ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

TESTIMONY OF THE HONORABLE JUDGE JULIE E. CARNES

CHAIR OF THE CRIMINAL LAW COMMITTEE

ON

BEHALF OF THE JUDICIAL CONFERENCE

BEFORE

THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

ON THE SUBJECT OF
MANDATORY MINIMUM SENTENCES

TUESDAY, JULY 14, 2009
10:30 a.m.

STATEMENT ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Distinguished Members of the Committee,

I am pleased to testify on behalf of the Judicial Conference of the United States and its Criminal Law Committee and to offer you a judicial perspective on mandatory minimum sentencing statutes and the harms that we judges, first-hand, have seen them visit on our federal sentencing system.

I start by attributing no ill will or bad purpose to any Congressional member who has promoted or supported particular mandatory minimums sentences. To the contrary, many of these statutes were enacted out of a sincere belief that certain types of criminal activity were undermining the order and safety that any civilized society must maintain and out of a desire to create an effective weapon that could be wielded against those who refuse to comply with these laws. For example, 18 U.S.C. § 924(c), which provides a mandatory minimum sentence for the use of a gun in a crime of violence, was enacted following the assassinations of Martin Luther King, Jr. and Robert F. Kennedy.[1] Likewise, the mandatory minimum sentencing statute for crack cocaine was enacted in response to the death of basketball star Len Bias, and grew out of a concern that crack cocaine was a dangerous substance that could devastate the poorest and most vulnerable communities in our society.[2]

Yet, as well-intentioned as the proponents of mandatory minimum legislation may have been, these kinds of sentencing statutes have created what the late Chief Justice Rehnquist aptly

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[1] *See* H.R. REP. NO. 90-1577 at 1698, 90th Cong., 2d Sess., 7 (1968), 1968 U.S.C.C.A.N. 4410, 4412.

[2] *See, e.g., Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity Before the Senate Subcomm. on Crime and Drugs*, 111th Cong. (Statement of Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice) (attributing high profile overdose death of Len Bias as a source of congressional interest in cocaine sentencing policy).

identified as "unintended consequences."[3] Indeed, appropriately echoing the Chief Justice's phrase, this hearing is focused on "Mandatory Minimums and Unintended Consequences."

What are some of those consequences? First, because these statutes typically focus on one factor only, such as drug weight, to the exclusion of all other potentially relevant factors, they sweep quite broadly. Therefore, a severe penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator, as long as the one factor identified in the statute is present. The ramification for this less culpable offender can be quite stark, as such an offender will often be serving a sentence that is greatly disproportionate to his or her conduct.

Unjust mandatory minimum statutes also have a corrosive effect on our broader society. To function successfully, our judicial system must enjoy the respect of the public. The robotic imposition of sentences that are viewed as unfair or irrational greatly undermines that respect. Further, as I will explain later in my testimony, some of these statutes do not produce merely questionable results; instead, a few produce truly bizarre outcomes.

Excessive mandatory sentences also squander scarce resources. It costs $25,895 a year to incarcerate a federal prisoner.[4] While this is money well-spent when the punishment fits the crime, these funds are wasted when they are used to incarcerate an individual whose sentence greatly exceeds what would be deemed a reasonable sentence.

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[3] *See* William H. Rehnquist, *Luncheon Address* (June 18, 1993), *in* United States Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993) (suggesting that federal mandatory minimum sentencing statutes are "perhaps a good example of the law of unintended consequences").

[4] *See* Matthew Rowland, Deputy Assistant Director, Administrative Office of the United States Courts Memorandum (May 6, 2009), Cost of Incarceration and Supervision (on file) (reporting the annual cost of Bureau of Prisons confinement as $25,894.50 as opposed to $3743.23 per year for supervision outside of confinement.)

In my testimony today on behalf of the Judicial Conference, I will touch on three points. In Part I, I will explain why mandatory minimum statutes are systemically flawed and will rarely avoid undesirable outcomes. In Part II, I will set out the history of the Judicial Conference's consistent and vigorous opposition to mandatory minimum sentences. In Part III, I will describe two recent cases in which use of mandatory minimum sentencing provisions produced sentences that greatly exceeded what even the toughest sentencer would consider an appropriate punishment. In Part IV, I will conclude by providing the Committee with some preliminary thoughts about approaches that Congress may begin to take to ameliorate the current situation and about a specific recommendation on one statute that the Conference has made.

PART I: THE SYSTEMIC FLAW IN MANDATORY MINIMUM SENTENCES, AND WHY IT WILL ALWAYS BE PROBLEMATIC TO DRAFT A MANDATORY MINIMUM STATUTE THAT WILL WORK

As I note in Part II, the Judicial Conference has, for decades, opposed mandatory minimum sentences. While this opposition has been clearly communicated, the reasons for the opposition may sometimes have been misinterpreted by Congress and others. My sense is that some believe that judicial opposition to mandatory minimums arises strictly out of a sense of wounded autonomy: that is, district judges believe that they should have the absolute right to impose whatever sentence they consider appropriate, unfettered by outside constraints. In other words, according to this theory, district judges do not believe that they should be dictated to in this manner.

In reality, however, district judges are continually dictated to in a variety of ways, in both civil and criminal cases. In fact, much of a judge's daily activity is consumed with executing "mandatory" tasks, using a decision-making process that is "mandated" by some other entity.

Thus, a judge must adjudicate a civil case, according to the prescribed standards, whether or not the judge agrees with the policy judgment made by Congress that gave rise to the cause of action or to the recognized defenses. A judge must instruct a jury as to what the applicable statute and precedent require, regardless of the judge's possible disagreement with some of these instructions. Myriad other examples abound.

