

Michael D. Zimmerman (3604)  
Troy L. Booher (9419)  
SNELL & WILMER L.L.P.  
15 West South Temple, Suite 1200  
Gateway Tower West  
Salt Lake City, UT 84101-1004  
Telephone: (801) 257-1900  
Facsimile: (801) 257-1800  
Email: mzimmerman@swlaw.com  
Email: tbooher@swlaw.com

Douglas A. Berman  
*Pro Hac Vice*  
THE OHIO STATE UNIVERSITY  
MORITZ COLLEGE OF LAW  
55 West 12<sup>th</sup> Avenue  
Columbus, OH 43210  
Telephone: (614) 688-8690  
Email: berman.43@osu.edu

Brian M. Heberlig  
*Pro Hac Vice*  
Shawn P. Davisson  
*Pro Hac Vice*  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
Telephone: (202) 429-3000  
Email: bheberlig@steptoe.com  
Email: sdavisson@steptoe.com

Attorneys for Petitioner Weldon H. Angelos

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

**WELDON H. ANGELOS,**

Petitioner,

vs.

**UNITED STATES OF AMERICA,**

Respondent.

**MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT TO VACATE PORTION OF  
SENTENCE PURSUANT TO  
28 U.S.C. § 2255**

Case No. 2:07-cv-00936-TC

Honorable Tena Campbell

**TABLE OF CONTENTS**

	<u>Page</u>
INTRODUCTION .....	1
STATEMENT OF UNDISPUTED MATERIAL FACTS .....	2
ARGUMENT .....	6
I.    ANGELOS’S PROSECUTION AND EXTREME SENTENCES BASED ON THE PRESENCE OF FIREARMS IN HIS HOME AND GUN POSSESSION VIOLATES THE SECOND AMENDMENT.....	8
A.    Given the unique facts of this case, the government’s threat of 25 years of mandatory imprisonment based on the presence of firearms in the Angelos home violated the Second Amendment.....	10
B.    Based on the unique facts of this case, imposition of 55 years of mandatory imprisonment based on mere firearm possession violates the Second Amendment.....	14
C.    Originalism and other principles reflected in the Constitution and Supreme Court jurisprudence support Angelos’s Second Amendment claims. ....	16
II.   ANGELOS’S EXTREME SENTENCE BASED ON FIREARM POSSESSION IS EXCESSIVE AND THUS VIOLATES THE EIGHTH AMENDMENT.....	18
CONCLUSION.....	22

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978).....	16
<i>District of Columbia v. Heller</i> , 128 S. Ct 2783 (2008).....	passim
<i>Kennedy v. Louisiana</i> , 128 S. Ct. 2641 (2008).....	passim
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972).....	12, 13
<i>Meese v. Keene</i> , 481 U.S. 465 (1987).....	13
<i>Mitchell v. United States</i> , 526 U.S. 314 (1999).....	14
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964).....	12
<i>Reno v. American Civil Liberties Union</i> , 521 U.S. 844 (1997).....	12
<i>Stenberg v. Carhart</i> , 530 U.S. 914 (2000).....	13
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958) .....	19
<i>United States v. Angelos</i> , 433 F.3d 738 (10th Cir. 2006) .....	6, 21
<i>United States v. Angelos</i> , 345 F. Supp. 2d 1227 (D. Utah 2004).....	passim
<i>United States v. Angelos</i> , No. 2:02-CR-0708 (D. Utah Oct. 1, 2003) .....	12
<i>United States v. Walker</i> , 473 F.3d 71 (3rd Cir. 2007) .....	12
<i>Weems v. United States</i> , 217 U.S. 349 (1910).....	17, 18

Weldon H. Angelos, by and through his attorneys, Brian M. Heberlig and Shawn P. Davisson, Steptoe & Johnson LLP; Michael Zimmerman and Troy L. Booher, Snell & Wilmer LLP; and Professor Douglas A. Berman, The Ohio State University, Moritz College of Law, submits this memorandum in support of his motion for partial summary judgment to vacate a portion of his sentence pursuant to 28 U.S.C. § 2255. Angelos respectfully asserts that undisputed case facts, together with important new Supreme Court rulings, authorize and justify this Court vacating, setting aside, or otherwise correcting a portion of Angelos's sentence as unlawful and unconstitutional under the Second and Eighth Amendments to the United States Constitution.

### **INTRODUCTION**

The initial motion submitted to this court to correct Angelos's sentence pursuant to 28 U.S.C. § 2255 (hereinafter "2255 motion") explained in detail the various unlawful and unconstitutional aspects of the convictions and 55-year-and-one-day federal prison sentence imposed on Weldon Angelos. Filed over nine months ago, the 2255 motion explained how, as a result of three sales of small amounts of marijuana to a paid informant and the suspect charging decisions by federal prosecutors, Angelos is now serving an extreme federal prison term that the sentencing court itself described as "unjust, cruel, and irrational." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004). The 2255 motion detailed all the factual and legal bases on which Angelos continues to assert that his functional life sentence for minor marijuana sales transgressed due process, fair justice and proportionality principles reflected in the Fifth, Sixth and Eighth Amendments.

