

No. _____

In The
Supreme Court of the United States

ABDI RAZAQ ABSHIR OSMAN;
MOHAMED ABDI JAMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners were convicted at trial of piracy in violation of 18 U.S.C. § 1651, which carries a mandatory term of life in prison, as two of the participants in the attempted robbery of the 600-foot USS Ashland from a skiff in the Gulf of Aden. On the spectrum of culpable conduct, one participant fired a rifle at the Ashland and another, Osman, was merely present on the skiff with knowledge of the operation. This attempted robbery did not physically harm any Ashland crew members or U.S. Navy property.

At sentencing, the district court, in recognition of “the evolving standards of decency that mark the progress of a maturing society,” *Graham v. Florida*, 560 U.S. 48, 58 (2010), held that life terms as applied to Petitioners amounted to impermissibly disproportionate sentences in contravention of the Eighth Amendment’s prohibition against cruel and unusual punishments. In reversing, the United States Court of Appeals for the Fourth Circuit held that petitioners had failed to establish an inference of gross disproportionality and then declined to apply the intra-jurisdictional and inter-jurisdictional comparative analyses set forth by this Court in *Solem v. Helm*, 463 US 277 (1983).

The questions presented are:

- (1) Does the imposition of a mandatory term of life imprisonment on all participants for an attempted robbery at sea that did not result in any physical harm to persons or property violate the Eighth Amendment?

- (2) What is the proper standard for analyzing as-applied proportionality claims under the Eighth Amendment in light of the three-part test set forth in *Solem* and subsequent case law?

PARTIES TO THE PROCEEDING

United States of America

Abdi Razaq Abshir Osman

Case No. 16-4754(L)

Mohamed Abdi Jama

Case No. 16-4756

Abdicasiis Cabaase

Case No. 16-4758

Mohamed Farah

Case No. 17-4274

****Defendants Abdicasiis Cabaase and Mohamed Farah have not joined in this petition for certiorari**

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The relevant opinions of the Court of Appeals are an unpublished *per curiam* opinion filed December 6, 2017 and a reported opinion at 798 F.3d 182.

The relevant opinion of the District Court for the Eastern District of Virginia is reported at 3 F. Supp. 3d 515.

JURISDICTION

The court of appeals issued its opinion and judgment on December 6, 2017. It had jurisdiction pursuant to 28 U.S.C. § 1291 following final judgments of conviction.

The district court had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. Const. amend. VIII.

STATEMENT OF THE CASE

I. Relevant Facts

In April 2010, seven Somali nationals, including Petitioners, approached the USS Ashland on a small skiff in international waters in the Gulf of Aden and fired a shot in the direction of the Ashland. The Ashland was not damaged and none of its crew injured. The Ashland returned fire, sank the skiff, killed one of its passengers, and captured the survivors.

Earlier, in February 2010, Petitioner Jama and other men were in a skiff that encountered the HMS Chatham, a British naval vessel on patrol in the Gulf of Aden. Chatham personnel boarded the skiff and seized a handgun and ammunition. The men claimed to be human smugglers but one of the men later cooperated and testified for the government that the men were pirates looking for a ship to seize. The British disabled one of the two engines on the skiff and allowed them to leave.

The cooperator testified that Petitioner Osman subsequently joined the pirate operation and contributed a firearm. The cooperator testified that on an uneventful trip to sea prior to the encounter with the USS Ashland, Osman brought a firearm, but did not have any specific job.

In the April encounter with the Ashland, one person from the front of the skiff fired a rifle in the direction of the vessel. Ashland personnel saw that the other people in the skiff were crouched down in the back holding on or at most were standing and looking at the Ashland. No one on the Ashland saw anyone on the skiff gesturing or making any other clear movements except the one gunman. When the Ashland returned fire and destroyed the skiff, Petitioner Osman received severe burns to his face and both hands. Another man was burned and lost part of one leg.

The cooperator testified that the men were looking to seize a ship to make money. He said that a man other than Petitioners was the person who fired at the Ashland. The cooperator did not testify about any actions taken, or words spoken, by Petitioner Osman. He did not testify that Petitioner Osman brought a weapon or did anything on this trip.

