

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4754

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ABDI RAZAQ ABSHIR OSMAN, a/k/a Abdirasaq Abshir,

Defendant - Appellant.

No. 16-4756

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MOHAMED ABDI JAMA, a/k/a Mohammed Abdi Jamah,

Defendant - Appellant.

No. 16-4758

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

APPENDIX A

v.

ABDICASIIS CABAASE, a/k/a Ahmed Mahomood,

Defendant - Appellant.

No. 17-4274

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MOHAMED FARAH, a/k/a Mahamed Farraah Hassan,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (2:10-cr-00057-RAJ-DEM-5; 2:10-cr-00057-RAJ-DEM-2; 2:10-cr-00057-RAJ-DEM-4; 2:10-cr-00057-RAJ-DEM-6)

Submitted: November 17, 2017

Decided: December 6, 2017

Before KING, KEENAN, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Trey R. Kelleter, VANDEVENTER BLACK LLP, Norfolk, Virginia; Jason Alan Dunn, JASON A. DUNN, PLC, Virginia Beach, Virginia; Lawrence H. Woodward, Jr., SHUTTLEWORTH, RULOFF, SWAIN, HADDAD & MORECOCK, P.C., Virginia Beach, Virginia; Robert B. Rigney, PROTOGYROU & RIGNEY, Norfolk, Virginia, for Appellants. Dana J. Boente, United States Attorney, Richard D. Cooke, Assistant United

States Attorney, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Abdi Razaq Abshir Osman, Mohamed Abdi Jama, Abdicasiis Cabaase, and Mohamed Farah (collectively, “Defendants”) appeal their convictions and life sentences for piracy, in violation 18 U.S.C. § 1651 (2012).^{*} We conclude that Defendants’ challenges to their convictions and life sentences are barred by the law-of-the-case doctrine because we previously considered and rejected Defendants’ arguments in *United States v. Said*, 798 F.3d 182, 193, 198-200 (4th Cir. 2015). *See United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) (describing law-of-the-case doctrine and its exceptions). Accordingly, we affirm the amended judgments of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

^{*} Defendants also were convicted of and sentenced for other offenses, but they do not challenge those convictions or sentences on appeal.

ignored most, disregarded abnormal test results, and failed to treat any of his symptoms effectively. In other words, he has pled facts that, if true, would establish that his doctors “actually kn[e]w of and disregard[ed] an objectively serious condition, medical need, or risk of harm.” *Id.* at 634. Dismissal of Jehovah’s claim is not appropriate unless he has failed to present factual allegations supporting a plausible claim to relief. *See Jackson*, 775 F.3d at 178. That is not the case here. Therefore, the district court erred in dismissing Jehovah’s Eighth Amendment claim.

V.

For the foregoing reasons, the judgment of the district court is

*REVERSED AND REMANDED.*¹²



UNITED STATES of America,
Plaintiff–Appellant,

v.

Mohamed Ali SAID, a/k/a Mohammed Said, a/k/a Maxamad Cali Saciid; Mohamed Abdi Jama, a/k/a Mohammed Abdi Jamah; Abdicasiis Cabaase; Abdi Razaq Abshir Osman, a/k/a Abdirasaq Abshir; Mohamed Farah, a/k/a Mahamed Farraah Hassan, Defendants–Appellees.

¹² In light of our opinion, the district court should also reconsider Jehovah’s requests for

United States of America,
Plaintiff–Appellee,

v.

Mohamed Abdi Jama, a/k/a Mohammed Abdi Jamah, Defendant–Appellant.

United States of America,
Plaintiff–Appellee,

v.

Mohamed Farah, a/k/a Mahamed Farraah Hassan, Defendant–Appellant.

United States of America,
Plaintiff–Appellee,

v.

Abdi Razaq Abshir Osman, a/k/a Abdirasaq Abshir, Defendant–Appellant.

United States of America,
Plaintiff–Appellee,

v.

Mohamed Ali Said, a/k/a Mohammed Said, a/k/a Maxamad Cali Saciid, Defendant–Appellant.

United States of America,
Plaintiff–Appellee,

v.

Abdicasiis Cabaase, Defendant–Appellant.

Nos. 14–4413, 14–4420, 14–4421, 14–4423, 14–4424, 14–4429.

United States Court of Appeals,
Fourth Circuit.

Argued: May 13, 2015.

Decided: Aug. 13, 2015.

Background: Defendants were convicted of piracy and other offenses in the United

discovery.

States District Court for the Eastern District of Virginia, Raymond A. Jackson, J., 3 F.Supp.3d 515, but the District Court declined to impose the life sentence mandated by piracy statute on ground that it would be cruel and unusual in violation of defendants' Eighth Amendment rights. Defendants appealed from their convictions, and government cross-appealed from the District Court's sentencing decision.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

- (1) evidence was sufficient to support their convictions of federal offense of piracy;
- (2) evidence was sufficient to support defendants' convictions of conspiring to commit hostage taking and kidnapping;
- (3) trial evidence was more than sufficient to prove that, at time of ill-fated seizure attempt, defendants were equipped and ready to commit violence; and
- (4) mandatory life sentence provided by legislature for any defendant convicted of piracy was not grossly disproportionate to defendants' offense.

Convictions affirmed; sentences vacated; case remanded.

Davis, Senior Circuit Judge, filed concurring opinion.

1. Criminal Law ⇌1139

Court of Appeals reviews de novo a district court's denial of motion to dismiss indictment, where that denial depends solely on questions of law.

2. Criminal Law ⇌1139

Court of Appeals reviews de novo a claim that jury instruction failed to correctly state applicable law.

3. Courts ⇌90(2)

On appeal from denial of Somali nationals' motion to dismiss piracy charge

against them and challenging propriety of district court's instruction on piracy, three-judge panel of the Court of Appeals was not at liberty to overrule prior panel decision that piracy, as proscribed by federal statute, was not limited to robbery at sea. 18 U.S.C.A. § 1651.

4. Criminal Law ⇌1139

Court of Appeals reviews de novo a district court's denial of motion for judgment of acquittal.

5. Criminal Law ⇌1144.13(3), 1159.2(7)

In reviewing sufficiency-of-the-evidence contentions, the Court of Appeals is obliged to view evidence in light most favorable to government and sustain jury's verdict if any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.

6. Criminal Law ⇌1159.2(2)

Defendant challenging the sufficiency of evidence faces a heavy burden, as reversal for insufficient evidence is reserved for the rare case where prosecution's failure is clear.

7. Criminal Law ⇌45.50

Evidence that defendants set out from Somalia in skiff with the intent to seize merchant ship and the tools, including assault rifles and rocket propelled grenade launcher, to do so, that they subsequently mistook United States naval ship for merchant ship and set out to capture it in international waters, and that they repeatedly sprayed gunfire at ship in attempt to frighten the crew before their skiff was destroyed by return fire from naval ship, was sufficient to support their convictions of federal offense of piracy. 18 U.S.C.A. § 1651.

8. Conspiracy ⇌47(8)

Kidnapping ⇌36

Evidence that Somali nationals, in attempt to make money, had conspired to

seize a ship from international waters was sufficient to support their convictions of conspiring to commit hostage taking and kidnapping; upon their planned seizure of ship, defendants had only two options with respect to members of crew, either to throw them overboard or to take them into custody and hold them, along with ship's cargo, for ransom, and jurors were entitled to infer, in light of defendants' thirst for money, that they would elect to choose the second option. 18 U.S.C.A. §§ 1201(c), 1203(a).

9. Conspiracy ⇨47(3.1)

Evidence that Somali nationals, in attempt to make money, had conspired to seize a ship from international waters, and that, pursuant to their scheme, had outfitted skiff with assault rifles and rocket propelled grenade launcher, given pursuit of vessel which they thought was merchant ship but which actually turned out to be United States naval vessel, and fired several rounds at vessel in alleged attempt to frighten the crew, was sufficient to support their conviction of conspiring to perform act of violence against individual on vessel, notwithstanding defendants' contention that it was possible to take vessel by surprise and that their agreement to seize ship did not necessarily mean that they had conspired to perform any violent act; trial evidence was more than sufficient to prove that, at time of ill-fated seizure attempt, defendants were equipped and ready to commit violence. 18 U.S.C.A. § 2291(a)(9).

10. Criminal Law ⇨1139

Court of Appeals reviews de novo whether a sentence runs afoul of the Eighth Amendment. U.S.C.A. Const. Amend. 8.

11. Sentencing and Punishment ⇨1435

To determine whether a punishment is cruel and unusual, in violation of the

Eighth Amendment, court must consider evolving standards of decency that mark the progress of a maturing society. U.S.C.A. Const.Amend. 8.

12. Sentencing and Punishment ⇨1435, 1482

Punishment is cruel and unusual, in violation of the Eighth Amendment, not only when it is inherently barbaric, but also when it is disproportionate to defendant's crime. U.S.C.A. Const.Amend. 8.

13. Sentencing and Punishment ⇨1482

On an as-applied challenge to proportionality of sentence, court must first perform threshold comparison of gravity of offense and severity of sentence to determine whether it produces an inference of gross disproportionality, and if it does, court then moves on to second prong of analysis and compares defendant's sentence with sentences received by other offenders in same jurisdiction and with sentences imposed for the same crime in other jurisdictions; if that comparison validates the initial judgment that sentence is grossly disproportionate, then sentence is cruel and unusual in violation of the Eighth Amendment. U.S.C.A. Const. Amend. 8.

14. Criminal Law ⇨45.50

Sentencing and Punishment ⇨1507

Mandatory life sentence provided by legislature for any defendant convicted of piracy on high seas was not grossly disproportionate to defendants' offense in outfitting skiff with assault rifles and rocket propelled grenade launcher, giving chase to what they thought was merchant ship but what actually turned out to be United States naval vessel, and firing several rounds at vessel in attempt to frighten the crew before their skiff was destroyed by return fire given by naval vessel; mere fact that no one on board naval vessel was

harméd before defendants' ill-considered attack was thwarted did not render the life sentences mandated by federal statute grossly disproportionate to defendants' offense or violative of their Eighth Amendment rights. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 1651.

15. Criminal Law ¶45.50

Mandatory life sentence provided for any defendant convicted of piracy in international waters reflected a rational legislative judgment, that was entitled to deference. 18 U.S.C.A. § 1651.

ARGUED: Benjamin L. Hatch, Office of the United States Attorney, Norfolk, Virginia, for Appellant/Cross-Appellee. Jeremy C. Kamens, Office of the Federal Public Defender, Alexandria, Virginia, for Appellees/Cross-Appellants. **ON BRIEF:** Dana J. Boente, United States Attorney, Alexandria, Virginia, Joseph E. DePadilla, Assistant United States Attorney, Office of the United States Attorney, Norfolk, Virginia; Jerome J. Teresinski, Trial Attorney, National Security Division, United States Department of Justice, Washington, D.C., for Appellant/Cross-Appellee. Michael S. Nachmanoff, Federal Public Defender, Frances H. Pratt, Keith Loren Kimball, Office of the Federal Public Defender, Alexandria, Virginia, for Appellee/Cross-Appellant Mohamed Ali Said; Robert B. Rigney, Protogyrou & Rigney, PLC, Norfolk, Virginia, for Appellee/Cross-Appellant Mohamed Abdi Jama; David M. Good, David Michael Good, PC, Virginia Beach, Virginia, for Appellee/Cross-Appellant Mohamed Farah; Trey R. Kelleter, Vandeventer Black LLP, Norfolk, Virginia, for Appellee/Cross-Appellant Abdi Razaq Abshir Osman; Bruce C. Sams, Sams & Gilchrist PLLC, Norfolk,

Virginia, for Appellee/Cross-Appellant Abdicasiis Cabaase.

