Testimony of

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on behalf of the

Practitioner's Advisory Group

before the

United States Sentencing Commission

for the hearing on

MANDATORY MINIMUMS

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Good morning Chair Sessions and the distinguished members of the United States Sentencing Commission.

My name is Jeff Steinback and I thank you for inviting me to testify on behalf of the Practitioner's Advisory Group regarding mandatory minimum sentencing.

I. Introduction

Since 1976, I have been engaged in the private practice of federal criminal defense, initially with the small firm, Genson & Steinback in Chicago Illinois. For the past 25 years, my practice has concentrated almost exclusively in the area of plea negotiations and sentencing, taking me in that time period to more than 30 different federal district courts across the country.

While approaches to plea negotiations, charge bargaining, and considerations concerning cooperation vary greatly from district to district, the problems created by the existence of the mandatory minimum sentencing is virtually the same everywhere my travels have taken me.

There was a time in the latter portion of the 1970's and even into the mid- 80's when federal prosecutors sought to bring drug charges before the federal courts on a relatively infrequent basis. For that matter, weapons charges were seldom seen prosecuted in a federal courtroom. Back then, these charges were largely the province of the state court system.

In this time period, however, when the occasional drug or gun charge found its way before a federal judge, the sentence, more often that not, for a first offender, was probation, even when the drug amount was significant or the weapon involved clearly dangerous. Difficult as it is for me to admit, those sentences were definitely skewed downward and cried out for reform.

When reform came, it took various forms, each continuing to ratchet the punishments upward over the years.[1]

Then, on November 1, 1987, when federal guidelines sentencing went into effect, largely marginalizing individual characteristics, the change in federal sentencing practice

[1] An individual charged with a federal drug offense sentenced today will likely spend nearly three times as much time in prison as did the same type of offender in 1984. The reason for this was well articulated in the article: *Grid& Bear It: Weighing the Evidence: Drug Quantity Issues in Mandatory Minimum Cases*, appearing in the March, 2000 issue of the *Champion* (National Association of Criminal Defense Lawyers). There are two conspicuous causes for this three-fold increase in sentence severity: (1) the Anti-Drug Abuse Act of 1986, which established most of the mandatory minimum penalties for drug trafficking; and (2) the Omnibus Anti-Drug Abuse Act of 1988, which extended the mandatory minimums to conspiracy cases. Kyle O'Dowd, *Grid& Bear It: Weighing the Evidence: Drug Quantity Issues in Mandatory Minimum Cases*, 24 Champion 43 (2000).

was, to say the least, dramatic. For most of us practitioners, and, I suspect, even the vast majority of then-sitting federal judges, it was as if we had all been struck by a giant tsunami, left awash in its aftermath, scrambling to figure out how to respond.

In my judgment, at least, federal sentencing practice under the guidelines grew to become too ritualistic, driven by the calculus generated from a two-axis grid without significant weight being accorded to the individual.

Post *Booker*[2], where the guidelines became advisory, and the history and characteristics of an individual offender[3] assumed a more prominent role in the fashioning of a reasonable sentence, our criminal justice system vastly improved. I think it fair to say that the vast majority of judges confronted with the task of imposing sentences on convicted offenders are grateful to have been reinvested with this greater degree of discretion. The obverse of this is no less true: many judges confronted with a mandatory minimum sentence have long since spoken out against their inability to do what they think is just and reasonable given the totality of the circumstances presented by a particular offender's situation.[4]

While I was preparing my testimony, a colleague sent me an article from a recent Boston Globe report, quoting a Massachusetts state court judge, Judge Cortland A. Mathers. The article describes Judge Mathers as traditionally pro-prosecution, never known to shirk from imposing lengthy prison terms where the circumstances warrant it. This article, however, described a case before Judge Mathers of a 31-year old impoverished mother with young children, found guilty of playing a minor role in a drug offense, facing a mandatory minimum six years in the state penitentiary without the possibility of early release.

Judge Mathers made it plain to the litigants that he simply could not reconcile the likely destruction which would be wrought upon the defendant's fragile family, leaving her embittered, angry, without means, and very likely only destined for more trouble when finally released from prison.

The defense lawyer in that case, not missing the opportunity, elected to proceed by way of bench trial. Judge Mathers found the defendant guilty of a lesser offense which did not carry the mandatory minimum prison term, instead sentencing that individual to five years of probation with a variety of special conditions. In imposing that sentence, Judge Mathers observed: "A judge is either an automaton, rubber-stamping these sentences, or is driven by a sense of justice." In order to avoid what the judge characterized "an absolute miscarriage of justice", the judge reflected the philosophy which guided his decision: "Disobey the law in order to be just."

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[2] *Booker v. United States* 543 U.S. 220 (2005).
[3] *See* 18 U.S.C. § 3553(a)(1)
[4] *See*, e.g. Justice Anthony M. Kennedy testimony to the ABA in August, 2003 ("I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences.")

