No. 20-1708

In the Supreme Court of the United States

JOSE LEONEL BONILLA-ROMERO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment and the separation-of-powers doctrine prohibited the district court from sentencing petitioner to a term of years on a conviction for a first-degree murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111, that petitioner committed shortly before turning 18.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. *Bonilla-Romero*, No. 14-cr-245 (Sept. 10, 2019)

United States Court of Appeals (5th Cir.):

Sealed Appellee 1 v. *Sealed Juvenile 1*, No. 15-20262 (Apr. 24, 2018)

United States v. *Bonilla-Romero*, No. 19-20643 (Dec. 30, 2020)

Supreme Court of the United States:

J. B. R. v. *United States*, No. 18-192 (Feb. 25, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-15a) is reported at 984 F.3d 414. A prior opinion of the court of appeals is not published in the Federal Reporter but is available at 2018 WL 11335611.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2020. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of this Court's order was to extend the deadline for filing a petition for a writ of certiorari in this case to May 29, 2021 (Saturday), and the petition was filed on June 1, 2021 (Tuesday following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following proceedings in the United States District Court for the Southern District of Texas under the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. 5031 *et seq.*, the district court ordered petitioner's transfer to adult criminal proceedings for trial on a charge of first-degree murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111. Pet. App. 17a-30a. The court of appeals affirmed, 2018 WL 11335611, and this Court denied a petition for a writ of certiorari, 139 S. Ct. 1258. Petitioner then pleaded guilty to first-degree murder. C.A. ROA 172. The district court accepted petitioner's guilty plea and sentenced him to 460 months of imprisonment, to be followed by five years of supervised release. *Id.* at 90-92, 172-173. The court of appeals affirmed. Pet. App. 4a-15a.

1. Petitioner was a member of MS-13, a violent international criminal gang. See Pet. App. 20a-21a. In September 2013, when petitioner was 17 years and nine months old, he and two other MS-13 members received orders from gang leadership to kill Josael Guevara, who was 16 years old. *Id.* at 17a, 21a-22a; see C.A. ROA 166-171. Petitioner and his accomplices drove Guevara to an "execution site" in the Sam Houston National Forest in Texas, where they murdered him using a machete and a baseball bat. Pet. App. 21a, 38a; see C.A. ROA 166-171. Guevara's "head was almost severed and his knees and ankles were cut almost through the joints." Pet. App. 21a. Petitioner later admitted to participating in the killing and to striking Guevara with the machete and the bat. C.A. ROA 171-172.

In 2014, the government filed a juvenile information alleging that petitioner "willfully, deliberately, maliciously, and with premeditation and malice aforethought" killed Guevara and that petitioner's conduct, had he been over the age of 18 at the time, would have qualified as murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111. C.A. ROA 593; see 18 U.S.C. 5032. Section 1111 defines murder as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. 1111(a). It provides that certain types of murder—including "murder perpetrated by * * * willful, deliberate, malicious, and premeditated killing"—qualify as first-degree murder, *ibid.*, punishable "by death or by imprisonment for life," 18 U.S.C. 1111(b). "Any other murder" qualifies as second-degree murder, 18 U.S.C. 1111(a), punishable by imprisonment "for any term of years or for life," 18 U.S.C. 1111(b).

The government filed a motion to transfer petitioner to adult proceedings pursuant to the FJDA, which provides that a juvenile who commits certain violent offenses, including murder in violation of Section 1111, may be prosecuted as an adult in the "interest of justice." 18 U.S.C. 5032; see Pet. App. 40a-42a; C.A. ROA 732-741. Petitioner opposed the government's motion on the theory that a transfer would subject him to cruel and unusual punishment in violation of the Eighth Amendment. C.A. ROA 743-744. Petitioner noted that neither of the statutorily specified punishments for first-degree murder—death or mandatory life imprisonment—could constitutionally be imposed on him for that offense. *Ibid.*; see *Miller* v. *Alabama*, 567 U.S. 460, 465 (2012) (holding that Eighth Amendment forbids imposing mandatory term of life imprisonment without parole

for an offense committed by a person under the age of 18); *Roper* v. *Simmons*, 543 U.S. 551, 578 (2005) (same for death penalty). Petitioner contended that, "because transfer would necessarily subject [him] to unconstitutionally cruel and unusual punishment," his transfer to adult proceedings would "not [be] in the interest of justice." C.A. ROA 744.