Before KING and KEENAN, Circuit Judges, and DAVIS, Senior Circuit Judge.

No. 14-4413 reversed in part, vacated in part, and remanded; Nos. 14-4420, 14-4421, 14-4423, 14-4424, and 14-4429 affirmed by published opinion. Judge KING wrote the opinion, in which Judge KEENAN and Senior Judge DAVIS joined. Senior Judge DAVIS wrote a separate concurring opinion.

KING, Circuit Judge:

In early 2010, a group of seven Somalis—including defendants Mohamed Ali Said, Mohamed Abdi Jama, and Abdicasiis Cabaase—boarded a small skiff and entered the Gulf of Aden (in the Indian Ocean between the Arabian Peninsula and the Horn of Africa), intending to seize a merchant ship at sea. Their objective was foiled by the British warship HMS Chatham, which was conducting a counter-piracy mission in the Gulf. Undeterred by their initial lack of success, Said, Jama, and Cabaase joined with defendants Abdi Razaq Abshir Osman and Mohamed Farah, plus two others, and returned from Somalia to the Gulf in the skiff in April 2010. During their April escapade, the defendants and their accomplices launched an attack on the USS Ashland, a United States Navy warship that they confused for a merchant vessel. The Ashland responded by destroying the skiff and killing one of the attackers.

After the defendants were apprehended and transported to the Eastern District of Virginia, they were tried and convicted of multiple offenses, including piracy as proscribed by 18 U.S.C. § 1651. At sentencing, the district court declined to impose statutorily mandated life sentences on the defendants, reasoning that such sentences

would contravene the Eighth Amendment's prohibition against cruel and unusual punishment. See *United States v. Said*, 3 F.Supp.3d 515 (E.D.Va.2014), ECF No. 260 (the "*Eighth Amendment Order*").¹

The government, in pursuing its appeal in No. 14-4413, seeks relief from the district court's decision not to impose the life sentences required by § 1651. By their cross-appeals in Nos. 14-4420, 14-4421, 14-4423, 14-4424, and 14-4429, the defendants challenge the court's failure to dismiss the § 1651 charge, the jury instructions with respect to the piracy offense, and the sufficiency of the evidence supporting certain of their convictions. As explained below, we reject each of the defendants' contentions and affirm their convictions. We deem the government's appeal to be meritorious, however, and reverse the Eighth Amendment Order, vacate the defendants' sentences, and remand for resentencing.

I.

A.

1.

In approximately February 2010, defendants Said, Jama, and Cabaase—along with Jama Idle Ibrahim and three others—acquired a small wooden skiff on the coast of Somalia and loaded it with a hooked ladder and weapons, including AK-47 assault rifles, a rocket-propelled grenade launcher (an "RPG"), a Singapore

Assault Rifle 80 (an "SAR-80"), and a Tokarev 9-mm pistol.² They also equipped the skiff with two motors, enabling it to more swiftly traverse the sea. The group then left Somalia and travelled into the Gulf of Aden searching for a merchant ship to seize. The Gulf is one of the most heavily trafficked shipping corridors in the world, making it a prime location for piracy.

On the afternoon of February 27, 2010, the skiff was intercepted in the Gulf of Aden by the HMS Chatham of the British Royal Navy. Upon encountering the skiff, the Chatham actioned a helicopter for a close investigation. The Somalis, recognizing the Chatham as a warship, attempted to flee in the skiff and threw weapons and their ladder overboard. Those actions were witnessed by the helicopter pilots, who conveyed information to a boarding team that had been dispatched in smaller boats from the warship.

The HMS Chatham's boarding team seized and searched the skiff, where team members discovered the pistol and ammunition for that weapon and the AK-47s. The boarding team also apprehended and questioned the Somalis. Ibrahim, speaking as the group's leader, asserted that the Somalis were smugglers who had taken human cargo to Yemen and that one of their boats had broken down along the way.³ Personnel of the Chatham photographed the Somalis, confiscated the pistol and ammunition, disabled one of the skiff's

1. The Eighth Amendment Order is published at 3 F.Supp.3d 515 and also found at J.A. 886-902. (Citations herein to "J.A. —" refer to the contents of the Joint Appendix filed by the parties in these appeals.).

2. We recite the facts in the light most favorable to the government, as the prevailing party at trial. See *United States v. Singh*, 518 F.3d 236, 241 n. 2 (4th Cir.2008).

3. Ibrahim later explained that the Somalis' cover story had to involve two boats to seem plausible, given that seven men claiming to be smugglers were aboard the skiff. Those who patrol the high seas and "see people smuggling people almost every day" would know that only two or three smugglers—and "not more than that"—generally carry out such missions. See J.A. 389.

motors, spray-painted a red identification number on the skiff, and ordered the Somalis to return home.

2.

In April 2010, the five defendants in this case, along with Ibrahim and another man called the “Engineer,” used the same skiff to enter the Gulf of Aden from Somalia. So that the skiff “would not be recognizable,” the Somalis had obliterated the identification number spray-painted on it by Royal Navy personnel. *See* J.A. 415. To accomplish their goal of seizing a ship, the Somalis had obtained a replacement for the disabled motor and loaded the skiff with a hooked ladder, three AK–47s, and an RPG. Ibrahim and Jama led the new mission, and Said was next in command. Farah drove the skiff, and Cabaase and Osman supplied two of the weapons.

In the pre-dawn hours of April 10, 2010, the skiff swiftly approached a large ship believed by the Somalis to be a “cargo ship.” *See* J.A. 444. Nearing the ship’s aft on its port side, Said and Cabaase held loaded AK–47s, while Jama attempted to load the RPG with explosive rockets.⁴ When the skiff was approximately twenty-five yards from the “cargo ship,” Cabaase began shooting at it with his AK–47. The Somalis intended to “scare [the crew], and then after that[,] capture the ship.” *Id.* The encounter took place about forty nautical miles off the coast of Yemen in international waters.

The targeted ship was actually the USS Ashland, a dock landing ship of the United States Navy, which was then transiting the Gulf of Aden transporting Marines and

military equipment.⁵ Several personnel aboard the Ashland—namely, Marine Lance Corporal John Curtis, Damage Control Fireman James Hendershot, Seaman Donald Lane, Lieutenant Junior Grade Benjamin Towers, Lieutenant Brent Holloway, and Gunner’s Mate Justin Myers—witnessed the Somalis’ attack from several vantage points, including near the warship’s aft, its mid-ship, and the bridge. Several of the witnesses saw Cabaase fire multiple rounds at the Ashland and heard bullets striking the ship. *See, e.g.,* J.A. 153 (Curtis: “He was deliberately shooting . . . the weapon towards the front right over the bridge of the USS ASHLAND.”); *id.* at 186 (Hendershot: “I saw a man stand up and bring a weapon up to his shoulder aiming at the ship . . .”); *id.* at 282 (Myers: “You saw a muzzle flash followed by the sound of a weapon, and I also heard a couple of clangs that sounded like ricochet on the side of the boat.”). Indeed, Corporal Curtis witnessed Cabaase “load a magazine, rack it, fire like two to three times, bang, bang, bang. Bang, bang. He dropped the magazine, loads another one, racks it a couple of times, keeps shooting, bang, bang, bang.” *Id.* at 153–54. The multiple shots fired at the Ashland were so startling that the warship’s helmsman had difficulty with the steering.

Gunner’s Mate Myers initially left his remote firing station inside the USS Ashland to observe the skiff’s assault from the warship’s deck. After watching Cabaase fire multiple times at the Ashland, Myers ran back to his duty station, where he controlled 25-mm machine guns loaded

4. Unable to render the RPG operational, Jama sought the assistance of Ibrahim, who soon realized that the ammunition on board the skiff did not fit the RPG.

5. As one of the Ashland’s personnel later testified, the vessel “is one of the ships in the U.S.

Navy inventory that actually looks like a merchant ship.” *See* J.A. 203–04. With military equipment on board, the Ashland “could be misconstrued as . . . a merchant container vessel that isn’t fully loaded.” *Id.* at 204.

with armor-piercing incendiary shells. The screen of the weapons system operated by Myers displayed images from an infrared camera mounted outside the ship. The camera zoomed in so closely on the skiff that it seemed “[a]lmost as if you [were] standing next to some of the people in the skiff.” *See* J.A. 213. Myers’s vantage point enabled him to see that Cabaase was aiming directly at the Ashland. After Cabaase began firing a second series of shots, the Ashland’s Captain ordered Myers to return fire with a 25-mm machine gun, and Myers promptly fired two shots. As a result of those shots from the Ashland, a fire erupted on the skiff, the Engineer died, and Farah lost a leg.⁶

The defendants jumped off the burning skiff, and Ibrahim followed suit after throwing the RPG and two of the AK-47s overboard. While treading water, the Somalis agreed to tell the crew of the USS Ashland a story similar to the one that had been concocted for the personnel of the HMS Chatham—that the skiff was returning from smuggling refugees to Yemen. To explain why they were travelling on one small skiff, they would tell the Ashland’s crew about transporting refugees on a second larger boat that had broken down before their return trip. The Somalis also agreed to explain that they were stranded without food or fuel, and that the Engineer (who was then deceased) had fired on the Ashland to alert the crew that they were in need of rescue.

The USS Ashland and its personnel apprehended the defendants and Ibrahim, took pictures of the skiff’s remains, and seized its contents, including the weapons and the hooked ladder that were left aboard. The Somalis were subsequently

transported to Virginia, where this prosecution was initiated.

B.

1.

On April 21, 2010, the grand jury in the Eastern District of Virginia at Norfolk returned an indictment against the defendants and Ibrahim. Nearly three months later, on July 7, 2010, the grand jury returned a superseding indictment. Those indictments—which dealt solely with the attack on the USS Ashland—charged the defendants and Ibrahim with, *inter alia*, piracy in contravention of 18 U.S.C. § 1651. That statute provides in full:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

18 U.S.C. § 1651.

On June 9, 2010, the defendants and Ibrahim moved to dismiss the piracy charge of the initial indictment, contending that piracy under § 1651 requires a robbery at sea. Because their effort to seize the Ashland was unsuccessful, the defendants and Ibrahim argued that the § 1651 piracy charge should be dismissed. The district court agreed with the defendants and granted their motion on August 17, 2010, dismissing the piracy charge from the superseding indictment.

On August 21, 2010, Ibrahim entered into a plea agreement with the United States Attorney, by which he agreed to assist the government in its prosecution of his cohorts. On August 27, 2010, Ibrahim pleaded guilty to three counts of the superseding indictment: attack to plunder a vessel, in contravention of 18 U.S.C.

6. The defendants each suffered burns as a result of trying to put out the fire on the skiff,

but Ibrahim was not injured.

§ 1659; performing an act of violence against an individual on a vessel, in contravention of 18 U.S.C. § 2291(a)(6); and using, carrying, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). On November 29, 2010, Ibrahim was sentenced to 360 months in prison.

2.

After Ibrahim was sentenced, the government filed an appeal contesting—as to the five defendants—the district court’s dismissal of the § 1651 piracy charge. Following an oral argument conducted in this Court on March 25, 2011, we placed the government’s appeal in abeyance pending argument and decision in *United States v. Dire*. The *Dire* appeals were brought by a separate group of Somalis who had been convicted of piracy for their attack on the USS Nicholas, another Navy warship. The *Dire* defendants had intended to seize the Nicholas in the Indian Ocean, but their plan was foiled by the Nicholas’s crew.

