

No.

IN THE SUPREME COURT OF THE UNITED STATES

JANE DOE, (Female Juvenile),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. When a juvenile is charged by Juvenile Information with First Degree Murder pursuant to 18 U.S.C. §§ 2, 1111(a), 1151 & 1153, and the government files a Motion to Transfer Proceedings Against Juvenile to Adult Criminal Prosecution (hereinafter referred to as the “Transfer Motion”) pursuant to 18 U.S.C. § 5032 of the Juvenile Justice and Delinquency Prevention Act, 18 U.S.C. §§ 5031-42 (hereinafter referred to as the “Federal Juvenile Act”), does the transfer to adult proceedings violate the juvenile’s rights pursuant to the Eighth Amendment to the United States Constitution to be free from cruel and unusual punishment because the only two punishments allowed by § 1111(b), the death penalty or a mandatory life sentence, are unconstitutional pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012)? Does the doctrine of “ripeness” allow a district court to fail to rule on this Eighth Amendment issue?

2. What is required by a district court in deciding whether the transfer of a juvenile is in the “interests of justice” as required by the express language of § 5032 of the Federal Juvenile Act? When deciding whether transfer would be in the interests of justice, is it acceptable for a district court, in its written decision, to adopt “a legally incorrect interpretation” of the six § 5032 Factors? Is it acceptable for the district court to include multiple “clearly

erroneous factual findings”? Is it acceptable for a district court decision to fail to address relevant evidence that tends to support denial of the Transfer Motion?

3. May a Circuit Court of Appeal affirm a district court’s transfer decision even though the district court’s written order included “a legally incorrect interpretation” of the § 5032 Factors and “clearly erroneous factual findings”; and failed to address relevant evidence?

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Sealed

Attachment 3: *United States v. Jane Doe, (Female Juvenile)*; Tenth Circuit Court of Appeals; Sealed Order filed February 17, 2023 (denying Doe's Petition for Rehearing)

Sealed

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PETITION FOR WRIT OF CERTIORARI

Jane Doe (hereinafter referred to as “Doe”) respectfully petitions for a writ of certiorari to review the Opinion of the United States Court of Appeals for the Tenth Circuit.

PREVIOUS OPINIONS AND ORDERS

In *United States v. Jane Doe, (Female Juvenile)*, 58 F.4th 1148 (10th Cir. 2023), on January 20, 2023, the United States Court of Appeals for the Tenth Circuit issued a published Opinion wherein Doe, the Petitioner herein, was the Appellant/Defendant. See Attachment 1 hereto. This Petition seeks issuance of a writ of certiorari to the Tenth Circuit Court of Appeals in regard to the Opinion.

Also on January 20, 2023, the United States Court of Appeals for the Tenth Circuit issued a sealed version of the Opinion. A Sealed Supplemental Appendix to this Petition is filed which includes: Sealed Attachment 2, the sealed version of the Opinion; Sealed Attachment 3, the sealed Order filed February 17, 2023, by Tenth Circuit denying Doe’s Petition for Rehearing. The Sealed Supplemental Appendix also includes the following from the sealed case in which Doe was the defendant in the United States District Court for the Eastern District of Oklahoma (the “District Court”): Sealed Attachment 4, the sealed Order of the District Court dated _____, 2022, granting the

Transfer Motion, which was the subject of the Tenth Circuit appeal and affirming Opinion (hereinafter the “District Court Order”); and Sealed Attachment 5, the sealed Findings and Recommendation of the Magistrate Judge in the District Court filed _____, 2022 (hereinafter the “Magistrate’s Report”).

JURISDICTION

The Tenth Circuit reviewed the District Court Order granting the Transfer Motion under the collateral order doctrine. Attachment 1, 58 F.4th at 1153, *citing United States v. Angelo D.*, 88 F.3d 856, 857-58 (10th Cir. 1996). Doe filed a sealed petition for rehearing on February 3, 2023, which was denied by a sealed order of the Tenth Circuit on February 17, 2023. See Sealed Attachment 3.

