IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2019-CT-01670-SCT

ALLEN M. RUSSELL,

Appellant,

v.

STATE OF MISSISSIPPI,

Appellee.

On Writ of Certiorari to the Supreme Court of Mississippi

AMICUS CURIAE BRIEF OF INTERNATIONAL CANNABIS BAR ASSOCIATION IN SUPPORT OF APPELLANT

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INTEREST OF THE *AMICUS CURIAE*

Founded in 2015, *Amicus Curiae* the International Cannabis Bar Association ("INCBA") is a membership organization of over 700 attorneys that advances the interests of its members and thousands of other attorneys across the United States and other jurisdictions. INCBA's mission is to improve access to quality legal services for the cannabis industry and to help build a solid foundation upon which the cannabis industry can sustainably thrive for years to come.

INCBA's members advocate on behalf of businesses and non-profits in an industry striving to legitimize and legalize, as well as on behalf of individuals who continue to be victimized by archaic punishments for non-violent cannabis crimes that are no longer considered crimes in many jurisdictions. *Amicus* appears in this proceeding in support of the development of Eighth Amendment jurisprudence in a manner consistent with our society's evolving attitudes toward cannabis, and in opposition to unduly harsh sentencing practices which only serve to perpetuate the failed War on Drugs.

INTRODUCTION

"It is not what a lawyer tells me I may do; but what humanity, reason and justice tell me I *ought* to do."

Edmund Burke, Second Speech on Conciliation, 1775.

Had he possessed only 14 lesser grams of marijuana, 38-year-old Allen Russell would not be serving a sentence of life without parole ("LWOP") under Mississippi's habitual offender statute, Miss. Code Ann. § 99-19-83. The Court could accept the artificial boundary of 43.71 grams versus 30 grams and determine that the interests of justice dictate that Mr. Russell must die in prison due to the fact that he has two prior burglary convictions – both of which were *retroactively* re-classified to per se "crimes of violence" in violation of ex post facto laws. Or, the

Court could recognize, as the United States Supreme Court did in *Solem v. Helm*, 463 U.S. 277 (1983), that Mr. Russell's "penultimate sentence for relatively minor criminal conduct" was "significantly disproportionate to his crime." *Id.* at 303.

In determining what "ought" to be done, the Court will grant deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes. However, the Court must also give equal weight to the teachings of *Solem* and the explicit constitutional prohibitions against "cruel and unusual punishment." U.S. Const. Amend. VIII; Miss. Const. Art. 3, § 28. When considered *in toto*, these factors support reversal.

ARGUMENT

I. Under *Solem*, the Mandatory LWOP Sentence Imposed on Mr. Russell Violates the Eighth Amendment.

While *Amicus* recognizes that the Mississippi Legislature may properly enact mandatory minimum statutes which generally must be accorded deference, our system of justice has always recognized that courts, including trial and appellate courts, "*do* have a responsibility—expressed in the proportionality principle—not to shut their eyes to grossly disproportionate sentences that are manifestly unjust." *Hutto v. Davis*, 454 U.S. 370, 377 (1982) (Powell, J., concurring) (emphasis in original).

Here, the Court must decide: Does the legislature's judgment—which mandated an LWOP sentence for Mr. Russell for simple possession of marijuana—cause a "grossly disproportionate" sentence under the Eighth Amendment? The answer should be a resounding "Yes." In resolving that question, this Court is not writing on a clean slate. Nearly four decades ago, in *Solem,* the United States Supreme Court, for the first time, held a mandatory LWOP sentence to be cruel and unusual because it was grossly disproportionate to the crime committed. Recognizing both the "exceedingly rare" nature of its holding, citing *Rummel v. Estelle*, 445 U.S. 263, 272 (1980), and

the "broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes," *Solem*, 463 U.S. at 289-90, the Court announced:

> "[A] court's 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.

The *Solem* test does not unduly interfere with legislative prerogatives. To the contrary, substantial deference to legislative penalties is built into the *Solem* test. *Id.* at 291 ("Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes…"). For that reason, perhaps, few sentences have been declared unconstitutional under the *Solem* standard.[1] Mr. Russell's sentence in this case, however, cannot be affirmed if *Solem* or the Eighth Amendment are to have any meaning at all.

