No. 18-___

IN THE

Supreme Court of the United States

J.B.R.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal law contains a number of crimes for which the only statutorily authorized punishments are death or life imprisonment without possibility of parole. As the Government conceded below, this Court has held that the Constitution forbids imposing either punishment on a person who was under the age of eighteen at the time of the crime. The question presented is:

Whether the Due Process Clause forbids the Government from prosecuting an individual who was a juvenile at the time of the crime under a statute that provides no punishment that can constitutionally be applied to that individual.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner J.B.R.[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, Pet. App. 1a, is unreported. The district court's Amended Supplement to Order of Transfer to Adult Criminal Proceedings, Pet. App. 7a, is sealed. The district court's Order of Transfer to Adult Criminal Proceedings, Pet. App. 14a, is sealed.

JURISDICTION

The judgment for the United States Court of Appeals for the Fifth Circuit was entered on March 9, 2018. Pet. App. 1a. A timely petition for rehearing en banc was denied on April 24, 2018. Pet. App. 28a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

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[1] The proceedings below were conducted under seal because petitioner was a juvenile at the time of the relevant events. He is therefore identified here by his initials.

18 U.S.C. § 1111(b) provides:

> "Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;
>
> Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."

INTRODUCTION

Petitioner J.B.R. was 17 years old at the time of the homicide at the center of this case. The Government has charged him with a federal crime—first-degree murder, 18 U.S.C. § 1111—for which the statute specifies two, and only two, punishments: "death or by imprisonment for life." *Id.* § 1111(b). Yet neither capital punishment nor mandatory life without parole sentences may be imposed on someone like petitioner who was under the age of 18 at the time of the crime. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 567 U.S. 460 (2012).

Petitioner maintains that the Due Process Clause forbids this prosecution from proceeding because the statute, as applied to juveniles, fails to provide the constitutionally required notice concerning the potential punishment a defendant faces. If petitioner were in the Fourth Circuit, he would have prevailed. Relying on the Due Process Clause and this Court's decision in *United States v. Evans*, 333 U.S. 483 (1948), that court has held that the Government cannot proceed with a prosecution against a juvenile offender for a crime with a

mandatory minimum punishment of life without parole. *United States v. Under Seal*, 819 F.3d 715, 720 (4th Cir. 2016).

The district court here, however, reached the opposite conclusion. The Fifth Circuit affirmed, rejecting the Fourth Circuit's holding and concluding that petitioner cannot challenge the legality of his prosecution unless and until he is convicted. At that point, he can challenge an "unconstitutional sentence," Pet. App. 5a, but he will have no challenge to the prosecution itself.

STATEMENT OF THE CASE

1. *Factual background.* Petitioner J.B.R. was raised by his grandparents in a farming community in El Salvador. Pet. App. 18a. In 2009, when he was 13, petitioner's family sent him to Texas to live with his father. *Id.* His father was rarely home, and petitioner became involved in a gang. At the age of 16, petitioner was put on juvenile probation for possession of marijuana. *Id.* 19a. During this probation, petitioner "had the foresight and sense of prudence" to leave Houston to live with his mother in Louisiana. *Id.* 21a. He successfully completed his probation without any problem. *Id.* 19a. In spring 2013, however, petitioner returned to Texas.

The Government alleges that in September 2013, when petitioner was 17 years old, he and two adult gang members killed a fellow gang member. Pet. App. 18a. The victim was attacked with a baseball bat and a machete. *Id.* 1a.

2. *The federal prosecution.* Originally, the State of Texas charged petitioner with first-degree murder under Texas Penal Code § 19.02(b)(1). Pet. App. 2a.[2] Nine months later, while that prosecution was still pending, the United States filed a juvenile information against petitioner, charging him under 18 U.S.C § 5032 with an act of juvenile delinquency—namely, his participation in the homicide. Pet. App. 2a. The basis for this assertion of federal jurisdiction was that the killing allegedly occurred in the Sam Houston National Forest. *Id.* 14a.[3]

A few days later, the Government filed a transfer motion seeking to have petitioner tried as an adult for first-degree murder. Pet. App. 2a. *See* 18 U.S.C. § 5032 (describing the circumstances under which a juvenile's case can be transferred to federal district court for prosecution as an adult). The United States took custody of petitioner from the state and, pending

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[2] Because petitioner was 17 at the time of the alleged crime, the State proceeded against him as an adult. *See* Tex. Fam. Code Ann. § 51.02(2). Under Texas law, a conviction for first-degree murder carries a punishment of "life" or "any term of not more than 99 years or less than 5 years." Tex. Penal Code Ann. § 12.32(a). That state prosecution has been on hold since the filing of federal charges.

[3] The Government simultaneously indicted the two adults allegedly involved in the crime for first-degree murder under 18 U.S.C. § 1111. The adult defendants pleaded guilty to aiding and abetting first-degree murder and were each sentenced to thirty-five years' imprisonment under 18 U.S.C. § 1111. Pet. App. 13a n.6. The court was permitted to sentence below the statutory minimum in Section 1111(b) because the Government filed substantial assistance motions under 18 U.S.C. § 3553(e). Pet. App. 13a n.6.

adjudication of the transfer motion, placed him in solitary confinement for nine months. ROA 27. During his confinement, petitioner spent "a great deal of time reading books, both in English and Spanish, as he want[ed] to spend the long hours of idle time constructively." *Id.* 169. Indeed, the Government noted that petitioner had "taken it upon himself to try and reform himself while in jail, which many petulant young juveniles will refuse to do." *Id.* 16.

Petitioner opposed the transfer. He pointed out that the first-degree murder statute contained only two punishments, "death or life without parole," and that the "statute allows for no lesser punishment." ROA 193.[4] But in *Roper v. Simmons*, 543 U.S. 551, 568 (2005), the Court had held that the death penalty could not constitutionally be applied to juvenile offenders. And in *Miller v. Alabama*, 567 U.S. 460, 465 (2012), this Court had held that sentences of mandatory life imprisonment without the possibility of parole violate the Eighth Amendment as applied to juvenile offenders. Citing *Roper* and *Miller*, petitioner argued that due process prohibited the court from granting the Government's motion to

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[4] Section 1111(b) authorizes punishment for first-degree murder only by "death or by imprisonment for life." 18 U.S.C. § 1111(b). Because Congress has "abolished the use of parole in the federal system for all offenses," a life sentence for a federal crime imposed after the abolition of parole in 1984 is, by definition, a sentence of life without parole. U.S. Sentencing Commission, Life Sentences in the Federal System 20 n.1 (2015).

transfer him for prosecution under 18 U.S.C. § 1111 for first-degree murder. ROA 194.

At the hearing on its motion to transfer, the Government conceded that it had "no doubt" that "the sentencing structure and the sentencing scheme" of the first-degree murder statute "is unconstitutional" as applied to a juvenile offender. ROA 20. But it nonetheless argued that transfer was permissible because the court, after conviction, could "fashion[] a sentence that is constitutional," even though "[t]he only statutorily authorized sentence" for first-degree murder was unavailable, *id.* 21-22. The district judge asked the Government whether providing such a sentencing structure was "my job; or is that Congress' job?" *Id.* 22. The Government acknowledged that it would be Congress's job to "ultimately determine what the appropriate sentencing range" for juvenile offenders convicted of first-degree murder would be. *Id.* But it suggested that until Congress enacted a constitutionally valid sentence, it was "the Court's job at this point" to "fashion a sentence which is appropriate." *Id.*

In response, petitioner's counsel explained that "[t]he sentence itself is not the issue. It's the statute and what it means for the process, and that's our problem." ROA 33. He emphasized that statutory provisions laying out punishments are designed "to give us notice about what we are subject to." *Id.* 31. He pointed out that under the Government's proposal, "I'm left here having to advise my client that the law is not the law, that the Court may have some other procedure that I don't know that may apply or may not apply whose guidelines may or may not be applicable," and that this uncertainty "affects

every decision and every counsel and every communication I have with my client." *Id.* Given this uncertainty, he was "unable to help [petitioner] make a decision about whether" to waive transfer or whether to "negotiate with the Government on—for a different charge." *Id.* 32.

Nonetheless, the district court upheld petitioner's transfer. It issued two opinions explaining its decision. Pet. App. 7a, 14a. Both times, it rejected petitioner's due process arguments.[5]

In the first order, the district court rejected petitioner's notice argument, treating petitioner's challenge as involving only the question of ultimate sentence. Pet. App. 23a. The court floated the prospect that at sentencing it could "fashion a sentence of imprisonment" that would be "similar to a sentence for second degree murder," *id.* 27a—that is, a sentence that would not involve either capital punishment or mandatory life imprisonment without the possibility of parole.

The district court issued a second decision on the transfer (after some proceedings not relevant here) that sought to address "certain new decisions handed down within the past year" by other courts. Pet. App. 8a. In particular, the district court recognized that the Fourth Circuit had affirmed a judgment denying a juvenile transfer and dismissing an indictment under a murder-in-aid-of-racketeering statute that

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[5] The court found that the transfer met the six statutory factors set out in 18 U.S.C. § 5032, Pet. App. 23a, a conclusion petitioner did not challenge on appeal to the Fifth Circuit and does not challenge here.

authorized sentences only of death or life imprisonment. *Id.* (citing *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016)).

But the district court rejected the Fourth Circuit's approach. Instead, it proposed to rewrite Section 1111 with respect to "the charge of murder in the first degree under § 1111(b) for juvenile offenders," Pet. App. 10a. It illustrated its proposal by providing a redlined version of the section:

> Whoever is guilty of murder in the first degree ~~shall be punished by death or by imprisonment for life; Whoever is guilty of murder in the second degree,~~ shall be imprisoned for any term of years or for life.

Id. 10a-11a (strikeout in original).

