

No. 15-892

IN THE
Supreme Court of the United States

LEE CARROLL BROOKER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

**On Petition for Writ of Certiorari to the
Alabama Court of Criminal Appeals**

**BRIEF OF *AMICUS CURIAE*
FAMILIES AGAINST MANDATORY MINIMUMS
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

1. Is a mandatory life imprisonment without parole sentence inherently excessive under the Eighth Amendment when the predicate for its imposition is a conviction for possession of marijuana merely for personal use?

2. Does equating possession of marijuana for personal use with the most heinous and aggravated crimes in a State's criminal code, for purposes of repeat-offender sentencing, violate the proportionality requirement of the Eighth Amendment?

3. Does a mandatory life imprisonment without parole sentence, imposed on an individual with prior convictions whose current offense is nothing more than the mere possession of marijuana for personal use, violate the Eighth Amendment's evolving standards of decency when such an extreme sentence for similarly situated offenders is unauthorized in almost every American jurisdiction?

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INTEREST OF *AMICUS CURIAE*¹

Amicus Families Against Mandatory Minimums (“FAMM”) is a national, nonprofit, nonpartisan organization dedicated to promoting fair and proportionate sentencing policies and challenging inflexible and excessive penalties required by mandatory sentencing laws. For twenty-five years, FAMM has worked to restore discretion to judges to distinguish between individually situated defendants according to their role in the offense, the seriousness of the offense, their potential for rehabilitation, and other individual characteristics. Since its founding in 1991, FAMM has grown to include 70,000 supporters, including prisoners, family members, practitioners, and concerned citizens.

FAMM’s vision is a nation in which sentencing is individualized, humane, and sufficient to impose just punishment, secure public safety, and support successful rehabilitation. FAMM accomplishes its purposes through education of the general public, selected *amicus* filings in important cases, congressional testimony, and advocacy.

FAMM submits this Brief because Petitioner Lee Brooker has been subjected to an extreme, arbitrary, disproportionate, and unjust life-without-parole sentence. His sentence was triggered by the mere possession of marijuana for personal use, and was imposed solely because of a mandatory sentencing provision

¹ Pursuant to Rule 37.6, *Amicus* states that no Counsel for any Party authored this Brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to fund or intended to fund the preparation or submission of this Brief. All Parties have consented to the filing of this Brief, and copies of their consents have been filed with the Clerk of the Court.

that removed discretion from his judge. Both Mr. Brooker’s trial and appellate tribunals stated they would not have imposed this sentence on this now-seventy-six-year-old disabled veteran if they had any discretionary authority whatsoever.

The injustice Mr. Brooker faces demonstrates the arbitrary and unfair results that can occur when the most extreme sentence short of death must be imposed in a vacuum, with individualized consideration of the circumstances of the offense and the offender absolutely forbidden to the decisionmaker best positioned to exercise that judgment—the sentencing judge. FAMM urges the Court to grant review in this case to address whether the Constitution tolerates the injustice of such sentences.

INTRODUCTION AND SUMMARY OF ARGUMENT

“Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment.”² While the Court has made clear that determining types of punishments for specific crimes “is purely a matter of legislative prerogative,”³ and reviewing courts should hesitate “to review legislatively mandated terms of imprisonment,”⁴ the Court also has observed that “no penalty is *per se*

² *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at *12 (U.S. Jan. 25, 2016), *as revised* (Jan. 27, 2016); *see also Graham v. Florida*, 560 U.S. 48, 59 (2010) (“The concept of proportionality is central to the Eighth Amendment.”).

³ *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (citing *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)).

⁴ *Ewing v. California*, 538 U.S. 11, 22 (2003) (citing *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam)).

constitutional.”⁵ Implicit in this promise is the assumption that “courts are competent to judge the gravity of an offense” and to measure that gravity against the severity of the punishment imposed—and courts “traditionally have made these judgments.”⁶ Courts, including trial and appellate courts, “do have a responsibility—expressed in the proportionality principle—not to shut their eyes to grossly disproportionate sentences that are manifestly unjust.”⁷ FAMM respectfully submits that mandatory minimum sentences are particularly likely to be disproportional.

Sentences of life imprisonment without the possibility of parole should be especially subject to judicial scrutiny. The Court has recognized these sentences reside in their own category as “the second most severe penalty permitted by law.”⁸ Applying this principle, FAMM supports Petitioner’s claim that a mandatory sentence of life without parole for the nonviolent offense of possession of marijuana for personal use, even by a person with prior convictions, presents precisely the “extreme circumstance” under which a legislative penalty should be invalidated.⁹ Indeed, a straightforward application of this Court’s precedent in *Solem v. Helm*, which invalidated the mandatory life-without-parole sentence of a seven-time recidivist for the “passive felon[y]” of issuing a

⁵ *Solem v. Helm*, 463 U.S. 277, 290 (1983).