A straightforward application of *Solem*, which invalidated the mandatory LWOP sentence of a seven-time recidivist for the "passive felon[y]" of issuing a bad check, commands reversal of the sentence in this case. *Solem*, *supra*, 463 U.S. at 296. As explained by Judge Wilson's dissenting opinion, the factual and legal issues raised in this case are indistinguishable from those decided by the United States Supreme Court in *Solem* for all practical purposes. *See*, Decision, at p. 18 (Wilson, P.J., dissenting). Although *Solem* was subsequently refined by a fractured Court in *Harmelin v. Michigan,* 501 U.S. 957 (1991), its legal principles remain controlling. *See*, *Bolton v. City of Greenville*, 253 Miss. 656, 666 (1965) ("Irrespective of how erroneous it may appear, or

[1] *See,* e.g., *Ashley v. State*, 538 So. 2d 1181, 1182 (Miss. 1989) (vacating a mandatory LWOP sentence for a defendant who burgled a home to get $4.00 to pay a grocer for food eaten in the store); *Clower v. State*, 522 So. 2d 762 (Miss. 1988) (holding that trial court had discretion to reduce a mandatory sentence of 15 years without parole under a recidivist statute for a defendant who uttered a forged check).

how odious it is, a decision of the United States Supreme Court is still the ultimate in judicial determination and is binding on tribunals and citizens of respective states in comparable cases.").

Nevertheless, relying on *Wall v. State*, 718 So. 2d 1107, 1114 (Miss. 1998), the Mississippi Court of Appeal found that Mr. Russell's LWOP sentencing as a habitual offender was not grossly disproportionate because it was "clearly within the prescribed statutory limits." *See*, Decision, at p. 6 (plurality opinion). This finding is not supported by *Solem* and creates an exception to the Eighth Amendment which abdicates the rule. As best articulated by distinguished legal scholar Lynn S. Branham:

> "[W]hile the opinions of legislatures [may] be given great weight when assessing the constitutionality of a penalty, their opinions [will] not, and [can] not, be conclusive. Otherwise, the Cruel and Unusual Punishment Clause would have no meaning, because its very purpose is to guard against the penchant of legislatures to overreact sometimes to the problem of crime . . . ."[2]

Amicus recognizes that the decision in *Solem* was not without controversy. *See, e.g.*, Solem, 463 U.S. at 309 (Burger, C.J., dissenting). Nonetheless, *Solem* operates as an important constitutional check on a legislature's ability to prescribe punishments that can and should be activated in extreme cases. *Solem* was one such case; this is another.

A. This is One of the "Rare Cases" Where a Threshold Comparison of the Crime Committed and the Sentence Imposed Leads to an Inference of Gross Disproportionality.

Eight years after *Solem*, the United States Supreme Court clarified that the Eighth Amendment did not include a guarantee of proportionality, but only a "narrow proportionality principle" applicable to "non-capital sentences," *Harmelin*, 501 U.S. at 996-97 (Kennedy, J., concurring), which forbids "extreme sentences that are 'grossly disproportionate' to the crime." *Id*. at 1001 (quoting *Solem*, 463 U.S. at 288). Under the teachings of *Harmelin*, courts need only

[2] Lynn S. Branham, The Law and Policy of Sentencing and Corrections in a Nutshell, p. 146 (8th ed. 2010).

examine the second and third factors mentioned in *Solem* – the intra-jurisdictional and inter-jurisdictional analyses – in the "rare case" in which a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id*. at 1005l; accord, *Wilkerson v. State*, 731 So. 2d 1173, 1183 (Miss. 1999).

A threshold determination of gross disproportionality requires us to consider *both* the gravity of the offense and the harshness of the penalty. Because the parties' appellate briefs and Judge Wilson's dissenting opinion discuss Mr. Russell's marijuana offense and his prior convictions in detail, *Amicus* will not repeat those arguments for the sake of brevity, and instead provides additional argument on the disproportionate harshness of the penalty and its violation of the Eighth Amendment guarantees against cruel and unusual punishment.

