RECENT CASES

EIGHTH AMENDMENT — MANDATORY MINIMUM SENTENCES — D.C. CIRCUIT HOLDS IT CRUEL AND UNUSUAL TO IMPOSE MANDATORY THIRTY-YEAR SENTENCE ON MILITARY CONTRACTORS FOR GUN CHARGE. — *United States v. Slatten*, 865 F.3d 767 (D.C. Cir. 2017) (per curiam), *reh'g and reh'g en banc denied*, No. 15-3078 (D.C. Cir. Nov. 6, 2017).

Because they are not tailored to individual defendants' culpability, mandatory minimum sentences are ripe targets for Eighth Amendment challenges.[1] Section 924(c)[2] prescribes a mandatory minimum sentence of thirty years for using a machine gun in the commission of a violent crime.[3] Recently, in *United States v. Slatten*,[4] the D.C. Circuit held that sentence to be cruel and unusual as applied to military contractors who were convicted of manslaughter after a shooting in Iraq resulted in several civilian deaths.[5] This decision is in tension with Supreme Court precedent in two ways. First, it is unusual to overturn a long prison sentence on Eighth Amendment grounds at all. And second, the court reviewed the proportionality of the thirty-year § 924(c) sentence separately from the one-day sentence imposed for defendants' other crimes, which contrasts with the "sentencing package" approach recently endorsed by the Supreme Court. The court could have diminished these tensions while achieving the same result by granting defendants' categorical, rather than as-applied, Eighth Amendment challenge.

Nicholas Slatten, Paul Slough, Evan Liberty, and Dustin Heard were part of the "Raven 23" team of Blackwater military contractors in Iraq.[6] On September 16, 2007, the Raven 23 shift leader directed the team to "lock down" Nisur Square, contrary to orders to lead the team elsewhere.[7] There, the team encountered a car that they believed might

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[1] In *Miller v. Alabama*, 567 U.S. 460 (2012), "two strands of precedent reflecting . . . concern with proportionate punishment" came together: first, categorical mismatches between a class of defendants (frequently juveniles) and sentencing practices; and second, prohibitions on mandatory capital punishment. *Id.* at 470. The Court held that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* The opinion could also be seen to represent a broader concern on the Court about mandatory sentences in general. *See id.* at 476 ("[M]andatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it.").

[2] 18 U.S.C. § 924(c) (2012).

[3] *Id.* § 924(c)(1)(B)(ii).

[4] 865 F.3d 767 (D.C. Cir. 2017) (per curiam), *reh'g and reh'g en banc denied*, No. 15-3078 (D.C. Cir. Nov. 6, 2017).

[5] *Id.* at 811.

[6] *Id.* at 776–77.

[7] *Id.* at 777.

have been carrying a bomb.[8] Chaos ensued, with heavy gunfire and Iraqi citizens running for cover.[9] During the incident, at least thirty-one Iraqi civilians were killed or injured.[10]

At trial, Slough, Liberty, and Heard were found guilty of various manslaughter charges and, under § 924(c), of "using and discharging a firearm in relation to a crime of violence."[11] When the firearm is a machine gun, as it was here, § 924(c) imposes a mandatory minimum sentence of thirty years.[12] The defendants were sentenced to one additional day for all other charges.[13] Slatten was charged with, and found guilty of, first-degree murder.[14]

The D.C. Circuit affirmed in part, vacated in part, and remanded for sentencing. In a per curiam opinion, the court ruled on several jurisdictional, procedural, and substantive issues.[15] On jurisdiction, the court found that prosecution was authorized under the "'deliberately expansive' language"[16] of the Military Extraterritorial Jurisdiction Act[17] (MEJA).[18] Venue in the District of Columbia was proper.[19]

Applying two "'highly deferential' standard[s],"[20] the circuit court next affirmed the district court's ruling that defendants were not entitled to a new trial because of contradictory evidence[21] and ruled against all but one of Liberty and Slatten's challenges to the sufficiency of the evidence supporting their convictions.[22]

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[8] *Id.*

[9] *Id.* at 776–77.