Most of what ails our federal sentencing system which, in one form or another, has over 170 separate mandatory minimum sentences, is encapsulated in these raw, powerful, and compelling statements by that judge.

II. *Gall* and the Guidelines

In *Gall v. United States*,[5] the Supreme Court reiterated this sage observation from its previous decision in *Koon v. United States*[6]: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[7]

Gall also emphasized that, while no longer mandatory, the guidelines nonetheless remain both the "starting point and initial benchmark"[8] for sentencing judges in their efforts to fashion a reasonable sentence.

Indeed, it is been my experience throughout the United States that district courts do turn to the guidelines, relying on them heavily, to begin their sentencing analysis. The ultimate goal, however, for a sentencing court, is to arrive at a sentence "sufficient, but not greater than necessary" to comply with purposes of sentencing set forth in 18 U.S.C. § 3553(a). This prompts the question: In what manner, if any, are the laudatory goals of avoiding unwarranted disparity and promoting honesty and truth in sentencing furthered by vesting the prosecution with exclusive discretion over whether to select an offense which carries a mandatory minimum sentence, thereby foreclosing the sentencing court from applying the advisory guidelines and individualizing the sentence pursuant to the mandate of § 3553(a)?

The simple truth, as articulated by jurists far more able than myself, is that mandatory minimum statutes are inflexible, unresponsive to individual circumstances, and far too often produce unnecessarily harsh punishment.

My colleagues have presented in their testimony compelling illustrations of how the presence of a mandatory minimum sentence has operated to create arbitrary disparities, placing far too much control in the hands of prosecutors, removing it from the judiciary, and frequently inverting the sentencing process.

With the commission's permission, I will take this opportunity to reify some of these abstractions with two further concrete illustrations.

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[5] 552 U.S. 38 (2007).
[6] 518 U.S. 81 (1996).
[7] *Id.* at 98.
[8] 522 U.S. at 39.

III. *Brigham* and Sentencing Inversion

The first illustration emerges from the Seventh Circuit's 1992 opinion in *United States v. Brigham.*[9] The particular facts of Brigham are instructive:

In 1992, Anthony Brigham, then 63 years of age, lacking any significant criminal record, occupied the bottom rung in the food chain of a drug conspiracy, at the apex of which was his son-in-law Craig Thompson.

Thompson, then in his early 30s, had two distinct accomplishments to his credit: (1) He dealt directly with two of the highest-ranking members of a Cali cartel cocaine distribution network, obtaining literally tens of thousands of kilos over the course of his several years of dealing with them on a monthly basis; and (2) at least until 1992, he somehow managed not to get caught. So when Craig Thompson was finally indicted, he had absolutely no prior criminal record.

Mr. Thompson had a regular crew who worked for him, amongst whom were two trusted employees, an enforcer/thug named Jeffrey Carter and an off-loader/delivery man named Tyrone Amos. At the time, Thompson was married to a young woman named Deborah, Anthony Brigham's oldest daughter.

Thompson was the undisputed leader of the drug conspiracy charged in the *Brigham* case. He would arrange for the importation of large quantities of cocaine from his Cali suppliers. The cocaine traveled through Panama, and then went up through Florida, eventually arriving in Chicago. Typically, Thompson, Carter and Amos would take very temporary receipt of the drugs, stashing them in a safe house for quick resale and delivery to a select few distributors. Thompson ordinarily would remain in constructive possession of these large drug quantities for periods of less than three days, sometimes as short as a day.

As things frequently turn out in the drug milieu, one of Thompson's distributors, whom we will call CS, found himself in an extremely uncomfortable situation, having been caught literally holding the bag in a drug deal gone bad. He responded as most rational-thinking drug dealers caught with the goods do: he told the DEA everything he could think of to obtain a lighter sentence. One of those things about which he told was his supplier, Craig Thompson.

The timing of this information was particularly useful, as there was a brief halt in the otherwise substantial flow of cocaine from Cali to Chicago. Thompson had 17 kilos stashed, but had an order for 27. Needing 10 more to satisfy his customer, Thompson reached out to the CS who, unbeknownst to Thompson, was now cooperating with the DEA, inquiring as to whether he might have 10 kilos remaining for Thompson to repurchase or, if not, whether he had another source from which Thompson could obtain the additional 10 kilos. Thompson had gotten away with his substantial drug trafficking because he was extremely cautious.

[9] 977 F.2d 317 (7th Cir. 1992) (Bauer, C.J. Dissenting)

As such, Thompson found himself in equally uncomfortable territory, having to rely on this CS in what he believed to be the CS' other sources, because those individuals were unknown to Thompson.

The cooperating CS was asked by the DEA to introduce one of the DEA agents to Thompson as a supplier in order to negotiate what is commonly referred to as a "reverse buy." In such cases, it is the drug dealer who is seeking to purchase drugs from the undercover agent, rather than the other way around. Thompson was mistrustful of this unknown source, which, as it turned out, he had good cause to be. Still, Thompson's need to feed his organization overrode his suspicions and he agreed to engage in negotiations with the undercover agent.