The district court granted the government's transfer motion. Pet. App. 17a-30a. The court determined that, in light of "the totality of the statutory factors pertaining to [petitioner] and the horrific and premeditated nature of the crime alleged," the "interest of justice" favored trying petitioner as an adult. *Id.* at 26a; see *id.* at 20a-26a. The court acknowledged that, if petitioner were ultimately convicted of first-degree murder, he could not receive either of the penalties directly specified in the statute for that offense. *Id.* at 26a-27a. It explained, however, that the appropriate solution to that problem would be to sentence petitioner within the statutory range for the lesser-included offense of second-degree murder—imprisonment for "any term of years or for life"—which would pose no constitutional concerns. *Id.* at 29a (quoting 18 U.S.C. 1111(b)); see *id.* at 27a-29a (citing decisions of "multiple federal courts" resentencing defendants convicted of committing murder before the age of 18 to terms of imprisonment less than life following *Miller*, notwithstanding that the defendants' crimes carried mandatory life sentences).

2. Petitioner filed an interlocutory appeal challenging the grant of the government's transfer motion. C.A. ROA 770. While petitioner's appeal was pending, he agreed to plead guilty to first-degree murder as an adult. See *id.* at 335-348, 816-817. At the parties' request, the court of appeals stayed petitioner's appeal

and remanded to the district court to allow petitioner to enter his plea. Pet. App. 31a.

a. Petitioner entered into a plea agreement in which he agreed to plead guilty to first-degree murder and to withdraw his pending appeal. C.A. ROA 335-336. Petitioner acknowledged in the plea agreement that, because the Eighth Amendment would preclude the district court from imposing a sentence of death or mandatory life imprisonment in his case, the appropriate sentencing procedure would be for the court to sever "the 'death' or mandatory 'for life' language in the first-degree murder penalty provision of Section 1111(b)," which "would permit the court to exercise its discretion to sentence [petitioner] to a term of years up to and including life." *Id.* at 336. Petitioner and the government further agreed, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), that the district court would be bound by "a sentence of no more than 30 years" of imprisonment if it accepted the plea agreement. C.A. ROA 336.

The district court accepted petitioner's guilty plea. C.A. ROA 306-307. During the plea colloquy, the court explained to petitioner that, as a constitutional matter, he could not be subject to a death sentence or a mandatory life sentence due to his age at the time of the offense, but that he could receive a sentence of any "term of years up to and including life in prison." *Id.* at 287; see *id.* at 286, 295-296. Petitioner repeatedly confirmed that he understood the sentencing range that would apply to his offense. *Id.* at 287, 296. The court further explained that it would not approve the parties' agreed-upon sentence of 30 years of imprisonment until it had reviewed the presentence report and "evaluate[d] all of the facts" relevant to sentencing, and that if the

court decided not to accept that sentence, petitioner would be permitted to "withdraw [his] plea of guilty and resume [his] appeal." *Id.* at 287-288.

The district court ultimately rejected a 30-year sentence. D. Ct. Doc. 202, at 10 (Oct. 26, 2016). The court observed that such a sentence would be substantially lower than the 420 months of imprisonment given to petitioner's adult co-defendants, one of whom was only a few months older than petitioner, even though petitioner was at "equal fault in the commission of the murder." *Id.* at 6; see *id.* at 6-9.

b. In connection with its decision to reject the agreed-upon sentence, the district court issued a supplemental order regarding petitioner's transfer to adult proceedings. C.A. ROA 37-43. The court notified the parties that, if petitioner were ultimately convicted of first-degree murder, it would "excise[]" the sentencing provisions for first-degree murder that were unconstitutional as applied to petitioner and would impose a sentence within the range specified for second-degree murder. *Id.* at 40; see *id.* at 40-41.

