**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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No. 04-4282

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| UNITED STATES OF AMERICA, | ) | APPEAL FROM THE UNITED |
| | ) | STATES DISTRICT COURT FOR |
| Plaintiff-Appellee | ) | THE DISTRICT OF UTAH, |
| | ) | CENTRAL DIVISION |
| v. | ) | |
| | ) | CASE NO. 2:02 CR 0708 PGC |
| WELDON ANGELOS, | ) | |
| | ) | HON. PAUL G. CASSELL |
| Defendant-Appellant | ) | |

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# BRIEF OF APPELLANT WELDON ANGELOS

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Jerome H. Mooney, Esq.
Mooney Law Firm
50 West Broadway, First Floor
Salt Lake City, Utah 84101-2006
(801) 364-6500

Erik Luna, Esq.
332 South 1400 East, Room 101
Salt Lake City, Utah 84112-0730
(801) 585-5500

ATTORNEYS FOR APPELLANT

**ORAL ARGUMENT REQUESTED**

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There are no prior or related appeals.

## STATEMENT OF JURISDICTION

Appellant-Defendant Weldon Angelos appeals from a final judgment disposing of all charges against him, entered by the United States District Court for the District of Utah, Central Division, on November 18, 2004. (Appellant's Appendix [hereinafter "App."] 26)

Angelos timely filed a notice of appeal on November 19, 2004. (App. 32)

The District Court had original jurisdiction over offenses against the laws of the United States under 18 U.S.C. § 3231. This Court has appellate jurisdiction over the judgment pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

## STATEMENT OF ISSUES

1. Did the 55-year mandatory minimum sentence imposed on Defendant Weldon Angelos violate the U.S. Constitution because:

   A. Defendant Weldon Angelos' 55-year sentence inflicts cruel and unusual punishment in violation of the Eighth Amendment.

   B. Defendant Weldon Angelos' 55-year sentence imposes an irrational classification in violation of equal protection.

   C. Defendant Weldon Angelos' unconstitutional sentence should have been avoided by statutory construction.

2. Should the District Court have granted Defendant's motion to suppress on the following grounds:

A. A law enforcement search exceeded the scope of the search warrant, and this violation was not subject to a "good faith" exception.

B. The District Court erroneously allowed an expansion of the plain view doctrine to include "plain smell."

3. Should the District Court have admitted copies of police reports that clearly demonstrated the belated reference to any mention of a firearm being present at the marijuana sales that served as the basis for two of the three § 924(c) counts.

## STATEMENT OF THE CASE

Weldon Angelos was indicted in a five count indictment charging three counts of distribution of marijuana and one violation of 18 U.S.C. § 924(c). (App. 1) When plea negotiations were unsuccessful, a superceding indictment adding four additional violations of 18 U.S.C. § 924(c) was filed on June 18, 2003. (App. 4) On August 4, 2003, Angelos filed a motion to suppress evidence. In his motion, Angelos argued, *inter alia*, that the search conducted on December 16, 2002 was improper and exceeded the scope of the warrant.

A second superceding indictment filed on October 1, 2003 added three counts of money laundering. (App. 14)

The District Court heard evidence on the suppression motion on October 7, 2003, and denied the motion in an opinion issued on November 4, 2003. (App. 98)

From December 8-16, 2003, the case was tried to a jury. A verdict of guilty was returned on five counts of possession with intent to distribute marijuana (21 U.S.C. § 841(a)(1)), three counts of possession of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)(1)), two counts of possession of stolen firearms (18 U.S.C. § 922(j)), one count of possession of a firearm with a removed serial number (18 U.S.C. § 922(k)), two counts of use of a controlled substance in possession of a firearm (18 U.S.C. § 922(g)(3)), and three counts of money laundering (18 U.S.C. §§ 1956, 1957). Mr. Angelos was acquitted on three counts, including two of the five § 924(c) charges. (App. 26 )

On November 16, 2004, Angelos was sentenced to a term of 55 years and one day. (App. 26) On November 19, 2004, Angelos filed a timely notice of appeal. (App. 32)

## STATEMENT OF FACTS

Weldon Angelos is an aspiring rap music producer and musician. In 2001 and 2002, he began producing rap music and created a record label by the name of Extravagant Records. (App. 423-436) Under this label, he released record albums that included artists such as "Snoop Dogg." (App. 403-406, 453) These records were distributed nationally. Mr. Angelos also worked with rap artists on the development of music and music-related projects. (App. 437-443)

In the spring of 2002, Ronnie Lazalde was facing serious drug and firearm charges. (App. 259-262) In the hopes of avoiding a lengthy prison sentence, he began working with law enforcement as a confidential informant. (App. 240-244) Lazalde knew Weldon Angelos and believed that he could purchase marijuana from Mr. Angelos.

It is without question that Mr. Angelos was involved with marijuana, and it is undisputed that he sold eight ounces of marijuana to Lazalde on three occasions.[1] These transactions were observed by police and described in their reports. (App. 55) No police officer observed the presence of a firearm at any of these transactions, and police reported that the confidential informant was carefully observed and debriefed after each such transaction. (App. 265, 272-276,

[1] The defense conceded Counts 1, 3, 5, and 9 of the indictment. (App. 461)

323-334) The contemporaneous police reports make no mention of the presence of a firearm. (App. 55, 287-295)

Sometime after the marijuana transactions occurred, police learned that Mr. Angelos may have been carrying a firearm on his person. (App. 310-311) Though there had been no mention of a firearm in the police reports for the marijuana sales, an entry dated October 30, 2002 claimed that Lazalde had referred to the presence of firearms during his debriefings in May and June. (App. 69, 276-287) Mr. Angelos denied that he possessed a firearm in connection with these transactions, and at trial he attempted to introduce into evidence the police reports that demonstrated the late reference to the alleged presence of a firearm. Although the District Court allowed examination on the report, it did not allow the introduction of the report. (App. 459)

At the time of Mr. Angelos' arrest, a warrantless search was made of his apartment (the "Gristmill property"), and various materials were seized. (App. 199-201) On December 16, 2002, law enforcement obtained a search warrant for the home of Mr. Angelos' wife and children (the "Fort Union property"). This warrant specifically identified the subjects of the search as a personal safe located in the home and a BMW automobile. (App. 40) In the execution of the warrant, law enforcement officers expanded the scope of the search to include all locations

of the home. They seized personal belongings including (but not limited to) documents, pictures, and items such as T-shirts. (App. 41-46, 208-211)[2] Claiming to have smelled marijuana, officers also seized duffle bags and suitcases, which contained marijuana residue, from the basement of the home and the garage.[3] Mr. Angelos brought a motion to suppress with regard to the search of the Fort Union property. The District Court denied the motion. (App. 98, 229-238)

In addition to the marijuana offenses, Mr. Angelos was convicted of three violations of 18 U.S.C. § 924(c): Count 2 (relating to Count 1, the sale that occurred on May 21, 2002); Count 4 (relating to Count 3, the sale that occurred on June 4, 2002 – listed as June 6, 2002 in the indictment); and Count 10 (relating to Count 9, the marijuana found in Mr. Angelos' home when he was arrested on November 15, 2002). (App. 1) Mr. Angelos was acquitted of two other § 924(c) counts. (App. 26)

The three § 924(c) charges for which Mr. Angelos was convicted carried mandatory minimum sentences that totaled 55 years. The District Court directed subsequent briefing on these mandatory minimum sentences. (App. 105) At

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[2] Government Exhibits 202-239 and 242-264 are items taken from the home during the search. (App. 352-369, 371-382, 386-391, 562-565)

[3] These were introduced as Exhibits 202, 203, 261, and 262. (App. 562, 565)

sentencing, the District Court found that although the punishment was "cruel, unusual, and even irrational," it did not violate the Eighth Amendment's ban on cruel and unusual punishment and did not impose an irrational classification in violation of equal protection principles. The District Court then imposed the mandatory minimum 55-year sentence, adding one day to this prison term for the remaining counts. *Id.*

## SUMMARY OF ARGUMENTS

### I.

Even though the District Court deemed a 55-year mandatory minimum sentence for Mr. Angelos to be cruel, unusual, and irrational, it still felt bound to impose this otherwise unconstitutional punishment. After completing an analysis that found all of the factors establishing an Eight Amendment violation under the *Solem-Harmelin* test, the District Court nonetheless determined that it was constrained from reaching the ultimate conclusion of unconstitutionality. This was in error, as the single precedent relied upon in upholding the sentence is easily distinguishable from the present case, it has been effectively overruled or narrowed by subsequent rulings, and today it is inconsistent with evolving standards of decency. The District Court also repeatedly found that the relevant sentencing scheme produced an irrational classification in violation of equal protection principles embodied in the due process clause of the Fifth Amendment — but again, it still upheld an effective life sentence for Mr. Angelos. The District Court was mistaken in this conclusion, however, by providing undue deference to an irrational legislative scheme that implicates the judicial branch's core duty of criminal sentencing and entails incomparable consequences for the individual defendant. Moreover, the sentence was not only unconstitutional, but

the District Court could have avoided imposing this punishment through appropriate statutory construction.

**II.**

The District Court made reversible error in its rulings on the execution of a very precisely drawn search warrant for the home of the Defendant's wife and children. The District Court found that although the officers had exceeded the scope of the warrant in their search of the house and seizure of property, they had acted in "good faith," thus crafting an entirely new exception to the Fourth Amendment's warrant requirement. As articulated by the U.S. Supreme Court, any "good faith" exception must relate to officer reliance on mistakes made by the magistrate, not on their own reckless or negligent acts. The rule created by the District Court is, in fact, a "bad faith" exception, and as such, the Court should reverse this ruling and hold that the illegally seized items must be suppressed. Additionally, the District Court found that even if the search was deemed invalid, some evidence seized in pursuit of the smell of marijuana constituted a "plain smell" search pursuant to the "plain view" doctrine. This ruling was unfounded, as the basis for the plain view doctrine is wholly distinct from the rationale permitting olfactory-based searches. Although smell may be a factor in

establishing probable cause, it does not authorize a search without the existence of exigent circumstances.

## III.

Two of the three charges which together constitute 50 years of the 55-year sentence imposed on Mr. Angelos (i.e., two of the 18 U.S.C. § 924(c) counts) were based solely on the testimony of a confidential informant. Contemporaneous police reports made no reference to the presence of a firearm that served as the basis for these counts. A much later police report, however, described for the first time that the confidential informant had previously reported the presence of a firearm. Defendant offered these police reports into evidence to visually demonstrate: (1) the discrepancy in the reports versus trial testimony, and (2) the stark contrast between the later reports on the presence of a firearm at these transactions versus all earlier reports made by officers who had been present, had observed the events, had listened to the debriefing, and had then documented this information. The District Court's refusal to allow the admission of these exhibits was erroneous and highly prejudicial to Mr. Angelos.

## LEGAL ARGUMENTS

### I.

### DEFENDANT WELDON ANGELOS' 55-YEAR SENTENCE VIOLATES THE U.S. CONSTITUTION.

The issue here is the validity of an effective life sentence[4] for a first-time offender for possessing firearms in connection with selling small amounts of marijuana, despite the fact that the handguns were never brandished or used and despite the absence of any threatened or actual violence or injury. *See United States v. Angelos*, 345 F.Supp.2d 1227, 1239, 1248, 1258 (D. Utah 2004). But in a very real sense, the larger issue is whether there are *any* limits to the imposition of "cruel, unusual, and even irrational" punishment. *Id.* at 1230, 1263. Although lawmakers and law enforcers have significant discretion in, respectively, setting punishment and charging individual defendants, the Court should hold that this prerogative is not boundless; that the federal judiciary will not serve as mere rubber stamps for cruel, unusual, and irrational sentences; and that the limits of punishment have been exceeded in this case. To conclude otherwise is tantamount

[4] As concluded by the District Court and discussed below, Weldon Angelos' 55-year sentence is more likely to be a life sentence than the punishment for someone who is actually sentenced to "life imprisonment" under the federal three-strikes law. *See United States v. Angelos*, 345 F.Supp.2d 1227, 1250-51 (D. Utah 2004).

to saying that the Constitution is inapplicable to prison sentences, no matter how draconian.

The underlying statute that produced the 55-year sentence for Weldon Angelos is 18 U.S.C. § 924(c), one of the so-called "mandatory minimum sentence" laws. Its application in the present case resulted in unconscionable punishment, despite the fact that every participant — including the judge, the jury, and, at least initially, the prosecution — recognized that Mr. Angelos' crimes did not merit an effective life sentence. The punishment was only made possible by a grotesque act of charge-staking after the defendant had the "gall" to ask for his day in court.

> The original indictment issued against Mr. Angelos contained three counts of distribution of marijuana, 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 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.

*Angelos*, 345 F.Supp.2d at 1231-32.

Based on his conviction on three of the § 924(c) counts, Mr. Angelos received a 55-year sentence. To put it bluntly, this first-time, low-level offender is treated as though he was the marijuana equivalent of Al Capone or Manuel Noriega. But ironically, not even these notorious, violent criminals received the unforgiving sentence that was doled out in this case — Capone was sentenced to a total of 11 years imprisonment, while Noriega received a 40-year sentence.[5] The justice of this result is hard to fathom, and although it reluctantly imposed what amounts to a life sentence, the District Court nonetheless "believe[d] that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational." *Angelos*, 345 F.Supp.2d at 1230.

