

In the Supreme Court of the United States

UNDER SEAL, PETITIONER

v.

UNITED STATES OF AMERICA

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

APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA

v.

[REDACTED]

Defendant.

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UNDER SEAL

Criminal Action No. 1:20-cr-231 (RDA)

ORDER

This matter comes before the Court on the Government's Motion to Transfer Defendant for Prosecution as an Adult ("Motion"). Dkt. 14. Considering the Motion, [REDACTED] ("Defendant") Brief in Opposition, Dkt. 20, the Government's Reply, Dkt. 23, and the evidence elicited at the evidentiary hearing, the Court GRANTS the Motion for the reasons stated below.

I. Background

On September 22, 2020, the Government filed under seal a two-count Juvenile Information and supporting affidavit against [REDACTED] Dkt. Nos. 1; 5. The Juvenile Information charged that Defendant knowingly and intentionally maimed [REDACTED], another juvenile, in violation of Va. Code Ann. §§ 18.2-51 and -18, and knowingly and intentionally assaulted [REDACTED] with a dangerous weapon resulting in serious bodily injury, in violation of the same. Dkt. 1. Had Defendant been an adult at the time of the offense conduct, Defendant would have violated 18 U.S.C. §§ 1959(a)(2), (a)(3), and 2. Dkt. 1. With the Juvenile Information, the Government filed a Certification to Proceed under the Juvenile Justice and Delinquency Prevention Act, Dkt. 2, as well as the instant Motion. Dkt. 14.

On October 21, 2020, this Court conducted Defendant's arraignment, at which Defendant denied the charges, opposed the Government's Motion, Dkt. 14, and advised the Court of his intent

to proceed as a juvenile.¹ Dkt. 16. Accordingly, the Court set a hearing on the pending Motion for December 14, 2020. *Id.* A protective order and speedy trial order were entered wherein the Court excluded the time period from the filing of the instant Motion to the date on which this Court's Order on the Motion becomes final. Dkt. Nos. 16; 18; 19.

Defendant filed his Brief in Opposition on December 10, 2020, Dkt. 20, and on December 11, 2020, the Government replied. Dkt. 21. The hearing on the Motion commenced on December 14 and ended on December 15, 2020, lasting approximately four hours. The Court made certain that Defendant's parents were aware of the hearing date by asking Defendant's counsel about his efforts on the record. During the hearing, the Government presented the testimony of three witnesses: Karl Leukefeld, who oversees the Federal Bureau of Prisons' Juvenile caseload, Valeria Antelo, who worked as a Probation Officer for the Virginia Department of Juvenile Justice—Defendant was a supervisee, and Darryl Ferrer, who was the primary gang detective for the Alexandria Police Department between 2016 and 2017. The Government also introduced myriad documents, which were admitted into evidence, including records maintained by: the Virginia Department of Juvenile Justice, the Circuit Court of the City of Alexandria, the Alexandria Adult Detention Center, the Virginia Department of Corrections, and Alexandria City Public Schools. Dkt. 25-1. Other documents admitted included the testimony of Fairfax County Gang Investigations Unit Detective and Federal Bureau of Investigations Task Force Officer Raymond Betts at Defendant's preliminary and detention hearings. *Id.* Defendant cross-examined the

¹ At each appearance before this Court, Defendant was provided the services of a Spanish-speaking interpreter. The Court also notes that Defendant's counsel, Mr. John C. Kiyonaga is fluent in Spanish. The Court ensured that Defendant understood his interpreters and was satisfied with the services of his counsel multiple times at every appearance.

Government's witnesses and elected not to present evidence, as is his prerogative. The Motion was then argued and taken under advisement.² Dkt. 25.

II. Analysis

The Court first considers whether it has properly exercised jurisdiction over the matter. *See, e.g., United States v. D.R.*, 225 F. Supp. 2d 694, 696-97 (E.D. Va. Oct. 11, 2002). Then, the Court addresses whether it is in the interests of justice to transfer Defendant to adult prosecution. *Id.* at 697-704.