⁶ *Id.* at 292.

⁷ *Hutto*, 454 U.S. at 377 (Powell, J., concurring) (emphasis removed).

⁸ *Graham*, 560 U.S. at 69-70 (citation omitted).

⁹ *Harmelin*, 501 U.S. at 1007 (Kennedy, J., concurring).

bad check, virtually commands a reversal of the sentence in this case.¹⁰

It is hard to understand how, in a civilized society, the law can tolerate that a seventy-six-year-old decorated, disabled, combat veteran is sentenced to die in prison for growing marijuana in his backyard for personal use. Only this Court can instruct the States' legislatures that the Eighth Amendment does not allow such injustice.

Mr. Brooker's case presents an extreme example of the myriad flaws of mandatory sentencing regimes, which jurists and commentators have long recognized. Mandatory minimums—especially in the context of recidivist statutes—may punish low-level conduct with the severest of penalties, regardless of what the wisest of judges may consider appropriate. Where, as here, the judiciary views itself as precluded from exercising any judgment to ameliorate those effects, even in “the unusual or exceptional case,”¹¹ the individual defendant, his or her family, society at large, and respect for the law all bear the consequences. And while some reforms are underway in the Department of Justice, Congress, and some States, those efforts

¹⁰ 463 U.S. at 296; see also *Ewing*, 538 U.S. at 20-22, 28 (comparing *Rummel* (upholding sentence of “incarceration for life, subject only to the State’s judgment as to whether to grant him parole”) with *Solem* (rejecting a life-without-parole sentence as cruel and unusual because “the penultimate sentence for relatively minor criminal conduct” was “significantly disproportionate to his crime”).

¹¹ Interview by John Shattuck with Stephen Breyer, at the John F. Kennedy Library 30 (Sept. 21, 2003), <http://www.jfklibrary.org/~media/assets/Education%20and%20Public%20Programs/Forum%20Transcripts/2003/2003%20A%20Conversation%20with%20Stephen%20Breyer.pdf>.

will not assist Mr. Brooker or eliminate all of the extreme and arbitrary effects of mandatory minimums on sentencing. This Court’s intervention is required.

ARGUMENT

I. THE ELIMINATION OF ALL JUDICIAL DISCRETION CAN LEAD TO ARBITRARY, EXTREME, AND UNFAIR PUNISHMENTS.

As Mr. Brooker’s case illustrates, mandatory minimums shift sentencing discretion from neutral judges (who exercise that discretion through public, transparent sentencing procedures) to adversarial prosecutors (who exercise that discretion through unilateral, unreviewable charging decisions). Charging incentives are dramatically different from sentencing incentives. The purpose of sentencing is to impose a sanction that recognizes the gravity of the offense while also balancing individual circumstances, fairness, costs, and other societal concerns, but the incentives behind charging include maximizing leverage in plea discussions and “wins” for the prosecutor’s office.¹² By shifting discretion from the independent judiciary to the adversarial prosecutor, mandatory minimum statutes can lead to arbitrary, capricious,

¹² See, e.g., *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) *aff’d*, 616 Fed. App’x 33 (2d Cir. 2015) (“To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate.” (footnote omitted)); *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before Subcomm. On Crime, Terrorism, and Homeland Sec. H. Comm. on Judiciary*, 110th Cong. 79 (2007) [hereinafter Cassell, 2007 Hearing] (statement & testimony of Paul G. Cassell, J.) (“[W]hen mandatory minimum sentences are in play, the only individuals with discretion are the prosecutors . . .”).

and unfair sentences for similarly situated defendants.¹³

Members of this Court have acknowledged that this shift undermines transparency, reason, and ultimately fairness. Justice Kennedy has noted that “[t]he trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way.”¹⁴ “[A]ccept[ing] neither the necessity nor the wisdom of federal mandatory minimum sentences,” Justice Kennedy stated that “[i]n too many cases, mandatory minimum sentences are unwise and unjust.” Mandatory minimums “give[] the decision to an assistant prosecutor not trained in the exercise of discretion,” and the defendant’s fate is often sealed before he ever sees a courtroom. This “transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided.”¹⁵

Justice Breyer has further observed that “mandatory minimums are bad policy”—because they are unfair and do not deter crime.¹⁶ And former Chief Justice Rehnquist noted that “one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have,

¹³ See, e.g., *United States v. Angelos*, 345 F. Supp. 2d 1227, 1246, 1263 (D. Utah 2004) (noting the unfairness of sentencing a first-time drug-and-gun offender to mandatory sentence “more severe than criminals who committed, for example, three aircraft hijackings, three second-degree murders, three kidnappings, or three rapes”).

¹⁴ Anthony M. Kennedy, Speech, Am. Bar Ass’n Annual Meeting 3 (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

¹⁵ *Id.* at 2-3.

