No. 21-

Supreme Court of the United States

JOSE LEONEL BONILLA-ROMERO,
ALSO KNOWN AS JOSE TUPAPA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Due Process Clause of the Fifth Amendment require notice of the sentencing range prior to sentencing?

Is it a violation of separation of powers for courts to substitute the statutory sentencing range for second-degree murder into the provision for first-degree murder?

PARTIES TO THE PROCEEDING

Petitioner is Jose Leonel Bonilla-Romero, also known as Jose Tupapa, who was the defendant in the district court and the appellant in the appeals court.

Respondent is the United States of America, the plaintiff in the district court and the appellee in the appeals court.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual.

DIRECTLY RELATED PROCEEDINGS

United States Of America v. Jose Leonel Bonilla-Romero, also known as Jose Tupapa, No. 19-20643 (5th Cir., opinion and judgment entered on December 30, 2020)

United States Of America v. Jose Leonel Bonilla-Romero, also known as Jose Tupapa, No. 4:14-cr-245-3 (S.D. Tex., final judgment of conviction and sentence on September 6, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Jose Leonel Bonilla-Romero respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

In an extreme case of bad facts making bad law, the lower court declared that sentencing judges may substitute statutory sentencing ranges from one crime to another. This decision has deepened a fundamental split of authority over the power of judges to rewrite statutes based on legislative intent. More important, it has introduced fundamental uncertainty into the plea bargaining process. Under the *Booker* regime, the criminal justice system depends above all on orderly and conclusive notice of the statutory sentencing range in the charging instrument. If left unaddressed, this split will place an unsustainable burden on district and appellate judges facing layers of due process challenges as sentencing ranges are retroactively interpreted over the course of criminal proceedings. The Court should grant certiorari and resolve this circuit split.

OPINIONS BELOW

The opinion of the court of appeals (App. 4a-15a) is reported at 984 F.3d 414 (5th Cir. 2020). The orders of the district court (App. 16a-34a) are not reported.

JURISDICTION

The court of appeals issued its judgment on December 30, 2020. App. 4a-15a. The first paragraph of this Court's Order of March 19, 2020, extended the time for filing a petition for certiorari in all cases involving petitions due after that date to 150 days following, as relevant here, the appeals court judgment. This petition is due by May 29, 2021. The Court's jurisdiction is invoked under 28 U.S. Code § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. am. 5.

The federal murder statute provides in relevant part:

> 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.

18 U.S.C. § 1111(b).

STATEMENT

I. Factual Background

Bonilla-Romero was raised by his grandparents in a farming community in El Salvador. App. 20a-21a, 44a-45a. When he was 13, his family sent him to Texas to live with his father. App. 20a-21a. His father was rarely home, and he became involved in a gang called MS-13. *Id.* The Government alleges that in 2013, when Bonilla-Romero was 17 years old, he and two adult gang members killed another gang member on orders from their superiors in El Salvador. *Id.*

II. Proceedings Below

A. Texas Indictment

In October 2013, Bonilla-Romero was arrested and charged with first-degree criminal homicide by the State of Texas. App. 36a, 37a, 62a. Before obtaining an arrest warrant, "Houston Police Department investigators identified [him] as a federal juvenile, but state of Texas adult." App. 36a. The Texas charge is on hold pending a final decision by this Court. In the event that Bonilla-Romero's federal conviction is vacated, the State of Texas is entitled immediately to proceed with prosecution. Bonilla-Romero has not asserted any defects in that charge. App. 62a.

B. Federal Delinquency Charge

The Government halted the Texas proceeding by filing charges in federal court and taking custody of Bonilla-Romero from the State of Texas through a writ of corpus ad prosequendum. App. 37a. The federal charges were for juvenile delinquency under

the Juvenile Justice and Delinquency Prevention Act, 18 U.S.C. § 5032. The Government asserted concurrent territorial jurisdiction with the State of Texas and alleged that "the State of Texas does not have available programs and services adequate for the needs of this juvenile, as under State of Texas law Bonilla-Romero was an adult on the date of the commission of the offense." App. 37a.

