

No. _____

**In The
Supreme Court of the United States**

WELDON ANGELOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

JEROME H. MOONEY
50 West Broadway, #100
Salt Lake City, UT 84101-2006
(801) 364-6500

MICHAEL D. ZIMMERMAN
TROY L. BOOHER
SNELL & WILMER, LLP
Gateway Tower West
15 West South Temple Street,
Suite 1200
Salt Lake City, UT 84101-1004
(801) 257-1900

ERIK LUNA
Counsel of Record
332 South 1400 East, Rm. 101
Salt Lake City, UT 84112-0730
(801) 585-5500

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether this Court's summary disposition in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*), stands as a precedential bar to a lower court otherwise concluding that a sentence violates the Eighth Amendment's ban on cruel and unusual punishment under the *Solem-Harmelin* analysis articulated after *Davis* and in opinions of the Court rendered after plenary review, full briefing, and oral argument.

2. Whether it violates the Eighth Amendment to impose a mandatory 55-year sentence on a first-time offender for possessing firearms in connection with selling small amounts of marijuana, where no violence or injury was caused or threatened, where far more serious federal offenses would receive lesser punishment, and where no other jurisdiction would impose such a severe sentence.

TABLE OF CONTENTS

| | Page |
|--|------|
| QUESTIONS PRESENTED | i |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| INTRODUCTION..... | 1 |
| STATEMENT..... | 3 |
| REASONS FOR GRANTING THE PETITION | 4 |
| I. The Uncertain Status of <i>Hutto v. Davis</i> Con- fuses this Court’s Otherwise Clear Guidance Regarding the Proper Analysis of Eighth Amendment Claims..... | 5 |
| A. The Confusion Created by <i>Hutto v. Davis</i> in Angelos’s Case | 6 |
| B. The Apparent Purposes and Limits of Summary Dispositions | 8 |
| C. The Confusion and Uncertain Status of Summary Dispositions | 12 |
| D. The Uncertain Status of <i>Hutto v. Davis</i> in Particular | 20 |
| E. <i>Hutto v. Davis</i> Is No Longer Good Law Based on Current Standards | 25 |
| II. This Case Is a Particularly Egregious Example of the Confusion Caused by Summary Disposi- tions as Well as the Problems of Eighth Amendment Analysis | 27 |
| CONCLUSION | 30 |

TABLE OF CONTENTS – Continued

Page

APPENDIX

| | |
|--|----------|
| Opinion of the Court of Appeals for the Tenth Circuit, filed January 9, 2006 | App. 1 |
| Memorandum Opinion and Order of the District Court for the District of Utah, filed November 16, 2004 | App. 30 |
| Order of the Court of Appeals for the Tenth Circuit denying petition for rehearing and rehearing <i>en banc</i> , filed April 4, 2006..... | App. 103 |
| Text of Constitutional and Statutory Provisions Involved..... | App. 104 |

TABLE OF AUTHORITIES

Page

CASES

| | |
|--|------------|
| <i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996) | 18 |
| <i>Alabama v. Pugh</i> , 438 U.S. 781 (1978)..... | 11 |
| <i>Allen v. Hardy</i> , 478 U.S. 255 (1986)..... | 15 |
| <i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)..... | 16 |
| <i>Anderson v. Harless</i> , 459 U.S. 4 (1982) | 10, 11 |
| <i>Arkansas v. Sullivan</i> , 532 U.S. 769 (2001) | 10 |
| <i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)..... | 25, 26 |
| <i>Baker v. Nelson</i> , 409 U.S. 810 (1972) | 17 |
| <i>Baker v. Wade</i> , 769 F.2d 289 (5th Cir. 1985) | 18 |
| <i>Blakely v. Washington</i> , 542 U.S. 296 (2004) | 18, 19, 20 |
| <i>Boag v. MacDougall</i> , 454 U.S. 364 (1982)..... | 11 |
| <i>Board of Educ. of Rogers, Ark. v. McCluskey</i> , 458 U.S. 966 (1982) | 11 |
| <i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986) | 18 |
| <i>Breard v. Greene</i> , 523 U.S. 371 (1998) | 17 |
| <i>Brosseau v. Haugen</i> , 543 U.S. 194 (2004) | 9, 12 |
| <i>Brown v. Allen</i> , 344 U.S. 443 (1953)..... | 14 |
| <i>Bunkley v. Florida</i> , 538 U.S. 835 (2003) | 9, 12, 13 |
| <i>C.I.R. v. Asphalt Products Co.</i> , 482 U.S. 117 (1987)..... | 10 |
| <i>Calderon v. Coleman</i> , 525 U.S. 141 (1998)..... | 11 |
| <i>Calderon v. Thompson</i> , 523 U.S. 538 (1998)..... | 11, 24 |
| <i>Cameron v. Johnson</i> , 381 U.S. 741 (1965) | 14 |

TABLE OF AUTHORITIES – Continued

| | Page |
|---|--------|
| <i>Central State Univ. v. American Assn. of Univ. Professors, Central State Univ. Chapter</i> , 526 U.S. 124 (1999) | 16 |
| <i>Close v. People</i> , 48 P.3d 528 (Colo. 2002)..... | 22 |
| <i>Colorado v. Connelly</i> , 474 U.S. 1050 (1986)..... | 12 |
| <i>Connecticut v. Doe</i> , 501 U.S. 1 (1991) | 15, 16 |
| <i>Constant A. v. Paul C.A.</i> , 496 A.2d 1 (Pa. 1985) | 18 |
| <i>Cox v. Larios</i> , 542 U.S. 947 (2004)..... | 17 |
| <i>Davis v. Davis</i> , 585 F.2d 1226 (4th Cir. 1977)..... | 20, 24 |
| <i>Davis v. Davis</i> , 601 F.2d 153 (4th Cir. 1979)..... | 20 |
| <i>Davis v. Davis</i> , 646 F.2d 123 (4th Cir. 1981)..... | 20, 21 |
| <i>Davis v. Georgia</i> , 429 U.S. 122 (1976)..... | 16, 20 |
| <i>Davis v. Zahradnick</i> , 432 F. Supp. 444 (W.D. Va. 1977)..... | 20 |
| <i>Doe v. Commonwealth’s Attorney for the City of Richmond</i> , 425 U.S. 901 (1976) | 17, 18 |
| <i>Dronenburg v. Zech</i> , 741 F.2d 1388 (D.C. Cir. 1984) | 18 |
| <i>E.E.O.C. v. F.L.R.A.</i> , 476 U.S. 19 (1986) | 10 |
| <i>Eaton v. Tulsa</i> , 415 U.S. 697 (1974) | 10 |
| <i>Edelman v. Jordan</i> , 415 U.S. 651 (1974) | 8, 16 |
| <i>Ewing v. California</i> , 538 U.S. 11 (2003)..... | 4, 6 |
| <i>Florida v. Meyers</i> , 466 U.S. 380 (1984) | 12 |
| <i>Fusari v. Steinberg</i> , 419 U.S. 379 (1975)..... | 16 |
| <i>Gray v. Mississippi</i> , 481 U.S. 648 (1987) | 16 |
| <i>Great Western Sugar Co. v. Nelson</i> , 442 U.S. 92 (1979) | 11, 16 |

TABLE OF AUTHORITIES – Continued

| | Page |
|---|---------------|
| <i>Hardwick v. Bowers</i> , 760 F.2d 1202 (11th Cir. 1985)..... | 18 |
| <i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991)..... | <i>passim</i> |
| <i>Harris v. Oklahoma</i> , 433 U.S. 682 (1977) | 15, 16 |
| <i>Harris v. Rivera</i> , 454 U.S. 339 (1981) | 14 |
| <i>Hart v. Coiner</i> , 483 F.2d 136 (4th Cir. 1973) | 20, 21 |
| <i>Hawkins v. Hargett</i> , 200 F.3d 1279 (10th Cir. 1999) | 6 |
| <i>Hernandez v. Robles</i> , 805 N.Y.S.2d 354 (2005) | 17 |
| <i>Hicks v. Miranda</i> , 422 U.S. 332 (1975) | 15 |
| <i>Hohn v. United States</i> , 524 U.S. 236 (1998)..... | 8, 15, 16 |
| <i>Hutto v. Davis</i> , 454 U.S. 370 (1982) | <i>passim</i> |
| <i>Hutto v. Finney</i> , 437 U.S. 678 (1978)..... | 5, 16 |
| <i>Idaho Department of Employment v. Smith</i> , 434 U.S. 100 (1977) | 11 |
| <i>Illinois v. Batchelder</i> , 463 U.S. 1112 (1984) | 11 |
| <i>Illinois State Board of Elections v. Socialist Workers Party</i> , 440 U.S. 173 (1979) | 16 |
| <i>In re Kandu</i> , 315 B.R. 123 (W.D. Wash. 2004) | 17 |
| <i>In re Municipal Reapportionment of Tp. of Haver- ford</i> , 873 A.2d 821 (Pa. 2005)..... | 17 |
| <i>Johnson v. California</i> , 543 U.S. 499 (2005) | 15 |
| <i>Lake Coal Co. v. Roberts & Schaefer Co.</i> , 474 U.S. 120 (1985) | 16 |
| <i>Lawrence v. Chater</i> , 516 U.S. 163 (1996) | 17 |
| <i>Lawrence v. Texas</i> , 539 U.S. 558 (2003) | 18 |
| <i>Lee v. Washington</i> , 390 U.S. 333 (1968) | 15 |