Like the defendants here, the *Dire* defendants argued that § 1651 requires a robbery—i.e., seizing or otherwise robbing a vessel. That contention is premised primarily on the Supreme Court’s decision in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162, 5 L.Ed. 57 (1820), where the Court indicated that it had “no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea.” As the argument goes, because “a court must interpret a statute by its ordinary meaning at the time of its enactment,” and because the language of § 1651 can be traced to an 1819 act of Congress, the *Smith* decision of 1820 constitutes “the definitive authority on the meaning of piracy.” See *United States v. Dire*, 680 F.3d 446, 452 (4th

Cir.2012) (internal quotation marks omitted).

By our *Dire* decision, however, we rejected the theory that the meaning of piracy for purposes of § 1651 “was fixed in the early Nineteenth Century.” See 680 F.3d at 467. That is, we excluded a static interpretation of § 1651 that would “render it incongruous with the modern law of nations and prevent us from exercising universal jurisdiction in piracy cases.” *Id.* at 468–69. Rather, consistent with Congress’s intent “to define piracy as a universal jurisdiction crime,” we concluded that “§ 1651 incorporates a definition of piracy that changes with advancements in the law of nations.” *Id.* at 469. We recognized in *Dire* that, for decades, piracy has been defined by the law of nations to include:

- (A) (1) any illegal act of violence or detention, or any act of depredation; (2) committed for private ends; (3) on the high seas or a place outside the jurisdiction of any state; (4) by the crew or the passengers of a private ship; (5) and directed against another ship, or against persons or property on board such ship; or
- (B) (1) any act of voluntary participation in the operation of a ship; (2) with knowledge of the facts making it a pirate ship; or
- (C) (1) any act of inciting or of intentionally facilitating (2) an act described in subparagraph (A) or (B).

Id. at 465 (alterations and internal quotation marks omitted) (drawing definition from the substantively identical Geneva Convention on the High Seas (the “High Seas Convention”) and United Nations Convention on the Law of the Sea (the “UNCLOS”)).

Because the foregoing definition of piracy encompassed the *Dire* defendants’ conduct, we affirmed their convictions under

§ 1651. The very day we decided *Dire*—that is, May 23, 2012—we vacated the district court’s dismissal of the § 1651 piracy charge in this case and “remand[ed] for such other and further proceedings as may be appropriate, consistent with our decision in *Dire*.” See *United States v. Said*, 680 F.3d 374, 375 (4th Cir.2012).⁷

3.

On August 8, 2012, after our remand to the district court, the grand jury returned a second superseding indictment against the defendants (the “operative indictment”), lodging additional charges stemming from the February 2010 encounter with the British warship HMS Chatham. As a result of Ibrahim’s cooperation, the government investigators and the grand jury had obtained evidence supporting those additional counts. The operative indictment contained the following charges:

- Count One—Conspiracy to commit hostage taking (18 U.S.C. § 1203(a));
- Count Two—Conspiracy to commit kidnapping (18 U.S.C. § 1201(c));
- Count Three—Conspiracy to perform an act of violence against an individual on a vessel (18 U.S.C. § 2291(a)(9));
- Count Four—Conspiracy to use and carry a firearm and a destructive device during and in relation to, and possessing a firearm and a destructive device in furtherance of, a crime of violence, specifically the crimes charged in Counts One through Three and Five through Eight (18 U.S.C. § 924(o));
- Count Five—Piracy as defined by the law of nations (18 U.S.C. § 1651);
- Count Six—Attack to plunder a vessel (18 U.S.C. § 1659);

7. The *Dire* defendants and the defendants in this case filed petitions for writs of certiorari in the Supreme Court, seeking to have the Court reverse our ruling in *Dire* concerning

- Count Seven—Assault with a dangerous weapon on a federal officer or employee (18 U.S.C. § 111(a)(1) and (b));
- Count Eight—Performing an act of violence against an individual on a vessel (18 U.S.C. § 2291(a)(6));
- Count Nine—Using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, specifically the crimes charged in Counts One through Three (18 U.S.C. § 924(c)(1)(A)); and
- Count Ten—Using, carrying, and discharging a firearm during and in relation to a crime of violence, specifically the crimes charged in Counts One through Three and Five through Eight (18 U.S.C. § 924(c)(1)(A)(iii)).

Counts One through Four of the operative indictment encompass the time period in which the encounters with the HMS Chatham and the USS Ashland occurred. Counts Five through Eight, plus Ten, deal solely with the attack on the Ashland, and Count Nine relates only to the Chatham. Counts Five through Ten include allegations of aiding and abetting, pursuant to 18 U.S.C. § 2(a).

Defendants Said, Jama, and Cabaase were named in all ten counts of the operative indictment. Defendants Osman and Farah were named in all counts except Count Nine. Prior to trial, the defendants again moved to dismiss the § 1651 piracy charge (Count Five of the operative indictment), which the district court denied on the basis of the *Dire* decision.

4.

The defendants’ trial began in Norfolk on February 19, 2013, and concluded on

the ambit of § 1651. Those petitions were denied on January 22, 2013. See — U.S. —, 133 S.Ct. 982, 184 L.Ed.2d 765 (2013).

February 27, 2013. The trial featured extensive testimony from personnel aboard the USS Ashland and the HMS Chatham during their encounters in 2010 with the defendants. Ibrahim was called to the stand by the government, and the prosecutors used his testimony to establish several details underlying their case.

Ibrahim began by explaining how he became involved in piracy activities. For example, after seeing “a lot of people in [his] neighborhood making a lot of money [and] buying houses and nice cars” from acts of piracy, he decided to “jump on that, too.” J.A. 360. Thus, in November 2008, Ibrahim joined a group of Somali pirates—none of whom are involved in this case—on a mission to seize merchant ships near the coast of Yemen. That group forcibly seized a Danish ship called the CEC Future, using assault weapons and a ladder. The pirates removed the Future to Somalia and held it “until [they] got a ransom” in January 2009. *Id.* at 363. Ibrahim was paid \$17,000 for that piracy mission.

In early 2010, Ibrahim sought out another piracy mission in order to “get more money.” J.A. 365. In February 2010, he joined Said, Jama, Cabaase, and three others on the mission to “seize a ship” that was thwarted by the HMS Chatham. *Id.* at 383. Thereafter, in April 2010, Ibrahim and the defendants set out with another plan to “seize a ship” and “make money.” *Id.* at 403. Ibrahim described his and the defendants’ subsequent attack on the USS Ashland and their apprehension by its personnel. After being indicted for the Ashland attack, Ibrahim explained, he decided to plead guilty and cooperate with the federal prosecutors, seeking a less severe sentence.⁸

At the close of the prosecution’s case, on February 25, 2013, the defendants moved for judgments of acquittal. The trial court denied the motions. The defendants rested without calling witnesses. The defendants objected to the court’s proposed instructions on piracy under § 1651, which adopted the legal principles recognized and applied in *Dire*. The court overruled the defendants’ objections and instructed the jury in a manner consistent with *Dire*. At the conclusion of the six-day trial, on February 27, 2013, the jury convicted the defendants on all counts. The defendants jointly filed a renewed motion for judgments of acquittal on May 13, 2013, which the court denied on August 1, 2013.

5.

On October 4, 2013, prior to their sentencing hearings, the defendants filed a motion to invalidate § 1651’s mandatory life sentence on Eighth Amendment grounds. By its Eighth Amendment Order of February 28, 2014, the district court granted the motion.

The Eighth Amendment Order concluded that life sentences in the circumstances of this prosecution would contravene the defendants’ Eighth Amendment rights. The district court began its analysis by recognizing the Supreme Court’s two-prong framework for assessing as-applied Eighth Amendment challenges to non-capital sentences, as spelled out in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). The district court explained that, under prong one, a court must “compare the gravity of the offense and the severity of the sentence,” and determine “if that comparison yields ‘an inference of gross disproportionality,’

8. After entering his guilty pleas in this case, Ibrahim pleaded guilty in the District of Columbia to charges relating to the 2008 seizure of the CEC Future. He was subsequently

sentenced in that prosecution to twenty-five years in prison, to run concurrently with his sentence here.

which should be a ‘rare’ result.” See *Eighth Amendment Order* 6 (quoting *Graham*, 560 U.S. at 60, 130 S.Ct. 2011). Upon ascertaining an inference of gross disproportionality, the court moves to prong two, which requires it to “compare the sentence with sentences received with other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions.” *Id.* “If that analysis confirms that the sentence is grossly disproportionate,” the district court explained, “then to impose the sentence would violate the Eighth Amendment.” *Id.*

At prong one of the Eighth Amendment analysis, the district court assessed whether an inference of gross disproportionality arose upon comparing the proposed life sentences with the gravity of the defendants’ § 1651 piracy offenses. The court reasoned that, although piracy is generally a serious offense, “this was not a run-of-the-mill case of modern piracy.” See *Eighth Amendment Order* 11. Indeed, the court explained that the defendants’ offenses were more properly characterized as attempted piracy, in that “[n]o victims were caused any physical harm, and it is unclear whether there was even any property damage.” *Id.* The court concluded that the defendants had satisfied prong one of the Eighth Amendment analysis by establishing the inference that life sentences would be grossly disproportionate to their piracy offenses. *Id.* at 12.

The district court then turned to prong two of the Eighth Amendment analysis, comparing the proposed life sentences with sentences imposed on other offenders in the same jurisdiction and with sentences imposed for piracy in other jurisdictions. The court observed that, with the exception of statutes punishing recidivist offenders, almost all of the “federal criminal statutes carrying a mandatory minimum

life sentence . . . involve the death of another person.” See *Eighth Amendment Order* 13. The court also perceived that imposing “a life sentence for the conduct in this case [would be] unique internationally,” on the premise that the “global average sentence for piracy is just over 14 years.” *Id.* at 16. Accordingly, the court concluded that the “statutorily-mandated sentence violates the Eighth Amendment and cannot be imposed.” *Id.*

By its Eighth Amendment Order, the district court directed the parties to submit supplemental briefing on the appropriate sentences for the defendants’ piracy convictions, in view of the court’s invalidation of the mandatory life sentence. In his supplemental brief, the United States Attorney urged the court to impose a life sentence on each of the defendants, asserting that such sentences were legally mandated. The defendants, by contrast, made recommendations of various non-life sentences.

The defendants’ sentencing hearings were conducted on May 14 and 15, 2014. Said was sentenced to an aggregate of 500 months (140 months for his § 1651 piracy offense), Jama to 500 months (140 months for piracy), Cabaase to 510 months (150 months for piracy), Osman to 360 months (240 months for piracy), and Farah to 384 months (264 months for piracy). The government and the defendants timely noted their respective appeals, and we possess jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b).

II.

Although the defendants are cross-appellants in these proceedings, we will review their contentions in the first instance, as our dispositions of their appeals could render moot the government’s challenge to the defendants’ non-life sentences for their 18 U.S.C. § 1651 piracy offenses. By their

appeals, the defendants contend that the district court erred in denying their motion to dismiss the piracy charge and in instructing the jury on the elements of piracy under § 1651. The defendants also maintain that the court erroneously denied their motions for judgments of acquittal, arguing that the evidence was insufficient to prove piracy and certain other offenses.

A.

[1,2] In contending that the district court erred with respect to the § 1651 piracy offense by declining to dismiss that charge and by erroneously instructing the jury, the defendants contest the court's reliance on *United States v. Dire*, 680 F.3d 446 (4th Cir.2012). We review de novo a district court's denial of a motion to dismiss an indictment where the denial depends solely on questions of law. See *United States v. Hatcher*, 560 F.3d 222, 224 (4th Cir.2009). We also review de novo the claim that a jury instruction failed to correctly state the applicable law. See *United States v. Jefferson*, 674 F.3d 332, 351 (4th Cir.2012).

