BEFORE THE PRESIDENT OF THE UNITED STATES

In re

WELDON H. ANGELOS,

Petitioner.

PETITION FOR EXECUTIVE CLEMENCY AND FOR COMMUTATION OF SENTENCE

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Weldon H. Angelos, by and through above-named counsel, submits this Petition for Executive Clemency and for Commutation of Sentence, and respectfully prays for clemency to correct his unjust, grossly disproportionate, and unconstitutionally excessive sentence, which violates the Second, Fifth, and Eighth Amendments to the United States Constitution.

INTRODUCTION

This Nation's Founders recognized and spoke grandly of the profound significance and importance of executive clemency. Alexander Hamilton, for example, stressed in the Federalist Papers that the clemency power plays a critical role in our constitutional structure:

> The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.

The Federalist No. 74, pp. 447-49 (C. Rossiter ed., 1961). James Iredell, another prominent Founding Era proponent of the clemency power, staunchly defended the inclusion of the clemency power in the Constitution in similar terms:

> [T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.

James Iredell, Address at North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 The Founders Constitution 17-18 (P. Kurland & R. Lerner ed., 1987).

It is not hard to imagine that the Framers had in mind someone like Weldon Angelos when they ensured that the clemency power would have a prominent place in our Nation's founding charter. Weldon Angelos, a 29-year-old man from Salt Lake City, is a son, a brother, a father, and a music industry executive; he has also now been a federal prisoner for five years and is facing another *fifty* years of federal imprisonment pursuant to a 55-year mandatory minimum sentence, which resulted from three small sales of marijuana to a paid informant. The district judge at Weldon's initial sentencing described this 55-year mandatory sentence as "unjust, cruel, and irrational," *see United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (attached as Appendix A), and 163 former U.S. attorneys general, retired federal judges, and prosecutors have signed an amicus brief

asserting the unconstitutionality of Weldon's extreme prison term for his relatively minor crimes. Put simply, Weldon's case is a modern and now notorious example of the federal criminal justice system wearing "a countenance too sanguinary and cruel." As set forth below, and in the Founding spirit at the heart of the clemency power, the outrageous and unquestionably "peculiar circumstances" of Weldon's sentence should "entitle him to mercy," because Weldon's continued imprisonment is truly a "cause of very great injustice."

The Supreme Court has described clemency as "the historic remedy for preventing miscarriages of justice." *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). The district court at sentencing, lamenting the miscarriage of justice caused by the statutory stacking of mandatory minimum sentencing terms in Weldon's case, explicitly called upon the President to use his clemency power to reduce the extreme sentence it felt forced to impose. Specifically, Judge Paul Cassell described Weldon's sentence as "unjust, disproportionate to his offense, demeaning to victims of actual criminal violence . . . [and] one of those rare cases where the system has malfunctioned." *Angelos*, 345 F. Supp. 2d at 1262.

Moreover, as discussed below and in the attached court filings, Weldon's sentence is not only a miscarriage of justice, it is also unconstitutional. In light of recent Supreme Court rulings and growing disenchantment with extreme mandatory prison sentences for minor crimes, it is now more clear than ever that Weldon's 55-year prison sentence for a few small marijuana sales was unconstitutional at imposition and continues to violate due process, fair justice, and proportionality principles reflected in the Second, Fifth, and Eighth Amendments. As an official sworn to uphold the Constitution, the President should – and arguably must – fulfill his constitutional obligations and oath by invoking the clemency

power to prevent Weldon Angelos from continuing to serve an unconstitutional, unjust, and inhumane sentencing term.

As a first-time offender who has achieved notoriety only because of the extreme prison sentence he received for relatively minor offenses, Weldon Angelos lacks any of the political connections, the powerful friends, or the resources that other offenders might utilize in order to garner attention in the clemency process. But, as detailed below, Weldon's story does not lack a compelling set of circumstances. To the complete contrary, the "perfect storm" of injustice that collectively led to Weldon's extraordinarily severe sentence not only justifies remediation, but arguably demands invocation of the President's clemency power to prevent a monumental miscarriage of justice. Weldon Angelos is not completely innocent; yet his cause is no less deserving of justice. In granting a commutation of sentence for Weldon Angelos – simply by adding his name to the list of persons to whom clemency is to be granted as President Bush's term in office comes to a close – this President can highlight and effectively reinforce that the clemency power remains a viable and critical means to remedy injustice for *any* American suffering "a countenance too sanguinary and cruel." Most importantly, however, and all other considerations aside, clemency for Weldon Angelos is simply the right result, correcting what is an unjust and grossly disproportionate sentence.

FACTUAL AND PROCEDURAL HISTORY

Weldon H. Angelos was born on July 16, 1979. Raised in the Salt Lake City, Utah area by a firearm aficionado, his father James Angelos, Weldon was immersed in the gun culture at an early age and legally acquired various firearms as an adult. In his early adulthood, Weldon became a successful music executive with his own label, Extravagant Records. Weldon is also the father of two young children, eleven-year-old Anthony and ten-year-old Jesse. Prior to his arrest for the underlying offenses, Weldon had no adult criminal record and was treated as a first-time offender at sentencing. At present, Weldon is housed at a federal prison in southern California having already served nearly five years of his sentence; he is not scheduled to be released from custody for another five decades.

The events leading to the investigation and prosecution of Weldon began in the Spring of 2002, when Ronnie Lazalde was facing serious drug and firearm charges. Seeking to curry favor with the government, Lazalde offered to become an informant; and after falsely accusing Weldon of being a major drug trafficker, informant Lazalde contacted Weldon in an effort to engineer significant transactions involving cocaine and weapons. However, because Weldon was merely a petty marijuana dealer, the only transactions ever arranged were three small hand-to-hand sales from Weldon to Lazalde for eight ounces of marijuana at a price of $350.

The first small marijuana transaction was an uneventful hand-to-hand "controlled buy" in Weldon'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 Weldon's car, exchanged cash for a small bag of marijuana, and then left. Realizing he had dropped his keys in Weldon's car, informant Lazalde returned to the car to get his keys and then met up

with law enforcement. Official surveillance did not reveal the presence of any weapon during this encounter, and the initial police report based on the original debriefing of informant Lazalde did not reflect any statement by Lazalde concerning the presence of a weapon during the transaction.[1]

The next small marijuana transaction was another uneventful hand-to-hand controlled buy during the day in the same parking lot on June 4, 2002. In a transaction photographed by law enforcement, Weldon got out of his car to meet informant Lazalde, and they exchanged cash for a small bag of marijuana. Once again, the official surveillance and initial police report, which reflected the initial debriefing of informant Lazalde, did not indicate the presence of a weapon during this transaction. The final small marijuana transaction occurred under the same basic circumstances on June 18, 2002. Again, there was no evidence or mention of any weapons involved in this transaction.

Throughout their encounters, informant Lazalde repeatedly asked Weldon to become involved in transactions involving other drugs and weapons. Weldon explained to Lazalde that he only was selling small quantities of marijuana. When Lazalde continued to urge involvement in other crimes, Weldon refused to interact with him any further.

In July 2002, informant Lazalde learned that Weldon had been cited on July 10 for carrying a concealed weapon in an ankle holster. Disconcertingly, after informant Lazalde reported this incident to his law enforcements contacts, Detective Jason Mazuran added a

[1] Had federal authorities arrested and prosecuted Weldon after the first transaction they engineered, Weldon would have faced a short prison sentence and a term of supervised release, and his petty marijuana dealing would have come to a quick end. But, apparently because informant Lazalde had convinced federal authorities that Weldon was a major drug trafficker, the government chose to engineer additional marijuana deals with Weldon. *See Angelos*, 345 F. Supp. 2d at 1253 (highlighting that Weldon faced a long sentence because of "additional criminal acts [that] were in some sense procured by the government").

new entry, dated October 30, 2002, to the earlier police reports in order to indicate that Weldon had been in possession of a firearm during the first two marijuana transactions discussed above.

Following the revision of police reports to include allegations of the involvement of a weapon, a federal grand jury returned an indictment against Weldon 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. Acting upon the indictment, police officers arrested Weldon in his home on November 15, 2002, at which point Weldon 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 safely-stored firearms. A search of the home of Weldon's girlfriend also turned up bags with marijuana residue, two guns, and additional cash.

The district court in its initial sentencing opinion provided this description of the plea discussions and events that transpired after Weldon's arrest:

> Plea negotiations began between the government and Mr. Angelos. On January 20, 2003, the government told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, 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. Weldon faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence. Ultimately, Mr. Angelos rejected the offer and decided to go to trial. The government then obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years. The five § 924(c) counts consisted of two counts for the Glock seen at the two controlled buys, one count for three handguns found at his home, and two more counts for the two guns found at the home of Mr. Angelos's girlfriend.

345 F. Supp. 2d at 1231-32. In response to the government's extreme charging decisions, Weldon attempted to re-open plea negotiations. Upon the government's refusal, the case proceeded to trial where the jury acquitted Weldon on some counts and convicted him on others. Included among the counts of conviction were three § 924(c) gun counts for the gun informant Lazalde purportedly observed during the two hand-to-hand marijuana sales and the guns found in Weldon's home, which the government claimed were linked to the underlying marijuana sales.

At the sentencing phase, the district court, after court-ordered briefing on various sentencing issues, issued a thoughtful opinion criticizing the extreme sentence it believed it was required to impose. While appealing to other branches to correct an obvious injustice, Judge Paul Cassell begrudgingly sentenced Weldon to 55 years and one day in prison. The composition of the ultimate sentence was the mandatory 55-year term of imprisonment for the three stacked 924(c) counts,[2] and only one day for the other drug-related convictions because of the extreme minimum mandatory sentences required by § 924(c). In his opinion, Judge Cassell strongly recommended some form of executive commutation and legislative reform to remedy the injustice suffered by Weldon.[3] *See* 345 F. Supp. 2d at 1261-62.

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[2] Under 18 U.S.C. § 924(c), possession of a weapon in furtherance of a drug trafficking crime results in a 5-year sentence for the first offense and a 25-year sentence for *each* "subsequent" conviction. Despite the seemingly recidivist nature of the statute's punitive scheme, § 924(c) has been interpreted as permitting the heightened 25-year sentence for "subsequent" convictions to attach even where multiple 924(c) counts are charged against a first-time offender in a *single prosecution*, leading to the inexplicable and draconian outcome in the case of Weldon Angelos. *See United States v. Deal*, 508 U.S. 129, 133-34 (1993).

[3] In fact, the sentencing opinion was partially entitled "Recommending Executive Clemency," within which Judge Cassell stated:

> For all the reasons previously given, an additional 55-year sentence for Mr. Angelos under § 924(c) is unjust, disproportionate to his offense, demeaning to victims of actual

In his appeal to the Tenth Circuit, Weldon challenged his conviction and sentence on various grounds. A Tenth Circuit panel affirmed in a written opinion on January 9, 2006. *See* 433 F.3d 738 (10th Cir. 2006). Weldon's petition for a writ of certiorari to the U.S. Supreme Court was denied on December 4, 2006.

In December 2007, Weldon filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or otherwise correct his unconstitutional 55-year prison sentence. *See Angelos v. United States*, No. 2:07-cv-00936-TC (D. Utah) (hereinafter "2255 petition"; attached hereto as Appendix B). In addition to claims asserting prosecutorial misconduct and ineffective assistance of counsel, Weldon's petition notes the continued evolution of society's sentencing laws and policies. Most critically, however, Weldon's 2255 petition stresses that the imposition of an effective life sentence for a first-time drug offender is unconstitutional under the Eighth Amendment as "grossly disproportionate" to his offenses of conviction in light of society's evolving standards of decency.

In September 2008, Weldon filed a motion for partial summary judgment in his 2255 petition (hereinafter "SJ motion"; attached hereto as Appendix C), which was based principally on two recent major Supreme Court rulings. Noting the Supreme Court's forceful recognition of the right of all citizens to possess firearms to effectuate "the inherent right of self-defense," *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008), Weldon asserted that the Second Amendment, as applied to the unique facts of his case, rendered

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> criminal violence . . . [and] this is one of those rare cases where the system has malfunctioned . . . . I therefore believe that it is appropriate for me to communicate to the President, through the Office of the Pardon Attorney, my views regarding Mr. Angelos' sentence. I recommend that the President commute Mr. Angelos' sentence to a prison term of no more than 18 years, the average sentence recommended by the jury that heard this case.

Id. at 1262.

unconstitutional the Government's pursuit of a superseding indictment threatening a 25-year mandatory prison sentence based on the presence of guns within his home, and the imposition of 55 years of federal imprisonment based on his gun possession. And, stressing the Supreme Court's explication of Eighth Amendment jurisprudence and its application in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), the SJ motion also asserted that the combined force of the *Heller* and *Kennedy* rulings, along with the notable and constitutionally significant public reactions to both decisions, reinforced that the sentence Weldon 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)).

Rather than seriously engage with the substance of the constitutional arguments based in the Second and Eighth Amendments set forth by Weldon in his 2255 petition and his SJ motion, the Government asserted that these constitutional claims were procedurally barred because they were or should have been raised during Weldon's direct appeal. Even though it is hard to understand how or why Weldon is now to be barred from advancing and refining constitutional claims based on newly developed facts and court rulings that were not even in existence at the time of his direct appeal, the district court considering his 2255 petition and his SJ motion accepted the Government's argument that his constitutional claims based in the Second and Eighth Amendments were procedurally barred.[4] *See Angelos v. United States*, 2008 U.S. Dist. LEXIS 99044, at *24-29 (D. Utah Dec. 8, 2008). This exhaustion of legal channels only highlights the pressing need for clemency to correct what even the presiding judge characterized as an "unjust" and "disproportionate" sentence imposed upon Weldon.

[4] The district court, acknowledging the potential merit in Weldon's Sixth Amendment claim based on the ineffectiveness of his trial counsel during plea negotiations, has ordered an evidentiary hearing on this claim alone to "fully develop the record." *See Angelos v. United States*, 2008 U.S. Dist. LEXIS 99044, at *3, *55-58 (D. Utah Dec. 8, 2008).

REASONS FOR GRANTING CLEMENCY

This petition has reviewed at length the background of Weldon Angelos' minor offenses, his remarkably troubling prosecution, and his extreme mandatory sentence because, ultimately, the basic facts simply and effectively document the injustice of Weldon's sentence and the reasons why he is a fitting and deserving candidate for executive clemency. In addition, the attached 2255 petition and SJ motion set forth in elaborate detail the arguments based in the Second, Fifth, and Eighth Amendments that reveal the many constitutional infirmities that plague the imposition of the extreme sentence Weldon is now serving. Finally, in the pages that follow, these basic and compelling facts are coupled with some additional reasons that justify a grant of executive clemency on behalf of Weldon.

I. The Need to Remedy an Injustice and Restore Trust

As partially detailed above and in the 2255 petition, many problems and factors that account for wrongful conviction of innocent criminal defendants – including cooperating witnesses who testify falsely to appease prosecutors and avoid criminal responsibility for their wrongdoing; ineffective representation preventing proper due process at pre-trial; prejudicial mistakes by defense counsel preventing jurors from making a full and fair assessment of the evidence; and prosecutors who make prejudicial judgments in the investigation and prosecution of crimes based on extraneous factors – all played a prominent role in Weldon's conviction and sentencing. A paid government informant seeking to curry favor with the government was the key witness for the prosecution, and his testimony accusing Weldon of gun possession during hand-to-hand minor marijuana sales was obtained by prosecutors by offering him various incentives and other means to avoid full prosecution for his own illegal activities. Moreover, because this paid government informant falsely

convinced prosecutors that Weldon was a major drug dealer, prosecutors became strangely and harmfully committed to the need to have Weldon serve an extraordinarily long prison term despite the fact that he had no adult criminal history and despite the reality that his only clear criminal offense was selling a small quantity of marijuana on three occasions.

Because a confluence of factors played a major role in Weldon's aggressive prosecution, special attention must be paid to Weldon's repeated and consistent assertions that he is a wrongfully convicted defendant serving an extreme sentence for gun crimes that he never committed.[5] As stressed by the Supreme Court, clemency is "the historic remedy for preventing miscarriages of justice," *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993), especially in cases involving evidence that an innocent person has been wrongfully convicted. The compelling evidence documenting serious and troubling concerns with the prosecution and sentencing of Weldon Angelos should raise a significant doubt in the mind of any objective observer as to the injustice of Weldon's conviction and sentence on the all-important gun charges. To restore trust in our legal system and to remedy a significant injustice, a commutation of the 50 years of imprisonment resulting from the very suspect gun convictions would provide a fitting and just resolution to this troublesome case.

II. The Need to Temper an Unforgiving Sentencing Judgment

As highlighted above, though Weldon was never in any serious trouble with the law as an adult, for his first offense he now faces the prospect of spending the remainder of his

[5] Notably, Weldon has never asserted and does not now maintain that he was innocent of the underlying drug crimes. However, Weldon does strenuously maintain that the government informant, Lazalde, completely fabricated the weapon accusations in a last-ditch effort to warrant the contingent benefits of his informant status. Ultimately, it was the protested gun convictions under § 924(c) which resulted in the very large majority of Weldon's sentence (upwards of 90%), not the drug charges.

life in a federal prison for selling small amounts of marijuana. Almost 30 years old, Weldon is now in his fifth year of his 55-year prison term for his alleged possession of guns in a series of minor marijuana transactions. Even assuming the very worst allegations against him as true, Weldon has been subject to an extreme punishment and has now paid a heavy and terribly disproportionate price for what was truly a non-violent, first offense. By any standard of justice, Weldon has already been punished severely and his continued imprisonment serves no apparent social purpose; and by any standard of compassion, Weldon now merits clemency in the form of a sentence commutation to temper an extreme and unforgiving sentencing judgment that threatens to keep Weldon behind bars for decades longer than the prison time given to many repeat and violent offenders.[6]

In this respect, Weldon's case parallels another high-profile case in which President George W. Bush exercised his historic power to commute the term of an excessive sentence. Specifically, in conjunction with his decision in 2007 to commute the prison term imposed on I. Lewis "Scooter" Libby, President Bush concluded:

> Mr. Libby was sentenced to thirty months of prison, two years of probation, and a $250,000 fine. In making the sentencing decision, the district court rejected the advice of the probation office, which recommended a lesser sentence and the consideration of factors that could have led to a sentence of home confinement or probation.
>
> I respect the jury's verdict. But I have concluded that the prison sentence given to Mr. Libby is excessive. Therefore, I am commuting the portion of Mr. Libby's sentence that required him to spend thirty months in prison.

[6] In his sentencing opinion, Judge Cassell entered into an extended and sobering discussion of the irrational disparities between other offenses and their corresponding sentences relative to the conviction and corresponding sentence faced by Weldon. *See Angelos*, 345 F. Supp. 2d at 1243-52. Judge Cassell concluded that the "irrationality of these differences is manifest and can be objectively proven" noting that Weldon is punished "more harshly for crimes that threaten potential violence [i.e., gun possession] than for crimes that conclude in actual violence to victims (e.g., aircraft hijacking, second-degree murder, racist assaults, kidnapping, and rape)." *Id.* at 1247-48.

> My decision to commute his prison sentence leaves in place a harsh punishment for Mr. Libby. The reputation he gained through his years of public service and professional work in the legal community is forever damaged. His wife and young children have also suffered immensely. He will remain on probation. The significant fines imposed by the judge will remain in effect. The consequences of his felony conviction on his former life as a lawyer, public servant, and private citizen will be long-lasting.
>
> The Constitution gives the President the power of clemency to be used when he deems it to be warranted. It is my judgment that a commutation of the prison term in Mr. Libby's case is an appropriate exercise of this power.

Press Release, *Statement by the President On Executive Clemency for Lewis Libby* (White House, July 2, 2007). These sentiments and insights echo loudly in the case of Weldon Angelos, now before the President, for several reasons: (1) Weldon's sentencing judge was unable to consider an array of factors that justified a lower sentence; (2) Weldon has already been subject to the harsh punishment of years in federal prison; and (3) Weldon's family has suffered immensely and the consequences of his conviction will last for the duration of Weldon's life. Accordingly, Weldon is similarly deserving of executive clemency in the form of a commutation of his prison sentence.

III. Showcasing How America is a Land of Second Chance

In a recent commentary in the *Washington Post*, former Pardon Attorney Margaret Colgate Love had these astute insights about the enduring importance of the clemency power:

> A series of final pardons could highlight flaws in the justice system that would be instructive to the next administration. The Framers considered the pardon power an integral part of our system of checks and balances, not a perk of office. Judicious grants of clemency can signal to Congress where rigid laws should be amended and give policy guidance to executive officials. The president's intervention in a case through his pardon power benefits an individual but also signals how he wants laws enforced and reassures the public that the legal system is capable of just and moral application.
>
> It is ironic that a president who has stretched his other constitutional powers to the breaking point has been so reticent and unimaginative in using the one power that is indisputably his alone. A course change would be fitting from someone who has spoken of the power of forgiveness in his own life and of America as "the land of second chance."…

> Despite its virtues, pardon has not played a meaningful role in the justice system for years. Meanwhile, punishments have become too harsh and the stigma of conviction too permanent. Pardons can show that the system works and that redemption is always possible. Americans want their leaders to be merciful as well as just, compassionate as well as resolute. President Bush still has time to burnish his legacy if he recognizes and responds to this reality.

Margaret Colgate Love, *In Defense of Pardons*, Washington Post, Nov. 18, 2008, at A27. To this effect, and for the reasons detailed throughout this petition, it is hard to imagine a federal defendant more deserving of a second chance than Weldon Angelos and it is difficult to envision a case for commutation that is more compelling.

CONCLUSION

The mandatory minimum equation that resulted in the draconian 55-year sentence imposed upon Weldon Angelos for minor drug offenses and allegations of "related" gun possession constituted a manifest injustice. The judge that begrudgingly imposed the sentence lamented this reality but nevertheless failed to take action, instead calling upon the President to correct the injustice. In our system of law and order, the clemency power exists as a constitutional safeguard to prevent those rare miscarriages of justice that are so egregious that they demand remediation. As recognized by the judge that sentenced Weldon, the jury that convicted Weldon, commentators across the nation, and an unprecedented number of former U.S. attorneys general, retired federal judges, and prosecutors, the case of Weldon Angelos is one such case. Simply put, the sentence imposed in this case was wrong, and justice demands that clemency be invoked to right this wrong.

In accordance with the foregoing, Weldon Angelos respectfully prays that the important power of executive clemency will be exercised to commute his unjust and grossly disproportionate sentence.

Appendix A

Memorandum Opinion and Order Denying Motion to Find 18 U.S.C. § 924(c) Unconstitutional, Imposing Sentence, and Recommending Executive Clemency

United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004)

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

WELDON ANGELOS

Defendant.

MEMORANDUM OPINION AND ORDER DENYING MOTION TO FIND 18 U.S.C. § 924(c) UNCONSTITUTIONAL, IMPOSING SENTENCE, AND RECOMMENDING EXECUTIVE CLEMENCY

Case No. 2:02-CR-00708PGC

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Introduction

Defendant Weldon Angelos stands now before the court for sentencing. He is a twenty-four-year-old first offender who is a successful music executive with two young children. Because he was convicted of dealing marijuana and related offenses, both the government and the defense agree that Mr. Angelos should serve about six to eight years in prison. But there are three additional firearms offenses for which the court must also impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two $350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government insists that Mr. Angelos should essentially spend the rest of his life in prison. Specifically, the government urges the court to sentence Mr. Angelos to a prison term of no less than 61½ years–six years and a half (or more) for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relies on a statute–18 U.S.C. § 924(c)–which requires the court to impose a sentence of five years in prison the first time a drug dealer carries a gun and twenty-five years for each subsequent time. Under § 924(c), the three counts produce 55 years of additional punishment for carrying a firearm.

The court believes that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational. Adding 55 years on top of a sentence for drug dealing is far beyond the roughly two-year sentence that the congressionally-created expert agency (the United States Sentencing Commission) believes is appropriate for possessing firearms under the same circumstances. The 55-year sentence substantially exceeds what the jury recommended to the court.

It is also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. It exceeds what recidivist criminals will likely serve under the federal "three strikes" provision. At the same time, however, this 55-year additional sentence is decreed by § 924(c).

The court's role in evaluating § 924(c) is quite limited. The court can set aside the statute only if it is irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment. After careful deliberation, the court reluctantly concludes that it has no choice but to impose the 55 year sentence. While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties. Under the controlling case law, the court must find either that a statute has no conceivable justification or is so grossly disproportionate to the crime that no reasonable argument can be made its behalf. If the court is to fairly apply these precedents in this case, it must reject Mr. Angelos' constitutional challenges. Accordingly, the court sentences Mr. Angelos to a prison term of 55 years and one day, the minimum that the law allows.