The district court observed that first- and second-degree murder are simply "two categories of the same crime," C.A. ROA 39 n.3 (citation omitted), and explained that "because the enhanced penalty for those who commit premeditated murder * * * is unconstitutional as applied to juveniles tried as adults, the punishment for such juveniles is limited to what is authorized for 'any other murder,'" *id.* at 41 (quoting 18 U.S.C. 1111(b)) (brackets and emphasis omitted). The court further observed that the sentencing range for second-degree murder "is constitutionally valid, capable of functioning independently" of the specified sentence for

first-degree murder, "and consistent with Congress's obvious objectives of punishing murderers." *Ibid.*

The district court acknowledged that the Fourth Circuit had concluded in *United States* v. *Under Seal*, 819 F.3d 715 (2016), that a juvenile's transfer to adult proceedings was unconstitutional where the charged offense—murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)—required at least a life sentence. C.A. ROA 38 (citing *Under Seal*, 819 F.3d at 724). The court explained, however, that the circumstances of the Fourth Circuit case were materially different because—unlike Section 1111—Section 1959(a) "provide[d] no alternative punishment for murder other than death or life imprisonment." *Id.* at 39; see *id.* at 41.

In light of the district court's decision not to accept the agreed-upon sentence, petitioner moved to withdraw his guilty plea and to proceed with his interlocutory appeal. Pet. App. 53a-54a. The court granted petitioner's motion. *Id.* at 32a.

c. The court of appeals affirmed the grant of the government's transfer motion. 2018 WL 11335611, at *1-*3. The court determined that petitioner's contention that he would be subject to an unconstitutional sentence if convicted of first-degree murder was not ripe for review. *Id.* at *2. The court explained that petitioner's concerns "pertain[ed] to the sentencing phase of a case that has yet to go to trial" and that the possibility of "an unconstitutional sentence" was "too remote" in light of the many "possible outcomes"—including the possibility of a plea to a lesser-included offense—that would obviate petitioner's concerns. *Ibid.*

This Court denied a petition for a writ of certiorari. 139 S. Ct. 1258.

3. Following this Court's denial of his certiorari petition, petitioner pleaded guilty, without a plea agreement, to first-degree murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111. C.A. ROA 44-45, 150, 172. During the plea colloquy, the district court reiterated that first-degree murder ordinarily "carries a maximum sentence of death and a minimum sentence of life in prison," but that those punishments "would be unconstitutional, if applied to [petitioner], because of [his] age at the time of the crime." Pet. App. 59a-60a. The court again explained that it would "sever" the "death" and "mandatory sentence of life imprisonment" language from Section 1111(b) and that petitioner would therefore face a "sentence of imprisonment for any term of years or for life." *Ibid.* Petitioner stated that, although he "intend[ed] to continue to challenge" whether that sentencing range was correct, he understood the penalties as the court had described them. *Id.* at 60a.

The district court accepted petitioner's guilty plea, C.A. ROA 90, 172-173, and sentenced petitioner to 460 months of imprisonment, *id.* at 91. At sentencing, the court again rejected petitioner's contention that "no sentence" is authorized under Section 1111(b) for the crime of first-degree murder committed by a juvenile. Pet. App. 64a. The court observed that, in its supplemental order regarding petitioner's transfer to adult proceedings, it had "posited one way" of severing the sentencing provisions for first-degree murder that were unconstitutional as applied to petitioner. *Ibid.* The court then identified "another way" of approaching the issue of severability, *ibid.*, which was to hold Section 1111(b) "invalid as to juveniles to the extent it provides

for a mandatory minimum sentence of life imprisonment," but to leave life imprisonment in place as the "maximum penalty authorized by Congress," *id.* at 71a. The court explained that the statute would then specify "a maximum [penalty] but no minimum," *id.* at 70a, and thus "provide[] the [c]ourt with discretion to sentence [petitioner] to any term of years up to the maximum," *id.* at 72a.

4. The court of appeals affirmed. Pet. App. 4a-15a. The court rejected petitioner's contention 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." *Id.* at 9a. The court of appeals explained 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.'" *Id.* at 9a-10a (quoting *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2209 (2020)). The court found "[n]othing" to "suggest[] that Congress would not have enacted a murder statute covering juveniles if it had foreseen the rulings in" *Miller* and *Roper*. *Id.* at 10a. The court thus "conclude[d] that it is appropriate to sever as necessary." *Ibid.*