[3] The defendants again advance the contention—considered and rejected in *Dire*—that the definition of piracy under § 1651 is limited to robbery at sea. Nevertheless, the defendants concede that we are obliged to adhere to *Dire*, as one panel of this Court is not entitled to overrule another panel. See *McMellon v. United*

States, 387 F.3d 329, 333–34 (4th Cir.2004) (en banc). Furthermore, the defendants do not dispute that the district court faithfully applied the *Dire* principles. We thus have no trouble concluding that the court did not err in declining to dismiss the piracy charge or in instructing the jury on the elements of the § 1651 offense.⁹

B.

Turning to the evidentiary issues, each defendant challenges the sufficiency of the evidence as to the § 1651 piracy offense. Additionally, the defendants, except for Said, challenge the sufficiency of the evidence on the offenses charged in Count One (conspiracy to commit hostage taking), Count Two (conspiracy to commit kidnapping), and Count Three (conspiracy to perform an act of violence against an individual on a vessel). Because Counts One through Three served as the predicate offenses for Count Nine (using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence), defendants Jama and Cabaase also seek vacatur of their Count Nine convictions.¹⁰

[4–6] We review de novo a trial court's denial of a motion for judgment of acquittal. See *United States v. Reed*, 780 F.3d 260, 269 (4th Cir.2015). In reviewing evidence sufficiency contentions, we are obliged to “view the evidence in the light most favorable to the government and sus-

9. Notably, we are not alone in our interpretation of § 1651. Other courts, including two courts of appeals, have adopted the definition of piracy announced in *Dire*. See *United States v. Ali*, 718 F.3d 929, 936–37 (D.C.Cir.2013); *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 943 (9th Cir.2013).

10. None of the defendants challenge their convictions of the offenses charged in Count Four (conspiracy to use and carry a firearm

and a destructive device during and in relation to, and possessing a firearm and a destructive device in furtherance of, a crime of violence); Count Six (attack to plunder a vessel); Count Seven (assault with a dangerous weapon on a federal officer or employee); Count Eight (performing an act of violence against an individual on a vessel); and Count Ten (using, carrying, and discharging a firearm during and in relation to a crime of violence).

tain the jury's verdict if any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *United States v. Barefoot*, 754 F.3d 226, 233 (4th Cir.2014) (emphasis and internal quotation marks omitted). A defendant challenging the sufficiency of the evidence faces a heavy burden, as "[r]eversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *United States v. Ashley*, 606 F.3d 135, 138 (4th Cir.2010) (internal quotation marks omitted).

1.

[7] The defendants first challenge the sufficiency of the evidence on the § 1651 offense, which relates solely to their attack on the USS Ashland. In support of their sufficiency contention, the defendants reiterate the argument that piracy requires a robbery at sea. As we have explained, however, their position is foreclosed by *Dire*.

Furthermore, the government presented sufficient evidence to prove that the defendants' conduct constituted piracy under the *Dire* principles. The evidence established, inter alia, the following:

- The defendants set out from Somalia in their skiff with the intent to seize a merchant ship and tools to do so, including a hooked ladder, three AK-47s, and an RPG;
- Seeking to capture the USS Ashland in international waters, Cabaase fired multiple AK-47 rounds at the Ashland from the skiff. *See Dire*, 680 F.3d at 465 (explaining that piracy includes "(A)(1) any illegal act of violence . . . ; (2) committed for private ends; (3) on the high seas . . . ; (4) by the crew or the passengers of a private ship; (5) and directed against another ship, or against persons or property on board

such ship" (alterations and internal quotation marks omitted));

- Farah drove the skiff as the defendants hunted a ship to seize and then targeted the Ashland. *See id.* (further defining piracy as "(B)(1) any act of voluntary participation in the operation of a ship; (2) with knowledge of the facts making it a pirate ship" (alterations and internal quotation marks omitted); and
- Osman, along with Cabaase, had supplied two of the weapons, and Jama and Said, a leader and next in command for the mission, carried an RPG and an AK-47 during the Ashland attack. *See id.* (lastly defining piracy as "(C)(1) any act of inciting or of intentionally facilitating (2) an act described in subparagraph (A) or (B) (internal quotation marks omitted)); *see also United States v. Shibin*, 722 F.3d 233, 240 (4th Cir.2013) (recognizing "that the facilitating conduct of [subparagraph (C)] is 'functionally equivalent' to aiding and abetting criminal conduct, as proscribed by 18 U.S.C. § 2").

Accordingly, we are well satisfied that, on the evidence presented, a reasonable jury was entitled to conclude beyond a reasonable doubt that each of the defendants committed the § 1651 piracy offense.

2.

[8] Next, defendants Jama, Cabaase, Osman, and Farah challenge the sufficiency of the evidence on the conspiracy offenses charged in Counts One through Three, encompassing the time period in which the encounters with the HMS Chatham and the USS Ashland occurred. As for Counts One and Two, the operative indictment alleged that the defendants conspired to commit hostage taking and kidnapping, in that they went to sea with the intent to hijack a ship and hold the

vessel and its crew for ransom. *See* 18 U.S.C. § 1203(a) (proscribing conspiracy to commit hostage taking); *id.* § 1201(c) (same for conspiracy to commit kidnapping). These four defendants contend that there was insufficient evidence to prove that they conspired to kidnap or hold any person hostage for ransom. They assert that the evidence showed merely that they intended to seize a ship to make money.

Upon seizing a ship, however, the defendants would have had to either detain the crew members and personnel on board or throw them off the vessel. A reasonable jury could conclude that the defendants intended to pursue the former option—that is, detain the crew and other personnel—given that their shared goal was to “make money,” and that they could do so by ransoming captives. *See, e.g.,* J.A. 403 (Ibrahim’s testimony that the defendants’ mutual objective at the time of the USS Ashland attack was “[t]o seize a ship so we can make money”). That evidence, illustrating the defendants’ thirst for funds, was sufficient to prove that the defendants conspired to profit by kidnapping and holding crew members and personnel hostage in exchange for ransom. Tellingly, there was no commonsense alternative offered to the jury. Although these defendants now contend that they might have intended to make money by, for example, selling the seized ship, they did not argue such a theory, or present any evidence supporting it, at trial. Indeed, the defense focused on convincing the jury that the defendants were smugglers rather than pirates.

[9] Turning to Count Three, the operative indictment alleged that the defendants conspired to perform an act of violence against an individual on a vessel, and that such act of violence was likely to endanger the safety of those on board. *See* 18 U.S.C. § 2291(a)(9) (criminalizing conspira-

cy to “do anything prohibited under paragraphs (1) through (8),” including performing act of violence against individual on vessel, as proscribed by paragraph (6)). Jama, Cabaase, Osman, and Farah contend that their mere intent to seize a ship does not also prove an intention to perform an act of violence against the ship’s crew or other personnel. Rather, according to these defendants, “[o]ne might seize a vessel by surprise or acquiescence.” *See* Br. of Cross-Appellants 59.

The trial evidence, however, was more than sufficient to prove that, at the time of the encounters with the HMS Chatham and the USS Ashland, the defendants were equipped and ready to commit violence against individuals on board in furtherance of their goal of seizing a ship. During the Ashland attack, they carried an RPG and three AK-47s—two provided by Cabaase and Osman—in their small, open skiff. While Farah drove the skiff into position, Jama attempted to load the RPG, and Cabaase fired multiple rounds from his AK-47 at the Ashland in order “to capture the ship.” *See* J.A. 444. From that evidence, a reasonable jury could conclude that these defendants conspired to perform an act of violence against an individual on a vessel, as part of their plan to forcibly seize a ship.

In these circumstances, the guilty verdicts on Count Three, as well as Counts One and Two, were adequately supported by the evidence. Because we therefore must affirm the convictions of Jama, Cabaase, Osman, and Farah on Counts One through Three, we also uphold Jama’s and Cabaase’s convictions on Count Nine.

III.

[10] Having resolved each defendant’s appeal against him, we turn to the government’s appeal from the district court’s Eighth Amendment Order. The govern-

ment contends that the court erroneously determined that 18 U.S.C. § 1651's mandatory life sentence, as applied to the defendants, contravenes the Eighth Amendment's prohibition against cruel and unusual punishment. The defendants, by contrast, maintain that the court properly imposed non-life sentences for their piracy offenses. We review de novo the question of whether a sentence runs afoul of the Eighth Amendment. *See United States v. Cobler*, 748 F.3d 570, 574 (4th Cir.2014).

A.

[11, 12] We begin our consideration of the government's appeal by identifying the controlling legal framework. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In deciding whether a punishment is cruel and unusual, we must examine the "evolving standards of decency that mark the progress of a maturing society." *Graham v. Florida*, 560 U.S. 48, 58, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (internal quotation marks omitted). A punishment is cruel and unusual not only when it is "inherently barbaric," but also when it is "disproportionate to the crime." *Id.* at 59, 130 S.Ct. 2011. Indeed, "[t]he concept of proportionality is central to the Eighth Amendment." *Id.*

[13] Here, the defendants pursued as-applied challenges to § 1651's mandatory life sentence. *See Cobler*, 748 F.3d at 575 ("Under an as-applied challenge, a defendant contests the length of a certain [non-capital] sentence as being disproportionate given all the circumstances in a particular case." (internal quotation marks omitted)). As the district court recognized in its Eighth Amendment Order, the Supreme Court has adopted a two-prong test for

assessing an as-applied challenge to the proportionality of a sentence. Under prong one, a court must determine whether a threshold comparison of "the gravity of the offense and the severity of the sentence" produces "an inference of gross disproportionality." *See Graham*, 560 U.S. at 60, 130 S.Ct. 2011 (internal quotation marks omitted) (relying on principles set forth in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)). If prong one is satisfied, the court moves to an analysis of prong two. Under that prong, the court must "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." *Id.* If that comparison "validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.* (alterations and internal quotation marks omitted).

The Supreme Court has on one occasion—in its *Solem* decision of 1983—identified a non-capital sentence as being grossly disproportionate. There, the recidivist defendant (Helm) was sentenced to life without parole for uttering a \$100 bad check. The Court observed that the matter involved "one of the most passive felonies a person could commit," in that the offense "involved neither violence nor threat of violence to any person"; Helm's prior offenses "were all relatively minor"; and life imprisonment was "the most severe punishment that the State could have imposed on any criminal for any crime." *See Solem*, 463 U.S. at 296–97, 103 S.Ct. 3001 (internal quotation marks omitted). The Court further determined that "Helm has been treated in the same manner as, or more severely than, criminals [in the same jurisdiction] who have committed far more serious crimes," and that "Helm was treated more severely than he would have

been in any other State” except possibly one. *See id.* at 299–300, 103 S.Ct. 3001. In those circumstances, the Court concluded that Helm’s life sentence was “significantly disproportionate to his crime” and “therefore prohibited by the Eighth Amendment.” *Id.* at 303, 103 S.Ct. 3001. The *Solem* decision emphasized, however, that “outside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare.” *Id.* at 289–90, 103 S.Ct. 3001 (alteration, emphasis, and internal quotation marks omitted).

Since *Solem* was decided, not a single “defendant before the Supreme Court has been successful in establishing even a threshold inference of gross disproportionality” in a non-capital case. *See Cobler*, 748 F.3d at 576. For example, in *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), the Court rejected an as-applied Eighth Amendment challenge to a mandatory life sentence in a cocaine possession case. Justice Kennedy distinguished the “passive” check fraud crime in *Solem* from the “pernicious” drug offense at issue in *Harmelin*, observing that the latter crime “threatened to cause grave harm to society.” *See Harmelin*, 501 U.S. at 1002, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).¹¹ In rejecting *Harmelin*’s Eighth Amendment challenge, Justice Kennedy also stressed the proposition that courts should give “substantial deference” to legislatures in determining the severity

of punishments. *See id.* at 998–99, 111 S.Ct. 2680 (internal quotation marks omitted).