The government has not yet formally responded to Angelos's 2255 motion, and facts in dispute likely require discovery and an evidentiary hearing for this Court to resolve Angelos's Fifth Amendment due process claims and his Sixth Amendment ineffective assistance of counsel claims. Nevertheless, given undisputed facts in the record and as a consequence of major new rulings recently handed down by the U.S. Supreme Court, this Court may and should now rule that at least a portion of the sentence that Angelos is currently serving is unconstitutional under the Second and Eighth Amendments. As detailed more fully herein, Angelos respectfully requests that this court vacate one or both of the 25-year stacked mandatory prison terms he is serving which, in light of the new Supreme Court rulings, are now unconstitutional under any view of the pertinent facts in this case.

#### **STATEMENT OF UNDISPUTED MATERIAL FACTS**

A full factual and procedural background is set forth in the 2255 motion at pp. 1-4. The undisputed facts for purposes of this Motion for Partial Summary Judgment are set forth below:

1. Weldon H. Angelos was born on July 16, 1979, and raised in the Salt Lake City, Utah area by his father, James Angelos, having very little contact with his mother. (345 F. Supp. 2d at 1231).
2. In his early adulthood, Angelos became a successful music executive with his own label, Extravagant Records. Angelos is also the father of two young children, ten-year-old Anthony and nine-year-old Jesse. (*Id.*).
3. Angelos has no adult criminal record and is treated as a first-time offender under the Guidelines. (*Id.* at 1232, 1258–59).

4. Angelos is currently housed at a federal prison in southern California, having already served nearly five years of his sentence and is not scheduled to be released from custody until roughly 2058.

5. The critical events leading to the arrest and prosecution of Angelos were three “controlled buys” of marijuana (each for eight ounces at \$350) by a government informant, Ronnie Lazalde, who was himself facing serious drug and firearm charges and sought to curry favor with the government. (*Id.* at 1231).

6. The first small marijuana transaction – which formed the basis for the first § 924(c) count – was an uneventful hand-to-hand controlled buy in Angelos’s car in a record store parking lot on May 21, 2002. In a transaction recorded and photographed by law enforcement, informant Lazalde got into Angelos’s car, exchanged cash for a small bag of marijuana, and then left. Although Lazalde did not initially inform the police about a gun when first debriefed, and official surveillance did not reveal the presence of any weapon during this encounter, Lazalde later informed the government that he observed a pistol near the center console of Angelos’s car. (*Id.*).

7. The next small marijuana transaction – which formed the basis for the second § 924(c) count – was another uneventful hand-to-hand controlled buy in the same parking lot on June 4, 2002. In a transaction photographed by law enforcement, Angelos got out of his car to meet informant Lazalde, and they exchanged cash for a small bag of marijuana. Again, official surveillance and the initial police report, which reflected the initial debriefing of informant Lazalde, did not indicate the presence of a weapon during this transaction. However, Lazalde later informed the government that during the transaction, Angelos lifted his pant leg to show Lazalde a pistol in an ankle holster. (*Id.*).

8. The final small marijuana transaction occurred under the same basic circumstances on June 18, 2002. There was no evidence or allegation of any weapons involved, so this transaction did not form the basis for any § 924(c) counts. (*Id.*).

9. Following the revision of police reports to include allegations of the involvement of a weapon related to the first two marijuana sales based on informant Lazalde's testimony, a federal grand jury returned an indictment against Angelos on November 13, 2002, charging three counts of marijuana distribution, one 924(c) count for possessing a firearm in connection with a drug trafficking crime, and one count of possessing a firearm with an obliterated serial number. (Indictment dated Nov. 13, 2002).

10. Acting upon the indictment, police officers arrested Angelos in his home on November 15, 2002, at which point Angelos consented to a search of the premises. The search yielded some additional quantities of marijuana and related paraphernalia, a large sum of money, and several guns that Angelos kept safely locked in his home for self-defense. A search of the home of Angelos's girlfriend also turned up bags with marijuana residue, two guns and additional cash. (345 F. Supp. 2d at 1231).

11. After commencing plea negotiations, the government offered Angelos a "deal" that would involve a recommendation of a 15-year prison sentence, consisting of a guilty plea to the drug distribution counts and the § 924(c) count, as well as the dropping of all other charges with no superseding indictment if accepted.

