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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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