It then added that petitioner's claim was "simply not ripe for decision," because "[i]n this case, like most prosecutions, the ending cannot be known at the beginning." Pet. App. 12a. The judge conjectured that petitioner might ultimately escape an unconstitutional sentence. For example, he might be acquitted altogether, found guilty of some lesser offense for which a constitutionally permissible punishment was authorized, or cooperate with the Government, in which case he might "receive the benefit of a motion by the Government under 18 U.S.C. § 3553(e) authorizing the Court to impose a sentence below the statutory minimum for first degree murder." Pet. App. 12a-13a.

3. *The Fifth Circuit*. Petitioner immediately appealed the transfer order to the Fifth Circuit.[6] He renewed his argument that prosecuting him for first-degree murder would violate the due process clause, Def. C.A. Br. 2. Petitioner emphasized that a core requirement of due process is that a criminal statute provide clear notice of the severity of the potential penalty a defendant faces. *Id.* 17 (citing *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015); *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). And he explained the "practical problems" counsel confront in advising their clients throughout a prosecution if they cannot intelligently predict the possible sentences their clients face. *Id.* 17 n.3. This due process defect could not be cured by federal courts "manufactur[ing] a constitutionally acceptable penalty." *Id.* 10.

Petitioner pointed the court of appeals to the Fourth Circuit's decision in *Under Seal*, which had held that a court cannot authorize a transfer under 18 U.S.C. § 5032 if the only statutorily authorized sentences for the crime charged are unconstitutional as applied to juvenile offenders. Def. C.A. Br. 8-9. Petitioner also pointed to this Court's decision in

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[6] There is consensus among the federal courts of appeals that a juvenile offender can immediately appeal a transfer order under 28 U.S.C. § 1291 and the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See United States v. J.J.K.*, 76 F.3d 870, 871 (7th Cir. 1996) (citing cases); U.S. Dep't of Justice, U.S. Attorney's Manual: Criminal Resource Manual § 139, https://www.justice.gov/usam/criminal-resource-manual-139-review-district-courts-determination.

United States v. Evans, 333 U.S. 483, 495 (1948), which had upheld dismissal of an indictment when the statute failed to "fix [a] penalty" to the crime. Def. C.A. Br. 13. As applied to juvenile offenders, he argued that Section 1111(b) suffers the same infirmity: It fails to provide a penalty that can be applied to his conduct given his status as a juvenile at the time of the crime. Def. C.A. Br. 13.

The Fifth Circuit recognized that the Government had "conceded" that applying the "statutorily prescribed penalty for first-degree murder" to petitioner would be unconstitutional. Pet. App. 2a. Nevertheless, it affirmed the transfer order. *Id.* 6a. Although the court noted in passing that petitioner was arguing that the Due Process Clause prohibited his transfer, the court proceeded to frame petitioner's constitutional challenge primarily as if it were an Eighth Amendment claim—that is, as if it only "pertain[ed] to the sentencing phase of a case that has yet to go to trial." *Id.* 4a. The court viewed petitioner's challenge to his prosecution as unripe. *Id.*

The Fifth Circuit acknowledged that the Fourth Circuit in a "parallel challenge" had forbidden the Government from proceeding against the defendant as an adult when the only authorized punishment was mandatory life without parole. Pet. App. 6a. But the Fifth Circuit declared that the Fourth Circuit's decision was "not binding on our court." *Id.*

As for this Court's decision in *Evans*, which of course was binding, the Fifth Circuit recognized that the Court had precluded the Government from proceeding with a prosecution under a statute that did not specify a punishment. *Id.* 6a n.3. But the Fifth Circuit insisted that "*Evans* does not conflict

with our decision to wait," stating without further elaboration that the "wording" of the penalty provision in *Evans* was less amenable to "'judicial interpretation'" than the statute at issue here. *Id.* (quoting *Evans*, 333 U.S. at 495).

The Fifth Circuit denied petitioner's request for rehearing en banc. Pet. App. 28a.

Following that denial, petitioner's case returned to the district court, where the Government indicted petitioner for first-degree murder.

REASONS FOR GRANTING THE WRIT

Lower federal courts disagree over how to handle prosecutions in which the Government seeks to proceed under a statute whose only authorized penalties are unconstitutional as applied to juvenile offenders. The Fifth Circuit's decision here exacerbates this problem. Its holding invites the Government to prosecute juvenile offenders for crimes for which there is no punishment that is both statutorily authorized and constitutionally permissible. In doing so, it casts aside this Court's holding in *United States v. Evans*, 333 U.S. 483 (1948), that the Government cannot prosecute an individual under a statute that contains no punishment. It also squarely conflicts with the Fourth Circuit's decision regarding a "parallel challenge." Pet. App. 6a.

This Court should hold that Due Process Clause prohibits the Government from prosecuting people for juvenile offenses under federal criminal statutes that provide punishments of only death or life imprisonment. Defendants in this situation are deprived of the constitutionally required notice of the

sentencing range they will face if convicted, information that is essential to making important decisions before and during trial. This due process violation is separate from any Eighth Amendment claim they might have if an unconstitutional sentence is imposed after conviction. And this due process defect cannot be cured by allowing courts somewhere down the line to craft constitutionally acceptable punishments when Congress has failed to provide them; separation of powers principles forbid this jury-rigged approach. Indeed, the overreaching nature of such prosecutions makes this Court's intervention especially warranted given the nearly four dozen federal statutes that provide no constitutionally permissible punishment for juveniles.

I. The Fifth Circuit's decision conflicts with decisions of this Court and lower federal courts.

In this case, the Fifth Circuit held that an individual's due process challenge to a prosecution under a statute that authorizes no permissible punishment is not ripe unless and until he is convicted and sentenced. That decision conflicts with this Court's due process holding in *United States v. Evans*, 333 U.S. 483 (1948). And there is disarray in the lower federal courts over whether, after this Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Miller v. Alabama*, 567 U.S. 460 (2012), the Due Process Clause forbids prosecuting an individual as an adult for a crime that occurred before he turned eighteen when the only authorized punishments for that crime are death and life

imprisonment without parole. This case presents an ideal vehicle for the Court to resolve this issue.

1. In *Evans*, this Court held that the Due Process Clause prevents the Government from prosecuting under a statute that fails to "specify the range of available sentences with 'sufficient clarity.'" *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979) and citing *Evans*, 333 U.S. at 483). It therefore affirmed the dismissal of an indictment brought under a statute that suffered from that defect.

The defendant in *Evans* was charged under a provision of federal immigration law that proscribed two separate acts: (1) "bring[ing] into or land[ing]" unauthorized aliens in the United States, and (2) "conceal[ing] or harbor[ing]" such aliens. *Evans*, 333 U.S. at 483-84 (quoting Section 8 of the Immigration Act of 1917). The defendant was charged with only the latter act. *Id.* at 484. Congress, however, had specified a penalty only with respect to the former; it had not specified a penalty for concealing or harboring aliens. *Id.* The district court dismissed the indictment "on the grounds that the statute does not provide a penalty for harboring and concealing, which is the only thing charged in the indictment." Brief for the Appellee at 3, *United States v. Evans*, 333 U.S. 483 (1948) (quoting the record).

This Court affirmed. It recognized that Congress clearly intended to make "concealing or harboring" a criminal act. *Evans*, 333 U.S. at 485. It nonetheless held that it would be unconstitutional for a court to fashion a penalty when Congress had failed to provide one: "fixing penalties" is a "legislative, not judicial, function[]." *Id.* at 486. When Congress has

failed to legislate a punishment, courts should not "plug the hole in the statute." *Id.* at 487, 495. Given the range of "tentative possibilities" the Government had offered for plugging that hole, *Evans*, 333 U.S. at 487, the Court emphasized that it was "better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law." *Id.* at 495.

In this case, the Fifth Circuit approved what this Court condemned in *Evans*: prosecution under a statute that does not specify the penalty the defendant faces if he is convicted. The Fifth Circuit tried to bury *Evans* in a footnote and to distinguish it. But neither of the grounds it offered for doing so withstands inspection.

First, the Fifth Circuit noted that *Evans* never discussed "the ripeness of the dispute," Pet. App. 6a n.3—as if all nine Justices there somehow failed to notice that the case involved a challenge to an indictment, rather than to the ultimate punishment. But it is the Fifth Circuit that was mistaken, not the *Evans* Court. Evans' challenge was that the Government could not *prosecute* him for a crime for which he could not be punished—not that he had a right merely not to have a court impose an unauthorized sentence. Evans's claim, by definition, was ripe at the outset of the prosecution. In fact, that is the *only* time such a claim can be meaningfully addressed. There is no way to later remedy a violation of the right not to be prosecuted if the prosecution is allowed to continue, particularly if that lack of notice impels the defendant to make strategic

choices that foreclose appellate review. *Cf. Abney v. United States*, 431 U.S. 651, 662 (1977) (holding that the Double Jeopardy Clause's "protections would be lost" if a defendant were forced to go to trial "before an appeal could be taken").

Second, the Fifth Circuit erred in justifying its decision by suggesting that the federal criminal statute in *Evans* was materially more "ambiguous" with respect to a potential penalty than Section 1111(b). Pet. App. 6a n.3. That supposition of course has nothing to do with ripeness. In any event, neither the statute in *Evans* nor the statute here is at all ambiguous with respect to Congress's intention to proscribe the specified conduct. Rather, the due process problem arises because both statutes are silent with respect to the legislatively authorized punishment for that conduct. The statute in *Evans* failed from the get-go to do so with respect to any defendant charged with concealing or harboring an unauthorized alien; after this Court's 2012 decision in *Miller*, Section 1111(b) fails to do so with respect to individuals charged with first-degree murders that occurred when they were juveniles.

