APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20643

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

v.

JOSE LEONEL BONILLA-ROMERO,
Also known as Jose Tupapa,
Defendant—Appellant.

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

Before OWEN, Chief Judge, and DENNIS and HAYNES, Circuit Judges. HAYNES, Circuit Judge:

Appellant Jose Leonel Bonilla-Romero was involved in a gang-related murder when he was seventeen years old. He was charged with and pleaded guilty to first-degree murder under 18 U.S.C. § 1111(b). While a person convicted of first-degree murder under § 1111(b) "shall be punished by death or by imprisonment for life," a defendant who was under the age of eighteen at the time of the offense, such as Bonilla-Romero, cannot be sentenced to death or mandatory life imprisonment, see Miller v. Alabama, 567 U.S. 460,

479 (2012) (holding mandatory life without parole unconstitutional for juveniles); Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding the same for the death penalty). In order to resolve this constitutional defect, the district court severed § 1111(b)'s punishment provision for first-degree murder, determined that the statute-as-modified authorizes imprisonment "for any term of years or for life," and accordingly sentenced Bonilla-Romero to a term of imprisonment of 460 months. For the reasons set forth below, we AFFIRM.

I. Background

As a teenager, Bonilla-Romero became involved with a gang. Related to their gang involvement, Bonilla-Romero and two other gang members "killed Josael Guevara by striking him with a bat and a machete." At the time of the murder, Bonilla-Romero was seventeen years old—a minor.

The Government filed proceedings against Bonilla-Romero under the Juvenile Justice and Delinquency Prevention Act, 18 U.S.C. §§ 5031–42. In a "Juvenile Information" charging document, the Government alleged that Bonilla-Romero killed Guevara "with premeditation and malice aforethought . . . which would have been a crime in violation of [18 U.S.C. § 1111] if he had been an adult." The Government moved to transfer the proceedings against Bonilla-Romero to adult criminal prosecution. The district court granted the motion and noted, among other factors warranting transfer, that Bonilla-Romero was only three months shy of his eighteenth birthday at the time of the offense, that the alleged murder "was particularly brutal," and that Bonilla-Romero exhibited sufficient maturity to be tried as an adult.

Bonilla-Romero appealed the transfer of his case to adult proceedings. A previous panel of this court stayed the appeal "for the limited purpose of plea proceedings." Back at the district court, Bonilla-Romero entered into a plea agreement with the Government that included a sentence of "no more than 30 years" of imprisonment and "a term of supervised release after imprisonment of up to five years." The district court, however, rejected the plea agreement. His plea agreement rejected, Bonilla-Romero withdrew his plea of guilty. But later, he again pleaded guilty. During the plea colloquy, the court asked Bonilla-Romero, "Have you talked with your lawyer . . . about what the maximum penalties are for the offense charged against you in the Superseding Indictment?" Bonilla-Romero answered affirmatively. The court also explained:

> Now, under Section 1111 of Title 18, which is the federal murder statute, the offense of murder in the first degree, which is charged here, carries a maximum sentence of death and a minimum sentence of life in prison.
>
> Because you had not quite attained the age of 18 when the crime was committed and are being tried as an adult, under the United States Constitution, you're not eligible for the death penalty or for a mandatory sentence of life imprisonment.
>
> Therefore, in reading the punishments prescribed for murder, in the murder statute, Section 1111(b), the Court must sever and omit those words in the punishment language. That would be unconstitutional, if applied to you, because of your age at the time of the crime. When the Court does that, the

> offense—the offense of murder in the first degree committed at the time— committed by one who, at the time of the murder, had not attained 18 years of age and is tried as an adult, carries with it the following punishment:
>
> The sentence of imprisonment for any term of years or for life; a fine not to exceed $250,000; a term of not more than five years of supervised release; and a special assessment of $100.

Bonilla-Romero then pursued his interlocutory appeal. Sealed Appellee 1 v. Sealed Juvenile 1, No. 15-20262, slip op. at 3 (5th Cir. Mar 9, 2018), cert. denied, 139 S. Ct. 1258 (2019). Another panel of this court dismissed the interlocutory appeal since sentencing had not yet occurred; in dismissing the appeal, the panel noted that Bonilla-Romero "raised an important constitutional question that may deserve a thorough review when the appropriate time comes." Id. at 5.

Prior to the sentencing hearing, as part of Bonilla-Romero's presentence investigation report ("PSR"), the probation officer provided that the statutory provision allowed for "[a]ny term of years up to and including Life" and that Bonilla-Romero's guideline range—based on an offense level of 43 and criminal history category of I—was life imprisonment. The probation officer recommended that, after applying a downward variance "given the defendant's age at the time of the offense" and accounting for time served in custody, Bonilla-Romero be sentenced to 578 months' imprisonment. The Government filed a sentencing memorandum requesting that the district court "sentence Bonilla-Romero to 35 years or more of incarceration."

Bonilla-Romero objected to the PSR's determination that he was subject to a term of imprisonment up to and including life, noting that 18

U.S.C. § 1111(b) allows for first-degree murder to be punished only with mandatory life imprisonment or death but that juveniles may not receive those sentences. At the sentencing hearing, the district court explained that "[t]he question is whether there is any valid portion of Section 1111(a) [that when] applied to juveniles . . . would function independently, and in a manner consistent with the intent of Congress." In this case, because "the maximum penalty is authorized" by statute and no provision exists for "less than [a] life sentence," a "gap" had been "left open." The court further explained that "[i]n the absence of more specific and constitutional guidance from Congress," a statute authorizing only a maximum penalty "provid[es] discretion to the sentencing judge to sentence anywhere between no penalty, and the maximum penalty." For these reasons, the court overruled Bonilla- Romero's objection.

The district court ultimately sentenced Bonilla-Romero to 460 months of imprisonment (thirty-eight years and four months), followed by five years of supervised release. Bonilla-Romero timely appealed the district court's judgment.

II.Jurisdiction and Standard of Review

The district court had jurisdiction over this case under 18 U.S.C. § 3231, and we have jurisdiction over Bonilla-Romero's timely appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We review constitutional challenges de novo. United States v. Romero-Cruz, 201 F.3d 374, 377 (5th Cir. 2000).