The court of appeals observed that Section 1111(b) "provides a statutory maximum of death for first-degree murder and a statutory minimum of life imprisonment without parole." Pet. App. 10a-11a. The court explained that under *Roper*, "the death penalty must be discarded, leaving life imprisonment as both the statutory maximum and minimum," and that because *Miller* "prohibits mandatory life without parole sentences for juveniles, all that remains of the punishment provision

is a statutory maximum of life imprisonment." *Id.* at 11a. The court further explained that, "[w]here Congress only provides a statutory maximum, the district court has discretion to impose no penalty or any penalty up to that maximum." *Ibid.* The court thus determined that "excising the mandatory minimum nature of the life sentence is all that is needed to satisfy the constitutional issue for juveniles under § 1111." *Ibid.*

The court of appeals also recognized that "[a]nother 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." Pet. App. 11a; see *id.* at 11a n.2. The court observed that "[e]ither approach yields the result reached by the district court: that [petitioner] shall be punished by imprisonment 'for any term of years or for life.'" *Id.* at 11a-12a. And the court of appeals rejected petitioner's contention that it "violates the separation-of-powers doctrine" to "appl[y] the penalty Congress intended for second-degree murder to first-degree murder." *Id.* at 13a-14a. The court emphasized that petitioner's contrary approach—*i.e.*, "deleting any penalty for juvenile first-degree murderers"—"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." *Id.* at 14a.

The court of appeals found petitioner's reliance on *United States* v. *Evans*, 333 U.S. 483 (1948), and *Under Seal* misplaced. Pet. App. 12a-13a. The court observed that *Evans* involved a statute that "criminalized both smuggling and harboring aliens," but "provided a pun-

ishment only for smuggling." *Id.* at 12a. The court explained that no similar ambiguity exists in Section 1111, which "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 premeditated, then an increased penalty applies." *Ibid.* The court further explained that the Fourth Circuit's decision in *Under Seal* was likewise inapposite because the "racketeering statute" in *Under Seal* provided no punishment for murder other than "life imprisonment or death," whereas the statute in this case sets forth penalties for both first-degree murder and second-degree murder, and petitioner's conduct necessarily satisfied the elements of the latter. *Id.* at 13a.

The court of appeals also rejected petitioner's contention that the district court "fail[ed] to specify his sentencing range at his plea hearing." Pet. App. 14a. The court of appeals explained that, "[u]nder 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." *Ibid.* The court of appeals observed that, at petitioner's plea hearing, the district court "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, [petitioner] would be eligible for a 'sentence of imprisonment for any term of years or for life.'" *Ibid.* The court of appeals therefore determined that the district court "properly notified [petitioner] of the consequences of a guilty plea" and that his "plea was knowing and voluntary." *Id.* at 14a-15a.

ARGUMENT

Petitioner contends (Pet. 2, 16-22) that the Due Process Clause and the separation-of-powers doctrine prohibited the district court from sentencing him to a term of years on his conviction for first-degree murder under Section 1111. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. The federal murder statute, 18 U.S.C. 1111, defines murder as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. 1111(a). Certain murders, including those involving "willful, deliberate, malicious, and premeditated killing," are classified as first-degree murder. *Ibid.* "Any other murder" is classified as second-degree murder. *Ibid.* First-degree murder is punishable "by death or by imprisonment for life," while second-degree murder is punishable by imprisonment "for any term of years or for life." 18 U.S.C. 1111(b). A sentence of imprisonment for life under federal law means life without the possibility of parole because federal law precludes parole or early release from a term of life imprisonment. See 18 U.S.C. 3624(a)-(b).

The Eighth Amendment prohibits imposing a death sentence or a mandatory term of life imprisonment without parole on an offender who commits homicide before the age of 18. See *Miller* v. *Alabama*, 567 U.S. 460, 465 (2012) (mandatory sentence of life imprisonment); *Roper* v. *Simmons*, 543 U.S. 551, 578 (2005) (death sentence). The Eighth Amendment therefore precluded the district court from sentencing petitioner to either of the punishments—death or a mandatory term of life imprisonment—directly specified in Section 1111(b) for first-degree murder.

"Generally speaking, when confronting a constitutional flaw in a statute," this Court "tr[ies] to limit the solution to the problem." *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006). The "touchstone for any decision about remedy is legislative intent," and this Court asks whether the legislature would "have preferred what is left of its statute to no statute at all." *Id.* at 330. In conducting that inquiry, this Court applies "a strong presumption of severability." *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350 (2020) (*AAPC*) (plurality opinion). This Court therefore "prefer[s] * * * to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." *Ayotte*, 546 U.S. at 328-329 (citation omitted). Accordingly, this Court will "retain those portions of the [statute] that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." *United States* v. *Booker*, 543 U.S. 220, 258-259 (2005) (citations and internal quotation marks omitted).

