Appendix

United States Court of Appeals
For the First Circuit

Nos. 12-2364, 12-2367, 13-2017

UNITED STATES,

Appellee,

v.

WENDELL RIVERA-RUPERTO,
a/k/a Arsenio Rivera,

Defendant, Appellant.

Before

Howard, Chief Judge,
Torruella, Lynch, Lipez, Thompson, Kayatta, and Barron, Circuit Judges.

ORDER OF COURT
Entered: February 27, 2018

Pending before the court is a petition for rehearing or rehearing en banc in United States v. Rivera-Ruperto, No. 12-2364, 12-2367 and a petition for rehearing or rehearing en banc in United States v. Rivera-Ruperto, No. 13-2017. The petitions for rehearing having been denied by the panel of judges who decided the cases, and the petitions for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that either case be heard en banc, it is ordered that the petitions for rehearing and the petitions for rehearing en banc be denied.

BARRON, **Circuit Judge, concurring in the denial of rehearing en banc, joined by HOWARD, Chief Judge, and TORRUELLA, LYNCH, THOMPSON, and KAYATTA, Circuit Judges**. The bulk of the 161-year and ten-month prison sentence that Wendell Rivera-Ruperto challenges -- 130 years of it to be exact -- was imposed for his six convictions under 18 U.S.C. § 924(c). United States v. Rivera-Ruperto, 852 F.3d 1, 17 (1st Cir. 2017) (Rivera-Ruperto II). Those convictions stem from a federal sting operation that targeted Puerto Rican police officers. Id. at 4. As part of that sting, Rivera participated, while armed, in a number of supposed "deals" involving large amounts of fake cocaine in which agents of the Federal Bureau of Investigation (FBI) posed as both buyers and sellers. Id. at 4-5.

But, § 924(c) did not merely permit this greater-than-life-without-parole sentence. It mandated it. It did so by requiring a minimum prison sentence of five years for the first of Rivera's § 924(c) convictions and consecutive twenty-five year prison sentences thereafter for each of his "second or subsequent" § 924(c) convictions. 18 U.S.C. § 924(c). And it did so even though all but one of those additional convictions were handed down at the same trial as the initial § 924(c) conviction that Rivera, who had no prior criminal history, received. Id. at 5.[1]

Thus, in consequence of Rivera's multiple convictions for his involvement in this one sting operation, Rivera was required to receive a punishment that seemingly could have been more severe only if it had required his death. And that is so even though this case is replete with factors that -- under a discretionary sentencing regime -- would surely have been relevant to a judge's individualized rather than arithmetical assessment of whether what Rivera did should not only be punished severely but also deprive him (absent a pardon or commutation) of any hope of ever enjoying freedom again.[2]

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[1] Rivera was indicted for six counts of violating 18 U.S.C. § 924(c) along with a variety of other charges also stemming from those fake drug transactions. Rivera-Ruperto II, 852 F.3d at 5. Those other charges consisted of six counts each of conspiracy to possess with intent to distribute five kilograms or more of a controlled substance, 21 U.S.C. §§ 841(a)(1) & (b)(l)(A)(ii)(II), 846; six counts of attempt to possess with intent to distribute five kilograms or more of a controlled substance, id. §§ 841(a)(1) & (b)(l)(A)(ii)(II), 846; and one count of possession of a firearm with an obliterated serial number, 18 U.S.C. § 922(k). For both the conspiracy and attempt charges, the controlled substance was "5 kilograms or more of a mixture or substance containing a detectable amount of . . . cocaine." 21 U.S.C. § 841(b)(l)(A)(ii)(II). The charges were then divided between two separate trials.

The first trial concerned the charges arising out of five of the six fake drug transactions, including five of the § 924(c) counts. Id.; United States v. Rivera-Ruperto, 846 F.3d 417, 420-21, 423 (1st Cir. 2017) (Rivera-Ruperto I). The first trial resulted in Rivera being sentenced to a term of imprisonment of 126 years and ten months, of which 105 years were for his convictions under § 924(c). Rivera-Ruperto I, 846 F.3d at 420-21. The second trial concerned the charges arising out of the other fake drug transaction and resulted in Rivera being sentenced to a term of imprisonment of thirty-five years -- of which twenty-five years were for his sixth § 924(c) conviction. Id. at 420. This sentence was to be served consecutively with his first term of incarceration. Id.

Rivera appealed both of his convictions. Id.; Rivera-Ruperto II, 852 F.3d at 5. Because of the order in which this Court decided his two appeals, "Rivera-Ruperto I" refers to his appeal from his second trial, which resulted in a sentence of thirty-five years' imprisonment, and "Rivera-Ruperto II" refers to his appeal from his first trial, which resulted in a sentence of 126 years and ten months imprisonment.

[2] Among the individualized factors that the sentencing judge could have considered if he had the discretion to do so are the fact that, although Rivera was caught up in a sting designed to catch corrupt police officers, he was himself not a police officer, Rivera-Ruperto II, 852 F.3d at 4 n.3, that Rivera had no prior criminal history, id. at 20 (Torruella, J., dissenting), that he caused no physical harm to any identifiable victim, id. at 35, and that he was never involved with any real drugs, id. at 19.

Despite the force of Rivera's argument that this mandatory sentence is so grossly disproportionate as to be unconstitutional under the Eighth Amendment, I am not permitted to conclude that it is. Other federal judges have expressed their dismay that our legal system could countenance extreme mandatory sentences under § 924(c) that are even shorter than this one.[3] And yet, just as those judges concluded that they were required by precedent to uphold the sentences in their cases, I conclude, like the panel, Rivera-Ruperto II, 852 F.3d at 18, that I am compelled by precedent -- and, in particular, by the nearly three-decades old, three-Justice concurrence in Harmelin v. Michigan, 501 U.S. 957, 1006 (1991) (opinion of Kennedy, J.) -- to uphold Rivera's greater-than-life sentence.[4]

I do think it is important to say something, however, about that precedent and why I believe the Supreme Court should revisit it. And so, in what follows, I explain my reasoning.

I.

The body of precedent that controls here concerns the meaning of the Eighth Amendment, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Amendment's text does not expressly state that prison sentences may be unconstitutional solely in consequence of their length. The Supreme Court, however, has long indicated that a sentence may, in rare cases, be so disproportionate to the seriousness of the underlying offense that it violates the Eighth Amendment. See Weems v. United States, 217 U.S. 349, 368 (1910).

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[3] United States v. Abbott, 30 F.3d 71, 72 n.1 (7th Cir. 1994) (recognizing the district court's concern that the defendant's sentence of twenty-six years for, in part, a § 924(c) conviction was an "illustration of the lack of wisdom in mandatory minimum sentences, but I cannot take it upon myself to change the law that Congress has written because I think it is an inappropriate disposition."); see also United States v. Angelos, 345 F. Supp. 2d 1227, 1247 (D. Utah 2004), aff'd, 433 F.3d 738 (10th Cir. 2006) (affirming a sentence of sixty-one years under § 924(c) despite its conclusion that § 924(c)'s sentencing requirements were "irrational").

[4] In both Rivera-Ruperto II and Rivera-Ruperto I, Rivera challenged the cumulative length of his sentence -- 161 years and ten months (of which 130 years stem from his § 924(c) convictions) -- as disproportionate under the Eighth Amendment. Rivera-Ruperto I, 846 F.3d at 425; Rivera-Ruperto II, 852 F.3d at 13. During both appeals, the parties and the panel considered his sentence cumulatively in addressing his Eighth Amendment challenge. See Rivera-Ruperto I, 846 F.3d at 425; Rivera-Ruperto II, 852 F.3d at 13. In his petition for rehearing in each case, Rivera likewise challenges the proportionality of his sentence cumulatively. I note that, even considering only the sentence that Rivera received in Rivera-Ruperto II, he still faces an inherently greater-than-life sentence -- 105 years -- solely on the basis of his § 924(c) convictions. Rivera-Ruperto II, 852 F.3d at 13. Moreover, because that more-than-100 year sentence was imposed before Rivera was sentenced in Rivera I for his sixth § 924(c) conviction, his additional twenty-five year sentence for that sixth § 924(c) conviction was necessarily a sentence that would extend his already-imposed 100-year-plus § 924(c) sentence another twenty-five years. Thus, it makes sense to consider those two sentences cumulatively for purposes of addressing his Eighth Amendment challenge.

In Rummel v. Estelle, 445 U.S. 263 (1980), for example, the Supreme Court, in the course of rejecting an Eighth Amendment challenge to a mandatory life sentence with the possibility of parole, explained that "the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime."[5] Id. at 271. The Court then applied this principle to invalidate a prison sentence solely in consequence of its disproportionate length in Solem v. Helm, 463 U.S. 277 (1983).

Solem specified the criteria that bear on whether the length of a prison term is impermissibly out of proportion to the seriousness of the offense (or offenses) of conviction. Solem emphasized that "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment," Solem, 463 U.S. at 290 n.17, but that "a combination of objective factors can make such analysis possible." Id. Specifically, Solem held that:

> [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.

Solem appeared to contemplate a holistic analysis, in which the assessment of each of these three criteria would inform the assessment of the others. That approach, notwithstanding its inherently (and appropriately) deferential nature, had teeth. In fact, in Solem, the Court concluded on the basis of this holistic assessment that "the Eighth Amendment proscribes a life sentence without the possibility of parole for a seventh nonviolent felony," id. at 279, in a case in which that discretionary sentence was triggered by a recidivist defendant's conviction -- after he had been punished for his prior felony convictions -- for uttering a "no account" check for $100. Id. at 303.

Thus, if Solem were the last word, I would have to assess in the following way whether Rivera's mandatory life-without-parole sentence for multiple felonies -- each of which is seemingly nonviolent, though hardly minor in nature -- comports with the Eighth Amendment.[6] I would have

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[5] Prior to Rummel, in Weems, "the Court had struck down as cruel and unusual punishment a sentence of cadena temporal imposed by a Philippine Court. This bizarre penalty, which was unknown to Anglo-Saxon law, entailed a minimum of 12 years' imprisonment chained day and night at the wrists and ankles, hard and painful labor while so chained, and a number of 'accessories' including lifetime civil disabilities." Solem v. Helm, 463 U.S. 277, 306-07 (1983). In Solem, as in Rummel, the Court determined that the holding in Weems could not "be wrenched from the facts of that case." Id. (quoting Rummel, 445 U.S. at 273).

[6] As a result of the length of Rivera's sentence, I do not address how long a sentence imposed on an adult defendant must be in order for that sentence to be one that necessarily constitutes a life sentence. There can be no question, after all, that a sentence of more than one hundred years is properly considered to be a life sentence for any adult defendant, no matter that defendant's age at sentencing.

to consider, holistically, the three criteria that Solem identifies as relevant to the proportionality determination. And, based on a consideration of those criteria, as I will next explain, I would find that Rivera's mandatory, more-than-century-long sentence was grossly disproportionate and thus in violation of the Eighth Amendment.[7]

A.

The first Solem criterion requires a relatively abstract inquiry. In performing it, a reviewing court must consider the gravity of the offense "in light of the harm caused or threatened to the victim or society[] and the culpability of the offender." Id. at 292. A reviewing court must then consider the harshness of the sentence in light of the gravity of the offense. Id.

Solem details how a court should go about the task of assessing a crime's severity for purposes of applying this first criterion. Of direct relevance here, Solem makes clear that drug crimes are serious, even though they do not inherently require proof of any harm having been done to any identifiable victim.

That guidance from Solem matters in this case. Section 924(c) sanctions anyone who "uses or carries, or who, in furtherance of [a predicate] crime, possesses a firearm," 18 U.S.C. § 924(c)(1)(A), and then defines those predicate crimes to include a wide variety of federal drug offenses, id. at § 924(c)(2). The predicate drug offenses that underlie each of Rivera's § 924(c) convictions are attempting to possess with intent to distribute, and conspiring to possess with intent to distribute, at least five kilograms of a substance that contained cocaine (though the drug itself need only have been present in a "detectable" amount). 21 U.S.C. §§ 84l(a)(l), (b)(l)(A)(ii)(II); see Rivera-Ruperto II, 852 F.3d at 10.

Thus, we are undoubtedly dealing with the repeated commission of a serious crime under Solem's reasoning. We are also dealing with a type of crime that is certainly more serious than the crime of uttering a "no account" check that triggered the sentence that Solem struck down. 463 U.S. at 281.

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[7] Prior to Solem, the Court had arguably adopted a much stricter test for determining whether a sentence might run afoul of the Eighth Amendment due to its length alone. In upholding the life sentence with parole in Rummel, the Court explained that there were serious concerns about judicial line-drawing presented by challenges to the proportionality of sentences based on the number of years a defendant had been sentenced to imprisonment for a particular offense. Rummel, 445 U.S. at 275. The Court thus expressed the view that successful proportionality challenges of that type would be "exceedingly rare," id. at 273, and the dissent identified as an example the extreme case of a sentence of "[e]ven one day in prison . . . for the 'crime' of having a common cold." Id. at 291 (Powell, J., dissenting) (quoting Robinson v. California, 370 U.S. 660, 667 (1962)). The Court then relied on Rummel's seemingly strict test in Hutto v. Davis, 454 U.S. 370 (1982), to summarily reverse a court of appeals decision that had invalidated on Eighth Amendment grounds a forty-year sentence for possessing nine grams of marijuana. Id. at 375. But, as Solem post-dates both Rummel and Hutto, Solem would set forth the controlling test -- especially in a case involving a proportionality challenge to a mandatory life-without-parole sentence -- absent some intervening precedent, such as, as I will explain, Harmelin v. Michigan, 501 U.S. 957 (1991), represents.

Still, Solem did not describe the repeated commission of the crime of drug dealing (let alone inchoate versions of that crime) as, in and of itself, violent conduct, even if the drug involved were heroin.[8] Nor did Solem describe drug dealing as a crime that was just as serious as many violent offenses undoubtedly are, at least for purposes of making a threshold assessment of whether a sentence's length is so grossly disproportionate to the underlying offense as to violate the Eighth Amendment. Nor, finally, does Solem suggest that possession of a firearm -- even in furtherance of a drug crime -- is itself a crime of violence.

Indeed, Solem emphasized that the fact that an offense does not actually require proof that the defendant inflicted any bodily harm against any identifiable victim generally makes that offense less serious than an offense that does. 463 U.S. at 292-93. Thus, while Solem does identify felony murder with no intent to kill as an example of the type of grave offense for which a life-without-parole sentence would be constitutional, id. at 291-92 & n.15 (citing Enmund v. Florida, 458 U.S. 782, 795-96 (1982)), it is of some significance under Solem that Rivera's crimes did not require the government to prove that he engaged in conduct that foreseeably resulted in the death of, or bodily injury to, any particular victim.

In offering guidance to judges about how they should evaluate an offense's seriousness under the first criterion, Solem also explicitly distinguished completed crimes from inchoate ones. 463 U.S. at 293. Solem did so on the ground that the latter type of offenses do not require proof that any actual harm resulted. Id.

Rivera was convicted of completed crimes in one sense, given that § 924(c) requires proof of firearm possession in furtherance of the predicate crimes. 18 U.S.C. § 924(c). But, given how § 924(c) works, Rivera's unforgiving life sentence results only from the fact that his firearm possession convictions were connected with drug offenses that were themselves inchoate: attempting to possess with intent to distribute, and conspiring to possess with intent to distribute, at least five kilograms of a substance that contained a detectable amount of cocaine. Rivera-Ruperto I, 846 F.3d at 420. Indeed, Rivera's § 924(c) convictions stem from his involvement with transactions concerning fake rather than real drugs. Rivera-Ruperto II, 852 F.3d at 14. That fact explains why, in addition to the predicate conspiracy convictions, he was charged for and convicted of (as predicate offenses) only attempted rather than actual possession with intent to distribute drugs. And, for that reason, Rivera's conduct, in its nature, could not have actually caused harm to any identifiable person. Thus, this fact, too, suggests that Rivera's § 924(c) offenses, serious though they are, are not, under Solem, of the most serious kind.

Solem did recognize that the fact that an offender is a recidivist is also potentially relevant to the analysis of how serious the conduct being punished is for Eighth Amendment purposes. Solem, 463 U.S. at 296. But Solem did not equate recidivism with the mere commission of

[8] The Court had no occasion to do so, as none of the defendant's offenses were drug related and the statute at issue in Solem imposed a mandatory life sentence on those convicted of multiple felonies -- including drug-related felonies -- if "one or more of the prior felony convictions was for a crime of violence." S.D. Codified Laws § 22-7-8; Solem, 463 U.S. at 299 n.26. Moreover, South Dakota's definition of a "crime of violence" did not include heroin dealing, or, for that matter, any drug offenses. S.D. Codified Laws § 22-1-2(9).

multiple offenses that then result in multiple convictions. Solem instead equated recidivism with being a "habitual offender." Id.

That understanding of recidivism accords with the understanding relied on in Rummel. There, the Supreme Court rejected an Eighth Amendment challenge to a life sentence with the possibility of parole that had been imposed for a defendant's conviction for committing a third nonviolent felony. Rummel, 445 U.S. at 265. The defendant challenging that sentence had already served his sentences for his convictions for committing the earlier two offenses. Id. at 265-66. In upholding the defendant's life-with-parole sentence, the Supreme Court emphasized the special interest that a state has in imposing such a harsh sentence when the offender has already "demonstrate[d] that conviction and actual imprisonment [does] not deter him from returning to crime once he is released." Id. at 278.

Rivera, by contrast, was sentenced to a prison term of more than 100 years for the § 924(c) convictions that he received at a single trial, Rivera-Ruperto II, 852 F.3d at 5, despite the fact that he had no prior criminal history, id. at 33 (Torruella, J., dissenting). And his additional sentence for his conviction for the other § 924(c) offense, for which he was tried separately, was imposed for conduct he had engaged in before he had served any time for his other § 924(c) offenses or even been charged with them. Id. at 5. As a result, his "forever" sentence was not premised, as the life sentence with the possibility of parole in Rummel was, on a state's determination that "actual imprisonment [would] prove[] ineffective" in dissuading the defendant from future law-breaking. Rummel, 445 U.S. at 278 n.17.

But, although Rivera's criminal conduct is not of the most serious kind, his no-hope sentence undoubtedly is. Indeed, his sentence could not have been harsher save for a sentence of death having been imposed. Yet, the Supreme Court has made clear that the Constitution does not permit a death sentence to be imposed for offenses that do not result in death. See Coker v. Georgia, 433 U.S. 584, 599 (1977) (reversing on Eighth Amendment grounds a sentence of death for a non-homicide crime).

Nor is the severity of Rivera's sentence solely a function of its length. His sentence is especially unforgiving because the sentencing judge was required to ignore any mitigating circumstances, like Rivera's lack of any criminal history prior to the sting. Rivera-Ruperto I, 846 F.3d at 420. Rivera's sentence in this respect is less forgiving than the life-without-parole sentence that Solem deemed disproportionate. That sentence was at least discretionary and therefore necessarily tailored to the defendant's particular circumstances, see Solem, 463 U.S. at 290, including most notably his prior criminal history.

So, what are we to conclude from a consideration of Solem's first criterion? Are the offenses that Rivera committed serious enough that the imposition of the most serious of prison sentences would not be grossly disproportionate?

Notably, Solem recognized the problem with calling upon judges to make this kind of abstract assessment. The range of criminal conduct that might reasonably be thought to be serious enough to warrant very severe punishment is broad. But, as one moves from consideration of crimes that involve core violent conduct to more boundary-pressing cases, judicial judgments about the relative severity of the crime necessarily risk becoming subjective.

Solem also appeared to recognize (even if it did not expressly hold) that this concern about judicial subjectivity is not properly addressed by simply requiring judges to uphold life-without-parole sentences so long as there is a rational basis to think the sentence is not grossly disproportionate. The cruelty and unusualness of punishment has long been understood to be determined, in part, by "evolving standards of decency," which themselves become knowable in part through a consideration of the actual penal practices of comparable jurisdictions. See Miller v. Alabama, 567 U.S. 460, 469-70 (2012) ("[W]e view [Eighth Amendment proportionality] less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976))); see also Gregg v. Georgia, 428 U.S. 153, 175-83 (1976).

It is not surprising, then, that Solem appears to have proceeded on the understanding that judges need to undertake a real-world comparative inquiry, even if the more abstract threshold inquiry does not in and of itself demonstrate the sentence to be grossly disproportionate. For, at least in a case involving conduct such as is involved here, I read Solem to require courts to move beyond an abstract, threshold assessment of the "gravity of the offense and the harshness of the penalty," Solem, 463 U.S. at 292, to a more grounded comparative assessment of how comparable crimes are actually treated both by the punishing jurisdiction and by other jurisdictions. And that is because I read Solem to require judges to undertake such a further inquiry if the question whether the sentence gives rise to an inference of gross disproportionality -- when viewed abstractly -- is at least fairly debatable.

This more holistic approach accords with the approach that is often taken in applying the Eighth Amendment. For, as I have noted, its bounds have long been understood to be drawn, at least in part, by actual legislative practices and by the norms of decency that those practices may be understood to reflect. See Graham v. Florida, 560 U.S. 48, 62 (2010). I turn next, then, to an assessment of the proportionality of this mandatory life-without-parole sentence in light of the two comparative criteria that Solem identifies. Those criteria train the focus of the inquiry on "the sentences imposed on other criminals in the same jurisdiction" and "the sentences imposed for commission of the same crime in other jurisdictions." Solem, 463 U.S. at 292.

B.

I begin by reviewing the sentences that the federal government imposes for other serious criminal conduct. That review suggests that, however debatable the question might be in the abstract, there is a gross disproportionality between the gravity of Rivera's offenses (serious though they are) and the severity of the punishment that he received for them.

Under federal law, "an aircraft hijacker . . . , a terrorist who detonates a bomb in a public place . . . , a racist who attacks a minority with the intent to kill and inflicts permanent or life threatening injuries . . . , a second-degree murderer, [and] a rapist," Rivera-Ruperto II, 852 F.3d at 31 (Torruella, J., dissenting) (citation omitted), would all be subject to less harsh sentences than Rivera. Congress has not mandated that any of these offenders receive life-without-parole sentences. In fact, the recommended prison terms for each of these offenses under the United States Sentencing Guidelines are no more than one-fifth as long as the one that Rivera received for his offenses. See id. It is hard to see, though, how Rivera's conduct is five times as serious as that of a terrorist who detonates a bomb in a public building, seven times as serious as that of a person

who inflicts life-threatening injuries on members of a racial minority because of their race, or eighteen times as serious as that of a rapist.

Consideration of the federal government's treatment of seemingly comparable conduct under § 924(c) itself further suggests that Rivera's sentence is grossly disproportionate. Rivera was involved in a series of putative drug transactions with, among other people, a group of FBI agents who were merely pretending to be drug traffickers. That the only person other than Rivera who was involved in each of the fake transactions was an FBI agent conducting a sting rather than an actual drug trafficker hardly makes Rivera's course of conduct more concerning than if he had been dealing with the same actual drug trafficker in each transaction. Yet, due to a quirk of conspiracy law and the way that it interacts with § 924(c), his involvement in an FBI-engineered sting rather than a true drug trafficking conspiracy dramatically increased his sentencing exposure under § 924(c).

Specifically, under our precedent, Rivera could not have been charged with participating in a single overarching conspiracy due to the way the FBI staged the sting. We have held that a conspiracy may not be between one individual and a government agent. United States v. Portela, 167 F.3d 687, 699-700, 700 n.8 (1st Cir. 1999) ("[G]overnment agents do not count as co-conspirators." (quoting United States v. Giry, 818 F.2d 120, 125 (1st Cir. 1987)). But, in this sting, the only common participant in each transaction other than Rivera himself was an FBI agent.[9] Thus, due to that quirk, the government could only charge Rivera with participating in the full course of his conspiratorial conduct by charging him with being a participant in six discrete conspiracies that corresponded to each of the six fake transactions.[10]

The decision to charge Rivera for his course of conduct in that manner was quite consequential. It helped to pave the way for the more-than-century-long mandatory prison sentence that he received under § 924(c). Each of his six § 924(c) convictions was predicated on one of the underlying drug conspiracy convictions that corresponded to Rivera's participation in one of the six fake drug transactions that the FBI staged.[11]

Notably, though, if Rivera had participated in the same type of extended conspiracy with a real drug trafficker standing in the stead of the FBI agent who was present for each of the six

[9] To be precise, while two of Rivera's co-defendants participated in two transactions with Rivera, no defendant, other than Rivera himself, was present at all six transactions in which Rivera participated.

[10] Rivera was not the only defendant caught up in this FBI sting to have been exposed to a much longer sentence due to how this quirk of conspiracy law interacts with § 924(c). See e.g., United States v. Diaz-Castro, 752 F.3d 101, 107 (1st Cir. 2014); United States v. Gonzalez-Perez, 778 F.3d 3, 10 (1st Cir. 2015).

[11] I note that, not long after Rivera was arraigned, the government made him a plea offer of fourteen years' imprisonment for all of his charged offenses. After negotiations, the government then agreed to reduce the offer to twelve years. Rivera rejected that offer, however, and proposed a counteroffer of eight years instead, which the government declined to accept. Later, the government renewed its twelve-year offer, but Rivera again rejected it. Rivera-Ruperto II, 852 F.3d at 6. The government then gave Rivera one final offer of eighteen years' imprisonment, which he rejected. Id. at 7.

transactions, and if Rivera had then been charged with participating in a single, extended conspiracy for his course of conduct, he could have been sentenced under § 924(c) to a prison term of only five years for possessing a firearm in furtherance of that conspiracy. And that is because a single conspiracy conviction may not serve as the predicate for multiple § 924(c) convictions, United States v. Rodriguez, 525 F.3d 85, 111 (1st Cir. 2008) (holding that the Double Jeopardy Clause bars multiple § 924(c) offenses predicated on the defendant's conviction for participation in a single conspiracy), no matter how large or extended that predicate conspiracy happens to be.[12]

In this way, then, § 924(c) itself appears to treat the very same course of conspiratorial conduct in which Rivera engaged far more leniently depending on how that course of conduct happens to be charged. After all, Rivera received a mandatory sentence that is more than twenty-five times greater than the defendant in Rodriguez received. And Rivera received that sentence, even though, just like the defendant in Rodriguez, Rivera was found to have committed multiple acts of gun possession in the course of committing a predicate offense and even though these acts were as a functional matter part and parcel of a single -- somewhat extended -- criminal conspiracy. Compare Rivera-Ruperto II, 852 F.3d at 4-5, with Rodriguez, 525 F.3d at 93.

To be sure, in addition to his conspiracy convictions, Rivera was also convicted of six counts of attempted drug possession with intent to distribute, and those convictions independently served as predicates for his § 924(c) convictions. But the conduct underlying those predicate attempt convictions was itself part and parcel of the conduct that could have supported charging Rivera with participating in one extended conspiracy, had an FBI agent not been the only other party to the whole of it. And it is hard to see how those predicate convictions for attempted possession with intent to distribute a substance containing a detectable amount of cocaine in and of themselves show that Rivera's course of conduct was more than twenty-five times worse than that of a § 924(c) offender who, while conspiring with actual drug traffickers in a similarly extended conspiracy to possess cocaine with the intent to distribute, served as an armed lookout for each drug transaction but (unlike Rivera) never had "the power and intent to exercise control over" the cocaine. Henderson v. United States, 135 S. Ct. 1780, 1784; see United States v. Sliwo, 620 F.3d 630, 638 (6th Cir. 2010) ("The government only showed that Defendant was involved in a scheme, and the evidence of his participating in transporting the empty van and serving as a lookout would not allow a rational jury to find beyond a reasonable doubt that Defendant conspired to possess with intent to distribute marijuana."); United States v. Penagos, 823 F.2d 346, 351 (9th Cir. 1987) ("Even if defendant acted as security and lookout . . . these actions do not indicate that he had dominion or control over cocaine.").[13] Yet, under Rodriguez, that latter offender at most

[12] The large majority of circuits apply this same rule. Rodriguez, 525 F.3d at 111; United States v. Lindsay, 985 F.2d 666, 674 (2d Cir. 1993); United States v. Diaz, 592 F.3d 467, 471-75 (3d Cir. 2010); United States v. Baptiste, 309 F.3d 274, 279 (5th Cir. 2002); United States v. Taylor, 13 F.3d 986, 994 (6th Cir. 1994); United States v. Cappas, 29 F.3d 1187, 1191 (7th Cir. 1994); United States v. Fontanilla, 849 F.2d 1257, 1258–59 (9th Cir. 1988); United States v. Moore, 958 F.2d 310, 312 (10th Cir. 1992); United States v. Hamilton, 953 F.2d 1344, 1346 (11th Cir. 1992); United States v. Anderson, 59 F.3d 1323, 1327 (D.C. Cir. 1995) (en banc); but see United States v. Camps, 32 F.3d 102, 108–09 (4th Cir. 1994); United States v. Lucas, 932 F.2d 1210, 1223 (8th Cir. 1991).

[13] In Rivera's case, an FBI agent handed him the bag that held the sham cocaine for him to weigh, thus ensuring that "[i]n every transaction . . . he held the [sham cocaine] in his hands."

could be sentenced to a prison term of five years under § 924(c) -- rather than the 130-year prison term that Rivera received -- if the prosecutor chose to treat that offender's course of conduct as evidencing his participation in one overarching conspiracy rather many discrete conspiracies. Rodriguez, 525 F.3d at 85.

This assessment of Rivera's mandatory sentence relative to the way that the federal government treats seemingly worse or at least comparable conduct does little to allay the concerns about disproportionality -- however debatable those concerns may be in the abstract -- that a consideration of the first Solem criterion raised. This comparison in turn raises the concern that the congressional choice to mandate this level of punishment for an offender like Rivera may not have been a carefully considered one. And that fact necessarily diminishes (even though it does not negate) the legislative claim to deference that informs the whole of the Solem framework. Solem, 463 U.S. at 3009 ("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.").