III. Discussion

On appeal, Bonilla-Romero raises two challenges to his conviction. First, he contends that the district court unconstitutionally fashioned a new punishment for first-degree murder committed by juveniles, violating the Due Process Clause's notice requirement and separation-of-powers doctrine. Second, he asserts that the district court violated the Due Process Clause and Federal Rule of Criminal Procedure 11 by failing to specify his potential sentencing range at his plea hearing. Neither of Bonilla-Romero's challenges succeed.

A. Punishment Provision Challenge

18 U.S.C. § 1111(a) creates two categories of murder. First-degree murder features an aggravating characteristic, such as being perpetrated "by poison, lying in wait, or any other kind of deliberate, malicious, and premediated killing." 18 U.S.C. § 1111(a). Second-degree murder encompasses all murder not in the first degree. Id. Although § 1111(b) authorizes a sentence of "imprison[ment] for any term of years or for life" for second-degree murder, §1111(b) sets forth a minimum and maximum sentence prescribing that first-degree murder "be punished by death or imprisonment for life." Id. § 1111(b). As the Government concedes, as a result of the Court's rulings in Miller and Roper, a death sentence is not available for juveniles. A mandatory life sentence without possibility of parole is also proscribed.

The Supreme Court recently restated that when a portion of a statute is unconstitutional, "the traditional rule is that the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have

enacted." Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2209 (2020) (internal quotation marks and citation omitted). Nothing suggests that Congress would not have enacted a murder statute covering juveniles if it had foreseen the rulings in Miller and Roper. Thus, the focus here must be on the proper remedy.

We conclude that it is appropriate to sever as necessary. The question then becomes which portions of § 1111 must be excised and which must be retained. United States v. Booker provides the framework: "we must retain those portions of [§ 1111] that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." 543 U.S. 220, 258–59 (2005) (cleaned up). At the same time, "we must refrain from invalidating more of the statute than is necessary." Id. at 258 (internal quotation marks and citation omitted).

Roper requires that we strike § 1111(b)'s authorization of the death penalty for juveniles, and Miller requires that we do the same for its mandatory minimum of life imprisonment. Yet we need not go further; under Miller, juveniles may be sentenced to life imprisonment, provided that the sentencer adequately considers the offender's youth. 567 U.S. at 479–80 (noting that "appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon").

As currently drafted, § 1111(b) provides a statutory maximum of death for first-degree murder and a statutory minimum of life imprisonment

without parole.[1] Under Roper, the death penalty must be discarded, leaving life imprisonment as both the statutory maximum and minimum. Because Miller in turn prohibits mandatory life without parole sentences for juveniles, all that remains of the punishment provision is a statutory maximum of life imprisonment. Where Congress only provides a statutory maximum, the district court has discretion to impose no penalty or any penalty up to that maximum. Cf. United States v. Turner, 389 F.3d 111, 120 (4th Cir. 2004) (holding that when Congress fails to provide a statutory maximum, it "gives maximum discretion to the sentencing court," such that "the maximum is life imprisonment"); United States v. Wright, 812 F.3d 27, 33 (1st Cir. 2016) (holding the same). Thus, excising the mandatory minimum nature of the life sentence is all that is needed to satisfy the constitutional issue for juveniles under § 1111.

Another way to address the issue is to substitute the punishment provision for second-degree murder in this case because, under § 1111's scheme, all of the elements of second-degree murder must be met to be convicted of first-degree murder.[2] Either approach yields the result reached by the district court: that

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[1] A federal life sentence is a sentence of life imprisonment without parole because parole is no longer available in the federal system. Richmond v. Polk, 375 F.3d 309, 316 (4th Cir. 2004) (citing the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, 98 Stat. 1987).

[2] First-degree murder is a murder plus the heightened state-of-mind element (willfulness, deliberateness, maliciousness, or premeditation). See 18 U.S.C. § 1111(a). Second-degree murder is any other murder. Id. Therefore, any offense that satisfies the elements for first degree murder necessarily satisfies those for second-degree murder as well.

Bonilla-Romero shall be punished by imprisonment "for any term of years or for life."

The district court's remedy complies with Roper and Miller, functions independently, and is consistent with Congress's clear intent to criminalize "the unlawful killing of a human being with malice aforethought," 18 U.S.C. § 1111(a). Nevertheless, Bonilla-Romero contends that the district court's solution is still unconstitutional, relying on United States v. Evans, 333 U.S. 483 (1948), and United States v. Under Seal, 819 F.3d 715 (4th Cir. 2016), for the proposition that the Government cannot retroactively graft a lesser penalty onto an indicted charge.

Evans presented "an unusual and a difficult problem": the statute at issue criminalized both smuggling and harboring aliens, but it provided a punishment only for smuggling. 333 U.S. at 484. Because the statutory scheme resulted in doubt and ambiguity, the Supreme Court declined to apply the smuggling penalty to a harboring offense. Id. at 489, 495. Here, however, the statutory scheme is not ambiguous. The scheme makes clear that any killing of a human being with malice aforethought is illegal and punishable by a term of imprisonment; and if the offender's conduct was willful, deliberate, malicious, or premediated, then an increased penalty applies. See 18 U.S.C. § 1111. Because the offenses and corresponding punishments are clear under the statutory scheme, the instant case does not raise the "unusual" problem that was at issue in Evans.

In *Under Seal*, the district court denied the Government's motion to try the defendant—a juvenile accused of murder in aid of racketeering—as an adult because the racketeering statute carried a mandatory

penalty of either life imprisonment or death. 819 F.3d at 717. The Fourth Circuit affirmed the district court's decision because a "conviction would require the court to impose an unconstitutional sentence." Id. at 728. The Fourth Circuit reasoned that, under the structure of the racketeering statute, there was no punishment that could be applicable to the juvenile. Id. The provision at issue, 18 U.S.C. § 1959(a)(1), contained one penalty for racketeering- related murder (life imprisonment or death), which could not be imposed on a juvenile, and another for racketeering-related kidnapping (imprisonment for any term of years or life). See id. at 723–24. The Fourth Circuit declined to "combine the penalty provisions for two distinct criminal acts." Id. at 724. Therefore, "[t]he penalty enacted for the kidnapping-based offense [could not] simply be interchanged with and applied to the murder-based offense, as these . . . [have] distinct elements." Id. Grafting the kidnapping penalty onto a murder offense would "run[] counter to the Constitution's guarantee of due process" because the statute does not provide notice that any other penalty could be applicable for the murder. Id. at 726.