A. Jurisdictional Prerequisites

Defendant contests this Court's jurisdiction by arguing that the Government's Certification to Proceed under the Juvenile Justice and Delinquency Prevention Act is inadequate. Specifically, Defendant argues that he was not charged with a "crime of violence" and that there is no substantial federal interest warranting Defendant's prosecution as an adult. Dkt. 20. The Government asserts that a categorical approach analysis reveals that Defendant was indeed charged with a "crime of violence" and that there is a substantial federal interest in transferring Defendant to adult prosecution. Dkt. 23.

i. Defendant was Charged with Crimes of Violence

The Government observed that there is a split among district courts in Virginia as to whether "a court should look to the elements of generic maiming and assault under federal law (by referencing, among other things, 18 U.S.C. §§ 114 and 113, respectively), or instead to the elements of maiming and aggravated assault under Virginia law." Dkt. 14, 9 (citing *United States*

² Government's Exhibit 8-3 was offered by the Government and taken under advisement pending the Court's review. The exhibit was a disc containing video footage captured on a witness' cell phone of Defendant engaging in a crime for which he was charged. The Court viewed the tape in open court and Defendant expressed that he was able to clearly see what the video footage purported to portray. Accordingly, the Court admits this exhibit.

v. *McCall*, No. 3:10-cr-170, 2019 WL 4675762 (E.D. Va. Sept. 25, 2019) and *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019)). However, in *Mathis*, the Fourth Circuit did not squarely address this question. The Court finds that it need not address that question at this time because under either analytical approach, Defendant has indeed been charged with crimes of violence.

In determining whether Defendant was charged with a crime of violence, “[t]he [Juvenile Justice and Delinquency Prevention] Act does not define crime of violence. However, courts have used the definition of crime of violence set out in 18 U.S.C. § 16.” *United States v. C.A.M.*, 251 Fed. App’x. 194, 195 (4th Cir. Oct. 19, 2007) (citing *United States v. Doe*, 49 F.3d 859, 866 (2d Cir. 1995)). 18 U.S.C. § 16 defines a “crime of violence” as

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16. Subsection a mirrors the “force clause” present in the Armed Criminal Career Act as well as 18 U.S.C. § 924(c). Generally, to determine whether the predicate offense is a “crime of violence under the force clause, courts must employ the ‘categorical’ approach.” *United States v. Taylor*, 979 F.3d 203, 207 (4th Cir. 2020) (citing *Descamps v. United States*, 570 U.S. 254, 258 (2013)). “Pursuant to the categorical approach, a court, ‘focuses on the elements of the prior offense rather than the conduct underlying the conviction.’” *Id.* (quoting *United States v. Cabrera-Umanzor*, 728 F.3d 347, 350 (4th Cir. 2013)). However, when a criminal statute is divisible, “courts employ a modified categorical approach, in which they may examine a limited class of documents, including indictments and jury instructions, to determine which part of the statute the defendant violated.” *Prayer v. United States*, No. 2:11-cr-58, 2020 WL 5793427, at *2 (E.D. Va. Sept. 28, 2020) (citing *Descamps*, 570 U.S. at 257). “Assessing a criminal statute’s divisibility is a matter of statutory interpretation and requires a court to decide whether Congress has ‘list[ed]

multiple elements disjunctively' or simply 'enumerate[d] various factual means of committing a single element.'" *Dorsey v. United States*, Civil No. 1:16-cv-738, Crim No. 1:99-cr-203, 2018 WL 3947914, at *3 (E.D. Va. Aug. 21, 2019) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016)).

In reviewing the two-count Juvenile Information, Defendant is charged with maiming in aid of racketeering, which would have amounted to a violation of 18 U.S.C. §§ 1959(a)(2) and 2(citing the statute that provides an individual may be charged as a principal) had Defendant been an adult at the time of the instant offenses. 18 U.S.C. §§ 1959(a)(2) provides in pertinent part:

(a) [w]hoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both.

18 U.S.C. § 1959(a)(2).

Defendant is also charged with intentional assault with a dangerous weapon resulting in serious bodily injury charge, which would have amounted to a violation of 18 U.S.C. §§ 1959(a)(3) and 2 had Defendant been an adult at the time of the instant offenses. 18 U.S.C. §§ 1959(a)(3) provides in relevant part:

(a) [w]hoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any

individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both.

18 U.S.C. §§ 1959(a)(3).

These offenses constitute violent crimes in aid of racketeering (“VICAR”).

A VICAR conviction requires proof of five elements: (1) the organization is a Racketeer Influenced and Corrupt Organizations Act (“RICO”) enterprise; (2) the enterprise was engaged in racketeering activity as defined in RICO; (3) the defendant had a position in that enterprise; (4) the defendant committed the alleged crime of violence in violation of federal or state law; and (5) the defendant’s general purpose in doing so was to maintain or increase position in the enterprise.

Cousins v. United States, 198 F. Supp. 3d 621, 626 (E.D. Va. Aug. 2, 2016) (citing *United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir.1994)).