As a threshold matter, Mr. Russell should never have been subjected to the harsh mandatory sentencing provisions of Section 99-19-83. Both the United States and Mississippi constitutions prohibit the State from enacting an ex post facto law which, "in common parlance…creates a new offense or changes the punishment, to the detriment of the accused, after the commission of a crime." *Bell v. State,* 726 So.2d 93, 94 (Miss. 1988) (holding a life sentence for a crime committed in 1976 based upon a 1977 habitual offender statute violated ex post facto provisions of the federal and state constitutions); U.S. Const. Art. 1, § X; Miss. Const. Art. 3, § 16. Concisely stated, Mr. Russell was adjudged a habitual offender in 2019 (Miss. Code Ann. § 99-19-83), under a statute enacted in 2014 (Miss. Code Ann. § 97-3-2), for crimes that occurred eleven years earlier in 2003. Thus, as in *Bell*, the sentence imposed on Mr. Russell as a habitual offender "made more burdensome the punishment for his crimes, after commission, thereby violating the ex post facto provisions of our State and Federal Constitutions." *Bell,* 726 So. 2d. at 94.

That Mr. Russell's LWOP sentence is disproportionate is beyond meaningful dispute. Although the severity of the recidivist sentence mandated by the Mississippi Legislature for the crime of simple marijuana possession does not place Mr. Russell's sentence in the same category as capital punishment, his mandatory LWOP sentence does share one important characteristic of a death sentence: Mr. Russell will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, Mr. Russell's LWOP sentence must rest on a rational determination that the punished "criminal conduct is **so atrocious** that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator." *Furman v. Georgia,* 408 U.S. 306, 307 (1972) (Stewart, J., concurring).

Serious as Mr. Russell's offense and criminal history may be, *Amicus* believes it is irrational to conclude that today's society would find Mr. Russell's conduct so "atrocious" that it would be deserving of an LWOP sentence. Indeed, recent voter trends in Mississippi and across the country radically indicate otherwise. Last year, Mississippi voters overwhelmingly passed Initiative 65, which would have legalized the possession of up to 2.5 ounces (or 70.87 grams) of medical marijuana had it not been subsequently overturned by this Court on a legal technicality. *In re Initiative Measure No. 65 v. Watson*, No. 2020-IA-01199-SCT, 2021 Miss. LEXIS 123 (May 14, 2021). Moreover, a recent survey conducted by Millsaps College and Chism Strategies shows that over 63% of Mississippi voters support legalizing medical marijuana, and 52% favor legalizing marijuana for recreational purposes, an idea opposed by only 37% of voters surveyed.[3] In yet another poll conducted by Public Opinion Strategies on behalf of FWD.us, Mississippi voters across the political spectrum and demographic groups supported ambitious reforms to the

[3] Millsaps College and Chism Strategies, *Mississippi Voters Favor Medicinal and Recreational Marijuana Legalization, Medicaid Expansion* (June 7, 2021), https://www.millsaps.edu/wp-content/uploads/2021/06/SotS_June_2021.pdf

State's criminal justice system, with 61% supporting "punishing people convicted of drug possession with a misdemeanor rather than a felony sentence, punishably by up to one year in jail," and with 65% believing that recidivist sentences should only be used when the current offense is violent.[4] Against this unique backdrop, this is one of those "exceedingly rare" and "extreme" cases that give rise to an inference of gross disproportionality. *Harmelin*, 501 U.S. at 1005.

B. A Comparison of Sentences Imposed on Others in Mississippi Confirms the Threshold Inference of Gross Disproportionality.

Having thus established an inference of gross disproportionality, the second step in the narrow proportionality analysis consists of an intra-jurisdictional evaluation of Mississippi's sentencing provisions. *Solem*, 463 U.S. at 292. As demonstrated below, when comparing sentences that could be imposed on others convicted of crimes in Mississippi, the gross disproportionality of Mr. Russell's LWOP sentence is further "validated." *See Harmelin,* 501 U.S. at 1005 ("The proper role for comparative analysis of sentences…is to validate an initial judgment that a sentence is grossly disproportionate to a crime.")