TABLE OF AUTHORITIES – Continued

| | Page |
|--|-----------|
| <i>Lehman v. Trout</i> , 465 U.S. 1056 (1984)..... | 14 |
| <i>Leis v. Flynt</i> , 439 U.S. 438 (1979)..... | 10 |
| <i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003) | 4, 6, 27 |
| <i>Lockyer v. City & County of San Francisco</i> , 33 Cal. 4th 1055 (2004)..... | 17 |
| <i>Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.</i> , 520 U.S. 893 (1997) | 14 |
| <i>Lunding v. New York Tax Appeals Tribunal</i> , 522 U.S. 287 (1998) | 15 |
| <i>Major League Baseball Player’s Assn. v. Garvey</i> , 532 U.S. 504 (2001) | 9, 13, 14 |
| <i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)..... | 10 |
| <i>Maryland v. Dyson</i> , 527 U.S. 465 (1999)..... | 10 |
| <i>Medellin v. Dretke</i> , 371 F.3d 270 (5th Cir. 2004)..... | 17 |
| <i>Metromedia, Inc. v. City of San Diego</i> , 453 U.S. 490 (1981) | 15, 16 |
| <i>Metropolitan Life Insurance Co. v. Ward</i> , 470 U.S. 869 (1985) | 16 |
| <i>Mickens v. Taylor</i> , 535 U.S. 162 (2002) | 3 |
| <i>Minor v. State</i> , 546 A.2d 1028 (Md. 1988)..... | 23 |
| <i>Mireles v. Waco</i> , 502 U.S. 9 (1991)..... | 9, 13 |
| <i>Montana v. Hall</i> , 481 U.S. 400 (1987)..... | 12, 13 |
| <i>O’Neil v. Vermont</i> , 144 U.S. 323 (1892) | 5 |
| <i>Oakley v. State</i> , 715 P.2d 1374 (Wyo. 1986)..... | 23 |
| <i>Olden v. Kentucky</i> , 488 U.S. 227 (1988) | 14 |

TABLE OF AUTHORITIES – Continued

| | Page |
|--|--------------------|
| <i>Oregon State Penitentiary v. Hammer</i> , 434 U.S. 945 (1977) | 14 |
| <i>Palmer v. BRG of Georgia, Inc.</i> , 498 U.S. 46 (1990) | 14 |
| <i>Parker v. Randolph</i> , 442 U.S. 62 (1979)..... | 16 |
| <i>Pennsylvania v. Mimms</i> , 434 U.S. 106 (1977) | 10 |
| <i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989) | 25 |
| <i>People v. Onofre</i> , 51 N.Y.2d 476 (1980)..... | 18 |
| <i>Pounders v. Watson</i> , 521 U.S. 982 (1997)..... | 13 |
| <i>Purkett v. Elem</i> , 514 U.S. 765 (1995)..... | 9, 12, 13 |
| <i>Rhodes v. Stewart</i> , 488 U.S. 1 (1988) | 10 |
| <i>Roper v. Simmons</i> , 543 U.S. 551 (2005) | 25, 26 |
| <i>Rummel v. Estelle</i> , 445 U.S. 263 (1980) | 20, 21, 22, 23, 27 |
| <i>Rushen v. Spain</i> , 464 U.S. 114 (1983) | 10 |
| <i>Schweiker v. Hansen</i> , 450 U.S. 785 (1981)..... | 9 |
| <i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983)..... | 18 |
| <i>Smelt v. County of Orange</i> , 374 F. Supp. 2d 861 (C.D. Cal. 2005) | 17 |
| <i>Smith v. Arkansas State Highway Employees</i> , 441 U.S. 463 (1979) | 10 |
| <i>Solem v. Helm</i> , 463 U.S. 277 (1983) | <i>passim</i> |
| <i>State v. Cooper</i> , 304 S.E.2d 851 (W.Va. 1983) | 23 |
| <i>State v. Harris</i> , 677 P.2d 625 (N.M. 1984)..... | 23 |
| <i>State v. Jonas</i> , 792 P.2d 705 (Ariz. 1990) | 22 |
| <i>State v. Mueller</i> , 671 P.2d 1351 (Haw. 1983)..... | 18 |
| <i>Stewart v. LaGrand</i> , 526 U.S. 115 (1999) | 13 |

TABLE OF AUTHORITIES – Continued

| | Page |
|---|------------|
| <i>Thomas v. American Home Products, Inc.</i> , 519 U.S. 913 (1996) | 11 |
| <i>Sumner v. Mata</i> , 455 U.S. 591 (1982) | 11 |
| <i>Thompson v. Louisiana</i> , 469 U.S. 17 (1984) | 10 |
| <i>Torres-Valencia v. United States</i> , 464 U.S. 44 (1983) | 10 |
| <i>Trop v. Dulles</i> , 356 U.S. 86 (1958) | 25 |
| <i>Tully v. Griffin, Inc.</i> , 429 U.S. 68 (1976) | 16 |
| <i>U.S. Bancorp Mortgage Co. v. Bonner Mall Partner- ship</i> , 513 U.S. 18 (1994) | 15, 16, 24 |
| <i>United States ex rel. Madej v. Schomig</i> , 223 F. Supp. 2d 968 (N.D. Ill. 2002) | 17 |
| <i>United States v. Angelos</i> , 345 F. Supp. 2d 1227 (D. Utah 2004) | 1 |
| <i>United States v. Angelos</i> , 433 F.3d 738 (10th Cir. 2006)..... | 1 |
| <i>United States v. Arvizu</i> , 534 U.S. 266 (2002)..... | 3 |
| <i>United States v. Booker</i> , 375 F.3d 508 (7th Cir. 2004)..... | 19 |
| <i>United States v. Booker</i> , 543 U.S. 220 (2005)..... | 18, 19 |
| <i>United States v. Dixon</i> , 509 U.S. 688 (1993) | 15, 16 |
| <i>United States v. Hammoud</i> , 381 F.3d 316 (4th Cir. 2004)..... | 19 |
| <i>United States v. Hankins</i> , 329 F. Supp. 2d 1225 (D. Mont. 2004)..... | 19 |
| <i>United States v. Hollywood Motor Car Co.</i> , 458 U.S. 263 (1982) | 10, 12 |
| <i>United States v. Koch</i> , 383 F.3d 436 (6th Cir. 2004) | 19 |

TABLE OF AUTHORITIES – Continued

| | Page |
|---|---------------|
| <i>United States v. Lowden</i> , 955 F.2d 128 (1st Cir. 1992)..... | 22 |
| <i>United States v. McKinney</i> , 339 F. Supp. 2d 1314 (N.D. Fla. 2004) | 20 |
| <i>United States v. Mueffelman</i> , 327 F. Supp. 2d 79 (D. Mass. 2004)..... | 19 |
| <i>United States v. Noriega</i> , 117 F.3d 1206 (11th Cir. 1997)..... | 29 |
| <i>United States v. Olivera-Hernandez</i> , 328 F. Supp. 2d 1185 (D. Utah 2004) | 19 |
| <i>United States v. Penaranda</i> , 375 F.3d 238 (2d Cir. 2004)..... | 19 |
| <i>United States v. Pineiro</i> , 377 F.3d 464 (5th Cir. 2004)..... | 19 |
| <i>United States v. Rhodes</i> , 779 F.2d 1019 (4th Cir. 1985)..... | 23 |
| <i>United States v. Singh</i> , 390 F.3d 168 (2d Cir. 2004)..... | 19 |
| <i>United States v. Watts</i> , 519 U.S. 148 (1997)..... | 9, 18, 19, 20 |
| <i>United States v. Yirkovsky</i> , 276 F.3d 384 (8th Cir. 2001)..... | 27 |
| <i>Washington v. Yakima Indian Nation</i> , 439 U.S. 463 (1979) | 16 |
| <i>Watt v. Alaska</i> , 451 U.S. 259 (1981) | 11 |
| <i>Weems v. United States</i> , 217 U.S. 349 (1910)..... | 5 |
| <i>Williams v. State</i> , 539 A.2d 164 (Del. 1988) | 23 |
| <i>Wilson v. State</i> , 830 So.2d 765 (Ala. 2001) | 22 |
| <i>Wyrick v. Fields</i> , 459 U.S. 42 (1982)..... | 10 |
| <i>Youngblood v. West Virginia</i> , 126 S. Ct. 2188 (2006) | 14, 17 |

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

| | |
|---------------------------------------|----------------|
| U.S. CONST. amend. VIII..... | <i>passim</i> |
| 18 U.S.C. § 924(c) | 1, 2, 3, 4, 29 |
| 28 U.S.C. § 1254(1)..... | 1 |
| VA. CODE ANN. § 18.2-10(e)..... | 26 |
| VA. CODE ANN. § 18.2-248.1(a)(2)..... | 26 |