C.

The final Solem criterion requires a comparison of this sentence with "the sentences imposed for commission of the same crime in other jurisdictions." Solem, 463 U.S. at 292. A consideration of this criterion would also appear to point in favor of Rivera's challenge.

As the government did not address this prong of the Solem inquiry, the government does not address whether there is any state that would impose for comparable conduct the same draconian punishment that § 924(c) required the District Court to impose in this case. But, my own unaided review accords with Rivera's contention that this sentence is an outlier compared to the sentencing practices elsewhere in the United States. That review indicates that virtually all "drug and weapons crimes amenable to federal mandatory minimums are actually prosecuted in state courts pursuant to state laws carrying much lower sentences." Erik Luna and Paul Cassell, Mandatory Minimalism, 32 Cardozo L. Rev. 1, 16 (2010); see also Rivera-Ruperto II, 852 F.3d at 19 (Torruella, J., dissenting).[14]

[14] The only present exceptions of which I am aware appear to be Alabama, see Ala. Code § 13A-12-231(2)(d) (a person convicted of possession of over ten kilograms of controlled substance shall be imprisoned for life without parole); see also Alabama Bd. of Pardons & Paroles v. Smith, 25 So. 3d 1198, 1201 (Ala. Crim. App. 2009) (applying Alabama statute to conspiracy convictions), and Mississippi, see Miss. Code. Ann. § 41-29-139(f) (imposing a punishment of ten to forty years without parole on drug trafficking offenses); Arnold v. State, 225 So. 3d 561, 564 (Miss. Ct. App. 2017) (applying Mississippi statute to conspiracy convictions); McDonald v. State, 921 So. 2d 353, 356 (Miss. Ct. App. 2005) (permitting "stacking" of sentences under Mississippi law). Most states that impose mandatory life sentences without the possibility of parole do so only for those convicted of violent crimes, or for true recidivists. See Rummel, 445 U.S. at 278 & n.17; American Civil Liberties Union, A Living Death: Life without Parole for Nonviolent Offenses 98 (2013). In fact, even Michigan, which passed the law mandating a life sentence for drug possession offenses that was affirmed by the United States Supreme Court in Harmelin, see 501 U.S. at 1007-08 (opinion of Kennedy, J.), no longer has such a law. The year after the Supreme Court decided Harmelin, the Michigan Supreme Court struck down the very sentencing provision that Harmelin

In addition, it appears that no country subject to the jurisdiction of European Court of Human Rights (ECtHR) may impose this sentence for any offense, let alone for an offense that is not of the most serious kind. Cf. Graham, 560 U.S. at 80 ("The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual."). The ECtHR has held that the nations subject to its jurisdiction must ensure that all sentences (even for serial murderers and terrorists) respect a right to hope under Article 3 of the European Convention on Human Rights. Hutchinson v. United Kingdom, (No. 57592/08) Eur. Ct. H.R. ¶ 20 (Feb. 3, 2015), http://hudoc.echr.coe.int/eng?i=001-150778; Vinter & Others v. United Kingdom, 2013-III Eur. Ct. H.R. 317, 349-50.[15]

In accord with that right, the ECtHR ruled that all people facing "whole life" sentences must be afforded a "review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds." Hutchinson, Eur. Ct. H.R. ¶ 20(a). The court declined to "prescribe the form -- executive or judicial -- which that review should take, or to determine when that review should take place." Id. ¶ 20(b). But, the court emphasized that "comparative and international law materials provide clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter[.]" Id. And the court added that "[a] whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought[.]" Id. ¶ 20(d). Thus, the court explained that, "where domestic law does not provide any mechanism or possibility for review of a whole life sentence," the unlawfulness of the sentence under Article 3 of the Convention "arises at the moment of the imposition of the whole life sentence and not at the later stage of incarceration." Id.

Accordingly, consideration of the last two Solem criteria reinforces the concern about whether Rivera's sentence is grossly disproportionate that consideration of the first Solem criterion raises. The consideration of these last two criteria reveals that Rivera's severe sentence is most unusual when compared to the sentences that have been imposed for crimes that would seem to be no less serious. And that is so whether one looks to the sentencing practices of other jurisdictions

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had upheld as unconstitutional under the Michigan Constitution's Eighth Amendment analog. People v. Bullock, 485 N.W.2d 866, 877 (Mich. 1992). The Supreme Court of Michigan concluded "largely for the reasons stated by Justice White in his dissenting opinion in Harmelin that the penalty at issue here is so grossly disproportionate as to be 'cruel or unusual.'" Id. at 875-76 (quoting Mich. Const. Art. I § 16).

[15] Article 3 of the European Convention on Human Rights states: "No one shall be subject to torture or to inhuman or degrading treatment or punishment." We note that, even prior to Vinter's ruling regarding Article 3, nine nations within the jurisdiction of the ECtHR allowed no life sentences at all. Vinter, 2013-III Eur. Ct. H.R. at 338. Of those that did, the majority had mandatory mechanisms to review such sentences after a fixed number of years, and only five had any provision at all for life sentences without the possibility of release. Id. We note, too, that Hutchinson and Vinter addressed sentences in the context of defendants who had been convicted of the most serious of crimes: murder. Id. at 327, 328, 329; Hutchinson, Eur. Ct. H.R. ¶ 6.

or even to the sentencing practices of the federal government itself, which appears to punish conduct that is quite similar, and even seemingly worse, far less severely.

D.

In the end, the question whether Rivera's sentence is constitutional under Solem is not without some difficulty. His crimes are more serious than the minor one that triggered the sentence that Solem struck down. But, Rivera received the harshest of prison sentences for crimes that Solem does not treat as being of the most serious kind. Moreover, comparative analyses reveal that his sentence is an outlier. I thus conclude that, if Solem were the last word, then Rivera's sentence would be grossly disproportionate. Under the Eighth Amendment, therefore, Rivera would be entitled to have his mandatory life-without-parole sentence vacated and his case remanded for resentencing.[16]

II.

Solem, however, is not the last word. I thus must address the post-Solem Supreme Court precedent that addresses the constitutionality of imposing mandatory life-without-parole sentences under the Eighth Amendment for drug offenses. And that precedent is Harmelin.[17]

There, a defendant brought an Eighth Amendment proportionality challenge to his mandatory life-without-parole sentence under Michigan law for the possession of what the Supreme Court described as 672.5 grams of cocaine. Harmelin, 501 U.S. at 1008 (opinion of Kennedy, J.). Notwithstanding Solem, the Supreme Court upheld that sentence. Id. at 996 (opinion of Kennedy, J.).

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[16] I acknowledge that crafting a remedy in this case would not be without difficulty. Rivera's more-than-a-century-long sentence was imposed pursuant to § 924(c)'s consecutive sentences requirement, which raises challenges about how it could be rendered constitutional without producing arbitrary results. And these challenges are aggravated by the fact that Rivera was sentenced at one trial based on five of the § 924(c) convictions (when he was thirty-nine years old) and sentenced at a separate trial for the sixth conviction. Nevertheless, as Justice White's dissent in Harmelin made clear, post-Solem, in the rare cases in which a sentence violates the Eighth Amendment due to its length, courts can vacate the sentence and remand for resentencing as a remedy. See Harmelin, 501 U.S. at 1016 n.2 (White, J., dissenting); see also Miller, 567 U.S. at 489 (reversing and remanding for further proceedings a sentence found unconstitutional); Graham, 560 U.S. at 82 (same). In Bullock, moreover, in which the Supreme Court of Michigan struck down under the Michigan Constitution the mandatory life-without-parole sentence that was at issue in Harmelin, the remedy was simply to remove the prohibition against parole eligibility. Bullock, 485 N.W.2d at 877-78. And, of course, the problem of crafting a remedy arises in any case in which mandatory consecutive sentencing results in a disproportionate sentence relative to the underlying crime, yet both Solem and Harmelin appear to contemplate that a remedy may be needed for consecutive sentences if the resulting disproportionality is severe enough. See Harmelin, 501 U.S. at 1001 (opinion of Kennedy, J.); Solem, 463 U.S. at 297.

[17] Other post-Solem Supreme Court cases do address the proportionality of life sentences. However, only Harmelin has ever upheld the mandatory imposition of such a sentence for a comparable crime where there was no possibility of parole.

Harmelin did not produce a majority opinion. Rather, a fractured Court yielded a controlling opinion that took the form of a three-Justice concurrence. Id.; see Graham, 560 U.S. at 59-60 (determining that Justice Kennedy's opinion in Harmelin is controlling). But that concurrence is still in my view dispositive in this case and in a manner that disfavors Rivera's challenge.[18]

A.

The first way in which the Harmelin concurrence adversely affects Rivera's proportionality challenge has to do with the concurrence's treatment of the second and third Solem criteria. The concurrence makes clear that consideration of these two criteria -- which require real-world comparative analyses -- are "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[19] Harmelin, 501 U.S. at 1005 (opinion of Kennedy, J.). The concurrence further indicates that there need only be a "rational basis" for a legislature's conclusion that an offense is as serious as one that, like felony murder, may constitutionally merit a life-without-parole sentence in order for the threshold Solem inquiry to require the conclusion that no such inference is warranted and thus that the sentence must be upheld. Id. at 1004.

I agree that a sentence's outlier status does not in and of itself demonstrate that a sentence is so grossly disproportionate as to be unconstitutional. But, as the discussion above demonstrates, there are consequences if judges are too quickly barred from gaining insight into whether a sentence is grossly disproportionate through a comparative analysis of other relevant sentencing practices. Those consequences are likely to be especially significant, moreover, in cases in which the offense is, per Solem, not of the most serious kind, but the prison sentence is.

In fact, all four dissenting Justices in Harmelin challenged the concurrence on this point. Id. at 1018-19 (White, J., dissenting); id. at 1027 (Marshall, J., dissenting); id. at 1028 (Stevens, J., dissenting). The dissenters explained that a virtue of the second and third criteria is that they help to inform the analysis of the first criterion. Id. at 1020-21 (White, J., dissenting). Under the Harmelin concurrence's approach, the dissenters worried, courts addressing the first Solem

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[18] A majority of the Supreme Court has not in any clear way embraced the reasoning of the Harmelin concurrence. Certainly Graham had no occasion to do so. Graham invalidated the life-without-parole sentence imposed on a juvenile under a special variant of the Eighth Amendment's proportionality test that applies when a sentencing practice, rather than a sentence in a particular case, is being challenged as disproportionate in all cases. 560 U.S. at 90-91. Similarly, Ewing upheld a mandatory twenty-five-years-to-life sentence under California's three strikes law. 538 U.S. at 20. Ewing explained that the concurrence in Harmelin "guide[s] our application of the Eighth Amendment in the new context that we are called upon to consider." Id. at 23-24. Notably, however, Ewing did not hold that the Court was adopting the concurrence's approach. Id.

[19] The Harmelin concurrence read Rummel as helpful to its position. Harmelin, 501 U.S. at 1005 (opinion of Kennedy, J.). Rummel noted that interjurisdictional analyses raise "complexities" and do not, alone, suffice to demonstrate that a sentence is disproportionate, given that "some State will always bear the distinction of treating particular offenders more severely than any other State." Rummel, 445 U.S. at 282.

criterion would have "no basis for [a] determination that a sentence was -- or was not -- disproportionate, other than the 'subjective views of individual [judges],' which is the very sort of analysis our Eighth Amendment jurisprudence has shunned." Id. at 1020 (quoting Coker, 433 U.S. at 592).

The dissenters also expressed the concern that the concurrence's approach to the first criterion -- by making it so difficult to make a showing that would justify undertaking a real-world comparative analysis -- threatened to render any objective Eighth Amendment proportionality analysis "futile." Id. at 1020. Justice White even went so far as to contend that the concurrence's gloss on the first criterion was inconsistent with Solem because it reduced Solem to "an empty shell." Id. at 1018.

Nevertheless, the dissenters did not prevail. I thus must, like the panel, Rivera-Ruperto II, 852 F.3d at 18, make the kind of critical threshold determination that the Harmelin concurrence requires. And that means that I must decide whether the severity of Rivera's § 924(c) sentence is so grossly disproportionate to the gravity of his underlying § 924(c) offenses that, as an abstract matter, it would not be rational for a legislature to conclude that such a sentence is at least as permissible as the same sentence would be for the offense of felony murder without the intent to kill. For, under the Harmelin concurrence, I am permitted to assess, in real-world terms, whether Rivera's sentence is an outlier -- and then to incorporate a determination that it is into the overall assessment of the sentence's proportionality -- only after first finding that this threshold Solem inquiry favors Rivera.

B.

The second way in which the Harmelin concurrence adversely affects Rivera's Eighth Amendment challenge concerns the way in which the Harmelin concurrence actually performed Solem's threshold inquiry with respect to the criminal conduct at issue in that case. Specifically, the concurrence determined that the drug possession crime in that case was of a sufficiently "serious nature" that no inference of gross disproportionality was warranted by the imposition of a mandatory life-without-parole sentence. Harmelin, 501 U.S. at 1004 (opinion of Kennedy, J.). Accordingly, the concurrence concluded, the judicial inquiry into the sentence's proportionality need not reach the second or third Solem criteria. Id.

In making this critical judgment, the concurrence reasoned that the "[p]ossession, use, and distribution of illegal drugs represents 'one of the greatest problems affecting the health and welfare of our population.'" Id. at 1002 (quoting Treasury Emps. v. Von Raab, 489 U.S. 656, 668 (1989)). For that reason, the concurrence explained, Harmelin's crime "falls in a different category from the relatively minor, nonviolent crime at issue in Solem." Id.

The concurrence stressed in this regard that the suggestion that the "crime was nonviolent and victimless . . . is false to the point of absurdity." Id. The concurrence emphasized that 650 grams of cocaine contained "between 32,500 and 65,000 doses." Id.

The concurrence further explained that the fact that the offense involved drug possession was important because "quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime[.]" Id. For example, the concurrence reasoned, drug users

may themselves commit crimes because of the effect of drugs on their cognitive state or to "obtain money to buy more drugs." Id. In addition, "a violent crime may occur as part of the drug business or culture." Id. Thus, the concurrence concluded, there was a basis for finding "a direct nexus between illegal drugs and crimes of violence." Id. at 1003.[20]

The concurrence then concluded, without the benefit of any comparative inquiry into the practices of other jurisdictions, that whether or not Michigan's penalty scheme was "correct or the most just in the abstract sense," the Michigan legislature "could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine -- in terms of violence, crime, and social displacement -- is momentous enough to warrant the deterrence and retribution of a life sentence without parole." Id. at 1003 (emphasis added). The Harmelin concurrence justified this conclusion by explaining that "a rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as felony murder without specific intent to kill," which, the concurrence noted, is a crime that Solem had stated was one "for which 'no sentence of imprisonment would be disproportionate.'" Id. at 1004 (quoting Solem, 463 U.S. at 290 n.15) (emphasis added). Thus, the Harmelin concurrence held that, "[i]n light of the gravity of petitioner's offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed." Id. at 1005.

This reasoning, in my view, is dispositive here. Rivera's convictions are not for offenses that are identical to Harmelin's. Indeed, he was not convicted of actually possessing any drugs. Still, I do not see how a lower court may say that the Michigan legislature had reason to conclude that a conviction for possession of a large quantity of cocaine and no guns warranted a mandatory life-without-parole sentence, but that Congress could not have had a rational basis for concluding that such a sentence was warranted for multiple convictions for possession of a firearm in furtherance of conspiring or attempting to possess with intent to distribute a "detectable amount" of cocaine packaged in five-kilogram-sized substances. See 21 U.S.C. § 841(b)(1)(A)(ii)(I). Accordingly, I agree with the panel that, no matter how much of an outlier Rivera's sentence may be, we must affirm this sentence in light of Harmelin, and we must do so at the threshold of the Solem inquiry. See Rivera-Ruperto II, 852 F.3d at 18; cf. Hutto, 454 U.S. at 374-75 ("By affirming the District Court decision [deeming a sentence to be a violation of the Eighth Amendment] after

[20] Harmelin noted that in Solem the Court contrasted the "minor" offenses for which the defendant had been convicted with "very serious offenses," such as "a third offense of heroin dealing," and stated that "[n]o one suggests that [a statute providing for life imprisonment without parole] may not be applied constitutionally to fourth-time heroin dealers or other violent criminals." Harmelin, 501 U.S. at 1002 (quoting Solem, 463 U.S. at 299 & n.26). But, as I read this passage, Solem was not holding that a mandatory life-without-parole sentence for such a crime would be proportionate, whether or not the defendant was a true recidivist, as Solem was simply explaining that no argument had been made on that point. Solem, 463 U.S. at 299 n.26. Nor was Solem, in referencing "other violent criminals," id., impliedly indicating that heroin dealers are themselves properly considered "violent" under Solem's rubric. In referring to "other violent criminals," Solem appears to have been merely describing how the sentencing regime at issue in Solem operated, as under that regime a defendant had to have engaged in some violent conduct that led to a previous conviction, in addition to having been convicted of a fourth felony offense, even if that fourth offense was a nonviolent one. See S.D. Codified Laws § 22-7-8.

our decision in Rummel, the Court of Appeals sanctioned an intrusion into the basic line-drawing process that is properly within the province of legislatures, not courts . . . . [and] ignored . . . the hierarchy of the federal court system created by the Constitution and Congress." (citation omitted)).[21]

III.

Although I am convinced that the Harmelin concurrence controls the outcome here, and that it does so by limiting our inquiry to a consideration of only Solem's first criterion, I am also convinced that the Court should revisit the logic of the Harmelin concurrence, at least insofar as it applies to mandatory greater-than-life-without-parole sentences under § 924(c) in cases involving predicate drug offenses.[22] That is so for three reasons.

A.

First, given the range of possible ways that a defendant may commit multiple § 924(c) offenses, it is not realistic to posit that the Congress that enacted § 924(c) made a focused judgment that defendants like Rivera should receive a mandatory life-without-parole sentence for their drug-related criminal conduct. There was, by contrast, far more reason to believe in Harmelin that the legislature had made a focused penal judgment to mandate a life-without-parole sentence for the particular criminal conduct in which the defendant there had engaged.

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[21] I note that I read the Harmelin concurrence to equate its conclusion that Michigan had a rational basis for deciding the defendant's drug-related conduct was as serious as the offense of felony murder with no intent to kill with its ultimate conclusion that the sentence that Michigan imposed for that conduct does not even give rise to an inference that such a sentence was grossly disproportionate. See Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring). The concurrence's equation of those two conclusions compels, in my view, the conclusion, as a matter of precedent, that no such inference can be drawn as to this sentence either and thus that a comparative inquiry under Solem's second and third criteria is prohibited here just as the Harmelin concurrence concluded that it was prohibited there. Nevertheless, it is not clear to me that it is warranted as a general matter to equate the conclusion that there is a rational basis to deem a sentence proportionate with the conclusion that the sentence does not even give rise to an inference that it is disproportionate. After all, in challenges to the sufficiency of the evidence, courts routinely determine that the challenge ultimately fails because a jury could rationally find the evidence to have been sufficient to prove the defendant guilty beyond a reasonable doubt, even though a rational jury could also have drawn a reasonable inference from the evidence that would have resulted in an acquittal. See Musacchio v. United States, 136 S. Ct. 709, 715 (2016).

[22] The Court's post-Harmelin affirmances in Ewing and Lockyer of mandatory twenty-five-year-to-life sentences with the possibility of parole under California's three strikes law offer little guidance here. Unlike in Ewing or Lockyer, we are dealing in this case with an offender with no prior criminal history. Ewing, 538 U.S. at 20; cf. Lockyer, 538 U.S. at 66. Additionally, the defendants in both Ewing and Lockyer retained the right to parole, and thus did not face sentences of equal severity to the one imposed here or in Harmelin. Ewing, 538 U.S. at 16; Lockyer, 538 U.S. at 74. Thus, in my view, Harmelin alone is our guide here.

Accordingly, the Harmelin concurrence's concern that "set[ting] aside [Harmelin's] mandatory sentence would require rejection not of the judgment of a single jurist . . . but rather the collective wisdom of the . . . Legislature and, as a consequence, the . . . citizenry," Harmelin, 501 U.S. at 1006 (opinion of Kennedy, J.), is in my view less salient here. And, for that reason, it is less clear to me that simply because it might be rational for a legislature to think that Rivera's conduct warranted punishment as severe as the punishment that Harmelin received, a court should not proceed to assess how much of an outlier such a sentence is before determining whether that sentence violates the Eighth Amendment.

As the Harmelin concurrence noted, the life-without-parole sentence in that case was mandated pursuant to a carefully calibrated and graduated penalty scheme in which the Michigan legislature specially singled out only a subset of precisely defined large-quantity drug possession crimes for such harsh punishment. Michigan's penalty scheme, the concurrence explained, "is not an ancient one revived in a sudden or surprising way; it is, rather, a recent enactment calibrated with care, clarity, and much deliberation to address a most serious contemporary social problem." Id. at 1007-08 (emphasis added). Thus, although the concurrence did acknowledge that it was not untroubled by the result, or certain "that Michigan's bold experiment [would] succeed," the concurrence concluded that it could not "say the law before us has no chance of success and is on that account so disproportionate as to be cruel and unusual punishment." Id. at 1008.[23]

Perhaps, in the face of the exercise of such legislative care to address a new social problem in a new way, there is a case to be made for according the kind of deference to the penal judgment at issue in Harmelin that the concurrence in Harmelin thought proper. And thus, perhaps, in such a circumstance, there is less need to check the judicial intuition about the proportionality of a mandatory life-without-parole sentence for a large-quantity drug possession offense against actual legislative practice than the dissenters in Harmelin thought there was.

But even if, in light of the legislative care taken in Michigan, the sentence at issue in Harmelin warranted such deferential review, uninfluenced by real-world sentencing practices, I cannot see what the case would be for applying the same limited form of review here. In contrast to the focused sentencing scheme considered in Harmelin, which targeted only carefully specified large-quantity drug possession crimes, § 924(c) criminalizes much conduct that -- given that statute's famously ambiguous scope -- is in its nature not similarly precisely knowable to legislators.[24]

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[23] I note that Ewing also emphasized the focused and deliberative nature of the judgment that the California legislature had made in imposing the severe sentence required under that regime for recidivist offenders, by determining that "individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." Ewing, 538 U.S. at 24.

[24] There is a large body of case law interpreting the uncertainties inherent in § 924(c). For example, even as it relates solely to drug crimes, courts of appeals have grappled with what constitutes a "drug trafficking crime," see Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 910-16 (9th Cir. 2004), what counts as "in furtherance of" a crime, United States v. Timmons, 283 F.3d 1246, 1252 (11th Cir. 2002), and what conduct constitutes "possess[ing] a firearm," United States v. Sparrow, 371 F.3d 851, 852-53 (3d Cir. 2004), as amended (Aug. 3, 2004).

Moreover, § 924(c) imposes a sentence as harsh as the one that Rivera received only because the statute requires the stacking of various individual § 924(c) sentences. As explained above, under § 924(c), a first conviction leads to a mandatory sentence of five years, and each "second or subsequent conviction" mandates an additional twenty-five year prison term that must be served consecutively. 18 U.S.C. §§ 924(c)(1)(A)(i), 924(c)(1)(C)(i).

In consequence, life-without-parole sentences may be required under § 924(c) for an astoundingly wide array of possible offense combinations, including mixes potentially of both state and federal offenses and various combinations of predicate drug offenses, whether or not paired with "crime[s] of violence." See id. § 924(c)(1)(A). For this reason, too, it is pure fiction to imagine that Congress, in requiring a sentence of imprisonment for more than 100 years with no chance of parole, was focused on the type of drug-related conduct at issue in this case in the way that the Harmelin concurrence understood the Michigan legislature to have been focused on the much more precisely defined type of drug-related conduct singled out for harsh punishment in that case.

Nor is there anything in § 924(c)'s legislative history to indicate that Congress, in enacting § 924(c), gave the kind of focused consideration to potential sentencing implications in a case of this sort that the concurrence in Harmelin plainly thought that the Michigan legislature had given to the type of case presented there. Section 924(c) in its original form -- before the statute was amended to add "drug trafficking crime[s]" as predicate offenses -- was introduced as a floor amendment. Simpson v. United States, 435 U.S. 6, 13 (1978); 114 Cong. Rec. 22231 (1968). No mention was made in the ensuing floor "debate" of the feature of this statute that results in the imposition of mandatory life-without-parole sentences for conduct at all like Rivera's -- namely, the "second or subsequent" provision at issue here. 114 Cong. Rec. 22231 (1968). Nor was any mention made of the draconian results that could follow from the "stacking" of § 924(c) sentences, let alone of the Eighth Amendment implications of doing so when multiple § 924(c) convictions are handed down at a single trial or across a pair of trials and thus before the defendant has served time for any of them and demonstrated that punishment will not deter him from future criminal conduct.[25]

[25] In a post-Harmelin case in which the Court has addressed the proportionality of a life sentence, albeit one with the possibility of parole, the Court again emphasized that state legislatures have "broad discretion" over sentence length. Lockyer, 538 U.S. at 76. But, that case reached the Court on habeas corpus review, and thus the Court did not address the merits of whether the sentence would violate the Eighth Amendment if reviewed on direct appeal. Id. at 71, 76. As a result, Lockyer did not have occasion to engage directly with Justice Souter's conclusion in his dissent that the sentence under California's "three strikes" law was "on all fours" with Solem and was therefore unconstitutionally disproportionate. Id. at 82 (Souter, J., dissenting). The dissent reasoned that when sentences based on related courses of conduct are "stacked," the incapacitation rationale for such lengthy sentences falls away, because a defendant in such a case does "not somehow become twice as dangerous to society when he [commits the second crime]; his dangerousness may justify treating one minor felony as serious and warranting long incapacitation, but a second such felony does not disclose greater danger warranting substantially longer incapacitation." Id. Such sentences, the dissent urged, may well be grossly disproportionate. Id. And the one at issue in Lockyer, the dissent determined, was in fact disproportionate. Id. at 83.

The concern that Congress did not give focused consideration is not allayed by the text of § 924(c). Its use of the curious "second or subsequent" phrase hardly reveals that Congress must have foreseen a result such as this one in amending the statute to encompass defendants who were involved not in committing "crimes of violence" but only in inchoate drug offenses. Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207 (codified at 21 U.S.C. § 801). In fact, for more than a decade after that amendment, due to the oddness of that statute's original text ("second or subsequent"), it was a matter of great uncertainty in the lower courts as to whether § 924(c) even allowed the stacking of sentences when multiple convictions were handed down at one trial. See, e.g., United States v. Deal, 954 F.2d 262, 263 (5th Cir. 1992) (citing cases), aff'd, 508 U.S. 129 (1993).

The Supreme Court in Deal did finally reject the view of some lower courts -- and the four dissenters in that case, 508 U.S. at 137 (Stevens, J., dissenting) -- that Congress intended only to impose such harsh sentences on true recidivists, such that a "defendant who commits a second § 924(c) offense before trial on the first would not be eligible for sentence enhancement[.]" Id. at 145 (Stevens, J., dissenting). But, Deal hardly reveals that Congress must have had in mind the notion that greater-than-life sentences would be mandatorily imposed for offenses committed in circumstances remotely like those involved here. Deal's only functional explanation for why it would make sense to read the "second or subsequent" language to encompass even an offender who is charged cumulatively for seemingly-related conduct, rather than only a true recidivist, took the form of the example of an offender who, through stealth, manages to evade detection in repeatedly committing unrelated crimes of violence -- namely, bank robberies. Id. at 137. And there is nothing to indicate that Congress has subsequently ratified that previously sharply-contested conclusion about what "second or subsequent" means in any way that would suggest that Congress did so while focused on the type of conduct that is at issue here, given that Rivera's acts were part and parcel of a single, albeit extended, course of conspiratorial conduct.

Moreover, unlike the scheme at issue in Harmelin, § 924(c) subjects offenders to mandatory life-without-parole sentences even for predicate drug offenses that -- like ones for conspiracy -- are inchoate. Prosecutorial decisions about whether to treat a series of events as part of one conspiracy or as multiple discrete offenses, however, can lead to wildly different sentencing outcomes under § 924(c), even though comparable conduct has occurred and is being punished. Cf. Deal, 508 U.S. at 134 n.2 (emphasizing the distinction between a prosecutor's "universally available and unavoidable power to charge or not to charge an offense" and the possibility of an "extraordinary new power to determine the punishment for a charged offense by simply modifying the manner of charging.").

Thus, this sentencing regime is very different from the one at issue in Harmelin, in which the state legislature "mandated the penalty" for a discrete drug possession crime. 501 U.S. at 1006 (opinion of Kennedy, J.). Here, there is a real possibility that, in upholding a more-than-century-long sentence based on multiple related § 924(c) offenses, we uphold not so much a legislative determination to punish the relevant conduct this severely as a prosecutorial one to divvy that same conduct up into a series of discrete charges that, if proved, will require the stacking of a series of stiff sentences that cumulatively will exceed 100 years.[26]

[26] As discussed above, see infra at 9-10, part of the reason Rivera was exposed to this "forever" sentence is that, due to a quirk of his case, his course of conspiratorial conduct could

I am troubled that the "forever" sentence that results from such charges must be upheld on the basis of only the abstract and highly deferential threshold inquiry that Harmelin limits us to undertaking. And yet, under that constricted inquiry, judges have no choice but to approve mandatory "forever" sentences under § 924(c) so long as they can hypothesize a rational reason for the legislature to have thought that the underlying criminal conduct was as serious as the large-quantity drug possession at issue in Harmelin.

