CASE NO.: 14-4586

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

versus

CORVAIN COOPER

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
(The Honorable Robert J. Conrad, District Judge)

MOTION FOR REHEARING EN BANC

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STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

Pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure, counsel for Defendant-Appellant believes that en banc consideration is necessary because this case involves questions of exceptional importance, specifically, the viability of United States v. Kratsas, 45 F.3d 63 (4th Cir. 1995) in light of the Eighth Amendment's prohibition on cruel and unusual punishment and the recent Supreme Court decisions

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION

On June 18, 2014, Corvain Cooper was sentenced upon his convictions of Count # 1, Conspiracy to Possess With Intent to Distribute to Distribute Marijuana in violation of 21 U.S.C. §§ 846, 841(b)(1)(A) and 851, Count # 2, Conspiracy to Commit Money Laundering in violation of 18 U.S.C. § 1956(h), and Count #3, Structuring Financial Transactions in violation of 31 U.S.C. § 5324(a)(3) and (d)(1) after a jury trial in the United States District Court for the Western District of North Carolina. He timely perfected an appeal to this Court, challenging his conviction and sentence. This Court affirmed the conviction and sentence in an unpublished decision dated October 2, 2015, a copy of which is attached.

STATEMENT OF FACTS RELEVANT TO THIS PETITION[1]

On June 18, 2014, the date that he was sentenced, Corvain Cooper was 34 years old and was a father to two minor children. His criminal history consisted of mainly minor theft and auto-related offenses, with two notable exceptions: he had one prior felony conviction for possession of marijuana in the State of California, and one prior felony conviction for possession of codeine in the State of California. He received a sentence of 2 years imprisonment on each of those cases to run concurrently. Other than brief jail sentences for his other prior non-violent convictions, Cooper had never spent any significant time incarcerated.

Cooper was charged with a number of other individuals with trafficking marijuana from California to North Carolina. Three of those charged in the conspiracy went to trial, the remainder entered into plea agreements with the Government.[2] Those that pled guilty received the following sentences:

> Ahmed Daniel Crockett – convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **235 months** + 5 years Supervised Release
>
> Goldie Frances Crockett – convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **60 months** + 3 years Supervised Release

[1] In the interest of brevity, Appellant is setting forth only the facts that concern the main issue to be raised in his appeal – the issue of whether his sentence is cruel and unusual under the Eighth Amendment. Appellate relies upon the facts as set forth in his Initial Brief as to the remaining facts.

[2] The other two defendants that went to trial each received sentences of 87 months imprisonment.

Sharon Kelsey-Brown - convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **60 months** + 3 years Supervised Release

Robert Jonathan Brown - convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **58 months** + 5 years Supervised Release

Shondu Lamar Lynch - convicted of Conspiracy to Distribute Marijuana, Money Laundering, and Possession of a Firearm in Furtherance of a Drug Crime - sentenced to 36 months + 4 years Supervised Release, concurrent with to 36 months + 3 years Supervised Release, consecutive to 60 months + 4 years of Supervised Release = **aggregate total 96 months** + 4 years Supervised Release

Tavarus Shamaco Logie - convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **210 months** + 5 years Supervised Release

Crystal Alethea Easter - convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **36 months** + 4 years Supervised Release

Don Levon Marsh - convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **48 months** + 4 years Supervised Release

Anthony Silva Alegrete - convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **24 months** + 5 years Supervised Release

Ronald Clemenceau Hargette - convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **60 months** + 4 years Supervised Release

> Sandra Anita Landers - convicted of Conspiracy to Distribute Marijuana and Money Laundering - sentenced to **27 months** + 3 years Supervised Release

As a result of Cooper's two prior drug convictions, the Government filed a special information pursuant to 21 U.S.C. § 851, and sought a mandatory sentence of life imprisonment without the possibility of parole.

After a jury trial, Corvain Cooper was found guilty of all charges. He retained new counsel, and challenged the mandatory life sentence without parole, pointing out the disparity in sentences meted out to the co-defendants and others similarly-situated. He further pointed out the disparity in sentence he would have received had he been prosecuted in the North Carolina State courts. Additionally, Cooper argued that recent developments in the policy of the Government militated in favor of a finding that mandatory life sentences for non-violent drug crimes were unconstitutional.