To correct what appears to be an unjust sentence, the court also calls on the President – in whom our Constitution reposes the power to correct unduly harsh sentences – to commute Mr. Angelos' sentence to something that is more in accord with just and rational punishment. In particular, the court recommends that the President commute Mr. Angelos' sentence to no more than 18 years in prison, the average sentence that the jurors in this case recommended. In addition, the court also calls on Congress to modify § 924(c) so that its harsh provisions for 25-year multiple

sentences apply only to true recidivist drug offenders – those who have been sent to prison and failed to learn their lesson. Because of the complexity of these conclusions, the court will set out their basis at some length.

I. Factual Background

Weldon Angelos is twenty-four years old. He was born on July 16, 1979, in Salt Lake City, Utah. He was raised in the Salt Lake City area by his father, Mr. James B. Angelos, with only minimal contact with his mother. Mr. Angelos has two young children by Ms. Zandrah Uyan: six-year-old Anthony and five-year-old Jessie. Before his arrest Mr. Angelos had achieved some success in the music industry. He started Extravagant Records, a label that produces rap and hip hop music. He had worked with prominent hip hop musicians, including Snoop Dogg, on the "beats" to various songs and was preparing to record his own album.

The critical events in this case are three "controlled buys" of marijuana by a government informant from Mr. Angelos. On May 10, 2002, Mr. Angelos met with the informant, Ronnie Lazalde, and arranged a sale of marijuana. On May 21, 2002, Mr. Angelos completed a sale of a eight ounces of marijuana to Lazalde for $350. Lazalde observed Mr. Angelos' Glock pistol by the center console of his car. This drug deal formed the basis for the first § 924(c) count.

During a second controlled buy with Lazalde, on June 4, 2002, Mr. Angelos lifted his pant leg to show him the Glock in an ankle holster. Lazalde again purchased approximately eight ounces of marijuana for $350. This deal formed the basis for the second § 924(c) count.

A third controlled buy occurred on June 18, 2002, with Mr. Angelos again selling Lazalde eight ounces of marijuana for $350. There was no direct evidence of a gun at this transaction, so no § 924(c) count was charged.

On November 15, 2003, police officers arrested Mr. Angelos at his apartment pursuant to a warrant. Mr. Angelos consented to a search. The search revealed a briefcase which contained $18,040, a handgun, and two opiate suckers. Officers also discovered two bags which contained approximately three pounds of marijuana. Officers also recovered two other guns in a locked safe, one of which was confirmed as stolen. Searches at other locations, including the apartment of Mr. Angelos' girlfriend, turned up several duffle bags with marijuana residue, two more guns, and additional cash.

The original indictment issued against Mr. Angelos contained three counts of distribution of marijuana,[1] one § 924(c) count for the firearm at the first controlled buy, and two other lesser charges. Plea negotiations began between the government and Mr. Angelos. On January 20, 2003, the government told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, 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. Ultimately, Mr. Angelos

[1] 18 U.S.C. § 841(b)(1).

rejected the offer and decided to go to trial. The government then obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years. The five § 924(c) counts consisted of two counts for the Glock seen at the two controlled buys, one count for three handguns found at his home, and two more counts for the two guns found at the home of Mr. Angelos' girlfriend.

Perhaps recognizing the gravity of the situation, Mr. Angelos tried to reopen plea negotiations, offering to plea to one count of drug distribution, one § 924(c) count, and one money laundering count. The government refused his offer, and the case proceeded to trial. The jury found Mr. Angelos guilty on sixteen counts, including three § 924(c) counts: two counts for the Glock seen at the two controlled buys and a third count for the three handguns at Mr. Angelos' home. The jury found him not guilty on three counts – including the two additional § 924(c) counts for the two guns at his girlfriends' home. (The court dismissed one other minor count.)

Mr. Angelos' sentence is presumptively governed by the Federal Sentencing Guidelines. Under governing Guideline provisions, the bottom line is that all counts but the three § 924(c) counts combine to create a total offense level of 28.[2] Because Mr. Angelos has no significant prior criminal history, he is treated as first-time offender (a criminal history category I) under the Guidelines. The prescribed Guidelines' sentence for Mr. Angelos for everything but the § 924(c) counts is 78 to 97 months.

After the Guideline sentence is imposed, however, the court must then add the § 924(c) counts. Section 924(c) prescribes a five-year mandatory minimum for a first conviction, and 25

[2] Tr. 9/14/04 at 27 (based on U.S.S.G. § 2D1.1(c)(7) & § 2S1.1(b)(2)(B)).

years for each subsequent conviction.[3] This means that Mr. Angelos is facing 55 years (660 months) of mandatory time for the § 924(c) convictions. In addition, § 924(c) mandates that these 55 years run consecutively to any other time imposed.[4] As a consequence, the minimum sentence that the court can impose on Mr. Angelos is 61½ years – 6½ years (78 months) for the 13 counts under the Guidelines and 55 consecutive years for the three § 924 convictions. The federal system does not provide the possibility of parole, but instead provides only a modest "good behavior" credit of approximately 15 percent of the sentence. Assuming good behavior, Mr. Angelos' sentence will be reduced to "only" 55 years, meaning he could be released when he is 78 years old.

Mr. Angelos challenges this presumptive sentence on two grounds. His main argument is that § 924(c) is unconstitutional as applied to him, either because the additional 55-year sentence is irrational punishment that violates equal protection principles or is cruel and unusual punishment that violates the Cruel and Unusual Punishment Clause. His other argument is that the 78 to 97 month Guidelines sentence is unconstitutional under *Blakely v. Washington*[5] because a jury did not find the facts underlying the Guidelines calculation. The court will first address his constitutional challenges to § 924(c), then his challenge to the Guidelines sentence.

II. Legislative History and Judicial Interpretation of § 924(c)

Before turning to Mr. Angelos' specific challenges to § 924(c), it is helpful to understand the history of the statute. Title 18 U.S.C. § 924(c) was proposed and enacted in a single day as an

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[3] 18 U.S.C. § 924(c)(1)(A)(i) & (C)(i).

[4] 18 U.S.C. § 924(c)(1)(D)(ii).

[5] 124 S.Ct.2531 (2004).

amendment to the Gun Control Act of 1968 enacted following the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. Congress intended the Act to address the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime."[6] Because § 924(c) was offered as a floor amendment, there are no congressional hearings or committee reports regarding its original purpose,[7] and the court is left only with a few statements made during floor debate.[8] For example, Representative Poff, the sponsor of the amendment, stated that the law's purpose was to "persuade the man tempted to commit a Federal felony to leave his gun at home."[9]

As originally enacted, § 924(c) gave judges considerable discretion in sentencing and was not nearly as harsh as it has become. When passed in 1968, § 924(c) imposed an enhancement of "not less than one year nor more than ten years" for the person who "uses a firearm to commit any felony for which he may be prosecuted in a court of the United States" or "carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States."[10] If the person was convicted of a "second or subsequent" violation of § 924(c), the additional penalty was "not less than 2 nor more than 25 years," which could not run "concurrently

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[6] H.R. REP. NO. 90-1577 at 1698, 90th Cong., 2d Sess., 7 (1968), 1968 U.S.C.C.A.N. 4410, 4412.

[7] *Cf. Jung v. Association of American Medical Colleges*, __ F.Supp.2d ___, 2004 WL 1803198 at * 11 (D.D.C. 2004) (noting interpretive difficulties created when legislation is passed without legislative hearings).

[8] *Busic v. United States*, 446 U.S. 398, 405 (1980).

[9] 114 CONG. REC. 22, 231- 48 (1968) (Statement of Rep. Poff).

[10] *Simpson v. United States*, 435 U.S. 6, 7-8 (1978) (citing 18 U.S.C. § 924(c) (1968)).

with any term of imprisonment imposed for the commission of such felony."[11] In the 36 years since its passage, the penalties attached to § 924(c) have been made continually harsher either by judicial interpretation or congressional action.

One of the first questions involving the provision was whether a defendant could be sentenced under § 924(c) where the underlying felony statute already included an enhancement for use of a firearm. In 1972 in *Simpson v. United States*,[12] the Supreme Court, relying on floor statements from Representative Poff, held that "the purpose of § 924(c) is already served whenever the substantive federal offense provides enhanced punishment for the use of a dangerous weapon" and that "to construe the statute to allow the additional sentence authorized by § 924(c) to be pyramided upon a sentence already enhanced under § 2113(c) would violate the established rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"[13] In 1980 in *Busic v. United States*,[14] the Court reaffirmed its decision in *Simpson* and went one step further, holding that prosecutors could not file a § 924(c) count instead of the enhancement provided for in the underlying federal statute. Supporting its conclusion, the Court noted that in 1971 the Department of Justice had advised prosecutors not to proceed under § 924(c) if the predicate felony

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[11] *Id*.

[12] 435 U.S. 6 (1977).

[13] *Id*. at 13, 14.

[14] 446 U.S. 398 (1980).

statute provided for "'increased penalties where a firearm was used in the commission of the offense.'"[15]

In response to *Simpson* and *Busic*, in 1984 Congress amended § 924(c) "so that its sentencing enhancement would apply regardless of whether the underlying felony statute 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'"[16] The 1984 amendment also established a five-year mandatory minimum for use of a firearm during commission of a crime of violence.[17]

In 1986, as part of the Firearms Owner's Protection Act, Congress made § 924(c) specifically applicable to drug-trafficking crimes, and increased the mandatory minimum to ten years for certain types of firearms.[18] In later amendments, Congress increased the penalty for a "second or subsequent" § 924(c) conviction to a mandatory minimum of twenty years (then ultimately to twenty-five years).[19]

The increased penalties for "second or subsequent" § 924(c) convictions produced litigation over whether multiple convictions in the same proceeding were subject to enhanced penalties. In essence, the issue was whether Congress intended § 924(c) to be a true recidivist statute or one that increased penalties for first offenders. Most courts, including the Tenth Circuit, did not apply the

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[15] *Id*. at 406 (quoting 19 U.S. Atty's Bull. No. 3, p.63 (U.S. Dept. of Justice, 1981)).

[16] *United States v. Gonzales*, 520 U.S. 1, 10 (1997)(citing Comprehensive Crime Control Act of 1984, Pub. L. 98-47. § 1005(a), 98 Stat. 2128-39).

[17] *Id*.

[18] Pub. L. No. 99-308, § 104(a)(2)(A)-(F).

[19] Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

twenty-year penalty when the "second" conviction was just the second § 924(c) count in an indictment.[20] But in *Deal v. United States*,[21] the Supreme Court, in a six-to-three decision, construed the statute more broadly. In *Deal*, the defendant was convicted of committing six different bank robberies on six different dates, each time using a gun. He was sentenced to five years for the first § 924(c) charge, and twenty years for each of the other five § 924(c) charges – a total of 105 years. In affirming his sentence, the Court held that a "second or subsequent" conviction could arise from a single prosecution.[22] To hold otherwise, the Court noted, would simply encourage prosecutors to file separate charges and try the defendant in separate prosecutions.[23]

Less than two weeks after *Deal*, the Court again interpreted the statute in *Smith v. United States*.[24] In *Smith*, the Court held that exchanging a gun for drugs constitutes "use" of a firearm "during and in relation to . . . [a] drug trafficking crime."[25] The Court rejected the defendant's argument that "use" of a firearm required use as a *weapon*.[26] The majority noted than when Congress enacted the relevant version of § 924(c) it was no doubt responding to concerns that drugs and guns

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[20] *See, e.g., United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988).

[21] 508 U.S. 129 (1993).

[22] *Id*. at 133-34.

[23] *Id*. at 134.

[24] 508 U.S. 223 (1993).

[25] *Id.* at 225.

[26] *Id*. at 228.

were a "dangerous combination."[27] Justice Scalia argued in dissent that it was "significant" that the portion of § 924(c) relating to drug trafficking was affiliated with the pre-existing provision pertaining to use of a firearm in relation to a crime of violence.[28] He therefore thought that the word "use" in relation to a crime of violence means use as a weapon, and that this definition of use carried over to the addition of drug trafficking to the statute.[29]

The Court again interpreted § 924(c) in *United States v. Gonzales*[30] and held that a sentence under § 924(c) could not be served concurrently with an unrelated sentence from a state conviction.[31] Finally, in *Muscarello v. United States*,[32] the Court held that, as used in § 924(c), "carries" is not limited to the felon who carries the firearm on his person, but includes a gun brought to a drug transaction in the glove compartment of his vehicle.

What all this history reveals is that if the original version of § 924(c) governed Mr. Angelos' sentencing, the court could impose three separate one-year enhancements, adding a total of three years to his sentence. However, after 36 years of judicial interpretation and congressional modifications, the court is now left with a version of § 924(c) that requires a sentence of 55 years on top of a tough Guidelines sentence for drug dealing.

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[27] *Id*. at 239.

[28] *Id*. at 244 (Scalia J., dissenting).

[29] *Id*.

[30] 520 U.S. 1 (1997).

[31] *Id*. at 9-10.

[32] 524 U.S. 125 (1998).

III. Mr. Angelos' Equal Protection Challenge to the Statute

Mr. Angelos first contends that 18 U.S.C. § 924(c) makes arbitrary classifications and irrationally treats him far more harshly than criminals guilty of other much more serious crimes. He raises this claim as an equal protection challenge. The court will first set forth the law on such arguments and then turn to the merits of Mr. Angelos' claim.

A. Equal Protection Review of Criminal Statutes

1. General Equal Protection Principles

Mr. Angelos can raise an equal protection challenge to classifications created by a federal criminal statute like § 924(c). While the Equal Protection Clause applies only to the states,[33] "[t]he Fifth Amendment's due process clause encompasses equal protection principles."[34] Under equal protection principles, the court's review is quite limited. The Equal Protection Clause "does not enact Mr. Herbert Spencer's *Social Statistics*"[35] or any other personal view of a judge. Instead, unless a law infringes upon a fundamental right or classifies along suspect lines such as race, the court's review is limited to determining whether there is a rational basis for the law.

Mr. Angelos does not argue that his claim is subject to a heightened standard of review. The law is well-settled on the subject.[36] As explained by the Supreme Court:

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[33] U.S. CONST. amend. XIV ("No *State* shall . . . deny to any person with its jurisdiction the equal protection of the laws."), *cert. denied*, 506 U.S. 978 (1992).

[34] *United States v. Lee*, 957 F.2d 778, 782 (10th Cir. 1992) (citing *Mathews v. de Castro*, 429 U.S. 181 (1976)).

[35] *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J.)

[36] *United States v. McKissick*, 204 F.3d 1282, 1300 (10th Cir. 2000) ("We review Mr. Zeigler's equal protection claim regarding the sentencing guidelines under the rational basis

> Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees . . . . But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual . . . and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. In this context . . . an argument based on equal protection essentially duplicates an argument based on due process.[37]

This holding places on Mr. Angelos a heavy burden of proof. First, "statutory classifications will not be set aside on equal protection grounds if any ground can be conceived to justify them as rationally related to a legitimate government interest."[38] Second, "those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis' which might support it."[39] The government "has no obligation to produce evidence to sustain the rationality of a statutory classification,"[40] nor does Congress have to "'articulate its reasons for enacting a statute'"[41] "[U]nder a rational basis analysis, [Congress] need not articulate the precise reasons why it chose to impose different sentences for different crimes; nothing in the Constitution prevents [Congress]

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standard to determine whether the challenged sentence is based on an arbitrary distinction or upon a rational sentencing scheme.").

[37] *Chapman v. United States*, 500 U.S. 453, 464-65 (1991) (citations omitted); *see also Baer v. City of Wauwatosa*, 716 F.2d 1117, 1125 (7th Cir. 1983) (discrimination against felons subject to rational basis review).

[38] *Lee*, 957 F.2d at 782 citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[39] *FCC v. Beach Communications, Inc.* 508 U.S. 307, 315 (1993) (citations omitted).

[40] *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993).

[41] *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (citations omitted).

from making classifications along non-suspect lines if there is a rational basis for doing so."[42] A statute can be both over-inclusive and under-inclusive and still pass rational basis review.[43] In sum, rational basis review is "a paradigm of judicial restraint" which "presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[44] It is on this basis that the court will proceed.[45]

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[42] *Phillips v. Iowa*, 185 F.Supp.2d 992, 1008 (N.D. Iowa 2002).

[43] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

[44] *Beach Communications, Inc.*, 508 U.S. at 314.

[45] Mr. Angelos also seeks to raise an "as-applied" challenge to § 924(c)'s rationality. It is not clear whether as-applied challenges are permitted in the context of rationality review. After all, "[n]early any statute which classifies people may be irrational as applied in particular cases." *Beller v. Rumsfeld*, 632 F.2d 788, 808-09, n.20 (9th Cir. 1980). Moreover, statutes subject to rational review can be based on "assumptions" and "generalizations" which "inevitably produce seemingly arbitrary consequences in some individual cases."*Califano v. Jobst*, 434 U.S. 47, 53 (1977). These statutes "must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Id*. at 55. Thus, in *Rojas-Reyes v. INS*, 235 F.3d 115 (6th Cir. 2000), the court rejected an as-applied challenge because it "misunderstands the nature of rational basis review, in which acts of Congress . . . need not result in the most just or logical result in every case to pass constitutional muster." *Id*. at 123 (citation omitted).

On the other hand, the Supreme Court and Tenth Circuit have both addressed as-applied challenges under rational basis review without questioning whether the posture of the case was appropriate. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) (striking down local zoning ordinance under rational basis review because irrational "as applied in this case"); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (concluding that Nebraska law prohibiting the teaching of German in public schools "as applied is arbitrary"); *United States v. Alahmad*, 211 F.3d 538, 541 (10th Cir. 2000) (upholding International Parental Kidnapping Crime Act against as-applied rational basis challenge); *United States v. Doyan*, 909 F.2d 412, 416 (10th Cir. 1990) (upholding U.S.S.G. § 5E1.2(i) "as applied here"). In light of these possibly conflicting approaches and the seriousness of the penalties facing Mr. Angelos, the safest and fairest approach here is to give him the benefit of the doubt and consider his as-applied challenge.

2. The Court's Obligation to Search for a Rational Basis

The Tenth Circuit has also instructed that rational basis review is not limited to the arguments advanced by the parties. In the recent civil case of *Powers v. Harris*[46], the Circuit explained that even if the parties cannot conceive of a rational basis for the statute, the court is "not bound by the parties' arguments" but is "'*obligated* to seek out other conceivable reasons for validating'" the statute.[47] If this understanding of rationality review extends to criminal cases, then a defendant must not only negate all of the proposed grounds for a statute put forth by the government but also any rational basis which the court might conceive.

Such a conclusion in a criminal case, however, is problematic in light of the defendant's due process rights at sentencing. In *Gardner v. Florida*,[48] for example, the Supreme Court, noting that a criminal defendant "has a legitimate interest in the character of the procedure which leads to the imposition of sentence,"[49] held that it was a violation of due process for a trial court to impose the death sentence based partially on confidential information in the pre-sentence report which the defendant did not have a chance to rebut at sentencing. *Gardner* was a death penalty case, and there is some question about whether the due process requirements would apply in a non-capital case.[50]

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[46] 379 F.3d 1208 (10th Cir. 2004).

[47] *Id*. at 1217 (quoting *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001) *cert. denied*, 534 U.S. 1021 (2001)).

[48] 430 U.S. 349 (1977).

[49] *Id*. at 357.

[50] Wayne R. LaFave, et al., CRIMINAL PROCEDURE 1240-41 (4th ed. 2004).

But here we have effectively a sentence of life in prison – the next most serious punishment the law can impose.

The Tenth Circuit has also provided guidance on the procedures to be followed at sentencing hearings. For example, in *United States v. Beaulieu*,[51] the Tenth Circuit held that while a judge may rely on reliable hearsay at the sentencing stage, the due process clause requires that the defendant "be given adequate notice of and an opportunity to rebut or explain information that is used against him" at sentencing.[52]

These due process considerations are the basis for Rule 32(i) of the Federal Rules of Criminal Procedure, which requires the court to give the defendant a chance to refute facts in the pre-sentence report.[53] But Rule 32(i) is not limited to factual allegations in the pre-sentence report. Specifically, Rule 32(i)(1)(C) states that the Court must afford counsel for the defendant an opportunity to "comment on the probation officer's determinations *and on other matters relating to the appropriate sentence* . . . ."[54] Similarly, Rule 32(i)(3)(B) requires the court to make findings on any "controverted matters." A matter cannot be "controverted" if it is hypothesized by the judge and the defendant never has an opportunity to comment on it.

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[51] 893 F.2d 1177 (10th Cir. 1990), *cert. denied*, 497 U.S. 1038 (1990).

[52] *Id*. at 1181.

[53] *See, e.g.*, *United States v. Romero*, 122 F.3d 1334, 1344 (10th Cir. 1997), *cert. denied*, 523 U.S. 1025 (1998).

[54] FED. R. CRIM. P. 32(c)(1) (emphasis added).

Rule 32 has been given an expansive reading by the Supreme Court. In *Burns v. United States*,[55] the Supreme Court considered whether a trial court could depart upwards from a Guidelines sentence *sua sponte* without notice to the defendant or the government. The Court held that Rule 32 requires that the defendant be notified beforehand of the court's intention to depart upward so that he can challenge both the factual and the legal basis for doing so.[56] As *Burns* suggests, for the trial court to reach legal conclusions without first affording notice to the parties would "render[] meaningless the parties' express right under Rule 32(a)(1) to 'comment upon . . . matters relating to the appropriate sentence'" because the right to comment upon a departure has "'little reality or worth unless one is informed' that a decision is contemplated."[57]

If the court follows here the approach adopted by the Tenth Circuit in *Powers* for civil cases, it could hold that § 924(c) is constitutional based solely on an argument hypothesized by the court without notice to the defense. Such an approach would clash with the purpose of Rule 32, which is to "promote[] focused, adversarial resolution of the *legal* and factual issues" relevant to fixing a sentence.[58] In *Burns*, the Court explained that allowing *sua sponte* departures would force the parties to hypothesize every potential departure and address them "in a random and wasteful way by trying

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[55] 501 U.S. 129 (1991).

[56] *Id.* at 135-136.

[57] *Id*. at 136 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

[58] *Burns*, 501 U.S. at 137.

to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative."[59]

Out of an abundance of caution, therefore, the court concludes that it should not uphold § 924(c) on grounds which the defendant has not had an opportunity to address. In reaching this conclusion, this court in no way intends to deviate from the standard rule that it is not necessary for the government to show the actual reason that Congress enacted a statute, be it civil or criminal.[60] The criminal cases supporting this rule, however, do not stand for the proposition that, in contrast to the ordinary rules of sentencing, the court can advance grounds to sustain a statute *sua sponte* without giving the defendant a chance to respond.[61]

Finally, the court has considered whether it might be feasible for it to conceive of grounds beyond those raised by the government or the defendant and then give the parties a further opportunity to brief and argue those additional grounds. Practical concerns, however, dictate against such an approach for a criminal sentencing, where the court must impose sentence "without unnecessary delay."[62] Presumably these same concerns were at play in the Tenth Circuit's decision in *Powers*. The Circuit did not call for additional briefing and argument there, probably because of the delay attendant to such a procedure.

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[59] *Id*.

[60] *United States v. Lee*, 957 F.2d 778, 782 (10th Cir. 1992), *cert. denied*, 506 U.S. 978 (1992).

[61] *See, e.g., id*. at 780 (government raising the grounds used to sustain the statute).

[62] FED. R. CRIM. P. 32(b)(1).

In reaching this conclusion, the court does not mean to suggest that there is some clearly "winning" argument that the government has simply failed to raise. The government has been ably represented throughout these proceedings by experienced and capable counsel. The government has briefed and argued the main grounds that can be advanced to sustain § 924(c) as applied in this case. Rather than chase down every hypothetical ground that could sustain the statute, the court will consider the grounds that have been briefed and argued in this case.

B. The Irrationality of § 924(c)

Mr. Angelos contends that § 924(c) effectively sentences him to life in prison and that this statutory scheme is irrational as applied to him. In particular, Mr. Angelos contends that § 924(c) leads to unjust punishment and creates irrational distinctions between different offenders and different offenses. The court will first review Mr. Angelos' claims about the statute's infirmities, then consider the government's defenses.

1. Mr. Angelos Effectively Receives a Life Sentence Under § 924(c)

Before turning to the merits of Mr. Angelos' claims, it is important to understand the length of the sentence that the government is asking the court to impose. If Angelos serves his full 61 ½ -year sentence, he will be 85 years old upon release. Assuming the 15 percent credit for good behavior, Mr. Angelos sentence will be reduced to "only" 55 years, leading to the earliest possible release date for Mr. Angelos at 77 years of age. The average life expectancy for males in the United States is about 74 years of age.[63] Therefore, under the best case scenario, Angelos *might* live long

[63] Elizabeth Arias, *United States Life Tables, 2001 in* National Vital Statistics Reports, U.S. Dep't of Health and Human Serv., Vol. 52, No. 14 (Feb. 18, 2004) *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_14.pdf.

enough to be released from prison (assuming that the harshness of prison life does not decrease his life expectancy). Put another way, if the court imposes the sentence sought by the government, Mr. Angelos will effectively receive a sentence of life.

