probation statutes that violate *Alleyne* are not set up

this way. Instead, they authorize either probation or incarceration for the offense of conviction and raise the penalty floor to incarceration, eliminating the probation option, upon a finding of fact at sentencing.[67] Probation may have originated as a form of judicial clemency—mercy that a court could dispense at its discretion to soften the punishment of what would otherwise always be incarceration. But once a legislature expressly denies the opportunity for probation in cases in which a particular fact is established at sentencing, it has removed the judge's discretion to dispense that leniency. By permitting probation in all cases except those in which the fact is established, the legislature has created two separate penalty ranges, one more aggravated than the other. In the words of *Alleyne*, "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury."[68]

The same can be said for statutes that regulate a judge's authority to set the minimum term an offender must serve before becoming eligible for release on parole. Through the 1970s, in states that granted judges the discretion to select a minimum eligibility date at sentencing, accelerating that date may have been a discretionary act of leniency. Today, if a statute permits a judge upon finding certain facts at sentencing to impose a minimum term that is even lower than a presumptive minimum term, neither *Apprendi* nor *Alleyne* requires a jury to determine those facts; that factfinding does indeed mitigate the range.[69] But once a legislature requires a judge to delay the date of eligibility for release in cases in which a designated fact is established at sentencing, the legislature has created two separate penalty ranges, one for cases without that fact, and another, more aggravated range for cases with that fact.[70]

B. Defining When the Higher Minimum Sentence is "Mandatory"

The Court in *Alleyne* limited its stated rule to factfinding that triggers more aggravated minimum sentences that are "mandatory," that is, factfinding that "alters the *legally prescribed* range." Defining what is or is not a mandatory minimum is a new issue introduced by the *Alleyne* ruling. The meaning of this concept can be derived from the Court's earlier decisions applying the *Apprendi* rule. The seven-year minimum in *Alleyne* was mandatory because it was enforceable on appeal. Had a judge refused to impose that sentence and imposed a lesser sentence instead, the government could have secured relief on appeal.[71] In *Booker*, the Court rendered the Guidelines "advisory" and compliant with the Sixth Amendment, rather than "mandatory" and unconstitutional, by invalidating those provisions in the Sentencing Reform Act that permitted the courts of appeals to enforce compliance with those guidelines. It is the potential for reversal on appeal, the Court explained, that makes the sentence mandatory.[72]

Thus, the parole and probation disqualification provisions vulnerable under *Alleyne* are those that are enforceable on appeal, so that if a judge imposed a sentence that allowed release sooner than the statute required, the state could have the sentence overturned. Conversely, if state law grants complete discretion to a trial judge to delay the date of eligibility for release after finding an aggravating fact, then it would not fall within the *Alleyne* rule, any more than advisory guidelines fall within *Blakely*.

Importantly, the seven-year minimum sentence in *Alleyne* was considered a mandatory minimum sentence even though under federal law Alleyne might have earned time off his sentence in "good" or "earned" time credits, and secure release in *less than* seven years. The "legally prescribed" floor of the range in *Alleyne* was the seven-year determinate term, despite the possibility that good or earned time would reduce the actual sentence served below seven years.[73] Likewise, the possibility or even probability that good or earned time credits will reduce the period of incarceration required before eligibility for release from an indeterminate sentence does not make the minimum period before eligibility for release any less mandatory.

Alleyne also makes it clear that a minimum term triggered by a judicial finding of fact can be mandatory even when the judge has the option of imposing the same sentence without the challenged factfinding.[74] In *Alleyne* itself the judge had discretion to impose seven years without finding the defendant had brandished a gun. Put differently, *Alleyne* controls whenever factfinding raises the floor of the sentencing range even if the ceiling stays the same.

Courts rejecting the application of *Alleyne* to the sentencing system in Michigan appear to have misunderstood this point. Michigan's system uses a sentencing grid that designates, at the intersection of criminal history and offense level scores, a "recommended" term of incarceration after which the offender would be eligible for parole. The offense level score is determined by the required combination of a specified set of offense variables, scored by the judge at sentencing.[75] The judge is not permitted to impose an eligibility date earlier than that recommended by the grid, unless he finds a "substantial and compelling reason" for doing so, and that finding may be challenged on appeal.[76] The Michigan Court of Appeals has reasoned that this scheme does not implicate *Alleyne* because the judicial factfinding under the state's guidelines merely "inform[s] the trial judge's sentencing discretion *within the maximum* determined by statute and the jury's verdict."[77] This conclusion was correct when *Harris* was in force. But *Alleyne* overruled *Harris*; states are no longer free to use judicial factfinding at sentencing to "inform" sentencing discretion within the maximum sentence authorized by conviction, when that guidance mandates a higher minimum sentence.[78]

Nor does the presence of an exception or departure provision that would allow a trial judge to impose a lower minimum sentence in unusual cases make the presumptive minimum term any less "mandatory." Consider the Supreme Court's earlier treatment of the same issue in connection with the range ceiling or maximum sentence, in its decisions in *Blakely*, *Booker*, *Cunningham*, and *Gall*. The

Court has consistently rejected the argument that when a judge is allowed to depart upward from the presumptive sentence, that presumptive sentence is not the "maximum" sentence.[79] For example, in *Gall*, the Court reasoned that if a statute defines a standard or test that must be met in order to depart from the guidelines, the guidelines are still considered mandatory.[80]

Just as a presumptive maximum sets the ceiling or maximum of a penalty range, regardless of the presence of a departure provision, so a presumptive minimum sets the floor despite the presence of one or more exceptions. There is no basis for treating the effect of a departure provision for the floor of the range any differently. Kansas lawmakers, for example, did not regard the statutory exception there—allowing a lesser term if the judge concludes "manifest injustice" would result[81]—as protection from *Alleyne*'s reach.[82] Although Michigan courts refuse to agree, the "recommended" term before eligibility under that state's law is the mandatory minimum sentence under *Alleyne*, even though a judge could impose a shorter term after finding a "substantial and compelling reason."