¹⁶ Interview, *supra* note 11, at 31.

is that they frustrate the careful calibration of sentences.”¹⁷ But the “combination of complex [Sentencing] Guidelines overlaid on a system of statutory minimum mandatories and fact-based enhancements has turned prosecutors into primary decisionmakers whose choices can, to a far greater extent than was ever before possible, unilaterally constrain the judge’s discretion.”¹⁸ According to Justice Breyer, “[m]andatory minimum statutes are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines.”¹⁹

For decades, judges from the Courts of Appeals and the District Courts who have been forced to implement these sentences have lamented that their obligation to follow their oath of office conflicts with their moral and judicial duty to ensure due process and fairness in

¹⁷ William H. Rehnquist, *Luncheon Address*, U.S. Sent’g Comm’n, *Drugs and Violence in America: Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 283, 287 (1993).

¹⁸ Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 *STAN. L. REV.* 235, 248 (2005); *see also* Terry Hatter & Edward Prado, *Feature: Sentencing—The Miscarriage of Mandatory Minimums*, 20 *CHAMPION* 16, 17 (July 1996) (“It’s no longer up to the judge to decide. . . . Mandatory minimums are applied inconsistently. The prosecutor decides who gets them.”).

¹⁹ *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring), *overruled on other grounds by Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013); *see also* U.S. Sent’g Comm’n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing Part A*, at 5 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf (“The guidelines have remained the essential starting point for all federal sentences and have continued to influence sentences significantly.”).

individual cases. Former Judge J. Lawrence Irving resigned from the bench after observing that “the system is run by the U.S. attorneys. When they decide how to indict, they fix the sentence.”²⁰ Stripped of any opportunity to apply their own judgment, federal judges have described their role when doling out “terribly cruel,”²¹ “unjust,”²² “and even irrational”²³ mandatory minimum sentences as that of a “machine”²⁴ or a “computer”²⁵—often in circumstances where the mandatory minimum results in “what are essentially life sentences.”²⁶

The Federal Reports are replete with statements by judges regarding arbitrary and unfair sentences they have been forced to impose over their moral objections.²⁷ And the Federal Judicial Conference has

²⁰ Mary Pat Flaherty & Joan Biskupic, *Rules Often Impose Toughest Penalties on Poor, Minorities*, WASH. POST (Oct. 9, 1996), <https://www.washingtonpost.com/archive/politics/1996/10/09/rules-often-impose-toughest-penalties-on-poor-minorities/19029236-3d2d-4dbd-a3fa-d22436438967/> (“Judge J. Lawrence Irving . . . quit the bench six years ago after concluding that increasingly harsher sentences for drug defendants and increased prosecutorial power had created . . . an ‘absurd’ situation.”).

²¹ Letter from Robert Holmes Bell, Chairman, Comm. on Crim. Law of Jud. Conf. to Sen. Patrick J. Leahy, Chairman, Comm. on Judiciary, at 5 (Sept. 17, 2013), <http://www.uscourts.gov/file/2612/download>.

²² *Angelos*, 345 F. Supp. 2d at 1230.

²³ *Id.*

²⁴ Sent’g Tr. at 16, *United States v. Prikakis*, No. 91-03099 (N.D. Fla. Feb. 5, 1992).

²⁵ *United States v. Madkour*, 930 F.2d 234, 239 (2d Cir. 1991).

²⁶ *United States v. Harris*, 154 F.3d 1082, 1085 (9th Cir. 1998).

²⁷ *See, e.g., United States v. Powell*, 404 F.3d 678, 683 (2d Cir. 2005) (“We understand the district court’s obvious reluctance to impose a life sentence on a defendant whose prior felony drug

year after year urged Congress that “[m]andatory minimum sentences waste valuable taxpayer dollars, create injustice in sentencing, undermine guideline sentencing, and ultimately foster a lack of confidence in the criminal justice system.”²⁸

convictions were committed years earlier, when the defendant was a minor. . . . It is, however, Congress’ prerogative to set mandatory minimums, and in this case the mandatory minimum is life imprisonment.” (citations omitted); *United States v. Abbott*, 30 F.3d 71, 72 n.1 (7th Cir. 1994) (quoting district court judge that this is “another illustration of the lack of wisdom in mandatory minimum sentences, but I cannot take it upon myself to change the law that Congress has written,” while imposing the sentence “Congress has told me that I must” (internal quotations omitted)); *Gates v. United States*, No. 98 Cr. 1496, 2003 U.S. Dist. LEXIS 8595, at *13 (S.D.N.Y. May 21, 2003) (“[T]he lowest [sentence the court] could impose . . . [is] an extremely harsh one,” but the court is “bound by the sentencing scheme—including mandatory minimums—put in place by Congress.”); see also David M. Zlotnick, *The Future of Federal Sentencing Policy*, 79 U. COLO. L. REV. 1, 22 (2008) (collecting cases).