The lower courts correctly applied those principles in this case. Pet. App. 9a-14a, 64a-71a; C.A. ROA 40-41. As the court of appeals explained, "[n]othing suggests that Congress would not have enacted a murder statute covering juveniles if it had foreseen the rulings in" *Miller* and *Roper*. Pet. App. 10a. And nothing suggests that Congress would have intended juveniles convicted of first-degree murder to be subject to no punishment at all if sentencing them to the death penalty or mandatory life imprisonment were unconstitutional. To the contrary, "deleting any penalty for first-degree mur-

derers * * * 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." *Id.* at 14a. The lower courts therefore correctly determined that "it is appropriate to sever" Section 1111(b)'s unconstitutional applications to petitioner, and they correctly identified two ways of doing so. *Id.* at 10a; see *id.* at 10a-11a.

One way is to "strike § 1111(b)'s authorization of the death penalty for juveniles" and eliminate life imprisonment as the "mandatory minimum." Pet. App. 10a. Doing so would leave life imprisonment as only the statutory maximum, and "[w]here Congress only provides a statutory maximum, the district court has discretion to impose no penalty or any penalty up to that maximum." *Id.* at 11a; see *id.* at 70a-71a. Another way of severing Section 1111(b)'s unconstitutional applications is to apply "the punishment provision for second-degree murder" to petitioner, who necessarily pleaded guilty to "all of the elements of second-degree murder" in pleading guilty to first-degree murder. *Ibid.*; see C.A. ROA 40. Indeed, petitioner does not dispute that second-degree murder is a lesser-included offense of the first-degree murder to which he pleaded guilty. See Pet. App. 11a n.2. As the court of appeals explained, either way of severing Section 1111(b)'s unconstitutional applications yields the result "that [petitioner] shall be punished by imprisonment 'for any term of years or for life.'" *Id.* at 11a-12a.

2. Contrary to petitioner's contention (Pet. 20-22), the lower courts' application of severability principles did not violate the separation-of-powers doctrine. As this Court has explained, the application of severability principles avoids "nullify[ing] more of a legislature's

work than necessary." *Ayotte*, 546 U.S. at 329. And the presumption of severability "reflects the confined role of the Judiciary in our system of separated powers—stated otherwise, the presumption manifests the Judiciary's respect for Congress's legislative role by keeping courts from unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional." *AAPC*, 140 S. Ct. at 2351 (plurality opinion). The doctrine of separation of powers therefore did not preclude the lower courts' application of severability principles here.

Nor does anything in this Court's decision in *Miller* suggest that a court, upon determining that the authorized sentences for an offense would violate the Eighth Amendment, should declare the statute "'unenforceable,'" Pet. 24 (citation omitted), and impose *no* sentence for that offense, rather than applying ordinary principles of severability. Indeed, both petitioners in *Miller* were resentenced by state courts that severed unconstitutional penalties from the statutes of conviction. See *Miller* v. *State*, 148 So. 3d 78, 78 (Ala. Crim. App. 2013) (citing *Ex parte Henderson*, 144 So. 3d 1262, 1284 (Ala. 2013)); *Jackson* v. *Norris*, 426 S.W.3d 906, 910-911 (Ark. 2013). And as the district court noted, numerous federal courts have likewise responded to *Miller* by resentencing juvenile homicide offenders to terms of imprisonment less than life notwithstanding the express minimum statutory term of life imprisonment for their offenses. Pet. App. 27a-29a (citing cases); see, *e.g.*, *United States* v. *Grant*, 9 F.4th 186, 197-198 (3d Cir. 2021) (en banc) (65-year sentence); *United States* v. *Barraza*, 982 F.3d 1106, 1116-1117 (8th Cir. 2020) (50-year sentence).