C. Federal First-Degree Murder Charge

Notwithstanding the Government's stated reason for seeking custody and taking over the prosecution from the State of Texas, the Government immediately filed a Motion to Transfer Proceedings Against Juvenile to Adult Criminal Prosecution alleging that Bonilla-Romero had committed first-degree murder and/or capital murder. App. 16a, 40a, 43a. The district court granted the motion. App. 17a.

D. Denial of Plea Agreement

Bonilla-Romero filed an interlocutory appeal to the order to transfer to adult proceedings. Before ruling, the circuit court sent the case back to the district court for rearraignment as an adult. App. 31a.

Bonilla-Romero entered a plea agreement with the Government to plead guilty in exchange for a sentence of 35 years, pending approval by the district court. App. 46a-52a. Before entering his plea, the magistrate judge walked Bonilla-Romero through the plea agreement, confirming that he had preserved his right to appeal the defect in the sentencing range. App. 46a-48a. Next, at the plea hearing, the district judge confirmed that there were "constitutional questions" regarding the sentence that Bonilla-Romero had agreed to waive solely on condition that the judge accepted the plea agreement. App. 51a. The

district judge, however, refused to accept the plea agreement. App. 32a, 52a-53a.

E. Interlocutory Appeal

At oral argument on the interlocutory appeal to the order to transfer to adult proceedings, the circuit court expressed dismay that, given the district judge's acknowledgment of the defect in the sentencing range, the district judge had denied the 35-year plea agreement. The court suggested the Government could avoid another appeal by simply charging Bonilla-Romero with second-degree murder, which carries a penalty that can validly be applied to a juvenile offender—imprisonment for "any term of years or for life." 18 U.S.C. § 1111(b). One circuit judge suggested the Government could avoid the problem by offering a plea under Fed. R. Crim. P. 11 (c)(1)(C) ("C plea"). Another questioned whether the Government was authorized to continue defending the indictment in the event of an adverse ruling by the panel given the constitutional question.

In its written opinion, the circuit court denied the interlocutory appeal on procedural grounds, noting it "pertain[ed] to the sentencing phase of a case that has yet to go to trial," and that it was still possible for the Government to avoid an unconstitutional sentence by filing a superseding indictment charging Bonilla-Romero with second-degree murder. *Sealed Appellee 1*, No. 15-20262 (5th Cir., March 9, 2018). The circuit court concluded:

> 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.

Id. (emphasis added). On remand, however, the Government did not change its charging decision.

F. Guilty Plea

Uncertain of going to trial in the absence of a statutory range of punishment, Bonilla-Romero pled guilty in order to proceed with his appeal. App.33a, 58a-59a. Again, the magistrate judge confirmed Bonilla-Romero had preserved his right to appeal the constitutional defect in the sentencing range and instructed Bonilla-Romero that his guilty plea would not constitute any agreement or waiver of that defect. App. 56a. At his final plea hearing, the district judge again acknowledged the ongoing constitutional issue and instructed Bonilla-Romero that rewriting the murder statute to insert a valid sentence "would be unconstitutional." App. 58a-59a. Bonillo-Romero confirmed his understanding of that fact but confirmed that he was pleading guilty in order to continue the challenge on appeal. *Id.*

G. Sentencing (Without Notice)

At sentencing on September 6, 2019, the district court recounted the ways it had "posited" for ascertaining Bonilla-Romero's sentencing range prior to the day of sentencing and then informed Bonilla-Romero that it was going to use a different approach to sentence him to a term of years according to a method of construction used by another judge interpreting another statute:

> The question here, and the objection raised by the defendant at this point, and the one objection that the defendant has, is that . . .

there is no sentence available for the crime. . . .

Now, in considering this, there's been an issue that's come up before. In the memorandum and order that -- or amended supplement to the order of transfer to adult criminal proceedings that I signed June 30, 2016, was entered that day, I posited one way in which the -- in the light of Miller when a minor is transferred to trial as an adult on charge of murder under 1111, Section 1111, that the punishment states the punishment of severability to be followed in accordance with Booker. And I gave an example of how that might be done.

There's another way to look at it as well, and this is suggested by United States District Judge Valerie Caproni from the Southern District of New York, in United States versus Conyers, 227 F.3d -- Fed Supp.3d 280. . . .