Jurisdiction for a writ of certiorari lies in this Court pursuant to 28 U.S.C. § 1254(1), which permits cases in the courts of appeals to be reviewed by writ of certiorari to be “granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.” Doe was the Appellant in the Tenth Circuit case and the Opinion (decree) now submitted for review by this Petition. This Petition is timely because it is due on May 18, 2023, which is 90 days from the denial of the petition for rehearing on February 17, 2023. S. Ct. R. 13(1), (2), and (3); Sealed Attachment 3.

APPLICABLE LEGAL PROVISIONS

Amendment VIII, United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 5032. Delinquency proceedings in district courts; transfer for criminal prosecution [applicable portions]

...

A juvenile who is alleged to have committed an act of juvenile delinquency ... shall be proceeded against under this chapter unless ... criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice. ...

...

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

...

STATEMENT OF THE CASE

1. District Court Proceedings

A. The Charged Offenses.

By Juvenile Information filed in 2021, Doe was charged with two counts of Murder in Indian Country pursuant to 18 U.S.C. §§ 2, 1111(a), 1151 & 1153. The Juvenile Information stated in both Count One and Count Two that on _____, 2020, Doe had acted “willfully, deliberately, maliciously, and with premeditation and malice aforethought.” Count One stated that Doe “did unlawfully kill [Doe’s biological father] with a blunt object and by fire,” and Count Two stated that she “did unlawfully kill [Doe’s biological mother] with a blunt object and a knife.” The Juvenile Information stated that on _____, 2020, Doe had not yet reached her eighteenth birthday. Along with the Juvenile Information, the government filed its Transfer Motion pursuant to § 5032 of the Federal Juvenile Act. The _____, 2022 District Court Order granting the Transfer Motion is the subject of this appeal. See Sealed Attachment 4.

B. Largely Uncontested Evidence Presented at the Transfer Hearing.

In the proceedings regarding the Transfer Motion, Doe presented voluminous evidence regarding her biological parents and Doe's own upbringing that was relevant to the six factors mandated for consideration by the Federal Juvenile Act (hereinafter the “§ 5032 Factors”).¹ The evidence showed that Doe's family lived in and around a rural town in Oklahoma² in approximately 11 different residences in the eight years from Doe's birth in 2003 to 2011. The Oklahoma Department of Human Services (hereinafter “DHS”) investigated a number of referrals, and in 2013 Doe (then age 9) was taken into emergency custody by Oklahoma DHS followed by a finding that child sexual abuse was an immediate concern. Doe was placed in Oklahoma's foster care system, and the parental rights of Doe's father were terminated by a county court for the State of Oklahoma in 2015.

Doe's parents later caused two of their friends to petition a tribal court for a guardianship over Doe. The friends' petition was part of a successful scheme by Doe's parents to return Doe to their unfit home. The friends

¹ The Dissenting Opinion (as defined herein) of the published Tenth Circuit Opinion recounts some of the details of this voluminous evidence. *Doe*, 58 F.4th at 1160-67.

² Undersigned counsel advises that, according to Wikipedia, this rural Oklahoma town had a population of less than 600 in 2010. Available from counsel upon request.

immediately turned Doe back over to the physical custody of her parents in approximately 2016, when Doe would have been about 13 years old.

Doe's father was then found guilty of Sexual Abuse of a Child Under Twelve for abusing his biological daughter who was Doe's half-sister. When Doe was about 14 to 15 years old, Doe's father served approximately 18 months in the Oklahoma Department of Corrections.

Upon Doe's father's release from prison, Doe's father and Doe's mother lived primarily in a camper across the road from a residence that belonged to the sister of Doe's father, while Doe lived primarily by herself in the residence.

C. The Expert Opinion Evidence of the Parties.

During the pendency of the Transfer Motion, Doe was assessed by the government's expert, Dr. Shawn Roberson; and by the defense expert, Dr. Kathy LaFortune; and both experts filed reports with the District Court and testified at the transfer hearing held before the magistrate judge in 2021 (hereinafter the "Transfer Hearing"). Both experts testified that the results of the objective testing of Doe were reliable, and that Doe had not been malingering during testing. Many conclusions of both experts were substantially in agreement, including: their subjective opinions that Doe's risk for future dangerousness was between low to moderate categories; Doe had low scores on scales measuring treatment rejection; Doe had average scores

for aggression and antisocial features; and Doe was immature compared to peers.