Judges understand and accept these constraints because judges know that they do not create the law; this is Congress's role. Rather, judges interpret that law and apply it to the facts of the case, within whatever ambit of discretion is deemed permissible for the particular issue. Likewise, as to mandatory minimum statutes, the Judicial Conference's opposition derives not from a narrow defense of a district judge's prerogatives but from a recognition, gained through years of experience, that mandatory minimum sentencing provisions have created untenable results and that they simply do not hang together in any coherent or rational way. As Chief Justice Rehnquist noted, they almost invariably create unintended, as well as undesirable, consequences.

The reason for this phenomenon lies in the way that mandatory minimum statutes must be constructed. A contrast with the federal sentencing guidelines system is instructive. The guidelines were premised on a "heartland" theory.[5] That is, the United States Sentencing Commission identified the typical core conduct that comprised a particular offense–the "heartland"–and assigned a numerical base offense level to that conduct. Then, the Sentencing Commission identified potential aggravating and mitigating conduct that could occur in

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[5] *See* United States Sentencing Commission, Guidelines Manual Ch. 1, Pt. A.(4)(b) (2008) ("The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes.").

connection with that offense and assigned a numerical value to that conduct, which number would either be added to or subtracted from the base offense level. A very calibrated criminal history formula was devised and included in the guidelines' calculation. Finally, a judge was given some limited departure authority to adjust a sentence up or down if "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines"[6] was found to exist.

It is true that some judges and others have criticized the severity of some of the sentences prescribed by the guidelines. Some also believe that the sentencing ranges are too narrow and that departure authority is too cramped.[7] Whatever criticisms can be made as to the substance of the Guidelines, however, it is clear that the Guidelines' system looks at multiple factors that relate to culpability and consequences of the commission of criminal conduct and dangerousness of the offender. In short, the federal guidelines allow for some flex in the joints.[8]

In contrast, mandatory minimum statutes typically identify just one aggravating factor, and then pin the prescribed enhanced sentence totally on that one factor, without regard to the

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[6] 18 U.S.C. § 3553(b).

[7] In *Koon v. United States*, 518 U.S. 81 (1996), the Supreme Court expanded departure authority, holding that whether a given sentencing factor was a legitimate ground for departure was a factual matter to be determined by the sentencing judge, subject to an abuse of discretion standard. With the 2003 passage of the PROTECT Act (Pub. L. No. 108-21, § 401(d)), however, *Koon* was overturned and departure authority was substantially restricted.

[8] *See* United States Sentencing Commission, Report to Congress, Downward Departures From the Federal Sentencing Guidelines (October 2003).

> The Committee does not intend that the Guidelines be imposed in a mechanistic fashion. *It believes that the sentencing judge has an obligation to consider all the factors in a case and to impose sentences outside the Guidelines in an appropriate case.* The purpose of the sentencing Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender as compared to similarly situated offenders, not to eliminate the imposition of thoughtful individualized sentences.

Id. at B-9 (quoting S. Rep. No. 97-307 at 969) (emphasis added).

possibility of mitigating factors surrounding the commission of the offense. For such a sentence to be reasonable in every case, then, the particular conduct triggering the mandatory minimum must necessarily always warrant the mandated sentence, regardless of any of the circumstances of the offense or the offender. There are perhaps a few types of criminal conduct that are so unambiguous or heinous in nature that no examination of any fact other than the commission of the crime itself is necessary to persuade a reasonable person that the prescribed mandatory penalty is appropriate. Most criminal conduct, however, does not lend itself to such narrow scrutiny.

In short, mandatory minimum statutes are a blunt and inflexible tool. There is an inherent structural challenge in drafting a mandatory minimum statute that can truly apply to every case. Such a statute, to be just in every case, must not over-punish the most benign conduct that could be prosecuted under the particular criminal statute. Thus, the drafter of a proportional and fair mandatory minimum sentencing provision must consider the "minimum" *conduct*, *circumstances* and *offender type* that could be punished under the statute. In this sense, the word "minimum" should not refer only to the minimum penalty for a typical offense, but instead to the "minimum"–or most extenuated–conduct that could satisfy the statutory elements of the offense. Having envisioned the most sympathetic hypothetical offender possible, the drafter should only then determine what would be an appropriate minimum penalty for that offender.

Yet, when one examines the approximately 170 mandatory minimum statutory provisions in the federal code, it appears that the above approach has infrequently been taken by Congress. Instead the approach has frequently resembled a search for severity, whereby the particular

statute appears to envision the most culpable offender and offense conduct possible, and the minimum penalty is then pegged to that hypothetical person. Such an approach will necessarily mean that any offender who is convicted of the particular statute, but whose conduct has been extenuated in ways not taken into account in fixing the penalty, will necessarily be given a sentence that is excessive.

Let me give you an example. Title 21 U.S.C. § 841(b)(1)(A) provides that, when a defendant has been convicted of a drug distribution offense involving a quantity of drugs that would trigger a mandatory minimum sentence of 10 years imprisonment–e.g., 5 kilograms of cocaine–the defendant's 10-year mandatory sentence shall be doubled to a 20-year sentence if he has been previously convicted of a drug distribution-type offense.

Now, if our defendant is a drug kingpin running a long-standing, well-organized, and extensive drug operation who has been previously convicted of another serious drug offense, a 20-year sentence may sound just fine. But, kingpins are, by definition, few in number, and they are not the most typical drug defendant that we see in federal court.

Instead, envision a low-level defendant who is one of several individuals hired to provide the manual labor used to offload a large drug shipment arriving in a boat. The quantity of drugs in the boat will easily qualify for a 10-year mandatory sentence. Further, assume that this off-loader has one prior conviction for distributing a small-quantity of marijuana, for which he served no time in prison. Further, assume that since his one marijuana conviction, he has led a law-abiding life until he lost his job and made the poor decision to offload this drug shipment in order to help support his wife and children. This defendant will now be subject to a 20-year sentence. Many persons would question the proportionality of this sentence.

I do not want to leave you with the impression that mandatory minimum sentencing provisions necessarily result in an unfair and excessive sentence in all cases. They do not. In some cases, the mandatory penalty will seem appropriate and reasonable. When that happens, judges do not typically fret that the sentence was also called for by a mandatory sentencing provision, because the judge believes the sentence to be fair. In other words, the "minimum" made sense in that particular case.

