No. 18-5384

IN THE SUPREME COURT OF THE UNITED STATES

WENDELL RIVERA-RUPERTO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's sentence for 19 drug- and firearm-related crimes arising from his possession of a firearm in furtherance of six separate offenses of attempted drug trafficking violates the Eighth Amendment.

2. Whether the district court correctly declined to grant relief on petitioner's claim of "sentencing manipulation."

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 26a-96a, 97a-138a) are reported at 852 F.3d 1 and 846 F.3d 417, respectively.

JURISDICTION

The judgment of the court of appeals in both cases was entered on January 13, 2017. Petitions for rehearing were denied on February 27, 2018 (Pet. App. 1a-25a). On May 3, 2018, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 27, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted on five counts of conspiracy to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A)[1] and 846; five counts of aiding and abetting an attempt to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A), 846 and 18 U.S.C. 2; five counts of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). Pet. App. 145a, 167a-168a. Following a second jury trial in the same court, petitioner was convicted on one count of conspiracy to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A) and 846; one count of aiding and abetting an attempt to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A), 846 and 18 U.S.C. 2; and one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. 139a, 169a. In

[1] Citations to 21 U.S.C. 841(b)(1)(A) refer to the version of the statute reflecting the 2010 amendments, which was the law in force at the time of petitioner's last offense in September 2010. The current version of the statute is the same.

both cases, the court of appeals affirmed. Id. at 26a-96a, 97a-138a.

1. In "an effort to root out police corruption throughout Puerto Rico," Pet. App. 27a, the Federal Bureau of Investigation (FBI) conducted an investigation known as Operation Guard Shack, which ultimately became "the largest police corruption investigation in the history of the FBI," United States v. Delgado-Marrero, 744 F.3d 167, 172 n.1 (1st Cir. 2014). As part of the operation, undercover FBI informants "posing as sellers and buyers of" cocaine offered to pay police officers to provide "armed security" at drug-trafficking transactions. Pet. App. 28a. For those agreed to do so, the FBI staged apparent transactions with fake drugs "at FBI-monitored apartments wired with hidden cameras." Ibid.

Although he was not a law enforcement officer, petitioner "misrepresented himself to" an FBI informant "as a prison corrections officer" and agreed to provide "armed security" for what he believed to be drug-trafficking transactions on six separate occasions between April and September 2010. Pet. App. 28a & n.3. Each purported transactions allegedly involved between eight and 15 kilograms of cocaine. Id. at 28a. Petitioner brought a firearm to each transaction as part of his agreement to provide "security." Ibid. He also "brought along with him additional recruits," including at least one actual police officer. Id. at

28a-29a; see id. at 29a n.4. At one transaction, petitioner "did even more; he sold a handgun, including magazines, to a confidential FBI informant posing as a drug dealer." Id. at 29a. "For his services," petitioner received payments totaling $13,000. Ibid.

2. A federal grand jury returned three indictments, collectively charging petitioner with one count of possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k); six counts of conspiracy to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A) and 846; six counts of aiding and abetting an attempt to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(A), 846 and 18 U.S.C. 2; and six counts of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. 29a, 139a, 145a, 167a-169a.

Two of the three indictments, collectively involving five of the six apparent drug transactions, were consolidated and tried together. Pet. App. 30a. A jury found petitioner guilty on all of the charged counts. Ibid.; see id. at 145a. Because each of the drug-trafficking convictions (except for one) rested on an attempt involving more than five kilograms of cocaine, each carried a statutory sentencing range of ten years to life imprisonment. 21 U.S.C. 841(b)(1)(A)(ii), 846; see Pet. App. 50a (explaining

that the jury did not return a drug-quantity finding with respect to one conviction). For each of those convictions, the district court imposed concurrent sentences totaling 21 years and ten months of imprisonment. Pet. App. 50a. The court also imposed a sentence of five years of imprisonment, to run concurrently with the other sentences, for petitioner's conviction for unlawful possession of a firearm with an obliterated serial number. Ibid.; see 18 U.S.C. 922(k).