Under Seal is also distinguishable from the instant case. As discussed above, an offense that meets the elements for first-degree murder would also satisfy the elements for second-degree murder. With that aspect of the statutory scheme in mind, the statute provides notice that the conduct of murder could result in a term of imprisonment for any term of years. See 18 U.S.C. § 1111(b).

Bonilla-Romero also insists that the district court's solution violates the separation-of-powers doctrine because it applies the penalty Congress intended for second-degree murder to first-degree

murder. Yet by deleting any penalty for juvenile first-degree murderers, Bonilla-Romero's approach would completely frustrate the will of Congress by placing juveniles who committed the most heinous murders in a better position than those who committed second-degree murder. Thus, we conclude that Bonilla-Romero's challenges to the district court's construction of § 1111(b)'s punishment provision fail.

B. Plea Hearing Challenge

Bonilla-Romero also challenges the district court's supposed failure to specify his sentencing range at his plea hearing. Under the Due Process Clause and Federal Rule of Criminal Procedure 11, when a guilty plea is accepted, the court must inform the defendant of the consequences of his plea, including the maximum possible penalty and any mandatory minimum sentence. See Fed. R. Crim. P. 11(c)(1); see also United States v. Pearson, 910 F.2d 221, 222–23 (5th Cir. 1990). As long as a defendant is advised of and understands the consequences of his plea, the plea is knowing and voluntary. Pearson, 910 F.2d at 223.

At the plea hearing, the district court provided notice of Bonilla- Romero's sentencing considerations in detail, as set forth above. It made clear that his offense typically resulted in a penalty of mandatory life imprisonment or death but that, because of his youth at the time of the offense, Bonilla-Romero would be eligible for a "sentence of imprisonment for any term of years or for life" and "a fine not to exceed $250,000." Thus, Bonilla-Romero was informed of the maximum penalty that he faced. Moreover, no mandatory minimum applied. The transcript of Bonilla- Romero's plea hearing demonstrates that the court properly notified him of the consequences of a

guilty plea and, accordingly, that Bonilla-Romero's plea was knowing and voluntary. Therefore, this challenge also fails.

Accordingly, we AFFIRM.

APPENDIX B

Case 4:14-cr-00245 Document 93 *SEALED* Filed on 07/09/14 in TXSD Page 1 of 1

CJA 30 DEATH PENALTY PROCEEDINGS: APPOINTMENT AND AUTHORITY TO PAY COURT-APPOINTED COUNSEL

* * *

Federal Capital Prosecution

* * *

/s/ [Illegible] (Judge Stacy)
Signature of Presiding Judge or By Order of the Court

7/9/2014
Date of Order

APPENDIX C

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

UNITED STATES OF AMERICA

v.

J.B.R., A MALE JUVENILE,

CR. NO. H-14-245-3

UNDER SEAL

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

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

[2] Document No. 40.

response and reply thereto, the Court-ordered psychological evaluation conducted by Dr. Ramon Laval,[3] and the arguments and evidence presented at 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

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[3] Dr. Laval, a licensed psychologist with extensive professional experience, who is bilingual in Spanish and English, was appointed by agreement of the parties. See Document No. 72-3 (Curriculum Vitae of Dr. Laval); Document No. 83 (Order for Psychological Examination).

on the date of the murder and would be tried as an adult under Texas law.[4]

The Government subsequently filed the instant 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

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[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 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.

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)).

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) i 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[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[13] and after being caught with marijuana, Defendant "then demonstrated an 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

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[8] Document No. 94 at 6.
[9] Id. at 7.
[10] Id. at 9.
[11] Id.
[12] Id.
[13] Id. at 10.

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

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[14] Id.

[15] Id. at 10-11.

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 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

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[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 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.

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 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. § llll(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

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[19] Document No. 23 at 1.

[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.

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 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]

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[21] Document No. 98.

[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

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 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 339-02, 2012 WL

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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.").

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 § llll(b), but not necessarily for life, similar to a sentence for second degree murder, for "any term of years or for life."2 3.[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

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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.").

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.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States District Court
Southern District of Texas FILED
OCT 14 2015
David J. Bradley, Clerk of Court

No. 15-20262
4:14-CR-245-03

SEALED APPELLEE 1,
Plaintiff—Appellee,

v.

SEALED JUVENILE 1,
Defendant—Appellant.

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

Before JOLLY, DENNIS and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the unopposed joint motion to stay this interlocutory appeal and remand to the district court for the limited purpose of plea proceedings is GRANTED.

APPENDIX E

JUDGE EWING WERLEIN, JR.

* * *

DATE: July 01, 2016

CR. No. H-14-245-3

* * *

SEALED SENTENCING HEARING

X For reasons stated in detail on the record, the Court rejected the Plea Agreement (Document No. 160, which was the basis of Defendant's plea conditionally accepted by the Court at arearraignment on January 22, 2016. The Court advised Defendant of his right to withdraw his plea and resume his interlocutory appeal from the Order of Transfer pending in the Fifth Circuit Court of Appeals.

X SENTENCING NOT HELD.

X Defendant's Motion to Withdraw Plea is GRANTED. ORDER signed.

X Defendant's plea of guilty, conditional waiver of juvenile status, and conditional waiver of indictment are WITHDRAWN, and Defendant may proceed with his interlocutory appeal.

X Defendant's counsel is to inform the Fifth Circuit Court of Appeals that the plea proceedings have ended without proceeding to sentencing, and counsel shall request a new briefing schedule in Appeal Case No. 15-20262.

X Defendant REMANDED to custody.

APPENDIX F

JUDGE EWING WERLEIN, JR.

* * *

DATE: April 19, 2019

CR. No. H-14-245-3

* * *

REARRAIGNMENT

X Rearraignment held on Ct(s) 1 of the superseding indictment.

X Dft enters a plea of GUILTY.

X Order Expediting PSI setting Disclosure and Sentencing dates signed.

X Sentencing set June 21, 2019 at 10:00 a.m.

X Dft REMANDED to custody.

X Terminate other settings and motions for this defendant.

APPENDIX G

JUDGE EWING WERLEIN, JR.

* * *

DATE: September 6, 2019

CR. No. H-14-245-3

* * *

SENTENCING

X Sentencing held on Ct(s)_l_ pursuant to a Guilty Plea on 04/19/2019.