OTHER AUTHORITIES

| | |
|--|----|
| Hon. William J. Brennan, Jr., <i>Some Thoughts on the Supreme Court’s Workload</i> , 66 JUDICATURE 230 (1983) | 11 |
| Hon. Stephen Breyer, <i>Federal Sentencing Guidelines Revisited</i> , 11 FED. SENTENCING RPTR. 180 (1999) | 2 |
| Ernest J. Brown, <i>Foreword: Process of Law</i> , 72 HARV. L. REV. 77 (1958)..... | 9 |
| Erwin Chemerinsky & Ned Miltenberg, <i>The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages’ Cases</i> , 36 ARIZ. ST. L.J. 513 (2004)..... | 17 |
| Richard S. Frase, <i>Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?</i> , 89 MINN. L. REV. 571 (2005)..... | 23 |
| Steven Grossman, <i>Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach To Cruel And Unusual Punishment</i> , 84 KY. L.J. 107 (1995-1996)..... | 23 |

TABLE OF AUTHORITIES – Continued

| | Page |
|---|-----------|
| Arthur D. Hellman, <i>Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review</i> , 44 U. PITT. L. REV. 795 (1983) | 9 |
| ILLICIT DRUG POLICIES: SELECTED LAWS FROM THE 50 STATES (2002) | 26 |
| Hon. Anthony M. Kennedy, "Speech at the American Bar Association Annual Meeting," Aug. 9, 2003 | 2 |
| RYAN S. KING & MARC MAUER, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990s (2005) | 26 |
| David B. Kopel, <i>Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety</i> , 208 CATO POL'Y ANALYSIS 1 (May 1994) | 2 |
| Hon. David Laro, <i>The Evolution of the Tax Court as an Independent Tribunal</i> , 1995 U. ILL. L. REV. 17 | 29 |
| Erik Luna, <i>Drug Exceptionalism</i> , 47 VILLANOVA L. REV. 753 (2002) | 27 |
| Hon. Gerard E. Lynch, <i>Sentencing Eddie</i> , 91 J. CRIM. L. & CRIMINOLOGY 547 (2001) | 27 |
| Hon. John S. Martin, Jr., <i>Let Judges Do Their Jobs</i> , N.Y. TIMES, June 24, 2003, at A31 | 27 |
| William J. Schneider, <i>The Do's and Don'ts of Determining the Precedential Value of Supreme Court Dispositions</i> , 51 BROOK. L. REV. 945 (1985) | 9, 18 |
| ROBERT L. STERN ET AL., SUPREME COURT PRACTICE (8th ed. 2002) | 8, 12, 16 |
| Hon. John Paul Stevens, <i>Some Thoughts on Judicial Restraint</i> , 66 JUDICATURE 177 (1982) | 9 |

TABLE OF AUTHORITIES – Continued

| | Page |
|--|------|
| SUP. CT. R. 16.1 (2005)..... | 5 |
| Stephen L. Wasby et al., <i>The Per Curiam Opinion: Its Nature and Functions</i> , 76 JUDICATURE 29 (1992) | 9 |
| 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PRO- CEDURE: JURISDICTION AND RELATED MATTERS (2d ed. 1996)..... | 8, 9 |

OPINIONS BELOW

The Tenth Circuit opinion is reported at 433 F.3d 738 and reprinted in the Appendix hereto (“App.”) at App. 1. That opinion affirmed the Memorandum Opinion and Order of the District Court for the District of Utah, which is reported at 345 F. Supp. 2d 1227 and reprinted at App. 30.

JURISDICTION

The judgment of the appellate panel was entered on January 9, 2006. App. 3. A timely petition for rehearing and rehearing *en banc* was denied on April 4, 2006. *Id.* at 103. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment and 18 U.S.C. § 924(c) are set forth at App. 104.

INTRODUCTION

Petitioner Weldon Angelos, a first-time offender, was sentenced to 55 years and one day – effectively a life sentence, *see* App. 52, 74 – for possessing firearms in connection with selling small amounts of marijuana. Angelos never brandished or used the handguns in his possession, nor did he cause or threaten any violence or injury. Every participant in the trial – the District Court judge, the jury, and, at least initially, the prosecution – recognized that the crimes at issue did not justify life imprisonment. *See* App. 32-38, 56-61, 82 (noting, *inter alia*, government plea offer, sentencing recommendation by jurors, and views of the District Court). Nonetheless, the lower courts rejected Angelos’s challenges to his sentence.

The draconian punishment in this case is a result of 18 U.S.C. § 924(c), one of the so-called “mandatory minimum” sentencing laws. According to the courts below, § 924(c) prescribes a 5-year mandatory minimum for a first conviction and a 25-year mandatory minimum for each subsequent

conviction, with the sentences required to run consecutively. *See* App. 29, 37-43. The statute does not distinguish between first-time offenders and recidivists. *See id.* at 70-75. Moreover, the “count stacking” quality of § 924(c) – i.e., the sentence for each conviction must run consecutively – can result in extreme and unjust punishment for *seriatim* “controlled buys” by law enforcement, given that “the additional criminal acts were in some sense procured by the government.” *Id.* at 81.

The sentence imposed in this case demonstrates that mandatory minimums are not only ill-advised,¹ but they may also violate the Eighth Amendment under the three-part test of *Solem v. Helm*, 463 U.S. 277 (1983), and *Harmelin v. Michigan*, 501 U.S. 957 (1991), as “unjust, cruel, and even irrational.” App. 33, 102. Preventing this conclusion, however, is the Court’s *per curiam* decision in *Hutto v. Davis*, 454 U.S. 370 (1982), which, as the District Court noted, is of questionable precedential value but cannot be ignored until the Supreme Court so decides. *See* App. 93-94. This case thus provides the Court with an opportunity to clarify its decision in *Davis*, as well as to address the widespread confusion over the precedential value of summary dispositions on the merits.

¹ Mandatory minimums have been questioned by many distinguished jurists, including members of this Court. *See* David B. Kopel, *Prison Blues: How America’s Foolish Sentencing Policies Endanger Public Safety*, CATO POL’Y ANALYSIS, May 17, 1994, at 18 (quoting address by Chief Justice William H. Rehnquist), *available at* <https://www.cato.org/pubs/pas/pa-208.html> (“There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders.”); 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 (“In too many cases, mandatory minimum sentences are unwise and unjust.”); Hon. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENTENCING RPTR. 180 (1999) (expressing agreement with such criticisms and noting that he “would add others,” including the fact that mandatory minimums emasculate the U.S. Sentencing Commission; “they skew the entire set of criminal punishments”; “they may permit the prosecutor, not the judge, to select the sentence” through charging decisions; and they do not accomplish the goal of uniformity in sentencing).

STATEMENT

On November 13, 2002, Petitioner Weldon Angelos was charged in a five-count indictment, including one count of carrying or possessing a firearm during or in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c).² Plea negotiations between the government and Angelos went as follows:

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.

App. 35-36. When plea negotiations were unsuccessful, the government obtained two superseding indictments on, respectively, June 18, 2003 and October 1, 2003. It eventually charged Angelos with twenty total counts, including five violations of 18 U.S.C. § 924(c), which carried a potential mandatory minimum sentence of 105 years.

² The following is based on the facts as found by the District Court. See App. 32-38. With respect to some factual issues, the appellate panel substituted its own factual findings for those made by the trial judge and jury, see App. 26-27, thereby acting as a sort of super-factfinder without the benefit of having participated in any part of the trial proceedings. Needless to say, this was flatly inconsistent with established precedent. See, e.g., *Mickens v. Taylor*, 535 U.S. 162, 177 (2002) (“Our role is to defer to the District Court’s factual findings unless we can conclude they are clearly erroneous.”); *United States v. Arvizu*, 534 U.S. 266, 276 (2002) (noting “District Court’s superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom”). In this instance, however, the Court may simply ignore the appellate panel’s inappropriate findings since the questions presented do not involve and are not affected by these disparities.

In early December 2003, the case was tried before a jury. Angelos was convicted on sixteen counts, including three of the five § 924(c) counts. Following extensive briefing, the District Court issued a memorandum opinion and order on November 16, 2004. Although it found that the mandatory minimum sentence in this case met all of the requirements for a successful Eighth Amendment challenge – that is, Petitioner’s punishment was “unjust, cruel, and even irrational” under the three-part test of *Solem* and *Harmelin* (App. 33, 102) – the court nonetheless concluded that it was constrained from striking down Angelos’s sentence by this Court’s decision in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*). The District Court therefore sentenced Mr. Angelos to a prison term of 55 years and one day.

Mr. Angelos appealed to the United States Court of Appeals for the Tenth Circuit, raising, *inter alia*, constitutional and statutory challenges to his sentence. On January 9, 2006, the appellate panel issued an opinion rejecting all of Angelos’s claims, including the argument that his sentence violated the Eighth Amendment. His petition for rehearing and rehearing *en banc* was denied on April 4, 2006.