²⁸ Letter from James C. Duff, Sec’y, Jud. Conf., to Rep. Bob Goodlatte, Chairman, Comm. on Judiciary (Nov. 13, 2015), at 1; see also *Over-Criminalization Task Force of 2014—Agency Perspectives: Hearing Before H. Comm. on Judiciary*, 113th Cong. 6 (2014), http://judiciary.house.gov/_cache/files/ade342df-6e0b-428f-a3cf-28c46eca8122/keeley-testimony.pdf [hereinafter Keeley, 2014 Hearing] (testimony of Irene Keeley, J., Chair, Comm. on Criminal Law) (“[S]tatutory minimums cost taxpayers excessively in the form of unnecessary prison and supervised release costs,” “impair the efforts of the United States Sentencing Commission to fashion Guidelines according to the principles of the Sentencing Reform Act,” and “often lead to inconsistent and disproportionately severe sentences.”); Letter from John D. Bates, Sec’y, Jud. Conf., to Sen. Patrick J. Leahy, Chairman, Comm. on Judiciary (Dec. 19, 2013), at 3 (stating mandatory minimums “waste valuable taxpayer dollars, create tremendous injustice in sentencing, undermine guideline sentencing, and ultimately could foster disrespect for the criminal justice

The rigid nature of mandatory minimums creates perverse effects, which sentencing judges are powerless to correct and which Mr. Brooker’s case tragically illustrates: (1) the “tariff effect,” under which a specific offense carries the same sentence in every instance, regardless of context or circumstances; and (2) the “cliff effect,” under which “sharp differences” in sentences result from falling just under or just over a statutory threshold, such as a specific quantity of drugs.²⁹ This Court has observed that by “eliminat[ing] a sentencing judge’s discretion in its entirety,” and thus eliminating the judge’s ability to ameliorate these effects, mandatory minimums “can produce unfairly

system”); Letter, *supra* note 21, at 3 (noting mandatory minimums “cost taxpayers excessively in the form of unnecessary prison and supervised release costs,” “are inherently rigid and often lead to inconsistent and disproportionately severe sentences,” and “impair the efforts of the Sentencing Commission to fashion Guidelines”); Cassell, 2007 Hearing, *supra* note 12, at 84 (“Over the years, dozens of academics have criticized such provisions, and scores of federal judges have echoed the condemnation of the Judicial Conference in questioning the wisdom of mandatory minimum terms.”).

²⁹ U.S. Sent’g Comm’n, *Report to the Congress: Mandatory Minimum Penalties in the Criminal Justice System*, Chapter 5 at 91 (Oct. 2011), <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system> [hereinafter 2011 Report]; U.S. Sent’g Comm’n, *Special Report to the Congress: Mandatory Minimum Penalties in the Criminal Justice System* 26, 29 (Aug. 1991), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf [hereinafter 1991 Report]; Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 209 (1993).

disproportionate impacts on certain kinds of offenders.”³⁰

The U.S. Sentencing Commission described the tariff effect in relation to the mandatory minimums set forth in 21 U.S.C. § 841(b), applicable to defendants convicted of trafficking in common street drugs:

For those convicted of drug trafficking under this section, one offense-related factor, and only one, is determinative of whether the mandatory minimum applies: the weight of the drug or drug mixture. Any other sentence individualizing factors that might pertain in a case are irrelevant as far as the statute is concerned. Thus, for example, whether the defendant was a peripheral participant or the drug ring’s kingpin, whether the defendant used a weapon, whether the defendant accepted responsibility or, on the other hand, obstructed justice, have no bearing on the mandatory minimum to which each defendant is exposed.³¹

The “cliff effect” is equally pernicious. Under this aspect of mandatory sentencing, individuals who engaged in nearly identical conduct can receive vastly different sentences based on whether they fall just over or just under a statutory threshold—again, often relating to drug quantities.

As Mr. Brooker’s case shows, a small difference in drug quantity can yield an enormous impact at sentencing—demonstrating both the tariff and cliff

³⁰ *Almendarez-Torres v. United States*, 523 U.S. 224, 245 (1998) (noting tariff and cliff effects).

³¹ 1991 Report, *supra* note 29, at 26.

effects. The Record makes clear that if the sentencing judge could have considered anything other than the quantity of marijuana and Mr. Brooker’s twenty-year-old prior convictions, he would have imposed a different sentence. And it is undisputed that the prosecution charged Mr. Brooker with possession of 2.8 pounds of marijuana—just over one-half pound more than the threshold to trigger the felony statute under which he was convicted. If the prosecutor had charged him with possessing one-quarter less—2.1 pounds—perhaps by excluding the dead and unusable plants, or by excluding the unusable parts of the plants, such as the vines, stalks, and leaves (as would have been required in many jurisdictions, including federal courts), Mr. Brooker could have been charged with a misdemeanor punishable by no more than one year in prison, which would not have triggered the habitual offender statute and the resulting mandatory life-without-parole sentence.

