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

WELDON H. ANGELOS, Petitioner, vs. **UNITED STATES OF AMERICA,** Respondent.	Case No.: 2:07-cv-936 Honorable Tena Campbell

MEMORANDUM OF LAW OF THE CENTER FOR THE ADMINISTRATION OF CRIMINAL LAW, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO VACATE PORTION OF SENTENCE PURSUANT TO 28 U.S.C. § 2255

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The Center on the Administration of Criminal Law ("the Center") is the first and only organization dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. The Center was founded because, although prosecutorial discretion is the central issue in criminal justice today at all levels of government, there is a dearth of research on how prosecutors exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decisionmaking. The Center aims to fill this gap by dedicating itself to identifying the best prosecutorial practices and suggesting avenues of reform. The Center's litigation component aims to use its empirical research and experience with criminal justice and prosecution practices to assist in important criminal justice cases at all levels. The Center's litigation practice concentrates on cases in which exercises of prosecutorial discretion raise significant substantive legal issues.

The Center is seeking to file a Memorandum of Law in this case in order to ensure that the constitutional limits on the exercise of prosecutorial discretion are preserved. Petitioner's case highlights the critical necessity for judicial enforcement of these limits at a time when executive discretion over the criminal justice system has become so entrenched that prosecutors, not judges or juries, are the only adjudicators in the vast majority of cases. The Constitution was never intended to permit prosecutorial charging decisions to dictate sentences that are cruel and unusual punishment. Nor does the Constitution allow prosecutors to engage in arbitrary and capricious charging practices that lack a rational basis. The Center thus seeks to ensure that the constitutional limits on prosecutorial discretion are preserved and enforced.

INTRODUCTION

Weldon Angelos was sentenced to 55 years in prison because the prosecutors in his case elected to exercise discretion in an arbitrary, irrational, and ultimately unconstitutional manner. The prosecution eventually elected to indict Mr. Angelos on five separate counts of possessing a firearm in connection with a drug offense, which under 18 U.S.C. § 924(c) requires a sentence of at least five years in prison for the first offense and at least 25 consecutive years for each subsequent offense. Had the prosecution not obtained a superseding indictment after Mr. Angelos refused a plea offer to the initial indictment, Mr. Angelos would have been subject to a mandatory minimum sentence of only 5 years, since the initial indictment charged only one § 924(c) count. The prosecutors' initial indictment suggests that they believed a sentence of five years would have been appropriate had Mr. Angelos opted to plead. It was only after Mr. Angelos indicated his desire to exercise his constitutional trial rights that the prosecutors decided to inflate the charges in a manner that resulted in a sentence 11 times greater than that initially thought to be appropriate. Indeed, had the prosecutors not rejected Mr. Angelos's subsequent offer to plea to one of the § 924(c) counts in the superseding indictment, Mr. Angelos would again have been subject to a mandatory minimum sentence of only 5 years. Moreover, had the prosecutors not charged five § 924(c) counts and instead pursued applicable enhancements under the Sentencing Guidelines, Mr. Angelos's sentence would have been increased by, at most, 24 months. Yet the prosecution in this case proceeded to trial pursuing five separate § 924(c) counts. After Mr. Angelos was convicted on three of these counts, the district court's hands were tied with respect to the sentence to be imposed because, at the very least, a mandatory minimum 55-year sentence was required regardless whether judge and jury

viewed such a sentence as excessive. As a result of the prosecutors' arbitrary exercise of discretion, Mr. Angelos will spend the rest of his life in prison.

The sentence should be vacated as cruel and unusual punishment in violation of the Eighth Amendment. The district court, after a careful analysis, concluded that the sentence violated the Eighth Amendment. The district court did not set the sentence aside on that basis, however, because it erroneously believed it was nevertheless bound to impose the unconstitutional sentence because of *Hutto v. Davis*, 454 U.S. 370 (1982). But the district court failed to consider whether *Davis* was limited by the Supreme Court's subsequent decision in *Solem* v. *Helm*, 463 U.S. 277 (1983), which made clear that the Eight Amendment prohibits excessive sentences involving terms of years. Moreover, the district court failed to consider whether Mr. Angelos's case was factually distinguishable. Indeed it was. *Davis* involved a recidivist defendant who was an "active drug dealer" trafficking both LSD and marijuana, who "knowingly sold drugs to be smuggled into prison," and who "sold drugs to an inmate's wife who was alone with an infant child." *Davis*, 454 U.S. at 372 n.1. Mr. Angelos was a first-time offender, not a recidivist. Mr. Angelos was convicted of selling only marijuana, not LSD. Mr. Angelos was not selling drugs to be smuggled into prison, nor did he knowingly sell drugs to mothers with infant children. Moreover, Mr. Angelos's sentence was in part based on the possession of a firearm in his home—something that the Supreme Court has clarified is constitutionally protected activity under the Second Amendment. *See District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Finally, the sentence in *Davis* was imposed by a jury, whereas Mr. Angelos's sentence was predetermined by the prosecutor's charging decision. And, in fact, the jurors in Mr. Angelos's case stated that they would have sentenced him to an average of 18