Finally, whenever a statute requires that a trial court must limit eligibility for release once it determines that a certain fact is established, that minimum sentence remains mandatory or "legally prescribed" despite the possibility that the defendant may obtain earlier release through clemency.[83] Alleyne himself could theoretically receive clemency at some point, too, but that possibility didn't make his seven-year term less mandatory in the Court's view.

III: Options for Compliance

This section provides guidance for courts and lawmakers in states with statutes that may violate the rule in *Alleyne*. Steps taken sooner rather than later to correct non-compliant statutes will help reduce the disruption created by *Alleyne*, minimizing the number of cases in which prisoners will be able to challenge their convictions and sentences. The options for bringing state law into compliance mirror those used by states in the wake of the Court's decision in *Blakely*.[84] In states where few statutes were implicated by *Blakely*, the fix was fairly simple; in states where the entire sentencing structure relied on mandatory guideline ranges, more sweeping measures were necessary.

In states where only a limited number of statutes include factfinding that restricts probation or parole release, compliance with *Alleyne* may require minimal legislative effort. For example, isolated statutes could be amended to delete the aggravating fact, or to allow the judge to impose the lesser sentence despite finding the aggravating fact. Or, a legislature could replace existing mandatory minimum sentence enhancements with lesser and greater offenses. If the number of facts triggering mandatory minimum sentences is small, a legislature could add a provision guaranteeing the right to a jury trial for those facts, alongside or after jury trial of the other elements of the offense, a practice already followed in several states. The Kansas legislature, for example, adopted this change for its "Hard 40" and "Hard 50" statutes, which previously required the judge determine the facts that triggered mandatory minimum sentences of forty or fifty years. The newly enacted statute now gives juries the authority to decide those aggravating factors, and whether there were any mitigating factors to offset such a sentence. It also creates a procedure to empanel new juries if it is necessary to resentence defendants who are already serving hard-40 or hard-50 sentences.[85]

For states that rely heavily upon judicial factfinding to set terms that must be served before eligibility for parole release, or to determine eligibility for non-incarceration sentences, it may be unrealistic to amend separately into graded offenses all of the different crimes affected by *Alleyne*. And treating as an element each of a very large number of factors would create the same sort of challenges that faced the Court in *Booker* under the Federal Guidelines. Providing for a jury determination of facts implicated by *Alleyne* may be more manageable after reducing the number of such facts,[86] or allowing defendants to admit or opt for a judicial determination on only those facts implicated by the *Apprendi* rule while contesting remaining elements (something like a partial plea or partial jury waiver).[87] But the most obvious remedy is the one adopted by the Supreme Court in *Booker* and by a number of states after *Blakely*: changing the "legally prescribed" ranges to advisory ranges.[88] This may involve invalidating or repealing those aspects of the law that allow appellate courts to enforce adherence to minimum sentences, thereby permitting judges to exercise their discretion to impose lower sentences despite finding aggravating factors at sentencing.

States may find the advisory option particularly attractive if non-compliant provisions are littered throughout the code or affect a large volume of cases. Take Michigan as an example. Under the current scheme, the sentencing judge is required to find and score a number of offense variables (OVs) to determine the appropriate guidelines range for a minimum sentence.[89] If the guidelines were advisory, the sentencing court would continue to determine the recommended minimum term before parole eligibility,[90] but would consider the "guidelines range as an aid," not a mandate.[91]

Another alternative might be to make the recommended restrictions on release part of the guidelines governing the *paroling authority's* decision to release rather than part of the judge's sentencing determination. As parole release guidelines, they would not affect the range available to the trial judge at sentencing, escaping challenge under the rule in *Apprendi*.

Finally, there is another option for coping with *Alleyne* that we do not recommend. A state could shift the presumptive sentence for an offense up to the highest minimum and reserve lower minimum sentences (i.e., earlier eligibility for release) for those defendants who are able to prove mitigating factors. As previously discussed, several states have probation statutes designed in this way,

presuming incarceration and placing the burden on defendants to prove certain facts that would permit probation. But as an option for enforcing tiered levels of parole eligibility based on facts found at sentencing, it makes little policy sense. This system could produce higher pretrial burdens if initial charges carried longer potential sentences, as well as longer sentences of incarceration, thereby raising even further costs that many states are attempting to lower.

IV. Conclusion

The Court's latest extension of the *Apprendi* rule in *Alleyne* requires courts for the first time to identify when judicial factfinding mandates a higher minimum sentence. This has proven to be no simple matter when state statutes require judges to delay or deny release on probation or parole depending upon whether specified facts are determined at sentencing. State courts continuing to resist the application of *Alleyne* to restrictions on release eligibility are fighting a losing battle. A legislature need not abandon efforts to calibrate eligibility for release with factfinding, but it must select a method of doing so that complies with the Constitution.