Petitioner's first conviction for possessing a firearm "in furtherance of" a drug-trafficking crime in violation of Section 924(c) required a minimum sentence of five years of imprisonment, 18 U.S.C. 924(c)(1)(A)(i), and the district court imposed that minimum sentence, Pet. App. 50a. Petitioner's "second or subsequent conviction[s]" for violating Section 924(c) each required a minimum sentence of 25 years of imprisonment, 18 U.S.C. 924(c)(1)(C)(i), which must run consecutively to petitioner's other sentences, 18 U.S.C. 924(c)(1)(D)(ii); see Deal v. United States, 508 U.S. 129, 132 (1993).[2] The court imposed consecutive

[2] The First Step Act of 2018 (Act), Pub. L. No. 115-391, changed Section 924(c)(1)(C)'s reference to a "second or subsequent conviction" to a "violation of this subsection that occurs after a prior conviction under this subsection has become final." § 403(a). Because petitioner did not have a "prior conviction" under Section 924(c) that had "become final" at the time of his sentencing in this case, the requirement of a minimum 25-year sentence would not have applied to him if the Act had been in force at the time of his sentencing. Ibid. The Act, however,

sentences of 25 years for each of petitioner's four additional convictions under Section 924(c). Pet. App. 50a. Petitioner's total sentence for his convictions at his first trial thus amounted to 126 years and ten months. Id. at 50a-51a.

Petitioner was subsequently tried before a different district judge on the third of the indictments, which involved participation as an armed guard in a sixth purported drug-trafficking transaction. Pet. App. 30a, 51a. The jury found him guilty of the charged offenses, and the district court sentenced him to ten years of imprisonment on the drug-trafficking counts and the statutorily required 25 years of consecutive imprisonment on the Section 924(c) count, all to run consecutively to his sentence from the first trial. Id. at 51a, 139a-140a. Petitioner's combined sentence for all his convictions was 161 years and ten months. Id. at 51a, 101a-102a.

3. Petitioner appealed in both cases, which were decided separately by the same court of appeals panel. In both cases, the court affirmed. Pet. App. 26a-63a, 97a-133a.

a. In each case, petitioner argued that the district court should have reduced his sentence as an equitable remedy for improper "sentencing manipulation" by the government. Pet. App.

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does not apply retroactively to a defendant who, like petitioner, has already been sentenced. § 403(b).

111a.[3] Petitioner contended that the government had "engaged in sentencing manipulation by using unnecessarily high quantities of sham drugs during the deals, by requiring [him] to bring a firearm with him to each of the deals, and then by allowing him to participate in a 'seemingly endless' number of those deals." Pet. App. 54a. In his view, the "government's only reason for structuring the sting operation in this way * * * was to inflate his eventual sentence." Ibid.; see id. at 114a.

The court of appeals rejected petitioner's claim. Pet. App. 54a. The court explained that it recognizes a sentencing-manipulation claim "where government agents have improperly enlarged the scope or scale" of a crime, id. at 51a (citations omitted), but that it "reserve[s] relief for sentencing factor manipulation only for the extreme and unusual case," such as a case involving "outrageous or intolerable pressure" by the government or "illegitimate motive on the part of" government agents, id. at 53a (citations and internal quotation marks omitted). The court did not find such factors to be present in this case. Id. at 55a. The court observed that "FBI agents testified that the government used large quantities of sham cocaine for the purpose of ensuring that the staged deals looked realistic

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[3] Petitioner raised a sentencing-manipulation claim in the district court in his first case but not his second. Pet. App. 113a & n.5. The court of appeals accordingly reviewed his claim for plain error in the second case, but ultimately concluded that the standard of review was immaterial to the result. Ibid.

enough to warrant the need for armed security," and that bringing a firearm to repeated transactions involving different participants was part of "the sting operation's design" to "ferret[] out additional corrupt officers." Id. at 54a-55a. The court acknowledged that the FBI agents could have designed the operation in a way that might have resulted in a lower sentence, but determined that "the mere fact that they did not, without more, does not establish that the agents engaged in the kind of 'extraordinary misconduct' that is required of a successful sentencing manipulation claim." Id. at 55a (citation omitted). The court noted that petitioner's arguments "have already been attempted and lost by other Operation Guard Shack defendants." Id. at 55a-56a (collecting cases); see id. at 114a.

b. Petitioner also contended in both cases that his combined sentence of 161 years and ten months of imprisonment constituted "cruel and unusual punishment" in violation of the Eighth Amendment. Pet. App. 56a; see id. at 114a-115a. The court of appeals acknowledged that petitioner's sentence was "extraordinarily long," but rejected the claim that it violates the Constitution. Id. at 57a; see id. at 61a-62a, 115a.