[10] *Id.* at 776.

[11] *Id.* at 778.

[12] 18 U.S.C. § 924(c)(1)(B)(ii) (2012); *Slatten*, 865 F.3d at 778.

[13] *Slatten*, 865 F.3d at 778.

[14] *Id.* Slatten was initially indicted for the same manslaughter and gun charges as the other three defendants, but he successfully moved to dismiss those charges as time-barred, and the government subsequently sought and obtained an indictment for first-degree murder. *Id.*

[15] *Id.* at 777. The panel consisted of Judges Henderson, Rogers, and Brown. *Id.* at 776. Each judge also wrote separately. *Id.*

[16] *Id.* at 783 (quoting District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 129 (1992)).

[17] 18 U.S.C. §§ 3261–3267.

[18] *Slatten*, 865 F.3d at 778. MEJA corrects a "jurisdictional gap," *id.* at 779 (quoting H.R. REP. NO. 106-778, at 5 (2000)), by allowing domestic prosecution for crimes committed overseas by civilians supporting American military missions (who are not subject to courts-martial). *Id.* at 778–79.

[19] *Id.* at 789. Venue was proper because another member of the Raven 23 team, who qualified as a joint offender, was initially arrested in D.C. *Id.* at 786; *see* 18 U.S.C. § 3238.

[20] *Slatten*, 865 F.3d at 792 (quoting United States v. Williams, 836 F.3d 1, 6 (D.C. Cir. 2016)) (sufficiency of the evidence); *see id.* at 790 (motion for new trial).

[21] *Id.* at 789–92. Defendants moved for a new trial because of contradictions between a prosecution witness's trial testimony and his Victim Impact Statement (VIS). *Id.* at 789. The appellate court found that defendants did not meet the "high bar," *id.* at 791 (quoting United States v. Celis, 608 F.3d 818, 848 (D.C. Cir. 2010)), of proving that the "VIS would probably result in an acquittal at a new trial," *id.* (citing Thompson v. United States, 188 F.2d 652, 653 (D.C. Cir. 1951)).

[22] *Id.* at 792. The circuit court vacated one of Liberty's counts of attempted manslaughter,

The court then considered two challenges specific to Slatten. First, it held that he was not the victim of vindictive prosecution, because there were no lesser charges available and there was no evidence of actual vindictiveness.[23] Second, it remanded Slatten's case for a new, separate trial so that he could introduce exculpatory evidence that he was unable to present in the joint trial.[24]

Finally, the court considered Slough, Liberty, and Heard's Eighth Amendment claim that the thirty-year sentences under § 924(c) were cruel and unusual. The defendants challenged their sentences in two ways: first, that the sentences were disproportionate as applied to their individual circumstances and, second, that a thirty-year sentence is categorically disproportionate when applied to any defendant who discharges a government-issued weapon in a war zone.[25] The court granted the defendants' as-applied challenge and remanded for individualized sentencing.[26] Because the court ruled in favor of defendants on their as-applied claim, it declined to rule on their categorical claim.[27]

The court first noted that it "should be exceedingly rare"[28] to rule in favor of an as-applied challenge to a mandatory sentence of imprisonment, because of deference to the legislature and because, while those sentences "may be cruel, . . . they are not unusual."[29] However, this case was an exception on both counts: the legislature intended the statute to apply to drug deals, not military combat, and the facts of the case were indeed unusual.[30] Therefore, the court proceeded to weigh the gravity of the offense against the severity of the sentence, while considering "all of the circumstances of the case."[31]

As to the gravity of the offense, the court found that several circumstances limited defendants' culpability. The court took care to distinguish between defendants' decision to shoot, which resulted in the manslaughter charges, and culpability under § 924(c) for their choice of

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finding it to "be based on mere speculation." *Id.* at 795. On all other counts, the court found that, while they "may have poked holes in some of the evidence," Liberty and Slatten did not "show[] that *no* reasonable factfinder could find [them] guilty." *Id.* (Liberty); *see id.* at 796 (Slatten).

