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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSUE PORTILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the Second Circuit Court of Appeals

REDACTED APPENDIX TO PETITION FOR A WRIT OF CERTIOTRARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2020

Submitted: August 17, 2020

Decided: November 24, 2020

Docket No. 19-2158

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOSUE PORTILLO,

DEFENDANT - APPELLANT.

Before: NEWMAN, POOLER, *Circuit Judges*.¹

Appeal from a judgment of the District Court for the Eastern District of New York (Joseph F. Bianco, then-District Judge) imposing a sentence of fifty-five years on a juvenile fifteen years of age at the time of an offense involving four murders.

Judgment affirmed.

¹ Circuit Judge Peter W. Hall, originally a member of the panel, is currently unavailable. The appeal is being decided by the remaining members of the panel, who are in agreement. *See* 2d Cir. IOP E(b).

Joseph W. Ryan, Jr., Melville Law Center, Melville,
NY, for Defendant-Appellant Josue Portillo.

Paul G. Scotti, Asst. U.S. Atty., Brooklyn, NY
(Richard P. Donoghue, U.S. Atty. for the
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John J. Durham, Asst. U.S. Attys., Brooklyn,
NY, on the brief), for Appellee United States
of America.

JON O. NEWMAN, *Circuit Judge*:

This appeal, challenging as unreasonably severe a sentence of fifty-five years imposed on a defendant who was fifteen years old at the time of the offense, presents the legal issue of the lawfulness of the sentence and also serves as a classic illustration of the unfortunate consequences of the congressional decision to eliminate parole in the Sentencing Reform Act of 1984.² Defendant-Appellant Josue Portillo appeals from the July 12, 2019, judgment entered in the United States District Court for the Eastern District of New York (Joseph F. Bianco, then-District Judge). Pursuant to a guilty plea, Portillo was convicted of participating in a pattern of racketeering activity evidenced by his role in the murder of four teenagers, in violation of 18 U.S.C. § 1962(c).

² Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 1837, 2027 (repealing 18 U.S.C. §§ 4201-08).

On appeal, Portillo makes two arguments. First, he urges an extension of the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), that would require the District Court at sentencing in this case to consider the factors that *Miller* ruled must be considered in sentencing a juvenile to life imprisonment without the possibility of parole. Second, he contends that his sentence was substantively "unreasonable," the standard the Supreme Court instructed federal appellate courts to use on review of sentences, *see United States v. Booker*, 543 U.S. 220, 260-64 (2005), after the Court determined in 2005 that the federal Sentencing Guidelines, which had become effective in 1987, were no longer mandatory, *see id.* at 245, 259-60.

We conclude that the challenged sentence was lawfully imposed and therefore affirm the judgment. We also add some observations on the relationship between this sentence and the unavailability of parole.

Background

The crime. In April of 2017, Portillo was fifteen years and eleven months old and a member of the MS-13 gang when he participated in the execution-style murders of four members of a rival gang. The original plan was to kill a person identified as "Witness 1," with whom Portillo had had a previous altercation. Portillo and other MS-13 members instructed two females to invite Witness 1 to a

public park in Central Islip, New York, to smoke marijuana. After learning that Witness 1 had invited four others to accompany him, Portillo and members of his gang decided to kill all five, believing that all of them were members of the rival gang.

Portillo sought and obtained a gang leader's approval to commit the murders. He, along with several gang members, surrounded the suspected rival gang members and, after Witness 1 escaped, killed the remaining four, using machetes, an ax, knives, and tree limbs. Portillo wielded a machete.

Litigation procedure. The Government initially filed a juvenile information, charging Portillo with conspiracy to murder and the substantive offense of murder, in violation of 18 U.S.C. § 1962(c), and several related offenses. The Government then moved to transfer Portillo to adult status, pursuant to 18 U.S.C. § 5032. At a hearing on that motion, the District Judge considered reports from a forensic psychiatrist and a rehabilitation program to which Portillo had been referred after the murders, and also heard testimony from the psychiatrist. The reports and testimony informed the District Judge of Portillo's troubled home life and his association with MS-13 one month after arriving in the United States from El

Salvador. The District Court granted the Government's motion. *See United States v. Juvenile Male*, 327 F. Supp. 3d 573 (E.D.N.Y. 2018).

Portillo waived indictment and pled guilty to a superseding information charging him with a substantive violation of section 1962(c), based on the four murders. The Probation Department's presentence report calculated a Sentencing Guidelines range of life imprisonment and recommended that sentence. The Government recommended a sentence of sixty years.

The District Court sentenced Portillo to a term of fifty-five years, using the post-*Booker* discretion to impose a nonGuidelines sentence. Judge Bianco provided an extensive explanation of his reasons.

The District Judge also provided a comprehensive explanation for the sentence in his written Statement of Reasons.

Discussion

I. Lawfulness of the Sentence

Application of Miller. In *Miller*, the Supreme Court considered two cases presenting Eighth Amendment challenges to mandatory sentences of life imprisonment without the possibility of parole, imposed on defendants who were fourteen years old at the time of their crimes. Each was convicted under statutes

punishing those responsible for a murder. The Court stated: "We . . . hold 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.'" *Id.* at 465. The reason the mandatory nature of the sentence violated the Eighth Amendment, the Court explained, was that it precluded the sentencing judge's consideration of several factors ("*Miller* factors"): the juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate consequence"; "the family and home environment that surrounds" the juvenile; "the circumstances of the homicide offense, including the extent of his participation in the conduct"; "the way familial and peer pressures may have affected him"; and "the possibility of rehabilitation." *Id.* at 477. Four years later, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), in deciding whether *Miller* must be applied retroactively, the Court stated: "In *Miller*, the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." *Id.* at 725. The Court also stated, "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are

different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 733 (quoting *Miller*, 567 U.S. at 480).

In the pending appeal, the sentence, although severe, is not life imprisonment and was not required to be imposed. Nevertheless, Portillo contends that *Miller* should be extended to require that a judge, exercising discretion to impose on a juvenile a sentence of such severity as fifty-five years without the possibility of parole, must consider the factors identified in *Miller*.

We will assume, for purposes of this appeal, that the District Court was required to consider the *Miller* factors in determining that a sentence of fifty-five years, not subject to parole, was warranted for a defendant fifteen years old at the time of the homicide crimes. Even with this assumption, we are satisfied that Judge Bianco, perhaps anticipating the possible application of the *Miller* factors to the sentencing task before him, gave thoughtful consideration to all of these factors. Noting that he had reread the *Miller* opinion, he noted at the sentencing hearing what he understood were his obligations:

“[T]he court should consider, among other factors, the defendant’s chronological age and characteristics, including any immaturity, impetuosity and failure to appreciate the risks and consequences. The court should consider the family and home environment that surround the defendant. The court should consider the circumstances of the offense including the extent of the juvenile’s participation and the

conduct and the way familial and peer pressures may have affected him and the possibility of rehabilitation.”

A 245-46

Portillo contends that the District Judge “rejected” the *Miller* factors. Br. for Appellant 11. On the contrary, as both the sentencing transcript and the District Court’s written Statement of Reasons make clear, Judge Bianco recognized the relevance of these factors, and departed downward from the Guidelines in part because of Portillo’s age, but reasonably concluded, after considering the *Miller* factors, that a further departure was not warranted.

Substantive reasonableness. We review a district court’s sentence under a “deferential abuse-of-discretion standard,” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (internal quotation marks and citation omitted), and “our review of a sentence for substantive reasonableness is particularly deferential,” *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012). We have analogized substantive unreasonableness to the “manifest injustice” and “shocks the conscience” standards applicable in other contexts. *United States v. Rigas*, 583 F.3d 108, 122-23 (2d Cir. 2009).

A sentence of fifty-five years is unquestionably severe. And it is fairly deemed especially harsh for a defendant fifteen years of age at the time of the

crime. At the same time, the offense for which this sentence was imposed is heinous, indeed, especially heinous. Four people were murdered, the killing was brutally accomplished, and the defendant not only actively participated in the murders but planned the crime in retaliation for a petty grievance. Acknowledging the broad scope of a sentencing judge's discretion and taking into account the care taken by Judge Bianco in exercising that discretion, we conclude that the sentence is not unreasonable in any legally cognizable sense.

II. Unavailability of Parole

We now consider the significance of the unavailability of parole with respect to Portillo's case and begin with an account of how that unavailability came about.

Parole is the release of a sentenced prisoner before the completion of a sentence. Although those sentenced for committing crimes sometimes have their sentences reduced to a limited extent by good behavior during confinement,³ parole can reduce the duration of imprisonment by a substantial amount and reflects an

³ Federal prisoners sentenced to a term exceeding one year can earn so-called "good-time credits" of up to fifty-four days for each year of the sentence for "exemplary compliance with institutional disciplinary regulations." 18 U.S.C. § 3624(b). Good time credits were first authorized for federal prisoners in 1875, and were set at ten days per months from 1910 until the Sentencing Reform Act reduced the rate to fifty-four days per year. *See* 18 U.S.C. § 4161 (1982) (repealed effective 1987); *see also* Kate Stith & Steven Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 226, n.10 (1993).

aggregate assessment of not only the prisoner's conduct in prison but also his or her prospects for leading a law-abiding life upon release.

In the federal criminal justice system, the use of parole began in 1910,⁴ when parole boards were established at three federal penitentiaries.⁵ The United States Board of Parole, renamed the United States Parole Commission in 1976,⁶ began making parole release decisions in 1930.⁷ In 1986, the year before the Sentencing Reform Act became effective,⁸ 8,749 federally sentenced defendants were paroled.⁹ Two types of parole eligibility were available. Typically, a federal prisoner, sentenced to more than one year, was eligible for parole after serving one-third of the sentence.¹⁰ Alternatively, a sentencing judge had the discretion to make such a federal prisoner eligible for parole at any time.¹¹

⁴ Act of June 25, 1910, ch. 387, 61st Cong., 2d Sess., § 1, 36 Stat. 819.

⁵ Peter B. Hoffman, *History of the Federal Parole System* 1 (May 2003), <http://www.fedcure.org/information/TheHistoryOfTheFederalParoleSystem-2003.pdf>.

⁶ See Parole Commission and Reorganization Act, Pub. L. 94-233, § 2, 90 Stat. 219 (1976) (codified at 18 U.S.C. § 4202) (repealed effective 1987).

⁷ Hoffman, *supra*, n.4, at 1.

⁸ Sentencing Reform Act § 235(a)(1).

⁹ See U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin, Probation and Parole 1986, Table 2, Entries, 1986 (Dec.1987), bjs.gov/index.cfm?ty=pbdetail&iid=3623.

¹⁰ See 18 U.S.C. § 4205(a) (repealed effective 1987). A prisoner serving a life sentence or any sentence longer than thirty years was eligible for parole after ten years. *See id.*

¹¹ See 18 U.S.C. 4205(b)(2) (repealed effective 1987). Some judges imposed a long sentence with the expectation that public awareness of its length would have a deterrent effect on potential law violators and at the same time invoked subsection 4205(b)(2) so that the defendant could be released before the one-third point, an event unlikely to attract public attention.