Notes

1 *Alleyne*, 133 S. Ct. 2151 (2013).

2 *Apprendi*, 530 U.S. 466 (2000).

3 Far more states will be affected by *Alleyne* if the Court decides to abandon the prior conviction exception to the *Apprendi* rule. For example, see Tennessee's sentencing structure, where penalty ranges vary depending upon whether the defendant is a standard, multiple, or career offender. *See also* People v. Griffis, 212 Cal. App. 4th 956, 962–63 (Cal. Ct. App. 2013) (rejecting the pleading and proof requirement for prior conviction that disqualified the defendant from the option of jail rather than prison, which in turn required "him to serve his entire term in prison without eligibility for the split-sentence option").

4 Astorga v. Kansas, 284 P.3d 289 (Kan. 2012), *vacated and remanded*, 133 S. Ct. 2877 (2013).

5 Specifically, the legislature addressed the sentencing law that formerly permitted a judge to impose a mandatory minimum sentence of fifty years for a first-degree murderer if the judge found by a preponderance of the evidence that certain aggravating factors were present. *See* Kan. Stat. Ann. § 21-6620 (2013); *see also* Engelhardt v. Heimgartner, 2014 WL 352789 at *9 (D. Kan. 2014) (noting that as revised, "the statute requires the jury to find beyond a reasonable doubt one or more of the aggravating circumstances enumerated in the statute before imposing a hard 50 sentence").

6 State v. Cromwell, 80 A.3d 743 (N.J. 2013) (granting review of the question: does *Alleyne* render the imposition of a mandatory minimum sentence invalid under the Sixth Amendment?).

7 *See, e.g.*, Commonwealth v. Hunt, 2014 WL 1671907 at *3 (Pa. Com. Pl. April 22, 2014) (invalidating 42 Pa. Con. Stat. § 9712.1(c), which gave the sentencing judge the authority to impose a mandatory minimum sentence of five years for a drug offender if the defendant was found to be in possession of a weapon during commission of the offense); Commonwealth v. Hanson, 82 A.3d 1023 (Pa. 2013) (recognizing but not deciding that *Alleyne* may apply and remanding for resentencing); Commonwealth v. Munday, 78 A.3d 661, 666 (Pa. Super. Ct. 2013) (concluding "that the imposition of the mandatory sentencing provision" violated *Alleyne*, because the sentencing factor at issue had not been proven to a jury beyond a reasonable doubt); Commonwealth v. Watley, 81 A.3d 108, 117–18 (Pa. Super. Ct. 2013).

8 Sentencing Reform Act of 1984, Pub. L. 98–473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

9 *See* 18 U.S.C. § 3561(b) (2012) (mandating at least a term of probation if victim is a relative).

10 United States v. Booker, 543 U.S. 220 (2005). After *Booker*, federal judges may "vary" down to a probation sentence, despite a Guideline prohibiting its imposition. *See* Gall v. United States, 552 U.S. 38, 59–60 (2007); United States v. Morace, 594 F.3d 340, 345 (4th Cir. 2010) (collecting cases).

11 For example, the Sixth Circuit recently avoided addressing the application of *Alleyne* to Michigan's statutes in Kittka v. Franks, 539 Fed. App'x 668 (6th Cir. 2013). *See also* Currie v. Rapelje, No. 13-CV-10252, slip op. at 1, 2013 WL 5566693 (E.D. Mich. Oct. 9, 2013) (granting the defendant's motion to stay this case and hold his habeas petition in abeyance so that he may return to state court to exhaust his remedies as to an unexhausted legal claim based upon *Alleyne*).

12 By extending the reach of the rule in *Apprendi*, *Alleyne* may also accelerate the need for courts to resolve other difficult questions already raised by the *Apprendi* rule in other contexts, questions not addressed in this article, including when a finding is one of fact subject to *Apprendi* rather than law, whether or not the prior conviction "exception" should survive, and whether or not facts affected by the rule in *Apprendi* or *Alleyne* must be treated like elements for purposes of the Sixth Amendment requirement of notice, double jeopardy, lesser included offense instructions, advice required for a knowing or voluntary guilty plea, or Eighth Amendment proportionality analysis. For discussion of many of these controversies, see Wayne R. Lafave, Jerold H. Israel, Nancy J. King, and Orin S. Kerr, Criminal Procedure (3d ed. 2007 & Supp. 2013) at § 26.4 (on Westlaw as database CRIMPROC, hereinafter CRIMPROC). *See also* Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior Conviction Exception to* Apprendi, 97 Marquette L. Rev. (forthcoming 2014), *available at* http://ssrn.com/abstract=2389531.

13 *Apprendi*, 530 U.S. 466 (2000).

14 *McMillan*, 477 U.S. 79 (1986).

15 *Id.* at 84–85.

16 *Apprendi*, 530 U.S. at 490.

17 *Id.*

18 *See* United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); *see also* Cunningham v. California, 549 U.S. 270 (2007) (presumptive statutory sentence).

19 *See* United States v. Southern Union, 132 S. Ct. 2344 (2012).

20 *Harris*, 536 U.S. 545, 568 (2002).

21 Alleyne v. United States, 133 S. Ct. 2151, 2160 (2013). Chief Justice Roberts' dissent was joined by Justices Scalia and Kennedy. *Id*. at 2167. Justice Alito dissented separately. *Id.* at 2172.

