IN THE SUPREME COURT OF MISSISSIPPI

NO. 2016-CT-01244-SCT

JEREMY SHANE FOGLEMAN a/k/a JEREMY FOGLEMAN a/k/a JEREMY S. FOGLEMAN

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	08/18/2016
TRIAL JUDGE:	HON. ROGER T. CLARK
TRIAL COURT ATTORNEYS:	IAN LAWRENCE BAKER ROBERT CHARLES STEWART JOEL SMITH
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: W. DANIEL HINCHCLIFF
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ALICIA M. AINSWORTH
DISTRICT ATTORNEY:	JOEL SMITH
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED, AND THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS REINSTATED AND AFFIRMED - 08/29/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MAXWELL, JUSTICE, FOR THE COURT:

¶1. A jury convicted Jeremy Fogleman of felony failure to stop his motor vehicle for police. Because Fogleman fled at a high rate of speed, showing an indifference to the

consequences and to causing injury, the trial judge designated Fogleman's offense a crime of violence under Mississippi Code Section 97-3-2(2) (Rev. 2014). This finding resulted in Fogleman's parole-ineligibility period increasing from one-fourth to one-half of his five-year sentence—a sentence clearly allowed by statute and authorized by the jury's verdict.

¶2. Even though Fogleman's sentence fell within the statutory range of up to five years in prison and the judge's findings did not increase a statutory maximum or minimum sentence, the Court of Appeals reversed and rendered the crime-of-violence designation. The appellate court held that the resulting parole-ineligibility increase violated the Sixth Amendment because it was based on facts found by a judge, not a jury.

¶3. The United States Supreme Court has held that the Sixth Amendment requires factual determinations that increase maximum or minimum *sentences* be submitted to a jury and found beyond a reasonable doubt.[1] But there is a notable distinction between a judge making factual findings that affect an actual sentence—for example, increasing the maximum or minimum sentence—versus those that merely impact time served. The first scenario requires a jury finding, while the second, which we confront here, does not. Our review shows that Fogleman's sentence—five years in prison, with no eligibility for parole or early release until half his sentence had been served—fell well within the range authorized by statute and by the jury's verdict.[2] We find the judge's crime-of-violence designation merely impacted the

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[1] ***Alleyne v. United States***, 570 U.S. 99, 116, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); ***Apprendi v. New Jersey***, 530 U.S. 466, 481, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[2] *See* Miss. Code Ann. § 97-9-72(2) (Rev. 2014).

minimum time Fogleman had to serve before becoming parole eligible. It did nothing to affect Fogleman's *sentence*. Thus, no Sixth Amendment violation occurred.

¶4. We reverse the decision of the Court of Appeals and reinstate the judgment of the Circuit Court of Harrison County.

Background Facts and Procedural History

¶5. On August 27, 2014, a Biloxi police officer attempted to stop a Dodge Charger with a partially obscured license plate. The owner, Jeremy Fogleman, had a suspended driver's license and an outstanding arrest warrant. Rather than obey the officer's signals to stop, Fogleman took off. He led numerous Biloxi police officers on a high-speed chase through residential neighborhoods and down Highway 90 at speeds reaching seventy miles per hour. The chase ended when Fogleman's Charger crashed into another car at an intersection. The occupants of the other car suffered minor injuries. Fogleman was immediately arrested.

¶6. Fogleman was indicted and tried before a jury. The jury convicted him of failing to stop his vehicle when signaled by law enforcement while operating his vehicle with reckless or willful disregard for the safety of persons or property. *See* Miss. Code Ann. § 97-9-72(2) (Rev. 2014). This offense carried statutory penalties of up to five years in prison. After the jury was dismissed, the State moved to classify Fogleman's crime as a crime of violence. The State argued Fogleman "used physical force, or made a credible attempt or threat of physical force against another person as part of [his] criminal act." Miss. Code Ann. § 97-3-2(2) (Rev. 2014).