Given that the elements are stated in the alternative, the Court applies a modified categorical approach and looks to the Juvenile Information. *Descamps*, 570 U.S. at 257. As previously noted, Defendant has been charged with violating 18 U.S.C. §§ 1959 (a)(2) and (a)(3). *Supra* 5-6.

In proceeding to determine whether these offenses are indeed crimes of violence, the VICAR statute does not define “maiming” or “assault,” thus, the Court “must look to the elements of the predicate offense as it is generically defined.” *Ellis v. United States*, __ F. Supp. 3d __, 2020 WL 1844792, at * 2 (E.D. Va. Apr. 10, 2020) (quoting *Davis v. United States*, 430 F. Supp. 3d 141, 145 (E.D. Va. Dec. 23, 2019)). Pursuant to federal law, the elements of “maiming” include “[w]hoever . . . and with intent to torture, maim, or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person.” 18 U.S.C. § 114. Additionally, “[m]aiming” has been defined as “[t]he type of strength-diminishing injury required to support a charge of mayhem, usu. involving a wound or injury that is both severe and permanent; esp., serious injury to a body part

that is necessary for fighting.” Bryan A. Garner, *Black’s Law Dictionary* (11th ed. 2019). “Assault” has been defined as the “(1) willful attempt to inflict injury upon the person of another . . . or (2) a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.” *Ellis*, 2020 WL 1844792, at *2 (quoting *Davis*, 2019 WL 7205915 at *3). Additionally, § 1959(a)(3) “heightens this common law assault definition by additionally requiring the use of a dangerous weapon, that is, an object with the capacity to endanger life or inflict serious bodily harm.” *Id.* It is clear that the generic definitions of “maiming” and “assault” under federal law require the use, attempted use, or threatened use of physical force.

The Court next analyzes whether the same is true under Virginia law. Va. Code Ann. § 18.2-51 provides that:

[i]f any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

Va. Code Ann. § 18.2-51.

It is clear that a violation of this statute requires the use, attempted use, or threatened use of force. Defendant’s argument to the contrary is unavailing. Defendant contends that a violation of this statute is not a crime of violence because it includes the phrase “by any means” and then analogizes the instant offenses to a conviction for VICAR Kidnapping in Aid of Racketeering. Dkt. 20, 2-3. Defendant’s argument fails to account for the *mens rea* requirement which requires that the individual have a specific intent “to maim, disfigure, disable, or kill.” *United States v. Jenkins*, 719 Fed. App’x 241, 244-45 (4th Cir. Mar. 9, 2018). Further, “[i]f a perpetrator specifically intends to ‘maim, disfigure, disable, or kill,’ then, as a practical matter, the means employed toward that end will involve violent force.” *Id.* In addition, “[s]everal district courts

and the Fourth Circuit have found that malicious or unlawful wounding under Va. Code Ann. § 18.2-51, is categorically a crime of violence.” *McCall*, 2019 WL 4675762, at *4 (citing string cite).

Accordingly, Defendant has been charged with crimes of violence.

ii. There is a Substantial Federal Interest in Prosecuting Defendant as an Adult

With respect to determining whether there exists a substantial federal interest, “a court must decide whether ‘the crime [is] of a sufficiently serious type that federal resources should be called upon, without regard to the State’s willingness or ability to handle the matter.’” *United States v. Juvenile Male*, 554 F.3d 456, 465 (4th Cir. 2009) (quoting *United States v. Juvenile Male # 1*, 86 F.3d 1314, 1320 (4th Cir. 1996)). “Indeed, ‘[o]ur prior cases . . . have placed importance on the severity of the penalty prescribed for the offense and the sense of urgency by Congress in deciding to federalize the crime.’” *Id.* (quoting *United States v. T.M.*, 413 F.3d 420, 426 (4th Cir. 2005)).

Defendant was charged with VICAR offenses. Dkt. 1. Congress enacted “[t]he VICAR statute [as a] complement[to] the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 through 1968, [which] address[es] the ‘particular danger posed by those . . . who are willing to commit violent crimes in order to bolster their positions within [racketeering] enterprises.’” *United States v. Keene*, 955 F.3d 391, 394 (4th Cir. 2020) (quoting *United States v. Ayala*, 601 F.3d 256, 266 (4th Cir. 2010)). In addition, Defendant faces a maximum exposure of thirty years of imprisonment on the maiming in aid of racketeering charge and twenty years of imprisonment on the intentional assault with a dangerous weapon resulting in serious bodily injury charge. *See* 18 U.S.C. §§ 1959(a)(2) and (a)(3). Moreover, 11 other individuals have been indicted in connection to the kidnapping and murder of S.A.A.T. Dkt. 14, 13. The Fourth Circuit has held that “there is a significant interest in trying all defendants together.” *D.R.*, 225 F. Supp. 2d at 697 (citing *United States v. Nelson*, 1998 WL 180481, at *2 (4th Cir. Apr. 17, 1998)). Thus, the Court

finds that there is a substantial federal interest warranting the Court's exercise of jurisdiction in this case.