In both *Evans* and this case, the Government has suggested various ways to fill the gap in the statute. But courts cannot choose any of these options because of what this Court has termed a problem "of multiple choice," *Evans*, 333 U.S. at 484. In *Evans*, the Court pointed to "at least three, and perhaps four, possible yet inconsistent answers" on what penalty should be available. *Id.* at 484-85. The same is true here. *See* Pet. App. 5a, 9a-11a. This uncertainty simply underscores the due process problem. *See infra* Part II.B.

2. The Fifth Circuit's decision here also squarely conflicts with the decision of the Fourth Circuit in *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016).

Under Seal involved the Government's attempt to prosecute a juvenile offender as an adult under a federal statute that prohibits murder in aid of racketeering. 18 U.S.C. § 1959(a)(1). That statute, like the one at issue here, provides for only two punishments: "death or life imprisonment." *Under Seal*, 819 F.3d at 720. The Fourth Circuit held that *Evans* required denial of the transfer because "[a]rticulating a crime and providing a penalty for its commission are indelibly linked," *id.* at 722.

As it did here, the Government conceded in *Under Seal* that it could not seek the penalties expressly provided in section 1959(a)(1) for murder in aid of racketeering. But it "contend[ed] that the impermissible punishments can be excised from § 1959(a)(1), leaving intact language contained later in that subsection for the separate criminal act of kidnapping in aid of racketeering, which authorizes a term of years up to a discretionary maximum sentence of life." *Under Seal*, 819 F.3d at 721.

The Fourth Circuit rejected that gambit. Reconfiguring the statute in that way, it recognized, would lead to an impermissibly "unforeseeable and retroactive" penalty provision. *Under Seal*, 819 F.3d at 727. Indeed, doing so would run contrary to the "Constitution's guarantee of due process" that persons be aware of "the severity of the penalty the state may impose." *Id.* at 726 (internal quotation marks omitted).

The Fifth Circuit recognized that *Under Seal* resolved in the putative defendant's favor a "parallel challenge to a motion to transfer at a similar procedural juncture." Pet. App. 6a. But it "decline[d]" to use the Fourth Circuit's decision "as guidance" because it claimed the Fourth Circuit had "never considered" the "issue of ripeness." *Id.*

As with its effort to distinguish *Evans*, that attempted side-step is unpersuasive. The Fourth Circuit emphasized that there was "only" one issue present in *Under Seal*: "whether *initiating prosecution* of a juvenile for murder in aid of racketeering alleged to have occurred after *Miller* would be unconstitutional." *Under Seal*, 819 F.3d at 728 (emphasis added). In recognizing that due process was denied upon initiation of a prosecution, the Fourth Circuit held that "such a prosecution cannot constitutionally proceed." *Id.* This outcome by definition conflicts with the Fifth Circuit's "decision to wait." Pet. App. 6a n.3.

In short, the outcomes of petitioner's case and *Under Seal* cannot be reconciled. Had the juvenile in *Under Seal* been charged within the Fifth Circuit, the Fifth Circuit's decision here would have required the district court to allow his transfer and prosecution as an adult on the grounds that, unless and until he were convicted of murder in aid of racketeering, his challenge to the sentencing scheme would not be ripe. Conversely, had petitioner been charged within the Fourth Circuit, he would have prevailed on his opposition to transfer.

3. Although there is disarray among federal courts with respect to the question presented, the issue is unlikely to often reach the courts of appeals.

A recent case within the Second Circuit shows why. In *United States v. Conyers*, 227 F. Supp. 3d 280 (S.D.N.Y. 2016), the Government sought to prosecute a juvenile offender under the same murder in aid of racketeering statute at issue in *Under Seal*. *Id.* at 283. The defendant sought to dismiss the indictment, raising the same constitutional objections made by petitioner in this case and the defendant in *Under Seal*. *See id.*

Unlike the Fifth Circuit, the district court in *Conyers* squarely reached and decided the merits of the juvenile offender's due process claim. *Conyers*, 227 F. Supp. 3d at 288-91. However, unlike the Fourth Circuit, the district court rejected the due process claim and allowed the Government to proceed with prosecuting the defendant as an adult. *Id.* at 291. The court reasoned that, even after *Miller*, *some* juveniles could receive sentences of life imprisonment without parole—namely, those who are sufficiently "irredeemable." *Id.* As for other juveniles, the court hypothesized that "[t]radition and historical practice" would support filling the "statutory 'gap'" with a sentence of "any term of years," *id.* at 289.

Within the week, the defendant pleaded guilty to a lesser offense, and waived his right to appeal the district court's rejection of his due process argument. *See* Transcript of Plea at 18, *United States v. Bracey*, No. 1:15-cr-00537, 2016 BL 434811 (Mar. 8, 2017, S.D.N.Y.).[7] The court subsequently sentenced him to 396 months' imprisonment. *See* Judgment at 2,

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[7] *Conyers* was a multi-defendant prosecution. The party raising the issue relevant here was William Bracey.

United States v. Bracey, No. 1:15-cr-00537, 2016 BL 434811 (S.D.N.Y., July 20, 2017). That sentence, which will result in the defendant being released in his 50s, was of course far lower than the life sentence he risked by turning down the plea.

Faced with the risk of a judge who may end up adopting any one of a variety of ways to "plug the hole" in a federal statute mandating a life sentence, *Evans*, 333 U.S. at 487, a juvenile offender faces a powerful incentive to abandon his *Evans*-based due process claim and plead guilty to a more determinate, lower term of years sentence. But if he does so, he will almost surely end up waiving his right to appeal, and the question presented will rarely reach the courts of appeals.[8]

4. This case presents an ideal vehicle for the Court to resolve this constitutional issue before the disarray among the lower federal courts spreads further. At every stage of the proceedings, petitioner preserved the question presented, which is of great importance both for defendants charged with offenses committed when they were juveniles and for the

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[8] The only way federal law affirmatively provides for a court to sentence a defendant to less than a statutory mandatory minimum is for the Government to file a motion under 18 U.S.C. § 3553(e) after the defendant provides "substantial assistance." But the U.S. Attorney's Manual recommends that the Government require a defendant to waive his right to appeal on the basis of his sentence before filing a substantial assistance motion. U.S. Dep't of Justice, U.S. Attorney's Manual: Criminal Resource Manual § 626, https://www.justice.gov/usam/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law.

administration of justice. Moreover, because petitioner challenges the transfer only on constitutional grounds, the issue is dispositive of whether the Government can proceed with prosecuting him for first-degree murder.

II. The Fifth Circuit's decision is erroneous.

The Fifth Circuit refused to address petitioner's due process claim on the theory that his challenge is unripe because the "ending" of a prosecution—that is, the sentence that will actually be imposed on petitioner if he is convicted—"cannot be known at the beginning." Pet. App. 2a; 12a. But the Fifth Circuit mischaracterized petitioner's claim. This case is not about the "sentencing phase," *Id.* 4a. Rather, this case is about what the Due Process Clause requires at the *beginning* of a criminal prosecution: the defendant must be charged under a provision that includes a valid legal penalty of which he has notice. Petitioner's due process claim is ripe now. Nor can the initial due process defect be cured through judicial creativity somewhere down the line. Any attempt to do so would both violate separation of powers and flout this Court's severability doctrine.

A. Petitioner's meritorious due process claim is ripe now.

1. The Fifth Circuit's ripeness holding is indefensible. Ripeness doctrine is designed to prevent courts from "entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). The Fifth Circuit might be right that any challenge to a particular sentence is "too remote and contingent upon too many factors" to justify the

court's consideration at this stage. Pet. App. 4a. But petitioner is not challenging his sentence. Instead, he argues that due process demands notice *now*—at the outset the prosecution against him—of what punishments can legally be imposed on him if he is convicted.

That claim is neither abstract nor contingent. Rather, petitioner faces concrete harms during the pendency of the prosecution that cannot be remedied later by judicial fixes, a favorable verdict, or anything else that might occur down the road. The only way to provide petitioner with due process is to give him notice from the outset of the prosecution of what punishments he potentially faces.

2. On the merits, there can be little doubt that the lack of notice as to the punishment petitioner faces if he were to be convicted of first-degree murder violates due process. It is "a fundamental tenet of due process" that no one be required "to speculate as to the meaning of penal statutes." *Batchelder*, 442 U.S. at 123 (citation omitted).

To that end, sentencing provisions are unconstitutional if they do not state with "sufficient clarity the consequences of violating a given criminal statute." *Batchelder*, 442 U.S. at 123. Because a "defendant's ability to predict with certainty the judgment from the face of the felony indictment flow[s] from the invariable linkage of punishment with crime," criminal statutes must grant people fair notice of not only what conduct is forbidden, but also what penalty attaches to that crime, *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (citing 4 William Blackstone, Commentaries *369-70).

If due process forbids the Government from prosecuting under a statute that provides only vague punishments, *Batchelder*, 442 U.S. at 123, even more so it must forbid the Government from prosecuting under a statute that provides only punishments this Court has already held violate the Eighth Amendment. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 567 U.S. 460 (2012). In fact, the Government has "conceded" throughout this case that applying "the statutorily prescribed penalty for first-degree murder" would be "unconstitutional" because petitioner was a juvenile at the time of the relevant events. Pet. App. 2a. As a result, allowing the Government to proceed on a first-degree murder charge deprives petitioner of any ability to predict his potential sentence from the face of the charging instrument.

3. Although all parties acknowledge that Section 1111(b) cannot be applied as written to petitioner—because Congress cannot require federal judges to impose a life sentence on all juvenile offenders convicted of first-degree murder—the due process problem cannot be cured by simply treating the life sentence as an option rather than a mandate. For one thing, this leaves totally unsettled what option *other* than life without parole the judge possesses.

Usually, a defendant will make many pre-trial decisions—such as whether to plead guilty, whether to cooperate with the Government, whether to waive any appeal, and so on—by consulting the sentence he faces if he goes to trial and is convicted on all charges. But such an analysis is impossible to make if it is unclear what the sentence can be for the charged offense.

