

No.

**In the
Supreme Court of the United States**

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JUVENILE FEMALE, aka Diablita,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court errs when it gives too much weight to the seriousness of charged offenses in deciding whether to transfer a juvenile to adult status, in light of the need to treat juveniles differently than adults, as established by Supreme Court precedent and intended by Congress in enacting the Juvenile Justice and Delinquency Prevention Act.

PARTIES TO THE PROCEEDING

There were no additional parties to the original proceeding before the district court that issued the judgment we petition the Court to review.

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No.

**In the
SUPREME COURT of the UNITED STATES
October Term, 2019**

JUVENILE FEMALE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Juvenile Female (“JF”) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 3, 2019.

OPINIONS BELOW

The opinion of the Second Circuit dated December 3, 2019, attached hereto as Appendix A, is reported at *United States v. Juvenile Female*, 786 Fed.Appx. 313 (2d Cir. 2019) (Summary order).

JURISDICTION

This petition for certiorari is being filed within 90 calendar days of the Second Circuit decision. This Court's jurisdiction is invoked under Title 28, United States Code, section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, section 5032, provides, in relevant part¹:

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 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.

...

¹ 18 U.S.C. § 5032 is set forth in its entirety at Appendix D.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile fifteen years and older alleged to have committed an act after his fifteenth birthday which if committed by an adult would be a felony that is a crime of violence or ... criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice....

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems. In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.

...

STATEMENT OF THE CASE

A. Background.

JF is charged in a superceding juvenile information with participating in a highly-publicized murder conspiracy involving members and associates of the La Mara Salvatrucha street gang, commonly known as MS-13. The government alleges that, on April 11, 2017, JF, then almost 17 years and 5 months old, and another juvenile female, both associated with MS-13, lured five young men to a park in Central Islip, on Long Island, where the men were ambushed by members of MS-13. Four of the men were killed while one escaped.

JF was arrested on July 13, 2017 and charged by juvenile information with participating in the murder conspiracy. Subsequently, a superceding juvenile information was filed adding charges that she had attempted to obstruct a grand jury investigation of the incident by destroying evidence, including a cell phone, SIM card, and clothing worn during the murders.

1. The Charges.

Count One of the Superceding Juvenile Information charged that, between about January 1, 2016 and the date of the superceding information, in the Eastern District of New York and elsewhere, JF was employed by and associated with MS-

13, and knowingly and intentionally conducted and participated in its affairs through a pattern of racketeering activity, in violation of Title 18, United States Code, sections 1962(c), 1963 and 5032 et seq. It included six racketeering acts.

Racketeering Act One alleged a conspiracy to murder rival gang members, in violation of New York Penal Law sections 125.25(1) and 105.15. Racketeering Acts Two through Five charged her and others with knowingly and intentionally causing the deaths of four named individuals, on April 11, 2017, in violation of New York Penal Law Sections 125.25(1) and 20.00. Racketeering Act Six charged JF with conspiring to obstruct a federal grand jury investigation between about April 11, 2017 and July 13, 2017, by destroying a cell phone, a SIM card and an article of clothing, in violation of 18 U.S.C. sections 1512(1) and 1512(k).

Count Two charged JF with participating in a racketeering conspiracy by committing Racketeering Acts One through Six, in violation of Title 18, United States Code, sections 1962(d), 1963 and 5032 et seq.

JF was charged in **Count Three** with conspiring to intentionally and knowingly murder one or more rival gang members between about March 2017 and April 2017, in violation of Title 18, United States Code, sections 1959(a)(5) and 5032 et seq.

Counts Four through Seven charged JF and others with knowingly and intentionally murdering each of the four individuals, in violation of Title 18,

United States Code, sections 1959(a)(1), 2 and 5032 et seq. (A.4-13.)

2. The Transfer Motion and District Court Decision.

The government filed a motion, pursuant to 18 U.S.C. § 5032, to transfer JF to adult status for prosecution. The government relied primarily on the seriousness of the offense in its analysis of the section 5032 factors.