Less extreme cases and the concept of mandatory minimums in general have been assailed as thoroughly unjust and unwise by distinguished members of the federal judiciary,[6] including Justices of the U.S. Supreme Court.[7] At various times

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[5] *See United States v. Noriega*, 117 F.3d 1206, 1210 (11th Cir. 1997) (noting Noriega's sentence); David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 21 (noting that Capone was given an 11-year sentence "after years of murdering, stealing, extorting, smuggling, and bribing with impunity").

[6] *Cf.* John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (op-ed by federal judge who resigned his position due to "the distress I feel at being part

in their careers, the past three U.S. Presidents have also doubted the wisdom of long mandatory sentences,[8] while leading federal lawmakers and even a former U.S. Drug Czar and a former U.S. Attorney General have disputed the efficacy and justice of mandatory minimums.[9] Moreover, numerous organizations have expressed opposition to mandatory minimums, with, for instance, a 2004

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of a sentencing system that is unnecessarily cruel and rigid"); Erik Luna, *Drug Exceptionalism*, 47 VILLANOVA L. REV. 753, 799-802 nn.218-229 (2002) (providing citations to judicial criticisms of drug-related sentences).

[7] *See* Hon. Anthony M. Kennedy, "Speech at the American Bar Association Annual Meeting," Aug. 9, 2003, available at http://www.supremecourtus.gov/publicinfo/speeches /sp_08-09-03.html [hereinafter "Kennedy Speech"]; Hon. Stephen Breyer, "Speech Before the University of Nebraska College of Law," Nov. 18, 1998, *available at* http://www.ussguide.com/members/ memos/BreyerSpeech.doc; David B. Kopel, *Prison Blues: How America's Foolish Sentencing Policies Endanger Public Policy*, 208 CATO POL'Y ANALYSIS 1, 12 (May 1994) (quoting address by Chief Justice William H. Rehnquist), *available at* https://www.cato.org/ pubs/pas/pa-208.html.

[8] *See* Frank Davies, *Drug Czar Vacancy Exposes Policy Divide in GOP*, MIAMI HERALD, Feb. 23, 2001, at A29 (quoting CNN interview of President-elect George W. Bush); "Interview of the President by Rolling Stone Magazine," Nov. 2, 2000 (comments of President William J. Clinton), *available at* http://www.clintonfoundation.org/legacy/ 20700-president-interviewed-by-rolling-stone-magazine-a.htm; 116 Cong. Rec. H33314 (Sept. 23, 1970), *reprinted in* 3 FED. SENT. REP. 108 (1990) (comments of then-Congressman George H.W. Bush).

[9] *See* Christopher S. Wren, *Public Lives: A Drug Warrior Who Would Rather Treat Than Fight*, N.Y. TIMES, Jan. 8, 2001, at A12 (quoting former U.S. Drug Czar Barry McCaffrey); Timothy Egan, *The Nation: Hard Time*, N.Y. TIMES, Mar. 7, 1999, § 4, at 1 (quoting former U.S. Attorney General Edwin Meese); Hon. 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, 192-95 (1993).

American Bar Association report calling for the repeal of mandatory minimum sentencing laws.[10] But whatever the merits of other cases or obligatory sentencing more generally, Mr. Angelos' punishment represents a singular instance of abusive, retaliatory deployment of mandatory minimums against a first-time, non-violent offender. It is, in fact, *sui generis*, presenting the ultimate example of what Justice Anthony Kennedy described as the "misguided" "transfer of sentencing discretion from a judge to an Assistant U.S. Attorney." Kennedy Speech, *supra*. To strike down an effective life sentence for a first-time, non-violent offender will not result in the invalidation of countless other sentences — the defense and the court below could find no analogous cases in the federal system. Instead, this Court would uphold the imperative that the Constitution and the judiciary are not impotent in the face of cruel, unusual, and irrational punishment.

Although any number of legal infirmities require the invalidation of Weldon Angelos' 55-year sentence, the following arguments will focus on a pair of constitutional claims that received substantial attention below and warrant reversal by this Court: the imposition of cruel and unusual punishment in violation of the Eighth Amendment, and the creation of an irrational classification in

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[10] *See* REPORT OF THE A.B.A. JUSTICE KENNEDY COMMISSION (2004), *available at* http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf.

contravention of equal protection principles embodied in the due process clause of the Fifth Amendment. The brief will then discuss sub-constitutional means by which the District Court could have avoided imposing an unconstitutional sentence in this case.

A. Standard of Review

Factual findings of the District Court are reviewed for clear error. The legal effect of those findings are reviewed *de novo*. *United States v. Carrier,* 9 F.3d 867, 869 (10th Cir. 1993). Likewise, issues of statutory construction are reviewed *de novo. In re Overland Park Financial Corp.*, 236 F.3d 1246, 1251 (10th Cir. 2001).

B. Defendant Weldon Angelos' 55-year Sentence Inflicts Cruel and Unusual Punishment in Violation of the Eighth Amendment

The conclusion that Weldon Angelos' sentence should be invalidated as being grossly disproportionate to his offenses is far from novel. To the contrary, the idea of proportionality between crime and punishment expresses a universal principle of justice and a limitation on government power that has been recognized throughout history and across cultures.[11] Proportionality was enshrined in the

[11] Mosaic Law and the Code of Hammurabi formulated the principle as an "eye for an eye" (*see, e.g., Exodus* 21:24, *in* THE HOLY BIBLE 97 (C.I. Schofield ed., Oxford U. Press 1945); MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 121 (2d ed. 1997) (translating Hammurabi's Laws)), commonly understood as requiring that

Magna Carta, the English Bill of Rights, and British jurisprudence. *See Solem v. Helm*, 463 U.S. 277, 284-85 (1983); *Trop v. Dulles*, 356 U.S. 86, 100 (1958).[12]

"The principle that a punishment should be proportionate to the crime is deeply

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punishment be commensurate to the offense. In the Classical Age, Aristotle opined that it was the judge's duty to impose punishment equivalent to the crime (ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 179-82 (J.A.K. Thomson trans., 1976)), while the Roman statesman and author Cicero proclaimed the maxim that "the punishment should fit the offense." *See* CICERO, DE RE PUBLICA, DE LEGIBUS 513 (Clinton Walker Keyes trans., 1928) ("noxiae poena par esto"). "[T]here are certain duties that we owe even to those who have wronged us," Cicero averred. "For there is a limit to retribution and to punishment." CICERO, DE OFFICIIS 35 (Walter Miller trans., 1938). *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 844-47 (1969) (discussing historical limits on excessive punishment).

Post-Enlightenment scholars heralded the concept of proportionality as well. For instance, Montesquieu wrote that "[a]ll punishment which is not derived from necessity is tyrannical." 2 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 357 (Thomas Nugent trans., 1900). Liberty is protected "when criminal laws derive each punishment from the particular nature of the crime. There are then no arbitrary decisions [when] the punishment does not flow from the capriciousness of the legislator, but from the very nature of the thing." *Id.* at 222. Likewise, the first modern penologists argued for proportionality between crime and penalty (*see, e.g.,* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS ch. 6 (1764) ("Of the Proportion Between Crimes and Punishments"); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. 14 (1789) ("Of the Proportion Between Punishments and Offences")); while Blackstone argued for proportionality in punishment and decried excessive penalties as violating "the dictates of conscience and humanity," being ineffective at "preventing crimes and amending the manners of people," and evincing "a bad symptom of the distemper of any state, or at least of its weak constitution." 4 WILLIAM BLACKSTONE, COMMENTARIES, at *10-19.

[12] *See also Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) ("imprisonment ought always to be according to the quality of the offence"); RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 236 (1959) (describing "the longstanding principle of English law that the punishment ... should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged").

rooted and frequently repeated in common-law jurisprudence." *Solem,* 463 U.S. at 284-85. The proportionality principle was carried over to the New World and codified in both colonial law and post-revolutionary state constitutions.[13] Most importantly, "[w]hen the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality," providing "convincing proof that they intended to ... [protect] the right to be free from excessive punishments." *Solem*, 463 U.S. at 285-86. The Supreme Court has now recognized this constitutional principle of proportionality for nearly a century, acknowledging the "precept of justice that punishment for crime be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). In particular, the Eighth Amendment prohibition was directed at "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Id.* at 371 (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)). As such, the appropriate legal posture is that "[c]onfinement in a prison ... is a form of punishment subject to

[13] *See, e.g.,* PERRY, *supra*, at 107 (Maryland Charter of 1632 permitting punishment if "the Quality of the offense requires it"); PA. CONST. §38 (1776) (calling for punishments "proportionate to the crime"); S.C. CONST. §XL (1776) (similar).

scrutiny under Eighth Amendment standards" (*Hutto v. Finney*, 437 U.S. 678, 685 (1978)), and that "no penalty is *per se* constitutional." *Solem*, 463 U.S. at 290.[14]

In *Solem v. Helm*, the Supreme Court articulated the modern Eighth Amendment test to determine whether a term of imprisonment amounts to cruel and unusual punishment, holding "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem*, 463 U.S. at 289. According to the *Solem* Court, "proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction, and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. This three-part test was later adapted by Justice Kennedy in his concurrence in *Harmelin v. Michigan*, concluding that the Eighth Amendment forbids "extreme sentences that are 'grossly disproportionate' to the crime." 501 U.S. 957, 1001

[14] It is worth noting that contemporary Eighth Amendment jurisprudence has established relatively strict limitations on capital punishment and excessive fines and forfeitures. *See, e.g., Roper v. Simmons*, 125 S.Ct. 1183 (2005) (striking down death penalty for juveniles); *United States v. Bajakajian*, 524 U.S. 321 (1998) (striking down criminal forfeiture). Given the historical background as well as direct and ancillary case law, "[i]t would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not." *Solem*, 463 U.S. at 289.

(1991) (Kennedy, J., concurring). Moreover, the "intrajurisdictional and interjurisdictional analyses" should be conducted when the "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* at 1005.

In the past few years, both the Supreme Court and the Tenth Circuit have relied upon the *Solem-Harmelin* three-part test as the appropriate Eighth Amendment standard. *See Ewing v. California,* 538 U.S. 11, 23-24 (2003) (noting that "Justice Kennedy's concurrence [in *Harmelin*] guide[s] our application of the Eighth Amendment"); *Hawkins v. Hargett,* 200 F.3d 1279, 1282 (10th Cir. 1999), *cert. denied,* 531 U.S. 830 (2000) ("Justice Kennedy's opinion controls because it both retains proportionality and narrows *Solem*."). Admittedly, "the precise contours of [the test] are unclear," given that the "precedents in this area have not been a model of clarity" and "have not established a clear or consistent path for courts to follow." *Lockyer v. Andrade*, 538 U.S. 63, 72-73 (2003). Nonetheless, "[t]hrough this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges" (*id.* at 72): An individual may not be subjected to grossly disproportionate punishment.

1. Threshold Comparison of Offense and Punishment

As mentioned, the first part of the *Solem-Harmelin* test requires that this Court compare the gravity of Weldon Angelos' crimes with the harshness of his sentence, "measur[ing] the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender." *Solem*, 463 U.S. at 288. In making this determination, the Court should consider the crimes of conviction, the defendant's criminal history (*Ewing*, 538 U.S. at 29), "the harm caused or threatened to the victim or society, and the culpability of the offender." *Solem*, 463 U.S. at 288. Relevant factors would include: the "absolute magnitude" of the crime and the presence or absence of violence (*see Solem,* 463 U.S. at 292-293; *Rummel v. Estelle,* 445 U.S. 263, 275 (1980)) as demonstrating the harm caused or threatened and thus society's interest in punishing the defendant; the "motive and level of scienter" (*Hawkins*, 200 F.3d at 1283 (citing *Solem,* 463 U.S. at 293-94)) as well as the defendant's age in assessing his culpability (*Hawkins*, 200 F.3d at 1283-84); and "the length of the prison term in real time" as the proper indicator of sentence severity. *Ewing*, 538 U.S. at 37 (Breyer, J., dissenting). In sum, "[i]t might be safely said that when the offense causes less revulsion than the punishment imposed ..., then grossly disproportionate punishment has been inflicted in violation of the Eighth

Amendment." *United States v. Gonzalez*, 922 F.2d 1044, 1053 (2d Cir. 1991), *cert. denied*, 502 U.S. 1014 (1991).

In concluding that Weldon Angelos' 55-year sentence "strongly suggests not merely disproportionality, but gross disproportionality" (*Angelos*, 345 F.Supp.2d at 1258), the District Court made the following findings:

> 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.... 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 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). With respect to the firearms conduct specifically, the Commission has concluded that about 24 months (a two-level enhancement) is the appropriate penalty. 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.

*Id.* at 1257-58. Earlier in its opinion, the District Court also noted that it had "asked the jurors what they believed was the appropriate penalty for Mr. Angelos" (*id.* at 1242), which the defense credits as both exceptionally useful in this case

and particularly appropriate in a post-*Booker* world. After being informed about Mr. Angelos' lack of criminal history and the absence of parole in the federal system, "the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years" (*id.*), a length of incarceration that pales in comparison to the 55-year sentence that the District Court felt bound to impose.