II. Relevant Procedural History

The six survivors, including Petitioners, were transferred to Norfolk, Virginia, where a federal grand jury indicted them for piracy, in violation of 18 U.S.C. § 1651, and other criminal offenses. The district court granted Petitioners' pretrial motion to dismiss the piracy charge, holding that as a matter of law their conduct did not meet the elements of piracy. *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2012).

The Fourth Circuit reversed on interlocutory appeal. *United States v. Said*, 680 F.3d 374 (4th Cir. 2012). Petitioners sought immediate interlocutory review from this Court, which denied the petition. *Said v. United States*, 133 S. Ct. 982 (Jan. 22, 2013)(No. 12-6576).

Following remand, the district court conducted a six-day trial, at which the jury convicted Petitioners on all counts. Prior to sentencing, Petitioners filed a motion to invalidate the piracy count's mandatory life sentence on Eighth Amendment grounds. The district court granted the motion, see *United States v. Said*, 3 F. Supp. 3d 515 (E.D. Va. 2014), and sentenced Petitioner Osman to 360 months (240 months for piracy) and Petitioner Jama to 500 months (140 months for piracy).

In its opinion granting the motion to invalidate the mandatory life sentences, the district court correctly laid out the applicable legal framework and recognized that Congress's determination that § 1651 violations merit mandatory life imprisonment was entitled to significant deference. The court also acknowledged that "[i]t is undoubtedly true that as a general matter, the crime of piracy is a very grave offense" and explained why that is so. *Said*, 3 F. Supp. 3d at 521.

The court then applied the legal framework to the facts of this case, taking those facts in the light most favorable to the government. Looking at those facts, the court concluded that “this was not a run-of-the-mill case of modern piracy,” and that although the encounter with the Ashland involved violence, the defendants “caused no physical harm at all.” *Id.* at 523. The court recognized what the defendants intended to do, but also acknowledged that “the law recognizes a distinction between harm intended and harm caused, and almost always gives more weight to the latter.” *Id.* at 524.

Based on its analysis, the court concluded that

As this shows, the harm a defendant actually inflicted is traditionally recognized by society as the key factor in selecting punishments, with physical violence to other persons meriting the most severe punishment. The label of piracy and the connotations it has traditionally carried can only go so far. Defendants attacked a heavily defended warship, not a vulnerable yacht or merchant vessel, were completely unsuccessful in that attempt, and inflicted no physical harm. And Defendants have no prior criminal record, unlike the recidivist defendants in many of the [Supreme Court] precedents discussed above. In such circumstances, a comparison with the most second severe sentence available yields an inference of gross disproportionality.

Id. The court confirmed this inference with a comparison of this case to other piracy prosecutions in the United States and internationally. *Id.* at 524-526.

The government and Petitioners cross-appealed. The Fourth Circuit affirmed the judgments of conviction, including piracy under 18 U.S.C. § 1651, and held that the district court erred in not imposing mandatory life sentences for that count. *United States v. Said*, 798 F.3d 182 (4th Cir. 2015). Accordingly, it vacated Petitioner’s sentences and remanded for resentencing after instructing the district

court that it was “obliged to impose [mandatory life] sentences on remand.” 798 F.3d at 200.

Judge Davis filed a separate concurrence. He stated that he was in full agreement with the decision of his brethren, but he wrote separately to emphasize that not every offender who commits piracy is “deserving of life in prison as the sole conceivable ‘rational’ punishment.” *Id.*

Petitioners filed a timely petition for rehearing *en banc* on both issues: whether Petitioners’ conduct constituted piracy and whether its mandatory life sentence violated the Eighth Amendment. After *en banc* review was denied, Petitioners sought review by this Court on the issue of whether Petitioners’ conduct constituted piracy. This Court denied the petition for certiorari on May 23, 2016.