Additionally, the opinion of Dr. Roberson, the government expert, was that Doe is in the moderate level for treatment amenability. He based that opinion on Doe's history of having no significant problems with authority figures, such as oppositional behavior. Defense expert Dr. LaFortune found Doe amenable to treatment and discussed the reasons for this finding at some length in her report and in her testimony.

D. Doe's Arguments Regarding the Transfer Motion and the Six § 5032 Factors.

Regarding transfer motions, Tenth Circuit law states that a district court may assume the truth of the government's allegations regarding the defendant's commission of charged crime. *See United States v. Leon D.M.*, 132 F.3d 583, 589-90 (10th Cir. 1997). Given this standard, defense counsel did not seriously contest that Factor #2, the nature of the offenses, weighed in favor of transfer. The defense vigorously contested the other five § 5032 Factors with extensive evidence, only a small portion of which is briefly described in Section 1.B. above. Much of the evidence at the Transfer Hearing was uncontested and, with the exception of the evidence regarding the nature of the offenses, weighed heavily against transfer and in favor of

retaining Doe for juvenile adjudication. The undisputed evidence favoring denial of the Transfer Motion included the largely-consistent opinions of both parties' experts described above in Section 1.C.

In addition to Doe's arguments regarding the § 5032 Factors, Doe argued that transfer was unconstitutional because the government had charged her with First Degree Murder in violation of 18 U.S.C. § 1111(a). Doe argued that transfer was prohibited because the only two punishments allowed by § 1111(b), the death penalty or a mandatory life sentence, are unconstitutional pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012). As part of her argument, Doe relied upon a Fourth Circuit case. *See United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016). In accordance with *Miller*, the *Under Seal* court affirmed the district court's denial of transfer based on the unconstitutional nature of the mandatory penalties when applied to the juvenile defendant. *Id.* at 728. The Fourth Circuit held "that such a prosecution cannot constitutionally proceed." *Id.*

E. The Magistrate's Report and the District Court Order.

After presiding over the two-day evidentiary Transfer Hearing in 2021, on _____, 2022, a magistrate judge filed the Magistrate's Report, Sealed Attachment 5. The Magistrate's Report recommended that the Transfer Motion be granted. The Magistrate's Report did not include any mention of

Doe's constitutional issue based on *Miller v. Alabama* and the Fourth Circuit *Under Seal* case, which had ruled that a juvenile prosecution such as that against Doe "cannot constitutionally proceed" by transfer to adult proceedings. *Under Seal*, 819 F.3d at 728.

Doe timely filed objections, asking the District Court to conduct *de novo* review pursuant to Rule 59(b)(2)-(3), Federal Rules of Criminal Procedure, and 28 U.S.C. § 636(b)(1). Doe objected to the Magistrate's Report on several grounds, among which was that the Magistrate's Report included a legally incorrect interpretation of Factor #5 because it stated that amenability to treatment was not relevant. Sealed Attachment 5 at 36. Doe also objected to several clearly erroneous factual findings. Doe also asserted that the Magistrate's Report should not be adopted because it had ignored uncontested evidence that tended to support denial of the Transfer Motion, including the opinions of both parties' experts that were largely in agreement as described in Section 1.C. of the Statement of the Case above. Doe objected that the Magistrate's Report did not address the constitutional argument she raised based on *Miller v. Alabama*, 567 U.S. 460, and the Fourth Circuit *Under Seal* case, 819 F.3d 715.

On May 9, 2022, the district court entered the District Court Order affirming and adopting the Magistrate's Report with additional observations

and granting the Transfer Motion. See Sealed Attachment 4 hereto. Regarding the constitutional issue timely raised by Doe, the District Court *sua sponte*³ found that the issue was not ripe. *Id.* at 8.

2. Tenth Circuit Proceedings

Doe timely appealed the District Court Order to the Tenth Circuit Court of Appeals, which granted her request for expedited briefing and hearing. On January 20, 2023, the Tenth Circuit issued the Opinion affirming the District Court Order. 58 F.4th 1148, Attachment 1. The Circuit agreed with the district court that the doctrine of ripeness allowed it not to address Doe's Eighth Amendment argument. *Id.* at 1155-56.

