Nos. 12-5226, 12-5582

In the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CORNELIUS DEMORRIS BLEWETT,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JARREOUS JAMONE BLEWITT,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Kentucky, No. 1:04-cr-36

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Defendants Cornelius Blewett and Jarreous Blewitt (collectively, "the Blewetts") pleaded guilty in 2004 and 2005 to multiple counts of conspiracy to distribute, and possession with intent to distribute, powder cocaine and crack cocaine. As part of their pleas, they admitted possession of 19.65 and 26.92 grams of crack cocaine, respectively. Based on those quantities, and because they each had a prior felony drug conviction, the district court sentenced the Blewetts to the statutory minimum sentence of 10 years' imprisonment. *See* 21 U.S.C. § 841(b)(1)(B) (2004) (mandating 10-year sentence for any person who possesses "5 grams or more of a mixture or substance" that contains "cocaine base" "after a prior conviction for a felony drug offense has become final").

The Blewetts later sought sentence reductions under 18 U.S.C. § 3582(c)(2). The district court denied relief and the Blewetts appealed. Over Judge Gilman's dissent, and contrary to the decision in *United States v. Hammond*, 712 F.3d 333 (6th Cir. 2013) (per curiam), the appellate panel reversed and held that equal protection principles mandated retroactive application of the Fair Sentencing Act of 2010 ("FSA"), Pub. L. No. 111-220, 124 Stat. 2372. Accordingly, crack-cocaine offenders sentenced to mandatory minimum terms before the FSA's effective date of August 3, 2010 are entitled to resentencing under the FSA's more lenient regime.

Shortly after the United States petitioned for en banc rehearing of this decision, the Court directed the parties to address whether the Blewetts' sentences are "constitutionally disproportionate in violation of the Eighth Amendment's Cruel and Unusual Punishments Clause."

The United States offers three responses. First, the Court lacks jurisdiction to consider an Eighth Amendment attack in this Section 3582(c)(2) proceeding. Second, the Blewetts are precluded from raising this claim. Cornelius Blewett waived his right to directly appeal or collaterally attack the sentence in his plea agreement and, therefore, forfeited his opportunity to press an Eighth Amendment claim. A prior panel already rejected Jarreous Blewitt's Eighth Amendment proportionality claim, and that decision is now "the law of the case." Jarreous Blewitt has also completed his prison sentence, mooting any new Eighth Amendment challenge to the length of his sentence. Third, even if the Court could address the merits of the question it posed, the answer is clear: The Eighth Amendment permits the imposition of a 10-year recidivist prison term for crack cocaine possession and the use of mandatory minimum sentencing provisions.

A. The Court lacks jurisdiction to entertain an Eighth Amendment challenge in an 18 U.S.C. § 3582(c)(2) proceeding.

"'[A] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon v. United States*, 130 S. Ct. 2683, 2690 (2010)

(quoting 18 U.S.C. § 3582(b), alteration in original). Consistent with that principle, Section 3582(c) provides that a court "may not modify a term of imprisonment once it has been imposed," 18 U.S.C. § 3582(c), except in three limited circumstances: (1) upon the motion of the Director of the Bureau of Prisons, *id.* § 3582(c)(1)(A); (2) "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure," *id.* § 3582(c)(1)(B); and (3) where the defendant was sentenced to a term of imprisonment "based on" a retroactively lowered sentencing range, *id.* § 3582(c)(2).

Section "3582(c)(2) proceedings give judges no more than this circumscribed discretion." *United States v. Bowers*, 615 F.3d 715, 727 (6th Cir. 2010) (quoting *Dillon*, 130 S. Ct. at 2692). "Unless the basis for resentencing falls within one of the specific categories authorized by section 3582(c), the district court lacks jurisdiction to consider the defendant's request." *United States v. Williams*, 607 F.3d 1123, 1125 (6th Cir. 2010) (citation and alterations omitted). This Court's "jurisdiction to consider the appeal of a § 3582(c)(2) determination" is likewise constrained to the question whether the defendant is eligible for a "discretionary reduction . . . of an already imposed sentence based on the satisfaction of some condition precedent" in the statute. *Bowers*, 615 F.3d at 722; *see also Blewett*, slip. op. at 21-22 (Gilman, J., dissenting) (same); *United States v.*

Watkins, 625 F.3d 277, 282 (6th Cir. 2010) (no appellate jurisdiction to review the district court's "denial of the sentence reduction under section 3582(c)(2) on *Booker* reasonableness grounds").

