

*From the Los Angeles Times*

## **Judges seek leeway in prison sentences**

**The Supreme Court will look at strict rules that are a holdover from the 1980s war on drugs and that legal activists say are unfair.**

By David G. Savage

Los Angeles Times Staff Writer

September 29, 2007

WASHINGTON — Marion Hungerford, a 52-year-old woman diagnosed with a mental illness, was convicted two years ago as an accomplice after her live-in boyfriend pleaded guilty to a series of armed robberies in Billings, Mont.

Her sentence: 159 years in federal prison.

The judge said federal sentencing rules gave him no choice. The U.S. Court of Appeals in San Francisco agreed, as did the U.S. Supreme Court, which in May turned away her claim that the sentence was unconstitutional.

Increasingly, judges and legal activists -- conservative and liberal -- point to cases like Hungerford's and say the federal sentencing system is badly out of whack. They are hoping that Congress or the Supreme Court will move to give judges leeway to impose shorter -- and, they say, fairer -- prison terms. The high court will hear two cases next month that challenge mandatory minimum sentences.

"The worst aspect is the utter irrationality of the system," said U.S. District Judge Paul G. Cassell from Utah, an appointee of President Bush and former law clerk to Antonin Scalia before Scalia joined the Supreme Court. "When I have to sentence a midlevel drug dealer to more time than a murderer, something is wrong."

"This is not about being soft on crime," Cassell said in an interview. "I believe in tough sentences for severe crimes."

Three years ago, Cassell was forced to sentence 24-year-old Weldon Angelos to 59 years in prison for three marijuana sales of \$350 each. On each occasion, Angelos had a gun in his car, which tacked on 55 years to his prison term.

"I believe that to sentence Mr. Angelos to prison for the rest of his life was unjust, cruel and even irrational," Cassell told a House committee in June. In contrast, he said, an airline hijacker or a terrorist who sets off a bomb in a public place would receive 20 to 25 years in prison.

The current system is a holdover of the mid-1980s and the war on drugs.

Congress set fixed prison terms for crimes involving guns and drugs and adopted sentencing guidelines that set prison terms for all other federal crimes, including white-collar offenses. It also eliminated parole, meaning those sent to federal prison cannot be released until they have served most of their terms.

The new rules have contributed to the nation's swelling prison population. Last year, 181,622 inmates were in federal prison, up from 24,363 in 1980, according to the Bureau of Justice Statistics.

Many states followed the federal model by setting long prison terms and abolishing parole. Nationwide, 2.3 million people were locked up last year in federal, state and local facilities, up from 501,886 in 1980. Nearly half a million people, or 493,800, are in prison or jail for drug crimes, up from 41,100 in 1980, the liberal Sentencing Project reported last week. The surge of inmates has contributed to prison overcrowding in many states, including California, home to about 175,000 state and 15,000 federal prisoners.

Critics of the sentencing rules point to several problems with them, some of which are unintended.

The fixed "mandatory minimum" sentences can generate some severe prison terms. To punish gun-toting criminals, Congress set a five-year term for using a gun to commit a crime and 25 years for a repeat offense.

Hungerford did not touch a gun nor rob any of the convenience stores, bars and casinos her boyfriend hit, and no one was hurt in the crime spree. Nonetheless, she was convicted as a co-conspirator and sentenced to nearly five years for the robberies, five years for the first use of a gun and 25 years each for six additional gun crimes.

Hungerford's attorneys argued, apparently to no avail, that her diagnosis of "borderline personality disorder" should have been taken into account.

Her boyfriend pleaded guilty and was sentenced to 32 years.

"This was absurd. She wasn't there when the crimes were committed, and she gets more than a life sentence," said Palmer Hooverstal, her defense attorney from Helena, Mont.

The Justice Department said the long sentence was appropriate because Hungerford was an active participant in a dangerous crime spree and did not cooperate with authorities.

If she had pleaded guilty and cooperated, "the court would have had discretion to impose a lesser sentence," said Justice spokesman Dean Boyd. "Multiple armed robberies present substantial risks of death or serious injury, and our sentencing laws reflect that . . . in the hope of protecting the public."