Judges and commentators have described other prosecutorial tactics—unreviewable under a mandatory minimum regime—as arbitrary and unfair. For example, “charge stacking” occurs when a prosecutor chooses to file multiple counts rather than a single count, triggering a harsh mandatory provision. This may even occur as a result of police officers inducing multiple counts during the course of a single undercover or surveillance operation.

Weldon Angelos, FAMM member and father of three, is a first-offender serving a mandatory sentence of more than fifty-five years due to charge-stacking.³² According to then-Judge Paul Cassell of the District of Utah, “[t]he original indictment issued against Mr.

³² *Angelos*, 345 F. Supp. 2d at 1248.

Angelos contained three counts of distribution of marijuana, one § 924(c) count for the firearm at the first controlled buy, and two other lesser charges.” But after Mr. Angelos refused to plead guilty, which could have reduced his exposure to sixteen years, the Government “obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years.”³³

The counts were all based on a series of “controlled buys” that the Government set up using an informant. Mr. Angelos initially sold the informant eight ounces of marijuana for \$350. “[T]he government did not arrest Mr. Angelos immediately after the first ‘controlled buy,’ but instead arranged two more such buys”³⁴

Judge Cassell noted this piling-on and called the mandatory sentence “unjust, cruel, and even irrational,” emphasizing that “‘count stacking’ . . . for first-time offenders—has lead [sic] to an unjust result in this case and will lead to unjust results in other cases.” Although he opined that a fifty-five-year sentence “is not ‘just punishment,’” Judge Cassell followed his “legal[] obligat[ion] to impose” it notwithstanding that Mr. Angelos was “a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders—including violent offenders and even a murderer—who have been before

³³ *Id.* at 1231-32.

³⁴ *Id.* at 1231, 1253 (“It is not clear to the court that other law enforcement agents would have allowed Mr. Angelos to continue to deal drugs after the first buy rather than taking him into custody immediately.”).

[him].”³⁵ Now retired from the bench, Judge Cassell continues to “[c]all[] the sentence one of the most troubling that I ever faced in my five years on the federal bench,” and says “the mandatory minimum sentence he was required to impose on Angelos was one of the chief reasons he chose to step down as a judge.”³⁶

Mandatory minimums may also arbitrarily result from the accident of geography—for example, Mr. Brooker’s misfortune that his backyard is located in Alabama—because different jurisdictions classify conduct in different ways, or even apply the same provision differently.³⁷ Judge Mark Bennett of the Northern District of Iowa described this problem when he was forced to sentence Douglas Young to a mandatory minimum after the prosecutor elected to

³⁵ *Id.* at 1230, 1243, 1261, 1263-64. Judge Roger Vinson of the Northern District of Florida similarly described charge-stacking as “the most absurd . . . abuse of the prosecutorial discretion,” resulting in a “minimum mandatory consecutive sentence for” what is essentially “one drug bust.” *Prikakis*, No. 91-03099, Sent’g Tr. at 15, 43.

³⁶ Sari Horwitz, *Former Federal Judge to President Obama: Free the Man I Sentenced to 55 Years in Prison*, WASH. POST (Feb. 9, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/02/09/former-federal-judge-to-president-obama-free-the-man-i-sentenced-to-55-years-in-prison/> (internal quotations omitted).

³⁷ See, e.g., *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on Judiciary*, 113th Cong. 2 (Sept. 18, 2013) [hereinafter Saris, 2013 Hearing] (statement of J. Patti B. Saris, Chair, U.S. Sent’g Comm’n) (“[C]ertain severe mandatory minimum sentences lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders.”); 2011 Report, *supra* note 29, Chapter 6 at 108 (“Prosecutors in several districts noted possible variations in charge bargaining practices as a result of decisions made by individual prosecutors.”).

file an information pursuant to 21 U.S.C. § 851 based on prior drug convictions.³⁸ Judge Bennett observed that a ninety-minute drive—from Iowa to neighboring States—yielded the “jaw-dropping, shocking disparity” between receiving a term of years and a sentence to die in prison. According to Judge Bennett, defendants are twenty-five times more likely to receive a doubled or tripled sentence in Iowa than those convicted on the same facts in neighboring Nebraska. And in Minnesota, defendants are “less than one-tenth as likely to be subjected to a § 851 enhancement [than] in the N.D. of Iowa.”³⁹

Judge Bennett observed that these charging decisions “are still solely within the unreviewed discretion of the DOJ without any requirement that the basis for the decisions be disclosed or stated on the record,” and opined that prosecutorial discretion is “shrouded in such complete secrecy that they make the proceedings of the former English Court of Star Chamber appear to be a model of criminal justice transparency.”⁴⁰

³⁸ Sent’g Op. at 3, *United States v. Young*, No. CR 12-4107-MWB (N.D. Iowa 2013), ECF No. 93 (noting § 851 is triggered in that District “any time a drug defendant, facing a mandatory minimum sentence in federal court, has a prior qualifying drug conviction in state or federal court . . . no matter how old that conviction is”).