years in prison—more than three times less than the sentence he received. These very different opinions about sentencing from the respective juries in *Davis* and this case demonstrate just how distinguishable the two cases are. Accordingly, the district court was not bound to impose a sentence based on a case with distinguishable facts and of questionable precedential value that was decided before *Solem* made clear that terms of years are subject to scrutiny under the Eighth Amendment. The district court therefore erred in relying on this case to justify its imposition of a sentence it acknowledged to be cruel and unusual punishment. The purpose of the Eighth Amendment is to prevent excessive sentences such as this one, and the district court failed to fulfill its constitutional mandate by allowing this sentence to stand.

Relatedly, Mr. Angelos's sentence should be vacated as a violation of structural separation-of-powers principles and the Equal Protection Clause of the Fifth Amendment. The choice of the prosecution to charge five § 924(c) counts, in combination with the mandate of Congress, seemingly took away all of the district court's discretion. As a result, even though the district court concluded that Mr. Angelos's sentence was "unjust, cruel, and irrational," the court believed that it had no power to sentence any differently. Yet even though the discretion of criminal prosecutors is great, it is not unfettered. The Equal Protection Clause of the Fifth Amendment requires that prosecutorial discretion be exercised in a manner that is not arbitrary and does not single out a defendant for irrational and unjust treatment. Moreover, the separation-of-powers principles which form the basis for our system of government prohibit the uniting of the power to prosecute and the power to sentence within a single branch, a problem that is especially highlighted when those powers are exercised unjustly and arbitrarily. When that

happens, the judicial branch must be permitted and indeed is compelled to play the role the Framers intended in imposing just sentences on criminal defendants.

Here, Mr. Angelos was unfairly and arbitrarily charged by the prosecution, and the district court imposed the sentence it did because it believed it lacked discretion to do anything less. That belief was erroneous. There was no rational basis to charge Mr. Angelos so excessively and arbitrarily, no plausible reason to pursue a sentence of more than 50 years in prison for a first-time, non-violent offender. Accordingly, Mr. Angelos's sentence was not authorized by law, and there has been a denial and infringement of Mr. Angelos's constitutional rights.

ARGUMENT

I. Mr. Angelos's Sentence Violates the Eighth Amendment.

Mr. Angelos is a first time offender who will spend the rest of his life in prison for crimes described by his sentencing judge as "far less serious than those committed by many other offenders--including violent offenders and even a murdered--who have been before me." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1261 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 723 (2006). Mr. Angelos possessed, but did not use or display, a firearm under his clothing while selling a few hundred dollars of marijuana on two occasions to a government informant. He also owned several additional firearms which were kept in his home. This was the sum total of the conduct for which he will spend the rest of his life in prison.

The district court, in imposing Mr. Angelos's sentence, stated that this sentence was "unjust, cruel, and even irrational." *Angelos*, 345 F. Supp. 2d at 1230. The court noted that the sentence was "far in excess of the sentence imposed for such serious crimes as aircraft hijacking,

second degree murder, espionage, kidnapping, aggravated assault, and rape." *Id.* The punishment imposed was "far beyond that called for by the congressionally-created expert agency on sentencing, by the jurors who heard the evidence, by the Utah state system, or by any of the other state systems." *Id.* at 1243. Indeed, had Mr. Angelos been charged in Utah state court rather federal district court, his sentence would most likely have been between five and seven years. *Id.* at 1259. Given the excessiveness of Mr. Angelos's sentence, the district court would have found Mr. Angelos's 55-year sentence to be unconstitutional under the Eighth Amendment but for one thing—the district court's belief that the Supreme Court's decision in *Hutto v. Davis*, 454 U.S. 370 (1982), controlled the question. *Angelos*, 345 F. Supp. 2d at 1259.

The district court was correct in its analysis of Mr. Angelos's sentence but incorrect in its reading of *Davis*. Mr. Angelos's sentence does violate the Eighth Amendment, and *Davis* does not require that a cruel and unusual punishment be imposed in this case. Its relevance as precedent today is questionable at best, and it is factually distinguishable from Mr. Angelos's case. Accordingly, the court should grant Mr. Angelos's motion for summary judgment and motion to vacate under § 2255 because his sentence violates the Eighth Amendment.