The Supreme Court has more recently rejected an as-applied Eighth Amendment challenge for lack of an inference of gross disproportionality in *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). Ewing received a sentence of twenty-five years to life under California’s “three strikes” law for stealing \$1,200 worth of golf clubs. Distinguishing his crime from that in *Solem*, the Court observed that the theft offense “was certainly not one of the most passive felonies a person could commit.” *See Ewing*, 538 U.S. at 28, 123 S.Ct. 1179 (internal quotation marks omitted). The Court then explained that, although Ewing’s sentence was “a long one[,] . . . it reflect[ed] a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.” *Id.* at 30, 123 S.Ct. 1179.

By our subsequent *Cobler* decision, we upheld a 120-year sentence imposed on a defendant who not only “possess[ed] large quantities of child pornography that he downloaded and shared on the Internet,” but “also created depictions of his own sexual exploitation, molestation, and abuse of a four-year-old child.” *See* 748 F.3d at 580. Applying the Supreme Court’s two-prong test for an as-applied Eighth Amendment challenge, *Cobler* failed at prong one. We explained:

11. Although a majority failed to coalesce in *Harmelin* concerning the scope of the Eighth Amendment’s proportionality guarantee, Justice Kennedy’s opinion, which was joined by two of his colleagues, has been recognized by the Supreme Court as the controlling decision on that issue. *See Graham*, 560 U.S. at 59–60, 130 S.Ct. 2011. It is thereby established that “the Eighth Amendment contains a ‘nar-

row proportionality principle,’ that ‘does not require strict proportionality between crime and sentence’ but rather ‘forbids only extreme sentences that are “grossly disproportionate” to the crime.’” *Id.* (quoting *Harmelin*, 501 U.S. at 997, 1000–01, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment)).

Given the shocking and vile conduct underlying these criminal convictions, we hold that Cobler has failed to substantiate the required threshold inference of gross disproportionality. Even assuming, without deciding, that Cobler's 120-year term of imprisonment is functionally equivalent to a sentence of life imprisonment without the possibility of parole, we conclude that Cobler's multiple child pornography crimes are at least as grave as the drug offense in *Harmelin*, which the Supreme Court deemed sufficiently egregious to justify a similar sentence.

Id. (footnote omitted). Judge Keenan emphasized the rarity of cases in which an inference of gross disproportionality may be drawn, noting the singularity of the Supreme Court's *Solem* decision and distinguishing the check fraud offense there from the crimes perpetrated by Cobler. *See id.* ("Far from being 'one of the most passive felonies a person could commit,' Cobler's heinous acts exploited, injured, and inflicted great harm on a most vulnerable victim." (quoting *Solem*, 463 U.S. at 296, 103 S.Ct. 3001)).

On the issue of gross disproportionality, *Cobler* is typical of this Court's decisions.¹² Significantly, we have not identified a grossly disproportionate life sentence or putative life sentence in the wake of *Solem*. *See, e.g., United States v. Dowell*, 771 F.3d 162, 167–69 (4th Cir.2014) (eighty-year sentence for child pornography); *United States v. Myers*, 280 F.3d 407, 415–16 (4th Cir.2002) (life sentence imposed under Armed Career Criminal Act for being felon in possession of fire-

arm); *United States v. Kratsas*, 45 F.3d 63, 68–69 (4th Cir.1995) (repeat drug offender's life sentence for conspiracy to distribute cocaine); *United States v. D'Anjou*, 16 F.3d 604, 612–14 (4th Cir.1994) (life sentence for conspiracy to distribute cocaine base).

B.

[14] With the foregoing legal framework in mind, we assess the government's challenge to the defendants' non-life sentences for their § 1651 piracy offenses. Prong one of the applicable analysis requires that we decide whether a threshold comparison of the gravity of the defendants' offenses and the severity of the proposed life sentences leads to an inference of gross disproportionality. *See Graham*, 560 U.S. at 60, 130 S.Ct. 2011. The defendants contend that life sentences would be grossly disproportionate to their conduct, which, echoing the district court, they describe as mere "attempted robbery on the high seas" that "resulted in no property damage to the USS Ashland and no physical harm to any of its occupants." Br. of Cross-Appellants 39.

As discussed above, however, the defendants' § 1651 piracy offenses included committing illegal acts of violence for private ends (Cabaase), operating a pirate ship (Farah), and otherwise facilitating the violent acts (Said, Jama, and Osman). When the defendants engaged in that conduct, their piracy offenses were complete. Those offenses were hardly "passive"; rather, they involved "violence [or threat[s] of violence to [m]any person[s]."

12. Our *Cobler* decision was rendered in April 2014—nearly two months after the district court had entered its Eighth Amendment Order in this case. The district court, upon being presented with *Cobler*, responded at defendant Said's sentencing hearing on May 14, 2014, that it

read [*Cobler* and] understands that there has not been any precedent that would appear favorable to what the [Eighth Amendment Order] has ruled, but the precedent is usually the precedent until the precedent changes.

J.A. 1104.

See *Solem*, 463 U.S. at 296, 103 S.Ct. 3001. Indeed, the defendants’ violent conduct was at least as severe as the cocaine possession in *Harmelin*. It is of no moment that no one aboard the USS Ashland was harmed before the defendants’ attack was thwarted. Cf. *Dowell*, 771 F.3d at 169 (“We reject out of hand the notion that the sexual abuse of a child can be considered nonviolent merely because it does not lead to physical or life-threatening injuries.”). That is, “[t]he mere fact that [the defendants’] acts of [violence] did not inflict . . . physical injury [to the Ashland’s personnel] does not render [life sentences] disproportionate.” See *id.*¹³

[15] Furthermore, § 1651’s mandatory life sentence “reflects a rational legislative judgment, entitled to deference,” that piracy in international waters is a crime deserving of one of the harshest of penalties. See *Ewing*, 538 U.S. at 30, 123 S.Ct. 1179. The government has helpfully and cogently detailed why such an offense is sufficiently grave to merit life imprisonment. Above all, “for centuries, pirates have been universally condemned as *hostis humani generis*—enemies of all mankind—because they attack vessels on the high seas, and thus outside of any nation’s territorial jurisdiction, with devastating effect to global commerce and navigation.” *United States v. Dire*, 680 F.3d 446, 454 (4th Cir.2012) (alterations and internal quotation marks omitted). Piracy was of such significance to the Framers that they expressly accorded Congress, in what is known as the Define and Punish Clause, the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. Const. art. I, § 8, cl. 10. In 1790, the First Congress created a series of crimes related to piracy, many of which were punisha-

ble by death. The piracy offense prescribed by § 1651 carried a mandatory death sentence from the offense’s inception in 1819 until 1909, when Congress reduced the penalty to mandatory life.

The prevailing definition of piracy, “spelled out in the UNCLOS, as well as the High Seas Convention before it, has only been reaffirmed in recent years as nations around the world have banded together to combat the escalating scourge of piracy.” *Dire*, 680 F.3d at 469. From 2005 to the fall of 2010, for example, Somali pirates hijacked approximately 170 vessels and fired upon some 280 more. See J.A. 952–53 (expert testimony at November 2010 trial of *Dire* defendants). Then, “[i]n 2011, armed Somali pirates attacked an estimated 3,863 seafarers and took some 555 individuals hostage.” See *United States v. Beyle*, 782 F.3d 159, 162 (4th Cir.2015). As Judge Wilkinson aptly explained in the *Beyle* decision,

[t]he United States and its allies are engaged in a multinational battle against piracy in the waters off the Horn of Africa. Through the Gulf of Aden and much of the Indian Ocean, Somalia-based pirates have launched attacks against commercial and recreational vessels, from large freighters to personal yachts. Piracy poses a threat not only to the free flow of global commerce, but also to the individuals who navigate the seas.

Id. (citation omitted). Victims of piracy are robbed of their vessels, kidnapped, held hostage, and even tortured and murdered, while pirates are often able to find safe refuge in the territorial waters off Somalia and collect multi-million-dollar ransom payments. In these circum-

13. Of course, the defendants’ attack on the USS Ashland was not casualty-free. The En-

gineer was killed and the defendants suffered burns when the Ashland returned fire.

stances, we agree with the government “that Congress could with reason conclude [that piracy] calls for the strong medicine of a life sentence for those who are apprehended.” *See* Br. of Appellant 39.¹⁴

We are satisfied that “the relationship between the gravity of [the defendants’] offenses and the severity of [their proposed] punishment fails to create the threshold inference of gross disproportionality that is required” to satisfy prong one of the Eighth Amendment analysis. *See Cabler*, 748 F.3d at 580. Thus, without moving to prong two, we rule that the district court erred in invalidating § 1651’s mandatory life sentence as to these defendants and is obliged to impose such sentences on remand.

IV.

Pursuant to the foregoing, we affirm the various convictions of the defendants. We, however, reverse the Eighth Amendment Order, vacate the defendants’ sentences, and remand for resentencing.

No. 14-4413 *REVERSED IN PART, VACATED IN PART, AND REMANDED*.

14. The defendants contend on appeal that we should not afford deference to Congress’s judgment that piracy should be punished by life imprisonment, because when that penalty was fixed in 1909, the definition of piracy was limited to robbery at sea and did not include their violent conduct. For that same reason, the defendants also assert that imposing life sentences on them would violate the Define and Punish Clause. We must reject the defendants’ theory, however, because Congress clearly meant to attach the mandatory life sentence to piracy, however defined by the law of nations at the relevant time. *See Dire*, 680 F.3d at 468–69 (recognizing that “§ 1651 incorporates a definition of piracy that changes with advancements in the law of nations,” and that, in enacting § 1651, “Con-

Nos. 14-4420, 14-4421, 14-4423, 14-4424, and 14-4429 *AFFIRMED*.

DAVIS, Senior Circuit Judge, concurring:

I join in full Judge King’s excellent opinion. I write to express my agreement with one thoughtfully-expressed and eminently correct observation by the district court: Although modern piracy is a genuine, life-threatening scourge, not all piracy offenses are equal in severity, in heinousness, and in the dire consequences visited on innocent seafarers. Nor are all those who participate in such offenses deserving of life in prison as the sole conceivable “rational” punishment.* The civilized world knows this. The United States of America knows this too, but has not yet elected to act on that knowledge. Accordingly, because we are not legislators, and as Judge King demonstrates, because the Constitution has remarkably little to say about severe, but non-capital, criminal punishments, our hands are tied.

Perhaps, in the fullness of time, Congress will act on the certain knowledge we all share about criminal offenses and their punishments, and thereby empower federal district judges (and not simply federal prosecutors) with discretion to fashion

gress properly made an act a crime, affixed a punishment to it, and declared the court that shall have jurisdiction of the [offense]” (alterations and internal quotation marks omitted)).

* Indeed, in this case, Mr. Ibrahim, who was “the group’s leader” and who “led the new mission,” *ante* at 187, would seem to have earned a life sentence. But he avoided that fate through the magic of “substantial assistance” and the fiction of “acceptance of responsibility,” the coins of the federal prosecutorial realm. The inference is unavoidable that it is not really those who participate in piracy who receive a life sentence upon conviction (as we imagine Congress might believe), but rather those who are convicted after electing to go to trial.

more individualized punishments in this small corner of federal criminal justice.



UNITED STATES of America,
Plaintiff–Appellee,

v.

Larry Michael BOLLINGER,
Defendant–Appellant.

No. 14–4086.

United States Court of Appeals,
Fourth Circuit.

Argued: May 13, 2015.

Decided: Aug. 19, 2015.

