

**Public Hearing on Federal Sentencing Options After Booker**  
**Roundtable I: Improving the Advisory Guideline System**

Statement of the Honorable Judge Andre M. Davis  
United States Circuit Judge  
United States Court of Appeals for the Fourth Circuit

I appreciate the opportunity to share my views on this important topic. In addition to my testimony to be offered during Roundtable I at the February 16, 2012, hearing, I am pleased to submit for the record this brief account of some of my views touching the topic of federal sentencing.

During my nearly 17-year tenure as a federal judge, first on the U.S. District Court for the District of Maryland and now on the U.S. Court of Appeals for the Fourth Circuit, I have learned of countless personal narratives that lay bare a major problem in our criminal justice system: mandatory minimum sentencing, an offshoot of our misguided “war on drugs.” Tony Gregg’s story bears retelling. *See United States v. Gregg*, 435 Fed.Appx. 209, 2011 WL 2420267 (4th Cir. June 17, 2011), *cert. denied*, 132 S.Ct. 327 (2011).

Mr. Gregg was a drug abuser, occasional dealer and “snitch” for the FBI whose early life was marked by abuse and instability, suicide attempts and prison stays. To support his drug use, Mr. Gregg resorted to selling crack cocaine — not kilos, but several grams at a time. Not unexpectedly, he was arrested and convicted. A reluctant district judge sentenced Mr. Gregg to the mandatory term of life imprisonment, required by statute, at the discretion of the prosecutor, for a third conviction of a felony drug offense. When his case came before me and my colleagues on appeal, we were bound to uphold the life sentence. The appellate court, like the disapproving trial court, was handicapped by mandatory minimum sentencing guidelines set by the Anti-Drug Abuse Act of 1986. Mr. Gregg did not deserve life in prison — the kind of sentence often (but not invariably) imposed on convicted murderers. Perhaps he and other low-level, nonviolent offenders like him deserve punishment. But this punishment must be just.

Our advisory guidelines system has significant benefits, but after 25 years of watching countless individuals, such as Tony Gregg, serve out impossibly long sentences for transgressions that would more appropriately be addressed by significantly less incarceration and more readily-available drug treatment and social safety nets, I say with certainty that mandatory minimums are unfair and unjust. These laws, created by an overzealous Congress decades ago,

do a disservice to the people accused of the crimes, to the judges reviewing their cases, to communities that are largely poor and black or Latino and to society.

Mandatory minimums hinder judges from handing out fair and individualized sentences, while prosecutors are given unwarranted power to dictate sentences through charging decisions. It was once thought that this system would reduce sentencing disparities by removing (or significantly reducing) judges' discretion, but the opposite has come to fruition. Shifting sentencing authority to prosecutors, whether through rigid guidelines and/or profligate use of statutory mandatory minimums, has only resulted in exacerbated disparities. Consequently, prison populations have swelled; nonviolent drug offenders are serving extraordinarily long sentences, receiving little or no drug treatment and growing older, sicker and more in need of taxpayer-provided medical care. The fiscal exaction of this approach is unsustainable. It was recently reported, for example, that in New Jersey the cost of a year in state prison exceeds the cost of a year at Princeton University. Meanwhile, families and communities are destroyed, society is unjustly served, and the "war on drugs" fails.

Congress took a step in right direction by passing the Fair Sentencing Act of 2010, but mandatory minimum laws remain at odds with the federal guideline system established under the Sentencing Reform Act as modified by the Supreme Court in *United States v. Booker*. In recognition of the Sentencing Commission's vital role in reforming this system, I offer the following, based on my experience as a judge and as a community volunteer working on issues of offender rehabilitation, reentry opportunities, and civic education about the law, as examples of the types of reforms I believe best serve everyone involved.

The Sentencing Commission should urge Congress to reassess the severity, scope, and structure of the recidivist provisions at 21 U.S.C. §§ 841 and 960. Their structure, in particular, nurtures inconsistent application. For instance, because states have adopted varying punishments for drug offenses, conduct that qualifies as a "felony drug offense" in Maryland under sections 841 and 960 may not qualify as such an offense in Virginia. In a similar manner, the Commission should encourage Congress to fine-tune statutory definitions of the underlying and predicate offenses that trigger mandatory penalties under 18 U.S.C. § 924(c) and the Armed Career Criminal Act. The statutes as written have created confusion and frustration among justices and judges and have resulted in inconsistent application and endless litigation.

The Commission should further press Congress to address the harsh consequences of 18 U.S.C. § 924(c). Specifically, Congress should amend the overly punitive length of its mandatory minimum penalties and consider amending section 924(c) to apply only to prior convictions. Perhaps most importantly, Congress should make use of the experience and position of judges and amend Section 924(c) to provide sentencing courts with the discretion to impose concurrent sentences for multiple violations, thereby allowing consideration of the individualized circumstances of each offender and avoiding overly harsh punishment.

The Commission should also undertake to persuade Congress to amend the “safety valve” provision at 18 U.S.C. § 3553(f). First, the Commission should encourage Congress to broaden the application of Section 3553(f) to include certain offenders who receive two or three criminal history points under the guidelines. This change would allow some offenders with a criminal history score that perhaps misrepresents their risk of recidivism to find protection from an overly punitive sentence. In addition, the Commission should entreat Congress to adopt a similar “safety valve” for low-level, nonviolent offenders convicted of other federal offenses carrying mandatory minimum penalties, as section 3553(f) applies only to drug offenders.

Finally, the Sentencing Commission should implore Congress to bring the prescribed statutory sentences in line with the just purposes of punishment. The prescribed sentences, as well as the corresponding guidelines ranges, are overly punitive, fail to adequately deter and fall short of promoting respect for the law. These laws also interfere with or fail to adequately provide for rehabilitative treatment.

I thank the members of the Commission and the talented and dedicated Commission staff for your continued attention to these vital issues and for considering my views.

February 8, 2012