REASONS FOR GRANTING THE PETITION

The Court’s review is warranted to resolve the uncertainty over the precedential value of the *per curiam* opinion in *Hutto v. Davis*, especially in light of the recent decisions in *Ewing v. California*, 538 U.S. 11 (2003), and *Lockyer v. Andrade*, 538 U.S. 63 (2003), both of which embraced the three-part analysis of *Solem* and *Harmelin*. Until this Court clarifies the status of *Hutto v. Davis*, lower courts will continue to be confused and conflicted regarding the proper Eighth Amendment analysis that they should employ. More generally, the lower courts have long been uncertain as to the precedential value of summary

dispositions on the merits,³ and they will remain so until guidance is provided by the Supreme Court. This case provides an excellent vehicle to address the confusion.

I. The Uncertain Status of *Hutto v. Davis* Confuses this Court’s Otherwise Clear Guidance Regarding the Proper Analysis of Eighth Amendment Claims.

This Court has recognized the constitutional principle of proportionality in sentencing for nearly a century, acknowledging the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Weems v. United States*, 217 U.S. 349, 367 (1910). In 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)). Therefore, “[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards,” *Hutto v. Finney*, 437 U.S. 678, 685 (1978), and “no penalty is *per se* constitutional.” *Solem v. Helm*, 463 U.S. 277, 290 (1983).

In *Solem v. Helm*, the 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

³ Supreme Court Rule 16.1 states: “After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.” SUP. CT. R. 16.1 (2005).

adopted by Justice Kennedy in his concurrence in *Harmelin v. Michigan*, in which he concluded that the Eighth Amendment forbids “extreme sentences that are ‘grossly disproportionate’ to the crime.” *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

Both this Court and the lower federal courts have relied upon the *Solem-Harmelin* three-part analysis 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: The Constitution bans grossly disproportionate punishment.

A. The Confusion Created By *Hutto v. Davis* in Angelos’s Case

Consistent with this line of Eighth Amendment jurisprudence, the District Court evaluated Angelos’s sentence pursuant to the *Solem-Harmelin* analysis. See App. 87-92. Under the first factor, it concluded that Petitioner’s 55-year sentence “strongly suggests not merely disproportionality, but gross disproportionality,” *id.* at 91, in light of the following factual findings:

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.

Id. at 90. The District Court then turned to the second factor, which required a comparison of Mr. Angelos’s 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. App. 91. Concluding that this factor was also satisfied, the District Court pointed out that “Mr. Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second-degree murders, three racial beatings inflicting life-threatening injuries, three kidnappings, and three rapes.” *Id.* at 92; *see also id.* at 61-75 (conducting similar analysis under equal protection principles).

Finally, the District Court considered the third factor, “compar[ing] 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). In concluding that “Mr. Angelos’ sentence is longer than he would receive in any of the fifty states,” App. 92; *see also id.* at 59-60, the District Court noted the prosecution’s concession that Petitioner “would serve about five to seven years” had he been convicted in state court. *Id.* at 92 (citing government’s sentencing memorandum).⁴ Based on this analysis, the District Court determined that the *Solem-Harmelin* factors “lead to the conclusion that Mr.

⁴ In fact, 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.” App. 59.

Angelos' sentence violates the Eighth Amendment." *Id.* at 92-93.

Nevertheless, it did not strike down Petitioner's sentence. According to the District Court, the decision in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*) – which upheld a 40-year sentence for crimes involving less than nine ounces of marijuana – foreclosed a ruling that Angelos's sentence violates the Eighth Amendment. *See* App. 92-94. In other words, *Hutto v. Davis* muddied what appeared to be a clear result under the analysis of *Solem* and *Harmelin*. This confusion requires the Court's review.

B. The Apparent Purposes and Limits of Summary Dispositions

For years, Justices and commentators alike have noted the uncertain status of *per curiam* opinions like *Hutto v. Davis*, in which the Court simultaneously grants certiorari and issues an opinion and judgment on the merits of the case without full briefing and oral argument. One of the reasons these opinions are “[t]he most controversial form of summary disposition,” ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 320 (8th ed. 2002), is the uncertainty regarding their precedential value. Indeed, the Court has noted on several occasions that *per curiam* summary dispositions are of “precedential value,” but they are “not of the same precedential value” as opinions rendered after full briefing and oral argument. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *see Hohn v. United States*, 524 U.S. 236, 251 (1998).

Summary dispositions on the merits have long been criticized by legal commentators as procedurally unfair to the parties and fraught with peril for practitioners and the lower judiciary. *See, e.g.*, STERN ET AL., *supra*, at 320-21, 324-26; 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4004.5, at 87 (2d ed. 1996) (“The practice increases the risk of erroneous disposition, and must leave at least the losing party feeling victimized by an unfair and unforeseen procedure.”); *see*

also Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77 (1958) (essay criticizing the Court's summary disposition practice); cf. Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29 (1992); William J. Schneier, *The Do's and Don'ts of Determining the Precedential Value of Supreme Court Dispositions*, 51 BROOK. L. REV. 945 (1985); Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983). But with the expanded use of summary dispositions accompanied by brief *per curiam* opinions, "mounting criticism has arisen from within the Court," expressed in numerous dissents from such opinions. STERN ET AL., *supra*, at 320-21; see also WRIGHT ET AL., *supra*, at 81-87; cf. Hon. John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982).

Because the *per curiams* themselves generally do not respond to criticism, "nor do they seek to justify the purposes or the procedures of summary disposition," STERN ET AL., *supra*, at 321, the only guidance is provided by fragments of Court opinions, the Justices' dissents, and scholarly analysis. For instance, several Justices have written that summary dispositions of this type are inappropriate where the resolution "makes new law" or is a "law-changing decision," *Bunkley v. Florida*, 538 U.S. 835, 842 (2003) (Rehnquist, C.J., dissenting); *Purkett v. Elem*, 514 U.S. 765, 770 (1995) (Stevens, J., dissenting), or when the issue presented is so novel, complicated, or consequential as to deserve plenary consideration by the Court. See, e.g., *Major League Baseball Player's Assn. v. Garvey*, 532 U.S. 504, 512-13 (2001) (Stevens, J., dissenting); *United States v. Watts*, 519 U.S. 148, 170-71 (1997) (Kennedy, J., dissenting). Instead, *per curiam* summary dispositions are "usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); see also *Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting) ("extraordinary remedy of summary reversal" unwarranted where lower

court decision was “not clearly erroneous”).⁵ In particular,

⁵ The following opinions also discuss these purposes and limitations: *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (*per curiam*) (summary reversal of lower court decision as “flatly contrary to this Court’s controlling precedent”); *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999) (*per curiam*) (“a summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court’s demonstrably erroneous application of federal law”); *Rhodes v. Stewart*, 488 U.S. 1, 5 (1988) (Blackmun, J., dissenting) (summary disposition inappropriate for “novel legal issues”); *C.I.R. v. Asphalt Products Co.*, 482 U.S. 117, 123 (1987) (Blackmun, J., concurring in part and dissenting in part) (disposition inappropriate unless “the correct result is so obvious and the Court of Appeals so clearly in error that summary reversal is warranted”); *E.E.O.C. v. F.L.R.A.*, 476 U.S. 19, 26 n.5 (1986) (Stevens, J., dissenting) (summary dispositions “customarily reserve[d] for settled issues of law”); *Thompson v. Louisiana*, 469 U.S. 17, 18 (1984) (*per curiam*) (summary disposition appropriate where lower court “holding is in direct conflict” with Supreme Court decision); *Rushen v. Spain*, 464 U.S. 114, 131 (1983) (Marshall, J., dissenting) (“important constitutional questions deserve more careful consideration than” provided by summary disposition); *Torres-Valencia v. United States*, 464 U.S. 44, 44-45 (1983) (Rehnquist, J., dissenting) (summary disposition is “appropriate where a lower court has demonstrably misapplied our cases in a manner which has led to an incorrect result” but not to correct isolated legal errors); *Wyrick v. Fields*, 459 U.S. 42, 52 (1982) (Marshall, J., dissenting) (summary disposition improper “in a case that involves a significant issue not settled by our prior decisions”); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 272, 275 (1982) (Blackmun, J., dissenting) (summary disposition inappropriate where prior precedents do not “mandate” or “compel” reversal); *Hutto v. Davis*, 454 U.S. 370, 387 (1982) (Brennan, J., dissenting) (summary disposition improper when “employed to change or extend the law in significant respects”); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 466-67 (1979) (Marshall, J., dissenting) (summary disposition inappropriate for “deciding vital constitutional questions”); *Leis v. Flynt*, 439 U.S. 438, 458 (1979) (Stevens, J., dissenting) (summary disposition “egregiously improvident when the Court is facing a ‘novel constitutional question’”); *Pennsylvania v. Mimms*, 434 U.S. 106, 124 (1977) (Stevens, J., dissenting) (summary disposition inappropriate for “a novel constitutional question”); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*) (summary dispositions “should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved”); *Eaton v. Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting) (summary disposition “should be reserved for palpably clear cases of constitutional error”). Individual Justices have also balked at the use of summary disposition: (i) in cases of local importance only; (ii) simply to correct lower court errors and trivial mistakes; (iii) when one party is at
(Continued on following page)

summary disposition has been utilized to enforce the mandate of a previous order, such as when the lower court “apparently misunderstood the terms of our remand,” *Sumner v. Mata*, 455 U.S. 591, 596-97 (1982) (*per curiam*) – or, worse yet, where the lower court failed to comply with the remand and “could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system,” as was the case in *Hutto v. Davis*, 454 U.S. at 374-75.