In the absence of more specific and constitutional guidance from Congress, the Court treats the authorization of a maximum penalty as providing discretion to the sentencing judge to sentence anywhere between no penalty, and the maximum penalty.

* * * *

So I find that, just as Judge Caproni did in the Conyers case, as applied here, Section 1111(b) is invalid as to juveniles to the extent it provides for a mandatory minimum sentence of life imprisonment. The maximum

> penalty authorized by Congress life in prison remains valid after Miller versus Alabama, and it's evident from that opinion. In the absence of specific guidance from Congress, the Court holds that authorization of a maximum penalty provides the Court with discretion to sentence a defendant to any term of years up to the maximum.

App. 62a-63a, 71a-72a. Thus, even after Bonilla-Romero had already pled guilty and was receiving his actual sentence, the lower court acknowledged there was broad uncertainty about what Bonilla-Romero's sentencing range should be. The district court then sentenced Bonilla-Romero to 460 months imprisonment. App. 34a.

H. Appeal

On appeal to the lower court, the Government admitted the charging instrument in this case failed to notify Bonilla-Romero of his applicable sentencing range. The lower court, however, affirmed the district court's final judgement of conviction and held the district court properly rewrote the federal murder statute "as necessary" at the time of sentencing. 984 F.3d at 418.

REASONS FOR GRANTING THE WRIT

I. The Question Has National Importance

The circuit court's decision deepens a split of authority regarding the most important requirement in criminal procedure: notice to a defendant of an applicable sentencing range.

A. Importance to Criminal Procedure

Federal Rule of Criminal Procedure 11 provides that at the time a court accepts a defendant's guilty plea, "the court must inform the defendant of, and determine that the defendant understands . . . any maximum possible penalty, including imprisonment, fine, and term of supervised release [and] any mandatory minimum penalty." Fed. R. Crim. P. 11.

In *Apprendi v. New Jersey*, the Supreme Court traced the history of the sentencing notice requirement to the Founding, at which time it was well-established that a defendant must have "no doubt" as to the maximum sentence. 530 U.S. 466, 478 (2000). "The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime." *Id.* Ever since, it has been a "basic principle" of due process in the United States that a sentencing judge's discretion is strictly confined to the range provided by statute for the indicted offense. *Id.* at 476, 483.

United States v. Booker, 543 U.S. 220 (2005) cemented the importance of the statutory range as the sine qua non of plea bargaining. *Booker* disestablished sentencing guidelines as binding authority and confirmed that judges retain "broad discretion in imposing a sentence within a statutory range." 543

U.S. at 233. The statutory range thus remains the only certainty that defendants can rely on in making plea decisions.

In *Johnson v. United States*, Justice Scalia explained for the Court that "statutes fixing sentences" as well as elements of crimes are subject to the void-for-vaguess doctrine, which is based on the Fifth Amendment. 135 S. Ct. 2551, 2556-57 (2015). The doctrine "requires that the range of available sentences be specified with 'sufficient clarity.'" *Id.* (citing *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979) and *United States v. Evans*, 333 U.S. 483, 68 S. Ct. 634, 92 L. Ed. 823 (1948)). The rule "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Id. See also Sessions v. Dimaya*, 138 S. Ct. 1204, 1224-26 (Gorsuch, J., concurring) (tracing the vagueness doctrine's "due process underpinnings" in English criminal law).[1]

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[1] *See also* Peter Low and Joel Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 Va. L. Rev. 2051, 2113-2115 (2015) ("[I]t is not only acceptable but desirable for the vagueness doctrine to apply to laws that define crimes, to laws that divide them into degrees, and to *laws that establish maximum and minimum sentencing parameters* based on statutorily described conditions. . . . Individualized sentencing decisions, by contrast, should not be subject to attacks based on vagueness if they are made by juries or judges within the limits established by such laws…And it seems right, moreover, that legal questions with consequences of the sort involved in Johnson—an increase from 0-10 years as the sentencing range to a minimum of 15 years and a maximum of life—should be subject to the same rule-of-law