An Eighth Amendment claim does not implicate any of the statutory conditions for modifying a final sentence and, therefore, is not cognizable in a Section 3582(c)(2) proceeding. As a result, this Court lacks jurisdiction to address whether the Blewetts' sentences offend the Eighth Amendment's proportionality requirement. *See United States v. Bravo*, 203 F.3d 778, 782 (11th Cir. 2000) (holding that "the district court was correct in declining to consider [the defendant's] Eighth Amendment claim" because "Section 3582(c), under which this sentencing hearing was held, does not grant the court jurisdiction to consider extraneous resentencing issues such as this one").

B. The Blewetts are barred from challenging the length of their sentences.

Even if this Court could entertain an Eighth Amendment claim in a Section 3582(c) proceeding, the Blewetts did not advance one below, or in their appellate briefs to this Court. "Any such objection is therefore deemed abandoned and not reviewable on appeal." *Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 618 n.1 (6th Cir. 2008). The Blewetts are also precluded from raising an Eighth Amendment claim because of earlier litigation decisions in this case.

1. Cornelius Blewett

In his plea agreement, Cornelius Blewett waived the right to challenge his sentence on direct appeal or in any collateral proceeding. *See* Plea Agreement ¶ 13 (R. 26) ("Defendant knowingly and voluntarily waives the right (a) to directly appeal his conviction and the resulting sentence . . . and (b) to contest or collaterally attack his conviction and the resulting sentence pursuant to 28 U.S.C. § 2255 or otherwise.").[1] The district court further explained during its plea colloquy that, by pleading guilty, Cornelius would "give[] up [his] right to appeal any sentence as long as it's within th[e] [statutory] range." Plea Hrg. Tr. at 14 (R. 108, #460). Cornelius confirmed he understood the force of this provision orally, *id*., and in writing, *see* Acknowledgement of Waiver of Appeal Rights (R. 37, #146) ("I hereby acknowledge that as a part of my plea agreement with the United States, I waived the right to appeal the sentence I just received from the Court."). Because Cornelius "entered his plea agreement—and accepted the waiver of appellate rights contained therein—knowingly and voluntarily," "[i]t follows that the waiver[] [is] valid." *United States v. Calderon*, 388 F.3d 197, 200 (6th Cir. 2004).

This waiver would not preclude Cornelius from requesting a discretionary modification of his sentence under Section 3582(c)(2) based on a retroactively applicable guideline amendment, or from appealing a district court's order denying

[1] The plea agreement is not available on PACER and, therefore, lacks an electronic "PageID" identifier.

such relief. *See, e.g.*, *United States v. Goodloe*, 388 Fed. Appx. 500, 503 (6th Cir. 2010). After all, these measures seek the reduction, but *not* the invalidation, of an already imposed sentence. *See Bowers*, 615 F.3d at 722.

An Eighth Amendment proportionality claim is different. The defendant is challenging his existing sentence as unconstitutional. Because Cornelius's plea agreement expressly waived the right "to contest or collaterally attack his . . . sentence pursuant to 28 U.S.C. § 2255 or otherwise," he cannot now claim that his sentence is "cruel and unusual" in this (or any other) proceeding.

2. Jarreous Blewitt

Unlike his cousin, Jarreous Blewitt pleaded guilty without a plea agreement, preserving his appellate rights. *See* Advice of Right to Appeal (R. 40, #154). On direct appeal, Jarreous asserted that "the imposition of a mandatory minimum sentence was a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause because his resulting sentence was disproportionate to the offense for which he was convicted." Order at 2, *United States v. Blewitt*, No. 05-5944 (R. 55-2, #217). A panel of this Court rejected Jarreous's argument, holding that "[m]andatory minimum sentences . . . do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." *Id.*