In her response to the transfer motion, and discussion of the factors, JF argued she had demonstrated great potential for rehabilitation at a juvenile detention center over the course of almost a year, by thriving in its structured environment and excelling in her schoolwork at the high school there. Attached to her response were a report from a psychologist strongly endorsing JF's potential for rehabilitation; a report from a mitigation specialist, which detailed her social history and terrible childhood and adolescence; school records; and a letter from the principal of the high school at the juvenile detention center.

Subsequently, JF submitted files from Child Protective Services, describing how, starting at age 13, she had been the victim of statutory rape by a 19 year-old "boyfriend," and a letter from a social worker at the juvenile detention center, providing additional evidence of her very positive response to rehabilitation efforts there.

The government did not have JF examined by a psychologist or other

qualified mental health expert, or submit a report from such a professional.

No testimony was taken at the transfer hearing. The government entered various documents into evidence, including JF's psychological and mitigation reports; crime scene photographs and autopsy reports; and a transcript of a telephone call from JF's then boyfriend, who was in jail; the government alleged he was a member of MS-13, and that, in the call, JF admitted her knowing participation in the murder conspiracy.

In its June 11, 2018, decision granting the transfer motion (Appendix B), the district court analyzed the section 5032 factors. It found the nature of the alleged offenses "overwhelmingly" favored transfer; JF's age and social background "strongly" favored transfer; JF's present intellectual development and psychological maturity were neutral factors; and her lack of a juvenile record, nature of past treatment efforts and JF's response to them, and the availability of programs designed to treat her behavioral problems, weighed against transfer. (B-2-3².) The court concluded, "Although some factors weigh against transfer, they do not outweigh the other factors that, in combination, overwhelmingly favor transfer." (B-3.) Thus, the court "determined in its discretion that treating the defendant as an adult in this case will serve the interests of justice." (*Id.*)

² References to "B-" are to Appendix B to this petition.

B. The Appeal.

The Second Circuit rejected Petitioner's appeal, finding she had not established the district abused its discretion in granting the government's transfer motion. The Court found the district court made findings as to each of the six factors it was required to consider pursuant to 18 U.S.C. § 5032. The Second Circuit held the district court was not required to weigh each factor equally, and was justified in according greater weight to the seriousness of the crimes alleged, which included intentional murder. (A-4, 5³.) The Court also rejected Petitioner's argument that the district court erred by not only assuming, for purposes of the transfer motion, that she was guilty of the offense, but by also accepting the government's factual allegations not included in the Juvenile Information. (A-5.)

The Second Circuit noted Petitioner bore a "heavy burden" seeking to overturn the district court's decision to transfer, and that they were "unaware of any case in which we have done so." (A-4.) The Court did not do so here.

³ References to "A-" are to Appendix A filed with this petition.

REASONS FOR GRANTING THE PETITION

Review is appropriate because the issue presented is one of exceptional importance, with dramatic sentencing consequences for the youngest of defendants: Whether juveniles accused of murder and other serious violent crimes should be treated differently than adults accused of the same crimes.

We submit the answer to this question is “Yes,” in light of the Court’s jurisprudence finding that juveniles are different from adults in ways relevant to sentencing, and the presumption of juvenile treatment for juveniles codified in the Juvenile Justice and Delinquency Prevention Act (“JJDP”), 18 U.S.C. §§ 5031 - 5042, which does not exclude juveniles accused of even the most heinous crimes from its protections. By giving determinative weight to the seriousness of the offenses charged, a court (as here) nullifies the protection for juveniles required by the Court’s decisions and the JJDP, and effectively exempts children accused of such serious crimes from the JJDP, despite the fact that the statute itself does not do so.

I. The Court’s Sentencing Decisions Recognize Juveniles are Different from Adults.

In a long series of cases involving the sentencing of juvenile defendants, relying upon, reflecting and advancing “evolving standards of decency,” the Court has recognized that juveniles are different from adults. First was *Thompson v.*

Oklahoma, 487 U.S. 815, 823 (1988) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(Plurality opinion), where the Court found that, in light of ““evolving standards of decency,”” the Eighth and Fourteenth Amendments forbid executing children under the age of 16 at the time of their crimes.