In the years leading up to 1987, a combination of reform-minded legislators and criminal law scholars advocated sentencing reform, primarily to lessen sentence disparity, and incidentally to abolish parole.¹² Although some of them had come to doubt that rehabilitation was occurring during imprisonment with sufficient frequency to justify a system of early release on parole, their principal reason for eliminating parole was to achieve what was called “truth in sentencing.”¹³ They wanted a thirty-year sentence to mean thirty years (less the slight reduction for good time credits), not the ten-year term that would result from release at the one-third point.

Those advocating what was considered sentencing reform joined forces with those favoring increased severity of sentences,¹⁴ and both sides found common ground in the concept of a system of sentencing guidelines, designed to reduce sentencing disparity. Their joint efforts produced the Sentencing Reform Act,¹⁵ which became effective on October 1, 1987.¹⁶

¹² See Michael Tonry, *Federal Sentencing “Reform” since 1984: The Awful as Enemy of the Good*, 44 *Crime & Just.* 99, 105-06 (2015); Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 38-48 (1998).

¹³ Tonry, *supra* n.12, at 152.

¹⁴ Some evidence of the differing views of those leading the legislative effort is the fact that Senator Edward M. Kennedy and Senator J. Strom Thurmond, Sr. were the co-sponsors of the bill that was a precursor of the Sentencing Reform Act. *See* S. 1630, 97th Cong., 1st Sess. (1981).

¹⁵ Comprehensive Crime Control Act of 1984, Pub. L. 98-473, tit. II, 98 Stat. 2027 (1984).

¹⁶ Sentencing Reform Act § 235(a)(1).

Our concern is the consequences of the provision of the Sentencing Reform Act that eliminated parole.¹⁷ First, we note that ending parole did not achieve the expected “truth in sentencing.” The reason is that federal court criminal cases are less than one percent of state court criminal cases,¹⁸ and, although some states have ended or curtailed parole, many have retained it, and the American public frequently reads, hears, or sees reports of state prisoners released on parole. Such reports gain notoriety if the paroled prisoner commits another crime. The prevalence of parole in state criminal justice systems has substantially diminished the possibility that the public would understand that federal sentences will be served in full.

Second, the elimination of parole contributed significantly to achieving one objective of many of the proponents of the Sentencing Reform Act, the substantial

¹⁷ *Id.* § 218(a)(5). Parole was not entirely eliminated. It remains available for prisoners sentenced before Oct. 1, 1987. Even without parole, a federal prisoner can be released at an early date if a President exercises an aspect of the constitutional pardon power by commuting a sentence, *i.e.*, reducing its length. “The President . . . shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.” U.S. Const., art II, § 2. Presidential commutation of a federal sentence, occurs infrequently, however, averaging fifty-six a year since 1900. *See* Office of the Pardon Attorney, Clemency Statistics, <https://www.justice.gov/pardon/clemency-statistics>.

¹⁸ Comparing the 87,149 federal criminal cases filed in 2018, *see* U.S. District Courts--Judicial Business 2018, U.S. Cts., <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2018>, with the approximately 17,000,000 state court criminal cases filed in 2018, *see* Court Statistics Project, Nat’l Ctr. for State Courts, *State Court Caseload Digest 2018 Data 3*, https://www.courtstatistics.org/data/assets/pdf_file/0014/40820/2018-Digest.pdf yields a percentage of .005.

lengthening of the time served by federal prisoners. The average time served by all federal prisoners in 1986, the year before the repeal of parole became effective, was 14.6 months;¹⁹ in 2012, it was 37.5 months.²⁰

Third, and of particular pertinence to a case like Portillo's, the elimination of parole means that this defendant, now nineteen years old, will serve his fifty-five year sentence until he is seventy-one years old (or slightly younger depending on the good time credits he earns in prison).²¹ We have ruled that the seriousness of his crime, considered along with his age and personal circumstances, permits that result. But if parole were available, there would be two consequences worth considering. On the one hand, Portillo's custodians would have an effective means of encouraging his observance of prison regulations, resulting from his awareness that misconduct would jeopardize any hope of parole. On the other hand, Portillo

¹⁹ See U.S. Dept. of Justice, Bureau of Justice Statistics, *Federal Criminal Case Processing, 1982-93*, Table 18 (May 1996), bjs.gov/content/pub/pdf/fcc93.pdf.

In addition to the abolition of parole, a major cause of the increase in time served by federal prisoners, also resulting from the Sentencing Reform Act, was mandatory minimum sentences. See, e.g., 18 U.S.C. § 924(c) (five year mandatory sentence enhancement for using or carrying a gun during a crime of violence or a drug crime), § 924(e) (mandatory fifteen-year sentence for possession of a firearm by a person with three state or federal convictions for a violent felony or a serious drug offense).

²⁰ See U.S. Dept. of Justice, Bureau of Justice Statistics, *Federal Justice Statistics, 2012-Statistical Tables*, Table 7.11 (Jan. 2015), bjs.gov/content/pub/pdf/fjs12st.pdf.

²¹ Portillo has been in custody since his arrest in 2017, and thus has fifty-two years remaining on his sentence. He estimates a release date in 2064 when he will be sixty-three, apparently assuming that his prison conduct will be unblemished, entitling him to a reduction for the maximum possible number of days of good time credits.

would have an incentive to obtain an education, participate in rehabilitative programs, and just possibly demonstrate, at some point in the future, that he has matured beyond the seemingly incorrigible person of his youth to become an adult whom parole authorities might reasonably think should be permitted to rejoin society.²²

Portillo's sentence illustrates the unfortunate consequences of eliminating parole. Nevertheless, it is a sentence that a conscientious District Judge concluded was appropriate, and one that, upon review, we affirm.

We have considered the remainder of Portillo's arguments and find them to be without merit. Accordingly, the judgment of the District Court is AFFIRMED.

²² Ruling in *Montgomery* that *Miller's* prohibition of a mandatory life sentence without parole, imposed on a juvenile, applied retroactively, the Supreme Court stated, "The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change." 136 S. Ct. at 736.

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of November, two thousand twenty.

Before: Jon O. Newman,
Rosemary S. Pooler,
*Circuit Judges.**

United States of America,

Appellee,

v.

Josue Portillo,

Defendant - Appellant.

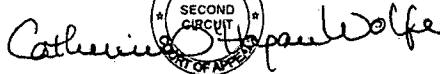

JUDGMENT

Docket No. 19-2158

The appeal in the above captioned case from a judgment of the United States District Court for the Eastern District of New York was submitted on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment the district court is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

* Circuit Judge Peter W. Hall, originally a member of this panel, is currently unavailable. The appeal is being decided by the remaining members of the panel, who are in agreement. *See* 2d Cir. IOP E(b).

1 (Judge Bianco enters the courtroom.)

2 THE COURT CLERK: Calling case 17-CR-366, United
3 States of America v. Portillo.

4 Counsel, please state your appearances for the
5 record.

6 MR. SCOTTI: Paul Scotti and Michael Keilty for
7 the United States.

8 THE COURT: Good morning.

9 MR. RYAN: Good morning, your Honor.
10 Joseph K. Ryan for Mr. Portillo.

11 THE COURT: Good morning, Mr. Ryan.

12 Mr. Portillo is present as well with the
13 assistance of the Spanish interpreter on staff here.

14 I would ask her to identify herself for the
15 record.

16 MS. GRAY: Good morning, your Honor.

17 Maya Gray, Spanish interpreter.

18 THE COURT: Good morning, Ms. Gray.

19 The courtroom is sealed because this is a
20 juvenile proceeding; and I assume that's your witness, Mr.
21 Ryan?

22 MR. RYAN: Yes, Dr. Goldsmith.

23 THE COURT: As you know, we scheduled this as a
24 transfer hearing, and the government will go first in
25 terms of what evidence they wish to introduce.

1 MR. SCOTTI: The government has no witness for the
2 hearing today. However, your Honor, the government has
3 provided to the Court and defense counsel a series of
4 exhibits that we intend to move into evidence. I have
5 provided those exhibits to Mr. Ryan. He has no objection
6 with the exhibits, except with Exhibit Number 10, which
7 actually, your Honor, before I get to the possible
8 objection, let me just, if I may, put on the record the
9 exhibits that we are introducing.

10 THE COURT: Sure.

11 MR. SCOTTI: Exhibit 1 is the juvenile information
12 that was filed in this case.

13 Exhibit 2 is the juvenile certification.

14 Exhibit 3 is Dr. Eric Goldsmith's psychiatric
15 report.

16 Exhibits 4-A through 4-I are crime scene
17 photographs.

18 Exhibit 5 is Justin Llivicura, his autopsy report.

19 Exhibit 6 is Michael Lopez' autopsy report.

20 Exhibit 7 is Jorge Tigre's autopsy report.

21 Exhibit 8 is the Jefferson Villalobos' autopsy
22 report.

23 Exhibit 9 is the Suffolk County District Court
24 record.

25 Exhibit 10 are records from the Suffolk County

1 Correctional Facility.

2 Exhibit 11 are the records from the Central Islip
3 School District.

4 Exhibit 12 is a Community Reinvestment Program
5 Report.

6 Exhibit 13 is a person in need of supervision or
7 PINS Intake Assessment.

8 So those are the exhibits the government intends
9 to move into evidence for purposes of this hearing, your
10 Honor.

11 I did mention that Mr. Ryan had informed me prior
12 to today that he has reservations as to Exhibit 10, which
13 are the records from the Suffolk County Correctional
14 Facility. So I will let him inform the Court further on
15 that.

16 THE COURT: Okay. Mr. Ryan.

17 MR. RYAN: We object to Exhibit 10. It was in the
18 government's memorandum for the court. They claim this fist
19 fight at the Suffolk County jail is evidence of the fact
20 that the defendant teamed with a fellow MS-13 member to
21 attack another inmate, an associate of the Bloods, makes the
22 incident even more serious, because it reflects the
23 defendant's continued allegiance to the gang months after
24 the April 11th murders.

25 We object because the government has the

1 obligation to show that this fist fight was related to
2 MS-13. The incident report, number 10, makes no reference
3 to Bloods, makes no reference to MS-13. It is one incident.
4 He has been in this jail for almost 365 days in the juvenile
5 section of the Suffolk County jail. This is the only
6 incident of a fist fight. So it's not evidence to persuade
7 your Honor that this episode is evidence that he has
8 allegiance to MS-13 before, during, or after his confinement
9 to the Suffolk County jail, and therefore we object.

10 THE COURT: Well, I'll just read it. Give me one
11 second to read it. Okay?

12 MR. RYAN: Sure.

13 (Pause)

14 THE COURT: I would say this to the government on
15 this particular issue, if the government wants to rely on
16 this in some way to show continuing allegiance to the gang,
17 or to show, even independent that I got it yesterday, is
18 continued to be violent and incapable of rehabilitation, for
19 purposes of the hearing I agree with Mr. Ryan that this
20 report is insufficient for me to be able to rely upon it.

21 If the government wants to prove that this was an
22 MS-13 related incident, that he did this because of the
23 continuing allegiance to MS-13, then you would have to put
24 on some witnesses to demonstrate that. There's nothing in
25 the report. Even if there was something in the report,

1 given that they are disputing that, I would want you to put
2 on witnesses, not just relying on the report.

3 I would also note with the issue of violence
4 itself, it seems that there are no injuries. No one wanted
5 to press any charges. There were no weapons. So I don't
6 know how much it sheds any light on the issue of violence.
7 Obviously, any fights are not good in the jail, but it does
8 not appear that there were any weapons or injuries, and that
9 it was over relatively quickly, but it is up to the
10 government.