a unique disadvantage; or (iv) to resolve a split among the federal circuit courts. *See, e.g., Dyson*, 527 U.S. at 467 (Breyer, J., dissenting) (summary disposition inappropriate “where the respondent is represented by a counsel unable to file a response”); *Arkansas State Highway Employees*, 441 U.S. at 467 n.* (Marshall, J., dissenting) (summary disposition is “especially inappropriate means of resolving conflicts between the United States Courts of Appeals”); *Calderon v. Coleman*, 525 U.S. 141, 147-52 (1998) (Stevens, J., dissenting); *Thomas v. American Home Products, Inc.*, 519 U.S. 913, 916-18 (1996) (Rehnquist, C.J., dissenting); *Illinois v. Batchelder*, 463 U.S. 1112, 1120 (1984) (Stevens, J., dissenting) (summary disposition inappropriate where there was no “counsel to represent the party defending the judgment of the court below”); *Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting) (“It is not appropriate for this Court to expend its scarce resources crafting [*per curiam*] opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law.”); *Board of Educ. of Rogers, Ark. v. McCluskey*, 458 U.S. 966, 971-73 (1982) (Stevens, J., dissenting) (summary disposition inappropriate for error correction and cases without national importance); *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (summary disposition inappropriate for “the correction of errors in lower court decisions”); *Watt v. Alaska*, 451 U.S. 259, 273-76 (1981) (Stevens, J., concurring) (summary disposition inappropriate simply “to correct what we perceive to be mistakes committed by other tribunals”); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979) (Stevens, J., dissenting) (summary disposition inappropriate “for the sole purpose of correcting a highly technical and totally harmless error”); *Alabama v. Pugh*, 438 U.S. 781, 782-83 (1978) (Stevens, J., dissenting) (summary disposition inappropriate to correct “harmless errors”); *Idaho Department of Employment v. Smith*, 434 U.S. 100, 104 (1977) (Stevens, J., dissenting) (summary disposition inappropriate for mere error correction and when “losing litigant is too poor to hire a lawyer”); Hon. William J. Brennan, Jr., *Some Thoughts on the Supreme Court’s Workload*, 66 JUDICATURE 230, 232 (1983) (summary disposition inappropriate “unless at least all of us believe that the judgment below flatly rejects the controlling authority of one of our decisions”).

Whatever their virtues, summary dispositions have obvious shortcomings. On several occasions, individual Justices have criticized the procedural unfairness of this mechanism, depriving some parties of “their ‘day in court’ in a singularly inappropriate manner.” *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 272 (1982) (Blackmun, J., dissenting); *see also Montana v. Hall*, 481 U.S. 400, 405-06 (1987) (Marshall, J., dissenting) (describing injustice at length); STERN ET AL., *supra*, at 320, 324-26. Some members of the Court have also suggested that summary dispositions damage the integrity of the proceedings, show insufficient respect for the lower courts as well as for dissenting Justices, and, in criminal cases, have tended to favor the government over the defendant. *See, e.g., Hall*, 481 U.S. at 405, 408-10 (Marshall, J., dissenting); *Colorado v. Connelly*, 474 U.S. 1050, 1050-51 (1986) (Brennan and Stevens, JJ., mem.); *Florida v. Meyers*, 466 U.S. 380, 385-87 (1984) (Stevens, J., dissenting); *see also Bunkley*, 538 U.S. at 844, 844 n.2 (2003) (Rehnquist, C.J., dissenting) (describing as “unjustified” *per curiam* opinion’s criticism of lower court “for failing to anticipate this holding” and for “failing to reach its holding in a sufficiently clear manner”); *Purkett*, 514 U.S. at 774 n.8 (Stevens, J., dissenting) (describing *per curiam* opinion’s criticism as “singularly inappropriate” and “disrespectful to the conscientious judges on the Court of Appeals”).

C. The Confusion and Uncertain Status of Summary Dispositions

But the most significant problem posed by summary dispositions is the potential for erroneous decisions and confusion among the lower courts, made worse by the uncertain precedential value of such *per curiam* opinions. Several Justices have objected to rendering important decisions without the benefit of briefs on the merits and oral argument. *See, e.g., Brosseau*, 543 U.S. at 207 (Stevens, J., dissenting) (“The Court’s attempt to justify its decision to reverse the Court of Appeals without giving the parties an opportunity to provide full briefing and oral

argument is woefully unpersuasive.”); *Bunkley*, 538 U.S. at 842 (2003) (Rehnquist, C.J., dissenting) (“The Court here makes new law, and does so without briefing or argument.”); *Mireles*, 502 U.S. at 15 (Scalia, J., dissenting) (“I frankly am unsure whether the Court’s disposition or Justice Stevens’ favored disposition is correct; but I am sure that, if we are to decide this case, we should not do so without briefing and argument.”).⁶ “Not only [does the Court] reach these summary dispositions without the benefit of thorough briefing, but the Court often acts without obtaining the complete record of the proceedings below.” *Hall*, 481 U.S. at 407 (Marshall, J., dissenting).

The end result is a decision on the merits based solely on the certiorari papers and the limited record before the Court, raising the possibility of a mistaken, imprudent, or muddled *per curiam* opinion that can perplex the lower courts.

[B]y deciding cases summarily, without benefit of oral argument and full briefing, and often with only limited access to, and review of, the record, this Court runs a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts: there is no reason to believe that this Court is immune from making mistakes, particularly under these kinds of circumstances. As Justice Jackson so aptly put it, although in a somewhat different context: “We are not

⁶ See also *Garvey*, 532 U.S. at 513 (Stevens, J., dissenting) (“Without the benefit of briefing or argument, today the Court resolves two difficult questions.”); *Stewart v. LaGrand*, 526 U.S. 115, 121 (1999) (Stevens, J., dissenting) (“I would not decide such an important question without full briefing and argument.”); *Pounders v. Watson*, 521 U.S. 982, 993 (1997) (Stevens, J., dissenting) (“Because I believe that these questions are important and not clearly answered by our precedents – indeed, the Court does not cite a single case that is at all comparable to this one on its facts – it is unwise to answer it without full briefing and argument.”); *Purkett*, 514 U.S. at 770 (Stevens, J., dissenting) (“[I]t is unwise for the Court to announce a law-changing decision without first ordering full briefing and argument on the merits of the case.”). Objections to the lack of oral argument and briefing on the merits were also raised in many of the opinions listed in footnote 5, *supra*.

final because we are infallible, but we are infallible only because we are final.”

Harris v. Rivera, 454 U.S. 339, 349 (1981) (Marshall, J., dissenting) (quoting *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result)); see, e.g., *Garvey*, 532 U.S. at 513 n.* (Stevens, J., dissenting) (describing part of summary disposition as “ambiguous,” “unclear,” and offering “no explanation of what standards it is using or of its reasons for reaching that conclusion”); *Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 897-98 (1997) (Rehnquist, C.J., dissenting) (describing summary disposition as “muddled and cryptic” and arguing that “the judges of the Court of Appeals are, in fairness, entitled to some clearer guidance from this Court than what they are now given”); cf. *Youngblood v. West Virginia*, 126 S. Ct. 2188, 2191 (2006) (Scalia, J., dissenting) (objecting to summary disposition and remand “in light of nothing”).⁷

The confusion created by a given *per curiam* opinion is then exacerbated by the uncertain precedential status of

⁷ See also *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 50 (1990) (Marshall, J., dissenting) (summary dispositions “significantly increase the risk of an erroneous decision”); *Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (Marshall, J., dissenting) (summary dispositions “create a significant risk that the Court is rendering an erroneous or ill-advised decision that may confuse the lower courts”); *Lehman v. Trout*, 465 U.S. 1056, 1062 (1984) (Stevens, J., dissenting) (“[T]his case illustrates the dangers inherent in an excessive reliance on summary dispositions. . . . It is, of course, entirely possible that the Court has issued the right command as it gallops by this immense record. But if that be true, the Court is just lucky.”); *Oregon State Penitentiary v. Hammer*, 434 U.S. 945, 946-47 (1977) (Stevens, J., dissenting) (criticizing summary disposition as providing only “a cryptic reference to a case . . . wide of the mark” and giving “no guidance whatsoever for further proceedings in this litigation”); *Cameron v. Johnson*, 381 U.S. 741, 742 (1965) (Black, J., dissenting) (“A cryptic, uninformative *per curiam* order is no way, I think, for this Court to decide a case involving as this one does a State’s power to make it an offense for people to obstruct public streets and highways and to block ingress and egress to and from its public buildings and properties.”). In addition, concerns about erroneous decision-making and confusion in the lower courts were raised in many of the opinions listed in footnote 5, *supra*.

summary dispositions. On the one hand, myriad Court opinions have relied, often extensively, on *per curiam* summary dispositions. See, e.g., *Johnson v. California*, 543 U.S. 499, 506-07 (2005); *cf. id.* at 540 (Thomas, J., dissenting) (“This Court’s brief, *per curiam* opinion in [*Lee v. Washington*, 390 U.S. 333 (1968)] simply cannot bear the weight or interpretation the majority places on it.”); *United States v. Dixon*, 509 U.S. 688, 698 (1993); *cf. id.* at 714-18 (Rehnquist, C.J., concurring in part and dissenting in part) (criticizing reliance upon *Harris v. Oklahoma*, 433 U.S. 682 (1977), “a three-paragraph *per curiam* in an unargued case”). Indeed, at times the Court has expressly treated summary dispositions as fully binding and controlling precedents. See, e.g., *Hohn*, 524 U.S. at 252-53 (citing to a *per curiam* summary disposition, *Allen v. Hardy*, 478 U.S. 255 (1986), as one of “several noteworthy decisions which resolved significant issues of federal law” and noting that “[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality”); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981) (“the California Supreme Court was quite right in relying on our summary decisions as authority”); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (holding that “the lower courts are bound by summary decisions by this Court ‘until such time as the Court informs [them] that [they] are not’”) (citation omitted).