Simply put, it is one thing to uphold such a sentence for the drug-related conduct at issue here on the basis of a limited and abstract threshold inquiry when that sentence has been legislatively "calibrated with care, clarity, and much deliberation to address a most serious contemporary social problem." Harmelin, 501 U.S. at 1007-08 (opinion of Kennedy, J.). It seems to me quite another to do so when that sentence does not appear to have been the product of such serious and careful legislative thought and may in fact have been the result of an exercise of a prosecutor's decision to break one course of conduct into many discrete offenses. For, in that event, the judge in rejecting a challenge to the sentence's proportionality is deferring to a hypothesized legislative choice, notwithstanding that there in fact may be no legislature -- not even the one imposing the sentence -- that has both thoughtfully focused on the need for such a sentence for such conduct and then carefully chosen to mandate it as a proportionate response.

B.

There is a second reason for my concern about applying the constricted form of the analysis that the Harmelin concurrence requires in this case. Harmelin was decided at a time at which, on the concurrence's own account, a state was trying out a new means of responding to a serious crime problem that was causing great concern. Id. In that circumstance, the concurrence expressed its understandable wariness about the federal Constitution's proportionality requirement being construed in a manner that would invalidate one state's "bold experiment" and thereby stifle the

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only be encompassed fully by charging him with many discrete conspiracy offenses rather than by charging him with having been a participant in a single overarching and extended conspiracy. See Portela, 167 F.3d at 699-700, 700 n.8. And yet, in consequence of these discrete conspiracy charges, he was exposed to the more-than-century long mandatory sentence under § 924(c) that he received. See Rodriguez, 525 F.3d 85, 111. That being the case, I find it hard to credit that Congress made a considered judgment that such a course of conspiratorial conduct merits a sentence of this extreme length, unless the defendant conspires with real drug traffickers and the prosecutor chooses to treat the entire course of conduct as a single extended conspiracy, in which case a prison sentence of five years will do just fine.

Nor is my concern about how considered the congressional judgment was for conduct like that at issue in this case diminished by the fact that Rivera's § 924(c) convictions were predicated not only on his underlying conspiracy convictions but also on his underlying convictions for attempted possession with the intent to distribute a substance containing a detectable amount of cocaine. As I have explained, see infra at 9-11, it is hard to credit the notion that Congress made a considered judgment that an armed participant in an extended drug conspiracy who touches the cocaine-bearing substance in each transaction must be imprisoned for the rest of his life, while an armed member of the conspiracy who serves as a lookout as to each transaction only warrants a five-year prison sentence under § 924(c), as such a conspirator would receive if he were charged and convicted of being a participant in that single, extended conspiracy.

kind of innovation that our federal system invites. Id. at 1008. The concurrence thus declined to permit Michigan's outlier status to be held against it, as doing so hardly seemed consistent with the notion instinct in our system of federalism -- that states are laboratories of democracy. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Harmelin, 501 U.S. at 1009.

But, here, we are considering a federal statutory sentencing mandate. And that mandate bears none of the hallmarks of considered experimentation, undertaken as a means of fashioning a bold, if untried, response to a new and vexing problem. In fact, this mandate's dramatic sentencing consequences result in significant part from a judicial construction of a much debated statutory phrase -- "second or subsequent" -- that was the subject of seemingly little discussion in Congress.

Moreover, we are reviewing that mandate's proportionality at a time when decades have passed since the Supreme Court first considered Michigan's arguably similar approach to combating the drug scourge through the imposition of mandatory life-without-parole sentences. Yet, during those intervening years, virtually no other jurisdiction has seen fit to follow suit. Indeed, if anything, the trend lines are moving in just the opposite direction. See Bullock, 485 N.W.2d at 877; cf. Graham, 560 U.S. at 109 (looking to "legislative trends" in determining whether a sentencing practice violated the Eighth Amendment).

Thus, for this reason, too, the concerns that appear to have animated the Harmelin concurrence's conclusion that a real-world comparative inquiry was not properly undertaken in that case do not appear to me to be present here. Rather, in a case like this, it seems to me that there is good reason for courts to undertake the holistic review that the dissenters in Harmelin understood Solem to require but that the Harmelin concurrence determined was not needed to review a mandatory life sentence that a state's legislature was thought to have required as a "bold experiment" to address the drug problem. Harmelin, 501 U.S. at 1008 (opinion of Kennedy, J.). By doing so, courts may factor the sentence's evident outlier status into the ultimate assessment of its gross disproportionality.

C.

These two concerns about applying the Harmelin concurrence's gloss on the Solem inquiry to this context are reinforced, in my view, by two lines of Supreme Court precedent that have developed since Harmelin was decided. I briefly describe each in turn.

First, in Alleyne v. United States, 570 U.S. 99 (2013), the Court held that the Sixth Amendment requires that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." Id. at 103. Thus, under Alleyne, the minimum sentence that a defendant can receive must be based on the minimum conduct criminalized by a statute, that is, the elements of that crime. Id. at 116. It would thus seem that, in evaluating the proportionality of a particular mandatory sentence, we must likewise look to the least of the conduct criminalized by the elements of the offense. Consideration of anything further -- like conduct alleged in the indictment or found at sentencing to have occurred -- would impermissibly permit the assessment of the sentence's proportionality to be based on conduct that had not been found by a factfinder beyond a reasonable doubt, even though under Alleyne the mandatory sentence may not be imposed based on such conduct.

The concurrence in Harmelin did not have the benefit of Alleyne. But, insofar as Alleyne indicates that the focus must be on the least of the conduct criminalized in evaluating a sentence's proportionality, the potential consequences of following the Harmelin concurrence's extremely deferential approach in the context of § 924(c) become even more concerning.

Consider in this regard that, seemingly contrary to Alleyne's logic, the Harmelin concurrence reasoned that the sentence there at issue was not disproportionate because Harmelin "possessed" 672.5 grams of "undiluted cocaine" as well as assorted drug paraphernalia, 501 U.S. at 1008 (opinion of Kennedy, J.). The concurrence emphasized that fact in spinning out how many "doses" of the drug could have been dispensed by the defendant. See id. And, the concurrence did so in order to describe the seriousness of the tangible harm caused by the defendant's conduct and thus the reasonableness of the legislative sentencing judgment. See id.

The offense in that case, however, actually held Harmelin criminally liable merely because he "possessed" 650 grams of a "mixture containing" cocaine, Mich. Comp. Laws Ann. § 333.7403(2)(a)(i). But, of course, such a mixture could contain a much smaller amount of the actual drug. Id.; People v. Puertas, 332 N.W.2d 399, 400 (Mich. App. 1983). And thus the least of the conduct criminalized there could not have caused the same harm that the concurrence attributed to the defendant's actions.

Still, there is no doubt that the Michigan legislature did intend to mandate a life-without-parole sentence for even that "mixture" crime, given how clearly the statute at issue set forth that penalty scheme. By contrast, it is less clear to me that Congress would have been fully aware of just how minimal the conduct could be that would result in a "forever" sentence under § 924(c). As I have explained, § 924(c)'s scope is notoriously ambiguous, the statute encompasses even inchoate crimes, and it requires the "stacking" of mandatory sentences even for related conduct that results in multiple convictions at a single trial due to a prosecutorial choice to divvy up the conduct. Thus, in light of how Alleyne suggests proportionality review must now proceed, there is additional reason to doubt that Congress, in enacting this sentencing regime, contemplated the full implications of its mandate, even if that mandate does encompass a range of cases involving more serious conduct that Congress no doubt had in view.

The second line of post-Harmelin cases that I have in mind further gives me pause about applying the Harmelin concurrence's more limited form of Solem review here. This line of precedent has resulted in the invalidation under the Eighth Amendment of life-without-parole sentences for juveniles. Miller, 567 U.S. at 474; Graham, 560 U.S. at 69.

Those cases, of course, are by no means controlling here. But, in them, the Court has emphasized in a way that it had not previously -- and thus in a way that it had not when Congress enacted § 924(c) -- that life sentences without the possibility of parole raise special constitutional concerns.

In particular, the Court has explained that such sentences constitute some of the "most severe punishments" that society imposes. Miller, 567 U.S. at 474; Graham, 560 U.S. at 69. And, the Court has added, such sentences:

> [S]hare some characteristics with death sentences that are shared by no other sentences . . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . . [A] life without parole sentence . . . means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.

Graham, 560 U.S. at 69–70 (citations and quotations omitted). The Court has also recently stressed, in connection with reviewing the proportionality of such sentences, that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Id. at 69.

It may be that, even despite these strong statements, the Eighth Amendment is still best understood to permit Congress to mandate, even for conduct like Rivera's that resulted in no bodily harm, that "whatever the future might hold" for him, he must "remain in prison for the rest of his days." Id. at 70. He was, after all, an adult, not a child, when he committed his crimes. And judges are not entitled to second-guess the wisdom of the penal judgments of legislatures. Instead, judges are supposed to accord them deference.

But, at least in a case involving a sentence this harsh for crimes of this type, one would think that such deference would stem from confidence that the legislature has in fact made a considered penal judgment to impose such an unforgiving sentence and from careful consideration of the way in which offenders more generally are punished for comparable or even worse conduct. For such confidence and consideration would ensure that judges in deferring to a legislative judgment are recognized to be engaged in an understandable, rather than an unforgivable, means of carrying out their duty to say what the constitutional prohibition against "cruel and unusual" punishment is.

Thus, in light of the concerns that the Court has recently expressed about the imposition of life-without-parole sentences, I do not see how the kind of abstract review that is contemplated under the first Solem criterion -- and that the Harmelin concurrence requires us to treat as dispositive here -- can suffice to permit us to determine whether Rivera's sentence is grossly disproportionate under the Eighth Amendment. In my view, a comparative assessment, grounded in actual legislative practice, should be required to inform the judge's assessment of proportionality in such a case.

Such a requirement would prevent judges from simply substituting their own preferences for legislative ones in evaluating whether a mandatory life-without-parole sentence is cruel and unusual. Such a requirement would also ensure that the judicial assessment of a mandatory life-without-parole sentence for drug-related offenses of the sort at issue here does not unduly discount the defendant's Eighth Amendment right to be protected from grossly disproportionate punishment.

IV.

Rivera faces the longest and most unforgiving possible prison sentence for conduct that, though serious, is not of the most serious kind. He does so not because the legislature had authorized its imposition and a judge had then considered all of the aggravating and mitigating circumstances and determined that this sentence was appropriate. He does so only because Congress has been deemed to have made a blanket judgment that even an offender like Rivera -- who has no prior criminal record and whose series of related crimes resulted in no harm to an identifiable victim -- should have no hope of ever living free. And he does so even though virtually every comparable jurisdiction punishes comparable criminal conduct less harshly, and even though the federal government itself punishes nearly the same or seemingly worse conduct more leniently.

Almost three decades have now passed since the concurring Justices in Harmelin concluded, without reference to real-world comparative benchmarks, that the Eighth Amendment afforded the Michigan legislature the scope to try out what at the time was viewed as a permissible sentencing experiment to address a newly concerning crime problem. In those intervening decades, virtually no jurisdiction has been willing to replicate that state's experiment. In fact, even the state that the Harmelin concurrence permitted to try it has abandoned it. And yet the Harmelin concurrence still controls.

In my view, a consequence as grave as the one that Harmelin requires in a case like this should have the imprimatur of more than only a nearly three-decade old, three-Justice concurrence. I thus urge the Supreme Court to consider whether the Eighth Amendment permits, at least in a case such as this, the mandatory stacking of sentences under § 924(c) that -- due to their cumulative length -- necessarily results in the imposition of a mandatory sentence of life without parole.

LIPEZ, Circuit Judge, statement regarding the denial of rehearing. In voting to deny panel rehearing, I express my agreement with the concurring statement issued by my colleagues in denying appellant's petition for en banc review.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Hermes Manuel Hernandez
Wendell Rivera-Ruperto
Jacqueline D. Novas Debien
Myriam Yvette Fernandez-Gonzalez
Peter M. Koski
Francisco A. Besosa-Martinez
Monique T. Abrishami
Robert James Heberle

United States Court of Appeals
For the First Circuit

Nos. 12-2364, 12-2367

UNITED STATES,

Appellee,

v.

WENDELL RIVERA-RUPERTO,
a/k/a Arsenio Rivera,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan M. Pérez-Giménez, U.S. District Judge]

Before

Torruella, Lipez, and Thompson,
Circuit Judges.

H. Manuel Hernández for appellant.

Robert J. Heberle, Attorney, Public Integrity Section, Criminal Division, U.S. Department of Justice, with whom Francisco A. Besosa-Martínez, Assistant United States Attorney, Nelson Pérez-Sosa, Assistant United States Attorney, Chief, Appellate Division, and Rosa Emilia Rodríguez-Vélez, United States Attorney, were on brief, for appellee.

January 13, 2017

THOMPSON, **Circuit Judge**. This case arises out of a now-familiar, large-scale FBI investigation known as "Operation Guard Shack," in which the FBI, in an effort to root out police corruption throughout Puerto Rico, orchestrated a series of staged drug deals over the course of several years.[1] For his participation in six of these Operation Guard Shack drug deals, Defendant-Appellant Wendell Rivera-Ruperto stood two trials and was found guilty of various federal drug and firearms-related crimes. The convictions resulted in Rivera-Ruperto receiving a combined sentence of 161-years and 10-months' imprisonment.

Although Rivera-Ruperto raises similar challenges in his appeals from the two separate trials, each trial was presided over by a different district judge. Thus, there are two cases on appeal, and we address the various challenges today in separate opinions.[2] In this present appeal from the first trial, Rivera-Ruperto argues that the district court committed reversible errors when it: (1) denied his claim for ineffective assistance of counsel during the plea-bargaining stage; (2) failed to instruct the jury that it was required to find drug quantity beyond a reasonable

[1] See, e.g., United States v. Navedo-Ramirez, 781 F.3d 563 (1st Cir. 2015); United States v. González-Pérez, 778 F.3d 3 (1st Cir. 2015); United States v. Diaz-Castro, 752 F.3d 101 (1st Cir. 2014).

[2] Co-defendants Miguel Santiago-Cordero and Daviel Salinas-Acevedo were tried along with Rivera-Ruperto at his second trial, and we address their challenges in our companion decision as well.

doubt; (3) either declined to consider or rejected his sentencing manipulation claim; and (4) sentenced him to a grossly disproportionate sentence in violation of the Eighth Amendment.

For the reasons stated below, we affirm the district court.

OVERVIEW

We keep our summary of the facts brief for now, saving the specific details related to Rivera-Ruperto's various challenges for our later discussion.

Rivera-Ruperto provided armed security during six Operation Guard Shack sham drug deals, which occurred on April 9, April 14, April 27, June 9, June 25, and September 16 of 2010.[3] Each of the sham deals followed the same pattern. They involved undercover officers posing as sellers and buyers of fake cocaine, and took place at FBI-monitored apartments wired with hidden cameras. The April 9 and April 14 deals each involved 12 kilograms of fake cocaine, the April 27 and June 9 deals each involved 8 kilograms of fake cocaine, and the June 25 and September 16 deals each involved 15 kilograms of fake cocaine. On top of rendering armed security services, Rivera-Ruperto brought along with him

[3] Although Rivera-Ruperto was not a police officer, he was invited to participate in Operation Guard Shack after he misrepresented himself to the FBI's confidential informant as a prison corrections officer.

additional recruits.[4] And at the April 27 deal, Rivera-Ruperto did even more; he sold a handgun, including magazines, to a confidential FBI informant posing as a drug dealer. For his services, Rivera-Ruperto received a payment of $2,000 for each of the deals, except for the September 16 deal, for which he received $3,000.

The government charged Rivera-Ruperto under three separate indictments (two on September 21, 2010 and one on September 23, 2010) for his illegal participation in the six sham drug deals.[5] For each of the transactions, the indictments charged Rivera-Ruperto with one count each of conspiracy and attempt to possess with intent to distribute a controlled substance, as well as possession of a firearm in relation to a drug trafficking crime. Additionally, Rivera-Ruperto was charged with possessing a firearm with an obliterated serial number during the April 27 deal.

Rivera-Ruperto's case proceeded to trial after plea negotiations with the government failed -- a point of contention

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[4] Among those Rivera-Ruperto recruited, at least one was a police officer.

[5] On September 21, 2010, Rivera-Ruperto was indicted for his participation in the April 14, April 27, June 9, and June 25, 2010 deals. On the same day, the government separately indicted Rivera-Ruperto for his participation in the April 9, 2010 deal. Superseding indictments were later filed, but the charges remained the same. Rivera-Ruperto was then indicted a third time on September 23, 2010 for his participation in the final September 16, 2010 deal.

that we get to shortly. For purposes of trial, the first September 21 indictment (which charged Rivera-Ruperto for the April 14, April 27, June 9, and June 25 deals) and the September 23 indictment (which charged him for the September 16 deal) were consolidated and tried together. A jury found Rivera-Ruperto guilty of all charges and the district judge sentenced him to 126-years and 10-months' imprisonment. It is this first trial which is the topic of the present appeal. As we discuss in more detail below, Rivera-Ruperto takes issue both with the judge's jury instructions and with the sentence he ultimately received.

Over defense counsel's objections, the second September 21, 2010 indictment (which charged Rivera-Ruperto for his involvement in the transaction on April 9, 2010 only) was tried several months later before a different district judge. After a second jury found Rivera-Ruperto guilty on all counts, Rivera-Ruperto received a 35-year sentence of imprisonment.

Rivera-Ruperto, who is presently serving his combined sentence of 161 years and 10 months, now timely appeals. Putting aside, as we are required to do, whatever misgivings we might have as to the need for or the wisdom in imposing a near two-life-term sentence to punish a crime that involved staged drug deals, sham drugs, and fake dealers, we turn to the task of assessing whether any of Rivera-Ruperto's legal arguments entitle him to relief. As we have already noted, we address only Rivera-Ruperto's challenges

from his first trial, saving those from the second for discussion in our separate, related opinion.

DISCUSSION

I. Lafler Motion

Rivera-Ruperto first challenges the district court's denial of his claim that his first court-appointed attorney provided ineffective assistance at the plea-bargaining stage. We begin by recounting what happened below.

A. Background

About a month after Rivera-Ruperto was arraigned, the government made him an initial plea offer of 14 years that covered the charged offenses in all three indictments. Rivera-Ruperto's first court-appointed attorney, Jose Aguayo ("Aguayo"), successfully negotiated that offer down to 12 years. When Rivera-Ruperto refused to take the 12-year deal, Aguayo attempted to negotiate an even lower sentence, but the prosecution told Aguayo that its 12-year offer was final.

Aguayo then showed Rivera-Ruperto the email, which spelled out the government's final offer of 12 years, and explained to him the repercussions of not taking the plea deal. But Rivera-Ruperto rejected the offer still, and directed Aguayo to make a counteroffer of 8 years instead. Unsurprisingly, the government refused the 8-year counteroffer.

In a last-ditch effort, Aguayo joined defense attorneys for five other Operation Guard Shack defendants to attempt to negotiate a global plea deal for the six defendants as a group. The government responded to these overtures by renewing its 12-year offer for Rivera-Ruperto, but this time the offer had an expiration date. When Aguayo showed Rivera-Ruperto the renewed offer, Rivera-Ruperto, once again, rejected it. The offer lapsed on February 4, 2011. Accordingly, on February 7, 2011, the government filed an informative motion, in which it notified the court that plea negotiations had terminated and that a trial schedule needed to be set.

On that same day, Aguayo, apparently alarmed by Rivera-Ruperto's behavior during their meetings regarding the plea negotiations, filed a request for a psychiatric exam for Rivera-Ruperto. In the motion, Aguayo stated that during their meetings, he had witnessed Rivera-Ruperto "exhibiting strange behavior which has progressively worsened," and that Rivera-Ruperto "refuses to, or lacks the ability to appreciate the seriousness of his case, refuses to review the discovery material, appears to lose his lucidity, rants and raves, and vehemently argues with imaginary people in the attorney-client visiting room." The district court granted the motion by electronic order.

Shortly after being examined in early June 2011, Rivera-Ruperto sent Aguayo an email, in which he stated that he wanted to

take the (by then, already expired) 12-year plea offer. Aguayo responded by advising Rivera-Ruperto that the 12-year deal had timed out, and that they should await the results of the mental evaluation before resuming further plea negotiations. If he were to withdraw the request for the psychiatric examination before they saw the results, Aguayo explained, Rivera-Ruperto could later argue, even after accepting an offer, that he had not been mentally competent to accept it after all.

When the results of the psychological exam came back in late June, the report deemed Rivera-Ruperto "stable" and contained no diagnoses for mental disorders that would affect Rivera-Ruperto's competency to stand trial.[6] As promised, Aguayo then reached out to the government to attempt to reopen plea negotiations. At first, it appeared the government would be unwilling to engage in further plea bargaining with Rivera-Ruperto, whom the government believed had shown himself to be a "malingerer." But Aguayo was insistent that it was not Rivera-Ruperto who had requested the psychological exam as a delay tactic, but Aguayo himself who had requested it, compelled by his duty to provide Rivera-Ruperto with effective assistance of counsel. After some back and forth, the government relented and agreed to entertain one, and only one more counteroffer from Rivera-Ruperto,

[6] The report also suggested that Rivera-Ruperto may have been exaggerating psychiatric impairment.

but it warned that the counteroffer had to be "substantial" (specifically, somewhere in the ballpark of 20-23 years).

Aguayo met with Rivera-Ruperto to relay this information, making clear that this was their last chance to make a counteroffer, and that a proposal of less than 20 years would not be considered. Despite this advice, Rivera-Ruperto insisted that Aguayo make a counteroffer of only 13 years. Unsurprisingly, the government again rejected this lowball, but nevertheless made one final offer of 18 years. Rivera-Ruperto said no, and then proceeded to fire Aguayo. With plea negotiations over (this time for good), the case was slated for trial.

On March 23, 2012, nine months after the date of the psychological evaluation report and three days before trial was to begin, Rivera-Ruperto, through his second court-appointed attorney, filed a motion alleging that Aguayo had provided ineffective assistance of counsel at the plea-bargaining stage and asking the district court to order the government to reoffer the 12-year deal. The district court granted Rivera-Ruperto's request for an evidentiary hearing on the issue and, after hearing testimony from both Rivera-Ruperto and Aguayo and considering the documentary evidence,[7] the district court concluded there was no

[7] Although the documents themselves are not in the record, the transcript from the Lafler hearing indicates that the parties' submissions included email correspondence between Aguayo and the government regarding plea negotiations, Aguayo's records

merit to the ineffective assistance of counsel claim, and denied Rivera-Ruperto's motion. Rivera-Ruperto says this was error.

B. Analysis

We review a district court's determination of ineffective assistance of counsel claims de novo and any findings of fact for clear error. Ortiz-Graulau v. United States, 756 F.3d 12, 17 (1st Cir. 2014).

A defendant's Sixth Amendment right to competent counsel extends to the plea-bargaining process. Lafler v. Cooper, 132 S. Ct. 1376, 1380-81 (2012). A defendant claiming, as Rivera-Ruperto does here, that counsel's assistance was ineffective at the plea-bargaining stage, must meet the two-part test laid out in Strickland v. Washington, 466 U.S. 668, 687 (1984). Lafler, 132 S. Ct. at 1384. He must show, first, that counsel's performance was deficient, and second, that "the outcome of the plea process would have been different with competent advice." Id.

Rivera-Ruperto argues that he meets both of these prongs. He contends that he "wanted to accept the 12-year plea offer, and would have sans his original defense counsel's decision to seek an unnecessary psychological evaluation, his related erroneous advice, and his refusal to inform the government and the

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containing detailed notes of his visits and conversations with Rivera-Ruperto, and a document signed by Rivera-Ruperto memorializing his refusal to accept the government's original "final" 12-year plea offer.

district Court of [his] decision [to accept the 12-year offer]."[8] But this argument fails on both Strickland requirements. To start, Rivera-Ruperto has failed to establish that Aguayo's performance was defective.

In order to meet the first Strickland prong, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Generally speaking, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Thus, in order to establish deficient performance, a defendant must show that, "given the facts known at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it." Tevlin v. Spencer, 621 F.3d 59, 66 (1st Cir. 2010) (citing Knight v. Spencer, 447 F.3d 6, 15 (1st Cir. 2006)).

Here, none of Aguayo's actions meets this standard. Aguayo sought a psychological exam only after he observed Rivera-Ruperto arguing with imaginary people and exhibiting other abnormal behavior. While ultimately the results of Rivera-Ruperto's exam may have shown that Rivera-Ruperto did not have any

[8] Rivera-Ruperto appears to limit his deficient-performance argument to these bases, and does not challenge the district court's finding that Aguayo otherwise competently made efforts to get lesser plea deals for his client and adequately explained how the plea bargaining process worked.

mental health issues, given the erratic behavior Rivera-Ruperto displayed during their meetings, Aguayo's motion was not "patently unreasonable." Tevlin, 621 F.3d at 66 (citation omitted).[9]

Nor do we think Aguayo's performance was deficient on account of the fact that he advised Rivera-Ruperto to await the results of the psychological exam before pursuing further plea negotiations. First, as we get to in a moment, by the time Rivera-Ruperto had emailed Aguayo to say he wished to take the 12-year plea offer, there was no actual offer for Rivera-Ruperto to take because the last 12-year deal had expired some three or four months prior. But even if there had been a live offer on the table, by the time Rivera-Ruperto expressed any interest in taking a 12-year plea deal, he had already been examined and was awaiting the results. As Aguayo explained to Rivera-Ruperto at the time, it was Aguayo's professional judgment that withdrawing the motion for the psychological exam at that point would threaten the durability of any plea agreement they might have reached because Rivera-Ruperto could later argue that he had not been mentally competent to enter into the deal at all. We think this advice was given in the exercise of reasonable professional judgment, and in any event,

[9] In fact, "where there are substantial indications that the defendant is not competent to stand trial, counsel is not faced with a strategy choice but has a settled obligation . . . under federal law . . . to raise the issue with the trial judge and ordinarily to seek a competency examination." Robidoux v. O'Brien, 643 F.3d 334, 338-39 (1st Cir. 2011).

certainly was not so deficient as to fall below "an objective standard of reasonableness." Strickland, 466 U.S. at 688. Rivera-Ruperto has therefore failed to show that Aguayo's performance was deficient.

Moreover, even if we were to assume the defective performance prong has been met, Rivera-Ruperto's claim still fails because he cannot show the necessary prejudice to meet the second Strickland prong. In order to establish prejudice, a defendant claiming ineffective assistance at the plea bargaining stage must show that "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court[,]. . . the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence." Lafler, 132 S. Ct. at 1385. Rivera-Ruperto cannot do so here.

Rivera-Ruperto argues that he would have accepted the 12-year deal but for Aguayo requesting an "unnecessary and unwanted" psychological exam and then refusing to withdraw the request after Rivera-Ruperto told Aguayo that he wished to accept the 12-year offer. But the facts simply do not bear out Rivera-Ruperto's theory that Aguayo's actions are what prevented a 12-year plea deal from being presented to the court. When Rivera-Ruperto emailed to tell Aguayo that he wanted to take the 12-year

plea offer, it was already early June 2011. By that time, nearly four months had passed since the 12-year plea offer had expired. It was therefore not the requested psychological examination that caused Rivera-Ruperto to "lose" a 12-year plea deal, but the fact that he had already rejected the offer (more than once, we might add), leaving no deal on the table for Rivera-Ruperto to accept. Furthermore, even after the results came back from Rivera-Ruperto's psychological exam and the government had labeled him a "malingerer," Rivera-Ruperto had a final opportunity to accept an 18-year plea offer from the government. Rivera-Ruperto rejected even this offer and opted for trial. Rivera-Ruperto has thus failed to show that there is a reasonable probability that any plea deal, much less the 12-year plea deal specifically, would have been presented to the court but for Aguayo's purported ineffective assistance.

Because Rivera-Ruperto has failed to show that Aguayo's performance was defective, and because, even if we were to assume the performance was defective, Rivera-Ruperto has failed to show the requisite prejudice, we affirm the district court's ruling on the Lafler claim.

II. Jury Instructions

Rivera-Ruperto raises on appeal only one challenge concerning the trial itself. He argues that the district court erred in failing to instruct the jury that it was required to make

its drug quantity findings beyond a reasonable doubt. We begin once more with a discussion of what happened below.

A. Background

After closing arguments were made, the trial judge gave jury instructions, beginning with general instructions, which explained that the prosecution had the burden "to prove guilt beyond a reasonable doubt." The trial judge then instructed the jury on the elements of the crimes with which Rivera-Ruperto was charged.

As a reminder, among other charges, Rivera-Ruperto was indicted for each of the five drug deals with one count each of two drug crimes: conspiracy and attempted possession with intent to distribute a controlled substance. As they are the only instructions relevant to our inquiry today, we focus our attention on the judge's instructions regarding drug quantity.

The judge instructed the jury as to the elements of the two drug offenses, and was explicit that in order to find the defendant guilty, the jury had to be convinced that the government had proven each element beyond a reasonable doubt. The judge did not include drug quantity among these elements, but after explaining the elements of the drug crimes, the judge did tell the jury: "If you find that the defendant conspired or attempted to possess with intent to distribute a controlled substance[,] . . . you will be asked to also make findings as to the quantity of this

substance that the defendant either conspired or attempted to possess."