At the initial negotiations, Thompson brought his trusted enforcer, Carter, both for protection and security. Before that meeting took place, Thompson had Carter search the undercover agent. Borrowing from the language of the *Brigham* decision, "Carter was not very good at his job."[10] Searching the undercover agent, Carter found the agent's gun, which did not seem to trouble either Carter or Thompson. What he was looking for, but failed to find, was the transmitting device that was carefully concealed in the undercover agent's jacket. As Thompson's regular source came up empty for the moment, and given Thompson's pressing needs for the ten kilos, he ultimately agreed to pay $30,000 per kilo, something the panel majority characterized as a "premium price for quick service."[11]

The undercover agent, being more clever than Thompson, feigned a mistrust of Thompson and demanded to hold collateral until the deal was done. Thompson relented, agreeing to allow the undercover agent to hold his Rolls Royce as acceptable collateral until the payment was received. To this end, Thompson called his other employee, Amos, advising him that they were going to pick up "10 of those things today"[12] at a suburban hotel agreed upon by both parties. Thompson then arranged to have his Rolls Royce delivered to a restaurant in another nearby suburb. Remarkably, all of this occurred within five hours of the initial meeting between Thompson and the undercover agent.

After leaving the meeting, Thompson and Carter picked up Thompson's Rolls Royce and drove it to the restaurant. Simultaneously, Thompson directed Amos to go to the prearranged suburban motel to pick up the drugs. In the interim, Thompson contacted his father-in-law, Anthony Brigham, a true neophyte to these kinds of proceedings, with only one prior relatively minor offense on his record, for which he was still on probation at the time of the conspiracy.[13] Brigham was out of work, so Thompson offered Brigham $500 to drive with Amos, just keep his eyes open, and ask no questions.

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[10] *Id.* at 318.
[11] *Id*.
[12] *Id*.
[13] The safety valve provisions of 18 U.S.C. § 3553(f) would have provided no relief for Brigham. Because of his status as a probationer, Brigham found himself in a criminal history category II. Its extremely

Two undercover DEA teams were deployed, one to the restaurant to receive the Rolls Royce and the other, driving a previously confiscated Corvette, to the motel to act out the purported delivery of the cocaine which actually never existed.

Amos and Brigham arrived at the suburban motel in an older model pickup truck, which belonged to Brigham.[14] Amos got out of the car, leaving Brigham to remain in his pickup while Amos met with the agents at the motel. Amos and the undercover agents engaged in some chitchat, while awaiting Carter and Thompson's appearance at the restaurant with the Rolls Royce. As the Seventh Circuit observed, "everyone (just) settled down to wait." [15]

Eventually, Brigham got out of the car, paced nervously in the motel's lobby while uncomfortably awaiting instructions from Thompson. Brigham was later observed walking around the parking lot, looking over the undercover agents' Corvette and then later rejoining Amos at a nearby gas station where Amos placed a call to Thompson, inquiring as to when the Rolls would show up so the deal could be consummated.

Amos and Brigham returned to the motel, whereupon Amos rejoined the undercover agents and ordered some food at the motel's diner while Brigham went back to his truck, driving it from one location to another from which, as the prosecution contended, Brigham could keep the pending delivery in sight. Very shortly thereafter Amos received a page from Thompson with the news that the Rolls had arrived at the restaurant and the deal could move forward. Amos then advised the undercover agents that they were ready to proceed. The agents and Amos headed to the agents' Corvette as if to retrieve drugs from the trunk. Of course there was no cocaine, only a gaggle of arresting agents to swoop up Amos and Brigham, just as the other team grabbed Thompson and Carter at the restaurant.

This is where the case really gets interesting.

Buying or selling 10 or more kilos of cocaine or even agreeing to do so, carries a minimum penalty of 10 years in prison without possibility of parole.[16] However, "mandatory,"[17] as noted by the Seventh Circuit, is only mandatory from the perspective of judges. For the parties, everything is negotiable. For people like Craig Thompson, whom, I might add, I represented, opportunities abound. Thompson had the ability to lure two principals from a major Cali drug cartel into Panama where DEA agents could arrest them. The DEA jumped at this opportunity. It proved to be highly marketable. Carter, a long-time right-hand enforcer for Thompson, likewise had significant corroboration to share with the DEA, thereby simultaneously fortifying the strength of the government's next case against Thompson's suppliers and Carter's ability to plea

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narrow scope would not have spared Brigham from the mandatory minimums, notwithstanding his minimal role in this offense, and the fact that he was completely unarmed and had no violence in his background.

[14] Brigham's pickup truck was ultimately forfeited to the government.

[15] *Brigham,* 977 F.2d. at 318.

[16] 21 U.S.C. §§ 841(h)(1)(A) and 846.

[17] *Brigham,* 977 F.2d at 317.

bargain. Likewise, Amos, although himself down the food chain, nonetheless had been present at many prior negotiations and had offloaded substantial quantities of cocaine, possessing a solid understanding of the network through which the drugs were trafficked. All three immediately went in to make a deal, trading on what they knew.