B. Importance to Plea Bargaining

Providing notice of the statutory range of punishment—and allowing defense attorneys to convey and explain it to their clients—are the most essential elements in criminal procedure. Put simply, discussing sentencing outcomes is largely what criminal defense attorneys do. While attorneys can guess what sentence a defendant will receive based on past experiences with similar offenses or individual judges, the one certainty an attorney can relay to their client is the statutory range of punishment that is tied to counts of conviction. The statutory range is the one bit of information that every defendant can grasp onto and that is essential for them to make an informed plea decision. Without it, the criminal defense attorney simply cannot fulfill his or her foremost obligation—advising his client of potential outcomes—and there is precious little guidance the attorney can offer during plea negotiations that does not make the decision more complicated than it already is. Meeting with the client becomes a Kafkaesque exercise in futility:

> What's my range of punishment?
>
> *I don't know.*
>
> If I go to trial and am convicted, what would I be facing?
>
> *Not clear.*
>
> How about if I plead guilty straight up?
>
> *Dunno.*

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protections against arbitrary resolution as apply to questions of law that control the elements of a crime.").

> Is there a benefit to pleading guilty, or will it have to be life?
>
> *Not sure. Hopefully there's a benefit.*
>
> If I reject the Government's plea offer, could I still fight to get that same amount of time?
>
> *Can't say.*

In *Whatley v. Zatecky*, the Seventh Circuit considered the alarming consequences of an ambiguous sentencing provision from the defendant's perspective:

> [T]he consequences were especially dire: without the sentencing enhancement, Whatley faced a maximum of eight years imprisonment. With the enhancement, the maximum rose to fifty years, and he ultimately received a sentence of thirty-five years, more than four times longer — twenty-seven years longer — than the sentence he could have received without the enhancement."

833 F.3d 762, 777 (7th Cir. 2016). The court found the sentence "not simply wrong but unreasonable" and void. *Id.* Here, the ambiguity is far more extreme, as it concerns whether or not a mandatory life sentence applies. Plea bargaining is simply not possible in the absence of such absolute uncertainty.

Notice of the sentencing range is equally important to prosecutors. The sentencing range is the one thing that both defendants and the Government can count on. Without it, meaningful plea negotiations are impossible, and defense counsel are obligated to file appeals at both the transfer and sentencing stages.

C. Importance to Separation of Powers

The consequences for separation of powers cannot be overstated. Plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system," *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012). And no plea decision is more consequential for a criminal defendant, and more carefully circumscribed by Congress, than choosing between first-degree and second-degree murder. The general murder statute, 18 U.S.C. § 1111 is one of the most deeply embedded and most heavily revised statutes in the federal criminal code. In *Lewis v. United States*, the Supreme Court described the "the extreme breadth of the possible sentences, ranging all the way from any term of years, to death" and "detailed manner in which the federal murder statute is drafted":

> It divides murderous behavior into two parts: a specifically defined list of "first degree" murders and all "other" murders, which it labels "second degree."
>
> * * *
>
> Congress' omissions from its "first degree" murder list reflect a considered legislative judgment. Congress, for example, has recently focused directly several times upon the content of the "first degree" list, subtracting certain specified circumstances or adding others.
>
> * * *
>
> By drawing the line between first and second degree, Congress also has carefully decided just when it does, and when it does not, intend for murder to be punishable by death….The death

> penalty is a matter that typically draws specific congressional attention.
>
> * * *
>
> As this Court said in *Williams*, "where offenses have been specifically defined by Congress and the public has been guided by such definitions for many years," it is unusual for Congress through general legislation like the ACA "to amend such definitions or the punishments prescribed for such offenses, without making clear its intent to do so." 327 U.S. at 718.

523 U.S. 155, 169-70 (1998).

Allowing judges to rewrite the murder statute amounts to a drastic expansion of judicial authority. It is also wholly unnecessary. Twenty-two states and D.C. have rewritten unconstitutional murder statutes in the wake of *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and the majority of states are now reviewing unconstitutional juvenile sentences. Indeed, this Court recently dismissed an appeal of such a sentence in the "D.C. sniper" case which lower courts had overturned. *Mathena v. Malvo*, No. 18-217 (R46-11 / OT 2019), 2020 U.S. LEXIS 1368, at *1 (2020). After oral argument, the State of Virginia signed legislation granting parole review, rendering the opinion moot. *Id.*

In light of such legislative activity, it was error for the lower court to preempt the legislative process. By allowing the district judge to retroactively rewrite 18 U.S.C. § 1111—the prototypical federal penal statute—the lower court did exactly what the Fourth

Circuit said it could not do: "judicial legislation pure and simple." *Under Seal* at 725.