2. Unjust Punishment from § 924(c)

Mr. Angelos argues that his sentence is irrational because the enhancement provided for under § 924(c) increases his sentence by 55 years, whereas were the Guidelines alone to be applied, his sentence would be enhanced by only two years. Under the Guidelines, Mr. Angelos' sentence would have been increased by, at most, 24 months.[64] Because the relevant conduct was charged as three separate § 924(c) violations, however, the result was a sentence increased by 660 months, or 55 years. Cases such as this force the government to choose between charging defendants under § 924(c) or relying on the Guidelines' enhancement. As the Eleventh Circuit has noted, "'The relationship between § 924(c) and [the Guidelines enhancement] is an "either/or" relationship at sentencing. If a defendant is convicted [under § 924(c)], he must receive a five year consecutive sentence, but he cannot also have his base offense level enhanced pursuant to [the Guidelines enhancement] because such enhancement would violate the Double Jeopardy Clause of the United States Constitution. However, a defendant who is not convicted of a violation of § 924(c), may receive an enhancement of his base offense level for possession of a firearm in connection with a drug offense."[65] The government in this case chose to pursue § 924(c) counts rather than enhancements under the Guidelines.

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[64] § 2D1.1(b)(1) (gun enhancement for drug offenses).

[65] *United States v. Mixon*, 115 F.3d 900, 902 (11th Cir. 1997) (citation omitted).

The Guidelines, Mr. Angelos argues, reflect the judgment of experts appointed by Congress to determine "just punishment" for federal criminal offenses. Because his sentence, the result of 924(c), is at such discrepancy with the Guidelines determination of "just punishment," Mr. Angelos argues that his sentence is irrational.

In imposing sentences in criminal cases, the court is required by the governing statute – the Sentencing Reform Act[66] – to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the Act]."[67] The purposes of sentencing set forth in the Sentencing Reform Act are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide *just punishment* for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[68]

To give some real content to the Sentencing Reform Act's directives, Congress established an expert body – the United States Sentencing Commission – to promulgate sentencing Guidelines for criminal offenses. The Sentencing Commission, after extensive review of sentencing practices across the country established a comprehensive set of sentencing guidelines. The Commission has carefully

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[66] 18 U.S.C. § 3551 et. seq.

[67] 18 U.S.C. § 3553(a).

[68] 18 U.S.C. § 3553(a)(2) (emphasis added).

calibrated the Guidelines through annual amendments, and Congress has had the opportunity to reject and amend Guidelines that were not to its satisfaction.

The Guidelines provide clear guidance on what is just punishment for federal offenses. To be sure, the constitutionality of the fact-finding apparatus attached to the Guidelines is currently under Supreme Court review,[69] and this court has held that in cases such as this one the Guidelines are advisory only.[70] But the substantive content of the Guidelines is what is relevant here. Both sides agree that the Guidelines should be considered as providing guidance on the appropriate penalty. Moreover, Congress has directed that courts must follow the Guidelines in imposing sentence unless some unusual factor justifies a departure.[71] As a result, Congress has in essence instructed the courts that the Guidelines provide "just punishment" for criminal offenses. It could hardly be otherwise, as Congress would not have gone to the trouble of having an expert body promulgate sentencing guidelines if those guidelines failed to prescribe the appropriate sentences. In short, the views of the Sentencing Commission are entitled to "great weight because the Sentencing Commission is the expert body on federal sentencing."[72]

In this case, neither side has offered any strong reason for believing that the sentence the Guidelines alone provide for would not achieve just punishment. The Guidelines specify sentences

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[69] *See United States v. Booker*, 125 S.Ct. 11 (2004) (granting certiorari to review this question).

[70] *United States v. Croxford*, 324 F. Supp.2d 1230 (D. Utah 2004); *see also* Part V, *infra* (discussing application of *Croxford* to this case).

[71] 18 U.S.C. § 3553(b)(1).

[72] *United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995); *see also Mistretta v. United States*, 448 U.S. 361, 379 (1989) (noting Commission's status as "an expert body").

for all crimes covered by the federal criminal code, including all the crimes committed by Mr. Angelos. Setting aside the three firearms offenses covered by the § 924(c) counts, all of Mr. Angelos' other criminal conduct results in an offense level of 28. Because Mr. Angelos is a first-time offender, the Guidelines then specify a sentence of between 78 to 97 months. It is possible to determine, however, what a Guidelines sentence would be covering all of Mr. Angelos conduct, including that covered by the § 924(c) counts. If this conduct were punished under the Guidelines rather than under § 924(c), the result would be an additional two-level enhancement,[73] increasing the offense level from a level 28 to a level 30. This, in turn, produces a recommended Guidelines sentence for Mr. Angelos of 97 to 121 months. Thus, the Guidelines inform the court that Mr. Angelos' possession of firearms should increase his sentence by no more than 24 months (from a maximum of 97 months to a maximum of 121 months). This is a point worth emphasizing: the expert agency established by Congress to evaluate federal sentences and that the court must follow when imposing sentences has specified 24 months as the appropriate enhanced penalty for Mr. Angelos' possession of firearms and no more than 121 months as "just punishment" for all of Mr. Angelos' offenses.

Bearing firmly in mind the conclusion of Congress' expert agency that 121 months is the longest appropriate prison term for all the criminal conduct in this case, it comes as a something of a shock to then consider the § 924(c) counts. Because Mr. Angelos' possession of firearms is punished not under the Guidelines but rather under § 924(c), the court is required to impose an additional penalty of 660 months (55 years) instead of the 24 month enhancement provided for by

[73] U.S.S.G. § 2D1.1(b)(1).

the Guidelines. It is not at all clear how the court can reconcile these two sentences. Knowing that the congressionally-approved Guidelines provide for an additional 24 month penalty for the firearms at issue, can the court conclude that an additional 660 months is a "just punishment"? One architect of the Guidelines has recognized the problem of the discrepancy:

> The compatibility of the guidelines system and mandatory minimums is also in question. While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent. . . . Whereas the guidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a "real offense" approach to sentencing, mandatory minimums are basically a "charge-specific" approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.[74]

There is, of course, the possibility that the Sentencing Guidelines are too low in this case and that mandatory minimums specify the proper sentence. The more the court investigates, however, the more the court finds evidence that the § 924(c) counts here lead to unjust punishment. For starters, the court asked the twelve jurors in this case what they believed was the appropriate punishment for Mr. Angelos. Following the trial, the court sent – over the government's objection – each of the jurors the relevant information about Mr. Angelos' limited criminal history, described

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[74] Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194 (1993); *see also Neal v. United States*, 516 U.S. 284, 292 (1996). *See generally* U.S. SENTENCING COMM., MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS 5-15 (1991) (numbers inserted and justifications reordered) (hereinafter SENTENCING COMM. MANDATORY MINIMUM REPORT).

the abolition of parole in the federal system, and asked the jurors what they believed was the appropriate penalty for Mr. Angelos. Nine jurors responded and gave the following recommendations: (1) 5 years; (2) 5-7 years; (3) 10 years; (4) 10 years; (5) 15 years; (6) 15 years; (7) 15-20 years; (8) 32 years; and (9) 50 years. Averaging these answers, the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years. Not one of the jurors recommended a sentence closely approaching the 61½ year sentence created by § 924(c).

At oral argument, the court asked the government what it thought about the jurors' recommendations and whether it was appropriate to impose a sentence so much higher than what the jurors thought appropriate. The government's response was quite curious: "Judge, we don't know if that jury is a random representative sample of the citizens of the United States . . . ."[75] Of course, the whole point of the elaborate jury selection procedures used in this case was to assure that the jury was, indeed, such a fair cross section of the population so that the verdict would be accepted with confidence. It is hard to understand why the government would be willing to accept the decision of the jury as to the guilt of the defendant but not as to the length of sentence that might be imposed.

More important, the jurors' answers appear to reflect a representative of what people across the country believe. The crimes committed by Mr. Angelos are not uniquely federal crimes. They could have been prosecuted in state court in Utah or elsewhere across the country. The court asked the Probation Office to determine what the penalty would have been in Utah state court had Mr. Angelos been prosecuted there. The Probation Office reported that Mr. Angelos would likely have been paroled after serving about two to three years in prison. The government gives a substantially

[75] Tr. 9/14/04 at 60.

similar estimate, reporting that on its understanding of Utah sentencing practices Mr. Angelos would have served about five to seven years in prison.[76] Even taking the higher figure from the government, the § 924(c) counts in this case result in punishment far beyond what Utah's citizens, through its state criminal justice system, provides as just punishment for such crimes.

The same conclusion obtains if the comparison is to the sentence that would be imposed in other states. Indeed, the government conceded that Mr. Angelos' federal sentence after application of the § 924(c) counts is more than he would have received in any of the fifty states.[77]

Of course, one way of determining what people across the country believe is to look to the actions of Congress. Congress serves as the nation's elected representatives, so actions taken by Congress presumably reflect the will of the people. The difficulty here is that Congress has taken two actions: (1) it created the Sentencing Commission and (2) adopted § 924(c). As between these two conflicting actions, the sentences prescribed by the Sentencing Commission more closely reflect the views of the country. And, indeed, empirical research has demonstrated that the Sentencing Guidelines generally produce sentences that are at least as harsh as those that the public would wish to see imposed.[78]

In sum, the court is faced with the fact that § 924(c) produces punishment in this case far beyond that called for by the congressionally-created expert agency on sentencing, by the jurors who

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[76] Government's Resp. Mem. Re: Constitutionality of Mandatory Minimum Sentences Pursuant to 18 U.S.C. § 924(c) at 23 n.19 (Apr. 8, 2004).

[77] *Id.* at 23 n.18.

[78] PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1998).

heard the evidence, by the Utah state system, or by any of the other state systems. If the court is to take seriously the directive that it should impose "just punishment" with its sentences, then it should impose sentences that are viewed as appropriate by the citizens of this state and of this country. The court concludes that placing Mr. Angelos in prison for 61½ years is not "just punishment" for his crimes. This factor suggests the irrationality of § 924(c).

3. Irrational Classifications

The next factor the court should consider is Mr. Angelos' argument that § 924(c) creates irrational classifications, between different offenses and different offenders. The court will consider each of these arguments in turn.

a. Classifications Between Offenses

Mr. Angelos contends that his § 924(c) sentence is not only unjust but also irrational when compared to the punishment imposed for other more serious federal crimes. Perhaps realizing where this evaluation will inevitably lead, the government initially argues that any comparison is futile because, as the Supreme Court suggested in its 1980 decision *Rummel v. Estelle*, different "crimes . . . implicate other societal interests, making any comparison inherently speculative."[79] At some level, this argument is correct; fine distinctions between the relative severity of some kinds of crimes are hard to make. It is difficult to compare, as *Rummel* points out, the crime of embezzlement of millions of dollars with the crime of taking a small amount of money at gun point.[80]

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[79] *Rummel v. Estelle*, 445 U.S. 263, 282 n.27 (1980).

[80] *Id.* at 282 n.27.

But general comparisons of crimes are possible. Some crimes have, for example, a common denominator that permits comparison. As the Supreme Court clarified three years after *Rummel* in *Solem v. Helm*, "stealing a million dollars is viewed as more serious than stealing a hundred dollars."[81] More important, *Solem* pointed to various factors that can be assessed relatively objectively. In instructing the court to judge the gravity of the offense in the cruel and unusual punishment context, the Court noted that its holding "assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments – just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender."[82] Therefore, in determining whether Congress has created irrational classifications with § 924(c), the court can be guided not by any subjective views on how harshly to punish a particular crime, but rather how the punishment for that crime compares to that imposed for other undoubtedly more serious offenses.

In evaluating the § 924(c) counts, the court starts from the premise that Mr. Angelos committed serious crimes. Trafficking in illegal drugs runs the risk of ruining lives through addiction and the violence that the drug trade spawns. As the government properly argued, when a defendant engages in a drug-trafficking operation and "carries and possesses firearms to aid in that venture, as was the case here, the actual threat of violence always exists, even it if does not actually

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[81] *Solem v. Helm*, 463 U.S. 277, 292 (1983).

[82] *Id.*

occur."[83] But do any of these general rationales provide a rational basis for punishing the *potential* violence which § 924(c) is meant to deter more harshly than *actual* violence that harms a victim in its wake? In other words, is it rational to punish a person who *might* shoot someone with a gun he carried far more harshly than the person who actually *does* shoot or harm someone?

As applied in this case, the classifications created by § 924(c) are simply irrational. Section 924(c) imposes on Mr. Angelos a sentence 55 years or 660 months. Added to the minimum 78-month Guidelines sentence for a total sentence of 738 months, Mr. Angelos is facing a prison term which more than doubles the sentence of, for example, an aircraft hijacker (293 months),[84] a terrorist who detonates a bomb in a public place (235 months),[85] a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months),[86] a second-degree murderer,[87] or a rapist.[88] Table 1 below sets out these and other examples of shorter sentences for crimes far more serious than Mr. Angelos'.

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[83] Government's Reply Mem. to Br. of Amici Curiae Re: Constitutionality of Mandatory-Minimum Sentences and to Resp. of Angelos Re: Court Order Inviting Angelos to File Plea Negotiation History at 13 (September 10, 2004).

[84] U.S.S.G. § 2A5.1 (2003) (base offense level 38). The 2003 Guidelines are used in all calculations in this opinion. All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I.

[85] U.S.S.G. § 2K1.4(a)(1) (cross-referencing § 2A2.1(a)(2) and enhanced for terrorism by § 3A1.4(a)).

[86] U.S.S.G. § 3A1.1 (base offense level 32 + 4 for life-threatening injuries + 3 for racial selection under § 3A1.4(a)).

[87] U.S.S.G. § 2A1.2 (base offense level 33).

[88] U.S.S.G. § 2A3.1 (base offense level 27).

Table I
Comparison of Mr. Angelos' Sentence with
Federal Sentences for Other Crimes

Offense and Offense Guideline	Offense Calculation	Maximum Sentence
Mr. Angelos with Guidelines sentence plus § 924(c) counts	Base Offense Level 28 + 3 § 924(c) counts (55 years)	738 Months
Kingpin of major drug trafficking ring in which death resulted U.S.S.G. § 2D1.1(a)(2)	Base Offense Level 38	293 Months
Aircraft hijacker U.S.S.G. §2A5.1	Base Offense Level 38	293 Months
Terrorist who detonates a bomb in a public place intending to kill a bystander U.S.S.G. § 2K1.4(a)(1)	Total Level 36 (by cross reference to § 2A2.1(a)(2) and terrorist enhancement in § 3A1.4(a))	235 Months
Racist who attacks a minority with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)(1)	Base Level 28 + 4 for life threatening + 3 for racial selection under § 3A1.1	210 Months
Spy who gathers top secret information U.S.S.G. § 2M3.2(a)(1)	Base Offense Level 35	210 Months
Second-degree murderer U.S.S.G. § 2A1.2	Base Offense Level 33	168 Months
Criminal who assaults with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)	Base Offense Level 28 + 4 for intent to kill = 32	151 Months
Kidnapper U.S.S.G. § 2A4.1(a)	Base Offense Level 32	151 Months
Saboteur who destroys military materials U.S.S.G. § 2M2.1(a)	Base Offense Level 32	151 Months
Marijuana dealer who shoots an innocent person during drug transaction U.S.S.G. § 2D1.1(c)(13) & (b)(2)	Base Offense Level 16 + 1 § 924(c) count	146 Months

Rapist of a 10-year-old child U.S.S.G. § 2A3.1(a) & (B)(4)(2)(A)	Base Offense Level 27 + 4 for young child = 31	135 Months
Child pornographer who photographs a 12-year-old. in sexual positions U.S.S.G. § 2G2.1(a) &(b)	Base Offense Level 27 + 2 for young child = 29	108 Months
Criminal who provides weapons to support a foreign terrorist organization U.S.S.G. § 2M5.3(a) & (b)	Base Offense Level 26 +2 for weapons = 28	97 Months
Criminal who detonates a bomb in an aircraft U.S.S.G. § 2K1.4(a)(1)	By cross reference to § 2A2.1(a)(1)	97 Months
Rapist U.S.S.G. § 2A3.1	Base Offense Level 27	87 Months

The court provided these examples to the government well before the argument in this case, and invited the government to provide any corrections or additions. No changes were suggested. At oral argument, to its credit, the government conceded that at least some of the crimes in the table involved crimes more serious than those committed by Mr. Angelos. Thus, the government agreed (after extensive questioning from the court) that Mr. Angelos has committed less serious crimes than a second-degree murderer,[89] a marijuana dealer who shoots someone,[90] or a rapist.[91] The government maintained, however, that the court was not making the proper comparison. Because Mr. Angelos was convicted of three counts of violating § 924(c), the government argued, the proper comparison is between Mr. Angelos and a three-time hijacker, a three-time rapist, or a three-time second degree

[89] Tr. 9/14/2004 at 66.

[90] *Id.* at 55.

[91] *Id.* at 67.

murderer. The government maintains that "the hijacker and kidnapper would serve much longer sentences if they were sentenced for committing those crimes three separate times."[92]

The government's argument misses the whole point of the comparison. All of Mr. Angelos' crimes taken together are less serious than, for example, even a single aircraft hijacking, a single second-degree murder, or a single rape. But even adopting the government's approach, the irrationality of the scheme only becomes more apparent. Amazingly, Mr. Angelos' sentence under § 924(c) is still far more severe than criminals who committed, for example, three aircraft hijackings, three second-degree murders, three kidnappings, or three rapes. Table II reflects a trebling of all the crimes in Table I. Mr. Angelos will receive a longer sentence than any three-time criminal, with the sole exception of a marijuana dealer who shoots three people. (Mr. Angelos still receives a longer sentence than a marijuana dealer who shoots two people.)

Table II
Comparison of Mr. Angelos' Sentence with Federal Sentences for Other Crimes Committed Three Times

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[92] Government's Resp. Mem. Re: Constitutionality of Mandatory Minimum Sentences Pursuant to 18 U.S.C. § 924(c) at 20 (Apr. 8, 2004).

On a less serious note, the court agrees with the government on a subsidary lexicographical point – that "kidnapper" is properly spelled with two *p*'s rather than one. The court acknowledges the contrary argument of Judge Boyce, who argues for the single *p* spelling. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 229 (1982). The court, however, finds persuasive the arguments of the nation's leading legal stylist–Bryan Garner–who notes (among other arguments) that a double *p* is used about five to ten times as often as a single *p*. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 494 (2d ed. 1995). Moreover, in this case, both Congress (*see* 18 U.S.C. § 1201) and the Sentencing Commission (*see* U.S.S.G. § 2A4.1) have used the double *p* spelling. Finally, while the Tenth Circuit has used both versions, it seems to prefer the double *p*. *See, e.g.*, *United States v. Wooten*, 377 F.3d 1134 (10th Cir. 2004) (using kidna*pp*ing).

Offense Guideline	Offense Calculation	Maximum Sentence
Mr. Angelos with Guidelines sentence plus § 924(c) counts	Base Offense Level 28 + 3 § 924(c) counts (55 years)	738 Months
Kingpin of three major drug trafficking rings in which three deaths resulted	Base Offense Level 38 + 3 units = 41	465 Months
Three-time aircraft hijacker	Base Offense Level 38 + 3 units = 41	405 Months
Terrorist who detonates three bomb in public places intending to kill a bystander	Total Offense Level 35 + 3 units = 38	293 Months
Racist who attacks three minorities with the intent to kill	Total Offense Level 29 + 3 units = 32	151 Months
Spy who gathers top secret information three times	Base Offense Level 35 + 3 units = 38	293 Months
Second-degree murderer of three victims	Base Offense Level 33 + 3 units = 36	235 Months
Criminal who assaults three people with the intent to kill	Total Offense Level 32 + 3 units = 35	210 Months
Kidnapper of three persons	Total Offense Level 32 + 3 units = 35	210 Months
Saboteur who destroys military materials three times	Base Offense Level 32 + 3 units = 35	210 Months
Marijuana dealer who shoots three innocent persons during three drug transactions	Base Offense Level 16 + 3 § 924(c) counts	813 Months
Rapist of three 10-year-old children	Total Offense Level 31 + 3 units = 34	188 Months
Child pornographer who photographs three 12-year-old children in sexual positions	Total Offense Level 29 + 3 units = 32	151 Months
Criminal who provides weapons to support three foreign terrorist organizations	Total Offense Level 26 3 counts grouped under § 3D1.2(b)	78 Months

Criminal who detonates three bombs in three aircraft	Total Offense Level 28 + 3 units = 31 (by cross reference to § 2A2.1(a)(1)) (3 counts)	135 Months
Rapist who rapes three victims	Total Offense Level 27 + 3 units = 30	121 Months

The irrationality of these differences is manifest and can be objectively proven. In the Eighth Amendment context, the Supreme Court has instructed that "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender."[93] In contrast to the serious violent felonies listed in tables I and II, the crimes committed by Mr. Angelos had the *potential* for violence, but no *actual* violence occurred. This is not to say that trafficking in illegal drugs is somehow a non-violent offense. Indeed, in *Harmelin*, Justice Kennedy quite properly called such an assertion "false to the point of absurdity."[94] *Harmelin* involved the potential distribution of approximately 32,500 doses of cocaine, a highly addictive drug that was linked to many of the homicides in Detroit.[95] Justice Kennedy's concurrence equated the crime in *Harmelin* with "felony murder without specific intent to kill."[96]

In this case, however, Mr. Angelos will be completely punished for his marijuana trafficking by the 78-97 month Guidelines sentence he receives. The § 924(c) counts pile on an additional 55 years *solely* for three offenses of possessing firearms in connection with that trafficking. He receives a five-year and then another twenty-five-year sentence for counts 2 and 4, which involved

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[93] *Harmelin v. Michigan*, 501 U.S. 957, 1004 (1991) (Kennedy J., concurring).

[94] *Id.* at 1002 (Kennedy J., concurring).

[95] *Id*. at 1002-03 (Kennedy, J., concurring).

[96] *Id*. at 1004 (Kennedy, J., concurring).

carrying a gun in an ankle holster during a drug deal with one other person for several hundred dollars in marijuana. He receives another twenty-five-year sentence for Count 10, which involved three handguns found in Angelos' apartment during the execution of a search warrant. Section 924(c) punishes Angelos more harshly for crimes that threaten potential violence than for crimes that conclude in actual violence to victims (e.g., aircraft hijacking, second-degree murder, racist assaults, kidnapping, and rape). This factor, therefore, also suggests the irrationality of § 924(c).

b. Irrational Classifications Between Offenders

Mr. Angelos also argues that § 924(c) is irrational in failing to distinguish between the recidivist and the first-time offender. Section 924(c) increases penalties for a "second or subsequent conviction under this subsection."[97] This language can be interpreted in two different ways. One construction would be that an offender who is convicted of a § 924(c) violation, serves his time, and then commits a subsequent violation is subject to an enhanced penalty. This was the construction that the Tenth Circuit (among other courts) originally gave to the statute.[98]

Another, far more expansive construction would be that an offender who is convicted of two or more counts is subject to an enhanced penalty for each count after the first count of conviction. In 1993 in *Deal v. United States*,[99] the Supreme Court adopted this second construction, reading the "second or subsequent" language in § 924(c) to apply equally to the recidivist who is convicted of violating § 924(c) on separate occasions after serving prison time and to the defendant who is

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[97] 18 U.S.C. § 924(c)(1).

[98] *United States v. Abreu*, 962 F.2d 1447, 1450 (10th Cir. 1992) (en banc)(*cert. granted, judg. vacated*, 508 U.S. 935 (1993)).

[99] 508 U.S. 129 (1993).

convicted of multiple § 924(c) counts in the same proceeding stemming from a single indictment. The Court concluded (over the dissents of three Justices) that the unambiguous phrase "subsequent conviction" in the statute permitted no distinction between the time at which the convictions took place.[100] In addition, all time imposed for each § 924(c) count must run consecutively to any other sentence.[101] This is what is known as "count stacking."