Unfortunately, however, given the severity of many of the mandatory sentences that are most frequently utilized in our system, judges are often required to impose a mandatory sentence in which the minimum term seems greatly disproportionate to the crime and terribly cruel to the human being standing before the judge for sentencing. It is this unintended consequence of a mandatory minimum statute that has created such concern and dismay.

PART II: THE JUDICIAL CONFERENCE'S HISTORY OF OPPOSITION TO MANDATORY MINIMUM SENTENCES

For more than fifty years, the Judicial Conference has consistently opposed mandatory minimum sentences. At its September 1953 meeting, the Conference endorsed a resolution from the Judicial Conference of the District of Columbia Circuit, opposing enactment of laws that compelled judges to impose minimum sentences and that denied judges the ability to place certain defendants on probation.[9]

Since then, the Judicial Conference of the United States has condemned mandatory minimum sentences with considerable regularity. In September 1961, the Conference

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[9] JCUS-SEP 53, pp. 28-29.

considered several criminal bills pending before Congress.[10] The Conference took no position on the substantive merits of the bills, but "disapproved in principle those provisions requiring the imposition of mandatory minimum sentences."[11] By the next year, opposition to mandatory minimum sentences was considered to be the well-established position of the Judicial Conference. In March 1962, the Conference supported a bill easing parole restrictions, "consistent with the *established policy* of the Conference concerning mandatory minimum sentences."[12] Legislation containing mandatory minimum sentencing provisions was opposed on these grounds in 1965,[13] 1967,[14] and 1971.[15]

In 1976, the Conference affirmed its opposition, noting that there was no demonstrated need for legislation imposing mandatory minimum terms for certain offenses, and concluding that such legislation would "unnecessarily prolong the sentencing process and engender additional appellate review and would increase the expenditure of public funds without increase in additional benefits."[16]

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[10] JCUS-SEP 61, pp. 98-99.

[11] *Id.* at 99.

[12] JCUS-MAR 62, p. 22 (emphasis added).

[13] JCUS-MAR 65, p. 20.

[14] JCUS-SEP 67, pp. 79-80 ("The Conference approved a recommendation of its Committee confirming the general opposition of the Conference to mandatory minimum sentences.").

[15] JCUS-OCT 71, p. 40 ("The Conference reaffirmed its disapproval of mandatory minimum sentences.").

[16] JCUS-APR 76, p. 10.

In 1981, the Conference disapproved of a bill that would have imposed extended and strengthened mandatory penalties for the use of firearms in federal felonies.[17] The Conference noted that proposed legislation typically required the imposition of a minimum term while prohibiting probation and parole eligibility.[18] The Conference noted, "Statutes of this type limit judicial discretion in the sentencing function and tend to increase the number of criminal trials and the number of appeals in criminal cases. Upon the recommendation of the Committee the Conference reaffirmed its opposition to legislation requiring the imposition of mandatory minimum sentences."[19]

In March 1990, the Conference noted that the Third, Eighth, Ninth, and Tenth Circuits had all passed resolutions against mandatory minimum sentences, and voted to "urge the Congress to reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities."[20] In May 1990, the Executive Committee of the Judicial Conference, acting on the Conference's behalf, reaffirmed this position in the form of approving a recommendation of the Federal Courts Study Committee that mandatory minimum sentencing provisions should be repealed, whereupon the Sentencing Commission should reconsider the guidelines applicable to the affected offenses.[21] The Conference's

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[17] JCUS-SEP 81, p. 90.

[18] JCUS-SEP 81, p. 93.

[19] *Id.*

[20] JCUS-MAR 90, p. 16.

[21] JCUS-SEP 90, p. 62.

longstanding opposition to mandatory minimum terms was reaffirmed in July and August of 1991 by the Executive Committee, acting on behalf of the Judicial Conference, when it opposed amendments to the Violent Crime Control Act of 1991.[22]

In September 1991, the Conference approved a proposed statutory amendment that would provide district judges with authority to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense.[23] The Conference noted that "[w]hile the judiciary's overriding goal is to persuade Congress to repeal mandatory minimum sentences, for the short term, a safety valve of some sort is needed to ameliorate some of the harshest results of mandatory minimums."[24]

In March 1993, in the context of a long-range planning initiative, the Conference again agreed to renew efforts to reverse the trend of enacting mandatory minimum prison sentences.[25] Later, in September 1993, the Conference considered the Controlled Substances Minimum Penalty – Sentencing Guideline Reconciliation Act of 1993, legislation presented by the Chairman of the Sentencing Commission that attempted to reconcile mandatory minimum sentences with the sentencing guidelines.[26] "The Committee on Criminal Law believed that, although the proposed legislation would not solve all of the problems associated with mandatory minimum sentences, it addresses the essential incompatibility of mandatory minimums and

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[22] JCUS-SEP 91, p. 45 (opposing mandatory minimum sentencing amendments to S. 1241, 102nd Congress).

[23] JCUS-SEP 91, p. 56.

[24] *Id.*

[25] JCUS-MAR 93, p. 13.

[26] JCUS-SEP 93, p. 46.

sentencing guidelines and represents a promising approach."[27] On recommendation of the Committee on Criminal Law, the Conference endorsed the concept.[28]

On May 17, 1994, the Executive Committee, acting on behalf of the Judicial Conference, agreed not to oppose retroactivity of "safety valves" included in pending crime legislation to ameliorate some of the harshest results of mandatory minimum sentences despite the burden that retroactivity may impose upon the judiciary.[29]

The Long Range Plan for the Federal Courts, adopted in 1995, reiterated the Conference position that Congress should be discouraged from prescribing mandatory minimum sentences.[30] More recently, when considering the appropriate responses to the Supreme Court's decision in *Booker v. U.S.*, 543 U.S. 220 (2005), the Conference resolved to "oppose legislation that would respond to the Supreme Court's decision by (1) raising directly the upper limit of each guideline range or (2) expanding the use of mandatory minimum sentences."[31] In 2006, the Conference also considered the consequences of mandatory minimum terms in opposing the existing differences between crack and powder cocaine sentences.[32]

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[27] *Id.*

[28] *Id.*

[29] JCUS-SEP 94, p. 42.