A. Mr. Angelos's Sentence Is Grossly Disproportionate to His Conduct.

The Eighth Amendment limits both the form and magnitude of punishments, including non-capital punishments. *Weems v. United States*, 217 U.S. 349, 382 (1910). As the Supreme Court has explained in decisions decided *after Davis*, prison sentences "must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 463 U.S. 277, 290 (1983). Thus the Court in *Solem* struck down a sentence of life without parole imposed on a felony recidivist for obtaining $100 by false pretenses because he received "the penultimate

sentence for relatively minor criminal conduct." *Id.* at 303. The defendant had "been treated more harshly than other criminals in the State who have committed more serious crimes," and "more harshly than he would have been in any other jurisdiction," thus the Court concluded that "his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment." *Id.*

Prior to the Court's decision in *Solem,* the Supreme Court had heard several cases, including *Davis*, which questioned the scope of proportionality review of non-capital sentences. *See Rummel v. Estelle*, 445 U.S. 263, 284-85 (1980); *Davis*, 454 U.S. at 374-75 (1982). Critically, however, these precedents did *not* eliminate proportionality review. And, as the Court's decision in *Solem* and other subsequent cases have made clear, the Eight Amendment requires the Court to strike down "extreme" prison sentences that are "grossly disproportionate" to a defendant's crime. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (citing *Solem*, 463 U.S. at 288, 303); *see also Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("Through [the] thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years."); *cf. Henderson v. Norris*, 258 F.3d 706, 709-14 (8th Cir. 2001) (granting habeas petition based on Eighth Amendment violation where jury imposed sentence of life imprisonment for selling less than a quarter of a gram of cocaine to a police informant and where defendant was first-time offender).

The current test of whether a non-capital punishment is "cruel and unusual" requires an analysis of: (1) the nature of the crime and its relation to the punishment imposed; (2) the

punishment for other offenses in the relevant jurisdiction; and (3) the punishment for similar offenses in other jurisdictions. *Harmelin*, 501 U.S. at 1004-05 (1991) (Kennedy, J., concurring). The district court fully analyzed these factors and concluded that Mr. Angelos's sentence violated the Eighth Amendment. But for the court's belief that *Davis* was controlling precedent, it would have found 55 years in prison to be constitutionally prohibited. *Angelos*, 345 F. Supp. 2d at 1259-60 (stating that "[h]aving analyzed the three *Harmelin* factors, the court believes that they lead to the conclusion that Mr. Angelos' sentence violates the Eighth Amendment," but concluding that *Davis* required the court to reject Mr. Angelos's claim). Furthermore, Mr. Angelos's § 2255 motion makes clear the many flaws in the Tenth Circuit's analysis of these factors in its opinion affirming Mr. Angelos's sentence on direct appeal. *See* Motion to Vacate at 42-47. Those arguments thus need not be restated here.

B. *Hutto* v. *Davis* Is Distinguishable and Does Not Speak to the Constitutionality of Mr. Angelos's Sentence.

The district court's Eighth Amendment analysis was correct except for its analysis of and reliance on *Davis*. In *Davis*, the Supreme Court rejected a collateral attack on a sentence of 40 years in prison for distribution of marijuana under Virginia state law. As was the practice in Virginia state court, the jury sentenced Davis upon its finding of guilt, and the court entered judgment on that verdict. *See Davis v. Davis*, 585 F.2d 1226, 1228 (4th Cir. 1978), *vacated*, 445 U.S. 947 (1980). As the Fourth Circuit explained, "The jury awarded the sentence after hearing evidence which revealed Davis to be a dealer in drugs who sold them to a man who had informed Davis that the drugs were being procured for distribution to inmates in a state penal institution. Davis sold not only marijuana but also two other drugs in pill form, all to be taken to the inmates." *Id.* at 1227. The jury also knew that Davis "had sold drugs to an inmate's wife who

was alone with an infant child, and had himself been imprisoned in the past." *Davis*, 454 U.S. at 372 n.1. The Supreme Court, in a *per curiam* opinion that was issued without full briefing or oral argument, *id.* at 381 (Brennan, J., dissenting), upheld the sentence.