Brigham was the odd-man out. He only knew Thompson and had only just met Amos at his son-in-law's direction. Once Thompson went in to make a deal, Brigham had nothing of value to add to the prosecutors.

In exchange for his masterfully executed ability to lure the two Cali cartel members to Panama, Thompson was rewarded with a seven-year sentence, though he confessed to having dealt literally thousands of kilos over the years. For Amos's efforts, he received a sentence of six years and three months, the government having made a motion under § 3553(e),[18] which enabled the sentencing judge to sentence below the mandatory minimum. Carter, characterized by the Seventh Circuit's majority opinion as a "goon",[19] mysteriously was allowed to plea to a phone count,[20] a charge which carried no mandatory minimum and received a sentence of four years probation with the first four months to be served in a work release program run by the local Salvation Army. This, of course, left Anthony Brigham with nothing to offer, and the unenviable option of either pleading guilty and receiving 120 months or proceeding to trial, taking his best shot, and, if losing, likewise receiving 120 months. In short, Brigham had nothing to lose by going to trial.[21]

Brigham took his case to trial. His lawyer's defense was "mere presence." The prosecution took the position that Brigham had a minor but intricate role in the conspiracy operating as a "look out." The jury convicted and Judge Marovich, most reluctantly, imposed a mandatory minimum 10-year sentence. Brigham and his lawyer cried foul, understandably taking their case to the Seventh Circuit. As previously noted, Brigham's conviction was affirmed, with a terse, stinging dissent.

At the outset, the majority observed, "Mandatory minimum penalties, combined with the power to grant exceptions, create a prospect of inverted sentencing."[22] The Seventh Circuit explained its reasoning this way: "The more serious the defendant's crimes, the lower the sentence, because the greater his wrongs, the more information and assistance he has to offer to a prosecutor."[23] Continuing in this vein, the panel majority

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[18] 18 U.S.C. § 3553(e) enables a sentencing judge to impose a sentence below the mandatory minimum established by Congress on motion by the government for substantial assistance to authorities. This provision is only available to the government. Neither the defendant nor the Court may independently utilize this provision.

[19] 977 F.2d at 317.

[20] 21 U.S.C. § 843.

[21] The district court, however, had to extend valuable judicial resources to try a case which could have readily been avoided in the absence of a mandatory minimum sentence.

[22] 977 F.2d at 318.

[23] *Id*.

wrote: "Discounts for the top dogs have the virtue of necessity, because rewards for assistance are essential to the business of protecting and punishing crime."[24]

Indeed, distinguished members of this Commission, this has been my experience with such discounts: while often amply rewarding the cooperator, they have the very salutary effect of assisting the government in apprehending extremely serious offenders, otherwise beyond the prosecution's grasp. Unfortunately, with mandatory minimums, it leaves the Anthony Brighams of the world hanging out to dry. As the Seventh Circuit further observed: "…what makes the post-discount sentencing structure topsy-turvy is the mandatory minimum, binding only for the hangers on. What is to be said for such terms, which can visit draconian penalties on the small fry without increasing prosecutors' ability to wring information from their bosses?"[25]

Expressly recognizing that the *Brigham* case, "illustrates a sentencing inversion,"[26] the majority nonetheless embraced the doctrine articulated in the Supreme Court decision in *Chapman v. United States*[27] that "such an outcome is neither illegal nor unconstitutional, because offenders have no right to be sentenced in proportion to their wrongs."[28]

As I understand one of the guiding principles upon which the Guidelines were constructed in the first place is that there ought to be consistent ranges for judges so that like sentences will be imposed on like offenders, directing the application of adjustments in direct proportion to the wrongs committed. It is thus little wonder that this Commission has, from the very beginning, opposed mandatory minimums, as they create in so many different contexts the very real and inequitable prospect of a sentencing inversion, allowing the big fish to swim away relatively unscathed, while leaving the so-called "small fry" to suffer draconian penalties. Anthony Brigham was left to smolder in his jail cell, having to choke on the notion that somehow, under our laws, he simply had "no right to be sentenced in proportion to (his) wrongs." Such results are not merely troubling, as the majority characterized them in the *Brigham* decision, but outrageous, leaving the sentencing judge frustrated, the small fries embittered, the prosecutors simply shrugging their shoulders, defense lawyers pleading to an audience which is incapable of responding, while being incompatible with anyone's notion of fair and equitable punishments.