[30] JCUS-SEP 95, p. 47.

[31] JCUS-MAR 05, pp. 15-16.

[32] JCUS-SEP 06, p. 18 ("Under the Anti-Drug Abuse Act of 1986 (Pub. L. No. 99-570), 100 times as much powder cocaine as crack cocaine is needed to trigger the same mandatory minimum sentences.").

Most recently, upon the recommendation of the Criminal Law Committee, the Judicial Conference has endorsed seeking legislation that would "unstack" penalties under 18 U.S.C. § 924(c) and permit the statute to operate as a true recidivist statute.[33]

In short, for more than fifty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentencing.

PART III: TWO EXAMPLES OF INJUSTICE WROUGHT BY MANDATORY MINIMUM SENTENCES

The description of an actual case can often convey more effectively than any abstract analysis the very real injustice that some specific mandatory minimum statutes have caused.

A. The Case of Weldon Angelos

Just over two years ago, my predecessor as Chair of the Criminal Law Committee, then-Judge, now-Professor Paul G. Cassell, testified before the Subcommittee on Crime, Terrorism, and Homeland Security,[34] and described in considerable detail the case of *United States v. Angelos*.[35] The sentencing of Weldon Angelos was a source of considerable distress for Judge Cassell,[36] and his description of that event stands as a powerful example of the unintended consequences that can result from well-intended legislation. I will not explore the intricacies of

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[33] JCUS-MAR 09, pp. 16-17.

[34] *Mandatory Minimum Sentencing Laws – The Issues Before the House Subcomm. on Crimes, Terrorism and Homeland Security*, 110th Cong. (Statement of Paul G. Cassell, Chair, Criminal Law Committee of the Judicial Conference).

[35] 345 F. Supp. 2d 1227 (D. Utah 2004).

[36] *See* J.C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 CARDOZO L. REV. 669, 682 (2007) ("Judge Cassell appears to have agonized over the decision, aching to strike down the fifty-five year sentence on Equal Protection and Eighth Amendment grounds...."). *Id.* at 683 (describing Judge Cassell's feeling of being "ethically obligated to bring this injustice to the attention of those who are in a position to do something about it.") (citing U.S. v. Angelos, at 1261).

the case as deeply as did Judge Cassell, but I will review some of the key facts, as they may prove instructive.

When Mr. Angelos was sentenced in November of 2004, he was a twenty-four-year-old, first-time offender, arrested for trafficking marijuana. For his offense of dealing marijuana and related offenses, both the Government and the defense agreed that he should serve between six and eight years in prison. Under the U.S. Sentencing Guidelines, his crimes resulted in a total offense level of 28,[37] and, because Mr. Angelos had no significant prior criminal history, he was treated as a first-time offender (criminal history category I) under the Guidelines, resulting in a prescribed Guidelines sentence between 78 to 97 months.

But in imposing his sentence, Judge Cassell was also required to consider three additional firearms counts, pursuant to 18 U.S.C. § 924(c), a mandatory minimum statute that requires a court to impose a consecutive sentence of five years in prison the first time a drug dealer carries a gun and a twenty-five-year consecutive sentence for each subsequent time.[38]

Two of the § 924(c) counts arose because Mr. Angelos carried a handgun to two separate $350 marijuana deals. The third count arose out of the discovery by police, during the execution of a search warrant, of several additional handguns at Angelos' home. As a result of his conviction on these three counts, the Government insisted that Mr. Angelos must serve the statutory minimum, which was a *de facto* life sentence. Specifically, the Government contended that the court had to sentence Mr. Angelos to a prison term of no less than 61½ years: 6½ years

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[37] U.S. v. Angelos. Tr. 9/14/04 at 27 (based on U.S.S.G. § 2D1.1(c)(7) & § 2S1.1(b)(2)(B)).

[38] 18 U.S.C. § 924(c)(1)(A)(I), (C)(i), and (D)(ii).

for drug dealing, followed by *55 additional years* for the three counts of possessing a firearm in connection with a drug offense.

It is also worth noting that the original indictment issued against Mr. Angelos contained only three counts of distribution of marijuana,[39] one § 924(c) count, and two other lesser charges.[40] The Government had told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the Government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. However, the Government also warned that if he rejected the offer, prosecutors would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time. In short, Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence. He elected to go to trial. As promised, the Government obtained two superseding indictments, charging a total of twenty counts, including five § 924(c) counts that alone carried a minimum mandatory sentence of 105 years (5 + 25 + 25 + 25 + 25).

At trial, the jury found Mr. Angelos guilty on sixteen of the twenty counts, including three § 924(c) counts. Those counts, alone, produced a mandatory 55 year term (5 + 25 + 25). Judge Cassell was troubled by the sentence, viewing it as unjust, cruel, and irrational,[41] but his role in evaluating § 924(c) was limited. A judge may ignore a statutorily-mandated sentence typically only on constitutional grounds under the Fifth or Eighth Amendment, i.e., if it produces

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[39] 18 U.S.C. § 841(b)(1).

[40] *See supra* note 34 (describing Judge Cassell's account of plea negotiations).

[41] *Angelos*, 345 F. Supp 2nd at 1251.

irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment.