[23] *Id.* at 800–01.

[24] *Id.* at 801. Slatten had moved to sever his trial because he wished to introduce a codefendant's statements that he, not Slatten, fired the first shots. *Id.* The trial court denied this motion, finding that the evidence would be inadmissible hearsay. *Id.* The circuit court held that the evidence was in fact admissible under the residual hearsay exception, FED. R. EVID. 807, and thus that the motion to sever should have been granted. *Slatten*, 865 F.3d at 801.

[25] *Slatten*, 865 F.3d at 811.

[26] *Id.* at 820.

[27] *Id.* at 820 n.14.

[28] *Id.* at 812 (quoting Hutto v. Davis, 454 U.S. 370, 374 (1982) (per curiam)).

[29] *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 994 (1991)).

[30] *Id.* at 812–13.

[31] *Id.* at 811 (quoting Graham v. Florida, 560 U.S. 48, 59 (2010)).

weapon.[32] The defendants were required to carry machine guns as part of their employment providing security for the Department of State, and they were ordered to go to Nisur Square.[33] This diminished culpability for the gun charge did not match the severity of the thirty-year sentence. Except for death or life imprisonment, thirty years is the harshest mandatory federal sentence that can be imposed on first-time offenders.[34] The mismatch between the gravity of defendants' crimes and the severity of their sentences led to an "inference of gross disproportionality."[35]

The next step was comparing the sentences at issue to those received by other offenders who committed the same crime.[36] This proved to be a challenge, because *Slatten* was the first instance of government contractors being found guilty of violating § 924(c) for using weapons in a war zone.[37] The court used § 924(c) violations by law enforcement personnel with government-issued firearms as a point of comparison and found that the statute is almost exclusively applied when an officer intentionally uses a weapon to commit a crime outside the scope of their duties.[38] According to the court, military contractors, who work in war zones and use lethal force as a central part of their jobs, should be granted more leeway than law enforcement officers, who work in the community and should use lethal force only as a last resort.[39] Broadening the scope of its comparison beyond § 924(c), the court found that similarly harsh sentences were usually imposed on first-time offenders only when their crimes were intentional and serious.[40]

The court also found that none of the traditional justifications for punishment weighed in favor of such a harsh and indiscriminate sentence.[41] Defendants did not "pose a danger to society," ruling out incapacitation and rehabilitation.[42] Since this sentence was "grossly disproportionate," it did not fulfill the retribution justification, which relies on personal culpability.[43] Finally, the district and circuit courts agreed that "there was no need to deter the defendants individually," given their lack of criminal history.[44] Any general deterrent effect would actually be

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[32] *Id.* at 812, 814, 820. The court found that, had defendants' perception of the car-bomb threat been correct, their choice of weapon would have been appropriate. *Id.* at 813–14.

[33] *Id.* at 813. The court also noted that defendants had no criminal record. *Id.* at 814–15.

[34] *Id.* at 815. Furthermore, since each defendant was charged with different counts of manslaughter, the court found it "troubling" that they received identical sentences. *Id.*

[35] *Id.* (quoting *Graham*, 560 U.S. at 60).

[36] *Id.* at 816 (quoting *Graham*, 560 U.S. at 60).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 817.

[40] *Id.* at 818.

[41] *Id.*

[42] *Id.* at 819.