12. The government, in order to obtain a guilty plea and avoid trial, threatened Angelos with a superseding indictment consisting of several additional § 924(c) counts carrying the potential of more than 100 years of mandatory prison time. Consequently, Angelos was

forced to choose between accepting 15 years in prison or exercising his jury trial right and face an effective life sentence. (*Id.* at 1231–32).

13. Not believing his petty marijuana dealing justified a 15-year prison sentence, Angelos rejected the plea offer, at which point the government followed through with its threat and obtained two superseding indictments. (*Id.* at 1232).

14. The ultimate charges faced by Angelos consisted of twenty total counts, including five § 924(c) counts, which alone carried a potential minimum mandatory sentence of 105 years. The § 924(c) counts included two counts for the pistol witnessed by informant Lazalde at the first two controlled marijuana buys, one count for the three handguns found safely locked in Angelos's home during the execution of the search warrant, and two additional counts for two guns found at the home of Angelos's girlfriend. (*Id.*).

15. Troubled by the government's decision to carry out its threat to seek an effective life sentence for a twenty-four-year-old offender with no criminal history based on three minor marijuana sales, Angelos attempted to re-open plea negotiations. The government refused and the case proceeded to trial. (*Id.*).

16. At trial, Angelos was acquitted on some counts and convicted on others.<sup>1</sup> Included among the counts of conviction were two 924(c) gun counts for the weapons informant Lazalde observed during the two hand-to-hand marijuana transactions. The jury also convicted Angelos of a third 924(c) count for the guns found in Angelos's home during the consensual search at the time of his arrest. (*Id.*).

17. At sentencing, the district court issued a thoughtful and lengthy opinion begrudging the sentence that the district judge believed was required by law. Angelos was

---

<sup>1</sup> Angelos was acquitted on the two additional § 924(c) counts stemming from the guns found in his girlfriend's home. The trial court also dismissed one minor count.

sentenced to 55 years and one day in prison. The composition of the ultimate sentence included the mandatory 55-year term of imprisonment for the three stacked 924(c) counts and only one day for the other drug-related convictions because of the extreme minimum mandatory sentences required by § 924(c). (*Id.* at 1260).

18. In his appeal to the Tenth Circuit, Angelos challenged his conviction and his sentence on various grounds. A Tenth Circuit panel affirmed in a written opinion on January 9, 2006. (433 F.3d 738).

19. Angelos filed a petition for rehearing *en banc* to the Tenth Circuit, which was denied on April 4, 2006. Angelos's petition for a *writ of certiorari* to the U.S. Supreme Court was denied on December 4, 2006. (127 S. Ct. 723).

19. Angelos timely filed his 2255 motion on December 3, 2007, raising all the claims on which summary judgment is now sought and additional claims.

### **ARGUMENT**

A full fact statement and procedural background is set forth in the 2255 motion at pp. 1-4. Though the government may eventually dispute some facts set forth in the 2255 motion, there is no dispute that Angelos had no adult criminal record prior to the instant case and that he was subject to 55 years of mandatory federal imprisonment based principally on allegations of possession of firearms in his home, in his car, and on his person. Specifically, the firearms providing the basis for one 25-year mandatory sentencing term were those present within Angelos's home. And though there is a dispute concerning whether Angelos possessed a firearm during the marijuana sales engineered by the government's informant, there is no evidence whatsoever or even any serious allegation that Angelos actively utilized firearms to facilitate three uneventful hand-to-hand marijuana sales. Nevertheless, on the basis of (suspect and

perhaps incredible) testimony of a single government informant, who belatedly asserted that Angelos possessed a firearm during two marijuana sales, the district court felt obliged under statutory sentencing provisions to impose another 30 years of federal imprisonment.

In light of the Supreme Court's broad and forceful recognition of the right of all citizens under the Second Amendment to possess firearms to effectuate "the inherent right of self-defense," *District of Columbia v. Heller*, 128 S. Ct 2783, 2817 (2008), the extreme sentence imposed upon Angelos for gun possession are now clearly unconstitutional and his 55-year sentence must be at least partially vacated. As explained more fully below, the Supreme Court's landmark *Heller* ruling as applied to the unique facts of this case render unconstitutional (1) the Government's pursuit of a superseding indictment threatening a 25-year mandatory prison sentence based on the presence of guns within the Angelos home, and (2) the imposition of 55 years of federal imprisonment Angelos is now serving based on his gun possession.