With respect to what will happen if he is convicted of first-degree murder, the defendant in petitioner's situation cannot look to the statute for guidance because the statute provides none other than to say he must receive a life sentence regardless of his individual circumstances—an outcome squarely precluded by *Miller*. Nor can he look to the federal Sentencing Guidelines for insight into what sentence the court might impose. The Guidelines for first-degree murder will tell him "life imprisonment is the appropriate sentence if a sentence of death is not imposed" and a "downward departure would not be appropriate in such a case." U.S. Sentencing Guidelines Manual § 2A1.1 cmt. 2(A) (U.S. Sentencing Comm'n 2010). Indeed, the Guidelines tell him that a downward departure is permissible "only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e)." *Id.* § 2A1.1 cmt. 2.

What is worse, in order to get a substantial assistance motion from the Government, an individual must not only cooperate with the Government but generally must also waive any right to appeal his conviction. This, of course, precludes him from later challenging the indictment or information on which he was convicted. So the Fifth Circuit's decision offers juvenile offenders only a Hobson's choice.

Given that neither the statute nor the Guidelines for the charged offense provide any help in assessing a juvenile offender's possible sentence for first-degree murder, such defendants are left with the question where else a court might look in deciding the

appropriate sentence. The Fifth Circuit's holding on ripeness means that a district court is free to tell the defendant—as the court did here—that it will decide that question only after the defendant chooses to go to trial and is convicted, when it will "fashion[]" some solution, Pet. App. 13a. This makes it impossible for the defendant who is offered a plea deal by the Government to intelligently compare his alternatives. The ripeness holding actually exacerbates the due process notice problem.

Moreover, striking out a chunk from the middle of Section 1111(b) as the district court's amended transfer order pitched is nowhere near as seamless a solution as it might first appear. For one thing, it would be unclear whether this gambit not only borrows the statutory penalty for second-degree murder but also requires consideration of the federal Sentencing Guidelines for that crime. In contrast to first-degree murder, where the Guidelines propose a life sentence regardless of a defendant's criminal history, the Guidelines for second-degree murder provide for a sentence of as little as 235 months for a defendant who, like petitioner, has only one criminal history point.[9] On the other hand, if the Guidelines for second-degree murder do *not* apply, then there is

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[9] First-degree murder has a base offense level of 43 and the Guidelines do not permit downward departure, except when the Government files a § 3553(e) motion for "substantial assistance." U.S. Sentencing Guidelines Manual § 2A1.1. Second-degree murder has a base offense level of 38, and the Guidelines contemplate even lower sentences for defendants who substantially assist the Government or who accept responsibility by pleading guilty. *Id.* § 2A1.2.

literally nothing in the Sentencing Guidelines to help a defendant and his counsel assess the likely sentence range for first-degree murder.[10]

And under the current regime, this uncertainty potentially varies not only circuit by circuit, but judge by judge. The district court in *United States v. Under Seal*, 819 F.3d 715, 715 (4th Cir. 2016), rejected the transfer motion altogether. The district court in *United States v. Conyers*, 227 F. Supp. 3d 280, 291 (S.D.N.Y. 2016) decided that it could sentence the defendant for any term of years up to, and including, life, and then imposed a sentence for a lesser offense under which he would be released in his fifties. And here, the district court left open all conceivable sentencing options beyond mandatory life without parole. Pet. App. 11a.

The lack of notice creates immediate problems for defendants in part because of the uncertainty it introduces into a defendant's calculation about whether to accept a plea offer, a decision that replaces, rather than simply preceding, a trial. Modern criminal adjudication is "a system of pleas, not a system of trials," *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Around ninety-seven percent of federal convictions are the result of guilty pleas and defendants convicted at trial often "receive longer sentences than even Congress or the prosecutor

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[10] The guidelines range for second-degree murder committed by someone with one criminal history point is 235 to 293 months. U.S. Sentencing Guidelines Manual ch. 5, pt. A. Petitioner has only one criminal history point from his juvenile marijuana possession. Pet. App. 19a.

might think appropriate" because the Government assumes that defendants will plead guilty. *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (quoting Rachel Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006)).

Because this uncertainty will affect a defendant's decisions whether to accept a plea deal and whether to cooperate with the government as part of any plea arrangement, the consequences from the grant of a transfer motion involving a prosecution for first-degree murder start flowing immediately. The Fifth Circuit's decision that a defendant does not need to know the statutorily authorized sentences until the end of his case cannot be right.

B. Courts cannot cure the due process problem by fashioning their own penalty provision for juvenile offenders convicted of first-degree murder.

The court of appeals held that petitioner's due process challenge was unripe in part because there were a variety of circumstances under which he would not face an unconstitutional sentence. But to the extent that those circumstances rest on the Government's or the district court's suggestions that courts could cure the due process problem by adopting some alternative to the sentences prescribed by Section 1111(b), they merely exacerbate the constitutional problem.

1. The Constitution assigns Congress the responsibility for enacting legislation and rewriting statutes with constitutional infirmities. U.S. Const., art. I. Indeed, this Court has long recognized that "[i]t is the legislature, not the court, which is to

define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (recognizing no federal common law crimes). Thus, before the Government can prosecute an individual, Congress "must first make an act a crime" and then "affix a punishment to it," *Hudson*, 11 U.S. at 34. And this means that unless it is operating under explicit statutory exceptions, "a district court lacks authority to impose a sentence below [a statutory] minimum." *See United States v. Sealed Appellee*, 887 F.3d 707, 709 (5th Cir. 2018).

On these constitutional grounds, the Court in *United States v. Evans*, 333 U.S. 483 (1948), refused to write in a punishment where none was statutorily provided because "fixing penalties are legislative, not judicial, functions." *Id.* at 486. It reasoned that there are "limits beyond which [the Court] cannot go in finding what Congress has not put into so many words." *Id.* Where Congress failed to provide a sentencing scheme, the Court refused to make "a judicial determination of the scope and character of the penalty." *Id.* at 486, 490-91.

Because the Fifth Circuit erroneously thought that petitioner's due process claim was unripe, it refused to address the question whether petitioner currently has any notice of the punishment he will face if convicted of first-degree murder. *That* constitutional violation cannot be cured by telling petitioner at some later date what the potential penalty is. The Fifth Circuit did not deny the existence of a serious constitutional question as to what penalty petitioner faces. Its refusal to answer

that question even in the face of the Government's concession that the sentence provided by the statute "would be unconstitutional if applied to [petitioner,]" Pet. App. 5a n.1, put petitioner in an untenable position. He can get certainty about the penalty he faces only by taking a plea bargain that will require him to waive his constitutional claims.

The Government argued below that a court could simply swap in the sentence authorized for second-degree murder, Pet. App. 5a n.1, and sentence a juvenile offender convicted of first-degree murder to "anywhere between no penalty and the maximum penalty" for that separate crime, U.S. C.A. Br. 24. Not so. The Constitution makes clear that rewriting a statute is Congress's job.

This Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Miller v. Alabama*, 567 U.S. 460 (2012), put Congress on notice years ago that the available punishments for first-degree murder could not be applied to juvenile offenders. But Congress has failed to respond. It has left in place a sentencing regime that, as written, even the Government concedes cannot constitutionally be applied to individuals like petitioner. Pet. App. 2a. This Court's decision in *Evans* shows that courts cannot step in when Congress remains silent. They must instead deny the Government the ability to prosecute juvenile offenders as adults under the constitutionally flawed first-degree murder statute.

2. Nor can courts use severance to cure the constitutional problem with prosecuting juvenile offenders for first-degree murder. The statute at issue here is not amenable to the conventional practice of "sever[ing] its problematic portions while

leaving the remainder intact." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006). For example, in light of this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), barring capital punishment for individuals who are intellectually disabled, courts can still impose the remaining authorized sentence of life imprisonment on such individuals when they are convicted of first-degree murder.

But severance cannot save the first-degree murder statute as applied to *juvenile offenders*. Conventional severance would in effect delete the two punishments for first-degree murder expressly authorized in Section 1111(b). After *Roper* and *Miller*, severing the unconstitutional punishments from Section 1111(b) would leave the following in place for juveniles: "Whoever is guilty of murder in the first degree shall be punished ~~by death or by imprisonment for life.~~" That approach, standing alone, would fail to specify a punishment. So a court would then be required to insert, rather than sever, statutory provisions in order to provide one. Yet this Court has held that "[i]t is one thing to fill a minor gap in a statute," but "quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." *United States v. Jackson*, 390 U.S. 570, 580 (1968). Indeed, aggressively deploying severance "invites courts to rely on their own views about what the best statute would be." *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring).

In order to properly sever a statute, this Court requires that the retained portions of an unconstitutional statute remain (1) "constitutionally valid," (2) "capable of 'functioning independently,'" and (3) "consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 543 U.S. 220, 258-59 (2005) (citations omitted).

That will not work for juvenile offenders convicted of first-degree murder. Under the first step of the *Booker* test, the retained portion of the statute is not constitutionally valid because due process forbids a statute from instructing that an individual "be punished," without saying what the punishment is. Second, and for similar reasons, the severed first-degree murder statute with respect to juvenile offenders is incapable of functioning independently. And finally, it is impossible to say what sentencing regime for juveniles Congress would have intended post-*Miller*.

The sheer diversity of statutory fixes the states have adopted in response to *Miller* demonstrates as much. Hawaii, for example, eliminated life without parole for juveniles, leaving in place a penalty of life with the possibility of parole for first-degree murder. Haw. Rev. Stat. § 706-656. Florida, on the other hand, amended its capital murder statute so that the punishment for juveniles ranges from a minimum of forty years to a maximum of life without parole. Fla. Stat. Ann. § 775.082(1); *see also* Mich. Comp. Laws Ann. § 769.25 (similar Michigan statute setting a minimum penalty of twenty-five years and a maximum of life without parole). Absent any evidence, courts are in no position to divine whether Congress would choose the approach used in Hawaii,

the one used in Florida, or yet a different approach altogether. Anything a federal court were to do to Section 1111(b) under the banner of severance would "do no more than make speculation law." *Evans*, 333 U.S. at 495.

* * *

Lacking any constitutionally permissible, statutorily authorized penalties for juvenile offenders, the first-degree murder statute is inoperative as applied to this class of potential defendants until and unless *Congress* amends it. The Court should reject the Government's proposals to write in a new type of sentence or "sever the statute to impose the second-degree sentence even if the appellant were convicted of the first-degree crime." Pet. App. 3a; U.S. C.A. Br. 7. That's not severance; that's rewriting statutes from the bench in violation of separation of powers.

III. This Court's intervention is essential.

1. The Fifth Circuit's decision here calls for an exercise of this Court's supervisory power. The Fifth Circuit's cursory footnote addressing (and misconstruing) this Court's decision in *United States v. Evans*, 333 U.S. 483 (1948), fails to give any guidance to district courts as to how to handle prosecutions for first-degree murder involving juvenile offenders. The Fifth Circuit instead exacerbates due process problems by guaranteeing that an entire class of possible defendants will lack notice as to the potential punishments they may face. The Fifth Circuit invites every judge to become a law unto herself. In doing so, it threatens to waste

judicial resources in adjudicating avoidable collateral attacks.

First, leaving the scope of Section 1111(b) unsettled threatens this Court's "well-recognized interest in ensuring that federal courts interpret federal law in a uniform way." *Williams v. Taylor*, 529 U.S. 362, 389-90 (2000) (plurality opinion). The Fifth Circuit's ripeness decision has essentially directed district courts to take their best shot at figuring out the permissible sentence for a serious federal crime. The ad hoc sentencing regime this approach has already produced undermines the very premise of the federal law of criminal sentencing, which, since the dawn of the guidelines regime, has had a commitment to treating similarly situated defendants similarly. Judges may reach different sentences in individual cases, but they should not be applying different approaches in determining the appropriate sentencing range.

Consider what has happened so far to juvenile offenders prosecuted for mandatory-life-sentence offenses. A district judge in Virginia held that he lacked the power to permit prosecution as an adult to go forward, thereby foreclosing *any* term of adult imprisonment for first-degree murder. *Under Seal*, 819 F.3d at 717. A district judge in New York held that she had the power to sentence a juvenile offender convicted of a crime for which the mandatory minimum is a life sentence to "any term of years." *Conyers*, 277 F. Supp. 3d at 289. In doing so, the court noted that it was acting "[i]n the absence of specific guidance from Congress" and that "reasonable minds could differ as to what Congress would intend under the circumstances." *Id.* at 291.

The district court here pointed to cases in the wake of *Miller* where other courts had resentenced previously convicted defendants to a wide range of different sentences, leaving it anyone's guess what sentences the district judge in petitioner's case thinks are permissible. This disparity in outcomes threatens to undermine public confidence in the federal sentencing regime.

Second, the uncertainty prevents lawyers from providing their clients with effective assistance of counsel. As petitioner has already explained, the current situation leaves lawyers unable to predict the sentencing range that their clients face if convicted of first-degree murder. *See supra* Part II.A. And it is almost certain to spawn a series of collateral challenges. If petitioner is correct about the due process problem, then these claims will come from risk-averse defendants who pleaded guilty after their lawyers predicted that judges can and will impose life sentences for first-degree murder whenever they can. By contrast, if this Court were to hold that the Government can prosecute individuals like petitioner under statutes that provide for only capital punishment or life imprisonment without parole, these claims will come from defendants who turned down plea bargains in order to press their due process claim and then received harsh sentences at trial. *See Lafler v. Cooper*, 566 U.S. 156, 163 (2012).

By granting review now, this Court can conserve the judicial resources that will otherwise be wasted adjudicating these claims.

2. This Court's review is particularly warranted in light of the Fifth Circuit's implicit invitation to the Government to overcharge juvenile offenders using

the first-degree murder statute and analogous statutes.

This Court has not hesitated to grant review when federal prosecutors and lower courts adopt interpretations of statutes that permit prosecutorial overreach. *Bond v. United States*, 134 S. Ct. 2077 (2014), provides a particularly salient recent example. There, this Court granted review to curb a Government prosecution that sought to use the Chemical Weapons Convention Implementation Act to prosecute a "local assault." *Id.* at 2093. So too in *Yates v. United States*, 135 S. Ct. 1074 (2015), this Court rejected the Government's "unrestrained reading" of the Sarbanes-Oxley Act, holding that it could not prosecute the destruction of fish under provision directed at document shredding. *Id.* at 1081.

The overreaching in this case is, if anything, more troubling concerning than the overreaching in *Bond* or *Yates.* Permitting the Government to proceed here invites the Government to prosecute juvenile offenders under any one of the forty-five statutes for which life imprisonment is the mandatory minimum punishment. U.S. Sentencing Commission, Life Sentences in the Federal System 1 (2015).[11] This invitation is particularly problematic

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[11] For example, under the Chemical Weapons Convention Implementation Act at issue in *Bond*, a person who violates the Act and "by whose action the death of another person is the result" can be punished only by "death or imprisoned for life." 18 U.S.C. § 229A(a)(2). Similarly, other statutes providing for a mandatory minimum of life imprisonment include a second or subsequent conviction of using a firearm in furtherance of a

now that the Department of Justice requires federal prosecutors to "charge and pursue the most serious, readily provable offense." U.S. Dep't of Justice, Office of the Attorney General, Memorandum for All Federal Prosecutors, Department Charging and Sentencing Policy at 1 (May 10, 2017), https://tinyurl.com/JBR1x. The Department defines the most serious offenses as "those that carry the most substantial guidelines sentence, including mandatory minimum sentences." *Id.*

What is more, permitting the Government to bring these constitutionally problematic prosecutions serves no purpose. In every conceivable case involving a crime for which death or life imprisonment is the mandatory punishment, there are other provisions of federal and state law that satisfy due process and are "sufficient to prosecute," *see Bond*, 134 S. Ct. at 2092. In fact, petitioner's counsel acknowledged that he "wouldn't be here with this argument" had the Government charged petitioner with a crime for which Congress had provided a constitutionally permissible punishment. ROA 33. The Government could have transferred petitioner to federal court and charged him with second-degree murder without raising constitutional

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crime of violence or drug trafficking crime if the second crime involves the use of a "machinegun or a destructive device," 18 U.S.C. § 924(c)(1)(C); kidnapping that results in death, 18 U.S.C. § 1201(a); preventing the attendance of a person in an official proceeding (that results in death), 18 U.S.C. § 1512(a)(3)(A); and a second conviction for engaging in a sexual act by force with a child who is above the age of 12, but under the age of 16, 18 U.S.C. § 2241(c).

issues. And Texas law is sufficient to prosecute petitioner in state court; in fact, Texas initially charged petitioner, and its prosecution has been on hold for years because of this case.

The Government has never explained why it insisted on proceeding under a statute it admits has no constitutional penalty when it could have charged petitioner with other homicide offenses that pose no constitutional problem. That being so, this Court should hold that charging petitioner under the one potentially applicable statute that provides no constitutional punishment violates due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20262

United States Court of Appeals
Fifth Circuit
FILED
March 9, 2018
Lyle W. Cayce
Clerk

SEALED APPELLEE 1,

Plaintiff – Appellee

v.

SEALED JUVENILE 1,

Defendant – Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CR-245-3

Before STEWART, Chief Judge, JONES, and CLEMENT, Circuit Judges.[*]

The appellant and two other members of the MS-13 gang murdered a sixteen-year-old using a machete and baseball bat. The three had been ordered to kill the victim by higher-ranking members of the gang in El Salvador. The appellant was less than three months shy of 18 at the time of the killing.

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The appellant was arrested and charged with murder by the state of Texas in October 2013. In July 2014, the Government filed a Juvenile Information and Certification against the appellant, charging him with an act of juvenile delinquency under 18 U.S.C. § 5032. The U.S. Attorney also filed a certification to proceed in federal court. A few days later, the Government filed a Motion to Transfer Proceedings Against Juvenile to Adult Criminal Prosecution pursuant to 18 U.S.C. § 5032, seeking to have the appellant tried as an adult for first-degree murder under 18 U.S.C. § 1111. The Government also filed a memorandum in support of its motion, arguing in favor of transfer according to the six-factor test required by § 5032.

The appellant did not contest the Government's arguments on the statutory factors; instead, he argued that the transfer would subject him to an unconstitutional sentencing scheme under *Miller v. Alabama*, 567 U.S. 460 (2012). Specifically, he noted that the statutorily prescribed penalty for first-degree murder is either death or life imprisonment without parole. Accordingly, its application here violated his constitutional right not to receive a mandatory sentence of life without parole as a person under the age of 18. *See id.* at 465. The Government conceded that this application would be unconstitutional, but argued that the district court had discretion to modify the sentence the appellant ultimately received. Thus, there was no inherent constitutional problem in merely charging the appellant under the statute as an adult.

The district court agreed with the Government, granting its Motion to Transfer in April 2015. In a supplement to its order, the district court explained that it rejected the appellant's constitutional argument on two grounds. First, it noted that 18 U.S.C. § 1111 provides distinct sentences for both first-degree and second-degree murder, and the latter does not implicate constitutional concerns. *See* 18 U.S.C. § 1111(b) ("Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."). Accordingly, a sentencing judge could sever the statute to impose the second-degree sentence even if the appellant were convicted of the first-degree crime—thereby avoiding any constitutional violations.

Second, the district court concluded that the dispute was not yet ripe for review, since "like most prosecutions, the ending cannot be known at the beginning." It then detailed numerous possible outcomes of the appellant's case that would dispose of it without ever requiring the court to determine whether he should face a minimum sentence of mandatory life without parole. The district court concluded, "conjecture at this stage of the proceedings that the Court would one day impose an unconstitutional sentence if [appellant] is convicted is simply not ripe for decision."

The appellant appeals the transfer order, raising his constitutional challenge anew. Reviewing the district court's ripeness determination de novo, *Pearson v. Holder*, 624 F.3d 682, 683 (5th Cir. 2010), we agree that the controversy is not yet properly before the court.

Whether a claim is sufficiently ripe for review turns on the likelihood that these asserted harms will occur. Accordingly, "[r]ipeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). A claim is unripe if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). As such, "[f]or an issue to be ripe for adjudication, a[n aggrieved party] must show that he 'will sustain immediate injury' . . . ." *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994) (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978)).

Here, the appellant appeals both the potential imposition of a mandatory life sentence under 18 U.S.C. § 1111 and, alternatively, the potential application of the doctrine of severability to the statute to avoid that sentence. As to the former, he contends that this result would violate his Eighth Amendment and due process rights. As to the latter, he argues that the doctrine of severability is inapplicable and, further, that severing the statute would violate due process. His concerns, in other words, pertain to the sentencing phase of a case that has yet to go to trial. They are too remote and contingent upon too many factors to justify our immediate intervention.[1]

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[1] Indeed, the former concern appears unlikely to occur at all, as the Government has already conceded that such a sentence

The improbability and remoteness of an unconstitutional sentence is demonstrated by a brief, non-exhaustive list of other possible outcomes. If the case goes to trial, the appellant may be acquitted or convicted only of second-degree murder: for example, his counsel might prove that the appellant was coerced to participate.[2] *See* 18 U.S.C. § 1111(a). Moreover, the appellant may be able to avoid both a trial and the first-degree sentence by reaching a plea agreement with the Government for the lesser-included offense. Even if the appellant is tried and convicted of first-degree murder, he still may not receive the sentence. For example, if the appellant agrees to work with the Government to assist in other investigations or prosecutions, the Government might move for a sentence lower than the statutory minimum under 18 U.S.C. § 3553(e). Any of these outcomes would obviate many, if not most, of the appellant's concerns.

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would be unconstitutional if applied to the appellant. The Government's brief indicates that it supports severing the statute to impose the second-degree sentence.

[2] The appellant contends that we are not permitted to consider this possibility because "[w]hen deciding whether transfer is appropriate, a district court looks only to the offense charged." In support, he cites to a Second Circuit case, *United States v. Nelson*, 68 F.3d 583, 589 (2d Cir. 1995). But *Nelson* involved a straightforward application of the second statutory factor for a motion to transfer. *Id.* ("This statutory factor calls for findings regarding the nature of the offense alleged and not some other offense, whether it be a greater offense or even a lesser included one."); *see also United States v. Doe*, 871 F.2d 1248, 1250 n.1 (5th Cir. 1989) ("For purposes of a transfer hearing, the district court may assume the truth of the offense as alleged."). The question before us—the ripeness of the appellant's constitutional challenge to the transfer—is entirely distinct.

The appellant cites a recent Fourth Circuit case, in which that court entertained a parallel challenge to a motion to transfer at a similar procedural juncture. *See United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016). This case is, of course, not binding on our court. Moreover, the issue of ripeness was never considered. We thus decline to use it as guidance for our purposes.[3]

In light of the long line of intervening contingencies, we conclude that the appellant's alleged harm is too remote to justify our intervention now. We acknowledge that the appellant has raised an important constitutional question that may deserve a thorough review when the appropriate time comes. If we were to consider this question now, however, our answer would amount to an advisory opinion. We decline to do so.

The district court's grant of the Government's motion to transfer is AFFIRMED.

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[3] Notably, the Fourth Circuit's analysis of the defendant's claim relied on criminal case law in which the defendant *had already been convicted* and sentenced prior to the appeal. Only one case presented a different procedural posture: *United States v. Evans*, 333 U.S. 483 (1948). There, the Supreme Court—without considering the ripeness of the dispute—overturned an indictment charging violation of an immigration statute. The Court concluded the statute's wording was so ambiguous that any attempt to apply it to the defendant would take the Court "outside the bounds of judicial interpretation." *Id.* at 495. We do not face such dire straits. *Evans* does not conflict with our decision to wait.

APPENDIX B

IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	CR. NO. H-14-245-3
v.	§	
	§	**UNDER SEAL**
J.B.R., A Male Juvenile	§	

AMENDED SUPPLEMENT TO ORDER OF TRANSFER TO ADULT CRIMINAL PROCEEDINGS

This Amended Supplement amends and replaces the Supplement to Order of Transfer to Adult Criminal Proceedings signed and entered June 29, 2016. The basic facts alleging the grisly murder of Josael Guevara by three MS-13 gang members, Ricardo Leonel Campos Lara, Cristian Alexander Zamora, and J.B.R., are set forth in the Order of Transfer to Adult Criminal Proceedings signed and entered April 14, 2015. Two of the gang members, Lara and J.B.R., attained their 18th birthdays in 2013. Lara completed his 18th year 96 days before he participated in Guevara's murder on September 22, 2013, and J.B.R. completed his 18th year 69 days after his participation in the murder. For the reasons set forth in the Order of Transfer, the Court determined, pursuant to 18 U.S.C. § 5032, that the Government's Motion to Transfer

Proceedings Against Juvenile J.B.R. to Adult Criminal Proceedings should be granted.[1]

More than a year has passed since the Court issued its Order of Transfer. Because the Court has expressed its intent to reject the Plea Agreement submitted by the parties pursuant to Fed. R. Crim. P. 11(c)(1)(C), which will entitle Defendant J.B.R. to resume prosecution of his appeal from the Order of Transfer in the United States Court of Appeals for the Fifth Circuit, it seems appropriate to supplement the Order of Transfer to acknowledge certain new decisions handed down within the past year.[2]

In *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016), the Fourth Circuit affirmed a judgment denying a motion to transfer a juvenile for adult prosecution based on the premise that the charged murder in aid of racketeering under 18 U.S.C. § 1959(a)(1), authorized only two penalties for the offense, "death or life imprisonment," neither of which was constitutionally permitted for one who committed the crime before his eighteenth birthday. For the following reasons, this Court does not believe that *Under Seal* applies to the Order of Transfer in this case.

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[1] Order of Transfer (Document No. 108).

[2] In this interim, the Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), holding that its decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), announced a substantive rule of constitutional law prohibiting as unconstitutional the sentencing of juvenile offenders to mandatory life imprisonment without parole "for all but the rarest of juvenile offenders whose crimes reflect 'irreparable corruption.'" *Miller*, 132 S. Ct. at 2469.

Unlike the juvenile defendant in *Under Seal*, who was charged with murder in aid of racketeering, Defendant J.B.R. is charged under the murder statute, 18 U.S.C. § 1111, which provides a range of punishment from death or imprisonment for life, for murder in the first degree, to any term of years or for life for murder in the second degree. Section 1959(a)(1), the violation of which was charged in *Under Seal*, provides no alternative punishment for murder other than death or life imprisonment. The Government unsuccessfully argued to the Fourth Circuit that § 1959(a)(1)'s provision for imprisonment for any term of years or for life for kidnapping should apply, but the court held that the "penalty enacted for the kidnapping-based offense cannot simply be interchanged with and applied to the murder-based offense, as these are two wholly separate means of violating § 1959 with distinct elements." *Under Seal*, 819 F.3d at 724.

In contrast, the murder statute under which Defendant J.B.R. is charged does not proscribe "two separate criminal acts (murder and kidnapping)," *id.*, but only one: murder. Murder is defined in the statute as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a).[3] Thus, in light of

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[3] One may be convicted of murder in the first degree or second degree, the difference being only that murder in the second degree does not require proof of premeditation. *United States v. Harrelson*, 766 F.2d 186, 189 (5th Cir. 1985); *see also United States v. Chagra*, 638 F. Supp. 1389, 1398 (W.D. Tex. 1986), *aff'd,* 807 F.2d 398 (5th Cir. 1986) ("[F]irst and second degree murder are the same crime (intentional killing) committed by actors with such distinct states of mind that legislatures have

Miller, when a minor is transferred for trial as an adult on a charge of murder under § 1111, if convicted, at the punishment stage the principles of severability must be followed, which require courts to "retain those portions of the Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 125 S. Ct. 738, 764 (2005) (Breyer, J.) (internal citations omitted).[4] Applying these principles to the charge of murder in the first degree under § 1111(b) for juvenile offenders, the statute may be properly severed by excising punishment that has been held unconstitutional ("shall be punished by death or by imprisonment for life;") and reference to the lesser included offense ("Whoever is guilty of murder in the second degree,"), as follows:

> Whoever is guilty of murder in the first degree ~~shall be punished by death or by imprisonment for life; Whoever is guilty of murder in the~~

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created two categories of the same crime to compel judicial recognition of the two levels of culpability.").

[4] *Booker* explained that "[s]ometimes severability questions (questions as to how, or whether, Congress would intend a statute to apply) can arise when a legislatively unforeseen constitutional problem requires modification of a statutory provision as applied in a significant number of instances." *Id.* at 757. *Miller*'s holding regarding the unconstitutionality of mandatory life in prison for all juvenile offenders who are tried as adults, which assuredly would have been "a legislatively unforeseen constitutional problem" when Congress adopted the murder statute, presents a classic case for severability as regards its application to such juveniles.