11 MR. SCOTTI: Well, your Honor, first, with respect
12 to the connection to the gang. The individual that the
13 defendant committed this violent act in the Suffolk County
14 jail with is the defendant's cousin, the very person who the
15 defendant's psychiatrist cited as the person who is a member
16 of the MS-13 gang when the defendant came into the United
17 States, the person who recruited the defendant into the
18 MS-13 gang.

19 So, just from the mere fact that right when the
20 defendant got to the Suffolk County jail, he teamed up with
21 this individual who recruited him out on the street into the
22 gang, and then the two of them attacked another inmate
23 himself is evidence that supports the defendant's continued
24 allegiance to the gang just from the face of this report
25 itself. That's with respect to the gang.

1 With respect to further rehabilitation,
2 defendants's continued violent conduct is absolutely
3 relevant to whether or not -- or to the Court's
4 determination as to whether or not this defendant is a good
5 candidate for rehabilitation. And after this defendant was
6 arrested and incarcerated on an extremely brutal murder, one
7 of the first things he did when he got to jail was with
8 another fellow inmate attack another inmate in a violent
9 incident. Understandably and luckily there were no serious
10 injuries, I do understand that, but it was a violent
11 incident. It was a fight. The defendant was told, and the
12 other people involved, were told and ordered by corrections
13 officers to stop. The defendant refused to stop. The
14 incident was only halted when they used pepper spray on the
15 defendant.

16 So just the mere fact of this report -- and it
17 also includes a disposition. So the defendant was deemed to
18 have been guilty of these charges. So just the mere fact of
19 the incident itself, the fact that the defendant was
20 convicted of these facts, are reflective of a continued
21 pattern of violent behavior after this quadruple murder that
22 in the government's estimation is absolutely relevant to the
23 Court's consideration and should be permitted in for that
24 purpose. If not the connection to the MS-13, then for that
25 purpose alone, your Honor.

1 THE COURT: Well, again, my conclusion is as
2 follows: The fact that he was not disciplined for this
3 doesn't necessarily mean he can't dispute it for purposes of
4 this hearing. They are disputing it was gang-related. I
5 don't know whether the other inmates instigated the fight,
6 that he's protecting himself. Obviously, there are a lot of
7 circumstances that could mitigate what you are suggesting
8 here.

9 So my ruling is the same. I'm not just simply
10 going to admit the report. If the government wants to rely
11 on this to show continued allegiance to the gang, the simple
12 fact that his cousin was involved, he was, according to some
13 of the other documentation in the record a gang member,
14 again doesn't in and of itself suggest that this was a
15 gang-related, or that the other individuals that they were
16 attacking rival gang members, doesn't tell me enough to make
17 this in my view material. But, in any event, it is
18 disputed. So the government would have to prove all of that
19 up, and it's up to you whether, given the record as a whole,
20 whether that's something the government wants to do.

21 MR. SCOTTI: In view of the Court's ruling on
22 this, we'll withdraw our Exhibit 10.

23 THE COURT: All right.

24 Mr. Ryan, do you have any objection to the other
25 exhibits, then?

1 MR. RYAN: No, your Honor.

2 THE COURT: Okay.

3 So other than Exhibit 10, all of the other
4 exhibits that the government placed on the record are
5 admitted into evidence for purposes of the hearing.

6 (Government Exhibits 1 through 9 and Exhibits 11,
7 12 and 13, are received and marked into evidence.)

8 THE COURT: So, does the government rest?

9 MR. SCOTTI: Yes, the government rests.

10 THE COURT: Mr. Ryan, I know you have Dr.
11 Goldsmith. The government obviously introduced his report.
12 That's already part of the record.

13 MR. RYAN: It is a government exhibit.

14 THE COURT: Anything else, besides Dr. Goldsmith's
15 testimony, that you want to place?

16 MR. RYAN: Yes, Defendant's A, Dr. Goldsmith CV.

17 THE COURT: Any objection to that?

18 MR. SCOTTI: No objection, your Honor.

19 THE COURT: So Defendant's A is admitted.

20 (Defendant's Exhibit A is received and marked into
21 evidence.)

22 Is that a copy for me?

23 MR. RYAN: Yes, it is. It is four pages.

24 THE COURT: All right. And you would like to call
25 Dr. Goldsmith?

Goldsmith - Direct/Ryan

10

1 MR. RYAN: Yes.

2 THE COURT: Dr. Goldsmith, come up to the witness
3 stand and remain standing for the oath.

4 E R I C G O L D S M I T H,
5 called as a witness, having been first duly sworn,
6 testifies as follows:

7 THE COURT CLERK: Please state your name and spell
8 it for the record.

9 THE WITNESS: Eric Goldsmith M.D., E-r-i-c, last
10 name, G-o-l-d-s-m-i-t-h.

11 THE COURT: Okay.

12 DIRECT EXAMINATION

13 BY MR. RYAN:

14 Q Dr. Goldsmith, you were approved by Judge Bianco to
15 serve as an expert to defense counsel and under the Justice
16 Act in this case?

17 A Yes.

18 Q The Judge has your CV, okay. I would like to proceed
19 with your testimony concerning the defendant in this case.

20 Now, your report shows that you examined the
21 defendant, his mother, through various documentation
22 concerning his psychological/psychiatric status.

23 With respect to your diagnosis of cannibus use
24 disorder, in your report you concluded that with the proper
25 treatment, Mr. Portillo could reduce the risk of recidivism

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1 as a juvenile, based upon your review of everything that you
2 have in your report.

3 Now, can you explain to the Judge, if you would,
4 the adolescent brain and how it may be affected by use of
5 cannibus?

6 A Sure.

7 So, in brain development, there is an area of the
8 brain called the prefrontal cortex or the frontal lobe.
9 That is the area of the brain that modulates what we call
10 executive functioning. Not so much whether someone is
11 intelligent or not intelligent, but the capacity of someone
12 to exercise appropriate judgment, to stop an impulse, to
13 weigh pros and cons, to think abstractly. That's all
14 modulated by what is called the frontal lobe or the
15 prefrontal cortex.

16 We know that that area of the brain is the last
17 area to develop, and in adolescence it is still what we call
18 an immature status. So that's the underpinnings of why we
19 understand that adolescents tend to make questionable
20 judgments and poor decisions. They are not as capable of
21 weighing the pros and cons and stopping an impulse. That's
22 what we understand to have in the evolution of brain
23 development is the last area to evolve.

24 Now, one of the things that we have come to
25 understand that is very important is that the use of

1 cannibus, the smoking of marijuana, in particular when
2 adolescents are using marijuana daily, that the chemicals in
3 marijuana powerfully effect and stimulate what is called the
4 endocannabinoid system. This is the area of the brain that
5 is affected by the heavy use of marijuana, and it has
6 particular effects on the frontal lobe where this system is
7 very active.

8 So, what we have come to understand is that
9 adolescents who are more vulnerable than adults because of
10 this immature frontal lobe when they ingest smoke, large
11 amounts of marijuana on a continuous basis, that they are
12 having particular toxic effects to the frontal lobe, the
13 prefrontal cortex.

14 So an adolescent brain, which is already immature
15 and has difficulties in exercising good judgment stopping an
16 impulse, weighing the pros and cons, that those executive
17 function skills are even more impaired by the toxic effects
18 of the ingestion of marijuana. It's the reason why the
19 scientific evidence has been put forward to strongly
20 advocate that adolescents don't smoke marijuana because it
21 has some pretty toxic effects.

22 So, the question about brain function and being an
23 adolescent is worsened by the ingestion of large amounts of
24 marijuana and further compromises areas of judgments,
25 decision-making, stopping impulses.

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1 Q Well, in your professional opinion, did your finding of
2 cannabis use disorder with respect to Mr. Portillo have any
3 impact on his capacity to resist peer influence?

4 A So certainly my opinion, to a reasonable degree of
5 psychiatric certainty, that Mr. Portillo, who was an
6 adolescent, met the diagnostic criteria for a cannabis use
7 disorder. He was using large amounts of cannabis smoking
8 marijuana on a consistent basis daily several times a day.
9 There's evidence of the consequences of that marijuana use.
10 He had diminished responses -- taking care of -- that he
11 evidenced diminished functioning in school. He made poor
12 choices. He was described as moody and irritable. And he
13 dismissed his obligations for the purposes of using --
14 getting himself into situations where he could use more
15 marijuana. These are all the kinds of things that we see in
16 adolescents who meet the criteria of cannabis use disorder.

17 So, it's my opinion, to a reasonable degree of
18 psychiatric certainty, that he met the criteria for the
19 substance abuse problem, and the use of the cannabis further
20 affects his brain, his capacity to make decisions, his
21 capacity to control his impulses, and that makes him that
22 much more vulnerable to the effects of peer pressure and
23 influences by others.

24 Q With respect to peer pressure, in your report you
25 outline how, when he arrived at 15 years of age in Central

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1 Islip, he eventually became aligned with MS-13, correct?

2 A Yes.

3 Q And can you tell us from an adolescent perspective,
4 based upon your interviews and the evidence that you
5 reviewed, what his vision was of MS-13, and why he was
6 introduced and attracted to that organization?

7 A The way that Mr. Portillo described it to me was that
8 his exposure to MS-13 occurred while living in El Salvador.
9 He understood that there was an almost an inevitability for
10 himself to be a member of the gang. The alternatives were
11 not particularly available to him, and he -- it's one of the
12 reasons why his family called for him to come to the United
13 States.

14 When he arrived here, his exposure is quite
15 limited. He has little relationship with his mother, and he
16 is drawn to associate himself with other Spanish-speaking
17 adolescents from El Salvador, his cousin a few years older
18 introduces him to the MS-13 gang where he experiences a
19 sense of belonging and a feeling of support and
20 understanding. And it's the place where he could get
21 marijuana, so that he could smoke and get high, which is
22 what his particular interest was as an adolescent at the
23 time, and it's a place where he can get introduced to other
24 adolescent females and girls, which was a particular
25 interest of his at that time, and that was his world. His

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1 interests were getting the opportunity to smoke marijuana,
2 be social, and be around women. That was what the gang
3 affiliation had for him.

4 Q You also point out in your report that he understood
5 that to advance within this community called MS-13 it was
6 necessary to kill somebody, someone else outside the MS-13
7 gang.

8 Can you tell us how that is reflected by his
9 adolescent attitude at that time? Why did he think that
10 way?

11 A That's what he understood. That's what he was told was
12 a way to advance in this criminal gang, and in order for him
13 to move up in rankings, that was what was a known behavior
14 that he had to engage in. His desire to move up in the gang
15 was to stay within the gang and be able to have access to
16 the marijuana, the friendships, the comradery, and the
17 women.

18 Q That's a decision that an adult would obviously be able
19 to make without any influence -- let me withdraw the
20 question.

21 Are you saying that the decision that he had to
22 join the gang is a social outlet, with a price of committing
23 an act of violence such as murder, was a rational act for an
24 adolescent, that it was an act uninfluenced by this cannibus
25 and his life-style prior to that moment?