Moreover, as a first-time offender (*see id.* at 1230, 1232), Weldon Angelos is not a recidivist who "'failed to learn his lessons from the initial punishment' and committed a repeat offense." *Id.* at 1232. Instead, Mr. Angelos is only twenty-four years of age, raised by his father with only minimal contact with his mother, who nonetheless has been a productive member of society, a successful businessman in the music industry, and a loving father of two small children, six-year-old Anthony and five-year-old Jessie. *Id.* at 1230-31. Mr. Angelos' acts were not only short-lived and wholly lacking "force or violence, or threats of force or violence" (*id.* at 1258), but the "absolute magnitude" of his crimes as well as his "culpability" (*Solem*, 463 U.S. at 292-293) make a 55-year sentence thoroughly excessive. Unlike the defendant in *Harmelin* who was convicted of possessing 672 grams of cocaine — an amount with "a potential yield of between 32,500 and 65,000 doses" (*Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring)) of an addictive and potentially deadly narcotic — Mr. Angelos sold "small amounts of

marijuana" worth only a few hundred dollars. *Angelos*, 345 F.Supp.2d at 1258. Marijuana has been decriminalized in a number of jurisdictions and is deemed a minor offense in others,[15] while the federal government itself treats marijuana as less harmful than cocaine and other more serious drugs under congressional statutes and the Sentencing Guidelines. *Compare* 21 U.S.C. § 841(b)(1)(A)-(C) (punishment for, *inter alia*, heroin and cocaine) *with* 21 U.S.C. § 841(b)(1)(D) (punishment for marijuana).[16] "Although drug crimes generally are considered serious," the Eighth Circuit argued in 2001, "we believe that it denies reality and contradicts precedent to say that all drug crimes are of equal seriousness and pose the same threat to society." *Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001). As a matter of the drug and quantity at issue, Mr. Angelos' offense is different in kind rather than degree from the crime in *Harmelin*.

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[15] *See, e.g.*, COLO. REV. STAT. § 18-18-406 (making possession of less than one ounce of marijuana a petty offense subject to $100 fine); N.Y. PENAL LAW § 221.05 (making possession of up to 25 grams of marijuana a civil violation subject to a $100 fine); OR. REV. STAT. § 475.992(4)(f) (making possession of less than one ounce of marijuana a civil violation subject to a fine of $500-$1,000).

[16] *See also* MITCH EARLEYWINE, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE (2002) (reviewing scientific evidence and concluding that, *inter alia*, marijuana is relatively harmless compared other drugs, does not cause physical dependence, does not have a toxic dose, and is not criminogenic); LYNN ZIMMER & JOHN P. MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE (1997) (similar).

In turn, the firearms in this case were either simply possessed by Mr. Angelos "under his clothing ... but never brandished or used" or found in his home during a police search. *Angelos*, 345 F.Supp.2d at 1258. As is true of many Utahns and citizens of other western states, Mr. Angelos was raised to appreciate and respect firearms, and he acquired a number of guns as an adult. His motive in possessing firearms was never to commit acts of violence or to injure others, but instead as a means of recreation (e.g., hunting) and personal protection. *Id.* Although such acts may be looked down upon in other parts of the nation, Utahns take pride in and are particularly protective of an individual's right to possess firearms, as evidenced by the exceptionally high level of gun ownership among the citizenry and the special protection accorded firearms in the state constitution.[17] Moreover, Mr. Angelos' gun possession was wholly devoid of actual or threatened violence or injury to others, thus eliminating whatever interest society might have (if any) in imposing severe punishment. *See id.* at 1258.

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[17] *See* UTAH CONST. Art. I § 6 (protecting the "*individual* right of the people to keep and bear arms") (emphasis added). *See also* Utah Attorney General Opinion No. 01-002 (2001) (state attorney general's opinion providing expansive interpretation of Utah's constitutional protection of firearm rights), available at http://attorneygeneral.utah.gov/Opinions_AttorneyGeneral/apop01002.htm; 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).

In contrast to his comparatively inconsequential crimes, Mr. Angelos has "effectively receive[d] a life sentence." *Id.* at 1239. If he survives 55 years of incarceration, the defendant will walk out of prison as an octogenarian, and his two little boys will both be in their sixties. With credit for good behavior, he will "only" be 70-years-old when he first becomes eligible for release. *See id.* at 1260. If the prosecution had had its way, however, Mr. Angelos would have received a 61½-year sentence. *See id.* This is particularly troubling given that the government was quite literally the master of this sentence through its "controlled buys" of relatively small amounts of marijuana — drugs which, of course, would never reach public consumption — as well as the fact that "additional criminal acts were in some sense procured by the government." *Id.* at 1253. It can be safely said, then, that the crimes in question cause far "less revulsion than the punishment imposed." *Gonzalez*, 922 F.2d at 1053. For the above reasons, the District Court was undeniably correct in its threshold determination that Mr. Angelos' punishment is grossly disproportionate to his offenses. *Angelos*, 345 F.Supp.2d at 1258.

2. Intrajurisdictional and Interjurisdictional Comparisons

Likewise, the District Court appropriately concluded that the final parts of the *Solem-Harmelin* test had been satisfied in this case. *Id.* at 1258-59. The

second part requires a comparison of Mr. Angelos' punishment to "the sentences imposed on other criminals in the same jurisdiction" (*Solem*, 463 U.S., at 291; *see also Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring)), namely, the sentences imposed on other offenders in the federal system. *See Angelos*, 345 F.Supp.2d at 1258. "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." *Solem,* 463 U.S. at 291. In the present case, the difference between Mr. Angelos' sentence and those for exceptionally violent federal offenders is both stark and disturbing.[18] While this defendant was sentenced to 55 years

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[18] It also relevant that the prosecution failed to follow the directive of the U.S. Attorney General with regard to charging multiple violations of 18 U.S.C. § 924(c). In this case, the government filed five violations of § 924(c) and obtained convictions on three of these counts, but the directive states that prosecutors only "pursue the first *two* violations." *Angelos*, 345 F.Supp.2d at 1253 (quoting "Ashcroft Memorandum") (emphasis in opinion). For this reason,

> 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.

*Id.* at 1253-54. Not only is this "no trivial matter" as an issue of fairness (*id.* at 1254), but other federal appellate courts have considered intrajurisdictional charging disparities in conducting Eighth Amendment analysis. *See Ramirez v. Castro*, 365 F.3d 755, 771-72 (9th Cir. 2004) (quoting and citing an internal policy memorandum that "makes clear that [the defendant] probably would not have faced a Three Strikes sentence at all if he had committed his [crime] just a couple of years later, and on the other side of the San Bernardino/Los Angeles county line").

imprisonment for possessing a firearm three times in connection with minor marijuana transactions,

- a kingpin of a major drug trafficking ring in which death resulted would receive a maximum sentence of 24 years, 5 months;
- likewise, an aircraft hijacker will serve a prison term of no more than 24 years, 5 months;
- a terrorist who detonates a bomb in a public place intending to kill a bystander would receive a maximum sentence of 19 years, 7 months;
- a racist who attacks a minority individual with the intent to kill and does, in fact, inflict permanent or life-threatening injuries would serve a prison sentence of no more than 17 years, 6 months;
- a spy who gathers top secret information would also receive a maximum sentence of 17 years, 6 months;
- a second degree murderer will be imprisoned for no more than 14 years;
- a criminal who assaults with the intent to kill and does, in fact, inflict permanent or life threatening injuries would receive a maximum sentence of 17 years, 7 months;
- likewise, a kidnapper would serve a prison term of no more than 17 years, 7 months;
- a saboteur who destroys military materials would also receive a maximum sentence of 17 years, 7 months;
- a marijuana dealer who shoots an innocent person during a drug transaction would be imprisoned for no more than 12 years, 2 months;
- a rapist of a 10-year-old child would serve a maximum sentence of 11 years, 3 months;

- a child pornographer who photographs a 12-year-old child in sexually explicit positions would serve a prison term of no more than 9 years;
- a criminal who provides weapons to support a dangerous foreign terrorist organization would receive a maximum sentence of 8 years, 1 month;
- a criminal who detonates a bomb in an aircraft would also serve no more than 8 years, 1 month; and
- a rapist would be imprisoned for no more than 7 years, 3 months.

*Angelos*, 345 F.Supp.2d at 1244-46 & tbl.1.

After extensive questioning by the District Court, the prosecution even admitted that Mr. Angelos had "committed less serious crimes than a second-degree murderer, a marijuana dealer who shoots someone, or a rapist." *Id.* at 1246. The prosecution, however, suggested that the comparison should be to a three-time hijacker, for instance, or a three-time rapist, a claim that the District Court appropriately rejected as "miss[ing] the whole point." *Id*. "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." *Id.*; *see also id.* at 1258. But even accepting the prosecution's argument, Mr. Angelos received "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." *Id.* at 1258; *see also id.* at 1246-47 & tbl.2.

As such, he received a much harsher sentence for offenses lacking threats, violence, or injury to others (*id.* at 1258; *see also id.* at 1244-48) than those individuals who actually threaten, harm, and even kill innocent victims. Quite simply, Mr. Angelos is "treated in the same manner as, or more severely than, criminals who have committed far more serious crimes." *Solem*, 463 U.S. at 299.[19]

Finally, evaluation of the third part of the *Solem-Harmelin* test is also "straightforward," as this prong is clearly satisfied in the present case. *Angelos*, 345 F.Supp.2d at 1259. The relevant analysis "compare[s] the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 291; *see also Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring). The District Court concluded that "Mr. Angelos' sentence is longer than he would receive in any of the fifty states." *Angelos*, 345 F.Supp.2d at 1259; *see also id.* at 1243. The prosecution even conceded this point at sentencing, noting in its brief "that in Washington State, Mr. Angelos would serve about nine years and in Utah would serve about five to seven years." *Id.* at 1259 (citing government's brief). Moreover, the prosecution's proffered sentencing range probably overestimates

[19] It was alarmingly ironic that a violent murderer received a 262 month sentence as recommended by the government, and "[y]et 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!?" *Angelos*, 345 F.Supp.2d at 1251.

the actual length of incarceration for an analogous case in the Utah state system. When the District Court "asked the Probation Office to determine what the penalty would have been in Utah state court had Mr. Angelos been prosecuted there," it reported that the defendant "would likely have been paroled after serving about two to three years in prison." *Id.* at 1243. But regardless of what figure is used, the bottom line remains the same: A 55-year sentence is far beyond the punishment a defendant would have received anywhere else in the United States. *See id.* at 1243, 1259.[20] Because Mr. Angelos has been "treated more severely than he would have been in any other [jurisdiction]," the third and final part of the *Solem-Harmelin* test has been satisfied. *See id.* at 1259.[21]

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[20] In remanding a pre-*Booker* case for resentencing, a recent First Circuit decision noted that the trial judge had "repeatedly expressed his concern about disparate treatment between federal and state court sentences in similar cases." The Court then pointed out that "the need to avoid unwarranted sentencing disparities" is "among the factors to be considered by the now advisory Guidelines." *United States v. Wilkerson*, 2005 WL 1355138 (1st Cir. 2005).

[21] Although difficult to discern with absolute certainly, it appears that a mandatory 55-year sentence under these facts might be the harshest punishment possible among common law-based nations (and maybe the longest potential sentence in the Western world). In Canada, for instance, the crime of trafficking less than 3 kilograms (105.8 ounces) — even while carrying a weapon in relation to the commission of the offense — can be sentenced to no more than 5 years imprisonment. *See* Controlled Drugs and Substances Act, S.C., ch. 19, § 5(4) (1996) (Can.) (providing punishment for trafficking less than 3 kilograms of marijuana); *id.* at § 10(2)(a)(I) (listing sentencing factor of carrying, using, or threatening to use a weapon). *Cf. Roper*, 125 S.Ct. at 1198-1200 (drawing upon foreign and international law as instructive in Eighth Amendment interpretation); Richard Frase, *Excessive Prison Sentences, Punishment Goals, and the*

As was the conclusion below and is the proper conclusion here, all three parts of the Eight Amendment standard have been met: (1) a threshold analysis establishes that Mr. Angelos' 55-year sentence is grossly disproportionate to the underlying offenses; (2) a comparison between his sentence and the punishment for more serious criminals in the federal system confirms this gross disproportionality; and (3) a comparison between Mr. Angelos' sentence and the punishment for the same offenses in other jurisdictions further corroborates the judgment of gross disproportionality. For these reasons, a 55-year sentence in the present case imposes cruel and unusual punishment in violation of the Eighth Amendment.