When multiple § 924(c) counts are stacked on top of each other, they produce lengthy sentences that fail to distinguish between first offenders (like Mr. Angelos) and recidivist offenders. As John R. Steer, Vice Chair of the United States Sentencing Commission, has explained:

> [C]onsider the effects if prosecutors pursued every possible count of 18 U.S.C. § 924(c) . . . . The statute provides for minimum consecutive sentence enhancements of 25 years to life for the second and subsequent conviction under the statute, even if all the counts are charged, convicted, and sentenced at the same time. Pursuing multiple § 924(c) charges at the same time has been called "count stacking" and has resulted in sentences of life imprisonment (or aggregate sentences for a term of years far exceeding life expectancy) for some offenders with little or no criminal history.[102]

Consider the way in which the § 924(c) counts stack up on Mr. Angelos. He is currently 24 years old. He is to receive at least 78 months for the underlying offenses. Stacked on top of this is another 5 years for the first § 924(c) conviction. Stacked on top of this is another 25 years for the second § 924(c) conviction. And finally, another 25 years is stacked on top for the third § 924(c) conviction. Even assuming credit for good time served, Mr. Angelos will be more than 55-years-old

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[100] *Id.* at 132-33.

[101] 18 U.S.C. § 924(c)(1)(D)(ii).

[102] Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Comm'n Before the ABA Justice Kennedy Comm'n 19 (Nov. 13, 2003).

before he even begins to serve the final 25 years his sentence. This happens not because Mr. Angelos "failed to learn his lessons from the initial punishment" and committed a repeat offense. Section 924(c) jumps from a five-year mandatory sentence for a first violation to a 25-year mandatory sentence for a second violation, which may occur just days (or even hours) later. It is not a recidivist provision.

Other true recidivist statutes do not operate this way. Instead, they graduate punishment (albeit only roughly) between first offenders and subsequent offenders. California's tough three-strikes-and-you're-out law can serve as a convenient illustration. Prompted by violence from career criminals who had been in prison and released,[103] California passed a law requiring lengthy prison terms for third-time offenders, even where the third offense could be viewed as relatively minor. Last year in *Ewing v. California*,[104] the Supreme Court upheld a twenty-five to life sentence under California's three-strikes law. While defendant Ewing's third offense was merely stealing $399 worth of golf equipment, the controlling opinion noted that the policy of the law was to "incapacitat[e] and deter[] repeat offenders who threaten the public safety. The law was designed 'to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.'"[105] In the end, the Court concluded that Ewing's sentence was justified "by his own long, serious criminal record [including]

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[103] *See generally* MIKE REYNOLDS & BILL JONES, THREE STRIKES AND YOU'RE OUT . . . A PROMISE TO KIMBER: THE CHRONICLE OF AMERICA'S TOUGHEST ANTI-CRIME LAW (1996).

[104] 538 U.S. 11 (2003).

[105] *Id*. at 15 (O'Connor, J.) (quoting Cal. Penal Code Ann. § 667(b)).

numerous misdemeanor and felony offenses . . . nine separate terms of incarceration . . . and crimes [committed] while on probation or parole."[106]

Similarly, in the earlier case of *Rummel*[107], the Court saw a critical distinction between first and repeat offenders. In that case, the defendant was convicted of a third felony for obtaining $120 by false pretenses and was sentenced to mandatory life imprisonment under a recidivist statute. The Court found it important to examine the "exact operation" of the statute at issue and found three important factors suggesting a legitimate basis for such a harsh punishment:

> First, [Rummel] had to be convicted of a felony and actually sentenced to prison. Second, at some time subsequent to his first conviction, Rummel had to be convicted of another felony and again sentenced to imprisonment. Finally, after having been sent to prison a second time, Rummel had to be convicted of a third felony. . . . Given this necessary sequence, *a recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released*. One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail.[108]

While some might raise theoretical objections to such recidivist statutes,[109] their underlying logic is clear and unassailable. But no such logic can justify § 924(c), at least when applied to first offenders such as Mr. Angelos. In cases such as his, the statute blindly draws no distinction between recidivists and first-time offenders. For this reason as well, the statute appears to be irrational as applied in this case.

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[106] *Id*. at 30.

[107] 445 U.S. 263 (1980).

[108] 445 U.S. at 278 (emphasis added).

[109] *See, e.g.,* Markus Dirk Dubber, Recidivist Statutes as Arational Punishment, 43 BUFF. L. REV. 689 (1996).

The irrationality only increases when section § 924(c) is compared to the federal "three strikes" provision. Criminals with two prior violent felony convictions who commit a third such offense are subject to "mandatory" life imprisonment under 18 U.S.C. § 3559(c) – the federal "three-strikes" law. But then under 18 U.S.C. § 3582(c)(1) – commonly known as the "compassionate release" provision – these criminals can be released at age 70 if they have served 30 years in prison. But because this compassionate release provision applies to sentences imposed under § 3559(c) – not § 924(c) – offenders like Mr. Angelos are not eligible. Thus, while the 24-year-old Mr. Angelos must serve time until he is well into his 70's, a 40-year-old recidivist criminal who commits second-degree murder, hijacks an aircraft, or rapes a child is potentially eligible for release at age 70. In other words, mandatory life imprisonment under the federal three-strikes law for persons guilty of three violent felony convictions is less mandatory than mandatory time imposed on the first-time offender under § 924(c). Again, the rationality of this arrangement is dubious.

This possibility, too, is no mere hypothetical. This morning, the court had before it for sentencing Thomas Ray Gurule.[110] Mr. Gurule is 54-years-old with a lifelong history of criminal activity and drug abuse. He has spent more of his life incarcerated than he has in the community. He has sixteen adult criminal convictions on his record, including two robbery convictions involving dangerous weapons. His most recent conviction was for carjacking. In August 2003, after failing to pay for gas at a service station, Mr. Gurule was pursued by the station manager. To escape, Mr. Gurule broke into the home of a young woman, held her at knife point, stole her jewelry, and forced

[110] *United States v. Gurule*, No. 2:04-CR-209-PGC.

her to drive him away from the scene of his crimes. During the drive, Mr. Gurule threatened both the woman and her family.

For this serious offense – the latest in a long string of crimes for which he has been convicted – the court must apparently sentence Mr. Gurule to "life" in prison under 18 U.S.C. § 3559(c). But because of the compassionate release provision, Mr. Gurule is eligible for release after serving 30-years of his sentence. Why Mr. Gurule, a career criminal, should be eligible for this compassionate release while Mr. Angelos is not obvious to the court.

4. Demeaning Victims of Actual Violence and Creating the Risk of Backlash

For the reasons outlined in the previous section, § 924(c) imposes unjust punishment and creates irrational classifications between different offenses and different offenders. To some, this may seem like a law professor's argument–one that may have some validity in the classroom but little salience in the real world. After all, the only issue in this case is the extent of punishment for a man justly convicted of serious drug trafficking offenses. So what, some may say, if he spends more years in prison than might be theoretically justified? It is common wisdom that "if you can't do the time, don't do the crime."

The problem with this simplistic position is that it overlooks other interests that are inevitably involved in the imposition of a criminal sentence. For example, crime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract "war on drugs."

This is no mere academic point, as a case from this court's docket will illustrate. Earlier today, shortly before Mr. Angelos' hearing, the court imposed sentence in *United States v. Visinaiz*, a second-degree murder case.[111] There, a jury convicted Cruz Joaquin Visinaiz of second-degree murder in the death of 68-year-old Clara Jenkins. On one evening, while drinking together, the two got into an argument. Ms. Jenkins threw an empty bottle at Mr. Visinaiz, who then proceeded to beat her to death by striking her in the head at least three times with a log. Mr. Visinaiz then hid the body in a crawl space of his home, later dumping the body in a river weighted down with cement blocks. Following his conviction for second-degree murder, Mr. Visinaiz came before the court as a first-time offender for sentencing. The Sentencing Guidelines require a sentence for this brutal second-degree murder of between 210 to 262 months.[112] The government called this an "aggravated second-degree murder" and recommended a sentence of 262 months. The court followed that recommendation. Yet on the same day, the court is to impose a sentence of 738 months for a first-time drug dealer who carried a gun to several drug deals!? The victim's family in the Visinaiz case–not to mention victims of a vast array of other violent crimes–can be forgiven if they think that the federal criminal justice system minimizes their losses. No doubt § 924(c) is motivated by the best of intentions–to prevent criminal victimization. But the statute pursues that goal in a way that effectively sends a message to victims of actual criminal violence that their suffering is not fully considered by the system.

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[111] *United States v. Visinaiz*, No. 2:03-CR-701-PGC.

[112] U.S.S.G. § 2A1.2 (offense level of 33) + § 3A1.1(b) (two-level increase for vulnerable victim) + § 3C1.1 (two-level increase for obstruction of justice).

Another reason for concern is that the unjust penalties imposed by § 924(c) can be expected to attract public notice. As shown earlier, applying § 924(c) to cases such as this one leads to sentences far in excess of what the public believes is appropriate. Perhaps in the short term, no ill effects will come from the difference between public expectations and actual sentences. But in the longer term, the federal criminal justice system will suffer. Most seriously, jurors may stop voting to convict drug dealers in federal criminal prosecutions if they are aware that unjust punishment may follow. It only takes a single juror who is worried about unjust sentencing to "hang" a jury and prevent a conviction. This is not an abstract concern. In the case of *United States v. Molina*[113] the jury failed to reach a verdict on a § 924(c) count which would have added 30 years to the defendant's sentence. Judge Weinstein, commenting on "the dubious state of our criminal sentencing law"[114] noted that "[j]ury nullification of sentences deemed too harsh is increasingly reflected in refusals to convict."[115] In the last several drug trials before this court, jurors have privately expressed considerable concern after their verdicts about what sentences might be imposed. If federal juries are to continue to convict the guilty, those juries must have confidence that just punishment will follow from their verdicts.

C. Justifications for § 924(c)

Given these many problems with § 924(c) as applied to this case – its imposition of unjust punishment, its irrational classifications between offenses and offenders, and its demeaning of

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[113] 963 F.Supp. 213 (E.D.N.Y. 1997).

[114] *Id*. at 213.

[115] *Id*. at 214.

victims of actual criminal violence – what can be said on behalf of the statute? The Sentencing Commission has catalogued the six rationales that are said to undergird mandatory sentencing schemes such as § 924(c):

> (1) Assuring "just" (i.e. appropriately severe) punishment, (2) elimination of sentence disparities, (3) judicial economies resulting from increased pressure on defendants to plead guilty, (4) stronger inducements for knowledgeable offenders to cooperate in the investigation of others, (5) more effective deterrence, and (6) more effective incapacitation of the serious offender.[116]

These six justifications potentially apply to § 924(c), and the court will consider them as they are advanced by the government.

In its skillfully-argued defense of the § 924(c) sentence here, the government does not rely on the first rationale – the "just punishment" rationale – presumably because the sentence to be imposed on Mr. Angelos appears to be unjust by any reasonable objective measure.

Nor does the government advance the second rationale: that § 924(c) eliminates sentence disparities. Again, the reasons are easy to see. Section 924(c) displaces a carefully-developed sentencing guideline system that would assure that Mr. Angelos receives equal punishment with other similarly-placed offenders. Indeed, § 924(c) creates the potential for tremendous sentencing disparity if federal prosecutors across the country do not uniformly charge § 924(c) violations. Such concerns are founded in real world data. In 1991, the Sentencing Commission found that only about 45 percent of drug offenders who qualified for a § 924(c) enhancement were initially charged under the statute, and for 26 percent of these offenders the counts were later dismissed.[117] In 1995, the

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[116] SENTENCING COMM. MANDATORY MINIMUM REPORT, *supra*, at 5-15.

[117] *See* SENTENCING COMM. MANDATORY MINIMUM REPORT at 57-58.

Commission again found that only a minority of qualified offenders–between 24 and 44 percent–were convicted and sentenced for applicable § 924(c)'s.[118] Again in 2000, the Commission found a pattern of inconsistent application. Only between 10 and 30 percent of drug offenders who personally used, carried, or possessed a weapon in furtherance of a crime received the statutory enhancement.[119]

The Justice Department has recently taken partial steps to reduce charging disparities stemming from § 924(c). A directive from the Attorney General – the so-called "Ashcroft Memorandum" – requires that prosecutors shall file the first readily provable § 924(c) count and a second count in certain circumstances:

> (i) In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued.
>
> (ii) In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are *crimes of violence*, federal prosecutors shall, in all but exceptional cases, charge and pursue the first *two* such violations.[120]

As applied to the facts of this case, the Ashcroft Memorandum seems only to highlight the problem of disparity rather than resolve it. First, when three or more violations of § 924(c) are involved, the directive requires federal prosecutors to "pursue the first *two* violations." In this case,

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[118] *See* Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41 (2000).

[119] Statement of John R. Steer to the ABA Justice Kennedy Commission, *supra*, at 17.

[120] Mem. to All Federal Prosecutors from A.G. John Ashcroft Re: Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing at 4 (Sept. 22, 2003) (emphases added).

the prosecutors pursued *five* violations, ultimately obtaining convictions on *three*. It seems likely that the prosecutors' charging decisions in this case would not have been replicated in other parts of the country. Second, the directive requires federal prosecutors to pursue at least two § 924(c) counts when the predicate offenses are "crimes of violence." Here, the predicates were drug crimes, which the directive does not discuss. Thus, the directive offers no guidance as to whether the prosecutors handling this case should have pursued multiple § 924(c) counts and, if so, how many.

There is also a lack of guidance to federal agents investigating these crimes. In this case, for example, the government did not arrest Mr. Angelos immediately after the first "controlled buy," but instead arranged two more such buys, which then produced one of the additional § 924(c) counts. It is not clear to the court that other law enforcement agents would have allowed Mr. Angelos to continue to deal drugs after the first buy rather than taking him into custody immediately. Of course, one of the rationales for the "stacking" feature of § 924(c) is that each additional criminal act demonstrates need for further deterrence. In this case, though, the additional criminal acts were in some sense procured by the government.

Because of the lack of guidance on these prosecutory and investigative issues, Mr. Angelos is probably receiving a sentence far in excess of what many other identically-situated offenders will receive for identical crimes in other federal districts. The court has been advised by judges from other parts of the country that, in their districts, an offender like Mr. Angelos would not have been charged with multiple § 924(c) counts. This is no trivial matter. The decision to pursue, for example, a third § 924(c) count in this case makes the difference between a 36-year-sentence and 61-year sentence. In short, § 924(c) as applied in this case seems to create the serious risk of massive

sentencing disparity between identically-situated offenders within the federal system. And the problem of disparity only worsens if we acknowledge the fact that Mr. Angelos would not have been charged with federal crimes in many other states. For all these reasons, the government could not plausibly defend § 924(c) on an eliminating-disparity rationale.

The government has also not advanced the third rationale – judicial economies resulting from increased pressure on defendants to plead guilty. Here again, it is possible to understand the government's reluctance. While it is constitutionally permissible for the government to threaten to file enhanced charges against a defendant who fails to plead guilty,[121] there is always the nagging suspicion that the practice is unseemly. In this case, for example, the government initially offered Mr. Angelos a plea bargain in which he would receive a fifteen-year-sentence under one § 924(c) count. When he had the temerity to decline, the government filed superseding indictments adding four additional § 924(c) counts. So far as the court can determine, the superceding indictment rested not on any newly-discovered evidenced but rather solely on the defendant's unwillingness to plead guilty. Moreover, if its plea-inducing properties justify § 924(c), then it is important to understand who will be induced to plead. Section 924(c) will not visit its harsh punishment "on flagrantly guilty repeat offenders (who avoid the mandatory by their guilty pleas), but rather on first offenders in borderline situations (who may have plausible defenses and are more likely to insist upon trial)."[122]

For all these reasons, it is understandable that the government would not want to publicly

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[121] *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

[122] Stephen J. Schullhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 203 (1993).

defend § 924(c) with the plea-inducing argument, even though given the realities of overworked prosecutors this may provide a true justification for the statute. Nor has the government argued that § 924(c) is needed to provide incentives for drug traffickers to inform on others in their organization.[123] Instead, the rationale advanced by government is deterrence and incapacitation: the draconian provisions of § 924(c) are necessary to deter drug dealers from committing crimes with those firearms and to prevent Mr. Angelos from doing so in the future.

The deterrence argument rests on a strong intuitive logic. Sending a message to drug dealers that they will serve additional time in prison if they are caught with firearms may lead some to avoid firearms entirely and others to leave their firearms at home. The Supreme Court has specifically noted "the deterrence rationale of § 924(c),"[124] explaining that a fundamental purpose behind § 924(c) was to combat the dangerous combination of drugs and firearms.[125] Congress is certainly entitled to legislate based on the belief that § 924(c) will "persuade the man tempted to commit a Federal felony to leave his gun at home."[126]

Congress' belief is, moreover, supported by empirical evidence. Generally criminologists believe that an increase in prison populations will reduce crime through both a deterrent and incapacitative effect. The consensus view appears to be that each 10% increase in the prison

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[123] *Cf.* Jay Apperson, *The Lock-'em Up Debate: What Prosecutors Know: Mandatory Minimums Work*, WASH. POST, Feb. 27, 1994 at C1.

[124] *Simpson*, 435 U.S. at 14.

[125] *Smith v. United States*, 508 U.S. 223, 240 (1993).

[126] 114 CONG. REC. 22, 231-48 (1968) (Statement of Rep. Poff).

population produces about a 1% to 3% decrease in serious crimes.[127] For example, one recent study concluded that California's three strikes law prevented 8 murders, 4000 aggravated assaults, 10,000 robberies, and 400,000 burglaries in its first two years of operation.[128] One study found that Congress' financial incentives to states to which (like the federal system) force violent offenders to serve 85% of their sentences decreased murders by 16%, aggravated assaults by 12%, robberies by 24%, rapes by 12%, and larcenies by 3%. While offenders "substituted" into less harmful property crimes, the overall reduction in crime was significant.[129] While no specific study has examined § 924(c), it is reasonable to assume – and Congress is entitled to assume – that it has prevented some serious drug and firearms offenses.

The problem with the deterrence argument, however, is that it proves too much. A statute that provides mandatory life sentences for jaywalking or petty theft would, no doubt, deter those offenses. But it would be hard to view such hypothetical statutes as resting on rational premises. Moreover, a mandatory life sentence for petty theft, for example, would raise the question of why such penalties were not in place for aircraft hijacking, second-degree murder, rape, and other serious crimes. Finally, deterrence comes at a price. Given that holding a person in federal prison costs

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[127] *See, e.g.,* Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319 (1996); James Q. Wilson, *Prisons in a Free Society*, 117 PUB. INTEREST 37, 38 (1998).

[128] *See, e.g.,* Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002).

[129] Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509 (2002).

about $23,000 per year,[130] the 61-year-sentence the court is being asked to impose in this case will cost the taxpayers (even assuming Mr. Angelos receives good time credit and serves "only" 55-years) about $1,265,000. Spending more than a million dollars to incarcerate Mr. Angelos will prevent future crimes by him and may well deter some others from being involved with drugs and guns. But that money could also be spent on other law enforcement or social programs that in all likelihood would produce greater reductions in crime and victimization.[131]

If the court were to evaluate these competing tradeoffs, it would conclude that stacking § 924(c) counts on top of each other for first-time drug offenders who have merely possessed firearms is not a cost-effective way of obtaining deterrence. It is not enough to simply be "tough" on crime. Given limited resources in our society, we also have to be "smart" in the way we allocate our resources. But these tradeoffs are the subject of reasonable debate. It is not the proper business of the court to second-guess the congressional judgment that § 924(c) is a wise investment of resources. Instead, in conducting rational basis review of the statute, the court is only to determine whether "any ground can be conceived to justify [the statutory scheme] as rationally related to a legitimate government interest."[132] "Where there are 'plausible reasons' for Congress' action, [the court's] inquiry is at an end."[133] In *Busic* referring to *Simpson*, the Supreme Court recognized that § 924(c)

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[130] MEMORANDUM TO ALL CHIEF PROBATION OFFICERS FROM THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS REGARDING COSTS OF INCARCERATION AND SUPERVISION (March 31, 2004).

[131] *See* John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27J. LEGAL STUD. 1 (1998)

[132] *Lee*, 957 F.2d at 782 citing *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[133] *Beach Communications*, 508 U.S. at 313-14.

could lead to "seemingly unreasonable comparative sentences" but that "[i]f corrective action is needed it is the Congress that must provide it. It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated."[134] The Court further noted that "in our constitutional system the commitment to separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'commonsense and the public weal.'"[135]

Accordingly, the court reluctantly concludes that § 924(c) survives rational basis scrutiny. While it imposes unjust punishment and creates irrational classifications, there is a "plausible reason" for Congress' action. As a result, this court's obligation is to follow the law and to reject Mr. Angelos' equal protection challenge to the statute.

IV. Cruel and Unusual Punishment

In addition to raising an equal protection argument, Mr. Angelos also argues that his 55-year sentence under § 924(c) violates the Eighth Amendment's prohibition of cruel and unusual punishment. In this argument, he is joined in an *amicus* brief filed by a distinguished group of 29 former United States District Judges, United States Circuit Court Judges, and United States

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[134] *Busic,* 446 U.S. at 405 citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

[135] *Id*. at 410.

Attorneys,[136] who draw on their expertise in federal criminal law and federal sentencing issues to urge that the sentence is unconstitutional as disproportionate to the offenses at hand.

Mr. Angelos and his supporting *amici* are correct in urging that controlling Eighth Amendment case law places an outer limit on punishments that can be imposed for criminal offenses, forbidding penalties that are grossly disproportionate to any offense. This principle traces its roots to the Supreme Court's 1983 decision in *Solem v. Helm*,[137] in which the Supreme Court seemed to modify its earlier holding in *Rummel v. Estelle*[138] and "h[e]ld as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."[139] The principles of *Solem* were themselves seemingly modified by the Court's fractured 1991 decision in *Harmelin v. Michigan*,[140] in which the Court held that imposition of a life sentence without possibility of parole for possession of 650 grams of cocaine did not violate the Eighth Amendment. Then, last year, the Supreme Court confirmed that the gross disproportionality

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[136] Buck Buchanan, Zachary W. Carter, Robert J. Cindrich, Robert J. Cleary, Veronica F. Coleman-Davis, Robert J. Del Tufo, W. Thomas Dillard, John J. Gibbons, Saul A. Green, J. Alan Johnson, James E. Johnson, Gaynelle Griffin Jones, Nathaniel R. Jones, Nicholas Katzenbach, Timothy K. Lewis, Andrew J. Maloney, John S. Martin Jr., William A. Norris, Denise E. O'Donnell, Stephen M. Orlofsky, A. John Pappalardo, James G. Richmond, Benito Romano, Stanley J. Roszkowski, Herbert J. Stern, Harold R. Tyler Jr., Ronald Woods, Sharon J. Zealey, Donald E. Ziegler.

[137] 463 U.S. 277 (1983).

[138] 445 U.S. 263 (1980).

[139] *Id.* at 289.

[140] 501 U.S. 957 (1991).

principle – "the precise contours of which are unclear"[141] – is applicable to sentences for terms of years; that there was a "lack of clarity" in its precedents;[142] that it had "not established a clear or consistent path for courts to follow;"[143] and that the proportionality principles from Justice Kennedy's *Harmelin* concurrence "guide our application of the Eighth Amendment."[144] The Tenth Circuit, too, has instructed that "Justice Kennedy's opinion controls because it both retains proportionality and narrows *Solem*."[145]

In light of these controlling holdings, the court must engage in a proportionality analysis guided by factors outlined in Justice Kennedy's *Harmelin* concurrence. In particular, the court must examine (1) the nature of the crime and its relation to the punishment imposed, (2) the punishment for other offenses in this jurisdiction, and (3) the punishment for similar offenses in other jurisdictions.

Before turning to these *Harmelin* factors, it is important to emphasize that the criminal conduct at issue is solely that covered by the three § 924(c) counts. Mr. Angelos will be fully and appropriately punished for all other criminal conduct from the sentence on these other counts. Thus, the proportionality question in this case boils down to whether the 55-year sentence is November 16,

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[141] *Lockyer v. Andrade*, 538 U.S. 63, 64 (2003).

[142] *Id.* at 74 n.1 (2003).

[143] *Id.* at 72-73.

[144] *Ewing v. California*, 538 U.S. 11, 23-24 (2003) (O'Connor, J.).

[145] *See Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999), *cert. denied*, 531 U.S. 830 (2000).

2004 disproportionate to the offense of carrying or possessing firearms three times in connection with dealing marijuana.

A. Mr. Angelos' Offenses and the Contemplated Penalty

The first *Harmelin* factor requires the court to compare the seriousness of the three § 924(c) offenses to the harshness of the contemplated penalty to determine if the penalty would be grossly disproportionate to such offenses. In weighing the gravity of the offenses, the court should consider the offenses of conviction and the defendant's criminal history,[146] as well as "the harm caused or threatened to the victim or society, and the culpability of the offender."[147] Simply put, "[d]isproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender."[148]

The criminal history in this case is easy to describe. Mr. Angelos has no prior adult criminal convictions and is treated as a first-time offender under the Sentencing Guidelines.