¶7. The trial judge sentenced Fogleman—within the statutory maximum—to five years

in Mississippi Department of Corrections' custody. *See* Miss. Code Ann. § 97-9-72(2). The judge also granted the State's motion and designated in the sentencing order that Fogleman had committed a crime of violence under Section 97-3-2(2). Under this provision, "No person convicted of a crime of violence listed in this section is eligible for parole or for early release from the custody of the Department of Corrections until the person has served at least fifty percent (50%) of the sentence imposed by the court." *Id.*

¶8. Fogleman appealed. On appeal, he did not challenge his conviction. Rather, his sole claim is that the trial judge erred by applying Section 97-3-2(2).

¶9. We assigned Fogleman's appeal to the Court of Appeals. The appellate court ruled that Section 97-3-2(2) is unconstitutional. Relying on ***Alleyne v. United States***, 570 U.S. 99, 113, 133 S. Ct. 2151, 2161, 186 L. Ed. 2d 314 (2013), the Court of Appeals concluded that Section 97-3-2(2) violates the Sixth Amendment to the United States Constitution because it allows a judge, not a jury, to make a factual finding that increases the mandatory minimum amount of time a convict must serve. ***Fogleman v. State***, 2016-KA-01244-COA, 2018 WL 4444057, at *3 (Miss. Ct. App. Sept. 18, 2018). The Court of Appeals reversed and rendered the crime-of-violence designation in the sentencing order.

¶10. The State petitioned for certiorari review, which we granted.

Discussion

¶11. After review, we reverse the Court of Appeals' decision and reinstate the trial judge's crime-of-violence designation. We find Section 97-3-2(2) does not increase the statutory minimum *sentence*, so it does not run afoul of ***Alleyne***'s holding and is not unconstitutional.

I. *Alleyne* and Section 97-3-2(2)

¶12. ***Alleyne***'s holding is an extension of ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In ***Apprendi***, the United States Supreme Court held that facts that increase the penalty for a crime—beyond the statutory maximum—are elements of the crime that, under the Sixth and Fourteenth Amendments, must be submitted to a jury and found beyond a reasonable doubt.[3] ***Apprendi***, 530 U.S. at 482-83. Two years later, the Supreme Court reiterated that only those facts that increase a defendant's penalty beyond the statutory maximum allowed by the jury's verdict had to be submitted to a jury. ***Harris v. United States***, 536 U.S. 545, 557, 122 S. Ct. 2406, 2414, 153 L. Ed. 2d 524 (2002), *overruled by* ***Alleyne***, 570 U.S. 99. According to ***Harris***, ***Apprendi***'s holding did not apply to facts that increased the statutory minimum. As the ***Harris*** Court put it, factual findings that limited a judge's sentencing discretion within the range of penalties authorized by the jury's verdict were considered sentencing factors, not elements, and thus did not violate the Sixth Amendment. ***Harris***, 536 U.S. at 566-67.

¶13. But nearly eleven years after the ***Harris*** decision, the Supreme Court, in a sharply divided opinion, changed course. In ***Alleyne***, the Supreme Court held that "[a] fact that increases a sentencing floor . . . forms an essential ingredient of the offense" and must be submitted to the jury. ***Alleyne***, 570 U.S. at 113. In other words, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a

[3] The Sixth Amendment right to an impartial jury trial, together with the Fourteenth Amendment right to due process of law, entitle criminal defendants to a jury's determination of guilt on every element of the offense, beyond a reasonable doubt. *See* ***Apprendi***, 530 U.S. at 476-77.

constituent part of a new offense and must be submitted to the jury." ***Id.*** at 114-15. Thus, according to ***Alleyne***, ***Apprendi*** applies not only to an increased statutory maximum sentence but also to an increased statutory minimum sentence.