On the other hand, this Court and some individual Justices have noted repeatedly that “[a] summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion.” *Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991); see, e.g., *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998) (noting that summary dispositions have lesser precedential value than opinions on the merits after briefing and argument); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (noting “our customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion”); *Hohn*, 524 U.S. at 251 (“[W]e have felt less constrained to follow precedent where . . . the opinion was

rendered without full briefing or argument.”); *Central State Univ. v. American Assn. of Univ. Professors*, *Central State Univ. Chapter*, 526 U.S. 124, 129 (1999) (Ginsburg, J., concurring) (recognizing “that a summary disposition is not a fit occasion for an elaborate discussion” and citing *Hohn* for the proposition that “opinions rendered without full briefing or argument have muted precedential value”); *see also Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 896 n.2 (1985) (O’Connor, J., dissenting); *Anderson v. Celebrezze*, 460 U.S. 780, 784-85, 784 n.5 (1983); *Metromedia*, 453 U.S. at 500; *Parker v. Randolph*, 442 U.S. 62, 75 n.8 (1979); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979); *Tully v. Griffin, Inc.*, 429 U.S. 68, 74-75 (1976); *Fusari v. Steinberg*, 419 U.S. 379, 392 (1975) (Berger, C.J., concurring); *Edelman*, 415 U.S. at 671.⁸ It seems clear, then, that the precedential value of the Court’s summary dispositions is now distinctly *unclear*.

⁸ It might be claimed that the distinction in precedential value relates to different eras of Supreme Court jurisdiction, with a lower value being attached to summary affirmances and summary dismissals for want of a substantial federal question, which “were common in the days when this Court had an extensive mandatory jurisdiction.” *Hohn*, 524 U.S. at 259 (Scalia, J., dissenting); *cf.* STERN ET AL., *supra*, at 279-85 (discussing Court’s appellate jurisdiction and precedential effect of summary dispositions). This argument is greatly undermined, however, by the fact that contemporary Court opinions have not discriminated between types of summary dispositions – those from certiorari jurisdiction versus those from appellate jurisdiction – in discussing the precedential value of such decisions. *See, e.g., Hohn*, 524 U.S. at 251 (citing to *Gray v. Mississippi*, 481 U.S. 648, 651 n.1 (1987), as “questioning the precedential value of *Davis v. Georgia*, 429 U.S. 122 (1976) (*per curiam*),” a certiorari summary disposition); *U.S. Bancorp Mortgage Co.*, 513 U.S. at 23-24 (questioning the value of two certiorari summary dispositions, *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979) (*per curiam*) and *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (*per curiam*), by citing to a case discussing summary affirmances on appeal, *Edelman*, 415 U.S. at 670-71); *Dixon*, 509 U.S. at 716 (Rehnquist, C.J., concurring in part and dissenting in part) (stating that a given certiorari summary disposition, *Harris*, 433 U.S. 682 (1977), is of lesser precedential value by citing to *Edelman* and *Doehr*, 501 U.S. at 12 n.4, both of which

(Continued on following page)

Not surprisingly, the lower courts have reached very different conclusions when interpreting and applying summary dispositions. Here are a few recent examples: *Compare In re Municipal Reapportionment of Tp. of Haverford*, 873 A.2d 821, 834-36 (Pa. 2005) (not bound by *Cox v. Larios*, 542 U.S. 947 (2004)); *with id.* at 841-43 (Pellegrini, J., dissenting) (bound by *Cox*). *Compare Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004), *cert. dismissed*, 545 U.S. 660 (2005) (bound by *Breard v. Greene*, 523 U.S. 371 (1998)); *with United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002) (not bound by *Breard*). *Compare In re Kandou*, 315 B.R. 123, 135-38 (W.D. Wash. 2004) (not bound by *Baker v. Nelson*, 409 U.S. 810 (1972)); *and Smelt v. County of Orange*, 374 F. Supp. 2d 861, 872-74 (C.D. Cal. 2005), *vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006) (not bound by *Baker*); *with Hernandez v. Robles*, 805 N.Y.S.2d 354, 368-69 (2005) (Catterson, J., concurring) (bound by *Baker*), *and Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055, 1126-27 (2004) (Kennard, J., concurring in part and dissenting in part) (bound by *Baker*).

In the past, lower court confusion over the precedential value of a given summary disposition has lingered until rectified by plenary consideration by the Supreme Court. One example is provided by *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), a summary disposition which affirmed a district court judgment upholding a state sodomy statute. Subsequently, the lower courts (and individual judges) were split concerning the precedential value

refer to summary affirmances). Some might even argue that the failure to distinguish among the various forms of summary disposition has only added to the confusion. Moreover, the uncertainty over summary dispositions may have been aggravated by recent "GVR" opinions as well. *See, e.g., Youngblood*, 126 S. Ct. at 2190-93 (Scalia, J., dissenting); *id.* at 2193 (Kennedy, J., dissenting); *Lawrence v. Chater*, 516 U.S. 163, 177-92 (1996) (Scalia, J., dissenting). Scholars have also discussed the confusion at length. *See, e.g.,* Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513 (2004).

of *Doe*, with some declaring it fully binding and others rejecting it as a controlling precedent. See, e.g., *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986) (*Doe* binding); *id.* at 293 (Goldberg, J., dissenting) (*Doe* non-binding); *Hardwick v. Bowers*, 760 F.2d 1202, 1210 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986) (*Doe* non-binding); *id.* at 1213-14 (Kravitch, J., concurring in part and dissenting in part) (*Doe* binding); *Constant A. v. Paul C.A.*, 496 A.2d 1, 4-5 (Pa. 1985) (*Doe* binding); *id.* at 11 (Beck, J., dissenting) (*Doe* non-binding); *Dronenburg v. Zech*, 741 F.2d 1388, 1391-92 (D.C. Cir. 1984) (*Doe* binding); *State v. Mueller*, 671 P.2d 1351, 1355-56 (Haw. 1983) (*Doe* non-binding); *People v. Onofre*, 51 N.Y.2d 476, 493-94 (1980), *cert. denied*, 451 U.S. 987 (1981) (*Doe* non-binding). The Supreme Court eventually took up the issue, “prefer[ing] to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe*.” *Bowers v. Hardwick*, 478 U.S. 186, 189 n.4 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).⁹

A more recent example of lower court confusion involved the Court’s summary disposition in *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*), which rejected a Double Jeopardy Clause challenge to the use of acquitted conduct at sentencing. In the mere six months between the Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004), and its decision in *United States v. Booker*, 543 U.S. 220 (2005),

⁹ Other instances of lower court confusion include the following: *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 94 n.11 (1983) (describing the “rather mystifying” sequence of events that led a lower court to initially declare that summary dispositions on ERISA-preemption were binding precedents, only to reverse itself based on an intervening “‘doctrinal development’ that warranted departure from the precedent set by the Court’s summary dispositions”); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 494-95, 494 n.6 (1996) (describing confusion and disagreement among lower courts over earlier summary disposition on an alcohol advertising ban and concluding that “[w]e are now persuaded that the importance of the First Amendment issue, as well as the suggested relevance of the Twenty-first Amendment, merits more thorough analysis”); see also Schneier, *supra* (critiquing lower court’s attempt to assess the precedential significance of summary dispositions on electoral reapportionment).