The sentence-triggering criminal conduct in this case is also modest. Here, on two occasions while selling small amounts of marijuana, Mr. Angelos possessed a handgun under his clothing, but he never brandished or used the handgun. The third relevant crime occurred when the police searched his home and found handguns in his residence. These handguns had multiple purposes –

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[146] *See Ewing*, 538 U.S. at 29 (O'Connor, J.).

[147] *Solem*, 463 U.S. at 292-294.

[148] *Id*. at 288.

including recreational activities – but because Mr. Angelos also used the gun to protect himself while dealing drugs, the possession of these handguns is also covered by § 924(c).[149]

Mr. Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person. It is well-established that crimes marked by violence or threat of violence are more serious[150] and that the absence of direct violence affects the strength of society's interest in punishing a particular criminal.[151]

It is relevant on this point that the Sentencing Commission has reviewed crimes like Mr. Angelos' and concluded that an appropriate penalty for all of Mr. Angelos' crimes is no more than about ten years (121 months).[152] With respect to the firearms conduct specifically, the Commission has concluded that about 24 months (a two-level enhancement) is the appropriate penalty.[153] The views of the Commission are entitled to special weight, because it is a congressionally-established expert agency which can draw on significant data and other resources in determining appropriate sentences. Comparing a recommended sentence of two years to the 55-year enhancement the court must impose strongly suggests not merely disproportionality, but gross disproportionality.

B. Comparison to Penalties for Other Offenses

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[149] *See* PSR ¶ 73.

[150] *See Solem*, 463 U.S. at 292-293.

[151] *See Rummel*, 445 U.S. at 275.

[152] *See* Part III.B.2, *supra.*

[153] *See id.*

The next *Harmelin* factor requires comparing Mr. Angelos' sentence with the sentences imposed on other criminals in the federal system.[154] Generally, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."[155] This factor points strongly in favor of finding that the sentence in this case is excessive. As shown in Tables I and II earlier in this opinion, Mr. Angelos will receive a far longer sentence than those imposed in the federal system for such major crimes as aircraft hijacking, second-degree murder, racial beating inflicting life-threatening injuries, kidnapping, and rape. Indeed, Mr. Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second-degree murders, three racial beatings inflicting life-threatening injuries, three kidnappings, and three rapes. Because Mr. Angelos is "treated in the same manner as, or more severely than, criminals who have committed far more serious crimes,"[156] it appears that the second factor is satisfied.

C. Comparison to Other Jurisdictions

The final *Harmelin* factor requires the court to examine "sentences imposed for the same crime in other jurisdictions."[157] Evaluating this factor is also straightforward. Mr. Angelos sentence is longer than he would receive in any of the fifty states. The government commendably concedes this point in its brief, pointing out that in Washington State Mr. Angelos would serve about nine

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[154] *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring).

[155] *Solem*, 463 U.S. at 291.

[156] *Id.* at 299.

[157] *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

years and in Utah would serve about five to seven years.[158] Accordingly, the court finds that the third factor is satisfied.

D. Application of the *Harmelin* Factors in Light of *Davis*

Having analyzed the three *Harmelin* factors, the court believes that they lead to the conclusion that Mr. Angelos' sentence violates the Eighth Amendment. But before the court declares the sentence unconstitutional, there is one last obstacle to overcome. The court is keenly aware of its obligation to follow precedent from superior courts – specifically the Tenth Circuit and, of course, the Supreme Court. The Supreme Court has considered one case that might be regarded as quite similar to this one. In *Hutto v. Davis*,[159] the Supreme Court held that two consecutive twenty-year sentences – totaling forty years – for possession of nine ounces of marijuana said to be worth $200 did not violate the Eighth Amendment. If *Davis* remains good law, it is hard see how the sentence in this case violates the Eighth Amendment. Here, Mr. Angelos was involved in at least two marijuana deals involving $700 and approximately sixteen ounces (one pound) of marijuana. Perhaps currency inflation could equate $700 today with $200 in the 1980's. But as a simple matter of arithmetic, if 40 years in prison for possessing nine ounces marijuana does not violate the Eighth Amendment, it is hard to see how 61 years for distributing sixteen ounces (or more) would do so.

The court is aware of an argument that the 1982 *Davis* decision has been implicitly overruled or narrowed by the 1983 *Solem* decision and other more recent pronouncements. For example,

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[158] Government's Resp. Mem. Re: Constitutionality of Mandatory Minimum Sentences Pursuant to 18 U.S.C. § 924(c) at 23.

[159] 454 U.S. 370 (1982).

Justice Kennedy's concurring opinion in *Harmelin*, explained that "[o]ur most recent pronouncement on the subject in *Solem* appeared to apply a different analysis than in . . . *Davis.*"[160] But the Court apparently continues to view *Davis* as part of the fabric of the law. Thus, Justice Kennedy's concurrence in *Harmelin*, after noting the seeming overruling of *Davis*, went on to discuss *Davis* along with other cases in distilling various "common principles" that control Eighth Amendment analysis.[161] Justice Kennedy also explained in Harmelin that his approach "takes full account of . . . *Davis*, [a] case[] ignored by the dissent."[162] More recently, in reviewing California's "three strikes" legislation last year, the plurality opinion reviewed *Davis* as one of a string of cases that guide analysis of Eighth Amendment challenges.[163]

In light of these continued references to *Davis*, the court believes it is it obligated to follow its holding here. Indeed, in *Davis* the Supreme Court pointedly reminded district court judges that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts . . . ."[164] Under *Davis*, Mr. Angelos' sentence is not cruel and unusual punishment. Therefore, his Eighth Amendment challenge must be rejected.

V. Calculating the Sentence

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[160] 501 U.S. at 997 (Kennedy, J., concurring).

[161] *Id.* at 998 (Kennedy, J., concurring); *see also id.* at 1004, 1005 (Kennedy, J., concurring).

[162] *Id.* at 1005 (Kennedy, J., concurring).

[163] *Ewing*, 538 U.S. at 21 (O'Connor, J.).

[164] *Davis*, 454 U.S. at 375.

With Mr. Angelos' constitutional challenges to the 55-year sentence on § 924(c) counts resolved, the remaining issue before the court is the sentence to be imposed on the other counts. Mr. Angelos raises a constitutional challenge to the 78-97 month sentence called for by the Sentencing Guidelines for his thirteen other offenses. He notes that the Guidelines calculation rests on enhancements that were never submitted to the jury, in particular enhancements based on the quantity of drugs involved and the amount of money laundered. Under this court's decision in *United States v. Croxford*[165] interpreting *Blakely v. Washington*,[166] these enhancements extend the maximum penalty that can be imposed on Mr. Angelos beyond that supported by the jury's verdict. *Croxford* explains that the Sixth Amendment as interpreted in *Blakely* requires jury fact-finding on such issues as drug quantities and dollar values. The court therefore holds that the Guidelines are unconstitutional as applied to Mr. Angelos.

Without the Guidelines, the court is free to make its own determination of what is an appropriate sentence for these thirteen offenses. In making that determination, the court consults the Guidelines as instructive but not binding.[167] If the sentence on these thirteen counts was the only sentence that Mr. Angelos would serve, a sentence of about 78-97 months might well be appropriate. But the court cannot ignore the reality that Mr. Angelos will also be sentenced to 55 years on the § 924(c) counts, far in excess of what is just punishment for all of his crimes. In light of this 55-year

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[165] 324 F. Supp.2d 1230 (D. Utah 2004); *see also United States v. Booker*, 125 S.Ct. 11 (2004)(granting certiorari to review this issue).

[166] 124 S.Ct. 2531 (2004).

[167] *See Croxford*, 324 F. Supp.2d at 1248.

sentence, and having considered all of the relevant factors listed in the Sentencing Reform Act,[168] the court will impose a sentence of one day in prison for all offenses other than the § 924(c) counts. Lest anyone think that this is a "soft" sentence, in combination with the § 924(c) counts, the result is that Mr. Angelos will not walk outside of prison until after he reaches the age of 70.

Not content with a mere 55-year sentence in this case, the government argues that the court may not depart downward from the Guidelines simply because of the penalties imposed by the § 924(c) counts. Its argument rests on *United States v. Thornburgh*,[169] in which the Tenth Circuit found it was an abuse of discretion for a district court to depart from the Guidelines because of the harsh effects of § 924(c). But for the reasons articulated in *Croxford*, the Guidelines no longer bind the court in this case. Therefore, the court need not "depart" from the Guidelines to impose a one-day sentence, and thus the analysis of departures in *Thornburgh* is not controlling in this case.

VI. Recommendations to Other Branches of Government

Having disposed of the legal arguments in this case, it seems appropriate to make some concluding, personal observations. I have been on the bench for nearly two-and-half years now. During that time, I have sentenced several hundred offenders under the Sentencing Guidelines and federal mandatory minimum statutes. By and large, the sentences I have been required to impose have been tough but fair. In a few cases, to be sure, I have felt that either the Guidelines or the mandatory minimums produced excessive punishment. But even in those cases, the sentences seemed to be within the realm of reason.

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[168] 18 U.S.C. § 3553(a) (listing factors to be considering in imposing sentence).

[169] 7 F.3d 1471 (10th Cir. 1993).

This case is different. It involves a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders–including violent offenders and even a murderer–who have been before me. For the reasons explained in my opinion, I am legally obligated to impose this sentence. But I feel ethically obligated to bring this injustice to the attention of those who are in a position to do something about it.

A. Recommendation for Executive Commutation

For all the reasons previously given, an additional 55-year sentence for Mr. Angelos under § 924(c) is unjust, disproportionate to his offense, demeaning to victims of actual criminal violence–but nonetheless constitutional. While I must impose the unjust sentence, our system of separated powers provides a means of redress. The Framers were well aware that "[t]he administration of justice . . . is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt."[170] In my mind, this is one of those rare cases where the system has malfunctioned. "To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments."[171] Under our Constitution, the President has "the Power to grant Reprieves and Pardons for Offenses against the United States . . . ."[172] One of the purposes of executive clemency is "to afford relief from undue harshness."[173] This power is

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[170] *Ex parte Grossman*, 267 U.S. 87, 120 (1925).

[171] *Id*. at 121.

[172] U.S. CONST., art. I, § 2.

[173] *Id*.

absolute. "The executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress."[174]

Given that the President has the exclusive power to commute sentences, the question arises as to whether I have any role to play in commutation decisions, *i.e.*, is it appropriate for me to make a commutation recommendation to the President. Having carefully reviewed the issue, I believe that such a recommendation is entirely proper. The President presumably wants the fullest array of information regarding cases in which a commutation might be appropriate. Moreover, the Executive Branch has indicated that it actively solicits the views of sentencing judges on pardon and commutation requests. The Office of the Pardon Attorney in the Department of Justice is responsible for handling requests for pardons and commutations. According to the U.S. Attorney's Manual Standards for Consideration of Clemency Petitions, the Pardon Attorney "routinely requests . . . the views and recommendations of the sentencing judge" on any request for commutation.[175]

I therefore believe that it is appropriate for me to communicate to the President, through the Office of the Pardon Attorney, my views regarding Mr. Angelos' sentence. I recommend that the President commute Mr. Angelos' sentence to a prison term of no more than 18 years, the average sentence recommended by the jury that heard this case.[176] The court agrees with the jury that this is an appropriate sentence in this matter in light of all of the other facts discussed in this opinion.

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[174] *Ex parte Grossman*, 267 U.S. at 120.

[175] U.S. Attorney's Manual § 1-2.111, available at www.usdoj.gov/pardon/petitions.htm.

[176] *See* Part III. B.2, *supra*.

The Clerk's Office is directed to forward a copy of this opinion with its commutation recommendation to the Office of Pardon Attorney.

B. Recommendation for Legislative Reform

While a Presidential commutation of Mr. Angelos' sentence would resolve his particular case, § 924(c) remains in place and will continue to create injustices in future cases. For the reasons explained in this opinion, the problem stems from the count stacking features of mandatory minimum sentences. In our system of separate powers, general correction of this problem lies in the hands of Congress which is possessed of the "legislative powers" granted in the Constitution.[177]

Again, the question arises regarding whether it is appropriate for me to communicate with Congress regarding apparent problems that have arisen in applying the mandatory minimums in this case. Having carefully studied the issue, I conclude that such a communication is proper. As Judge Calabresi on the Second Circuit has noted, "[t]he tradition of courts engaging in dialogue with legislatures is too well-established in this and other courts to disregard."[178] Presumably Congress no less than the President desires feedback on how its statutes are operating. Congress also presumably wants to be informed in situations where its mandates are producing adverse effects, such as demeaning crime victims or risking a possible backlash from citizen juries.

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[177] U.S. CONST., art. I § 1.

[178] *United States v. Then*, 56 F.3d 464, 466 (2nd Cir. 1995) (Calabresi J., concurring) (citing *Computer Associates Intern., Inc., v. Altai, Inc.*, 982 F.2d 693, 712 (2nd Cir. 1992) (exhorting Congress to resolve an issue); *Brock on behalf of Williams v. Peabody Coal Co.*, 822 F.2d 1134, 1152-53 (D.C. Cir. 1987) (Ginsburg, J., concurring) (stating that "Congressional attention to this matter may well be in order").

Justice Anthony Kennedy recently commented on the roles of courts and legislatures in specific reference to mandatory minimums:

> The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just . . . A court decision does not excuse the political branches or the public from the responsibility for unjust laws.[179]

This court deals with sentencing matters on a daily basis and feels in a unique position to advise Congress on such matters. Congress itself has recognized the expertise of the judiciary in matters of sentencing by placing the Sentencing Commission in the judicial branch of government. As the Supreme Court noted in *Mistretta v. United States*,[180] "sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment . . . . Congress placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise."[181]

For all these reasons, it is appropriate for me to communicate with Congress concerning the need for legislative reform. I express no view on mandatory minimum sentencing schemes in general. But for the reasons discussed in this opinion, one particular feature of the federal scheme – the "count stacking" feature of § 924(c) for first-time offenders – has lead to an unjust result in this

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[179] Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting, at 4 (Aug. 9, 2003) *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08_09_03.html (last visited November 16, 2004).

[180] 488 U.S. 361 (1989).

[181] *Id*. at 396.

case and will lead to unjust results in other cases. Particularly in cases (like this one) that do not involve direct violence, Congress should consider repealing this feature and making § 924(c) a true recidivist statute of the three-strikes-and-you're-out variety. In other words, Congress should consider applying the second and subsequent § 924(c) enhancements only to defendants who have been previously convicted of a serious offense, rather than to first-time offenders like Mr. Angelos. This is an approach to § 924(c) that the Tenth Circuit[182] and Justices Stevens, O'Connor, and Blackmun[183] believed Congress intended. It is an approach to sentencing that makes good sense. The Clerk's Office is directed to forward a copy of this opinion to the Chair and Ranking Member of the House and Senate Judiciary Committees.

CONCLUSION

The 55-year sentence mandated by § 924(c) in this case appears to be unjust, cruel, and irrational. But our constitutional system of government requires the court to follow the law, not its own personal views about what the law ought to be. Perhaps the court has overlooked some legal point, and that the appellate courts will find Mr. Angelos' sentence invalid. But applying the law as the court understands it, the court sentences Mr. Angelos to serve a term of imprisonment of 55 years and one day. The court recommends that the President commute this unjust sentence and that

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[182] *United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987).

[183] *United States v. Deal*, 508 U.S. at 137 (Stevens, J., dissenting).

the Congress modify the laws that produced it. The Clerk's Office is directed to forward a copy of this opinion with its commutation recommendation to the Office of Pardon Attorney and to the Chair and Ranking Member of the House and Senate Judiciary Committees.

DATED this 16th day of November, 2004.

BY THE COURT:

/S/
Paul G. Cassell
United States District Judge

tsh

United States District Court
for the
District of Utah
November 16, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cr-00708

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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Appendix B

Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum of Law in Support

Angelos v. United States, No. 2:07-cv-00936-TC (D. Utah)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

WELDON H. ANGELOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND MEMORANDUM OF LAW IN SUPPORT

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OTHER AUTHORITIES

Weldon H. Angelos, by and through counsel, submits this Motion and supporting Memorandum pursuant to 28 U.S.C. § 2255, and respectfully moves the Court to vacate, set aside, or otherwise correct his sentence as unlawful and unconstitutional under the Second, Fifth, Sixth, and Eighth Amendments to the United States Constitution.

INTRODUCTION

Weldon Angelos, a 28-year-old man from Salt Lake City, is a son, a brother, a father, a music industry executive, and has now been a federal prisoner for nearly four years. In 2002, Angelos had never been in trouble with the law as an adult, but he was a petty marijuana dealer. As a result of three sales of small amounts of marijuana to a paid informant and the suspect charging decisions by federal prosecutors, Angelos received a 55-year sentence that highlights the most unjust and arbitrary aspects of the federal criminal justice system and mandatory minimum sentencing provisions.

The district court at Angelos's sentencing described the 55-year sentence as "unjust, cruel, and irrational." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004). Yet the district court, hamstrung by the prosecutors' suspect charging decisions, felt compelled by statute to impose this extreme sentence. As explained in detail below, Angelos contends his sentence is unlawful under relevant constitutional doctrines. In addition, new evidence and other developments (a) prompt serious doubts about Angelos's guilt on key charges, (b) document the ineffectiveness of his trial counsel and the extreme behavior of prosecutors, and (c) raise new constitutional issues to be adjudged through this motion. Because some factual matters should be further investigated, Angelos respectfully requests an evidentiary hearing and the opportunity to conduct discovery in conjunction with his claims.

In short, based on procedural flaws in his prosecution and the substantive excessiveness of his punishment, Angelos contends that his 55-year prison sentence for minor marijuana sales transgressed due process, fair justice and proportionality principles reflected in the Fifth, Sixth and Eighth Amendments. In 2004, the district court recognized (but failed to vindicate) some of the constitutional principles undermined through Angelos's prosecution and sentencing. Three years later it now is even more evident – especially given significant new legal developments – that Angelos's extreme sentence is contrary to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

FACTUAL AND PROCEDURAL BACKGROUND

Weldon H. Angelos was born on July 16, 1979. Raised in the Salt Lake City, Utah area by a firearm aficionado, his father James Angelos, Weldon was immersed in the gun culture at an early age and legally acquired various firearms as an adult. 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, Anthony and Jesse, and he had no adult criminal record prior to his arrest in the underlying action. At present, Angelos is housed at a federal prison in southern California; he has already served nearly four years of his extreme sentence and is not scheduled to be released from custody until roughly 2058.

The events leading to the investigation and prosecution of Angelos began in spring 2002, when Ronnie Lazalde was facing serious drug and firearm charges. Seeking to curry favor with the government, Lazalde offered to become an informant; then, after falsely accusing Angelos of being a major drug trafficker, informant Lazalde contacted Angelos in an effort to engineer significant transactions involving cocaine and weapons. However, because Angelos was just a

petty marijuana dealer, the only transactions ever arranged were three hand-to-hand sales from Angelos to Lazalde of eight ounces of marijuana for $350.

The first small marijuana transaction 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. Realizing he had dropped his keys in Angelos's car, informant Lazalde returned to the car to get his keys and then met up with law enforcement. Official surveillance did not reveal the presence of any weapon during this encounter, and the initial police report based on the original debriefing of informant Lazalde did not reflect any statement by Lazalde concerning the presence of a weapon during this transaction.[1]

The next small marijuana transaction was another uneventful hand-to-hand controlled buy during the day 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. Once again, the official surveillance and initial police report, which reflected the initial debriefing of informant Lazalde, did not indicate the presence of a weapon during this transaction. The final small marijuana transaction occurred under the same basic circumstances on June 18, 2002. Again, there was no evidence or mention of any weapons involved in this transaction.

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[1] Notably, had federal authorities arrested and prosecuted Angelos after the first transaction they engineered, Angelos would have faced a relatively short prison sentence and a term of supervised release, and his petty marijuana dealing would have come to a quick end. However, apparently because informant Lazalde had convinced federal authorities that Angelos was a major drug trafficker, the government chose to engineer additional marijuana deals with Angelos. *See Angelos*, 345 F. Supp. 2d at 1253 (highlighting that Angelos faced a long sentence because of "additional criminal acts [that] were in some sense procured by the government").

Throughout their encounters, informant Lazalde repeatedly asked Angelos to become involved in transactions involving other drugs and weapons. Angelos explained to Lazalde that he only was selling small quantities of marijuana. When Lazalde continued to urge involvement in other crimes, Angelos refused to interact with him any further.

In July 2002, informant Lazalde learned that Angelos had been cited on July 10 for carrying a concealed weapon in an ankle holster. Disconcertingly, after informant Lazalde reported this incident to his law enforcements contacts, Detective Jason Mazuran added a new entry dated October 30, 2002 to police reports in order to indicate that Angelos had been in possession of a firearm during the first two marijuana transactions discussed above.

Following the revision of police reports to include allegations of the involvement of a weapon, 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. 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 safely stored in a locked gun safe. A search of the home of Angelos's girlfriend also turned up bags with marijuana residue, two guns and additional cash.

The district court in its initial sentencing opinion provided this description of the plea discussions and events that transpired after Angelos's arrest:

> Plea negotiations began between the government and Mr. Angelos. On January 20, 2003, the government told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, 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. Ultimately, Mr. Angelos rejected the offer and decided to go to trial. The government then obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years. The five § 924(c) counts consisted of two counts for the Glock seen at the two controlled buys, one count for three handguns found at his home, and two more counts for the two guns found at the home of Mr. Angelos's girlfriend.

345 F. Supp. 2d at 1231-32. After the government's extreme charging decisions, Angelos attempted to re-open plea negotiations. Upon the government's refusal, the case proceeded to trial where the jury acquitted Angelos on some counts and convicted on others.[2] Included among the counts of conviction were three 924(c) gun counts for the gun informant Lazalde purportedly observed during the two hand-to-hand marijuana sales and the guns found in Angelos's home.

At the sentencing phase, the district court, after court-ordered briefing on various sentencing issues, issued a thoughtful opinion criticizing the extreme sentence it believed it was required to impose. While appealing to other branches to correct an obvious injustice,[3] Judge Paul Cassell begrudgingly sentenced Weldon Angelos to 55 years and one day in prison. The composition of the ultimate sentence was 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).

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. *See* 433 F.3d 738 (10th Cir. 2006). Angelos filed a petition for rehearing *en banc*, which was denied

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[2] The trial court also dismissed one minor count.

[3] In his opinion, Judge Cassell strongly recommended some form of executive commutation and a legislative reform to remedy the injustice suffered by Angelos. *See* 345 F. Supp. 2d at 1261-62

on April 4, 2006. Angelos's petition for a writ of certiorari to the U.S. Supreme Court was denied on December 4, 2006. Angelos now comes before this Court pursuant to 28 U.S.C. § 2255 within the one-year limitations period set forth in § 2255 from "the date on which the judgment of conviction [became] final."

JURISDICTION

Pursuant to 28 U.S.C. § 2255, "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." Angelos so moves this Court on grounds that the sentence imposed based on the three stacked 924(c) counts violates the United States Constitution and is otherwise subject to collateral attack.

REVIEW STANDARDS

A motion for relief under § 2255 follows the procedures established by the "Rules Governing Section 2255 Cases in the United States District Courts" (hereinafter, the "Rules"). The text of § 2255 states that, "[u]nless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255 (emphasis added). Similarly, the Rules dictate that, upon initial consideration by the assigned District Judge, a 2255 motion should be dismissed only "if it *plainly* appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief." Rule 4(b) (emphasis added). In all other cases, "the judge must order the United States

attorney to file an answer, motion, or other response within a fixed time, or to take action the judge may order." *Id.* The Rules also authorize, where appropriate and by order of the Court, discovery proceedings, an expansion of the record, and an evidentiary hearing.

Subsequent to the "Preliminary Review" stage set out in Rule 4, the ultimate legal standard for motions brought pursuant § 2255 is prescribed by statute:

> If the court finds that . . . the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 2255.

ARGUMENTS FOR RELIEF

The story of a first-time offender sentenced to 55 years in prison for three minor marijuana sales does not sound like a realistic possibility in the American legal system. Unfortunately, this story is reality for Weldon Angelos, whose sentence reflects a culmination of injustices combining ineffective defense counsel, vindictive federal prosecutors, rigid federal sentencing doctrines, and the indecency of a criminal justice system too accustomed to extremely long prison terms. Accordingly, because numerous constitutional deprivations contributed to Angelos's fate, he is entitled to relief on the following grounds set forth in this 2255 motion.

GROUND ONE:
SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court has explained that a defendant has been deprived of his Sixth Amendment right to effective assistance if "counsel's representation fell below an objective standard of reasonableness" and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). As detailed below, there were many phases and specific failings that reveal the ineffectiveness of Angelos's trial counsel. Moreover, the simple fact that a first-offender was sentenced to 55 years in federal prison for three minor marijuana sales itself provides stark evidence that trial counsel did not provide reasonable assistance and that his failings greatly prejudiced Angelos.

