disability or restraint" on an individual who has lived for two years in this country, whose wife is a permanent resident here, who owns considerable property, has cultural and business interests here and thus has a "vested interest in his residence." Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2nd Cir. 1947). Time and again, courts have recognized that deportation or exclusion for an alien who has established a residence here is a devastating disruption, since such aliens "may live within a state for many years, work in the state and contribute to the economic growth of the state." Leger v. Saites, 321 F. Supp. 250 (E.D. Pa. 1970), aff'd. sub nom; Graham v. Richardson, 403 U.S. 365, 376 (1971). In short, aliens, like citizens, form permanent attachments to their adopted communities, and deportation, like denationalization, results in

"the total destruction of the individual's status in organized society." Trop v. Dulles, 356 U.S. 86, 101 (1958). As such, deportation can only be seen as an "affirmative disability." In addition, it is akin to exile, which has historically been regarded as punishment.

2. Under American law, scienter is a requirement of the offense (illicit possession of marijuana) that is the basis for the proposed exclusion. (See Point I of this Memorandum.)

3. Exclusion for past conviction of possession of marijuana can only be directed towards the "traditional aims of punishment--retribution and deterrence," since no other purposes would be served by the exclusion once a proscribed act has already been committed.

4. The behavior to which the exclusion proceeding is directed is a crime under American law.

5. The sanction is excessive in terms of the alternative purpose assigned for it--the stopping

of drug trafficking--to which Lennon's crime has no relationship whatsoever.

Once it is clear that the proceeding against Lennon is penal in nature, he must be accorded all the protection guaranteed a defendant in a criminal proceeding, including due process procedures and rights under the Eighth Amendment.

In Powell v. Texas, 392 U.S. 514 (1968) the Supreme Court noted that "the cruel and unusual language of the Eighth Amendment immediately follows language that prohibits excessive bail and excessive fines [italics in original]. The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'"

In O'Neill v. Vermont, 144 U.S. 451 (1889), the punishment of fifty-four years at hard labor for theft of liquor was struck down on Eighth Amendment grounds because "[t]he inhibition [against cruel and unusual punishments] is directed not only against

punishments of the character mentioned, [torture] but against all punishments which by their excessive length or severity are greatly disporportioned to the offenses charged. The whole inhibition is against that which is excessive..." at 458.

In short, the Supreme Court has "made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those which were cruel." Furman v. Georgia, U.S. , 33 L. Ed. 2d 346 (1973).

As Justice Marshall stated in his opinion in Furman v. Georgia, a given punishment may not be cruel and unusual at one time, but mah become so at another. This concept has been stated by the Court on several occasions. In Trop v. Dulles, 356 U.S. 86 (1958) it said: [T]he [Eighth] Amendment must draw its meaning from the evolving standards

of decency that mark the progress of an evolving society." In Robinson v. California, 370 U.S. 660 (1962), the Court held that the Eighth Amendment is not a static concept, "but one that must be continually reexamined 'in the light of contemporary human knowledge.'"

Thus, even though exclusion of an alien for possession of marijuana might once have been reasonable and permissible, given what we know today about the relatively harmless nature of the drug, the penalty of exclusion has become excessive. This was the reasoning of the Michigan Court of Appeals in People v. Sinclair, supra, which held that a sentence of twenty years in prison was excessive for possession of marijuana.

One test of excessiveness is whether a penalty serves a valid legislative purpose. In

this case the penalty to be imposed on Appellant serves no legislative purpose whatsoever. It will not stop the spread of dangerous narcotic drugs because John Lennon is not and has never been a user or seller of narcotics and the record indicates that he was not even a user of marijuana at the time of his arrest. It will not prevent the entry into the United States of a dangerous or undesirable person, because John Lennon is neither. Indeed, the fact that he has been granted a Third Preference visa shows that he is very desirable, if his artistic accomplishments are not proof enough. No allegation has been made that in the two years he has been living here he has broken any laws or in any way shown himself to be unworthy of being allowed to remain. If the government believes that he may violate the drug laws in the

future, it has the option of prosecuting him at that time. In short, no valid state interest is served by excluding him.

The Supreme Court said in Furman v. Georgia, supra at 403:

> "...[W]here a punishment is not excessive and serves a valid legislative purpose it still may be invalid if popular sentiment abhors it. For example, if the evidence clearly demonstrated that capital punishment served valid legislative purposes, such punishment, would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable. A general abhorrence on the part of the public would, in effect, equate a modern punishment with those barred since the adoption of the Eighth Amendment."

Considerable evidence was produced below, including

affidavits from respected public figures and petitions from ordinary citizens, attesting to the fact that the public, both in the United States and abroad, finds the idea of a government deporting a great artist because he once possessed marijuana to be both abhorrent and ridiculous. Not since 1953 when, in a similar fit of paranoia, the Immigration and Naturalization Service excluded Charlie Chaplin from the United States--an act which subsequently caused the government considerable embarrassment--has there been such a public outcry against a proposed deportation.

The public today, both at home and abroad, simply does not find such dire punishment for marijuana smokers to be morally acceptable, and for this reason the penalty does not meet constitutional standards.

C. The Penalty of Exclusion for a First-Time Petty Drug Offense is Discriminatory

Millions of American citizens smoke marijuana at least occasionally. A recent nationwide survey revealed that 61.7% of the country's college students have used marijuana at least once. Over one-third of the students, 38.6%, stated that they had used marijuana ten or more times.[1]

Few marijuana-law violators are ever prosecuted. As of 1971 only one in every 5,500 marijuana smokers was being caught and sent to prison.[2] As of that same year twenty-six states

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1. Playboy's Student Survey: 1971

2. Kaplan, supra at 34

had no minimum sentence for the sale of marijuana.

In Graham v. Richardson, 403 U.S. 365, 372 (1971), the Supreme Court said that classifications on the basis of alienage "are inherently suspect and subject to close judicial scrutiny." The government therefore must justify such a discriminatory scheme by showing that it is necessary to promote a compelling state interest and that no less drastic alternative scheme exists that would effect the same purpose.

There is no question that stopping drug trafficking is a compelling state interest. Discriminating against aliens by imposing a severe penalty on them for a crime for which Americans daily go unpunished, however, in no way promotes this purpose. Even those few Americans who are prosecuted for felony possession of marijuana would be eligible after five years (under New York

law) for a certificate releasing them from any collateral disabilities they might have suffered as a result of their convictions.

Even if some rational basis existed for distinguishing between American citizens and aliens, there is clearly no basis for discrimination under the Immigration Law against petty drug offenders as opposed to other petty offenders.

Subsection 9 of 8 U.S.C.A. §1182 provides for the exclusion of aliens who have committed crimes c moral turpitude. It grants exception, however, to "[a]ny alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18, by reason of the punishment actually imposed, or who would be excludable as one who admits

the commission of an offense that is classifiable as a misdemeanor under the provisions of section 1(2) of Title 18, by reason of the punishment which might have been imposed upon him...: Provided, that the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense." The statute provides that any such alien may be granted a visa and admitted to the United States if he is otherwise admissible.

The rationale of the Congressional policy of ignoring or excusing a petty offense applies with equal or greater force for petty drug offenses, particularly "offenses" where drug possession may be inadvertent. The policy recognizes that one petty offense is not a rational basis for exclusion. This is particularly true where widespread petty

illegal conduct exists among youth.

To exclude John Lennon for past possession of marijuana when, had he been convicted instead of public intoxication he would have been given a "second chance," is arbitrary and irrational, particularly in light of the fact that alcohol is a more direct cause of both public and private harm than is marijuana.[10]

Lennon would also have been excused once for public lewdness; harrassing other people by kicking, shoving or striking them; premitting prostitution to exist on his premises or forging a check, among other crimes. No conceivable purpose, compelling or otherwise, justifies the distinction

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10. The President's Commission on Law Enforcement and Administration of Justice Task Force Report: Drunkenness, p. 35; J. Kaplan, supra pp. 275-320, specifically p. 318.

between these crimes and possession of marijuana, except that the latter is less harmful. Particularly in John Lennon's case, where the possession was unknowing, the extreme penalty as compared with the second chance given to other petty offenders is particularly egregious and discriminatory.

D. Subsections 9 and 23 of 8 U.S.C.A. §1182 Read Together are Ambiguous and Therefore Must be Resolved in Favor of the Applicant

Immigration law is clear that ambiguities in statutoy language must be resolved in favor of the alien about to be deported. As the Supreme Court stated in Tan v. Phelan, 333 U.S. 610 (1948):

> "deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a resident in this country. Such a forfeiture is a penalty. To construe this statutory penalty less generously to the alien might find support in logic. But since the stakes are considerable for the individual we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings."

See also Petition of Catalanotte, 236 F.2d 955 (6 Cir. 1956); Immigration Service v. Errico, 385 U.S.

214 (1966).

When subsection 9 of 8 U.S.C.A. §1182, granting a "second chance" to one-time petty offenders, is read together with subsection 23, which provides for the exclusion of "Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana..." an ambiguity is created. The statute is unclear whether any alien who has been convicted of <u>any</u> drug-related offense may be excluded or whether an alien who has been convicted of only one petty drug offense has the right under sub-section 9 to be admitted. In other words, it is uncertain whether the framers of the statute intended the exception granted to one-time petty offenders under subsection 9 to apply

as well to one time petty drug offenders under subsection 23.

The rule that ambiguities must be resolved in favor of the alien commands that the subsection 9 exception apply to petty drug offenses. The correctness of this interpretation is supported by the fact that it reflects the repeated instances of leniency in immigration law toward people who have committed a single offense and the attempt to give them a second chance. Nason v. Immigration and Naturalization Service, 394 F.2d 223 (2nd Cir. 1968).

The statute under which John Lennon is to be deported was not intended by Congress to punish petty drug offenders, but rather to stop the traffic in illicit drugs.

The nature of the offense of possession of

marijuana, particularly when that possession was inadvertent and unknowing for the reasons discussed above, does not justify the exclusion from the United States of a person who is otherwise highly desirable and deserving of permanent resident status.

III. THE FIRST AMENDMENT INTERESTS OF THE AMERICAN PEOPLE REQUIRE THE GOVERNMENT TO SHOW A COMPELLING INTEREST IN EXCLUDING JOHN LENNON FROM THE UNITED STATES

In a series of opinions the Supreme Court has ruled that the First Amendment guarantees the American citizens the inalienable right to receive as well as to disseminate artistic communications free from governmental interference. E.g., Martin v. Struthers, 319 U.S. 141, 143 (1943); Lamont v. Postmaster General, 381 U.S. 301 (1965); Stanley v. George, 394 U.S. 557; United States v. Dellapia, 433 F.2d 1252, 1258 n. 25 (2nd Cir. 1970); Caldwell v. United States, 434 F.2d 1081, 1089 (9th Cir. 1970); Hiett v. United States, 415 F.2d 664, 671 (5th Cir. 1968); Brooks v. Auburn University, 412 F.2d 1171, 1172 (5th Cir. 1969); Fortune Society v. McGinnis, 319 F. Supp. 901, 904 (S.D.N.Y. 1970);

United States v. B & H Dist. Corp., 319 F. Supp. 1231 (W.D. Wisc. 1970); ACLU v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970); Williams v. Blount, 314 F. Supp. 1356 (D.D.C. 1970); Smith v. University of Tennessee, 300 F. Supp. 77 (E.D. Tenn. 1969).

Where government acts so as to affect First Amendment rights it must show both a compelling interest, Brandenburg v. Ohio, 395 U.S. 444 (1969); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Stanley v. Georgia, 394 U.S. 557 (1969); De Jonge v. Oregon, 299 U.S.353 (1951), and that no less drastic alternative to the proposed action exists. Shelton v. Tucker, 364 U.S. 479 (1960).

John Lennon is one of the best musicians and composers in the world. The American people have a right under the First Amendment to enjoy his artistic influence and presence in the United States.

Thus, before the Immigration authorities can exclude him they must show that a compelling state interest will be served by so doing and that no less drastic alternative to exclusion exists.

Clearly, this is not the case. No conceivable benefit can be derived from excluding people of great artistic stature from our country. On the contrary, this nation is impoverished when it banishes people with life styles differing from the norm, for it is often just those people who add most to our cultural and intellectual life. If immigration authorities believe that John Lennon might in the future repeat his offense, they have the alternative of deporting him at that time rather than punishing him before the fact and depriving citizens of their right to benefit from his presence.

At best the exclusion of a dintinguished

artist from the United States for an old conviction of a petty crime, after he has already lived here for two years, could be viewed as silly.

John Lennon, however, has participated in unpopular political causes in the United States, as was noted by the immigration judge below. He has opposed the war and has donated his name and time and talents to peace and other political causes. In such a case the government's action does not appear to be simply a routine matter, but rather to be calculated to achieve an improper government goal: the silencing of aliens who are outspoken when in this country.

While Lennon may not have an absolute First Amendment right to remain in the United States, when government action not only denies the public the right to receive communication, but also appears to have the improper retaliatory motive of punishing

an alien for expressing unpopular views, that action must be closely scrutinized.

The loss to the American people, the damage done to the reputation of the United States as a tolerant country cannot possibly be justified by whatever reason exists here for expelling Lennon. No justification based on the rule of law where that rule appears discriminatory and retaliatory can be offered to explain the order below in this case.

CONCLUSION

For the reasons given, it is respectfully submitted that the order below should be reversed and the appellant should be granted resident status.

Respectfully submitted,

H. Miles Jaffe
Eve Cary
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Amicus Curiae
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(212) 924-7800

Of counsel:

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New York, New York

Counsel wish to thank Robin Colin, a student at Temple Law School for her invaluable assistance on this brief.

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SEGMENT 10

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Congress of the United States

House of Representatives

Washington, D.C.

January 9 1974

Mr. Sol Marks
District Director, INS
20 W. Broadway
New York, NY 10007

Sir:

The attached communication is sent for your consideration. Please investigate the statements contained therein and forward me the necessary information for reply, returning the enclosed correspondence with your answer.

Yours truly,

Benjamin A. Gilman M. C.

Re: [redacted] (b)(6)

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November 20, 1973

In re: John Winston Ono Lennon
File: A17 597 321

Leon Wildes, Esq.
515 Madison Avenue
New York, New York 10022

Dear Mr. Wildes:

Thank you for your letter dated November 16, 1973 concerning the above-captioned matter.

I have not yet seen a transcript of the oral argument. I am certain, however, that the Board made no commitment which could support your "understanding" as recited in the last paragraph of your letter. I have consulted the Board members and they corroborate my recollection. Without in any way implying what the Board's ultimate decision will be on your application for deferment of decision on the merits, I must therefore tell you that you are incorrect in your understanding that you will be informed of that ruling, if it is adverse, separately and in advance of any determination on the merits.

Sincerely yours,

Maurice A. Roberts
Chairman

cc: Vincent A. Schiano, Esq.
Trial Attorney, I&N Service
New York, New York 10007

Irving A. Appleman, Esq.
Appellate Trial Attorney
I&N Service

MAR:mhl

LEON WILDES
ATTORNEY AT LAW
515 Madison Avenue
New York, N.Y. 10022

PLAZA 3-3468

CABLE ADDRESS
"LEONWILDES," N. Y.

November 16, 1973

Board of Immigration Appeals
U.S. Department of Justice
521 12th Street, N.W.
Washington, D.C. 20530
Attention: Mr. Maurice Roberts, Chairman

Re: LENNON, John Winston Ono
A17 597 321

Dear Sir:

I wish to thank the Board for the courtesies extended to me in connection with the presentation of my oral application before the full Board on October 31st.

In keeping with the undertaking of counsel for both the government and the respondent to apprise the Board of Immigration Appeals of developments, I wish to inform the Board of the fact that service of process has been completed in both lawsuits pending before the U.S. District Court for the Southern District of New York. Moreover, I am advised (see copy of cablegram attached) that the trial of Detective Sergeant Pilcher and the other officers who participated in the arrest of the respondent in England in 1968 has been concluded, and that Officer Pilcher was convicted and apparently sentenced to four years imprisonment. I am instructing British counsel to study the proceedings which have transpired to determine whether they may now form the foundation for a proceeding to reopen respondent's conviction in London.

I will keep the Board apprised of any such developments.

It is my understanding that the Board will reach a determination with respect to my application that its deliberations be deferred and that I will be informed of the ruling separately and in advance

of any determination on the merits.

Very truly yours,

LEON WILDES

LW/ts
Encl.
cc: Vincent A. Schiano, Esq., Chief Trial Attorney, New York District
cc: Irving Appleman, Esq., Appellate Trial Attorney

RCA Global Telegram

NNNN

ZCZC LEON WILDES

515 MADISON AVE

NYC 10022

WHB0201 RMB6067 UYS232 LGC709 PLG025

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RCA Global Telegram

LEON WILDES CARE LEONWILDES

NEWYORKCITY

PILCHER GUILTY OF PERJURY SENTENCE FOUR YEARS LETTER

FOLLOWS

MARTIN POLDEN

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Board of Immigration Appeals

Memorandum for the File

In re: John Winston Lennon

File: A17 595 321

At 1:10 p.m. I telephoned Mr. Wildes at his New York office and read him the letter which I am sending him today. He stated he understood it clearly and would take it into account when he presents his oral argument.

Maurice A. Roberts
Chairman

October 30, 1973

MAR:mhl

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10-23-73

Board of Immigration Appeals

Memorandum for the File

In re: John Lennon

File: A17 595 321

Attorney Leon Wildes telephoned from New York at noon and requested a continuance of oral argument, now scheduled for October 29, 1973. He stated that in August of this year, after the record on appeal had been forwarded to the Board, he ascertained that there was possible wrongdoing on the part of the Government in the deportation proceedings. He then made a request to Immigration Judge Fieldsteel for disclosure under 18 U.S.C. 3504. The immigration judge felt that he did not have jurisdiction to hear such a motion. Mr. Wildes therefore contacted trial attorney Schiamo and asked him to declare whether the Government had engaged in illegal electronic surveillance. Mr. Schiamo refused to give him a responsive answer. Mr. Wildes recently asked Immigration Judge Fieldsteel to expand the record to include the foregoing matters.

Mr. Wildes has also tried to get records from the Service of how other "non-priority" cases have been treated. He never received a response from the Service and has been informed that if he wishes this information he will have to proceed under the Freedom of Information Act.

Mr. Wildes stated that he has a copy of a memorandum indicating that the case has been prejudiced from the start; that at the time the Republican National Convention was scheduled from San Diego in 1972, instructions were sent to the Immigration Service that the respondent and his wife were not to receive any relief. Mr. Wildes stated that the Government was under the impression that the respondent and his wife had planned to join demonstrators at the Convention

in an anti-Viet Nam war demonstration, a fact which the respondent and his wife deny. As a result, the Government had determined that the respondent and his wife should be ousted as quickly as possible and that instructions to that effect were given to the Immigration Service. Mr. Wildes intends to bring these allegations out by evidence, to show prejudgment. He also intends to adduce evidence of illegal electronic surveillance and he is filing a court action under the Freedom of Information Act today.

Under the circumstances, Mr. Wildes feels that it would be premature to argue the case on the merits next Monday, as the record is incomplete. He has tried to get in touch with the District Director at New York to seek consent to a continuance, but Mr. Marks is unavailable. Mr. Schiano is also away from the office. Mr. Wildes contacted Mr. Schiano at home and was informed that Mr. Schiano will abide by whatever decision the Board comes to. Mr. Wildes asked for a continuance of about 60 days, in the thought that in the interim the situation would be crystalized.

I informed Mr. Wildes that none of the information he had brought to my attention is reflected in the record now before the Board. If he has any documentation which the Board should consider in support of his motion for a continuance, he should see to it that it reaches the Board by the fastest means possible. I told Mr. Wildes that I would have to ascertain the Service's position with respect to the requested continuance and would have to refer the question to the Board before I could advise him and this could not possibly be done today. I promised to telephone him the Board's decision on the requested continuance as soon as possible.

I informed Mr. Appleman of the foregoing and asked him to advise me of the Service's position with respect to the requested continuance.

October 23, 1973

Maurice A. Roberts
Chairman

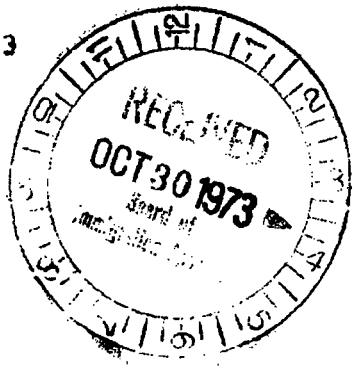
LEON WILDES
ATTORNEY AT LAW
515 MADISON AVENUE
NEW YORK, NEW YORK 10022

(212) 753-3468

STEVEN L. WEINBERG
STEPHEN IRA TAMBER

CABLE ADDRESS
"LEONWILDES," N.Y.

October 26, 1973



Board of Immigration Appeals
521 12th Street, N.W.
Washington, D.C. 20530
Attention: Mr. Maurice Roberts, Chairman

Re: LENNON, John Winston Ono
A17 597 321

Dear Sir:

This will confirm our recent telephone conversations, commencing on Tuesday morning, October 23rd, at which time I requested a continuance for a period of approximately 60 days of the oral argument in the above case. The request was made in view of the extraordinary recent developments in the case, none of which were apparently known to the Board prior to my telephone call. On the same date, I forwarded, as agreed, copies of the relevant documents including the summonses and complaints which have been filed in two actions in the U.S. District Court, for the Southern District of New York. Today, I received your telephonic reply denying a continuance and I indicated that under the circumstances I was not prepared to attend and argue the case on the merits and would not be present at the oral argument, scheduled for Monday, October 29, 1973.

The Board has now granted me permission to appear on Wednesday, October 31, 1973 to state my position and make my request for whatever relief I desire.

I wish to confirm my position as stated, that although I desire oral argument on the merits, I am not in a position to do so at this time, and that my appearance is solely for the purpose of making a special request of the Board to defer its determination of the merits of the case until the record on appeal is properly completed, or for other appropriate relief consistent with my position that the threshhold issue of prejudgment must be disposed of prior to the Board's reaching a determination on the merits of the case.

The purpose of this letter is to eliminate any misapprehension as to the limited purpose of my appearance before the Board this coming Wednesday afternoon.

I thank you for your courtesy in allowing my appearance as stated above.

Very truly yours,

LEON WILDES

LW/ts
cc: Vincent A. Schiano, Chief Trial Attorney

cc: Appellate Trial Attorney, Washington, D.C.

CERTIFIED MAIL