3. Distinguishing *Hutto v. Davis*

The District Court agreed that analysis of this case pursuant to the *Solem-Harmelin* test "lead[s] to the conclusion that Mr. Angelos' sentence violates the Eighth Amendment." *Angelos*, 345 F.Supp.2d at 1259. Despite this inevitable judgment, however, the District Court still upheld the 55-year sentence based on a single per curiam decision issued more than two decades ago. That case, *Hutto v. Davis*, involved a defendant sentenced to 40 years imprisonment for crimes

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*Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 623-27 (2005) (showing that the concept of proportionality has been adopted in foreign and international law as a limitation on punishment).

involving less than 9 ounces of marijuana. 454 U.S. 370 (1982). Specifically, the defendant in *Davis* received consecutive sentences of 20 years imprisonment for distribution of approximately 84 grams (or 2.96 ounces) of marijuana and 20 years imprisonment for possession with intent to distribute 168 grams (or 5.93 ounces) of marijuana. *See Davis v. Zahradnick*, 432 F.Supp. 444, 448, 448 n.1 (W.D. Va. 1977). But as it turns out, the Supreme Court's decision in *Davis* is easily distinguishable from the present case. Moreover, *Davis* has been effectively overruled or narrowed by subsequent rulings, and today that nearly quarter-century-old opinion is inconsistent with "the evolving standards of decency that mark the progress of a maturing society." *Roper*, 125 S.Ct. at 1190 (quoting *Trop*, 356 U.S. at 101).

In contrast to the present case, *Davis* involved a recidivist who "previously had been convicted of selling LSD," *Davis*, 454 U.S. at 380 n.10 (Powell, J., concurring in the judgment) (quoting *Davis v. Davis*, 585 F.2d 1226, 1233 (4th Cir. 1977)), who "had knowingly sold drugs to be smuggled into a prison," who "had sold drugs to an inmate's wife who was alone with an infant child," *Davis*, 454 U.S. at 372 n.1 (per curiam) (citing *Davis v. Davis*, 585 F.2d. at 1227-28), and whose current offenses "were committed while on bail pending appeal from the previous conviction for selling LSD." *Davis*, 454 U.S. at 380 n.10 (Powell, J.,

concurring in the judgment). So unlike Mr. Angelos, the defendant in *Davis* had "'failed to learn his lessons from the initial punishment' and committed a repeat offense" (*Angelos*, 345 F.Supp.2d at 1232); worse yet, he undermined the penological goals of incarceration by trafficking in drugs to be consumed by prison inmates.

Moreover, the judge and jury in *Davis* maintained substantial deference in determining an appropriate sentence in light of the specific facts of that case. Although the defendant in *Davis* could have received a 5-year sentence, "the jury awarded the [defendant] a sentence which it believed was appropriate for such an offender," and "[t]he trial court, with a more detailed comprehension of Davis' record of prior drug offenses, chose to enter judgment on that verdict, and directed the sentences to be served consecutively." *Davis v. Davis*, 585 F.2d. at 1228; *see also Davis*, 454 U.S. at 371. In the present case, however, the jurors recommended a sentence for Mr. Angelos that was about 40 years less than he actually received. *See Angelos*, 345 F.Supp.2d at 1242. Likewise, the District Court opined that Mr. Angelos would be completely and justly punished by an 8-10 year sentence (specifically, a 97-121 month sentence) under the Guidelines and certainly no more than the 18-year mean sentence recommended by the jury. *See id.* at 1230-31, 1241, 1248, 1258, 1260-62. "In this case," the District Court

argued, "neither side has offered any strong reason for believing that the sentence the Guidelines alone provide for [i.e., 97-121 months] would not achieve just punishment." *Id.* at 1241. But unlike the sentencing discretion accorded the judge and jury in *Davis*, the strict interpretation of 18 U.S.C. § 924(c)[22] prevented the District Court from justly punishing Mr. Angelos consistent with its own assessment of the case and the opinion of the jury.

The nature of the proceedings in *Davis* is also highly relevant. The U.S. Supreme Court and the lower federal courts were presented with a federal writ of habeas corpus to upset the judgment of another legal system (*see Davis*, 454 U.S. at 371-72), and thus were considering the defendant's sentence through the limited lens of collateral review of state proceedings rather than the much broader ambit of direct appeal within their own legal system. The Supreme Court has imposed "significant limits on the discretion of federal courts to grant habeas relief" in light of "'the profound costs that attend the exercise of habeas jurisdiction.'" *Calderon v. Thompson*, 523 U.S. 538, 554-55 (1998) (quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986)). "To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, [federal habeas

[22] As discussed below, however, appropriate statutory construction in light of potential constitutional infirmities argues for an interpretation of federal sentencing law that would not mandate a minimum 55-year sentence in the present case.

corpus proceedings] render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems." *Schneckloth v. Bustamonte*, 412 U.S. 218, 263 (1973) (Powell, J., concurring); *see also Engle v. Issac*, 456 U.S. 107, 128 (1982). Thus, "considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power" (*Stone v. Powell*, 428 U.S. 465, 478 n. 11 (1976) (quoting *Francis v. Henderson*, 425 U.S. 536, 539 (1976))), and specifically, federal collateral review "will not be allowed to do service for an appeal." *Stone*, 428 U.S. at 478 n.10 (quoting *Sunal v. Large*, 332 U.S. 174, 178 (1947)). In the present case, however, there are no issues of federalism stemming from collateral review of state proceedings. Unlike the federal judiciary's tenuous role in *Davis*, the District Court was in the posture of evaluating Mr. Angelos' 55-year sentence in the first instance rather than by habeas corpus petition, and this Court is directly reviewing the sentence pursuant to its primary function as appellate tribunal within the federal criminal justice system.

Morever, the *Davis* opinion was dubious from the outset and has been effectively overruled by subsequent decisions. To begin with, the prosecutor himself concluded afterward "that Davis' sentence was a 'gross injustice,'" and "referred to the 'grave disparity in sentencing' in comparable drug offenses in the

'commonwealth [of Virginia] and the nation.'" *Davis*, 454 U.S. at 378 (Powell, J., concurring in the judgment) (quoting "a letter from the Commonwealth Attorney who successfully prosecuted Davis"). Given, *inter alia*, this prosecutorial admission, concurring Justice Powell "view[ed] the sentence as unjust and disproportionate to the offense," although he felt bound by a prior Supreme Court decision. *Id.* at 375. Dissenting Justices Brennan, Marshall, and Stevens likewise believed that the sentence in *Davis* was grossly disproportionate, but they also attacked the per curiam opinion "because the Court had misused precedent" (*id.* at 387 (Brennan, J., dissenting, joined by Marshall and Stevens, JJ.)) and because the Court had "inappropriately ... invoke[d] its power of summary disposition" with "neither full briefing nor oral argument" (*id.* at 381) in a "patent abuse of our judicial power." *Id.* at 388. Since its issuance, the *Davis* per curiam opinion has been questioned by legal scholars (*see, e.g.,* Frase, *supra*, at 637-38) and, most importantly, has been called into doubt by members of the Supreme Court. Justice Scalia has argued that *Davis* cannot be squared with the Court's subsequent decision in *Solem*: "Having decreed that a general principle of proportionality exists, the [*Solem*] court used as the criterion for its application the three-factor test that had been explicitly rejected in ... *Davis*." *Harmelin*, 501 U.S. at 965 (opinion of Scalia, J., joined by Rehnquist, C.J.). Likewise, Justice Kennedy's

concurrence in *Harmelin* noted that "[o]ur most recent pronouncement on the subject in *Solem* ... appeared to apply a different analysis than in ... *Davis*." *Id.* at 998 (Kennedy, J., concurring).

The District Court in the present case was "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," but it then suggested that subsequent cases had discussed "*Davis* along with other cases in distilling various 'common principles' that control Eighth Amendment analysis." *Angelos*, 345 F.Supp.2d at 1259. But any recent discussion of *Davis* by the Supreme Court has appeared as mere historical background on the evolution of Eighth Amendment jurisprudence, quickly followed by a discussion of the *Solem* opinion and its reigning three-part test. *See Ewing,* 538 U.S. at 21-22. In fact, the 2003 opinion in *Lockyer v. Andrade*, 538 U.S. at 66-83, discussed and cited all of the Court's contemporary Eighth Amendment excessive sentence cases *except Davis*. Moreover, the Supreme Court's mention of *Davis* in distilling "common principles" for Eighth Amendment analysis is not synonymous with the larger contention that the decision's legal analysis remains in full force and binding on arguably similar fact patterns. For instance, the Court continues to cite to its decision in *Korematsu v. United States*, 323 U.S. 214 (1944), for the limited

proposition that racial classifications are subject to strict scrutiny. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215-16 (1995). But at the same time, the Court has acknowledged that *Korematsu* was wrongly decided (*see, e.g., id.* at 236 ("*Korematsu* demonstrates vividly that even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification")), while individual Justices have argued that the judgment in *Korematsu* should be relegated to a shameful position alongside *Dred Scott*. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting); *see also Reno v. Flores*, 507 U.S. 292, 344 n.30 (1993) (Stevens, J., dissenting) (noting that although the Japanese-American internment case supports the Court's legal analysis, "I understand the majority's reluctance to rely on *Korematsu*").[23]

Finally, the 40-year sentence in *Davis* — like the 55-year sentence in the present case — violates "evolving standards of decency" (*Roper*, 125 S.Ct. at 1190 (quoting *Trop*, 356 U.S. at 101)), and thus is inconsistent with the

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[23] As an aside, one scholar has noted that the long sentence in *Davis* may have resulted, in part, from racism: "At least some familiar with his case suggest the explanation for Davis' comparatively long sentence 'was not marijuana but miscegenation.' Davis, a black man, apparently had broken a social taboo in rural Wytheville, Virginia by dating white women and ultimately marrying one. He was not shy about his relationship with the woman, and during that time he had a cross burned on his lawn." Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach To Cruel And Unusual Punishment*, 84 KY. L.J. 107, 120 n.80 (1995-1996) (internal citation omitted).

constitutional ban on cruel and unusual punishment. The meaning of the Eighth Amendment is not "frozen when it was originally drafted" (*Roper*, 125 S.Ct. at 1205 (Stevens, J., concurring)), and "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). As the Supreme Court has repeatedly stated, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 311 (quoting *Trop*, 356 U.S. at 100). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 311-12 (quoting *Trop*, 356 U.S. at 101); *see also Roper*, 125 S.Ct. at 1190.

"Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent'" (*Atkins*, 536 U.S. at 312 (quoting *Harmelin,* 501 U.S. at 1000)), and the Supreme Court has "pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Thirteen years after upholding the death penalty for mentally retarded criminals, the Court struck down the practice due in large part to the fact that various states had subsequently

abolished capital punishment in such cases. *See Atkins*, 536 U.S. at 313-17. Recently, the Supreme Court struck down the death penalty for juvenile offenders only a decade and a half after it had affirmed the practice, again largely due to the legislative movement against capital punishment for those under the age of majority. *See Roper*, 125 S.Ct. at 1192-94. In neither case had legislative unanimity been achieved in the intervening period between the Court's original opinion upholding the punishment and its decision striking down the practice. It was enough that a large number of states had prohibited the punishment. *See Atkins*, 536 U.S. at 315-16; *Roper*, 125 S.Ct. at 1193.

As concluded by the District Court in this case and conceded by the prosecution, Mr. Angelos' 55-year sentence is longer than the punishment he could have received in any other jurisdiction (*see Angelos*, 345 F.Supp.2d at 1243, 1259) — and the same appears to be true with regard to the defendant in *Davis*. At the time of his conviction, Davis received a sentence that was more than three and a half decades longer than the average punishment for marijuana offenders in the relevant jurisdiction (Virginia) and a quarter-century longer than the maximum sentence that had, in fact, been doled out. *Davis*, 454 U.S. at 378 n.8 (Powell, J., concurring in the judgment). Moreover, only five years after Davis' trial, the state "reduced the maximum penalty for offenses of which Davis was convicted,"

resulting in a "maximum [that] is less than half the sentence Davis received" and evidencing Virginia's "sentencing judgment that marihuana possession and distribution in small amounts no longer would justify Davis' sentence." *Id.* at 379. Today, Davis' crimes would produce a maximum sentence of 20 years and could result in no incarceration at all. *See* VA. CODE ANN. §§ 18.2-10(e), 18.2-248.1(a)(2). In fact, it appears that no jurisdiction would actually impose a 40-year sentence for distributing 2.96 ounces of marijuana and possessing with intent to distribute 5.93 ounces of marijuana, and only a couple of states make such punishment a *theoretical* possibility (e.g., Oklahoma) simply by virtue of maintaining broadly indeterminate sentencing schemes (e.g., 2 years to life for drug distribution). The vast majority of states set current punishment at a fraction of what Davis received a quarter-century ago. *See, e.g.,* ILLICIT DRUG POLICIES: SELECTED LAWS FROM THE 50 STATES (2002). In Utah, for instance, both distribution and possession with intent to distribute any amount of marijuana would be third-degree felonies punishable by no more than 5 years imprisonment. *See* UTAH CODE ANN. §§ 58-37-8(1)(b)(ii). Nationally, the average sentence for individuals convicted of marijuana trafficking is 2 years, 3 months. *See* RYAN S. KING & MARC MAUER, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990S, at 24 (2005).

It can be safely concluded, then, that a 40-year sentence for crimes involving less than 9 ounces of marijuana today would be deemed unconstitutional as inconsistent with "the evolving standards of decency that mark the progress of a maturing society" (*Roper*, 125 S.Ct. at 1190 (quoting *Trop*, 356 U.S. at 101)), and as such, *Davis* does not control the present case. And because the *Solem-Harmelin* test has been satisfied per the District Court's conclusions and the analysis above, this Court should hold that a 55-year sentence for Mr. Angelos imposes cruel and unusual punishment in violation of the Eighth Amendment.