During his proffer session with the government, at which I was present, Craig Thompson, referring to Anthony Brigham, just in his early 60s but nonetheless as the "old man", pleaded with the government to give him a sentencing break. Candidly, he told the government that Brigham was only there at his direction, that it was Brigham's first involvement in Thompson's drug enterprise, that he only asked Brigham to come so that he could have an excuse to give him some money to tide him over and that Brigham

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[24] *Id.* at 317.
[25] *Id.*
[26] *Id.*
[27] 111 S. Ct. 1919, 1928-29 (1991)
[28] 977 F.2d at 318.

had no real understanding of the magnitude of Thompson's dealing in general or the amount of drugs involved in this deal in particular. Thompson also announced to the government that he would boldly risk testifying against the members of the Cali cartel and anyone else involved in his drug distribution network, but he simply could not bring himself to point an accusatory finger at his father-in-law. Significantly, at trial the government honored Thompson's wishes, prompting Judge Bauer in his dissent to note: "The fact is, no one testified as to what exactly Brigham was doing or why he was doing it; no one, despite a marvelous number of totally cooperating witnesses who if the government's theory is correct could have nailed Brigham's hide to the jailhouse wall."[29]

Continuing in his dissenting diatribe, Judge Bauer, wrote: "…it is not Brigham's missing explanation that is fatal, it is the government's inability to explain that creates the problem."[30]

In his obvious frustration, the dissent continued: "Tell us another, indeed, but only if it is the government's tale; the accused has absolutely no burden to explain anything."[31] Thus, Judge Bauer concluded: "I would have directed a verdict of not guilty had I been the trial judge, and I construe my role in review to be the same."[32]

Isn't Judge Bauer's terse dissenting opinion a tacit condemnation of the sentencing process which inverted itself to permit the ringleader and his upper echelon to receive relatively light sentences, while Brigham was forced to receive a mandatory minimum 120 month sentence without the prospect of parole?

IV. *Johnson* and Prosecutorial Discretion

Sentencing statutes that carry mandatory minimum sentences have become one of the greatest weapons in the arsenal of the prosecution.

Consider a 23-year old male arrested for a drug conspiracy may be charged by way of preliminary complaint with a drug quantity alleged to be in excess of 10 kilograms, triggering a mandatory minimum sentence. Our hypothetical complaint makes it clear that the defendant has been taped by a confidential informant as well as several undercover agents and caught in the midst of the drug transaction, accepting cash in exchange for the drugs. In short, trial is not a viable option.

The prosecution, by virtue of the charge itself, is in an excellent position to seek and obtain an order of detention thus ensuring that the defendant will be held in custody pending trial.[33] Once detention is secured, the defendant, previously unwilling to

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[29] *Id.* at 320.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *See* 18 U.S.C. 3142 §§ (e) and (f).

cooperate, now must seriously rethink his options. Sitting in an MCC[34] or some other contract facility, such as a local county jail, gives the defendant a great deal of time to contemplate his future. The defendant, after having an opportunity to reconsider, frantically reaches out for his attorney, directing counsel to make a preliminary inquiry as to how his case might be resolved short of trial should he agree to plead guilty. At this juncture, the defendant still does not wish to cooperate. The prosecution's reply is that a guilty plea, preceded by a candid proffer[35] and full cooperation, could very well prompt the prosecution to file a motion for downward departure pursuant to the provisions of guideline § 5K1.1[36] and 18 U.S.C. § 3553(e).

Upon further discovery, the prosecution learns that this hypothetical defendant, just a few years earlier, was convicted for the delivery of a small quantity of cocaine, received a prison sentence and was on parole at the time of his commission of this offense. The effect of this prior conviction is to increase the prosecution's arsenal 100-fold. Rather than being able to pull out an arrow with a 10-year mandatory minimum on its tip, it can threaten a notice under § 851[37] which would have the effect of doubling the mandatory minimum, thereby ensuring that the defendant receive 20 years based on a couple of grams of cocaine he sold a few years before.

To make matters worse, our hypothetical defendant is no more than a courier in the drug conspiracy with which he was charged by complaint. He knows what the big fish did, but he too was just a small fry; a small fry now potentially facing a mandatory minimum of 20 years simply for once having sold about $300 worth of powder cocaine and now having been paid $1000 to transport an unknown quantity of drugs from one point to another at the direction of the higher-ups. From experience, I can unconditionally state to this distinguished Commission that there is no joy in conveying to your client the untold misery that is in store for him should he persist in his refusal to cooperate; but there it is. Ultimately, the defendant relents, signs a formal proffer agreement, tells all and, as a result, the others in the conspiracy decide to plead guilty.

Commissioners, in our hypothetical, the prosecutor assigned to pursue the case is what Justice Kennedy described in his 2003 speech to the ABA, "not much older than the defendant himself." Indeed, the defendant in our hypothetical is 23 years old; the Assistant United States Attorney is 27. Yet, the discretion as to precisely what will

[34] Metropolitan Correctional Center, generally constructed near federal buildings in large cities to serve as a short-term holding facility. These buildings are cement high-rises, affording their involuntary residents precious little opportunity for exercise or fresh air.

[35] Although varying from district to district, a proffer is essentially a statement a defendant gives under a written letter agreement between the parties that outlines the basic understandings as to how the statement may or may not be used, generally as a precursor to a plea agreement where cooperation is a component of that agreement.

[36] This guideline provision establishes criteria by which the prosecution, in its sole discretion, may base a motion for a downward departure from the applicable guideline range for what it deems "substantial assistance to authorities".