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1 A Well, it certainly wasn't a rational act, as we would
2 judge it to be. In his state of mind, in the insular world
3 in which he found himself in, it was the -- he understood
4 the expectation of what he would engage in to advance within
5 the organization. He was influenced by his affiliation with
6 the gang, with MS-13. It was -- he didn't challenge it per
7 se. An adolescent again has difficulties in comparing the
8 pluses and minuses, the pros and cons, particularly someone
9 who is using lots of marijuana, would have more difficulty
10 in challenging decisions, and it kind of greased the wheels
11 for him, the fact that he was using lots of marijuana
12 greased the wheels for his very poor decision-making to
13 participate in this gang, of course carry out these violent
14 acts.

15 Q Assuming that the Court would deny the motion by the
16 government to treat him as an adult, have you been able to
17 locate any juvenile facilities for sentenced defendants to
18 address these adolescent deficiencies that you testified to?

19 A Yes. There are, as I understand, no long-term juvenile
20 facilities under the governance of the Federal Bureau of
21 Prison Services, but there are state facilities that can
22 provide the kinds of interventions that an adolescent such
23 as Mr. Portillo with his problems with marijuana abuse,
24 conduct disorder, antisocial behaviors, that those
25 particular service needs and treatment needs can be met with

1 a number of institutions that are for long-term placements.
2 There are institutions in Pennsylvania, institutions in
3 Maine, and they follow an essential -- I believe the same
4 concept of tailor treatment, forming an assessment, and then
5 developing the program to address the behavior problem, the
6 substance abuse problem, the vocational problem, and the
7 educational problems, and these are all services that can be
8 met in a -- in these state run facilities.

9 MR. RYAN: Thank you very much.

10 I have no further questions.

11 THE COURT: Okay. Cross-examination.

12 MR. SCOTTI: Thank you, your Honor.

13 CROSS-EXAMINATION

14 BY MR. SCOTTI:

15 Q Good morning, Doctor.

16 A Good morning.

17 Q Doctor, you said -- some questions for you about your
18 report, and also some questions regarding what you just
19 testified to on direct examination. So if you can just bear
20 with me.

21 Doctor, you are not recommending that the
22 defendant be treated as a juvenile in this case; is that
23 correct?

24 A That's correct.

25 Q Now, you also talked about the defendant's marijuana

1 use and the effect on his brain.

2 Unfortunately, marijuana use is not something that
3 is uncommon in teenagers. Do you agree with that?

4 A Absolutely.

5 Q Unfortunately, there are a lot of teenagers who abuse
6 marijuana, correct?

7 A That's true.

8 Q Is it also fair to say you haven't heard of many other
9 teenagers abusing marijuana who committed quadruple murders
10 with machetes and knives and things of that nature?

11 A That would be fair to say.

12 Q You also, in assessing the defendant, considered the
13 information you received in connection with the relevant
14 legal factors that the Court has to consider when
15 determining whether or not to transfer the defendant to
16 adult status, correct?

17 A Yes.

18 Q I just want to go through some of the information you
19 got relevant to those facts.

20 Okay. With respect to the defendant's social
21 background and his own personal history, he has no history
22 of physical or sexual abuse; is that correct?

23 A Correct.

24 Q He was raised in El Salvador by his maternal
25 grandmother?

1 A Yes.

2 Q In El Salvador -- and he was raised until the age of 14
3 when he came to the United States?

4 A Correct.

5 Q In El Salvador he lived with his grandmother, as well
6 as his older sister Cindy?

7 A Yes.

8 Q Did the defendant indicate he had a good relationship
9 with his sister growing up?

10 A I know of no conflicts. He seemed to have what I would
11 describe as a distant relationship with her, despite they
12 lived together in the same home.

13 Q Okay.

14 And El Salvador obviously is a very poor country?

15 A Yes.

16 Q Third world country. There's a lot of poverty and
17 homeless there?

18 A Yes.

19 Q Given -- under the circumstances, all indications that
20 you he received were that the defendant had a fairly good
21 supportive environment to grow up in with his grandmother,
22 given the circumstances where he was; is that fair to say?

23 A Yes. I think that she was, by what I can tell from
24 conversations with Mr. Portillo and his mother, that she was
25 a strong woman and had done a good job of parenting him up

1 until age 14 in the context of poverty and challenges that
2 were present in his neighborhood in El Salvador.

3 Q She did things like she worked to provide them a home,
4 to provide them food; is that correct?

5 A Yes.

6 Q She took him to church every Sunday?

7 A Yes.

8 Q She worked to make sure that they had an education?

9 A Yes.

10 Q That they avoided negative influences and she tried to
11 keep them out of trouble?

12 A Yes.

13 Q And the defendant, specifically, to try to steer him
14 away from bad influences like a gang, correct?

15 A Correct.

16 Q And also the defendants's sister is still living there,
17 correct?

18 A Yes.

19 Q And she's supposed to be starting college soon?

20 A That is what her mother tells me, yes.

21 Q Okay.

22 The defendant also -- he didn't report any
23 singular or specific traumatic event in his upbringing, did
24 he?

25 A He did not.

1 Q He didn't tell you anything that he saw or was exposed
2 to at a very young and tender age that could potentially be
3 damaging to him in his development in growing up; is that
4 correct?

5 A That's correct.

6 Q The decision also to send the defendant from El
7 Salvador to the United States was basically made to protect
8 the defendant from himself; is that fair to say?

9 A Yes.

10 Q Because the defendant in El Salvador he started to
11 display more disobedient behavior towards his grandmother,
12 right?

13 A Yes.

14 Q He was staying out late with friends, correct?

15 A Yes.

16 Q He also started to, when MS-13 got to his neighborhood,
17 he started seeing them and hanging out with them at the
18 soccer field, right?

19 A Yes.

20 Q Exchanging cigarettes with them?

21 A Yes.

22 Q And his grandmother was concerned that he was going
23 down a dangerous path; is that correct?

24 A I believe so, yes.

25 Q She was in communication with his mother. His mother

1 became concerned that he was going down a dangerous path?

2 A Yes.

3 Q So the decision was made he should go leave El Salvador
4 and come to the United States; is that correct?

5 A Yes.

6 Q And the decision was made because his mother and his
7 grandmother believed that he would be safer in the United
8 States; is that fair to say?

9 A Yes.

10 Q And that he would be protected from those negative
11 influences that were in El Salvador starting to creep into
12 his life?

13 A Yes.

14 Q Defendant also told you about the MS-13 in his town,
15 didn't he?

16 A He did.

17 Q He told you that when the MS-13 got to his town in El
18 Salvador, violence in his town significantly increased?

19 A There were clashes between the police and the MS-13,
20 yes, and disappearance of someone who was affiliated with on
21 the soccer team.

22 Q And he said -- I believe he told you there were two
23 specific people he knew who had been murdered by the gang;
24 is that fair to say?

25 A I don't recall that, but I do know that he talked about

1 a disappearance of someone that he believed was related to
2 the gang.

3 Q He told you that after the gang arrived, the
4 neighborhood he lived in became more violent; is that fair
5 to say?

6 A Yes.

7 Q And that people started disappearing from the
8 community; is that also true?

9 A Yes.

10 Q And, as you said, the person associated with the soccer
11 team, as well as his cousin's husband, was also killed by
12 gang members, right?

13 A Yes, that's correct.

14 Q So basically the defendant was very aware that the gang
15 was a very violent dangerous gang; is that fair to say?

16 A Yes.

17 Q And knowing this, he began to hang out with them in El
18 Salvador, correct?

19 A Yes.

20 Q And he told you that it was just a matter of time
21 before he would end up joining the gang in El Salvador,
22 correct?

23 A That's what he believed, yes.

24 Q So he came to the United States. And knowing all of
25 that, which he knew in El Salvador -- let me ask you this:

1 Was the defendant aware of why he was moving to the United
2 States? Was he aware his family was trying to get him away
3 from those negative influences?

4 A Yes.

5 Q Okay.

6 So he moves to the United States. He's aware that
7 he's being moved here to avoid the gang and other negative
8 influences, correct?

9 A Yes.

10 Q His family is moving him here so that he could be safe
11 and have better opportunities, correct?

12 A Yes.

13 Q And knowing all of that, the defendant got to the
14 United States and almost immediately joined the MS-13; is
15 that fair to say?

16 A It appears that way, yes.

17 Q It was within a month that he became a member, correct?

18 A Yes.

19 Q And he almost immediately began hanging out with Asael,
20 his cousin who was in the gang, right?

21 A Yes.

22 Q And almost immediately began hanging out with other
23 gang members, right?

24 A Yes.

25 Q And Mr. Ryan talked to you about his motivation for

1 doing this, right?

2 A Yes.

3 Q So he was very aware that they were a violent gang in
4 El Salvador?

5 A Yes.

6 Q And then he comes to the United States and he
7 immediately wants respect, he wants friends, he wants girls,
8 he wants marijuana, correct?

9 A Yes.

10 Q So he joins the MS-13 right away?

11 A Yes.

12 Q And Mr. Ryan talked about peer influence and the affect
13 marijuana has a young minds and their ability to be
14 influenced by peers, right?

15 A Yes.

16 Q But the defendant actually stated to you that he
17 approached the gang, and that he was the one who expressed
18 the interest in joining the gang, correct?

19 A I recall that he was introduced to the gang or members
20 of MS-13 -- sub-MS-13 gang by his cousin, and it was the
21 decision to join came from them.

22 Q Okay.

23 However, in your report you did indicate on page 9
24 that Mr. Portillo maintains that he approached MS-13
25 representatives and expressed interest; is that correct?

1 A Yes, after the introduction, yes.

2 Q But it wasn't a situation where people were -- or a
3 group were actively pressuring him to come into the gang; is
4 that correct?

5 A He did not describe being actively pressured by anyone,
6 correct.

7 Q He wasn't threatened to join the gang, right?

8 A He didn't say that he was.

9 Q This wasn't a situation where he got to school, was
10 being threatened by other students who were with other gangs
11 and felt like he needed to join the gang for protection,
12 right?

13 A He did not describe that, correct.

14 Q He joined the gang for very self-motivated superficial
15 reasons, right?

16 A Very immature reasons, yes.

17 Q And he was fully aware of what the gang was involved
18 with, right?

19 A Yes.

20 Q He was fully aware of the things he would have to do to
21 join the gang and to be promoted into the gang, and that was
22 to specifically commit serious acts of violence, correct?

23 A Yes.

24 Q And murders, right?

25 A Yes.

1 Q And he joined the gang willingly and freely?

2 A Yes.

3 Q And in doing so, right, when he got to the United
4 States, he basically chose to bond with the MS-13, rather
5 than bond with his mother and the family that was providing
6 a home for him on Long Island?

7 A So you say choose, and I would say that it's a little
8 bit more complicated than a choice. He was in a situation
9 where he did not feel particularly close with his mother.
10 He hardly knew her. And he felt kind of odd and out of
11 place there. He also didn't speak the language. So school
12 was particularly difficult for him. And so the way he
13 described it was, the MS-13 gang, his cousin, the
14 Spanish-speaking adolescents from El Salvador, those were
15 the social structure that he felt comfortable in, and that's
16 what he was driven toward.

17 Q Okay.

18 His mother spoke Spanish, obviously, right?

19 A Yes.

20 Q Her boyfriend who she lives with spoke Spanish?

21 A Yes.

22 Q His half sister spoke Spanish?

23 A Yes.

24 Q And he joined the gang and started hanging out with the
25 gang immediately when he got there, right?

1 A Within a short period of time, yes.

2 Q He didn't really give his Mom or her family much of a
3 chance to provide that support for him and to get to know
4 them, did he?