Judge Cassell considered these arguments carefully, noting that adding 55 years on top of a 6½ year sentence for drug dealing is *far* beyond the roughly two-year-increase in sentence that the United States Sentencing Guidelines indicated to be appropriate for possessing firearms under the same circumstances,[42] and also noting that the sentence exceeded what the jury recommended to the court.[43] Judge Cassell also contrasted the sentence of Mr. Angelos with the sentences that would be imposed for various serious crimes under the Sentencing Guidelines.[44] He noted that the sentence exceeded the sentences prescribed for these much more serious crimes. In fact, the punishment imposed in Mr. Angelos' case so exceeded the penalties associated with these other, serious crimes that it is impossible to credibly contend that the sentence was proportional to the penalties for those offenses at the time.[45] See Table I, below.

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[42] *See* U.S.S.G. § 2D1.1(b)(1) (describing gun enhancement for drug offenses). If Angelos' sentence had been calculated under the Sentencing Guidelines rather than stacked 924 (c) counts, it would have increased his offense level from 28 to 30, resulting in 24 additional months of imprisonment.

[43] Following the trial – over the government's objection – Judge Cassell sent each of the *Angelos* jurors the relevant information about Mr. Angelos' limited criminal history, described the abolition of parole in the federal system, and asked the jurors what they believed was the appropriate penalty for Mr. Angelos. Nine jurors responded and provided the following recommendations: (1) 5 years; (2) 5-7 years; (3) 10 years; (4) 10 years; (5) 15 years; (6) 15 years; (7) 15-20 years; (8) 32 years; and (9) 50 years. Averaging these answers, the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years.

[44] The 2003 Guidelines were used in all calculations. All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I.

[45] *See* Harmelin v. Michigan, 501 U.S. 957, 1004 (1991) (Kennedy J., concurring) (noting that "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender").

Table I: Comparison of Mr. Angelos' Sentence with Federal Sentences for Other Crimes

Offense and Offense Guideline	Offense Calculation	Maximum Sentence
Mr. Angelos with Guidelines sentence plus § 924(c) counts	Base Offense Level 28 + 3 § 924(c) counts (55 years)	738 Months
Kingpin of major drug trafficking ring in which death resulted U.S.S.G. § 2D1.1(a)(2)	Base Offense Level 38	293 Months
Aircraft hijacker U.S.S.G. §2A5.1	Base Offense Level 38	293 Months
Terrorist who detonates a bomb in a public place intending to kill a bystander U.S.S.G. § 2K1.4(a)(1)	Total Level 36 (by cross reference to § 2A2.1(a)(2) and terrorist enhancement in § 3A1.4(a))	235 Months
Racist who attacks a minority with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)(1)	Base Level 28 + 4 for life threatening + 3 for racial selection under § 3A1.1	210 Months
Spy who gathers top secret information U.S.S.G. § 2M3.2(a)(1)	Base Offense Level 35	210 Months
Second-degree murderer U.S.S.G. § 2A1.2	Base Offense Level 33	168 Months
Criminal who assaults with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)	Base Offense Level 28 + 4 for intent to kill = 32	151 Months
Kidnapper U.S.S.G. § 2A4.1(a)	Base Offense Level 32	151 Months
Saboteur who destroys military materials U.S.S.G. § 2M2.1(a)	Base Offense Level 32	151 Months
Marijuana dealer who shoots an innocent person during drug transaction U.S.S.G. § 2D1.1(c)(13) & (b)(2)	Base Offense Level 16 + 1 § 924(c) count	146 Months
Rapist of a 10-year-old child U.S.S.G. § 2A3.1(a) & (B)(4)(2)(A)	Base Offense Level 27 + 4 for young child = 31	135 Months
Child pornographer who photographs a 12-year-old. in sexual positions U.S.S.G. § 2G2.1(a) &(b)	Base Offense Level 27 + 2 for young child = 29	108 Months
Criminal who provides weapons to support a foreign terrorist organization U.S.S.G. § 2M5.3(a) & (b)	Base Offense Level 26 +2 for weapons = 28	97 Months
Criminal who detonates a bomb in an aircraft U.S.S.G. § 2K1.4(a)(1)	By cross reference to § 2A2.1(a)(1)	97 Months
Rapist U.S.S.G. § 2A3.1	Base Offense Level 27	87 Months

It would be myopic to suggest that drug trafficking is a non-violent offense,[46] but the *potential for* violence associated with Mr. Angelos' carrying a firearm to his drug deals certainly did not cause the kind of *actual violence* associated with aircraft hijacking, murder, and rape. Yet, as indicated in Table I, Mr. Angelos faced a prison term more than double the sentence of, for example, an aircraft hijacker (293 months), a terrorist who detonates a bomb in a public place (235 months), a racially-motivated defendant who attacks a minority victim with the intent to kill and inflicts permanent or life-threatening injuries (210 months), or a second-degree murderer (168 months). Indeed, Mr. Angelos faced a prison term more than *five times as long* as the Guidelines sentence of someone who rapes a ten-year-old child (135 months) and more than eight times as long as that of a rapist (87 months).

In fact, on the very same day that Judge Cassell sentenced Weldon Angelos, he imposed sentence in another case, *United States v. Visinaiz.*[47] In the Visinaiz case, the defendant had beaten a 68-year-old woman to death by striking her in the head with a log, before hiding her body and then dumping it in a river, weighed down with cement blocks. The Sentencing Guidelines required a sentence for this brutal second-degree murder of between 210 to 262 months.[48] Upon the Government's recommendation, Judge Cassell imposed a sentence of 262 months, which was less than half the sentence he was compelled to impose on Mr. Angelos.

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[46] Harmelin, at 1002 (Kennedy J., concurring).

[47] 344 F. Supp. 2d 1310 (2004).

[48] U.S.S.G. § 2A1.2 (offense level of 33) + § 3A1.1(b) (two-level increase for vulnerable victim) + § 3C1.1 (two-level increase for obstruction of justice).