Background: Defendant was indicted on two counts of traveling to Haiti and engaging in illicit sexual conduct with a minor. The United States District Court for the Western District of North Carolina, Robert J. Conrad, Jr., J., 966 F.Supp.2d 568, denied defendant’s motion to dismiss and defendant entered a conditional guilty plea. Defendant appealed.

Holdings: The Court of Appeals, Gregory, Circuit Judge, held that:

- (1) statute did not violate foreign commerce clause;
 - (2) sentence was procedurally reasonable; and
 - (3) sentence was substantively reasonable.
- Affirmed.

1. Criminal Law ⇌1139

Appellate courts review de novo a district court’s denial of a motion to dismiss where the denial depends solely on a question of law.

2. Constitutional Law ⇌990, 2478

Appellate review of a constitutional question recognizes that every statute is presumed to be constitutional; as such, courts will invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.

3. Commerce ⇌4

Analysis of statutes enacted pursuant to the interstate commerce clause did not apply to determine constitutionality of statutes enacted pursuant to the foreign commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

4. Commerce ⇌4

Legislation made pursuant to the foreign commerce clause must: (1) regulate commerce; and (2) concern commerce with foreign Nations. U.S.C.A. Const. Art. 1, § 8, cl. 3.

5. Commerce ⇌4

To enact legislation under the foreign commerce clause, the fact that commerce must be with foreign Nation requires a nexus between the United States and a foreign country. U.S.C.A. Const. Art. 1, § 8, cl. 3.

6. Commerce ⇌4

Under the foreign commerce clause, when a United States citizen acts in a foreign country, the United States, by extension of its citizenship, also engages in the activity with that country, and, thus, a regulation of a commercial interaction between a U.S. citizen and another nation is a regulation of commerce with that nation, even if the interaction is entirely within the other nation’s territory. U.S.C.A. Const. Art. 1, § 8, cl. 3.

UNITED STATES of America

v.

Mohamed Ali SAID, a/k/a Maxamad Cali Saciid, Mohamed Abdi Jama, a/k/a Mohammed Abdi Jamah, Abdicasiis Cabaase, a/k/a Ahmed Mahomood, Abdi Razaq Abshir Osman, a/k/a Abdirasaq Abshir, and Mohamed Farah, a/k/a Mahamed Farraah Hassan, Defendants.

Criminal Action No. 2:10cr57.

United States District Court,
E.D. Virginia,
Norfolk Division.

Signed Feb. 28, 2014.

Background: Defendants, who were convicted of piracy under the law of nations and related offenses, moved for order finding that statutory mandatory life sentence for piracy offenses would violate the Eighth Amendment.

Holding: The District Court, Raymond A. Jackson, J., held that mandatory life sentence for piracy offenses would be grossly disproportionate and thus would violate the Eighth Amendment.

Motion granted.

1. Sentencing and Punishment ¶1482

The concept of proportionality is central to the Eighth Amendment. U.S.C.A. Const.Amend. 8.

2. Sentencing and Punishment ¶1482

Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense. U.S.C.A. Const.Amend. 8.

3. Sentencing and Punishment ¶1482

To answer the question of whether a sentence is grossly disproportionate for a

particular defendant's crime, in violation of the Eighth Amendment, the following analysis applies: (1) the court must first compare the gravity of the offense and the severity of the sentence; (2) if that comparison yields an inference of gross disproportionality, which should be a rare result, then a court should next compare the sentence with sentences received with other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions; and (3) if that analysis confirms that the sentence is grossly disproportionate, then to impose the sentence would violate the Eighth Amendment. U.S.C.A. Const.Amend. 8.

4. Sentencing and Punishment ¶1482

The gross disproportionality principle for determining whether a sentence for a particular defendant's crime violates the Eighth Amendment reserves a constitutional violation for only the extraordinary case. U.S.C.A. Const.Amend. 8.

5. Sentencing and Punishment ¶1482

The Eighth Amendment's focus on proportionality of sentences is to be viewed less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society. U.S.C.A. Const.Amend. 8.

6. Sentencing and Punishment ¶1435

The Eighth Amendment must be applied in light of today's standards of decency and will therefore incorporate modern norms regarding appropriate punishment. U.S.C.A. Const.Amend. 8.

7. Sentencing and Punishment ¶1482

The mandatory nature of a non-capital penalty is irrelevant for purposes of determining whether a sentence is grossly disproportionate for a particular defendant's crime, in violation of the Eighth Amendment. U.S.C.A. Const.Amend. 8.

8. Sentencing and Punishment ⇐1507

Imposing mandatory minimum life sentence would be grossly disproportionate to conduct of defendants convicted of piracy under the law of nations for attempting to board United States Naval amphibious landing ship, which they thought was an unprotected merchant vessel, and take its crew hostage, and thus such sentence would violate the Eighth Amendment; although the incident was a violent act, defendants caused no physical harm to vessel and no victims were caused any physical harm when one defendant fired at the vessel, the only physical harm directly resulting from the event was to defendants themselves, imposing a life sentence would penalize less grievous conduct than that of offenders subject to life imprisonment for other federal crimes, and life sentence for defendants' conduct would be unique internationally. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 1651.

9. Sentencing and Punishment ⇐1482

Consideration of the general severity of the crime is not nearly the end of the analysis in determining whether a sentence is grossly disproportionate for a particular defendant's crime, in violation of the Eighth Amendment, because what is critical is the gravity of the conduct of the individual defendant raising the constitutional claim. U.S.C.A. Const.Amend. 8.

West Codenotes

Unconstitutional as Applied

18 U.S.C.A. § 1651

Joseph E. Depadilla, Benjamin Lucas Hatch, United States Attorney's Office, Norfolk, VA, Jerome Teresinski, U.S. Department of Justice, Washington, DC,

Raymond E. Patricco, Jr., United States Attorney's Office, Alexandria, VA, for Plaintiff.

Keith Loren Kimball, Richard Joseph Colgan, Office of the Federal Public Defender, Robert Bryan Rigney, Protogyrou & Rigney PLC, Christian Lee Connell, Bruce Christopher Sams, Sams & Gilchrist PLLC, Trey Robert Kelleter, Vandeventer Black LLP, Norfolk, VA, David Michael Good, David Michael Good PC, Virginia Beach, VA, for Defendants.

MEMORANDUM OPINION AND ORDER

RAYMOND A. JACKSON, District Judge.

Before this Court is Defendants Mohamed Ali Said, Mohamed Abdi Jama, Abdicasiis Cabaase, Abdi Razaq Abshir Osman, and Mohamed Farah's Joint Motion for Ruling Regarding Inapplicability of Statutory Mandatory Minimum Punishment for Piracy Offenses. Dkt. No. 245. For the reasons stated below, Defendants' Motion is **GRANTED**. The parties are **DIRECTED** to submit supplemental memoranda addressing the sentence to be imposed for the piracy charge within **TWENTY-ONE (21) DAYS** of the date of entry of this Order.

I. PROCEDURAL AND FACTUAL HISTORY

The Second Superseding Indictment provides a concise description of the relevant underlying facts in this case. Dkt. No. 140. Defendants' names have been shortened to only their last names for brevity.

1. In and around the early to middle part of February 2010, the exact date being unknown, defendants Said, Jama, Cabaase, along with Jama Idle Ibrahim

and others, went to sea in a boat with the intent to hijack a ship and hold the ship and its crew for ransom. Their boat carried weapons and tools to be used in the hijacking.

2. On or about February 26, 2010, [they] again went to sea with the intent to hijack a ship and hold the ship and its crew for ransom. Their boat carried weapons and tools to be used in the hijacking, including but not limited to one or more AK-47 firearms, a handgun, and a hooked ladder for boarding another vessel.

3. On or about February 27, 2010, [they] were transiting the Gulf of Aden in their boat. They were intercepted by the HMS Chatham (F-87), a frigate of the Royal Navy, which deployed its helicopter and smaller boats to interdict [them]. Before they were stopped and boarded by sailors from the HMS Chatham, the conspirators threw several weapons and their hooked ladder overboard. When they were stopped and questioned, the conspirators made false statements about their activities, that is, one or more of the conspirators claimed to be human smugglers.

4. On or about April 9, 2010, the defendants, Said, Jama, Cabaase, Osman, and Farah, along with Ibrahim and another individual, again went to sea, specifically, the Gulf of Aden, with the intent to hijack a ship and hold the ship and its crew for ransom. The conspirators carried, among other things, firearms and a hooked ladder for boarding another vessel.

5. On or about April 10, 2010, shortly before sunrise, [they] approached a vessel they had been following. One of the conspirators raised an AK-47 and began firing. The vessel under attack was in fact the USS Ashland, of the United States Navy.

6. On or about April 10, 2010, after their boat had been hit by return fire from the USS Ashland, [they] agreed to make false statements and to tell the Navy and government that they were human smugglers who had become stranded at sea.

Second Superseding Indictment at 2-4. As this Court has previously noted, “[a]t no time did Defendants board or attempt to board the USS Ashland.” *United States v. Said*, 757 F.Supp.2d 554, 557 (E.D.Va.2010).

One of the pirates, un-named in the Second Superseding Indictment, was killed after the *Ashland* responded to their attack. The others were apprehended and eventually transported to this District, and on April 21, 2010, Defendants and co-defendant Jama Ibrahim were named in a five-count Indictment. On July 7, 2010, they were named in an eight-count Superseding Indictment. On August 17, 2010, the Court dismissed Count One of the Superseding Indictment, which charged the defendants with piracy under 18 U.S.C. § 1651, reasoning that their conduct did not fall within “the crime of piracy as defined by the law of nations.” *Said*, 757 F.Supp.2d 554. On August 27, 2010, Ibrahim pleaded guilty to three counts of the Superseding Indictment: attack to plunder a vessel, act of violence against persons on a vessel, and use of a firearm during a crime of violence. On November 29, 2010, the Court sentenced Ibrahim to 360 months of imprisonment and the Government dismissed the remaining counts of the Superseding Indictment. In the meantime, the Government filed an interlocutory appeal of the Court’s August 17, 2010 Order.

On May 23, 2012, the United States Court of Appeals for the Fourth Circuit issued an opinion vacating the Court’s dismissal of the piracy count. *United States*

v. Said, 680 F.3d 374 (4th Cir.2012). See also *United States v. Dire*, 680 F.3d 446, 465 (4th Cir.2012) (upholding an instruction to the jury that the crime of piracy includes “any of the three following actions: (A) any illegal acts of violence or detention or any act of depredation committed for private ends on the high seas or a place outside the jurisdiction of any state by the crew or the passengers of a private ship and directed against another ship or against persons or property on board such ship; or (B) any act of voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship; or (C) any act of inciting or of intentionally facilitating an act described in (A) or (B) above”).