C. Defendant Weldon Angelos' 55-year Sentence Imposes an Irrational Classification in Violation of Equal Protection

Weldon Angelos' grossly disproportionate sentence is also pursuant to a statutory scheme that creates an irrational classification in violation of equal protection principles embodied in the due process clause of the Fifth Amendment. *See Mathews v. de Castro*, 429 U.S. 181, 182 n.1 (1976) ("It is well settled that the Fifth Amendment's Due Process Clause encompasses equal protection principles."). Under prevailing constitutional jurisprudence, this Court will review an "equal protection claim regarding [punishment] under the rational basis standard to determine whether the challenged sentence is based on an arbitrary distinction or upon a rational sentencing scheme." *United States v. McKissick*,

204 F.3d 1282, 1300 (10th Cir. 2000). The District Court noted that "[t]he 55-year sentence mandated by § 924(c) in this case appears to be unjust, cruel, and *irrational*" (*Angelos*, 345 F.Supp.2d at 1263 (emphasis added); *see also id.* at 1230), and this Court should rule that Mr. Angelos' sentence violates principles of equal protection.[24]

In its equal protection analysis, the District Court described the 45-year disparity between the punishment apparently mandated by 18 U.S.C. § 924(c) versus the appropriate sentence under the governing statute (i.e., 18 U.S.C. § 3551 et seq.) and the relevant Guidelines. *See id.* at 1239-42. It also detailed the equally vast discrepancy between Mr. Angelos' 55-year sentence under § 924(c) versus the punishment recommended by the jury and the potential sentence in any other jurisdiction in the United States. *See id.* at 1242-43. Based on its evaluation of these "shock[ing]" disparities (*id.* at 1241), the District Court correctly concluded that the abject failure to provide "just punishment" for Mr. Angelos' crimes "suggests the irrationality of § 924(c)." *Id.* at 1243.

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[24] The District Court appropriately conducted its equal protection analysis of 18 U.S.C. § 924(c) as applied to the present case. In considering conflicting approaches, it noted that "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." *Angelos*, 345 F.Supp.2d at 1236-37 n.45 (citations omitted). Given "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." *Id.*

The District Court then considered the treatment of different offenses as an indicator of irrationality. As detailed in the written opinion and in Part I.B.2 above, the result of this comparison is startling: Mr. Angelos is punished more harshly than offenders who commit multiple crimes of violence — hijackings, terrorist bombings, murders, rapes, and so on. Needless to say, this disparity should be morally revolting to anyone who cares about justice. "As applied to this case, the classifications created by § 924(c) are simply irrational," the District Court concluded, an irrationality that is both "manifest" and "objectively proven." *Id.* at 1244, 1247.

It also considered the classification between different offenders, in particular, the failure of § 924(c) to distinguish between habitual criminals and first-time offenders like Mr. Angelos. In contrast to recidivist statutes, § 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." *Id.* While a recidivist statute is at least logical in theory — providing longer sentences for individuals who have been previously convicted and imprisoned for serious or violent crimes but continue to violate the law — "no such logic can justify § 924(c) ... when applied to first offenders such as Mr. Angelos." *Id.* at 1250. Instead, § 924(c) "blindly draws no distinction between

recidivists and first-time offenders," and "[f]or this reason as well, the statute appears to be irrational as applied in this case." *Id.* The irrationality of this scheme becomes especially obvious when considering that a recidivist sentenced to life imprisonment under the federal "three strikes" law is nonetheless eligible for "compassionate release." *See Angelos*, 345 F.Supp.2d at 1250 (discussing 18 U.S.C. §§ 3559(c), 3582(c)(1)). "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." *Id.*[25]

Equally disconcerting is a comparison between different categories of drug offenders. Weldon Angelos, who was convicted of trafficking small amounts of marijuana and carrying but never brandishing a weapon nor threatening any type of violence, nonetheless received a prison sentence *30 years longer* than a *kingpin* of a *major drug trafficking ring* in which a *death results* (*see id.* at 1245 tbl.1, 1257 tbl.2) — a discrepancy that is not just irrational but completely absurd.

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[25] This possibility "is no mere hypothetical." On the day Mr. Angelos was sentenced, the District Court announced the punishment for a violent recidivist with "sixteen adult criminal convictions on his record, including two robbery convictions involving dangerous weapons," and whose "most recent conviction was for carjacking" — and yet this habitual offender will be eligible for release after serving 30 years. *Angelos*, 345 F.Supp.2d at 1250-51.

Moreover, the District Court persuasively argued that the irrationality of § 924(c) is compounded by demeaning the victims of violent crime and creating the risk of backlash against the federal criminal justice system. *Id.* at 1251-52. Based on its own experiences and those of other trial judges, the District Court noted that "jurors may stop voting to convict drug dealers in federal criminal prosecutions if they are aware that unjust punishment may follow." *Id.* at 1252. The irrationality of a sentencing scheme becomes nearly self-evident when nullification is viewed by jurors as a rational means of responding to excessive punishment.

Given "its imposition of unjust punishment, its irrational classifications between offenses and offenders, and its demeaning of victims and actual criminal violence" (*id.*), § 924(c) proves unjustifiable in the present case. The government did not and could not rely upon the idea that the draconian punishment in this case provides "just punishment," eliminates sentencing disparities, or produces morally justifiable judicial economies. *See id.* at 1252-54. The only argument forwarded by the prosecution was one of crime prevention or deterrence. *Id*. at 1254. But in the District Court's words, this argument "proves too much." *Id.* at 1255. Mandatory life sentences for jaywalking or petty theft might deter these offenses (*id.*), as would summary execution or chopping off the hands of petty larcenists and the feet of jaywalkers. But this punishment would beg the exact question at issue

here: *Is such a program rational, particularly when far more serious offenses and far more dangerous offenders and recidivists receive substantially less punishment?*

Deterrence arguments are easily made yet rarely supportable, thrown out in a flippant fashion and without empirical or logical support, offering a rhetorical trope for those who cannot justify harsh punishment on the merits of a given case. Stepping back for a moment, claims of deterrence cannot be made in isolation, as they constitute subordinate arguments that must always support a larger theory of justice — utilitarianism. In its Benthamite formulation, this theory demands the greatest good for the greatest number (*see* BENTHAM, *supra*), meaning that punishment is only justifiable when its total costs are outweighed by its total benefits. In the present case, the District Court estimated that it will cost taxpayers $1,265,000 to incarcerate Mr. Angelos for 55 years. *Angelos*, 345 F.Supp.2d at 1255. This does not include the opportunity cost from imprisoning an individual who would otherwise be positively contributing to society through his lawful employment in the music industry and the paying of taxes, as well as the welfare cost society will bear because a father will not be able to provide for his two small children. Moreover, the million-plus dollars that will be used to cage this defendant could be spent "on other law enforcement or social programs that in all

likelihood would produce greater reductions in crime and victimization." *Id.* (citing John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime,* 27 J. LEGAL STUD. 1 (1998)). And, of course, this tab does not include the very real institutional costs should society in general and jurors in particular believe that the federal criminal justice system is unjust due to its imposition of unconscionably harsh sentences. *See id.* at 1252.

Considering the other side of the equation, leading punishment theorist (and former U.S. Sentencing Commissioner) Paul Robinson points out that deterrence will only work if three prerequisites are satisfied: "The potential offender must know of the rule; he must perceive the cost of violation as greater than the perceived benefit; and he must be able and willing to bring such knowledge to bear on his conduct decision at the time of the offense." Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003). However, "[t]he social science literature suggests that potential offenders commonly do not know the law, do not perceive an expected cost for a violation that outweighs the expected gain, and do not make rational self-interest choices." *Id.*

These limitations fully apply in the present case. Few lawyers, judges, and lawmakers fully grasp the ins-and-outs of the U.S. Code, so it can be safely assumed that high school graduates like Weldon Angelos are unfamiliar with the federal scheme of punishment in general and the intricacies of 18 U.S.C. § 924(c) in particular. In turn, whatever level of awareness might be assumed arguendo is undermined by the aforementioned disparity and non-uniformity in the application of § 924(c). It is axiomatic that an individual must know about potential punishment prior to the commission of crime in order to be deterred by this sentence — and in the present case, "an offender like Mr. Angelos would not have been charged with multiple § 924(c) counts" in other federal districts and, in fact, "Mr Angelos would not have been charged with federal crimes [at all] in many other states." *Angelos*, 345 F.Supp.2d at 1254. Finally, the underlying crime at issue, illegal drugs, typically implicates individuals who are not fully rational actors, do not fit the mold of *homo economicus*, and instead continue to commit drug-related crimes irrespective of brutal punishment, whether due to youth, peer pressure, socio-economic conditions, cognitive biases and heuristics, and/or the offenders' own addictions. Whatever specific deterrence is required for Weldon Angelos would be completely served by a sentence consistent with the Guidelines, the jury recommendations, or the potential punishment in a state jurisdiction such

as Utah, while it seems farfetched that a 55-year sentence in this case will serve general deterrence given, among other things, the aberrant nature of this prosecution and resulting punishment. For Mr. Angelos, the sentence is overkill in the extreme; for drug offenders in general, this punishment is either unknown or irrelevant.

For these reasons, § 924(c) creates an irrational classification as applied to Weldon Angelos and thus violates equal protection principles. The District Court itself repeatedly refers to the irrationality of this sentencing scheme and its application in this case.[26] Nonetheless, the equal protection claim was rejected, apparently due to a perceived obligation to broadly defer to legislative judgments under rational basis review. *See id.* at 1235-36, 1256. Although an

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[26] *See Angelos*, 345 F.Supp.2d at 1230 ("The court believes that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational."); *id.* at 1243 ("This factor suggests the irrationality of § 924(c)."); *id.* at 1244 ("As applied in this case, the classifications created by § 924(c) are simply irrational."); *id.* ("adopting the government's approach, the irrationality of the scheme only becomes more apparent"); *id.* at 1247 ("The irrationality of these differences is manifest and can be objectively proven."); *id.* at 1248 ("This factor, therefore, also suggests the irrationality of § 924(c)."); *id.* at 1250 ("For this reason as well, the statute appears to be irrational as applied in this case."); *id.* ("The irrationality only increases when section § 924(c) is compared to the federal 'three strikes' provision."); *id.* ("Again, the rationality of this arrangement is dubious."); *id.* at 1251 ("For the reasons outlined in the previous section, § 924(c) imposes unjust punishment and creates irrational classifications between different offenses and different offenders."); *id.* at 1252 (noting "irrational classifications between offenses and offenders"); *id.* at 1256 (§ 924(c) "imposes unjust punishment and creates irrational classifications"); *id.* at 1263 ("The 55-year sentence mandated by § 924(c) in this case appears to be unjust, cruel, and irrational.").

understandable misconception, the District Court's near total deference to classifications under § 924(c), after repeatedly finding the scheme irrational, was neither required as a matter of law nor appropriate in the present case.

Although rational basis review is, of course, not the type of stringent standard provided by heightened scrutiny, neither does it call for total judicial acquiescence akin to "rationality in theory, anything goes in practice." On various occasions, the U.S. Supreme Court has invalidated legislative classifications under rational basis review as violating equal protection principles. For instance, in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court reviewed a section of the Food Stamp Act that excluded from participation in the program an individual who is unrelated to any other member of the household. The section apparently was intended to prevent "hippies" and "hippie communes" from participating in the food stamps program. *Id.* at 535. In striking down the provision pursuant to rationality review, the Court held that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* Likewise, in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), the Court considered a zoning ordinance and permit requirement that prevented the operation of a group

home for the mentally retarded. Arguments in favor of the ordinance — such as avoiding concentrated populations, lessening congestion on the streets, and maintaining neighborhood serenity — were rejected given that "apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit." *Id.* at 450. And given that negative attitudes or fear toward the mentally retarded could not provide a permissible basis for the legislative distinction, the Court struck down the ordinance pursuant to rationality review. *See id.* at 448, 450.

The same analysis applies in this case. As argued above, Mr. Angelos' 55-year sentence pursuant to § 924(c) is dramatically longer than the punishment imposed for offenses that are incontrovertibly more serious, violent, and harmful — hijackings, murders, terrorist bombings, rapes, kidnappings, et cetera. In other words, the non-violent, relatively minor offenses in this case receive decades of incarceration beyond the maximum punishment for a class of offenses that involve violence, terror, physical harm, and even death. Moreover, § 924(c) fails to distinguish between first-time offenders and dangerous habitual criminals and, in fact, has the potential to treat the latter recidivist with greater leniency than the former newcomer to the criminal justice system. As illustrated by the District Court, "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)." *Angelos*, 345 F.Supp.2d at 1250. In turn, Mr. Angelos' 55-year sentence required by § 924(c) cannot be justified by reference to other regimes, as it is inconsistent with and dramatically longer than the punishment prescribed by Congress' expert sentencing body (the U.S. Sentencing Commission), the potential punishment in other jurisdictions, and the sentence deemed appropriate by the judge and jury that heard this case. *See id.* at 1240-43. Nor can the 55-year sentence be justified by considerations of just punishment, eliminating sentencing disparities, judicial economy, or inducement for cooperation. *See id.* at 1252-54. And as discussed above, the overwhelming sentence in this case does not serve the utilitarian goals of crime prevention/deterrence. The only rationale left is some type of unmerciful, heedless revenge or maybe a primitive desire to inflict cruel and ultimately senseless punishment on Mr. Angelos. Under equal protection principles, of course, this is no justification at all.