The District Court recognized the severity of the mandatory life sentence, noting that it "would want to have discretion before imposing a life sentence. The absence of discretion is a troubling thing for the Court." (App. Vol. II 974). Later, the District Court stated that

> [T]he Court is not comfortable with imposing a mandatory life sentence on a 34 year old individual without some discretion to consider the 3553(a) factors that a court normally is entitled to consider…The Court has no discretion. I'm not sure what I would do if I had discretion, but the absence of discretion is a difficult thing for the Court.

Nevertheless, the District Court sentenced Cooper to life without the possibility of parole.

Cooper then prosecuted an appeal to this Court, which affirmed his conviction. This timely motion follows.

ARGUMENT AND CITATIONS OF AUTHORITY[3]

Over the past 15 years, the United States Supreme Court has repeatedly taken up the issue of sentencing, repeatedly finding that sentencing schemes that result in harsh sentences violate various Constitutional provisions, including the Eighth Amendment. The recent trend started with Apprendi v. New Jersey, 530 U.S. 466 (2000) in which the Court held that a state sentencing scheme which increased a defendant's sentence for facts not proven to a jury beyond a reasonable doubt, or conceded by the defendant, violated the Sixth Amendment. In 2002, the Court held

[3] Appellant again concentrates on the main issue in this appeal – sentencing – in the interest of brevity. However, this should not be construed as a waiver of the other issues raised in his appeal. Appellant specifically reserves the right to raise those issues in the Supreme Court should he choose to seek certiorari.

that the Eighth Amendment prohibits capital punishment for the mentally retarded. Atkins v. Virginia, 536 U.S. 304 (2002).

The ruling in Apprendi was re-affirmed 4 years later in Blakely v. Washington, 542 U.S. 296 (2004), where the Court struck down a similar state sentencing scheme. The year 2004 also saw the end of capital punishment for crimes committed while under the age of eighteen. In Roper v. Simmons, 543 U.S. 551 (2004) the Court held that the Eighth Amendment prohibited such a penalty.

The Court then took up the issue of Federal sentencing in the landmark case of United States v. Booker, 543 U.S. 220 (2005), holding that the Federal Sentencing Guidelines were advisory, not mandatory, giving District Courts the freedom to impose a reasonable sentence outside of the Guidelines.

Two years later, in Kimbrough v. United States, 552 U.S. 85 (2007), the Supreme Court held that District Courts were free to reject the 100:1 crack-to-cocaine ratio set forth in the Sentencing Guidelines. This effectively paved the for reduced sentences to be imposed for crack distribution offenses by the Fair Sentencing Act of 2010 which reduced the disparity between the amount of crack cocaine and powder cocaine to a ratio of 18:1 weight ratio and eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine, among other provisions.

The Court revisited the Constitutional prohibition on cruel and unusual punishment in 2010, holding in Graham v. Florida, 560 U.S. 48 (2010) that imposition of a life sentence without the possibility of parole for a juvenile violates the Eighth Amendment. This trend in the continued with the Court's holding in Alleyne v. United States, __ U.S. __ (2013), where the Court re-affirmed the central holding of Apprendi, ruling that a defendant's minimum sentence cannot be increased unless supported by facts proven beyond a reasonable doubt to a jury.

United States v. Kratsas, 45 F.3d 63 (4th Cir. 1995), relied upon by this Court in the October 2, 2015 opinion was decided in a different time, in a different political climate, and came off the heels of the Crack Wars of the late 1980s. It relied on the Supreme Court's decision of Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), a case decided in the same era with the same prevailing mindset at the time.

There is a current trend in the law that recognizes that the War on Drugs has been a failure. Harsh mandatory minimum sentences have done nothing to alleviate crime; rather, they have wrought the same kind of destruction upon individuals, their families, and society as a whole that drugs themselves have wrought.