The Government then filed the ten-count Second Superseding Indictment on August 8, 2012. Defendants Said, Jama, and Cabaase were named in all ten counts. Defendants Osman and Farah were named in nine of the ten counts (all excluding Count Nine, which related solely to the February 2010 incident involving the British vessel described above). The ten counts and the applicable penalties are as follows:

- Count 1: Conspiracy to Commit Hostage Taking, 18 U.S.C. § 1203(a) (any term of years or life imprisonment)
- Count 2: Conspiracy to Commit Kidnapping, 18 U.S.C. § 1201(c) (any term of years or life imprisonment)
- Count 3: Conspiracy to Perform Act of Violence Against Persons on a Vessel, 18 U.S.C. § 2291(a)(9) (0–20 years of imprisonment)
- Count 4: Conspiracy Involving Firearm and a Crime of Violence, 18 U.S.C. § 924(o) (any term of years or life imprisonment)
- Count 5: Piracy Under the Law of Nations, 18 U.S.C. §§ 1651 & 2 (mandatory life)

- Count 6: Attack to Plunder Vessel, 18 U.S.C. §§ 1659 & 2 (0–10 years of imprisonment)
- Count 7: Assault with a Dangerous Weapon on Federal Officers and Employees, 18 U.S.C. §§ 111(a)(1), 111(b) & 2 (0–20 years of imprisonment)
- Count 8: Act of Violence Against Persons on a Vessel, 18 U.S.C. §§ 2291(a)(6) & 2 (0–20 years of imprisonment)
- Count 9: Use/Possession of a Firearm During a Crime of Violence, 18 U.S.C. §§ 924(c)(1)(A) & 2 (5 years to life to run consecutively)
- Count 10: Use/Possession of a Firearm During a Crime of Violence, 18 U.S.C. §§ 924(c)(1)(A) & 2 (25 years to life to run consecutively)

At the end of a six-day jury trial, on February 27, 2012, Defendants were convicted of all counts of which they were charged. As to Count 10, the jury also found that a firearm had been discharged. Dkt. Nos. 204, 206, 208, 210, & 212.

Prior to the Defendants’ scheduled sentencing hearings, on October 4, 2013 they submitted a joint motion contending that the Court should “enter an order finding that it is not limited to imposing a mandatory life sentence for the offense of piracy under 18 U.S.C. § 1651.” Dkt. No. 245, at 1. They argue that a life sentence on the piracy count would be grossly disproportionate and therefore violate the Eighth Amendment of the United States Constitution. The Government filed a Response in Opposition on October 11, 2013, Dkt. No. 257, and Defendants filed a Reply on October 15, 2013, Dkt. No. 258. On October 16, 2013, the day of the first scheduled sentencing hearings, the Court continued

all of the sentencings pending its consideration of Defendants' motion.

II. DISCUSSION

1. Applicable Legal Framework

[1,2] The Eighth Amendment of the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Defendants' challenge concerns the final clause, which proscribes cruel and unusual punishments and is concerned not only with excessively barbaric or inhumane treatment, but also with proportionality. "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham v. Florida*, 560 U.S. 48, 59, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). Eighth Amendment challenges to the proportionality of a sentence are typically either categorical or based on the circumstances of an individual case. The Supreme Court has most recently decided cases involving categorical challenges to a sentencing scheme: for example, whether a sentence of mandatory life without parole for those under the age of 18 at the time of their homicide crimes is cruel and unusual punishment. *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). But the Supreme Court has also taken up cases in the latter category, which consider "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Graham*, 560 U.S. at 59, 130 S.Ct. 2011.

[3] Defendants do not contend that a mandatory life sentence for piracy is un-

constitutional in every case, but instead rely upon the lack of harm they themselves inflicted, their lack of criminal records, and other individual considerations to argue that it would be unconstitutional to sentence them to life in prison. Accordingly, the appropriate analysis is that which the Supreme Court has set forth for the individualized category of cases, where the key question is whether the sentence "is grossly disproportionate for a particular defendant's crime." *Id.* at 60, 130 S.Ct. 2011. To answer that question, a court must first compare the gravity of the offense and the severity of the sentence. Second, if that comparison yields "an inference of gross disproportionality," which should be a "rare" result, then a court should next compare the sentence with sentences received with other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. If that analysis confirms that the sentence is grossly disproportionate, then to impose the sentence would violate the Eighth Amendment. *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)).

[4] "The gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Lockyer v. Andrade*, 538 U.S. 63, 77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). Since 1980, the Supreme Court has taken up cases requiring an individualized analysis six times, and found a constitutional violation only once. Most recently, in *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), the Court upheld a twenty-five-years to life sentence for felony grand theft of three golf clubs valued at approximately \$1,200 pursuant to California's "Three Strikes" law, where the defendant had a long history of felony recidivism including robbery and residential burglary. In *Harmelin v. Michigan*, 501

U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), the Court upheld a mandatory life sentence without possibility of parole for the possession of over 650 grams of cocaine where the defendant had no prior felony convictions. The Court has also rejected Eighth Amendment claims in three cases arising in a habeas corpus posture (the most recent arising under the deferential posture of the Antiterrorism and Effective Death Penalty Act), upholding a forty-year sentence for possession and distribution of less than nine ounces of marijuana, *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982), a mandatory life sentence under a recidivist statute for three theft-related felonies totaling less than \$230, *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), and two 25 year to life sentences for petty theft under California's "Three Strikes" law, *Lockyer*, 538 U.S. 63, 123 S.Ct. 1166. In *Solem v. Helm*, however, the Court affirmed that the Eighth Amendment does impose some constraints on the proportionality of sentences. In that case, which also arose in a habeas posture, it found that a sentence violated the Eighth Amendment where the defendant had received a mandatory life sentence without parole for a seventh felony, which was writing a bad check for \$100, where the first six felony convictions were non-violent. 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

[5] The most recent of these cases was decided over ten years ago. Since then, the Court has been more receptive to Eighth Amendment claims of disproportionate sentences, albeit in the context of categorical challenges raised by juvenile offenders. See *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (death penalty for juvenile homicide offenders violates the Eighth Amendment); *Graham*, 560 U.S. 48, 130 S.Ct.

2011 (life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders); *Miller*, 132 S.Ct. 2455 (mandatory life imprisonment for those under 18 at the time of their crimes violates the Eighth Amendment). In any event, the Eighth Amendment's focus on proportionality is to be viewed "less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society." *Miller*, 132 S.Ct. at 2463 (quotations omitted). And it is this Court's duty to address whether imposing a life sentence on Defendants in this case would be grossly disproportionate, considering those evolving standards of decency.

The Court must also consider precedent from the United States Court of Appeals for the Fourth Circuit. Only few published cases have given significant consideration to the issue, and it appears that the Fourth Circuit has never "reversed a sentence that fell within the statutory range on grounds of disproportionality." *United States v. Myers*, 280 F.3d 407, 416 (4th Cir.2002). Most notably, in *United States v. Kratsas*, 45 F.3d 63 (4th Cir.1995), the Fourth Circuit rejected a proportionality challenge of a defendant who received a mandatory life sentence for a conviction of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine. It emphasized that the defendant was a repeat drug offender and was neither simply a drug user nor a single distributor, but part of a ring of distributors and was attributed with 18 kilograms of cocaine. *Id.* at 68.

[6] Defendants contend that the deferential gross proportionality principle should be relaxed in this case because Defendants' conduct did not constitute piracy at the time that Congress first affixed a life sentence to the crime of piracy. Gross proportionality is grounded in part,

Defendants argue, in deference to Congress's penological judgment, and they contend that Congress made no such judgment in this case. While the amorphous definition of piracy is relevant to the analysis in certain respects (as discussed below, it demands particularly careful consideration of Defendants' individual conduct and also warrants greater weight to the inter-jurisdictional analysis), the Court finds that it does not support a less stringent gross disproportionality principle. Although Congress might not have envisioned Defendants' piratical conduct in 1909, it made the explicit judgment that piracy, however defined by the international community, merits a life sentence. Though the prescribed sentence has remained unchanged in the era of modern piracy, Congress has also expressed its intent to punish lesser conduct of piracy by enacting other pirate statutes which carry lesser penalties than life imprisonment. *E.g.*, 18 U.S.C. § 1659 (attack to plunder carries a maximum of ten years); 18 U.S.C. § 2280 (violence against maritime navigation carries a maximum of twenty years unless death results). However, the Eighth Amendment must be applied in light of today's "standards of decency" and will therefore incorporate modern norms regarding appropriate punishment.

[7] Finally, although Defendants do not appear to place much weight upon the mandatory nature of the penalty, the Court notes that "*Harmelin* squarely establishes that the mandatory nature of a non-capital penalty is irrelevant for proportionality purposes." *United States v. Farley*, 607 F.3d 1294, 1343 (11th Cir.2010) (citing *Harmelin*, 501 U.S. at 994–95, 111 S.Ct. 2680 (opinion of the Court); *id.* at 1006, 111 S.Ct. 2680 (Kennedy, J., concurring)).

2. Comparison of the Severity of the Crime with the Gravity of the Conduct

[8] As discussed above, the first step in the applicable analysis is a comparison of the gravity of the offense and severity of the sentence to determine whether there is an inference of gross proportionality. As the Government acknowledges, "[a] mandatory life sentence is the second most severe criminal sentence" available. Resp. of the United States in Opp., Dkt. No. 257 (hereinafter "Opp."), at 18. Accordingly, it is undisputed that the statutorily-mandated punishment is severe and at the very upper end of available criminal sentences.

It is undoubtedly true that as a general matter, the crime of piracy is a very grave offense. It involves often vulnerable and unarmed victims on the high seas. After boarding a vessel and taking it over by force, pirates may hold the crew members hostage for years and often worse, all in the pursuit of a monetary reward. For example, in a case recently prosecuted in this District, the Government alleged that the Defendants boarded a sailing vessel, took the four people on board hostages, and then intentionally shot and killed them when threatened with force from the United States military. *See United States v. Salad, et al.*, No. 2:11cr34, Dkt. No. 237. In *United States v. Shibin*, 722 F.3d 233, 235–36 (4th Cir.2013), pirates held the crew for ten months and inflicted "psychological and physical torture." The severe and grievous harm occurring in many piracy cases undoubtedly led Congress in 1909 to designate piracy as one of the handful of crimes in the United States Code that carries a mandatory minimum life sentence. 757 F.Supp.2d at 562.

[9] But consideration of the general severity of the crime is not nearly the end of the analysis, because what is critical is

the gravity of the conduct of the individual defendant raising the constitutional claim. See *United States v. Reingold*, 731 F.3d 204, 216 (2d Cir.2013) (concluding that “[t]he circumstances of this case do not mitigate the general severity of such criminal conduct [dissemination of child pornography]”). Moreover, unlike most federal crimes that have specifically delineated elements, the crime of piracy is defined by the “law of nations,” 18 U.S.C. § 1651, which is continually evolving, *Dire*, 680 F.3d at 467, and can encompass an extraordinarily large scope and variety of criminal conduct. It is therefore particularly important to consider the conduct of the individual defendants in this case. For these reasons, although the Congress’s penological judgment is undoubtedly entitled to significant deference, *Ewing*, 538 U.S. at 25, 123 S.Ct. 1179, the Court must focus on what actually occurred in this case.

In *Solem*, the Supreme Court delineated a non-exhaustive list of factors that may be relevant at this stage of the analysis: “the harm caused or threatened to the victim or society,” “the culpability of the offender,” and “the absolute magnitude of the crime” (e.g., stealing a hundred dollars versus a million dollars). 463 U.S. at 292–93, 103 S.Ct. 3001. With those principles in mind, here is the Government’s account of what transpired on April 10, 2010:

On April 10, 2010, the defendants . . . approached the USS Ashland (Ashland), a United States Naval amphibious landing ship, from the aft by traveling at a high rate of speed in a small skiff. The purpose of all men on the skiff, including the defendants, was to find a merchant vessel at sea, attack it, seize the merchant ship, and to take the ship and the people on it back to Somalia to hold for ransom. To accomplish this goal, the skiff was equipped with two motors, enabling it to travel quickly. On board was a hooked ladder that is used by

pirates to board the larger vessels they attack. The men were armed with three automatic AK–47 firearms and a RPG launcher, though the projectiles they had on hand would not work in the launcher. As the men approached the Ashland, defendant Said held an AK–47 in his lap. Defendant Jama attempted to load a rocket-propelled grenade (RPG) for use in the attack, and defendant Cabaase wielded an AK–47. The defendants possessed another AK–47, which lay at the bottom of the skiff. Defendant Farah drove the skiff. Finally, defendant Osman stood ready to participate in this attack and the seizure of another vessel, and had previously supplied one of the AK–47s that were being used by the defendants.

