APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20262

United States Court of Appeals
Fifth Circuit
FILED
March 9, 2018
Lyle W. Cayce
Clerk

SEALED APPELLEE 1,

Plaintiff – Appellee

v.

SEALED JUVENILE 1,

Defendant – Appellant

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

Before STEWART, Chief Judge, JONES, and CLEMENT, Circuit Judges.[*]

The appellant and two other members of the MS-13 gang murdered a sixteen-year-old using a machete and baseball bat. The three had been ordered to kill the victim by higher-ranking members of the gang in El Salvador. The appellant was less than three months shy of 18 at the time of the killing.

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The appellant was arrested and charged with murder by the state of Texas in October 2013. In July 2014, the Government filed a Juvenile Information and Certification against the appellant, charging him with an act of juvenile delinquency under 18 U.S.C. § 5032. The U.S. Attorney also filed a certification to proceed in federal court. A few days later, the Government filed a Motion to Transfer Proceedings Against Juvenile to Adult Criminal Prosecution pursuant to 18 U.S.C. § 5032, seeking to have the appellant tried as an adult for first-degree murder under 18 U.S.C. § 1111. The Government also filed a memorandum in support of its motion, arguing in favor of transfer according to the six-factor test required by § 5032.

The appellant did not contest the Government's arguments on the statutory factors; instead, he argued that the transfer would subject him to an unconstitutional sentencing scheme under *Miller v. Alabama*, 567 U.S. 460 (2012). Specifically, he noted that the statutorily prescribed penalty for first-degree murder is either death or life imprisonment without parole. Accordingly, its application here violated his constitutional right not to receive a mandatory sentence of life without parole as a person under the age of 18. *See id.* at 465. The Government conceded that this application would be unconstitutional, but argued that the district court had discretion to modify the sentence the appellant ultimately received. Thus, there was no inherent constitutional problem in merely charging the appellant under the statute as an adult.

The district court agreed with the Government, granting its Motion to Transfer in April 2015. In a supplement to its order, the district court explained that it rejected the appellant's constitutional argument on two grounds. First, it noted that 18 U.S.C. § 1111 provides distinct sentences for both first-degree and second-degree murder, and the latter does not implicate constitutional concerns. *See* 18 U.S.C. § 1111(b) ("Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."). Accordingly, a sentencing judge could sever the statute to impose the second-degree sentence even if the appellant were convicted of the first-degree crime—thereby avoiding any constitutional violations.

Second, the district court concluded that the dispute was not yet ripe for review, since "like most prosecutions, the ending cannot be known at the beginning." It then detailed numerous possible outcomes of the appellant's case that would dispose of it without ever requiring the court to determine whether he should face a minimum sentence of mandatory life without parole. The district court concluded, "conjecture at this stage of the proceedings that the Court would one day impose an unconstitutional sentence if [appellant] is convicted is simply not ripe for decision."

The appellant appeals the transfer order, raising his constitutional challenge anew. Reviewing the district court's ripeness determination de novo, *Pearson v. Holder*, 624 F.3d 682, 683 (5th Cir. 2010), we agree that the controversy is not yet properly before the court.

Whether a claim is sufficiently ripe for review turns on the likelihood that these asserted harms will occur. Accordingly, "[r]ipeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). A claim is unripe if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). As such, "[f]or an issue to be ripe for adjudication, a[n aggrieved party] must show that he 'will sustain immediate injury' . . . ." *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994) (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978)).

Here, the appellant appeals both the potential imposition of a mandatory life sentence under 18 U.S.C. § 1111 and, alternatively, the potential application of the doctrine of severability to the statute to avoid that sentence. As to the former, he contends that this result would violate his Eighth Amendment and due process rights. As to the latter, he argues that the doctrine of severability is inapplicable and, further, that severing the statute would violate due process. His concerns, in other words, pertain to the sentencing phase of a case that has yet to go to trial. They are too remote and contingent upon too many factors to justify our immediate intervention.[1]

---

[1] Indeed, the former concern appears unlikely to occur at all, as the Government has already conceded that such a sentence

The improbability and remoteness of an unconstitutional sentence is demonstrated by a brief, non-exhaustive list of other possible outcomes. If the case goes to trial, the appellant may be acquitted or convicted only of second-degree murder: for example, his counsel might prove that the appellant was coerced to participate.[2] *See* 18 U.S.C. § 1111(a). Moreover, the appellant may be able to avoid both a trial and the first-degree sentence by reaching a plea agreement with the Government for the lesser-included offense. Even if the appellant is tried and convicted of first-degree murder, he still may not receive the sentence. For example, if the appellant agrees to work with the Government to assist in other investigations or prosecutions, the Government might move for a sentence lower than the statutory minimum under 18 U.S.C. § 3553(e). Any of these outcomes would obviate many, if not most, of the appellant's concerns.

---

would be unconstitutional if applied to the appellant. The Government's brief indicates that it supports severing the statute to impose the second-degree sentence.

[2] The appellant contends that we are not permitted to consider this possibility because "[w]hen deciding whether transfer is appropriate, a district court looks only to the offense charged." In support, he cites to a Second Circuit case, *United States v. Nelson*, 68 F.3d 583, 589 (2d Cir. 1995). But *Nelson* involved a straightforward application of the second statutory factor for a motion to transfer. *Id.* ("This statutory factor calls for findings regarding the nature of the offense alleged and not some other offense, whether it be a greater offense or even a lesser included one."); *see also United States v. Doe*, 871 F.2d 1248, 1250 n.1 (5th Cir. 1989) ("For purposes of a transfer hearing, the district court may assume the truth of the offense as alleged."). The question before us—the ripeness of the appellant's constitutional challenge to the transfer—is entirely distinct.

The appellant cites a recent Fourth Circuit case, in which that court entertained a parallel challenge to a motion to transfer at a similar procedural juncture. *See United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016). This case is, of course, not binding on our court. Moreover, the issue of ripeness was never considered. We thus decline to use it as guidance for our purposes.[3]

In light of the long line of intervening contingencies, we conclude that the appellant's alleged harm is too remote to justify our intervention now. We acknowledge that the appellant has raised an important constitutional question that may deserve a thorough review when the appropriate time comes. If we were to consider this question now, however, our answer would amount to an advisory opinion. We decline to do so.

The district court's grant of the Government's motion to transfer is AFFIRMED.

---

[3] Notably, the Fourth Circuit's analysis of the defendant's claim relied on criminal case law in which the defendant *had already been convicted* and sentenced prior to the appeal. Only one case presented a different procedural posture: *United States v. Evans*, 333 U.S. 483 (1948). There, the Supreme Court—without considering the ripeness of the dispute—overturned an indictment charging violation of an immigration statute. The Court concluded the statute's wording was so ambiguous that any attempt to apply it to the defendant would take the Court "outside the bounds of judicial interpretation." *Id.* at 495. We do not face such dire straits. *Evans* does not conflict with our decision to wait.