For a host of reasons, the result in *Davis* does not dictate the result here. First, the decision in *Davis* came down before the Court's decision in *Solem* and later decisions that established the current framework for evaluating whether a noncapital sentence is cruel and unusual. At the time *Davis* was decided, the Court had not yet found a sentence for a term of years to constitute cruel and unusual punishment. *Id.* at 372. Nor had the Court announced its current three-part framework for assessing the constitutionality of a prison sentence. Under current law, as noted, courts must compare the punishment at issue with the punishment for other offenses in the relevant jurisdiction and also must compare the punishment at issue with the punishment for similar offenses in other jurisdictions. *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring). Before *Davis*, the Court had actually rejected this comparative analysis in *Rummel*. 445 U.S. at 281-82. Indeed, at the time *Davis* was decided, the Court was of the view that "[o]nce the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging" whether sentences are cruel and unusual and instead these are "peculiarly questions of legislative policy." *Id.* at 282 n.27 (internal quotation marks omitted).

The procedural history of *Davis* demonstrates that it was this narrow—and ultimately rejected—conception of Eighth Amendment review from *Rummel* that dictated the outcome in *Davis*. Before *Rummel* was decided, the district court on habeas review had found Davis's sentence to be cruel and unusual punishment. A panel of the Court of Appeals reversed, but then

the entire Court of Appeals heard the case en banc and affirmed the grant of habeas relief. *Davis*, 454 U.S. at 371-72. The Supreme Court vacated the en banc judgment of the Court of Appeals "for reconsideration in light of our decision in *Rummel*." *Id.* at 372. When the Court of Appeals affirmed the district court again by an equally divided vote, the Supreme Court reversed "[b]ecause the Court of Appeals failed to heed our decision in *Rummel*" and because "*Rummel* stands for the proposition that federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment.'" *Id.* at 372, 374 (quoting *Rummel*, 445 U.S. at 274). Indeed, the Court believed the result was so preordained by *Rummel* that it did not hear oral argument or receive full briefing. Instead, the Court in *Davis* reiterated its view from *Rummel* that successful challenges to noncapital sentences should be "exceedingly rare" and reserved for sentences like life imprisonment for overtime parking violations. *Id.* at 374 & n.3. The decision in *Davis* is thus a direct product of the then-governing view from *Rummel* that noncapital sentencing review was virtually non-existent except in the most outrageous of circumstances.

The law at the time *Davis* was decided was therefore quite different than the law that governs Mr. Angelos's case. *See* Brief for 163 Individuals as Amici Curiae Supporting Appellant, *United States v. Angelos*, No. 04-4282, 2005 WL 2347343, at *11-*17 (10th Cir. June 22, 2005). The law at the time of *Davis* failed to acknowledge that terms of years could violate the Eighth Amendment except in the most extreme example, such as the one provided by the Court. Both *Rummel* and *Davis* were decided before *Solem*, which serves as an example of a noncapital sentence that amounts to cruel and unusual punishment and, more importantly, sets out the three-part test, later modified in *Harmelin*, that now provides the governing legal standard for evaluating noncapital sentences under the Eighth Amendment. It is this framework

that governs Mr. Angelos's case, not the legal standard used in *Davis*. The district court therefore committed legal error when it concluded that *Davis*, not its analysis under the three-part test of *Harmelin*, governed its decision. *Davis* employed a test of proportionality that is no longer used. Under the correct legal standard—the test from *Harmelin*—the district court found the sentence to be cruel and unusual. *Angelos*, 345 F. Supp. 2d at 1259. Nothing in *Davis* should have altered the district court's decision, and therefore the district court's decision was reversible error.

Davis is fundamentally distinguishable because the law at the time was different than the law that governs Mr. Angelos's case, but it is also factually distinguishable. No precedent affirming the constitutionality of a sentence in one case is necessarily binding in a separate case involving a separate defendant, separate facts and circumstances, and a separate sentence. *Solem*, 463 U.S. at 290 ("[N]o penalty is per se constitutional.").

First, in contrast to the mandatory sentence imposed in Mr. Angelos's case, the 40-year sentence upheld in *Davis* was imposed by a jury which weighed the facts and arrived at a sentence it believed to be just, given the circumstances. In Mr. Angelos's case, the jury (and the judge) would have imposed a sentence of only 18 years had it been given the choice. *Angelos,* 345 F. Supp. 2d at 1230-31, 1242. This marked contrast demonstrates that Mr. Angelos's sentence does not pass muster under the contemporary test of whether a punishment is "cruel and unusual"—whether the sentence accords with the "evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Court has stated that the judgment of evolving standards of decency "should be informed by objective factors to the maximum possible extent," *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion),

and that one objective measure of those standards is the jury. *See Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (stating that the jury is a "significant and reliable objective index of contemporary values"); *Coker*, 433 U.S. at 603 n.2 (1977) (Powell, J., concurring in part, dissenting in part) (stating that the behavior of juries is a "highly relevant" indicator of a society's evolving standards).