First, just like the sentence invalidated in *Solem*, Mr. Russell's sentence for marijuana possession is comparable in severity only to the sentences that Mississippi otherwise reserves for those who have committed the most serious, violent crimes. Mississippi imposes only one sentence more severe than the sentence Mr. Russell received: death. Miss. Code §§ 97-3-21, 97-13-13, 97-3-21, 97-7-67 and 97-25-55. To receive a sentence in Mississippi equal to or more severe than Mr. Russell's for reasons other than recidivism, an individual would have to commit one of a handful of the most violent, socially destructive and/or morally reprehensible crimes that had resulted in or threatened great bodily injury or death. For example, Mississippi imposes a life sentence, or

[4] Public Opinion Strategies and FWD.us, *New Poll Shows Strong, Bipartisan Support for Ambitious Criminal Justice Reforms in Mississippi* (poll fielded Aug. 15-19, 2018), https://www.fwd.us/wp-content/uploads/2018/10/ms-poll-memo.pdf

death, for: first degree murder (Miss. Code § 97-321(1)); capital murder (Miss. Code § 97-321(3)); treason (Miss. Code § 97-7-67); forcible rape (Miss. Code § 97-3-71); kidnapping (Miss. Code § 97-3-53); and using an explosive or a chemical, biological or other weapon of mass destruction (Miss. Code § 97-37-25). Mr. Russell's past burglary convictions, when coupled with marijuana possession, do not merit a sentence equal to those meted for these heinous crimes.

Second, it is also the case here, as it was in *Solem*, that the State punishes many crimes that are far more serious than Mr. Russell's with sentences that are far less harsh. For many extremely violent or serious crimes, Mississippi imposes sentences with maximum term lengths or sentences of life imprisonment *with* possibility of parole and no specified minimum term. These crimes include: first degree arson of a dwelling (Miss. Code § 97-17-1); child abuse involving burning, torture or serious injury (Miss. Code § 97-5-39); intentionally injuring a pregnant woman causing great bodily harm to the embryo or fetus (Miss. Code § 97-3-37); statutory rape of a minor under the age of 14 (Miss. Code § 97-3-65); and human trafficking (Miss. Code § 45-33-23). Here, , Mr. Russell's sentence allows *no* possibility of parole, which further evidences the gross disproportionality of his sentence.

Lastly, again as in *Solem*, Section 99-19-83's mandatory penalties are far more severe and disproportionate in comparison to those imposed by Mississippi's other habitual offender statute, Miss. Code § 97-19-81. *See*, *Solem*, 463 U.S. at 298 (comparing Helm's life sentence to sentences that could be imposed under South Dakota's recidivist laws for more serious offenses). Because Section 97-19-81 mandates a maximum sentence for conviction of a third penalty, it is generally based on the sentence otherwise available for the current offense, thus maintaining a discernable proportional relationship between the relative gravity of the offense being punished and the sentence imposed. Section 99-19-83 is different. Although the third offense must be a felony, the

law does not take into account the fact that the third felony itself may not be serious or violent by Mississippi standards. Unlike Section 97-19-81, the mandatory LWOP sentence under Section 99-19-83 operates in a manner untethered to the current offense. Such a "one size fits all" sentencing provision "raises serious doubts about the proportionality of the sentence applied to the least harmful offender." *Rummel*, 445 U.S. at 301 (Powell, J., dissenting).

C. Mr. Russell's LWOP Sentence Far Exceeds National Standards and Comparative State Laws for the Crime of Simple Marijuana Possession.

The third and final factor in the narrow proportionality analysis calls for an inter-jurisdictional evaluation, comparing sentences imposed for the same or similar crimes in other jurisdictions. *Solem*, 463 U.S. at 292. To facilitate this exercise, *Amicus* has compiled a list of the maximum sentences that Mr. Russell could have received had he been tried and convicted for the possession of 43.71 grams of marijuana as a habitual offender by the federal government or any other state. *See* Appendix A. That list makes clear that Mississippi's mandatory LWOP sentence under Section 99-19-83 is the harshest in the nation. It is, moreover, the harshest by a considerable margin. Aside from Mississippi, only Alabama imposes a mandatory LWOP sentence for such behavior by a recidivist. Indeed, in at least thirty-eight states, Mr. Russell could not have been sentenced to more than 12 months in jail and, in at least 12 of those states, his maximum punishment would be a mere monetary fine or his conduct would not even be considered a crime at all. Thus, as in *Solem,* the defendant in this case "could not have received such a severe sentence in 48 of the 50 States." *Solem*, 463 U.S. at 299.