¶14. The ***Alleyne*** Court considered a federal sentencing statute—18 U.S.C.A. § 924(c)(1)(A). This statute applied to crimes of violence or drug trafficking, in which firearms are involved.[4] ***Id.*** at 103-04. In ***Alleyne***, the jury's verdict supported a sentencing range from five years in prison to life. ***Id.*** at 117. But under Section 924(c)(1)(A)(ii), if the defendant brandished a firearm during the crime, rather than simply possessing it, the mandatory minimum sentence increased from five years to seven years. ***Id.*** at 104; *see also* 18 U.S.C.A. § 924(c)(1)(A) (West 2018). In ***Alleyne***, the district judge made a factual

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[4] 18 U.S.C.A. § 924(c)(1)(A) states,

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C.A. § 924(c)(1)(A) (West 2018).

finding that Alleyne had brandished a firearm and, thus, the *mandatory minimum sentence* increased from five to seven years. ***Id.*** The Supreme Court found that this violated Alleyne's Sixth Amendment rights.

¶15. But that is not what we face here. The sentencing range authorized by the jury's guilty verdict for felony failure to stop a motor vehicle for law enforcement was zero to five years in prison. Miss. Code Ann. § 97-9-72(2). There was no mandatory minimum sentence that was triggered by a judicial finding. Nor is there a tiered sentence structure that would—for example—increase the statutory sentence from zero to five years to two to five years based on judge-made factual findings like in ***Alleyne***.[5] Here, Fogleman was sentenced to five years, a sentence clearly within the parameters of Section 97-9-72(2).

¶16. Still, the Court of Appeals ruled Fogleman's sentence was unconstitutional—not for the length of his sentence (five years) but rather for the amount of time he must serve before becoming eligible for parole or early release. Instead of focusing on Section 97-9-72(2), the statute under which Fogleman was sentenced, the Court of Appeals focused on Section 97-3-2(2). That section provides that,

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[5] Fogleman was convicted for violating Section 97-9-72(2), which states,

> Any person who is guilty of violating subsection (1) of this section by operating a motor vehicle in such a manner as to indicate a reckless or willful disregard for the safety of persons or property, or who so operates a motor vehicle in a manner manifesting extreme indifference to the value of human life, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not to exceed Five Thousand Dollars ($5,000.00), or by commitment to the custody of the Mississippi Department of Corrections for not more than five (5) years, or both.

Miss. Code Ann. § 97-9-72(2).

> In any felony offense with a maximum sentence of no less than five (5) years, upon conviction, the judge may find and place in the sentencing order, on the record in open court, that the offense, while not listed in subsection (1)[6] of this section, shall be classified as a crime of violence if the facts show that the defendant used physical force, or made a credible attempt or threat of physical force against another person as part of the criminal act. No person convicted of a crime of violence listed in this section is eligible for parole or for early release from the custody of the Department of Corrections until the person has served at least fifty percent (50%) of the sentence imposed by the court.

Miss. Code Ann. § 97-3-2(2). The Court of Appeals found this section was unconstitutional. Specifically, the court looked to a New Jersey Supreme Court decision that "held that [New Jersey's sentencing] statute was unconstitutional under ***Alleyne*** because it required the court to impose a period of parole ineligibility if the judge found that the defendant was involved in organized crime." ***Fogleman***, 2018 WL 4444057, at *3 (citing ***State v. Grate***, 106 A.3d 466, 475-76 (N.J. 2015)). The appellate court also relied on a Michigan Supreme Court decision that "held [Michigan's] sentencing guidelines were unconstitutional under ***Alleyne*** to the extent that they required the court to extend a defendant's parole eligibility date based on facts found by the judge but not the jury." ***Id.*** (citing ***People v. Lockridge***, 870 N.W.2d 502, 516-17 (Mich. 2015)).