22 18 U.S.C. § 924(c)(1)(A) (2012).

23 *Alleyne*, 133 S. Ct. at 2155–56.

24 *Id.* at 2159.

25 *Id.* at 2160–61 (quoting Apprendi v. New Jersey, 530 U.S. 466, 522 (2000)) (Thomas, J., concurring)).

26 *Alleyne*, 133 S. Ct. at 2161 n.2.

27 *See Apprendi*, 530 U.S. at 511.

28 *Alleyne*, 133 S. Ct. at 2167 (Breyer, J., concurring).

29 *Id*. at 2161 n.2 (emphasis added).

30 In addition to the statutes cited earlier, *see* Neb. Rev. Stat. § 83-1,110; N.C. Gen. Stat. § 15A-1371; 42 Pa. Cons. Stat.

§ 9717; 75 Pa. Cons. Stat. § 3815; S.C. Code § 16-15-425; Vt. Stat. tit. 28, § 501; W. Va. Code § 62-12-13a; Johnson v. State, 722 A.2d 435, 440 (Md. Ct. Spec. App. 1999), *rev'd on other grounds*, 749 A.2d 769 (Md. 2000) (holding that the defendant's period of parole ineligibility was ten years—the same length of time as the doubled mandatory minimum sentence of five years—for transporting a weapon in relation to a drug trafficking offense); Commonwealth v. Brown, 730 N.E.2d 297, 300 (Mass. 2000) ("The minimum sentence serves as a base for determining his parole eligibility date. . . . [T]he judge establishes both the maximum sentence the defendant will serve if he is never paroled and the minimum sentence the defendant will serve, after which the prisoner becomes eligible for parole."); Watkins v. Missouri Dep't of Corr., 349 S.W.3d 423, 426 (Mo. Ct. App. 2011).

[31] *Alleyne*, 133 S. Ct. at 2161.

[32] Instead, the minimum term after which the defendant will be eligible for parole is a set percentage of the maximum sentence for the offense of conviction or is determined by the underlying offense of conviction and is not subject to modification at sentencing. *See generally* Kevin R. Reitz, *The "Traditional" Indeterminate Sentencing Model*, *in* Oxford Handbook of Sentencing and Corrections 270, 275 (Joan Petersilia & Kevin Reitz eds., 2012).

[33] *E.g.*, Fla. Stat. § 775.082(9) (denying eligibility for parole and imposing a minimum term upon a judicial finding that the offense occurred within three years of release from prison).

[34] People v. Anaya, 221 Cal. App. 4th 252, 269 (Cal. 2013) (discussing the application of the gang enhancement statute, Cal. Penal Code § 186.22(b)(4)(C)).

[35] Mass. Gen. Laws ch. 94C, § 32A (providing that a "person shall not be eligible for parole *upon a finding of any one of the following aggravating circumstances*" including whether that person used or threatened violence or possessed a firearm (emphasis added)); Mass. Gen. Laws ch. 94C, §§ 32(c), 32B(c), 32E(d) (same); Nev. Rev. Stat. § 202.446 (same, violation of the chemical weapons statute that results in substantial bodily harm or death); N.J. Stat. § 2C:43-6(c) (same, for possession of a firearm); 18 Pa. Cons. Stat. § 6121 (same, for crime involving armor-piercing ammunition).

[36] La. Rev. Stat. § 14:27(D)(1)(b); La. Rev. Stat. § 14:34.2(3).

[37] Nev. Rev. Stat. § 200.750 (delaying eligibility for parole if the victim of specified pornography offense was younger than fourteen); 42 Pa. Cons. Stat. § 9717 (commanding that "[p]arole shall not be granted until the minimum term of imprisonment has been served," upon finding that a defendant convicted of specified offenses was under sixty years of age and "the *victim is over 60 years of age* and not a police officer" (emphasis added)); 42 Pa. Cons. Stat. § 9718 (same, victim under sixteen years of age); R.I. Gen. Laws § 11-9-5.3(f) (same, victim of child abuse five years of age or under).

[38] *E.g.*, Mass. Gen. Laws ch. 209A, § 7 (restricting eligibility upon a judicial finding of whether the offense was "in retaliation for the defendant being reported . . . for failure to pay child support payments"); Nev. Rev. Stat. § 193.161 (same, upon finding of death or substantial bodily harm, if the offense was committed on school property when pupils or employees were present); Nev. Rev. Stat. § 453.3353 (same, upon finding of serious bodily harm or death in a drug discovery or cleanup); *see also* Nev. Rev. Stat. § 193.162 (minimum one year for committing felony with the aid of a child); Nev. Rev. Stat. § 193.163 (same, armor piercing bullets); Nev. Rev. Stat. § 193.165 (same, hate crime); Nev. Rev. Stat. § 193.167 (same, vulnerable victims); Okla. Stat. tit. 21, § 13.1 (same, requiring service of 85% of the sentence prior to eligibility if the assault victim was defending another person from assault); *see also* State v. Rosling, 180 P.3d 1102, 1116 (Mont. 2008) (rejecting an *Apprendi* challenge to a statute that authorizes the sentencing judge to deem a defendant ineligible for parole "[i]f the sentencing judge finds that the restriction is necessary for the protection of society").