Notably, recent statistics show that the vast majority of *all* felony marijuana trafficking convictions (including convictions of persons with extensive criminal histories) result in the imposition of a prison term of less than one year. *See* Ryan S. King & Marc Mauer, The Sentencing Project, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, at 23 (May 2005) (citing data from the year 2000). Against this backdrop, original defense counsel's performance seems not merely unreasonable, but grossly incompetent, because his representation allowed a relatively minor offender like Angelos to receive essentially a life sentence for his first criminal convictions. More tangibly, as detailed below, trial counsel was constitutionally ineffective at various stages and in various ways when representing Angelos.

I. Ineffective Assistance of Angelos's Counsel Before Trial

To any reasonable counsel, the facts and evidence surrounding Angelos's case would have made contesting guilt on the marijuana sales a very bad strategy. The three hand-to-hand sales were the subject of police surveillance and could be readily proven at trial. In addition, evidence found in the consensual search of Angelos's home on November 15, 2002, provided

further circumstantial evidence of his status as a marijuana dealer. Thus, competent counsel would have advised Angelos that his chief goal and desire after indictment should be to limit his sentencing exposure. Competent counsel would have also advised Angelos that a plea deal (perhaps coupled with cooperation) was the surest and most effective way to limit his sentencing exposure and to reduce the sentence he would likely receive. Moreover, competent counsel would have realized and advised Angelos that his biggest concern needed to be any 924(c) counts, because conviction on these counts mandated a lengthy prison sentence and multiple 924(c) convictions could result in a mandatory sentence of many decades, not just years.

Unfortunately, and in violation of the standards of conduct for reasonable counsel, Angelos's trial counsel did not adequately advise Angelos about the sentencing risks of going to trial or about the risks of the government charging additional 924(c) counts through a superseding indictment. In addition, in response to the initial indictment, trial counsel did not adequately negotiate with prosecutors to reasonably limit Angelos's sentencing exposure were he to plead guilty to the marijuana charges (which Angelos was prepared to do). Further, in response to the superseding indictment, trial counsel once again failed to advise Angelos and failed to competently negotiate with prosecutors to reasonably limit Angelos's sentencing exposure were he to plead guilty (which Angelos was again prepared to do). Finally, trial counsel did not adequately investigate exculpatory witnesses and failed to competently prepare a case for the defense that disputed the evidence supporting two key (and highly suspect) 924(c) counts.

A. Deficient Performance During Initial Plea Negotiations on Original Indictment

Courts have held that counsel's performance during plea bargaining stages can be constitutionally deficient for various reasons, such as basing advice to the defendant on incomplete research or recommending a defendant risk a great deal at trial in exchange for very little. *See, e.g., Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006), *cert. granted*, 76 U.S.L.W. 3238 (U.S. Nov. 5, 2007). Indeed, the Supreme Court long ago stressed that a defendant "is entitled to rely upon his counsel . . . to offer his informed opinion as to what plea should be entered," *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948), and courts of appeal have regularly found counsel's performance deficient when counsel fails to sufficiently explain and advise a client about "the substantial difference between the likely sentencing ranges upon conviction after trial and upon a guilty plea." *Cullen v. United States*, 194 F.3d 401, 403-04 (2d Cir. 1999); *see also United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994) (indicating that "an attorney's incompetent advice regarding a plea bargain [can fall] below reasonable standards of professional conduct"); *Toro v. Fairman*, 940 F.2d 1065, 1067-68 (7th Cir. 1991) (finding that misguided advice during plea stage amounted to deficient performance); *Turner v. Tennessee*, 858 F.2d 1201, 1205-06 (6th Cir. 1988) (holding that bad plea advice amounted to ineffective assistance), *vacated on other grounds*, 492 U.S. 902 (1989); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (finding that incompetent plea advice violated defendant's right to effective assistance of counsel). The Tenth Circuit has also very recently indicated "that a failure by counsel to provide advice may form the basis of a claim of ineffective assistance of counsel." *United States v. Klima*, 2007 U.S. App. LEXIS 18503, No. 07-3073, at *7 (10th Cir. Aug. 1, 2007) (quoting *United States v. Broce*, 488 U.S. 563, 574 (1989)).

Competent counsel would have realized, had he done adequate research, that the longest sentence Angelos was realistically facing based on the original indictment was less than 10 years' imprisonment even if he pled guilty without the benefit of any concessions by the government through a formal plea agreement. More specifically, the original indictment included only one 924(c) count and the marijuana charges alone would have likely yielded a guideline range of well under five years' imprisonment. Indeed, at a September 2004 sentencing hearing before the district court, counsel for the government repeatedly asserted that Angelos would have faced a sentence of just over five years' imprisonment if convicted of only one 924(c) count and one marijuana charge. *See* Transcript of Sentencing Hearing Before the Honorable Paul G. Cassell at 53, 59 (September 14, 2004) (statements of Assistant U.S. Attorney Robert A. Lund).

Consequently, Angelos's trial counsel should have realized and effectively advised Angelos: (1) that the government's "offer" to recommend 15 years' imprisonment if Angelos pled guilty to a drug distribution count and the 924(c) count in the original indictment was a threat, not a concession; (2) that prosecutors, for whatever reasons, were eager to subject Angelos to an extreme punishment involving a very long prison term; and (3) that prosecutors could greatly enhance Angelos's sentencing exposure by adding more 924(c) counts through a superseding indictment. Angelos's trial counsel did not provide this kind of advice and his failure to do so significantly prejudiced Angelos; had Angelos's trial counsel provided competent advice along these terms, Angelos would have had a better understanding of the extreme

sentencing leverage that prosecutors were seeking to exercise and he would have been better able to make a sound and sensible plea decision.[4]

The failure of Angelos's trial counsel to effectively assess and advise Angelos about the plea and sentencing dynamics based on the original indictment amounted to constitutionally deficient performance that significantly prejudiced Angelos.

B. Deficient Performance During Plea Negotiations After Superseding Indictments

After initial plea negotiations failed to produce an agreement, the government made good on its threat to seek superseding indictments that dramatically increased Angelos's sentencing exposure. Specifically, through two superseding indictments, the government added 15 new criminal counts, including four additional 924(c) counts, which collectively increased Angelos's sentencing exposure by over 100 years of imprisonment. As suggested above, competent trial counsel would have advised Angelos about the possibility that the government could and likely would subject him to new charges even in the absence of any new developments other that his decision to seek to exercise his right to a jury trial. Moreover, in response to the superseding indictments, trial counsel once again failed to advise Angelos effectively about likely sentencing ranges upon a conviction after trial and upon a plea. Trial counsel also failed to negotiate competently with prosecutors to reasonably limit Angelos's sentencing exposure were he to plead guilty (which Angelos was again prepared to do).

After trial counsel's unreasonable performance during initial plea negotiations prompted the government to dramatically "up the ante" through superseding indictments, Angelos was

[4] In light of the evidence, the soundest and most sensible plea choice that should have been suggested by counsel (and that likely would have been accepted by Angelos) would have involved Angelos pleading "blind" to the original indictment's three marijuana charges and then contesting at trial the single 924(c) count set forth in the original indictment.

eager to reopen plea negotiations. Indeed, at this stage, Angelos offered to plea to the exact counts and on the exact terms that the government sought after the original indictment. *See* 345 F. Supp. 2d at 1232. The factual record is unclear as to why the government was unwilling to accept a plea on these terms, but it is a fair inference that the ineffective assistance of Angelos's counsel in part impeded the consummation of a plea agreement on the very terms the government had previously sought.

Importantly, Angelos's desire to reopen plea discussion showcases the import and impact of Angelos's trial counsel failings. Angelos's interest in securing a sensible plea agreement following the superseding indictments reveals (1) that Angelos was prepared and willing to plead during the initial negotiations, and (2) that counsel ineffectively advised Angelos with respect to both the gravity of the government's threats to dramatically increase Angelos's sentencing exposure and the seriousness of those threats. Competent counsel would have initially advised Angelos that the government could readily pursue and secure a superseding indictment and would have emphasized the severe risk/reward realities of going to trial facing multiple 924(c) counts carrying severe mandatory sentences. In other words, especially in light of the evidence that made convictions on marijuana counts likely, counsel should have continuously understood and stressed to Angelos the extraordinary importance of securing a viable plea deal following the initial and the superseding indictments.[5]

Simply put, Angelos was prejudiced by trial counsel's failure to understand and effectively advise Angelos with respect to his sentencing exposure and the risks and consequences from the government's pursuit of superseding indictments. But for counsel's

[5] Even after the superseding indictments, trial counsel could have suggested and arranged for Angelos to plead guilty to the main marijuana charges based on the hand-to-hand public sales in order to have a trial focused principally on contesting the suspect 924(c) charges that were the only counts that presented the real risk of a severely long mandatory sentencing term.

deficient performance, Angelos would likely have initially pleaded guilty following the original indictment and faced a sentence less than one-tenth of the sentence he eventually faced at trial.

C. Failure to Investigate Exculpatory Evidence and to Prepare an Effective Defense to Contest Key 924(c) Counts

As detailed above, based on the relatively minor marijuana sales that Angelos committed, competent counsel should never have allowed this case to spin out of control to the point where Angelos was going to trial facing a potential mandatory sentencing term of 105 years imprisonment based on five 924(c) counts. Moreover, once trial was scheduled, competent counsel should have realized he needed to focus his attack on the 924(c) charges. As suggested before, even though the evidence supporting the marijuana sales was mostly uncontestable, the evidence supporting the 924(c) counts was highly suspect.

Importantly, three of the five 924(c) counts were based on the discovery of firearms in Angelos's home and in his girlfriend's home, and the jury acquitted Angelos on two of these three counts. Because the presence of guns in these locations was not disputed, the only debatable issue on these counts was the link between these "at home" guns and Angelos's petty drug dealing.[6] The two remaining 924(c) counts were based entirely on the testimony of Ronnie Lazalde, the government informant who claimed at trial – but seemingly ***not*** when initially debriefed by law enforcement – that he saw Angelos with a gun at two of the three hand-to-hand sales of marijuana in a public parking lot.

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[6] The jury, by acquitting Angelos on two of these three 924(c) counts, rejected the government's extreme efforts to bootstrap Angelos's small-time marijuana sales to hold him criminally responsible for any firearm in a residence that could be alleged to be within his ambit. (As discussed *infra*, Angelos's conviction and severe sentence for the remaining 924(c) count, based on the presence of a gun in his home, raises serious and troublesome constitutional issues under the Second and Eighth Amendments.)

As detailed before, the initial police reports suggest that, when first debriefed by law enforcement, informant Lazalde did not mention the presence of any weapons at any of the hand-to-hand sales, and the surveillance evidence did not indicate the presence of a weapon during these transactions. Consequently, competent counsel would have realized that an acquittal on two key 924(c) counts could be achieved by raising a reasonable doubt about informant Lazalde's testimony regarding the presence of a gun. Competent counsel would have thus invested significant pre-trial resources in investigating the circumstances surrounding the hand-to-hand sales and surrounding informant Lazalde's belated and self-serving claims that he saw a gun during these transactions.

Significantly, had trial counsel done adequate pre-trial investigations, he would have been able to develop substantial evidence to raise reasonable doubts about the claims by informant Lazalde concerning the presence of a gun during the marijuana sales. *See Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (finding constitutionally deficient performance based on attorney's failure to effectively investigate potential mitigation evidence); *see also Wiggins v. Smith*, 539 U.S. 510, 522-27 (2003) (stressing that a "failure to investigate thoroughly" a critical issue could amount to ineffective assistance and explaining that, when "assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further"). Of particular note and concern, especially in light of the evidence known to counsel and the sentencing consequences facing Angelos, was trial counsel's complete failure to investigate (perhaps with the help of an expert) the physical impossibility of informant Lazalde's assertion that, during the second hand-to-hand marijuana sale, he saw a firearm in an ankle holster on Angelos's leg. The positioning of Lazalde and

Angelos during this transaction suggests, based on the government's own surveillance photos, that informant Lazalde physically could not have seen a firearm on Angelos's ankle when he was exiting his vehicle before the controlled buy on June 4, 2002 because Angelos's car blocked informant Lazalde's line of sight.

Under these circumstances, competent counsel would have done a much more thorough and focused pre-trial investigation of informant Lazalde's belated claim about seeing a firearm on Angelos's leg and related matters – which could have and should have included the use of an expert witness to examine and assess the government's surveillance photos in preparation for testimony as to whether informant Lazalde's line of sight made it impossible for him to have seen a gun on Angelos's legal before the controlled buy on June 4, 2002 as he later claimed. This kind of potentially mitigating expert testimony would have been extraordinarily valuable for helping jurors recognize that the physical evidence suggested Angelos's factual innocence on at least one of the two key 924(c) counts. Moreover, expert testimony that could directly and powerfully contradict informant Lazalde's testimony concerning what he saw would have also undermined dramatically informant Lazalde's overall veracity, which in turn could have greatly increased the likelihood of the jury finding reasonable doubt on both of the 924(c) counts that hinged entirely on Lazalde's testimony.

In short, the failure of Angelos's trial counsel to investigate before trial important exculpatory evidence amounted to constitutionally deficient performance that significantly prejudiced Angelos. These failures diminished the opportunity for Angelos to secure an acquittal at trial on at least one of the key 924(c) counts and perhaps on both 924(c) counts that depended entirely on Lazalde's claims about the presence of a firearm at the two controlled buys (and thus was responsible for 50 years of the mandatory sentences Angelos is now serving). Also, these

investigatory failures likely impacted the posture of plea negotiations following the superseding indictments: armed with evidence raising serious doubts about key 924(c) counts, the government likely would have been more willing to accept a plea agreement on the very terms it had earlier suggested after the original indictment.

II. Ineffective Assistance of Angelos's Counsel at Trial

As discussed above, the government's only direct evidence in support of two 924(c) counts was the highly suspect testimony of informant Lazalde. In many ways, as detailed below, trial counsel should have more effectively impeached Lazalde's testimony about the purported presence of a gun at the hand-to-hand marijuana sales, and trial counsel also should have presented exculpatory witnesses that would have raised obvious doubts about the veracity and accuracy of Lazalde's critical testimony that ultimately served as the basis for Angelos's convictions leading to 50 years of his 55-year mandatory minimum sentence. *See generally* ABA Standards for Criminal Justice 4-4.2(a) (3d ed. 1993) (stressing that failure to prepare and present evidence to question key eyewitness testimony can "be grounds for finding ineffective assistance of counsel"); *see also Strickland*, 466 U.S. at 688 (explaining that counsel's performance should be judged under "prevailing professional norms"); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (describing ABA standards as guides to determining what is reasonable performance by counsel).

The Tenth Circuit has emphasized that "an attorney's failure to present a defense theory or mitigation evidence" is a classic example of constitutionally ineffective assistance and "cannot be considered strategic where that decision was influenced by inadequate preparation and investigation." *Bullock v. Carver*, 297 F.3d 1036, 1049 n.7 (10th Cir. 2002). And, of particular significance in this context, the Tenth Circuit has also explained that "counsel's failure to

impeach a key witness is potentially the kind of representation that falls outside the wide range of professionally competent assistance." *Moore v. Marr*, 254 F.3d 1235, 1241 (10th Cir. 2001). Similarly, other courts of appeal have regularly found trial counsel constitutionally ineffective for failing to effectively challenge the testimony of a key witness. *See, e.g., Higgins v. Renico*, 470 F.3d 624, 634 (6th Cir. 2006) ("In . . . a case largely dependent on the testimony of one key witness, [defendant's] right to [the] essential safeguard [of confrontation] was denied by the hasty action of a lawyer who . . . was unprepared."); *Reynoso v. Giurbino*, 462 F.3d 1099, 1110-18 (9th Cir. 2006); *Eze v. Senkowski*, 321 F.3d 110, 126-33 (2d Cir. 2003); *Dixon v. Snyder*, 266 F.3d 693, 701-05 (7th Cir. 2001); *Driscoll v. Delo*, 71 F.3d 701, 709-11 (8th Cir. 1995); *Nixon v. Newsome*, 888 F.2d 112, 115-16 (11th Cir. 1989); *Blackburn v. Foltz*, 828 F.2d 1177, 1183-84 (6th Cir. 1987).

In addition, the Tenth Circuit has repeatedly indicated that the failure to present expert testimony to contest the government's debatable evidence can amount to constitutionally ineffective assistance. *See United States v. Becker*, 109 Fed. Appx. 264, 267-69 (10th Cir. 2004); *Stouffer v. Reynolds*, 214 F.3d 1231, 1233-35 (10th Cir. 2000). In the same vein, other courts of appeal have also regularly found trial counsel ineffective for counsel's failure to explore and present expert testimony that could have provided a counterpoint to the prosecution's evidence. *See, e.g., Gersten v. Senkowski*, 426 F.3d 588 (2d Cir. 2005) (counsel ineffective for failing to explore use of medical experts); *Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005) (counsel ineffective for failing to explore use of ballistics experts); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (counsel ineffective for failing to explore use of ballistics or forensics experts).

Simply put, given the considerable evidence concerning Angelos's minor drug sales and the extraordinary sentencing consequences that would result from Angelos's conviction on multiple 924(c) counts, competent counsel would have focused his energies and efforts at trial on raising reasonable doubts concerning the 924(c) charges that Angelos faced. But, as detailed herein, Angelos's counsel at trial failed in a variety of ways to develop and present evidence that could have raised reasonable doubt on the two questionable 924(c) counts which ultimately led to 50 years of Angelos's mandatory 55-year sentence of imprisonment. Specifically, Angelos's trial counsel: (A) failed to effectively impeach informant Lazalde and other suspect witnesses presented by the government; (B) failed to present key defense witnesses and other exculpatory evidence; and (C) failed to move for a judgment of acquittal on one of the key 924(c) counts and otherwise preserve critical issues for appeal.

A. Failure to Impeach Informant Lazalde and Other Witnesses

Though perhaps not inherently incredible, informant Lazalde's trial testimony concerning the presence of a gun during the May 21 and June 4 hand-to-hand marijuana sales was suspect in many ways and should have been subject to devastating impeachment. Specifically, informant Lazalde repeatedly gave inconsistent and contradictory accounts about events surrounding the May 21 sale, particularly as to (1) whether, when and where he saw a gun in Angelos's car, and (2) whether, when and how he reported to Detective Mazuran that he saw a gun in Angelos's car. *Compare* Transcript of Jury Trial before the Honorable Paul G. Cassell, 273-79 (Dec. 2003) [hereinafter "Trial Tr."] (informant Lazalde testifying he saw gun when first in car) *with id.* at 200-201 (reviewing with Detective Mazuran that police reports were amended to indicate that informant Lazalde said he saw a gun when he returned to retrieve his keys); *compare* Trial Tr. 278-282 (informant Lazalde testifying inconsistently about when and how he called Detective

Mazuran to report he saw a gun in Angelos's car) *with id.* at 201-03 (reviewing with Detective Mazuran inconsistencies in police reports and his testimony concerning when and how informant Lazalde reported seeing a gun in Angelos's car). In addition, the government's own surveillance photos from the June 4 sale suggest it may have been physically impossible for informant Lazalde, given his blocked line of sight, to have witnessed a firearm in an ankle holster on Angelos's leg as he exited his car, as informant Lazalde eventually claimed. Moreover, informant Lazalde had very strong motives to lie about the presence of firearms: not only was informant Lazalde eager to curry favor with the government to reduce his sentence for his federal crimes, but informant Lazalde needed to back up his (false) assertions to prosecutors that Angelos was a major player in the drug trade.

Further, Detective Mazuran's assertions that informant Lazalde mentioned the presence of firearms during his initial debriefing could have and should have been more effectively undermined through the admission of the original police reports that failed to reflect any mention of weapons during any of the hand-to-hand sales. Competent counsel also would have effectively cross-examined Detective Mazuran concerning informant Lazalde's obstructed line of sight during the June 4 transaction that seemed to make it physically impossible for Lazalde to observe a weapon on Angelos's leg as he exited his car. Similarly, the testimony of Chelsea Davenport, Angelos's estranged girlfriend, whose testimony the government used to try to bolster the notion that Angelos always carried a firearm, was also subject to strong impeachment for bias and for inconsistent statements.

Unfortunately, and much to the prejudice of Angelos's efforts to secure an acquittal on the two key 924(c) counts, trial counsel failed to effectively cross examine these witnesses to showcase the many defects in the government's proof. Counsel's failures are evident from a

Mazuran to report he saw a gun in Angelos's car) *with id.* at 201-03 (reviewing with Detective Mazuran inconsistencies in police reports and his testimony concerning when and how informant Lazalde reported seeing a gun in Angelos's car). In addition, the government's own surveillance photos from the June 4 sale suggest it may have been physically impossible for informant Lazalde, given his blocked line of sight, to have witnessed a firearm in an ankle holster on Angelos's leg as he exited his car, as informant Lazalde eventually claimed. Moreover, informant Lazalde had very strong motives to lie about the presence of firearms: not only was informant Lazalde eager to curry favor with the government to reduce his sentence for his federal crimes, but informant Lazalde needed to back up his (false) assertions to prosecutors that Angelos was a major player in the drug trade.

Further, Detective Mazuran's assertions that informant Lazalde mentioned the presence of firearms during his initial debriefing could have and should have been more effectively undermined through the admission of the original police reports that failed to reflect any mention of weapons during any of the hand-to-hand sales. Competent counsel also would have effectively cross-examined Detective Mazuran concerning informant Lazalde's obstructed line of sight during the June 4 transaction that seemed to make it physically impossible for Lazalde to observe a weapon on Angelos's leg as he exited his car. Similarly, the testimony of Chelsea Davenport, Angelos's estranged girlfriend, whose testimony the government used to try to bolster the notion that Angelos always carried a firearm, was also subject to strong impeachment for bias and for inconsistent statements.

Unfortunately, and much to the prejudice of Angelos's efforts to secure an acquittal on

review of the trial transcript reflecting the testimony of, and counsel's tepid cross-examination of, the first few witnesses at trial. Though trial counsel arguably did a competent job highlighting that informant Lazalde was being prosecuted for his role in a drug conspiracy when he volunteered to work for the government and that he was still using drugs while working as an informant, trial counsel asked virtually no questions addressing the implausibility of informant Lazalde's belated assertions that he saw a gun on Angelos's leg before the June 4 transaction. Competent counsel would have more effectively emphasized this critical point as another way to impeach this key witness concerning his inconsistent statements. This crucial misstep was especially magnified given that 25 additional years of imprisonment hung in the balance and ultimately fell upon Angelos's undeserving shoulders as result of his counsel's failings.

Relatedly, counsel failed to rebut or question in any way the testimony of Chelsea Davenport, even though her estrangement from Angelos accounted for the fact that she testified on Angelos's behalf at his suppression hearing (where the district court found her testimony not credible), but then became a witness for the government against Angelos (whose testimony the Tenth Circuit panel stressed when upholding Angelos's convictions on direct appeal). Because of a failure to effectively cross-examine Davenport about her numerous inconsistent statements and strong bias, the jury did not have a complete picture of the suspicious nature of testimony that the government stressed at the trial closing, *see* Trial Tr. 1304-05, and that the appellate panel used to convince itself of Angelos's guilt.

B. Failure to Present Key Defense Witnesses and Other Exculpatory Evidence

As noted earlier, trial counsel failed to conduct an adequate investigation before trial, which in turn led to his failure to present at trial any expert testimony concerning the physical impossibility of informant Lazalde's assertion that, during the second hand-to-hand marijuana

sale, he saw a firearm in an ankle holster on Angelos's leg as he exited his car. Had trial counsel done a sufficient investigation, including working with a forensics expert to analyze the crime scene based on the government's surveillance photographs, a critical witness may have been available to suggest to the jury that the positioning of Lazalde and Angelos before their June 4 transaction made it highly implausible that informant Lazalde's line of sight allowed him to see a firearm on Angelos's ankle when Angelos was exiting his vehicle.

Aided by an adequate pre-trial investigation, including the involvement of an expert witness to examine and assess the government's surveillance photos, competent trial counsel could and should have presented expert testimony at trial to help jurors appreciate that the physical evidence demonstrated that Angelos was factually innocent of one of the key 924(c) counts. Presentation of this evidence would have further impressed to the jury that informant Lazalde was prepared to say whatever the government wanted him to say, so that the jury would more broadly appreciate that his testimony concerning the presence of weapons was concocted and likely the product of his strong interest in currying favor with the government.