The district court in Mr. Angelos's case seemed to recognize the significance of the jury's opinion about sentencing since the court asked the jurors what they believed would be an appropriate sentence in light of the facts of the case. Mr. Angelos's jury responded that they would have sentenced him to 18 years, if given the discretion to do so. Given that the jury's recommended sentence is a surrogate for the evolving standards of decency in our society, the fact that the jury would have recommended substantially less than the sentence imposed is powerful objective evidence that Mr. Angelos's sentence is cruel and unusual. Moreover, the contrast between the 18 years that Mr. Angelos's jury would have sentenced and the 40 years which the jury imposed in *Davis* means one of two things is true: either the facts of the two cases are so distinguishable as to render *Davis* irrelevant as precedent, or evolving standards of decency have changed so as to render *Davis* irrelevant as precedent. Either way, *Davis* does not stand for the proposition that Mr. Angelos's sentence is constitutional under the Eighth Amendment.

Second, the punishment in Mr. Angelos's case was "unusual" in a manner that materially distinguishes it from the punishment imposed in *Davis*. The Eighth Amendment, by its plain language, prohibits "unusual" punishments, *i.e.*, punishments that deviate from the norm for a given crime based, once again, on "evolving standards of decency that mark the progress of a

maturing society." *See Trop*, 356 U.S. at 101. And again, objective measures demonstrate that Mr. Angelos's punishment is highly unusual. A Department of Justice directive regarding charging and disposition of offenses—the "Ashcroft Memorandum"—sets forth policies regarding charging and disposition of § 924(c) and other statutory enhancement provisions. As described by the district court in this case, *Angelos*, 345 F. Supp. 2d at 1253, "the 'Ashcroft Memorandum' requires that prosecutors shall file the *first* readily provable § 924(c) count" and a second count in certain circumstances: those "in which the predicate offenses are *crimes of violence*." *Id.* (quoting Mem. to All Federal Prosecutors from A.G. John Ashcroft Re: Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing at 4 (Sept. 22, 2003) (emphasis in original)). Mr. Angelos's predicate crimes were drug crimes, not violent crimes. Interpreting the Ashcroft Memorandum, the district court noted that "[i]t seems likely that the prosecutors' charging decisions in this case would not have been replicated in other parts of the country." *Id.* Indeed, the district court was "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; *see also* U.S. Attorney's Manual, Principles of Federal Prosecution §9-27.300, available online at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.300 (stating that a federal prosecutor should "select[] charges or enter[] into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime"). The Center's research into the charging practices in United States Attorney's Offices, including two of the largest (the District of

Columbia and the Southern District of New York), yields a comparable conclusion: an offender like Mr. Angelos would not have been charged as he was here. The "unusual" nature of the punishment in Mr. Angelos's case is further evidenced by the Amicus Brief filed in the direct appeal to the Tenth Circuit—a brief filed by 163 individuals, including former United States Attorneys General, United States Attorneys, and other former high-ranking Department of Justice officials, which argued that, in their experience, Mr. Angelos's punishment was highly cruel and unusual. Brief for 163 Individuals as Amici Curiae Supporting Appellant, *United States v. Angelos*, No. 04-4282, 2005 WL 2347343, at *11-*17 (10th Cir. June 22, 2005). Published ethical standards for prosecutors further support the notion that the prosecution of Mr. Angelos was cruel and unusual. *See* ABA Standards for Criminal Justice 3-3.9(b) (3d ed. 1993) ("The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are: . . . (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender."). Seemingly, in any other jurisdiction, Mr. Angelos would not have been charged as he was in the District of Utah, and thus would not have been subject to the same excessive and highly "unusual" sentence. This fact is unquestionably relevant to the Eighth Amendment analysis in Mr. Angelos's case. *See Enmund v. Florida*, 458 U.S. 782, 796-97 (1982) (stating that "it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder,"

and that "the judgments of legislatures, juries, and prosecutors weigh heavily in the balance" when a judge considers whether a sentence is barred by the Eighth Amendment).

In *Davis*, by contrast, the punishment was not alleged to be contrary to the guidelines set forth for prosecutors in Virginia, nor was the punishment contrary to the reasonable opinions of a judge or jury because *the sentence was actually imposed by the jury*. By contrast, in Mr. Angelos's case, virtually every actor to have considered the appropriate sentence for Mr. Angelos's conduct concluded that 55 years in prison was excessive. The jury would have sentenced him to 18 years, if given the discretion to do so. The judge would have sentenced him to 18 years, if given the discretion to do so. Even the Department of Justice, if following their own internal policies, likely would have pursued only a single § 924(c) count carrying a mandatory minimum sentence of 5 years, plus the appropriate Guidelines sentence for his drug charges. Indeed, even the prosecutors in this case likely would have acknowledged that a five-year sentence was the appropriate one under a plea to the initial indictment. The only actor in Mr. Angelos's case who believed that Mr. Angelos's sentence was in accordance with evolving standards of decency was the prosecutor who elected to supersede the original indictment and charge five § 924(c) counts. By any objective measure, Mr. Angelos's punishment was, in fact, cruel and unusual and thus unconstitutional.