¶17. We disagree with the analysis in these two out-of-state cases. First, there is no constitutionally recognized right to or interest in parole in Mississippi—so Fogleman has *no* right to parole or early release. *See* ***Vice v. State***, 679 So. 2d 205, 208 (Miss. 1996). Second, applying ***Alleyne*** to any judicial finding that impacts parole eligibility stretches the Supreme Court's decision beyond its actual holding. As discussed, the Supreme Court said in ***Alleyne***

[6] In subsection (1), the Legislature designated specific statutory crimes as per se violent. Miss. Code Ann. § 97-3-2(1) (Rev. 2014).

that facts impacting a defendant's *sentence* must be submitted to the jury and found beyond a reasonable doubt. The Court did not mandate how much time a defendant must actually serve, nor did it snuff out judicial discretion in sentencing within statutory parameters. In ***Alleyne***, the majority recognized these issues. It emphasized that "facts that increase a *mandatory minimum sentence* must be submitted to the jury," but it cautioned that the court's ruling did "not mean that *any fact* that influences judicial discretion must be found by a jury."[7] ***Alleyne***, 570 U.S. at 116 (emphasis added).

¶18. We find that Illinois has clearly and concisely addressed these precise distinctions and has taken the more reasoned approach. The Illinois Court of Appeals has found the ***Alleyne*** decision merely extended ***Apprendi*** to apply to minimum *sentences*. ***People v. Barnes***, 90 N.E.3d 1117, 1140 (Ill. App. Ct. 2017); *see also* ***People v. Gray***, No. 1-14-3474, 2017 WL 2800019, at *11 (Ill. App. Ct. June 26, 2017) (unpublished). In other words, statutes that only "impact the actual amount of jail time [the] defendant must serve"—and do not increase a defendant's mandatory minimum sentence—fall outside of ***Alleyne***. ***Barnes***, 90 N.E.3d at 1140. That is exactly what we face here, and we agree with the Illinois Court's analysis.

¶19. As the Illinois appellate court noted, ***Alleyne*** attempted to draw a line between the elements of an offense and sentencing factors. ***Gray***, 2017 WL 2800019, at *11. But ***Alleyne*** also recognized that such a line is difficult to draw, because many legislatures have enacted fact-based sentencing enhancements in their criminal statutes. ***Id.*** Because the

[7] Even New Jersey later recognized some distinctions exist and held that discretionary decisions by a trial court over parole or early release fall outside ***Alleyne***'s mandate. *See* ***State v. Kiriakakis***, 196 A.3d 563, 576-78 (N.J. 2018).

Supreme Court "merely extend[ed] the reasoning in ***Apprendi*** to minimum sentences, ***Alleyne*** provide[d] . . . no justification for disturbing the distinction between the time served and the sentence imposed . . . ." ***Id.***

¶20. Accordingly, we find that Section 97-3-2(2) does not violate ***Alleyne*** because it only impacted Fogleman's actual time to serve and not his sentence. The jury's verdict and the statute authorized the judge to sentence Fogleman from zero to five years. And his designation of Fogleman's offense as a crime of violence in no way altered that statutory sentence or kicked in any mandatory minimum. Because Fogleman was sentenced within the parameters of the statute under which the jury convicted him, we reinstate the trial court's designation of Fogleman's conviction as a crime of violence under Section 97-3-2(2).

II. Sections 97-3-2 and 47-7-3

¶21. As a result, Fogleman is not eligible for parole or early release until he "has served at least fifty percent (50%) of the sentence imposed by the court." Miss. Code § 97-3-2(2).

¶22. Contrary to the clear language of this provision, the Court of Appeals concluded that Fogleman's conviction for a "crime of violence" eliminated his parole eligibility altogether. ***Fogleman***, 2018 WL 4444057, at *3. The appellate court reached its decision by looking to another parole-eligibility statute, Mississippi Code Section 47-7-3(1)(g)(i) (Rev. 2014), which provides "[n]o person who . . . is convicted of a crime of violence pursuant to Section 97-3-2 . . . shall be eligible for parole." While Sections 97-3-2(2) and 47-7-3 appear to be in conflict, "[s]tatutes on the same subject, although in apparent conflict, should if possible be construed in harmony with each other to give effect to each." ***Roberts v. Miss.***

Republican Party State Exec. Comm., 465 So. 2d 1050, 1052 (Miss. 1985). We find this directive especially relevant here because the Legislature amended Section 47-7-3(1)(g)(i) to remove parole eligibility for crimes of violence in the very same bill—indeed in the very next section after—it codified Section 97-3-2. *See* 2014 Miss. Laws ch. 457, §§ 39-40 (H.B. 585).