The trial judge referred to drug quantity one other time in his jury instructions. This was when he described the verdict forms to the jury, explaining: "[I]f you find [the] [d]efendant guilty, then you are also asked to provide the amount of drugs involved in said count. And there's a question for you to find that."[10]

Rivera-Ruperto's trial attorney raised no objections to the jury instructions. After deliberations, the jury returned a verdict in which it found Rivera-Ruperto guilty of all charges. With respect to the drug-related offenses, the jury found Rivera-Ruperto guilty "[i]n the amount of five kilograms or more" for each of the counts, with the exception of the attempted possession count for the September 16 deal, for which the jury did not return a drug quantity finding.[11]

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[10] The verdict forms (there were two because there were originally two indictments that were consolidated for trial) asked the jury to mark whether it found Rivera-Ruperto "Guilty" or "Not Guilty" for each of the charged counts. Underneath the drug related counts, the verdict form asked the following question:

> If you find the defendant guilty, please answer the following additional question:
>
> Do you find that the amount of fake cocaine involved in that offense was (circle one):
>
> A. 5 kilograms or more
>
> B. At least 500 grams but less than 5 kilograms
>
> C. Less than 500 grams

[11] Although the jury found Rivera-Ruperto guilty of that

At sentencing, the district court imposed a sentence for these drug convictions that was based on the jury's drug quantity findings. Specifically, because the jury had found that all of Rivera-Ruperto's drug offenses (except the September 16 attempted possession count) involved 5 kilograms or more of a controlled substance, the court imposed concurrent sentences of 21-years and 10-months' imprisonment for each of these convictions.[12] The sentences thus exceeded the 20-year statutory maximum for offenses involving an indeterminate quantity of drugs, see 21 U.S.C. § 841(b)(1)(C), and instead fell within the minimum 10-year to maximum life sentencing range for offenses involving 5 kilograms or more of a controlled substance, id. § 841(b)(1)(A).

On appeal, Rivera-Ruperto argues that he is entitled to a new trial because the district court failed to instruct the jury that it was required to find the drug quantities beyond a reasonable doubt.

B. Analysis

We typically review jury instruction challenges de novo, but where, as here, a defendant failed to object to the jury

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count, it left the corresponding drug quantity question blank on the verdict form.

[12] For the September 16 attempted possession conviction, for which the jury had returned no drug quantity finding, the district court imposed the maximum statutory sentence of 20 years for offenses involving an indeterminate quantity of drugs. See 21 U.S.C. § 841(b)(1)(C).

instructions below, our review is for plain error. United States v. Delgado-Marrero, 744 F.3d 167, 184 (1st Cir. 2014).

Reversal under the plain error standard requires: (1) that an error occurred; (2) that the error was obvious; (3) that it affected the defendant's substantial rights; and (4) that it threatens the fairness, integrity or public reputation of the proceedings. Delgado-Marrero, 744 F.3d at 184. We have noted previously that "[t]his multi-factor analysis makes the road to success under the plain error standard rather steep; hence, reversal constitutes a remedy that is granted sparingly." United States v. Gelin, 712 F.3d 612, 620 (1st Cir. 2013).

We begin with the question of error. To satisfy plain error review, we must conclude not only that the district court erred in not instructing the jury that it was required to find drug quantity beyond a reasonable doubt, but that the error was obvious.

The Supreme Court has held that facts such as drug quantity are to be considered elements of the offense and must be found beyond a reasonable doubt if those facts "increase the penalty for a crime beyond the prescribed statutory maximum," Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), or increase the mandatory minimum sentence for a crime, Alleyne v. United States, 133 S. Ct. 2151 (2013). In this case, it is clear that drug quantity was an element of Rivera-Ruperto's charged drug offenses

because the drug quantity findings increased Rivera-Ruperto's sentence beyond the statutory maximum for undetermined drug quantities. At trial, the judge did submit the drug quantity question to the jury, and also instructed the jury that the government was required to prove each element of the drug offenses beyond a reasonable doubt. But he never instructed the jury that drug quantity was an element of the drug crimes, nor did he ever state explicitly that drug quantity had to be found beyond a reasonable doubt. The question we must answer, then, is whether the jury nonetheless would have understood that it was required to apply the beyond-a-reasonable-doubt standard to its findings on drug quantity. We conclude that it did, and that the court therefore did not commit obvious error.

In United States v. Barbour, 393 F.3d 82, 89 (1st Cir. 2004), a case involving similar facts, the district court failed, much like the court in this case, to instruct the jury that drug quantity was an element of the offense, although it should have done so. We concluded, however, that this failure did not constitute obvious error because the jury had been "clearly instructed that the defendant's guilt must be proven beyond a reasonable doubt" and subsequently told, albeit separately, that, if the jury found the defendant guilty, it would be required to make a drug quantity finding. Id. We reasoned that the instructions, while not perfect, sufficiently "connected that

burden of proof to the drug quantity determination." Id. In addition, as in the present case, the verdict form contained a multiple-choice drug quantity question that immediately followed the question regarding the defendant's guilt. Id. Under those circumstances, we concluded that the district court had not committed plain error. Id.

Likewise, here, although the judge never instructed the jury that it was required to make its drug quantity findings beyond a reasonable doubt (though, we stress, he should have), he correctly submitted the drug quantity question to the jury, instructed the jury more than once as to the government's beyond-a-reasonable-doubt burden, and instructed the jury that if it found Rivera-Ruperto guilty of a drug offense, it would also be required to make a drug quantity finding. Furthermore, on the verdict form, after each question that asked whether the jury found Rivera-Ruperto "guilty" or "not-guilty" of a drug-related offense, a question directing the jury to make a multiple-choice finding as to drug quantity immediately followed. Thus, the "link between the burden of proof and the jury's quantity determination," id. at 89, was at least as close here as it was in Barbour.

In arguing that the district court nonetheless committed plain error, Rivera-Ruperto relies on Delgado-Marrero, a case in which, applying plain error review, we remanded for resentencing on the basis of an Alleyne error. 744 F. 3d at 186-90. In Delgado-

Marrero, however, the district court had submitted drug quantity to the jury as a special verdict question only after the jury had already deliberated and returned its guilty verdict. Id. 186-87. The court never directed the jury to apply the beyond-a-reasonable-doubt standard to the special verdict question, nor did it instruct the jury that drug quantity was an element of the drug offense. Id. at 187. Under those circumstances, "given the timing and manner in which the [drug quantity] question was presented," we reasoned that we could not find that the jury was "sufficiently put on notice of [the drug quantity question's] critical import to this case." Id. Because the jurors "had no cause to understand the special verdict question as involving another element of the offense," we concluded that the court had obviously erred. Id.

By contrast, here, as we have already noted, drug quantity was submitted to the jury in the initial jury instructions and on the verdict form, and the court explicitly instructed the jury that the government was required to prove its case beyond a reasonable doubt. Therefore, Rivera-Ruperto has not cleared the obvious-error hurdle.

Moreover, even if we assumed that the district court's error was obvious and that it affected the defendant's substantial rights,[13] reversal still would not be warranted because Rivera-

[13] For all but one of Rivera-Ruperto's convictions, the jury's drug quantity finding triggered enhanced mandatory minimum

Ruperto cannot show that the error was sufficiently fundamental to threaten the fairness, integrity, or public reputation of the proceedings. See id. at 184. The evidence in this case that each of the staged drug deals involved more than 5 kilograms of sham cocaine was "overwhelming" and "essentially uncontroverted," which gives us no basis for concluding that the judicial proceedings were so affected. United States v. Cotton, 535 U.S. 625, 633 (2002) (holding that the fourth plain-error-review requirement cannot be met where the evidence of an element was "overwhelming" and "essentially uncontroverted" at trial) (quoting Johnson v. United States, 520 U.S. 461, 470 (1997)).

At trial, the government showed the jury video footage from each of the charged drug deals of a confidential informant weighing the bricks of sham cocaine, and then Rivera-Ruperto placing each brick into a suitcase. The same confidential informant also testified on the stand as to the number of kilograms of sham cocaine that were used during each deal. No conflicting evidence emerged at trial that might have possibly called into question the government's drug quantity evidence, and Rivera-Ruperto does not provide any argument on appeal as to how we might

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sentences and resulted in sentences that exceeded the statutory maximum sentence for undetermined drug quantities. Thus Rivera-Ruperto's substantial rights would have been affected had the jury instructions been obviously erroneous, and Rivera-Ruperto would have met plain error review's third prong.

conclude that, given the evidence presented, any error on the district court's part threatened the fairness, integrity, or public reputation of his trial.

Let us be clear: we think the district court's jury instructions were flawed, and that the judge should have instructed the jury that it was required to make its drug quantity findings beyond a reasonable doubt. But, as Rivera-Ruperto has not succeeded in climbing the steep road of plain error review, we cannot reverse.

III. Sentencing Challenges

Rivera-Ruperto's remaining two arguments are challenges to his sentence. He argues that the government engaged in improper sentencing manipulation when it set up the sting operation, and also that his resulting combined sentence between the two trials of 161 years and 10 months violated the Eighth Amendment's prohibition on cruel and unusual punishment. We begin for a final time by recounting what happened below.

A. Background

At the beginning of Rivera-Ruperto's sentencing hearing, defense counsel raised the issue of sentencing manipulation, arguing that the FBI had arbitrarily chosen to use "large" amounts (more than 5 kilograms) of sham cocaine for the sole purpose of enhancing Rivera-Ruperto's sentencing exposure. Defense counsel argued that, for each of the staged drug transactions, the elements

of the charged offenses would have been fulfilled with lesser amounts of sham cocaine, and that the FBI's decision to use the 8-kilogram, 12-kilogram, and 15-kilogram quantities could only have been for purposes of "mere sentencing enhancement."

Defense counsel also argued that the government's charging practices constituted impermissible sentencing manipulation because the series of five drug deals could have been charged as a single drug conspiracy, in which case Rivera-Ruperto would have been convicted of just one count of possession of a firearm in violation of 18 U.S.C. § 924(c), an offense that carries with it a mandatory minimum sentence of 5 years imprisonment, id. § 924(c)(1)(A). Instead, the government chose to charge each drug deal as a separate transaction, counsel contended, fully knowing that each "second or subsequent" conviction under the subsection carries with it a mandatory minimum sentence of 25 years imprisonment, id. § 924(c)(1)(C)(i), which must be served consecutively, id. § 924(c)(1)(D)(ii). As a result, Rivera-Ruperto's sentencing exposure in the first trial was 105-years imprisonment for the firearms convictions alone.

The government argued that there had been no improper conduct on its part. Each staged drug deal had in fact been a separate event, involving varying amounts of sham cocaine. And Rivera-Ruperto had decided each time to participate voluntarily, without regard to the amount involved.

After hearing from both sides, the district court, without making an explicit ruling on the sentencing manipulation argument, imposed the following sentence. For all but one of the drug convictions, the district court sentenced Rivera-Ruperto to concurrent 21-year and 10-month terms of imprisonment.[14] For the remaining attempted possession conviction (for which the jury had not returned a drug quantity finding), the district court sentenced Rivera-Ruperto to a term of 20 years (the statutory maximum where the amount of drugs involved is undetermined). The district court also sentenced Rivera-Ruperto to 5-years imprisonment for his conviction for possession of a firearm with an obliterated serial number during the April 27 drug deal. This 5-year sentence was to run concurrently with the 21-year-and-10-month and 20-year drug sentences.

As for the other firearms counts, the district court imposed a 105-year sentence based on the mandatory 5-year minimum term for the first conviction under 18 U.S.C. § 924(c), and four consecutive 25-year mandatory minimum terms for the four subsequent § 924 convictions. In total, Rivera-Ruperto was

[14] Reminder: the jury convicted Rivera-Ruperto of one count of conspiracy and one count of attempted possession for each of the five drug deals, and found for each count (except for the September 16 attempted possession count) that 5 kilograms or more of sham cocaine were involved.

sentenced to 126-years and 10-months' imprisonment from the first trial.

Rivera-Ruperto was then also convicted of all counts at his second trial, and the second judge imposed a sentence of 35-years imprisonment, to be served consecutively to his first sentence. This brought Rivera-Ruperto's combined sentence for his participation in six fake drug deals to 161-years and 10-months' imprisonment.

Rivera-Ruperto now appeals the sentencing manipulation issue and raises an Eighth Amendment challenge to the total length of his sentence.

B. Sentencing Manipulation

Sentencing factor manipulation occurs "where government agents have improperly enlarged the scope or scale of [a] crime." United States v. Lucena-Rivera, 750 F.3d 43, 55 (1st Cir. 2014) (alteration in original) (quoting United States v. Fontes, 415 F.3d 174, 180 (1st Cir. 2005)). Where the government engages in such manipulation, we "recognize[] the court's power to impose a sentence below the statutory mandatory minimum as an equitable remedy." Fontes, 415 F.3d at 180.

Rivera-Ruperto begins his sentencing manipulation appeal by arguing that the district court neglected to address his properly-raised sentencing manipulation objection at all, and that

this alone constitutes clear error and warrants reversal. We address this threshold argument first.

It is true that the sentencing hearing transcript reflects that the district court never made an explicit ruling on Rivera-Ruperto's sentencing manipulation objection. However, the transcript also plainly indicates that at the hearing, the judge invited defense counsel to make any statements he wished. After defense counsel argued the sentencing manipulation issue, the judge thanked him, acknowledging that he had heard the argument, and then, after allowing Rivera-Ruperto himself to speak, invited the government to respond. The judge gave the government ample time to argue the sentencing manipulation issue as well, and then thanked the government lawyer before imposing the sentence.

Based on the transcript, we think it evident that the judge effectively denied the sentencing manipulation objection when he chose not to deviate from the statutory minimums in sentencing Rivera-Ruperto for his crimes. This appears to have been clear enough to defense counsel as well, because counsel raised no objection and asked for no clarification as to the judge's ruling on the sentencing manipulation issue, even when the judge invited counsel to speak after he imposed the sentence.[15] In

[15] The judge asked, "That is the sentence of the Court. Anything else, Counsel?" Defense counsel responded by requesting abatement for the special monetary assessment (which the judge granted), but did not bring up the sentencing manipulation issue

the face of such an extraordinary sentence, the district court should have taken the time to explain why it concluded that the doctrine of sentencing factor manipulation did not warrant relief, rather than leave it for this court to draw the necessary inferences, but we nevertheless conclude that the judge effectively denied Rivera-Ruperto's sentencing manipulation claim, and we turn to its merits.

Because "[b]y definition, there is an element of manipulation in any sting operation," we reserve relief for sentencing factor manipulation only for "the extreme and unusual case," Lucena-Rivera, 750 F.3d at 55 (alteration in original) (quoting Fontes, 415 F.3d at 180), such as those situations "involving outrageous or intolerable pressure [by the government] or illegitimate motive on the part of the agents," United States v. Navedo-Ramirez, 781 F.3d 563, 580 (1st Cir. 2015) (alteration in original) (quoting United States v. Richardson, 515 F.3d 74, 86 n.8 (1st Cir. 2008)). It is the defendant who bears the burden of establishing sentencing factor manipulation by a preponderance of the evidence, and a district judge's "determination as to whether improper manipulation exists is ordinarily a factbound determination subject to clear-error review." United States v. Gibbens, 25 F.3d 28, 30 (1st Cir. 1994).

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again.

Here, Rivera-Ruperto argues, as he did below, that the government engaged in sentencing manipulation by using unnecessarily high quantities of sham drugs during the deals, by requiring Rivera-Ruperto to bring a firearm with him to each of the deals, and then by allowing him to participate in a "seemingly endless" number of those deals.[16] The government's only reason for structuring the sting operation in this way, he says, was to inflate his eventual sentence.

But Rivera-Ruperto has not met his burden to show by a preponderance of the evidence that the government's motivations were indeed improper. At trial, FBI agents testified that the government used large quantities of sham cocaine for the purpose of ensuring that the staged deals looked realistic enough to warrant the need for armed security. Although it is certainly feasible that, as Rivera-Ruperto argues, the agents could have used some lesser quantity of drugs and still made the deals look

[16] In his brief, Rivera-Ruperto appears not to reprise the argument, which he raised below, that the prosecution's charging practices (specifically, its decision to charge the five drug deals separately as opposed to as a single conspiracy) constituted impermissible sentencing manipulation. To the extent that counsel alluded to this issue at oral argument, absent exceptional circumstances, we generally consider as waived issues raised only at oral argument. See United States v. Vazquez-Rivera, 407 F.3d 476, 487-88 (1st Cir. 2005). And even if we were to make an exception here, counsel has provided no evidence that the government was driven by improper motives in charging the drug transactions, which occurred on separate days and involved distinct drug deals, as separate conspiracies.

realistic, the mere fact that they did not, without more, does not establish that the agents engaged in the kind of "extraordinary misconduct," United States v. Sánchez-Berríos, 424 F.3d 65, 78-79 (1st Cir. 2005), that is required of a successful sentencing manipulation claim.

Likewise, it was a part of the sting operation's design from the get-go that Operation Guard Shack would "hire" corrupt law enforcement officers to provide armed security at the staged drug deals, and that those officers would then, in turn, be asked to recruit others to participate in subsequent deals, thereby unwittingly assisting the sting in ferreting out additional corrupt officers.[17] Rivera-Ruperto has provided no evidence to suggest that, in telling him to bring a firearm to the deals or in allowing him to participate in multiple deals, the FBI agents engaged in "anything beyond the level of manipulation inherent in virtually any sting operation" or "lure[d] the appellant[] into committing crimes more heinous than [he was] predisposed to commit." Sánchez-Berríos, 424 F.3d at 79.

Moreover, these same arguments have already been attempted and lost by other Operation Guard Shack defendants. See

[17] As we have already noted, Rivera-Ruperto was not himself a police officer (and turned out not even to be a prison corrections officer, as he had originally claimed), but among those co-defendants that he recruited to participate in subsequent Operation Guard Shack deals, at least one was an officer in the Puerto Rico Police Department.

Navedo-Ramirez, 781 F.3d at 570 (denying defendant's argument that government's use of high drug quantities constituted sentencing factor manipulation); Lucena-Rivera, 750 F.3d at 55 (rejecting the defendant's argument that the government had prolonged its investigation for a year in order to inflate the sentence, where the government argued that it had done so to identify other conspirators, and the defendant did not otherwise present sufficient evidence of an improper motive); Sánchez-Berríos, 424 F.3d at 78-79 (denying defendant's argument that the government connived to make him bring his firearm to the deal in order to enhance his sentencing exposure). The district court therefore did not clearly err in denying Rivera-Ruperto's sentencing manipulation claim.

C. Eighth Amendment

Rivera-Ruperto's final argument on appeal is an Eighth Amendment challenge to his sentence. Rivera-Ruperto argues that his combined sentence between the two trials for 161-years and 10-months' imprisonment constitutes cruel and unusual punishment. We assume, favorably to Rivera-Ruperto, that this Eighth Amendment argument was properly preserved, and review his challenge de novo.[18]

[18] The government makes no argument whatsoever in its brief in this first appeal as to what standard of review applies, but it argues in its brief in Rivera-Ruperto's second appeal that Rivera-Ruperto's Eighth Amendment claim was not properly preserved below,

Let us begin by acknowledging that Rivera-Ruperto's 161-year and 10-month sentence is indeed extraordinarily long. But in order to deem it constitutionally infirm under the Eighth Amendment's cruel and unusual punishment clause, there are three criteria we must assess: "(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." United States v. Polk, 546 F.3d 74, 76 (1st Cir. 2008) (quoting Solem v. Helm, 463 U.S. 277, 292 (1983)). We reach the last two criteria only if we can first establish that the sentence, on its face, is grossly disproportionate to the crime. Id.

To quickly sketch out the underpinnings for Rivera-Ruperto's sentence once more, of the combined 161 years and 10 months to which Rivera-Ruperto was sentenced, the lion's share of

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and that plain error review applies. For his part, Rivera-Ruperto does not discuss the standard of review in either opening or reply brief in either appeal.

On our read of the record, at least when it comes to his first sentence, Rivera-Ruperto probably did enough to preserve an Eighth Amendment challenge. At the first sentencing hearing after the first trial, counsel for Rivera-Ruperto argued that the prescribed statutory minimums had resulted in a punishment that "goes way over, substantially way over, what's necessary for punishing these offenses," and resulted in a "horribly, horribly increased sentence which borderlines on draconian." No similar arguments were made at Rivera-Ruperto's second sentencing, but for our purposes today, we will apply the defendant-friendly de novo standard to Rivera-Ruperto's challenge to his combined sentence.

the sentence -- 130 years to be exact -- was the result of minimum sentences required by statute for Rivera-Ruperto's six firearms convictions under 18 U.S.C. § 924(c)(1)(C) (5 years for his first § 924 conviction, and 25-year consecutive sentences for each of the five subsequent convictions).[19] Because Rivera-Ruperto bases his Eighth Amendment challenge on the length of his sentence in its totality, in order to prevail, he must establish that this statutorily-mandated 130-year sentence is grossly disproportionate on its face.[20] Thus, we focus our inquiry here on the portion of his sentence stemming from the § 924(c) convictions.

In noncapital cases, the Eighth Amendment "does not require a precise calibration of crime and punishment." United States v. Graciani, 61 F.3d 70, 76 (1st Cir. 1995). Rather, "[a]t most, the Eighth Amendment gives rise to a 'narrow proportionality principle,' forbidding only extreme sentences that are significantly disproportionate to the underlying crime." Id. (quoting Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J.)). We have previously remarked that "instances of gross

[19] As for the rest of Rivera-Ruperto's term of imprisonment, as we have already explained, 21 years and 10 months of the sentence were the result of all the remaining convictions from the first trial, and 10 years of the sentence were from the remaining convictions from the second trial.

[20] In other words, Rivera-Ruperto does not argue that we could somehow find that the remaining 31 years and 10 months resulting from his other convictions were, by themselves, grossly disproportionate to the crimes for which they were imposed.

disproportionality will be hen's-teeth rare." Polk, 546 F.3d at 76. The Supreme Court has upheld against disproportionality challenges, for example, a sentence of 25 years to life under California's "three strikes law" for the theft of golf clubs, Ewing v. California, 538 U.S. 11, 30-31 (2003), and a sentence of 40 years for possession with intent to distribute nine ounces of marijuana, Hutto v. Davis, 454 U.S. 370, 370-74 (1982) (per curiam).

The dissent here argues that in those cases where the Supreme Court has upheld harsh sentences for seemingly minor crimes, the Court's rationale was justified because the offenders were recidivists and recidivism is a legitimate basis on which a legislature can elect to sentence more harshly. However, we see no reason why recidivism may be deemed such a legitimate basis, but crimes involving the combination of drugs and weapons -- like those targeted by the § 924(c) stacking regime -- may not also be deemed a legitimate basis. To the contrary, "[t]he Supreme Court has noted that the 'basic purpose' of § 924(c) is 'to combat the dangerous combination of drugs and guns'" and "has also noted that 'the provision's chief legislative sponsor . . . said that the provision seeks to persuade the man who is tempted to commit a Federal felony to leave his gun at home.'" United States v. Angelos, 433 F.3d 738, 751 (10th Cir. 2006) (quoting Muscarello v. United States, 524 U.S. 125, 126 (1998)).

Defendants have a particularly difficult time passing through the proportionality principle's narrow channel where the sentence is the result of a statutory mandate. This is because courts are required to give deference to the judgments of the legislature in determining appropriate punishments, and must "step softly and cede a wide berth to the Legislative Branch's authority to match the type of punishment with the type of crime." Polk, 546 F.3d at 76; see also Harmelin, 501 U.S. at 998 ("[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter is 'properly within the province of legislatures, not courts.'" (quoting Rummel v. Estelle, 445 U.S. 263, 275-76 (1980)). Accordingly, "[n]o circuit has held that consecutive sentences under § 924(c) violate the Eighth Amendment." United States v. Robinson, 617 F.3d 984, 991 (8th Cir. 2010) (alteration in original) (quoting United State v. Wiest, 596, F.3d 906, 912 (8th Cir. 2010)). For example, courts have upheld against Eighth Amendment challenges such sentences as a 107-year and 1-month sentence for a defendant's five § 924(c) convictions, United States v. McDonel, 362 F. App'x 523, 530 (6th Cir.), cert. denied, 562 U.S. 1061 (2010); a 132-year and 1-day sentence, of which 125 years were for § 924(c) convictions, United States v. Ezell, 265 F. App'x 70, 72 (3d. Cir. 2008); a 147-year and 8-month sentence based, in large part, on a defendant's six § 924(c) convictions, United States v. Watkins, 509 F.3d 277, 282

(6th Cir. 2007); and a 155-year sentence for seven § 924(c) convictions, United States v. Hungerford, 465 F.3d 1113, 1117-18 (9th Cir. 2006), cert. denied, 550 U.S. 938 (2007). Rivera-Ruperto has not presented any contrary authority upon which we might base a departure from our sister circuits' holdings here.

At oral argument, counsel for Rivera-Ruperto argued that we should be swayed by the fact that, in this case, the crime involved fake drug deals. A near two life-term punishment where no real drugs and no real drug dealers were involved, he contended, is a punishment that is grossly disproportionate on its face. But in coming to this sentence, the judge below was guided by and correctly employed a sentencing scheme that is written into statute -- a statute that makes no distinction between cases involving real versus sham cocaine. At each of the six stings, in fact, Rivera-Ruperto repeatedly and voluntarily showed up armed and provided security services for what he believed to be illegal transactions between real cocaine dealers. The crime of possessing a firearm in furtherance of such a drug trafficking offense is a grave one, and Congress has made a legislative determination that it requires harsh punishment. Given the weight of the case law, we see no Eighth Amendment route for second-guessing that legislative judgment.

We thus cannot conclude that Rivera-Ruperto has established that his sentence, which is largely due to his

consecutive sentences under § 924(c), is grossly disproportionate to the crime, so as to trigger Eighth Amendment protections.[21]

[21] Because Rivera-Ruperto fails to establish that his sentence is grossly disproportionate, we need not reach the last two criteria -- a comparison of his sentence with sentences received by other offenders in the same jurisdiction or a comparison of his sentence with sentences imposed for the same crime in other jurisdictions. Nevertheless, we note that in comparing Rivera-Ruperto's sentence, the dissent relies largely on the rationale of Judge Cassell in United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004), aff'd, 433 F.3d 738 (10th Cir. 2006). However, despite Judge Cassell's misgivings about the resulting sentence under § 924(c) for a 24 year old first-time offender in that case, he ultimately (and we think correctly) ruled that:

> The court's role in evaluating § 924(c) is quite limited. The court can set aside the statute only if it is irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment. After careful deliberation, the court reluctantly concludes that it has no choice but to impose the 55 year sentence. While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties. Under the controlling case law, the court must find either that a statute has no conceivable justification or is so grossly disproportionate to the crime that no reasonable argument can be made [on] its behalf. If the court is to fairly apply these precedents in this case, it must reject [the defendant's] constitutional challenges.

Angelos, 345 F. Supp. 2d at 1230.

Similarly, we cannot find that the sentence imposed pursuant to § 924(c) has no conceivable justification or is so grossly disproportionate that no reasonable argument can be made on its behalf. However unfair we may deem the life sentence here, we cannot say that the Constitution forbids it.

CONCLUSION

Our job now finished, we affirm for the reasons we have stated above. A second opinion, in which we address Rivera-Ruperto's separate challenges as to his second trial, issues herewith.

-Dissenting Opinions Follows-

TORRUELLA, Circuit Judge (Dissenting). The majority today affirms a sentence of 160 years and one month without the possibility of parole for Rivera-Ruperto. The transgression for which Rivera-Ruperto was punished in such an extreme manner was his participation as a security guard in several fake transactions, while the FBI duped Rivera-Ruperto into believing that the composite was actually illegal drugs. The FBI ensured that more than five kilograms of composite moved from one agent's hands to another at each transaction; the FBI also made sure that the rigged script included Rivera-Ruperto's possession of a pistol at each transaction. This combination -- more than five kilograms of composite, a pistol, and separate transactions -- triggered the mandatory consecutive minimums of 18 U.S.C. § 924(c), which make up 130 years of Rivera-Ruperto's sentence.

In a real drug transaction, all participants would be guilty of a crime. And, in general, the greater their knowledge of the crime would be, the harsher the law would punish them. In the fictitious transaction we are faced with today, however, only the duped participants, who had no knowledge of what truly transpired, are punished. The other participants are not only excused, but indeed rewarded for a job well done.

If Rivera-Ruperto had instead knowingly committed several real rapes, second-degree murders, and/or kidnappings, he would have received a much lower sentence; even if Rivera-Ruperto

had taken a much more active role in, and brought a gun to, two much larger real drug deals, he would still have received a much lower sentence.[22] For these and many other crimes Rivera-Ruperto would have received sentences that would see him released from prison during the natural term of his life. For the fictitious transgressions concocted by the authorities, however, Rivera-Ruperto will spend his entire life behind bars -- a sentence given to first-degree murderers, 18 U.S.C. § 1111, or those who cause death by wrecking a train carrying high-level nuclear waste. 18 U.S.C. § 1992.

From the majority's approval of the draconian sentence imposed in this case, I respectfully dissent. Rivera-Ruperto's sentence is grossly disproportionate to his offense, and therefore violates the Eighth Amendment to the Constitution. While some seemingly excessively harsh sentences have withstood Eighth Amendment challenges, such harsh sentences have been sanctioned only in the context of recidivists or those who otherwise dedicated

[22] See, e.g., United States v. Carlos Cruz, 352 F.3d 499, 509-10 (1st Cir. 2003) (affirming a sentence of 32 years given to an actual drug dealer -- who was caught with actual cocaine, heroin, cocaine base, two machine guns, a rifle, a pistol, and a large amount of ammunition -- on seven counts related to possession with intent to distribute illegal drugs and to possession of firearms); United States v. Grace, case no. 1-16-cr-0039-001 (D. Maine Dec. 13, 2016) (sentence of 15 years for conspiracy to distribute and possess 100 or more grams of heroin. Defendant had two prior convictions and admitted to importing more than 20,000 bags of cocaine).

themselves to a life of crime -- a context that explained the severity of the sentences. But Rivera-Ruperto has no criminal record, nor has he dedicated himself to a life of crime. Not even under the infamous § 924(c) has a first-time offender like Rivera-Ruperto ever been condemned to spend his entire life in jail.[23]

I. The Eighth Amendment

> The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.
>
> In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.