the lower federal courts were sharply divided over the value and relevance of *Watts* in determining whether the *Blakely* decision applied to the Federal Sentencing Guidelines. *See, e.g., United States v. Singh*, 390 F.3d 168, 191 (2d Cir. 2004) (citing to *Watts* and refusing to apply *Blakely* to federal guidelines); *United States v. Hammoud*, 381 F.3d 316, 352-53 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005) (refusing to apply *Blakely* to federal guidelines and noting that “[w]e must also be mindful of the effect of an incorrect reading of *Blakely* on *United States v. Watts*”); *id.* at 370-71 (Motz, J., dissenting) (distinguishing *Watts* and stating that “[i]n refusing to follow *Blakely*’s plain language, purportedly because to do so would ‘undermine’ or ‘outright nullify’ prior Supreme Court precedent,” the majority “avoids our constitutional duty to decide properly presented claims in accord with current Supreme Court instruction”); *United States v. Olivera-Hernandez*, 328 F. Supp. 2d 1185, 1186-87 (D. Utah 2004) (“A *Blakely*-type holding striking down the Sentencing Guidelines would arguably require the Supreme Court to strike down . . . *United States v. Watts*. . . . Such overruling of binding United States Supreme Court precedent should come from the pen of the author of a majority opinion for the Supreme Court, not from a district court judge.”); *see also United States v. Booker*, 375 F.3d 508, 513 (7th Cir. 2004), *aff’d*, 543 U.S. 220 (2005) (dismissing relevance of *Watts* to Sixth Amendment *Blakely* issue); *id.* at 517 (Easterbrook, J., dissenting) (describing *Watts* as one of the “casualties of the [Seventh Circuit’s] approach”); *United States v. Koch*, 383 F.3d 436, 439-40 (6th Cir. 2004), *vacated*, 544 U.S. 995 (2005); *United States v. Pineiro*, 377 F.3d 464, 472-73, 472 n.6, 474 (5th Cir. 2004), *vacated*, 543 U.S. 1101 (2005); *cf. United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004), *certified question dismissed by* 543 U.S. 1117 (2005) (discussing *Watts* and certifying questions to the Supreme Court); *United States v. Mueffelman*, 327 F. Supp. 2d 79, 83 n.9 (D. Mass. 2004) (“If the Guidelines are advisory, which is the outcome I believe *Blakely* dictates, the *Watts* decision would be moot. If the Guidelines remain intact, with upward enhancements subject to a jury trial, the decision in *Watts* would have to be reconsidered.”); *United States v. Hankins*,

329 F. Supp. 2d 1225, 1235 (D. Mont. 2004) (noting tension between *Watts* and *Blakely*); *United States v. McKinney*, 339 F. Supp. 2d 1314, 1318-19 (N.D. Fla. 2004) (similar).

With the foregoing in mind, it is not hyperbolic to describe the jurisprudence on summary dispositions as a mess. Given the Court's conflicting use of summary dispositions – sometimes affording them little weight while at other times relying on them heavily – and the lower court confusion and division over their precedential value, additional guidance in this area would be welcome and appropriate. This case affords the Court just such an opportunity.

D. The Uncertain Status of *Hutto v. Davis* in Particular

As it turns out, a case evaluating the status of *Hutto v. Davis* would be a particularly appropriate vehicle to examine the precedential value of summary dispositions on the merits. This is because the Supreme Court's *per curiam* opinion in *Davis* did not focus on the underlying facts of the case but instead concerned the role of the federal appellate courts and their interaction with this Court. See *Davis v. Zahradnick*, 432 F. Supp. 444 (W.D. Va. 1977), *rev'd*, *Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978), *aff'd on reh'g*, *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979), *vacated*, *Hutto v. Davis*, 445 U.S. 947 (1980), *on remand to Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd*, *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*).

The relevant background is as follows: In the 1973 case, *Hart v. Coiner*, 483 F.2d 136, 140-43 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974), the Fourth Circuit adopted a multi-part Eighth Amendment analysis to determine whether a given sentence is constitutionally disproportionate. This test provided the basis for the lower court decision that defendant Davis's sentence violated the Eighth Amendment. See *Davis v. Zahradnick*, 432 F. Supp. at 451-53. The following year, this Court rejected the *Hart* analysis in *Rummel v. Estelle*, 445 U.S. 263 (1980). Less than two weeks later, the Court remanded *Davis* to the Fourth Circuit to review the decision in light of *Rummel*.

The Fourth Circuit, however, neither sent the case back to the district court for further proceedings nor did it attempt to distinguish *Rummel*. Instead, it ruled without explanation that “[t]he judgment of the district court is affirmed on an equal division of the *en banc* court.” *Davis v. Davis*, 646 F.2d at 124. In contrast, three dissenting circuit judges viewed the Supreme Court’s remand as crystal clear, that “the disposition of the present *en banc* court in this case should have been a simple reversal,” and that a decision to the contrary was in spite of *Rummel*. *Id.* at 124-25 (Widener, J., joined by Russell and Hall, JJ., dissenting).

The Fourth Circuit’s action inspired a majority of the Supreme Court to reprimand the lower court for disregarding its command: “Not only did we expressly recognize *Hart* as the primary opposing authority, but our opinion [in *Rummel*] also disapproved of each of its four ‘objective’ factors.” *Davis*, 454 U.S. at 373. Because the lower court analysis “was clearly guided by these factors, the Court of Appeals erred in affirming.” *Id.*

More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases “by virtue of their commissions, not their competence.” And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel*. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.

Id. at 374-75. As such, the Court’s *per curiam* summary disposition was used to enforce the mandate of a previous order, with a particular focus on the hierarchy and function of the federal courts. As described by dissenting Justice Brennan, however, “the Court had misused precedent” and “inappropriately . . . invoke[d] its power of summary disposition,” resulting in a terse reversal and

remand “[w]ith the benefit of neither full briefing nor oral argument.” *Id.* at 381, 387 (Brennan, J., dissenting).

Regardless of its propriety, the summary disposition in *Davis* was not designed as a seminal or ground-breaking constitutional decision after plenary review of the underlying case. Instead, it was merely policing lower court compliance with a Court order. Most importantly, *Davis*’s rejection of Eighth Amendment proportionality analysis soon would be relegated to history, when the Supreme Court decided *Solem v. Helm* a year later. In that case, the Court concluded that “[t]here is no basis for the State’s assertion that the general principle of proportionality does not apply to felony prison sentences.” *Solem*, 463 U.S. at 288. In fact, *Solem* embraced an Eighth Amendment analysis that had been rejected in *Rummel*, including three of the factors previously adopted in *Hart* and applied by the lower courts in *Davis*. *See id.* at 292. Since then, several Justices have noted the difficulty of squaring *Davis* with *Solem*. *See Harmelin*, 501 U.S. at 965 (opinion of Scalia, J., joined by Rehnquist, C.J.) (“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 both *Rummel* and *Davis*.”); *id.* at 998 (Kennedy, J., concurring) (“Our most recent pronouncement on the subject in *Solem* . . . appeared to apply a different analysis than in *Rummel* and *Davis*.”).

As a result, the lower courts have experienced difficulty in trying to ferret out the meaning of *Davis*. *See, e.g., Close v. People*, 48 P.3d 528, 533-34 (Colo. 2002) (“the *Davis* Court did not prohibit proportionality reviews”); *Wilson v. State*, 830 So.2d 765, 772 (Ala. 2001) (*Davis* “disapproved of the proportionality analysis applied by the lower court” and *Solem* “represented a significant departure” from *Davis*); *United States v. Lowden*, 955 F.2d 128, 131 (1st Cir. 1992) (finding it significant that “three justices [in *Harmelin*] cited [*Davis*] with seeming acceptance and approval”); *State v. Jonas*, 792 P.2d 705, 716 (Ariz. 1990) (Feldman, J., dissenting) (“*Solem* rejected *Hutto*’s basic premise that the Eighth Amendment does not apply to prison terms. *Hutto* provides no authority for finding the sentence in this case proportionate.”);

Williams v. State, 539 A.2d 164, 171 (Del. 1988), *cert. denied*, 488 U.S. 969 (“In *Hutto*, the Court did not attempt to determine whether a proportionality review would be appropriate in the case before it or to set forth criteria for determining when such review would be necessary for a prison sentence.”); *Minor v. State*, 546 A.2d 1028, 1034 (Md. 1988) (Eldridge, J., concurring in the judgment) (“The majority, following the lead of some courts, approaches sentence proportionality review under the Eighth Amendment as if the controlling principles are those set forth in *Rummel v. Estelle* and *Hutto v. Davis*, and as if *Solem v. Helm* is of extremely limited applicability.”); *id.* at 1036 (Adkins, J., dissenting) (“I read *Helm* as effectively overriding *Rummel* and *Hutto*”); *Oakley v. State*, 715 P.2d 1374, 1376 (Wyo. 1986) (“In *Solem*, the United States Supreme Court adopted a proportionality analysis by embracing the concept they had forcefully rejected in *Rummel* and *Hutto*.”); *United States v. Rhodes*, 779 F.2d 1019, 1028-29 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (interpreting *Solem* in light of the “Court’s refusal to overrule *Rummel* and *Davis*”); *State v. Harris*, 677 P.2d 625, 634 (N.M. 1984) (“Until the United States Supreme Court provides more specific guidance . . . we will follow *Hutto v. Davis* which holds that successful challenges to the proportionality of particular sentences should be exceedingly rare.”); *State v. Cooper*, 304 S.E.2d 851, 855 n.4 (W.Va. 1983) (“The United States Supreme Court has emasculated the concept of proportionality in its *per curiam* opinion in *Hutto v. Davis*.”).¹⁰

The treatment of Mr. Angelos’s legal challenges illustrates the potentially bewildering effect of a summary disposition on the merits by short *per curiam* opinion in the absence of full briefing and oral argument. Not only is *Davis*

¹⁰ Moreover, *Davis* continues to be criticized by legal scholars. See, e.g., Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 637-38 (2005); cf. 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) (describing disturbing factual background of *Davis* prosecution).

of ambiguous precedential value, but its lack of detailed legal analysis inhibited the ability of the lower courts to recognize otherwise clear distinctions between *Davis* and the present case.¹¹ Instead of considering the possibility of distinguishing *Davis* – particularly in light of the “customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion,” *U.S. Bancorp Mortgage Co.*, 513 U.S. at 24 – the courts below compared the raw facts in the present case with those in *Davis* and deemed the latter binding as a result. App. 25, 93-94.