The court of appeals explained that, under this Court's framework for considering Eighth Amendment challenges to noncapital sentences, three criteria are relevant: "(i) the gravity of the offense and the harshness of the penalty; (ii) the

sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Pet. App. 57a (citations omitted); see Solem v. Helm, 463 U.S. 277, 292 (1983). It further explained that a court may "reach the last two criteria only if [it] can first establish that the sentence, on its face, is grossly disproportionate to the crime." Pet. App. 57a; see Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

The court of appeals rejected petitioner's claim at the threshold step, concluding that his sentence was not "grossly disproportionate on its face." Pet. App. 58a; see id. at 61a-62a. The court explained that petitioner's sentence was largely driven by the statutory requirement that he serve consecutive sentences of at least 25 years of imprisonment for repeatedly violating Section 924(c) by bringing a firearm to separate apparent drug transactions. Id. at 57a-58a; see 18 U.S.C. 924(c)(1)(C)(i) and (D)(ii). The court observed that the "crime of possessing a firearm in furtherance of * * * a drug trafficking offense is a grave one" and that it had no basis for "second-guessing th[e] legislative judgment" that the crime "requires harsh punishment." Pet. App. 61a. The court noted that no other "circuit has held that consecutive sentences under § 924(c) violate the Eighth

Amendment." Id. at 60a (citations omitted); see id. at 60a-61a (collecting cases).

The court of appeals also rejected petitioner's claim that it "should be swayed by the fact that, in this case, the crime involved fake drug deals" rather than real ones. Pet. App. 61a. The court explained that the "statute makes no distinction between cases involving real versus sham cocaine," and that in "each of the six stings," petitioner "repeatedly and voluntarily showed up armed and provided security services for what he believed to be illegal transactions between real cocaine dealers." Ibid.

c. Judge Torruella dissented from the majority's Eighth Amendment analysis. Pet. App. 64a-96a. In his view, petitioner's sentence was "grossly disproportionate to his offense, and therefore violates the Eighth Amendment." Id. at 65a.

4. The court of appeals unanimously denied a petition for panel rehearing or rehearing en banc. Pet. App. 1a. Judge Barron, joined by the other five active judges on the First Circuit, issued an opinion concurring in the denial of rehearing en banc. Id. at 1a-25a.[4] Judge Barron explained that the court was "required by precedent" -- in particular, Justice Kennedy's controlling opinion in Harmelin v. Michigan, supra -- "to uphold" petitioner's

[4] Judge Lipez, a senior circuit judge who sat on the panel that decided petitioner's appeals, issued a statement regarding the denial of panel rehearing expressing his "agreement with the concurring statement issued by" Judge Barron. Pet. App. 25a.

sentence. Pet. App. 3a. Judge Barron agreed with the panel that petitioner's sentence was not "grossly disproportionate" to his crimes, given that Congress has a "rational basis for concluding" that such a sentence "was warranted for multiple convictions for possession of a firearm in furtherance of" drug-trafficking crimes. Id. at 16a. Judge Barron expressed the view, however, that this "Court should revisit the logic of the Harmelin concurrence, at least insofar as it applies to mandatory greater-than-life-without-parole sentences under § 924(c) in cases involving predicate drug offenses." Id. at 17a.

ARGUMENT

Petitioner contends (Pet. 8-16) that this Court should grant the petition for a writ of certiorari to provide further guidance on the Eighth Amendment, at least as it applies to cases involving multiple convictions under 18 U.S.C. 924(c). But he identifies no sound reason for doing so. Courts of appeals have regularly rejected Eighth Amendment challenges to sentences under Section 924(c). See Pet. App. 60a. And petitioner's Eighth Amendment challenge to the congressionally prescribed sentence for his serious crimes -- bringing a firearm to apparent drug-trafficking transactions on six separate occasions, recruiting others (including a police officer) to join him, and selling a firearm to an informant posing as a drug dealer -- likewise lacks merit. Furthermore, many of the specific concerns about Section 924(c)

identified by the concurrence below have diminishing significance in light of the recently enacted First Step Act of 2018, Pub. L. No. 115-391, which amended the provision of Section 924(c)(1)(C) that required the district court in this case to impose five consecutive sentences of at least 25 years. See p.5 n.2, supra.