Sentencing by mandatory minimums is the antithesis of rational sentencing policy, or the principle of law that justice should be individualized. A mandatory minimum sentence of life without the possibility of parole effectively deprives a

court of discretion, and substitutes the prosecutor as both the accuser and judge. Mandatory minimum sentencing effectively shifts discretion from judges to the prosecutors. Prosecutors decide what charges to bring against a defendant, and they can "stack the deck," which involves over-charging a defendant in order to get them to plead guilty. Since prosecutors are part of the executive branch, and the judicial branch has almost no role in the sentencing, the checks and balances of the democratic system are removed; thus diluting the notion of a Separation of Powers. It is the proper role of a judge, not a prosecutor, to apply discretion given the particular facts of a case

Both the President of the United States and the Office of the Attorney General have recognized the failure of the War on Drugs. As everyone is well aware, the former Attorney General announced a new policy by which the Government would not seek to enhance Federal drug sentences for non-violent offenders with exactly the kind of sentence enhancement meted out in this case. This policy has been adopted and continued by the current Attorney General. For whatever reason, it was not followed in this case.

In Solem v. Helm, the Supreme Court analyzed an Eighth Amendment challenge to a habitual felony offender statute and the imposition of a life sentence for the crime of passing a bad $100 check. There, the Court held that several factors must be weighed in determining whether a sentence violates the Eighth Amendment:

(1) the gravity of the offense and harshness of the penalty; (2) sentences imposed on other criminals in the jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. Id. at 290-291. An application of the Solem factors to the case at bar results in the inescapable conclusion that a mandatory sentence of life imprisonment without parole violates the Eighth Amendment.

Here, the Government enhanced a sentence for selling marijuana which would normally result in an average 10-15 year sentence to a mandatory sentence of life without the possibility for parole. The reason for the enhancement was his two prior convictions in California state court for possession of drugs, neither of which resulted in a lengthy prison sentence. While conspiracy to distribute marijuana is a serious offense, this is not a crime of violence, nor a crime of deception, nor a crime perpetrated against an individual resulting in direct serious economic, physical, or emotional injury. It is submitted that marijuana is the most benign of all of the controlled substances, so much so that the State of Colorado has recently legalized its possession and use, and the Federal Government's enforcement of Federal drug laws as to marijuana distribution has relaxed. This reflects a change in policy towards marijuana, recognizing that it poses the least danger to the public compared to other drugs.

The co-defendants in this case, who were clearly equally or more culpable than Cooper, received sentences that were far less harsh as detailed above. Thus, the second Solem factor militates in favor of an unconstitutionally harsh sentence.

Finally, the sentence Cooper received in this case was far greater than the worst sentence he could have received had he been prosecuted in a State court. In the State of North Carolina, the penalties for distribution of marijuana are set forth in N.C.G.S. § 90-95(h)

> Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:
>
> a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 39 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);
>
> b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 51 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);
>
> c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 93 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

> d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 222 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

Throwing away the key seems not only inappropriate or draconian, but medieval. In his concurring opinion in United States v. Preacely, 628 F.3d 72 (2d. Cir. 2010), Judge Lynch observed: "[E]ven for a man with a history of multiple (if mostly minor) criminal convictions (almost exclusively tied to the possession and sale of narcotics), a sentence of nearly sixteen years in prison for the possession of a few thousand dollars worth of cocaine seems remarkably severe." By that same token, a sentence of life imprisonment without the possibility for parole for marijuana, a drug far less dangerous that cocaine, shocks the conscience.

The time has come for this Court to re-review prevailing case law in this Circuit, decided in another era with a different prevailing mindset, and re-analyze the Eighth Amendment vis-a-vis drug cases where the characteristics of the defendant and the nature of the offense leads to the inescapable conclusion that a life sentence without the possibility for parole in a non-violence offense such as this is cruel and unusual punishment.

CONCLUSION AND RELIEF REQUESTED

For these reasons set forth herein, this Court should rehear this case en banc.

Dated: October 15, 2015

Respectfully Submitted,

PATRICK MICHAEL MEGARO, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of October, 2015, I served a copy of the foregoing upon the Clerk of the Court and opposing counsel via CM/ECF

PATRICK MICHAEL MEGARO, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This document complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font. Further, this motion complies with F.R.A.P. 35 and 40 and Local Rule 35.

STATEMENT PURSUANT TO LOCAL RULE 27

Pursuant to Local Rule 27, on October 14, 2015 AUSA Amy Ray, Esq. has been notified of this motion and advises that the Government takes no position.

PATRICK MICHAEL MEGARO, ESQ.