[43] *Id.*

[44] *Id.* (citing Transcript of Sentencing Hearing at 153, United States v. Slough, No. 08-360

harmful, because it would lead to hesitation in dangerous, fast-moving situations.[45]

Judge Rogers dissented from the court's ruling on the mandatory minimum sentence.[46] Noting that each defendant was convicted of killing more than five people and attempting to kill more than ten more,[47] and that, putting § 924(c) aside, each defendant faced a maximum sentence of more than 100 years for these manslaughter convictions,[48] Judge Rogers disagreed with the court's ruling that the thirty-year sentences were disproportionate.[49] She argued that the court evaluated the mandatory thirty-year sentences as "freestanding," when it should have considered the full "sentencing packages" of thirty years and one day for the § 924(c) and manslaughter convictions combined.[50] In that light, "the result [was] not disproportionate to the defendants' crimes, let alone grossly, *unconstitutionally* disproportionate."[51]

Judge Rogers's dissent is more consistent with Eighth Amendment precedent than is the court's per curiam opinion. It is highly unusual to overturn a term-of-years sentence on proportionality grounds. By separating out the § 924(c) sentence, the court was able to highlight the facts that reduced the defendants' culpability and dismiss those that increased culpability. But that approach was itself unusual and in tension with the Supreme Court's recent decision in *Dean v. United States*.[52] The court could have avoided these difficulties by overturning the mandatory thirty-year sentence on categorical, rather than as-applied, grounds.

Term-of-years sentences are almost never struck down under the Eighth Amendment.[53] Although the *Slatten* court acknowledged that such rulings "should be exceedingly rare,"[54] it still underplayed the

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(D.D.C. Apr. 13, 2015), ECF No. 793).

[45] *Id.* at 819–20.

[46] *Id.* at 823–24 (Rogers, J., concurring in the judgment in part and dissenting in part). Judge Rogers also concurred with respect to Slatten's motion to sever, arguing that the codefendant's statement was inculpatory, rather than exculpatory, and therefore should have been admitted without resorting to the residual hearsay exception. *Id.* at 829. The other judges on the panel also each filed separate opinions. Judge Henderson concurred with respect to Slatten's vindictive prosecution claim, noting that the government needed to reindict Slatten only due to an earlier, mistaken ruling by the D.C. Circuit. *Id.* at 820, 823 (Henderson, J., concurring in part). Judge Brown dissented from the court's "unnecessarily broad[]" interpretation of MEJA. *Id.* at 832 (Brown, J., concurring in part and dissenting in part).

[47] *Id.* at 830 (Rogers, J., concurring in the judgment in part and dissenting in part).

[48] *Id.* at 830–31.

[49] *Id.* at 831.

[50] *Id.*

[51] *Id.* at 832.

[52] 137 S. Ct. 1170 (2017).

[53] Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1159–61 (2009).

[54] 865 F.3d at 812 (quoting Hutto v. Davis, 454 U.S. 370, 374 (1982) (per curiam)).

weight of precedent on this point. In the last century, the Supreme Court has ruled only once that a sentence violated the Eighth Amendment because it was excessively long, in *Solem v. Helm*.[55] In that case, the defendant was sentenced under a recidivist statute to life without parole for a nonviolent crime (specifically, issuing a no-account check for $100),[56] a stark contrast to both the length of sentence and the gravity of the offense in *Slatten*. Since *Solem*, the Court has upheld a mandatory sentence of life without parole for a first-time offender convicted of drug possession in *Harmelin v. Michigan*.[57] The Court has repeatedly rejected challenges to sentences that are comparable to or lengthier than those in *Slatten* for less serious, nonviolent crimes.[58]

The *Slatten* court overcame this precedent by insisting it was analyzing the proportionality of the sentences only with regard to the weapons charge under § 924(c), and not with regard to the manslaughter charges.[59] As the preceding examples show, had the court not cabined its analysis to the weapons charge, but also considered the manslaughter convictions, it would have been hard-pressed to find thirty-year sentences disproportionate.[60] Compared to other sentences that have been upheld, thirty years for multiple counts of manslaughter does not seem grossly disproportionate. Even within the § 924(c) context, the court's decision is outside the norm: never before has a court of appeals overturned a § 924(c) mandatory minimum sentence under the Eighth Amendment.[61]

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[55] 463 U.S. 277 (1983); *see* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 579 (2005).