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court found the Eighth and Fourteenth Amendments forbid the execution of children younger than 18 at the time of their crimes. The Court focused on three ways in which juveniles are different than adults. They lack maturity, which results in “impetuous and ill-considered decisions”; they are “more vulnerable and susceptible to negative influences and outside pressures,” partly because they “have less control, or less experience with control, over their own environment”; and their characters are less well-formed than those of adults, their personality traits “more transitory, less fixed.” *Id.* at 569-70.

Discussing retribution, one of the penological justifications for the death penalty, the Court referred to its analysis in *Atkins v. Virginia*, 536 U.S. 304 (2002), of how the ““lesser culpability of the [intellectually disabled] offender”” reduces the case for retribution, and said “[t]he same conclusions follow from the lesser culpability of the juvenile offender.” *Id.* at 571.

The Court extended this line of Eighth Amendment analysis to consider punishments imposed on juveniles aside from the death penalty in *Graham v.*

Florida, 560 U.S. 48 (2010), where it found the Eighth Amendment prohibits imposing a sentence of life without parole on a juvenile not convicted of homicide, as “[d]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.” *Id.* at 69.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court found the Eighth Amendment forbids mandatory sentences of life imprisonment without parole for juveniles, largely based on scientific evidence showing that juvenile brains are different from adult brains in ways relevant to sentencing, and continue to be so into the mid-20s. The Court relied upon all the reasons and factors that had caused it to find the Eighth Amendment prohibits executing juveniles (and intellectually impaired adults), and imposing life sentences on juveniles convicted of non-homicide offenses, and identified “two strands of precedent reflecting our concern with proportionate punishment.” *Id.* at 2463. One strand “adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty,” and included finding, in *Atkins*, *supra*, that the Eighth Amendment prohibits executing intellectually disabled defendants. The second strand, evoked by the Court’s holding in *Graham*, *supra*, “liken[ing] life without parole for juveniles to the death penalty itself,” prohibited mandatory imposition of capital punishment, and instead required individualized

consideration of a defendant's characteristics and the details of the crime. *Id.* at 2463-64.

While the Court did not prohibit life imprisonment for all juveniles, it found,

[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."

Id. at 2469 (quoting *Roper*, 543 U.S. at 573; *Graham*, 130 S.Ct. at 2026-27).

Finally, in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Court found *Miller* applies retroactively, as it created a new substantive rule of law. The Court said *Miller* created a class of juvenile defendants convicted of homicides who may not be sentenced to life without parole without violating the Eighth Amendment: those whose crimes reflect "unfortunate yet transient immaturity." *Id.* at 734 (quoting *Miller*, 132 S.Ct. at 2460 (quoting *Roper*, *supra*, 543 U.S. at 573)).

The Court found children different for sentencing purposes in three primary ways:

First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking.

Second, children “are more vulnerable to negative influences and outside pressures,” including from their family and peers; they have limited “control over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as “well-formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievable depravity.”

Id. (quoting *Miller, supra*, 132 S.Ct. 2464 (other citations omitted)).

The *Montgomery* Court said that, “[a]s a corollary to a child’s lesser culpability,” *Miller* recognized the “‘distinctive attributes of youth diminish the penological justifications’ for imposing life without parole on juveniles.” Minors are less blame worthy than adults, making the case for retribution weaker; they are immature, reckless and impetuous, and, as a result, “less likely to consider potential punishment,” undercutting the deterrence rationale; and there is less need for incapacitation, as ordinary adolescent development lessens the likelihood they will forever be dangerous to society. *Id.* at 733 (citing *Miller*, 132 S.Ct. at 2465). Moreover, “Rehabilitation cannot justify the sentence, as life without parole ‘forswears altogether the rehabilitative ideal.’” *Id.* (citing *Miller, supra*, 132 S.Ct. at 2465 (quoting *Graham, supra*, 560 U.S. at 74)).

II. Congress has Mandated that Juveniles be Treated Differently Than Adults.

The Juvenile Justice and Delinquency Prevention Act, 18 U.S.C. §§ 5031-5042 (“JJDPA”), is designed to ensure that juvenile defendants are treated differently than adults where possible. It creates a presumption that juveniles will be treated as such, and creates a burden on the government to prove it would be in the interests of justice to deny a juvenile its protections. It does not exclude from this presumption juvenile defendants accused of even the most heinous crimes. The six factors it requires a court to consider when deciding a motion to transfer a juvenile to adult status provide a framework to decide whether the juvenile has the potential for rehabilitation, and should receive the benefit of its protections, or does not.

