No. 17-5716

IN THE
Supreme Court of the United States

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether a defendant whose substantial assistance to the authorities resulted in a sentence imposed "in accordance with the guidelines," rather than dictated by an otherwise applicable mandatory minimum, is eligible for Section 3582(c)(2) relief when the Guidelines are amended to recommend even lower sentences—or whether, as the Eighth Circuit held, the Sentencing Commission is powerless to enable such relief on the ground that the defendant's original sentence was not "based on" the Guidelines at all, but rather on the statutory mandatory minimum that would have applied in the absence of his substantial assistance.

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INTEREST OF AMICUS CURIAE[1]

Amicus Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the inflexible and excessive penalties they require. Founded in 1991, FAMM currently has more than 50,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected amicus filings in important cases.

FAMM submits this brief cognizant of the toll mandatory minimums exact on its members in prison, their loved ones, and our communities. The court of appeals has embraced an interpretation of the interplay between 18 U.S.C. §§ 3553(e) and 3582(c)(2) that wrongly and unnecessarily subjects individual defendants to the damaging and failed system of mandatory minimums. In light of the grave harm wreaked by these sentences, FAMM is keenly interested in ensuring they be used sparingly and only when authorized by statute.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no one other than *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief.

Pursuant to Supreme Court Rule 37.3, counsel for *amicus curiae* states that counsel for Petitioners and Respondent have both granted consent to the filing of this brief.

STATEMENT

Petitioners were convicted of drug crimes that ordinarily would have been subject to mandatory minimum sentences. But because each rendered substantial assistance in the Government's investigation and prosecution of others, the Government moved to free the sentencing judge from the constraints of the mandatory minimums. This permitted the judge to impose sentences by consulting the Guidelines established by the United States Sentencing Commission and exercising the guided discretion that ordinarily applies in federal sentencing.

The Commission subsequently lowered the Guidelines ranges that apply to the Petitioners' offenses and made those changes retroactive. A federal statute allows criminal defendants who have been sentenced to terms of imprisonment based on sentencing ranges that have been subsequently lowered to seek sentence modifications to reflect the Commission's better-informed judgment as to the range of recommended sentences. The question before the Court is whether the law nonetheless requires mandatory minimums—which were not imposed on the Petitioners—to continue to cast a shadow over their sentences, depriving Petitioners of even the possibility of benefiting from the Commission's periodic reassessment of proportional and just sentencing outcomes.

The answer is no. Mandatory minimums have no place in the substantial assistance and retroactivity provisions at issue here. To hold otherwise would be contrary to the clear intent of both provisions, and would frustrate the purposes of the Sentencing Reform Act and the system of guided discretion it established. Moreover, reading those provisions in

favor of applying mandatory minimums would perpetuate unjust, and unjustifiable, sentences, in direct contravention of the Commission's objectives.

The Government has already urged that Petitioners should be relieved from mandatory minimum sentencing, and the original sentencing court has already agreed. There is no sound basis for resurrecting the constraints of those mandatory minimums when the Commission determines that a reduced sentencing range should form the basis for a sentence reduction motion.

ARGUMENT

I. Defendants Who Are Granted Relief from Mandatory Minimum Statutes Because of Their Substantial Assistance to the Government Are Eligible for Sentence Reductions Under Section 3582(c)(2).

"[Section] 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Dillon* v. *United States*, 560 U.S. 817, 828 (2010). That provision allows defendants who have already been sentenced to seek a sentence modification if they were originally "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

Petitioners and the Government agree that the Sentencing Commission validly exercised its authority to lower the sentencing ranges that correspond to the drug offenses for which Petitioners were convicted. They also agree that those amendments may be applied retroactively. The Government contends,

however—and the Eighth Circuit concurs—that Petitioners are not eligible for relief under Section 3582(c)(2) because their sentences were "based" *not* on subsequently lowered Guidelines ranges, but on statutory minimum terms of imprisonment.

While that is an accurate statement when the original sentence was restricted by a statutory minimum, it is not true here. In each of Petitioners' cases, the district court granted the Government's motion for relief under 18 U.S.C. § 3553(e) because each provided substantial assistance to the Government. That relief "freed the district court to . . . disregard the mandatory minimum," *In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013), and impose a different sentence "in accordance with the guidelines and policy statements issued by the Sentencing Commission," 18 U.S.C. § 3553(e). In other words, when a sentencing court grants the Government's Section 3553(e) "substantial assistance" motion, an otherwise-applicable statutory minimum sentence drops out, and the defendant's sentence is necessarily "based on" the Guidelines, which the sentencing court is required to consult. The Eighth Circuit's holding to the contrary is inconsistent with the basic function of Section 3553(e), and would subject criminal defendants to disparate (and oftentimes unduly harsh) treatment based on the sentencing court's individual application of federal statutes and the Guidelines.