That only two state jurisdictions permit a mandatory LWOP sentence to be imposed for the crime of simple marijuana possession weighs heavily against the constitutionality of Mr. Russell's sentence. Here, as in *Hall v. Florida,* 134 S. Ct. 1986, which addressed procedures adopted by only three death-penalty states, the scarcity of state laws permitting LWOP sentences for marijuana

possession is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane." *Id.* at 1998; *see also*, *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (death penalty for rape of an adult woman held unconstitutional, in part, because Georgia was the only state in the country that authorized such a punishment and therefore the nation's collective judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman"). While it is one thing to say that the states can act as laboratories in addressing difficult social issues within their own borders, it is entirely another thing to say that two states can impose unduly harsh punishments that are out of line with the national consensus. These are not differences of degree but of kind. Such radical disparities cannot and should not be upheld under the Eighth Amendment.

The comparison with federal law is even more illuminating. Had Mr. Russell been convicted of possession of 43.71 grams of marijuana in federal court, he would have only been sentenced to a maximum of 18 months in prison based on his prior criminal history,[5] and even that sentence is discretionary. Additionally, if the prosecutor had followed the example of federal courts to exclude dead and unusable plant material that contains little or no psychoactive substances such as vines, stalks, and leaves,[6] Mr. Russell may not have been charged under the Mississippi's felony statute at all. Instead, Mr. Russell may have only faced a misdemeanor, at worst, and would not have been subject to Section 99-19-83. Certainly, the Constitution does not require Mississippi to endorse the federal government's approach to convicting and sentencing offenders for non-violent crimes such as marijuana possession. At the same time, however, the

[5] *See* United States Sentencing Commission, Guidelines Manual, §§ 2D1.1, 2B2.1 and 2K2.1 (Nov. 2018).

[6] *See, e.g.*, 21 U.S.C. § 802(16)(b)(2) (stating that "marihuana" does not include "the mature stalks of such plant, fiber produced from such stalks"); *United States v. Walton*, 514 F.2d 201 (D.C. Cir. 1975) (concluded that the legislative history of 21 U.S.C. § 802(16) indicated that the definition of marijuana was intended to include parts of marijuana that contain THC, and "to exclude those parts which do not").

Constitution does not permit Mississippi, or any other state, to subject its citizens to "cruel and unusual" punishment. By any objective measure, that constitutional line has been crossed in this case.

II. With Marijuana Legalization Movements Growing Rapidly Across the Country, an LWOP Sentence for Simple Marijuana Possession is Irreconcilable With Society's "Evolving Standards of Decency."

Separate from proportionality, the Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' … against which we must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted). Recognizing that proportionality determinations are fluid over time, the United States Supreme Court long ago observed that the Eighth Amendment "may be … progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). Nearly a century later, the Supreme Court "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons,* 543 U.S. 551, 560-61 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

One manner by which a court may determine a society's standards of decency and what comports with such standards is by looking to contemporary norms. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (stating that the Eighth Amendment is to be understood "not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail"). Implicit within this principle is the premise that society's moral judgment changes over time. Only by looking to contemporary norms may courts determine whether a particular sentencing practice constitutes cruel and unusual punishment.

A. A Strong Majority of Mississippi Voters Support Marijuana Legalization.

Mr. Russell's LWOP sentence runs afoul of clear public opinion in Mississippi. When 74% of Mississippi voters approved Initiative 65 during the November 2020 ballot,[7] the will of the people had spoken: the people of Mississippi demanded marijuana reform. Even after this Court overruled Initiative 65 for procedural (not substantive) reasons,[8] polling undertaken by Millsaps College and Chism Strategies still found that almost 52% of Mississippi voters favored legalizing marijuana for recreational purposes, and 69.7% supported the State legislature approving a medical marijuana program that mirrors Initiative 65,[9] which would have legalized the possession of an amount of medical marijuana far in excess of what Mr. Russell had possessed in this case.[10]

To be sure, Initiative 65 would have required Mr. Russell to qualify for a debilitating condition and obtain a medical marijuana card in order to possess his 43.71 grams of marijuana. Still, the possession limit proposed by Initiative 65 stands in stark contrast to the current State laws that make it felonious to possess anywhere between 30 to 250 grams of marijuana, Miss. Code Ann. § 41-29-139(c)(2)(B)(1), while the possession of less than 30 grams of marijuana is only considered a civil infraction or a misdemeanor punishable by a small fine. Miss. Code Ann. § 41-29-139(c)(2)(A)(1). This arbitrary "line in the sand" of thirty grams of marijuana signifies that Mississippi's sentencing provisions for marijuana offenses are inconsistent with Mississippi's evolving standards of decency. More broadly, Mississippians' support for Initiative 65 reflects a

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[7] "Mississippi Ballot Measure 1, Initiative 65 and Alternative 65A, Medical Marijuana Amendment (2020)" BallotPedia, https://ballotpedia.org/Mississippi_Ballot_Measure_1,_Initiative_65_and_Alternative_65A,_Medical_Marijuana_Amendment_(2020)

[8] *In re Initiative Measure No. 65 v. Watson*, No. 2020-IA-01199-SCT, 2021 Miss. LEXIS 123 (May 14, 2021).