Petitioner's contention (Pet. 16-19) that his guilty plea is invalid due to lack of notice about the possible

penalties is likewise incorrect. The Due Process Clause requires that "'statutes fixing sentences must specify the range of available sentences with sufficient clarity'" that "ordinary people" have fair notice of the penalties that may result from criminal conduct. *Beckles* v. *United States*, 137 S. Ct. 886, 892 (2017) (citations and internal quotation marks omitted). Petitioner does not dispute that Section 1111 adequately describes the punishments for first- and second-degree murder or that his guilty plea encompasses the elements of both offenses. Pet. App. 11a & n.2. And even if petitioner were confused about those penalties, it would not affect the validity of his plea. See *Brady* v. *United States*, 397 U.S. 742, 756-758 (1970) (holding that a plea can be intelligently made even when defendant's understanding of the possible penalties (there, a belief that trial could result in the death penalty) turns out to be mistaken).

In any event, the record demonstrates that petitioner was well aware of the sentencing range for his first-degree murder conviction. Pet. App. 14a-15a. As explained above, petitioner previously entered into a plea agreement in which he agreed to a 30-year sentence and acknowledged that "[s]everance of the 'death' or mandatory 'for life' language in the first-degree murder penalty provision of Section 1111(b) would permit the court to exercise its discretion to sentence [petitioner] to a term of years up to and including life." C.A. ROA 336; see *ibid.* (acknowledging that "unconstitutional portions of a statute may be severed or excised so that the remaining constitutional portions may be applied"). Petitioner further confirmed during his plea colloquy that he understood that the district court "would have discretion" to sentence him to "a term of years up to and including life in prison." *Id.* at 287.

Although the district court ultimately rejected the parties' agreed-upon sentence as too lenient—and petitioner withdrew his plea as a result—the court explained that, if petitioner were convicted of first-degree murder in future proceedings, he would face a sentencing range of "any term of years" up to "life." C.A. ROA 41 (citation omitted). After petitioner decided again to plead guilty to first-degree murder, *id.* at 172, the district court held another plea hearing at which it "made clear that [petitioner's] offense typically resulted in a penalty of mandatory life imprisonment or death but that, because of his youth at the time of the offense, [petitioner] would be eligible for a 'sentence of imprisonment for any term of years or for life.'" Pet. App. 14a; see *id.* at 60a. Thus, as the court of appeals correctly found, the record "demonstrates that the [district] court properly notified [petitioner] of the consequences of a guilty plea" and that his "plea was knowing and voluntary." *Id.* at 14a-15a.

Petitioner also cannot plausibly assert that he lacked information concerning the possible sentence he faced at the time he committed his offense. Even if petitioner made his pre-*Miller* decision about whether to murder Guevara believing that the statutory punishments for federal first-degree murder would be unconstitutional as applied to him, Section 1111 placed him on notice that his offense would at least qualify as second-degree murder, punishable by imprisonment for "any term of years or for life," 18 U.S.C. 1111(b). He could not have believed that he could not receive any term of imprisonment as an adult for admitting to a murder that also satisfies the elements of first-degree murder, as his present argument appears to suppose.

3. Petitioner does not identify any disagreement in the courts of appeals involving the application of Section 1111(b) to juvenile offenders. Rather, petitioner principally contends (Pet. 23-27) that the court of appeals' decision in this case conflicts with two decisions involving other statutes—this Court's decision in *United States* v. *Evans*, 333 U.S. 483 (1948), and the Fourth Circuit's decision in *United States* v. *Under Seal*, 819 F.3d 715 (2016). That contention is incorrect.

a. *Evans* concerned a statute that listed two offenses—smuggling unauthorized aliens into the United States and concealing or harboring them after they had arrived—but imposed a penalty only for the smuggling offense. 333 U.S. at 483-484. This Court noted that the concealing or harboring provision was vague and created "very real doubt and ambiguity concerning the scope of the acts forbidden." *Id.* at 489. That ambiguity, the Court explained, "raise[d] equal or greater doubt that Congress meant to encompass" both offenses "within the [same] penal provisions." *Ibid.*; see *id.* at 490 (observing that the two offenses "might require, in any sound legislative judgment, very different penalties"). Under those circumstances, the Court determined that applying the smuggling penalty to the concealing or harboring offense would be "outside the bounds of judicial interpretation." *Id.* at 495.