Petitioner separately contends (Pet. 16-22) that this Court should address a purported conflict among the courts of appeals regarding the viability of sentencing-manipulation claims. Petitioner's case, which arises from a circuit that recognizes sentencing-manipulation claims, would not provide a suitable vehicle to address any circuit conflict that may exist on whether such claims should be recognized. The court of appeals correctly rejected his claim, and his factbound objections to that determination do not warrant further review.

1. a. In Harmelin v. Michigan, 501 U.S. 957 (1991), this Court rejected a defendant's Eighth Amendment challenge to a mandatory sentence of life imprisonment without parole for possessing 672 grams of cocaine. Justice Scalia, joined by Chief Justice Rehnquist, concluded that "the Eighth Amendment contains no proportionality guarantee." Id. at 965. In his view, the Eighth Amendment "disables the Legislature from authorizing particular forms or 'modes' of punishment" -- i.e., "cruel methods of punishment that are not regularly or customarily employed" -- but does not constrain the legislature's authority to prescribe

particular sentences of imprisonment. Id. at 976. Part IV of Justice Scalia's opinion, which was joined by a majority of the Court, rejected the defendant's claim that the sentence was cruel and unusual because the legislature mandated life imprisonment without "consideration of so-called mitigating factors," such as absence of a criminal record. Id. at 994.

Justice Kennedy, joined by Justices O'Connor and Souter, concurred in part and concurred in the judgment. He concluded that "stare decisis counsels * * * adherence to the narrow proportionality principle that has existed in [the Court's] Eighth Amendment jurisprudence for 80 years." Harmelin, 501 U.S. at 996 (Kennedy, J., concurring in part and concurring in the judgment). In describing his approach, Justice Kennedy recognized that "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" Id. at 998 (citation omitted). He also observed that "the Eighth Amendment does not mandate adoption of any one penological theory," so legislatures have discretion to make "different, yet rational" decisions about how much prison time to impose for particular crimes. Id. at 999-1000. And he explained that review of Eighth Amendment challenges to prison sentences should be "informed by 'objective factors to the maximum possible extent.'" Id. at 1000 (citations and internal quotation marks omitted). Justice Kennedy then relied on those

principles to conclude that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. at 1001 (citation omitted).

Applying that standard, Justice Kennedy determined that a sentence of life imprisonment without parole was not grossly disproportionate to the crime of possessing more than 650 grams of cocaine. Harmelin, 501 U.S. at 1001-1005 (Kennedy, J., concurring in part and concurring in the judgment). He explained that such a drug crime differed in severity from the "relatively minor" and "passive" crime of uttering a no-account check, as to which the Court in Solem v. Helm, 463 U.S. 277 (1983), had deemed a sentence of life imprisonment without parole to be unconstitutional. Harmelin, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Solem, 463 U.S. at 296-297). Justice Kennedy described in detail the "pernicious effects of the drug epidemic in this country," including the "direct nexus between illegal drugs and crimes of violence," and found that "the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine -- in terms of violence, crime, and social displacement -- is momentous enough to warrant the deterrence and retribution of a life sentence without parole." Id. at 1003. Justice Kennedy accordingly concluded that "a comparison of [the defendant's]

crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed." Id. at 1005.

In the decades since Harmelin, the Court has consistently relied on the analysis in Justice Kennedy's controlling opinion in resolving Eighth Amendment challenges. See, e.g., Graham v. Florida, 560 U.S. 48, 59-60 (2010) (invoking the "narrow proportionality principle" in Justice Kennedy's Harmelin opinion) (citation omitted); Ewing v. California, 538 U.S. 11, 23-24 (2003) (plurality opinion) ("The proportionality principles in our cases distilled in Justice Kennedy's [Harmelin] concurrence guide our application of the Eighth Amendment.") (capitalization altered).

b. The decision below correctly applied Justice Kennedy's controlling opinion in Harmelin and does not warrant further review. Petitioner contends (Pet. 9-16) that the Harmelin framework is unsuited for application to cases involving Section 924(c) offenses, but the decision below and decisions of other courts of appeals undermine that contention.