~~second degree,~~ shall be imprisoned for any term of years or for life.[5]

In other words, because the enhanced penalty for those who commit premeditated murder as defined by § 1111(a) is unconstitutional as applied to juveniles tried as adults, the punishment for such juveniles is limited to what is authorized for "[a]ny other murder," *id.*, that is, imprisonment "for any term of years or for life." § 1111(b). This construction as applied to juvenile offenders is constitutionally valid, capable of functioning independently, and consistent with Congress's obvious objectives of punishing murderers. *See id.*; *United States v. Evans*, 68 S. Ct. 634, 636 (1948) ("For, where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether omitted provision for penalty, *every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose*.") (emphasis added). The impediment of "two separate criminal acts" found by the Fourth Circuit in *Under Seal* is therefore not present in the instant prosecution under Section 1111, the murder statute, which proscribes only murder.

Additionally, as suggested by the Order of Transfer, conjecture at this stage of the proceedings that the Court would one day impose an unconstitutional sentence if Defendant J.B.R. is convicted is simply not ripe for decision. *See United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003)

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[5] If a juvenile offender is convicted of murder in the second degree, of course, no consideration of severability is necessary.

("Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review. A claim is not ripe for review if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal citations and quotations omitted); *People In Interest of K.J.F.*, No. 2013-0024, 2013 WL 3377638, at *3 (V.I. July 5, 2013) (finding that the issue of whether the defendant may be subject to an unconstitutional sentence was not ripe and granting the motion to transfer to adult court).

In this case, like most prosecutions, the ending cannot be known at the beginning. If Defendant J.B.R. proceeds to trial, it is possible that a jury may find him not guilty, or guilty of the lesser included offense of murder in the second degree, which provides the full range of constitutional sentencing possibilities. It is possible that a plea agreement could result in Defendant entering a plea to the lesser included offense of murder in the second degree, which also would assure the same full range of constitutional sentencing possibilities. It is possible that Defendant J.B.R., if convicted of murder in the first degree, either by a jury verdict or plea of guilty, before he is sentenced might provide substantial assistance to the Government in the investigation or prosecution of others who have committed offenses, and receive the benefit of a motion by the Government under 18 U.S.C. § 3553(e) authorizing the Court to impose a sentence below the statutory minimum for first degree

murder.[6] It is possible, as first mentioned above in distinguishing *Under Seal*, that if Defendant is convicted of murder in the first degree, that at the punishment phase the Court will apply the established principles of severability, consider as stricken those punishments that have been held unconstitutional when applied to one who commits murder before his eighteenth birthday, and, after carefully considering all of the *Miller* factors, impose a constitutional sentence authorized under the murder statute for "any term of years or for life." 18 U.S.C. § 1111(b). In any event, the decision at this stage is whether it is in the interest of justice to try J.B.R. as an adult pursuant to 18 U.S.C. § 5032, not the fashioning of a constitutional sentence if he is convicted.

For the foregoing additional reasons, the Order of Transfer signed and entered April 14, 2015, is REAFFIRMED.

The Clerk will enter this Amended Supplement to Order of Transfer to Adult Criminal Proceedings, providing a correct copy to all parties of record.

SIGNED at Houston, Texas, on this **30th** day of June, 2016.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

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[6] Both of Defendant J.B.R.'s fellow gang members who acted with him in committing the murder provided such assistance to the Government, which in turn filed § 3553(e) motions, and both co-defendants received reduced sentences of terms of years instead of the otherwise mandatory minimum of life for adults.

APPENDIX C

IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	CR. NO. H-14-245-3
v.	§	
	§	**UNDER SEAL**
J.B.R., A Male Juvenile	§	

ORDER OF TRANSFER TO ADULT CRIMINAL PROCEEDINGS

The Government alleges that on September 22, 2013, Defendant J.B.R.—who at the time was 17 years, 9 months old—"willfully, deliberately, maliciously, and with premeditation and malice aforethought" killed Josael Guevara by striking him with a bat and a machete, while he was within the special maritime and territorial jurisdiction of the United States, an offense that would be a crime in violation of 18 U.S.C. § 1111 if Defendant had been an adult.[1] The Government moves to transfer the proceedings against Defendant to adult criminal prosecution pursuant to 18 U.S.C. § 5032.[2] After having considered the motion, Defendant's opposition and the response and reply thereto, the Court-ordered psychological evaluation conducted by Dr. Ramon Laval,[3] and the arguments and evidence presented at

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[1] Document No. 23 (Juvenile Information).

[2] Document No. 40.

[3] Dr. Laval, a licensed psychologist with extensive professional experience, who is bilingual in Spanish and English,

the transfer motion hearing on April 3, 2015, the Court finds for the following reasons that the motion should be granted.

Title 18 U.S.C. § 5031 defines a "juvenile" as "a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday," and defines "juvenile delinquency" as, *inter alia*, "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." 18 U.S.C. § 5031.

The Government filed a "Certification to Proceed under the Juvenile Justice and Delinquency Prevention Act, 18 U.S.C. § 5031 *et. seq.*," alleging that federal jurisdiction is proper on two separate bases: (1) that the crime is a felony crime of violence in which there is a substantial federal interest because of its serious nature and the fact that it took place within the territorial jurisdiction of the United States, and (2) that Texas does not have available programs and services adequate for the needs of Defendant because under Texas law he was an adult on the date of the murder and would be tried as an adult under Texas law.[4] The Government subsequently filed the instant

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was appointed by agreement of the parties. *See* Document No. 72-3 (Curriculum Vitae of Dr. Laval); Document No. 83 (Order for Psychological Examination).

[4] Document No. 24. *See* 18 U.S.C. § 5032 ("A juvenile alleged to have committed an act of juvenile delinquency . . . shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate

Motion to Transfer Proceedings Against Juvenile to Adult Criminal Prosecution.[5] The Government argues that all of the statutory factors in 18 U.S.C. § 5032 except for Defendant's one recorded prior delinquency strongly support transfer.[6] Defendant responds that the Court is "prohibited from transferring J.B.R.'s case because transfer would necessarily subject J.B.R. to unconstitutionally cruel and unusual punishment, a result that is not in the interest of justice."[7]

The decision whether to transfer a juvenile for adult prosecution pursuant to 18 U.S.C. § 5032 is committed to the sound discretion of the trial court, provided the court employs and makes findings as to the six criteria outlined in § 5032. *United States v. Three Male Juveniles*, 49 F.3d 1058, 1060 (5th Cir. 1995). Although all six of the statutory factors must be considered, the court "is certainly not required to weigh all statutory factors equally." *Id.* (quoting *U.S. v. Doe,* 871 F.2d 1248, 1254-55 (5th Cir. 1989)).

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district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony . . . and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.").

[5] Document No. 40.

[6] Document No. 97.

[7] Document No. 98 at 2.

I. Findings Regarding Statutory Factors

The Court makes the following findings only for purposes of ruling on the Government's transfer motion. The six § 5032 factors to be considered in determining whether transfer is in the interest of justice are: (1) the age and social background of the juvenile; (2) the nature of the alleged offense; (3) the extent and nature of the juvenile's prior delinquency record; (4) the juvenile's present intellectual development and psychological maturity; (5) the nature of past treatment efforts and the juvenile's response to such efforts; and (6) the availability of programs designed to treat the juvenile's behavioral problems. 18 U.S.C. § 5032.

A. Defendant's Age and Social Background

Defendant was shy of his eighteenth birthday by just three months when Guevara was murdered.

His social history related here is based on Dr. Laval's report, which he prepared after conducting an extensive three-hour interview with Defendant and reviewing Defendant's law enforcement interview video recordings, school records, and juvenile delinquency records, all of which were received in evidence at the hearing.

Defendant was born in El Salvador in 1995 and was reared on a farm by his maternal grandparents until he was almost 14. At the transfer hearing, Defendant's counsel described Defendant's young life in El Salvador as "idyllic." In 2009, Defendant came to Houston to live with his father and stepmother, and became involved in the MS-13 gang. When Defendant was about 16 years old, he left home and began

staying with friends, moving from house to house, and also began a relationship with a 21-year-old woman. After about six months away from his father's house, Defendant moved in with his paternal grandmother and went back to school. Defendant later moved to Louisiana to live with his biological mother.

Defendant advanced to the third grade in El Salvador, and learned to read and write in Spanish, in part through his grandfather's help. In the United States, Defendant enrolled in bilingual classes and progressed to but did not complete the ninth grade. Defendant learned to speak and read English on the streets and, to a large extent, during his current incarceration.

Defendant's social background is not outside the realm of the ordinary, and nothing about it suggests that Defendant, then just under 18 years old, lacked at least the maturity of a typical 18-year-old when Guevara was murdered. Accordingly, this factor weighs in favor of transfer.

B. Nature of the Alleged Offense

The murder alleged in this case was particularly brutal. The victim, Guevara, was chopped with a machete and beaten with a bat multiple times; his head was almost severed and his knees and ankles were cut almost through the joints. Defendant admitted that when he got into a truck with Guevara and two other MS-13 gang members, he knew that they were going to kill someone based on an order from MS-13 in El Salvador. Defendant further admitted that he learned on the way to the execution site that

the intended victim was Guevara. Defendant admitted hitting Guevara in the head with a bat.

This was not a crime of impulse attributable to Defendant's youth or any lack of maturity. Instead, Defendant acted to murder the victim, as ordered by gang leaders, and did so with brutal violence in a deliberate, calculated, and premeditated manner. Based on the charges and evidence thus far presented, all the accomplices in the murder appear to have wielded the bat or machete or both as they inflicted the fatal blows, cuts, and slashes on Guevara. The very serious nature of the alleged murder, which was planned and calculated, weighs heavily in favor of transfer. *See United States v. Nelson*, 68 F.3d 583, 590 (2d Cir. 1995) ("[W]hen a crime is particularly serious, the district court is justified in weighing this factor more heavily than the other statutory factors. The heinous nature of the crime of intentional murder certainly may be a factor entitled to special weight.") (citing *United States v. A.R.*, 38 F.3d 699, 705 (3d Cir. 1994); *United States v. Hemmer*, 729 F.2d 10, 17-18 (1st Cir. 1984); *United States v. A.W.J.*, 804 F.2d 492, 493 (8th Cir. 1986)) (internal citation omitted).