X SENTENCE: Ct(s)_l_ BOP Custody for 460 months

* * *

X WRITTEN NOTICE REGARDING APPEAL RIGHTS

* * *

APPENDIX H

ASSIGNED TO THE
12TH JUDICIAL DISTRICT COURT

INDICTMENT NO. [REDACTED]
* * *

STATE OF TEXAS VS. [REDACTED]

CHARGE: 19.02{B){1)
MURDER/FIRST DEGREE FELONY
* * *

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS,

THE GRAND JURORS, duly selected, organized, sworn, and impaneled as such for the County of Walker, State of Texas, at the July Term, A.D. 2013, of the District Court for said County upon their oaths present in and to said Court, that on or about the 22nd day of September, 2013, and anterior to the presentment of this indictment, in the County and State aforesaid did then and there intentionally or knowingly cause the death of an individual, namely, by by striking him with a blunt object and cutting him with a machete or other sharp object.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

[redacted]
Foreman of the Grand Jury

FILED
Time 5:15
13 DAY OF NOV 2013
* * *

APPENDIX I

Case 4:14-cr-00245 Document 23 *SEALED* Filed on 07/07/14 in TXSD Page 4 of 5

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

UNITED STATES OF AMERICA

v.

J.B.R., A MALE JUVENILE,

NO. H-14-245-3

UNDER SEAL

JUVENILE INFORMATION

On or about the 22nd day of September, 2013, in the Southern District of Texas, the defendant, J.B.R., a male juvenile who had at the time not yet reached his eighteenth birthday, committed an act of juvenile delinquency. . . .

* * *

Houston Police Department investigators identified "Jose" as a federal juvenile, but state of Texas adult, J.B.R.

* * *

APPENDIX J

Case 4:14-cr-00245 Document 24 *SEALED* Filed on 07/07/14 in TXSD Page 2 of 2

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

UNITED STATES OF AMERICA

v.

J.B.R., A MALE JUVENILE,

NO. H-14-245-3

UNDER SEAL

CERTIFICATION TO PROCEED UNDER THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT, 18 U.S.C. § 5031 ET SEQ.

COMES NOW, the United States Attorney for the Southern District of Texas, after investigation of the matters described herein, and with the delegation of the Attorney General of the United States and pursuant to Title 18, United States Code, Section 5032, certifies to this Court as follows:

1. This certification is made pursuant to the requirements under Title 18, United States Code, Section 5032 of the Juvenile Justice and Delinquency Prevention Act (18 U.S.C. §§ 5031-42), hereafter referred to as "the Act." J .B.R., a male juvenile, Defendant herein, has been charged by the United States with violating Title 18 United States Code,

Sections 1111 and 2, Aiding and Abetting Murder Within the Special Maritime and Territorial Jurisdiction of the United States , which is classified as a felony crime of violence or offenses described in Title 21, United States Code, Section 841.

2. Defendant is a "juvenile" as that term is defined in the Act, in that he has not yet attained the age of twenty-one, and is accused of committing acts of juvenile delinquency under Title 18, United States Code, Section 5032, as described in paragraph 1 herein.

3. There is substantial Federal interest in the case, or the offense(s), to warrant the exercise of federal jurisdiction due to the serious nature of the offense and the allegation that the offense occurred within the territorial jurisdiction of the United States, namely, Sam Houston National Forest.

4. Furthermore, the State of Texas does not have available programs and services adequate for the needs of this juvenile, as under State of Texas law J.B.R. was an adult on the date of the commission of the offense and thus will be prosecuted in Texas as an adult.

5. The United States Attorney, in filing this Certification, acts in delegation of authority of the Assistant Attorney General of the Department of Justice pursuant to Title 18, United States Code, Section 5032; Title 28, Code of Federal Regulations, Section 0.57; and, by Memorandum of the Assistant Attorney General which is attached to this

Certification as Attachment A and made a part hereof for all purposes.

WHEREFORE, the United States Attorney now certifies to this Court that jurisdiction over the defendant as a juvenile committing acts of juvenile delinquency is proper in this Court in accordance with Title 18, United States Code, Section 5032.

Respectfully submitted,
/s/ Kenneth Magidson
KENNETH MAGIDSON
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF TEXAS

APPENDIX K

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

UNITED STATES OF AMERICA

v.

J.B.R., A MALE JUVENILE,

NO. H-14-245-3

UNDER SEAL

MOTION TO TRANSFER PROCEEDINGS
AGAINST JUVENILE TO ADULT CRIMINAL
PROSECUTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the United States of America, by and through the United States Attorney in and for the Southern District of Texas, with the delegation of the Attorney General of the United States, and pursuant to Title 18, United States Code, Section 5032, and files this motion and would show as follows:

1. J.B.R., a male juvenile, Defendant herein, has not attained his twenty-first birthday and has allegedly committed an act(s) of juvenile delinquency prior to his 18th birthday, and is therefore classified as a "juvenile" for the purposes of criminal prosecution under federal law.

2. That on or about September 22, 2013, in the Southern District of Texas, J.B.R., a male juvenile, Defendant herein, committed the following act(s) which if committed by an adult would be a felony offense that has an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offence, namely: on or about September 22, 2013 aiding, abetting, and assisting others known and unknown, in a place within the special maritime and territorial jurisdiction of the United States, J.B.R. willfully, deliberately, maliciously, and with premeditation and malice aforethought, did unlawfully kill Josael Guevara, by striking Josael Guevara with a bat and by striking Josael Guevara with a machete, in violation of Title 18, United States Code, Sections 1111 and 2.

3. Defendant's actions as alleged herein were committed after Defendant's fifteenth birthday and if committed by an adult would be felonies that are crimes of violence or offenses described in Section 401 of the Controlled Substances Act (21 U.S.C. § 841). It would be in the interest of justice if the district court would transfer the juvenile for criminal prosecution as an adult for the alleged criminal acts.

WHEREFORE, the United States of America urges the Court, upon notice and hearing, to grant the Government's motion to transfer and order Defendant transferred for criminal prosecution as an adult.

Respectfully submitted,
/s/ Kenneth Magidson

KENNETH MAGIDSON
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF TEXAS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing motion has this 9th day of July 2014 been hand-delivered to counsel of record for the Defendant.

/s/ Kenneth Magidson
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF TEXAS

APPENDIX L

UNOPPOSED MOTION FOR CONTINUANCE excerpt

Case 4:14-cr-00245 Document 54 *SEALED* Filed on 08/18/14 in TXSD Page 1 of 2

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS:

Now comes J.B.R., Defendant, and files this Unopposed Motion for Continuance of the pretrial deadlines and certification hearing in this matter, and in support shows the following:

1. Defendant, J.B.R. is charged with Capital Murder.

…..