[37] 21 U.S.C. § 851.

happen to this defendant is largely left to this young prosecutor,[38] rather than a sentencing judge with substantial experience, far better equipped to weigh the competing equities in fashioning an appropriate sentence. Quite understandably, Justice Kennedy characterized such a transfer of discretion as "misguided." Whether one agrees with this assessment, the fact is that the prosecution holds all of the cards and it knows just how to play them. One such case, with which I am currently dealing, poignantly illustrates the difficulties arising from these kinds of situations.

Because this case is pending disposition, I will, for sake of anonymity, refer to the defendant as Samuel Johnson. The relevant facts in Johnson are as follows: Three individuals who, again, for sake of anonymity we will identify as A, B, and C, agreed to distribute wholesale quantities of cocaine beginning in the late spring of 2008. Individuals A, B and C had previously dealt with Individual E, who, unbeknownst to A and B was now working as a confidential government source. A and B negotiated with E to sell E quantities of cocaine. Under the agreement, Individual E was to become a distributor of the cocaine for Individuals A, B and C. Later, Individual E introduced Individual A to Individual F, whom Individual E explained was a purchaser of large quantities of cocaine. In fact, this Individual F was really an undercover government agent. After negotiations were completed, Individual A recruited Samuel Johnson to deliver a package in exchange for $1,000.00. Johnson agreed and was directed by individual A as to the location for its delivery and the purchase price to be collected.

During the early summer of 2008, Individual A directed Johnson to pick up a package from him and deliver it to Individual E and Individual F and collect $25,000 from E and F. Johnson did as directed, delivered the package, collected the $25,000 cash payment and brought it to Individual A. Individual A in turn paid Johnson $1,000. Two days later, Individual A again contacted Johnson, directing Johnson to meet Individual A, obtain $500 from him and take it to a prearranged location to give to Individual E for his role in arranging the deal. After Johnson took the money to Individual E, everyone was arrested and charged with possession with intent to distribute more than 10 kilograms of cocaine.

Immediately upon his arrest, Johnson agreed to speak with the arresting agents, telling them everything he knew about Individual A and his own role in this offense. Johnson did not know and had not dealt with Individuals B or C. Shortly thereafter, Johnson entered into a formal proffer agreement with the government, whereupon he reiterated his involvement and told the government everything he knew about Individual A. He possessed no other information which was of any interest to the government.

At the time of Johnson's proffer, neither Individuals A, B, or C had spoken with the government. They had pled not guilty at their arraignment, engaged counsel, and appeared to be preparing for trial. Johnson agreed to be a prosecution witness should the government choose to call him. After the government distributed discovery to all the

[38] Typically, a young prosecutor will have a supervisor or supervisory chain to oversee the implementation of office policy. Still, great weight ordinarily is accorded to the judgment of the young assistant, who occupies a position on the front line of the investigation.

parties, which included a copy of Johnson's proffer statement, defense counsel for each of the three other defendants, instantly placed phone calls to the young prosecutor handling the case.

Johnson had one complicating factor in his background. In January of 2007, he was convicted of delivering 3 grams of cocaine, a felony, in the Circuit Court of Lake County and was sentenced to two years imprisonment. Three criminal history points were thus added to his history pursuant to § 4A1.1(a). Additionally, because Johnson committed the present offense while on parole from his January 2007 offense, two more criminal history points were added pursuant to § 4A1.1(d). Moreover, because Johnson committed the present offense less than 2 years after his release from custody on his January 2007 offense, one further criminal history point was added pursuant to § 4A1.1(d). The net impact on Johnson's criminal history for his three gram delivery was to elevate his criminal history category from a I to a III.[39] With a base offense level of 32, and a three-level reduction pursuant to guideline § 3E1.1 for timely acceptance of responsibility, Johnson's total offense level is 29. Combined with a criminal history category of III, his advisory sentencing guideline range becomes 108-135 months.

One other extremely significant factor in the Johnson case is that, at the arraignment, the government, pursuant to § 851, filed a written notice which reflected Johnson's prior drug conviction. As noted above, such a notice effectively doubled the mandatory minimum sentence, increasing it from 10 to 20 years.

After preliminary plea negotiations, the government offered Johnson the following deal: in exchange for his plea to the conspiracy count, the government would move to dismiss the notice of prior conviction. It resonated with the prosecution that a mandatory minimum 20-year sentence for a low-level courier, who fully and truthfully cooperated with the government, was just a little harsh. However, the government was completely comfortable with the imposition of the statutory minimum ten-year sentence.