But despite that contrasting experience and notwithstanding all the above considerations, controlling precedent required Judge Cassell to reject Mr. Angelos' constitutional challenges and Judge Cassell imposed the mandatory 55-years sentence. Troubled by an unjust but unavoidable sentence, Judge Cassell wrote to the Office of the Pardon Attorney, asking the President to commute Mr. Angelos' sentence to no more than 18 years in prison (the average recommended by jurors in the case).[49] He also recommended that Congress modify § 924(c) so that its harsh provisions for 25-year multiple sentences apply only to "true" recidivist drug offenders: those who have been sent to prison for a particular crime, but who have failed to learn their lesson and repeat the same crime after release.[50] Judge Cassell also testified about the *Angelos* case, twice, when appearing before the House Subcommittee on Crime, Terrorism and Homeland Security in 2006 and 2007.[51]

B. The Case of Marion Hungerford

Another case illustrating the cruelly harsh results that can emanate from the "stacking effect" of § 924(c) is *United States v. Hungerford*,[52] a case from the Ninth Circuit Court of Appeals. Although Marion Hungerford never held a weapon during the robberies that her boyfriend carried out, she was involved in the planning of the crimes and she enjoyed the spoils of the offense. She would not agree to a plea bargain, and in accordance with the law she was

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[49] *See* United States v. Angelos, 345 F. Supp. 2d at 1261-62.

[50] *See id.* at 1262-63.

[51] *See Oversight Hearing on* United States v. Booker: *One Year Later—Chaos or Status Quo? Before the House Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. (2006) (statement of Paul Cassell, Chair, Criminal Law Committee of the Judicial Conference); *Mandatory Minimum Sentencing Laws – The Issues, supra* note 4.

[52] 465 F.3d 1113 (2006).

convicted of conspiracy and seven counts of robbery and using a firearm in relation to a crime of violence.[53] Because of the seven stacked § 924(c) counts, Hungerford was sentenced to slightly more than 159 years in prison.[54] Although the evidence indicated that Marion Hungerford suffered from a severe case of borderline personality disorder,[55] the Ninth Circuit followed established precedent, rejected her claims, and affirmed her sentence.[56]

In short, as the above two cases illustrate, mandatory minimum sentencing laws can be grenades: powerful, but crude, and lacking in the ability to distinguish meaningfully between serious offenders and those who are substantially less culpable. With mandatory minimum sentences, there is no discretion afforded to judges at either the trial or appellate level to correct sentences that are obviously greatly disproportionate to the offense.

PART IV: SUPPORT OF THE JUDICIAL CONFERENCE AND OTHERS FOR EFFORTS TO RESCIND MANDATORY MINIMUM STATUTES OR TO AMELIORATE THEIR DELETERIOUS EFFECTS

As the Conference has consistently opposed mandatory minimum sentencing provisions over the last five decades, we are pleased that Congress is taking steps to address the problems created by these statutes. Indeed, three bills have already been introduced, and additional approaches will likely be suggested by Congressional members.

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[53] *Id.* at 1114.

[54] *Id.* at 1119.

[55] *Id.*

[56] *Id.* at 1118.

A. Previous Suggested Approaches

Approximately 170 mandatory minimum sentencing provisions are found throughout the federal criminal code. Any thorough reform should ultimately address all of them. In considering what approach to take, Congress can draw on the views of many knowledgeable observers who have considered the question over the years. The Judicial Conference has offered several ideas in the past, which might usefully serve as a basis for reform now. For example, the Conference has long sought the repeal of mandatory minimum sentences.[57] As interim or partial solutions, the Judicial Conference has supported other measures. In September 1991, the Judicial Conference approved a proposed statutory amendment that would provide district judges with authority to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense.[58] In 1993, the Conference endorsed a proposal offered by Judge William W. Wilkins, Jr., in his capacity as chair of the Sentencing Commission, in which the guidelines would trump the statutory mandatory minimum.[59]

Over the years, at the same time that the Conference has been maintaining its opposition to mandatory minimum sentences, several Members of Congress have proposed alternatives to them. In February 1993, Representative Don Edwards introduced the Sentencing Uniformity Act of 1993. The Act sought to amend the federal criminal code and other federal laws to abolish

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[57] *See supra* notes 24 and 25.

[58] *Supra* note 23.

[59] *Supra* note 26. *See also* Paul J. Hofer, *The Possibilities for Limited Legislative Reform of Mandatory Minimum Penalties*, 6 FED. SENTENCING REP. 2, at 63 (September 1993) (explaining that Judge Wilkins' proposal was seen as "too sweeping" by Congress).

mandatory minimums.[60] Although the bill had 36 co-sponsors, it never left the subcommittee. Later that year, Senator Orrin G. Hatch, citing the Sentencing Commission's special report on mandatory minimums, suggested that Congress should begin using methods other than mandatory minimums to shape sentencing policy. Among the recommendations cited were: (1) specific statutory directives to the Sentencing Commission (e.g., instructing the Commission to adjust the guidelines by a specific number of levels), (2) general directives (e.g., highlighting Congress' concerns for the Commission's consideration when amending the guidelines), (3) increased statutory maximums, and (4) diligent oversight of federal sentencing policy (e.g., relying on data and research, conducting oversight hearings).[61]

Simultaneously with the Judicial Conference, groups such as the American Bar Association[62] and the Sentencing Project[63] have called for the outright repeal of all mandatory minimums. The Constitution Project has called for the enactment of mandatory minimum sentences "only in the most extraordinary circumstances."[64] The members of Families Against Mandatory Minimums (FAMM) have been active over the years in the debate concerning mandatory minimums and, true to the name of their organization, they have repeatedly challenged

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[60] H.R. 957, 103rd Congress (February 7, 1993).

[61] *See* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993).

[62] *See* American Bar Association, Justice Kennedy Commission, *Reports with Recommendations to the House of Delegates* 9 (Aug. 2004).

[63] Ryan S. King, The Sentencing Project, *Changing Direction? State Sentencing Reforms 2004-2006* (2007), available at http://sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf.

[64] Constitution Project, *Principles for the Design and Reform of Sentencing Systems: A Background Report* (March 15, 2006), available at http://www.constitutionproject.org/pdf/Sentencing_Principles_Background_Report.pdf.