Relatedly, in addition to failing to investigate and present expert testimony, trial counsel did not call any other witness to impeach informant Lazalde's credibility. Angelos stressed to counsel that such witnesses existed and were available, particularly in the form of two victims of an assault and kidnapping episode involving informant Lazalde that was known to Angelos. During the trial, Angelos pressed his trial counsel to present these witnesses in order to highlight for the juy that informant Lazalde was still involved in serious criminal activity while serving as an informant for the government. Trial counsel told Angelos that he was not going to present these witnesses because "had already got Lazalde good enough." But this was an unreasonable

choice in light of the fact that informant Lazalde's testimony and credibility were of critical importance in support of charges accounting for 50 years of Angelos's mandatory sentence.

Further, as noted before, trial counsel failed to secure the admission of the original police reports that failed to reflect any mention of weapons during any of the hand-to-hand sales. Though counsel was able at trial to note that these police reports were amended in October 2002 by Detective Mazuran in order to indicate that informant Lazalde mentioned the presence of firearms during his initial debriefing, the failure to secure admission of the original reports meant that the jury lacked a significant and tangible reminder that claims about the presence of a firearm at the hand-to-hand sales were belated and not initially documented at the time of these sales.

C. Failure to Move for Acquittal or a New Trial

Perhaps as a result of failing to effectively impeach informant Lazalde and failing to present exculpatory witnesses, trial counsel further failed (and compounded earlier errors) by not moving for a judgment of acquittal or a new trial on one or both of the 924(c) charges related to the hand-to-hand marijuana sales. *See generally Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310 (11th Cir. 2003) (counsel ineffective for failure to preserve arguments and claims based on certain key issues); *Flores v. Demskie*, 215 F.3d 293 (2d Cir. 2000) (same).

As explained before, 50 years of petitioner's 55-year sentence is based on the testimony of Ronnie Lazalde. Informant Lazalde's testimony was inconsistent and contradictory concerning the events surrounding the May 21 sale, particularly as to whether, when and where he saw a gun in Angelos's car. And informant Lazalde's testimony about having seen a gun on Angelos's leg before the June 4 transaction was undermined by physical realities and therefore of dubious credibility. Failing to argue these facts to the judge was not a strategic decision, but

rather it was incompetence resulting in a reasonable probability that, but for this error, the outcome of the proceedings would have been different. Thus, trial counsel's actions, or lack thereof at the close of the government's case, constituted ineffective assistance. Courts of appeal have recognized a judicial obligation to intervene in similar circumstances when counsel has adequately presented a motion to the trial judge: "When . . . a jury has convicted a person of a crime carrying a very long mandatory minimum penalty, [and] the complete record, testimonial and physical, does not permit a confident conclusion that the defendant is guilty beyond a reasonable doubt, *the district judge is obliged* to grant a motion for a new trial." *United States* v. *Morales* 902 F.2d 604, 608 (7th Cir. 1990) (emphasis added). In such a case, as was true at Angelos's trial, "it would be a manifest injustice to let the guilty verdict stand." *United States v. Reed*, 875 F.2d 107, 114 (7th Cir. 1989).

D. Cumulative Ineffectiveness in Light of the Weakness of the Evidence

The Supreme Court explained in *Strickland* that "a court hearing an ineffectiveness claim must consider the totality of the evidence" because certain "errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." 466 U.S. at 695-96. As detailed above, counsel's numerous and repeated mistakes in failing to effectively assail the belated claims by informant Lazalde about the presence of a gun during the hand-to-hand sales necessarily "had a pervasive effect on the inferences to be drawn from the evidence" and necessarily altered "the entire evidentiary picture" seen by the jury.

As further explained by the Supreme Court in *Strickland*, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 496. The trial record shows, as repeatedly stressed above, that the verdict on the 924(c) counts was supported only and entirely by the claims of informant

Lazalde; what the record overwhelmingly supports is the fact that Angelos's trial counsel performed in an unreasonable manner and his failings allowed the jury to convict on two counts leading to 50 years of mandatory prison time for Angelos on two 924(c) counts that were weakly supported by the suspect assertions of an informant apparently willing to say whatever he thought necessary to curry favor with prosecutors.

GROUND TWO:

FIFTH AMENDMENT DENIAL OF DUE PROCESS BASED ON PROSECUTORIAL VINDICTIVENESS AND TRIAL MISCONDUCT

I. Prosecutorial Vindictiveness in Charging and Bargaining

In *United States v. Armstrong*, the Supreme Court reiterated that, despite the "presumption of regularity" for prosecutorial decisions, a court has the authority and a responsibility to ensure that "a prosecutor's discretion is subject to constitutional constraints." 517 U.S. 456, 465 (1996) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)). And, in *Wayte v. United States*, the Court detailed that a decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, *including the exercise of protected statutory and constitutional rights*." 470 U.S. 598, 608-09 (1985) (emphasis added).

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Supreme Court opted not to create a strong presumption of vindictiveness when a prosecutor brings more serious charges through a new indictment after a defendant asserts his right to a jury trial, but the Court emphasized that, in the right factual setting, a defendant could establish a constitutional violation if a prosecutor, through bargaining and charging choices, seemed to "pursue a course of action whose objective is to penalize a person's reliance on his legal rights." *Id.* at 363. To that effect, the Tenth Circuit has recently explained that, in the context of claims of improper exercise of prosecutorial

charging and bargaining choices, a defendant can "demonstrate a due process violation by showing either (1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which gives rise to a presumption of vindictiveness." *United States v. Thomas*, 410 F.3d 1235, 1247 (10th Cir. 2005).

Lower courts are understandably disinclined to quickly second-guess reasonable discretionary charging and bargaining choices of prosecutors. But the extreme and unprecedented charging and bargaining decisions by prosecutors in this case justifies, at the very least, discovery and an evidentiary hearing to explore if unconstitutional motives in part explain why prosecutors here were so eager to threaten a first-offender like Angelos with a mandatory prison sentence of over 100 years in response to relatively minor criminal behavior. *Cf. State v. Halling*, 672 P.2d 1386 (Or. Ct. App. 1983) (finding that defendant had established actual vindictiveness based on evidence concerning prosecutor's remarks during plea negotiation and evidence that prosecutor's decision to file additional charges was not affected by any new information but only defendant's decision to reject a plea agreement).

At this early stage of the proceedings, Angelos can only present circumstantial evidence to support his claims of vindictiveness and/or other unconstitutional motives by prosecutors. Nevertheless, the basic facts surrounding the series of indictments and prosecutorial behaviors – which involve prosecutors ultimately pursuing claims designed to require the imposition of a sentence of more than 110 years of imprisonment on a first-offender based largely on three minor marijuana sales – provides strong circumstantial evidence that prosecutors in this case were motivated by goals other than achieving justice. Indeed, the district court's factual finding that Angelos's 55-year sentence is "unjust, cruel, and irrational," 345 F. Supp. 2d at 1230, provides further support for Angelos's contention that the extreme facts here support a claim of

prosecutorial vindictiveness and/or the influence of some unconstitutional prosecutorial motives. Specifically, Angelos maintains that an objective assessment of the following undisputed facts raise "a realistic likelihood of vindictiveness which gives rise to a presumption of vindictiveness" under Tenth Circuit case law:

- The original indictment charged only three drug charges and only one 924(c) count.
- Though a guilty plea to all the counts in the original indictment likely would have resulted in a maximum possible sentence of less than 10 years of imprisonment, prosecutors "offered" a plea deal in which it would recommend a sentence of 15 years of imprisonment.
- After Angelos failed to accept prosecutors' oppressive plea "offer," the government secured superseding indictments that ***quadrupled*** the total number of charges against Angelos and ***quintupled*** the number of 924(c) counts (one of which was based on information purportedly known to prosecutors even before the original indictment).
- The only obvious new development in this case directly preceding the prosecutors' pursuit of these superseding indictments was Angelos's decision not to accept the plea "offer" being suggested by prosecutors.
- The particulars of the superseding indictments increased the available and likely sentence facing Angelos by over **1,000 percent** and included counts that would have mandated the imposition of at least 105 years of imprisonment.
- After the superseding indictments, prosecutors refused to reopen serious plea discussions, even though Angelos was prepared to discuss a plea agreement on the terms originally suggested by the government following the initial indictment.

On this factual record, there is good reason to suspect and fear that the government's pursuit of superseding indictments with extreme sentencing consequences was motivated, at least in part, to punish Angelos for his interest in exercising his constitutionally protected right to a jury trial.[7]

[7] Public comments by prosecutors provide additional reasons to suspect and fear that Angelos's decision to exercise his right to a jury trial was a central factor in the government's extreme prosecutorial charging decisions. *See, e.g.*, Geoffrey Fattah, *Attorneys For Angelos Vow To Keep Fighting Sentence*, Deseret Morning News, Jan. 11, 2006, at B3 (reporting statement by U.S. Attorney Paul Warner that "he personally has little sympathy for Angelos, since his office

In addition, Angelos has reason to believe that the government's aggressive and oppressive approach to plea bargaining following the original indictment was motivated, at least in part, to punish Angelos for his interest in exercising his constitutionally protected right not to cooperate with authorities. Angelos believes that informant Lazalde convinced prosecutors that Angelos was involved in major criminal misconduct and that prosecutors refused to conduct good faith plea negotiations unless and until Angelos agreed to implicate other more significant drug traffickers. But Angelos had no information to trade (and, of course, had a constitutionally protected right not to cooperate with authorities even if he did have information the government sought), and it would be a violation of due process if prosecutors refused a reasonable plea deal based on a desire to punish Angelos for failing to cooperate on the terms they sought. *See United States v. Thomas*, 410 F.3d 1235, 1246 (10th Cir. 2005) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)) ("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.'").

II. Prosecutorial Misconduct at Trial

The circumstantial evidence of prosecutorial vindictiveness present in this case also raises the disconcerting possibility that, after Angelos refused to plead guilty to the original indictment, prosecutors urged informant Lazalde to "remember" having seen Angelos flash a gun during their June 4 encounter. Though, at this stage of these proceedings, Angelos cannot present direct evidence relating to his concern that prosecutors "trumped up" an additional 924(c) count, Angelos seeks to conduct discovery to explore why and how prosecutors pursued

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offered Angelos a plea bargain of just over 15 years, which he rejected for taking the case to trial").

this charge only in its superseding indictment and did so despite knowing the weakness of the evidence and the suspect nature of the testimony of informant Lazalde presented at trial. Angelos is adverse to casting inappropriate allegations concerning the conduct and motives of federal prosecutors; but the extreme and unprecedented treatment he has received at the hands of government officials makes it difficult for him not to be suspicious that prosecutors were driven by motives other than the pursuit of justice.

GROUND THREE:

ANGELOS'S EXTREME SENTENCE IS UNCONSTITUTIONAL

As recently reported in *Time* magazine, last month voters in Hailey, Idaho and in Denver, Colorado "passed pro-marijuana measures on election day" to join a growing number of localities that are "reducing or removing penalties" for marijuana offenses. *See* Rita Healy, *Mellowing Out on Marijuana*, Time, Nov. 8, 2007. As the article noted, numerous other cities in California, Montana, and Washington "have previously passed laws that give the lowest priority to enforcing existing marijuana laws." *Id.*; *see also* Lester Grinspoon, *Creating a Sensible Marijuana Law*, Boston Globe, Nov. 22, 2007 (noting that "12 states have now adopted legislation or initiatives that allow for [marijuana's] medicinal use and 12 states have decriminalized it by reducing penalties for possession of small quantities to a fine, with no arrest or jail penalty"). Against this backdrop, and in light of society's evolving standards of decency, which are growing ever more tolerant of not only marijuana use but also the possession and carrying of firearms for self-defense,[8] the imposition of what is effectively a life sentence for a first-offender like Angelos for his relatively minor offenses is unconstitutional.

[8] In recent weeks, articles in national and local publications have highlighted the growing public affinity for gun possession and for the societal beliefs that the Second Amendment protects individuals' inherent natural rights to keep and bear arms for personal defense. *See, e.g.* Glen Warchol, *Utahns Exercise Right To Openly Carry Firearms*, Salt Lake Tribune, Nov. 18,

Beyond the ineffective assistance of counsel and due process deprivations suffered by Angelos, the imposition of the excessive sentence itself violates the Eighth Amendment as "grossly disproportionate" to the offenses of conviction in light of society's evolving standards of decency. Moreover, when compared to the sentences received by both those committing comparable offenses and those guilty of far more heinous acts, the extreme severity of Angelos's prosecution and sentencing raise Fifth Amendment equal justice concerns. In addition, the fact that Angelos received an additional 25 years in prison based on the possession of firearms in his home raises Second Amendment issues as the application of § 924(c) in this case infringed upon Angelos's personal right to keep arms. Finally, the remarkable reality that prosecutors effectively selected the sentence Angelos received through their charging decisions raises serious separation of powers concerns.

2007; Robert Levy, *Unholster the 2nd Amendment*, Los Angeles Times, Nov. 14, 2007 (highlighting that in recent years "there has been an outpouring of legal scholarship – some from prominent liberals – that recognizes the Second Amendment as securing the right of each individual to keep and bear arms."); Glenn Harlan Reynolds, *Lawyers, Guns & Washington*, New York Post, Nov. 21, 2007 (noting that "most Americans think the Second Amendment gives them a right to own a gun"); *see also* Pew Research Center for the People & the Press, *Va. Tech Shootings Produce Little Boost for Gun Control*, April 23, 2007 (detailing polling data showing that public support for gun owners' rights has increased over the last decade).

I. Angelos's Sentence Violates Eighth Amendment Prohibition Against Cruel and Unusual Punishments

At the initial sentencing, the district court re asoned that even though "the sentence mandated by § 924(c) in this case appears to be unjust, cruel, and irrational . . . our constitutional system of government requires the court to follow the law, not its own personal views about what the law ought to be." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1263 (D. Utah 2004) Though Judge Cassell's perceived obedience to the law in the face of an egregious injustice is commendable, a proper understanding of Eighth Amendment jurisprudence should have led him to realize that a commitment to the rule of law in this case demands judicial intervention to provide some sentencing relief to Angelos. Indeed, given that Judge Cassell found Angelos's 55-year sentence to be "unjust, cruel, and irrational," and given that Angelos's sentence is uniquely harsh, the sentence should not have been imposed in light of the Eighth Amendment's straight-forward textual command that "Cruel and Unusual Punishments" shall not be inflicted. U.S. Constitution, amend. VIII.

Moreover, Judge Cassell's conclusion that a distant and distinguishable Supreme Court ruling precluded giving legal effect to his assessment about the cruelty and unusualness of the sentence facing Angelos failed to consider the Supreme Court's repeated declaration 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); *cf. Atkins v. Virginia*, 536 U.S. 304 (2002) (finding that the Eighth Amendment had evolved to prohibit categorically the execution of murderers with mental retardation even though only a decade earlier the Court had determined that the Eighth Amendment still permitted the execution of these offenders); *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (finding that the Eighth Amendment had evolved to prohibit categorically the execution of murderers who committed

their crimes before reaching age 18 even though only a decade earlier the Court had determined that the Eighth Amendment still permitted the execution of these offenders).

Giving appropriate meaning and effect to the Eighth Amendment's evolving command is not an inappropriate form of judicial activism, but rather an important judicial responsibility to protect against the risk of over-reaching and oppressive government power reflected in this case. Indeed, until the Supreme Court declares the Eighth Amendment non-justiciable in cases challenging non-capital sentences, lower courts have a constitutional obligation to assess when an extreme prison term for relatively minor crimes reaches a level of excessiveness prohibited by the Eighth Amendment. In that respect, the 55-year prison sentence now being served by Angelos was unjust and irrational when imposed, as the district court recognized, and new legal developments further confirm that this sentence violates society's standards of decency. The continuing evolution of societal norms, morals, and the sentencing law landscape documents that Angelos's sentence is constitutionally excessive.

A. Society's Evolving Standards of Decency

The Supreme Court has indicated that the Eighth Amendment's prohibition on cruel and unusual punishments must adapt through judicial interpretation informed by objective evidence of society's evolved standards of justice. As a civilized society progresses, the values and humanity of its people changes, and Eighth Amendment jurisprudence must not only adapt to, but be applied to reflect, these evolving standards of decency. The Supreme Court has stressed that "the Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' . . . against which we must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). Simply put, "the basic concept underlying the Eighth Amendment is nothing less than the dignity of

man," *Trop v. Dulles*, 356 U.S. 86, 100 (1958), and this profound principle "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. To that effect, as the Supreme Court has recently emphasized, "[a] claim that punishment is excessive is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those *that currently prevail*." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (emphasis added).

Accordingly, as recently explained by the Supreme Court, any Eighth Amendment analysis must commence with an "inquiry into our society's evolving standards of decency." *Roper v. Simmons*, 543 U.S. 551, 563 (2005). This judicial inquiry, which was intended by the Framers to place an important and enforceable outer limit on the federal government's power to punish citizens, calls upon a reviewing court to consult "objective indicia of consensus" and also to exercise "independent judgment" as to whether a punishment goes too far. *Id.* at 564. In just the few years since Angelos was sentenced, society's standards pertaining to criminal justice, and specifically sentencing standards in drug and gun cases, have evolved significantly. As detailed below, developments on legal, political, and social fronts directly implicate the application of the Eighth Amendment in assessing the boundaries of our humanity in the treatment of low-level drug offenders and they provide objective indicia of the evolving standards in our country.

1. New Legislation and Perspective on Drug Crime Sentencing

State legislative movements away from harsh sentences for drug crimes: In recent years, state policymakers and politicians have begun to reject and reverse severe mandatory sentencing provisions for drug offenses. *See* Marc Mauer & Ryan S. King, The Sentencing Project, *A 25-Year Quagmire: The "War On Drugs" and Its Impact on American Society*, at 25-26 (Sept.

2007) (detailing "evolving momentum for reform" as "legislative bodies [have been] reconsidering the wisdom of mandatory sentencing laws," which has resulted in "at least 13 states [having] either established or expanded drug treatment and diversion sentencing options."); *see also* Ryan S. King, The Sentencing Project, *Changing Direction? State Sentencing Reforms 2004-2006*, at 1 (Feb. 2007) (documenting that "between 2004 and 2006, at least 22 states enacted legislative reforms to their sentencing policies, or adopted policy changes affecting probation and parole revocation procedures," and that many of these reforms include "diversion of drug offenders from incarceration through expanded treatment options" and related moves to reduce prison sentences). These recent legislative developments, many of which post-date Angelos's initial sentencing, are especially important in light of the Supreme Court's recent explication of its Eighth Amendment jurisprudence:

> Proportionality review under [the Eighth Amendment's] evolving standards should be informed by objective factors to the maximum possible extent. We have pinpointed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.... It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States [recently reducing sentences for a certain class of offenders] provides powerful evidence that today our society views [these offenders] as categorically less culpable....

Atkins v. Virginia, 536 U.S. 304, 312-16 (2002) (internal quotations and citations omitted)

Federal sentence reductions for crack offenses: On May 1, 2007, the U.S. Sentencing Commission proposed an amendment to reduce all the sentencing ranges for crack cocaine offenses. No member of Congress spoke out against this sentence reduction in drug sentences and a number of legislators proposed bills to reduce crack sentences further. This amendment, which became effective on November 1, 2007 based on Congress's tacit approval, will

significantly reduce the sentences of thousands of low-level crack dealers sentenced in federal courts each year.[9]

This shift in sentencing policy demonstrates society's evolving standards as it applies to extreme sentences for low-level drug crimes because, if the only concern were sentencing disparities, the crack/powder differential could have been addressed by increasing sentences for powder cocaine offenses rather than by decreasing sentences for crack offenses. The political pressure that brought about the new guidelines also exemplifies society's increasing intolerance toward inequitable sentencing outcomes, a form of injustice also reflected in this case. *Cf. Angelos*, 345 F. Supp. 2d at 1245-48 (illustrating the disparity between Angelos's statutory minimum sentence and sentences for more serious offenses).

2. New Concerns About the Application of Mandatory Sentencing Provisions

State ruling finding extreme mandatory sentence unconstitutional: The case of Weldon Angelos comes before the Court in the wake of the Georgia Supreme Court's recent Eighth Amendment ruling in *Humphrey v. Wilson*, 2007 Ga. LEXIS 774, No. S07A1481 (Ga. Oct. 26, 20007). In 2004, Wilson was subject to a 10-year mandatory minimum prison term for having consensual oral sex with an under-age girl. Attentive to evolving constitutional standards, the Georgia Supreme Court determined that the circumstances compelled "the conclusion that Wilson's sentence [was] grossly disproportionate to his crime and constitutes cruel and unusual punishment under both the Georgia and United States Constitutions." *Wilson*, 2007 Ga. LEXIS 774, at *30-31.

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[9] *See* Memorandum, United States Sentencing Commission, "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary," at 47 (May 1, 2007), *available at* http://www.ussc.gov/2007guid/finalamend07.pdf.

The cases of Angelos and Wilson share telling parallels based on extreme prosecutorial behavior in the wake of a defendant's refusal to accept an oppressive plea "offer." Moreover, both cases involve the application of the Eighth Amendment in cases involving extreme minimum mandatory prison terms, the appropriateness of reconsideration of extreme sentencing terms via collateral attack, and a sustained public outcry of injustice. The ruling and outcome in the *Wilson* case – the defendant's release after serving nearly three years in prison on a ten-year statutory minimum sentence – not only responded to the public outcry over the miscarriage of justice suffered by Wilson, but also documented an evolving societal standard of decency that has increasingly entered both the legal and public discourse. Notably, the Georgia Supreme Court, responding to legal developments since the time of Wilson's initial sentencing, emphasized that whether "a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at *11-12 (quoting *Trop,* 356 U. S. at 101).

The *Wilson* case demonstrates not only that the Eighth Amendment is a means for the judiciary to check extremely oppressive criminal punishment, but also that society recognizes the dangers of "one-size-fits-all" sentencing schemes, a danger that this case clearly reflects. Just as ten years was grossly disproportionate for offenses that should have resulted in at most a short sentence in *Wilson,* the 55-year sentence being served by Angelos is grossly disproportionate for offenses that should have resulted in a sentence more in line with what the US Sentencing Guidelines advised.

Outrage concerning extreme application of federal gun mandatories: Though not yet the subject of a constitutional challenge, another recent case involving the application of severe mandatory sentencing terms has made national headlines and has prompted federal legislators

from both parties to express concern about the severe application of mandatory sentences for certain gun crimes. This recent case involves the lengthy mandatory prison terms imposed on U.S. Border Patrol agents Ignacio Ramos and Jose Alonso Compean for shooting a suspected Mexican drug smuggler. Troubled by the severe application of a mandatory minimum sentencing statute in this case, members of the House of Representatives have drafted legislation to cut off funding for the continued incarceration of Ramos and Compean. *See* Fred Lucas, *No More Federal Money to Jail Border Agents, Congressman Says*, Cybercast News Service Jan. 26, 2007. In addition, the Senate recently held a hearing to examine the application of a mandatory sentencing term in this case, after which two prominent Senators made a public plea to President George W. Bush to commute the sentences of Ramos and Compean.[10] The *Wilson* ruing and the political fervor over the sentences received by the Border Agents spotlight the growing public recognition that extreme mandatory sentencing provisions can sometimes misfire, especially when prosecutors fail to temper their punitive tendencies with a dose of common sense.

3. Other Notable Indicia of Concern About Long Prison Sentences

In addition to the tangible legal developments documented above, over the past few years there have also been related events or movements reflecting the public's evolving consciousness about the injustices and harms of excessive prison sentences. These include: (a) a growing political movement against severe mandatory minimum sentences, (b) President George Bush's grant of executive clemency for Lewis "Scooter" Libby and subsequent advocacy in favor of additional clemency grants and sentencing proportionality, (c) the continuing political campaigns

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[10] *See* Senators Feinstein and Cornyn Ask President Bush To Commute the Sentences of former Border Patrol Agents Ramos and Compean, Press Release of July 18, 2007, *available at* http://cornyn.senate.gov/public/index.cfm?FuseAction=ForPress.NewsReleases&ContentRecord_id=db568bed-802a-23ad-4ae9-6139ad3dfe9e&Region_id=&Issue_id=.

to legalize or decrease the sanctions for marijuana-related offenses, (d) bipartisan support of the Second Chance Act and other state and local initiatives designed to reduce the lingering impact of a first offense, and (e) changes in sentencing law marked by the Supreme Court's pro-judicial discretion rulings throughout its Sixth Amendment jurisprudence.

These developments all present additional objective and tangible evidence of a maturing society with new and more progressive views on crime and punishment. In the aggregate, they help document and demonstrate that a mandatory minimum federal prison sentence of 55 years for Angelos, in light of his relatively minor offenses, is simply incompatible with our society's evolving standard of decency.

B. Sentence Imposed is Grossly Disproportionate

Against this backdrop of an evolved standard of decency, the sentence imposed upon Angelos must be reexamined under the Eighth Amendment. When considered anew under standards that current prevail, as Supreme Court doctrine requires, *see Roper*, 543 U.S. at 563, a sentence of 55 years for a few uneventful hand-to-hand sales of marijuana by a petty dealer equates to an unconstitutionally excessive term of imprisonment.