[39] Kan. Stat. Ann. § 21–6620. Former Kan Stat. Ann. § 21–4635, relating to the same subject matter as this Section, was held to be unconstitutional as a violation of the Sixth Amendment by State v. Soto, 322 P.3d 334, 2014 WL 1407665 (Kan. 2014). *See also* State v. Astorga, 2014 WL 2155269, at *2–3 (Kan. May 23, 2014) (ordering relief for defendant sentenced under statute found unconstitutional in *Soto*, despite state's arguments that *Alleyne* was not violated because defendant's sentence rested in part on a prior conviction, and alternatively, that error was harmless).

[40] Kan. Stat. Ann. § 21-6624(f).

[41] Kan. Stat. Ann. § 21–6624(a).

[42] Alleyne v. United States, 133 S. Ct. 2151, 2160–61 (2013).

[43] *E.g.*, S.D. Codified Laws § 24-15A-32.1 (providing that for sex offenders, the board may, after a hearing, determine if parole eligibility is to be withheld); Mass. Gen. Laws ch. 269, § 10 (providing that the commissioner of correction may grant an offender temporary release to, for example, attend a family member's funeral or obtain medical services).

[44] *E.g.*, Colo. Rev. Stat. § 17-22.5-405; Miss. Code Ann. § 47-5-139 (stating that "earned time shall be forfeited by the inmate in the event of escape"); N.Y. Correct. Law § 803-b (McKinney) (explaining that inmates may earn a limited credit time allowance if they successfully participate in the work and treatment program); Tex. Gov't Code Ann. § 498.003 (providing an inmate may "accrue good conduct crime" for participation in various work programs).

[45] *E.g.*, Ark. Code § 16-93-615; Fla. Stat. § 944.275 (authorizing gain time if the "inmate works diligently, participates in training, uses time constructively, or otherwise engages in positive activities," or "performs some outstanding deed"); *see also* Michael M. O'Hear, *Solving the Good-Time Puzzle: Why Following the Rules Should Get You Out of Prison Early*, 2012 Wis. L. Rev. 195 (2012) (including an appendix showing for each state the maximum reduction in terms, statutory exclusions, and grounds for denial or revocation).

But when statute requires a judge to limit the amount or rate of good or earned time based on a particular fact found at sentencing, *Alleyne* does apply. *See* State v. Iowa Dist. Court for Black Hawk Cnty., 616 N.W.2d 575, 579 (Iowa 2000) (holding that statutory ineligibility for parole under Iowa Code Ann. § 902.12, taken together with separate statutory restrictions on eligibility for good behavior credits under Iowa Code Ann. § 903A.2, operated as minimum sentence rather than restriction on the power of the parole board).

[46] La. Rev. Stat. § 15:574.4; Miss. Code Ann. § 47-7-3 ("Any inmate refusing to participate in an educational development or job training program may be ineligible for parole."); Neb. Rev. Stat. § 83-1,112.01 (same, refusing to complete diagnostic evaluations) N.Y. Correct. Law § 805 (McKinney); *see also* State v. Rippy, 69 A.3d 153, 159 (N.J. Super. Ct. App. Div. 2013) ("Where a parole ineligibility term is not part of the sentence, gap-time credits will advance the date on which a defendant first becomes eligible for parole.").

[47] *E.g.*, R.I. Gen. Laws § 13-8.1-4.

[48] *E.g.*, R.I. Gen. Laws § 42-26-13.3 (providing that if overcrowding is established, the governor may grant "emergency good time to nonviolent offenders to expedite eligibility for parole of the minimum number of sentenced offenders to meet the mandated population caps"); Neb. Rev. Stat. § 83-962.

[49] *See* Jones v. State, 71 So.3d 173, 178–79 (Fla. Dist. Ct. App. 2011) (holding that without a jury finding, the court cannot impose a "dispositional departure, i.e., incarceration rather than probation, because that would exceed the statutory maximum by increasing the quantum of punishment even

though the length of the sentence might be no different. In other words, five years of probation is most certainly not equal to five years of state prison: the latter is qualitatively, albeit not quantitatively, more severe." (quoting State v. Allen, 706 N.W.2d 40 (Minn. 2005) (internal quotations and citations omitted)); *see also* Faye S. Taxman, *Probation, Intermediate Sanctions, and Community-based Corrections*, *in* Oxford Handbook of Sentencing and Corrections (Joan Petersilia & Kevin Reitz, eds. 2012) (the first words of the chapter covering probation: "Probation is a 'lesser' punishment").

50 Ariz. Rev. Stat. § 13-901.01.

51 Fla. Stat. § 948.013 (stating that a defendant is ineligible for probation "*where the victim is a minor and the defendant is not the victim's parent*" (emphasis added)); Minn. Stat. § 609.229 (same, if the victim of the crime was under eighteen); Tex. Code Crim. Proc. Ann. art. 42.12(4)(d)(5), (6) (same, victim under fourteen).