Congress has determined that in a limited category of cases a criminal defendant should not be subject to the statutory minimum term of imprisonment that would otherwise restrict a sentencing judge's discretion. In an effort to encourage and reward cooperation by defendants in government enforcement efforts, Congress provided that relief where the

defendant provides "substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e). In that case, the sentencing court, "upon motion of the Government, . . . shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance." *Id.* The sentence imposed in lieu of the statutory minimum must be "imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission." *Id.*

As both this Court and the Sentencing Commission have long recognized, the basic function of Section 3553(e) is to relieve a sentencing court of the obligation to impose the statutory minimum. "[A]n offender may escape a minimum by providing substantial assistance in the investigation or prosecution of another person." *Dorsey* v. *United States*, 567 U.S. 260, 285 (2012). In the words of the Commission's commentary, "[w]here a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be 'waived' and a lower sentence imposed . . . by reason of a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.'" U.S.S.G. § 2D1.1, cmt. n. 24; *see also* U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 59 (1991) (hereinafter "U.S.S.C. 1991 Report"), referenced in H.R. Rep. No. 103-460, at 4 (1994) ("[A] substantial assistance motion granted by the court *removes* the mandatory minimum requirements that would otherwise be binding at sentencing." (emphasis added)). The mandatory minimum provision having been "waived," the sentencing court is free to impose a sentence other than the statutory minimum.

Not long ago, the D.C. Circuit recognized the inherent logic of this proposition in a case presenting the same question now before this Court. *In re Sealed Case*, 722 F.3d at 363, 366. There, the court noted that a sentencing court's decision to grant a Section 3553(e) motion "'waive[s]' the statutory minimum and permit[s] the district court to impose a lower sentence based on the [defendant's] applicable guidelines range." *Id.* at 368. In other words, "[b]ecause of the government's substantial assistance motion, *no mandatory minimum [is] at work* when the district court sentence[s] the [defendant]." *Id.* (emphasis added).

Once a sentencing court is "freed" of any obligation to impose a statutory minimum, *In re Sealed Case*, 722 F.3d at 366, its discretion to impose a new sentence is not unlimited. The new sentence must be imposed "in accordance with the guidelines and policy statements issued by the Sentencing Commission," 18 U.S.C. § 3553(e), a statutory command that compels the sentencing court to consult the Guidelines Manual. *See* Br. for Pet'rs 19–23; *cf. Peugh* v. *United States*, 569 U.S. 530, 541 (2013). At that point, then, the Guidelines, as explicated in the Commission's "policy statements," *see* U.S.S.G. § 1B1.7—not some "creature of statute," *In re Sealed Case*, 722 F.3d at 369—become the *basis* for the new sentence.[2] And because Petitioners' applicable Guidelines ranges were indisputably lowered by the Commission,

[2] As Petitioners point out, the Government's previous position in this litigation and others has been that Section 3553(e) removes the statutory minimum from the picture. *See* Br. for Pet'rs 30–31. Indeed, the Government has argued in another context that, "after [a] substantial assistance motion [is] granted," the defendant "[is] still subject to an advisory guideline sentence for the [offense of conviction]." Br. for Appellee at 12, *United States* v. *Becton*, 593 Fed. App'x 469 (6th Cir. 2014) (No. 12-5851), 2014 WL 3556222, at *12.

Petitioners satisfy the eligibility requirements of Section 3582(c)(2).

II. Reading Section 3582(c)(2) in Favor of Applying Mandatory Minimums Runs Counter to Congressional Intent and Contributes to an Unjust Sentencing Policy.

The Sentencing Reform Act was crafted to cabin the nearly unlimited discretion that had long been afforded federal judges in sentencing, which had "led to significant sentencing disparities among similarly situated offenders." *Peugh*, 569 U.S. at 535. Before its enactment, "federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." S. Rep. No. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N., 3182.

The Act established the Commission, whose mission is to create a "detailed set of sentencing guidelines" addressing "all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." S. Rep. No. 98-225, at 168.