³⁹ *Id.* at 3, 30-31.

⁴⁰ *Id.* at 3; see also *United States v. Trader*, No. CR 04-680-06, 2015 U.S. Dist. LEXIS 109287, *47 (E.D. Pa. Aug. 18, 2015) (calling on prosecutor to withdraw § 851 Information “so that the Court may impose a sentence . . . that better serves the interests of justice”); *Angelos*, 345 F. Supp. 2d at 1253-54 (“Because of the lack of guidance on these prosecutory and investigative issues, Mr. Angelos is probably receiving a sentence far in excess of what many other identically-situated offenders will receive for identical crimes in other federal districts.”).

While sentencing a defendant to more than ten years for a nonviolent drug trafficking offense, Judge John Gleeson of the Eastern District of New York condemned prosecutorial manipulation, which pressures defendants to plead guilty. In that case, the defendant would “have been [sentenced to] 30 years in prison if he had proceeded to trial and the jury had found him guilty.”⁴¹ In an extensive review of prosecutorial practices, Judge Gleeson accused prosecutors of “abus[ing] [their] power to file prior felony informations in drug trafficking cases,” resulting in “sentences so excessively severe they take your breath away.”⁴² In those federal cases, as in Mr. Brooker’s state case, the existence of a stale prior record gave the prosecutor the sole power to remove the court’s discretion to impose a just and proportionate sentence.

The effects of a prior criminal record can be stunning. FAMM member Arlana Moore was sentenced to die in prison for supplying pseudoephedrine pills to a dealer in exchange for drugs to support her methamphetamine addiction because she had two prior possession convictions that resulted in probation. Ms. Moore was indicted along with two dozen other individuals as a member of a methamphetamine conspiracy. The other individuals received sentences ranging from fifteen months to twenty years, but Ms. Moore received a mandatory life-without-parole sentence.⁴³ When sentencing Ms. Moore to die in prison, Judge Robert Junell of the Western District of Texas described the penalty as “so severe, I took extra

⁴¹ *Kupa*, 976 F. Supp. 2d at 434.

⁴² *Id.* at 419-20.

⁴³ FAMM, *Arlana Moore*, <http://famm.org/arlana-moore/> (last visited Feb. 4, 2016).

time yesterday making sure that this was correct.” But he “couldn’t find anyplace [in the Presentence Investigation Report] where there was an error made that would change it from life,”⁴⁴ so life without parole is what she got.

Mandatory minimums have the additional perverse effect of penalizing lower-level criminals more harshly than leaders. Prosecutors can waive otherwise-mandatory sentences as a reward for cooperation, and because higher-ranking criminals know more about their operations, drug kingpins routinely enjoy better treatment than associates who have no information about the larger criminal conspiracy.⁴⁵ “[T]he most culpable offenders are able to avoid mandatory minimums by cooperating with prosecutors because they have more knowledge of the drug conspiracy”⁴⁶—leading to what Judge Frank Easterbrook of the Seventh Circuit described as a “topsy-turvy” and “draconian” situation that “accords with no one’s theory of appropriate punishments.”⁴⁷

⁴⁴ Sent’g Tr. at 13, *United States v. Moore*, No. 09-CR-00260 (W.D. Tex Aug. 25, 2010), ECF No. 67.

⁴⁵ See, e.g., 18 U.S.C. § 3553(e); Saris, 2013 Hearing, *supra* note 37, at 2 (“in the drug context, statutory mandatory minimum penalties [are] often applied to lower-level offenders, rather than just to the high-level drug offenders that it appears Congress intended to target”).

⁴⁶ Letter, *supra* note 21, at 5.

⁴⁷ *United States v Brigham*, 977 F.2d 317, 318 (7th Cir. 1992); see also *United States v. Vasquez*, No. 09-CR-259, 2010 WL 1257359, at *5 (E.D.N.Y. Mar. 30, 2010) (“The mandatory minimum sentence in this case supplanted any effort to do justice, leaving in its place the heavy wooden club that was explicitly meant only for mid-level managers of drug operations.”).

Female partners of kingpins are a special example of this phenomenon. Girlfriends may play a trivial role in the crime, such as “tak[ing] messages,” or “stor[ing] drugs,”⁴⁸ and “rarely ma[ke] a substantial profit” since “their primary motivation for criminal conduct [is] their relationship with a man who [is] a drug dealer.”⁴⁹ Because they play an insignificant role, they have no valuable information to provide and no leverage to avoid a charge bearing a mandatory minimum.