In addition, the extremely deferential treatment of legislative classifications in the present case was unwarranted given the nature of criminal justice proceedings and the constitutional implications of liberty deprivations through incarceration. Admittedly, equal protection principles provide "wide latitude" for

the political branches "[w]hen social or economic legislation is at issue." *Cleburne*, 473 U.S. at 440 (citations omitted). This makes sense for garden-variety socio-economic legislation involving, for instance, the regulation of business transactions or public works. Lawmakers have a special ability to make comprehensive decisions in these areas based on legislative hearings, reports, debates, and so on, while the judiciary largely lacks the institutional capacity to assess and weigh the various concerns and numerous parties impacted by new commercial regulations, the disbursement of interstate highway funds, educational standards for public schools, and so forth. The imposition of punishment, however, is a core function of the judiciary and arguably its most important and consequential obligation. The power to deprive freedom is totally unique, the most potent action any government can take against the governed. It almost goes without saying that incarceration is different from all other state actions, involving an incomparable denial of human dignity and autonomy. The practical consequences of involuntary confinement (e.g., prison rape) only accentuate the distinction between criminal punishment and all other state actions. Most importantly, punishment is imposed by judges, not lawmakers or law enforcers, and thus carries the imprimatur of the courts.

In setting boundaries of punishment, legislators can paint with broad strokes, but they lack the institutional capacity to precisely delineate a just sentence for specific cases. In contrast, the judiciary is specially trained on issues of criminal justice and uniquely experienced at sentencing individual defendants. Moreover, only a trial court — learned in the law, guided by experience, and dispassionate in decisionmaking — can morally judge a convicted criminal. The personal assessment of facts and circumstances, along with the interaction between judge and defendant, provides the basis for a court's imposition of moral judgment in the form of sentence. This weighing of the unique factors of each case cannot be done from afar or by the brute force of legislatively mandated punishment. It is their training and experience that allows trial courts to see the similarities between crimes and criminals, and, more importantly, the differences between individuals and important variations in their conduct, permitting the sentencing judge to reach a moral judgment based on all the information before him. "The fair method of sentencing is for an impartial judge, who is fully cognizant of an individual defendant's personal character, family responsibilities, medical and mental condition, criminal record, and the particular circumstances surrounding the crime, to impose sentence after deep reflection, informed by the judge's experience in life and in the law." *United States v. Sidhom*, 144 F.

Supp.2d 41, 41 (D. Mass. 2001). Given the crucial distinctions between legislation involving socio-economic issues versus criminal punishment, rational basis review of the latter should not mean rote deference — particularly when a sentencing statute like § 924(c) employs the crude tool of mandatory minimums literally in spite of judicial discretion.

Finally, "[w]hen social or economic legislation is at issue, ... the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne*, 473 U.S. at 440 (citations omitted). Again, this seems sensible for standard socio-economic statutes and squares with the political process theory of constitutional interpretation first articulated in the Supreme Court's *Carolene Products* opinion, which held that an assumption of legality was appropriate for "ordinary commercial transactions." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938). But as the Court's decision noted in its famous footnote four, "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments." *Id.* at 153 n.4. And although the Court considered it unnecessary to rule on the issue for all times, it hinted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the

operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* In the present case, Weldon Angelos is sentenced to 55-years imprisonment pursuant to a legislative classification that the District Court referred to as "cruel, unusual, and even irrational." *See Angelos*, 345 F.Supp.2d at 1230, 1263. Given that the sentencing scheme "appears on its face to be within a specific prohibition of the Constitution" (*Carolene Products*, 304 U.S. 153 n.4) — namely, the Eighth Amendment's ban on cruel and unusual punishment — a presumption of constitutionality under rational basis review is inappropriate. And, quite frankly, it is hard to conceive of a more "discrete and insular minority" than drug offenders like Weldon Angelos; not only are they effectively unrepresented and their interests totally ignored in the legislative process, but such individuals can be disenfranchised after conviction and often serve as political scapegoats for all that ails society. Keeping in mind the points made earlier — that mandatory minimums like § 924(c) have been assailed by distinguished jurists of the federal court system, including members of the U.S. Supreme Court, and have even been called into question by U.S. Presidents — there has been a systematic failure of the political processes that might ordinarily be expected to bring about the repeal of these draconian devices. *Cf. Angelos*, 345 F.Supp.2d at 1261 (noting that "the

system has malfunctioned" in imposing a 55-year sentence on Weldon Angelos). For this reason as well, a presumption of constitutionality under rational basis review is unwarranted in the present case.

In sum, when a federal judge concludes that a legislative classification is cruel, unusual, and irrational — and, in fact, repeatedly denominates the sentence as "irrational" — it must also conclude that this classification and the resulting punishment are, in fact, irrational in violation of equal protection principles. With any other resolution, words and the Constitution itself become meaningless. For all the above reasons, then, this Court should hold that § 924(c) creates an irrational classification as applied to Weldon Angelos in violation of the equal protection principles embodied in the due process clause of the Fifth Amendment.

D. Defendant Weldon Angelos' Unconstitutional Sentence Should Have Been Avoided by Statutory Construction

In addition to its constitutional infirmities, Weldon Angelos' 55-year sentence was unnecessary as a matter of statutory construction, given that the District Court could have imposed a sentence pursuant to "the governing statute — the Sentencing Reform Act." *Angelos*, 345 F.Supp.2d at 1240. This case presented an irreconcilable conflict between the brutal punishment apparently mandated by 18 U.S.C. § 924(c) versus the sentence provided under the governing

law of federal sentencing, 18 U.S.C. § 3553(a), and the relevant U.S. Sentencing Guidelines duly promulgated by Congress' expert body on federal sentencing, the U.S. Sentencing Commission. *See id.* at 1240-41. The District Court recognized this conflict in a briefing order (App. 105), and also averred to the incompatibility in its written opinion. *Angelos*, 345 F.Supp.2d at 1243.

The District Court did not, however, conduct the type of statutory analysis that could have solved the conflict and avoided questions of constitutionality. It is an established rule of statutory construction that criminal laws are to be strictly construed in favor of the defendant. As the Supreme Court has argued, it is appropriate to "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity, rooted in 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (citing and quoting *United States v. Bass*, 404 U.S. 336, 347-348 (1971)). Moreover, a court should avoid a constitutional question through statutory construction if at all possible. *See Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Here, the District Court was faced with a just sentence under the federal system's governing statute and the relevant Guidelines (*see Angelos*, 345

F.Supp.2d at 1241), versus a punishment "mandated by § 924(c) [that] in this case appears to be unjust, cruel, and irrational." *Id.* at 1240. Of course, the Supreme Court itself has recently held that § 3553(a) is the polestar of federal sentencing. *See United States v. Booker*, 125 S.Ct. 738, 764-66 (2005). Likewise, this Court has articulated the post-*Booker* sentencing framework as follows: "Though not mandatory, district courts now must consider the guidelines and the sentencing factors identified by Congress in 18 U.S.C. § 3553(a) when imposing sentences. In turn, the court of appeals will review sentences for reasonableness." *United States v. Lynch,* 397 F.3d 1270, 1272 (10th Cir. 2005) (citing *Booker,* 125 S.Ct. at 764-65). For these reasons, the District Court should have resolved the conflict in favor of the constitutionally valid sentence pursuant to the Sentencing Guidelines and the post-*Booker* framework rather than imposing the constitutionally dubious mandatory minimum punishment under § 924(c). And, in fact, at least one other trial court has resolved an analogous conflict in precisely this fashion, imposing an appropriate sentence pursuant to the federal system's governing statute rather than an excessive mandatory minimum punishment. *See United States v. Smith*, 359 F.Supp.2d 771 (E.D. Wis. 2005) (imposing a sentence pursuant to 18 U.S.C. § 3553(a) instead of the mandatory minimum sentence required by 21 U.S.C. § 841(b)(1)(A)).

The District Could also could have avoided the imposition of an unconstitutional sentence through statutory construction and interpretation of § 924(c). Specifically, the District Court felt bound by the interpretation of this statute in *Deal v. United States*, 508 U.S. 129 (1993).

> 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.

*Angelos*, 345 F.Supp.2d at 1234. Based on the jury's conviction for three counts of marijuana distribution, the District Court concluded that relevant precedents on § 924(c) mandated a 5-year sentence for the first marijuana count, a 25-year sentence for the second marijuana count, and another 25-year sentence for the third marijuana count, with the sentences to be served consecutively for a grand total of 55 years imprisonment.

But as it turns out, the *Deal* decision dealt specifically with a "crime of violence" under § 924(c), which, in turn, is defined by § 924(c)(3). In that subsection, "the term 'crime of violence' means <u>an offense that is a felony</u>" and has certain characteristics detailed in subsection (3)(A)-(B). 18 U.S.C. § 924(c)(3) (emphasis added). In this case, however, the predicate offenses that triggered the

mandatory minimum provision involved "drug trafficking," which is defined not by subsection (c)(3) but instead under subsection (c)(2): "For purposes of this section, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act." 18 U.S.C. § 924(c)(2) (emphasis added). Thus, the issue in *Deal* implicated a "crime of violence" which "means an offense that is a felony," while the issue in this case is "drug trafficking crime" which "means any felony punishable" under federal drug laws.

It is the contention here that the specifically unitary term "an offense" for "crime of violence" allows separate treatment of each such crime (like six different bank robberies), but that "any felony" for purposes of "drug trafficking crime" refers to a grouping of related acts. In other words, the three drug distribution convictions in this case — which involved seriatim offenses — should be treated collectively as "any felony," triggering only the 5-year mandatory minimum sentence under 18 U.S.C. § 924(c)(2)(A)(i). As a matter of statutory construction, the use of different words within the same statute — "any felony" versus "an offense that is a felony" — is presumed to be legislatively significant. "It is a well-established maxim in statutory construction that, if there is a change in the statutory language, the court is to assume that 'the change was not made by

accident, but that it was intentional, and that by making such a change in expression Congress used the term in a different sense from that in which the former expression was used.'" *Toy Biz, Inc. v. United States,* 248 F.Supp.2d 1234, 1245 (C.I.T. 2003) (citation omitted).

This construction is consistent with the Sentencing Guidelines' distinct treatment of drug crimes versus crimes of violence. Under the so-called "grouping rules," the Guidelines' commentary notes:

> Some offenses that may be charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range. For example, embezzling money from a bank and falsifying the related records, although legally distinct offenses, represent essentially the same type of wrongful conduct with the same ultimate harm, so that it would be more appropriate to treat them as a single offense for purposes of sentencing.... Some offense guidelines, such as those for theft, fraud and drug offenses, contain provisions that deal with repetitive or ongoing behavior. Other guidelines, such as those for assault and robbery, are oriented more toward single episodes of criminal behavior. Accordingly, different rules are required for dealing with multiple-count convictions involving these two different general classes of offenses.

U.S.S.G. § 3D1 intro. Specifically, § 3D1.2 states that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group," including "[w]hen counts involve the same victim and two or more acts or transactions by a common criminal objective or constituting part of a common

scheme or plan." U.S.S.G. § 3D1.2. The accompanying Guideline commentary then provides relevant examples. "The defendant is convicted of three counts of bank robbery. The counts are not to be grouped together[.]" U.S.S.G. § 3D1.2 cmt. (emphasis in original). This is consistent with the unitary language of 18 U.S.C. § 924(c)(3), defining "crime of violence" as "an" offense. In contrast, the Guideline commentary offers this example: "The defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together." U.S.S.G. § 3D1.2 cmt. The grouping of all three drug counts together is consistent with the aggregate language of 18 U.S.C. § 924(c)(2), where "drug trafficking crime means any felony." Moreover, this interpretation serves the aforementioned rule of lenity in construing penal statutes as well as the judicial preference of avoiding constitutional questions through statutory construction.

For these reasons, this Court should construe "any felony" in 18 U.S.C. § 924(c)(2) as referring to all three marijuana distribution counts in this case, thus triggering only the 5-year mandatory minimum sentence under 18 U.S.C. § 924(c)(2)(A)(i).

## II.

## THE DISTRICT COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED DURING AN ILLEGAL SEARCH.

A. Standard of Review

The District Court's ultimate determination of reasonableness as it relates to a search is reviewed *de novo*. *United States v. Long,* 176 F.3d 1304, 1307 (10th Cir. 1999). The factual findings of the District Court are accepted unless clearly erroneous. *United States v. Avery,* 295 F.3d 1158, 1167 (10th Cir. 2002).

B. The Search of the Home Exceeded the Scope of the Warrant Issued by the Magistrate, Resulting in an Unconstitutional General Search and Requiring the Suppression of the Seized Materials

The Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized" (U.S. CONST. amend. IV), thus protecting against the "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). With this cardinal restriction in mind, it is the responsibility of the issuing magistrate to delineate specific limits on the officers' actions in conducting the search by describing with particularity where the search will be conducted and the object of that search.