Graham v. Florida, 560 U.S. 48, 59 (2010).

The second classification has evolved to encompass not only the death penalty, but also prison sentences. See id. at 61-62, 82 (holding that a sentence of life without the possibility of parole for non-homicide offenses by juveniles violates the Eighth

[23] See infra Section II.A. Although § 924(c) has rightly been the subject of much scathing criticism, the statute as such is not the focus of this dissent. See, e.g., Judge Paul Cassell, Statement on Behalf of the Judicial Conference of United States from U.S. District Judge Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, 2007 WL 3133929, Fed. Sent'g Rep. 19(5) (2007). Rather, what is at issue today is the proportionality of Rivera-Ruperto's sentence, not the proportionality of sentences under § 924(c) in general.

Amendment); Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (holding that a mandatory sentence of life without parole for juvenile offenders violates the Eighth Amendment).

In the present case, this court is faced with a challenge that falls under the first classification: a challenge to the length of Rivera-Ruperto's sentence based on the circumstances of his case; in other words, an as-applied constitutional challenge to the length of Rivera-Ruperto's sentence.

The Supreme Court's jurisprudence in this first classification is animated by the principle of proportionality in punishment, as well as by deference to the legislature's judgment as to what punishment is merited.

A. Proportionality

The principle of proportionality is deeply embedded into the very roots of our legal system. Solem v. Helm, 463 U.S. 277, 284 (1983). "In 1215 three chapters of Magna Carta were devoted to the rule that 'amercements' [the most common criminal sanction at the time] may not be excessive" -- and disproportionate penalties were invalidated accordingly by the royal courts. Id. at 284-85. When the Framers adopted the language of the Eighth Amendment from the English Bill of Rights -- which provided that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted" -- they also adopted the principle of proportionality, for it was a major

theme of the era that Americans had all the rights of English subjects. Id. at 285-86.

The principle of proportionality is not merely of historical interest, however. In that same case, the Court went on to observe that "[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." Id. at 286. The Court proceeded to cite from no fewer than eleven of its precedents ranging from 1892 to 1982, in which the principle of proportionality was recognized[24] -- and

[24] To wit: O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (the Eighth Amendment "is directed ... against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged"); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); id. at 111 (Brennan, J., concurring); id. at 125–26 (Frankfurter, J., dissenting). Weems v. United States, 217 U.S. 349, 367, 372-73 (1910) ("that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," and endorsing the principle of proportionality as a constitutional standard); Robinson v. California, 370 U.S. 660, 667 (1962) ("But the question [of excessive punishment under the Eighth Amendment] cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); Enmund v. Florida, 458 U.S. 782 (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); id., at 601, (Powell, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"); Hutto v. Finney, 437 U.S. 678, 685 (1978); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Gregg v. Georgia, 428 U.S. 153, 171–72 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Hutto v. Davis, 454 U.S. 370, 374, and n.3 (1982) (per curiam) (recognizing that some prison sentences may be constitutionally disproportionate); Rummel v. Estelle, 445 U.S.

this was not even an exhaustive list. See id. at 287-88, n.11, 12. The Court proceeded to hold that a punishment of life without the possibility of parole was disproportionate to the offense of issuing a no account check in the amount of $100 (even though it was the defendant's seventh offense) -- and that this sentence therefore violated the Eighth Amendment. Id. at 303.

The Supreme Court has continued to recognize that prison sentences must be proportional under the Eighth Amendment in every case that has dealt with that question since Solem.[25] See Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring)[26] ("[t]he Eighth Amendment proportionality principle also applies to noncapital sentences"); Ewing v. California, 538 U.S. 11, 20 (2003) ("The Eighth Amendment . . . contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'") (internal citations omitted); id. at 33 (Stevens, Souter, Ginsburg, Breyer, JJ., dissenting) ("The concurrences prompt this separate writing to emphasize that proportionality review is not only capable of

263, 272, n.11 (1980) ("[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare").

[25] I here limit my consideration to non-capital cases, because capital cases fall within the second classification of Eighth Amendment proportionality challenges. Note, however, that in capital cases, the principle of proportionality certainly applies as well. See, e.g., Graham, 560 U.S. at 59-61.

[26] This concurrence has since been described as "controlling." Graham, 560 U.S. at 59.

judicial application but also required by the Eighth Amendment."); Lockyer v. Andrade, 538 U.S. 63, 72 (2003) ("Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years."); Graham, 560 U.S. at 59 ("The concept of proportionality is central to the Eighth Amendment."); Miller, 132 S. Ct. at 2463 (same).[27]

B. Deference to the Legislature

The same case law is also clear that respect for the judgment of the legislature as to what constitutes appropriate punishment is in order. See, e.g., Solem, 463 U.S. at 290 ("[w]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. 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"); Ewing, 538 U.S. at 24 (noting that "[t]hough three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important

[27] Although the position that the Eighth Amendment does not contain a proportionality principle was occasionally raised, it never achieved a majority in the Supreme Court, and has been squarely rejected. See, e.g., Miller, 132 S. Ct. at 2483 ("The [Eighth Amendment] does not contain a proportionality principle.") (Thomas, Scalia, JJ., dissenting) (internal citation omitted).

policy decisions is longstanding", and adding "[o]ur traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory'"). The proportionality principle is therefore sometimes described as "narrow," and only in "exceedingly rare" instances of "gross disproportionality" should the courts apply the Eighth Amendment to overturn a sentence. See, e.g., id. at 20, 21.

C. The Three-Step Analysis

Thus it is clear that proportionality is of crucial importance in our sentencing law, but its "precise contours . . . are unclear". Lockyer, 538 U.S. at 72, 73. It is also clear that these contours are primarily determined by deference to the legislature's judgment as to appropriate punishment. This has led to the emergence of a three-step analysis that assesses both proportionality and the legislature's judgment. In performing this three-part test, courts must look at the actual severity of a defendant's offenses (as opposed to merely looking at the laws he violated), as well as look at the actual severity of the penalty (rather than merely at the name of the penalty); and courts must give recidivism great weight when assessing the gravity of an offense, and thus when justifying a harsh sentence.

1. The Three Steps

> The controlling opinion in Harmelin explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual.

Graham, 560 U.S. at 60 (internal citations omitted; alterations in original).

2. Actual Severity of the Offense and of the Punishment

In performing the three-step analysis, the Supreme Court has considered the actual severity of the acts committed by defendants, as well as the importance of the laws they violated. See, e.g., Ewing, 538 U.S. at 18-19, 28 (detailing defendant's past nine criminal convictions and considering the dollar value of the merchandise stolen by the defendant in his latest conviction).

Similarly, the Supreme Court has been clear that for the purposes of the three-step analysis, courts must look to the actual severity of the penalty -- that is, the actual amount of time a defendant will serve in prison -- and not to what his penalty is called.

> [The defendant's] present sentence is life imprisonment without possibility of parole. . . . Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummel v. Estelle. Rummel was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily.

Solem, 463 U.S. at 297.[28]

The Supreme Court reaffirmed this approach in 2012, its most recent pronouncement on the issue:

> The two 14–year–old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. . . . State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate.

Miller, 132 S. Ct. at 2460 (original emphasis).

3. Recidivism

The Supreme Court has upheld several harsh sentences for seemingly relatively minor crimes. The Supreme Court reasoned that the severity of these sentences was justified because they involved recidivist offenders and recidivism was a legitimate

[28] The Court explicitly rejected the Government's argument that the possibility of executive clemency made a sentence of life without the possibility of parole the same as a sentence of life with the possibility of parole. Id. at 303 ("The possibility of commutation is nothing more than a hope for 'an ad hoc exercise of clemency.' It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.").

basis on which a legislature could elect to sentence more harshly. For instance, in Rummel v. Estelle, the Supreme Court upheld a sentence of life with the possibility of parole for obtaining $120.75 under false pretenses, but reasoned that:

> Moreover, given Rummel's record, Texas was not required to treat him in the same manner as it might treat him were this his first "petty property offense." Having twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.
>
> The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

Rummel, 445 U.S. at 284.

In Ewing, to use another example, the Supreme Court devoted an entire section of its opinion to explaining that the defendant's sentence of 25 years to life for stealing three golf clubs under California's three strikes law must be understood in the context of recidivism, and explained: "California's justification is no pretext. Recidivism is a serious public safety concern in California and throughout the Nation." Ewing, 538 U.S. at 26. "In weighing the gravity of Ewing's offense, we must place

on the scales not only his current felony, but also his long history of felony recidivism." Id. at 29.

Indeed, of the seven cases that address as-applied proportionality challenges under the Eighth Amendment, five deal with recidivist offenders.[29] Of the remaining two cases, one (Harmelin) deals with a career criminal (another important justification for meting out sentences that appear harsh on their face); and in the final case (Weems) the punishment was held to violate the Eighth Amendment.

II. Discussion

A. Three-Step Test

Rivera-Ruperto's case has no difficulty clearing the first step of the three-step analysis, in which "[a] court must begin by comparing the gravity of the offense and the severity of the sentence. '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then [proceed to the second step of the analysis]." Graham, 560 U.S. at 59 (internal citations omitted). In over forty years on the federal bench, I have never seen so disproportionate a penalty handed down, particularly where the offense is based on fiction. I am certainly not alone in finding this sentence to be vastly disproportionate to the offense.

[29] To wit, Rummel, Hutto, Solem, Ewing, Lockyer.

Speaking on behalf of the Judicial Conference of the United States, Judge Paul Cassell, after describing mandatory minimum sentences -- in particular under § 924(c) -- as "one-size-fits-all injustice," "bizarre," "irrational," "cruel and unusual, unwise and unjust," concluded that the mandatory minimum system of sentencing "must be abandoned in favor of a system based on principles of fairness and proportionality."[30] The Sentencing Commission, too, views sentences such as Rivera-Ruperto's as disproportionate -- not only would its Guidelines recommend a far lower sentence, but the Commission stated that sentences as a result of § 924(c) stacking "can lead to sentences that are excessively severe and disproportionate to the offense committed."[31] As an example, the Commission cited the case of Weldon Angelos, a marijuana dealer who received a sentence of 61.5 years (55 years of which was mandatory minimum sentence under

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[30] Judge Paul Cassell, Statement on Behalf of the Judicial Conference of United States from U.S. District Judge Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, 2007 WL 3133929, Fed. Sent'g Rep. 19(5) (2007) (quoting Senior Judge Vincent L. Broderick, Southern District of New York, speaking for the Criminal Law CommRRep. 19(5) (2007) (quoting Senior Judge Vincent L. Broderick, Southern District of New York, speaking for the Criminal Law Committee of the Judicial Conference in testimony before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, July 28, 1993).

[31] United States Sentencing Commission, 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 359 (2011).

§ 924(c) for bringing (but not using or brandishing) a gun to three marijuana deals)[32] -- Rivera-Ruperto, however, is faced with a sentence of 160 years (130 years due to stacking under § 924(c)).

Rivera-Ruperto's case also has no trouble passing the second step, namely a comparison of "the defendant's sentence with the sentences received by other offenders in the same jurisdiction." Graham, 560 U.S. at 60. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." Solem, 463 U.S. at 291. Rivera-Ruperto received, effectively, a mandatory sentence of life without the possibility of parole ("LWOP") -- because 160 years is about two human lifetimes. The district court has effectively condemned him to die in prison. As noted above, this court is to consider the actual time a defendant is to spend incarcerated -- in Rivera-Ruperto's case, that means his whole life. See supra Section I.C.2. If, however, one compares his offense to other offenses that would result in mandatory LWOP under federal law, then his offense pales in comparison. I have been able to locate forty-nine statutes that prescribe a mandatory penalty of LWOP.[33]

[32] Id. n.903.

[33] See United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System, App. A (2011).

Seventeen of these are for first degree murder.[34] The general statute imposing a mandatory minimum for first degree murder, 18 U.S.C. § 1111, goes back to 1790. Congress has steadily widened its application since then, and it now covers many specific situations, from killing the president, 18 U.S.C. § 1751(a), to killing an eggs product quality inspector, 21 U.S.C. § 1041(b). Other statutes mandate a sentence of LWOP for such crimes as genocide killing -- perhaps the gravest crime imaginable -- 18 U.S.C. § 1091, wrecking a train carrying high level nuclear material and thereby causing death, 18 U.S.C. § 1992, and hostage taking resulting in death, 18 U.S.C. § 1203. Rivera-Ruperto's offenses simply do not rise to the level of the offenses in this chart. The complete chart follows.

	Statute (Guideline)	**Description**	**Date Enacted[35]**	**Minimum Term[36]**
1	15 U.S.C. § 1825(a)(2)(c) (§2A1.1)	First degree murder of horse official	1970	Life**

[34] Note that the statutes permit the death penalty for first degree murder. 18 U.S.C. § 1111. Because the statutes only mandate a sentence of LWOP and the death penalty is given only rarely, I include the statutes in the comparison. After all, the statutes reflect Congress's judgment that first degree murder, without more -- already a heinous offense far worse that Rivera-Ruperto's -- is adequately punished by LWOP.

[35] I follow the Sentencing Commission here by indicating the year during which the mandatory minimum was first enacted with respect to the substantive offense proscribed by the relevant statute. See supra n.11, Mandatory Minimum Penalties in the Federal Criminal Justice System.

[36] All sentences are without the possibility of parole, for parole has been abolished in the federal system. See Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections

	Statute (Guideline)	**Description**	**Date Enacted**[35]	**Minimum Term**[36]
2	18 U.S.C. § 115 (§§2A1.1, 2A1.2, 2A2.1, 2X1.1)	First degree murder of federal official's family member	1984	Life**
3	18 U.S.C. § 175c(c)(3) (§2M6.1)	If the death of another results from a person's violation of subsection (a) (knowingly produce, engineer, synthesize, acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use, variola virus)	2004	Life
4	18 U.S.C. § 229a	Develop/produce/acquires/transfer/possess/use any chemical weapon that results in the death of another person.	1998	Life**
5	18 U.S.C. § 351 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4)	First degree murder of Congress, Cabinet, or Supreme Court member	1971	Life**
6	18 U.S.C. § 924(c)(1)(C)(ii)(§2K2.4)	Second or subsequent conviction of using or carrying a firearm during a crime of violence or drug trafficking crime and fire arm is a machine gun or destructive device or the firearm is equipped with a silencer or muffler	1986	Life
7	18 U.S.C. § 930(c) (§2K2.5)	First degree murder involving the possession or use of a firearm or other dangerous weapon in a Federal Facility	1988	Life**
8	18 U.S.C. § 1091 (§2H1.3)	Genocide killing	1988	Life**
9	18 U.S.C. § 1111 (§§2A1.1, 2A1.2)	First degree murder	1790	Life**
10	18 U.S.C. § 1114 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.2)	First degree murder of federal officers	1934	Life**
11	18 U.S.C. § 1116 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1)	First degree murder of foreign officials, official guests, or internationally protected persons	1972	Life**
12	18 U.S.C. § 1118 (§§2A1.1, 2A1.2)	Murder in a federal correctional facility by inmate sentenced to a term of life imprisonment	1994	Life**
13	18 U.S.C. § 1119(b) (§§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1)	First degree murder of a U.S. national by a U.S. national	1994	Life**

of 18 U.S.C. and 28 U.S.C.).

	Statute (Guideline)	**Description**	**Date Enacted**[35]	**Minimum Term**[36]
		while outside the United States		
14	18 U.S.C. § 1120 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4)	Murder by escaped federal prisoner	1996	Life**
15	18 U.S.C. § 1121(a)(1) (§§2A1.1, 2A1.2)	First degree murder of a state or local law enforcement officer or any person assisting in a federal crime investigation	1996	Life**
16	18 U.S.C. § 1201(a)	Kidnapping	2003	Life**
17	18 U.S.C. § 1203 (§§2A4.1, 2X1.1)	Hostage taking resulting in the death of any person	2003	Life**
18	18 U.S.C. § 1503(b)(1) (§2J1.2)	First degree murder of an officer of the court or juror	1948	Life**
19	18 U.S.C. § 1512(a)(1) (§§2A1.1, 2A1.2, 2A1.3, 2A2.1)	First degree murder of any person with the intent to prevent their attendance or testimony in an official proceeding	1982	Life**
20	18 U.S.C. § 1512(a)(2) (§§ 2A1.1, 2A1.2, 2A1.3, 2A2.1)	Obstructing justice by using, or attempting to use, physical force against another	1982	Life
21	18 U.S.C. § 1512(a)(3)(A) (§§2A1.1, 2A1.2, 2A1.3, 2A2.1)	Obstructing justice by tampering with a witness, victim, or an informant	1982	Life
22	18 U.S.C. § 1651	Piracy under the laws of the nation	1790	Life
23	18 U.S.C. § 1652	Piracy by U.S. citizen	1790	Life
24	18 U.S.C. § 1653	Piracy against the United States by an alien	1790	Life
25	18 U.S.C. § 1655	Piracy in the form of assault on a commander	1790	Life
26	18 U.S.C. § 1661	Robbery ashore by a pirate	1790	Life
27	18 U.S.C. § 1751(a) (§§2A1.1, 2A1.2, 2A1.3, 2A1.4)	Killing the President of the United States, the next in order of succession to the Office of the President, or any person who is acting as the President of the United States; or any person employed in the Executive Office of the President or Office of the Vice President	1965	Life**
28	18 U.S.C. § 1958(a) (§2E1.4)	Causing death through the use of interstate commerce facilities in the commission of a murder-for-hire	1984	Life**
29	18 U.S.C. § 1992	Wrecking train carrying high level nuclear waste and thereby causing death	2006	Life**
30	18 U.S.C. § 2113(e) (§§2A1.1, 2B3.1)	Causing death in the course of a bank robbery, avoiding	1934	Life**

	Statute (Guideline)	**Description**	**Date Enacted**[35]	**Minimum Term**[36]
		apprehension for a bank robbery, or escaping custody after a bank robbery		
31	18 U.S.C. § 2241(c) (§2A3.1)	Second or subsequent offense, engaging in a sexual act with a child under the age of 12, or engaging in a sexual act by force with a child who is above the age of 12, but under the age of 16	1986	Life**
32	18 U.S.C. § 2332g (§2K2.1)	If death of another results from knowingly produc[ing], acquir[ing], transferr[ing], or possess[ing] missile systems designed to destroy aircraft	2004	Life
33	18 U.S.C. § 2332(h)(c)(3) (§2M6.1)	If death results from knowingly produc[ing], acquir[ing], transferr[ing], or possess[ing] any weapon designed to release radiation or radioactivity at a level dangerous to human life	2004	Life
34	18 U.S.C. § 3559(c)(1)	Upon conviction for a serious violent felony, if offender has two or more prior serious violent felony convictions, or one or more prior serious violent felony convictions and one or more prior serious drug offense conviction	2003	Life†,††
35	18 U.S.C. § 3559(d)(1)	If the death of a child less than 14 years results from a serious violent felony	2003	Life
36	18 U.S.C. § 3559(e)(1)	Where a federal sex offense committed against a minor and the offender has a prior sex conviction in which minor was a victim.	2003	Life**,†
37	21 U.S.C. § 461(c) (§2N2.1)	Killing any person engaged in or on account of performance of his official duties as poultry or poultry products inspector.	1957	Life**
38	21 U.S.C. § 675 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.2, 2A2.3)	Killing any person engaged in or on account of performance of his official duties as a meat inspector	1907	Life**
39	21 U.S.C. § 841(b)(1)(A) (§2D1.1)	Second offense manufacturing, distributing, or possessing a controlled substance or counterfeit substance with intent to distribute, if death or serious bodily	1986	Life*,†

	Statute (Guideline)	**Description**	**Date Enacted**[35]	**Minimum Term**[36]
		injury results from the use of such substance 21 U.S.C. §§ 859(b) (distribution to a person under the age of 21), 860(b) (distribution or manufacture in or near a school or college), and 861(c) (employing or using a person under the age of 21 to engage in a controlled substance offense) all incorporate the minimum terms set by § 841(b)(1)(A).		
40	21 U.S.C. § 841(b)(1)(A) (§2D1.1)	Third offense, manufacturing, distributing, or possessing a controlled substance or counterfeit substance with intent to distribute 21 U.S.C. §§ 859(b) (distribution to a person under the age of 21), 860(b) (distribution or manufacture in or near a school or college), and 861(c) (employing or using a person under the age of 21 to engage in a controlled substance offense) all incorporate the minimum terms set by § 841(b)(1)(A).	1986	Life*,†
41	21 U.S.C. § 841(b)(1)(B) (§2D1.1)	Second or any subsequent offense, manufacturing, distributing or possessing a controlled substance or counterfeit substance with intent to distribute, death or serious bodily injury results 21 U.S.C. §§ 859(b) (distribution to a person under the age of 21), 860(b) (distribution or manufacture in or near a school or college), and 861(c) (employing or using a person under the age of 21 to engage in a controlled substance offense) all incorporate the minimum terms set by § 841(b)(1)(A).	1984	Life*,†

	Statute (Guideline)	**Description**	**Date Enacted**[35]	**Minimum Term**[36]
42	21 U.S.C. § 848(b) (§2D1.5)	Any offense; principal, administrator, organizer, or leader ("kingpin") of continuing criminal enterprise	1986	Life**
43	21 U.S.C. § 960(b)(1) (§2D1.5)	Second or any subsequent offense, unlawful import or export of controlled substance, death or serious bodily injury results	1986	Life*,†
44	21 U.S.C. § 960(b)(2)	Second or any subsequent offense, unlawful import or export of controlled substance, death or serious bodily injury results	1986	Life†
45	21 U.S.C. § 960(b)(3)	Second or any subsequent offense, unlawful import or export of controlled substance, death or serious bodily injury results	1986	Life†
46	21 U.S.C. § 1041(b)	Killing any person engaged in or on account of performance of his official duties under Chapter 15-Eggs Product Inspection	1970	Life**
47	42 U.S.C. § 2272(b) (§2M6.1)	Violation of prohibitions governing atomic weapons; death of another resulting	1954	Life
48	49 U.S.C. § 46502(a)(2)(B) (§§2A5.1, 2X1.1)	Committing or attempting to commit aircraft piracy in special aircraft jurisdiction of the U.S.; resulting in death of another individual	1958	Life**
49	49 U.S.C. § 46502(b)(1)(B) (§§2A5.1, 2X1.1)	Violation of Convention for the Suppression of Unlawful Seizure of Aircraft outside special aircraft jurisdiction of U.S.; resulting in death of another individual	1958	Life**

* Safety valve applies (18 U.S.C. § 3553(f)), allowing for sentencing below the mandatory minimums for certain low-level, first-time offenders.
** Statute also permits the imposition of the death penalty.
† Recidivism required for the mandatory term of life imprisonment to apply.
†† 18 U.S.C. § 3582(c)(1), commonly known as the "compassionate release" provision, applies. This provision allows certain criminals to be released at age 70 if they have served at least 30 years in prison.

If one approaches the analysis under this second step from another angle, one arrives at the same conclusion. That is, if one looks to offenses far graver than those Rivera-Ruperto

committed, one finds that they carry far less severe sentences than Rivera-Ruperto's. In sentencing to a mandatory term of 55 years a defendant who had committed three offenses under § 924(c), Judge Cassell compiled a table of offenses under federal law that would result in a shorter sentence than those 55 years -- but were clearly graver than the defendant's offenses. Judge Cassell's comparison applies even to Rivera-Ruperto's considerably longer sentence. Examples from his table include "an aircraft hijacker (293 months), a terrorist who detonates a bomb in a public place (235 months), a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months), a second-degree murderer, or a rapist." United States v. Angelos, 345 F. Supp. 2d 1227, 1244-45 (D. Utah 2004), aff'd, 433 F.3d 738 (10th Cir. 2006). Judge Cassell went on to compare the sentence before him to triple offenders, and arrived at the conclusion that,

> [a]mazingly, [the Defendant's] 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. . . . [Defendant] will receive a longer sentence than any three-time criminal, with the sole exception of a marijuana dealer who shoots three people. ([The defendant] still receives a longer sentence than a marijuana dealer who shoots two people.)

Id. at 1246.

Similarly telling is a comparison to the federal three-strikes provision, 18 U.S.C. § 3559(c). This statute mandates that a court impose a sentence of LWOP on a criminal with two prior serious violent felony convictions when this criminal commits a third such offense -- but such an offender can then be released at age 70 if he has served at least 30 years in prison under 18 U.S.C. § 3582(c)(1), the so-called "compassionate release clause." That is, if Rivera-Ruperto had committed a violent felony, been convicted, then committed a second violent felony, then been convicted again, and then committed a third violent felony, and been convicted yet again, he -- even though a seemingly incorrigible recidivist -- would have been eligible for release at age 70. As a first-time offender sentenced under § 924(c), however, Rivera-Ruperto will never be eligible for release.[37]

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[37] See also Angelos, 345 F. Supp. 2d at 1250-51 ("The irrationality only increases when section § 924(c) is compared to the federal 'three strikes' provision. Criminals with two prior violent felony convictions who commit a third such offense are subject to 'mandatory' life imprisonment under 18 U.S.C. § 3559(c)--the federal 'three–strikes' law. But then under 18 U.S.C. § 3582(c)(1)--commonly known as the 'compassionate release' provision--these criminals can be released at age 70 if they have served 30 years in prison. But because this compassionate release provision applies to sentences imposed under § 3559(c)--not § 924(c)--offenders like [the Defendant] are not eligible. Thus, while the 24–year–old [Defendant] must serve time until he is well into his 70's, a 40–year–old recidivist criminal who commits second degree murder, hijacks an aircraft, or rapes a child is potentially eligible for release at age 70. In other words, mandatory life imprisonment under the federal three-strikes law for persons guilty of three violent felony convictions is less mandatory than mandatory time imposed on the first-time offender under § 924(c).

At the third, and final, step of the analysis, "the court should . . . compare [Rivera-Ruperto's sentence] . . . with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." Graham, 560 U.S. at 60 (internal citations omitted). Rivera-Ruperto's case also clears this final step without difficulty. Sentences for offenses like Rivera-Ruperto's are much lower under state law.[38] (This brings with it a number of serious

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Again, the rationality of this arrangement is dubious.

This possibility, too, is no mere hypothetical. This morning, the court had before it for sentencing Thomas Ray Gurule. Mr. Gurule is 54–years–old with a lifelong history of criminal activity and drug abuse. He has spent more of his life incarcerated than he has in the community. He has sixteen adult criminal convictions on his record, including two robbery convictions involving dangerous weapons. His most recent conviction was for carjacking. In August 2003, after failing to pay for gas at a service station, Mr. Gurule was pursued by the station manager. To escape, Mr. Gurule broke into the home of a young woman, held her at knife point, stole her jewelry, and forced her to drive him away from the scene of his crimes. During the drive, Mr. Gurule threatened both the woman and her family.

For this serious offense--the latest in a long string of crimes for which he has been convicted--the court must apparently sentence Mr. Gurule to "life" in prison under 18 U.S.C. § 3559(c). But because of the compassionate release provision, Mr. Gurule is eligible for release after serving 30–years of his sentence. Why Mr. Gurule, a career criminal, should be eligible for this compassionate release while [the Defendant is not] is not obvious to the court.").

[38] Erik Luna and Paul Cassell, Mandatory Minimalism, 32 Cardozo L. Rev. 1, 16 (2010) ("Most drug and weapons crimes amenable to federal mandatory minimums are actually prosecuted in state courts pursuant to state laws carrying much lower

issues, such as prosecutors choosing to bring cases in federal court merely because of the higher sentences -- but such issues are not the focus of this dissent.).[39] There is also some suggestion that courts may need to look to foreign law in this step of the analysis. In cases involving the second classification of Eighth Amendment challenges -- applying categorical restrictions on the death penalty or LWOP -- the Supreme Court "has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. . . . Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question." Graham, 560 U.S. at 80. It is unclear whether in the first classification of Eighth Amendment challenges -- such as the as-applied challenge before us today -- courts should also look to

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sentences.") (emphasis added).

[39] Id. ("It is hardly disputed, however, that the possibility of severe punishment can influence the choice of whether to pursue a federal or state prosecution. For some, this prospect raises serious questions about the propriety of bringing charges in federal rather than state court, particularly where the prosecution is pursued, not because the case implicates a special national interest, but because it jacks up the potential punishment."). See also Angelos, 345 F. Supp. 2d at 1243 ("Indeed, the government conceded that [the Defendant's] federal sentence [of 55 years in prison] after application of the § 924(c) counts is more than he would have received in any of the fifty states."); Id. at 1259 ("[Defendant's] sentence [of 55 years under § 924(c)] is longer than he would receive in any of the fifty states. The government commendably concedes this point in its brief, pointing out that in Washington State [the Defendant] would serve about nine years and in Utah would serve about five to seven years.").

foreign law. I therefore note that foreign law further supports the proposition that Rivera-Ruperto's sentence is out of proportion to his crime, for "LWOP . . . scarcely exists elsewhere in the world. Yet today, the number of defendants sentenced to LWOP by American courts approaches 50,000. . . . In fact, what separates the American criminal justice system from the rest of the world, and brands it as distinctively harsh, is the number of inmates dispatched to prison for the duration of their lives, without offering a legal mechanism for freedom."[40] Indeed, Germany, France, and Italy have declared LWOP to be unconstitutional, and other European countries apply it only very rarely.[41]

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[40] Craig S. Lerner, Who's Really Sentenced to Life Without Parole?: Searching for "Ugly Disproportionalities" in the American Criminal Justice System, 2015 Wis. L. Rev. 789, 792 (2015). See Ashley Nellis, Throwing Away the Key: The Expansion of Life without Parole Sentences in the United States, Fed. Sent'g. Rep. 23(1) (2010), 2010 WL 6681093 at *30 ("In many other industrialized nations, serious offenders are typically released after a maximum prison term of no more than thirty years. For instance, in Spain and Canada, the longest sentence an offender can receive is twenty-five or thirty years. In Germany, France, and Italy, LWOP has been declared unconstitutional. In the United Kingdom, it is allowable, but used quite sparingly; according to a recent estimate, only twenty-three inmates were serving this sentence. In Sweden, parole-ineligible life sentences are permissible, but never mandatory. The Council of Europe stated in 1977 that 'it is inhuman to imprison a person for life without the hope of release,' and that it would 'be compatible neither with the modern principles on the treatment of prisoners . . . nor with the idea of the reintegration of offenders into society.'") (footnotes omitted).