On the merits of the Transfer Motion, a two-judge majority of the panel affirmed the result. *Id.* at 1160 (hereinafter referred to as the "Majority Opinion"). The Honorable Circuit Judge Briscoe wrote a separate dissenting opinion. *Id.* at 1160-67 (hereinafter referred to as the "Dissenting Opinion"). Doe timely filed a petition for rehearing on February 3, 2023, which was denied on February 17, 2023. Sealed Attachment 3. Circuit Judge Briscoe would have granted the petition for rehearing. *Id.*

³ Neither party had previously asserted the doctrine of ripeness or addressed it in briefing.

REASONS FOR GRANTING A WRIT

Reason No. 1:

This Court Has Never Addressed § 5032 of the Federal Juvenile Act

The modern form of the Federal Juvenile Act was enacted by Congress in the Juvenile Justice and Delinquency Prevention Act of 1974. *See United States v. R.L.C.*, 503 U.S. 291, 298-99 (1992) (discussing legislative history); “Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters” Congressional Research Service (May 9, 2023) (hereinafter “CRS Report”), at 1-2 (same). In the 49 years since the 1974 Act, this Court has addressed only two cases regarding the Federal Juvenile Act, neither of which⁴ involved § 5032.

Questions regarding how § 5032’s transfer provisions should be implemented by district courts and reviewed by courts of appeal are crucial to the Federal Juvenile Act and therefore the administration of justice throughout the United States. Congress intended that transfer of juveniles to

⁴ In *R.L.C.*, this Court addressed the meaning of § 5037(c)’s language of the “maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult.” *R.L.C.*, 503 U.S. at 299. In *United States v. Juvenile Male*, 564 U.S. 932 (2011), a juvenile appealed a special condition of supervision related to sex offender registration. This Court decided that the appeal was moot because the juvenile had turned 21 and was no longer subject to the special conditions of juvenile supervision. *Id.* at 938. Transfer of juveniles to adult proceedings was not discussed in either *R.L.C.* or *Juvenile Male*.

adult prosecutions should only be granted when it was “in the interests of justice.” 18 U.S.C. § 5032. A purpose of the Federal Juvenile Act is “to encourage treatment and rehabilitation” of juveniles. *United States v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990); CRS Report at 2-3, 10-11. Juvenile adjudication is preferred under the Act. *Leon D.M.*, 132 F.3d at 589; CRS Report at 10-11. The government bears the burden of proof by a preponderance of the evidence that transfer to adult status is warranted. *Leon D.M.*, 132 F.3d at 589.

These questions are crucial for Doe, and these questions regarding § 5032 proceedings will arise with increasing frequency due to the *McGirt* case decided in July 2020. *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020), modified by *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022). *McGirt* originated in Wagoner County, Oklahoma, which is within the Eastern District of Oklahoma.

Doe’s Federal Juvenile Act case was filed within the Eastern District of Oklahoma due to the *McGirt* decision. An inquiry to the Systems Manager of the District Court resulted in the following numbers for cases brought pursuant to the Federal Juvenile Act since the advent of the CM/ECF system:

2003	1 case
2004	1 case
2005 through 2019	0 cases
2020	1 case
2021	7 cases
2022	3 cases
2023 to date	1 case ⁵

Thus, Doe's Petition raises questions that have never been addressed by this Court and that will be of increasing importance due to the anticipated increased number of juvenile cases filed in federal court after the 2020 *McGirt* decision.