[9] Millsaps College and Chism Strategies, *Mississippi Voters Favor Medicinal and Recreational Marijuana Legalization, Medicaid Expansion* (June 7, 2021), https://www.millsaps.edu/wp-content/uploads/2021/06/SotS_June_2021.pdf

[10] Initiative Measure No. 65, § 8(a)(1) (allowing the possession of up to 2.5 ounces of medical marijuana), https://www.sos.ms.gov/content/InitiativesPDF/Proposed%20Initiative%20Measure.pdf

rejection of harsh sentencing regimes for simple possession of marijuana.

B. Voters and Legislatures Across the Country Overwhelmingly Favor Marijuana Legalization and Criminal Justice Reform.

There is more national support for marijuana legalization than ever before. Poll after poll finds that a supermajority of Americans, including outright majorities of Democratic, Republican and Independent voters, support the full legalization of marijuana.[11] In fact, according to an April 2021 Pew Research Center survey, an overwhelming majority of U.S. adults (91%) favor some form of marijuana legalization, with only 8% saying marijuana should not be legal in any form.[12] Consistent with this polling, voters in 8 states (New Jersey, Montana, South Dakota, Arizona, New York, Virginia, New Mexico and Connecticut) decisively passed measures legalizing marijuana in the last year alone.[13] This means that, as of today, 37 states (3 of which border Mississippi) have legalized some form of medical marijuana;[14] 19 states, along with Washington D.C. and Guam, have legalized recreational marijuana;[15] and 27 states have either fully or partially decriminalized the possession of marijuana.[16] Significant bipartisan efforts also are underway in the U.S. Congress to decriminalize marijuana at the federal level.[17] This national trend is indicative of a sea change

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[11] *See, e.g.*, *Support for Legal Marijuana Holds at Record High of 68%,* Gallup (Nov. 4, 2021), https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx; Michael R. Blood, *Poll: Support rises in all age groups for legal pot*, AP News (Mar. 19, 2019), https://apnews.com/article/marijuana-north-america-us-news-business-ap-top-news-8eb58810be2642b3a2c81e9da247ff80

[12] Ted Van Green, *Americans overwhelmingly say marijuana should be legal for recreational or medical use*, Pew Research Center (Apr. 16, 2021), https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/

[13] Claire Hansen, Horus Alas and Elliott Davis, *Where is Marijuana Legal? A Guide to Marijuana Legalization,* U.S. News & World Report (Oct. 14, 2021), https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization

[14] *See* National Organization for the Reform of Marijuana Laws ("NORML"), table of states with medical marijuana programs, https://norml.org/laws/medical-laws/

[15] Casey Leins; Horus Alas, *States Where Recreational Marijuana is Legal*, (U.S. News, June 30, 2021).

[16] *See* Appendix A.

[17] *See, e.g.*, H.R. 2617 - Marijuana Opportunity, Reinvestment and Expungement (MORE) Act of 2021 (Rep. Nadler (D-NY)); H.R. 3105 – Common Sense Cannabis Reform for Veterans, Small Businesses, and Medical Professionals Act (Rep. Joyce (R-OH)); Jyle Jaeger, *Republican-Led Bill to Legalize and Tax Marijuana Emerges as Alternative to Democratic Measures,* Marijuana Moment, https://www.marijuanamoment.net/republican-led-bill-to-legalize-and-tax-marijuana-emerges-as-alternative-to-democratic-measures/, David Lightman and Andrew Sheeler, *This effort to*

in Americans' perspectives on marijuana, especially when compared to the early 1990's when the *Harmelin* decision took place, when only 25% of Americans believed marijuana should be legal.[18]