52 *See* Ariz. Rev. Stat. Ann. § 13-708 (stating a convicted defendant "shall be sentenced to a term of not less than the presumptive sentence authorized for the offense and the person is not eligible for suspension of sentence, probation, pardon or release from confinement"); State v. Large, 234 Ariz. 274, 321 P.3d 439 (Ariz. Ct. App. 2014) (finding that the defendant, sentenced to "flat time" under § 13-708 for his robbery because the sentencing judge determined it occurred while he was on parole, "was entitled to have a jury determine his parole status [at the time he committed the offense of conviction] because that fact exposed him to a penalty beyond the statutory minimum," but finding error harmless). *See also, e.g.*, Nev. Rev. Stat. § 176A.100 (stating that probation is required for certain crimes *unless*, at sentencing, the judge finds the person was on probation or parole at the time the felony was committed, the person had previously had probation or parole revoked, or the person failed to successfully complete a rehabilitation program); State v. Albrecht, 790 N.W.2d 1, 4 (Neb. 2010) (holding a convicted defendant was not eligible for probation for driving under the influence (DUI) if that offense was committed while another DUI charge was pending, finding that the ineligibility statute "does not change the crime or the elements thereof").

53 Kan. Stat. Ann. § 21-6707 (formerly § 21-4618); Ky. Rev. Stat. Ann. § 533.060; Nev. Rev. Stat. § 193.165. For other variations, see Alaska Stat. § 12.55.125; Mass. Gen. Laws ch. 269, § 10; 42 Pa. Cons. Stat. § 9719 (requiring for listed offenses a three-year minimum sentence of confinement during which the defendant is ineligible for probation, if the judge finds at sentencing that the defendant was impersonating a law enforcement officer during the commission of the offense); S.D. Codified Laws § 22-6-11 (2013) (permitting the court to impose a sentence other than probation if "aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation"); *see also* Fla. Stat. § 948.20(1); State v. Winbush, 121 So. 3d 1165, 1166 (Fla. Dist. Ct. App. 2013).

54 *See* United States v. Wilson, Nos. 13-4202, 13-4306, 2013 WL 6645470 (4th Cir. Dec. 18, 2013) (unpublished table opinion) (holding that the imposition of a five-year term of release after a drug amount finding (instead of at least a three-year term for a lower amount) affected substantial rights and violated *Alleyne*, but failed the fourth prong of plain error review).

55 Whether, under *Alleyne*, the addition of a particular *condition* of release creates a more aggravated penalty than release without that condition is an interesting question. Frequently, mandatory conditions of release depend upon particular factual findings by the judge at sentencing. *E.g.*, La. Rev. Stat. § 15:538 (listing the mandatory conditions of probation if an offender is convicted of an offense "which involves the physical, mental, or sexual abuse of a minor"). In Montana, if the judge finds—using a risk assessment instrument—that the defendant is at risk level three, the offender must enroll in and successfully complete the cognitive and behavioral phase of the prison's sexual offender treatment program. Mont. Code § 46-18-207. But variations in the length of a period of incarceration or supervised release may be qualitatively different than variations in the requirements placed on an offender during that period. Compare, for example, this language in *Alleyne*: "[C]riminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty." Alleyne v. United States, 133 S. Ct. 2151, 2160 (2013) (citing nineteenth-century statutes designating a minimum and maximum term of imprisonment).

56 Taxman, *supra* note 49.

57 *Alleyne*, 133 S. Ct. at 2170 (Roberts, C.J., dissenting) ("[G]iven that *Apprendi*'s rule rests heavily on affirmative historical evidence about the practices to which we have previously applied it, the lack of such evidence on statutory minimums is a good reason not to extend it here.").

58 *Id.* at 2163 n.5 (citing Harris v. United States, 536 U.S. 545, 579 (2002)).

59 *Alleyne*, 133 S. Ct. at 2160 ("Consistent with common-law and early American practice, *Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." (internal citations omitted)); Apprendi v. New Jersey, 530 U.S. 466, 483, n.10 (2000) ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." (internal citations omitted)).

60 *Harris*, 536 U.S. at 561 (citing Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1474–77 (2001)).

61 *Harris*, 536 U.S. at 579–80 (Thomas, J., dissenting).

62 *Alleyne*, 133 S. Ct. at 2167 (Breyer, J., concurring) (emphasis in original).

63 *Harris*, 536 U.S. at 579–80 (Thomas, J., dissenting).

64 Oregon v. Ice, 555 U.S. 160, 177 (2009) (Scalia, J., dissenting) ("[W]e have watched [the horribles] parade past before, in several of our *Apprendi*-related opinions, and have not saluted."). See also United States v. Booker, 543 U.S. 220, 244 (2005).

65 *Cf.* People v. Woodward, 127 Cal. Rptr. 3d 117, 123–24 (Cal. Ct. App. 2011) ("[f]inding a defendant ineligible for probation is not a form of punishment, because probation itself is an act of clemency on the part of the trial court."). Clemency is also discussed at note 83 *infra*.

66 *E.g.*, La. Code Crim. Proc. Ann. art. 893 (permitting the court to suspend a defendant's sentence and place the defendant on probation "[w]hen it appears that the best interest of the public and of the defendant will be served"); R.I. Gen. Laws § 42-56-20.2 (same; the judge's findings "*shall include*" factors "based on evidence regarding the nature and circumstances of the offense and the personal history, character, record, and propensities of the defendant" (emphasis added)). *See also* Tenn. Code § 40-35-303; Tenn. Code § 40-36-106; State v. Bise, 380 S.W.3d 682, 709 (Tenn. 2012) ("[T]he defendant had failed to "carr[y] his burden of establishing his suitability for probation and ha[d] not established that the suspension of his sentence serve[d] the ends of justice or the best interest of the public." (quoting State v. Carter, 254 S.W.3d 335, 348 (Tenn. 2008) (alterations in original)); Tex. Crim. Proc. Code art. 42.12(5) (permitting a judge to place a certain offenders on community supervision "only if the judge [finds that it] *is in the best interest of the victim*" (emphasis added)); Tex. Crim. Proc. Code art. 42.12(5)(d)(4) (prohibiting deferred adjudication for defendants charged with murder unless the judge determines that the defendant did not cause, intend, or

anticipate death); Utah Code § 76-5-406.5; State v. Offerman, 172 P.3d 310, 315 (Utah 2007).