Although the Guidelines are no longer mandatory, *see United States* v. *Booker*, 543 U.S. 220, 259–64 (2005), the majority of offenders are either sentenced within the Guidelines range or granted a government-sponsored downward departure. U.S. Sentencing Comm'n, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* 46 (2017) (hereinafter "U.S.S.C. 2017 Report"). The Guidelines thus remain the starting point for sentences, consistent with this Court's guidance. *See Gall* v. *United States*, 552 U.S. 38, 49 (2007).

Congress envisioned that the Commission would regularly amend the Guidelines to account for various changes in circumstances, including new information that better informs the Commission's choice of sentencing ranges. *See* 28 U.S.C. § 994(o) & (p); *see also Rita* v. *United States*, 551 U.S. 338, 350 (2007) ("The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process."). The Commission is empowered to undertake an amendment process each year, ensuring continuous assessment of the propriety of sentencing ranges. 28 U.S.C. § 994(p). "The guidelines system, as envisioned by Congress, is . . . a self-correcting, and, hopefully, ever-improving system." U.S.S.C. 1991 Report, at iii. Indeed, there had been nearly 800 amendments to the Guidelines as of August 2015. U.S. Sentencing Comm'n, *Federal Sentencing: The Basics* 25 (2015). An essential part of this self-correcting and ever-improving system is the power to make a select number of these amendments to the Guidelines retroactive through Section 3582(c)(2).

Mandatory minimums disrupt this carefully crafted and calibrated system by imposing one-size-fits-all punishments despite differences in culpability. Moreover, they shift the power to determine sentences from an experienced judiciary to prosecutors. And for what? Empirical evidence demonstrates not only that the oft-touted benefits of mandatory minimums are illusory, but also that the harms they impose on individuals and communities are manifest. Simply put, there is no sound basis in law *or* policy to subject offenders to the continued effects of mandatory minimum sentences where, as here, the Government and the court have agreed in a particular case that a mandatory minimum sentence is inappropriate.

A. Mandatory Minimums Interfere with the System of Guided, Flexible Discretion Established by the Sentencing Reform Act.

Since 1991, the Commission has explained that mandatory minimums interfere with central goals of federal sentencing reform: reducing disparities resulting from both prosecutorial and judicial discretion; deterring crime by increasing certainty in punishment; and, perhaps most fundamentally, ensuring proportionality in sentencing. *See* U.S.S.C. 1991 Report, at ii–iii.

Nevertheless, the Commission's view has long been that the Guidelines must take into account statutory dictates. Initially, the Commission incorporated the results of mandatory minimums into the Guidelines by establishing Guidelines ranges slightly above mandatory minimum penalties. *See* U.S.S.C. 2017 Report, at 16. Over time, however, as Congress adjusted mandatory minimums—particularly for drug offenses—the Commission adopted sentencing ranges that *encompass* rather than exceed the mandatory minimum. *Id.* at 17. Thus, the "floor" of the Guidelines range will often fall below the mandatory minimum sentence.

The Commission concluded that the result of interactions between the Guidelines and mandatory minimums is disproportionality in two directions. First, for those offenses in which the floor of the sentencing range is below the mandatory minimum, the offender may be subjected to a harsher sentence than deserved. And second, the Commission pointed to statistics revealing, somewhat counterintuitively, that where offenders are subject to a guideline minimum higher than the mandatory minimum, courts

"often" sentenced such offenders to the mandatory minimum—that is, the mandatory minimum can prompt a sentence *lower* than that recommended by the Guidelines themselves. *See* U.S.S.C. 2017 Report, at 47.

Mandatory minimums also contribute to disproportionate sentences by creating sentencing "cliffs." While the Guidelines provide for a spectrum of sentences that contemplate proportional increases or decreases based on small variations in culpability, so-called sentencing "cliffs" subject an offender whose conduct falls barely within a mandatory minimum offense to *much* harsher punishment than an offender whose conduct falls just outside the reach of that offense, despite the near-identical conduct. U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 91 (2011) (hereinafter "U.S.S.C. 2011 Report"). Even when offenders subject to mandatory minimums receive relief from those penalties, the average sentence is still more than *two times* greater than the average sentence for offenders not subject to a mandatory minimum. U.S.S.C. 2017 Report, at 6.

The judiciary is acutely aware of this tension between the Guidelines and mandatory minimums. In a 2010 survey of federal district judges, most ranked mandatory minimums among the top three factors contributing to sentencing disparities, while seventy-eight percent of judges believed that the Guidelines reduce unwarranted disparities. U.S.S.C. 2011 Report, at 91.