"inflexible and excessive penalties required by mandatory sentencing laws."[65] They have traditionally supported three primary strategies to be used in lieu of mandatory minimums.

First, they have recommended restoring sentencing discretion to judges. To insure a judge's decision will meet standards for appropriate punishment, the prosecutor or the defendant would be able to appeal the judge's sentence.[66] Second, FAMM supports the use of sentencing guidelines. Finally, FAMM recommends that Congress consider sentencing alternatives--such as substance abuse treatment, drug court supervision, probation, and community correctional programs--as well as incarceration.[67]

Congress could use the Sentencing Commission as a starting point for reform. Congress created the Commission in 1984 as part of its efforts to reduce sentencing disparities and improve the transparency of federal sentencing. The irony, however, is that Congress has created two conflicting federal sentencing systems: the Guidelines system and mandatory minimum statutes.

While guidelines and mandatory minimums can occasionally be reconciled,[68] far more often they seem to cut in opposite directions. As the Sentencing Commission has cogently explained, the two systems are "structurally and functionally at odds."[69] In the *Angelos* case, for

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[65] Families Against Mandatory Minimums, FAMMGRAM, *The Case Against Mandatory Minimums* (Winter 2005), available at http://www.famm.org/Repository/Files/PrimerFinal.pdf.

[66] *Id.* See also, Christina N. Davilas, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 CORNELL L. REV. 1259 (July 2002) (suggesting that prosecutorial sentence appeals maintain judicial discretion while at the same time providing a mechanism for correcting judicial mistakes, including "unreasonable" sentences).

[67] *Id.*

[68] *See, e.g.*, 18 U.S.C. §§ 3553(e) and (f).

[69] *See* United States Sentencing Commission, Special Report to Congress, Mandatory Minimum Penalties in the Federal Criminal Justice System 25 (August 1991).

example, the guidelines called for a sentence for Mr. Angelos that was more than forty years lower than what he ultimately received as a result of mandatory minimum penalties. Moreover, because of the transparency of the Guidelines system, it was possible to calculate precisely how far Angelos' sentence exceeded what he would have received for committing other more serious crimes such as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape.

In reforming the system today, Congress should, at a minimum, examine offenses in which mandatory minimum provisions have produced sentences significantly different from those produced by the Guidelines. As noted, the Judicial Conference has previously endorsed a proposal that would allow the court to "depart" from the mandatory minimum sentence to impose any sentence that would be proper under the Sentencing Guidelines.[70]

In short, there are a variety of ways to address and ameliorate the unintended and deleterious effects of mandatory minimum sentencing provisions: from outright repeal to other more incremental steps. The Judicial Conference is supportive of Congress' efforts to make a thoughtful and thorough assessment of this continuing problem.

B. The Need to Unstack § 924(c) Penalties

The Conference recognizes the significance and scope of any undertaking to revise the current mandatory minimum regime. At the same time, we hope that the Congress will attempt to identify expeditiously and address those most egregious mandatory minimum provisions that produce the unfairest, harshest, and most irrational results in the cases sentenced under their

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[70] *Supra* notes 23 and 26.

provisions. The Conference, at the recommendation of the Criminal Law Committee, has identified one such provision–the stacking aspect of § 924(c) penalties–and has explicitly endorsed seeking legislation that would unstack § 924(c) penalties and permit the statute to operate as a true recidivist statute.[71]

To understand the basis for this recommendation, a familiarity with the history of this section is instructive. Title 18 U.S.C. § 924(c) was proposed and enacted in a single day as an amendment to the Gun Control Act of 1968, which had been prompted by the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. Congress intended the Act to address the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime."[72] Because § 924(c) was offered as a floor amendment, there are no congressional hearings or committee reports regarding its original purpose,[73] and only a few statements made during floor debate are available.[74]

As originally enacted, § 924(c) gave judges considerable discretion in sentencing and was not nearly as harsh as it has become. When passed in 1968, § 924(c) imposed an enhancement of "not less than one year nor more than ten years" for the person who "uses a firearm to commit any felony for which he may be prosecuted in a court of the United States" or "carries a firearm unlawfully during the commission of any felony for which he may be

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[71] JCUS-MAR 09, pp. 16-17.

[72] H.R. REP. NO. 90-1577 at 1698, 90th Cong., 2d Sess., 7 (1968), 1968 U.S.C.C.A.N. 4410, 4412.

[73] *Cf. Jung v. Association of American Medical Colleges*, 339 F.Supp.2d 26,40, 2004 WL 1803198 at * 11 (D.D.C. 2004) (noting interpretive difficulties created when legislation is passed without legislative hearings).

[74] *Busic v. United States*, 446 U.S. 398, 405 (1980).

prosecuted in a court of the United States."[75] If the person was convicted of a "second or subsequent" violation of § 924(c), the additional penalty was "not less than 2 nor more than 25 years," which could not run "concurrently with any term of imprisonment imposed for the commission of such felony."[76]

One of the first questions involving the statute concerned whether a defendant could be sentenced under § 924(c) when the underlying felony statute already included an enhancement for use of a firearm. In 1972, in *Simpson v. United States*,[77] the Supreme Court, relying on floor statements from Representative Poff, held that "the purpose of § 924(c) is already served whenever the substantive federal offense provides enhanced punishment for the use of a dangerous weapon" and that "to construe the statute to allow the additional sentence authorized by § 924(c) to be pyramided upon a sentence already enhanced under § 2113(c) would violate the established rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"[78]

In 1980, in *Busic v. United States*,[79] the Court reaffirmed its decision in *Simpson* and went one step further, holding that prosecutors could not file a § 924(c) count instead of the enhancement provided for in the underlying federal statute. In support of this decision, the Court noted that, in 1971, the Department of Justice had advised prosecutors not to proceed under

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[75] *Simpson v. United States*, 435 U.S. 6, 7-8 (1978) (citing 18 U.S.C. § 924(c) (1968)).