First, this Court should rule upon how this Court's jurisprudence regarding juveniles, as exemplified by *Miller v. Alabama*, interacts with the Federal Juvenile Act. Second, this Court should address the standards by which United States District Courts must make juvenile transfer decisions pursuant to § 5032, as well as the standards for review of those decisions by the United States Circuit Courts of Appeal. Specifically, Doe raises whether a district court transfer order can be upheld on appeal even if the order

⁵ Email of Susan Schwebke, Systems Manager, United States District Court for the Eastern District of Oklahoma, dated May 11, 2023 to Barbara L. Woltz, Research and Writing Specialist, Federal Public Defender; copy available upon request to Ms. Woltz. Counsel was unable to find a way to obtain national numbers for filings of cases pursuant to the Federal Juvenile Act before and after the 2020 *McGirt* decision.

includes erroneous legal interpretations of the § 5032 Factors or clearly erroneous factual findings. Doe also asks this Court to consider if a district court decision can be upheld if it fails to address relevant evidence that supports denial of a transfer motion, such as the opinion evidence submitted in Doe's case by both parties' experts that was largely in agreement on key points regarding Doe's amenability to treatment and lack of dangerousness.

Reasons Nos. 2 and 3:

The *Miller v. Alabama* Issue in Doe's Case Raises Important Questions of Federal Law That Have Not Been Addressed by This Court and Involve a Conflict Among Circuit Courts of Appeal

This Court's jurisprudence regarding juveniles in our country's criminal justice systems has changed dramatically in the decades following Congress' major changes to the Federal Juvenile Act enacted in 1974. Foremost among these developments is this Court's 2012 decision in *Miller v. Alabama*, 567 U.S. 460. In *Miller*, a 14-year-old had been convicted of murder and sentenced to a mandatory term of life imprisonment without parole. *Id.* This Court elaborated on the principle that "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments." *Id.* at 471. After discussing the differences between juveniles and adults, the *Miller* Court held "that the Eighth

Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Id.* at 479. Thus, while *Miller* has been the law for over 10 years, this Court has never addressed its application to the Federal Juvenile Act.

This Court should grant Doe’s Petition first because she squarely raised the issue that *Miller* should have been applied to prohibit transfer to adult proceedings in her case. In the District Court Order, the lower court decided *sua sponte*, with no briefing by the parties, that the issue was not ripe. Order at 8, Sealed Attachment 4. The Tenth Circuit panel unanimously affirmed this portion of the District Court’s Order. Opinion, 58 F.4th at 1153-56, Supplement 1.

Second, this Court should grant certiorari because Doe specifically raised the Fourth Circuit’s decision in *Under Seal*, in which the government appealed a denial of transfer for a juvenile charged with murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1), a charge which carries a mandatory statutory penalty of either death or life imprisonment. *Under Seal*, 819 F.3d at 717. In accordance with the binding *Miller* precedent, the *Under Seal* court affirmed the district court’s denial of transfer based on the unconstitutional nature of the mandatory penalties when applied to the juvenile defendant. *Id.* at 728. The Fourth Circuit held “that such a prosecution

cannot constitutionally proceed.” *Id.* Thus, the Fourth Circuit ruled that the interplay of *Miller* with the Federal Juvenile Act required the denial of transfer when the federal government was prosecuting a juvenile for a crime for which the mandatory penalties were unconstitutional.

In Doe’s case, the lower courts did not address the Fourth Circuit’s *Under Seal* decision. Instead, the district court found that the issue was not ripe, and only cited, with no discussion, the *Under Seal* decision and a contrasting Fifth Circuit decision in a footnote. District Court Order at 8, n. 8, *citing United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016); and *United States v. Bonilla-Romero*, 984 F.3d 414, 418-19 (5th Cir. 2020), *cert. denied* 142 S. Ct. 482 (2021). The Tenth Circuit affirmed the District Court’s ruling based on lack of ripeness and cited *Bonilla-Romero* with approval. Opinion, 58 F.4th at 1155. The Tenth Circuit described Doe’s argument regarding the *Under Seal* case as one focused “on the possibility of severing the first-degree murder statute, such that a constitutional punishment could be available for a juvenile.” *Id.* at 1156. The court said that it “need not address severance because [Doe’s] argument about her unconstitutional punishment is not ripe.” *Id.* Thus, the Tenth Circuit’s decision below ignores that the Fourth Circuit’s decision was specific to the point of transfer. The Fourth Circuit did not postpone until sentencing to decide the Eighth Amendment issue, but instead

said, at the point of transfer, “that such a prosecution cannot constitutionally proceed.” *Under Seal*, 819 F.3d at 728.