APPENDIX M

Case 4:14-cr-00245 Document 94 *SEALED* Filed on 02/18/15 in TXSD Page 4 of 11

Psychological Evaluation
J.B.R. -C.R. NO. H-14-245 (3)
Page 4
…..

Educational Background:

J.B.R. reported that he progressed to the third grade while still residing in El Salvador, despite his claims of excessive absenteeism. He commented that he and his family lived in the country, outside of San Miguel, and that his grandfather had cattle, horses, and com fields. He stated that his grandfather took him with him from the time he was a young child to help with some of the farm chores, including "cleaning" and preparing the soil, sowing the com seeds, fertilizing "to make the com strong," and harvesting the com. In this same context, he discussed with a rather bright affect and with apparent pride that he learned to ride horses when he was very young, "And that's how we went" to the fields, on horse-back, "or walking." They left the home at about 5 :00 AM and school was in session from 7:00 AM to 11 :00 AM, thus, "I didn't go continuously. I would go one day, and then not, and sometimes not for a full week." Nevertheless, he was promoted from one to the next grade until he reached the third grade. Despite his limited formal education, J.B.R. noted that he learned to read and write in Spanish, "not only at school," (but) "through the

course of the years." His grandmother could not help him read and write - she did not have those basic skills, he explained, but his grandfather did. His grandparents were "Christians," J .B .R. commented, adding "and we worshiped every night and my grandfather would read from the Bible," which he did as well with his grandfather's help, and this promoted his reading skills.

APPENDIX N

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

UNITED STATES OF AMERICA

vs.

J.B.R., A MALE JUVENILE,

CASE NO. 4:14-CR-245-(3)
HOUSTON, TX
FRIDAY, JANUARY 22, 2016 9:25 A.M. TO 9:47 A.M.

* * *

ARRAIGNMENT

(SEALED BY ORDER OF THE COURT)

BEFORE THE HONORABLE
MARY MILLOY
UNITED STATES MAGISTRATE JUDGE

* * *

[Page 9]

MR. PARRAS:....[W]e intend to pursue a plea agreement. If the plea agreement is not accepted, then these waivers will be withdrawn and we'll proceed on an appeal that's currently being advanced in the Fifth Circuit. So with that very single exception, we're proceeding forward with this waiver.

THE COURT: Is that the agreement, Mr. Donnelly?

MR. DONNELLY: Yes, Your Honor.

THE COURT: Do you understand that, Mr. Romero?

DEFENDANT ROMERO: Yes, ma'am.

THE COURT: So let me see if I understand it. Mr. Romero, you intend to plead guilty this afternoon -- later this morning --

DEFENDANT ROMERO: Yes, ma'am.

THE COURT: -- under an agreement between your lawyer and you and the prosecutor?

DEFENDANT ROMERO: Yes, ma'am.

THE COURT: If the judge does not accept this agreement that you-all have reached, you're going to withdraw your plea of guilty?

[Page 10]

DEFENDANT ROMERO: Yes, ma'am.

THE COURT: You're going to withdraw all of your waivers?

DEFENDANT ROMERO: Yes, ma'am.

MR. DONNELLY: The plea is an 11(c)(1) plea -- (c)(1)(C) plea, Your Honor. We have discussed with Judge Werlein in general our plans and he has approved them at this point; however, he won't actually accept the plea until the PSR has been prepared and the Defendant has been presented before sentencing. He understands that the waiver of status from the juvenile to an adult is conditional, as well as his waivers to proceed without a Grand Jury Indictment on an Information only.

So if Judge Werlein ultimately were to reject the 11(c)(1)(C) plea, we would revert back to where we were prior to entering into the courtroom. The Defendant would be able to pursue his appeal of Judge

Werlein's previous Order that he be transferred to adult status.

THE COURT: May I ask what's on appeal?

MR. DONNELLY: The transfer would be the transfer to adult status. We've had a hearing before Judge Werlein.

THE COURT: Oh, so that was contested?

[Page 11]

MR. DONNELLY: No, Your Honor.

DEFENDANT ROMERO: Yes, ma'am.

MR. DONNELLY: So now he has held that appeal in abeyance to pursue the plea agreement, a condition of which is that he waive his status as a juvenile.

THE COURT: Okay.

* * * *

APPENDIX O

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

UNITED STATES OF AMERICA

vs.

J.B.R., A MALE JUVENILE,

CRIMINAL ACTION NO.
4:14-CR-245-3
11:12 A.M.

SEALED

RE-ARRAIGNMENT BEFORE
THE HONORABLE EWING WERLEIN, JR.
JANUARY 22, 2016

* * * *

[Page 7]
THE COURT: Now, I've been provided a copy of a plea agreement that your lawyer has negotiated with the government lawyer.

* * * *

[Page 8]
In paragraph 1, on the first page, it states that you voluntarily consent to being prosecuted as an adult, and you waive any right to a hearing to determine if a transfer to adult status for prosecution would be in the interest of justice.

* * * *

[Page 10]

THE COURT: Now, the next paragraph says that you're agreeing to plead guilty to count one of this criminal information, which charges you with aiding and abetting murder within the special maritime jurisdiction -- and territorial jurisdiction of the United States. So you understand what it is that you're proposing to plead guilty on, what crime it is to which you are proposing to plead guilty?

THE DEFENDANT: (In English) Yes, Your Honor.

THE COURT: And then in the next section, D, it says by entering this plea, you waive any right, that is, you give up any right you have that -- that you're waiving any right to have the facts and the law essential to punishment either charged in the information or proven to the jury by evidence beyond a reasonable doubt. In other words, you're saying you do not require the

[Page 11]

government to prove its case by evidence to satisfy a jury or fact finder beyond a reasonable doubt. you're giving up? Do you understand what you're giving up?

THE DEFENDANT: (In English) Yes, Your Honor.

THE COURT: [The plea agreement] says that you've also entered a -- have pending in the United States Court of Appeals an appeal an interlocutory appeal in *Sealed Appellee 1 versus Sealed Appellee [sic] 1*, Fifth Circuit case. It's pending, and you agree to abandon that appeal, that is, give it up and withdraw it upon the time that you are sentenced in this case.

THE DEFENDANT: (In English) Yes, Your Honor.