[41] Id.

B. Additional Observations

The analysis could stop here. But because this is such a rare case, a few additional observations are in order.

1. Direct Comparison to Other Cases

A direct comparison of Rivera-Ruperto's offense and its sentence to offenses and their sentences that the Supreme Court held constitutional is enlightening. There are five such cases. See supra, Section I.C.3. Four of these cases involve recidivists -- and the Supreme Court weighed the recidivism heavily in its proportionality analysis. See id. The fifth case involved a career criminal, another important factor in determining the appropriate sentence. See id. However, Rivera-Ruperto is neither a recidivist nor a career criminal. He is a first-time offender who has not led a life of crime. I therefore place his crime on one side of the scales -- without adding the weight of recidivism or a career of crime -- and his sentence on the other. And the weight of the sentence dwarfs the weight of his offense.

Such a direct comparison also holds if the present case is compared to cases from other circuits. The Government, in its 28j letter, has provided this court with eleven cases of sentences from 55 to 186 years given under § 924(c).[42] The Government notes

[42] To wit: United States v. Wiest, 596 F.3d 906 (8th Cir. 2010); United States v. McDonel, 362 F. App'x 523 (6th Cir. 2010); United States v. Walker, 437 F.3d 71 (3d Cir. 2007); United States v. Watkins, 509 F.3d 277 (6th Cir. 2007); United States v. Khan,

that these lengthy sentences were "based largely on recidivist violations of § 924(c)." In fact, only three of these cases concerned recidivist offenders; six involved career criminals; the final one involved terrorists who were involved in, inter alia, planning the attacks on 9/11. It is telling indeed that in providing this court with cases in which sentences of comparable length to Rivera-Ruperto's weathered Eighth Amendment challenges, the Government has presented this court with such grave offenses as:

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461 F.3d 477 (4th Cir. 2006); United States v. Angelos, 433 F.3d 738 (10th Cir. 2006); United States v. Hungerford, 465 F.3d 1113 (9th Cir. 2006); United States v. Beverly, 369 F.3d 516 (6th Cir. 2004); United States v. Marks, 209 F.3d 577 (6th Cir. 2000); United States v. Arrington, 159 F.3d 1069 (7th Cir. 1998). The Government also cites United States v. Hernández-Soto, No. 12-2210 (1st Cir. Aug. 19, 2015); although Hernández-Soto did involve a lengthy sentence, there was no Eighth Amendment challenge in that case, and I therefore do not consider it here. Finally, the Government cites United States v. Polk, 546 F.3d 74 (1st Cir. 2008), a case in which this court rejected an Eighth Amendment challenge to a fifteen-year sentence imposed under 18 U.S.C. § 2251(e). The defendant in Polk had engaged in online conversation with a person he thought was a 13-year-old girl, and he pressured her to take sexually explicit photographs of herself and to send them to him. In addition, "The presentence investigation report told a seamy story: it revealed an earlier conviction for aggravated sexual assault on a toddler, sexual involvement with teenage girls on at least two occasions, and yet another series of sexually charged computer chats with a minor. The defendant conceded these facts . . . ." Polk, 546 F.3d at 75. I see no difficulty in reconciling the proposition that Polk's sentence of 15 years did not violate the Eighth Amendment with the proposition that Rivera-Ruperto's sentence of, effectively, LWOP, does violate the Eighth Amendment.

- Seven bank robberies (in four of which a firearm was brandished) by "a repeat bank robber whose criminal record reflects a life of violent crime interrupted only by terms of imprisonment." Arrington, 159 F.3d at 1073.
- A defendant who "was convicted of six separate robberies, each of which involved the brandishing of a firearm." Watkins, 509 F.3d at 283. Although a first-time offender, the defendant "and/or his accomplices entered the homes of victims by force and threatened to seriously harm or kill not only the victims, but, in multiple cases, their spouses and small children." Id.
- Defendants who were involved in the planning of the terrorist attack on 9/11 and who were convicted on "various counts related to a conspiracy to wage armed conflict against the United States and a conspiracy to wage armed conflict against a country with whom the United States is at peace." Khan, 461 F.3d at 83.

Thus, the Government confirms that when long sentences are applied to serious offenses by recidivists, career criminals, or terrorists, the Eighth Amendment does not protect the offenders, for the severe punishment is not grossly disproportionate to the grave crimes. But Rivera-Ruperto is a first-time offender; he is no career criminal; and he is no terrorist. Note that even in the case of recidivist, but minor, offenses, the punishment may violate

the Eighth Amendment. See Ramírez v. Castro, 365 F.3d 755 (9th Cir. 2004) (holding that a sentence of 25 years to life for a third shoplifting offense violated the Eighth Amendment).

2. Penological Goals

There is also a suggestion in the case law that courts may consider penological goals in their analysis, specifically: deterrence, retribution, rehabilitation, and incapacitation. Ewing, 538 U.S. at 24. As for deterrence, harsh punishment can have a deterrent effect, but deterrence alone cannot justify disproportionate punishment: "The inquiry focuses on whether, a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice". Rummel, 445 U.S. at 288 (Powell, J., dissenting). As for retribution, it is not clear how Rivera-Ruperto has caused any injury -- for the transaction was a sham -- but even if one ignores that obstacle, Rivera-Ruperto clearly caused less of an injury than those who receive LWOP under federal law, or, for that matter, than those who receive a lesser punishment under federal law. See supra, Section II.A. Indeed, had Rivera-Ruperto been a drug dealer himself, and transacted a vast quantity of real drugs in a single transaction to which he brought a gun, he would undoubtedly have received a much lower sentence. Id. Rehabilitation is clearly

not served here, because the current sentence means that the law has judged Rivera-Ruperto to be beyond rehabilitation -- something that may be understandable in the case of recidivists who have demonstrated that punishment does not change their ways -- but it is troubling indeed to say that a first-time offender will not be given a chance to learn from his mistakes. Finally, as to incapacitation, Rivera-Ruperto does not present such a danger to society that society needs to be protected from him forever.

This analysis of penological goals highlights another facet of the present case that deserves pause. Rivera-Ruperto's offenses involved a sham drug transaction, at which sham drugs were transacted. "Proportionality--the notion that the punishment should fit the crime--is inherently a concept tied to the penological goal of retribution." Ewing, 538 U.S. at 31 (Scalia, J., concurring). But Rivera-Ruperto did no injury, and retribution is therefore not in order. This affects the proportionality analysis. For the purposes of proportionality, participation in a sham drug deal and a real drug deal weigh differently, because retribution applies in the latter, but not in the former. That is not to say that when a sentence is given out for a sham drug deal as if it were a real drug deal, then that sentence necessarily violates the Eighth Amendment. For while such a sentence might be disproportionate, it would not necessarily be "grossly disproportionate" so as to violate the Eighth Amendment. But as

the length of a sentence for a sham deal is multiplied, so is its disproportionality. This is simply arithmetic and common sense.

3. The Legislature's Judgment

The three-step analysis already incorporates due respect for the judgment of the legislature as to the severity of penalties, and, as shown above, Rivera-Ruperto's case passes that analysis. Because the judgment of the legislature deserves great deference, however, it is worth pointing out that, on the particular facts of this case, I am not questioning the judgment of the legislature. Rather, § 924(c), as the late Chief Justice Rehnquist pointed out, presents a good example of "unintended consequences" of legislative action.[43] Indeed, § 924(c) was the result of a floor amendment (so there is no legislative history) passed by a legislature that wanted to appear tough on gun crime soon after the assassinations of Robert Kennedy and Martin Luther King, Jr.[44] Not only were the minimums in that law much lower than they have become since, but -- crucially -- the law was understood as a recidivist statute for a good 25 years. It was not until

[43] William H. Rehnquist, Luncheon Address (June 18, 1993), in U.S. Sentencing Comm'n., Proceedings of the Inaugural Symposium on Crime and Punishment in the United States, 286 (1993).

[44] Judge Paul Cassell, Statement on Behalf of the Judicial Conference of United States from U.S. District Judge Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, 2007 WL 3133929, Fed. Sent'g. Rep. 19(5) (2007) at *347.

Deal v. United States, 508 U.S. 129 (1993), that the statute became applied the way it is today -- not as a recidivist statute, but rather as one that requires stacking of mandatory minimums on first-time and recidivist offenders alike. Not only is this court generally cautious to infer anything from Congressional inaction, but in this case, it would not even make sense to try. For Congress's inaction cuts both ways: for the first 25 years after § 924(c) was enacted, the statute applied to recidivists only; after Deal, that changed -- but Congress did not act on either understanding of the statute. Furthermore, as has been pointed out countless times, applications of § 924(c) such as in the case before us today contravene the intent of Congress in many ways: most importantly, § 924(c) has led to significant sentencing disparity, directly contradicting the intent behind the major sentencing reform of the 1980s. See, e.g., Stephen Breyer, Federal Sentencing Guidelines Revisited, 1999 WL 730985, Fed. Sent'g. Rep. 11(4)(1999). This is yet another facet of the present case that distinguishes it from this court's decision in, for instance, Polk. See supra, n.20. In that case, this court was faced with a harsh sentence -- but that sentence was clearly so intended by Congress, Congress had clearly resolved that the offense in question deserved that harsh penalty. But in the present case, this court is faced not with a Congressional assessment of the gravity of this offense,

but rather with an unintended consequence of a statute hastily implemented and judicially altered.

III. Conclusion

The present case is "hen's-teeth rare". Polk, 546 F.3d at 76. It may very well be even rarer than that. I would hold that Rivera-Ruperto's sentence violates the Eighth Amendment. Indeed, the present case is so rare that it is distinguishable from the cases in which the Supreme Court rejected Eighth Amendment challenges to sentences for a term of years (already rare cases), and it is also distinguishable from cases the Government cited in which other circuits rejected Eighth Amendment challenges to sentences under § 924(c) (also rare cases). Never before has a first-time offender who has not dedicated his life to crime been condemned to spend his entire life in prison for a transgression such as Rivera-Ruperto's, not even in cases in which the transgression was real -- and Rivera's-Ruperto's transgression is fictitious.

The Government has effectively asked this court to pronounce the Eighth Amendment dead for sentences for a term of years. I respectfully refuse to join in this pronouncement. "Unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete." Graham, 560 U.S. at 85 (Stevens, Ginsburg, Sotomayor, JJ., concurring).

United States Court of Appeals
For the First Circuit

Nos. 13-2017, 13-2047, 13-2072

UNITED STATES,

Appellee,

v.

WENDELL RIVERA-RUPERTO, a/k/a Arsenio Rivera,
MIGUEL SANTIAGO-CORDERO,
DAVIEL SALINAS-ACEVEDO,

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Carmen Consuelo Cerezo, U.S. District Judge]

Before

Torruella, Lipez, and Thompson,
Circuit Judges.

H. Manuel Hernández for appellant Wendell Rivera-Ruperto.
Ignacio Fernández de Lahongrais for appellant Daviel Salinas-Acevedo.
Camille Lizarribar-Buxó on brief for appellant Miguel Santiago-Cordero.
Robert J. Heberle, Attorney, Public Integrity Section, Criminal Division, U.S. Department of Justice, with whom Juan Carlos Reyes-Ramos, Assistant United States Attorney, Nelson Pérez-Sosa, Assistant United States Attorney, Chief, Appellate Division, and Rosa Emilia Rodríguez-Vélez, United States Attorney, were on brief, for appellee.

January 13, 2017

THOMPSON, Circuit Judge. In this appeal, Defendant-Appellants Wendell Rivera-Ruperto, Daviel Salinas-Acevedo, and Miguel Santiago-Cordero challenge various aspects of their trial and sentencing. For Rivera-Ruperto, this was his second of two trials, which were presided over by different district judges. Having separately addressed Rivera-Ruperto's challenges from the first trial in a decision simultaneously released herewith, we address in this opinion Rivera-Ruperto's challenges, as well as those of Salinas-Acevedo and Santiago-Cordero, as to the second trial only.

During trial, all three defendants were convicted of various federal drug and firearms-related crimes for participating in drug deals that were staged as a part of the FBI sting operation "Operation Guard Shack," about which we say more in a bit. As a result of the convictions, each was sentenced to multiple years of imprisonment. In the present appeal, Rivera-Ruperto raises similar challenges, which we detail momentarily, to those he raised in his appeal of his first trial and sentencing. As for Salinas-Acevedo, he argues the district court erred in preventing him from presenting an entrapment defense. Santiago-Cordero presses a similar argument, challenging the judge's refusal to give an entrapment jury instruction, and also appeals the district court's denial of his post-verdict motion for acquittal.

For the reasons stated below, we affirm.

OVERVIEW

We begin with a broad overview of the facts, and later return to the specific details of the case as they relate to the individual defendants' arguments.

Operation Guard Shack, as we have explained in previous decisions,[1] was a large-scale investigation mounted by the FBI over several years in order to root out police corruption throughout Puerto Rico. Each of the stings followed a similar pattern. Undercover FBI informants recruited police officers to provide armed security at drug deals staged by the FBI. The deals took place at FBI-monitored apartments wired with hidden cameras, and involved undercover officers posing as sellers and buyers of sham cocaine. In exchange for their armed security services, the police officers were paid about $2,000 per deal.

Rivera-Ruperto, Salinas-Acevedo, and Santiago-Cordero provided armed security at several of these Operation Guard Shack sham drug deals between March and September of 2010. Rivera-Ruperto, who was not a police officer (but who was recruited because he misrepresented himself to the FBI's undercover informant as a prison corrections officer) provided armed security

[1] See, e.g., United States v. Navedo-Ramirez, 781 F.3d 563 (1st Cir. 2015); United States v. González-Pérez, 778 F.3d 3 (1st Cir. 2015); United States v. Diaz-Castro, 752 F.3d 101 (1st Cir. 2014).

at six deals, which took place on April 9, April 14, April 27, June 9, June 25, and September 16 of 2010. Salinas-Acevedo and Santiago-Cordero, who were both police officers, participated in one deal each, on March 24, 2010, and July 8, 2010, respectively.

The government charged the three defendants with one count each of conspiracy and attempted possession with intent to distribute a controlled substance, as well as possession of a firearm in relation to a drug trafficking crime. (Various other co-defendants were also charged, but their cases are not before us.) In this indictment, Rivera-Ruperto was charged for his participation in the April 9 deal only. For his participation in the five later deals, Rivera-Ruperto had already been indicted separately, tried before a different district judge, and found guilty. The first judge sentenced Rivera-Ruperto to 126-years and 10-months' imprisonment.

Several months after Rivera-Ruperto's first trial, he, Salinas-Acevedo, and Santiago-Cordero were tried together in a second proceeding, which is the subject of this appeal. The jury found Rivera-Ruperto guilty of all charges, and Salinas-Acevedo and Santiago-Cordero guilty of the conspiracy and firearms counts (it did not reach a verdict for either of them on the attempted possession count). After separate sentencing hearings, the district judge sentenced Rivera-Ruperto to 35-years imprisonment to be served consecutively with his first sentence, resulting in

a combined prison sentence from Rivera-Ruperto's two trials that totaled 161 years and 10 months. Salinas-Acevedo and Santiago-Cordero were each sentenced to 15-years and 1-month imprisonment.

The defendants timely appealed. Rivera-Ruperto challenges various aspects of the trial and sentencing, and Salinas-Acevedo and Santiago-Cordero of the trial only. We discuss below each defendant in turn, beginning with Rivera-Ruperto.

DISCUSSION

I. RIVERA-RUPERTO

As we have previously noted, we issue today a companion decision to this case affirming the district court in Rivera-Ruperto's first trial and sentencing. Rivera-Ruperto's challenges here are similar to those he raised in that first appeal. Specifically, Rivera-Ruperto argues that the district court in this second case committed reversible errors when it: (1) failed to conduct a sua sponte inquiry to determine whether Rivera-Ruperto had received ineffective assistance of counsel during the plea-bargaining stage; (2) gave erroneous jury instructions; (3) did not reduce his sentence on account of sentencing manipulation by the government; and (4) sentenced him to a grossly disproportionate sentence in violation of the Eighth Amendment. For the reasons we explain, each of these challenges fails in this second appeal, as well.

A. Lafler Claim

Rivera-Ruperto reprises a Lafler challenge that he made (and lost) in his first appeal, in which he argues that he received ineffective assistance of counsel during the plea-bargaining phase. See Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) (holding that a defendant's Sixth Amendment right to competent counsel extends to the plea-bargaining process). Before getting to his arguments, we give a brief recounting of what happened below.

1. Background

We set what is quite the complicated stage by again reminding the reader that Rivera-Ruperto eventually stood two trials, which were presided over by different district judges. Before the first trial began, Rivera-Ruperto was represented by court-appointed attorney Jose Aguayo ("Aguayo"), who remained his lawyer throughout the plea-bargaining stage.

Aguayo attempted to negotiate a plea deal for all of Rivera-Ruperto's charges across the six sham drug deals (though Rivera-Ruperto had been indicted separately for the charges). When the negotiations resulted in no plea deal, the first case proceeded toward trial, this time with Rivera-Ruperto represented by different court-appointed counsel.

Three days before that first trial was set to begin, Rivera-Ruperto's second attorney filed a Lafler motion, alleging

that Aguayo had provided ineffective assistance of counsel at the plea-bargaining stage. He argued that but for Aguayo's deficient performance, Rivera-Ruperto would have taken a 12-year plea deal that the government had previously offered during negotiations, and he requested that the court order the government to re-offer that 12-year deal.

On the morning of the day the first trial was scheduled to begin, the presiding judge held an evidentiary hearing on the issue. After considering the testimony and documentary evidence, the judge denied Rivera-Ruperto's ineffective assistance of counsel claim. For reasons that we explain in detail in our companion decision and will not rehash here, we have already affirmed the judge's denial of Rivera-Ruperto's Lafler claim as it pertains to his first trial.

Some months after the first trial and sentencing, Rivera-Ruperto, represented by the same attorney, stood trial a second time for the charged offenses stemming from his participation in the April 9 deal only. At no time did trial counsel request that the second judge consider the Lafler argument Rivera-Ruperto had raised and lost before the first judge. Therefore, no ineffective assistance of counsel claim was raised by counsel or ruled upon by the judge in this second case.

2. Analysis

On appeal, Rivera-Ruperto acknowledges that counsel during his second trial never raised the Lafler issue, but he argues that the trial judge should nevertheless have made a sua sponte inquiry and independent ruling on the ineffective assistance of counsel claim. The judge's failure to do so, he claims, was reversible error.[2]

Rivera-Ruperto never raised the Lafler issue before the second presiding judge, and we assume his claim was forfeited and not waived. We thus review the judge's purported failure to make a sua sponte inquiry on the ineffective assistance of counsel claim

[2] The government raises a threshold argument that, because Rivera-Ruperto had already obtained a ruling on the Lafler issue in the first case, he was collaterally estopped from raising an identical issue in his second trial.

Collateral estoppel, often referred to as issue preclusion, traditionally barred civil litigants from relitigating an issue that had already been decided in an earlier action. But it has also become an "established rule of federal criminal law," and "is a part of the Fifth Amendment's guarantee against double jeopardy." United States v. Collazo-Aponte, 216 F.3d 163, 198 (1st Cir. 2000), vacated on other grounds by 532 U.S. 1036 (2001). As such, our case law has permitted the use of collateral estoppel in criminal cases -- at least insofar as it is invoked by the defendant to prevent the government from relitigating a previously-decided issue. See id.

The parties disagree over whether collateral estoppel may be used here, by contrast, offensively against Rivera-Ruperto. Indeed, we know of no case in our circuit, and the government points us to none, in which we have used collateral estoppel to prevent a criminal defendant from raising an issue, as the government would have us do in this case. We need not decide this issue today, however, and will not. As we explain, even if we assume, favorably to Rivera-Ruperto, that he is not collaterally estopped from raising his Lafler claim, the claim still fails.

for plain error. United States v. Sánchez-Berríos, 424 F.3d 65, 74 (1st Cir. 2005) ("[A] waived issue ordinarily cannot be resurrected on appeal, whereas a forfeited issue may be reviewed for plain error".).

Reversal under plain error review is only proper if: (1) an error occurred; (2) it was obvious; (3) it affects the defendant's substantial rights; and (4) it is sufficiently fundamental to threaten the fairness, integrity or public reputation of the proceedings. United States v. Delgado-Marrero, 744 F.3d 167, 184 (1st Cir. 2014). Rivera-Ruperto cannot succeed in meeting these requirements. Even assuming that he clears the first three of the plain error review hurdles, Rivera-Ruperto cannot clear the fourth, because he cannot show that the judge's purported error was sufficiently fundamental to threaten the fairness, integrity or public reputation of the proceedings.

In order to meet this fourth requirement, Rivera-Ruperto would need to show that if the judge had made a sua sponte inquiry into his ineffective assistance of counsel claim, she would indeed have found that Rivera-Ruperto had received ineffective assistance at the plea-bargaining stage, and was therefore entitled to appropriate relief. But, for reasons we explain in great detail in our companion decision to this case, and which we will not belabor here, we have already determined, on de novo review, that Rivera-Ruperto was not entitled to Lafler relief, as he cannot

meet the two-part ineffective assistance of counsel test laid out in Strickland v. Washington, 466 U.S. 668, 687 (1984). See Lafler, 132 S. Ct. at 1376. Specifically, Rivera-Ruperto is unable to show either that Aguayo's performance was defective or that, even if defective performance were to be assumed, it prejudiced him. Thus, any claimed error on the second judge's part in failing to conduct a sua sponte Lafler inquiry did not threaten the fairness or integrity of Rivera-Ruperto's proceedings, and reversal on this ground is not proper.

B. Alleyne Issue

We move on to Rivera-Ruperto's appeal of the jury instructions at his second trial, the only one of Rivera-Ruperto's claimed errors that we have not also addressed in our companion decision. Rivera-Ruperto challenges the jury instructions regarding the firearms charges only, so we focus our discussion accordingly. First, a discussion of what happened below.

1. Background

Before we begin, we pause to remind the reader that at his first trial, among other offenses, Rivera-Ruperto had been charged with and convicted of one count of possession of a firearm in relation to a drug trafficking crime for his participation in each of five sham drug deals (which occurred on April 14, April 27, June 9, June 25, and September 16 of 2010). Under 18 U.S.C. § 924(c)(1)(A), a defendant who is convicted of possession of a

firearm in relation to a drug trafficking crime is subject to a mandatory minimum sentence of 5-years imprisonment on the first conviction, and then 25-years imprisonment for every subsequent conviction, id. § 924(c)(1)(C)(i), to be served consecutively, id. § 924(c)(1)(D)(ii). Accordingly, following the trial, the first district judge sentenced Rivera-Ruperto to a total of 105 years imprisonment for his firearms convictions (5 years for the first § 924(c) conviction, and 25 for each of the subsequent four convictions).

At the second trial, Rivera-Ruperto was again tried, among other offenses, for possession of a firearm in relation to a drug trafficking crime, this time for his participation in the April 9, 2010 drug deal only. Notable for Rivera-Ruperto's purposes, the government did not introduce at the second trial any evidence of Rivera-Ruperto's prior § 924 convictions from his first trial. In addition, while the judge instructed the jury as to the elements of the firearms offense, neither the jury instructions nor the verdict form included prior § 924 convictions as an "element" of the offense, or otherwise made any mention of Rivera-Ruperto's prior convictions.[3] After deliberating, the jury found Rivera-Ruperto guilty of all counts.

[3] The verdict form, which Rivera-Ruperto did not object to, simply stated: "We, the Jury, find defendant WENDELL RIVERA RUPERTO _____ (GUILTY/NOT GUILTY) as charged in Count Eighteen of the Indictment."

Prior to sentencing, Rivera-Ruperto filed a sentencing memorandum in which he argued that -- notwithstanding his five previous § 924 convictions from the first trial -- the judge should impose the 5-year mandatory minimum sentence for a first-time conviction under the firearms statute, and not the 25-year minimum for subsequent convictions. Rivera-Ruperto argued that the judge could not impose the "enhanced" mandatory minimum because the jury had not made a beyond-a-reasonable-doubt finding as to his prior § 924 convictions.

The judge disagreed, denying the request in a written order prior to sentencing. After a hearing, the judge imposed the 25-year minimum sentence for a subsequent § 924 conviction. Rivera-Ruperto now appeals.

2. Analysis

Because the sentencing memorandum Rivera-Ruperto filed before the district court preserved his Alleyne challenge, our review of his argument on appeal is de novo.[4] See Delgado-Marrero, 744 F.3d at 184.

In order to explain Rivera-Ruperto's argument, we must first give a bit of background on the relevant case law. At the

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Count Eighteen of the Indictment charged Rivera-Ruperto with "knowingly possess[ing] a firearm in furtherance of a drug trafficking crime as defined in Title 18, United States Code, Section 924(c)(2)," but made no mention of prior convictions under 18 U.S.C. § 924.

[4] Jury instruction challenges generally must be preserved at

time of Rivera-Ruperto's second trial, the rule was (and still is, as we explain in a moment) that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element of the offense to be found by a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added). In making this exception for prior convictions in Apprendi, the Supreme Court deliberately left undisturbed its holding in Almendarez-Torres v. United States, 523 U.S. 224, 226-27 (1998), which permitted the use of prior convictions to enhance sentences without a finding by the jury.

Between Rivera-Ruperto's trial and sentencing, the Supreme Court decided Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013), in which it held that the Apprendi rule applied not only to facts that increase the mandatory maximum sentence, but also to those that increase the mandatory minimum (thus overruling its prior holding in Harris v. United States, 536 U.S. 545, 568 (2002), which had limited Apprendi to the former). The Supreme Court explicitly stated, however, that its decision would leave untouched Almendarez-Torres's "narrow exception" for prior convictions. Alleyne, 133 S. Ct. at 2160 n.1.

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trial, but a defendant may preserve his challenge to an instructional Apprendi/Alleyne error by objecting at sentencing. See United States v. Pizarro, 772 F.3d 284, 296 (1st Cir. 2014). The government also concedes that our review here is de novo.

Despite this language in Alleyne itself, Rivera-Ruperto argues before us that Alleyne made Almendarez-Torres inapplicable to his case. He seems to argue that, because Alleyne expanded the Apprendi umbrella, bringing facts that increase mandatory minimums under its shelter, we should, in keeping with the spirit of Alleyne, limit Almendarez-Torres to its facts and determine that only prior convictions that increase the prescribed maximum are exempt from the Apprendi rule that such facts be found by a jury. Because his prior convictions increased the prescribed minimum, Rivera-Ruperto argues, they should be subject to Alleyne's requirement that they be found by a jury beyond a reasonable doubt.

But this is not the law. As we have already explained, this was not the Supreme Court's holding in Alleyne. Moreover, we have already rejected, in a post-Alleyne case, the argument that prior convictions must be proven to a jury beyond a reasonable doubt. See United States v. Rodriguez, 759 F.3d 113, 122 (1st Cir. 2014) (holding that the jury was not required to make a finding as to the defendant's prior convictions because Almendarez-Torres remained good law). We therefore find no error.

C. Sentencing Challenges

Rivera-Ruperto's remaining two challenges concern his sentence. He argues, as he did in his appeal from the first trial, that the government engaged in improper sentencing manipulation, and that his sentence across the two trials, for a combined 161-

years and 10-months' imprisonment, violates the Eighth Amendment's prohibition on cruel and unusual punishment. In raising these arguments in the present appeal, Rivera-Ruperto incorporates by reference the sections of his brief from his appeal in the first trial. As we have already discussed these arguments in detail in our companion decision, we keep our recounting of what happened concise.

1. Background

At the first trial, the jury found Rivera-Ruperto guilty of five counts each (one for each of the five charged drug deals) of conspiracy and attempted possession with intent to distribute 5 kilograms or more of a controlled substance and of possession of a firearm in relation to a drug trafficking crime. It also found Rivera-Ruperto guilty of one count of possession of a firearm with an obliterated serial number.

At sentencing, Rivera-Ruperto argued that the FBI's use of "large" quantities of sham cocaine at each of the drug deals, its request that he bring a firearm to each of the deals, its decision to allow him to participate in multiple deals, and its decision to charge him separately for each of the deals all constituted improper sentencing manipulation because, he claimed, the government made those choices for the sole purpose of exposing him to an enhanced sentence. The first district judge disagreed,

and sentenced Rivera-Ruperto to 126 years and 10 months for the crimes.

At his second trial, Rivera-Ruperto was again found guilty, this time of one count each of three crimes (for the remaining April 9 drug deal only): conspiracy and attempted possession with intent to distribute 5 kilograms or more of a controlled substance, and possession of a firearm in relation to a drug trafficking crime.