[56] *Solem*, 463 U.S. at 281–82.

[57] 501 U.S. 957 (1991); *see* Frase, *supra* note 55, at 581.

[58] *See* Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (upholding a twenty-five years to life sentence for a triggering offense of stealing $68.84 worth of videotapes); Ewing v. California, 538 U.S. 11, 35 (2003) (Breyer, J., dissenting) (noting that the triggering offense for a twenty-five years to life sentence was theft of golf clubs worth $1197); Rummel v. Estelle, 445 U.S. 263, 265–66 (1980) (upholding a mandatory life sentence under a three-strikes law for "obtaining $120.75 by false pretenses," *id.* at 266); Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 443–44 (2017) (collecting cases). These harsh sentences for seemingly trivial crimes were imposed as a consequence of mandatory minimum three-strikes laws. *See id.* While the *Slatten* defendants, as first-time offenders, may be distinguishable from some of these extreme examples of harsh mandatory minimum sentences, *Harmelin* demonstrates that the Court has also upheld harsh mandatory sentences for first-time offenders.

[59] 865 F.3d at 812, 814, 820 (per curiam) ("[W]e believe it is important to distinguish between the predicate crimes of violence for which Slough, Heard and Liberty were convicted and the conviction under Section 924(c) . . . ." *Id.* at 812.).

[60] *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 117 (1993) (concluding that the Court is particularly unwilling to interfere with mandatory sentences for violent crimes, which "directly threaten the physical safety of others").

[61] Government's Motion for an Extension of Time to File an En Banc Petition & to Exceed the Word Limit at 4, *Slatten*, 865 F.3d 767 (No. 15-3078(L)).

Because it limited the proportionality analysis to § 924(c), the court was able to cherry-pick the facts it considered. By focusing on the weapons charge, the court emphasized that defendants used government-issued firearms, which they were required to carry.[62] This circumstance significantly mitigated the defendants' culpability both in itself and by drawing out the defendants' unique role as military contractors operating in a war zone.[63] On the other hand, the court repeatedly acknowledged that defendants were culpable for the deaths and injuries of dozens of victims,[64] a fact that was found by the jury and would usually weigh heavily in favor of the proportionality of a lengthy sentence.[65] But the court did not consider those severe consequences of defendants' actions because they were attributed to the manslaughter charges and thus deemed irrelevant to the § 924(c) violation.

As Judge Rogers noted in her dissent, the *Slatten* court's proportionality analysis is difficult to reconcile with the logic of *Dean*.[66] In that case, the Supreme Court held that sentencing courts could consider § 924(c)'s harsh mandatory sentence in their deliberations as to additional discretionary sentences.[67] In these "sentencing package cases,"[68] judges can impose lenient sentences for predicate crimes when they believe that the mandatory § 924(c) sentence adequately accounts for a defendant's total culpability, even if the discretionary sentence would be inappropriate standing on its own, such as a one-day sentence for a violent crime.[69] This was likely the district court's approach in *Slatten*.[70]

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[62] *Slatten*, 865 F.3d at 813, 818.

[63] *See id.* at 817. However, the court did not consider the malleability of the distinction between a "community" and a "war zone." From the perspective of Iraqis, Nisur Square is part of their community. *See, e.g.*, James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES (Oct. 3, 2007), https://nyti.ms/2oAjOy9 [https://perma.cc/2KAL-FBM2] (describing Iraqis passing through Nisur Square on family errands or on their way to work when the shooting began).

[64] *Slatten*, 865 F.3d at 814 ("We emphasize [defendants] are still culpable for their decision to fire at all, as encompassed by their manslaughter and attempted manslaughter convictions . . . ."); *id.* at 818 ("[W]e by no means intend to minimize the carnage attributable to Slough, Heard and Liberty's actions. Their poor judgments resulted in the deaths of many innocent people. What happened in Nisur Square defies civilized description."); *id.* at 820 ("We again emphasize these defendants can and should be held accountable for the death and destruction they unleashed on the innocent Iraqi civilians who were harmed by their actions.").