Judicial legislation was particularly unnecessary given that a Texas grand jury had already indicted Bonilla-Romero as an adult for first-degree murder under a Texas statute that complies with *Miller*. App. 35a, 62a. The Houston police officers who led the investigation leading up to his arrest had confirmed before seeking a warrant that he was a "federal juvenile, but state of Texas adult." App. 36a, 37a-39a. After the transfer, the Government's rationale for taking over—that the "the State of Texas does not have available programs and services adequate for the needs of this juvenile," App. 38a—was promptly discarded when the Government immediately filed a motion to transfer alleging first-degree murder. App. 40a. Both district and appeals courts repeatedly suggested to the Government that it could either to file a proper indictment or to allow the State of Texas to proceed with its original case, yet the Government insisted on prosecuting Bonilla-Romero under § 1111(b). Despite such guidance and in the absence of any statutory authority from Congress, the Government pressured the district court to adopt an unsupportable interpretation of the statute so that it could retain control of the case.

The ultimate consequence of the lower court's sweeping ruling is an expansion of grounds for appeal. Nothing could increase the volume and complexity of criminal appeals more than empowering judges to rewrite sentencing statutes, not only because such judicial legislation violates due process but because it erodes or eliminates the value of plea bargaining.

II. Circuit Courts Are Sharply Divided

A. The Fourth Circuit Rule

In *U.S. v. Under Seal*, 819 F.3d 715 (4th Cir. 2016), a case involving very similar factual allegations of gang-related murder by a juvenile, the Fourth Circuit held the Government could not indict a juvenile for murder by retroactively "grafting" a lesser offense onto the charge:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996)….
>
> Our concerns about lack of notice arise from the Government urging us to look outside the express language of the stated offense for an acceptable alternative penalty. When the crime at issue in this case occurred, Congress unambiguously informed individuals that murder in aid of racketeering was punishable by death or mandatory life imprisonment…*The only authorized statutory punishment was mandatory life imprisonment, not an indeterminate punishment capped at life imprisonment*.
>
> That the authorized penalty for murder in aid of racketeering is greater than the Government's proposed alternate penalty may lessen, but does not obviate, the concern as to notice. If the "[d]eprivation of the right to fair warning . . . can result . . . from an

> unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face," *Rogers [v. Tennessee]*, 532 U.S. at 457, then surely it can also come from an *unforeseeable and retroactive judicial severability analysis* that would result in excising an offense's penalty provision so that the penalty for another offense would now apply.

Id. at 726-727. Acknowledging ongoing legislative fixes to the problem, the court concluded it had "no way of knowing how Congress would or will act and would be engaging in pure speculation in guessing what that result might be." *Id.*

The Fourth Circuit followed *U.S. v. Evans,* in which this Court conclusively settled the question of whether courts may import sentences from one offense to another in order to prosecute an offense that does not contain an applicable sentence. 333 U.S. 483 (1948). Although *Evans* involved a statute with no sentence (in contrast to first-degree murder which the Government argues "includes" a sentence for second-degree murder), *Under Seal* held *Evans* stood for a basic constitutional principle: once an unconstitutional sentence is "removed for purposes of prosecuting juveniles, . . . no applicable penalty provision remains . . . . [I]t simultaneously creates a vacuum that renders the statute unenforceable." 819 F.3d at 723. Regardless of whether the omitted penalty was deliberate or merely an "oversight" by Congress, courts could never know with "reasonable certainty" how similarly Congress intended to treat the two for purposes of sentencing. *Id.* at 487-88. Fixing a sentence is thus "outside the bounds of judicial interpretation." *Id.* at 395. The court's reading

of *Evans* is supported by a long line of decisions by this Court, citing *Evans* for the same proposition: "statutes fixing sentences must specify the range of available sentences with sufficient clarity." *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (citing *Evans*). *See also U.S. v. Batchelder*, 442 U.S. 114, 123, 99 S. Ct. 2198, 2204 (1979) (*"*[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.") (citing *Evans*).