[67] *See* discussion *supra* notes 50–53 and accompanying text. Of course, statutes that forbid a judge from imposing a sentence of incarceration *unless* certain facts are established at sentencing violate the ceiling-raising metric of *Apprendi* itself.

[68] Alleyne v. United States, 133 S. Ct. 2151, 2161 (2013).

[69] For examples, consider Ark. Code § 16-93-618 (authorizing judge to "waive" the subsection requiring 70% of a sentence to be served before eligibility if the defendant was a juvenile at the time of the offense, was merely an accomplice, and offense occurred on or after July 28, 1995); Tenn. Code Ann. § 40-35-109 (explaining that the court may determine a defendant's "mitigated offender status" and thereby reduce the defendant's parole eligibility date if the defendant has no prior felony convictions and if the "court finds mitigating, but no enhancement factors"); *see also id.* (stating that when the judge has designated the defendant as an "especially mitigated offender," the judge may "reduc[e] the minimum sentence by 10 percent or reduc[e] the release eligibility date to 20 percent or both options"); Utah Code § 76-5-302(6) (stating that the mandatory minimum sentence of fifteen years for aggravated kidnapping is not applicable if the defendant was under eighteen at time of offense).

[70] One particularly challenging statute to classify in this regard is found in Montana. It provides for minimum terms before eligibility for certain offenses, but only if the *prosecutor* can prove at an exceptions hearing that certain factors do *not* apply. *See* Mont. Code § 46-18-222 (stating that restrictions on parole eligibility do not apply if, for example, the offender "was less than 18 years of age"; had significantly impaired mental capacity; "was acting under unusual and substantial duress"; or, was an accomplice with relatively minor participation); Mont. Code § 46-18-223 (providing that if the court finds by a preponderance, based on the presentence report and other factors at the sentencing hearing, that none of the exceptions apply, "the court shall impose the appropriate mandatory sentence"); *see also* State v. Sprinkle, 4 P.3d 1204 (Mont. 2000) (remanding for entry of reasons after court held an "exceptions hearing" and denied relief).

Another unusual scheme is found in Ohio. Ohio permits judges to order early release at a post-commitment hearing after a motion by the defendant. Factfinding at that hearing that determines eligibility falls outside of the *Apprendi* rule for two reasons. First, the defendant must show he qualifies for the more mitigated sentence; and second, these post-sentencing findings arguably resemble the eligibility determinations made by paroling authorities, not those made at initial sentencing, even though they are made by a judge. *See, e.g.*, Ohio Rev. Code § 2929.13(F) (providing that a sentence reduction is not permitted for gross sexual imposition or sexual battery "if the victim is less than thirteen years of age"); Ohio Rev. Code § 2929.20 (providing that a court "shall not grant a judicial release" at a hearing unless the court finds "[t]hat a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender"); State v. Hunt, 2005-Ohio-3144, 2005 WL 1476887 (Ohio Ct. App. 2005) (vacating a defendant's sentencing reduction when the trial court did not make the statutorily required findings in granting the defendant's motion for judicial release); *see also* Alaska Stat. § 12.55.125(j).

[71] *E.g.*, United States v. Reingold, 731 F.3d 204, 210 (2d Cir. 2013) (agreeing the district court was "legally obligated to sentence Reingold to the minimum five-year prison term mandated by 18 U.S.C. § 2252(b)(1) for any distribution of child pornography").

[72] *See* United States v. Booker, 543 U.S. 220, 235 (2005) ("The sentencing judge would therefore have been reversed had he not imposed a sentence within the [applicable] Guidelines range.").

[73] *See* Pepper v. United States, 131 S. Ct. 1229, 1248 n.14 (2011) ("An award of good time credit by the Bureau of Prisons (BOP) does not affect the length of a court-imposed sentence; rather, it is an administrative reward 'to provide an incentive for prisoners to compl[y] with institutional disciplinary regulations.' Such credits may be revoked at any time before the date of a prisoner's release." (internal quotations and citations omitted)).

[74] For an example of a statute that requires a certain minimum sentence upon a designated factual finding, even though the sentence is optional without the finding, see Alaska Stat. § 12.55.125(a)(3) (requiring sentence of ninety-nine years without parole eligibility upon certain findings for murder, even though the maximum sentence for murder without those findings is already ninety-nine years and even though Alaska Stat. § 12.55.155 permits a judge the discretion to restrict the eligibility of a prisoner for discretionary parole at sentencing); State v. Korkow, 2013 WL 6516415 (Alaska 2013) (parole restrictions under 12.55.155 are completely discretionary).

[75] Mich. Comp. Laws § 777.21(1).

[76] Mich. Comp. Laws § 769.34(3); *see* People v. Hardy, 2014 WL 716145 (Mich. Ct. App. 2014); People v. Herron, 2013 WL 6508495 at *4 (Mich. Ct. App. 2013).