As the skiff drew near the Ashland, defendant Cabaase raised his AK–47 and began firing at the Ashland. This shooting, or portions of it, was witnessed by a number of United States service members on the Ashland Several of these witnesses testified that they could tell the person shooting from the small boat was actually shooting at the Ashland, and several of them heard sounds that they associated with bullets hitting the Ashland. [Footnote 1: The FBI’s forensic examination of the Ashland, conducted after the shooting, was inconclusive as to whether the areas examined by the FBI had been impacted by a bullet or some other object.]

[A crewmember] . . . was given permission to return fire. He returned fire. His first shot he believed hit one of the individuals on the skiff. His second shot caused the skiff to explode in flames. Meanwhile on the skiff, most men had jumped overboard after the skiff was impacted by [the] second round. Defendant Ibrahim, who remained on the skiff, threw the RPG overboard and two

of the AK-47's. The defendants came back to the skiff, and they attempted to extinguish the flames. . . .

When all the men were in the water, they discussed the need to come up with a "story" to tell the U.S. Navy to try and get out of trouble. The story they agreed to tell the Navy was that they were human smugglers. . . . The U.S. Navy rescued the five defendants and defendant Ibrahim. The Navy also took pictures of the burnt remains of their boat, which showed the remains of the hooked ladder and the burnt remains of an AK-47. . . .

Opp. at 5-7.

In sum, this was not a run-of-the-mill case of modern piracy. Although the incident was indeed a violent act, Defendants caused no physical harm at all. Indeed, the only physical harm directly resulting from the event was to the pirates themselves. One of the Defendants fired at the *Ashland*, and may or may not have actually hit it. No victims were caused any physical harm, and it is unclear whether there was even any property damage. Defendants did not board the ship or have any physical contact with it or the people on board. Of course, *Solem* directs consideration of Defendants' culpability and the threat they pose to society, so the Court cannot ignore what Defendants undoubtedly intended to do: board what they thought was an unprotected merchant vessel and take its crew hostage. But even though Defendants' conduct was a completed act of piracy, the law recognizes a distinction between harm intended and harm caused, and almost always gives more weight to the latter. For example, attempted murder is punishable under federal law by a maximum prison sentence of twenty years, 18 U.S.C. § 1113, whereas murder in the first degree "shall be punished by death or by imprisonment for

life," 18 U.S.C. § 1111. As the Court noted in *Solem*, courts have held that rape is more serious than assault with intent to commit rape, and noted generally that "attempts are less serious than completed crimes." 463 U.S. at 293, 103 S.Ct. 3001. Similarly, threats to commit an act are punished less severely than the threatened act itself would be. For example, transmitting a ransom demand is punishable up to 20 years and transmitting a threat to kidnap is punishable up to 5 years, 18 U.S.C. § 875, but kidnapping itself (without resulting in death) is punishable for up to life. 18 U.S.C. § 1201.

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 precedents discussed above. In such circumstances, a comparison with the most second severe sentence available yields an inference of gross disproportionality.

The Government emphasizes the presence of violence in this case and comes close to arguing that a life sentence is always appropriate for a crime involving violence. But the Supreme Court has never said so, and indeed has stated that "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel v. Estelle*, 445 U.S. 263, 275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). And any inference that violence is dispositive in the

Eighth Amendment proportionality analysis is undermined by the Supreme Court's recent cases in the juvenile context, particularly its recent holding that a life sentence for juvenile homicide offenders may not always be appropriate. *Miller*, 132 S.Ct. 2455.

3. Comparison to Sentences in Other Cases

Having found that there is an inference of gross disproportionality, the Court must proceed to an intra- and inter-jurisdictional analysis.

a. Intra-Jurisdictional Analysis

In the intra-jurisdictional analysis, Defendants' life sentence should be compared to "the sentences imposed on other criminals in the same jurisdiction. 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, 103 S.Ct. 3001. A review of the federal criminal statutes carrying a mandatory minimum life sentence¹ prepared by the Congressional Research Service indicates that besides a few statutes punishing recidivist offenders (which Defendants are not) for certain offenses involving drugs, guns, sex with a minor, or other serious violent felonies, almost all such crimes involve the death of another person. Charles Doyle, Federal Mandatory Minimum Sentencing Statutes, at 101–16 (Sept. 9, 2013), available at <http://www.fas.org/sgp/crs/misc/RL32040.pdf>. In the Court's view, causing the death of another person is more serious than Defendants' conduct in this case. The Report also reveals that crimes that could be considered more seri-

ous than Defendants' conduct are punishable by a term less than life. For example, kidnapping the President (as long as no death results) or second degree murder of the President does not require the imposition of a life sentence, but is punishable by imprisonment for any term of years or life. 18 U.S.C. § 1751.

As the Government notes, a subset of other piracy offenses also carry a mandatory life sentence. *See* 18 U.S.C. § 1652 (pirates who are U.S. citizens); 18 U.S.C. § 1653 (aliens as pirates); 18 U.S.C. § 1655 (assault on commander as piracy); 18 U.S.C. § 1661 (robbery ashore). But as already noted, this case is far afield from the typical piracy case prosecuted today in federal courts. Although another case with very similar circumstances was prosecuted in this district and resulted in life sentences, *see Dire*, 680 F.3d 446, the Government does not contest Defendants' assertion that "other than the defendants in *Dire*, every defendant convicted under § 1651 in recent years committed either robbery on the high seas or homicide or both." Defts' Joint Motion, Dkt. No. 245, at 9. For example, the defendant in *Shibin* acted as the negotiator in two piracy events. In one, he boarded the ship after it was taken into Somali waters and participated in the torture of the crew. In the other, the four Americans on board were killed. He was prosecuted and convicted under § 1651 under aider and abettor liability, and was sentenced to 12 terms of life imprisonment, among other terms of years sentences. 722 F.3d 233 (4th Cir. 2013). In a case recently prosecuted in this District, the Government alleged that the Defendants boarded a sailing vessel,

1. Many other crimes *allow* but do not require a sentence of life imprisonment. The Court references those with a mandatory penalty not because their mandatory nature is relevant to this analysis, but because the Court

can assume that defendants convicted of those crimes actually receive a life sentence, a more helpful comparison in a proportionality analysis.

took the four people on board hostages, and then intentionally shot and killed them when threatened with force from the United States military. See *United States v. Salad, et al.*, No. 2:11cr34. The defendants were convicted of piracy and received multiple life sentences. By contrast to these cases, the conviction with facts most analogous to this case is of Defendants' co-defendant Ibrahim, who pleaded guilty to non-piracy charges and was sentenced to 360 months in prison.

Defendants who engage in conduct just like the some of the worst piracy offenders but are convicted under other statutes have received more favorable sentences than the Government seeks in this case. For example, the defendant in *United States v. Shi*, 525 F.3d 709 (9th Cir.2008) was convicted by a jury of interfering with the safe navigation of a maritime vessel through the use or threat of force after he seized control of a fishing vessel killed two other crew members, and sentenced to 36 years' imprisonment. See *id.* at 723 ("[T]he acts with which Shi is charged constitute acts of piracy."). The surviving pirate of the incident on which the recent film *Captain Phillips* was based pled guilty to hijacking, kidnapping, and hostage taking and was sentenced to 33 years and 9 months in prison. *United States v. Muse*, 1:09-cr-512 (S.D.N.Y.).

In sum, a comparison of the circumstances of this case with other federal penalties indicates that imposing a life sentence in this case would penalize less grievous conduct than that of offenders subject to life imprisonment for other crimes. It also indicates that other piracy offenders who cause far more harm than Defendants receive a life sentence or even a lesser term of years.

b. Inter-Jurisdictional Analysis

An inter-jurisdictional comparison of "the sentences imposed for commission of

the same crime in other jurisdictions," *Solem*, 463 U.S. at 300, 103 S.Ct. 3001, also confirms that a life sentence in this case is grossly disproportionate. Given the dearth of state piracy convictions, the most applicable comparison is to other nations' punishments for piracy. International punishments are especially relevant for a crime explicitly defined by the law of nations, and the Court accords this factor particular weight in this case. A comparison with the approaches of other nations is also in accord with recent Supreme Court cases, which have found relevant in an Eighth Amendment analysis the "judgments of other nations and the international community." *Graham*, 560 U.S. at 80, 130 S.Ct. 2011.

It is clear that a life sentence for the conduct in this case is unique internationally. The Government has little response to Defendants' assertion that "[n]o jurisdiction outside the United States calls for a mandatory life sentence for piracy when there has not also been robbery and physical harm caused to another person." Defts' Joint Motion, at 10 (citing Eugene Kontorovich, *The Penalties for Piracy: An Empirical Study of National Punishment for International Crime*, Northwestern Public Law Research Paper No. 12-16 (July 10, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103661). The global average sentence for piracy is just over 14 years. Kontorovich, at 1. The research paper they rely upon notes that the United States "is an outlier in its punitive severity." *Id.* at 17. It reviewed 256 sentenced Somali pirates, with cases coming from 12 different countries outside of Somalia, and found that outside of the United States, there was only one case where the pirates received a life sentence. *Id.* at 12-13. Those pirates were sentenced in South Korea and had

caused the death of the ship's captain. Defts' Joint Motion, at 10–11.

Therefore, an inter- and intra-jurisdictional analysis confirms that imposing a life sentence as punishment for Defendants' conduct would be grossly disproportionate. The statutorily-mandated sentence violates the Eighth Amendment and cannot be imposed.

III. CONCLUSION

For the reasons previously stated, Defendants' Joint Motion for Ruling Regarding Inapplicability of Statutory Mandatory Minimum Punishment for Piracy Offenses is **GRANTED**. Further, the parties are **ORDERED** to submit briefs no longer than fifteen (15) pages regarding the appropriate sentence for the piracy charge within **TWENTY-ONE (21) DAYS** of the date of entry of this Order.

The Clerk is **DIRECTED** to send a copy of this Order to the parties.

IT IS SO ORDERED.



Brandon RAUB, Plaintiff,

v.

Michael CAMPBELL, Defendant.

Civil Action No. 3:13CV328–HEH.

United States District Court,
E.D. Virginia,
Richmond Division.

Signed Feb. 28, 2014.

Background: Mental health detainee brought § 1983 action against mental health clinician, alleging violations of the First and Fourth Amendment resulting

from clinician's mental evaluation. Clinician moved for summary judgment.

Holdings: The District Court, Henry E. Hudson, J., held that:

- (1) clinician seeking temporary detention order for detainee was objectively reasonable, and
- (2) there was no evidence that detainee was subjected to real or immediate threat of future detention for mental examination without probable cause.

Motion granted.

1. Arrest ⚖️1

Mental Health ⚖️36, 40

The Fourth Amendment requires that an involuntary hospitalization may be ordered only upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard. U.S.C.A. Const.Amend. 4.

2. Civil Rights ⚖️1375, 1376(6)

Typically a law enforcement officer who truthfully presents the results of his investigation to a magistrate, who in turn finds probable cause and issues a warrant, is entitled to qualified immunity, even if other officers disagree as to the thoroughness of the investigation. U.S.C.A. Const. Amend. 4.

3. Civil Rights ⚖️1376(4)

Mental health clinician seeking temporary detention order for detainee was objectively reasonable, and therefore, clinician was entitled to qualified immunity in detainee's § 1983 action alleging violations of his First Amendment speech rights and the Fourth Amendment; clinician reviewed e-mails and Internet postings of detainee that spoke of revolution and the government perpetrating terrorism, Federal Bureau of Investigation (FBI) agents, police