Under Seal established a bright-line rule that has been followed by lower courts and incorporated into prosecutorial practice. For example, *United States v. Reyes-Canales*, No. JKB-17-0589, 2019 U.S. Dist. LEXIS 174108, at *5-6 (D. Md. 2019) involved similar facts as the instant case, murder by a juvenile member of MS-13 with adult codefendants. *Id.* The court applied the long-established rule:

> An individual may not be prosecuted in federal court for crimes committed as a juvenile if the mandatory maximum penalties for those crimes would be unconstitutional as applied to a juvenile. The Supreme Court has held that both the death penalty and life imprisonment—the mandatory maximum sentences for murder in aid of racketeering—are unconstitutional when applied to juveniles. Therefore, as the case stands, Reyes-Canales is not and cannot be charged in federal court for the murder of Victim 1.

Id. (citations omitted). *Under Seal* was cited as persuasive authority by the Eleventh Circuit in a case with similar facts that was denied as moot. *Alfaro-*

Granados v. United States, No. 20-11581-G, 2020 U.S. App. LEXIS 27520, at *7 (11th Cir. 2020).

B. The Fifth Circuit Rule

The lower court reached the opposite conclusion, holding: "We conclude that it is appropriate to sever as necessary." 984 F.3d at 418. "Substitut[ing] the punishment provision for second-degree murder" was permissible and "consistent with Congress's clear intent." *Id.* at 419.

The lower court's ruling far exceeds the limits of severance as defined by the Fourth Circuit. *See supra. See also American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985) (Even the broadest severability clause does not permit a federal court to rewrite as opposed to excise.), *aff'd*, 475 U.S. 1001 (1986); *Eubanks v. Wilkinson*, 937 F.2d 1118, 1125 (6th Cir. 1991) ("clearly the judiciary lacks power to *add* new phrases") (quoting *Musselman v. Commonwealth*, 705 S.W.2d 476 (Ky. 1986).

The conflict is plainly illustrated by the opinion in *Under Seal*. The Fourth Circuit rejected the following "severance": "[Violators] shall be punished...for murder~~, by death or life imprisonment, or a fine under this title, or both; and for kidnapping,~~ by imprisonment for any term of years or for life." *Under Seal*, 819 F.3d at 721. In this case, by contrast, the district court rewrote the statute more aggressively, *adding* new language as follows: "Whoever is guilty of murder in the first degree shall be punished by death or by [a maximum penalty of] imprisonment for life." App. 65a, 70a-72a.

The Fourth Circuit held such judicial revision "usurps the constitutional allocation of the power to write a statute to Congress." *Id.* at 724:

> Legislatures, not courts, are charged with articulating the authorized penalties for criminal conduct…."This is a task outside the bounds of judicial interpretation. It is 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 723, 728 (quoting *U.S. v. Evans*, 333 U.S. 483, 495 (1948)). *See also United States v. Bass*, 404 U.S. 336, 348 (1971); ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

Little more than a month before the lower court's decision came down, another Fifth Circuit opinion, decided on different grounds, acknowledged the split in authority and opined that the case presented "an important constitutional question" and that "it seems at least debatable whether a juvenile offender may constitutionally be resentenced to a punishment that, while consistent with *Miller*, is not authorized by the statute governing the substantive criminal offense." *Jackson v. Vannoy*, 981 F.3d 408, 415 (5th Cir. 2020).

CONCLUSION

The lower court held that district judges may rewrite sentencing statutes at the time of sentencing. This inversion of criminal procedure has deepened a pernicious circuit split. There are now two versions of the murder statute in the United States. Worse, the lower court's decision has created fundamental uncertainty as to the value of plea bargaining. The Court should grant review and send the case back for a proper indictment or simply let the State of Texas proceed with its prior prosecution of this case. There is no question justice will be served in this case. What is at stake is far broader: whether citizens in a proceeding, civil or criminal, are entitled to notice of statutes—or may trial judges rewrite or supplement them at the time of judgment based on supposed legislative intent. The Court should grant the writ of certiorari to resolve this profound split of authority.

Respectfully submitted,

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