[77] *Herron*, 2013 WL 6508495 at *4. *Herron* found that Michigan's guidelines did not establish a statutory minimum sentence, but rather "inform[ed] the trial judge's sentencing discretion within the maximum determined by statute and the jury's verdict." *Id.* at *7 (reasoning "judicial fact-finding to score Michigan's guidelines falls within the 'wide discretion' accorded a sentencing judge 'in determining the kind and extent of punishment to be imposed within limits fixed by law'" and that "Michigan's sentencing guidelines are within the 'broad sentencing discretion, informed by judicial fact-finding, [which] does not violate the Sixth Amendment.'" The *Herron* court reasoned that "[w]hile judicial fact-finding in scoring the sentencing guidelines produces a recommended range for a minimum sentence of an indeterminate sentence, the maximum of which is set by law . . . it does not establish a mandatory minimum; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment's right to a jury trial." (internal quotations and citations omitted)). At least six later decisions in Michigan have followed *Herron*.

[78] So far, only two judges in Michigan have taken this position, agreeing with the defendant in *Herron* and arguing *Herron* was wrongly decided. People v. Lockridge, 2014 WL 563648 at *3 (Mich. Ct. App. 2014) (Beckering, J., concurring) (stating "the guidelines range within which a sentencing court in Michigan is required to fix a minimum term of imprisonment is itself a legally prescribed mandatory minimum" and explaining that "since Michigan's sentencing scheme requires the court to rely upon Offense Variables ("OVs") to calculate the appropriate guidelines range for a minimum sentence, it is finding facts to determine the sentence range authorized by law"); *see also Lockridge*, 2014 WL 563648 at *11 (Shapiro, J., concurring).

[79] *E.g.*, Cunningham v. California, 549 U.S. 270, 289 (2007) ("[B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied."); Blakely v. Washington, 542 U.S. 296, 304–05, (2004); United States v. Booker, 543 U.S. 220, 221 (2005).

[80] Gall v. United States, 552 U.S. 38 (2007).

[81] Kan. Stat. Ann. § 21-5803 ("The mandatory provisions of this subsection shall not apply to any person where such application would result in a manifest injustice."); Kan. Stat. Ann. § 21-6707c) (same).

[82] For similar exceptions, see Chism v. People, 80 P.3d 293 (Colo. 2003) (permitting judges, upon application of the prosecuting attorney, to waive ineligibility for probation); Ky. Rev. Stat. § 533.060 (providing that when an offense involved a weapon capable of causing serious bodily injury or death, the offender "shall not be eligible for probation" unless the offender "establishes that the person against whom the weapon was used had previously . . . engaged in . . . domestic violence and abuse" against the offender); Mass. Gen. Laws ch. 269, § 10 (stating that "[a person] holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph"); Mont. Code § 46-14-312 (excepting any mandatory minimum sentence if the court finds the defendant suffered from a mental disease or defect at the time of the offense); N.J. Stat. § 2C:43-6.5.

[83] *See* People v. Woodward, 127 Cal. Rptr. 3d 117, 123–24 (Cal. Ct. App. 2011) ("Finding a defendant ineligible for probation is not a form of punishment, because probation itself is an act of clemency on the part of the trial court."); People v. Benitez, 26 Cal. Rptr. 3d 262 (Cal. Ct. App. 2005) (probation is an act of clemency). These cases relied on an earlier case which in turn relied on *Harris* and *McMillan*. *See* In re Varnell, 70 P.3d 1037, 1044–45 (Cal. 2003).

[84] *See, e.g.*, Cunningham v. California, 549 U.S. 270, 294 (2007) ("States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury—either at trial or in a separate sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence. As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements. . . . Other States have chosen to permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal. . . . California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions." (internal citations omitted)).

[85] Kan. Stat. Ann. § 21-6620, House Bill No. 2002 (2013).

[86] *See* CRIMPROC, *supra* note 12, at § 26.4(i) nn.188–88.1 (listing states that opted to provide jury determinations for aggravating facts after *Blakely* rather than make binding guideline ranges advisory); State v. Essex, 838 N.W.2d 805, 812–13 (Minn. Ct. App. 2013).

[87] *See* Nancy J. King, *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to* Apprendi, forthcoming S.M.U. L. Rev., at 5–9, available at http://ssrn.com/abstract=2459682 (describing similar approaches adopted by states for handling proof of prior convictions).

[88] *See* United States v. Booker, 543 U.S. 220, 246 (2005). For example, the Tennessee governor established a task force to remedy the infirmities of the state's criminal justice system after the Supreme Court announced *Blakely*. This resulted in the Criminal Sentencing Reform Act of 2005, which announced the sentencing guidelines to be advisory. *See* David Wilstermann, Administrative Office of the Courts, Impact of the Criminal Sentencing Reform Act of 2005 on Tennessee's Criminal Justice System: A Report of the Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing (Oct. 2006), *available at* http://www.tncourts.gov/sites/default/files/docs/task_force_annual_report_2006.pdf.

[89] Mich. Comp. Laws § 777.21.

[90] Mich. Comp. Laws § 769.8(1).

[91] *See* People v. Lockridge, 2014 WL 563648, at *12 (Mich. Ct. App. 2014) (Beckering, J., concurring) (citing Mich. Comp. Laws § 769.34(2)).