In enacting Section 3553(e), Congress created a limited opportunity to avoid a mandatory minimum and thereby diminish its interference with the guided

system of discretion.[3] That opportunity benefits the government in its investigation and prosecution of criminal activity. As Petitioners' cases demonstrate, a defendant's substantial assistance to the government can result in sentences based on the Guidelines, significantly mitigating the disproportionality caused by the mandatory minimum. *See* Br. for Pet'rs 3–10. There is no sound reason to declare this waiver of the mandatory minimum only temporary—that is, to wipe the waiver away when cooperators later seek modifications of their sentences based on a retroactive amendment to the Guidelines range relevant to their conduct.

This case presents two options when cooperators seek modification of their sentences based on a retroactive amendment to their Guidelines range. The first is to nullify the effect of the mandatory minimum—a choice the prosecution has already approved by requesting a substantial assistance departure. The second is to nullify the effect of the Guidelines and their subsequent amendment. Refusing to apply amendments retroactively where a mandatory minimum was originally implicated, but ultimately not applied, freezes sentences in time, contrary to Congress's vision of an "ever-improving" and evolving sentencing system. It perpetuates a fiction that the offenders were sentenced "based on" a mandatory minimum, belied by actual sentences *below* the minimum. And it interferes with the goals of the Commission, the Guidelines, *and* the prosecution, the last of which successfully sought to shield the defendants from the mandatory minimum as a reward for their

[3] Certain drug offenses are subject to a "safety valve" that also permits a sentence unshackled from the mandatory minimum. 18 U.S.C. § 3553(f).

assistance in the investigation or prosecution of others. These results are unwarranted and contrary to the law.

B. By Shifting the Power to Decide Sentences to Prosecutors, Mandatory Minimums are Inconsistent with Traditional Notions of Fairness.

Prosecutors typically enjoy unreviewable discretion to choose which charges to file, so long as they are supported by probable cause. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). For instance, where a defendant could be charged with possessing drugs with the intent to distribute, the prosecutor could choose to charge possession with intent to distribute the greatest amount for which evidence is available, the same charge based on some lesser amount, or only a lesser included offense such as simple possession. As such, it is the prosecutor's choice that determines whether a defendant is exposed to a mandatory minimum. *See, e.g.*, 21 U.S.C. § 841(b)(1)(B)(v) (establishing a mandatory minimum sentence for possessing with intent to distribute one gram or more of LSD).[4] The prosecutor's charging decision can therefore "preset" the defendant's sentence, binding the hands of the sentencing judge if the defendant is subsequently found guilty. *See, e.g.*, *United States* v. *Hungerford*, 465 F.3d 1113, 1118–22 (9th Cir. 2006) (Reinhardt, J., concurring in the judgment) ("Hungerford's case is a textbook example of how [mandatory minimum statutes] permit[] a prosecutor, but never a judge, to determine the appropriate sentence."). And it is the

[4] The prosecutor can also choose whether to file an information under 21 U.S.C. § 851 to trigger (or not) an increased mandatory minimum, *see id.* § 841(b), based on the defendant's prior conviction for certain drug offenses.

prosecutor who controls whether the mandatory minimum can be waived through a motion under Section 3553(e).

This shifting of power is problematic on several levels. Practically, prosecutors, no matter how well-intentioned, generally do not have the same training, experience, or incentives as judges to set appropriate sentences. Hon. Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) ("The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way."). For instance, the U.S. Attorney's Manual instructs federal prosecutors to select charges that "maximize the impact of federal resources on crime"—an important consideration, to be sure, but not the only one with penological relevance for an individual defendant. U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-27.300 (2016). And federal prosecutors are told to "charge and pursue the most serious, readily provable offense," which "by definition" are those offenses "that carry the most substantial guidelines sentence, including mandatory minimum sentences." Memorandum from Office of the Attorney General to All Federal Prosecutors, Department Charging and Sentencing Policy 1 (May 10, 2017); *see also Reevaluating the Effectiveness of Mandatory Minimum Sentences: Hearing before the S. Comm. on the Judiciary*, 113th Cong. 4 (2013) (statement of Brett Tolman, former U.S. Attorney) ("[I]nstitutional pressures to prosecute with an eye toward identifying and using mandatory minimum statutes to achieve the longest potential sentence in a given case are severe.").