Because Defendant was charged with crimes of violence and there is a "substantial federal interest" present in this case, this Court has properly exercised its jurisdiction over the matter.

B. Discretionary Transfer Analysis

Addressing the merits of the instant Motion, the Court need not consider whether Defendant's transfer is mandatory pursuant to 18 U.S.C. § 5032 because the Court grants the Motion pursuant to its discretionary authority.

"The [G]overnment bears the burden of proving by a preponderance of the evidence that a transfer of defendant from juvenile to adult status would be in the 'interest of justice.'" *D.R.*, 225 F. Supp. 2d at 697 (citing *United States v. Juvenile Male #1*, 86 F.3d 1314, 1323 (4th Cir. 1996)). "This test requires district courts to 'balance the [rehabilitative] purposes [of the juvenile system] against the need to protect the public from violent and dangerous individuals.'" *Id.* Accordingly, "'a motion to transfer is properly granted where a court determines that the risk of harm to society posed by affording the juvenile more lenient treatment within the juvenile justice system outweighs the defendant's chance for rehabilitation.'" *Id.* (quoting *United States v. One Juvenile Male*, 40 F.3d 841, 844 (6th Cir. 1994)).

While resolution of the instant Motion is within this Court's discretion, the following factors guide the Court's consideration:

- (i) the age and social background of the juvenile;
- (ii) the nature of the alleged offense;
- (iii) the extent and nature of the juvenile's prior delinquency record;
- (iv) the juvenile's present intellectual development and psychological maturity;
- (v) the nature of past treatment efforts and the juvenile's response to such efforts;
- and
- (vi) the availability of programs designed to treat the juvenile's behavioral problems.

18 U.S.C. § 5032.

In making this determination, this Court is not required to afford each factor equal weight. *D.R.*, 225 F. Supp. 2d at 698 (citing *United States v. Nelson*, 90 F.3d 636, 640 (2d Cir. 1996)). However, the Fourth Circuit has held that “the nature of the crime [factor] clearly predominates.” *Id.* (quoting *Juvenile Male # 1*, 86 F.3d at 1323). And in conducting this analysis, it is significant to note that this proceeding is not a trial but rather an adjudication of status; therefore, this Court must take the allegations as true for the purposes of the instant Motion. *Id.*

A review of the above factors persuades this Court that the Government has demonstrated by a preponderance of the evidence that it is in the interests of justice to transfer Defendant from juvenile to adult prosecution.

i. Age and Social Background

In assessing this factor, the proximity of a juvenile’s age to 18 is the important consideration. *D.R.*, 225 F. Supp. 3d at 698-99 (citing *United States v. Smith*, 178 F.3d 22, 27 (1st Cir. 1999)). Defendant was born on [REDACTED] 1999. Dkt. 3. Therefore, at the time of the offense conduct, Defendant was almost 17, and now, Defendant is 21. Considering the relatively close proximity of Defendant’s age to 18 at the time of the offense, and that he is now 21, it appears that Defendant’s age weighs in favor of transfer.

Reviewing Defendant’s social background, Defendant was born in El Salvador. Dkt. 1-6, 6. When Defendant was four years old, his mother left El Salvador and traveled to the United States to provide for her family. *Id.* In 2012, Defendant was reunited with his mother and, according to Ms. Antelo, Defendant’s probation officer, he made healthy adjustments in that relationship. *Id.* Ms. Antelo testified that Defendant’s home life was stable and that his relationship with his mother and the male figure present in the home was good. They even engaged in family activities, such as travelling to Disney World. *Id.* Ms. Antelo advised that Defendant’s

problematic behaviors as reflected in his records stemmed from his truant behavior, which she did not initially attribute to gang-related activity. *Id.* Defendant also reported that he has consumed alcohol and that he uses marijuana. *Id.* at 8.