The district court subsequently resentenced Petitioners to terms that included mandatory life sentences on the piracy count. Petitioners appealed the life sentences and the Fourth Circuit denied the appeal by unpublished *per curiam* opinion on December 6, 2017. This petition follows.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit rejected Petitioners’ as-applied Eighth Amendment proportionality claims without applying the full three-part test announced by this Court in *Solem v. Helm*, 463 U.S. 277 (1983). In effect, it short-circuited its review and failed to engage in any comparative analysis within and between jurisdictions because to date only one as-applied proportionality claim has been successful, giving little reason to expect Petitioner’s claim would be upheld if granted. But this static

approach ignores this Court’s admonition that Eighth Amendment jurisprudence recognizes “the evolving standards of decency that mark the progress of a maturing society,” *Graham v. Florida*, 560 U.S. 48, 58 (2010). In this light, Petitioners’ claim is an appropriate vehicle for breathing new life to its proportionality jurisprudence.

In *Solem v. Helm*, this Court, in considering the constitutionality of a mandatory life sentence, articulated a three-part test for analyzing as-applied proportionality claims under the Eighth Amendment. 463 U.S. 277, 290 (1983). This Court articulated three factors to be considered in conducting such a proportionality review: (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. 463 U.S. at 292.

Subsequently in *Harmelin v. Michigan*, a splintered Court rejected an Eighth Amendment proportionality challenge to a life term in a drug case. 501 U.S. 957 (1991). The Court divided 5-4 over the outcome, but no single opinion garnered a majority. Justice Kennedy’s opinion concurring in the judgment could arguably be read to propose a modification of the three-part *Solem* test: rather than considering all three factors in every case, the intra-jurisdictional and inter-jurisdictional analyses could be reached only if a threshold comparison of the crime committed and the sentence imposed led to an inference of gross disproportionality. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in the judgment).

But this reading is but one interpretation and four years after *Harmelin*, the Fourth Circuit, for example, recognized that *Solem*’s three-factor test still had

vitality. In *United States v. Kratsas*, the Fourth Circuit considered whether “in light of the Supreme Court’s decision in *Harmelin*, [] *Solem*’s three-part proportionality test is still relevant in noncapital cases,” 45 F.3d 63 at 67 (4th Cir. 1995), and came to the conclusion that it is:

Despite the Court’s conflicting opinions on the issue, [] the continuing applicability of the *Solem* test is indicated by the fact that a majority of the *Harmelin* Court either declined expressly to overrule *Solem* or explicitly approved of *Solem*. Indeed, the Fourth Circuit has continued to use the *Solem* test in conducting proportionality reviews under the Eighth Amendment for cases involving life sentences or the death penalty.

Id. The *Kratsas* court went on to analyze each *Solem* factor, even after finding *Solem*’s first prong unmet. *Id.* at 68. Thus, *Kratsas* provides an excellent example of the continued application of the full, three-part *Solem* test, which in turn requires comparative analysis of a sentence within and between jurisdictions. Accord *United States v. D’Anjou*, 16 F.3d 604, 613 (4th Cir. 1994) (engaging in comparative analysis in case involving life sentence); *United States v. Barber*, 226 F. App’x 255, 258 (4th Cir. 2007) (same).

But the Fourth Circuit in Petitioners’ case explicitly failed to reach the second and third prongs of the *Solem* test. The court found no gross disproportionality between the offenses and the proposed life sentences under prong one and then, without moving to prong two, the court ruled against Petitioners. To short-circuit the full *Solem* test, the court relied on this Court’s opinion in *Graham v. Florida*, 560 U.S. 48, 59-60 (2010). But *Graham* did not present an as-applied challenge. The *Graham* Court explicitly disclaimed the relevance of *Solem* and

Harmelin to the question presented in that case: “Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.” *Graham*, 560 U.S. at 61-62. Whatever *Graham* suggested about the relationship between *Harmelin* and *Solem*, it was dicta.

In sum, there is some question whether courts should consider all three *Solem* factors in assessing an as-applied proportionality challenge to a life sentence. But if the admonition of this Court in *Graham* is to have effect — that sentences should reflect “the evolving standards of decency that mark the progress of a maturing society” — then the vitality of the *Solem* standard should be reaffirmed.

For these reasons, the writ should be granted.

Respectfully Submitted:

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