There are still additional facts that distinguish Mr. Angelos's case from *Davis*. *Davis* involved a sentence motivated by the defendant's recidivism. *Davis*, 585 F.2d at 1233. Davis had been previously convicted of selling LSD, and in fact, the two offenses for which Davis was sentenced were committed while he was on bail pending appeal from the previous conviction for selling LSD. *Id.* By contrast, Mr. Angelos was a first-time offender. This is a critical

distinction because, under *Harmelin*, the "gravity of offense" factor requires a court to consider not only the offense itself, but also whether the offense is a particular defendant's first offense or not. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (O'Connor, J., concurring) (noting that the "gravity" of Ewing's offense could not be assessed without taking into account "his long history of felony recidivism" and "the State's public-safety interest in incapacitating and deterring recidivist felons."). Thus the *Harmelin* analysis in *Davis* versus in Mr. Angelos's case is materially different, and *Davis* cannot be considered binding precedent as to Mr. Angelos's Eighth Amendment claim.

Moreover, *Davis* involved a different crime: the sale of "not only marijuana but also two other drugs [including LSD] in pill form," *Davis*, 585 F.2d at 1227. Certainly *Davis* did not involve a sentence enhanced based on conduct that may receive some constitutional protection, *i.e.*, the possession of a handgun by a non-felon in his home. The proportionality of Mr. Angelos's sentence and conduct must be analyzed in light of *Heller*. As the district court correctly articulated, "the proportionality question in this case boils down to whether the 55-year sentence is disproportionate to the offense of carrying or possessing firearms three times in connection with dealing marijuana." *Angelos*, 345 F. Supp. 2d at 1257. One of the § 924(c) counts for which Mr. Angelos is serving 25 years in prison was based solely on the simple possession of firearms in Mr. Angelos's home—firearms that were found upon the execution of a search warrant and not alleged to have been used during the sale of marijuana. After *Heller*, it is, at a minimum, an open question whether the Second Amendment protects someone with no prior convictions from criminal prosecution for the possession of firearms in one's home. This fact

must be considered in the Eighth Amendment proportionality calculus and, at the very least, distinguishes this case from *Davis*.

Finally, as the Supreme Court noted in *Davis*, the jury in that case was the sentencing authority and it was aware that Davis was "an active drug dealer," that Davis "had knowingly sold drugs to be smuggled into prison," and that Davis had sold drugs to an inmate's wife who had become a drug user during her husband's term of confinement and was in his absence the sole parent responsible for caring for their infant child. *Davis*, 454 U.S. at 372 n.1; *id.* at 375 (Powell, J., concurring in the judgment). These facts could all be aggravators in the jury's view to justify its ultimate sentence.

Mr. Angelos's case is thus factually and legally distinguishable from *Davis*, and nothing in *Davis* dictates the outcome here. The district court erred when it reached the opposite conclusion. Accordingly, this court should vacate the sentence as a violation of Mr. Angelos's constitutional right to be free from cruel and unusual punishment.

II. Mr. Angelos's Sentence Violates Structural Separation-of-Powers Principles and the Equal Protection Clause of the Fifth Amendment.

Mr. Angelos was not sentenced to 55 years imprisonment because a judge or jury found that sentence to be appropriate or just. Rather, he was sentenced to 55 years imprisonment because of the prosecutor's decision to charge him with multiple separate § 924(c) offenses. Mr. Angelos's case—and the frustration expressed by the district court in imposing a sentence it knew to be "unjust, cruel, and unusual"—exemplify the constitutional problem presented when the power to punish is taken away from the judicial branch and placed solely in the hands of the Executive.

As James Madison wrote in the Federalist Papers, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). The Framers thus designed the American political system around the doctrine of separation of powers with the intent of maintaining structural checks on the accumulation of excessive power in any one branch.