Mandatory minimum statutes not only affect individual defendants like Mr. Angelos, Mr. Young, Ms. Moore, and Mr. Brooker, they also have a corrosive effect on 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.”⁵⁰ The resulting “truly bizarre sentences . . . can seriously undermine public confidence in the system.”⁵¹

Deputy Attorney General Sally Yates made this point last year, invoking the “public confidence in our criminal justice system” necessary for public legitimacy and opining that “our mandatory minimum laws do not calibrate a defendant’s sentence to match the

⁴⁸ Zlotnick, *supra* note 27, at 40.

⁴⁹ *Id.* Studies consistently suggest more than half of incarcerated women were victims of sexual and/or physical abuse. See, e.g., Lawrence A. Greenfeld & Tracy L. Snell, *Women Offenders*, Bureau of Justice Statistics Special Report (revised Oct. 3, 2000), <http://www.bjs.gov/content/pub/pdf/wo.pdf>.

⁵⁰ *Mandatory Minimum Sentences: Hearing Before Subcomm. on Crime, Terrorism, and Homeland Sec. H. Comm. on Judiciary*, 111th Cong. 2 (2009) (statement of Julie E. Carnes, J., Chair, Criminal Law Comm., on behalf of the Judicial Conference).

⁵¹ Cassell, 2007 Hearing, *supra* note 12, at 43.

threat that he or she poses to our safety.”⁵² This Court should grant certiorari to address how the Constitution can control the worst of these injustices.

II. MANDATORY MINIMUMS IMPOSE SUBSTANTIAL COSTS FOR LITTLE DETERRENT BENEFIT.

In addition to creating unfair results and undermining faith in the judicial system, mandatory minimums impose costs on society that far outweigh their benefits. “These unwise sentencing policies which put men and women in prison for years, not only ruin lives of prisoners and often their family members, but also drain the American taxpayers of funds which can be measured in billions of dollars.”⁵³

“[M]andatory minimum penalties have contributed significantly to the overall federal prison population.”⁵⁴ Since 1980, the federal prison population has exploded, growing from fewer than 25,000 federal prisoners to nearly 200,000.⁵⁵ Mandatory minimums—particularly for drug-related offenses—have fueled this growth. One-in-two federal inmates is serving a sentence for a drug-related crime—up from one-in-five

⁵² Sally Quinlan Yates, Deputy Att’y Gen., Dep’t of Justice, Remarks at the Bipartisan Summit on Fair Justice (July 22, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-bipartisan-summit-fair>.

⁵³ *United States v. Hiveley*, 61 F.3d 1358, 1363 (8th Cir. 1995) (Bright, Sr. J., concurring).

⁵⁴ Saris, 2013 Hearing, *supra* note 37, at 2.

⁵⁵ Fed. Bureau of Prisons, *Statistics*, http://www.bop.gov/about/statistics/population_statistics.jsp (last updated Feb. 4, 2016); Pew Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return* 8-9 (Aug. 2015), http://www.pewtrusts.org/~media/assets/2015/08/pspp_feddrug_brief.pdf.

in 1980—and sixty percent of incarcerated drug offenders were sentenced under a mandatory minimum.⁵⁶ During the same period, the average sentence imposed on drug offenders increased by nearly twenty months, to more than six years.⁵⁷ A 2015 federal task force found the “biggest driver of growth in the prison population is in federally sentenced drug offenders,” and the “length of stay for [those] drug offenders, [is] often dictated by statutory mandatory minimum penalties.”⁵⁸

Incarcerating more people for longer durations imposes substantial costs.⁵⁹ The average annual cost to incarcerate a federal prisoner in 2014 was \$30,620.⁶⁰ Annual federal prison spending has grown from \$970

⁵⁶ U.S. Sent’g Comm’n, *Quick Facts 2* (Jan. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts_BOP.pdf; Charles Colson Task Force on Fed. Corr., *Drivers of Growth in the Federal Prison Population 2* (Mar. 2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000141-Drivers-of-Growth-in-the-Federal-Prison-Population.pdf>.

⁵⁷ Pew, *supra* note 55, at 2.

⁵⁸ Colson Task Force, *supra* note 56, at 1-2.

⁵⁹ Letter, *supra* note 21, at 3 (“Mandatory minimums have a significant impact on correctional costs,” noting prison “growth is the result of several changes to the federal criminal justice system, including expanding the use of mandatory minimum penalties; the federal government taking jurisdiction in more criminal cases; and eliminating parole for federal inmates.” (internal quotation omitted)).