"Under the law of the case doctrine, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the

same case." *United States v. Rayborn*, 495 F.3d 328, 337 (6th Cir. 2007) (internal quotations and citation omitted). There are three exceptions to the rule, none of which is present here. First, the evidentiary record in this appeal "is not materially different from the evidence considered by the previous Sixth Circuit panel." *Id.* Second, "no contrary view of the law has been decided by the Sixth Circuit or the Supreme Court." *Id.* Eighth Amendment proportionality jurisprudence has remained static in the intervening years. Third, for reasons discussed below, "the previous panel's decision cannot be described as [a] 'clearly erroneous'" application of those precedents. *Id.* As a result, the law of the case doctrine bars the Court from revisiting its earlier ruling.

In addition, any Eighth Amendment claim would be moot. A motion for modification of sentence under Section 3582(c)(2) is limited to seeking a "reduc[tion] [of] the term of imprisonment." 18 U.S.C. § 3582(c)(2). "In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served." U.S.S.G. § 1B1.10(b)(2)(C) (2012).

Jarreous completed his 10-year prison term on June 3, 2013. Because the district court is now barred from ordering a reduction under Section 3582(c)(2), any Eighth Amendment disputes about the length of Jarreous's prison term "are no longer 'live.'" *Powell v. McCormack*, 395 U.S. 486, 496 (1969), *see also United States v. Waltanen*, 356 Fed. Appx. 848, 850-51 (6th Cir. 2009) ("Because [the

defendant] has now served his custodial sentence, and the Guidelines prohibit any reduction in either the custodial sentence already completed or any future imprisonment due to a revocation of supervised release, [the defendant's] appeal [of the denial of his Section 3582(c)(2) motion] is moot as to any custodial sentence.").

At bottom, an Eighth Amendment inquiry into the appropriateness of a 10-year prison sentence for crack cocaine possession would be a hollow exercise in this case. Under no circumstances can the Blewetts advance that claim.

C. A 10-year sentence for the defendants' crack cocaine offenses does not offend the Eighth Amendment's proportionality requirement.

The Blewetts fare just as poorly on the merits of the Eighth Amendment question. When reviewing challenges to noncapital sentences, the Sixth Circuit "ha[s] adopted the 'narrow proportionality principle' articulated in Justice Kennedy's opinion in *Harmelin v. Michigan*, 501 U.S. 957, 996-1009 (1991) (Kennedy, J., concurring)." *United States v. Jones*, 569 F.3d 569, 573 (6th Cir. 2009). "Under this approach, there is no requirement of strict proportionality; the eighth amendment is offended only by an extreme disparity between crime and sentence." *Id.* (citation omitted). To secure relief under this "tremendously difficult burden," a defendant must show that his sentence is "egregious in the extreme." *United States v. Hughes*, 632 F.3d 956, 959 (6th Cir. 2011).

The proportionality analysis is a two-step test. It begins with "a threshold comparison of the crime committed and the sentence imposed." *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). If that inquiry "leads to an inference of gross disproportionality," the court then performs a "comparative analysis of [the defendant's] sentence with others in [the jurisdiction] and across the Nation." *Id*. "[O]nly in the rare case" will the second step be necessary. *Id*.

The Blewetts do not meet even the threshold comparison because their sentences matched the serious nature of their conduct. On three occasions, they sold powder or crack cocaine to a confidential informant or an undercover police officer. *See* PSR ¶¶ 18-27 (R. 88, #311-313) (Sealed); PSR ¶¶ 14-22 (R. 89, #346-347) (Sealed). These were not the acts of recreational drug users, but of "professional seller[s]" whose actions risked "great[] bodily harm upon members of society." *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 296 n.12 (1980) (Powell, J., dissenting)). The severity of the Blewetts' offenses is further amplified by their criminal record. Each had a prior conviction for a felony drug offense. *See Ewing v. California*, 538 U.S. 11, 29 (2003) ("In weighing the gravity of [the defendant's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.").