By adding to the already considerable leverage a prosecutor has over a defendant, the threat of mandatory minimums can be wielded as a "trial tax" to pressure defendants into accepting plea bargains—including, in some cases, when a guilty plea may not be justified. U.S.S.C. 2011 Report, at 97 & nn. 523–24 (citing the Prepared Statement of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia, to the Commission, at 13 (May 27, 2010) ("The problem with mandatory minimums is that they have a coercive effect. . . . This extraordinary pressure can result in false cooperation and guilty pleas by innocent people.")). And when defendants refuse the government's plea offer, prosecutors often file charges or seek sentencing enhancements that they were willing to forego just moments before the defendants decided to exercise their constitutional right to trial. *See*, *e.g.*, *United States v. Kupa*, 976 F. Supp. 2d 417, 432–37 (E.D.N.Y. 2013).

More fundamentally, nowhere else in the law does the prosecuting party effectively set the consequences of a violation. Criminal sentences are ordinarily determined by the judge, guided by a number and variety of factors including the Guidelines. 18 U.S.C. § 3553(a). In those cases the judge may—indeed, must—take into consideration circumstances and factors of the crime beyond those specifically charged and proved by the prosecutor. *See Booker*, 543 U.S. at 223. In a civil case, the amount of damages is ordinarily determined by the jury (or the judge in a bench trial). Similarly, in an administrative hearing, the penalty or fine is determined by a neutral agency decisionmaker. Accordingly, where—as here—the prosecutor has certified that a defendant's cooperation was sufficient to restore the usual order by returning sentencing discretion to the judge, the prosecutor should

not be granted a form of residual control over the defendant's sentence by reimporting the previously waived mandatory minimum into Section 3582(c)(2).

C. Mandatory Minimums Are Largely Ineffective at Deterring Offenders, Reducing Crime, or Inducing Cooperation.

Three key rationales advanced in support of mandatory minimums are that they increase deterrence, reduce crime through incapacitation, and improve cooperation with law enforcement. None of these common contentions holds up to empirical scrutiny.

Deterrence. Proponents claim that mandatory minimums improve deterrence by increasing the certainty and severity of punishment. *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 11 (2010). But since Victorian England, when capital sentences were nominally required for some 220 felonies, mandatory sentences have always been more certain in theory than in practice.

The discretion of prosecutors and law enforcement officers themselves is one reason. According to study results, some law enforcement officers altered their behavior to reduce the likelihood of discovering an offense that came with a mandatory sentence. Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65, 77–78 (2009) (citing Kenneth Carlson, Nat'l Inst. of Just., U.S. Dep't of Just., *Mandatory Sentencing: The Experience of Two States* 6 (1982) (reviewing the effects of a Massachusetts statute that imposed a one-year sentence on the unlicensed carrying of firearms)). And, as noted, prosecutors may file charges or accept plea deals in a way that avoids a mandatory sentence.

Other actors have had some influence as well. Surveying research from the 1930s through the 2000s, professor Michael Tonry found that juries and judges in the United States and abroad have had a leavening effect by sometimes nullifying the verdict altogether, reducing the charges, or expanding the grounds for departing from the minimums. Tonry, *supra*, at 71–90. The net result is that the supposed certainty of mandatory minimums—and, relatedly, the supposed uniformity they bring—has largely proved to be illusory.

Similarly, studies have found that the marginal deterrent effect of severe mandatory sentences is, to the extent it exists at all, modest and short-lived, particularly when sentences would otherwise already be lengthy. Daniel S. Nagin, *Deterrence*, in *Reforming Criminal Justice Vol. 4: Punishment, Incarceration, and Release* 19, 22–27 (Erik Luna ed., 2017). For instance, in fifteen studies of California's Three-Strikes Law, only one reported a significant deterrent effect; it was outnumbered by the two studies finding that the threat of increased penalties under that law may have *increased* homicides. Tonry, *supra*, at 98–99. And on the federal level, the proliferation of mandatory minimums for drug crimes was not associated with a decrease in the availability of drugs in the nation's high schools. Barbara S. Vincent & Paul J. Hofer, Fed. Jud. Ctr., *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 14–16 (1994). Moreover, there is evidence that mandatory sentences lead to increases in recidivism, likely because of both the conditions of incarceration and the difficulties of reintegration post-release—which increase with sentence length. Erik Luna,

Mandatory Minimums, in *Reforming Criminal Justice Vol. 4: Punishment, Incarceration, and Release* 117, 128 (Erik Luna ed., 2017).