Specifically, the language that the government offered in the draft plea agreement was that it would agree "to recommend the Court impose a sentence at the low end of the applicable guideline range or the statutory minimum sentence if applicable, whichever is greater." Given the circumstances, the Court would have to find that the mandatory minimum sentence was applicable; the government knew its agreement to a low-end recommendation would be trumped and nothing more than lip service. In the Northern District of Illinois, the United States Attorney has policies in place for the treatment of cooperating individuals at sentencing. Unlike other districts, where the United States Attorney will agree to a sentence reduction for cooperation by decreasing the guideline range by a certain number of levels, depending on the magnitude of the cooperation, in Chicago, the United States Attorney's Office calculates the advisory guideline range and then offers a certain percentage to be discounted from the bottom of the guideline range,

[39] Ignoring for the moment that additional one point for "recency" will no longer be applicable under the amendments to the guidelines which will become effective November 1, 2010, Johnson's prior relatively minor drug offense of the delivery and sale of three grams of cocaine is fully taken into account in connection with his criminal history calculation.

likewise depending on the magnitude of the cooperation. I have seen discounts of anywhere between 10% and 65% from the bottom of the guideline range.

Individual A, against whom Johnson was willing to cooperate, is a fairly dangerous individual. There is always some risk of retaliation. Not coincidentally, after Johnson's cooperation was revealed, Individual A agreed to plead guilty. When Individual A pled, it initiated a domino effect with Individuals B and C pleading shortly thereafter on the heels of Individual A's guilty plea. Clearly, Johnson's cooperation provided substantial assistance to authorities in the resolution of this conspiracy case. The question thus became, what was the government prepared to offer Johnson by way of a discount for his substantial and timely assistance against a dangerous co-conspirator? The answer, described below, can be summarized here as follows: "virtually nothing."

Initially, the government's plea offer was to allow Johnson to plead to the one and only count to which he was named, the conspiracy count, which carried a statutory mandatory minimum 10-year sentence. Because he had previously delivered three grams of cocaine he was not eligible for any safety valve consideration. The government, realizing full well that Johnson's role was that of a low-level courier, nonetheless elected to file a written notice under § 851, effectively doubling his exposure and virtually guaranteeing that, absent Johnson's continued cooperation, he would face a certain 20 years in prison without the possibility of parole.

The "concession" the government was prepared to make was to agree to dismiss the § 851 notice, which it was not compelled to file in the first place. This "now you see it, now you don't" slight-of-hand by the prosecution created the impression that the government was providing something to Johnson in exchange for his cooperation. I can assure you, from Johnson's perspective, it was as if he cooperated for nothing. Johnson grew up impoverished from the poor side of town in Waukegan, Illinois. With no father, a mother who worked two jobs, his main education was on the streets. He was, at most, an extremely low-level drug offender, dealing in a few grams and then being recruited by a big shot, so that he could make $1000, a huge score from Johnson's perspective. Johnson, like Brigham, was clearly a small fry. At least Johnson, however, had something marketable with which to trade in an attempt to improve his criminal predicament.

No federal judge, left to his or her own devices, would impose a 20-year sentence on Sam Johnson. Johnson, in accordance with the policies of the United States Attorney's Office for the Northern District of Illinois, could have been offered at least a small percentage discount from the bottom of the guideline range of 108 months. Indeed, he should have. Unfortunately, the prosecution had Johnson over a barrel and it knew it.[40]

The bigger fish in this case have yet to be sentenced. Doubtless, as with Anthony Brigham, they have far more to offer than Sam Johnson and will be rewarded

[40] I am currently awaiting a response from the supervisory chain of command from whom I requested a reconsideration of the plea offer to include a downward departure from the advisory guideline range.

accordingly. As such, the prospect of another unwarranted disparity and sentencing inversion looms large here, doesn't it?

IV. Practical Inequities Arising from Mandatory Minimum Sentences

(A) Honesty and Truth in Sentencing

In the *Brigham* case, Jeffrey Carter was allowed to plead to a phone count for which there is no mandatory minimum and the statutory maximum is only four years. The prosecution's choice of this charge enabled Carter to receive probation and work release. A long-time enforcer for the Thompson drug trafficking network, referred to as a "goon" in the *Brigham* opinion, walks away with probation. Anthony Brigham served all of his 10-year mandatory minimum sentence, less some good time. To add insult to injury, Craig Thompson eventually received an additional one-year reduction to his sentence pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure for some further cooperation undertaken while he remained free on bond, pending execution of his sentence. Thompson, made literally millions in the illegal drug trafficking trade, spent six years in a minimum-security camp, while the "old man" languished in an FCI[41] in Minnesota for 10 years.

Could the prosecution in the *Brigham* case have dismissed the conspiracy charge and replaced it with an offer to plea to a phone count as they did for Carter? They explained that they could not because, in fact, Brigham never made any phone calls in furtherance of the crime. Would a different set of prosecutor's possibly have dared to fabricate a phone count in order to attempt to achieve a more just result? As reflected in the Boston Globe account of Judge Mathers' case, such factual distortions are clearly not unheard of, and, at least to me, are ultimately far more just and reasonable than the results which are contained in the Johnson/Brigham cases. Of course, the fabrication of such a charge would seriously denigrate the policy of "honesty and truth in sentencing." Yet, no one could seriously blame a defense attorney for suggesting such an alternative; nor could anybody be truly critical of a prosecutor who might just be willing to accept such a suggestion. For that matter, how likely is it that a sentencing court, not having possession of all the actual facts, would even know or question the validity of such a charge? Even if the court did have its suspicions, knowing the overall circumstances surrounding the *Brigham* case, would a court really even want to pursue those suspicions? Clearly, the goal of honesty and truth in sentencing is a noble and worthy one. Still, the temptation to compromise this goal in the plea negotiation process can be quite compelling, particularly in the context of mandatory minimum sentences, where the scales of justice are too frequently out of balance.