The Blewetts' sentences are not "gross[ly] disproportion[ate]," in the Eighth Amendment sense, to the gravity of their offenses and their status as recidivists. The district court imposed the statutory *minimum* sentence on each defendant—a 10-year term that fell well below the authorized maximum sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(B) (2004); *accord United States v. Levy*, 904 F.2d 1026, 1034 (6th Cir. 1990) ("A ten-year sentence for drug possession simply does not approach the . . . level of gross inequity [for an Eighth Amendment violation]."") (citation omitted). The Blewetts' sentences are also authorized by current federal law. Section 841(b)(1)(C), as amended by the FSA, authorizes a "term of imprisonment of not more than 30 years" for offenses involving up to 28 grams of crack cocaine "after a prior conviction for a felony drug offense." 21 U.S.C. § 841(b)(1)(C) (2012). The fact that the FSA continues to permit 10-year sentences for similarly situated defendants confirms that Congress continues to regard these sentences as proportional.

Case law further supports this conclusion. In *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (per curiam), the Supreme Court rejected an Eighth Amendment proportionality challenge to a 40-year prison term for possession and distribution of nine ounces of marijuana. Two decades later, the Court affirmed a 25-year recidivist sentence imposed on a defendant for the theft of three $399 golf clubs. *See Ewing*, 538 U.S. at 19-20. In addition, this Court has previously held that the

very punishment the Blewetts received—10 years for crack cocaine possession—"is not cruel and unusual under the eighth amendment." *United States v. Avant*, 907 F.2d 623, 627 (6th Cir. 1990) (affirming defendant's sentence of 10 years for possession of 7.3 grams of crack cocaine); *see also United States v. Wimbley*, 553 F.3d 455, 463 (6th Cir. 2009) (holding that life sentence, based on defendant's distribution of 143.2 grams of crack cocaine and two prior felony drug convictions, did not violate Eighth Amendment); *United States v. Walls*, 70 F.3d 1323, 1330-31 (D.C. Cir. 1995) (rejecting attack on 10-year sentence for first time offender convicted of distributing 50 or more grams of crack cocaine); *United States v. Thomas*, 900 F.2d 37, 39 (4th Cir. 1990) (same as *Walls*).

Hutto, *Ewing*, and *Avant* provide helpful markers for the first step of Eighth Amendment proportionality review.[2] The Blewetts' offenses—multiple counts of conspiracy to distribute, and possession with intent to distribute, powder cocaine and crack cocaine—are more severe than the conduct at issue in those cases, and their 10-year prison terms are comparable to or less than the punishments ordered in those cases. Therefore, if *Hutto*, *Ewing*, and *Avant* did not "present[] the kind of

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[2] The Court's briefing order cites *Solem v. Helm*, 463 U.S. 277 (1983), where the Supreme Court found a life sentence without the possibility of parole unconstitutional for the crime of uttering a "no account" check for $100. In *Avant*, 907 F.2d at 627, this Court applied *Solem* to *reject* an Eighth Amendment challenge to the defendant's 10-year sentence for possession with intent to distribute 7.3 grams of crack cocaine. *Solem* thus provides little support to the Blewetts, who stand in the same shoes as the defendant in *Avant*.

extreme disparity between the sentence imposed and the crime committed," *Jones*, 569 F.3d at 574, this case does not either. Simply put, the Blewetts' Eighth Amendment claim would fail the threshold test of proportionality review, omitting any need for a secondary inquiry into jurisdictional disparities.

D. Imposition of mandatory minimum sentences in this case did not offend the Eighth Amendment.

The Court's briefing order referenced the 100-to-1 ratio used in pre-FSA law to fix mandatory minimum sentences for crack cocaine offenses. But that ratio informed only part of the Blewetts' 10-year sentences; their criminal records played an equally important role. The Blewetts each possessed five grams or more of crack cocaine, triggering a mandatory minimum sentence of five years. *See* 21 U.S.C. § 841(b)(1)(B) (2004). Because the Blewetts committed this violation after prior conviction of a felony drug offense, they faced an elevated mandatory minimum sentence of 10 years. *Id.*

In any event, mandatory minimum penalties do not offend the Eighth Amendment. Justice Kennedy's controlling opinion in *Harmelin* "reject[ed] any requirement of individualized sentencing in noncapital cases." 501 U.S. at 1006 (Kennedy, J., concurring). "[T]he legislature 'has the power to define criminal punishments without giving the courts any sentencing discretion,'" and "Congress and the States have enacted mandatory sentencing schemes" "[s]ince the beginning of the Republic" without invalidation by the courts. *Id.* (citation omitted).