1. Modern Eighth Amendment Standards

"It is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). In this spirit, the Eighth Amendment "succinctly prohibits 'excessive' sanctions" and the Supreme Court has "repeatedly applied this proportionality precept" when interpreting the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. at 311.[11] Although this proportionality precept has been more robustly

[11] Congress has also embraced the important concept of ensuring sanctions are not excessive, the concept that the Framers embraced through the Eighth Amendment. Notably, the first instruction Congress gave to federal judges when imposing a sentence requires that "[t]he

applied in death penalty contexts, the Supreme Court long ago clarified that this precept has application in the context of prison terms because, "as a matter of principle[,] a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 463 U.S. 277, 290 (1983).[12]

As the Supreme Court has conceded, its proportionality cases in the wake of *Solem* "exhibit a lack of clarity regarding what factors may indicate gross disproportionality." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). Nevertheless, it has become generally accepted that the Eighth Amendment contains a "narrow proportionality principle" applying to "noncapital sentences," *Ewing v. California*, 538 U.S. 11, 20 (2003), and that this principle "does not require the crime and the sentence to be strictly proportional." *United States v. Gillespie*, 452 F.3d 1183, 1190 (10th Cir. 2006) (citing *Harmelin v. Michigan*, 501 U.S. 957, 996-1001 (1991) (Kennedy, J., concurring)). But it is also settled that the Eighth Amendment does forbid "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). Consequently, for purposes of this case, the bottom line is that "through [the] thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established:' A gross disproportionality principle *is* applicable to sentences for terms of years."

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court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of the penal objectives specified by statute. 18 U.S.C. § 3553(a). This so-called "parsimony provision" has been a statutory command for nearly 25 years, and it has become an especially important sentencing principle following the Supreme Court's emphasis on the provisions of § 3553(a) when it transformed the federal sentencing guidelines into an advisory system through its remedial ruling in *United States v. Booker*, 543 U.S. 220 (2005).

[12] In *Solem*, though the Supreme Court noted that successful challenges to the proportionality of prison sentences will be rare, the Court was quick to note that "this does not mean, however, that proportionality analysis is entirely inapplicable in noncapital cases." 463 U.S. at 289-90. Indeed, in *Harmelin*, a majority of Justices expressly rejected the suggestions by a few Justices that the Eighth Amendment essentially was not justiciable when a defendant challenged a lawfully imposed term of imprisonment. *See Harmelin*, 501 U.S. at 996-98 (Kennedy, J., concurring); id. at 1009-19 (White, J., dissenting).

Lockyer, 538 U.S. at 73 (emphasis added). If this principle is to be given any effect at all, the sentence imposed here must be in violation thereof.

2. Statutory Minimum Mandatory Sentence is Unconstitutionally Disproportionate As-Applied to Angelos

The Supreme Court's fractured and oft-criticized pronouncement in *Deal v. United States* settled basic statutory questions about the reach of the recidivist provision found in 18 U.S.C. § 924(c)(1)(C)(i).[13] But this ruling about the statute's application in the abstract does not resolve its application as applied to Angelos in this case; as applied here, the statute operates to require an unconstitutional punishment under the Eighth Amendment because the resulting sentence is grossly disproportionate to Angelos's crimes in light of society's evolving standard of decency.

The Tenth Circuit panel acknowledged that a proportionality principle applied to the sentence imposed. The panel concluded, nevertheless, that the Supreme Court's Eighth Amendment precedent supported the constitutionality of Angelos's sentence because "the gross disproportionality principle reserves a constitutional violation for only the extraordinary cases." *United States v. Angelos*, 433 F.3d 738, 751 (10th Cir. 2006). However, to give any effect to the Supreme Court's pronouncements on the Eighth Amendment's proportionality principle in noncapital cases – i.e., its repeated indication that there must be some "extreme sentences" that are constitutionally problematic – a jurisprudential line must be drawn beyond which some "extraordinary case" exists. *Lockyer*, 538 U.S. at 73 (citing *Harmelin*, 501 U.S. at 1001

[13] In *Deal v. United States*, 508 U.S. 129 (1993), the Supreme Court adopted an interpretation of 924(c)'s "subsequent conviction" provision which permitted application of the provision in a singular prosecution against a first-time offender in part to discourage prosecutors from bringing multiple prosecutions. In his dissent in *Deal*, Justice Stevens, joined by both Justice Blackmun and Justice O'Connor, found "no ambiguity in the phrase 'subsequent conviction' as used in § 924(c)." *Id.* at 141 (Stevens, J., dissenting). Justice Stevens continued, "the phrase clearly is intended to refer to a conviction for an offense committed after an earlier conviction has become final; *it is, in short, a recidivist provision.*" *Id.* at 142-43 (emphasis added).

(Kennedy, J., concurring)). If the case of Weldon Angelos does not cross such a line, then that line is illusory.

In light of society's evolving standard of decency that has reshaped the sentencing landscape in recent years, Eighth Amendment analysis must adapt to reflect the changing values of a people who are beginning to understand that there are societal and moral consequences to over-confinement. The case of Angelos illustrates the dangers inherent with mandatory minimum sentences when irrationally applied to a defendant that simply does not deserve the sentence. The essential safety valve in our constitutional structure to prevent the extreme cases of the excessive exercise of government power from slipping through the cracks is the proportionality review under the Eighth Amendment. *See* Eva Nilsen, *Indecent Standards: The Case of U.S. versus Weldon Angelos*, 11 Roger Williams U. L. Rev. 537, 563 (2006) ("Notably, Angelos is precisely the kind of claimant the Supreme Court has said deserves special protection . . . it is hard to conceive of a more 'discrete and insular minority' than drug offenders like Weldon Angelos."). If the extreme application of 924(c)'s long mandatory recidivism sentences to Weldon Angelos, 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 the state of a *de facto* repeal unauthorized by law.

3. Application of the *Harmelin* Framework

As Judge Cassell recognized at the initial sentencing, applying the proportionality factors of Justice Kennedy's concurrence in *Harmelin* leads to the conclusion that the sentence in this case does not pass constitutional muster. *Angelos*, 345 F. Supp. 2d at 1259 ("Having analyzed the three *Harmelin* factors, the court believes that they lead to the conclusion that Mr. Angelos'

sentence violates the Eighth Amendment."). In *Harmelin*, Justice Kennedy's concurring opinion announced an informal framework utilizing three previously-established factors that a court must examine when conducting a proportionality analysis: (1) the nature of the crime and its relation to the punishment imposed; (2) the punishment for other offenses in the relevant jurisdiction; and (3) the punishment for similar offenses in other jurisdictions. *See* 501 U.S. at 1004-05; *see also Ewing*, 538 U.S. at 23-24 ("The proportionality principles in our cases distilled in Justice Kennedy's concurrence [in *Harmelin*] guide our application of the Eighth Amendment in the new context that we are called upon to consider."); *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999), *cert. denied*, 531 U.S. 830 (2000) ("Justice Kennedy's opinion in *Harmelin* . . . sets forth the applicable Eighth Amendment proportionality test.").

Despite consisting of three individual factors, the first *Harmelin* factor, which is essentially the crux of any proportionality analysis, is viewed as a threshold determination rather than just one factor to be balanced alongside the others. *See Ewing*, 501 U.S. at 1005 ("A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."). In his sentencing opinion, Judge Cassell found that, under the threshold factor, the sentence dictated by statute for Angelos "strongly suggests not merely disproportionality, but gross disproportionality." *Angelos*, 345 F. Supp. 2d at 1258. Moreover, the court determined that the minimum mandatory sentence created not only this inference of disproportionality under the first factor, but also failed the remaining *Harmelin* factors, concluding that: "[h]aving analyzed the three *Harmelin* factors, the court believes that they lead to the conclusion that Mr. Angelos's sentence violates the Eighth Amendment." *Id.* at 1259.

As to the comparative factors of the *Harmelin* test, Judge Cassell concluded that both factors demonstrated that the sentence required by statute for Angelos was significantly excessive relative to other offenders and jurisdictions:

> The next *Harmelin* factor requires comparing Mr. Angelos's sentence with the sentences imposed on other criminals in the federal system. Generally, "if more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." This factor points strongly in favor of finding that the sentence in this case is excessive. . . . Because Mr. Angelos is "treated in the same manner as, or more severely than, criminals who have committed far more serious crimes," it appears that the second factor is satisfied.
>
> The final *Harmelin* factor requires the court to examine "sentences imposed for the same crime in other jurisdictions." Evaluating this factor is also straightforward. Mr. Angelos's sentence is longer than he would receive in any of the fifty states. The government commendably concedes this point in its brief, pointing out that in Washington State Mr. Angelos would serve about nine years and in Utah would serve about five to seven years. Accordingly, the court finds that the third factor is satisfied.

Id. at 1258-59 (internal citations omitted).

In contrast, the Tenth Circuit panel did not find it necessary to move beyond the threshold factor, concluding that "the first, and controlling, 'factor' in *Harmelin*, i.e., whether the sentence at issue is grossly disproportionate to the crime, has not been satisfied." *Angelos*, 433 F.3d at 753. The Tenth Circuit panel asserted that "the district court failed to accord proper deference to Congress's decision to severely punish criminals who repeatedly possess firearms in connection with drug-trafficking crimes, and erroneously downplayed the seriousness of Angelos's crimes." *Id.* However, rather than considering just the convictions below, the panel inappropriately relied upon unproven conduct, essentially condemning Angelos on the basis of conjecture and hearsay. Although the panel acknowledged that Angelos "had no significant adult criminal history," the panel baldly asserted that the lack of criminal history "appears to have been the result of good fortune rather than Angelos's lack of involvement in criminal activity." *Id.*

The Tenth Circuit panel's proportionality analysis did not precisely analyze the *Harmelin* test, which requires a comparison "of the *crime committed* and the sentence imposed." 501 U.S. at 1005 (emphasis added). The Circuit inappropriately weighed the sentence imposed against the crimes of conviction and unfounded allegations that Angelos was involved in other illegal activities. In other words, the Tenth Circuit panel missed the constitutional mark – and arguably violated the Supreme Court's recent Sixth Amendment jurisprudence precluding judicial fact-finding to increase the legally available sentence – when it upheld a grossly disproportionate sentence by relying on its conjencture that Angelos *may* have been involved in some other criminal activities at some point during his life. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.").

Again, as succinctly emphasized in *Ewing*, the first factor in determining whether a sentence is so disproportionate that it violates the Eighth Amendment is a comparison between "the gravity of *the offense* and the harshness of the penalty." 538 U.S. at 22 (quoting *Solem*, 463 U.S. at 292) (emphasis added). In this case, Angelos's offense was dealing in relatively small quantities of marijuana and passively possessing firearms; his penalty was 55 years in prison. When comparing the unquestioned harshness of Angelos's sentence to the offenses for which he was convicted (and to those offenses alone), the proper conclusion is the one originally reached

by the district court: the sentence is grossly disproportionate. This is especially clear in light of Angelos's lack of a criminal history and the reality that the Supreme Court's adverse proportionality precedent has rejected Eighth Amendment challenges principally in cases dealing with recidivist offenders, unlike Angelos. *See, e.g.*, *Lockyer*, 538 U.S. 63; *Ewing*, 538 U.S. 11; *Rummel v. Estelle*, 445 U.S. 263 (1980).[14]

Especially when taking into account society's evolved standard of decency as reflected by the important legal and social developments highlighted earlier, the *Harmelin* factors must be reexamined as applied to Angelos. And when examined anew, it becomes more apparent than ever that the sentence being served by Angelos is grossly disproportionate to his crimes of conviction. Society's evolving standards that continue to inform appl ication of the Eighth Amendment provide a strong basis for the inference of disproportionality under the *Harmelin* first factor as originally found by the district court.

Furthermore, the comparative analysis conducted under the second and third factors of the *Harmelin* test, which were not even reached by the Tenth Circuit panel, clearly weigh against imposition of the sentence in this case,[15] as the government has already acknowledged in prior

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[14] The only arguable outlier in the Court's Eighth Amendment precedents is *Hutto v. Davis*, 454 U.S. 370 (1982). In *Hutto*, a fractured Supreme Court issued a *per curiam* opinion rejecting a collateral attack on a 40-year Virginia state sentence (which included the possibility of parole) for distribution of marijuana imposed by a jury on a defendant with a well-established criminal past. (As the Court noted in *Hutto*, the jury sentencing the defendant "knew from evidence presented at trial that respondent had knowingly sold drugs to be smuggled into prison, had sold drugs to an inmate's wife who was alone with an infant child, and had himself been imprisoned in the past." 454 U.S. at 372 n.1). The Supreme Court's 1982 ruling in *Hutto* – a 25-year-old habeas case reviewing a jury-imposed state discretionary sentence from an era in which defendants were often likely to be paroled long before the end of a long prison sentence – cannot alone provide a sound and satisfying basis for rejecting Angelos's Eighth Amendment claims.

[15] In his recent testimony before the House Judiciary Committee, Judge Cassell spoke about the damage that he believed mandatory minimum sentences do "to logic and rationality in our nation's federal courts." *Statement on Behalf of the Judicial Conference of the United States from U.S. District Judge Paul Cassell before the House Judiciary Committee Subcommittee on*

proceedings. *See Angelos*, 345 F. Supp. 2d at 1258-59 ("Mr. Angelos's sentence is longer than he would receive in any of the fifty states. The government commendably concedes this point in its brief . . . ."). This reality not only spotlights the unusualness of the sentence imposed on Angelos, but also reinforces the inference of disproportionality and thereby further supports the legal conclusion that the sentence imposed violates the Eighth Amendment.

In sum, the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . [and] the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. at 101. This constitutional safeguard, applied to the myriad of important consideration set forth herein, calls for concluding that the sentence currently being served by Angelos is undignified, grossly disproportionate to his crimes, and exceeds the limits of our society's maturing standards of decency.[16] Accordingly,

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Crime, Terrorism, and Homeland Security, 19 Fed. Sent. R. 344 (June 2007). The prominent case study cited by Judge Cassell of the tragic problems inherent in the application of mandatory minimums, which he referred to as "one-size-fits-all injustice," was the case of Weldon Angelos. *Id.* Judge Cassell explained that the sentence he imposed on Angelos was irrational and unjust, greatly exceeding sentences received by those convicted of perpetrating far more heinous crimes:

> Mandatory minimum sentences produce sentences that can only be described as bizarre. For example, recently I had to sentence a first-time offender, Mr. Weldon Angelos, to more than 55 years in prison for carrying (but not using or displaying) a gun at several marijuana deals. The sentence that Angelos received far exceeded what he would have received for committing such heinous crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. Indeed, the very same day I sentenced Weldon Angelos, I gave a second-degree murderer 22 years in prison--the maximum suggested by the Sentencing Guidelines. It irrational that Mr. Angelos will be spending 30 more years in prison for carrying a gun to marijuana deals than a defendant who murders an elderly woman by striking her with a log.

Id.

[16] *See* Eva Nilsen, *Indecent Standards: The Case of U.S. versus Weldon Angelos*, 11 Roger Williams U. L. Rev. 537, 563 ("A life sentence for Weldon Angelos shocks the conscience of the community and offends our deepest notions of human dignity. The [courts] should [act] to uphold the deep respect for human dignity that is at the heart of the Eighth Amendment.").

the sentence should be set aside as unconstitutional pursuant to the Eighth Amendment's prohibition against "cruel and unusual punishment."

II. Angelos's Sentence Violates the Second Amendment

Constitutional scholars, prominent politicians and now a growing number of lower courts are coming to recognize that the Second Amendment to the U.S. Constitution safeguards an individual's right to "keep and bear arms." The rights of personal protection and self-defense reflected in the Second Amendment are obviously not without some reasonable limits – a government can surely prohibit individuals from visibly bearing weapons in certain locations (such as in hospitals) or in conjunction with certain activities (such as while making threats to a bank teller). However, just as some punishments for some acts of speech and expression can go so far as to violate the First Amendment, *see, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964), and some punishments for exercising the right to remain silent can go so far as to violate the Fifth Amendment, *see, e.g., Mitchell v. United States*, 526 U.S. 314 (1999), it is also plausible and possible that some punishments for some acts of keeping and bearing arms, especially when dealing with the severity of Angelos's sentence, may go so far as to potentially violate the Second Amendment.

The Supreme Court is poised to address the meaning and reach of the Second Amendment's protection of the right to "keep and bear arms." *See District of Columbia v. Heller*, 2007 U.S. LEXIS 12324, No. 07-290 (Nov. 20, 2007) (granting certiorari). Against that backdrop, it is important to realize that, even if all the suspect evidence in support of the key 924(c) counts in this case is credited, Weldon Angelos was subject to 55 years of mandatory imprisonment for keeping arms in his home and on his person. Of particular note, the facts supporting the two stacked 924(c) counts that resulted in 50 years of his sentence involve

nothing more than the allegation that Angelos had a weapon on his person during his (admittedly illegal) brief encounter with informant Lazalde on June 4 and the essentially undisputed fact that Angelos kept some firearms (safely locked) in his home for personal protection.

A robust understanding of an individual's right to "keep and bear arms" under the Second Amendment might well prohibit *any criminal punishment whatsoever* for a citizen's act of safely keeping firearms in his home for personal protection and self-defense. But Angelos's claim here is not that the Second Amendment precludes any criminal punishment for his keeping of arms in his home; rather, he is simply arguing that the 25-year term of imprisonment as applied in this case for having firearms in his home raises serious concerns under any individual rights interpretation of the Second Amendment's protection of the right to "keep and bear arms." *See Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (recognizing an individual right secured by the Second Amendment to keep a firearm in the home for self-protection), *cert. granted, Heller*, 2007 U.S. LEXIS 12324.[17]

III. Sentence Imposed Infringes Fifth Amendment Equal Justice Principles and Structural Separation of Powers Principles

The Supreme Court has explained that "[c]oncern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most directly in applying it to the States" and has repeatedly "held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws." *Vance*

[17] In this context it especially bears noting that Utahns have formally and informally demonstrated their strong affinity for firearms and individual rights to keep and bear guns. *See* Utah Const. Art. I § 6 (protecting the "individual right of the people to keep and bear arms"); Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 Utah L. Rev. 889, 889 (noting high gun ownership and importance of firearms in Utah); see also *University of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006) (holding that the University of Utah could not legally preclude students with concealed carry licenses from bringing firearms on campus).

v. Bradley, 440 U.S. 93, 95 n.1 (1979). In the context of criminal prosecutions, the Court has also explained that a facially valid law can be applied "with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws" because, even when "the law itself [is] fair on its face and impartial in appearance, . . . if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

On direct appeal, the district court and the Tenth Circuit panel assessed Angelos's equal protection claims under a "rational basis" standard of review. Notably, even applying this highly deferential standard, the district court expressly and repeatedly concluded, after a series of thoughtful and detailed analyses, that the operation of the sentencing provisions of the stacked 924(c) counts was irrational in many ways:

- "In sum, the court is faced with the fact that § 924(c) produces punishment in this case far beyond that called for by the congressionally-created expert agency on sentencing, by the jurors who heard the evidence, by the Utah state system, or by any of the other state systems. If the court is to take seriously the directive that it should impose "just punishment" with its sentences, then it should impose sentences that are viewed as appropriate by the citizens of this state and of this country. The court concludes that placing Mr. Angelos in prison for 61 1/2 years is not 'just punishment' for his crimes. This factor suggests the irrationality of § 924(c)." *Angelos*, 345 F. Supp. 2d at 1243.

- "As applied in this case, the classifications created by § 924(c) are simply irrational." *Angelos*, 345 F. Supp. 2d at 1244.

- While some might raise theoretical objections to such recidivist statutes, 109 their underlying logic is clear and unassailable. But no such logic can justify § 924(c), at least when applied to first offenders such as Mr. Angelos. In cases such as his, the statute blindly draws no distinction between recidivists and first-time offenders. For this reason as well, the statute appears to be irrational as applied in this case." *Angelos*, 345 F. Supp. 2d at 1250.

Despite these well-gounded findings, Judge Cassell "reluctantly conclude[d] that § 924(c) survives rational basis scrutiny" with this rationale: "While it imposes unjust punishment and creates irrational classifications, there is a 'plausible reason' for Congress' action." Angelos, 345 F. Supp. 2d at 1256. The Tenth Circuit panel on appeal similarly concluded that § 924(c) "survives the rational basis test." *Angelos*, 433 F.3d at 754.

Though Angelos continues to struggle to find a true rational basis to support the severe application of recidivist sentencing provisions to a defendant being punished for his first serious criminal convictions, in this action he suggests that rational basis review is not the proper legal standard for assessing his fundamental claim of unequal and inequitable governmental treatment. Rather, the real gravamen of Angelos's equal protection claim centers upon the inconsistent and oppressive application of severe mandatory minimum sentencing provisions. As explained by the Supreme Court in *Yick Wo*, a facially valid statute that survives rational basis review in general can still be applied "with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws" because, even when "the law itself [is] fair on its face and impartial in appearance, . . . if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. at 373. Angelos understandably believes that his case shows the administration of the law with "an unequal hand," and this view is fully supported by a factual record full of circumstantial evidence of "oppressive" governmental choices ranging from the government's efforts to induce multiple hand-to-hand drug sales to the prosecution's decision to secure indictments on additional counts that could mandate a sentence of over 100 years after Angelos's indicated his interest in going to trial on the original indictment. Even accepting the rational basis supporting the operation of stacked 924(c) counts in general, this case reflects the

application and administration of this criminal law "by public authority with an evil eye and an unequal hand" in a manner that the Supreme Court recognized over 130 year ago could be unconstitutional in light of fundamental equal justice principles.

At the end of this lengthy motion, it bears recalling not only that the district court considered Angelos's 55-year sentence as "unjust, cruel, and irrational," but also that prosecutors doggedly pursued charges that would have statutorily *required* the imposition of a sentence of over 100 years of imprisonment. Moreover, even after jury acquittal on two 924(c) counts protected Angelos from 50 additional mandatory years of prison time, prosecutors still urged the district court to impose a prison sentence more than six years longer than the sentence that the district court concluded was "unjust, cruel, and irrational." In light of the facts of this case, Angelos submits that, because he is hard-pressed to imagine a sound rationale for the government's discretionary charging and bargaining choices, his rights to equal protection and dues process under the Fifth Amendment were violated because the prosecutors applied and administered federal law "with an evil eye and an unequal hand."

Relatedly, in other settings, the Supreme Court has held that equal protection claims may also involve a "class of one," where an individual can reasonably allege that only he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, (2000). Though a "class of one" claim must plaintiff bears the burden of proving that he has suffered intentional, irrational, and arbitrary discrimination, the prosecutors' extreme charging and bargaining decisions in this case certainly provides circumstantial evidence of intentional, irrational, and arbitrary discrimination for a claim based on *Olech* to proceed.

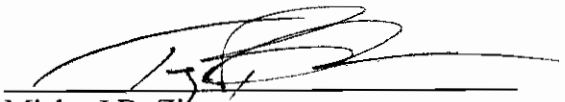
Moreover, the fact that the district court in this case felt it must impose a sentence it viewed as "unjust, cruel, and irrational" spotlights the separation of powers problems raised by this case. It is fair and accurate to say that the federal judicial branch did not decide upon a sentence for Angelos; rather, the federal executive branch made this decision through the prosecutors' extreme charging decisions that functionally determined the sentence that Angelos is now serving. The remarkable reality that prosecutors were effectively Angelos's sentencing judge raises serious separation of powers concerns that this Court can and should remedy not merely to address the injustices in this case, but also to safeguard critically important structural principles that are at the foundation of the Framers' entire constitutional design. *Cf. Mistretta v. United States*, 488 U.S. 361, 390-91, 391 n.17 (1989) (stressing that "sentencing has been and should remain primarily a judicial function" and noting the serious constitutional questions that would be raised if Congress ever functionally "assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch").

CONCLUSION

In accordance with the foregoing, Weldon Angelos respectfully requests that this honorable Court vacate the convictions and sentences as unconstitutional and unlawful under statute as-applied to Angelos, and order a resentencing and/or whatever other proceedings this Court deems appropriate to insure the constitutionality and lawfulness of his convictions and sentences.

DATED this 3rd day of December, 2007.

Snell & Wilmer L.L.P.



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Appendix C

Memorandum in Support of Motion for Partial Summary Judgment to Vacate Portion of Sentence Pursuant to 28 U.S.C. § 2255

Angelos v. United States, No. 2:07-cv-00936-TC (D. Utah)

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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

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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.[1] 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

[1] 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.[2]

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

[2] 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 15th day of September, 2008.

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CERTIFICATE OF SERVICE

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

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