(B) Pressure to Provide False Cooperation

It is easy to imagine the extraordinary pressure brought to bear on Anthony Brigham as the reality of his situation sunk in: pleading guilty would have produced a 10 year minimum term and proceeding to trial and losing would have produced a 10 year

[41] Federal Correctional Institution, typically housing low to medium security level offenders.

minimum term. Cooperation was the only possible solution to this "Hobson's choice." In this regard, the majority opinion, after reviewing the sentencing transcript in *Brigham* stated: "Brigham (had) told the prosecutor that he was part of the organization and had been involved in some big-stakes transactions. But he was unable to provide enough information to induce the prosecutor to make the motion under § 3553(e) that unlocks the trap door in the sentencing 'floor.'"[42] Was Brigham actually part of the drug organization? Did he really have some involvement in the so-called big-stakes transactions? Not according to his son-in-law, Craig Thompson. Perhaps this explains why Brigham was unable to provide any real details or enough information to be deemed "substantial" in the eyes of the government.

Could anyone really blame Brigham for his efforts to provide what has sometimes been characterized as "false cooperation", lacking any meaningful information to provide? Someone at the very bottom of the culpability food chain, a newcomer, with nothing of substance to provide, lacking any marketability, is ironically impelled to conjure up stories, making him appear to be more involved and far more culpable than he really is. As long as mandatory minimum sentences continue to exist, the strong impetus for defendants to come up with something in order to make a deal will continue to create a very unjust and unhealthy environment.

(C) Collateral Damage

The hardships visited upon our sentencing process are not limited to those cases where courts are handcuffed in their sentencing options by the presence of a mandatory minimum sentence. There has been what I call collateral damage.

Prosecutors, frustrated by the ever-increasing utilization of the so called "blind plea,"[43] largely employed by the defense bar in white collar cases, have taken to filing § 851 notices every time they encounter a drug case where a defendant has had a prior drug conviction, regardless of how minor in nature that prior conviction was. Samuel Johnson is a case in point.

These § 851 notices have an impact well beyond the parameters of mandatory minimum cases, instead reverberating across the entire spectrum of federal criminal cases. Federal judges are forced to impose sentences of 10 years, 20 years and even life sentences on drug offenders, who, although playing relatively minor roles, nonetheless have two or more prior drug convictions. Many of these judges are left scratching their heads in frustration when contrasting the enormity of those sentences with the white collar offender who has stolen or embezzled millions of dollars and yet is facing a relatively far lesser sentencing range of approximately five or six years. I have listened to judges' express their frustrations over this obvious inequity. Too often, however, the

[42] 977 F.2d at 319

[43] A "blind plea" generally refers to a situation where a defendant offers a guilty plea before the court without any plea agreement between the parties. In a case where no mandatory minimum sentences are applicable, defendants, unhappy with the written plea offers from the prosecution, take their chances with the court, typically arguing for a downward variance from the advisory guideline range.

result is a pull, whether conscious or subconscious, toward higher sentences for the white-collar offender to better balance the scales of justice. The net effect is that offenders ensnared in the web of the entire federal criminal justice system find themselves caught in the updraft of ever-increasing sentences across the board.

The statistical analysis supplied by my colleagues shows a staggering number of individuals incarcerated in this country; apparently more than 1 in a 100 United States citizens are in prison. Is the answer found in enhanced sentences for all offenders to offset the hardships caused by mandatory minimum sentences? Or does the answer lie in the abrogation of mandatory minimums, with the salutary effect of a leavening of the overall sentencing process?

V. Conclusion

In the context of mandatory minimum sentencing, we are not merely parading a cavalcade of imagined horribles but real life and very distressing situations, occurring more times than anyone would like to consider: Defendants lying to prosecutors about wrongs they did not commit; trial court judges finding individuals guilty of lesser included offenses, disobeying the law in order to seek a more just result; appellate court judges dissenting against the imposition of a mandatory minimum sentence by opining that the individual should have been found not guilty, all to avoid the wholesale inversion of the sentencing process. All of these circumstances would be ameliorated, if not immediately remedied, by the abrogation of the vast majority of the mandatory minimum sentences now on the books.

Accordingly, on behalf of my colleagues, members of the Practitioner's Advisory Group, I lend my voice to my colleagues, Ms. Orr, Mr. Felman and Mr. Nachmanoff, in urging the Commission, in the strongest terms, to continue its long-standing opposition to mandatory minimum sentences. I thank you for your time and consideration.

Jeffrey B. Steinback