Applying that principle, this Court has upheld Section 841(b)'s mandatory punishment provisions against Eighth Amendment attack. *See United States v. Graham*, 622 F.3d 445, 452 (6th Cir. 2010) ("[M]andatory minimum sentences under 21 U.S.C. § 841(b)(1)(A)(iii) do not constitute cruel and unusual punishment.") (citing *United States v. Hill*, 30 F.3d 48, 50-51 (6th Cir. 1994)).

This conclusion holds even though the mandatory minimum sentences rested on a 100-to-1 quantity ratio between crack and powder cocaine. Every federal appellate court, including this one, has long rejected arguments that the 100-to-1 ratio establishes unconstitutional disparity under the Eighth Amendment. *See United States v. Pickett*, 941 F.2d 411, 419 (6th Cir. 1991); *Avant*, 907 F.2d at 627; *Levy*, 904 F.2d at 1034; *see also United States v. García-Carrasquillo*, 483 F.3d 124, 134 (1st Cir. 2007) ("[E]very . . . circuit has rejected the argument that the sentencing disparity between crack and powder cocaine constitutes cruel and unusual punishment.").

To be sure, many stakeholders reasonably criticized the 100-to-1 crack-to-powder ratio in the old law as unjust and unsound. *See Dorsey v. United States*, 132 S. Ct. 2321, 2328-29 (2012) (citing examples). Congress responded by selecting an 18-to-1 ratio, thereby reducing the population of new crack cocaine

offenders subject to mandatory minimum sentences.[3] But Congress's decision to chart a new course in 2010 did not constitutionally condemn the 100-to-1 ratio or the punishments imposed under that regime. These reforms reflect a deliberate rebalancing of penological principles, which is "properly within the province of legislatures, not courts." *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring) (citation omitted); *accord United States v. Speed*, 656 F.3d 714, 720 (7th Cir. 2011) ("Congress's amendment to the statutory penalties [in Section 841(b)] does not transform the preexisting penalty scheme into a cruel and unusual one.").[4]

The constitutional inquiry remains the same. Affording "substantial deference" to the legislature's judgments, *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring) (citation omitted), the Court must ask whether the sentence imposed was "grossly disproportionate" punishment for the crime committed, *id.* at 1005.

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[3] The FSA retains automatic sentencing enhancements. For instance, current law requires a 10-year mandatory minimum sentence for a defendant found guilty of recidivist possession of 28 grams of crack cocaine. *See* 21 U.S.C. § 841(b)(1)(B) (2012). If that sentence satisfies the Eighth Amendment's proportionality requirement, the Blewetts' 10-year sentences based on slightly lower quantities (19.65 and 26.92 grams) should as well.

[4] Congress made a policy judgment to limit the FSA's remedial changes to cases to be sentenced on or after the effective date of the FSA. Such a "line-drawing effort" is inevitable "whenever Congress enacts a new law changing sentences (unless Congress intends re-opening sentencing proceedings concluded prior to a new law's effective date)." *Dorsey*, 132 S. Ct. at 2335. If Congress perceives a need to remedy any remaining unfairness, it can make clear that the FSA should apply fully retroactively. But its decision not to do so does not render pre-FSA sentences unconstitutional.

The answer here is no. Every objective indicator—Justice Kennedy's *Harmelin* decision, the Supreme Court and this Court's guideposts in other Eighth Amendment cases, current sentencing law, and the severity of the Blewetts' conduct—negates an inference of gross disproportionality.

CONCLUSION

For these reasons, the Court is precluded from considering—much less granting relief on—any claim that the Blewetts' sentences violate the Eighth Amendment's narrow proportionality principle.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on June 28, 2013, I served an electronic copy of the Supplemental Brief for the United States on counsel for appellant via the Court's ECF system:

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CERTIFICATE OF COMPLIANCE

I certify that this supplemental brief complies with the Court's briefing order because it is 15 pages in length and has been prepared on a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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