* * * *

THE COURT: All right. Then down here in the next paragraph on page 2 it states that the statutory penalty for

[Page 12]

this offense to which you're proposing to plead guilty is death or imprisonment for life, and then it explains some of the decisions that have been rendered by the United States Supreme Court that pertain to offenses committed by persons under the age of 18 when the crime was committed. That is what is alleged in your instance, that it is alleged you were under the age of 18 at the time of the crime.

And so it states while there are constitutional questions here, it's -- it states in this plea agreement that the -- the Court, in applying the law, would have exercise would exercise its would have discretion to exercise in order to sentence you up to a term of years up to and including life in prison. But this last sentence states that pursuant to Rule 11(c)(1)(C) of the Federal Rules of Procedure, that you and the government are agreeing that a sentence of no more than 30 years should be applied and is the appropriate sentence for you in this case. Do you understand?

THE DEFENDANT: (In English) Yes, Your Honor.

THE COURT: Now, the fact that you and your lawyer and the government lawyer agree to that does not bind the Court at this point, and this morning I don't expect to approve that. I expect to wait until I get a presentence investigation report and then evaluate all of the facts and then make a determination at the time of sentencing as to whether this would be approved or not.

[Page 13]

And if that agreement that you should be sentenced to no more than 30 years in prison should not be approved by me at that time, then you will have the right to withdraw your plea of guilty and resume your appeal in the Fifth Circuit Court of Appeals and the rest of it.

* * * *

APPENDIX P

Case 4:14-cr-00245 Document 190 *SEALED* Filed on 07/01/16

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

UNITED STATES OF AMERICA

v.

J.B.R., A MALE JUVENILE,

NO. 4:14-CR-245-3

UNOPPOSED MOTION TO WITHDRAW PLEA

J.B.R., through his attorney, M. Andres Sanchez Ross, files this motion respectfully requesting that the Court allow him to withdraw his plea, withdraw his conditional waiver of juvenile status, withdraw his conditional waiver of indictment, and proceed with his interlocutory appeal in the Fifth Circuit Court of Appeals, No. 15-20262.

Following this Court's transfer order, J.B.R. filed an interlocutory appeal. Prior to briefs being due, previous counsel, with consent of J.B.R., negotiated a Rule 11(c)(1)(C) plea agreement. At that point, the Fifth Circuit remanded proceedings to this Court for the limited purposes of plea proceedings. J.B.R. then conditionally waived his status as a

juvenile, waived his right to an indictment, and pleaded guilty pursuant to the plea agreement.

After due consideration, this Court has rejected the plea agreement. At this point, after considering the advice of his counsel, J.B.R. chooses to withdraw his plea of guilty, withdraw his conditional waiver of his juvenile status, and proceed with his appeal in the Fifth Circuit.

For these reasons, J.B.R. respectfully requests that the Court allow him to withdraw his plea, withdraw his conditional waiver of juvenile status, withdraw his conditional waiver of indictment, and proceed with his interlocutory appeal in the Fifth Circuit Court of Appeals, No. 15-20262.

APPENDIX Q

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

UNITED STATES OF AMERICA

vs.

JOSE LEONEL BONILLA-ROMERO

CASE NO. 4:14-CR-00245-003
Houston, TX
Friday, Jun 8, 2018 10:14 AM – 10:25 AM

* * *

MOTION HEARING

BEFORE THE HONORABLE
CHRISTINA A. BRYAN
UNITED STATES MAGISTRATE JUDGE

April 19, 2019

* * *

[Page 4]

THE COURT: Okay. And, Mr. Donnelly, could you tell us the penalty to be charged?

MR. DONNELLY: Yes, Your Honor. Statutorily, the punishment is death or automatic life imprisonment, a fine of up to $250,000, and up to five years of supervised release and a $100 special assessment. However, because the Supreme Court case law, specifically under Roper and Miller -- because those

[Page 5]

two options are unavailable to an individual who committed the offense prior to his 18th birthday, under rules of statutory construction, the punishment ranges up to life imprisonment.

THE COURT: Do you understand that the punishment (indiscernible [alleged by the Government]) is up to life imprisonment, Mr. Bonilla-Romero?

MR. SANCHEZ: And Your Honor, before he answers that -- I was waiting for the translation to finish, sorry. But before he answers that, the issue about whether a court can give up to life, I think is an issue that we don't feel is settled yet, and it's an issue that we have appealed and will appeal potentially further in the future.

THE COURT: You're reserving your right to appeal the sentence that Mr. Donnelly has just stated is the potential sentence?

MR. SANCHEZ: I guess what I'm saying is –

THE COURT: Whether it applies in this situation?

MR. SANCHEZ: Whether it applies at this moment. Right.

THE COURT: Okay. Understood. And I'm not asking you to agree to it. I just want to make sure that the Defendant understands that that is -- according to the government, that is the potential penalty with which he's faced if he were convicted.

MR. SANCHEZ: And I think you stated it perfectly, that is according to the government, not according to any courts so far.

THE COURT: Okay. Have you been following this private conversation, Mr. Bonilla-Romero? Your counsel has objections as to whether or not that is the

appropriate penalty, or whether that penalty applies. But that is definitely what the government alleges is the penalty, and I assume we'll [sic] be seeking in the case if you are convicted. Do you understand that?

MR. BONILLA-ROMERO: Yes, ma'am.

* * *

APPENDIX R

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HONORABLE EWING WERLEIN, JR., JUDGE
PRESIDING

UNITED STATES OF AMERICA

vs.

J.B.R., A MALE JUVENILE,

4:14-CR-245-3

RE-ARRAIGNMENT HEARING
* * *
April 19, 2019
* * *

[Page 2]

THE COURT: Thank you. Good morning. It's my understanding that the defendant wishes to enter a plea of guilty pursuant to Count 1. This is a one-count Indictment?

* * *

THE COURT: Very well. With that, no plea agreement?

MR. SANCHEZ: That's right. There is no plea agreement. We do have an understanding that

[Page 3]

the defense is not accepting the sentencing scheme articulated. But we're -- it's a legal argument that

we've raised here in this Court, and the Fifth Circuit, Supreme Court. So we were --

THE COURT: Do you have any new authority on that?

MR. SANCHEZ: No, Your Honor.

THE COURT: And the indication implied from the Court of Appeals' opinion would be that severance of the punishment statute under 1111(b) would be correct, is it not?