After a sentencing hearing, during which Rivera-Ruperto's counsel did not raise a sentencing manipulation objection, the second district judge sentenced Rivera-Ruperto to the statutory minimum of 10-years imprisonment for the conspiracy and attempt counts and the statutory minimum of 25-years imprisonment for the firearms count. Rivera-Ruperto was thus sentenced to a total of 35-years imprisonment, to be served consecutively to his 126-year and 10-month sentence from the first trial.

2. Sentencing Manipulation

Because Rivera-Ruperto did not raise a sentencing manipulation challenge before the second district judge, we review for plain error.[5] See Sánchez-Berríos, 424 F.3d 65 at 78.

[5] Rivera-Ruperto did raise his sentencing manipulation argument during his first sentencing hearing before the first district judge, and it would therefore be reasonable to treat the sentencing manipulation argument as altogether waived as to his

Rivera-Ruperto argues that the government engaged in sentencing manipulation by using unnecessarily high quantities of sham drugs during the deals, requiring Rivera-Ruperto to bring a firearm with him to each of the deals, and then allowing him to participate in a "seemingly endless" number of those deals. We need not tarry in our consideration of Rivera-Ruperto's sentencing manipulation argument here. In our companion decision, we explain in detail why Rivera-Ruperto's fact-determinative sentencing manipulation argument fails under a clear-error standard of review. In renewing his challenge as to this second trial, Rivera-Ruperto has added no new argument, choosing merely to incorporate by reference the sections of his brief from his first appeal. Because Rivera-Ruperto has adopted his briefing from the first case wholesale, the only difference in our review here is that the more rigorous plain-error standard applies. Given that Rivera-Ruperto's sentencing manipulation challenge failed under the less exacting standard in the first case, it also fails here.

3. Eighth Amendment

The same is true of Rivera-Ruperto's final challenge: his argument that his total sentence from the two trials of 161-years and 10-months' imprisonment violates the Eighth Amendment's

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second sentence. The government, however, does not argue waiver in its brief. Thus, favorably to Rivera-Ruperto, we review for plain error.

prohibition on cruel and unusual punishment. Here, Rivera-Ruperto again adopts by reference the Eighth Amendment section of his brief in the first appeal, which fails for the reasons we have already explained in our decision in that case. For the reasons stated in our companion opinion, Rivera-Ruperto's sentence is affirmed.

II. SALINAS-ACEVEDO

We turn now to Salinas-Acevedo's appeal. As we noted above, Salinas-Acevedo was indicted on charges of conspiracy to distribute and attempted possession with the intent to distribute more than 5 kilograms of cocaine, as well as of possession of a firearm in furtherance of a drug crime, for his participation in one Operation Guard Shack deal on March 24, 2010. The jury found Salinas-Acevedo guilty of the conspiracy and firearm counts, but did not reach a verdict as to the attempted possession count. Salinas-Acevedo was sentenced to a total of 15-years and 1-month imprisonment.

Salinas-Acevedo raises just one argument on appeal. He argues that the district court erred in preventing him from presenting an entrapment defense at trial. We begin with a discussion of what happened below.

A. Background

1. Lead-Up to the March 24 Deal

On March 24, 2010, fellow police officers Salinas-Acevedo, Alwin Camacho ("Camacho"), and Israel Rullán-Santiago

("Rullán-Santiago")[6] provided armed security at an Operation Guard Shack drug deal. What Salinas-Acevedo did not know at the time was that Camacho was working undercover as an FBI informant to recruit corrupt police officers for Operation Guard Shack.

Camacho had targeted Rullán-Santiago after he heard Rullán-Santiago bragging around the station that he knew drug traffickers and was "basically a delinquent using up the uniform." It was Rullán-Santiago who, in turn, recruited his friend Salinas-Acevedo. Both Rullán-Santiago and Camacho were aware that Salinas-Acevedo had a daughter and was expecting another child, and that he was in a difficult financial situation.

Originally, Salinas-Acevedo was supposed to participate in a drug transaction that had been planned for March 10, 2010. But, according to a recorded telephone conversation between Rullán-Santiago and Camacho on the night before that deal, Salinas-Acevedo, seemingly referring to his child, backed out at the last minute, telling Rullán-Santiago, "Sorry, it's gonna be difficult for me because of the little girl and the like." Hearing that Salinas-Acevedo would not make it to the deal, Camacho postponed the scheduled transaction.

Shortly thereafter, Camacho was also recorded talking to Carlos Méndez-Pérez ("Méndez-Pérez"), yet another police officer

[6] Rullán-Santiago was one of the co-defendants in this case below, but is not a party to this appeal.

who would himself participate in Operation Guard Shack and be charged separately in a different case. During the conversation, Camacho brought up Salinas-Acevedo. Camacho asked, "[S]ince you're buddies with Salinas, what do you think about Salinas?" He went on to say, "Because, um, Rullán approached him and later he gave me excuses that his daughter . . . ." Camacho told Méndez-Pérez that Rullán-Santiago had told him that Salinas-Acevedo was "willing to do anything and he's broke."

Camacho also told Méndez-Pérez that he had directed Rullán-Santiago not to "bring up that topic with [Salinas-Acevedo] anymore." But later in the conversation, Camacho told Méndez-Perez to talk to Salinas-Acevedo and have him "come by" to see him. In response, Méndez-Pérez told Camacho that he would stop by Salinas-Acevedo's house. Camacho instructed Méndez-Pérez to find out what days Salinas-Acevedo "ha[d] available," but also directed Méndez-Pérez, "[I]f he gives you a lot of crap[;] . . . [t]his isn't compulsory, this is for those who want to and know what it is."

On March 19, 2010, in another recorded phone conversation with Rullán-Santiago, Camacho directed Rullán-Santiago to "get that guy that you tried to find last time," by which he meant Salinas-Acevedo. Rullán-Santiago responded, "[L]et me see if, . . . if that dog is around here." Camacho replied,

"Well, but let me know for sure, don't do the same shitty thing to me like you did last week."

Three days later, Camacho, who by then presumably knew Salinas-Acevedo had agreed to the job, called Rullán-Santiago to "double check[]" that Rullán-Santiago and Salinas-Acevedo were both on board for the upcoming March 24 drug deal. In a not-entirely-clear exchange, Camacho asked Rullán-Santiago, "You told Salinas what it was, right, the devices?" Rullán-Santiago at first told Camacho "Yes," but then laughed and told Camacho that Salinas-Acevedo would "jump off the balcony when he sees [the drugs]."

The story ends, as we know, with the deal going down as planned, with Rullán-Santiago and Salinas-Acevedo being arrested and brought up on charges, and with Salinas-Acevedo standing trial.[7]

2. Lead-Up to Trial

Before trial, the government moved in limine to preclude Salinas-Acevedo from raising an entrapment defense in his opening statement. The district court initially denied the motion, but when the government filed a motion for reconsideration of the order, the trial court ordered Salinas-Acevedo to proffer his evidence supporting an entrapment defense.

[7] Rullán-Santiago took a plea deal, and was eventually sentenced to 19-years imprisonment.

Salinas-Acevedo proffered the following. First, he asserted that, at all relevant times, Camacho had been aware of Salinas-Acevedo's difficult financial situation because Salinas-Acevedo had previously asked Camacho about part-time opportunities at CompUSA, where Camacho worked as a part-time security guard, and Camacho had told Salinas-Acevedo that he would let him know if any opportunities opened up. Second, Salinas-Acevedo submitted a transcript of the recorded conversations between Camacho and Rullán-Santiago and Méndez-Pérez, which Salinas-Acevedo argued showed that Camacho had targeted and incited Salinas-Acevedo into participating in the sham drug deals.

Finally, Salinas-Acevedo alleged that he had been wrongly induced into committing the crime because Rullán-Santiago had told him that the March 24 transaction was a "legitimate business transaction" involving the sale of diamonds, and that it was only after he had arrived at the location that it was revealed to him that it was a drug deal. However, at the court's subsequent prompting, Salinas-Acevedo conceded that he did not have any evidence that the government (through Camacho) had directed Rullán-Santiago to tell Salinas-Acevedo that it was a legitimate transaction, or that Camacho was otherwise responsible for the alleged misinformation.

By sealed ex parte order, the court held that this was an "insufficient basis to allow defendant Salinas to mention to

the jury in opening statements a defense of entrapment," and vacated its previous order denying the government's motion in limine. Accordingly, Salinas-Acevedo was not permitted to mention entrapment in his opening statement.

At trial, over the objections of Rivera-Ruperto and Santiago-Cordero (our third co-defendant in this appeal, who we will get to know better shortly), the district court declined to give the jury an instruction on the entrapment defense. Salinas-Acevedo did not join in that objection to the jury instructions. Salinas-Acevedo now appeals, arguing that the district court erred in preventing him from raising an entrapment defense.

B. Analysis

The government argues that Salinas-Acevedo neither requested an entrapment instruction, nor joined in his co-defendants' jury instruction objection during trial, and that his claim is therefore unpreserved and subject to plain error review. See United States v. Guevara, 706 F.3d 38, 46 (1st Cir. 2013). Salinas-Acevedo argues that our review is de novo, presumably on a theory that his objection to the government's motion in limine was sufficient to preserve his objection to being denied a jury instruction on entrapment as well. But even assuming, favorably to Salinas-Acevedo, that the claim was properly preserved, the argument still fails under de novo review.

The judicially-created doctrine of entrapment exists "to prevent 'abuse[]' of the 'processes of detection and enforcement . . . by government officials' who might instigate an illegal 'act on the part of persons otherwise innocent in order to lure them to its commissions and to punish them.'" United States v. Díaz-Maldonado, 727 F.3d 130, 137 (1st Cir. 2013) (quoting Sorrells v. United States, 287 U.S. 435, 448 (1932)) (alteration and omission in original). A defendant seeking to present an entrapment defense at trial must satisfy an "entry-level burden of production." Sánchez-Berríos, 424 F.3d at 76. He must produce "evidence which fairly supports the claims" that: (1) the government agents not only induced the crime but did so improperly, and (2) that he was not already predisposed to commit the crime. Id. at 76-77.

In determining whether a defendant has met this two-part burden, a court "is to examine the evidence on the record and to draw those inferences as can reasonably be drawn therefrom, determining whether the proof, taken in the light most favorable to the defense can plausibly support the theory of the defense." United States v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998). If the defendant succeeds and the defense is introduced at trial, it becomes the government's obligation to prove beyond a reasonable doubt that no entrapment occurred.

We begin by examining whether Salinas-Acevedo has satisfied the improper inducement prong of his two-part burden.

Because Salinas-Acevedo did not deal directly with Camacho -- the "government agent" in this case, see United States v. Luisi, 482 F.3d 43, 53 (1st Cir. 2007) (explaining that an individual hired as a government informant constitutes a government agent for entrapment purposes) -- but was brought into the deal by a middleman (Rullán-Santiago), Salinas-Acevedo must rely on a derivative theory of entrapment. Under this theory, the conduct of a middleman is only attributable to the government where:

> (1) the government agent specifically targeted the defendant in order to induce him to commit illegal conduct; (2) the agent acted through the middleman after other government attempts at inducing the defendant had failed; (3) the government agent requested, encouraged, or instructed the middleman to employ a specified inducement, which could be found improper, against the targeted defendant; (4) the agent's actions led the middleman to do what the government sought, even if the government did not use improper means to influence the middleman; and (5) as a result of the middleman's inducement, the targeted defendant in fact engaged in the illegal conduct.

Luisi, 482 F.3d at 55.

Salinas-Acevedo satisfies the first two of these requirements. The recorded conversations proffered by Salinas-Acevedo show Camacho more than once asking Rullán-Santiago and Méndez-Pérez about Salinas-Acevedo, and encouraging them to get Salinas-Acevedo involved in the drug deals. Viewing the evidence in the light most favorable to Salinas-Acevedo, a jury could conclude that Camacho targeted Salinas-Acevedo and used at least

Rullán-Santiago, if not both middlemen,[8] to induce him to participate in the March 24 transaction.

In order to meet the third requirement, however, Salinas-Acevedo must show that the government (via its agent Camacho) encouraged Rullán-Santiago to employ a specific "improper" inducement.[9] Id. The key issue here is whether a specified improper inducement by Rullán-Santiago (or Méndez-Pérez) can be attributed to the government itself. The government would be responsible for any improper inducement by either middleman if

[8] It appears Méndez-Pérez may not have attempted to recruit Salinas-Acevedo. The video recording from the March 24 drug deal shows Camacho asking Salinas-Acevedo if he knows anyone "trustworthy" that he would recommend for future deals, to which Salinas-Acevedo suggests his "buddy" Méndez-Pérez, and then appears surprised to hear that Méndez-Pérez was "already part of the clan." The government argues that if Méndez-Pérez had actually induced Salinas-Acevedo into participating in the March 24 drug deal, Salinas-Acevedo would not have been surprised to hear he was already in on the conspiracy. Salinas-Acevedo does not challenge this argument.

[9] Salinas-Acevedo appears to raise an alternative argument in his reply brief that he was not required to meet this third factor at all, and that the factors laid out in Luisi, 482 F.3d at 55, are merely factors for the district court to weigh in assessing a defendant's derivative entrapment theory. We need not address an argument raised for the first time in a party's reply brief. See N. Am. Specialty Ins. Co. v. Lapalme, 258 F.3d 35, 45 (1st Cir. 2001) ("[A]bsent exceptional circumstances, an appellant cannot raise an argument for the first time in a reply brief."). Nor would it make any difference here because Salinas-Acevedo is incorrect. All five Luisi factors must be met in order to warrant an entrapment instruction based on the conduct of a middleman. See Luisi, 482 F.3d at 55; see also United States v. Navedo-Ramirez, 781 F.3d 563, 570 n.1 (1st Cir. 2015) (describing the Luisi factors as "conditions" that must be "satisfied").

its agent (Camacho) had "told" or "instructed" the middleman (Rullán-Santiago or Méndez-Pérez) to apply the inducement later deemed improper. See United States v. Rogers, 102 F.3d 641, 645 (1st Cir. 1996) ("Under the case law the government would be responsible if [its agent] told [the middleman] to apply the pressure or inducement later deemed improper, and perhaps if [the government's agent] knowingly tolerated it, but not if [the government's agent] were ignorant of it."); Luisi, 482 F.3d at 55.

For example, in Rogers, a government agent was introduced to a third-party middleman who engaged the defendant in a conspiracy to purchase drugs with the intent to sell. The defendant argued that the middleman should be treated as an "unwitting government agent." Rogers, 102 F.3d at 645. We disagreed, finding that there was insufficient evidence associating the government's agent with any improper inducement by the middleman. Id. We specifically noted that even if the middleman did act improperly, nothing in the record demonstrated that the government agent "urged, suggested, or was even aware of" the improper conduct referenced by the defendant. Id.

Similarly, here, the record negates a finding of improper inducement by the government itself (via its agent, Camacho). On multiple occasions, Camacho told his intermediaries not to pressure Salinas-Acevedo to participate in the drug deals. While Camacho repeatedly asked the middlemen to check on Salinas-

Acevedo's availability and willingness to participate, there is no evidence that he urged them to apply improper pressure on Salinas-Acevedo to join the enterprise. To the contrary, Camacho specifically directed Méndez-Pérez that "if [Salinas-Acevedo] gives you a lot of crap[;] . . . [t]his isn't compulsory, this is for those who want to and know what it is."

And although Camacho did direct Rullán-Santiago to get Salinas-Acevedo ("that guy that you tried to find last time") to participate and Rullán-Santiago responded that he would see "if that dog is around here," Camacho never insisted that Rullán-Santiago do whatever it takes to get Salinas-Acevedo to participate. Instead, Camacho's reply -- "don't do the same shitty thing to me like you did last week" -- appears to be a warning about adequate notice, given that Rullán-Santiago had backed out of the first transaction at the last minute and Camacho wanted Rullán-Santiago to let him know "for sure" -- one way or another -- whether Salinas-Acevedo would participate. Salinas-Acevedo must show not only that Camacho, through his middlemen, gave him the opportunity to commit the crime, but also a "plus" factor -- an inducement amounting to some kind of "government overreach." Guevara, 706 F.3d at 46. Even if we were to assume that actions of the middlemen here were improper, Salinas-Acevedo has failed to

produce sufficient evidence of government overreach or arm-twisting in this case.[10]

Salinas-Acevedo has thus failed to meet the improper inducement prong of his two-prong burden, and we need not proceed to the second question of whether he was already predisposed to commit the crime. The district court did not err in denying Salinas-Acevedo an opportunity to present an entrapment defense.

III. SANTIAGO-CORDERO

The last of the three defendants in this appeal, Santiago-Cordero, participated in an Operation Guard Shack drug deal on July 8, 2010, and was tried for one count each of conspiracy

[10] We do not consider Salinas-Acevedo's originally-proffered claim that Rullán-Santiago duped him into participating in the March 24 deal by misrepresenting it as a legitimate business transaction over the sale of diamonds. Salinas-Acevedo conceded below that he had no proof that it was Camacho who directed or in any way encouraged Rullán-Santiago to tell him this lie. See United States v. Gates, 709 F.3d 58, 63 (1st Cir. 2013) ("[A] party cannot concede an issue in the district court and later, on appeal, attempt to repudiate that concession and resurrect the issue. To hold otherwise would be to allow a litigant to lead a trial court down a primrose path and later, on appeal, profit from the invited error."). Because Salinas-Acevedo has no evidence connecting the purported misrepresentation to a government agent, it does not factor into our derivative entrapment analysis.

Although Salinas-Acevedo was not permitted to argue that he was lied to as part of an entrapment defense, we note that he did have an opportunity to do so at trial as part of his argument that he lacked the mens rea to commit the crime. The jury was thus presented evidence of the alleged misrepresentation -- including the phone conversation in which Rullán-Santiago told Camacho that Salinas-Acevedo would "jump off the balcony" upon seeing the drugs -- and had the opportunity to consider it in coming to its verdict.

to distribute and attempted possession with the intent to distribute more than 5 kilograms of cocaine, as well as possession of a firearm in furtherance of a drug crime. The jury found Santiago-Cordero guilty of the conspiracy and firearm counts, but did not reach a verdict as to the attempted possession count. For his crimes, Santiago-Cordero was sentenced to 15-years and 1-month imprisonment.

Santiago-Cordero raises two issues on appeal. First, like Salinas-Acevedo, he appeals the district court's ruling denying him a jury instruction on an entrapment defense. Second, he appeals the district court's denial of his motion for acquittal. We start again with what happened below.

A. Background

This has, by now, become a familiar scene with a familiar cast of characters, so we will do our best to keep our narration short. Camacho and Rullán-Santiago reprise the same roles here that they played in Salinas-Acevedo's story, as confidential FBI informant and unsuspecting middleman turned co-defendant, respectively.

As he had done with Salinas-Acevedo, Rullán-Santiago (with Camacho's blessing) recruited Santiago-Cordero for an Operation Guard Shack drug deal. Camacho was apparently aware in the lead-up to the deal that Santiago-Cordero was money-strapped, because during the phone calls in which they discussed bringing

Santiago-Cordero on board, Rullán-Santiago told Camacho that Santiago-Cordero was in need of money.

On July 8, 2010, as planned, Santiago-Cordero arrived with firearm in tow at the apartment where the sham drug deal would take place. Unaware that he was being surveilled by the FBI, Santiago-Cordero provided security services at the deal, where undercover officers posing as drug dealers exchanged sham cocaine bricks for large amounts of cash. After the deal was completed, Santiago-Cordero was paid $2,000. This was all caught on film.

Santiago-Cordero was arrested shortly thereafter, charged, and stood trial along with Rivera-Ruperto and Salinas-Acevedo. During trial, the prosecution introduced testimony from Camacho, as well as the video footage of the deal.

Toward trial's end, the court held a jury charge conference. There, counsel for Santiago-Cordero requested that the jury be instructed on an entrapment defense, which the judge denied. After deliberations, the jury found Santiago-Cordero guilty of the conspiracy and firearm counts, but did not reach a verdict as to the attempted possession count.

About a week after trial, Santiago-Cordero filed a motion for acquittal, in which he argued that his conviction should be vacated because the evidence had been insufficient to support the jury's verdict on the conspiracy count. The judge denied the motion, and, after a sentencing hearing, sentenced Santiago-

Cordero to 15-years and 1-month imprisonment. Santiago-Cordero now appeals both the sufficiency of the evidence and jury instruction issues.

B. Analysis

1. Sufficiency of the Evidence

Santiago-Cordero argues, as he did in his motion for acquittal below, that both his convictions should be overturned because: (1) the government presented inadequate evidence at trial to support a guilty verdict on the conspiracy charge, and (2) without the conspiracy conviction, there was no "drug crime" on which his conviction for possession of a firearm in furtherance of a drug crime could be based. Because Santiago-Cordero preserved his sufficiency of the evidence argument, we apply de novo review. See United States v. Adorno-Molina, 774 F.3d 116, 121 (1st Cir. 2014).

In order to return a conspiracy conviction under 21 U.S.C. § 846, the government must show that: "(1) a conspiracy existed; (2) the defendant had knowledge of the conspiracy; and (3) the defendant knowingly and voluntarily participated in the conspiracy." United States v. Maryea, 704 F.3d 55, 73 (1st Cir. 2013). Here, Santiago-Cordero takes issue with the "knowledge" element, arguing that at trial the government presented insufficient evidence that he knew the transaction involved the distribution of drugs. He contends that the video footage shows

that drugs were never explicitly discussed during the transaction, and that he never looked inside the wrapped packages to confirm that they, in fact, contained drugs. He also argues that Camacho testified at trial that he did not know what Santiago-Cordero had been told about the transaction by Rullán-Santiago, and the government never put Rullán-Santiago himself on the stand. Thus, he claims, the government's evidence was insufficient to prove beyond a reasonable doubt that he had knowledge of the nature of the conspiracy.

But a jury verdict will not be overturned so long as we find that a rational factfinder could have found that the evidence presented at trial, "together with all reasonable inferences, viewed in the light most favorable to the government," established each element of the offense beyond a reasonable doubt. United States v. Poulin, 631 F.3d 17, 22 (1st Cir. 2011). Given this difficult standard, defendants raising this claim are "rarely successful," United States v. Moran, 984 F.2d 1299, 1300 (1st Cir. 1993), and Santiago-Cordero is no exception.

To sustain a conspiracy conviction under § 846, the government "need only prove that the defendant had knowledge that he was dealing with a controlled substance, not that he had knowledge of the specific controlled substance." United States v. Woods, 210 F.3d 70, 77 (1st Cir. 2000). Here, the government introduced at trial video footage of Santiago-Cordero, who the

jury knew was a trained police officer, showing up for the July 8 deal armed with his firearm and ready to provide security.

Santiago-Cordero frisked the undercover buyer upon arrival at the deal site, and then watched as a substance packaged in bricks and marked with logos (in the same manner as cocaine is usually packaged) was exchanged for cash. See United States v. Azubike, 564 F.3d 59, 65 (1st Cir. 2009) (explaining that where the jury was shown evidence that "the modus operandi of the crime was the same as that of drug transactions sadly common in this geographic area," this "support[ed] the jury's conclusion that defendant knew he was transporting drugs"). Santiago-Cordero was then paid $2,000 for what amounted to less than an hour of work.

The government also presented the jury with a recorded phone call in which Rullán-Santiago told Camacho that he had informed Santiago-Cordero that they would be working a drug deal, as well as footage from the July 8 deal in which Camacho asks Santiago-Cordero, "Rullán already explained it to you?," and Santiago-Cordero answers in the affirmative. On this evidence, a jury had a more than adequate basis to come to its conclusion that Santiago-Cordero had knowledge of the nature of the conspiracy. We thus affirm.

2. Entrapment Defense

We turn to Santiago-Cordero's appeal of the judge's denial of an entrapment defense instruction. Because he raised

the objection below, our review is de novo. See Azubike, 564 F.3d at 64.

Having already mapped out the doctrine of derivative entrapment in our previous discussion of Salinas-Acevedo's appeal, we keep our discussion of Santiago-Cordero's entrapment argument short. Recall that a defendant is only entitled to an entrapment defense if he can establish the government agents improperly induced a crime that he was not already predisposed to commit. Sánchez-Berríos, 424 F.3d at 76-77. Here, the only evidence that Santiago-Cordero has produced of improper inducement is that the government knew he was "broke and needed money," and that the government knew that its middleman, Rullán-Santiago, was a "delinquent" and used him anyway to recruit Salinas-Acevedo.

Awareness on the part of the government of a targeted defendant's difficult financial situation does not, without more, constitute improper inducement. See, e.g., United States v. Baltas, 236 F.3d 27, 37 (1st Cir. 2001). As for Santiago-Cordero's suggestion that using Rullán-Santiago as a middleman despite his shady reputation somehow constituted improper inducement, this misses the mark, too. As we explained above, the focus in an improper inducement inquiry is on the government's tactics for recruiting the defendant. Rullán-Santiago may have been of disreputable character, but Santiago-Cordero has not identified any specific conduct on Rullán-Santiago's part, whether at

Camacho's behest or otherwise, that constitutes improper inducement. Thus, Santiago-Cordero did not meet his burden of production on an entrapment defense, and was not entitled to an instruction at trial.

CONCLUSION

For the reasons we have stated above, we affirm.

-Dissenting Opinion Follows-

TORRUELLA, Circuit Judge (Dissenting in Part). The majority holds that, as a matter of law, repeated suggestions cannot give rise to a defense of entrapment. I respectfully dissent. The purpose of sting operations is to bring willing perpetrators to justice, not to induce law-abiding citizens to err. Repeated suggestions are precisely one way to induce law-abiding citizens to err -- especially where, as here, those law-abiding citizens are in dire financial straits.

Because the majority has already laid out the facts of this case, I summarize only the key facts here. Salinas-Acevedo was in debt, had a little daughter, and another child on the way -- his financial situation was difficult, to say the very least. Both the government agent and the middlemen knew this. Still, Salinas-Acevedo showed great reluctance to become involved in any illegal drug transaction. The middleman had to approach Salinas-Acevedo multiple times in order to induce him to participate in the drug transaction. Although Salinas-Acevedo initially agreed, he later pulled out of the transaction on account of his little girl. It was only after being approached by the middleman again that Salinas-Acevedo finally gave in and reluctantly participated in the drug transaction. The middleman's actions were all on the direct instructions of the government agent. Indeed, the final instructions of the government agent to the middleman were "Hey,

get that guy," "find, find that guy," and, once more, "[f]ind that guy" -- all referring to Salinas-Acevedo.

I agree with the majority that we are here faced with derivative entrapment, and that the test for that has five prongs:

> (1) a government agent specifically targeted the defendant in order to induce him to commit illegal conduct; (2) the agent acted through the middleman after other government attempts at inducing the defendant had failed; (3) the government agent requested, encouraged, or instructed the middleman to employ a specified inducement, which could be found improper, against the targeted defendant; (4) the agent's actions led the middleman to do what the government sought, even if the government did not use improper means to influence the middleman; and (5) as a result of the middleman's inducement, the targeted defendant in fact engaged in the illegal conduct.

United States v. Luisi, 482 F.3d 43, 55 (1st Cir. 2007).

I also agree with the majority that the first two prongs of this test are satisfied -- but unlike the majority, I believe that the third prong is satisfied as well.[11]

The majority takes great comfort in the fact that "[u]nder the case law the government would be responsible if [its agent] told [the middleman] to apply the pressure or inducement

[11] Because the majority does not believe that the third prong is satisfied here, it does not reach the fourth and fifth ones. For the same reason, the majority also does not reach the improper inducement prong of the entrapment analysis. On the facts of this case, I have no difficulty finding that all these prongs have been met.

later deemed improper, and perhaps if [the government agent] knowingly tolerated it, but not if [the government agent] were ignorant of it." United States v. Rogers, 102 F.3d 641, 645 (1st Cir. 1996). The majority then reasons that there are no indications that the government agent engaged in any improper inducement; the majority emphasizes that even if the middleman somehow did engage in improper inducement, then there is no indication that the government agent had told the middleman to do so.

However, "examples of improper 'inducement'" include the use of "'repeated suggestions' which succeeded only when the defendant had lost his job and needed money for his family's food and rent." United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994)(Breyer, C.J.)(quoting United States v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993)). In the present case, the government agent told the middleman to engage in exactly this kind of improper inducement, for the government agent told the middleman to approach Salinas-Acevedo repeatedly about the drug transaction, knowing full well that Salinas-Acevedo had serious difficulties providing for his family, and that he had declined to participate numerous times.[12]

[12] Another example of improper inducement is "dogged insistence until [defendant] capitulated". Gendron, 18 F.3d at 961 (quoting United States v. Rodriquez, 858 F.2d 809, 815 (1st Cir. 1988)(alteration in original); see also United States v.

Other circuits have also found that repeated suggestions constitute improper inducement for entrapment purposes. See United States v. Mayfield, 771 F.3d 417, 435 (7th Cir. 2014)(en banc)(holding that improper inducement "may be repeated attempts at persuasion"); United States v. Kessee, 992 F.2d 1001, 1004 (9th Cir. 1993)("[The government agent] induced [the defendant] to sell narcotics by repeated entreaties, which only became successful when [the defendant] had lost both his jobs and desperately needed the money . . . A jury could have had a reasonable doubt as to inducement or lack of predisposition"); United States v. Burkley, 591 F.2d 903, 915 (D.C. Cir. 1978) ("[T]he trial judge correctly issued an entrapment instruction because (1) [the government agent]'s repeated requests constituted sufficient evidence of inducement").

It is not surprising that our sister circuits have come out this way, because the Supreme Court has found entrapment (even as a matter of law) where repeated suggestions were involved.

> Retracing the Supreme Court's key entrapment cases may help illuminate the problem . . .