¶23. Instead of just declaring that Section 43-7-3(1)(g)(i)'s parole-elimination provision trumps, our law requires us, if possible, to harmonize these two parole-related provisions so as not to render the last sentence of Section 97-3-2(2) meaningless. We find Section 43-7-3(1)(g)(i) *does* apply to the per se crimes of violence listed in subsection (1) of Section 97-3-2 because Section 97-3-2(1) is silent about parole eligibility. But Section 43-7-3(1)(g)(i) *does not* apply to the trial court's discretionary designation of a "crime of violence" under subsection (2) of Section 97-3-2. Rather, subsection (2)'s specific parole-and-early-release-eligibility provision controls.

¶24. Fogleman's conviction was designated by the trial court as a crime of violence under Section 97-3-2(2). So he is not eligible for parole or early release until he has served 50 percent of his five-year sentence.

Conclusion

¶25. ***Alleyne*** extends ***Apprendi*** only to facts that increase a defendant's mandatory minimum sentence, not to facts that affect how much of that sentence must be served. There is no mandatory minimum sentence for Fogleman's crime. And because Section 97-3-2(2) is effectively an enhancement statute that only affects how much time Fogleman must serve,

Alleyne does not apply. Thus, no Sixth Amendment violation occurred in this case.

¶26. **THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED, AND THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS REINSTATED AND AFFIRMED.**

RANDOLPH, C.J., COLEMAN, BEAM AND CHAMBERLIN, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J., AND ISHEE, J. GRIFFIS, J., NOT PARTICIPATING.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶27. I would affirm the holding of the unanimous Court of Appeals that Jeremy Fogleman's enhanced sentence violates his right to a jury trial under the Sixth Amendment. The United States Supreme Court has held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." ***Alleyne v. United States***, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (citing ***Apprendi v. New Jersey***, 530 U.S. 466, 483 n.10, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The Supreme Court has not, as the majority indicates, narrowly limited the application of the Sixth Amendment to facts that increase the *sentence* for the crime. Rather, the Court more broadly has held that the Sixth Amendment requires a jury finding beyond a reasonable doubt for any fact that increases the *punishment* or *penalty*. ***Blakely v. Washington***, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). I would hold that postponing the date of a defendant's eligibility for parole or early release increases the punishment or penalty for the crime. Therefore, a fact that results in the postponement of the date of such eligibility must be charged in the indictment and found by a jury beyond a reasonable doubt before the enhanced sentence may be imposed.

¶28. Fogleman's indictment charged that he, in violation of Mississippi Code Section 97-9-72(2),

> did willfully, unlawfully and feloniously, while operating a motor vehicle in such a manner as to indicate a reckless or willful disregard for the safety of persons or property, fail to stop such vehicle after being given a visible or audible signal by a Law Enforcement Officer by emergency light or siren directing him to bring his motor vehicle to a stop when such signal was given by a Law Enforcement Officer acting in the lawful performance of duty who had reasonable suspicion to believe that Jeremy Shane Fogleman had committed a crime, to wit: partially obscured license plate . . . .

Section 97-9-72(2) carries a penalty of not more than five years in the custody of the Mississippi Department of Corrections, a fine of up to $5,000, or both. Miss. Code Ann. § 97-9-72(2) (Rev. 2014).

¶29. After Fogleman had been tried and convicted, the State requested that the trial court make a crime-of-violence finding under Mississippi Code Section 97-3-2(2), which provides that

> In any felony offense with a maximum sentence of no less than five (5) years, upon conviction, the judge may find and place in the sentencing order, on the record in open court, that the offense, while not listed in subsection (1) of this section, shall be classified as a crime of violence if the facts show that the defendant used physical force, or made a credible attempt or threat of physical force against another person as part of the criminal act. No person convicted of a crime of violence listed in this section is eligible for parole or for early release from the custody of the Department of Corrections until the person has served at least fifty percent (50%) of the sentence imposed by the court.