The present case, then, is a good vehicle for this Court to examine the precedential value of summary dispositions on the merits. While some lower courts have acknowledged the questionable status of summary dispositions and provided in-depth analysis of changes in jurisprudence and distinctions between their case and the relevant *per curiam* opinion, the decisions in this case accepted *Davis* as though it were a plenary opinion after full briefing and argument. Nor did the lower court decisions recognize the underlying purpose of the Court’s summary disposition in *Davis* as a means to enforce its previous remand. Given *Davis*’s particularly uncertain place in the precedential landscape as noted by several Justices, and the uncertainty it engenders with respect to the proper Eighth Amendment analysis as demonstrated by this case, the Court’s review is warranted.

¹¹ Among other things: (1) The defendant in *Davis* was a recidivist previously convicted of selling LSD. *Davis*, 454 U.S. at 380 n.10 (Powell, J., concurring in the judgment). Mr. Angelos, on the other hand, is a first-time offender. (2) The judge and jury in *Davis* maintained substantial discretion in sentencing and could have punished the defendant with as little as 5 years’ imprisonment. *See Davis v. Davis*, 585 F.2d at 1228; *see also Davis*, 454 U.S. at 371. The sentencing judge in the present case had no discretion. (3) The federal courts in *Davis* were reviewing a state sentence through the limited ambit of a federal writ of habeas corpus. *Davis*, 454 U.S. at 371-72; *see generally Calderon v. Thompson*, 523 U.S. 538, 554-56 (1998) (discussing limitations on federal collateral review of state proceedings). Here, the District Court and appellate panel were in the posture of directly evaluating Mr. Angelos’s 55-year sentence rather than on collateral review.

E. *Hutto v. Davis* Is No Longer Good Law Based on Current Standards

In addition, the 40-year sentence in *Davis* – like the 55-year sentence in the present case – violates “evolving standards of decency,” *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)), and thus it is inconsistent with the constitutional ban on cruel and unusual punishment. The meaning of the Eighth Amendment is not “frozen when it was originally drafted,” *Roper*, 356 U.S. at 587 (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 Court has repeatedly stated, “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . 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 100-01); see also *Roper*, 356 U.S. at 560-61.

“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 this 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. Likewise, the Court recently struck down the death penalty for juvenile offenders only a decade and a half after it had affirmed the practice, again because of the legislative movement against capital punishment for those under the age of majority. See *Roper*, 543 U.S. at 564-68. 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*, 543 U.S. at 564-66.

In terms of objective criteria for guiding proportionality review pursuant to evolving standards of decency, the basis for reconsidering *Davis* proves far more compelling than that presented in *Atkins* and *Roper*. At the time of his conviction, the defendant in *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*'s 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 marijuana possession and distribution in small amounts no longer would justify *Davis*' sentence." *Id.* at 379. Today, the crimes at issue in *Davis* 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 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., Montana) simply by virtue of maintaining broadly indeterminate sentencing schemes (e.g., one year to life for drug distribution). The vast majority of states currently set 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). Nationally, the average sentence for individuals convicted of marijuana trafficking is two years, three months. *See* RYAN S. KING & MARC MAUER, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990S, at 24 (2005). This evolution presents

a compelling reason for the Court to reconsider and clarify its decision in *Davis*.¹²

II. This Case is a Particularly Egregious Example of the Confusion Caused by Summary Dispositions as Well as the Problems of Eighth Amendment Analysis.

Other mandatory minimum cases involving less extreme sentences have been assailed by members of the federal judiciary. *See, e.g., United States v. Yirkovsky*, 276 F.3d 384, 385 (8th Cir. 2001) (Arnold, J., dissenting from denial of rehearing *en banc*), *cert. denied*, 536 U.S. 964 (2002); Hon. Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547 (2001); *cf.* Hon. 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 of a sentencing system that is unnecessarily cruel and rigid”); Erik Luna, *Drug Exceptionalism*, 47 VILLANOVA L. REV. 753, 799-803 (2002) (providing citations to judicial criticisms of drug-related sentences). Nonetheless, this Court has expressed caution in its jurisprudence, holding that the Eighth Amendment’s “gross disproportionality principle reserves a constitutional violation for only the extraordinary case.” *Andrade*, 538 U.S. at 76. But the punishment challenged here is precisely that – an extraordinary instance of grossly disproportionate punishment – and when a case such as this appears, the judiciary must be empowered to declare that the Eighth Amendment and the Court’s jurisprudence are not merely hortatory declarations.

This case involves “a twenty-four-year-old first offender who is a successful music executive with two young children,” who received a 55-year sentence for carrying “a

¹² It might be noted that four members of the Court – Justices Brennan, Marshall, Powell, and Stevens – believed that defendant Davis’s sentence was unjust and disproportionate, although Powell “reluctantly conclude[d]” that the case was controlled by *Rummel v. Estelle*. *Davis*, 454 U.S. at 375 (Powell, J., concurring in the judgment).

handgun to two \$350 marijuana deals” and having “several additional handguns at his home.” App. 32. “For these three acts of possessing (not using or even displaying) these guns,” Mr. Angelos will “essentially spend the rest of his life in prison,” a sentence that the District Court deemed “unjust, cruel, and even irrational.” *Id.* at 32-33. The punishment is far in excess of the federal sentence for:

- an aircraft hijacker (maximum term of 24 years, 5 months)
- a terrorist who detonates a bomb in a public place intending to kill a bystander (maximum term 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 (maximum term of 17 years, 6 months)
- a spy who gathers top secret information (maximum term of 17 years, 6 months)
- a second-degree murderer (maximum term of 14 years)
- a criminal who assaults with the intent to kill and does, in fact, inflict permanent or life threatening injuries (maximum term of 12 years, 7 months)
- a kidnapper (maximum term of 12 years, 7 months)
- a saboteur who destroys military materials (maximum term of 12 years, 7 months)
- a rapist of a 10-year-old child (maximum term of 11 years, 3 months)
- a child pornographer who photographs a 12-year-old child in sexually explicit positions (maximum term of 9 years)
- a criminal who provides weapons to support a dangerous foreign terrorist organization (maximum term of 8 years, 1 month)
- a criminal who detonates a bomb in an aircraft (maximum term of 8 years, 1 month)
- a rapist (maximum term of 7 years, 3 months)

See id. at 63-65.

Ironically, Mr. Angelos’s 55-year sentence for possessing a firearm three times in connection with minor marijuana offenses is more than twice the federal sentence for a *kingpin*

of a major drug trafficking ring in which a death results (maximum term of twenty-four years, five months), and more than four times the sentence for a marijuana dealer who shoots an innocent person during a drug transaction (maximum term of twelve years, two months). *See id.* “Amazingly,” the District Court noted, “Mr. Angelos’ sentence under § 924(c) is still far more severe than criminals who committed, for example, three aircraft hijackings, three second-degree murders, three kidnappings, or three rapes.” *Id.* at 66-67. Moreover, Angelos’s sentence is longer than he would have received in any other jurisdiction. *Id.* at 92. To put it bluntly, this first-time, low-level offender is treated as though he were the marijuana equivalent of Al Capone or Manuel Noriega. Yet not even these ruthless, violent criminals received the unforgiving sentence that was doled out in this case – Capone was sentenced to a total of eleven years imprisonment, while Noriega received a forty-year sentence. *See United States v. Noriega*, 117 F.3d 1206, 1210 (11th Cir. 1997) (noting Noriega’s sentence); Hon. 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 eleven-year sentence “after years of murdering, stealing, extorting, smuggling, and bribing with impunity”). Due to the extreme punishment for modest criminal conduct committed by a first-time offender, this case provides an ideal vehicle to clarify the proper proportionality analysis under the Eighth Amendment, including considering the status of *Davis* in this landscape. In the process, the Court can provide much needed guidance on the precedential value of summary dispositions like *Davis*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME H. MOONEY
50 West Broadway, #100
Salt Lake City, UT 84101-2006
(801) 364-6500

ERIK LUNA
Counsel of Record
332 South 1400 East, Rm. 101
Salt Lake City, UT 84112-0730
(801) 585-5500

MICHAEL D. ZIMMERMAN
TROY L. BOOHER
SNELL & WILMER, LLP
Gateway Tower West
15 West South Temple Street,
Suite 1200
Salt Lake City, UT 84101-1004
(801) 257-1900