Thus, the Fourth Circuit in *Under Seal* and the Fifth Circuit in *Bonilla-Romero*, now joined by the Tenth Circuit in Doe’s appeal, present diametrically opposed approaches to how this Court’s *Miller v. Alabama* jurisprudence should be applied to transfer decisions pursuant to the Federal Juvenile Act. This Court should grant Doe’s Petition because it is an opportunity to address this important question and the split of the circuits that has now been widened by the Tenth Circuit’s refusal in Doe’s appeal to decide whether relief is required at the time of the transfer decision. This Circuit split can only be resolved by a decision of this Court.

Reasons Nos. 4 and 5:

The Tenth Circuit Divided Panel Decision Regarding § 5032 Illustrates That This Court Should Address the Standards by which District Courts Must Make Transfer Decisions as well as the Standard of Review to be Used by Circuit Courts of Appeal

The transfer provision, § 5032, of the Federal Juvenile Act is crucial because it decides whether a juvenile may remain in the juvenile system or whether the juvenile will be prosecuted as an adult. Congress specified that the question was governed by whether “a transfer would be in the interest of justice.” Congress understood the critical nature of this decision when it

mandated in the statute that district courts are required to consider the six § 5032 Factors in making a transfer decision.

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice:

- [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;
- [6] the availability of programs designed to treat the juvenile's behavioral problems.

18 U.S.C. § 5032 (formatting and numbering added for ease of reference).

Over the decades since 1974, when the modern version of the Federal Juvenile Act was enacted, federal courts have been developing case law to supplement the bare language of the § 5032 Factors. The resulting jurisprudence is by no means consistent nationally or among the Circuits and is often only loosely based on Congress' statutory language, and this Court has never addressed it. This Petition cannot catalog all instances of federal courts

creating new legal principles regarding § 5032, but will discuss examples that are important both to Doe's Petition and to all juvenile transfer decisions.

The split views of the Majority Opinion and the Dissenting Opinion illustrate competing views regarding important questions § 5032. The Majority Opinion gave what could fairly be described as a "relaxed" view of what a district court is required to do:

[W]e reiterate that courts reviewing juvenile transfer should describe the legal standard for transfer including the statutory factors, summarize the evidence they relied on, and explain their reasoning to the best of their ability. We are satisfied the district court did so in this case.

Majority Opinion, 58 F.4th at 1160. Essentially, the majority started with the conclusion that the outcome, the transfer of Doe to adult prosecution, was within the district court's discretion ("the district court did not abuse its discretion in granting the government's motion to transfer"). *Id.* Starting with this conclusion, the majority saw no reason to vacate the district court's decision even though, as found by the Dissenting Opinion, the Order included a "legally incorrect interpretation" of Factor #5 and "clearly erroneous factual findings" regarding Factors ## 1, 5, and 6; and it failed to address relevant evidence tending to support denial of the government's Transfer Motion.

Dissenting Opinion, 58 F.4th at 1160. The Dissenting Opinion would have vacated the district court's decision due to these problems. *Id.*

The Dissenting Opinion gives this Court a detailed illustration of the issues that only this Court can address and can definitively rule upon. These issues are critical to allow “the interests of justice,” as Congress expressed in the language of § 5032, to be properly considered in Doe’s case. Moreover, a decision by this Court would also give needed guidance to all federal courts.

Amenability to treatment and future dangerousness are important considerations in making a transfer decision. *United States v. McQuade Q.*, 403 F.3d 717, 719 (10th Cir. 2005) (further quotations omitted); *United States v. Anthony Y.*, 172 F.3d 1249, 1251-52 (10th Cir. 1999). *McQuade Q.* and *Anthony Y.* held that a district court must balance the Federal Juvenile Act’s purpose of encouraging treatment and rehabilitation versus the need to protect the public from dangerous individuals. *Id.* The District Court’s legally incorrect interpretation, clearly erroneous factual findings, and failure to address the consistent opinions of both parties’ experts regarding Doe’s lack of dangerousness and amenability to treatment mean that it did not properly consider the purposes of the Federal Juvenile Act. This failure to balance favorable amenability to treatment versus lack of dangerousness infected the validity of the District Court Order granting transfer.