In addition, the *Heller* ruling, considered together with the Supreme Court's most recent explication of Eighth Amendment jurisprudence and its application in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), confirms that the 55-year federal prison term that Angelos is serving based on the possession of firearms is constitutionally excessive. Indeed, the combined force of the *Heller* and *Kennedy* rulings, along with the notable and constitutionally significant public reactions to both decisions, make plain that the sentence Angelos is now serving violates "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 2664 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

**I. ANGELOS’S PROSECUTION AND EXTREME SENTENCES BASED ON THE PRESENCE OF FIREARMS IN HIS HOME AND GUN POSSESSION VIOLATES THE SECOND AMENDMENT**

The Supreme Court’s opinion in *Heller* makes clear that Weldon Angelos, before his prosecution in this case, had a constitutionally protected Second Amendment right to possess and use firearms within his home in order to protect himself, his family and his homestead. 128 S. Ct 2783 (2008). As the Supreme Court explained in *Heller*, the Second Amendment safeguards “the inherent right of self-defense” by protecting from undue government interference the right of citizens “to use arms in defense of hearth and home.” *Id.* at 2817, 2821. Critically, by sustaining a facial Second Amendment challenge to a federal law which merely prohibited possession of a certain *type* of firearm, the Supreme Court made clear that the Second Amendment imposes a significant burden of justification on any and all governmental efforts to restrict any individual’s constitutionally protected right to “keep and bear arms.” Though the *Heller* decision did not specify a precise standard for reviewing government restrictions on Second Amendment rights, the Court made emphatically clear that the government must provide much more than a rational basis to justify severe restrictions on any “specific, enumerated [constitutional] right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.” *Id.* at 2817-18, n.27.

Especially germane to this case and to Angelos’s motion for summary judgment are the Supreme Court’s important and repeated pronouncements in *Heller* that (1) the *home* is an especially important locus for the exercise and protection of Second Amendment rights, and (2) unique constitutional difficulties are presented by *even just the threat* of severe criminal sanctions impeding the exercise of Second Amendment rights. Specifically, while acknowledging that rights secured by the Second Amendment are not unlimited, the *Heller* Court

stressed that government restrictions on the right to possess firearms are especially problematic when applied to “the home, where the need for defense of self, family, and property is most acute.” *Id.* at 2817. In addition, when striking down the District of Columbia’s handgun law, the *Heller* Court emphasized that the “District law, ...far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place.” *Id.* at 2821.

The *Heller* opinion thus indicates that any gun laws that “burden the right of self-defense” by threatening or imposing serious criminal sanctions for firearms possession in the home are constitutionally suspect and cannot be justified by broad and generic claims about public safety interests. *Id.* (explaining why the “core protection” of the Second Amendment regarding the “use arms in defense of hearth and home” cannot and must not be “subjected to a freestanding ‘interest-balancing’ approach” that might too readily allow judges to balance away individual rights protected by the Constitution.). Consequently, the *Heller* Court’s account for why the District of Columbia’s handgun law violated the Second Amendment – particularly when considered in conjunction with the *Heller* Court’s frequent and repeated comparison of the terms and limits of the First Amendment to those of the Second Amendment, *see id.* at 2790-91, 2797, 2799, 2805, 2813, 2816, 2821 – provides potent and dispositive support for Angelos’s claim that, at the very least, the 25-year mandatory imprisonment term pursued and imposed in this case for the presence of firearms in his home violates the Second Amendment.

**A. Given the unique facts of this case, the government's threat of 25 years of mandatory imprisonment based on the presence of firearms in the Angelos home violated the Second Amendment.**

As found by the sentencing court and as detailed in the 2255 motion, during initial plea negotiations based on the original indictment, the government sought to secure a plea deal by threatening to seek a superseding indictment against Angelos adding several § 924(c) counts based on the presence of handguns found in Angelos's home and at the home of Angelos's girlfriend. *See* 345 F. Supp. 2d at 1231-32. The sentencing court described the government's extreme threats during initial plea negotiations this way:

The government made clear to Mr. Angelos that if he rejected the offer [in which it would recommend a sentence of 15 years' imprisonment], the government would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time. In short, Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence.

*Id.* Beyond the government's constitutionally suspect efforts to coerce Angelos into waiving his jury trial rights and other related procedural protections, *see* 2255 motion at pp. 27-28, 48-52 (raising Fifth Amendment claims based on government's oppressive plea offer), the government's eagerness to threaten Angelos with additional decades of imprisonment based on his possession of guns in the home amounts to an unconstitutional effort to punish Angelos for exercising rights secured by the Second Amendment. Indeed, because the initial indictment and the government's evidence against Angelos involved criminal activities taking place outside the home, the government's troublesome efforts in this case to leverage the discovery of firearms in the Angelos home into an extreme bargaining threat (and thereafter to demand the imposition of decades of mandatory federal prison time) presents grave and acute risks to the lawful exercise of the rights secured by the Second Amendment.