MR. SANCHEZ: That is not necessarily our reading of the opinion. Our reading of it was that's something to take up at a later time. So we'll take it up at a different time.

THE COURT: They certainly did not rule it out, did they?

MR. SANCHEZ: I don't read the opinion as ruling it out. That's correct, but...

THE COURT: All right. Government ready to go forward?

* * * *

[Page 11]

[THE COURT:] Do you understand what it is you're charged with?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, under Section 1111 of Title 18, which is the federal murder statute, the offense of murder in the first degree, which is charged here, carries a maximum sentence of death and a minimum sentence of life in prison. Because you had not quite attained the age of 18 when the crime was committed and are being tried as an adult, under the United States Constitution, you're not eligible for the death penalty or for a mandatory sentence of life

imprisonment. Therefore, in reading the punishments prescribed for murder, in the murder statute, Section 1111(b), the Court must sever and omit those words in the punishment language. That would be unconstitutional, if applied to you, because of your age at the time of the crime. When the Court does that, the offense -- the offense of murder in the first degree committed at the time

[Page 12]

committed by one who, at the time of the murder, had not attained 18 years of age and is tried as an adult, carries with it the following punishment: The sentence of imprisonment for any term of years or for life; a fine not to exceed $250,000; a term of not more than five years of supervised release; and a special assessment of $100. Has all of that been explained to you?

THE DEFENDANT: Yes, Your Honor.

MR. SANCHEZ: I think it is important at this stage to, again, make clear that I've explained that that is this Court's position, and it's something that we intend to continue to challenge. And he understands that that is something that we will challenge at the next stage. We're not accepting that as the legal punishment range in this case.

THE COURT: Do you have any alternative advice that I should give the defendant under Rule 11?

MR. SANCHEZ: Not at this time, Your Honor.

THE COURT: Now, when I talk about

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supervised release, I'm talking about the condition of supervision that exists when one commits – that condition of supervision that exists when one leaves

prison. There are certain conditions imposed that one not commit another federal, state, or local crime. And if any of those conditions is broken, then the Judge, upon hearing, may set aside your release and order you back to prison for up to five more years in prison, just for breaking the term of supervised release. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You understand, then, what the possible consequences of your plea of guilty may be in terms of what the maximum possible sentence can be?

THE DEFENDANT: Yes, Your Honor.

* * *

THE COURT: You also understand that, under some circumstances, either you or the government would have the right to appeal to a higher court any sentence that I impose?

THE DEFENDANT: Yes, Your Honor.

* * *

APPENDIX S

PRESENTENCE INVESTIGATION REPORT
exceprt

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Pending Charges

Date of Arrest	**Charge**	**Agency**	**Disposition**
10/03/2013	Murder, Walker County, Texas, District Attorney's Office, Docket No. 26512	Walker County, Texas, Texas Department of Public Safety	Pending

This offense is related to the instant federal offense and is described above in The Offense Conduct section of this report. An additional charge for aggravated assault with a deadly weapon was rejected.

APPENDIX T

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

vs.

J.B.R., A MALE JUVENILE,

4:14-CR-245
Houston, TX
10:08 a.m.
September 6, 2019

SENTENCING

BEFORE THE
HONORABLE EWING WERLEIN, JR.,
UNITED STATES DISTRICT JUDGE
* * *
April 19, 2019
* * *

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THE COURT: All right. Now we come to the defendant's objections. Anything -- I gather your submission is complete on this already, Mr. Sanchez-Ross?

MR. SANCHEZ: Yes, Your Honor.

THE COURT: All right. The question here, and the objection raised by the defendant at this point, and the one objection that the defendant has, is that

Paragraph 96, I think -- I said 93, I think, but I think in the revised PSR it would be Paragraph 96, objecting to the statement, "Imprisonment, is any terms of years, up to and including life, under USC Section 1111(b). And the defendant relies on United States versus Evans, 333 United States 483, 1948, arguing that there is no sentence available for the crime of murder committed by one -- under 1111(b), which requires a sentence of either life or death, given the holding of the Supreme Court in Miller versus Alabama in 2012. Is that a fair statement?

MR. SANCHEZ: Yes, Your Honor.

THE COURT: 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 [Page 17]

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. And in this case she was dealing with a similar section, 18, United States Code, 1859, which proscribes violent crimes in aid of racketeering activity.

The defendant there who was 17, like this defendant, about three months short of turning 18, as

I recall, committed murder, like this be defendant did. Three-fourths of his way through his 18th year, but still three months shy of completing it. And he was -- he was transferred for adult, or rather, for prosecution as an adult. And, so, Judge Caproni dealt with the question of the statute there which provides in Section 1959(a)(1), that whoever commits murder under a, attempts to, for murder by death or life imprisonment, shall be punished, one for murder by death or life in prison. Virtually the same as Section 1111(b).

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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. And the analysis begins with examining, of course, in our case, and in hers as well, in Miller, because after Miller, one who is tried as an adult can still get life because the Supreme Court narrowed considerably the opportunity for that, it is still permissible but only after considering the mitigating factors of youth. And, so, the question arises, then, when it is applied, the statute is applied to one who is a minor, that is three months short of completing his 18th year, can the -- and where the government has not sought life imprisonment or undertaken to show that this would be the right answer for this particular defendant. The question is can the constitutional, unconstitutional part of the statute, 1111(b), be severed from the statute without invalidating the statute as a whole. The question is whether there is any valid portion of Section 1111(a) is applied to juveniles that would function independently, and in a manner consistent with the intent of Congress. Judge

Caproni, I think, wisely as I made reference to in my previous order of June 30th and positing a different possibility, she makes reference to the United States versus Booker once again, articulating the three-part standard to be used to determine whether unconstitutional provisions may be severed from a statute

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without invaliding the statute as a whole. The touchstone of Booker, as the Supreme Court later held, is legislative intent. And to determine what parts of a statute can be raised, the Court must consider what portions of the statute are: One, constitutionally valid; two, capable of functioning independently; and, three, consistent with Congress's basic objectives in enacting the statute. Most often, Judge Caproni observes, that requires the Court to consider whether the Legislature -- and here she's quoting from the Supreme Court decision in "Ayoti" to consider whether the Legislature would have preferred what is left of the statute, or no statute at all. The Court should be careful not to invalidate principle is of Booker, not to invalidate more of a statute than is necessary, because holding legislation unconstitutional frustrates the intent of the elected representatives of the people. She cites also a District of Columbia Circuit in which states in connection with another case, that the analysis is whether Congress would have preferred the law with the offending provision severed over no lat at all. The law -- and, two, the law with the offending provision severed would remain fully operative as the law. So the first step is to consider what

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portions or applications of Section 1111(b) are constitutional, mindful of the Supreme Court's directive that the Court should invalidate as little of the statute as possible.