Incapacitation. Even if mandatory minimums do not provide general deterrence, they should at least be expected to reduce crime by incapacitating, often for extended periods, convicted criminals. *See* Luna & Cassell, *supra*, at 11–12. Again, the theory does not hold up under scrutiny because of an unintended effect.

Assuming that some would-be offenders are deterred (or incapacitated) by mandatory sentences, it matters little to the criminal organization as a whole if it is able to rapidly recruit replacements. The evidence suggests that narcotics operations demonstrate such "replacement effects." Roger K. Pryzbylski, Colo. Criminal Justice Reform Coal., *Correctional and Sentencing Reform for Drug Offenders* 17–19 (2009). Thus, the incapacitation effect, if any, is offset by a growth in the number of offenders.

Cooperation. Some proponents argue that a prosecutor's discretion to refrain from seeking or to waive mandatory minimums can induce cooperation with law enforcement. *See* Luna & Cassell, *supra*, at 12. Yet the evidence indicates that rates of cooperation are about the same between crimes that are subject to mandatory minimums and those that are not. *Id.* at 19 & n.73 (citing U.S. Sentencing Comm'n, *2008 Sourcebook of Federal Sentencing Statistics* at tbl.27 (2008)). Some have noted that mandatory minimums may even produce a backlash against cooperation, out of concern that others will receive unduly harsh sentences. Luna & Cassell, *supra*, at 20 n.74.

In sum, none of the key rationales for mandatory minimums has much empirical support. On the contrary, the available evidence largely points the other way, and studies dating back two decades have concluded that mandatory minimums are simply not worth their massive cost. *See* Jonathan P. Caulkins et al., RAND Corp., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* xxv (1997); Gregory Newburn, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates*, The State Factor, March 2016, at 2. The Court should therefore resist an interpretation of Section 3582(c)(2) that resurrects the impact of a mandatory minimum after the Government has successfully moved to waive it in a particular case.

D. Mandatory Minimums Are Detrimental to Communities and How They View the Criminal Justice System.

Mandatory minimums engender severe distrust of the criminal justice system. They have the effect of making sentences less predictable and transparent because sentences depend on opaque charging decisions. And stories abound of absurd applications of mandatory minimums, such as that of Tonya Drake, a single mother with no criminal history who mailed a package for an acquaintance in exchange for $100. She turned a blind eye to what was inside because she needed the money, only to get sentenced to a mandatory minimum of 10 years because the package contained 233 grams of cocaine. *See* Steven Nauman, Note, Brown v. Plata*: Renewing the Call to End Mandatory Minimum Sentencing*, 65 Fla. L. Rev. 855, 866–67 (2013); *see also* Erin Fuchs, *10 People Who Received Outrageous Sentences for Drug Convictions*, Bus. Insider (Apr. 23, 2013). Indeed, Drake exemplifies the

type of low-level drug offenders mandatory minimums are most often imposed on, *see* U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* 20–21 (2007), instead of the "kingpins" whom legislators thought the sentences would target, *see* U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* 6 (2002). The frequency and currency of these types of sentences feed into a perception that the sentencing system is deeply unfair and altogether irrational.

The actual effects of mandatory minimums are even more severe than the perceived ones. By extending incarceration, mandatory minimums prolong the disruption to the defendants' families and communities, and reduce the chances of effective reintegration post-release. Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 Judicature 6, 7 (2010). FAMM has collected a heart-breakingly large number of perspectives from defendants' relatives, a small number of which are featured on its website, that individually and collectively detail the terrible toll mandatory minimum sentences have imposed. *See Family Perspectives*, FAMM, http://famm.org/prisoner-profiles/stories-from-families-and-friends/ (last visited Jan. 25, 2018). And as FAMM has documented—and has long been recognized—this burden has been disproportionately borne by minority communities. *See* FAMM & Nat'l Council of La Raza, *Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States* (Mar. 10, 2006); Vincent & Hofer, *supra*, at 23.

Section 3553(e) permits judges to alleviate some of these burdens on a case-by-case basis by waiving the application of a mandatory minimum in exchange for a defendant's substantial assistance to law enforcement. The salutary effects of that waiver

should not be undone through an interpretation of Section 3582(c)(2) that prevents judges from exercising their discretion to reduce sentences in those cases where the Commission has deemed a reduction appropriate.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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