Of course, as the Supreme Court acknowledged in *Heller*, the rights of personal protection and self-defense in the home safeguarded by the Second Amendment are not without limits. *See Heller*, 128 S. Ct. at 2816-17. The government can presumably enact safety regulations that preclude homeowners from keeping unusually dangerous arms (such as hand grenades), and can threaten to punish those who utilize guns within the home as an instrument in illegal activities (such as an armed assault of a co-inhabitant). *See id.* at 2822 (stressing that there are a variety of constitutionally permissible means to deal with “the problem of handgun violence in this country”). But, the Second Amendment would provide no genuine protection of the inherent right of self-defense if the government could readily bootstrap allegations of non-violent criminal activity *outside* the home into criminal charges threatening severe mandatory prison terms based on the presence of firearms kept in the home for self-protection. Indeed, to permit federal prosecutors to bring serious criminal charges and the threat of decades of mandatory imprisonment based on presence of guns in the home could indirectly encourage vindictive or otherwise illegitimate prosecutorial charging and bargaining practices and would leave citizens’ Second Amendment rights subject to the whims of prosecutorial discretion and in constant peril.

As noted earlier, the Supreme Court in *Heller* frequently and repeatedly compared the terms and limits of the First Amendment to those of the Second Amendment. *See Heller*, 128 S. Ct. at 2790-91, 2797, 2799, 2805, 2813, 2816, 2821. This fact makes First Amendment jurisprudence and doctrines, and in particular the constitutional importance of placing limits on government regulations that may chill the lawful exercise of important rights, of particular significance as lower courts seek to mark out and safeguard the Second Amendment’s protections for individuals. Significantly and instructively, in the First Amendment context the

Supreme Court “has found in a number of cases that constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.” *Laird v. Tatum*, 408 U.S. 1, 11 (1972). The Supreme Court has also made clear that concerns about chilling the exercise of important personal rights are especially constitutionally significant when a government regulation is in the form of “a criminal statute” that threatens “the opprobrium and stigma of a criminal conviction [and] years in prison.” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 872 (1997). *Cf. New York Times v. Sullivan*, 376 U.S. 254 (1964) (restricting common law tort actions when concluding that even the threat of *civil* liability can unduly burden and chill the exercise of protected constitutional rights).

The government may claim that the prosecution of Angelos for the presence of firearms in his home was not oppressive nor constitutionally suspect because the government alleged and a jury found that firearms in his home were utilized “in relation to, and in furtherance of” illegal marijuana sales. *See* Count 10 of Second Superseding Indictment, *United States v. Angelos*, No. 2:02-CR-0708 (D. Utah Oct. 1, 2003). If government infringements on Second Amendment rights were subject merely to rational basis review, these claims might carry the day (as some courts found in pre-*Heller* challenges to mandatory sentences imposed pursuant to § 924(c), *see United States v. Walker*, 473 F.3d 71 (3rd Cir. 2007)). But these claims cannot now suffice as a justification or constitutional defense for the government’s actions in light of *Heller*’s recognition of individual firearm possession in the home as a “specific, enumerated right” subject to heightened constitutional protection. *See Heller*, 128 S. Ct at 2817-18, n.27.

Again, an analogy to First Amendment rights highlights the obvious problems and inherent illegitimacy of government efforts to prosecute individuals for constitutionally-

protected activity that it claims helped further illegal activities. The state surely could not seek to impose decades of *additional* prison time on someone who illegally purchased marijuana based on the fact she often spoke out in favor of legalizing marijuana for medicinal purposes; the state surely could not seek to impose decades of *additional* prison time on someone who illegally blocked access to an abortion clinic based on the fact he held prayer sessions asking for divine help in stopping abortions; the state surely could not seek to impose decades of *additional* prison time on someone who illegally destroyed a federal mailbox on April 15 based on the fact that he had organized a tax protest rally earlier in the day. These hypotheticals seem fanciful and almost comical because the First Amendment right to speak out against tax or drug laws or to pray for a change in abortion practices cannot be threatened with, or subject to, extreme criminal punishments even if a government official could allege the speech or prayer was “in relation to, and in furtherance of” illegal activities. Likewise, Angelos’s Second Amendment right to have firearms in his home for self-protection should not and cannot constitutionally be threatened with, or subject to, extreme criminal punishment simply based on the fact that a government official can allege that his firearm possession was in furtherance of illegal activity.

Put another way, the Supreme Court has recognized in a variety of contexts that there must be constitutionally protected breathing room around the exercise of any and all important individual rights safeguarded by the Constitution. *See Laird, supra* (First Amendment); *Meese v. Keene*, 481 U.S. 465, 492 (1987) (Blackmun, J., dissenting in part) (noting that the Supreme Court “often has struck down disclosure requirements that threatened to have a deterrent and ‘chilling’ effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association”); *Stenberg v. Carhart*, 530 U.S. 914, 946 (2000) (finding unconstitutional a state law that places an “undue burden upon a woman’s right to make an

abortion decision”); *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (refusing to allow a sentencing court to draw adverse inferences from a defendant’s silence because by using “silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination” protected by the Fifth Amendment). And the Supreme Court in *Heller* plainly recognized and vindicated these principles in the application of the Second Amendment when it sustained a facial constitutional challenge to a federal law which merely prohibited possession of a certain *type* of firearm. Against this backdrop, this Court should recognize that allowing governments to bootstrap allegations of criminal activity *outside* the home into criminal charges threatening severe mandatory prison terms based on the presence of firearms kept in the home would risk strangulating, rather than provide breathing room, for the important Second Amendment rights recognized by the Supreme Court in *Heller*.