[65] Frase, *supra* note 55, at 580.

[66] *Slatten*, 865 F.3d at 831 (Rogers, J., concurring in the judgment in part and dissenting in part).

[67] Dean v. United States, 137 S. Ct. 1170, 1178 (2017).

[68] *Id.* at 1176 (quoting Greenlaw v. United States, 554 U.S. 237, 253 (2008)); *see also Slatten*, 865 F.3d at 832 (Rogers, J., concurring in the judgment in part and dissenting in part) ("The district court judge made an individualized assessment of an appropriate sentencing package for each of these defendants . . . .").

[69] *Dean*, 137 S. Ct. at 1176.

[70] *See* 865 F.3d at 831 (Rogers, J., concurring in the judgment in part and dissenting in part) (noting that the district court judge was "'very satisfied' with the thirty-year sentences" (quoting Transcript of Sentencing Hearing, *supra* note 44, at 154)).

The circuit court turned the *Dean* holding on its head. Under *Dean*, sentencing judges may consider lengthy § 924(c) mandatory sentences and account for them with lenience in their discretionary sentences.[71] But in *Slatten*, the circuit court refused to consider the lenience of the discretionary sentences in its proportionality analysis of the mandatory § 924(c) sentences. It reviewed the mandatory sentences "on their own — and not as part of a combined package."[72]

The defendants themselves presented the court with another option: the court could have held that § 924(c)'s mandatory thirty-year sentence is *categorically* disproportionate for defendants using government-issued weapons in a war zone.[73] Although the court declined to address this argument,[74] it in some ways fits better with the majority's reasoning. At each step of the Eighth Amendment analysis, the court emphasized the defendants' status as military contractors using government-issued weapons in a war zone.[75] A categorical Eighth Amendment holding would have also been in line with the majority's instinct to address the § 924(c) penalty separately, rather than as part of a sentencing package. If the holding were to apply to all war-zone cases, these particular defendants' manslaughter convictions would be irrelevant to the Eighth Amendment analysis. Within that framework, the tension between *Slatten* and *Dean* fades away. Just as the court wished, the defendants could individually "be held accountable for the death and destruction they unleashed" under their convictions for manslaughter, without "the sledgehammer of a mandatory 30-year sentence" under § 924(c).[76]

In *Slatten*, the D.C. Circuit made several unusual moves to overturn the § 924(c) mandatory minimum sentences. Courts rarely even review non–death penalty sentences for proportionality. Those that are reviewed are almost always upheld, even when the crimes are less serious and the sentences are harsher than those in *Slatten*. And finally, the court considered the proportionality of the thirty-year § 924(c) sentence separately from the one-day sentence for the remainder of the defendants' crimes, creating tension with *Dean*, where the Supreme Court explicitly endorsed the "sentencing package" approach. A better way to achieve the same result would have been to sustain defendants' categorical Eighth Amendment challenge.

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[71] *Dean*, 137 S. Ct. at 1176.

[72] *Id.* at 1175.

[73] *Slatten*, 865 F.3d at 811; *cf.* Noah A. Kuschel, Note, *Exempting Police from 18 U.S.C. § 924(c)*, 51 WM. & MARY L. REV. 1609, 1612 (2010) (proposing that police officers be exempted from § 924(c) when they are authorized to carry the firearm and are performing official duties).

[74] *Slatten*, 865 F.3d at 820 n.14.

[75] For example, the court embarked on the proportionality analysis only because the military nature of the case rendered it unusual and outside the scope of the legislature's intent for § 924(c). *Id.* at 812–13. That defendants used government-issued weapons and were operating in a war zone diminished their culpability. *Id.* at 813–14. The court also highlighted that defendants were military contractors when comparing their sentences to others of a similar nature. *Id.* at 816–17.

[76] *Id.* at 820.