Given Harmelin's conclusion that a mandatory sentence of life imprisonment without parole was not grossly disproportionate to the crime of cocaine possession, it follows logically that a less severe sentence (a statutory minimum sentence of 25 years under 18 U.S.C. 924(c)(1)(C)(i)) cannot be grossly disproportionate to an

arguably more severe crime (possessing a firearm in furtherance of a drug-trafficking offense). Indeed, all of the active First Circuit judges ultimately reached that conclusion. Pet. App. 16a (Barron, J., concurring in the denial of rehearing en banc); see id. at 61a-62a, 115a. Other courts of appeals have likewise repeatedly rejected proportionality challenges to sentences based on Section 924(c), and this Court has repeatedly denied review. See, e.g., United States v. Walker, 473 F.3d 71, 79-84 (3d Cir.), cert. denied, 549 U.S. 1327 (2007); United States v. Khan, 461 F.3d 477, 494-495 (4th Cir. 2006); United States v. Thomas, 627 F.3d 146, 159-160 (5th Cir. 2010), cert. denied, 563 U.S. 998 (2011); United States v. Beverly, 369 F.3d 516, 536-537 (6th Cir.), cert. denied, 543 U.S. 910 (2004); United States v. Arrington, 159 F.3d 1069, 1073 (7th Cir. 1998), cert. denied, 526 U.S. 1094 (1999); United States v. Wiest, 596 F.3d 906, 911-912 (8th Cir.) (collecting cases and noting that "[n]o circuit has held that consecutive sentences under § 924(c) violate the Eighth Amendment"), cert. denied, 562 U.S. 935 (2010); United States v. Lopez, 37 F.3d 565, 571 (9th Cir. 1994), vacated on other grounds, 516 U.S. 1022 (1995); United States v. Angelos, 433 F.3d 738, 750-753 (10th Cir.), cert. denied, 549 U.S. 1077 (2006); United States

v. Bowers, 811 F.3d 412, 431-433 (11th Cir.), cert. denied, 136 S. Ct. 2401 (2016).[5]

c. Petitioner's asserted distinctions (Pet. 12-16) between the statute in Harmelin and Section 924(c) provide no basis for this Court's review.

Petitioner asserts, for example, that the statute at issue in Harmelin "singled out only a subset of precisely defined large-quantity drug possession crimes," Pet. 12 (quoting Pet. App. 18a), while Section 924(c) criminalizes a broader range of possible offense conduct, Pet. 13 (quoting Pet. App. 19a). But the suggestion that the scope of Section 924(c) indicates a lack of "legislative care" regarding its possible implications, Pet. App. 18a, disregards the extensive attention that has been paid to the statute. This Court has explained that Congress acted deliberately in enacting Section 924(c) "to combat the 'dangerous combination' of 'drugs and guns'" by seeking "'to persuade the man who is tempted to commit a Federal felony to leave his gun at home.'"

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[5] In United States v. Slatten, 865 F.3d 767 (2017), cert. denied, 138 S. Ct. 1990 (2018), the D.C. Circuit concluded that three defendants' 30-year sentences under Section 924(c) (resulting from the use of automatic weapons during crimes of violence) were grossly disproportionate under the Eighth Amendment, but that case involved a unique and different factual scenario in which the defendants were security contractors "providing diplomatic security for the Department of State in Iraq" who "were required to carry the very weapons they ha[d] been sentenced to thirty years of imprisonment for using." Id. at 813 (emphasis added); see id. at 812, 815-816.

Muscarello v. United States, 524 U.S. 125, 132 (1998) (citations omitted). And as petitioner observes (Pet. 10-11), the Judicial Conference and the Sentencing Commission have repeatedly drawn Congress's attention to the lengthy sentences that Section 924(c) can require, yet Congress declined to amend the statute until very recently, when it enacted the First Step Act of 2018 to prospectively eliminate the mandatory "stacking" of 25-year-minimum sentences in cases like petitioner's. See p. 5 n.2, supra.

Petitioner also asserts (Pet. 14) that his case is "distinguishable from Harmelin because" his case "is a federal prosecution," while Harmelin involved a state prosecution. That distinction has little relevance. Justice Kennedy's opinion in Harmelin explained that "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts,'" without distinguishing between state and federal legislatures. 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment) (citation omitted). Indeed, Justice Kennedy's opinion cited Gore v. United States, 357 U.S. 386 (1958), which involved a federal statute, for the proposition that matters "regarding severity of punishment * * * are peculiarly questions of legislative policy," Harmelin, 501 U.S. at 998-999 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Gore, 357 U.S. at 393). And this Court has

never held that an Act of Congress violates the Eighth Amendment by requiring a disproportionate sentence.

d. In any event, this case would be a poor vehicle to revisit any application of proportionality analysis under the Eighth Amendment.