With respect to Defendant's educational background, the record reflects that Defendant demonstrated a much stronger academic performance at the start of the year and that his progress declined over the year; for example, in tenth grade, Defendant earned much higher marks during his first term and much lower marks for his final grades. Dkt. Nos. 2-3; 2-9; 2-10. Further, as Defendant progressed through high school, his final grades worsened each year. Dkt. 2-9. In addition, Defendant's middle school grades were much higher than those he earned in high school. Dkt. 2-11. These observations suggest that Defendant does not lack academic ability, but rather other factors, such as Defendant's truancy and gang-related behavior, played a significant role in Defendant's decreased performance over time. And, although Defendant posited that he may have disabilities based on observations Ms. Antelo made, Defendant has not been formally diagnosed with any such disability.

Another significant part of Defendant's social background is his affiliation with *La Mara Salvatrucha*, MS-13, an internationally-known and extremely violent gang. Overtime, Ms. Antelo began to believe that Defendant was involved with MS-13. She reached this conclusion based on new and violent charges that Defendant incurred, Defendant's fraternization with known gang associates in a neighborhood located in Alexandria known for its gang activity, and from a conversation wherein Defendant directly asked if it was illegal to be part of a gang. When Ms. Antelo inquired of Defendant why he asked that question, he provided no reason. Ms. Antelo's testimony is further supported by the testimony of Agent Ferrer. Agent Ferrer detailed multiple encounters with Defendant wherein Defendant was interacting with MS-13 members and associates (including a co-defendant in the related case *United States v. Aguilar*, No. 1:18-cr-

123(E.D. Va. 2018)), provided Defendant's gang moniker—Duple, Dupla, Duplex, etc., and authenticated two pictures. In one of the pictures, Defendant is seen flashing the “legare,” meaning devil's claws, a hand gesture which Agent Ferrer testified is used by MS-13 members. Dkt. 8-1. In two others, Defendant was shown wearing a white and blue reversible jersey with the number “13” printed on the back and then in a white and black checked shirt with Nike shoes. Dkt. Nos 8-2A; 8-2B; 8-2C. Agent Ferrer testified that MS-13 members often wore blue and that brand of tennis shoes to represent their gang affiliation.

Given the proximity of Defendant's age to that of 18 at the time of the offense conduct and that Defendant is currently 21, Defendant's age weighs in favor of transfer. With respect to Defendant's social background, Defendant's documented MS-13 affiliation provides a strong basis for this Court to find that Defendant's social background weighs in favor of transfer.

ii. Nature of the Alleged Offense

Reviewing the two-count Juvenile Information, the Court assumes that the allegations contained therein are true for the purposes of this hearing. *D.R.*, 225 F. Supp. 2d at 698. Defendant was charged with knowingly and intentionally maiming [REDACTED], and knowingly and intentionally assaulting [REDACTED] with a dangerous weapon resulting in serious bodily injury, which would have been a violation of 18 U.S.C. §§ 1959(a)(2) and 18 U.S.C. §§ 1959(a)(3) and 2 had Defendant been over the age of 18 at the time of the offenses. Those charges are severe, and the allegations are horrific. Considering the affidavit filed in support of the Juvenile Information and Detective Betts' testimony at the October 15, 2020, preliminary and detention hearings, Defendant affiliated with the *Cabanas Locos Salvatruchas* clique of MS-13 and also interacted with the *Park View Locos Slavatrucha* (“PVLS”) clique of MS-13. Dkt. 5, 8-9. On September 26, 2016, members of the PVLS clique believed that [REDACTED] was an informant and a “green light” authorizing his murder was issued. Dkt. 5, 8. [REDACTED] was lured to Holmes Run Street Park. Defendant arrived

at Holmes Run Street Park and initially served as a lookout. Dkt 8, 11. S.A.A.T. was taken deeper into the woods, surrounded, and attacked with machetes, a knife, and a pickaxe. Dkt. 5, 8. At some point during the *en masse* attack against 14-year old [REDACTED] Defendant struck [REDACTED] Dkt. 5, 13. Defendant was then promoted within the gang for his participation in the murder. Dkt. 5, 13.

Considering the greater weight afforded to this factor in this Circuit, the grave nature of the offense militates strongly in favor of transfer.

iii. Extent and Nature of Juvenile's Prior Delinquency Record

Defendant's prior record is lengthy and revealing.

On May 17, 2016, prior to the instant offense, a Child in Need of Services ("CHINS") petition was filed as to Defendant for his truant behavior. Dkt. 1-1. At the hearing on the CHINS petition, the Alexandria Juvenile and Domestic Relations District Court withheld finding Defendant guilty and continued the hearing to August 24, 2016. Dkt. 1-3. At the August hearing, Defendant was placed on probation. Dkt. Nos. 1-7; 1-17. The matter was continued for review to February 16, 2017. Dkt. 1-7. During that time, Defendant violated the terms his probation by missing required meetings, continuing his truant behavior, leaving the shelter care program, and incurring new charges. Dkt. Nos. 1-1; 1-3; 1-9; 1-11; 1-17.