The JJDPA is designed “to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.” *United States v. Juvenile Male No. 1*, 47 F.3d 68, 71 (2d Cir. 1995) (quotation omitted). The JJDPA establishes a presumption that juveniles should receive the special treatment afforded by the act and not be treated as adults. *United States v. A.R.*, 38 F.3d 699, 706 (3rd Cir. 1994) (“The statute clearly intends a presumption of juvenile treatment[.]”); *Juvenile Male No. 1*, 47 F.3d at 71.

Where, as here, the government seeks discretionary transfer of a juvenile

who is at least 15 years old but less than 18 at the time of the alleged crime, the government bears the burden of establishing by a preponderance of the evidence that doing so is “in the interest of justice.” *Id.*; see *United States v. Nelson*, 68 F.3d 583, 588 (2d Cir. 1995)(“*Nelson I*”).

In determining whether transfer to adult status is “in the interest of justice,” the primary question is whether the juvenile has the potential for rehabilitation. *United States v. Nelson*, 90 F.3d 636, 640 (2d Cir. 1996) (“*Nelson II*”). To assess a juvenile’s potential for rehabilitation, a district court must consider and make specific findings as to six factors: (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 (6) “the availability of programs designed to treat the juvenile’s behavioral problems.” 18 U.S.C. § 5032; *Juvenile Male No. 1*, 47 F.3d at 71. The district court’s findings as to the factors are by a preponderance of the evidence. *United States v. Doe*, 49 F.3d 859, 868 (2d Cir. 1995.)

Courts have made clear that, “[p]ermeating the transfer decision and the six factor inquiry is the notion of rehabilitation.” *Nelson II*, 90 F.3d at 640. A district court is to balance “the goal of rehabilitation” against “the threat to society posed by juvenile crime.” *Id.* (quotation omitted); *United States v. Ramirez*, 297 F.3d at

193. Thus, while a particularly serious crime (as here) may be given added weight in the analysis, *Nelson I*, 68 F.3d at 590, “the motion to transfer may be granted only when the government proves that rehabilitation is *not* likely.” *Nelson II*, 90 F.3d at 641.

Therefore, commission of a very serious crime may be given more weight in the analysis *not* because a juvenile who commits such a crime *deserves* to be treated as an adult, in which case the statute could simply make transfer automatic for such crimes. Rather, it is because committing such a crime may indicate a juvenile is not likely to be rehabilitated. As the Second Circuit has noted, “[T]he statutory factors have been identified primarily because of their impact on the juvenile’s rehabilitative potential.” *Nelson II*, 90 F.3d at 640; *see also United States v. John Doe*, 871 F.2d 1248, 1255 (5th Cir. 1989) (“[T]he seriousness of the crime obviously can be given more weight than the other factors in determining whether there is a ‘realistic chance’ of rehabilitation, and hence whether a transfer is appropriate.”)

A district court’s decision to transfer a juvenile to adult status is reviewed for abuse of discretion. A court abuses its discretion “when it fails to make the required factual findings or where the findings it does make are clearly erroneous.” *Nelson I*, 68 F.3d at 588 (citation omitted).

III. Giving Too Much Weight to the Seriousness of the Offenses Effectively Deprives Juveniles Accused of Violent Crimes of the Protections of the JJDPa, Contrary to Congress's Intent.

Congress did not exclude juveniles accused of murder and other violent crimes from the special consideration required, and protection afforded, by the JJDPa. The seriousness of the offense is only one of six factors a court is to consider in deciding whether transfer to adult status would be in the interest of justice. Yet, as JF's case illustrates (see below), in practice and effect, giving too much weight to the seriousness of the offense easily overwhelms and colors consideration of the other factors. This results in juveniles accused of serious violent crimes effectively being excluded from the presumption of juvenile treatment required by the JJDPa, even where, as here, the juveniles present overwhelming evidence of their capacity for rehabilitation.

For example, there are eleven published and unpublished decisions of the district court concerning government transfer motions, including this case. The district court has granted transfer in all eleven, primarily based on the seriousness of the crimes alleged. *See United States v. Juvenile Male*, 327 F.Supp.3d 573 (E.D.N.Y. 2018); *United States v. Juvenile Male*, 316 F.Supp.3d 553 (E.D.N.Y. 2018); *United States v. Juvenile Male*, 269 F.Supp.3d 29 (E.D.N.Y. 2017); *United States v. Juvenile Male*, 14-CR-645 (JFB), 2015 WL 6550344 (Oct. 23, 2015);

United States v. Juvenile Male, 11-CR-717 (JFB), 2013 WL 461220 (Jan. 30, 2013); *United States v. Juvenile Male*, 12-CR-317 (JFB), 2012 WL 6043271 (Dec. 3, 2012); *United States v. Juvenile Male*, 844 F.Supp.2d 333 (E.D.N.Y. 2012); *United States v. Juvenile Male*, 844 F.Supp.2d 312 (E.D.N.Y. 2011); *United States v. Juvenile Male #2*, 761 F.Supp. 2d 27 (E.D.N.Y. 2011); and *United States v. Juvenile Male*, 754 F.Supp.2d 569 (E.D.N.Y. 2010). As the Second Circuit noted here, they have not overturned these – or any - decisions granting transfer.

It cannot be that none of the juveniles in these cases had the potential for rehabilitation that is the focus of the JJDPa. Rather, its focus on the seriousness of the offenses in these cases may indicate the court was concerned with the adequacy of the punishments the defendants would have faced if not transferred to adult status. This is not a concern of the JJDPa, under which consideration of the seriousness of the offense is relevant only to the extent it indicates a defendant's potential for rehabilitation.

IV. Transfer to Adult Status has a Dramatic Effect on Sentences Faced by Juvenile Defendants.

Under the JJDPa, a juvenile may not receive a sentence exceeding five years. (18 U.S.C. 5037(c)(2)(A)(i).) Once transferred to adult status, a juvenile defendant faces the same possible sentences as adults. Here, if transferred to adult status and convicted of the crimes alleged, JF would face the possibility of life

imprisonment. Two juveniles charged in the same incident as JF and transferred to adult status have received terms of imprisonment of 50 and 55 years, respectively, after pleading guilty.

V. This Case Illustrates How Weighing the Seriousness of the Offense Too Heavily Results in a Decision Contrary to the Court’s Jurisprudence Regarding the Sentencing of Juveniles and Congress’ Intent in Enacting the JJDP.

JF presented extensive evidence establishing she has great potential for rehabilitation. This included uncontroverted evidence describing her outstanding behavior in juvenile detention and accomplishments in school there, and reports from a psychologist and mitigation expert showing how her tragic social history led to her involvement in this offense.

JF presented substantial, uncontroverted evidence of her overwhelmingly positive response to rehabilitation efforts. This included evaluations and reports from the juvenile detention center and high school, which established that JF was thriving in the structured and supportive environment there, had not engaged in any negative behavior, and had developed and was pursuing pro-social goals.

Because she had not yet completed the 9th grade, JF was, after turning 18 while detained, taking Grade 9 and 10 level courses, and doing extremely well, with 5 A’s and 2 B+’s. Her educational plan was to complete the 9th and 10th grade so she could take New York State Regents courses the following academic year,

and ultimately earn a New York State Regents High School Diploma.

JF's willingness to take, work hard at, and succeed at Grade 9 and 10 level courses demonstrated her potential for rehabilitation, as did the fact that she was working towards a pro-social goal - taking Regents courses the next year, so she could eventually graduate with a New York State Regents High School Diploma.

JF's potential for rehabilitation was also evident from the way she was described by the staff at the high school. The Principal said she "has shown the ability to be able to establish a good rapport with our staff and has consistently kept up with her school work ... her behavior has been consistent and her school work has been excellent." He stated that JF was "one of our brightest, most determined and focused students," and he was "very pleased with this young lady and admire[d] her commitment and efforts towards improving herself."

All her teachers described her similarly. JF's Computer Science teacher stated, "[JF] is a wonderful student. She is thorough when [] working on an assignment. [JF] works independently and participates in extracurricular activities (Parents' Night Spanish Interpreter). [JF] demonstrates the desire and commitment to learning. Displays good logical reasoning and decision-making skills." Her Mathematics teacher, with whom she studied geometry, said, "She is focused on completing her classwork and she asks questions when [she] needs help," demonstrating her openness, indeed, desire for, guidance and supervision. JF's

Science teacher said she was “an excellent student,” who was earning an “A,” and exhibited “excellent behavior beside her academics.” Similarly, her Spanish teacher reported JF had “excellent behavior in my class, no problems at all,” and was earning an “A+.” JF’s History teacher said she was “a model student who completes all of her assignments. Currently she has an A in my class.”

The school advocate, stated: “I have had the pleasure of working with [JF] on several events this school year. She acted as an interpreter during our annual open house as well as served on the welcoming committee. She completes all assignments and is very inquisitive. She loves to learn and often adds valuable insights to various topics.”

A letter from the Social Services Department stated that JF had made “Level IV status” for almost her entire stay at the juvenile detention center. This meant she had complied “with all requirements and instructions throughout the facility,” which entitled her to special privileges, including but not limited to “later bed time, work details and additional phone calls.” The letter further noted JF was “a straight A student” who had made the honor roll for 2 marking periods.

All of this provided a direct answer to the very question the section 5032 factors are supposed to address: whether JF had the potential for rehabilitation – or, more precisely, whether the government had proven JF’s rehabilitation was “not likely.” But whereas the other section 5032 factors are subject to analysis and

interpretation, and lead to only a prediction of how JF will respond to efforts to rehabilitate her in the future, JF's overwhelmingly positive response to actual efforts to rehabilitate her at Essex County Juvenile answered the question directly and required no interpretation or prediction. She had proven her amenability to rehabilitation.

This is consistent with the conclusion of the psychologist who interviewed, tested, and evaluated JF. She concluded:

JF has several protective factors that make her a good candidate for treatment and rehabilitation. Of significance is the high achievement and good behavior that she is presenting while incarcerated. She is described as highly curious, motivated and engaged. Her cognitive and intellectual resources, lack of psychopathology or severe personality traits, lack of significant problems with impulsivity, and strong commitment to returning to school, significantly increase the probability that she will be amenable to treatment and rehabilitation, especially if provided with appropriate interventions.

A court deciding a transfer motion is to consider a juvenile's social background alongside her age at the time of the offense and current age "because the juvenile's life experience may shed light on [her] actual level of maturity and [her] capacity for growth, which ultimately informs the Court's assessment of 'whether juvenile-type rehabilitation programs would be appropriate' for [her]." *United States v. C.F.*, 225 F. Supp.3d 175, 184 (S.D.N.Y. 2016) (*quoting Nelson I*, 68 F.3d at 589.) A court is to make a "holistic" finding as to this factor, in order to

gauge how a defendant's age at the time of the offense, current age, and social history, considered together, affect a determination of her potential for rehabilitation. *Id.*

Abuse and neglect does not even begin to describe the circumstances of JF's life. Her mother had entered the country illegally, and was "sickly" during her pregnancy, with trouble breathing at times, but afraid to seek care because she was undocumented. She struggled to care for JF because she was poor and had to work, walking in snow during winter to a fish factory and leaving JF with a babysitter.

Her mother sent JF to stay with her maternal grandparents in Honduras when JF was about nine months old. Her aunt, then 10 years old, recalled her crying for her mother. Though sickly, JF was not provided medical care. Still, once she settled down, the aunt remembered JF as a "loving, happy and bright baby."

At age 3, her mother arranged for JF to be taken from her grandparents and put in the care of a "stranger," who was an alcoholic. One day, the "caregiver" left JF and her own daughter unsupervised, and they were attacked by a wild dog, that bit the other child severely. When JF, traumatized by the incident, returned to live with her grandmother, her aunt noticed a change in her personality: "She was acting weird as though she had been mistreated."