Miss. Code Ann. § 97-3-2(2) (Rev. 2014). At a separate sentencing hearing, the trial court heard arguments from both parties on whether the facts met the crime-of-violence criteria. Then, the trial court deemed the crime one of violence because Fogleman's flight from police at a high rate of speed through a downtown area had demonstrated his indifference to the

potential for serious damage or injury. The trial court noted that Fogleman's actions had, in fact, caused a vehicular collision with minor injuries.

¶30. The trial court imposed the maximum sentence of five years. And the judge's crime-of-violence finding resulted in the postponement of Fogleman's parole or early release eligibility date. Without the judicial crime-of-violence finding, Fogleman would have been eligible for parole after serving 25 percent of his sentence. Miss. Code Ann. § 47-7-3(1)(g)(i) (Rev. 2015). With the judicial crime-of-violence finding, according to the majority's construction of the conflicting parole provisions, Fogleman will be ineligible for parole or early release until he has served 50 percent of his five-year sentence. Miss. Code Ann. § 97-3-2(2); Miss. Code Ann. § 47-7-3(1)(g)(i).

¶31. ***Apprendi*** dealt with a New Jersey hate crime statute that increased the maximum sentence for a firearm possession crime from ten to twenty years if the trial judge found, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." ***Apprendi***, 530 U.S. at 468-69 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000)). The Supreme Court held that, under the Sixth Amendment, "[o]ther than the fact of a prior conviction, 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." ***Id.*** at 490. The Court held that labeling a fact finding as a sentencing factor does not end the Sixth Amendment analysis: "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to

greater punishment than that authorized by the jury's guilty verdict?" ***Id.*** at 494 (footnote omitted). Because the effect of the judicial fact finding was to increase the maximum sentence beyond what was authorized by the jury's verdict, the defendant's constitutional right to a jury trial was violated. ***Id.*** at 497.

¶32. In subsequent cases, the United States Supreme Court has applied the rule from ***Apprendi*** in various sentencing contexts. In ***Ring v. Arizona***, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court held that the Sixth Amendment forbids a sentencing judge, sitting without a jury, from finding an aggravating fact that triggers the imposition of the death penalty. ***Blakely v. Washington***, 542 U.S. 296, 303,124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), held that mandatory state sentencing guidelines are subject to ***Apprendi***. In that case, the maximum penalty for the crime was fifty-three months, but the state court had imposed an exceptional sentence of ninety months on a judicial finding that the defendant had acted with deliberate cruelty; the Supreme Court held that, because the jury's verdict alone had not authorized the enhanced sentence, the Sixth Amendment had been violated. ***Id.*** at 303-04. In ***United States v. Booker***, 543 U.S. 220, 226-27, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Court held that federal sentencing guidelines are subject to ***Apprendi***. And in ***Cunningham v. California***, 549 U.S. 270, 274, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007), the Court found that California's determinate sentencing law, which empowered the trial judge to find facts that enabled imposition of a longer sentence, violated the jury trial right.

¶33. In ***Southern Union Co. v. United States***, 567 U.S. 343, 346, 132 S. Ct. 2344, 183 L.

Ed. 2d 318 (2012), the Court examined whether the ***Apprendi*** rule applies to a different kind of punishment: a criminal fine. In answering that question affirmatively, the Court "s[aw] no principled basis under ***Apprendi*** for treating criminal fines differently" than other punishments. ***Id.*** at 349. This is because "***Apprendi***'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.'" ***Id.*** (quoting ***Oregon v. Ice***, 555 U.S. 160, 170, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009)). The Court held that this concern is present "whether the sentence is a criminal fine or imprisonment or death." ***Id.*** In a pronouncement vital to this case, the Court said that "[i]n stating ***Apprendi***'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]' . . . ." ***Id.*** at 350 (citing ***Blakely***, 542 U.S. at 304; ***Apprendi***, 530 U.S. at 490; ***Ring***, 536 U.S. at 589).