On February 15, 2017, Defendant was charged with violating Va. Code Ann. § 18.2-41; Defendant ultimately pleaded guilty to a violation of Va. Code Ann. § 18.2-42. Dkt. Nos. 1-1; 1-12. For that conviction, Defendant was sentenced to serve 30 days of detention, ordered to complete 100 hours of community service, and placed on probation. Dkt. 1-17. Defendant was also charged for possession of marijuana on June 10, 2017. Dkt. Nos. 1-13; 1-17. That possession charged was ultimately *nolle prossed*. Dkt. 1-17. Then, on June 18, 2017, Defendant was charged with a violation of Va. Code Ann. § 18.2-41, which was later amended to simple assault, a violation

of Va. Code Ann. § 18.2-57. Dkt. Nos. 1-14; 1-17. On the amended charge, Defendant was sentenced to detention. Dkt. 1-17. Defendant again did not adhere to the terms of his probation as he failed to attend an appointment and failed to report home in June and July of 2017. Dkt. 1-15. And on July 14, 2017, Defendant was charged with violating Va. Code Ann. §§ 18.2-26 and -41; that charge was ultimately *nolle prossed*. Dkt. Nos. 1-16; 1-17. A review of the relevant incident reports reflects that during the June 2017 attack, Defendant and four others approached and attacked the victim—one of the attackers struck the victim with a rock. Dkt. 1-24. And during the July 2017 attack, Defendant and two others approached and chased the victim with switchblades. Dkt. 1-25.

When Defendant was detained, he displayed aggressive, gang-related, and assaultive behavior as documented in incident reports from the Northern Virginia Juvenile Detention Center. Dkt. Nos. 1-20; 1-21; 1-22; 1-23.

As an adult, on April 12, 2018, before the Circuit Court for the City of Alexandria, Defendant pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to malicious wounding and gang participation. Dkt. 3-1. The circuit court sentenced Defendant to 10 years of imprisonment, with all but three years suspended, on the malicious wounding conviction, and three years of imprisonment, with all three years suspended, on the gang participation conviction. *Id.* And while serving his sentence, several incidents were reported, including an aggravated assault. Dkt. 5-1.

Given Defendant's continued and violent violations of law as both a juvenile and an adult, Defendant's clear disregard for the terms of his probation, and Defendant's disruptive and aggressive behavior while detained and imprisoned, Defendant's record weighs heavily in favor of transfer.

iv. Juvenile's Present Intellectual Development and Psychological Maturity

As previously discussed, Defendant did not excel in academics. *Supra* p. 11. However, it is apparent that Defendant performed better when in middle school and at the start of the school year in high school. *Supra* p. 11. As noted, the Court finds that Defendant's truancy and gang-related behavior contributed to his lackluster performance. *Supra* p. 11. Moreover, although Ms. Antelo believed that Defendant may have struggles in reading comprehension in both Spanish and English, Defendant was never tested for a learning disability and there is no evidence that Defendant has a learning disability. Dkt. 1-6, 7.

Addressing Defendant's psychological maturity, Ms. Antelo described Defendant as nonresponsive, *id.* at 6, which she attributes to the trauma that occurred to Defendant when being separated from those who raised him. *Id.* Reviewing Ms. Antelo's 2016 report with respect to Defendant's cognitive skills, Ms. Antelo also advised that Defendant is not able to think of or apply solutions, lacks a sense of responsibility, and does not have effective problem-solving skills. *Id.* at 9-10. However, Defendant does not have a history of nor a formal diagnosis of any mental illness.

Accordingly, this factor weighs in favor of transfer.

v. The Nature of Past Treatment Efforts and the Juvenile's Response to Such Efforts

Past services provided to Defendant have not been successful due to his failure to participate in treatment. Additionally, a Youth Assessment and Screening Instrument was completed and reflects that Defendant has "an overall moderate risk to reoffend, with a moderate to high dynamic risk." Dkt. 1-6, 10. The findings of the assessment are supported by Ms. Antelo's testimony, wherein she detailed Defendant's noncompliance. Thus, even if Defendant were offered services now, the likelihood that those services would benefit Defendant or aid in his rehabilitation is low as Defendant has a pattern of noncompliance. Further, any efforts made in this regard did not deter Defendant from affiliating with MS-13 nor from engaging in violent and

criminal behavior. This observation holds even stronger force given that as an adult, Defendant elected to continue this pattern of noncompliance and law-breaking.