1. The Search Exceeded the Scope of the Warrant

In the present case, the search warrant affidavit described a telephone conversation that an officer had with a previously unknown person who claimed to be the former girlfriend of the Defendant. The officers contended that this person advised them that there were drugs in the trunk of a BMW automobile in the garage and that there were drugs, firearms, and money inside a safe located within the home. (App. 34, ¶ 6) The affidavit went on to request that the Magistrate Judge issue a warrant to seize the safe and the automobile. It then stated: "Your Affiant also requests permission to seize any drug paraphernalia, illegal narcotics, any proceeds derived from these activities, any photographs, video tapes or other items pertaining to the sale and distribution of illegal narcotics and street gang affiliation and activities." (App. 34, ¶ 11)

The warrant that was issued, however, did not include all of the requests made by the officers and instead was very narrow, describing only the BMW automobile and the safe. After defining the place to be searched as required by law, it defined the things to be seized as:

> Marijuana and other indicia of narcotics in the trunk of the veihcle [sic], 1993 BMW 318i, License Plate #215J3; personal safe located in the basement of the residence containing ddrugs [sic], firearms, and money.

(App. 40) Drawn by an experienced prosecutor, the warrant delineates two areas for the search — the BMW and the safe — and it then clearly identifies which things in each area are to be seized. They are separately identified, with the description of each separated from the other by a semi-colon. As would be expected, the things to be seized are different for each of the two identified areas, providing a logical limitation that helps keep the intrusiveness of the search in check and preserves the rights of the property owners and occupants. The restrictions naturally follow from the affidavit and the claimed probable cause for the search.

The warrant itself is not a lengthy, complicated document. It is only a single page, most of which is a standard form. There are two equally important parts to this form. The first describes the place to conduct the search: 1701 East Fort Union Boulevard, and a 1993 BMW 318i, license plate number 215J3. The second describes what is to be seized — and with respect to the home, this item is the safe. Thus, the warrant defined with great specificity the places to search and the things to be seized. Once the Magistrate Judge had performed this task, the officers executing the search were required to focus on the items described in the warrant based on a reasonable effort to locate such items.

Although the warrant limits the search within the house to a single object — the safe and its contents — the many items seized from all parts of the house during an unrestricted exploratory search resulted in a six-page inventory. (App. 41-46) The list included, among other things, video tapes, documents, a computer, license plates for cars, photographs, shirts, duffle bags, and a rifle. These items were not obvious contraband and/or evidence of criminal activity. Most importantly, they were clearly outside the scope of the search warrant.

The District Court found that "[o]n these facts, it would stretch the Fourth Amendment's requirement of particularity beyond the breaking point to find that the phrase in the warrant describing the items to be searched included not only the items spelled out with specificity but the entire residence." (App 100) "[T]he search warrant itself authorized only a search for the safe and the car. As a result, the items seized by police outside of those areas are not covered by the search warrant." (App. 100-01)

2. <u>There is No Good Faith Exception to Expand the Scope of this Warrant</u>

Having found that the warrant was limited by its language and that it would not cover the property seized by the officers, the District Court nonetheless failed to suppress this evidence, relying on the factually dubious and constitutionally unsound notion that the officers had asked for a more general, expansive warrant.

In so doing, the "good faith" exception established in *United States v. Leon*, 468 U.S. 897 (1984) would be transformed from a limited doctrine that allows officers to reasonably rely upon a warrant issued by a magistrate to a legally unsustainable exception that forgives careless, even reckless disregard of the warrant itself — an exception that would swallow the rule of the Fourth Amendment's warrant requirement. (App. 98) Quite bluntly, this ruling is unprecedented and must be reversed.

To reiterate, the warrant in question was drafted by an experienced Assistant U.S. Attorney, and it was reviewed and signed by a Magistrate Judge. (App. 227-228) At the suppression hearing, the government claimed that this was a mistake by both the prosecutor and the magistrate, who in fact should have just rubber-stamped the request of the officer. Ironically, the *Leon* good faith exception expressly rejects the precise situation where a magistrate "serve[s] merely as a rubber stamp for the police." *Leon*, 468 U.S. at 914. Any moderately trained law enforcement officer knows that it is the magistrate who identifies the limits of the search — not the officer himself — and for this reason, law enforcement must follow the requirements set forth in the warrant. Moreover, there was no evidence presented at the hearing that suggested that either the prosecutor or the magistrate intended to provide some larger scope to the warrant, or that either was in error by

preparing and signing it in the form issued. If accepted, the District Court's unprecedented extension of *Leon* would mean that the terms of a warrant can be disregarded and that the officers are at liberty to expand the search, to rummage through drawers and small spaces that could never contain the materials listed in the warrant, to pry open documents, pictures, and letters,[27] and to seize anything they choose even though such actions were not approved in the warrant.

In *Leon*, the Supreme Court determined that officers who relied in good faith on a judicial warrant would not have their searches overturned if the warrant was later found to lack probable cause. In a companion case, *Massachusetts v. Sheppard,* 468 U.S. 981 (1984), it applied this doctrine in situations where the question was not probable cause, but other technical defects that the officers were not expected to know about and thus were undeterrable by the exclusionary rule. Properly understood, these two decisions stand for the proposition that once a warrant is issued to law enforcement officers, their job is not to second guess the magistrate but to comply with the terms of the document they had been given. The magistrate's function is to define the limits of the search, and once done, officers are permitted to believe that a judicially issued warrant is valid and that they may

[27] Officers even seized, and the government introduced into evidence, personal letters written by Mr. Angelos to his wife that had been found in the home. (App. 562) This is illustrative of the depth and breadth of the search.

execute it as written. For this reason alone, a subsequent invalidation of the warrant due to a technical defect will not invalidate an otherwise good faith search conducted pursuant to the warrant. *Leon* and *Sheppard* dealt with cases where police conduct

> was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges."

*Sheppard,* 468 U.S. at 990 (quoting Illinois v. Gates, 462 U.S. 213, 263 (1983) (White, J., concurring in judgment)).

But while *Leon* and its progeny excused officers from judicial errors based on the idea that the exclusionary rule would not have an ameliorative effect on the actions of magistrates, it specifically excluded the wrongful execution of a warrant as written.

> Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant.

*Leon*, 468 U.S. at 918 n.19. Thus, *Leon* allows law enforcement officers to rely upon a warrant issued by a magistrate where the officers had no reason to question

its validity, but the doctrine does not authorize law enforcement to go beyond the boundaries established by the warrant. "Unlike cases in which the police properly execute an invalid warrant that they reasonably thought was valid, in cases of improper execution there is police conduct that must be deterred." *United States v. Medlin (Medlin I)*, 798 F.2d 407, 410 (10th Cir. 1986), *appeal after remand*, *United States v. Medlin (Medlin II)* 842 F.2d 1194 (10th Cir. 1988). As such, "[t]he *Leon* good faith exception will not save an improperly executed warrant." *United States v. Rowland,* 145 F.3d 1194, 1208 n.10 (10th Cir. 1998); *see also United States v. Moland,* 996 F.2d 259, 261 (10th Cir. 1993).

In contravention to *Leon* and its progeny, the District Court effectively created a "bad faith" exception to the Fourth Amendment that affirmatively encourages officers to ignore a warrant's terms and conduct a search pursuant to their own ad hoc discretion. In the present case, law enforcement was not simply following the requirements of a warrant that contained errors unknown to the officers, as was the situation in *Leon* and *Sheppard*. Instead, the officers disregarded the terms of the warrant and then asked for forgiveness because they had originally asked for more than was ultimately authorized by the Magistrate Judge. To put it another way, the officers' asked for a broadly exploratory search, were issued a warrant that did not permit such actions, and then proceeded to

behave as though the specific limits of the warrant did not exist. To permit such conduct would effectively eliminate the Fourth Amendment's particularity requirement.

3. The Officers' Flagrant Disregard for the Restrictions of the Warrant Requires Suppression of All Evidence Seized

As found by the District Court, the officers in this case did not follow the restrictions set out in the warrant. The only question, then, should be the appropriate remedy. When items beyond the scope of the search warrant are seized, one potential remedy is suppression of those specific items that were outside the warrant's scope. *Medlin I,* 798 F.2d at 411. However, suppression of all items obtained pursuant to a judicially issued warrant is appropriate where the executing officer's conduct exceeds any reasonable interpretation of the warrant's provisions. *See United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978). "[I]n cases where there is a 'flagrant disregard' for the terms of the warrant, the district court may suppress all of the evidence, including evidence that was not tainted by the violation." *United States v. Chen*, 979 F.2d 714, 717 (9th Cir. 1992); *see also Medlin II*, 842 F.2d at 1198-1200. "The standard for determining whether there has been a flagrant disregard justifying wholesale suppression is whether the agents have disregarded the terms of the warrant to such an extent that the search

has been transformed into an impermissible general search." *Chen*, 979 F.2d at 720; *see also Medlin I*, 798 F.2d at 411; *Medlin II*, 842 F.2d at 1198-1200. Likewise, "all evidence seized during the search must be suppressed" where "it is not possible for the court to identify after the fact the discrete items of evidence which would have been discovered had the agents kept their search within the bound permitted by the warrant." *Rettig*, 589 F.2d at 423. For example, the *Medlin* Court found that given the large number of items seized that were not listed in the warrant, it was possible that police had utilized the warrant as a pretext for a general search of the defendant's property. It then remanded the case to the District Court for this determination and, if found to be true, the total suppression of all items seized under the warrant. *Medlin I*, 798 F.2d at 411; *see also Medlin II*, 842 F.2d at 1198 (upholding total suppression). But regardless of exact remedy, the present conviction must be reversed and the case remanded.

The highly prejudicial items seized, beyond the scope of the warrant, included: pictures of firearms as well as Mr. Angelos with firearms, including a picture of what a government witness claimed was the firearm allegedly carried in two of the § 924(c) counts. (App 352-356, 376-378) Also included were documents and papers such as rental car receipts, airline tickets, u-haul records, deposit slips and other financial records. (App. 365-369, 379-382, 387-388) In

addition, there were weapons-related materials, including ammunition, boxes, books, magazines, and even a taser (App. 362-363, 378-379) — and, perhaps most damaging of all, photographs and shirts with logo's that government witnesses testified were allegedly indicative of gang involvement. (App. 371-374) "The wholesale seizure for later detailed examination of [items] not described in a warrant is significant as 'the kind of investigatory dragnet that the fourth amendment was designed to prevent.'" *United States v. Tamura,* 694 F.2d 591, 595 (9th Cir. 1982) (*citing United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980))

In this case, experienced law enforcement officers prepared an affidavit setting forth their basis for probable cause and outlining the things they wanted to search and to seize. They received instead, however, a warrant much more conservative in scale than the request in the affidavit. (App. 227) The warrant in this case is not complex, its descriptions are not long (only several lines), and it certainly is not something unfamiliar in form to these experienced officers. Yet the officers did not follow the constraints of the warrant, leaving two interpretations of their actions: the officers knew the limits of the warrant and decided to disregard them, or the officers never bothered to read the warrant itself.

Either way, their conduct evinces flagrant disregard of the warrant and the Fourth Amendment.

A search warrant gives authority to law enforcement officials to invade the sanctity of the most private of places — our homes — and as a result, obtaining a warrant from a neutral magistrate is an essential part of the constitutionally mandated process. If law enforcement is allowed to disregard the terms of the warrant, or if officers are not bound by its terms when failing to read them before invading the homes of citizens, there is little protection left in the Fourth Amendment's warrant requirement. In the present case, the officers simply operated on the cavalier and blatantly unconstitutional assumption that they were at liberty to do as they pleased, while the nature of the material exceeding the scope of the warrant and introduced at trial was both dramatic and highly prejudicial. (App. 352-369, 371-382, 386-391) Given the flagrant disregard for the warrant and the constitutional process, as well as the ultimate consequences for this defendant, the Fourth Amendment demands condemnation of the officers' behavior. The appropriate remedy is to find that such blatant behavior — demonstrated by the breadth of the search and its excesses beyond the scope of the warrant — thus rendered the entire search invalid.