Montoya, No. 15-2089, 2016 WL 7336577, at *2 (1st Cir. Dec. 19, 2016) ("[Improper inducement] might include, for example, . . . relentless insistence . . . to participate in a criminal scheme). In the present case, I have no difficulty finding that the government agent told the middleman to engage in "dogged insistence" or "relentless insistence." This dissent focuses on "repeated suggestions" in light of defendant's difficult financial situation, because the facts of this case shout out "repeated suggestions" even more loudly than they do "dogged insistence" and "persistent insistence."

> In Sorrells the Court found that an entrapment instruction was warranted . . . the informant's persistent appeal to military camaraderie qualified as a potentially entrapping inducement. [Sorrells v. United States, 287 U.S. 435, 441 (1932).] In Sherman the Court found entrapment as a matter of law . . . the inducement there consisted of repeated requests from an informant posing as a fellow recovering addict who had fallen off the wagon. [Sherman v. United States, 356 U.S. 369, 371 (1958).] In Jacobson the Court found entrapment as a matter of law . . . the inducement in that case was a two-year campaign of fake mail-order entreaties conditioning the defendant to believe that child porn was acceptable and encouraging him to purchase it. [Jacobson v. United States, 503 U.S. 540, 546–47 (1992).]
>
> . . . [In each of these cases] [t]he entrapment defense was available because the government's solicitation of the crime was accompanied by subtle and persistent artifices and devices that created a risk that an otherwise law-abiding person would take the bait.

Mayfield, 771 F.3d at 434 (emphasis added).

In sting operations, the Government should know when to take "no" for an answer, lest, as here, the "Government's quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law." Gendron, 18 F.3d at 961 (quoting Jacobson, 503 U.S. at 553-54)(emphasis added in original).

I respectfully dissent.

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

JUDICIAL DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
v.
WENDELL RIVERA-RUPERTO

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:10-CR-342-5 (CCC)

USM Number: 35452-069

Juan Matos de Juan, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) Fifteen (15), Sixteen (16), and Eighteen (18) of the Superseding Indictment on January 10, 2013. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:846&841(b)(1)(A)	Conspiracy to Possess with intent to distribute cocaine.	4/9/2010	15
21:846&841(b)(1)(A) & 18:2	Aid and Abet to Attempt to Possess with intent to distribute cocaine.	4/9/2010	16
18:924(c)(1)(A)	Possession of a firearm in furtherance of drug trafficking crime.	4/9/2010	18

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 30, 2013
Date of Imposition of Judgment

S/ Carmen Consuelo Cerezo
Signature of Judge

Carmen Consuelo Cerezo U.S. District Judge
Name and Title of Judge

July 30, 2013
Date

DEFENDANT: WENDELL RIVERA-RUPERTO
CASE NUMBER: 3:10-CR-342-5 (CCC)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 MONTHS as to counts fifteen and sixteen, to be served concurrently to each other, and 300 MONTHS as to count eighteen, to be served consecutively to the sentences imposed on counts fifteen and sixteen, for a total imprisonment term of 420 MONTHS. Said term of 420 MONTHS shall, in turn, be served consecutively to the imprisonment term imposed in criminal cases no. 10-344 and 10-356.

☑ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant serve his term of imprisonment at Allenwood and that he participate in a drug rehabilitation program.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: WENDELL RIVERA-RUPERTO
CASE NUMBER: 3:10-CR-342-5 (CCC)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

FIVE (5) YEARS as to each count, to be served concurrently with each other.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall refrain from the unlawful use of controlled substances and submit to a drug test within fifteen (15) days of release, and thereafter submit to random drug testing, no less than three (3) samples during the supervision period and not to exceed 104 samples per year under the coordination of the U.S. Probation Officer. If any such samples detect substance abuse, the defendant shall participate in an in-patient or out-patient substance abuse treatment program, for evaluation and/or treatment, as arranged by the U.S. Probation Officer until duly discharged. The defendant is required to contribute to the cost of services rendered (co-payment) in an amount arranged by the U.S. Probation Officer based on the ability to pay or availability of third party payments.

The defendant shall provide the U.S. Probation Officer access to any financial information, upon request.

The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

The defendant shall cooperate in the collection of a DNA sample, as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code § 3563(a)(9).

Defendant shall forfeit to the United States the amount of $2,000, which were the proceeds he obtained from the offenses.

Having considered defendant's financial condition, a fine is not imposed.

DEFENDANT: WENDELL RIVERA-RUPERTO
CASE NUMBER: 3:10-CR-342-5 (CCC)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: WENDELL RIVERA-RUPERTO
CASE NUMBER: 3:10-CR-342-5 (CCC)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

Defendant shall forfeit to the United States the amount of $2,000, which were the proceeds he obtained from the offenses.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

FOR THE District of PUERTO RICO

UNITED STATES OF AMERICA
V.
WENDELL RIVERA-RUPERTO

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:10-CR-344-001 (PG)
3:10-CR-356-001 (PG)

USM Number: 35313-069

JUAN F. MATOS-DE-JUAN, ESQ.
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

X was found guilty on count(s) 1-3, 5-7, 9-12, 18-20 of the **superseding indictment** in Cr. 10-344 and counts 1-3 of the **indictment** in Cr. 10-356 on April 02, 2012. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC §§ 846, 841(b)(1)(A)	Conspiracy to possess with the intent to distribute in excess of five kilograms of cocaine. A Class "A" felony.	9/16/10	1-2,5,10-11,18 in Cr. 10-344 and 1 in Cr. 10-356
21 USC §§ 846, 841(b)(1)(A), 18:2	Aid and abet to attempt to possess with the intent to distribute in excess of five (5) kilograms of cocaine. A Class "A" felony.	9/16/10	6, 19 in Cr. 10-344 and 2 in Cr. 10-356
18 USC § 924(c)(1)(A)	Possession of a firearm in furtherance of a drug trafficking offense. A Class "A" felony.	9/16/10	3,7, 12, 20 in Cr. 10-344 and 3 in Cr. 10-356
18 USC § 922(k)	Possession of a firearm with an obliterated serial number. A Class "D" felony.	4/27/10	9 in Cr. 10-344

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

X Count(s) 1-3, 5-7, 9-12, 18-20 of the indictment in Cr. 10-344 is X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 16, 2012
Date of Imposition of Judgment

S/ Juan M. Pérez-Gímenez
Signature of Judge

Juan M. Pérez-Gímenez, United States Senior Judge
Name and Title of Judge

October 31, 2012
Date

DEFENDANT: WENDELL RIVERA-RUPERTO
CASE NUMBER: 3:10-CR-344-001 (PG) / 3:10-CR-356-001 (PG)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of : 262 months as to counts 1-2,5-6,10-11,18-19 of the superseding indictment in Cr. 10-344, and count 1 in Cr. 10-356; to the maximum statutory term of 240 months as to count 2 in Cr. 10-356; and to 60 months as to count 9 of the superseding indictment in CR. 10-344; to run concurrently with each other. Count(s) 3, 7,12 & 20 of the superseding indictment in Cr. 10-344, and count 3 in Cr. 10-356, carry a consecutive term as follows: count 3 of the superseding indictment in Cr. 10-344, the imposed sentence is the mandatory consecutive term of 60 months. Pursuant to Title 18 U.S.C. Sec. 924(c)(1)(C)(ii), in the case of a second or subsequent conviction under this subsection, the defendant shall be sentenced to a consecutive term of imprisonment of not less than 25 years. As such 25 years of imprisonment is imposed as to counts 7, 12 & 20 of the superseding indictment in Cr. 10-344, and count 3 in Cr. 10-356, for a total imprisonment term of 105 years, to be served consecutively to the terms imposed above. As such, a total imprisonment term of 126 years and 10 months is imposed.

x The court makes the following recommendations to the Bureau of Prisons:
The defendant shall remain committed at MDC-Guaynabo pending trial before Hon. Judge Carmen C. Cerezo in Cr. 10-342.

X The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

☐ as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons at his own expenses :

☐ before 2 p.m. on _____ .

as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: WENDELL RIVERA-RUPERTO
CASE NUMBER: 3:10-CR-344-001 (PG) / 3:10-CR-356-001 (PG)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
5 years as to counts 1-3,5-7,10-12, 18-20 of the superseding indictment in Cr. 10-344; and count 1& 3 in Cr. 10-356; and to 3 years as to count 9 of the superseding indictment in CR. 10-344, and count 2 in CR. 10-356, to be served concurrently pursuant to Title 18 U.S.C. Sec. 3624(e). Said terms to be served under the following terms and conditions:

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime and shall observe the standard conditions of supervised release recommended by the U.S. Sentencing Commission and adopted by this Court.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release and thereafter submit to random drug testing, not to exceed 104 samples per year in accordance with the Drug Aftercare Program Policy of the U.S. Probation Office approved by this Court . If any such samples detect substance abuse, the defendant shall participate in an in-patient or out-patient substance abuse treatment program in accordance with such policy. The defendant is required to contribute to the cost of services rendered (co-payment) based on the ability to pay or availability of third party payments, as approved by the Court .

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer, pursuant to the Revised by DNA Collection Requirements, and Title 18, US Code § 3563 (a) (9). (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: WENDELL RIVERA-RUPERTO
CASE NUMBER: 3:10-CR-344-001 (PG) / 3:10-CR-356-001 (PG)

ADDITIONAL SUPERVISED RELEASE TERMS

THE DEFENDANT SHALL PROVIDE THE U.S. PROBATION OFFICER ACCESS TO ANY FINANCIAL INFORMATION UPON REQUEST.

THE DEFENDANT SHALL SUBMIT HIS PERSON, PROPERTY, HOUSE, RESIDENCE, VEHICLE, PAPERS, COMPUTERS (AS DEFINED IN 18 U.S.C. Sec.1030(e)(1)), OTHER COMMUNICATIONS OR DATA STORAGE DEVICES OR MEDIA, OR OFFICE, TO A SEARCH CONDUCTED BY A UNITED STATES PROBATION OFFICER. FAILURE TO SUBMIT TO A SEARCH MAY BE GROUNDS FOR REVOCATION, THE DEFENDANT SHALL WARN ANY OTHER RESIDENTS THAT THE PREMISES MAY BE SUBJECT TO SEARCHES PURSUANT TO THIS CONDITION.

HAVING CONSIDERED THE DEFENDANT'S FINANCIAL CONDITION, THE COURT FINDS THAT HE DOES NOT HAVE THE ABILITY TO PAY A FINE .

DEFENDANT: WENDELL RIVERA-RUPERTO
CASE NUMBER: 3:10-CR-344-001 (PG) / 3:10-CR-356-001 (PG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 1,600.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0	$ 0

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 10-342
	)	
vs.	)	
	)	
WENDELL RIVERA-RUPERTO,	)	
	)	
Defendant.	)	

SENTENCING HEARING

BEFORE THE HONORABLE CARMEN CONSUELO CEREZO

HATO REY, PUERTO RICO

TUESDAY, JULY 30, 2013, 4:35 P.M.

APPEARANCES:

FOR THE PLAINTIFF: EMILY RAE WOODS
ASSISTANT U.S. ATTORNEY

FOR THE DEFENDANT: JUAN MATOS DE JUAN, ESQ.

Proceedings recorded by mechanical stenography, transcript produced by computer.

ZULMA M. RUIZ, RMR
Federal Official Court Reporter
150 Carlos Chardón
Hato Rey, PR 00918

THE CLERK: Criminal No. 10-342, United States of America versus Wendell Rivera Ruperto for sentence.

On behalf of the Government, Assistant U.S. Attorney Emily Rae Woods.

On behalf of the Defendant, attorney Juan Matos De Juan.

Defendant is present in court and he's being assisted by the official court interpreter.

THE COURT: Again, good afternoon, Ms. Rae, are you ready for this sentence?

MS. WOODS: Good afternoon.

THE COURT: Mr. Matos, good afternoon.

MR. MATOS: Good afternoon, Judge, Juan Matos De Juan on behalf of Wendell Rivera Ruperto. Defense is ready.

THE COURT: Did you read the Court's ruling issued today?

MR. MATOS: I read the Court's ruling, I don't have the docket number for the same to make reference to it on the record, but I read it, I discussed it with my client. I had explained to him already, when we were discussing the sentencing memorandum, that this was one of the potential scenarios or outcomes, and he, I believe, understands the Court's ruling.

THE COURT: All right. And Ms. Rae, as Government counsel, were you able to read the ruling?

MS. WOODS: Yes, Your Honor, I have reviewed your ruling and I understand it.

THE COURT: All right, thank you.

Mr. Matos De Juan, did you explain to your client fully and in Spanish the contents of the probation officer's report before this afternoon?

MR. MATOS: I did, Judge, I discussed it with him. Additionally, it should be noted that this presentence report is essentially the same presentence under which he was sentenced in case 10-356 before Judge Perez-Gimenez. Like I discussed with him, the only substantial difference is that that case doesn't include a prior conviction and this presentence includes the conviction under Judge Perez-Gimenez, but he's familiar with the presentence report.

THE COURT: Mr. Rivera, did you understand what was explained to you by your attorney regarding what the probation officer reported in your case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Matos, is there any reason why Mr. Rivera-Ruperto should not be sentenced this afternoon?

MR. MATOS: I'm not aware of any reason, Judge.

THE COURT: Mr. Rivera-Ruperto, you are here today to be sentenced in this case. Is there any reason why the Court should postpone it?

THE DEFENDANT: No.

THE COURT: You may address the Court, Mr. Matos.

MR. MATOS: Thank you, Judge.

Like I was saying a few minutes before, I received the Court's ruling on the sentencing memorandum, which is docket 549. I would like to make a comment, if the Court allows.

I reviewed the result. I would beg to differ from the Court in that I believe that the ruling in -- I'm sorry if I'm mispronouncing the Supreme Court case, it's just that I've never seen this last name before, Alleyne, I believe it's pronounced that way --

THE COURT: Don't worry, we know what you're talking about.

MR. MATOS: -- does not, although Judge Thomas, who wrote the opinion, states that the court at that moment is not addressing Almendarez-Torres, which is 523 U.S. 224, because it was not squarely before it. I believe that that does not preclude this Court from saying that Almendarez-Torres' vitality has elapsed. I believe that the situation created now is pretty much the same with a felon-in-possession case. It's to a certain extent a supra felon-in-possession case, and probably from a practical point of view what's going to happen is that the defense will probably stipulate the prior conviction because it doesn't want it before the jury, just like it usually happens in felon-in-possession cases; just

that under this particular scenario it's a very specific felon in possession, as well a specific 924 prior conviction.

I believe that the logic of Almendarez, although it was not overruled specifically by the Supreme Court in Alleyne, the logic of Almendarez and the reasoning for that argument is totally overruled. Under this particular scenario, I think that his enhancement, his mandatory minimum of 25 years should not be imposed by the Court. The Court should sentence him under -- for lack of a better word -- the basic 924 five-year consecutive sentence. I believe that that enhancement should have been alleged under Alleyne, and that that should be the sentence today, particularly under the facts of this case.

The case under which he was prior sentenced, the case before Judge Perez-Gimenez, which is, like I said, 10-356, were a series of 924s. But factually what happened is this: They were essentially the same case here, agents posing as couriers, call him to give protection to a drug shipment. I think that the way in which they were charged, these were the same undercover officers working in all the cases, in all the events in which Mr. Rivera Ruperto allegedly participated, and I say "allegedly" because he has appealed Judge Perez-Gimenez's conviction, I don't want it to look like he's consenting or accepting the facts there. But it was the same group of undercover agents, under the same operation. They even had the same name, Operation Guard Shack. Charging them as separate

924(c) for each of the individuals days, was artificially creating the consecutive "plus 25" sentences for each event. This was not one 924 for one drug cargo, and then six months down the road, another organization with another group, he got into another conspiracy or another event and he got another sentence; or as usually happens, the usual scenario for these consecutive "plus 25" is you've got a prior conviction, you come out of jail and you decide to embark again in crime and you get your second conviction. This was the same course of conduct with the same group of persons. And the Government intentionally, what I call in the sentence in that case, made what I believe was sentencing entrapment, artificially creating "plus 25s" for each of the consecutive sentences.

Under this particular scenario, I believe that there's even more strength to the argument that it should be a "plus 5" and not a "plus 25" consecutive sentence for the weapon.

Having said that, Judge, I believe that the appropriate sentence is like I argued, and I believe that my client wishes to address the Court before sentence.

THE COURT: Thank you, Mr. Matos.

Mr. Rivera, you may now address the Court yourself.

MR. MATOS: I'm sorry, Judge, I didn't mean to interrupt you.

THE COURT: No, you said your client was ready to --

MR. MATOS: He has corrected me. He has corrected

* * *

REPORTER'S CERTIFICATE

I, ZULMA M. RUIZ, Official Court Reporter for the United States District Court for the District of Puerto Rico, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct computer-aided transcript of proceedings had in the within-entitled and numbered cause on the date herein set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

S/Zulma M. Ruiz

Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

THE UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No: CR-10-344-01 (PG)
vs.	)	CR-10-356-01 (PG)
	)	
WENDELL RIVERA RUPERTO,	)	
	)	
Defendant.	)	

TRANSCRIPT OF SENTENCING HEARING
HELD BEFORE
THE HONORABLE JUAN M. PEREZ-GIMENEZ
OCTOBER 16, 2012

A P P E A R A N C E S

For the United States:

Ms. Jacqueline D. Novas-Debien

For the Defendant:

Mr. Juan F. Matos-De-Juan

P R O C E E D I N G S

-- OOO --

THE COURT: Good morning.

THE CLERK: The United States of Americas versus Wendell Rivera Ruperto, in criminal cases 10-344 and 10-356. Proceedings, sentencing hearing.

On behalf of the government, Assistant US Attorney Jacqueline D. Novas-Debien. On behalf of the defendant, Attorney Juan F. Matos-De-Juan. The defendant is present in court and has been provided the services of a court interpreter.

MS. NOVAS: Good morning, Your Honor. The Government is ready to proceed.

MR. MATOS: Good morning, Your Honor. Juan F. Matos-De-Juan on behalf of Defendant Rivera Ruperto. Ready at your convenience.

THE COURT: Mr. Rivera, have you had now enough time to talk to your attorney about the pre-sentence report?

THE DEFENDANT: We spoke yesterday afternoon.

THE COURT: The question is: Have you had enough time to speak with your attorney about the contents of the pre-sentence report?

THE DEFENDANT: Yes.

THE COURT: Because the last time you were here,

you advised me that you had not had enough time to consult with him, and I gave you some time. And apparently, you did take benefit of that time that you received.

THE DEFENDANT: Yes.

THE COURT: All right.

And, Counsel, you have discussed the pre-sentence report with your client?

MR. MATOS: I did on more than one occasion, Judge.

THE COURT: Mr. Rivera, is there any information in that report that needs to be corrected?

THE DEFENDANT: I don't believe so.

THE COURT: Anything from the Government?

MS. NOVAS: No, Your Honor.

THE COURT: Counsel, is there anything you would like to state to the Court on behalf of your client before I pronounce sentence?

MR. MATOS: Yes, Judge. I believe this case brings before the Court a substantial issue of sentencing manipulation on different levels.

If the Court remembers, ^Counsel Doles filed a motion last Friday which I requested the Court permission to join, and the Court granted permission to join.

So we incorporate those arguments there. Literally, Judge, for example, if you go to page 12 of the

pre-sentence report which is docket 529 --

THE COURT: Yes.

MR. MATOS: Now, you see, five transactions there. Each one of those transactions -- the elements of the offenses have been fulfilled, if this was a sting operation, with 1 kilo of cocaine, with half a kilo of cocaine.

However, the amounts charged in each one of the those events, which were solely within the control of the United States -- how much alleged was this of sham cocaine base, how much alleged drug they put in those suitcases -- the only effect they have is driving up the guidelines.

There was a comment during the trial in which this was discussed in the jury trial by counsel for the United States that they needed to make this believable. Yet it could have been believable with a substantially lower amount.

The only effect of 12 kilograms of cocaine, of sham cocaine, is to bring this event to a specific guideline, not the 3.525, but to push it over. It's the same with the 8 kilograms in the other two cases and the 15 kilograms in the other two transactions.

And that's disquieting because it makes you wonder what was the reason for that if not for mere sentencing enhancement.

By the same token, Your Honor, the filing of these

cases, by claiming that each individual event was an abstract event, when, rather, from the get-go, from the onset -- and this was proven through the testimony -- the confidential informant, the human resource, however you want to call it, told Mr. Rivera-Ruperto, "Look. This is what we're going to do, and this is what we need you to do. We need you to provide conspiracy for the transactions."

This could have been charged as a single conspiracy, the drug conspiracy. It could have been charged as a single conspiracy.

The only effect of charging each individual event as a single count is that if it had been charged as a single conspiracy, then it would have been one 924 instead of five 924s which brings the consequence of one five-year sentence and then stacked upon that 25 years for each individual event.

So I believe that the charging practice used by the Government in this case and the manner in which the amounts were placed bring to the Court the situation of a sentencing manipulation by the Government which I don't think the Court should endorse.

As to the drugs, I believe that the Court should impose the lowest sentence possible. My recommendation would be actually, Judge, time served because we're talking about sham cocaine.

As to the weapons, Judge, that's a different situation because the sentence is statutory rather than -- you're required by statute to impose specific consecutive sentences.

However, I believe even those sentences -- the Court should examine and consider the manner in which they are stacked, and I would request the Court to consider this to be a single all-encompassing conspiracy which is really what it is and impose one sentence for a 924(c) rather than 105 years of imprisonment which would be the result of five years and then four consecutive 25-year sentences.

I think that the punishment created by the Government in the charging decision goes way over, substantially way over, what's necessary for punishing these offenses, particularly when you see that in plea negotiations, pretty much everybody got less than 15 years.

Most of the persons got between 7 and 15 years. Only two individuals that went to trial are getting this horribly, horribly increased sentence which borderlines on draconian. That would be the prayer to the Court.

THE COURT: Thank you.

Mr. Rivera, do you wish to state anything?

THE DEFENDANT: Yes. Good morning to all.

THE COURT: Good morning.

THE DEFENDANT: I want to tell the court that I

to a plea agreement to his liking. He had a fair trial, and we are here for his sentencing.

The Government requests that the mandatory minimums for the firearms charges be applied which would be 105 years and then the lower end of the guidelines for the drug counts for which he was convicted, and that will be all.

THE COURT: Thank you.

Anything else?

MR. MATOS: Yes, Judge. I was not part of the pre-plea negotiations, and I understand what the Government is saying as to a right to trial, not a right to a plea negotiation.

However, from what I understand, this gentleman was given two options: Fourteen years or life in prison. It's nowhere a balanced plea negotiation process, the use of a substantially increased sentence to bully a person into accepting a specific term in which one side is saying, "This is it, and that's what you get."

After Mr. Aguayo withdrew from the case and I joined the case, I think well over a year almost before this case proceeded to trial, repeated attempts for negotiations were done with the Government.

And I have to admit it was the most gentlemanly manner in which I have ever been told no. The Government

simply flat out refused to open any plea negotiations except it was a day before trial or two days before trial in which they offered something like 60 years.

As to the sentencing manipulation factors, I beg to differ from the Government. This was obviously a single conspiracy. It may have been broken up for administrative purposes.

Probably, in my perception, it was broken up because it would have the effect of imposing serious consecutive sentences rather than a single conspiracy and a single 924, and that would be my submission to the Court.

THE COURT: Thank you.

On April 2, 2012, the defendant, Wendell Rivera Ruperto, was found guilty by jury trial as to counts 1, 2, 3, 5, 6, 7, 9, 10, 11, 12, 18, 19, and 20 in criminal 10-344 and to counts 1, 2, and 3 in criminal case 10-356 which charge violations of Title 21, US Code, Sections 846 and 841(a)(1) and Title 18, United States Code, Section 2 and Title 21, United States Code, Sections 841(b)(1)(A) and (C) and Title 18, United States Code, Section 922(k) and 18 United States Code, Section 924(c)(1)(A) which consisted of class A, C, and D felonies.

The Court has used the November 1, 2011 edition of the United States sentencing guidelines manual to apply the now advisory guideline adjustments.

Counts 3, 7, 12, and 20 in criminal 10-344 and count 3 in criminal 10-356 are Title 18, United States Code, Section 924(c)(1)(A) offenses which carry a mandatory consecutive sentence of five years for the first count and 25 years for the remaining counts and are precluded from the guideline applications pursuant to guideline 2K2.4(b).

Pursuant to guideline 3D1.2(c), count 9 embodies conduct that is treated as a specific offense characteristic in or other adjustment to the guideline applicable to the remaining drug counts.

Pursuant to guideline 3D1.2(d), rules relative to grouping of closely related counts 1, 2, 5, 6, 10, 11, 18, and 19 in criminal 10-344 and counts 1 and 2 in criminal 10-356 were grouped together into a combined offense level since the counts involved the same general type of offense and the guideline for that type of offense determines the offense level primarily on the basis of the total amount of the harm or loss and the quantity of the substance involved.

Guideline 3D1.3(b) establishes that the offense level applicable to a group is the offense level corresponding to the aggregate quantity, in this case, a controlled substance.

Trial testimony by the FBI case agent as to the involved drug amounts in each of the transactions were totaled in order to determine the corresponding offense

UNITED STATES DISTRICT COURT)
) ss.
OF PUERTO RICO)

REPORTER'S CERTIFICATE

I, Kelly Surina, do hereby certify that the above and foregoing, consisting of the preceding 22 pages, constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability. Dated this 25th day of February, 2013.

S/Kelly Surina

Kelly Surina, CSR, RPR, CRR
Official Court Reporter
85 Calle Caribe
San Juan, PR 00917
310-904-2194

TABLE OF CHARGES AND INDICTMENTS WITH DRUG QUANTITIES

10-CR-344(PG)		***Rivera-Ruperto I*** **First Consolidated Trial**
Count	**Violation**	**Co-Defendant**
Count One 4/11-14/2010	21 U.S.C. §§ 846 and 841(a)(1) **12 kilograms sham cocaine**	William Rivera-Ruperto Yamil M. Navedo Ramirez
Count Two 4/14/2010	21 U.S.C.§ 846 and 841(a)(1) & (b)(1)(A)(ii)(II), and 18 U.S.C. § 2. **12 kilograms sham cocaine**	William Rivera-Ruperto Yamil M. Navedo Ramirez
Count Three 4/14/2010	18 U.S.C.§ 924(c)(1)(A).	William Rivera-Ruperto
Count Five 4/27/2010	21 U.S.C. §§ 846 and 841(a)(1) **8 kilograms sham cocaine**	William Rivera-Ruperto Isaias Reyes Arroyo
Count Six 4/27/2010	21 U.S.C.§ 846 and 841(a)(1) & (b)(1)(A)(ii)(II), and 18 U.S.C. § 2 **8 kilograms sham cocaine**	William Rivera-Ruperto Isaias Reyes Arroyo
Count Seven 4/27/2010	18 U.S.C.§ 924(c)(1)(A)	William Rivera-Ruperto
Count Nine 4/27/2010	18 U.S.C. §922(k)	William Rivera-Ruperto
Count Ten 6/4-9/2010	21, U.S.C. §§ 846 and 841(a)(1) **8 kilograms sham cocaine**	William Rivera-Ruperto Omar Torres Ruperto Luis A. Gonzalez Torres
Count Eleven 6/9/2010	21 U.S.C.§ 846 and 841(a)(1) & (b)(1)(A)(ii)(II), and 18 U.S.C. § 2 **8 kilograms sham cocaine**	William Rivera-Ruperto Omar Torres Ruperto Luis A. Gonzalez Torres

10-CR-344(PG)		***Rivera-Ruperto I*** **First Consolidated Trial**
Count Twelve 6/9/2010	18 U.S.C.§ 924(c)(1)(A)	William Rivera-Ruperto
Count Eighteen 6/25/2010	21 U.S.C. §§ 846 and 841(a)(1) **15 kilograms sham cocaine**	William Rivera-Ruperto Omar Torres Ruperto Luis A. Gonzalez Torres
Count Nineteen 6/25/2010	21 U.S.C.§ 846 and 841(a)(1) & (b)(1)(A)(ii)(II), and 18 U.S.C. § 2 **15 kilograms sham cocaine**	William Rivera-Ruperto Omar Torres Ruperto Luis A. Gonzalez Torres
Count Twenty 6/25/2010	18 U.S.C.§ 924(c)(1)(A)	William Rivera-Ruperto

10-CR-356(PG)		***Rivera-Ruperto I*** **First Consolidated Trial**
Count	**Violation**	**Co-defendant**
Count One 9/16/2010	21 U.S.C. §§ 846 and 841(a)(1). **15 kilograms sham cocaine**	William Rivera-Ruperto Isaias Reyes Arroyo Jonathan Ortiz Muñiz
Count Two 9/16/2010	21 U.S.C.§ 846 and 841(a)(1) & (b)(1)(A)(ii)(II), and 18 U.S.C. § 2 **15 kilograms sham cocaine**	William Rivera-Ruperto Isaias Reyes Arroyo Jonathan Ortiz Muñiz
Count Three 9/16/2010	18 U.S.C.§ 924(c)(1)(A)	William Rivera-Ruperto

10-CR-342(CCC)		***Rivera-Ruperto II*** **Second Trial**
Count	**Violation**	**Co-Defendant**
Count Fifteen 4/9/2010	21 USC 846 and 841(b)(1)(A) **12 kilograms sham cocaine**	William Rivera-Ruperto Israel Rullan Santiago
Count Sixteen 4/9/2010	21 USC 846 and 841(b)(1)(A) 18 USC 2 **12 kilograms sham cocaine**	William Rivera-Ruperto Israel Rullan Santiago
Count Eighteen 4/9/2010	18 USC 924(c)(1)(C)	William Rivera-Ruperto