**B. Based on the unique facts of this case, imposition of 55 years of mandatory imprisonment based on mere firearm possession violates the Second Amendment.**

As stressed above, the Second Amendment rights described in grand terms by the Supreme Court in *Heller* would practically mean very little if the government could readily threaten decades of additional mandatory imprisonment whenever it found guns in the home as part of a criminal investigation. But, of course, this case involves much more than just an extreme governmental threat of an extreme sentence for firearm possession in the home: Weldon Angelos was subject to and is now serving 55 additional mandatory years of imprisonment based on three convictions involving little more than allegations that Angelos possessed a firearm in his home, in his car and on his person. As detailed in the 2255 motion and above, the factual basis for one 25-year mandatory prison term came from the discovery of firearms stored in Angelos’s

home and the basis for another 30 years of mandatory prison term came from a government informant's (highly suspect) claims that he saw a firearm once in Angelos's car and another time in an ankle holster when Angelos met the informant to complete uneventful hand-to-hand marijuana sales in a public parking lot. Even accepting all the government's allegations and the jury's findings concerning the possession of these firearms "in relation to, and in furtherance of" illegal drug sales, the extreme prison terms imposed on Angelos cannot stand under any heightened standard of constitutional scrutiny that the *Heller* Court indicated must be applied to any and all restrictive gun laws that may unduly impede an individual's Second Amendment right to "keep and bear arms."

As suggested by the Supreme Court's opinion in *Heller*, it may be constitutionally sound and permissible for governments to impose a fine or a forfeiture or a relatively minor term of imprisonment for an individual's failure to exercise his Second Amendment rights in a way that respects broad concerns for public safety and the need to address handgun violence. See *Heller*, at 2820 (suggesting the constitutional legitimacy of Founding-era regulations that "punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), [but] not with significant criminal penalties"). But, in this case, where there was neither gun violence nor serious threat of gun violence, in which firearms were not utilized to facilitate a crime and did not serve as an instrumentality of criminal activity, the extreme prison term imposed upon Angelos for gun possession violates the Second Amendment. As highlighted in the 2255 motion, Angelos has been subject to 55 years of mandatory federal prison time, a functional life sentence imposed upon a first offender, for what may fairly be characterized as transgressions of public-safety regulations on gun possession. The Second Amendment cannot and will not provide any meaningful protection for citizens if persons like

Angelos are subject to life imprisonment merely for possessing guns in the right places but at the wrong times.

Three decades ago in *Bordenkircher v. Hayes*, the Supreme Court set out in clear terms why severe criminal sanctions in a setting like this raises a host of constitutional concerns: “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is ‘patently unconstitutional.’” 434 U.S. 357, 363 (1978) (citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 n.20 (1973)). Though the *Bordenkircher* holding might justify granting relief to Angelos on a variety of constitutional theories, counsel respectfully submits in this motion that the Second Amendment provides the most direct and appropriate justification for vacating those portions of Angelos’s sentence that were based on the mere possession of a firearm in his home, in his car and on his person.<sup>2</sup>

**C. Originalism and other principles reflected in the Constitution and Supreme Court jurisprudence support Angelos’s Second Amendment claims.**

In addition to clarifying the existence of an historic and judicially enforceable Second Amendment right of an individual to possess and use firearms within his home in order to protect himself, his family and his homestead, the Supreme Court’s opinion in *Heller* also highlighted the importance of originalism and other constitutional principles in deciphering the scope and

---

<sup>2</sup> In this context, it is ironic and disconcerting that Angelos is serving 25 additional years of federal prison time pursuant to 18 U.S.C. § 924(c) based on guns left in his home when committing three hand-to-hand sales of marijuana in a public parking lot. As the Supreme Court has highlighted, the extreme sentence enhancements Congress placed in § 924(c) were designed “to persuade the man who is tempted to commit a Federal felony to leave his gun at home.” *Muscarello v. United States*, 524 U.S. 125, 132 (1998) (quoting legislative history). But the application of stacked § 924(c) enhancements in this case resulted in Angelos receiving an additional 25-year sentencing term even though he did leave his gun at home when tempted (by a paid government informant) to commit the hand-to-hand outdoor sales of marijuana that served as the basis for Angelos’s initial indictment.

enforcement of this right. And originalist concepts and other foundational constitutional principles provide additional support for Angelos's Second Amendment claims.