However, Bush's nominee to head the Justice Department as the next attorney general, Michael B. Mukasey, has spoken out against the sentencing laws. While on the federal bench, he was among a number of judges who thought the limits that the guidelines placed on courts violated the constitutional principle of separation of powers.

And the conservative **Washington Legal Foundation** has condemned "the unduly harsh sentences" set by the federal rules. Its lawyers say too many business owners and white-collar defendants are

given long prison terms for violating regulatory laws.

"We have clients who are serving eight years for importing seafood packed in the wrong containers," said Paul D. Kamenar, counsel for the group.

Moreover, defendants can be given extra prison time for charges on which they were acquitted. This "goes against virtually everything we know and respect about the American criminal justice system," New York lawyer Harlan Protass said.

He cited the case of Mark Hurn, a convicted drug dealer from Madison, Wis. Police found drugs, including crack cocaine, in his house. Hurn testified that the drugs were not his but were owned by others who had lived there. A jury convicted him of having some powder cocaine, which called for at least two years in prison, and acquitted him of the crack charges. But the judge disagreed and sentenced him to 17 1/2 years, which included time for the crack charges. In August, the U.S. appeals court in Chicago upheld his sentence.

This fall, the Supreme Court and the U.S. Sentencing Commission may move to lower the prison terms for drug crimes.

The law that governs sentencing is in flux. Although the high court cannot change the "mandatory minimum" sentences that are set by Congress, it ruled recently that the federal sentencing guidelines are not legal mandates. Now the court must decide when judges may ignore the range of prison terms set in the guidelines.

On Oct. 2, the justices will hear a pair of drug cases. One concerns Brian Gall, an Arizona construction worker who faces three years in prison for selling drugs during his college days. The other involves Derrick Kimbrough, a Gulf War veteran who pleaded guilty to selling crack cocaine and faces more than 20 years in prison.

Gall sold ecstasy pills as a sophomore at the University of Iowa, but quit his drug ring within a year. He graduated, moved to Arizona and began a construction business.

Several years later, when FBI agents broke up the drug ring in Iowa City, Iowa, one of the participants fingered Gall. He confessed and pleaded guilty. Under the sentencing guidelines, which focus on the quantity of drugs sold, Gall faced 30 to 37 months in prison.

The judge said he saw no point in sending Gall to prison, and chose probation instead. Bush administration prosecutors appealed and won a reversal from the U.S. Court of Appeals in St. Louis. It said a judge may not ignore the guidelines except in "extraordinary circumstances."

Kimbrough's case focused on the controversial 100-to-1 disparity in punishments for crack and powder cocaine. Under this rule, selling 50 grams of crack calls for 10 years in prison; a powder cocaine dealer would have to sell 5,000 grams to get the same sentence. A broad array of legal groups say this disparity is unfair and racially biased because more than 4 out of 5 crack defendants are black.

Police in Norfolk, Va., arrested Kimbrough in his car and found small quantities of crack cocaine and powder cocaine and a loaded gun. He pleaded guilty, and the sentencing guidelines called for 19 to 22 years in prison. The judge called that sentence unjust and instead imposed the 15-year mandatory minimum term.

Prosecutors appealed and won a reversal from the U.S. Court of Appeals in Richmond, Va., which said the judge overstepped his authority by ignoring the guidelines covering crack cocaine cases.

Meanwhile, the U.S. Sentencing Commission has proposed lowering future sentences for crack cocaine defendants. This rule will take effect in November unless Congress rejects it.

None of this would shorten Hungerford's prison term. The Bureau of Prisons has given her a projected release date: May 23, 2144.

Hungerford said her biggest mistake was not pleading guilty.

"My crime is not robbing, and my crime isn't hurting anyone, because I didn't do that," she said at her sentencing hearing. "My crime is being stupid. It looks like I'm going to be faced with a lot of years for being stupid."

[david.savage@latimes.com](mailto:david.savage@latimes.com)