The application of Section 1111 in this case presents none of the "unusual" and "difficult" interpretive problems that plagued the statute in *Evans*. 333 U.S. at 484. As the court of appeals explained, Section 1111 "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 premeditated, then an increased penalty applies." Pet. App. 12a. Petitioner does not contend that the substantive murder offense described in Section 1111 is vague or ambiguous.* And the unconstitutionality of the increased punishments for first-degree murder as applied to him does not mean that he is not subject to any term of imprisonment at all. As this Court explained in *Evans*, "where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose." 333 U.S. at 486. Here, Congress has expressed a "clear intent to criminalize 'the unlawful killing of a human being with malice aforethought'" and has made clear that such an offense should be punishable by at least a term of years. Pet. App. 12a (quoting 18 U.S.C. 1111(a)). Petitioner's reliance on *Evans* is therefore misplaced.

b. The Fourth Circuit's decision in *Under Seal* is likewise inapposite. See Pet. App. 13a. The juvenile defendant in that case was charged with murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1). *Under Seal*, 819 F.3d at 717. That statute provides that any murder committed in aid of a racketeering enterprise

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* The Seventh Circuit's decision in *Whatley* v. *Zatecky*, 833 F.3d 762 (2016) (cited at Pet. 19), is inapposite for that same reason. *Whatley* involved a challenge to a state law that imposed an enhanced sentence for possessing drugs near a "youth program center." 833 F.3d at 765. The Seventh Circuit determined, on federal habeas review, that the term "youth program center" was unconstitutionally vague and that a sentence based on that provision should be vacated. *Id.* at 777-778, 784. Petitioner does not assert any similar constitutional infirmity in this case.

shall be punished "by death or life imprisonment." 18 U.S.C. 1959(a)(1). The Fourth Circuit concluded that transferring a juvenile to adult proceedings to face trial for that offense would be impermissible. *Under Seal*, 819 F.3d at 720. The court noted that "Congress has authorized two penalties—and only two penalties—for the crime of murder in aid of racketeering," neither of which could be imposed consistent with the Eight Amendment. *Ibid.* The court explained that, because no other penalty applied to murder under Section 1959(a)(1), it could not sever the unconstitutional penalty provision without creating a "vacuum" that would render the statute's substantive provision unenforceable. *Id.* at 723.

The Fourth Circuit declined to import the statute's lesser penalties for kidnapping offenses to the murder provision, explaining that "combin[ing] the penalty provisions for two distinct criminal acts" would "go[] beyond the permissible boundaries of severance and tread[] into the legislative role." *Under Seal*, 819 F.3d at 723-724. The Fourth Circuit emphasized, however, that its ruling would have been different if "an acceptable punishment that Congress had specifically authorized" for murder "remained intact." *Id.* at 724. In that circumstance, the Fourth Circuit recognized, "excising the unconstitutional * * * penalty provision and enforcing the remainder would have been an appropriate judicial action." *Ibid.*

This case falls within the circumstance that the Fourth Circuit specified. Here, after the lower courts excised Section 1111(b)'s unconstitutional applications to petitioner, "an acceptable punishment that Congress had specifically authorized" for murder "remained intact," *Under Seal*, 819 F.3d at 724: "imprisonment 'for

any term of years or for life,'" Pet. App. 12a. Thus, excising the unconstitutional applications and "enforcing the remainder" was "appropriate judicial action." *Under Seal*, 819 F.3d at 724. Accordingly, *Under Seal* provides no sound reason to believe that the Fourth Circuit would have reached a different outcome in this case.

Contrary to petitioner's contention (Pet. 27), the Fifth Circuit has not previously "acknowledged" a circuit conflict on the question presented. In *Jackson* v. *Vannoy*, 981 F.3d 408 (2020), the Fifth Circuit held on federal habeas review that a Louisiana prisoner's challenge to his life sentence under *Miller* was moot in light of a state statute that made him eligible for parole. *Id.* at 416-417. The Fifth Circuit stated that the issue of whether a court may remedy a *Miller* violation by imposing a sentence not specifically authorized by the statute of conviction "seems at least debatable" and "may deserve a thorough review when the appropriate time comes." *Id.* at 415 (citation omitted). The Fifth Circuit also observed that the Fourth Circuit's decision in *Under Seal* resolved that question in "the negative" in the context of the federal murder-in-aid-of-racketeering statute. *Id.* at 414-415. The Fifth Circuit, however, did not address the issue further in *Jackson*. And it was not until this case that the Fifth Circuit addressed the application of Section 1111(b) to juvenile offenders in light of *Miller*, finding *Under Seal* inapposite. See Pet. App. 13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[†] The Acting Solicitor General is recused in this case.