[76] *Id.*

[77] *Id.*

[78] *Id.* at 13, 14.

[79] 446 U.S. 398 (1980).

§ 924(c) if the predicate felony statute provided for "increased penalties where a firearm was used in the commission of the offense."[80]

In response to *Simpson* and *Busic*, Congress amended § 924(c) in 1984 "so that its sentencing enhancement would apply regardless of whether the underlying felony statute 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'"[81] The 1984 amendment also established a five-year mandatory minimum for use of a firearm during commission of a crime of violence.[82]

In 1986, as part of the Firearms Owner's Protection Act, Congress amended § 924(c) so that it also applied to drug-trafficking crimes, and increased the mandatory minimum to ten years for certain types of firearms.[83] In later amendments, Congress increased the penalty for a "second or subsequent" § 924(c) conviction to a mandatory minimum of twenty years, which twenty years later became twenty-five years.[84]

The increased penalties for "second or subsequent" § 924(c) convictions gave rise to litigation over whether multiple convictions in the same proceeding constituted "second or subsequent" convictions subject to the enhanced penalty. In essence, the issue was whether Congress intended § 924(c) to be a "true" recidivist statute or one that applies enhanced penalties to successive counts of carrying a firearm during a crime of violence within a single proceeding.

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[80] *Id.* at 406 (quoting 19 U.S. Atty's Bull. No. 3, p.63 (U.S. Dept. of Justice, 1981)).

[81] *United States v. Gonzales*, 520 U.S. 1, 10 (1997)(citing Comprehensive Crime Control Act of 1984, Pub. L. 98-47. § 1005(a), 98 Stat. 2128-39).

[82] *Id.*

[83] Pub. L. No. 99-308, § 104(a)(2)(A)-(F).

[84] Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

Most courts, including the Tenth Circuit, did not apply the twenty-year penalty when the "second" conviction was just the second § 924(c) count in an indictment.[85]

In *Deal v. United States*,[86] however, the Supreme Court, in a six-to-three decision, construed the statute more broadly. Deal had been convicted of committing six different bank robberies on six different dates, each time using a gun. He was sentenced to five years for the first § 924(c) charge, and twenty years consecutive for each of the other five § 924(c) charges, for a total of 105 years. In affirming his sentence, the Court held that a "second or subsequent" conviction could arise from a single prosecution.[87] The Court stated, "We choose to follow the language of the statute, which give no indication that punishment of those who fail to learn the 'lesson' of prior conviction or of prior punishment is the sole purpose of § 924(c)(1), to the exclusion of other penal goals such as taking repeat offenders off the streets for especially long periods or simply visiting society's retribution upon repeat offenders more severely.[88]

Less than two weeks after *Deal*, the Court again interpreted the statute in *Smith v. United States*.[89] In *Smith*, the Court held that exchanging a gun for drugs constitutes "use" of a firearm "during and in relation to . . . [a] drug trafficking crime." The Court rejected the defendant's argument that "use" of a firearm required use as a *weapon*.[90] The majority noted than when

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[85] *See, e.g., United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988).

[86] 508 U.S. 129 (1993).

[87] *Id.* at 133-34.

[88] *Id.* at 136.

[89] 508 U.S. 223 (1993).

[90] *Id.* at 228.

Congress enacted the relevant version of § 924(c), it was no doubt responding to concerns that drugs and guns were a "dangerous combination."[91] Justice Scalia argued in dissent that it was "significant" that the portion of § 924(c) relating to drug trafficking was affiliated with the pre-existing provision pertaining to use of a firearm in relation to a crime of violence.[92] He therefore construed the word "use" in relation to a crime of violence to mean use as a weapon, and concluded that this definition of use should carry over to the addition of drug trafficking to the statute.[93]

Additional rulings further broadened the applicability and effect of § 924(c). The Court again interpreted § 924(c) in *United States v. Gonzales,*[94] where it held that a sentence under § 924(c) could not be served concurrently with an unrelated sentence from a state conviction.[95] Finally, in *Muscarello v. United States*,[96] the Court held that, as used in § 924(c), "carries" is not limited to a firearm that is carried by the felon on his person, but also includes a gun found in the glove compartment of a vehicle that was present at the drug transaction.

The Conference recommends that, at the least, Congress should establish § 924(c) as a "true" recidivist statute. This would be particularly important in cases like *Angelos* that do not involve direct violence, but instead only the possession of a gun. A "true" recidivist statute would

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[91] *Id.* at 239.

[92] *Id.* at 244 (Scalia J., dissenting).

[93] *Id.*

[94] 520 U.S. 1 (1997).

[95] *Id.* at 9-10.

[96] 524 U.S. 125 (1998).

mean that the "second and subsequent" enhancement would apply only to defendants who have been previously convicted of a § 924(c) offense prior to the firearm possession that led to the § 924(c) charge being sentenced. It is an approach that we believe makes good sense.

CONCLUSION

The Conference supports Congress's efforts to review and ameliorate the deleterious and unwanted consequences spawned by mandatory minimum sentencing provisions. A predecessor chair of the Criminal Law Committee of the Judicial Conference, the late and wise Senior Judge Vincent L. Broderick, summarized the conclusion that many reach concerning mandatory minimum sentences when he testified about the mandatory minimum sentences before the House Judiciary Subcommittee on Crime and Criminal Justice of the House Committee in 1993. What he said then still makes a great deal of sense today.

> I firmly believe that any reasonable person who exposes himself or herself to this [mandatory minimum] system of sentencing, whether judge or politician, would come to the conclusion that such sentencing must be abandoned in favor of a system based on principles of fairness and proportionality. In our view, the Sentencing Commission is the appropriate institution to carry out this important task.[97]

I hope that Congress will act swiftly to reform mandatory minimums to eliminate the great injustices that they are creating.

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[97] Senior Judge Vincent L. Broderick, Southern District of New York, speaking for the Judicial Conference Committee on Criminal Law in testimony before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, July 28, 1993.