The Dissenting Opinion documented specific errors by the District Court regarding multiple § 5032 Factors relating to dangerousness and amenability

to treatment. Regarding Factor #5, the nature of past treatment efforts and the juvenile's response to such efforts, the Dissenting Opinion said that the Magistrate's Report came to an erroneous legal conclusion regarding the relevance of "a juvenile's ability to benefit from future treatment." Dissenting Opinion, 58 F.4th at 1163-64. It found that the district court's adoption of this portion of the Magistrate's Report was an erroneous "discounting" of the relevance of Factor #5. *Id.* at 1164.

Also regarding Factor #5, the Dissenting Opinion found it significant that neither the Magistrate's Report nor the Order "addressed, let alone adopted or rejected" evidence from the defense expert relevant to Factor #5. *Id.* at 1165. It criticized the Magistrate's Report for its statement that treatment efforts of Doe "were not successful as evidenced by ... ultimately, her role in the murders." *Id.* If the commission of the crime meant that a juvenile had failed to respond to past treatment or was not amenable to future treatment, then "there would be no point in a court considering either Factors #5 or #6." *Id.* The Dissenting Opinion found that the district court had "erred by adopting the magistrate judge's erroneous legal interpretation of, and factual findings regarding, Factor #5." *Id.*

Regarding Factor #1, the age and social background of the juvenile, the Dissenting Opinion found that the Magistrate's Report was clearly erroneous

when it found that Doe's "relationship with her parents appeared to be relatively routine since 2016." *Id.* at 1162. It therefore found that the district court had abused its discretion by implicitly relying upon the erroneous factual finding of the Magistrate Report regarding Doe's social background. *Id.* at 1163. Regarding Factor #6, the Dissenting Opinion noted that the Report omitted parts of the testimony of the government's witness regarding treatment available in juvenile facilities and the BOP adult prisons. *Id.* at 1166. The omissions undercut the Magistrate Report's finding that Doe would have better treatment options in BOP adult prison. *Id.*

The contrast between the Majority Opinion and the Dissenting Opinion is illustrative of the differing standards used by federal courts in carrying out the mandate of Congress that evidence of the § 5032 Factors "shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice." 18 U.S.C. § 5032. Doe asserts that the Dissenting Opinion is more in keeping with the intent of Congress in enacting the Federal Juvenile Act. Doe asks this Court to grant certiorari in order to address this question of justice in her case and to give guidance for future federal juvenile cases.

The Dissenting Opinion's approach is supported by other courts, one example of which is a Ninth Circuit decision reversing a grant of transfer when

the district court's factual finding on one factor was "contrary to the evidence of record." *United States v. Juvenile Male*, 492 F.3d 1046, 1048-49 (9th Cir. 2007). Doe raised this Ninth Circuit in her Tenth Circuit appeal, and asked that court to follow its example and reverse the District Court's Order. If this standard, of reversal when one factual finding was contrary to the evidence of record, had been used in Doe's case, there can be no doubt that vacation of the District Court's Order would have been required. Doe asserts that this result would be in keeping with the Congressional intent of the Federal Juvenile Act. This Court should grant certiorari.

The District Court Order presents another illustration of federal courts using different standards because it quoted the following language from a Sixth Circuit case:

[A] motion to transfer is properly granted where a court determines that the risk of harm to society posed by affording the defendant more lenient treatment within the juvenile justice system outweighs the defendant's chance for rehabilitation.

Order at 8, quoting *United States v. One Juv. Male*, 40 F.3d 841, 844 (6th Cir. 1994). In briefing before the Tenth Circuit, Doe's counsel pointed out that words "lenient" or "leniency" and "risk of harm to society" do not appear in the Federal Juvenile Act. Because Congress did not use any language indicating that a federal court making a transfer decision should consider societal interests, Doe asserts that these policy questions were not intended to be part of a

transfer decision under the Federal Juvenile Act. The Majority Opinion, however, said that the Sixth Circuit language was consistent with Tenth Circuit case law and was a valid statement of what district courts should consider pursuant to § 5032. Majority Opinion, 58 F.4th at 1157.