C. There Should Not Be a Plain Smell Expansion to the Plain View Doctrine

Upon entering the Fort Union home, officers conducted a protective sweep of the entire premises. They supposedly were looking for other people in the home that might create an "officer safety issue." (App. 193-194) In the course of this sweep, however, officers reported smelling marijuana in the basement. (App. 196-197, 205-207, 215-216) Agent Lehrol described the area of the smell as "a lot of stuff, boxes, kids toys, I don't recall what, big piles of things, and in that pile in those boxes in this big area of clutter there were very many large duffle bags." (App. 206) The same odor was reported in the garage. (App. 206-207, 216-217) More duffle bags and suitcases were recovered from the garage, although Agent Lehrol testified that the smell in the garage was so strong you could not tell where it was coming from. (App. 206-207) Officers did not immediately follow up on the smell. (App. 206). Duffle bags were seized both from the basement and the garage. The safe that was authorized for seizure by the warrant was located in plain view in a bedroom on the second floor of the house. (App. 219)

The District Court relied upon *United States v. Downs,* 151 F.3d 1301 (10th Cir. 1998), to support the government's claim that even if the search exceeded the bounds of the warrant, these bags should be admitted under a "plain smell" rule as an extension of the "plain view" doctrine established in *Coolidge v. New*

*Hampshire,* 403 U.S. 443 (1971). The *Downs* decision is inapposite, however, as that case revolved around probable cause to search an automobile, *see Downs,* 151 F.3d at 1303, while the present case implicates the uniquely protected sanctuary of the home. *Downs* neither referred to the plain view doctrine nor suggested that the opinion's strictures would extend to a search of a domicile. Instead, this decision was narrowly tailored to the special exigencies presented by automobiles. As a general rule, officers do not need to rely upon a warrant for vehicle searches if they have probable cause, pursuant to the so-called "automobile exception" to the warrant requirement. *See Carroll v. United States*, 267 U.S. 132 (1925). But to be clear, the use of odor to assist in establishing probable cause is something very different from the application of the "plain view" doctrine to seize items not otherwise authorized in a warrant. Unless the Fourth Amendment is to become one grand Rorschach blot, distinct doctrines cannot be allowed to haphazardly blur into one another, creating an all-encompassing exception to the constitutionally dictated process.

For the purposes of this evaluation, the officers' search in the present case must be considered warrantless, and in turn, authorization for a warrantless search must be founded on exigent circumstances. *See Marshall v. Columbia Lea Regional Hospital,* 345 F.3d 1157, 1172 (10th Cir. 2003). In *Downs*, for instance,

the search of an automobile based on smell implicated the exigent circumstances related to the mobility of motor vehicles and their heavy regulation by government. *Cf. California v. Carney,* 471 U.S. 386, 391-92 (1985) (holding that the mobility and extensive regulation of automobiles reduced the expectation of privacy as compared to the heightened expectation of privacy in a residence). The same cannot be said with regard to the home, where an individual's expectation of privacy is at its zenith. In fact, few exigencies permit intrusions into the sanctity of one's dwelling; as the Supreme Court has twice held, there is not even a "murder scene exception" to the Fourth Amendment's protection of the home. *See Flippo v. West Virginia*, 528 U.S. 11 (1999); *Mincey v. Arizona*, 437 U.S. 385 (1978). "[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey*, 437 U.S. at 393.

In the present case, after the protective sweep revealed no danger to the officers and the property was secure, there was no authorization for a search that exceeded the scope of the warrant without further judicial authorization. Yet duffle bags and suitcases were searched and seized from the basement and the garage. The bags in and of themselves were not exceptional, and there was

nothing about their outward appearance that would make them obvious contraband.

In *United States v. Pringle*, 53 Fed.Appx. 65 (10th Cir. 2002) (unpublished), officers detected the strong smell of raw marijuana emanating from a home. They asked the occupants to leave the home and then made a protective sweep, all before seeking a warrant. *Id.* at 67. Because there was no exigent circumstance, the initial warrantless entry into the home violated the Fourth Amendment, as the proper role of the smell was as part of a magistrate's probable cause determination for the issuance of a warrant. *Id.* at 67-68, 68 n.2. Likewise, in the present case, the house was fully secure after the protective sweep. There was no exigent circumstance for officers to rummage through the basement and garage in an attempt to locate the source of the smell. *See Kirk v. Louisiana,* 536 U.S. 635, 637 (2002).

## III.

## THE DISTRICT COURT SHOULD HAVE ADMITTED THE POLICE REPORTS OFFERED INTO EVIDENCE BY THE DEFENDANT.

A. Standard of Review

The District Court's exclusion of evidence is reviewed for abuse of discretion. *Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir. 1995).

B. The Court Should Have Admitted the Police Reports Offered by the Defendant

Mr. Angelos was convicted of two § 924(c) charges relating to the transactions with police informant Ronnie Lazalde occurring on, respectively, May 21, 2002 and June 4, 2002. (App. 14, 26) The events of May 21, 2002 began with conversations between Mr. Angelos and Lazalde that were recorded by officers. (App. 245-246) There was no mention of a firearm in these conversations. (App. 84) Law enforcement observed from a safe distance. On this occasion, Mr. Angelos never left his automobile. Lazalde got into the back seat of the vehicle (App. 247, 326), as there was a passenger, Nathan Bickett, in the front seat the entire time. (App. 397-400) After the informant left the vehicle with the marijuana, Lazalde realized that he had left his keys in Angelos' car. He called

Angelos on the phone. Angelos returned and handed the keys to Lazalde. Angelos and his passenger then left. (App. 248, 321)

Lazalde was debriefed by law enforcement officers, who then made entries to their contemporaneous police reports. (App. 270) There was no mention in any of the officers' reports on the debriefing that Lazalde had said anything about the presence of a firearm. (App. 55) At trial, however, Lazalde testified that he had seen a firearm stuck between the driver's seat and the consol when he got into the back seat of the automobile. (App. 313) He did not see the firearm when Angelos returned to give him his keys. (App. 320) Nathan Bickett testified that he saw no firearm during the entire time he was in the car. (App. 397-400)

The second § 924(c) charge relates to the transaction on June 4, 2002, which began with telephone conversations between Lazalde and Angelos. (App. 91, 249-250) There was no mention of a firearm in these conversations. Once again, officers watched and photographing from a distance as Angelos and Lazalde met. (App. 271-276) This time, Mr. Angelos exited his vehicle and met Lazalde in an open parking lot, where he received the money and handed Lazalde a potato chip bag containing marijuana. (App. 52-54, 272-276, 332-335)

Although the photographs show that at the time Angelos' exited his vehicle the lower half of his body was not visible to Lazalde, he nonetheless testified that

he had observed the firearm in an ankle holster as Angelos exited the vehicle. (App. 52, 321)[28] No police officers observing the transaction saw a firearm or reported seeing Angelos raise his pant leg. Like before, Lazalde was debriefed in the presence of a number of officers. The officers again wrote police reports, none of which made any mention of a firearm being reported by Lazalde. (App. 55, 334)

On July 10, 2002, Angelos was found to be in possession of a pistol. He was cited for a concealed weapon and released. Lazalde learned of the incident and reported it to Officer Mazuran. (App. 310-311) Subsequently, Mazuran made an entry into the police report, claiming for the very first time that Angelos had been in possession of a firearm during the previous transactions and that Lazalde had reported this during the debriefings. (App. 69)

The version of the events of May 21, 2002 reported in the subsequent police report varies greatly from the testimony of Lazalde. The report claims that Lazalde got back into the vehicle to get his keys and at that time saw the firearm placed on top of the console in the vehicle. It goes on to state that this was a purposeful demonstration because Angelos was obviously suspicious about being called back. (App. 69, 287-295) But Lazalde testified that he did not get back into

[28] The original exhibits were returned to the government by the Court's clerk. They were not located in time to file the appendix. Black and white copies of exhibits 27-32 have been included in the appendix. (App. 52-54)

the vehicle and did not see the firearm on Angelos return. At trial, Officer Mazuran's testimony supported Lazalde's testimony. (App. 266-269)

In particular, Mazuran admitted that procedure would call for including important information from the debriefing in the contemporaneous police reports. He had even included in the report an earlier occasion (not involving any sale of marijuana) where Lazalde said that Angelos had shown him a firearm. (App. 55, 264) Yet not one of the many contemporaneous reports describing either of the drug sales and the debriefings included any word of Lazalde mentioning the presence of a firearm during the sales. (App. 55)[29]

Counsel was allowed to cross-examine Officer Mazuran on the fact that he had not made any contemporaneous notation of this information, but when he moved to admit the police reports — which graphically demonstrated this point — the District Court sustained the government's objection and did not admit the reports. (App. 459) The government used this to its advantage in its closing argument: "You know, these detectives wrote a report to document all this stuff,

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[29] Officer Brady Cottam made entries to the police report and testified at trial. Although being present at both of the debriefing, he makes no mention in either his report or testimony of any firearm involving Mr. Angelos. Officer Saul Baily also made entries to the police report and testified at trial. He was present at the second debriefing. Although he discusses a firearm in connection with another person in the police report, he makes no mention of a firearm in connection with Mr. Angelos in either his report or his testimony. *Id.*

did they do it to his satisfaction on a particular day he wanted? No, because that doesn't matter in the least." (App. 461)

Needless to say, this was an exceptionally important issue. While the District Court has wide discretion in the admission of evidence, the two counts impacted by this decision account for 50 of the 55 years in mandatory sentences that were imposed on Mr. Angelos. Lazalde is a person of questionable background, and there was good reason that he should not be trusted. State charges involving both narcotic sales and related gun possession had been dismissed in favor of federal prosecution, which, in turn, was never filed. (App. 259-262) As such, the jury's consideration of these charges largely stood on the corroboration of Lazalde's claims by Officer Mazuran. It goes without saying, of course, that police officers carry great weight in their testimony. The written reports by officers that are inconsistent with the testimony offered powerful evidence that should have been considered by the jury. There was no justification to deny Mr. Angelos the admission of these reports, and the failure to do so undermined the very reasonable doubt that must shroud these belated reports. "As a general proposition, the testimony of a witness, after a proper foundation has been laid, may be impeached by showing former declarations, statements, or

testimony which are contradictory or inconsistent with the answers given at a trial." *Brooks v. United States,* 309 F.2d 580, 581 (10th Cir. 1962).

In addition, the failure to make any mention in the reports of what was the most significant fact in the case — the presence or absence of a firearm — was vital to the juries consideration of whether a firearm was, in fact, present. This is evidence that has a "tendency to make the existence of any fact that is of consequence [i.e. the presence of the firearm] ... less probable than it would be without the evidence." *United States v. Abel*, 469 U.S. 45, 50-51 (1984).

Where there were two different reports relating to an incident that varied in relevant detail, this Court has found that admitting both reports served a significant evidentiary purpose beyond impeachment. *United State v. Marshall,* 307 F.3d 1267, 1269 (10th Cir. 2002). In particular, the *Marshall* Court recognized the importance of the jury being able to actually see the reports in order to avoid confusion. *Id.* Likewise, in *United States v. Gauvin,* 173 F.3d 798, 802 (10th Cir. 1999), this Court held that testimony calling into question the accuracy of a police report was relevant, and its admissibility should not have been rejected on those grounds.[30] Moreover, the Third Circuit has concluded that not

[30] In *Gauvin*, the evidence was properly excluded under Federal Rule of Criminal Procedure 16. *Id.*

only is a police report admissible, but when the information in the report calls into question an important factual issue in a prosecution, it is an abuse of discretion not to admit the report. *United States v. Versaint,* 849 F.2d 827, 831-32 (3d Cir. 1988).

In the present case, it is significant that the police officer was available and testified at trial, and the police report was substantive evidence. For this reason, the exhibits were highly relevant and probative, and there was no proscription to their introduction. The District Court abused its discretion in failing to admit them.

## CONCLUSION

Mr. Angelos' conviction should be set aside as based upon the admission of evidence that should have been suppressed and because evidence offered in support of his theory of defense was improperly kept from the jury. Law enforcement officers grossly exceeded the limits of the search warrant for the Fort Union property. The result was the admission at trial of numerous pictures, documents, and other evidence that was used to paint Mr. Angelos as a dangerous person, the kind of person who would be expected to carry a firearm. The prejudicial effect of these rulings and the resulting evidentiary admission was compounded by the District Court's refusal to admit the police reports, which would have allowed the jury to view the precise documents that so clearly demonstrate the belated claim of the presence of a firearm and would have cast doubt on Counts 2 and 4. Except for Counts 1, 3, 5, and 9 — for which the evidence was clear and which Mr. Angelos did not and does not contest — the balance of the conviction should be set aside and the matter remanded for new trial.

In addition or in the alternative, the draconian 55-year sentence in this case should be set aside. An effective life sentence for a first-time offender for possessing firearms in connection with selling small amounts of marijuana, despite

the fact that the handguns were never brandished or used and despite the absence of any threatened or actual violence or injury, imposes cruel and unusual punishment in violation the Eighth Amendment. Mr. Angelos was also subjected to an irrational classification in contravention of the equal protection principles embodied in the due process clause of the Fifth Amendment. Both constitutional infirmities could have been avoided, however, through appropriate statutory construction and interpretation. For any and all of these reasons, the sentence should be declared invalid and the matter remanded for resentencing.

## REQUEST FOR ORAL ARGUMENT

Due to the complexity of the issues involved in this case, counsel believes that oral argument will be of assistance to the Court in this matter.

Respectfully submitted this 14th day of June, 2005,

MOONEY LAW FIRM, P.C.

_____
Jerome H. Mooney
Attorney for Appellant

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. Appellant has filed a motion for overlength brief. This motion was granted for a brief up to 21,000 words. Utilizing WordPerfect word count, I have determined that this brief contains [20,969] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Word Perfect in Times Roman font 13 and 14 pitch.

_____
Attorney for Weldon Angelos
Dated: June 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2005, a copy of the foregoing was mailed, postage prepaid, to the following:

Robert Lund
Attorney for Plaintiff
185 South State Street, Suite 400
Salt Lake City, UT 84111

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