The separation of powers was particularly important to the Framers in the design of the criminal legal system. The Constitution includes numerous provisions designed to check against the accumulation of too much power over criminal defendants in any one branch: the prohibitions against bills of attainder, *see* U.S. Const. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1, which assuage "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge, or worse still, lynch mob," *Nixon v. Administrator of General Services*, 433 U.S. 425, 480 (1977); the Ex Post Facto Clause, *see* U.S. Const. art. I, § 9, cl. 3, which prevents the legislature from "usurp[ing] the judicial power . . . and . . . legislat[ing] so as to administer justice unfairly against particular individuals," *California Department of Corrections v. Morales*, 514 U.S. 499, 520 (1995) (Stevens, J., dissenting); and the right to a jury trial, U.S. Const. art. III, § 2, cl. 3; *id.* amend. VI, which ensures that general legislative mandates are applied to the specific circumstances of an individual defendant's case. *See* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1297 (2005). "All of these restrictions place a premium on judicial involvement so that the political process does not dictate criminal justice policy without a check." *Id.*; *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 994 (2006). By

design, then, "the judiciary (judges and juries alike) serves as the critical safety valve against the political abuse of the criminal process," *id.* at 1036, and "the Constitution's provisions addressing crime and the separation of powers reflect the fact that the Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal government power over crime," *id.* at 1017.

The separation of powers in the criminal law context has not been addressed by the Supreme Court in many cases, but in one of the very few cases to address the issue, the Supreme Court stated that "the sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch." *Mistretta v. United States*, 488 U.S. 361, 390 (1989). Although in *Mistretta* the Court upheld Congress's delegation of the creation of sentencing guidelines to the Sentencing Commission, the Court also noted that "had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or *unconstitutionally had united the power to prosecute and the power to sentence within one Branch*." *Id.* at 391 n.17 (emphasis added).

The "unit[ing of] the power to prosecute and the power to sentence within one Branch" is the very definition of what occurred in this case. *Id.* Here, the power to prosecute was synonymous with the power to sentence because the charging decision was determinative of the sentence imposed. The district court recommended, on the record, that Mr. Angelos be sentenced to no more than 18 years in prison. *Angelos*, 345 F. Supp. 2d at 1230-31. The jury was polled and those who responded stated, on average, that they would have imposed a

sentence of 18 years. *Id.* at 1242. But neither judge nor jury was given the opportunity to decide Mr. Angelos's sentence. Instead, that role was usurped by the decision of the prosecutors to charge five separate § 924(c) offenses. As a result, Mr. Angelos is sentenced to 55 years in prison, more than *three times* the recommendation of judge and jury.

This is not meant to suggest that all mandatory sentences are unconstitutional. They clearly are not. *See Harris v. United States*, 536 U.S. 545, 568-69 (2002); *McMillan v. Pennsylvania*, 477 U.S. 79, 91, 93 (1986). Nor is this meant to suggest that § 924(c), specifically, is unconstitutional. Certainly, the government can rationally and appropriately charge multiple § 924(c) counts, and Mr. Angelos has not challenged the facial constitutionality of the statute. Finally, to be clear, the existence of prosecutorial discretion does not, by itself, violate the separation of powers. It is an indisputable fact that prosecutorial charging decisions are largely, though not entirely, free from judicial interference. *Wayte v. United States*, 470 U.S. 598, 608 (1985). "In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

But this is not "the ordinary case." The district court itself stated that "[t]his case is different." *Angelos*, 345 F. Supp. 2d at 1261. And while it is undeniable that a prosecutor's discretion is vast, it is also indisputable that a prosecutor's discretion is "'subject to constitutional constraints.'" *Armstrong*, 517 U.S. at 464 (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)). Prosecutors may not charge based upon "an unjustifiable standard

such as race, religion, or other arbitrary classification." *Id.* (quotation marks omitted). Such a decision violates the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* Moreover, "[a] defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." *Id.* at 464-65 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)). This class of persons may involve a "class of one," where an individual can allege that only he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

The district court and the Tenth Circuit erred because they both found that the existence of "a plausible reason" for § 924(c) as a facial, statutory matter excused the irrational prosecution and sentence of Mr. Angelos through the use of § 924(c). But the existence of a plausible justification for Congress to have passed § 924(c) does not excuse the government's intentional decision to apply it to a defendant in an inconsistent, arbitrary, and irrational way. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

There were numerous instances where the government appeared to exercise discretion in a completely arbitrary manner. Although the initial indictment charged only one § 924(c) count,

after Mr. Angelos refused a plea offer, the prosecution obtained a new superseding indictment containing five separate § 924(c) counts. Mr. Angelos then offered to plead guilty to one of the counts—an offer which had earlier been extended by the government. Rather than accept the plea, the prosecution elected to proceed to trial. That decision was arbitrary, given the facts of the case, which do not involve any crimes of violence by Mr. Angelos. In fact, three of the charged § 924(c) counts pursued by the government relate to firearms that were never alleged to have been possessed at the scene of any of the controlled buys for which Mr. Angelos was charged.