JF's mother returned to Honduras and took JF to live with her, but decided to return to the United States, and left JF with a woman who abused and neglected

her, which form her most vivid early memories. The woman locked her in the bathroom, forced her to kneel with a concrete block on her head and arms in the air, made her eat dangerously prepared food, and allowed her own son to play outside while keeping JF locked inside.

Because she had difficulty entering the United States, JF's mother returned and took JF to Mexico, when she was about four years old. JF "was shocked when her mother started to abuse her," according to the mitigation report. Only four, JF was forced to help clean her mother's wound from the C-Section delivery of her fourth child and help with baby-sitting, under threat of physical abuse. When she failed to clean the wound properly, her mother became angry and kicked her.

Although bright and interested in learning, JF was not sent to school. Rather, at five, she was locked in their home with fulltime responsibility for caring for her sister while her mother went to work. She felt helpless when the baby cried for no apparent reason: "I didn't know what to do, so I would scream to see if someone can hear me and come to help." Her mother beat JF if the baby was sick or injured, and almost "beat her to death" when the baby fell off a chair, to such an extent that the belt used was in tatters. She recalled, "I felt my entire body pounding and hot all night," her face and body were "blue all over," and her mother warned her not to leave the house. When a neighbor tried to intervene, her mother said she could discipline JF any way she wanted.

JF's mother moved back to Honduras when JF was about six, first near her grandmother, but then to the town where she had been abused by the alcoholic caregiver. She left JF and her sister with another abusive woman, who made her care for her own children and attacked her with a stick. JF became hardened to being abandoned by her mother: "She left me so many times that it did not matter anymore."

Her mother returned from Mexico and took JF and her sister to live with her grandmother, where she was happy and allowed to attend school. At about eight, she fell, hit her head, and lost consciousness, but was not given medical care.

When she was about nine, her mother returned from Mexico and again uprooted JF and her sister. The mitigation expert noted, "The movements wore down JF emotionally. She was never sure when next her mother would uproot her. According to JF, she did not know where she was born or when she was born or where she would be next."

JF had mixed feelings when her aunt invited her to live with her in the United States, as she did not want to leave her sister, who she viewed as her baby (her sister could not move with her as she was not a U.S. citizen). JF was concerned that, after she left, her sister would get the beatings she had endured.

JF had almost no contact with her mother once she moved to the United States. She felt like a "stranger" in her aunt's home, felt her aunt only cared for

her own daughter, and cried at night, feeling angry at herself for abandoning her sister. Her interest in doing well in school was mocked, and she was denigrated, her aunt saying she would be just like her mother, having many children like a dog having puppies. Another maternal aunt said her aunt bullied JF, abused her emotionally, and punished her for things she did not do. The aunt admitted she was not affectionate to JF, and only took her in to qualify for public assistance, as JF was a citizen.

JF took refuge in school, where she excelled, and church. Still, she struggled with depression and resentment. Her cousin described how JF spoke about the horrors of her childhood and resentment about being abandoned by her mother and left with strangers who treated her like a slave.

At the age of 13, while still in middle school, JF visited her another aunt for Christmas and fell in love with a 19-year-old man. After graduating middle school, JF moved to her aunt's home to be closer to the man. Her aunt seemed unable to keep her, and JF moved in with her boyfriend. As a 19-year-old while JF was below the age of consent, the boyfriend repeatedly raped her, and his mother used her as an unpaid maid, triggering unpleasant memories of her childhood. JF's relationship with her boyfriend deteriorated, as he abused her and cheated on her with a friend. JF started to hate him, and was depressed, but felt trapped in the relationship with nowhere to go. She was not yet able to enroll in school, and did

not have a church, both of which institutions had provided refuge in Maine. The mitigation report noted, “As depression overtook her, she had trouble eating, sleeping, and thinking straight. ‘I couldn’t find the exit door,’ she stated.”

JF lived with her boyfriend for about two years before finding the courage to leave at the age of 15. She stayed with her aunt briefly, and then one of the aunt’s friends, for a short period of time.

At 15, JF was homeless and without support. At 16, she took a job in a bar, where she earned a commission based on how many drinks she could entice patrons to buy. On her first night, she earned \$100, and earned as much as \$600 in a night. She began drinking Tequila heavily, which helped her appear older than she was, and also started working at different bars to reduce the chance that somebody would learn she was a minor. She moved back in with her aunt, as she was now able to contribute to expenses.