As the Supreme Court explained in *Weems v. United States*, 217 U.S. 349 (1910), the provisions of the Eighth Amendment reflect that the Framers' "predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse." *Id.* at 372. And, as the *Weems* Court emphasized, the Framers' profound "distrust of power" extended to the modern tendency of men to seek oppressive regulations and punishments of all sorts:

But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty,' because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.

*Id.* at 372-73. Though these originalist insights from the Supreme Court in *Weems* have particular importance in the application of the Eighth Amendment (*see infra* Part II), they also help inform an understanding and application of the Second Amendment. A "distrust of power" was also clearly at the heart of the individual rights secured by the Second Amendment, and the extreme provisions of 924(c) as applied in this case spotlights the misapplication of the "power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment." *Id.* at 372. Though Congress may well have been acting with an honest purpose and a zeal to address the very real problem of gun violence,

the application of 924(c) in this case has become an “instrument of tyranny” and a “form[] of abuse” and “coercive cruelty” that has the effect of undercutting the Second Amendment rights recognized by the Supreme Court in *Heller*. *Id.* at 372-73.

The Bill of Rights was intended, and must be enforced, not just for the benefit of the politically advantaged, but for the benefit of the politically disadvantaged. Because Weldon Angelos was admittedly involved in petty marijuana dealing, few Second Amendment activists may consider him an ideal candidate for encouraging courts to acknowledge and enforce the scope and reach of the Second Amendment rights set forth in *Heller*. But, of course, the constitutional rights of political popular individuals can and typically will be secured by legislatures and do not require or depend upon courts to preserve their vitality. But courts must ensure that the safeguards of constitutional rights protect all individuals whether they are Neo-Nazis asserting First Amendment rights to free speech or child rapists asserting Eighth Amendment rights to avoid excessive punishments. In this context, though a variety of political forces may prompt some to disavow the Second Amendment rights of a petty marijuana dealer like Weldon Angelos, this Court has an historic and venerated obligation to ensure that the constitutional rights recognized in *Heller* are honored and respected for all individuals.

## **II. ANGELOS’S EXTREME SENTENCE BASED ON FIREARM POSSESSION IS EXCESSIVE AND THUS VIOLATES THE EIGHTH AMENDMENT**

The 2255 motion stressed that the Eighth Amendment is not a static command, but rather must reflect “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The motion also highlighted the reality that society’s evolving standards are growing ever more tolerant of the type of marijuana use and sales at the heart of the criminal allegations lodged against Angelos. Critically, the Supreme Court recently reinforced in *Kennedy v. Louisiana* that the Eighth Amendment not only empowers, but

constitutionally commands, courts to assess whether and when a criminal sentence reaches a level of excessiveness prohibited by the Eighth Amendment. *See* 128 S. Ct. 2641 (2008). In light of the Supreme Court's *Heller* ruling and the broad-based political and public support thereof, it is now even more clear that Angelos's extreme sentence is constitutionally excessive from any perspective and that modern societal norms would not and cannot accept what amounts to a functional lifetime prison sentence based on minor marijuana dealing combined with passive (and arguably constitutionally protected) firearm possession.

Though principally focused on death penalty doctrines and jurisprudence, the Supreme Court in *Kennedy* set forth foundational principles for understanding and applying the Eighth Amendment's prohibition of certain types of criminal sanctions. Specifically, the *Kennedy* Court clarified and reiterated that:

The [Eighth] Amendment proscribes *all excessive punishments*, as well as cruel and unusual punishments that may or may not be excessive [and its] protection against excessive or cruel and unusual punishments flows from *the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense*. Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail. The Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

*Id.* at 2649 (emphasis added). The *Kennedy* Court further explained that: (1) the “constitutional prohibition against excessive or cruel and unusual punishments mandates that the State’s power to punish be exercised within the limits of civilized standards;” (2) “[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule;” and (3) the application of the Eighth Amendment should and must be informed by “the fundamental, moral distinction between a ‘murderer’ and [any

other crime that] . . . is not like death in its severity and irrevocability.” *Id.* at 2649, 2658, 2661 (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)). Indeed, by stressing that a “basic precept of justice” embodied and safeguarded by the Eighth Amendment requires that “punishment for a crime should be graduated and proportioned to the offense,” the *Kennedy* ruling makes plain that even those crimes that “may be devastating in their harm . . . cannot be compared to murder” in terms of moral culpability and thus cannot constitutionally be subject to comparable extreme punishment schemes. *Id.* at 2649, 2660 (quoting *Weems*, 217 U.S. at 367).