State and federal lawmakers pushing marijuana reform are not just touting legalization as a way to raise tax revenue and regulate an illicit market. With staunch public support, citizens and lawmakers also are seeking to reverse the negative impacts caused by the racially disparate enforcement on the War on Drugs.[19] In that regard, it may be helpful (albeit disturbing) for this Court to consider the following marijuana enforcement statistics in the state of Mississippi: black people are 2.7 times more likely than white people to be arrested for marijuana possession;[20] black people comprise a staggering 77.5% of the prison population serving habitual-life sentences for non-violent offenses (including drug offenses) in the Mississippi Department of Corrections (MDOC);[21] and there are only 3 prison inmates (Allen Russell, Tameka Drummer and Kevin Warren) currently serving habitual-life sentences in MDOC for simple marijuana possession, and *all 3 of them are black*. *See* Appendix B.[22]

Mississippi's statistics notwithstanding, with 43% of U.S. adults now living in a

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decriminalize marijuana nationally is even getting Republican support, McClatchy DC Bureau (Dec. 4, 2019), https://www.mcclatchydc.com/news/politics-government/justice/article237831759.html

[18] Anthony Saieva, *Marijuana Legalization: Americans' Attitudes Over Four Decade*s (2008). Electronic Theses and Dissertations, 2004-2019. 3446, https://stars.library.ucf.edu/etd/3446

[19] *See, e.g.*, Restoration of Rights Project, *50-State Comparison: Marijuana Legalization, Decriminalization, Expungement and Clemency* (Updated Sept. 2021), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-marijuana-legalization-expungement/; H.R. 2617 - MORE Act of 2021 (Rep. Nadler (D-NY) (bill would allow federal marijuana convictions to be erased while allocating federal funds to help people whose lives were profoundly affected by the War on Drugs); S. ___, Cannabis Administration and Opportunity Act (Sens. Booker (D-NH), Wyden (D-OR) and Schumer (D-NY) (recognizing the disproportionate harm suffered by minorities as a result of the War on Drugs).

[20] Ezekiel Edwards, et al., *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU Research Report (2020), https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform

[21] Office of State Public Defender, *Overview of Racial Disparity in the Criminal Justice System* (Updated Sept. 2018), at p. 5, http://www.ospd.ms.gov/REPORTS/racial%20disparity%20update%202.pdf

[22] This list of inmates serving LWOP sentences in MDOC was obtained by the undersigned counsel through a public records request submitted to MDOC pursuant to the provisions of Miss. Code Ann. § 25-61-5(1)(b).

jurisdiction where the recreational use of marijuana is legal,[23] it is clear that the imposition of LWOP sentences for simple marijuana possession has become a relic of the past. Even in Oklahoma, one of the most conservative states in the country, the state legislature has refused to impose LWOP sentences for marijuana crimes. Under Oklahoma law, there is no penalty for the possession of up to three ounces (84.9 grams) of medical marijuana by qualified patients. Okla. Admin. Code § 310:681-2-8(a)(2). For those who do not qualify as a medical marijuana patient, the possession of any amount of marijuana without the intent to distribute is a misdemeanor punishable by a maximum of 12 months. Okla. Stat. tit. 63 § 2-402(b)(2). More significantly, the penalty for the most *serious* marijuana offense under Oklahoma law (a felony for the sale or distribution of more than 1,000 pounds of marijuana) carries a maximum sentence of life *with* the possibility of parole, even if convicted as a habitual offender. Okla. Stat. tit. 63 § 2-401(G)(3)(g); Okla. Stat. tit. 21 § 21-51. In sum, it is beyond question that societal standards of decency have now evolved to the point where an LWOP sentence for the crime of simple marijuana possession, even under a recidivist statute, is unconscionable and unconstitutional.

CONCLUSION

Mr. Russell's mandatory LWOP sentence for the non-violent offense of possession of marijuana, even as a violent habitual offender, presents precisely the "extreme circumstance" under which a legislative penalty should be invalidated. *Harmelin,* 501 U.S. at 1007 (Kennedy, J., concurring). Accordingly, the Court should reverse and remand to the trial court for re-sentencing without regard to the mandatory minimum requirements under Section 99-19-83.

That is what "ought" to be done.

[23] Ted Van Green, *Americans overwhelmingly say marijuana should be legal for recreational or medical use*, Pew Research Center (Apr. 16, 2021), https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been filed using the Court's MEC system and thereby served on all counsel of record and other persons entitled to receive service in this action.

This the 12th day of November, 2021.

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