While working at one of the bars, JF met a young man (alleged by the government to be a member of MS-13). Although she shied away initially, he seemed different from other men she had known, and said he just wanted to be her friend. She was impressed with his sensitivity. She said “she felt part of a love story because of the way [he] approached her,” and the affection he showed her. Her aunt did not like him and refused to let JF have him over when she learned he was a gang member, because she did not want him to be a bad influence on her

son. JF felt her aunt was forcing her to choose, whereas all she “wanted was to have a family.” JF moved in with the man, partially persuaded by his promise to help bring her sister to the United States; she still felt guilty for leaving her behind.

Contrary to the district court’s finding on this factor, JF’s emotional maturity, age at the time of the transfer hearing, and social history, considered “holistically,” strongly weighed against transfer. In her report, the psychologist discussed “developmental maturity,” which “is affected by age, but also by biological or environmental influences, such as family dysfunction, learning deficits, mental illness or poverty.” Underlying the concept of developmental maturity are three factors: “cognitive abilities, autonomy, and emotional maturity.”

As to the first factor, the psychologist found “[JF] functions at least within the average range of intellectual or cognitive functioning.”

However, the mitigation report continued, “[JF]’s main delay in development appears to be in the area of autonomy, which refers to someone’s ability to resist pressures from others, to have clarity in self-concept, to have high self-esteem, or to be aware of strengths and weaknesses.” The psychologist stated, “[JF] had an upbringing marked by adverse experiences, including abuse, neglect, and abandonment.” Her frequent moves, among households and caregivers, made it “difficult for her to establish stable attachments and contribut[ed] to an overall sense of emotional instability.” She was forced to take on responsibilities beyond

her age, like caring for her infant sister when only five. As a result of the multiple separations and sense of abandonment, JF felt she need to be tough to survive.

The psychologist noted, JF “longed for a family and a sense of being taken care of,” and hoped for a stable family when she moved to the United States to live with her aunt. But, coming from an unstructured environment where she was largely unsupervised, she found it difficult to adjust to the structure of her aunt’s house. Next, “Likely looking for someone to take care of her, [JF] first became involved in a relationship at the age of 13 with a man who was 6 years older than her.” After breaking up with him, JF experienced more instability, going back and forth between living alone and with her aunt, but again having “to assume responsibilities not age appropriate, such as supporting herself financially, which prevented her from attending school.” Although able to support herself, “she also experienced several episodes during which she felt lonely and depressed and significantly emotionally reliant on others.”

As to emotional maturity, the psychologist said JF appeared to have “adequate interpersonal skills,” to “have been able, to a certain extent, to delay gratification when needed to obtain a goal,” and, “[o]n the surface, ... to be in control of her emotions.” The psychologist continued, “However, this appears to be a somewhat simplistic way of overcompensating for pervasive feelings of loneliness and abandonment. She does not appear to have good insight into her

real emotions or feelings because of her use of avoidance and denial of emotions as a defense.” Further, “her lack of consistent and clear role models have likely resulted in delays in moral development.” Thus, “Overall, despite intact cognitive/intellectual skills, she has significant delays in developmental maturity.”

JF’s social history clearly weighed against transfer, by demonstrating that her chronologic age overstated her actual, developmental maturity. It also provided the context in which to place any alleged involvement in the charged conduct. Given her social history, it was not surprising that she was vulnerable to bad influences by older men, and to becoming part of a group that could provide her with a substitute for the family for which she so obviously longed. Her longtime interest in education, and achievement while attending high school while in detention, demonstrated that she had significant potential to grow, mature and become rehabilitated if provided with the means to do so.

JF’s emotional maturity and social history outweighed her chronological age at the time of the offense. Considered together, they established that the significant potential for rehabilitation she has demonstrated at Essex County Juvenile is real. Yet, the weight accorded the seriousness of the offenses by the district court overwhelmed its analysis, and led to a decision contrary to the purposes of the JJDP.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and the opinion of the Second Circuit.

Respectfully submitted,

s/Jesse M. Siegel

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