⁶⁰ Charles Colson Task Force on Fed. Corr., *Transforming Prisons, Restoring Lives* 14 n.xii (Jan. 2016), <http://colson-task-force.org/final-recommendations/Colson-Task-Force-Final-Recommendations-January-2016.pdf>.

million in 1980 to nearly \$7 billion in 2014 in inflation-adjusted dollars.⁶¹

The picture in state prisons is similar, as prison populations have grown with the proliferation of mandatory minimums. In 1986, the number of state prisoners sentenced to at least one year was less than 500,000. In 2012, that number was more than 1.3 million. During that time, state prison spending rose from \$7.7 billion to \$46 billion.⁶²

Lengthy mandatory minimums also impose heavy tolls on the families and communities of the inmates. Children spend years without the emotional and financial support of incarcerated parents, placing them at risk for negative behavioral, academic, and emotional outcomes; spouses, partners, and extended families are left to struggle without a key wage earner; and the inmate suffers lost employment opportunity, stigma, and often mental health problems.⁶³ Countless examples are available of the human toll exacted by mandatory minimum sentences.⁶⁴

It has even been suggested that mandatory minimums “harm crime victims” because of the message communicated by disproportionate sentences for minor versus major crimes.⁶⁵ “When the sentence for actual violence inflicted on a victim is dwarfed by a

⁶¹ Pew, *supra* note 55, at 2.

⁶² Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, Vera Inst. of Justice, 7 (Feb. 2014), <http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v3.pdf>.

⁶³ Colson Task Force, *supra* note 60, at 15.

⁶⁴ See, e.g., FAMM, *My Story: Sara S.*, <http://famm.org/my-story-sara-s/> (last visited Feb. 3, 2016); FAMM, *supra* note 43.

⁶⁵ Cassell, 2007 Hearing, *supra* note 12, at 47.

sentence for carrying guns to several drug deals, the implicit message to victims is that their real pain and suffering counts for less than some abstract ‘war on drugs.’”⁶⁶

All of this might be tolerable if mandatory minimums had a corresponding deterrent effect or other social benefit, but that has not been shown to be true.⁶⁷ Extensive research shows that the likelihood of being caught—not the severity of punishment—has the greatest deterrent effect.⁶⁸ “The length of time the offender actually was confined made little difference” to whether he was going to commit the crime.⁶⁹

⁶⁶ *Id.*

⁶⁷ Matthew C. Lamb, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126, 144 (2015), <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1638&context=jleg>; Michael Nachmanoff, Testimony in Pub. Hr’g Before U.S. Sent’g Comm’n, *Mandatory Minimum Sentencing Provisions Under Federal Law* (May 27, 2010), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Nachmanoff.pdf (“[T]here is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects.” (internal quotation omitted)); Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, Fed. Judicial Ctr., 14 (1994), [http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/\\$file/conmanmin.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf) (comparing criminal victimization rates and drug availability “fail[s] to demonstrate any reduction in crime that can be attributed to” mandatory minimums).

⁶⁸ Lamb, *supra* note 67, at 144; Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, The Sentencing Project, 2 (2010), <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

⁶⁹ Nat’l Inst. of Justice, *Effects of Judges’ Sentencing Decisions on Criminal Careers*, Research in Brief, 2 (Nov. 1999), <https://www.ncjrs.gov/pdffiles1/nij/178889.pdf>; *see also* Allen J.

III. MANDATORY MINIMUMS ARE RESISTANT TO LEGISLATIVE CHANGE.

Although there has been substantial recent recognition in the Department of Justice and the legislative sphere regarding the lack of wisdom of mandatory minimums, and as of the filing of this Brief certain reforms are under consideration, these efforts are little consolation to Mr. Brooker and others affected by these sentences. For example, the measures currently under consideration in Congress would not fully reform recidivist statutes and would not protect individuals from excessive statutory minimums under state laws.⁷⁰ And while some States have begun to implement sentencing reforms,⁷¹ other States are under no compulsion to do so. If the Court does not define the constitutional limits on severe sentences, States without a legislative interest in reform may

Beck & Bernard E. Shipley, *Recidivism of Prisoners Released in 1983*, U.S. Dep't of Justice Bureau of Justice Statistics, 10 (Apr. 1989), <http://www.bjs.gov/content/pub/pdf/rpr83.pdf> (“In general . . . no relationship was found between recidivism and length of time served in prison.”).

⁷⁰ See, e.g., FAMM, *Sentencing Reform and Corrections Act of 2015 (S. 2123)*, <http://famm.org/sentencing-reform-and-corrections-act-of-2015/> (last visited Feb. 5, 2016); Lydia Wheeler, *Sentencing Reform Bill Advances in House*, THE HILL (Nov. 18, 2015), <http://thehill.com/regulation/legislation/260577-sentencing-reform-bill-advances-in-house>; see also Eric Holder Mem. to U.S. Att'ys, et al. (Aug. 12, 2013), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drug-cases.pdf> (announcing Justice Department policy of avoiding mandatory minimum sentences in low-level, nonviolent drug cases).

⁷¹ See, e.g., Subramanian & Delaney, *supra* note 62.

continue to impose harsh, irrational, and unconstitutional sentences. This Court's intervention in an appropriate case, such as Mr. Brooker's, is needed to define the constitutional limits of arbitrary mandatory sentencing.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

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