C. Extent and Nature of Defendant's Prior Delinquency Record

Before Guevara's murder, Defendant had one recorded delinquency in 2012, when he was found in possession of marijuana on school property and was placed on six months of court-supervised probation. He successfully completed his probation four months before the murder. This prior delinquency record does not weigh in favor of transfer.

D. Defendant's Present Intellectual Development and Psychological Maturity

Dr. Laval examined Defendant on January 16, 2015 and noted, among other things, that: Defendant's "mood was neutral, stable, and jovial, and his affect was appropriate in range and congruent with his mood";[8] "his thought processes were logical, organized, and goal-directed";[9] "his manner of communication reflected use and command of [Spanish] suggesting that, at the very least, he has abilities within the average range of intellectual functioning";[10] Defendant obtained a score of 104 on the Test of Nonverbal Intelligence, which is "consistent with intellectual functioning within the average range";[11] "there is no evidence that J.B.R. suffers from a severe or diagnosable mental illness (other than as it relates to a history of polysubstance abuse) that would significantly interfere with the development of optimal levels of psychological maturity," despite the disruptions to his childhood;[12] Defendant exhibited poor judgment demonstrating psychological immaturity by experimenting with marijuana and alcohol in El Salvador at a young age, which evolved into more destructive patterns when he joined MS-13 in the United States;[13] and after being caught with marijuana, Defendant "then demonstrated an

[8] Document No. 94 at 6.

[9] *Id.* at 7.

[10] *Id.* at 9.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 10.

appropriate measure of judgment and psychological insight when he considered that his social network and his substance abuse had become too problematic," at which time, "displaying an increased level of psychological maturity, he had the foresight and sense of prudence to decide to leave Houston, stay away from his old friends, and move to Louisiana to reside with his mother," after which he successfully completed probation.[14]

Dr. Laval identified these factors as "signs of an appropriate level of psychological maturity," and concluded:

> [I]t is my opinion that J.B.R. possesses a level of intellectual development and psychological maturity which allows him, among other things: to have a clear and reasonable understanding of the charges against him and of the possible consequences of conviction; to disclose to his attorney pertinent facts, events and states of mind regarding his personal history, and his current legal circumstances in a relevant and goal-directed manner; to think rationally and coherently and to confer with his lawyer and engage in reasoned choices of legal strategies and options; to understand the criminal justice system and the adversarial nature of prosecution; to display appropriate behavior and demeanor in Court; and to

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[14] *Id.*

> participate meaningfully as he faces the charges leveled against him in Court.[15]

The evidence supports a finding that Defendant is a person of at least average intellectual development and psychological maturity, amply adequate to render him amenable to trial as an adult. This factor weighs in favor of transfer.

E. Nature of Past Treatment Efforts and Defendant's Response to Such Efforts

The only evidence of record related to past treatment efforts and Defendant's response thereto is that Defendant successfully completed six months of probation for his marijuana possession offense, but that approximately four months later, he had used marijuana on the day of his arrest for murder.[16] This factor adds no material weight in favor of transfer.

F. Availability of Programs Designed to Treat Defendant's Behavioral Problems

Defendant was an adult under Texas law when Guevara's murder was committed, and Defendant is therefore ineligible to participate in Texas's juvenile programs and services.[17] Defendant presents no

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[15] *Id.* at 10-11.

[16] *See id.* at 5.

[17] The Texas Juvenile Justice Code "covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct," TEX. FAM. CODE § 51.04, and defines "child" as "a person who is: (A) ten years of age or older and under 17 years of age; or (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct

evidence of available federal programs designed to treat his behavioral problems. The Government represents that if Defendant were convicted and sentenced to incarceration as a juvenile, the juvenile facilities would "have the same programs that are available in an adult facility; however they are geared toward juveniles."[18] Because Defendant is now 19 years old, with an intellectual and psychological profile consistent with his present age, programs in an adult facility presumably would be more appropriate for his treatment than programs "geared toward juveniles." Accordingly, this factor weighs for transfer.

G. Conclusion

After considering the totality of the statutory factors pertaining to this Defendant and the horrific and premeditated nature of the crime alleged, the Court finds that it is in the interest of justice to transfer the proceedings against Defendant to criminal prosecution as an adult.

II. Defendant's Eighth Amendment Challenge

The Juvenile Information against Defendant alleges that Defendant killed Guevara "willfully, deliberately, maliciously, and with premeditation and malice aforethought," allegations of first degree murder if charged in an adult prosecution.[19] *See* 18 U.S.C. § 1111(a) ("Every murder perpetrated by . . . any other kind of willful, deliberate, malicious, and

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or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age." *Id.* § 51.02.

[18] Document No. 97 at 9.

[19] Document No. 23 at 1.

premeditated killing . . . is murder in the first degree."). Section 1111 provides that "[w]ithin the special maritime and territorial jurisdiction of the United States, [w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life."[20] *Id.* § 1111(b).

Defendant argues that transfer to adult prosecution should be denied because the mandated statutory sentences for first degree murder have been held to violate the Eighth Amendment if applied to defendants who were younger than eighteen when they committed murder.[21] *See Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"). The Court in *Miller*, however, declined to hold that a sentence of life imprisonment without parole was always unconstitutional when applied to juvenile offenders. 132 S. Ct. at 2469 ("Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how

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[20] The Government acknowledged on the record that it could not pursue the death penalty against Defendant and, as well, has filed a Notice of Intent Not to Seek Death Penalty for the other two defendants in this case. Document No. 60.

[21] Document No. 98.

those differences counsel against irrevocably sentencing them to a lifetime in prison.").

Since *Miller*, multiple federal courts have resentenced defendants convicted of murder committed by them before the age of 18 who were sentenced to mandatory life terms without parole. These courts routinely consider what have become known as the "*Miller* factors" associated with youth[22] and have imposed sentences for various terms of years. *See United States v. Pete*, No. 03-cv-355-SMM, Document No. 384 (D. Ariz. July 25, 2014) (resentencing to 59 years for crimes including felony murder in the course of aggravated sexual abuse committed when defendant was 16); *United States v. Stone*, No. 05-CR-401-ILG, Document No. 536 (E.D.N.Y. August 11, 2014) (resentencing to total of 40 years for crimes including murder in aid of racketeering committed when defendant was one

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[22] *See Miller*, 132 S. Ct. at 2468 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations omitted.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.").

month shy of his 18th birthday); *United States v. Bryant*, No. 06-CR-234-GMN-GWF, Document No. 694 (D. Nev. January 17, 2014) (resentencing to total of 80 years for crimes including murder in aid of racketeering committed when defendant was 16 years old); *United States v. Alejandro*, No. 98-CR-290-CM-LMS, Document No. 202 (S.D.N.Y. May 21, 2014) (resentencing to total of 25 years for crimes including murder in aid of racketeering committed when defendant was 15 years old). In *United States v. Maldonado*, the sentencing court considered the *Miller* factors in the first instance and concluded that "even taking into account that Maldonado was four months shy of his eighteenth birthday when he committed the crimes charged in Counts 5 and 6, and considering all of the 'hallmark features' associated with a person of that young age, the imposition of a sentence of life imprisonment is nonetheless warranted in this case." No. 09 CR 33 9-02, 2012 WL 5878673, at *10 (S.D.N.Y. Nov. 21, 2012), *aff'd*, *United States v. Guerrero*, 560 F. App'x 110 (2d Cir. 2014).

Defendant does not dispute the correctness of these decisions, but argued at the motion hearing that they are distinguishable because, unlike this case, they—with the exception of *Maldonado*—were correcting previously imposed unconstitutional sentences. Defendant argues that because a mandatory life sentence is unconstitutional for Defendant, there is prospective uncertainty about the expected sentence. That, of course, is an uncertainty that favors Defendant by opening the possibility for a term of imprisonment that is more lenient than life imprisonment. Because "imprisonment for life" cannot

constitutionally be imposed upon a defendant convicted of first degree murder committed before the defendant was 18 without consideration of the *Miller* factors, the Court at sentencing is therefore compelled to consider the *Miller* factors and to fashion a sentence of imprisonment as required by § 1111(b), but not necessarily for life, similar to a sentence for second degree murder, for "any term of years or for life."[23]

The question presently before the Court, however, is not sentencing but whether it is in the interest of justice to try Defendant as an adult. *See Miller*, 132 S. Ct. at 2474 ("[T]he question at transfer hearings may differ dramatically from the issue at a post-trial sentencing."). For the reasons given above, it is in the interest of justice to try Defendant as an adult, and accordingly, it is

ORDERED that the Government's Motion to Transfer Proceedings Against Juvenile to Adult Criminal Proceedings (Document No. 40) is GRANTED, and Defendant J.B.R. shall be subject to criminal prosecution as an adult for the crime described in the Juvenile Information.

The Clerk will enter this Order, providing a correct copy to all parties of record.

SIGNED at Houston, Texas, on this **14th** day of April, 2015.

/s/ Ewing Werlein, Jr.
UNITED STATES DISTRICT JUDGE

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[23] *See* 18 U.S.C. § 1111(b) ("Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.").

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20262

SEALED APPELLEE 1,

Plaintiff – Appellee

[Date Filed: 4/24/2018]

v.

SEALED JUVENILE 1,

Defendant – Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion March 09, 2018, 5 Cir., ____ , ____ F.3d ____)

Before STEWART, Chief Judge, JONES, and CLEMENT, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having

been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E.B. Clement
UNITED STATES CIRCUIT JUDGE