¶34. In ***Alleyne***, the Court overruled its decision in ***Harris v. United States*** "that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment" and found that ***Harris*** was irreconcilable with ***Apprendi***. ***Alleyne***, 570 U.S. at 102 (citing ***Harris v. United States***, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002)). The Court set forth the ***Apprendi*** rule that "[a]ny fact that increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." ***Id.*** (citing ***Apprendi***, 530 U.S. at 483 n.10, 490). Then, the Court held that the ***Apprendi*** rule applies to mandatory minimum sentences because "[m]andatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the

mandatory minimum is an 'element' that must be submitted to a jury. Accordingly, ***Harris*** is overruled." ***Id.*** Thus, although ***Alleyne*** applied ***Apprendi*** to mandatory minimum sentences, it did not, as the majority posits, limit the application of the ***Apprendi*** rule to judicial fact findings that increase maximum or minimum sentences. Rather, as has been the case from the inception of the ***Apprendi*** rule, after ***Alleyne,*** the Sixth Amendment continues to require a jury trial for any fact that increases the sentence, penalty, or punishment for the crime, including fines, imprisonment, or death. ***S. Union***, 567 U.S. at 349-50.

¶35. Most recently, in ***United States v. Haymond***, 139 S. Ct. 2369, 2378, 204 L. Ed. 2d 897(2019), the Court applied the ***Apprendi*** rule to invalidate a federal statute providing that, upon revocation of supervised release, a judge must impose an additional prison term from five years to life upon the judge's finding of new facts by a preponderance of the evidence. To date, the Court has recognized only "two narrow exceptions" to the ***Apprendi*** rule: a judge may find the fact of a defendant's prior conviction, and a judge may find facts that dictate whether the defendant's sentences will run consecutively or concurrently. ***Haymond***, 139 S. Ct. at 2377 n.3 (citing ***Almendarez-Torres v. United States***, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); ***Ice***, 555 U.S. 160).

¶36. Section 97-3-2(2) prescribes a fact-finding role for the judge identical to what is found in the statutes condemned in ***Apprendi*** and its progeny. If the judge finds by a preponderance of the evidence that the defendant has committed a crime of violence, then the defendant's parole or early release eligibility date must be postponed until he has served 50 percent of the sentence. Miss. Code Ann. § 97-3-2(2). The sentencing judge has no discretion in

determining whether the date will be postponed because postponement is automatic upon a crime-of-violence finding. And the postponement is an additional feature of the sentence beyond what was permitted by the jury's verdict.

¶37. The majority attempts to distinguish this case from ***Apprendi*** and ***Alleyne*** on the ground that, even if the defendant's parole or early release date is postponed, the defendant remains eligible for the same sentence length, in this case, from zero to five years. But this reasoning is erroneous. The ***Apprendi*** rule is not limited to facts that increase the *sentence* for the crime, but applies more broadly to facts that increase the *penalty* or *punishment* for the crime. The postponement of the date on which a convict will be eligible for parole or early release is punitive. Whatever other penological goals exist that may be furthered by such postponement, such as deterrence or incapacitation, postponing the date on which a convict is eligible for parole or early release unquestionably serves as additional punishment for the convict, who must serve the time until that date, "day for day," in prison with no possibility of early release or parole.[8] Although parole ultimately may be denied to any parole-eligible prisoner, a meaningful difference exists between a sentence that includes parole eligibility and a sentence in which the possibility of parole is entirely foreclosed. The United States Supreme Court has recognized that time served without parole eligibility is a harsher "penalty" or "punishment" than time served with parole eligibility in its landmark

[8]The reasoning of the United States Supreme Court regarding mandatory minimum sentences is equally applicable in the context of postponing the date of parole or early release eligibility: "Why else would Congress link an increased mandatory minimum to a particular aggravating fact other than to heighten the consequences for that behavior?" ***Alleyne***, 570 U.S. at 113.