The Sixth Circuit language approved by the lower courts in Doe's case contrasts strongly with language approved by other federal courts, including this example:

It is incumbent upon the court to deny a motion to transfer where, all things considered, the juvenile has a realistic chance of rehabilitative potential in available treatment facilities during the period of his minority. Denial of a motion to transfer does not require a finding that the transfer would not serve the interest of justice. Denial simply means that the existence of corrigible personality factors mandates continued treatment of the offender as a juvenile. Where realistic chance for rehabilitation exists, the balance ought not to tip in recognition of the general societal interests subsumed in the broader sense of the word "justice."

United States v. E.K., 471 F. Supp. 924, 932 (D. Ore. 1979). *See also United States v. Doe*, 871 F.2d 1248, 1253 (5th Cir. 1989) (construing language of *E.K.*); *United States v. M.L.*, 811 F. Supp. 491, 493 (C.D. Cal. 1992) (quoting language of *E.K.*); *United States v. M.H.*, 901 F. Supp. 1211, 1213-14 (E.D. Tex. 1995) (quoting language of *E.K.*); *United States v. A.F.F.*, 144 F. Supp. 2d 797, 801 (E.D. Mich. 2001) (discussing language of *E.K.*).

E.K. therefore agrees with Doe's position that "general societal interests" should be subordinate to a juvenile's "realistic chance for rehabilitation." In Doe's case, the opinion evidence of the experts of both parties' established that Doe was a good candidate for treatment and rehabilitation. Counsel for Doe strongly advocate that the *E.K.* language should be the standard in all federal courts in making transfer decisions, because it properly promotes the policy of Congress, as reflected in the § 5032 Factors. If Doe's case had been assessed using the *E.K.* standard, then it would have been incumbent upon the District Court to deny the Transfer Motion so that Doe could have continued to receive treatment and rehabilitation that the experts agreed was already helping her while her juvenile case was pending.

The language of a district court case, *Leon D.M.*, that was affirmed by the Tenth Circuit, is fully applicable to Doe:

[T]here appears little chance Defendant will be a danger to society and there appears to be a good chance he can be rehabilitated to become a useful member of society. The congressional history of Section 5032 indicates that Defendant should retain juvenile status

...

United States v. Leon D.M., 953 F. Supp. 346, 350 (D.N.M. 1996), *aff'd*, 132 F.3d 583 (10th Cir. 1997). In *Leon D.M.*, the district court's decision to deny transfer was made even though juvenile had been charged with the "heinous murder" of a three-year-old child. *Leon D.M.*, 953 F. Supp. at 348. The *Leon D.M.* district

court's reasoning is applicable to Doe, because the evidence at Doe's Transfer Hearing was that there is little chance that she will be a future danger to society; there is a good chance that she can be rehabilitated to become a useful member of society; and the congressional history of § 5032 indicates that Doe should have retained juvenile status.

These differences in the tests used by district courts and the standards of review applied by Circuit Courts of Appeal make a difference in the outcome of juveniles' lives. At this moment, Doe should be in a juvenile facility receiving the treatment and rehabilitation that the objective testing and the opinions of the experts all proved are likely to be effective in her case. This Court should grant certiorari to address these crucial issues of federal law.

CONCLUSION

First, certiorari review is both appropriate and urgently needed, given the uncertain state of federal case law regarding the Federal Juvenile Act and the prospect of increased numbers of juvenile cases being filed in federal court due to the 2020 *McGirt* decision.

Second, this Court should grant certiorari so that it can address how its decision in *Miller v. Alabama* affects a transfer decision pursuant to § 5032 of the Federal Juvenile Act. This is especially important given the split between

the Fourth Circuit in the *Under Seal* case and the Fifth Circuit in *Bonilla-Romero*, now joined by the Tenth Circuit in Doe's case.

Third, Doe's Petition, and especially the disparate opinions of the Majority Opinion and the Dissenting Opinion in the Tenth Circuit's disposition of her appeal, illustrate the lack of standards governing transfer decisions pursuant to § 5032 of the Federal Juvenile Act. This Court should grant certiorari to address the inconsistent implementation of the Federal Juvenile Act across the United States.

Respectfully submitted,

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