First, petitioner's total sentence resulted not from a single act of drug possession (as in Harmelin) but from his possession of a firearm in furtherance of six separate apparent drug-trafficking transactions over a period of several months. Pet. App. 28a. Petitioner's conduct -- which also included bringing "along with him additional recruits," including at least one actual police officer, and selling "a handgun, including magazines, to a confidential FBI informant posing as a drug dealer," id. at 28a-29a -- resulted in his conviction of a total of 19 federal crimes. Petitioner's Eighth Amendment claim thus rests largely on the factbound interaction of sentences for many distinct crimes.

In addition, as noted, future defendants in petitioner's position will not be subject to mandatory consecutive sentences of at least 25 years. See First Step Act of 2018, § 403(a); see also p. 5 n.2, supra. The question presented by his case therefore has diminishing significance.

2. Petitioner separately contends (Pet. 16) that this Court should review an asserted circuit conflict over whether to recognize "sentencing manipulation" as a potential justification

for imposing a lower sentence. This Court has consistently denied petitions seeking review of the varying approaches to "sentencing manipulation" (or "sentencing entrapment") in the courts of appeals. See, e.g., Flowers v. United States, 139 S. Ct. 62 (2018) (No. 17-8370); Whitfield v. United States, 137 S. Ct. 1063 (2017) (No. 16-5769); Macedo-Flores v. United States, 136 S. Ct. 1156 (2016) (No. 15-5947); Daniels v. United States, 562 U.S. 1079 (2010) (No. 09-9754); Docampo v. United States, 559 U.S. 1050 (2010) (No. 09-7833); Jimenez v. United States, 552 U.S. 828 (2007) (No. 06-10315). And this case presents no occasion to resolve any conflict.

As petitioner acknowledges (Pet. 21), his case arose in a circuit that does recognize the possibility of sentencing-manipulation claims. See Pet. App. 53a (recognizing the possibility of a sentencing-manipulation claim in "extreme and unusual" cases, such as those involving "outrageous or intolerable pressure" by the government or "illegitimate motive on the part of" government agents) (citations omitted). The court of appeals nevertheless rejected petitioner's claim, finding that petitioner "ha[d] not met his burden to show by a preponderance of the evidence that the government's motivations were * * * improper." Id. at 55a. The court explained that "FBI agents testified that the government used large quantities of sham cocaine for the purpose of ensuring that the staged deals looked realistic enough

to warrant the need for armed security," and that bringing a firearm to repeated transactions involving different participants was part of "the sting operation's design" to "ferret[] out additional corrupt officers." Id. at 54a-55a.

Petitioner suggests (Pet. 21) that the outcome of his case "would have differed had he been sentenced in either the Eighth or Tenth Circuit." That contention lacks merit. Petitioner cites no case in which the Eighth or Tenth Circuit -- or any circuit -- has in fact granted relief on a sentencing-manipulation claim. Petitioner observes (Pet. 21) that the Eighth Circuit has suggested that sentencing manipulation may exist if the government engages in drug transactions "solely to enhance [a] potential sentence." United States v. Baber, 161 F.3d 531, 532 (1998). But the Eighth Circuit rejected the claim of sentencing manipulation in that case, ibid., and the court of appeals in this case explained that the government engaged in the apparent drug transactions not to enhance petitioner's potential sentence but to uncover additional corruption (which the operation succeeded in doing), see Pet. App. 54a-55a. Similarly, the Tenth Circuit has suggested that it may recognize a sentencing-manipulation claim if the government's conduct is "so shocking, outrageous and intolerable that it offends the universal sense of justice." United States v. Beltran, 571 F.3d 1013, 1018 (2009) (citation and internal quotation marks omitted). But the Tenth Circuit found that standard unsatisfied

in the case at issue, id. at 1020, as the First Circuit did in applying its similar standard here, see Pet. App. 53a-55a. Petitioner further asserts (Pet. 21) that the Tenth Circuit has identified "substantial coercion" as a factor that may support a sentencing-manipulation claim. United States v. Mosley, 965 F.3d 906, 911 (1992). But he does not explain how he was coerced to participate in the numerous crimes he committed here, and in fact he was not. Contrary to petitioner's assertion, therefore, no basis exists to conclude that his sentencing-manipulation claim would have fared differently in any other circuit. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2019