By holding that only the most extreme crimes can be subject to the most extreme punishments, *Kennedy* indicates that it is unconstitutional for a jurisdiction to punish even extreme non-homicide crimes under the same terms as it punishes murders. Of course, even under the government’s version of the facts, Angelos did not commit an extreme crime nor did he cause devastating harm: he merely engaged in petty hand-to-hand marijuana sales with a paid informant while (passively) possessing a firearm. And, yet, as the district court stressed at the initial sentencing, Angelos is being punished far more severely than murderers and those who do commit devastating crimes under applicable federal law. The court acknowledged the disturbing reality that Angelos is serving “a prison term which more than doubles the sentence of . . . a second-degree murderer,” and which is also more than double the sentence that would likely be imposed under federal law for “an aircraft hijacker (293 months), a terrorist who detonates a bomb in a public place (235 months), a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months), [and] a rapist.” 345 F. Supp. 2d at 1244-45.

Writing two years before the Supreme Court’s recent rulings in *Kennedy* and *Heller*, a Tenth Circuit panel recognized on direct review that a proportionality principle must be applied

in this case, but it decided at that time that the Supreme Court's Eighth Amendment precedents supported the constitutionality of Angelos's sentence because "the gross disproportionality principle reserves a constitutional violation for only extraordinary cases." *United States v. Angelos*, 433 F.3d 738, 751 (10th Cir. 2006). Two years later, the *Heller* holding and broader Second Amendment principles add extra force to Angelos's claims that this is an extraordinary case in which his functional life sentence is grossly disproportionate in light of his relatively minor criminal activity, and the *Kennedy* ruling further suggests that the Eighth Amendment is now to be applied more dynamically to non-homicide crimes.

Tellingly, when considering the constitutionality of a sentence for child rape, the Supreme Court in *Kennedy* never explicated Eighth Amendment standards in terms of "gross disproportionality," but rather spoke more broadly about the court's "Eighth Amendment proportionality precedents" that reflect the "basic precept of justice that punishment for a crime should be graduated and proportioned to the offense." *Kennedy*, 128 S. Ct. 2649 (2008) (quoting *Weems*, 217 U.S. at 367). As stressed in the full 2255 motion, in order to give real effect to the Supreme Court's pronouncements concerning the Eighth Amendment's proportionality principle (a principle emphasized in both the holding and dicta in *Kennedy*), a jurisprudential line must be drawn beyond where some "extraordinary case" exists in which an extreme prison sentence is found to be constitutionally excessive. If the case of Weldon Angelos does not cross such a line, then that line is illusory. (This is especially true now that the essential behavior used legally and jurisprudentially to justify an extreme sentence – Weldon's possession of firearms – is now protected as a result of the *Heller* ruling.)

If the extreme application of 924(c)'s long mandatory sentences to Weldon Angelos for gun possession in his home, in his car and on his person, which resulted in a 55-year sentence for

a defendant with no criminal history who engaged in a few hand-to-hand marijuana sales, does not trigger the constitutional safety valve that the Framers created through the Eighth Amendment, then proportionality review in noncapital cases is in a state of a *de facto* repeal. But the *Kennedy* ruling, with its broad pronouncements that “the State’s power to punish [must] be exercised within the limits of civilized standards” and “must embrace and express respect for the dignity of the person,” suggests a new vitality to constitutional review of “*all* excessive punishments.” 128 S. Ct. at 2649, 2658 (emphasis added). The Eighth Amendment must be interpreted to limit excessively extreme sentencing terms in order to provide protection for offenders beyond just child rapists and other horrific criminals that may be subject to death sentences. On the undisputed facts of this case, the Eighth Amendment must be interpreted to provide protection for Weldon Angelos.

### CONCLUSION

For the foregoing reasons, the Court should grant Angelos’s motion for partial summary judgment on Second and Eighth Amendment grounds.

DATED this 15<sup>th</sup> day of September, 2008.

SNELL & WILMER L.L.P.

/s/ Troy L. Booher

Michael D. Zimmerman

Troy L. Booher

STEPTOE & JOHNSON LLP

Brian M. Heberlig, *Pro Hac Vice*

Shawn P. Davisson, *Pro Hac Vice*

Douglas A. Berman, *Pro Hac Vice*

THE OHIO STATE UNIVERSITY

MORITZ COLLEGE OF LAW

Attorneys for Petitioner

Weldon H. Angelos

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of September, 2008, a true and correct copy of the foregoing was delivered via the CM/ECF Electronic Filing System to the following:

Richard W. Daynes  
Robert A. Lund  
Elizabethanne C. Stevens  
US ATTORNEY'S OFFICE (UT)  
185 South State, Suite 300  
Salt Lake City, UT 84111  
Richard.Daynes@usdoj.gov  
Robert.Lund@usdoj.gov  
Elizabethanne.Stevens@usdoj.gov

/s/ Troy L. Booher  
Michael D. Zimmerman  
Troy L. Booher