The Court in Miller makes clear that the Court should invalidate Section 1111(b) to the extent that it provides for a mandatory life sentence for the defendant in this case. But Miller also stands for the proposition that the Court has sentencing discretion to account for the juvenile's lessened culpability and potential rehabilitation, and does not rule out a life sentence in all circumstances. It requires that the Court take into account these mitigating circumstances or mitigating qualities of youth. Yet it recognizes that if there are some cases where the crime reflects irreparable corruption, a life sentence may be appropriate and constitutional. This reading of the Supreme Court's decision in Miller is -- the Supreme Court's Miller decision, I think that Judge Caproni made, with respect to violent crimes in aid of racketeering activities is exactly the same that we're dealing with here in Section 1111(b).

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The fact that here Miller does not require the Court by its own expressions of the opinion itself to invalidate 1111(a) and all applications to juveniles. They may be sentenced to that maximum penalty of life under certain circumstances, as long as the Court finds that the defendant is irredeemable, or so culpable as to warrant a life sentence. Now, here, like in the violent crime in aid of racketeering statute, the Congress set the same mandatory minimum and maximum sentence, but the fact they did so does not mean that the Court has to invalidate both. Thus, a juvenile who commits a sufficiently heinous act, has a

sufficiently severe history of criminal conduct may be constitutionally sentenced, as they say under Section 1111(a), as enacted by Congress, so long as the Court is not bound by Section 1111(b)'s mandatory minimum. So we have a situation where the maximum sentence for a crime committed here is life, but there is no valid, constitutionally valid minimum term set. So the question arises, then: How, what kind of precedence do we have for the Court invalidates the part of the statute? And Judge Caproni is very helpful in her research on this, pointing out a couple of cases where the Supreme Court uses a surgical approach, as she calls it, to narrow, to tailor narrowly the as applied challenges -- which we have here -- to the statute in severability cases.

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So she cites United States versus Gray, where the Supreme Court struck down a federal statute that band assembly on the Supreme Court's grounds only as it applied to the sidewalks outside the court's building, even though the statute did not back any distinction between the ground's proper and the sidewalks. And, again, in the Garner case, the Supreme Court invalidated a Tennessee statute that authorized all of the necessary maintenance to effect an arrest, but only to the extent that it authorized deadly force, and only to the extent that deadly force was authorized against nonviolent offenders. Well, the Court finds this analysis that Caproni made very persuasive, and finds and concludes that Section 1111(b) as applied to this defendant, in looking at that statute, it is only the mandatory minimum portion of Section 1111(b) that must be invalidated. Now, that being the case, we have a statute with the maximum sentence. We do not have any mandatory minimum

statute. This is what is referred to as the gap that is left open. A gap in the statute whereby the maximum penalty is authorized, there's no provision for a less than life sentence. At this point, in analyzing the violent crimes in aid of racketeering activity, Judge Caproni

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again pointed out, which I think is well taken, that Booker requires the Court to assume that any sentencing regime enacted by Congress would provide for some degree of judicial discretion if required by the Constitution. So, here, the task is to consider where the statute as constitutionally construed, will serve Congress's basic purpose and is consistent with, not necessarily perfectly reflective of Congress's intent, had it legislated this statute 1111(b) with the holding of Miller in mind. Judge Caproni points out that tradition and historical practice suggests that the absence of a more specific guidance authorization, a maximum penalty permits the Court to sentence a defendant to any term of years up to that maximum penalty. It's a sensible rule of construction. It's one that has applied in many instances in the converse of this situation where there is a minimum set by Congress, but no maximum. Thus, for example, in the bank robbery sentence where there's a statutory minimum of ten years, the courts have held that in the absence of a specified maximum, it means simply that the maximum is life in prison. And one case so holding United States versus Turner, 389 F. 3d 111, where the Court writes that -- this is Fourth Circuit -- "That by declining to limit the

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penalty, Congress gives maximum discretion to the sentencing court. And when Congress places sentencing at the discretion of the court, courts have interpreted such a statute as intending to authorize a maximum of life in prison." The Fifth Circuit has held the same thing in Section 924(c)(a)(1)(2) in application of that statute, where for the use of carrying and using a firearm in commission of a violent crime, there's a sentence of -- prescribed, required, minimum of seven years. And the fact that they have that term of not less than seven years has led the Court to find that the statute is applicable, that the statute implies that the only term of imprisonment mandated was the minimum, or floor, not the floor and ceiling as the prior version of the statute provided by application Congress left open a ceiling sentences. And the Court holds that in this kind of a case, they construe the statute to authorize up to life imprisonment. That's United States versus Sias, 227 F.3d 244. The same thing has been held in some cases dealing with where there's minimum -- mandatory minimum with respect to sentencing guidelines imposed by statute also, kinds of certain type of case. And the courts have

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construed that means up to life on supervised release. Well, here is, as Judge Caproni found in with respect to violent crimes act, here's the natural corollary of that. Now, with respect to Section 1111(b), the language he uses in looking at it is equally applicable here. The statute 1111(b) has a maximum but no minimum, and the same default rule of construction applies.

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. Now, the defendant -- and she uses some rhetoric here that isn't a bad way to approach it also, saying it would be to seriously lose sight of the forest for the trees, to argue that Congress would prefer to invalidate -- in this instance Section 1111(b) entirely -- as applied to juveniles who commit such murders, than to allow the sentencing court discretion to sentence such defendants to a term less than life. Now, the defendant has cited the Evans case. The Evans case really does not apply to the circumstance. In the Evans case, Congress had proscribed the Supreme Court decision, by the Supreme Court cited at

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333 U.S Reports, but in any event, 1948 U.S. Supreme Court decision, where there were two crimes proscribed by the statute of the sentence. There was a sentence prescribed for only one of those crimes. And when the defendant was charged with the other crime, the Court found there was no sentence that Congress had authorized in that instance. And, therefore, the Court could not write in a sentence, is quite different than the situation that we have applied here.

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. And that's based upon reason and tradition in the authorities that support that principle. Accordingly, the defendant's objection is denied.