No. 18-8441

IN THE SUPREME COURT OF THE UNITED STATES

GAETAN DINELLE, AKA GATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's sentence of life imprisonment for his leadership role in a continuing criminal enterprise to traffic drugs, 21 U.S.C. 848, violates the Eighth Amendment's prohibition on cruel and unusual punishment.

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OPINION BELOW

The order of the court of appeals (Pet. App. A1-A5) is not published in the Federal Reporter but is reprinted at 737 Fed. Appx. 49.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2018. A petition for rehearing was denied on December 13, 2018 (Pet. App. B1). The petition for a writ of certiorari was filed on March 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Judgment 1. The district court sentenced petitioner to life imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A5.

1. Petitioner was one of the leaders of a massive drug-trafficking organization that smuggled thousands of kilograms of marijuana, worth tens of millions of dollars, into the United States from Canada. Presentence Investigation Report (PSR) ¶¶ 16-17, 28-32. Petitioner was responsible for smuggling the marijuana into the United States through the St. Regis Mohawk Indian Territory, which straddles the border between the State of New York and the Province of Quebec. PSR ¶¶ 15-16. Petitioner used speedboats, fishing boats, personal watercraft, and (during the winter months) snowmobiles with sleds to bring the marijuana across the St. Lawrence River, which runs through the St. Regis territory along the border. PSR ¶ 16. Petitioner also smuggled people across the border to serve as drug couriers within the United States. Ibid.

Once the marijuana and couriers were across the border, members of the conspiracy divided the marijuana into individual shipments of up to 120 pounds, which were then hidden in the trunks

of delivery vehicles and driven to buyers throughout the Eastern and Southern United States. PSR ¶ 17. Petitioner "recruit[ed] and manag[ed] the couriers" who drove the delivery vehicles. PSR ¶ 22. Petitioner served as a courier himself on some occasions, PSR ¶¶ 23-24, directed other couriers by cell phone during their "runs," PSR ¶¶ 25-27, and arranged the time and place for the couriers' deliveries and the collection of money from buyers, see Gov't C.A. Br. 14-15 (citing record). From 2006 to 2008, the organization illegally imported and distributed at least 5589 kilograms -- more than five tons -- of marijuana worth over $23.7 million. PSR ¶¶ 31-32.

2. A federal grand jury charged petitioner and numerous co-conspirators with one count of conspiracy to distribute and to possess with the intent to distribute more than 1000 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A); one count of conspiracy to import more than 1000 kilograms of marijuana into the United States, in violation of 21 U.S.C. 960(a)(1), (b)(1)(G), and 963; one count of conspiracy to distribute more than 1000 kilograms of marijuana for importation into the United States, in violation of 21 U.S.C. 960(b)(1)(G) and 963; five counts of distributing and possessing with the intent to distribute marijuana, in violation of 21 U.S.C. 841(b)(1)(C) or (D); and one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Pet. C.A. App. (C.A. App.) A102-A117.

The government voluntarily dismissed the five substantive counts of drug possession and distribution before trial. D. Ct. Doc. 271, at 1-2 (July 28, 2015). A jury found petitioner guilty on the remaining counts. Judgment 1; see C.A. App. A1367-A1371. Following trial, the government voluntarily dismissed the conspiracy counts as lesser-included offenses of the continuing criminal enterprise count. C.A. App. A1439, A1462-A1463.

3. A defendant engages in a continuing criminal enterprise, in violation of 21 U.S.C. 848, if he commits a "continuing series" of felony controlled-substance offenses "in concert with five or more other persons"; serves as an "organizer," "supervisor[]," or "manage[r]" of the enterprise; and "obtains substantial income or resources" from the enterprise. 21 U.S.C. 848(c). Section 848 provides a mandatory punishment of life imprisonment for a defendant who is a "principal administrator, organizer, or leader" of a continuing criminal enterprise that "receive[s] $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution" of controlled substances. 21 U.S.C. 848(b)(1) and (2)(B).

The jury returned a special verdict form indicating that it had determined beyond a reasonable doubt that the drug-trafficking organization qualified as a continuing criminal enterprise; that petitioner was a principal administrator, leader, or organizer of that enterprise; and that the enterprise received at least $10 million a year from the importation and distribution of marijuana.

C.A. App. A1370-A1371. Accordingly, the district court determined that petitioner was subject to a mandatory life sentence under 21 U.S.C. 848(b). C.A. App. A1458; see PSR ¶¶ 67-68.

Although petitioner did not specifically contend that a life sentence would violate the Eighth Amendment, he asked the district court to "consider" whether that sentence would be "harsh and excessive under the circumstances of this case." C.A. App. A1432. Petitioner noted that "[m]arijuana use and distribution has been legalized in some states," and that New York law permitted marijuana use "for medicinal purposes." Ibid. He contended that, in light of "the current climate and culture of the community regarding the possession and distribution of marijuana," a life sentence would be "especially severe and cruel." Ibid.

The district court sentenced petitioner to life imprisonment, as required by 21 U.S.C. 848(b). C.A. App. A1459. The court rejected petitioner's contention that his distribution of marijuana was "harmless" and "not [an] important crime" in light of "the legalization of marijuana" in some states. Id. at A1461. The court observed that petitioner was a leader of an organization that illegally trafficked huge quantities of marijuana between the United States and Canada and that employed dozens of people, including "teenagers" and other "young people" who served as drug couriers and who "ended up with felony convictions" as a result. Ibid.

4. The court of appeals affirmed in a non-precedential summary order. Pet. App. A1-A5. The court rejected various allegations of trial error, observing that the evidence against petitioner "was overwhelming." Id. at A3. And, as relevant here, the court found that petitioner had "failed to substantiate" the "Eighth Amendment challenge[]" he had raised on appeal. Id. at A4. The court observed that "[w]ith the exception of capital punishment cases, successful Eighth Amendment challenges to the proportionality of a sentence are exceedingly rare." Ibid. (citation omitted).

ARGUMENT

Petitioner contends (Pet. 3-7) that the sentence of life imprisonment required by Congress for his offense is disproportionate to his crime and therefore violates the Eighth Amendment. The court of appeals correctly rejected that argument in a factbound, non-precedential summary order that does not conflict with any decision of this Court or another court of appeals. This case would also be an unsuitable vehicle for reviewing application of the Eighth Amendment to a life sentence, because petitioner may be transferred to his home country of Canada, which could then later decide to release him on parole.

1. Under this Court's precedents, "the Eighth Amendment contains a 'narrow proportionality principle'" that "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" Graham v. Florida, 560 U.S. 48, 59-60 (2010) (quoting

Harmelin v. Michigan, 501 U.S. 957, 997, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). In determining whether a sentence is grossly disproportionate, "[a] court must begin by comparing the gravity of the offense and the severity of the sentence." Id. at 60. This initial, "objective" inquiry requires courts to "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." Solem v. Helm, 463 U.S. 277, 290 (1983); see Harmelin, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment) ("[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.'") (citation omitted)). Only "'[i]n the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality'" should a court proceed to "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" to determine whether the sentence is in fact disproportionate. Graham, 560 U.S. at 60 (quoting Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment)) (second set of brackets in original).

The court of appeals correctly determined that petitioner had "failed to substantiate" his Eighth Amendment claim here. Pet.

App. A4. Drug distribution is a serious crime that "threaten[s] to cause grave harm to society," and thus warrants severe punishment. Harmelin, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment); see id. at 1003 (describing the "pernicious effects of the drug epidemic in this country," including the "direct nexus between illegal drugs and crimes of violence"). In Harmelin, this Court rejected a proportionality challenge to a sentence of mandatory life imprisonment without parole for a first offender convicted of simple possession of 672 grams of cocaine. See id. at 961, 985-994 (plurality opinion); id. at 1003 (Kennedy, J., concurring in part and concurring in the judgment) (concluding that "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 * * * is momentous enough to warrant the deterrence and retribution of a life sentence without parole"). This Court has also upheld lengthy term-of-year sentences or life sentences for possession and distribution of nine ounces of marijuana, see Hutto v. Davis, 454 U.S. 370, 370-371, 374-375 (1982) (per curiam) (40-year sentence), and for minor theft or fraud offenses under recidivist statutes, see Lockyer v. Andrade, 538 U.S. 63, 66-68, 77 (2003) (50-years-to-life sentence based on three-strikes recidivist enhancement for defendant who stole nine videotapes worth about $150); Rummel v. Estelle, 445 U.S. 263, 264-266, 284-285 (1980) (mandatory life sentence based on three-strikes

recidivist enhancement for defendant whose three fraud offenses triggering that enhancement involved a total of about $229).

In upholding those sentences, this Court has repeatedly explained that "federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment'" and that "'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'" Davis, 454 U.S. at 374 (quoting Rummel, 445 U.S. at 272, 274) (brackets in original); see Harmelin, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment); Solem, 463 U.S. at 290. The court of appeals determined that petitioner had failed to demonstrate that his leadership of a massive international drug-trafficking organization -- an offense far more serious than those in which this Court upheld life sentences in the cases cited above -- presented the sort of "exceedingly rare" circumstance in which the sentence could be deemed grossly disproportionate to the offense. Pet. App. A4 (citations omitted). That factbound determination is correct and warrants no further review.

2. Petitioner suggests that a sentence of life imprisonment is impermissible because he did not play a leadership role in the drug-trafficking conspiracy. See Pet. 4 (stating that he was "not a kingpin" and "was, at most, the person who gave driving directions"). But those assertions merely seek to relitigate the jury's findings -- based on "overwhelming" evidence, Pet. App. A3 -- that petitioner fell within the narrow category of high-level

drug-conspiracy leaders that Congress determined should receive life sentences under 18 U.S.C. 848(b). See, e.g., C.A. App. A1461 (sentencing court emphasizing the "gravity" and "size" of the organization and determining that the jury "had sufficient proof to find" that petitioner was a "leader[] [and] manager" who recruited "many [other] people" to work for him).

Petitioner also contends (Pet. 4) that he "has no criminal record" and is therefore differently situated from the "recidivists [and] those who otherwise dedicated themselves to a life of crime" who have received life sentences in other cases. That contention is mistaken. This Court has upheld life sentences for offenders with analogous criminal histories. See, e.g., Harmelin, 501 U.S. at 994 (upholding life sentence for drug offender who "had no prior felony convictions"). Given that petitioner does not contend (Pet. 4) that a life sentence would be unjustified for a first-time offender irrespective of the crime committed, his position effectively amounts to a disagreement with Congress about the severity of his particular offense. That argument is properly addressed to Congress -- or to the Executive Branch through the pardon process. Congress's decision to order a life sentence for leading a large-scale continuing criminal enterprise does not implicate any gross disproportionality for purposes of the Eighth Amendment, under which courts must "grant substantial deference to the broad authority that legislatures

necessarily possess in determining the types and limits of punishments for crimes." Solem, 463 U.S. at 290.

Petitioner further contends (Pet. 5) that his life sentence reflects an unwarranted disparity with the lesser sentences imposed on two of his co-conspirators, Debbie Francis and Michael Harris. As an initial matter, it is only appropriate to "compare the defendant's sentence with the sentences received by other[s]" if a "compari[son] [of] the gravity of the offense and the severity of the sentence" objectively establishes an initial "'inference of gross disproportionality.'" Graham, 560 U.S. at 60 (quoting Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment)). As explained above, petitioner has failed to make that threshold showing. Regardless, petitioner's assertion of an unwarranted disparity is unsound. Although Francis and Harris received significantly lower sentences than petitioner did, that result reflects their guilty pleas and substantial assistance to the government in the investigation and prosecution of this case. See, e.g., Gov't C.A. Br. 157-157; PSR ¶¶ 30-31. Petitioner, in contrast, continued to falsely deny his guilt through trial and sentencing. See C.A. App. A1441-A1457. The disparity between his sentence and those of his co-conspirators was thus warranted -- and at a minimum not constitutionally disproportionate. The court of appeals correctly rejected his Eighth Amendment claim. Pet. App. A4.

3. Petitioner contends (Pet. 6-7) that this Court should grant review to reconsider the "analytical structures for determining proportionality" set forth in this Court's cases. That contention lacks merit. The analytical structure governing Eighth Amendment claims is well-established, and this Court recently rejected a similar request to reconsider it.

As explained above, this Court analyzed the Eighth Amendment's proportionality standard in Harmelin, supra, which rejected a defendant's challenge to a mandatory sentence of life imprisonment without parole for possession of 672 grams of cocaine. Justice Scalia, joined by Chief Justice Rehnquist, concluded that "the Eighth Amendment contains no proportionality guarantee." 501 U.S. at 961, 985-994 (plurality opinion). In his view, the Eighth Amendment "disables the Legislature from authorizing particular forms or 'modes' of punishment" -- i.e., "cruel methods of punishment that are not regularly or customarily employed" -- but does not constrain the legislature's authority to prescribe particular sentences of imprisonment. Id. at 976. Justice Kennedy, joined by Justices O'Connor and Souter, concurred in part and concurred in the judgment, concluding that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. at 1001 (citation omitted).

In the decades since Harmelin, the Court has consistently relied on the analysis in Justice Kennedy's controlling opinion in resolving Eighth Amendment challenges. See, e.g., Graham, 560 U.S. at 59-60 (invoking the "'narrow proportionality principle'" set forth in Justice Kennedy's "controlling" opinion in Harmelin) (citation omitted); Ewing v. California, 538 U.S. 11, 23-24 (2003) (plurality opinion) ("The proportionality principles in our cases distilled in Justice Kennedy's [Harmelin] concurrence guide our application of the Eighth Amendment.") (capitalization omitted). No court of appeals has deviated from that standard.

As petitioner observes (Pet. 6), Judge Barron -- joined by five other judges of the First Circuit -- recently suggested that this Court should consider whether to adopt a more "holistic analysis" in determining whether a "mandatory life-without-parole sentence for multiple felonies -- each of which is seemingly nonviolent, though hardly minor in nature -- comports with the Eighth Amendment." United States v. Rivera-Ruperto, 884 F.3d 25, 27-28 (2018) (Barron, J., concurring in the denial of rehearing en banc). But this Court denied review in that case, see 139 S. Ct. 1258 (2019) (No. 18-5384), and petitioner identifies no reason to reach a different result here. Moreover, petitioner fails to identify any likelihood that his Eighth Amendment claim would succeed under Judge Barron's proposed "holistic" approach.

4. Finally, this case is a poor vehicle for considering the question presented because petitioner, who is a Canadian citizen,

may not actually serve a life sentence. Federal law authorizes the discretionary transfer of foreign nationals to their home countries to serve criminal sentences imposed in the United States if a treaty between the United States and the receiving country "provid[es] for such a transfer." 18 U.S.C. 4100(a). Pursuant to a treaty with Canada, Canadian citizens serving criminal sentences in the United States may be eligible for a transfer to Canada, after which their sentences "shall be carried out according to the laws and procedures of [Canada], including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise." Treaty on the Execution of Penal Sentences, art. IV(1), Mar. 2, 1977, 30 U.S.T. 6263, 6269. Under Canadian law, an individual who receives a life sentence for a non-homicide offense may be eligible to seek full parole after serving seven years of imprisonment. See Correctional Serv. Can., Types of Release, https://www.csc-scc.gc.ca/parole/002007-0003-eng.shtml (last visited June 10, 2019).

Petitioner may be eligible to apply for a discretionary transfer to Canada pursuant to the U.S.-Canada prisoner transfer treaty. Although it is unclear at this time whether petitioner would be deemed suitable for a discretionary transfer, the potential for such a transfer -- which could result in petitioner's eventual parole from his life sentence under Canadian law -- indicates that he will not necessarily remain incarcerated for life. Petitioner acknowledged as much in the district court. See

C.A. App. A1430 (contending that petitioner "may want to apply for a treaty transfer of his sentence so that he may be transferred to Canada to serve his time in accordance with the applicable guidelines in his country of citizenship," which "may permit him to rejoin his family sooner"). Petitioner's assertion (Pet. 3) that, "absent a pardon or commutation, [he] has no hope that he will ever enjoy freedom again," is therefore incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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