decision that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without parole for juvenile offenders." ***Miller v. Alabama***, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

¶38. The majority relies on decisions of the Illinois Court of Appeals holding that ***Alleyne*** and ***Apprendi*** apply only to sentences. ***People v. Barnes***, 90 N.E. 3d 1117, 1140 (Ill. App. Ct. 2017); ***People v. Gray***, No. 1-14-3474, 2017 WL 2800019, at *11 (Ill. App. Ct. June, 26, 2017) (unpublished). But several other state courts that have examined the question more closely have held that any fact that postpones the date of eligibility for parole or early release increases the punishment for the crime and must be found by a jury beyond a reasonable doubt. In ***State v. Grate***, 106 A.3d 466, 475-76 (N.J. 2015), the New Jersey Supreme Court found that a statute contravened ***Alleyne*** because it required the imposition of a period of parole ineligibility if the judge found that the defendant had been involved in organized crime. And in ***People v. Lockridge***, 870 N.W.2d 502, 516-17 (Mich. 2015), the Michigan Supreme Court invalidated state sentencing guidelines to the extent that they required the trial court to extend the defendant's parole eligibility date based on facts found by the judge. In ***State v. Louis***, 73 N.E.3d 917, 935-36 (Ohio Ct. App. 2016), the Court of Appeals of Ohio, Fourth District, held that the trial court had erred by sentencing the defendant to life without parole rather than life imprisonment because the jury had not made the fact findings required for a life without parole sentence. Further, after ***Alleyne***, the Kansas Legislature amended its sentencing scheme that had provided for an increased mandatory minimum sentence of fifty years before parole eligibility if a judge found certain facts. ***State v.***

Bernhardt, 372 P.3d 1161, 1168 (Kan. 2016). After the amendment, any fact findings that could increase the amount of time served before parole eligibility must be made by a jury. ***Id.***

¶39. In an apparent effort to insinuate that New Jersey has weakened its stance on the application of ***Alleyne***, the majority posits that New Jersey later recognized that "discretionary decisions by a trial court over parole or early release fall outside ***Alleyne***'s mandate." Maj. Op. ¶ 17 n.7 (citing ***State v. Kiriakakis***, 196 A.3d 563 (N.J. 2018)). But there is no question that ***Apprendi*** and ***Alleyne*** did not disturb a trial judge's ability to exercise discretion in sentencing a defendant within the range of punishments authorized by the jury's verdict. ***Alleyne***, 570 U.S. at 116 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury . . . [;] broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). The Sixth Amendment's jury trial guarantee is implicated when a statute authorizes a trial judge to make fact findings that increase the penalty or punishment beyond what is authorized by the jury's verdict. And that is exactly what occurred here. Section 97-3-2(2) does not permit the trial court to exercise discretion within the range of punishments authorized by the jury's verdict. Rather, Section 97-3-2(2) provides that, if the trial judge finds the defendant committed a crime of violence, then the defendant's parole or early release eligibility date will be postponed until the defendant has served 50 percent of the sentence. Without the crime-of-violence finding, the defendant would be parole or early release eligible after serving one quarter of the sentence. That elevation in punishment, dependent upon a judicial

fact finding, violates the ***Apprendi*** rule.

¶40. Because I would find that Fogleman's enhanced sentence violates the Sixth Amendment to the United States Constitution, I would affirm the Court of Appeals' reversal of his crime-of-violence sentencing enhancement under Section 97-3-2(2). Section 97-3-2(2) is unconstitutional because it authorizes enhanced punishment beyond what is authorized by the jury's verdict of guilty, based on the finding of an uncharged fact by the trial judge instead of a finding beyond a reasonable doubt by a jury after indictment. Because the majority's result cannot be squared with the decisions of the United States Supreme Court, I respectfully dissent.

KING, P.J., AND ISHEE, J., JOIN THIS OPINION.