5 A He certainly seemed to choose the gang right away, yes.

6 Q And also he didn't indicate to you that when he got to
7 the United States and he was staying with his mother, there
8 was no allegations of abuse or neglect on the part of his
9 mother, correct?

10 A Correct.

11 Q And every indication to you, from the information that
12 you received, was that the mother really tried to be a
13 parent, right?

14 A She tried to step in to be a parent. She tried to --
15 she had her boyfriend Jose spend some time with Josue as
16 well in an attempt to, of course, bring him into the family,
17 yes.

18 Q And he wasn't interested in their efforts. He was more
19 interested in going right to the gang?

20 A He seemed to resist those efforts, yes.

21 Q Doctor, I want to ask you now, if the defendant were to
22 be treated as a juvenile in this case and were released then
23 after adjudication as a juvenile he were to be released by
24 the age of 21, and were to go back to the same exact
25 situation into the community, as he was when he was

1 incarcerated here, with no strong support structure, with no
2 positive relationships, with no real positive role models in
3 his life, in that case would you agree that it's very likely
4 that he would fall back into the same pattern as he was
5 before and with the gang?

6 A So under that parodyne where he didn't have the
7 development of the skills, the language skills, the
8 vocational skills, connection with positive resources in his
9 life, and if he did not have that, and if I was just placed
10 back in the community where the gang was present, yes, he
11 would be at high risk to return to join the gang.

12 Q And I'm not just referring to him not receiving any
13 treatment while incarcerated, I'm talking about regardless
14 of whatever treatment he got, is it fair to say he was just
15 dropped at 21 years old back into the same situation back
16 into that community, it is still likely that the defendant,
17 without any support structure on the outside, without any
18 family that he's close to, and surrounded by others, the
19 same detrimental influences that he was before he went in,
20 there's still a likelihood, a fair strongly likelihood, that
21 he would fall back into the same pattern?

22 A It is a very difficult question to answer. I really
23 can't give an answer to that.

24 Q I understand. That's fine. I want to talk to you,
25 Doctor, you are obviously aware of the nature and

1 circumstances of the crime to which the defendant is
2 charges, correct?

3 A Yes.

4 Q You know that the defendant and the other MS-13 members
5 they ambushed four teenagers and basically slaughtered them
6 with machetes and knives and clubs and things of that
7 nature, right?

8 A That's my understanding.

9 Q You are aware from having spoken to the defendant,
10 having read our motion papers, that this was an assault that
11 was planned for weeks prior to the incident itself, right?

12 A Yes.

13 Q These are horrific crimes. There's no other way to
14 describe it, obviously, correct?

15 A Correct.

16 Q You talked to the defendant for I believe in your
17 report it said four and a half hours?

18 A Approximately, yes.

19 Q He did talk about the murders with you, correct?

20 A Yes.

21 Q And he talked about the circumstances leading up to
22 them?

23 A Yes.

24 Q He also talked about some of his motivations for
25 participating in the murders, correct?

1 A Yes.

2 Q And with respect to the events before the murder, he
3 told you about an altercation that he had with at least
4 several of the victims prior to the murder at 7/11, correct?

5 A Yes.

6 Q And he believed that they were rival gang members based
7 on his altercation with them, right?

8 A Yes.

9 Q After that, he and the a say he will, his cousin, they,
10 through social media, identified -- the defendant helped
11 identify several of the victims through social media,
12 correct?

13 A That's my understanding from reading the documents. He
14 did not explain that to me, but, yes.

15 Q He indicated to you, however, that he and Asael did
16 identify the individuals?

17 A Yes.

18 Q Okay.

19 And a say he will, this older cousin of his, I
20 believe you testified that he was the person who had that
21 when he got to the United States, was hanging out with right
22 away, correct?

23 A Yes.

24 Q Are you aware that I say he will is only five months
25 older than the defendant, rather than actually years older

1 than the defendant?

2 A My understanding was a year or two older. I didn't
3 know it was only five months.

4 Q Okay.

5 So not a very significant difference in age?

6 A Obviously.

7 Q Your understanding is five months is not a very
8 significant difference in age, correct?

9 A Correct.

10 Q So back to what the defendant told you about the
11 incident itself.

12 He also told you that he was a low-ranking member
13 of the gang, a paro, is what they call them, correct?

14 A Yes.

15 Q He old also knew that to ge promoted he would have to
16 kill?

17 A Yes.

18 Q He wanted to get promoted?

19 A Yes.

20 Q And at some point he had informed gang leaders that he
21 was -- his gang leaders about his altercation with those
22 rivals at the 7/Eleven, correct?

23 A Yes.

24 Q And he also provided pictures of them and helped to
25 identify these targeted rivals, correct?

1 A Yes.

2 Q And then he and other MS-13 members came up with a plan
3 to murder?

4 A Yes.

5 Q The understanding from the defendant's standpoint was
6 that his participation in these murders would lead to his
7 promotion in the gang?

8 A Yes.

9 Q And the defendant didn't just provide this information
10 and walkaway, did he? He participated in the plan; is that
11 correct?

12 A He participated, yes.

13 Q Okay.

14 And you are aware, from the information that you
15 read in this case, that the plaintiff had two females lure
16 victims to the recreational center in Central Islip so that
17 they could smoke marijuana, correct?

18 A Yes.

19 Q You are also aware that it was there they would be
20 ambushed by the MS-13 members, and that it was the defendant
21 at the recreational center who was communicating with the
22 girls on the evening of the murders to coordinate the
23 attack?

24 A I don't recall if that was the fact pattern, but I
25 accept that.

1 Q But overall, you understand that the defendant had a
2 very active role in not just the planning, but in the
3 execution of this murder, correct?

4 A Yes.

5 Q And, so, it's fair to say, based upon your knowledge
6 from speaking to the defendant, from the information you
7 received in this case, it would be fair to describe the
8 defendant's role in these crimes from start to finish as
9 very significant; is that fair to say?

10 A Yes.

11 Q You wouldn't describe his role in the murders as
12 mindlessly or robotically following his leader's direction
13 without second thoughts; would that be fair to say?

14 A That would be fair so say.

15 Q He committed these crimes willingly and for his own
16 benefit, right?

17 A Yes.

18 Q Now, in your report you touch upon the defendant's risk
19 of recidivism.

20 Do you recall that?

21 A Yes.

22 Q I'm sure in your profession you have been asked to
23 assess the risk of certain individuals who committed crimes
24 and the level of risk they impose for future crimes and
25 future acts of violence, correct?

1 A Sure.

2 Q There's a myriad of factors I'm sure you consider, when
3 trying to evaluate the level of risk that you can assign to
4 a person; is that fair to say?

5 A Yes.

6 Q But specifically with this type of case, I'm sure there
7 are several factors and facts that you would need to know
8 and they would be the nature of the prior crime, you know,
9 what did they do, how serious was it, correct?

10 A Yes.

11 Q Also their motivation, the circumstances behind the
12 crime. Was this just a crime of opportunity or a crime of
13 passion, or premeditated or done for personal benefit,
14 correct?

15 A Yes.

16 Q And you would also want to know what their role is,
17 what was their level of culpability. Were they just a
18 driver, were they a lookout, or were they an active
19 participant who had a lead role. Those are things you want
20 to know, right?

21 A Yes.

22 Q And the reason you want to know that is because it
23 helps you determine where on the spectrum in terms of risk
24 of future violence or risk of recidivism that person would
25 fall, right?

1 A Yes.

2 Q The more serious the crime, the more sinister the
3 motivations, the more significant the role, the higher risk
4 they would be for recidivism and violence in the future;
5 would that be a fair to say?

6 A That would be one factor, yes.

7 Q That's one series of factors amongst many others,
8 correct?

9 A Yes.

10 Q Here, with respect to those factors, and I understand
11 it is just those factors, but with respect to those factors
12 here, the facts here would support the defendant falling on
13 the spectrum of being a greater risk of recidivism and
14 future violence based on the seriousness of the crime, his
15 motivation in the crime, and his level of culpability; is
16 that fair to say?

17 A Based upon those narrow facts, yes.

18 Q Another significant factor, Doctor, and maybe perhaps
19 from a psychiatric standpoint, one of the most significant
20 factors would be a person's expressions of remorse; would
21 you agree with that?

22 A Yes.

23 Q Because if someone is genuinely sorry and is genuinely
24 disturbed by the crimes that they have committed, of course
25 that would make it less likely that they would want to

1 inflict that pain on others and inflict that pain on others
2 in the future, correct?

3 A Theoretically, yes.

4 Q And on the flip side, if someone has no remorse for a
5 very serious crime that they committed, they don't express
6 any sort of regret or remorse or hesitation for serious
7 crimes that they committed, that would indicate that they
8 would fall on the higher end of that spectrum of being more
9 likely to commit the crime; is that fair to say?

10 A Yes.

11 Q Okay.

12 Again you spoke to the defendant for four and a
13 half hours, correct?

14 A Yes.

15 Q You prepared an 11-page report that has been presented
16 to the Court on your detailing of what you spoke to the
17 defendant about, and your assessment of him; is that
18 correct?

19 A Yes.

20 Q He knew why you were there. You explained it to him,
21 right?

22 A Yes.

23 Q He knew you would prepare a report and it would go to
24 Judge Bianco to help decide whether he should be treated as
25 a juvenile or as an adult, right?

1 A Yes.

2 Q The defendant, in the four and a half hours, didn't
3 tell you he was sorry for what he did?

4 A I didn't ask him and he didn't tell me.

5 Q You spoke to him for a while. You spoke to him on a
6 lot of things, correct?

7 A Yes.

8 Q I'm sure he shared information with you that you didn't
9 specifically ask about or elaborated on things that you
10 didn't specifically ask about, correct?

11 A Correct.

12 Q So, one of those things he never elaborated on what you
13 were talking about and expressed any sorrow or regret for
14 committing these four murders, did he?

15 A Not specifically, no.

16 Q He expressed -- he didn't describe to you -- I know you
17 testified or you put in your report the defendant told you
18 about a traumatic event, and the traumatic event was when he
19 came from El Salvador to the United States, right?

20 A Yes.

21 Q That was the only traumatic event he mentioned to you,
22 correct?

23 A Yes.

24 Q So he didn't tell you or indicate to you that his
25 participation in this murder was traumatic?

1 A Yes, that's correct.

2 Q I think given the circumstances, as you are aware, this
3 murder was a horrific scene in which four people were
4 slaughtered, and the defendant never indicated to you any
5 subsequent issues or trauma that he had, or difficulty
6 sleeping he had in connection with his participation in that
7 crime, did he?

8 A That's correct, he did not.

9 Q And not just in words, but also you talked about his
10 demeanor during your interactions with him.

11 Do you recall that?

12 A Yes.

13 Q And from his demeanor, is it fair to say that the
14 defendant didn't seem to be racked with guilt based upon
15 what he did?

16 A He seemed to be particularly emotionally cut off.

17 Q Specifically you said that his manner did not indicate
18 a full appreciation of the gravity of the charges against
19 him, or the life-altering implications of that.

20 Do you recall that?

21 A Yes.

22 Q That has to do with the effects of these charges on
23 him, right?

24 A Yes. He appeared to present kind of a level of
25 psychological denial of it at all.

1 Q And you talked about how he viewed the events leading
2 up to his arrest and his current situation as superficial
3 and self-involved; is that fair to say?

4 A Yes.

5 Q So clearly the defendant, at least when you were
6 talking to him, wasn't concerned about the lives he took or
7 the family members of the people he murdered; is that fair
8 to say?

9 A It is fair to say that he did not talk about that.

10 Q All right.

11 You also in your report indicated that you found
12 no mental defects or illness with this defendant?

13 A No major defects.

14 Q No history major psychiatric disorder?

15 A Correct.

16 Q No intellectual limitation?

17 A No.

18 Q You talk about and you seem to attribute his demeanor
19 sort -- his sort of affect and lack of really showing much
20 range of any emotion to a lack of maturity; is that correct?

21 A Well, I'd say in part, you know, I would say that
22 because of his adolescence, his lack of maturity, this
23 incredibly serious situation he is in, he doesn't appear to
24 be able to come to grips with what is happening. He doesn't
25 appear to be able to appreciate fully the seriousness. And,

1 so, you know, many many people, particularly immature
2 adolescents, will approach things with a sense of kind of
3 psychological denial.

4 Q That was your impression from being in a room with him,
5 correct.

6 A Yes.

7 Q He didn't say anything to you to that effect?

8 A That's my impression of him.

9 Q That could also be attributed to just him not having
10 remorse for what he did, correct?

11 A It would be consistent with not having remorse.

12 Q And in terms of maturity level, I mean, I think we all
13 have been 17. I think you would agree with me almost all
14 male 17-year-olds are probably immature, do you agree with
15 that? Some more mature than others. Will you concede that
16 factor?

17 A Yes.

18 Q But, Doctor, you would also agree that a 17-year-old,
19 or any teenager for that matter, is still fully capable of
20 expressing remorse or expressing regret or expressing
21 empathy, would that be fair to say?

22 A Yes.

23 Q But this defendant did got express any of those things,
24 correct?

25 A About this particular situation, correct.

1 Q Towards the victims of what he did, nothing that he
2 expressed to you, correct?

3 A Correct.

4 Q And this conduct -- you talked about marijuana use and
5 you talked about its affect on an adolescent brain.

6 Just with respect to your conversations with the
7 defendant, he wasn't under the influence of marijuana when
8 you spoke to him as far as you know, correct?

9 A As far as I know, correct.

10 Q He has been in jail for almost a year at the point when
11 you spoke to him, so he probably didn't smoke marijuana
12 since he got to jail; is that fair to say?

13 A Yes.

14 Q And you talked before about chronic marijuana use in
15 teenagers leading to poor decisions and to kids or teenagers
16 using poor judgment, right?

17 A Yes.

18 Q You would agree that this specific conduct we are
19 talking about could be well beyond poor judgment and bad
20 decisions, correct?

21 This wasn't the defendant going into a Walgreen's
22 and stealing a pack of gum, right?

23 A Right. So when you say well beyond, I would say that
24 there is obviously a component of decision-making judgment,
25 weighing pros and cons, that goes into his behavior, if he's

1 back to these violent incidents. And I certainly am not
2 testifying that his marijuana use just substantially
3 incapacitated him such that his judgment was unable to be
4 operational.

5 Q He has no mental defects, correct?

6 A He has no evidence of any major psychiatric condition,
7 correct.

8 Q He has no indication from you that he is someone that
9 doesn't know right from wrong; is that correct?

10 A That is correct.

11 Q He came into this country knowing what the MS-13 was.
12 He immediately joined the MS-13, he wanted to be promoted
13 into the MS-13, and to do so he willingly and gladly
14 participated in the horrific murder, correct?

15 A I don't know if I would say gladly, but he certainly
16 participated without resistant, yes.

17 Q And he did so because of his own personal desire to
18 elevate his position in the gang?

19 A I would agree with that.

20 Q No one forced him to do it, correct?

21 A Yes.

22 Q And no amount of marijuana made him do it, correct?

23 A Correct, it did not make him do it.

24 Q And whatever effect that marijuana may have on the
25 brain of a defendant at that age, you would agree that can't

1 explain that type of conduct that I've just laid out; is
2 that fair to say?

3 It may inform generally what happens to an
4 adolescent brain, but it can't be used as an explanation for
5 why this defendant did what he did, correct?

6 A It can be used only as some insight and understanding
7 into his capacity to think more abstractly and make
8 judgments. It does not explain the ultimate decision of the
9 participant.

10 Q I understand we are talking insight, insight from a
11 clinical standpoint, correct?

12 A Correct.

13 Q But the defendant himself -- the bottom line is, the
14 defendant himself joined the gang and participated in these
15 crimes because he wanted to; is that correct?

16 A Yes.

17 MR. SCOTTI: That's all of the questions I have,
18 your Honor.

19 REDIRECT EXAMINATION

20 BY MR. RYAN:

21 Q Was one of the objectives -- was the prime objective of
22 your interview of Mr. Portillo was to determine why he
23 thought what he did what he did, or were you there to hear a
24 confession as to guilt or innocence?

25 A No. My objective was to do a comprehensive psychiatric

1 assessment, and address the issues that were laid out for me
2 concerning the factors that determine the transfer from
3 adolescent status to adult status in this particular case.

4 Q You weren't there to determine whether or not he was
5 remorseful or not?

6 A I was not there to determine whether or not he was
7 remorseful, correct.

8 Q You had no information before you about the ten hours
9 the federal agents examined him in the U.S. Attorney's
10 Office?

11 MR. SCOTTI: Objection, your Honor.

12 Q Every fact that he gave concerning his involvement?

13 THE COURT: Overruled.

14 A Repeat the question again.

15 Q It is undisputed that Mr. Portillo, when first
16 confronted by this allegation in a prison by an FBI agent,
17 and four interviews later on by the United States Attorney's
18 Office and federal agents, gave all of the details of his
19 participation in a crime, did you have access to any of
20 that?

21 A I did not have access to that. I understood that to be
22 the case. I didn't have access to any of the information.

23 Q Okay.

24 So when we talk about robotically following orders
25 of other members of the gang, it is a fact, is it not, you

1 didn't have access to the full ten hours of interviews that
2 Mr. Portillo gave to the federal government concerning this
3 crime?

4 A Correct.

5 Q And based upon the cross-examination and the answers
6 that he gave, does it in any way change your opinion that if
7 Mr. Portillo received appropriate juvenile treatment and
8 risk of recidivism would be significantly reduced?

9 A It remains my opinion, to a reasonable degree of
10 psychiatric certainty, that with the treatment that I
11 outlined in my report, his risk of recidivism would be
12 significantly reduced.

13 MR. RYAN: Thank you.

14 No further questions.

15 THE COURT: Doctor, I want to ask you a couple of
16 follow-up questions based upon what I heard, and some of
17 these questions may be difficult. If you can't answer them,
18 that's fine, too. These are things I have to think about,
19 obviously, and you are the expert. So I want to see if you
20 can shed any additional light on some of these issues and
21 some of these things there have been some questions about.
22 I will try to frame it more broadly and let you talk, if you
23 have something to add.

24 One of the issues, obviously, you know, what you
25 explained about, the development of the brain and marijuana,

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1 I accept it. It makes complete sense to me. But as the
2 prosecutor was suggesting through some of his questions
3 there seems to be a difference between in my thinking a
4 juvenile who might be smoking pot, who might be subject to
5 bad decision-making, for those reasons they are young, brain
6 undeveloped and they are smoking spot. But there are levels
7 of bad decision-making, obviously, to use the example of
8 stealing gum, or whatever it was, could be weak in school,
9 not studying. But here we are talking about, obviously, a
10 murder -- murders, participating in murders.

11 So, is there an explanation for that? That seems
12 to me to suggest something more is going on than simply a
13 young person smoking pot. Even in a young person smoking
14 pot and asked to kill somebody, something inside of them
15 might say, I'm not going to do that. I may skip school. I
16 may shoplift. I will not go kill somebody.

17 Is there some explanation that you can give for
18 how someone, even at that young age, who is using pot, could
19 not have that ability and maybe there's no answer to that,
20 but that's my question?

21 THE WITNESS: So I would answer that by saying
22 that the behavior of a person in a context -- in the context
23 of that he faced was being here new to this country,
24 resisting the efforts of his mother, who he had little
25 relationship with, and falling in with this MS-13 gang. So,

1 he is clearly, the record demonstrates and what he tells me
2 at the interviews, is that he is dismissing the opportunity
3 that the school is providing to him, what his family is
4 trying to assist him with, and he is, you know, leaving the
5 positive influence and participating in this MS-13 gang
6 culture, because it provides him with that -- those feelings
7 of belonging, comradery, and the access to the weed and the
8 women, and that's what he wanted. And he knows from it,
9 because of his cultural background and from what he
10 understood life was like in El Salvador, and the fact that
11 he was an adolescent, and then the fact that he was using
12 that much marijuana, doesn't explain his behavior. But what
13 it does is, it helps provide some insight into understanding
14 that his brain was not fully able to resist the poor
15 decisions, that he wasn't fully able to think through this,
16 to challenge, you know, the decision to go along with the
17 culture of this gang and participate.

18 So, it is just a part of the insight and
19 understanding to what would make him participate in this
20 gang behavior and in these pretty horrific violent acts.

21 THE COURT: How do you distinguish that from
22 someone who may just want to commit an act of violence, who
23 may be drawn to committing an act of violence, how do you
24 distinguish that?

25 THE WITNESS: So partly you distinguish that by

1 looking at the history, and if there was any particular
2 history of psychopathy. Was he sadistic? Was he cruel to
3 animals? Did he set fires? Was he bullying? Was he
4 violent? And there's just no evidence of that kind of
5 psychopathic behavior before the killings.

6 His behavior seemed to be participating in soccer,
7 which was his interest in El Salvador, playing as much as he
8 could. Then the social interest of being with friends that
9 he could then get high and be introduced to girls. That
10 seemed to be his particular world. He wasn't someone that
11 there was this historical pattern of psychopathic social
12 behavior present prior to the killings.

13 THE COURT: And this issue of wanting to be
14 promoted within the gang, I guess if his attraction to the
15 gang was simply to smoke marijuana, to hang around with
16 girls, and to people promoting it, in other words, it
17 appeared that he had all of those things basically in his
18 current position, why would he need to be promoted, other
19 than obviously the promotion requires an act of violence?
20 So in order for him to feel those things, you are saying he
21 was drawn to as part of the gang, he already had all of
22 that. If you kill somebody, we'll let you be part of the
23 group. He was already part of the group, right? He had
24 been part of the group since he almost came to the United
25 States, and he didn't commit the murders until 2017. So he

1 was already operating for a long time as part the group,
2 right?

3 THE WITNESS: I don't hold myself out to be an
4 expert on this MS-13 gang culture. The way he explained it
5 to me was being a part of the group, being a part of the
6 gang, he could be introduced to marijuana and the women that
7 he wanted and the social relationships that he wanted, but
8 there's an expectation that you kind of move up. You just
9 don't remain even at this kind of introductory level. As he
10 described it to me, it was just part of the culture of
11 becoming a member of this gang, that you don't remain on the
12 fringe. That's the way he explained it to me as he
13 understood it. I can't give you more information about
14 whether or not that's accurate culture within this
15 particular gang. I'm not an expert on that.

16 THE COURT: But you didn't hear him describe an
17 incident where someone said to him, look, you've been
18 hanging around us long enough, you need to kill somebody
19 now. There's instances where you have that type of
20 pressure. There was no incident like that where someone
21 said, you have been at this level for too long, you need to
22 kill somebody.

23 THE WITNESS: As I recall the interview with him,
24 while he did not specifically tell me about that, he was
25 being pressured to do something violent to move up, it was

1 asked of him that this was something that was expected of
2 him and this is how he understood it.

3 THE COURT: The next issue relates to treatment
4 and the likelihood of success of the treatment. Does it
5 weigh at all in your analysis - I don't know if there was
6 any question about this - obviously, the school was trying
7 to intervene. I know it's not the same as being in a
8 facility and subject to programs in a more formalized
9 setting, does that weigh in your assessment that these
10 programs would be successful where his mother in conjunction
11 with the school was unable to do that?

12 THE WITNESS: Right. So it does seem -- my
13 assessment of that is that when he arrives here, and within
14 the year plus that he's here and in the school system,
15 moving through the middle school, to the high school, he is
16 -- doesn't speak the language fully, and his mother had no
17 experience in parenting an adolescent, and had no experience
18 of course with him, and she saw that when he's asked to do
19 things that he doesn't want to do, he gets very, very moody,
20 very irritable, and he would leave school, and not follow
21 the directions of the school. And in part she interpreted
22 it as just this is typical adolescent behavior.

23 So I think there were probably missed
24 opportunities of intervention with him at this early age,
25 you know. Unfortunately, it wasn't fully recognized by his

1 family, and what trouble he was really in. So that's one
2 factor here.

3 Being, you know, outside of a structured facility
4 environment, his decision-making at that time, of course,
5 was to abandon the positive forces of the school and
6 education and participate in the gang. There's no evidence
7 from a psychiatric perspective, there's no hurdles that I
8 see that in a structured environment that he could not
9 learn, he could not become fully in English, and be educated
10 and then participate in vocational training to give him some
11 skills, that he could be marketable as an employable person.

12 So, I do believe that although he discarded the
13 opportunity when he first arrived here, that he does have
14 the capacity to learn and to benefit from educational and
15 vocational training.

16 THE COURT: Two more things. I'm almost done.

17 THE DEFENDANT: Sure.

18 THE COURT: I don't want to spend too much more
19 time on the issue of remorse, but I just want you to tell me
20 whether or not, from a psychiatric standpoint, my assumption
21 is generally accurate, that if you have a juvenile who makes
22 bad decisions as for their age and/or marijuana use, if that
23 decision leads to an horrific result, that even at that age,
24 and even someone who smokes pot, if they have this enormous
25 remorse, take for example, a car accident, a teenager drives

1 while drunk and someone dies, you know, in a car accident,
2 is it your experience that generally in those situations
3 that even teenagers making bad decisions like that, when it
4 happens or when they are recounting it to a psychiatrist,
5 and I understand Mr. Ryan's statement was that wasn't your
6 goal, that wasn't part of your thought process, but isn't
7 that just sort of natural, generally, in that type of
8 situation?

9 THE WITNESS: At least eventually. It would not
10 be -- it certainly would not be unique that someone in his
11 situation, after being involved in this horrific event,
12 could initially present with lots of denial and resistance
13 in talking about it. I mean, I have seen thousands of young
14 people, adolescents, but even adults, mostly adults, who
15 have been in situations where they have committed some
16 particularly horrific violent acts, and it's very common to
17 initially see just a level of psychological denial. It is
18 difficult to talk about. It is difficult psychologically to
19 accept that you have done such a horrific thing.

20 So, it is the kind of thing that over time that
21 denial breaks down and the person begins to talk about it,
22 and get into much of these horrific emotions that are
23 accompanying this act. So, it is something that I would
24 expect to happen over the course of some time with him.

25 THE COURT: Isn't that part of the issue of

1 whether or not there's a likelihood of rehabilitation to the
2 extent that -- I don't know how long it was that you
3 interviewed him?

4 THE WITNESS: Four and a half hours.

5 THE COURT: I mean April, a year later, right?

6 THE WITNESS: Yes.

7 THE COURT: So the fact that we are not talking
8 about a month later, we are talking a year later, after he
9 has been incarcerated for a year, he did not appear at least
10 to have that, and he also described to you what happened to
11 some extent in your interview with him, and was reliving to
12 some extent the moment and didn't have any emotion about it,
13 right?

14 THE WITNESS: That is correct.

15 THE COURT: He did talk about it. Doesn't that
16 indicate from a rehabilitation standpoint, we don't know
17 when that day is going to come?

18 THE WITNESS: Well, I would just say that I
19 interviewed him for four and a half hours. That my intent,
20 my goals were to do a comprehensive assessment and
21 understand him as a person, and the challenges of his life
22 and come to some diagnostic opinions. I was not focusing on
23 his state of mind at the time of the killings.

24 We did talk a lot about his involvement with the
25 MS-13 gang. We talked some about the murders, the killings

1 that happened. And during that period of time, he certainly
2 appeared to be emotionally dependent.

3 THE COURT: All right. The last question. You
4 were asked this, and you said I think that's a difficult
5 question, but here's the bottom line question that I have to
6 answer, which likelihood of rehabilitation I think you used
7 the term capacity.

8 THE WITNESS: Right.

9 THE COURT: But, you know, I think everyone has
10 the capacity -- I would assume everybody under the right
11 circumstances would have the capacity. But the question is
12 the likelihood, and the scenario of that was presented to
13 you in terms of if he was treated as a juvenile and if he
14 was released at age 21, or sometime before 21, and had the
15 same structure in the place that he had at the time of these
16 events, what's the likelihood that he would return to
17 criminal activity or some type of violence even if he had
18 treatment in the jail? Treatment, you know, obviously as an
19 expert you know sometimes this drug treatment, whatever it
20 might be, in a controlled setting. But once that person is
21 put back in an uncontrolled setting, they could revert back
22 to exactly the type of criminal associations or behaviors,
23 right?

24 So, if he's put back, and I don't see any other
25 scenario that you are presenting to me that, no, he's not

1 going to go back into this. Sometimes you have no
2 structure, he has no family. But he's going back to have a
3 structure. So he's going to have a structure now. He's
4 going back to the same structure that potentially he had at
5 the time of these events. It's not more structure. The
6 best I think is equal to what he had. So what is the
7 likelihood of him avoiding criminal activity if he's put
8 back into the same structure that he was in? And maybe
9 there's no answer to that, but that's the bottom line
10 question.

11 THE WITNESS: Sure. These are questions that I
12 address frequently in questions of release from long-term
13 facilities. People who have been, for example, found
14 non-responsible for a crime because of mental disease or
15 defects.

16 And so the approach -- the psychiatric approach is
17 to identify the risk factors for dangerousness, so identify
18 the risk factors here for recidivism behavior, address those
19 factors in the structured inpatient facility. But once you
20 get released when you are going to a step-up, a lesser level
21 of care, or a lesser level of supervision, you just can't
22 abandon resources.

23 So, if he were -- the question was if there were
24 no resources provided to him, there was no structured plan
25 for him to participate in, you know, some counseling and

1 treatment and supervision over his life, you know, once he's
2 released at age 21, I would have concerns about his capacity
3 for him to maintain lawful behavior. But, you know, there's
4 no impediments I see from a psychiatric perspective for him
5 to take advantage of the kinds of behaviors and services of
6 treatment available to him at a facility, and then to
7 continue with that once he leaves that facility.

8 THE COURT: What's the likelihood of being in a
9 position to go back safely into society when he's 21, what's
10 the likelihood of that? I know you might normally assess
11 that if after the person has gone through the treatments and
12 at age 21 where do they stand?

13 THE WITNESS: Right.

14 THE COURT: That's not the way this works.

15 I have to make the decision now and project the
16 likelihood at age 21 he would have gone through these
17 programs successfully, and that he would not pose a risk to
18 society at that point, what's the likelihood of that as we
19 sit here based on everything we know?

20 THE WITNESS: From a psychiatric perspective, a
21 forensic evaluative perspective, I don't have enough
22 information to answer that question. All I can say is that
23 he would certainly require some continued services and
24 monitoring, once he would be released from a juvenile
25 facility at age 21. Without that, I would say his risk

1 factors for recidivism would be higher.

2 THE COURT: All right.

3 But you also don't know the likelihood that he's
4 going to be successful in the program, right?

5 THE WITNESS: I don't know the likelihood of
6 whether he would be successful. I do know that he does not
7 evidence the kinds of hurdles, barriers to being successful.
8 So he doesn't evidence that uncooperative psychopathic
9 behavior, and even major psychiatric problems that would --
10 and intelligence difficulties that would be barriers to
11 benefitting from the kinds of services and treatment
12 available to him in a juvenile facility.

13 THE COURT: Okay. Thank you. Thank you very
14 much.

15 Mr. Ryan, if you have any additional question you
16 want to ask based on what I asked.

17 REDIRECT EXAMINATION

18 BY MR. RYAN:

19 Q You interviewed the mother?

20 A Yes.

21 Q And she seems to be supportive of her son?

22 A She certainly is supportive of her son, yes.

23 Q Does that indicate to you this is a learning experience
24 for her, too?

25 A To say the least, yes.

1 Q You mentioned before she had no experience in
2 parenting. Now she has experience with respect to her son?

3 A Yes.

4 Q She would welcome him back and learn from this horrific
5 experience?

6 A She certainly has, as I could tell, been supportive of
7 him. She's participated in this examination, evaluation.
8 She's provided information. She has expressed a desire to
9 be supportive of him.

10 MR. RYAN: Thank you.

11 THE COURT: Anything else?

12 MR. SCOTTI: No further questions.

13 Thank you, your Honor.

14 THE COURT: You can step down, Doctor. Thank you.

15 THE WITNESS: Thank you.

16 THE COURT: So I have one question to the lawyers.

17 Mr. Ryan, do you rest or you have anything else
18 you want to put on the record?

19 MR. RYAN: We rest.

20 THE COURT: Okay.

21 So, two things. The first is, if you want to make
22 brief or any argument based upon -- I'm not requiring you to
23 do any of that, but if you want to, I will give you an
24 opportunity to do that.

25 I did have one other thing that came up in the

1 papers. Mr. Ryan mentioned it today, and I don't think the
2 government addressed it in their reply, and it's something I
3 think the Court should consider, although I will not
4 reference it in my opinion because I don't want to create
5 any safety issues for the defendant, given the fact that he
6 proffered. But Mr. Ryan argued in his opposition that the
7 fact that he proffered with the government, and I don't know
8 whether it was 10 hours, four meetings; is that what you
9 said, Mr. Ryan?

10 MR. RYAN: Correct.

11 THE COURT: That that's some indication of
12 rehabilitation and/or remorse. So I don't know if the
13 government wants to respond to that factor. Obviously
14 that's something the Court can consider. So, I don't know
15 if you want to respond to that.

16 MR. SCOTTI: Well, your Honor, what I will say is
17 that --

18 THE COURT: First of all, what was the timing of
19 that? Was it both before and after Dr. Goldsmith's
20 interview?

21 MR. RYAN: It was all before.

22 THE COURT: All before? Okay.

23 MR. SCOTTI: Yes, your Honor. The defendant
24 initially when first taken into federal custody, waived
25 Miranda and provided a post-Miranda statement wherein he

1 admitted to his involvement in the murders, and the
2 involvement of the other MS-13 members and identified a
3 series of photographs of the other members that he was able
4 to identify who participated.

5 He then did come right in and engaged in numerous
6 proffer sessions, in the government's estimation was
7 forthcoming further about his involvement in those murders.

8 So, the Court can -- with respect to how that
9 applies to the Court's analysis for purposes of the transfer
10 hearing and his ability to be rehabilitated, given the fact
11 that he admitted -- he gave a post-Miranda statement right
12 away, admitted his involvement, and basically his defense of
13 this serious case his hands were basic tied at that point.
14 His decision to come in could have in large part been
15 strategic at that point, if this is all I have left, this is
16 what I'm doing, it's the best decision that I can make for
17 myself to attempt to minimize the damage here and get the
18 best possible outcome given. So there's a self-interested
19 component in there, your Honor. I'm got a psychologist. I
20 can't get into his mind about whether there was also a
21 component of that where there was some remorse, whether he
22 came in because he wanted to do the right thing. All I can
23 say is that we have a psychiatrist here who evaluated him
24 for four and a half hours a year to the day of the murders,
25 and the defendant -- as the Court went through with the

1 psychiatrist, the defendant went through the crime, and went
2 through his reasons for participating, and never expressed
3 any remorse.

4 So I think that has to be weighed also in
5 connection with this.

6 Also as the Court indicates, the doctor told your
7 Honor in response to questions that he didn't show remorse
8 yet. This was the first time the doctor had spoken to him,
9 but it is not the first time he talked about it. As Mr.
10 Ryan pointed out to the Court, he talked about this for
11 hours. So, if there's a process by which he has to go
12 through to feel remorse for this, do you think that process
13 would have happened by the time the doctor got to him a year
14 after the murders?

15 So, with respect -- for purposes of transfer, the
16 government's position is that the proffers that the
17 defendant engaged in do not weigh in favor of him being a
18 better candidate for rehabilitation or weigh in favor of his
19 transfer.

20 THE COURT: All right. Mr. Ryan.

21 MR. RYAN: As the doctor testified, the reaction
22 of the juvenile is denial. I think in the other case that
23 your Honor wrote on, it was denial. Not in this case. It
24 was an admission right away, and it's been an admission for
25 every meeting he had with the agents. The fact that he says

1 I am guilty, instead of saying I'm sorry, doesn't eliminate
2 the fact that he admitted everything he did. He told them
3 every detail possible. He told them about everybody else,
4 identified photographs and everything else. I don't know
5 what more can be said, that his actions spoke louder than
6 his words. He was sorry, and he's going to tell everybody
7 in the various law enforcement agencies exactly what he did.
8 The fact that he didn't use the words "I'm sorry" doesn't
9 mean he wasn't sorry. He wasn't denying, which would be an
10 implication that he doesn't appreciate what he did, and that
11 he's not a likely candidate for rehabilitation. Your
12 Honor's own experience, once a plea of guilty is entered,
13 that's the first step towards rehabilitation, and this young
14 man has done everything he could to tell the agencies about
15 his own involvement and his involvement with others, and
16 should not be treated as a denial of remorse.

17 THE COURT: All right.

18 Is there anything else you want -- the government
19 wants to add to their papers with respect to a closing
20 argument?

21 MR. SCOTTI: I have nothing further to add, unless
22 the Court has any further questions for the government. We
23 rest on our papers.

24 THE COURT: Mr. Ryan, is there anything further?

25 MR. RYAN: Very briefly.

1 The government is trying to convince your Honor of
2 the brutality of the crime, which we concede, overrides all
3 of the other five factors, and the fact that we can't say
4 here today if he had the treatment, what he would be like at
5 21. But the record does show he's a candidate and capable
6 of undergoing these treatments.

7 Now, we are frustrated by the fact that we can't
8 give your Honor the programs of Pennsylvania or the main
9 states given under BOP contracts, which I hope the
10 government had given your Honor, so that you can make a
11 better assessment. I have a FOYA, Freedom of Information
12 Act, request of the Bureau of Prisons to produce information
13 related to their contracts with juvenile facilities in the
14 State of Pennsylvania, which is one of the states the
15 government says has those kinds of facilities. And I'm not
16 going to expect any answer soon. So if I have a form letter
17 that says it will take a lot of time, can't give you any
18 time frame or anything else. So I wouldn't be able to give
19 your Honor a program concrete terms that your Honor could
20 consider in assessing this decision.

21 I do think that through the Probation Department,
22 and your Honor's intervention, you can possibly get that
23 information. But I can't offer it to the Court, and the
24 government hasn't offered it to the Court. We knew in Judge
25 Englemayer's case in Southern District, the government

1 actually had an affidavit from someone from the Bureau of
2 Prisons to explain the programs. Your Honor doesn't have
3 the benefit of that to make the decision.

4 So I would urge the Court, if it's possible, to
5 try to find out what kind of programs are available, if you
6 think the decision does need the record amplified to see
7 what kind of treatment is, so that we can project when he's
8 21, if your Honor should decide the likelihood of success is
9 here or not. At 21 years of age, his mother will be here.
10 He also has a family back in El Salvador, and I don't think
11 he would resist deportation, either. He has had enough of
12 the United States of America, given his life-style and
13 experience.

14 So, I just want to close and say that we are
15 frustrated that we can't give you the BOP contracts for
16 Pennsylvania which, given those contracts, should have a
17 detailed account of the kind of programs that the federal
18 government paid for for juvenile treatment.

19 Thank you very much.

20 THE COURT: Thank you, Mr. Ryan.

21 Let me ask Mr. Scotti. First of all, if you there
22 was an affidavit in the case before Judge Englemayer,
23 assuming the information is the same, why can't I just get a
24 copy of that affidavit that describes the program?

25 MR. RYAN: No question. It is outlined in his

1 opinion. I will get it.

2 THE COURT: Well, the government might be able to
3 get it more easily.

4 Mr. Scotti, is there any reason why, especially if
5 it's already been done in that case, that you can't submit
6 to the court generally what the programs are in these
7 facilities what programs might be available?

8 MR. SCOTTI: I will look into it, your Honor, and
9 make an effort to obtain that information and get it to the
10 court.

11 THE COURT: Contact Southern District and say
12 that you would like the affidavit that Judge Englemayer had.
13 I don't want you to feel like you are disadvantaged by that,
14 Mr. Ryan, because in the past because obviously I had other
15 of these juvenile cases where I hadn't had that information.
16 I'm assuming that the programs are good and I guess at the
17 highest level for rehabilitation purposes. All given the
18 benefit to the defendant, their availability and their
19 quality, it's really a question, as I was asking the doctor,
20 of the likelihood for a particular defendant given the
21 factors of whether or not they would be successful. But I'm
22 happy to look at it. Okay.

23 MR. SCOTTI: And, your Honor, I do want to point
24 out, as the Court is aware, the government has conceded that
25 specific point. But just that the totality of the other

1 factors that weigh in favor of transfer -- overwhelmingly
2 weigh in favor of transfer to the point that that factor
3 does not come close to overcome. But understanding the
4 Court's request, we will get that information.

5 THE COURT: Okay. So if you can get that to me
6 within a week from today, hopefully it will be sooner,
7 within a week from today. If not, just write me a letter
8 explaining why.

9 MR. SCOTTI: Certainly, your Honor.

10 THE COURT: Once I get that, I will consider that
11 matter fully submitted. Agreed?

12 MR. RYAN: Agreed.

13 MR. SCOTTI: Agreed.

14 THE COURT: So, I would like to put it down for a
15 conference the following week. My intention would be to
16 issue a written opinion prior to that conference date or, if
17 necessary, place an oral ruling on the record at the
18 conference if I'm not able to finalize the opinion at that
19 point, so let me see if everyone is available.

20 THE COURT: How about Thursday, August 2nd?

21 MR. RYAN: I think that's a good date.

22 THE COURT: One o'clock.

23 MR. SCOTTI: That's fine, your Honor.

24 MR. RYAN: One o'clock on the 2nd?

25 THE COURT: Yes.

1 And your client is willing to obviously exclude
2 the time until then, Mr. Ryan?

3 MR. RYAN: Yes.

4 THE COURT: Let him fill out the Waiver.

5 MR. RYAN: We will.

6 MR. RYAN: Judge, I'm sorry, I checked my
7 calendar. Is there a possibility you have an open date in
8 that week?

9 THE COURT: The first Wednesday, the 1st?

10 MR. RYAN: That's a bad week for me.

11 THE COURT: The whole week?

12 MR. RYAN: It is. I have plans to be out of town.
13 That's the week of July 30th?

14 THE COURT: Yes.

15 You will be out the whole week?

16 How about the following Monday, then?

17 MR. RYAN: That's fine, Monday the 6th.

18 THE COURT: Monday the 6th at 11 a.m.

19 MR. RYAN: Yes.

20 THE COURT: If you can just write that in the
21 waiver for Mr. Scotti for the reason consideration of papers
22 on transfer motion.

23 MR. SCOTTI: That was the 6th; is that correct,
24 hour Honor?

25 THE COURT: Yes.

1 MR. SCOTTI: Your Honor, just one other issue.

2 We provided the Court a binder of exhibits. Given
3 the fact that Exhibit 10, would the Court want to give that
4 back to us now?

5 THE COURT: Yes.

6 Mr. Portillo, you heard the lawyers. We are
7 putting this one for a conference on August 6th. That will
8 give me time to get this document regarding the programs
9 that Mr. Ryan would like me to consider, and give me time,
10 then, to make a decision with respect to the transfer
11 motion, and obviously wait until Mr. Ryan is available. So,
12 by signing this Waiver, you are excluding the time under the
13 speedy trial provision from today until August 6th to allow
14 that to occur.

15 Is that your wish?

16 THE DEFENDANT: Yes.

17 THE COURT: Okay. So we will adjourn until August
18 6th at 11 a.m. The time is excluded from today until
19 August 6th under Title 18 United States Code, Section 5036,
20 which deals with juvenile proceedings. It's with consent of
21 Mr. Portillo and his counsel, and it's in the interest of
22 justice to allow the Court time to receive additional
23 documents, and to consider the submissions on this important
24 motion.

25 I also, in an abundance of caution, for the same

1 reasons, will exclude the time under 3161(h)(7)(A) for the
2 reasons I just stated. I find that the ends of justice are
3 served by granting the continuance outweigh the best
4 interest of the public and Mr. Portillo in a speedier
5 juvenile proceeding or in a speedier trial, if transferred
6 to adult status, and I so ordered the waiver.

7 Anything else today from the government?

8 MR. SCOTTI: No, your Honor.

9 THE COURT: Anything else from the defense?

10 MR. RYAN: No, your Honor.

11 THE COURT: All right. Thank you.

12 (The proceeding is concluded.)

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Witnesses

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E X H I B I T S

Page

Government Exhibits 1 through 9 and Exhibits 11, 12 and 13, are received and marked into evidence

9

Defendant's Exhibit A is received and marked into evidence

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