Indeed, the application of § 924(c) to Mr. Angelos's case is particularly irrational with respect to the 25 years of federal prison time that Mr. Angelos is serving based on guns *left in his home* when he sold marijuana in controlled buys which occurred in public. The Supreme Court has stated that § 924(c) was intended by Congress to encourage drug offenders to leave their guns at home, not to punish them for doing so. *See Muscarello v. United States*, 524 U.S. 125, 132 (1998). The Court emphasized this legislative history in a lengthy string citation in *Muscarello*:

> [T]he provision's chief legislative sponsor has said that the provision seeks "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22231 (1968) (Rep. Poff); *see Busic v. United States*, 446 U.S. 398, 405, 100 S. Ct. 1747, 1752, 64 L.Ed.2d 381 (1980) (describing Poff's comments as "crucial material" in interpreting the purpose of § 924(c)); *Simpson v. United States*, 435 U.S. 6, 13-14, 98 S. Ct. 909, 913-914, 55 L.Ed.2d 70 (1978) (concluding that Poff's comments are "clearly probative" and "certainly entitled to weight"); *see also* 114 Cong. Rec. 22243-22244 (statutes would apply to "the man who goes out taking a gun to commit a crime") (Rep. Hunt); *id.*, at 22244 ("Of course, what we are trying to do by these penalties is to persuade the criminal to leave his gun at

> home") (Rep. Randall); *id.*, at 22236 ("We are concerned ... with having the criminal leave his gun at home") (Rep. Meskill).

Id. If the intended purpose of § 924(c) is "to persuade the man who is tempted to commit a Federal felony to leave his gun at home," it is irrational on the facts of this case for Mr. Angelos to be serving 25 additional years in prison for the possession of guns left in his home.

Mr. Angelos's sentence pursuant to § 924(c) is also irrational because the unusual departure from the Justice Department's normal practices, reflected in the Ashcroft Memorandum, by the experiences of judges in other districts, and by Center's research into charging practices in United States Attorney's Offices, cannot be rationally explained. As explained above, the Ashcroft Memorandum requires prosecutors to pursue more than one violation of § 924(c) only in cases involving crimes of violence. *Id.* The extraordinary deviation from the government's ordinary practices in Mr. Angelos's case without any rational basis demonstrates that the purpose of § 924(c) was completely outside the minds of the prosecutors in electing to charge Mr. Angelos with five § 924(c) counts.

In a case like this one—where the charging decision results in a sentence that a judge concludes is "unjust, cruel, and irrational"—the sentence imposed violates the Fifth Amendment, and the presiding judge must have the power to impose a lesser sentence. After all, the judge and jury have the power to acquit a defendant, even in the face of overwhelming evidence of guilt. *See Fong Foo v. United States*, 369 U.S. 141 (1962) (affirming power of federal district courts to direct acquittals). Since that power results in *no punishment at all* for conduct that Congress has deemed unlawful, it is only logical that the judge and jury must also have the power to impose some punishment which is in between that which results from acquittal and that proscribed by statute:

> It is hard to understand why constitutional law should make it impossible for legislatures to command that a given course of conduct be punished (the power to acquit for any reason does away with that legislative power, at least in theory), and yet leave legislatures free to require that, if behavior is to be punished, it should be punished at least so much. Logically, the greater mercy ought to include within it the lesser.

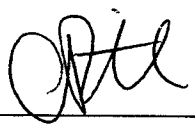
William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 596 (2001).

In *Mistretta*, the Court emphasized that the legitimacy of a government scheme with respect to the separation of powers depends upon the "practical consequences" of that scheme. 488 U.S. at 393. The practical consequences for Mr. Angelos of the stacking features of § 924(c) when combined with the discretion exercised by the prosecution in this case to charge five separate § 924(c) counts exemplify the arbitrary treatment of individual citizens that results when too much power is accumulated in the hands of a single branch of government. Because Mr. Angelos's sentence violates the Fifth Amendment and the separation-of-powers principles reflected therein, the court should grant Mr. Angelos's motion to vacate pursuant to 28 U.S.C. § 2255.

CONCLUSION

28 U.S.C. § 2255 empowers this court to correct for these errors where a sentence imposed was not authorized by law or where there has been a denial or infringement of Mr. Angelos's constitutional rights. For the foregoing reasons, the Court should grant Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and Petitioner's Motion for Partial Summary Judgment to Vacate Portion of Sentence Pursuant to 28 U.S.C. § 2255.

Respectfully submitted,



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Date: September 17, 2008