Accordingly, this factor weighs heavily in favor of transfer.

vi. Availability of Programs Designed to Treat the Juvenile's Behavioral Problems

Defendant is now 21 years old. Karl Leukefeld testified that because of Defendant's age, Defendant would not be eligible for juvenile rehabilitative services administered by the Bureau of Prisons, nor would a contract juvenile facility accept Defendant due to his current age. The Court observes that even if Defendant were eligible for such services, it is not at all likely that Defendant would obtain any benefit therefrom. *Supra* p. 15-16.


This factor weighs in favor of transfer.

III. Conclusion

Given that the Court has properly exercised its jurisdiction over the matter and that the Government has demonstrated by a preponderance that the discretionary factors weigh in favor of transfer, the Court GRANTS the Government's Motion. Therefore, the Court transfers Defendant from juvenile to adult prosecution in the interests of justice.

It is SO ORDERED.

Alexandria, Virginia
December 28, 2020

/s/ 

Rossie D. Alston, Jr.
United States District Judge

UNPUBLISHED

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

No. 21-4034

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

UNDER SEAL,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Rossie David Alston, Jr., District Judge. (1:20-cr-00231-RDA-1)

Submitted: February 22, 2022

Decided: June 15, 2022

Before GREGORY, Chief Judge, and THACKER and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: John C. Kiyonaga, LAW OFFICE OF JOHN C. KIYONAGA, Alexandria, Virginia, for Appellant. Raj Parekh, Acting United States Attorney, Rebecca H. Bellows, Assistant United States Attorney, Cristina C. Stam, Assistant United States Attorney, Aidan Taft Grano, Assistant United States Attorney, Alexander E. Blanchard, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Male Juvenile appeals the district court's order transferring him to adult status under the Juvenile Justice and Delinquency Act, 18 U.S.C. §§ 5031-5043 ("JDA").¹ Male Juvenile was charged in a two-count juvenile information with maiming in aid of racketeering activity, in violation of 18 U.S.C. §§ 2, 1959(a)(2), and assault with a dangerous weapon resulting in serious bodily injury in aid of racketeering activity, in violation of 18 U.S.C. §§ 2, 1959(a)(3).² The Government certified to the district court that there is a substantial federal interest in Male Juvenile's case and his offenses that warrant exercising federal jurisdiction. Male Juvenile argues that the district court lacked jurisdiction to transfer him to adult status because (1) a violation of Va. Code § 18.2-51 is not a "crime of violence" under the JDA; and (2) prosecuting him as an adult implicates no "substantial federal interest." Male Juvenile further asserts that the court abused its discretion when it determined that the interests of justice compelled the exercise of its discretion to transfer him for trial as an adult. Finding no error, we affirm.

I. Jurisdiction

The principal purpose of the JDA "is to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to

¹ We possess jurisdiction to review the district court's transfer order under the collateral order doctrine. *United States v. Juv. Male*, 554 F.3d 456, 463-65 (4th Cir. 2009).

² The maiming and assault charges underlying the charged federal offenses were alleged under Va. Code § 18.2-51 and § 18.2-18.

encourage treatment and rehabilitation.” *United States v. Robinson*, 404 F.3d 850, 858 (4th Cir. 2005) (internal quotation marks omitted). Accordingly, the JDA dictates that a juvenile not be prosecuted in federal court unless the Government first certifies “one of three potential jurisdictional bases for proceeding in federal court.” *Juv. Male*, 554 F.3d at 460. The potential jurisdictional bases are: “(1) that no state possesses, or is willing to exercise, jurisdiction over the juvenile; (2) that the state lacks adequate programs and services for the juvenile; or (3) that the juvenile has committed a felonious ‘crime of violence’ or drug offense in which there is a substantial federal interest.” *Id.*

In order to satisfy itself that jurisdiction exists, then, a district court must “review[] the stated reasons underlying the [G]overnment’s decision to proceed in federal court.” *Id.* (internal quotation marks omitted). In evaluating a transfer motion, “a court is not required to examine the veracity of the allegations lodged against the juvenile; it is entitled to accept the prosecution’s allegations as true.” *Id.* We conduct a de novo review of the district court’s determination that it possessed jurisdiction over the proceeding against Male Juvenile. *See United States v. Cortez*, 930 F.3d 350, 355 (4th Cir. 2019).

The parties now agree that a violation of Va. Code § 18.2.51 is a “crime of violence” under the JDA. *See Moreno-Osorio v. Garland*, 2 F.4th 245, 253 (4th Cir. 2021) (holding that a violation of “Virginia Code § 18.2-51 is a ‘crime of violence’ under 18 U.S.C. § 16(a), since it has as an element the use of ‘physical force’”). In addition, given the egregious nature of the offenses in Male Juvenile’s case, the severity of the penalties Male Juvenile faces, the importance of the federal law under which the

Government seeks to prosecute Male Juvenile, and the fact that the Government has a significant interest in prosecuting all of the individuals—including the adult individuals—involved in the alleged crimes, we find no error in the district court’s determination that a “substantial federal interest” is implicated in Male Juvenile’s case.

We therefore conclude that the district court properly exercised jurisdiction over Male Juvenile’s proceedings.

II. Discretionary Transfer

Before a juvenile defendant eligible for discretionary transfer may become the subject of a transfer order, the district court must determine, after a hearing, that transferring him for prosecution as an adult would serve the “interest[s] of justice.” 18 U.S.C. § 5032, para. 4. In so doing, the court must consider evidence on, and make findings of fact regarding, six factors: (1) “the age and social background of the juvenile”; (2) “the nature of the alleged offense;” (3) “the extent and nature of the juvenile’s prior delinquency record;” (4) “the juvenile’s present intellectual development and psychological maturity”; (5) “the nature of past treatment efforts and the juvenile’s response to such efforts”; and (6) “the availability of programs designed to treat the juvenile’s behavioral problems.” *Id.*, para. 5.

A transfer hearing is not a criminal proceeding; rather, it is essentially a civil matter that results in the adjudication of the juvenile’s status. *See Juv. Male*, 554 F.3d at 459 & n.3. Accordingly, the Government need only show by a preponderance of the evidence that transfer to adult status is in the “interest of justice.” *See Robinson*, 404 F.3d at 858.

While the district court must make explicit findings on each of the six § 5032 factors, *see United States v. Romulus*, 949 F.2d 713, 715-16 (4th Cir. 1991), it need not accord them equal weight, *see United States v. Juv. Male No. 1*, 86 F.3d 1314, 1323 (4th Cir. 1996). This court has nonetheless recognized that “the nature of the offense is significant,” and a district court does not clearly err if it concludes “that this factor weigh[s] heavily in favor of transfer.” *Juv. Male*, 554 F.3d at 469. Regardless of the emphasis placed on a particular factor, however, the district court must be sure to “balance the rehabilitative purposes against the need to protect the public from violent and dangerous individuals.” *Juv. Male No. 1*, 86 F.3d at 1323. While we review a district “court’s findings on the statutory factors for clear error,” we examine the court’s “ultimate transfer ruling for abuse of discretion.” *Juv. Male*, 554 F.3d at 469.

The district court here appropriately considered each of the § 5032 factors and thoroughly explained why it determined that the factors favored prosecuting Male Juvenile as an adult. We find that, given the documentary evidence before the court and the witness testimony provided during the transfer hearing, combined with the deference this court affords the district court’s credibility determinations, *see United States v. Palmer*, 820 F.3d 640, 653 (4th Cir. 2016) (“When reviewing factual findings for clear error, we particularly defer to a district court’s credibility determinations, for it is the role of the district court to observe witnesses and weigh their credibility” (cleaned up)), the district court did not clearly err in rendering its factual findings, *see United States v. Cox*, 744 F.3d 305, 308 (4th Cir. 2014) (recognizing that this court will find clear error only if

it is “left with the definite and firm conviction that a mistake has been committed.” (internal quotation marks omitted)).

And as to the court’s decision to exercise its discretion to grant the Government’s motion based on the § 5032 factors, the district court can be said to have abused its discretion only if it “acted arbitrarily or irrationally,” “failed to consider judicially recognized factors constraining its exercise of discretion, . . . relied on erroneous factual or legal premises,” or “committed an error of law.” *United States v. High*, 997 F.3d 181, 187 (4th Cir. 2021) (cleaned up). While we have considered Male Juvenile’s insistence that the court inappropriately evaluated the § 5032 factors under the circumstances of his case, we defer to the district court’s determination that the § 5032 factors weighed in favor of Male Juvenile being prosecuted as an adult. *See Juv. Male*, 554 F.3d at 469-70 (finding no abuse of discretion in district court’s transfer decision because “the court appropriately evaluated and weighed th[e § 5032] factors”).

Accordingly, we affirm the district court’s order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

FILED: July 26, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4034
(1:20-cr-00231-RDA-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

UNDER SEAL

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk