A Paradigm for the Proper Use of Pre-Majority Conduct in Prosecuting Continuing Crimes

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Introduction

At sixteen years old, Alex became a part-time "runner"—making deliveries and picking up cash—for an opioid dealer named River a couple times a week before and after school. Residing in a modest apartment with one parent and a younger sibling, Alex ran these errands in exchange for River's help in paying Alex's monthly rent. At some point, the Drug Enforcement Agency ("DEA") became aware of River's operation and launched an investigation that lasted more than a year. Once the local Assistant United States Attorney was satisfied that the DEA had gathered sufficient evidence to appreciate the scope of River's network and bring appropriate charges against the parties involved, River, Alex, and several others were indicted for substantive drug distribution and a grand opioid trafficking conspiracy. The grand jury returned the indictment and Alex was arrested on March 8, one week after Alex's eighteenth birthday on March 1, three days after Alex's last "errand" for River on March 5, and two months before Alex's high school graduation.

These facts are hypothetical, but they are reminiscent of real events routinely unfolding throughout the United States. Specifically, minors become involved in criminality, often at an influential adult's instigation, and persist in committing related unlawful acts until they reach adulthood themselves. Circumstances like those outlined above give rise to a myriad of important questions: Will Alex face juvenile proceedings, be tried and punished as an adult, or endure some combination of the two?

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What charges can the federal government pursue against Alex if he is tried alongside River and others in district court? Can federal prosecutors introduce evidence of pre-majority conduct to prove Alex's guilt in an adult trial? If Alex is found culpable, what is the maximum potential punishment? In large part, the answers to these questions depend on where Alex lives.

Without guidance from the Supreme Court, the Courts of Appeals have conflicted for more than thirty years regarding essential aspects of age-of-majority-spanning prosecutions—those involving criminal activity beginning when one is a minor and persisting continually into adulthood. For instance, the circuits do not agree on whether the trial court or the jury should determine if the prosecution has made the requisite factual demonstration to establish jurisdiction over pre-majority conduct. They also disagree about the necessity of jury instructions regarding the prerequisite finding of adult ratification before convicting a defendant. The circuits even split on "the more difficult question" of whether or not prosecutors can use a defendant's juvenile acts to establish guilt in adult proceedings.[1]

Despite this issue's importance and persistence, scholars have not significantly focused on this conflict heretofore. This is rather surprising because the inconsistency among the circuits has created uncertainty for a variety of stakeholders in the criminal justice system.[2] On one hand, to the extent that the Juvenile Delinquency Act ("the JDA" or "the Act") "creates a special procedural and substantive enclave for juveniles

[1] United States v. Cruz, 805 F.2d 1464, 1476 (11th Cir. 1986); *see also* United States v. Thomas, 114 F.3d 228, 264 (D.C. Cir. 1997); ORGANIZED CRIME & GANG SECTION, U.S. DEP'T OF JUST., CRIMINAL RICO: 18 U.S.C. §§1961-1968: A MANUAL FOR FEDERAL PROSECUTORS 468 (6th rev. ed. 2016) [hereinafter RICO PROSECUTOR'S MANUAL] ("Although the United States Circuit Courts of Appeal generally agree on the standard for establishing jurisdiction over a defendant who engaged in pre-18 conduct during the commission of a continuing offense, they are divided over whether evidence of pre-18 acts may be introduced to prove the defendant's guilt of the offense.").

[2] *See* United States v. Serrano-Mercado, 828 F.3d 1, 5 (1st Cir. 2016) (mem.) (Lipez, J., dissenting from denial of rehearing) (urging the Supreme Court to "dispel the confusion created by the circuit split on who bears the burden to produce the documents showing the nature of a past conviction under a divisible statute"); United States v. Seltzer, 227 F.3d 36, 41 (2d Cir. 2000) ("[T]here is a split among the circuits and even within some circuits evidencing confusion about a district court's power to impose sanctions under the inherent powers doctrine."); Julian W. Smith, *Evidence of Ambiguity: The Effect of Circuit Splits on the Interpretation of Federal Criminal Law*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 79, 89 (2011) ("Circuit splits create ambiguity and uncertainty, especially for 'officers, prosecutors, defendants, and courts.'" (quoting Christopher Live Nybo, Comment, *Dialing M for Murder: Assessing the Interstate Commerce Requirement for Federal Murder-for-Hire*, 2001 U. CHI. LEGAL F. 579, 584 (2001))).

accused of criminal acts,"[3] the availability of those protections should not be allowed to vary significantly based on venue. On the other hand, the federal government should not have different burdens of proof in the various circuits when prosecuting otherwise similarly situated defendants.[4]

While three circuits have yet to rule conclusively on these matters, the current split is so stark and longstanding that the Supreme Court will almost certainly have to resolve it. This Article clarifies the significant points of departure and offers a cogent resolution. Part I provides a brief introduction to the JDA and the challenge with applying it to continuing offenses that straddle a person's eighteenth birthday. Part II surveys the leading appellate cases creating the split and discusses the competing principles on both sides. Part III illustrates the consequent uncertainties and disparities. Finally, Part IV presents a paradigm for resolving the controversy in a way that is both consistent with the JDA's purposes and respects juries' traditional role as factfinders.

I. The Juvenile Delinquency Act ("JDA") Generally

There are substantial cognitive and psychological differences between adults and juveniles, even when both are accused of breaking the law.[5] In determining that imposing the death penalty on juvenile offenders violates the Eighth Amendment prohibition on cruel and unusual punishment, for example, the Supreme Court observed that minors are comparatively less mature and responsible, more susceptible to negative influences and outside pressures, and more transitory in their personality traits.[6] Accordingly, courts ought to generally adjudicate matters involving

[3] United States v. Frasquillo-Zomosa, 626 F.2d 99, 101 (9th Cir. 1980); *see also* United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990) ("[The Act] provides special procedures for the prosecution of persons who are juveniles at the time a federal crime is committed.").

[4] *See* M. Jackson Jones, *The United States Sentencing Guidelines are not Law!: Establishing the Reasons "United States Sentencing Guidelines" and "Ex Post Facto Clause" Should Never be Used in the Same Sentence*, 32 U. LA VERNE L. REV. 7, 24 (2010) ("The circuit split is extremely important because defendants charged with the same offense in different jurisdictions can receive different sentences.").

[5] *See* Graham v. Florida, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); State v. Watkins, 423 P.3d 830, 837 (Wash. 2018). *See generally* Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917 (2009).

[6] Roper v. Simmons, 543 U.S. 551, 569–70 (2005); *see also* Miller v. Alabama, 567 U.S. 460, 471–72 (2012).

alleged juvenile lawbreakers separately and differently than those involving adults engaging in analogous conduct.[7] In fact,

> [t]he early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help "to save him from a downward career."[8]

While juvenile courts are less idyllic than this romanticized portrait,[9] the paradigmatic difference between juvenile and adult courts is still profound. In the United States, the JDA establishes the criteria for determining which system will be used to adjudicate an alleged juvenile offender's culpability.

A. *The Importance of the JDA*

The JDA "establishes procedures for handling criminal charges brought against juveniles in federal court."[10] Congress adopted it to "remove juveniles from the ordinary criminal process . . . to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation."[11] Under the JDA, a "juvenile" is a person who either has not reached his eighteenth birthday or, for the proceedings and disposition of an alleged act of juvenile delinquency, has not reached his twenty-first birthday.[12] The Act's provisions "thus apply in cases where a defendant

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[7] *See In re* Gault, 387 U.S. 1, 14 (1967) ("From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles."); *cf.* Goodwin v. Iowa Dist. Court, 936 N.W.2d 634, 653 (Iowa 2019) (McDonald, J., concurring) (observing that the Iowa legislature accounted for the differences between juveniles and adults with respect to criminal conduct "by creating a separate juvenile justice system to address the different and particular needs of juvenile offenders").

[8] *Gault*, 387 U.S. at 25–26.

[9] McKeiver v. Pennsylvania, 403 U.S. 528, 543–44 (1971) (plurality) ("We must recognize, as the Court has recognized before, that the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized . . . Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged."); *see, e.g.*, United States v. Ciavarella, 716 F.3d 705, 713–17 (3d Cir. 2013) (describing charges against a former state judge for the "so-called 'Kids for Cash' scandal," in which a judge received money to send juvenile offenders to certain detention centers).

[10] United States v. Under Seal, 819 F.3d 715, 718 (4th Cir. 2016).

[11] United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990); *see also*, Jonah R. v. Carmona, 446 F.3d 1000, 1010 (9th Cir. 2006) ("The primary goal of the [JDA] is rehabilitative, not punitive . . . .").

[12] 18 U.S.C. § 5031 (2018) ("For the purposes of this chapter, a 'juvenile' is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and 'juvenile delinquency' is the violation of a law of the United States committed by a person prior to his

commits a crime before his or her eighteenth birthday and is under twenty-one at the time the juvenile information charging the crime is filed."[13]

The availability of the JDA's protections has dramatic and profound implications for accused persons.[14] Those proceeded against under the Act "receive special rights and immunities, are shielded from publicity, are confined apart from adult criminals and are protected from certain consequences of adult conviction."[15] The difference in potential consequences is especially poignant.[16] While criminal proceedings are generally initiated by the filing of a criminal indictment, for example, juvenile proceedings begin when the government files a delinquency information.[17] The former potentially culminates in an adjudication of guilt and a criminal conviction while the latter possibly results in a civil adjudication of "juvenile delinquency"[18]—indicating the violation of a US law by a person before his or her eighteenth birthday "which would have been a crime if committed by an adult."[19] Moreover, the potential commitment to federal custody is far greater in criminal proceedings.[20]

eighteenth birthday which would have been a crime if committed by an adult or a violation by such a person of section 922(x).").

13 United States v. Ramirez, 297 F.3d 185, 191 (2d Cir. 2002).

14 *See* Kemplen v. Maryland, 428 F.2d 169, 173–74 (4th Cir. 1970) ("By deciding the [Maryland state law] waiver issue, the juvenile court determines whether the accused, if found guilty, will receive nonpunitive rehabilitation as a juvenile from the state's social service agencies or will be sentenced as an adult. The state argues that this is not a critical stage in the guilt determining process. But, it seems to us nothing can be more critical to the accused than determining *whether there will be a guilt determining process in an adult-type criminal trial*. The waiver proceeding can result in dire consequences indeed for the guilty accused." (footnote omitted)).

15 United States v. Thomas, 114 F.3d 228, 263 (D.C. Cir. 1997); *cf.* Kent v. United States, 383 U.S. 541, 556–57 (1966) (discussing the importance of protections guaranteed to juveniles by the D.C. Juvenile Court Act's jurisdictional waiver proceedings).

16 *See* United States v. Frasquillo-Zomosa, 626 F.2d 99, 101 (9th Cir. 1980) (observing that, in keeping with the JDA's overarching purpose, the ultimate result of successful prosecution under the Act "differs, in substantial ways, from that of an adult criminal proceeding"); Victor L. Streib, *Prosecutorial Discretion in Juvenile Homicide Cases*, 109 PENN ST. L. REV. 1071, 1083–84 (2005).

17 *See* 18 U.S.C. § 5032; United States v. Under Seal, 819 F.3d 715, 718 (4th Cir. 2016) ("To initiate a proceeding under the Act, the Government files a delinquency information rather than a criminal indictment.").

18 United States v. Juvenile Male, 554 F.3d 456, 459 (4th Cir. 2009); Jonah R. v. Carmona, 446 F.3d 1000, 1006 (9th Cir. 2006); United States v. Juvenile LWO, 160 F.3d 1179, 1182 n.4 (8th Cir. 1998) ("We recognize that under the federal statutes a juvenile is not adjudicated to be guilty as a criminal; rather, he is adjudicated to be a juvenile delinquent."); *Frasquillo-Zomosa*, 626 F.2d at 101; *see* United States v. Robinson, 404 F.3d 850, 858 (4th Cir. 2005).

19 18 U.S.C. § 5031.

20 *See* United States v. Geraldo, 687 F. App'x 101, 107 (2d Cir. 2017) (noting that juvenile prosecutions offer "a much attenuated regime of punishment"); United States v. Ramirez, 297 F.3d 185,

Under the JDA, a defendant between the ages of eighteen and twenty-one who is accused of juvenile delinquency may receive a maximum sentence of five years' imprisonment or three years' probation.[21] The same conduct might expose a defendant to life imprisonment without the JDA's protections.[22]

B. *The Applicability of the JDA Generally*

Where the Act applies, federal courts generally lack jurisdiction over juvenile defendants.[23] Persons younger than eighteen who are suspected of committing federal crimes are presumptively exempted from criminal prosecution.[24] However, the exemption is not absolute because the JDA

190–91 (2d Cir. 2002) ("[A juvenile] who is found guilty of committing an act of juvenile delinquency is subject to probation or 'official detention' for no more than five years, a term which is normally considerably less than the prison term that an adult who committed the same crime would receive."); *Frasquillo-Zomosa*, 626 F.2d at 101; *cf.* Kemplen v. Maryland, 428 F.2d 169, 173–74 (4th Cir. 1970) ("If the [state] juvenile court decides to keep jurisdiction, [the accused juvenile] can be detained only until he reaches majority. But, if jurisdiction is waived to the adult court, the accused may be incarcerated for much longer, depending upon the gravity of the offense, and, if the offense be a felony, lose certain of his rights of citizenship." (citation omitted)); Hidalgo v. State, 983 S.W.2d 746, 755 (Tex. Crim. App. 1999) (discussing the Texas Juvenile Justice Code).

[21] *See* 18 U.S.C. §§ 5037(b)(2)(A), (c)(2)(A).

[22] *See, e.g.*, Kent v. United States, 383 U.S. 541, 557 (1966) (discussing the D.C. Juvenile Court Act and observing that a "waiver of [juvenile] jurisdiction and transfer of the matter to the District Court was potentially as important . . . as the difference between five years' confinement and a death sentence"); *Ramirez*, 297 F.3d at 192 ("[One defendant] faces possible life imprisonment if prosecuted as an adult. [The other], who has already been convicted as an adult, was sentenced to a prison term of thirty-five years.").

[23] *See, e.g.*, United States v. Machen, 576 F. App'x 561, 562 (6th Cir. 2014) ("Under the Federal Juvenile Delinquency Act (FJDA), the government may not proceed in federal court against a defendant under the age of twenty-one for acts the defendant committed before turning eighteen unless the government 'certifies' that certain conditions are met and that federal jurisdiction is appropriate."); United States v. Díaz, 670 F.3d 332, 339 (1st Cir. 2012) ("Absent a certification from the Attorney General, the FJDA prevents a district court from exercising jurisdiction over a defendant who is under the age of twenty-one for criminal acts that he committed before he turned eighteen."); United States v. Flores, 572 F.3d 1254, 1269 (11th Cir. 2009) (per curiam) ("The JDA places limits on when a minor may be tried. 'A juvenile alleged to have committed an act of juvenile delinquency' cannot be tried in federal court unless the Attorney General issues a certification to the trial court." (quoting 18 U.S.C. § 5032)); United States v. Diaz-Antunuez, 930 F. Supp. 2d 103, 110 (D.D.C. 2013) ("For prosecutions affected by the strictures of the FJDA, a federal court's subject matter jurisdiction depends upon the government's compliance with the statute, including, *inter alia*, a certification by the Attorney General pursuant to 18 U.S.C. § 5032."), *aff'd sub nom.* United States v. Machado-Erazo, 901 F.3d 326 (D.C. Cir. 2018).

[24] *See* 18 U.S.C. § 5032; *see also Flores*, 572 F.3d at 1268–69 ("[T]he district court dismissed [charges of murder, a violent crime in aid of racketeering ("VICAR"), conspiracy to commit the VICAR murder, and use of a firearm during the VICAR murder] for lack of jurisdiction because [the defendant]

contains both mandatory and discretionary transfer provisions.[25] As an initial matter, the transfer of recidivists for criminal prosecution is mandatory if a juvenile recidivist commits a felonious violent crime or an enumerated drug offense after his or her sixteenth birthday.[26] Furthermore, the Act permits federal courts to adjudicate delinquency for juveniles fifteen years or older when the Attorney General certifies the following: (1) the appropriate state court lacks or "refuses to assume jurisdiction over" the juvenile for the alleged act of juvenile delinquency; (2) the state lacks adequate programs and services for the juvenile's needs; or (3) the charged offense is a felony crime of violence or an enumerated drug offense and there is a substantial federal interest to warrant federal prosecution.[27] Where the appropriate certification is made along with a motion to transfer by the Attorney General or his designee, a juvenile who apparently committed a crime after his or her fifteenth birthday may be transferred for criminal prosecution as an adult if the appropriate district court finds, after a hearing and consideration of certain enumerated factors, that such transfer would be in the interest of justice.[28]

Given this framework, federal prosecutors have immense discretion in determining whether or not a juvenile enjoys JDA protections.[29] First, the prosecutor determines whether or not to charge offenses triggering either of the Act's transfer provisions.[30] Second, the prosecutor alone

was 16 years old at the time of the alleged murder and the government failed to get Department of Justice Approval to prosecute him for these crimes, as required by the Juvenile Delinquency Act.").

25 *See* 18 U.S.C. § 5032 (outlining juvenile criminal prosecution transfers).

26 *Id.*

27 *Id.*; *see* United States v. Juvenile Male, 554 F.3d 456, 461 (4th Cir. 2009); United States v. Ceja–Prado, 333 F.3d 1046, 1048 (9th Cir. 2003).

28 18 U.S.C. § 5032 ("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."); United States v. Under Seal, 819 F.3d 715, 718 (4th Cir. 2016).

29 *See* United States v. Welch, 15 F.3d 1202, 1207 (1st Cir. 1993); Streib, *supra* note 16, at 1083 ("The prosecutor's role in judicial waiver jurisdictions often is to file a motion to transfer, without which it would be unlikely that the case would be transferred to criminal court.").

30 *See* D. Ross Martin, Note, *Conspiratorial Children? The Intersection of the Federal Juvenile Delinquency Act and Federal Conspiracy Law*, 74 B.U. L. REV. 859, 866 (1994); *see also* United States v. Delatorre, 157 F.3d 1205, 1210 (10th Cir. 1998) ("[I]n its discretion . . . the Government chose not to charge [the defendant] for murder under § 1959(a)(1), and thus need not comply with the JDA's provisions governing acts of juvenile delinquency."); State v. J.M., 866 A.2d 178, 184 (N.J. 2005) (discussing the prosecutor's responsibility for waiver decisions under New Jersey's juvenile transfer statute).

determines whether to seek certification based on a substantial federal interest to warrant federal prosecution, a determination unreviewable by the courts.[31] Third, courts afford a prosecutor's timing in filing a juvenile information or a criminal indictment considerable deference.[32]

For most criminal offenses, then, the limits of federal jurisdiction over juveniles are readily discernible. The defendant's age at the time the juvenile information is filed determines the Act's applicability.[33] A person not yet twenty-one years old who committed an ostensibly criminal act

[31] *See, e.g.*, United States v. Smith, 178 F.3d 22, 25 (1st Cir. 1999) ("We agree with the great majority of circuits that hold that 'the United States Attorney's certification of a substantial federal interest is an unreviewable act of prosecutorial discretion.'" (quoting United States v. Juvenile Male J.A.J, 134 F.3d 905, 909 (8th Cir. 1998))); United States v. Juvenile Male J.A.J., 134 F.3d 905, 909 (8th Cir. 1998) ("We conclude that the text and structure of § 5032, in addition to separation of powers concerns, demonstrate that the United States Attorney's certification of a substantial federal interest is an unreviewable act of prosecutorial discretion."); United States v. I.D.P., 102 F.3d 507, 511 (11th Cir. 1996) ("In the context of certification under this statute, the government's authority to ascertain the presence of a substantial federal interest is no different from its authority to decide whether to prosecute a case in a federal forum. This type of decision falls squarely within the parameters of prosecutorial discretion that previously we have held does not lend itself to judicial intervention."). *But see* United States v. Juvenile Male #1, 86 F.3d 1314, 1320–21 (4th Cir. 1996) (determining that a certification of a substantial federal interest is reviewable).

[32] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 465 (1996) ("Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts."); United States v. Lovasco, 431 U.S. 783, 790–91 (1977) ("It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt."); Smith v. United States, 411 U.S. 952, 954 (1973) (mem.) (Douglas, J., dissenting from denial of certiorari) ("[There is] virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution."); United States v. Staton, 605 F. App'x 110, 113 (3d Cir. 2015) ("[T]he Government is not required to initiate charges as soon as the requisite proof has been developed because such a rule 'would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act.'" (quoting *Lovasco*, 431 U.S. at 793)); United States v. Ciampaglia, 628 F.2d 632, 639 (1st Cir. 1980) ("The prosecution has wide discretion in deciding to delay the securing of an indictment in order to gather additional evidence against an individual.").

[33] *See* United States v. Camez, 839 F.3d 871, 874 (9th Cir. 2016) ("We must look first to the defendant's age at the time of indictment. If the defendant is under 18, then the JDA applies." (citation omitted)); United States v. Ramirez, 297 F.3d 185, 191 (2d Cir. 2002) ("[T]o determine whether the JDA governs a prosecution, a court should look to the defendant's age at the time of the offense or offenses charged in the indictment." (quoting United States v. Wong, 40 F.3d 1347, 1365 (2d. Cir. 1994))); United States v. A.D., 28 F.3d 1353, 1355 (3d Cir. 1994) ("Under the Act, persons who violate the laws of the United States before reaching their eighteenth birthday may be subject to federal juvenile delinquency proceedings, provided that proceedings against them begin before their twenty-first birthday."); United States v. Doe, 631 F.2d 110, 113 (9th Cir. 1980) ("[W]e hold that inasmuch as the offenses with which appellant was charged occurred while she was under the age of eighteen and both informations against appellant were filed before her twenty-first birthday, the district court was correct in treating the cases as within its juvenile jurisdiction.").

before his or her eighteenth birthday "ordinarily may not be prosecuted as an adult in federal court and generally is placed into state juvenile court systems or proceeded against in a juvenile delinquency proceeding in the district court."[34] Moreover, JDA safeguards seemingly continue to apply even if the defendant reaches his or her twenty-first birthday during the pendency of proceedings.[35] However, district courts can acquire jurisdiction to adjudicate matters involving substantial federal interests upon certification by federal prosecutors.[36] When the district courts have thusly acquired jurisdiction, they can transfer juveniles accused of serious violence or enumerated drug offenses to the criminal courts to be tried as adults upon government motion and after making the requisite findings.[37]

The parameters for prosecuting persons who are charged after their twenty-first birthdays for crimes they allegedly completed before they reached their eighteenth birthdays are also clear. In short, the Courts of Appeals have consistently held that, under 18 U.S.C. § 5031, a defendant charged after reaching twenty-one years of age with allegedly committing a crime before turning eighteen may not invoke the protections of the Act.[38] It is assumed that, at that point, he or she can no longer benefit from the Act's safeguards.[39] This is true even when the government's delay in initiating a prosecution affects availability of juvenile proceedings, at least so long as the government has no improper motive for the delay.[40]

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34 United States v. Thomas, 114 F.3d 228, 263 (D.C. Cir. 1997).

35 *See Ramirez*, 297 F.3d at 192 ("Since the juvenile informations against [the defendants] were filed when each was twenty years old, we conclude that the JDA continues to apply to their criminal prosecutions notwithstanding that they are now over twenty-one."); *see also* United States v. Geraldo, 687 F. App'x 101, 107 (2d Cir. 2017) ("Even where the defendant turns twenty-one during the pendency of the criminal proceedings, we have held that the JDA continues to apply.").

36 *See* 18 U.S.C. § 5032 (2018).

37 *Id.*

38 *See, e.g.*, *Camez*, 839 F.3d at 874 ("If the defendant is 21 or older, then the JDA does not apply."); United States v. Blake, 571 F.3d 331, 344 (4th Cir. 2009) (affirming that the defendant was not a "juvenile" under the JDA where he was indicted three months after his twenty-first birthday); United States v. Delatorre, 157 F.3d 1205, 1209 n.2 (10th Cir. 1998); United States v. Hoo, 825 F.2d 667, 669–70 (2d Cir. 1987) ("[C]ourts have consistently held that a defendant who is alleged to have committed a crime before his eighteenth birthday may not invoke the protection of the Juvenile Delinquency Act if criminal proceedings begin after the defendant reaches the age of twenty-one.").

39 *Thomas*, 114 F.3d at 263.

40 *See, e.g.*, United States v. Edwards, 768 F. App'x 702, 703–04 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 275 (2019); *Blake*, 571 F.3d at 345; *Hoo*, 825 F.2d at 671; United States v. Davilla, 911 F. Supp. 127, 130 (S.D.N.Y. 1996); *cf.* David Jaffe, *Strategies for Prosecuting Juvenile Offenders*, 66 DOJ J. FED. L. & PRAC. 91, 92–93 (2018) (noting that prosecutors choose whether to seek transfer and acknowledging that "a delay in indictment until an offender turns 21 can have significant consequences for the juvenile offender").

C. *The JDA and Continuing Offenses*

While there is relative clarity regarding the government's discretion in proceeding against juveniles for conduct that would be criminal if it were perpetrated as adults, on the one hand, and persons older than twenty-one suspected of committing crimes before they turned eighteen, on the other hand, some crimes do not fit neatly within this rubric. Contrasted with the punctiliar nature of most substantive crimes, where the offense is complete as soon as the defendant satisfies the elements of the offense, a continuing offense involves a potentially "prolonged course of conduct" where commission and harm persist until the conduct has "run its course."[41] For example, a conspirator commits the crime each moment he or she remains a member of the conspiracy.[42] As a practical matter, then, a juvenile who continues to participate in a criminal conspiracy after turning eighteen potentially commits a criminal act as an adult.[43]

As the US Court of Appeals for the Ninth Circuit observed, "for continuing crimes alleged to have occurred both before and after the defendant turned 18, the statute provides no clear answer to the question whether the JDA applies."[44] While the Act does not address its applicability to a defendant aged eighteen, nineteen, or twenty at the time of indictment for continuing crimes straddling his or her eighteenth birthday, "courts uniformly have held that adult prosecution is

[41] United States v. Green, 897 F.3d 443, 448 (2d Cir. 2018); United States v. Holden, 806 F.3d 1227, 1231 (9th Cir. 2015); United States v. Rivera-Ventura, 72 F.3d 277, 281 (2d Cir. 1995); John v. State, 291 N.W.2d 502, 505 (Wis. 1980).

[42] *See, e.g.*, Smith v. United States, 568 U.S. 106, 111 (2013) ("Since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law 'through every moment of [the conspiracy's] existence' . . . ." (alteration in original) (citation omitted) (quoting Hyde v. United States, 225 U.S. 347, 369 (1912))); Toussie v. United States, 397 U.S. 112, 122 (1970) ("It is in the nature of a conspiracy that each day's acts bring a renewed threat of the substantive evil Congress sought to prevent."); United States v. Borden Co., 308 U.S. 188, 202 (1939) ("A conspiracy thus continued is in effect renewed during each day of its continuance."); United States v. Yashar, 166 F.3d 873, 875 (7th Cir. 1999) ("The hallmark of the continuing offense is that it perdures beyond the initial illegal act, and that 'each day brings a renewed threat of the evil Congress sought to prevent' even after the elements necessary to establish the crime have occurred." (quoting *Toussie*, 397 U.S. at 122)); United States v. Maddox, 944 F.2d 1223, 1233 (6th Cir. 1991) ("[A] conspirator commits the crime each day that he remains a member of the conspiracy."); United States v. Cohen, 583 F.2d 1030, 1040 (8th Cir. 1978) ("A conspiracy, once established, is presumed to continue until the contrary is established.").

[43] *Maddox*, 944 F.2d at 1233.

[44] United States v. Camez, 839 F.3d 871, 874 (9th Cir. 2016).

warranted."[45] Such cases often arise in the context of narcotics trafficking conspiracies,[46] but "[i]t is not uncommon in gang-related RICO prosecutions to encounter juvenile defendants."[47] Because substantive RICO offenses under 18 U.S.C. § 1962(c) are continuing crimes like conspiracies,[48] it is possible for a person to participate in racketeering as a juvenile, which persists uninterruptedly into adulthood.

Given the unique nature of continuing offenses and the JDA's silence regarding their treatment, the lower federal courts have been left to chart their own courses. Rather predictably, they have carved disparate paths, raising concerns about the proper scope of the Act's procedural and substantial protections.

II. A Survey of the Circuit Split

The Supreme Court has yet to rule on important aspects of prosecuting age-of-majority-straddling continuing crimes, or "straddle offenses." In the resulting vacuum, the federal Courts of Appeals have not ruled uniformly. Those that have directly addressed the issues divide into two general camps, one adopting a limited approach and the other adopting a liberal approach to the evidentiary use of juvenile acts in adult

45 *Id.*; *see also* United States v. Delatorre, 157 F.3d 1205, 1209 (10th Cir. 1998) ("No circuit has applied the JDA to an adult conspiracy or racketeering prosecution simply because defendant's participation in the crimes began prior to his eighteenth birthday.").

46 *See, e.g.*, United States v. Harris, 740 F.3d 956, 962 (5th Cir. 2014); United States v. Farias, 469 F.3d 393, 398–99 (5th Cir. 2006); United States v. Gjonaj, 861 F.2d 143, 144 (6th Cir. 1988); United States v. Gardenhire, No. 15-87, 2017 U.S. Dist. LEXIS 25772, at *5 (W.D. Pa. Feb. 24, 2017); Key v. United States, No. 08-CV-4065-DEO, 2011 U.S. Dist. LEXIS 49669, at *1–2 (N.D. Iowa May 9, 2011); United States v. Jsames, No. 4:09CR3090, 2009 U.S. Dist. LEXIS 83615, at *1–2 (D. Neb. Sept. 14, 2009).

47 RICO PROSECUTOR'S MANUAL, *supra* note 1, at 460; *see* Jaffe, *supra* note 40, at 91 ("Juvenile offenders in transnational criminal organizations and violent street gangs are not new phenomena. Federal prosecutors and agents are learning, however, of organizations and gangs actively recruiting juveniles to commit the group's more heinous acts, in part based upon the belief that a juvenile will receive leniency or no punishment for their crimes."). For examples of gangs that recruit juveniles, see, e.g., United States v. Cruz-Ramirez, 782 F. App'x 531, 537–38 (9th Cir. 2019) (La Mara Salvatrucha ("MS-13")), *cert. denied*, 140 S. Ct. 1164 (2020); United States v. Scott, 681 F. App'x 89, 91–92 (2d Cir. 2017) (Chain Gang); United States v. Guerrero, 768 F.3d 351, 354 (5th Cir. 2014) (Texas Mexican Mafia); *Delatorre*, 157 F.3d at 1207 ("Albuquerque street gang"); Williams v. United States, No. 5:17-CV-860 (NAM), 2018 U.S. Dist. LEXIS 230463, at *1 (N.D.N.Y. Aug. 27, 2018) (Bricktown Gang).

48 *See* United States v. Yashar, 166 F.3d 873, 879 (7th Cir. 1999) ("[RICO] criminalizes a 'pattern' of activity that can include predicate acts separated in time by as much as ten years. Therefore, the nature of the offense is such that Congress must have intended it to be a continuing one . . . ."); *Delatorre*, 157 F.3d at 1209 ("[C]onspiracy and racketeering are continuing crimes . . . ."); United States v. Wong, 40 F.3d 1347, 1366 (2d Cir. 1994) ("Both substantive RICO and RICO conspiracy offenses are continuing crimes."); United States v. Moscony, 927 F.2d 742, 754 (3d Cir. 1991) ("RICO is a continuing offense 'directly analogous to the crime of conspiracy' . . . .").

criminal proceedings.[49] This Part highlights the lack of harmony by chronologically surveying the seminal cases in these respective camps, starting with the limited evidentiary approach.

A. *The Limited Evidentiary Approach*

Three Courts of Appeals—the Fourth, Sixth, and District of Columbia—permit introduction of juvenile conduct in prosecuting straddle offenses for only limited evidentiary purposes. Juries can consider it to put adult conduct into context, for example, by inferring from pre-majority conduct that the defendant knew of the conspiracy.[50] In these circuits, district courts must specifically instruct juries that the evidence cannot be directly considered in determining guilt. The ostensible justification for this approach is that it is more in line with JDA procedures than is the liberal approach taken by the majority of circuits. Because post-majority conduct alone gives a district court jurisdiction over a conspiracy spanning a defendant's eighteenth birthday, any conviction for such a conspiracy should be based only on post-eighteen activities.[51] Despite the more restrictive approach, these courts allow judges to consider pre-majority conduct when sentencing a defendant for crimes straddling his or her eighteenth birthday.[52]

1. The US Court of Appeals for the Fourth Circuit

In 1984, the Fourth Circuit became the first of the appellate courts to address this issue. In *United States v. Spoone*,[53] a father and his two sons were convicted of various offenses, including conspiracy, relating to a scheme involving the theft of vehicles in the Carolinas, the transfer of wrecked cars' title certificates and identification numbers to the stolen cars, and the sale of the stolen cars in the Detroit, Michigan area.[54] On

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[49] *See* United States v. Thomas, 114 F.3d 228, 264–65 (D.C. Cir. 1997) ("[T]he circuits lined up on two sides.").

[50] *See id.* at 266 (adopting the approach taken by the Fourth and Sixth Circuits); United States v. Maddox, 944 F.2d 1223, 1233 (6th Cir. 1991) ("[The defendant] cannot be held liable for pre-eighteen conduct, but such conduct can, of course, be relevant to put post-eighteen actions in proper context."); United States v. Spoone, 741 F.2d 680, 687 (4th Cir. 1984) (holding that the jury was entitled to assess evidence in light of testimony regarding pre-majority acts, which showed that the defendant knew of the conspiracy's existence).

[51] *See Thomas*, 114 F.3d at 266.

[52] *See id.* at 267; *see also* United States v. Sparks, 309 F. App'x 713, 717 (4th Cir. 2009); United States v. Gibbs, 182 F.3d 408, 442 (6th Cir. 1999).

[53] 741 F.2d 680 (4th Cir. 1984).

[54] *Id.* at 683.

appeal, the younger son, "Rusty," contended that his conspiracy conviction should be overturned because the evidence of his adult participation was insufficient for a jury to convict him.[55] In fact, he was seventeen years old when all but one of the alleged conspiracy's overt acts occurred.[56]

The Fourth Circuit affirmed Rusty's conviction because the government presented evidence that law enforcement agents observed him tampering with the vehicle identification number and federal identification sticker areas of a stolen vehicle on his eighteenth birthday.[57] Where the trial court repeatedly instructed the jury that it could not consider Rusty's juvenile acts as evidence of guilt, the Fourth Circuit concluded that there was no basis to believe that the jury convicted him of conspiracy solely because of his pre-majority conduct.[58] Of course, the juvenile acts were properly admissible pursuant to the Federal Rules of Evidence to prove that Rusty knew about and was involved in the auto-theft conspiracy as a minor.[59]

Post–*Spoone*, the Fourth Circuit has reiterated that juvenile conduct cannot be considered as evidence of guilt and emphasized that a jury must be instructed accordingly.[60] A jury also is entitled to assess evidence linking a defendant to a conspiracy as an adult in light of juvenile conduct bearing upon the level and nature of involvement in that conspiracy.[61] This reasoning suggests that the Fourth Circuit reads the JDA as having a "substantive law effect," where guilt must be partially established on post-majority conduct.[62]

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55 *Id.* at 687.

56 *Id.*

57 *Id.* at 687–88.

58 *Id.* at 687.

59 *Spoone*, 741 F.2d at 687 (4th Cir. 1984); *see also* FED. R. EVID. 404(b) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character . . . [but] may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").

60 *See* United States v. Thompson, No. 97-4896, 1999 U.S. App. LEXIS 28416, at *6–7 (4th Cir. Nov. 2, 1999) (per curiam) (overturning a drug trafficking conspiracy conviction where the instruction was not given); United States v. McCoy, No. 99-6096, 1999 U.S. App. LEXIS 19242, at *22 (4th Cir. Aug. 16, 1999) (per curiam) ("When a conspiracy begins before a defendant's eighteenth birthday, but continues beyond that date, evidence of pre-majority conduct may not be used to provide the sole basis for a guilty verdict.").

61 United States v. Coleman, 11 F. App'x 140, 141 (4th Cir. 2001) (per curiam).

62 Martin, *supra* note 30, at 869–70.

2. The US Court of Appeals for the Sixth Circuit

In 1991, the Sixth Circuit became the first federal appellate court to follow the Fourth Circuit's reasoning in *Spoone*. In *United States v. Maddox*[63] several defendants were convicted of crimes regarding the operation of a chain of cocaine houses in and around Flint, Michigan over a period of approximately four years.[64] One of the defendants, Ronald Arnold, appealed, arguing that there was insufficient evidence to convict him of participating in the conspiracy as an adult.[65] While he contended that he stopped selling drugs before reaching his eighteenth birthday, witnesses testified that they observed him doing so afterwards.[66] The Sixth Circuit affirmed Arnold's conviction and held that "the government must make a threshold demonstration that the defendant who joined a conspiracy prior to his eighteenth birthday 'ratified' his membership in that conspiracy after his eighteenth birthday."[67] It also specified that Arnold could not have been held liable for pre-eighteen conduct, but his juvenile conduct was potentially relevant to put his adult actions in "proper context."[68]

Later, in *United States v. Machen*,[69] the court overturned a racketeering conspiracy conviction where the trial court failed to instruct the jury that Terrance Machen Jr. could only be convicted if he "ratified" his participation in the conspiracy after his eighteenth birthday.[70] Machen was charged in an indictment targeting a Youngstown, Ohio street gang.[71] The conspiracy began around January 1, 2003, and concluded around March 15, 2011.[72] Before trial, Machen moved to dismiss the indictment for lack of subject-matter jurisdiction because the only alleged overt acts involving him were committed before his eighteenth birthday on April 18, 2009.[73] In response, the government indicated that it was prepared to meet its burden of proving that he ratified his involvement as an adult, but the district court never ruled on the motion to dismiss.[74]

63 944 F.2d 1223 (6th Cir. 1991).

64 *Id.* at 1225–26.

65 *Id.* at 1233.

66 *Id.* at 1233–34.

67 *Id.* at 1233.

68 *Id* at 1233–34.

69 576 F. App'x 561 (6th Cir. 2014).

70 *Id.* at 562.

71 *Id.*

72 *Id.*

73 *Id.* at 563.

74 *Id.*

The evidence at Machen's trial connecting him to the gang after he turned eighteen consisted of one witness testifying that he participated in initiating a new member in 2010 and two witnesses affirming that Machen was a member when he was indicted in March 2011.[75] The district court did not instruct the jury on Machen's age or the government's burden to establish ratification, and he was convicted.[76] In overturning the conviction, the Sixth Circuit reiterated that defendants cannot be held liable for pre-majority conduct, but juries can consider evidence of the same in assessing the proper context of post-majority conduct.[77]

3. The US Court of Appeals for the D.C. Circuit

The D.C. Circuit joined the Fourth and Sixth Circuits in adopting a limited evidentiary approach to pre-majority conduct in 1997. *United States v. Thomas*[78] involved the prosecution of multiple members of a drug trafficking network.[79] Donnell Williams, who was eleven years old when the organization began distributing drugs in 1983, turned eighteen on December 21, 1989, and was indicted at age nineteen for, inter alia, participating in racketeering and narcotics trafficking conspiracies.[80] He argued that, since most of his involvement in the conspiracies occurred while he was a juvenile, he should still benefit from the JDA's protections.[81] Without following the JDA transfer proceedings, the D.C. Circuit determined that an adult conviction could only be sustained against Williams where it was "based solely on adult participation in the conspiracy, and not in whole or in part on acts committed as a juvenile."[82]

While Williams's case was similar to the defendant's case in *Machen*—where no limiting instruction was given to the jury regarding his age—the D.C. Circuit affirmed his convictions despite the error.[83] Like the Fourth Circuit, the D.C. Circuit acknowledged that juvenile conduct is admissible pursuant to the Federal Rules of Evidence "as probative of knowledge of

75 *See Machen*, 576 F. App'x at 564.

76 *Id.*

77 *Id.* at 566–67; *see also* United States v. Strothers, 77 F.3d 1389, 1392 (D.C. Cir. 1996) (affirming admission of pre-majority conduct where "the trial judge circumscribed the jurors' use of the challenged evidence, instructing them it was admitted 'for the limited purpose of enabling [them] to decide when, if ever, [the defendant] became a member of the conspiracy charged in count one'" (first alteration in original)).

78 114 F.3d 228 (D.C. Cir. 1997).

79 *Id.* at 235.

80 *See id.* at 236.

81 *Id.* at 239.

82 *Id.* at 266.

83 *Id.* at 274

the conspiracy, when the defendant joined it, the scope of the conspiracy he agreed to and the foreseeability of the acts of co-conspirators."[84] Because the adult participation gives the district court jurisdiction over an eighteen to twenty-one year old defendant, however, juries must ordinarily be instructed that evidence of continued membership in the conspiracy must be predicated on the adult acts.[85] In the instant case, the D.C. Circuit found that the omission was harmless since Williams was also convicted of two substantive offenses committed in furtherance of the conspiracies after he turned eighteen.[86]

B. *The Liberal Evidentiary Approach*

The majority of Courts of Appeals—the First, Second, Seventh, Ninth, Tenth, and Eleventh Circuits—have adopted a liberal evidentiary approach to juvenile conduct, where "once having established that certain acts of the offense occurred after the defendant's eighteenth birthday, the entire case may be tried in accordance with the adult rules of procedure and evidence."[87] This approach ultimately allows juries to consider defendants' pre-majority acts as direct proof of guilt and is grounded in a strict jurisdictional understanding of the JDA.[88] In short, if the charged offense falls outside of the Act's jurisdictional provisions, the Act has no lingering evidentiary effects.[89] Among the circuits following this approach, some require a jury finding regarding the necessity of adult participation in the continuing offense to ensure that juries do not base a conviction solely on pre-majority acts, but others do not.[90] Like their sister circuits that follow a more restrictive evidentiary approach, these circuits allow

84 *Thomas*, 114 F.3d at 266.

85 *Id.*

86 *Id.* at 239, 266–67.

87 United States v. Cruz, 805 F.2d 1464, 1477 (11th Cir. 1986); *see also* United States v. Camez, 839 F.3d 871, 877 (9th Cir. 2016); United States v. Delatorre, 157 F.3d 1205, 1211 (10th Cir. 1998); United States v. Wong, 40 F.3d 1347, 1367 (2d Cir. 1994); United States v. Welch, 15 F.3d 1202, 1207 (1st Cir. 1993); United States v. Doerr, 886 F.2d 944, 969–70 (7th Cir. 1989).

88 *See Delatorre*, 157 F.3d at 1210 (criticizing the limited approach as "incorrectly suggest[ing] that the JDA changes the substantive standard of criminal liability for a racketeering enterprise or conspiracy spanning a defendant's eighteenth birthday").

89 *See id.* (noting that "[t]he JDA simply does not address the admissibility of evidence" in an adult trial for continuing criminal activity spanning a defendant's eighteenth birthday); *Cruz*, 805 F.2d at 1476 ("The [JDA] amendments were not made to modify the proceedings in adult court . . . none of the provisions of the act are applicable in a trial involving one who is not a juvenile and has not committed an act of juvenile delinquency.").

90 *Compare Delatorre*, 157 F.3d at 1209 (requiring such a finding), *and Welch*, 15 F.3d at 1212 (same), *with* United States v. Scott, 681 F. App'x 89, 92–93 (2d Cir. 2017) (rejecting the requirement of such a finding), *and Cruz*, 805 F.2d at 1476 (same).

trial courts to consider juvenile conduct when sentencing a defendant for crimes that span his or her eighteenth birthday.[91]

1. The US Court of Appeals for the Eleventh Circuit

The split among the circuits developed rather quickly. The Eleventh Circuit was the second to consider the direct use of pre-majority conduct to establish guilt in adult prosecutions. In 1986, only two years after the Fourth Circuit's *Spoone* decision, the Eleventh Circuit decided *United States v. Cruz*,[92] a case involving a large cocaine distribution conspiracy.[93] Stephen Cruz, one of the conspirators convicted at trial, appealed and contended the following: (1) the federal courts lacked jurisdiction because there was "insufficient evidence to prove that he continued to participate in the conspiracy"; (2) assuming, arguendo, that the district court had jurisdiction, Cruz's guilt had to "be prove[n] solely on the basis of his post-eighteen activity"; and (3) "even if evidence of his pre-eighteen acts were admissible to provide a context within which the jury could evaluate his post-eighteen activity, evidence of his pre-eighteen acts would not be admissible to prove his guilt."[94]

At a minimum, the Eleventh Circuit explained, the jury could assess evidence regarding Cruz's post-majority activities in light of other evidence that tended to show that he knew about the cocaine conspiracy from its inception.[95] Yet, it squarely rejected the Fourth Circuit's reasoning in *Spoone* and held that once "sufficient evidence" was adduced to allow a jury to conclude that Cruz participated in the cocaine distribution conspiracy as an adult, evidence of his pre-majority activities was admissible as direct proof of his guilt.[96] Consequently, the Eleventh Circuit rejected Cruz's arguments, finding that the government presented evidence from which a jury could infer his adult participation in the conspiracy.[97] This "threshold demonstration of post-eighteen conspiracy activity" was sufficient for jurisdiction within the district court even

91 *See, e.g.*, United States v. Rodríguez, 731 F.3d 20, 30 (1st Cir. 2013) (explaining that the court had previously implied that "inclusion of the defendant's pre-majority conduct was permissible" for sentencing); United States v. Flores, 572 F.3d 1254, 1270 (11th Cir. 2009) (per curiam) ("[W]e conclude that in the context of a RICO conspiracy, if the defendant continues his participation in the activities of the conspiracy past the age of majority, those crimes may be considered for *both* determining guilt and his sentence.").

92 805 F.2d 1464 (11th Cir. 1986).

93 *Id.* at 1467.

94 *Id.* at 1475.

95 *Id.* at 1476.

96 *Id.* at 1476–77.

97 *Id.* at 1476.

though the jury was never called upon to make a finding of adult participation.[98]

Once the prosecution introduced evidence sufficient to allow a jury to conclude that Cruz participated in the conspiracy as an adult, evidence of his juvenile conduct was admissible to prove his guilt.[99] The Eleventh Circuit relied in part on the "[c]ommon sense" notion that Congress did not intend to "bifurcate the prosecution" of age-of-majority-spanning crimes.[100] In a subsequent case, *United States v. Newton*,[101] the court went a step further and averred: "Where there is one continuous conspiracy, and the defendant has straddled his eighteenth birthday by membership in that conspiracy both before and after that significant day, his prior acts could be found to be the sole basis for guilt."[102]

2. The US Court of Appeals for the Seventh Circuit

After the Sixth Circuit followed the limited evidentiary approach that the Fourth Circuit adopted in *Spoone*, the Seventh Circuit joined the Eleventh Circuit in 1989 with its ruling in *United States v. Doerr.*[103] Dale Doerr was convicted of conspiring with his father and others "to travel in and use the facilities of interstate commerce to promote, carry on, and distribute the proceeds of unlawful activities involving prostitution."[104] Doerr, a mid-level manager in the operation, contended that the district court erred by denying his request for an instruction informing the jury that pre-majority acts could only be considered as evidence of knowledge of the conspiracy and not as evidence of acts in furtherance of the conspiracy.[105] The Seventh Circuit affirmed the district court's refusal to give the requested instruction.[106] The Seventh Circuit agreed with the Eleventh Circuit's decision in *Cruz*, asserting that "once sufficient evidence has been introduced to allow a jury reasonably to conclude that a defendant's participation in a conspiracy continued after the defendant reached the age of eighteen," then the defendant may be tried before a

98 *Cruz*, 805 F.2d at 1476.

99 *Id.* at 1477.

100 *Id.*

101 44 F.3d 913 (11th Cir. 1995).

102 *Id.* at 919.

103 886 F.2d 944 (7th Cir. 1989).

104 *Id.* at 948.

105 *Id.* at 969.

106 *Id.*

district court without certification, and only the Federal Rules of Evidence limit the government's introduction of evidence.[107]

In the instant case, the Seventh Circuit determined that the government introduced sufficient evidence to allow the jury to reasonably conclude that Doerr, who turned eighteen years old in August 1981, had participated in the charged conspiracy after his eighteenth birthday.[108] Among other things, the government's evidence at trial included testimony from a masseuse that she saw Doerr manage the massage parlor almost daily for a five-month period between September 1981 and January 1982.[109] Based on the evidence adduced at trial that his participation in the conspiracy continued into adulthood, the Seventh Circuit affirmed his conviction, although no limiting instruction was given.[110]

3. The US Court of Appeals for the First Circuit

The First Circuit joined the Eleventh and Seventh Circuits in 1993. In *United States v. Welch*,[111] two youthful defendants, Christopher Driesse and Shane Welch, had been convicted of conspiring with ten co-defendants to possess and distribute cocaine.[112] On appeal, Driesse and Welch contended that the district court lacked jurisdiction over them because they initiated participation in the conspiracy as minors and had asserted a right to a pretrial evidentiary hearing on the district court's jurisdiction to try them as adults.[113] According to the government, the JDA was inapplicable because the indictment alleged that the conspiracy straddled their eighteenth birthdays.[114] Driesse and Welch, though, argued that the Act's applicability in a conspiracy case could not "depend conclusively on bare allegations" that their participation continued into adulthood.[115]

The First Circuit concluded that the government's proposed "allegation-based approach" to JDA applicability was "more consonant with its language and structure, its legislative history, the case law, and important policy considerations."[116] It highlighted, inter alia, the discretion prosecutors have pursuant to 18 U.S.C. § 5032 to certify and

107 *Id.* at 969–70.

108 *Id.*

109 *Doerr*, 886 F.2d at 970.

110 *Id.*

111 15 F.3d 1202 (1st Cir. 1993).

112 *Id.* at 1206.

113 *Id.*

114 *Id.* at 1207.

115 *Id.*

116 *Id.*

proceed against accused persons as adults rather than juveniles.[117] In holding that the JDA does not require a pretrial evidentiary hearing on jurisdiction, the First Circuit reasoned that "[p]roperly instructed in the performance of their traditional tasks, trial juries can be entrusted to discriminate between pre-majority and post-majority conduct."[118]

While it followed *Cruz* in determining that evidence of pre-majority conduct was admissible against Driesse and Welch for all purposes, the First Circuit rejected the idea that the "trial judge is the sole and final arbiter of the threshold determination as to the sufficiency of the evidence of *post*-majority conduct, or that further limiting instructions to the jury are unnecessary once the evidentiary threshold has been met to the satisfaction of the trial court."[119] Still, it affirmed the convictions, in part, because the trial court effectively instructed the jury that it could not consider the defendants' juvenile acts unless it determined that the defendants had ratified their participation after their respective eighteenth birthdays.[120] In a subsequent ruling, the First Circuit confirmed that if a defendant ratifies participation in a criminal conspiracy as an adult, a jury may consider evidence of pre-majority conduct to establish the existence of a conspiracy.[121]

4. The US Court of Appeals for the Second Circuit

The Second Circuit aligned with the liberal evidentiary use group in 1994. In *United States v. Wong*,[122] a group of defendants were convicted of RICO conspiracy and substantive offenses, as well as various violent crimes in aid of racketeering.[123] Two of the defendants, Alex Wong and Danny Ngo, began their participation in the RICO offenses as minors and argued that their juvenile conduct could not properly constitute RICO predicate acts.[124] Wong committed all but one of the alleged predicates before his eighteenth birthday.[125] He asserted that unless the government could prove that he committed two or more racketeering acts as an adult, he could not be charged in district court without a request to transfer

117 *Welch*, 15 F.3d at 1207 & n.6.

118 *Id.* at 1210.

119 *Id.* at 1211.

120 *See id.* at 1212, 1215.

121 United States v. Vargas-De Jesús, 618 F.3d 59, 65–66 (1st Cir. 2010).

122 40 F.3d 1347 (2d Cir. 1994).

123 *Id.* at 1353–55.

124 *Id.* at 1364–65.

125 *Id.* at 1364.

pursuant to the JDA.[126] Ngo similarly argued that the district court did not have jurisdiction over his pre-majority racketeering acts without the requisite certification.[127]

The Second Circuit rejected these arguments and affirmed the convictions, agreeing with the Fourth and Sixth Circuits that federal courts can exercise jurisdiction over defendants on "a threshold demonstration" of adult conspiracy activity.[128] Because Wong was convicted for conspiring to murder and Ngo was convicted of robbery and extortion after their eighteenth birthdays, the district court properly exercised jurisdiction over their substantive RICO and RICO conspiracy charges.[129] The Second Circuit concluded that a defendant's age at the time the substantive RICO or RICO conspiracy offense is completed is the relevant age for JDA purposes and that an adult defendant may be held liable for predicate offenses committed as a juvenile.[130] Notably, it did not hold that a jury determination regarding post-majority conduct was required.[131]

5. The US Court of Appeals for the Tenth Circuit

In 1998, the Tenth Circuit acknowledged the conflict among the circuits and joined the majority when it addressed the use of pre-majority conduct in continuing offenses in *United States v. Delatorre*.[132] Jason Delatorre, a member of an Albuquerque street gang, was charged with RICO, RICO conspiracy, narcotics trafficking conspiracy, and various gang-related offenses.[133] The government filed an interlocutory appeal challenging the district court's ruling limiting the admissibility of evidence that Delatorre participated in a murder as a juvenile.[134] The government intended to introduce the evidence to prove Delatorre's guilt on the racketeering and conspiracy charges, but the district court denied its admission for that specific purpose.[135]

126 *Id.*

127 *Id.* at 1365.

128 *Wong*, 40 F.3d at 1365–66.

129 *Id.* at 1366.

130 *Id.* at 1368.

131 *See* United States v. Scott, 681 F. App'x 89, 93 (2d Cir. 2017) ("The *Wong* court relied on the jury's findings to satisfy the requirement, but we did not there hold that a jury determination was required.").

132 157 F.3d 1205 (10th Cir. 1998).

133 *Id.* at 1207.

134 *Id.* at 1207–08.

135 *Id.* at 1207.

The Tenth Circuit overruled the district court's denial, explaining that there was "nothing in the JDA's language or legislative history . . . which affords any special protection to a defendant properly indicted as an adult whose participation in alleged continuing criminal activity spans his eighteenth birthday. The JDA simply does not address the admissibility of evidence in such cases."[136] In specifically declining to follow the D.C. Circuit's then-recent holding in *Thomas*, the Tenth Circuit continued,

> [a]ny decision denying the admissibility of evidence of an adult defendant's pre-eighteen conduct to prove his guilt for continuing crimes incorrectly suggests that the JDA changes the substantive standard of criminal liability for a racketeering enterprise or conspiracy spanning a defendant's eighteenth birthday. We do not read the JDA so broadly.[137]

The Tenth Circuit further stated that, "where an adult defendant is properly charged with a continuing crime, that defendant's pre-majority conduct is admissible on the same basis as post-majority conduct."[138] Consequently, on remand, the prosecution would be permitted to introduce evidence of Delatorre's juvenile actions as proof of his guilt.[139] Still, some demonstration of adult participation in conspiracy and racketeering would be necessary to sustain convictions.[140] The jury could not convict based solely on pre-majority conduct; rather it had to "find post-majority conduct sufficient to establish that defendant participated in the conspiracy or racketeering enterprise after attaining the age of eighteen."[141] While the Tenth Circuit did not state it expressly, this seems to necessarily imply, at a minimum, that the jury would be instructed concomitant with this expectation.

6. The US Court of Appeals for the Ninth Circuit

In 2016, the Ninth Circuit Court of Appeals became the latest to address the admissibility of juvenile conduct as direct proof of guilt. In *United States v. Camez*,[142] the government indicted David Ray Camez for RICO and RICO conspiracy based on his participation in the "'carder.su enterprise,' that operated an online trading post for stolen and counterfeit access devices and means of identification."[143] Camez's "criminal activities in furtherance of the enterprise included production of, and trafficking

136 *Id.* at 1210.

137 *Id.*

138 *Delatorre*, 157 F.3d at 1211.

139 *See id.*

140 *Id.*

141 *Id.* at 1209.

142 839 F.3d 871 (9th Cir. 2016).

143 *Id.* at 872–73.

in, counterfeit identification documents, possession of counterfeit and unauthorized access devices, and conspiracy to possess device-making equipment."[144]

On appeal, Camez challenged his substantive RICO conviction and argued that the JDA implicitly forbade the jury from considering his conduct as a minor as substantive proof of guilt in adult proceedings.[145] The indictment alleged that he committed three predicate racketeering acts—one when he was seventeen years old and two when he was eighteen years old—and the district court instructed the jury that it could not convict Camez solely for his pre-majority conduct.[146] In the special verdict form, the jury selected "proven" for the lone pre-majority act and one of the post-majority acts but did not respond for the second alleged post-majority act.[147] Camez's guilt, then, was contingent on the jury's ability to consider the alleged juvenile predicate as direct proof of guilt.

The Ninth Circuit equated Camez's argument to the position the D.C. Circuit adopted in *Thomas* and expressly rejected it.[148] According to the court, the instant case illustrated the critical flaw in the argument:

> Defendant committed one act when 17 and another act when 18. Under Defendant's and the D.C. Circuit's approach, he would not be guilty as *either* a juvenile *or* an adult. He committed only one act as a juvenile and therefore never established a pattern for purposes of a juvenile delinquency proceeding; and he committed only one act as an adult and therefore never established a pattern for purposes of an adult prosecution. Nothing in the JDA or in any other statute suggests that Congress intended to create a loophole resulting in no rehabilitation or punishment whatsoever for persons who indisputably committed a serious continuing crime, merely because the crime happened to span the defendant's eighteenth birthday.[149]

The Ninth Circuit also stressed that Congress obviously did not intend to allow persons to start with a "clean slate" upon reaching their eighteenth birthdays because those indicted after turning twenty-one must be charged as an adult, even for crimes committed before reaching majority.[150] Ultimately, the Ninth Circuit followed what it called "the prevailing view"—pre-majority acts are admissible as substantive proof of continuing crimes.[151]

144 *Id.* at 873.

145 *Id.* at 873–74.

146 *Id.* at 873.

147 *Id.*

148 *See Camez*, 839 F.3d at 874–75.

149 *Id.* at 875–76.

150 *Id.* at 876.

151 *Id.*; *see also* United States v. Cruz-Ramirez, 782 F. App'x 531, 542 (9th Cir. 2019) ("The district court's jury instruction here was just as restrictive as the one given in *Camez*, permitting conviction on conspiracy charges only if Flores continued in the conspiracy after he turned 18 and *only* if the government proved 'all elements of the crime as of or after the defendant's 18th birthday.'").

C. *Undecided Circuits*

1. US Courts of Appeals for the Third and Eighth Circuits

The Third and Eighth Circuits have not definitively addressed the JDA's application to continuing offenses that involve both pre-majority and post-majority conduct. Within the Third Circuit, the US District Court for the Western District of Pennsylvania considered the question in resolving a pretrial motion to dismiss a conspiracy to distribute heroin charge for lack of jurisdiction.[152] There, the court held that it had jurisdiction where the superseding indictment alleged a timeframe for the conspiracy that straddled the defendant's eighteenth birthday and included post-majority substantive counts that, if proven, would ratify the defendant's participation in the conspiracy.[153] In light of the procedural posture, the court did not address the purposes for which evidence of juvenile conduct might be admitted or the substance of any relevant jury instructions it might give to the jury.

2. The US Court of Appeals for the Fifth Circuit

While it has not taken a position regarding the ultimate question, the Fifth Circuit first addressed the question of the JDA's applicability to age-of-majority-spanning offenses in 1995 in *United States v. Tolliver*.[154] There, a group of defendants was charged with various offenses arising from a narcotics trafficking conspiracy that continued from 1985 to 1992.[155] Noah Moore Jr. distributed cocaine and procured and stored firearms for the operation.[156] On appeal, he argued that the JDA "deprived the district court of jurisdiction over him or, in the alternative, that the district court failed to instruct the jury that conduct prior to [his] eighteenth birthday could not be used to assess his guilt."[157] Notably, however, he had not raised these arguments before the trial court.[158]

The Fifth Circuit determined that a defendant may be tried for a conspiracy that spans his eighteenth birthday if the government can show

152 United States v. Gardenhire, No. 15-87, 2017 U.S. Dist. LEXIS 25772, at *4–5 (W.D. Pa. Feb. 24, 2017).

153 *Id.* at *11–15.

154 61 F.3d 1189 (5th Cir. 1995), *vacated on other grounds*, Moore v. United States, 519 U.S. 802 (1996).

155 *Id.* at 1196.

156 *Id.* at 1196–97.

157 *Id.* at 1199.

158 *See id.*

that the defendant ratified his involvement in the conspiracy after turning eighteen.[159] While Moore's participation in the conspiracy began before his eighteenth birthday on October 3, 1990, the Fifth Circuit affirmed his conviction because "there was sufficient evidence for the jury to conclude Moore ratified his involvement in the conspiracy after his eighteenth birthday."[160] For instance, the government presented transcripts of conversations that occurred after Moore turned eighteen in which he provided instructions regarding the sale of drugs and the handling of proceeds.[161] Also, during the execution of a search warrant at the apartment Moore shared with a co-conspirator in August 1992, law enforcement found a handgun, ammunition, and a notebook with records of drug transactions in Moore's bedroom.[162]

In *Tolliver*, the Fifth Circuit observed that "[t]he circuits are split on whether the district court must instruct the jury to disregard evidence of pre-eighteen conduct when assessing guilt."[163] However, it declined to resolve that question, in part, because of the procedural posture. Since Moore had not raised his arguments at trial, the Fifth Circuit reviewed only for plain error, which it did not find since evidence of his adult conduct was sufficient to support the jury's verdict and Moore could not show that the omitted instruction affected his substantial rights.[164] Post–*Tolliver*, the Fifth Circuit has reiterated its adoption of the ratification requirement[165] and has declined to decide the harder questions.[166]

III. An Illustration of the Problem

This discrepancy in required proof and uses of evidence among the circuits can significantly impact proceedings and outcomes for accused

159 *See id.* at 1200.

160 *Tolliver*, 61 F.3d at 1200.

161 *Id.*

162 *Id.*

163 *Id.*

164 *See id.* at 1200–01.

165 *See, e.g.*, United States v. Bams, 858 F.3d 937, 947 & n.17 (5th Cir. 2017) (acknowledging that *Tolliver* is precedential); United States v. Guerrero, 768 F.3d 351, 361–62 (5th Cir. 2014) (relying on *Tolliver*'s rule); United States v. Farias, 469 F.3d 393, 398 (5th Cir. 2006) ("The conspiracy spanned his eighteenth birthday, and the Government must show that the alleged conspirator ratified his involvement in the conspiracy after that birthday.").

166 United States v. Harris, 740 F.3d 956, 966 (5th Cir. 2014) ("This Court still has not resolved this question, and given the sufficiency of the evidence of post-eighteen conduct, we need not answer it today."); United States v. McCuiston, 183 F. App'x 474, 476 (5th Cir. 2006) ("[Because] the circuits are split on whether a jury may consider juvenile conduct when assessing guilt for a conspiracy that was ratified after the age of majority, it is not plain that a failure to instruct the jury . . . is error.").

persons. In the appropriate federal district court, Alex[167] can certainly be prosecuted for one or more substantive crimes relating to the March 5 delivery and conspiring to traffic in narcotics from March 1 until March 8 because the JDA does not apply. However, courts will have to adjudicate any substantive charges stemming from opioid-related deliveries Alex made as a minor in juvenile delinquency proceedings unless the US Attorney's Office seeks and receives certification to prosecute him as an adult for that conduct. With or without the certification, though, evidence of Alex's juvenile actions will be admissible as relevant conduct at sentencing if he is convicted of either a substantive drug offense for the March 5 delivery or weeklong participation in the opioid trafficking conspiracy.

Alex may also be criminally liable for juvenile participation in the opioid conspiracy, and perhaps even racketeering. With the accompanying safeguards, juvenile delinquency proceedings could be initiated, but criminal prosecution and punishment for those straddle offenses would also be permissible because Alex almost certainly ratified participation in the opioid trafficking conspiracy by making the March 5 delivery after turning eighteen. Of course, some courts would require a jury finding on the question of whether Alex, in fact, ratified participation as an adult. In those courts, that finding would ultimately determine whether Alex could be punished as an adult. However, other courts would only require that the trial judge determine that a reasonable jury *could* find that Alex ratified based on the evidence presented at trial, and that question would never be submitted to the jury.

Assuming that the federal prosecutor elects to file criminal charges without first procuring a transfer under the JDA, the protections afforded to Alex will vary substantially depending on the venue in which the conduct occurred. If Alex lives in one of the jurisdictions comprising the Fourth, Sixth, or D.C. Circuits, a trial jury will hear evidence of his involvement as a minor but will be specifically instructed that it cannot consider that evidence as proof of guilt.[168] The court would have to base any conviction solely on adult conduct. In the First, Second, Seventh, Ninth, Tenth, and Eleventh Circuits, a trial jury will hear the same evidence.[169] So long as Alex ratified participation in the conspiracy or racketeering crime after turning eighteen, however, it will be permitted to consider the pre-majority actions as direct proof of guilt. In the Eleventh Circuit, the court will seemingly permit the jury to convict Alex in the

167 *See supra* Introduction (introducing the hypothetical young man).

168 *See supra* Part II.A.

169 *See supra* Part II.B.

adult proceeding based entirely on evidence of pre-majority behavior.[170] In the Third, Fifth, and Eighth Circuits, neither Alex nor the prosecution will know precisely how this evidence might be used.[171]

Because the circuit courts disagree on the JDA's application to straddle offenses, Alex's prospects vary, potentially quite significantly, based merely on geography. Alex may or may not be entitled to a jury determination on whether criminal conviction, with its myriad of consequences, and adult punishment can be imposed. Moreover, a court may or may not admit potentially compelling evidence of Alex's conduct as a minor to establish guilt at trial. These material variances inevitably lead to inconsistent treatment for similarly situated young people throughout the United States and ultimately contravene federal efforts to ensure consistency in, inter alia, punishment.[172] Inconsistencies in this context are even more acute than in most others because of the additional vital interests associated with proceeding against minors and the outstanding differences between the juvenile and adult systems.

IV. A Paradigm for Resolution

While the Courts of Appeals generally agree on the standard for establishing jurisdiction over age-of-majority-straddling offenses,[173] they are divided over who must make the determinative finding and, more importantly, whether evidence of juvenile acts may be introduced to prove the defendant's guilt in a criminal trial.[174] The circuits following the limited evidentiary approach hold that the evidence may not be used in this manner, while those following the liberal evidentiary approach hold that it may. Further, at least one federal appellate court has indicated that it will potentially uphold a conviction based solely on a defendant's conduct as a minor.[175] This stark difference in requirements of proof is untenable. This Article offers a framework for consistently handling these straddle offenses in federal courts that, heretofore, has not been wholly adopted by any of the various circuit courts. The paradigm features four principles around which the federal courts ought to rather easily coalesce.

170 *See supra* Part II.B.1.

171 *See supra* Part II.C.

172 *See* Gall v. United States, 552 U.S. 38, 49 (2007) (expressing the Court's interest in nationwide consistency in sentencing); United States v. Eiselt, 988 F.2d 677, 680 (7th Cir. 1993) ("A goal of the sentencing guidelines is to bring consistency into sentencing . . . .").

173 *See supra* Part II.

174 *See, e.g.*, United States v. Harris, 740 F.3d 956, 966 (5th Cir. 2014); United States v. Delatorre, 157 F.3d 1205, 1210 (10th Cir. 1998); United States v. Tolliver, 61 F.3d 1189, 1200–01 (5th Cir. 1995); *see also* RICO PROSECUTOR'S MANUAL, *supra* note 1, at 468–69.

175 *See* United States v. Newton, 44 F.3d 913, 919 (11th Cir. 1995).

A. *A Ratification Finding is Rightly Required*

While the Act "nowhere specifically addresses the treatment to be accorded a juvenile whose involvement in a conspiracy spans his or her eighteenth birthday,"[176] the circuit courts almost unanimously permit prosecution and punishment without JDA safeguards if the government demonstrates that a defendant "ratified" his participation in a continuing crime after reaching adulthood.[177] While a couple of circuit courts have not ruled on the need for ratification, they will almost certainly agree with the super-majority that have already done so rather than create an additional split.[178]

Ratification in this context is roughly analogous to the civil ratification doctrine for contracts.[179] Generally, an "infant"—a person younger than eighteen years old—is legally incapable of entering into a binding contract but may nonetheless become bound if he or she affirms the agreement after becoming an adult.[180] In civil law, as one scholar explains, "a person can be deemed incapable of giving consent one day, but instantly gain contractual capacity if his eighteenth birthday happens to

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176 United States v. Thomas, 114 F.3d 228, 266 (D.C. Cir. 1997).

177 *See* United States v. McCormick, No. 18-0359, 2019 U.S. Dist. LEXIS 203977, at *7–8 (D.D.C. Nov. 25, 2019) ("Courts have unanimously concluded that prosecutors can charge a defendant with an adult conspiracy where he or she entered into the conspiracy as a juvenile but committed further overt acts as an adult."); *see also Delatorre*, 157 F.3d at 1209 ("Every court addressing the issue has required post-eighteen participation in 'continuing crimes' because only such participation signals an adult defendant's ratification of pre-majority involvement in such crimes." (quoting *Thomas*, 114 F.3d at 264)); *Thomas*, 114 F.3d at 264 ("Every court that has considered the issue has required post-eighteen participation in the conspiracy because only such conduct signals the adult individual's ratification of prior involvement in the conspiracy as a juvenile."); Taylor Imperiale, Comment, *Keeping Juvenile Conduct in Juvenile Court: Why the Federal Juvenile Delinquency Act Does not and Should not Contain a Ratification Exception*, 2018 U. CHI. LEGAL F. 287, 292.

178 *See* Jewell v. United States, 749 F.3d 1295, 1300 (10th Cir. 2014) ("[W]e do not lightly create a circuit split . . . ."); United States v. Dorsey, 677 F.3d 944, 957 (9th Cir. 2012) ("[O]ur law has endorsed the idea that we will not lightly create a circuit split. Accordingly, we start off inclined to follow the consistent decisions of [sister circuits] which have squarely addressed this issue." (citation omitted)); Andrews v. Chevy Chase Bank, 545 F.3d 570, 576 (7th Cir. 2008) ("[W]e note that creating a circuit split generally requires quite solid justification; we do not lightly conclude that our sister circuits are wrong."). *But see In re* Penrod, 611 F.3d 1158, 1161 (9th Cir. 2010) (acknowledging that its decision created a circuit split after eight circuits had previously reached a different conclusion).

179 United States v. Camez, 839 F.3d 871, 876 (9th Cir. 2016); United States v. Welch, 15 F.3d 1202, 1211–12 (1st Cir. 1993); United States v. Maddox, 944 F.2d 1223, 1233 (6th Cir. 1991); United States v. Claiborne, 92 F. Supp. 2d 503, 514 (E.D. Va. 2000) ("Adult ratification of a criminal conspiracy begun as a juvenile is analogous to the civil law concept of adult ratification of a contract made as an infant.").

180 *Maddox*, 944 F.2d at 1233 ("An 'infant' cannot enter a contract prior to the age of majority, but an infant can be held liable if he acts to ratify the contract, either explicitly or implicitly."); RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981).

be the next day."[181] Similarly, the JDA counts a person as a juvenile one day and as an adult the next. In the criminal context, the ratification requirement is intended to ensure that accused persons are not improperly convicted and punished for crimes as adults based solely on "'acts of juvenile delinquency,' thereby eviscerating the protections afforded juveniles under the JDA."[182]

B. *Ratification is Properly a Jury Question*

While the Courts of Appeals broadly agree that ratification is required, they are divided on whether a jury must determine if the government has proven ratification.[183] Some—the First and Tenth Circuits—require a jury finding, while others—the Seventh and Eleventh Circuits—apparently do not.[184] Requiring a jury finding is appropriate because, without certification under the JDA, a defendant's age is essentially a jurisdictional element in age-of-majority-spanning crimes, and the Sixth Amendment right to a jury trial and the Fifth Amendment Due Process Clause require the prosecution to prove every essential element of a crime beyond a reasonable doubt.[185]

In determining the necessary substance and scope of jury instructions for continuing offenses involving pre- and post-majority conduct, it is important to note that, in the civil context, the question of ratification has

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181 Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract through the Cyberscope*, 43 GONZ. L. REV. 239, 244 (2007).

182 *Delatorre*, 157 F.3d at 1209 ("Because conspiracy and racketeering are continuing crimes, however, some demonstration of post-eighteen participation in such crimes is necessary to sustain a conviction against a defendant indicted prior to the age of twenty-one."); *see also Maddox*, 944 F.2d at 1233. *But see* United States v. Newton, 44 F.3d 913, 919 (11th Cir. 1995) ("Where there is one continuous conspiracy, and the defendant has straddled his eighteenth birthday by membership in that conspiracy both before and after that significant day, his prior acts could be found to be the sole basis for guilt.").

183 *See* United States v. Scott, 681 F. App'x 89, 93 n.4 (2d Cir. 2017).

184 *Compare Delatorre*, 157 F.3d at 1209 (requiring a jury finding), *and Welch*, 15 F.3d at 1211 ("[W]e reject . . . the proposition that the trial judge is the sole and final arbiter of the threshold determination as to the sufficiency of the evidence of *post*-majority conduct, or that further limiting instructions to the jury are unnecessary once the evidentiary threshold has been met to the satisfaction of the trial court."), *with* United States v. Doerr, 886 F.2d 944, 969 (7th Cir. 1989) (allowing the district court to evaluate proof of threshold demonstration at trial), *and* United States v. Cruz, 805 F.2d 1464, 1475–76 (11th Cir. 1986) (same).

185 Hurst v. Florida, 136 S. Ct. 616, 621 (2016) ("The Sixth Amendment [right to an impartial jury] . . . in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond reasonable doubt."); *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

long been considered a question of fact for the jury to determine.[186] There is no compelling basis for distinguishing the essential nature of this finding in the criminal and contracts contexts; in both cases, something more than a mere pleading requirement is imposed.[187] Obviously, the government must allege conduct spanning the defendant's eighteenth birthday for a district court to exercise jurisdiction over a criminal charge absent the appropriate certification under the JDA.[188] Once the court determines that the allegations include adult conduct, however, there is no need for a pretrial evidentiary hearing in which the trial court evaluates the sufficiency of the government's evidence proving the same.[189] A judge should not be "the sole and final arbiter of . . . the sufficiency of the evidence of *post*-majority conduct."[190] Like most findings of fact, this determination is properly within the jury's province.[191]

186 Irvine v. Irvine, 76 U.S. (9 Wall.) 617, 629–30 (1869) ("The controlling question, the one submitted to the jury, was whether he had conveyed his interest, whatever it might have been, to the defendant, and whether he had confirmed his conveyance after he attained his majority."); Gislason v. Henry L. Doherty & Co., 260 N.W. 883, 884 (Minn. 1935) ("Whether a contract entered into by an infant has been ratified or affirmed by him after majority is usually a question of fact, or of mixed fact and law."); Bryan v. First Nat'l Bank, 114 So. 576, 577 (Ala. 1927) ("The question of ratification was for the jury."); Durfee v. Abbott, 28 N.W. 521, 524 (Mich. 1886) ("But, whether the contract be executed or executory, the question as to what acts will or will not amount to a confirmation is one of intention, and is one proper to be submitted to and determined by a jury under proper instructions from the court."); Scott v. Buchanan, 30 Tenn. (11 Hum.) 468, 477–78 (1850) ("We may observe, however, that there is no proof of an express ratification; the proof from which a ratification may be inferred is but feeble. The delay to make the election, for the time and under the circumstances stated, seems to us to be the strongest ground upon which to rest the verdict. These issues, however, were so exclusively appropriate for the decision of the jury, upon the facts submitted to them, that we do not consider ourselves authorized by the well established practice of this court, in reference to new trials, to disturb the verdict."); Miller v. McAden, 253 S.W. 901, 903 (Tex. Civ. App. 1923) ("It is well settled that the question of ratification of a contract executed during minority, after the minor has reached lawful age, is one for the jury . . . .").

187 *See* United States v. Gardenhire, No. 15-87, 2017 U.S. Dist. LEXIS 25772, at *11 (W.D. Pa. Feb. 24, 2017) ("[The JDA] does not set forth a pleading requirement, but one that must be met at trial.").

188 *See* United States v. Machen, 576 F. App'x 561, 562 (6th Cir. 2014); United States v. Díaz, 670 F.3d 332, 339 (1st Cir. 2012); United States v. Flores, 572 F.3d 1254, 1269 (11th Cir. 2009) (per curiam).

189 *See Machen*, 576 F. App'x at 564–65 ("Because the government charged [the defendant] with participation in an age-of-majority-spanning conspiracy and did not seek certification, it necessarily proceeded against [him] as an adult and the FJDA's jurisdictional bar to the prosecution of juveniles in federal court is not implicated.").

190 United States v. Welch, 15 F.3d 1202, 1211 (1st Cir. 1993).

191 *See Machen*, 576 F. Appx. at 563 ("The government acknowledged its burden to prove that [the defendant] 'ratified his membership in the conspiracy after his eighteenth birthday,' and stated that it was prepared to do so at trial."); United States v. Vargas-De Jesús, 618 F.3d 59, 65 (1st Cir. 2010) ("[W]here a case involves conduct both before and after the age of 18, there can be 'no conviction unless the jury found that [the defendant] in some manner "ratified" [his] participation in the conspiracy after attaining majority.'" (second alteration in original) (quoting *Welch*, 15 F.3d at 1212));

The defendant's age in these cases is analogous to other jurisdictional requirements requiring jury instructions and findings in criminal contexts. For instance,

> [a]n age-of-majority-spanning conspiracy is somewhat analogous to a criminal conspiracy that spans a bar date imposed by the statute of limitations. Although evidence of both pre- and post-bar date conduct is fully admissible in such a case, the jury nonetheless must be instructed to acquit a defendant who *withdrew* from the conspiracy before the bar date.[192]

While judges make an initial determination regarding whether an indictment alleges conduct within the statute of limitations for a criminal trial to proceed, juries ultimately have to make this finding beyond a reasonable doubt to convict and pave the way for punishment.[193] Similarly, although territorial requirements generally exist outside of substantive criminal statutes, they must also be proven beyond a reasonable doubt at trial.[194] The finding of ratification should be treated the same way.

United States v. Brock, No. 13-CR-6025CJS, 2015 U.S. Dist. LEXIS 167482, at *24 n.6 (W.D.N.Y. Dec. 11, 2015) ("[T]he government concede[d] [that] the issue of whether the government can prove that [the defendant] engaged in conspiratorial conduct after he turned eighteen is a matter for the jury." (citation omitted)); *cf.* Bazemore v. Davis, 69 Ga. 745, 746 (1882) (denying a motion for a new trial where the issue of whether a minor ratified a property transaction was "fairly submitted to and passed upon by the jury").

192 *Welch*, 15 F.3d at 1211 (citation omitted).

193 *See* Grunewald v. United States, 353 U.S. 391, 396–97 (1957) ("l]t was therefore incumbent on the Government to prove that the conspiracy . . . was still in existence . . . and that at least one overt act in furtherance of the conspiracy was performed [within the statute of limitations]."); United States v. Jake, 281 F.3d 123, 129 (3d Cir. 2002) ("It is well settled that a criminal defendant is entitled to an instruction on the applicable statute of limitations. Accordingly, the trial court should have informed the jury of the need to prove at least one overt act within five years of the date of the indictment, just as defense counsel argued in his motion for a new trial." (citations omitted)); United States v. Read, 658 F.2d 1225, 1232 (7th Cir. 1981) ("In practice, to convict a defendant the prosecution must prove that the conspiracy existed and that each defendant was a member of the conspiracy at some point in the five years preceding the date of the indictment."); United States v. Nowak, 448 F.2d 134, 140 (7th Cir. 1971) (finding the trial judge's instruction sufficient where he informed the jury that "the Government must prove that 'at least one overt act as set forth in the indictment was committed'" within the statute of limitations); Buhler v. United States, 33 F.2d 382, 385 (9th Cir. 1929) (holding that a finding beyond a reasonable doubt that a defendant continued to participate in the alleged conspiracy within the statute of limitations is implicit in the conviction); United States v. Hampton, No. 15-302, 2017 U.S. Dist. LEXIS 190139, at *6–8 (E.D. Pa. Nov. 16, 2017) (observing that jurors had to find that the conspiracy was still in existence, at least one overt act was committed in furtherance of the conspiracy within the statute of limitations, and the jury was instructed that the government had to prove these things beyond a reasonable doubt); *see also* United States v. Greichunos, 572 F. Supp. 220, 227 (N.D. lll. 1983) (granting a motion for a new trial where the jury had not been instructed "that proof of an overt act in furtherance of the conspiracy within the five years preceding the indictment was a necessary element of the government's burden").

194 *See, e.g.*, State v. Serrato, 787 N.W.2d 462, 468 (Iowa 2010) ("[Territorial jurisdiction] is an essential element of every crime, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the State to prove it beyond a reasonable doubt."); State v. Rick,

C. *Courts Should Instruct Juries on the Necessity of Ratification*

With straddle offenses, ratification is a critical matter of fact necessary to ensure that adult punishment is inflicted on proper grounds and that, in this specific context, a defendant's age is as dispositive of guilt as his or her conduct.[195] After all, the government must introduce evidence that will allow a jury to conclude that a defendant's participation in a conspiracy or racketeering continued as an adult.[196] The allegation-based approach to jurisdiction that the First Circuit accepted in *Welch*,[197] then, is inadequate standing-alone. As the Fifth Circuit said,

> the issue of district court "jurisdiction" in cases implicating the FJDA seems to us sufficiently similar to other fact-bound defenses to tip the balance in favor of a determination by the trial jury . . . A finding of "participation" or "ratification" ordinarily depends heavily upon (i) common-sense evaluations of the youthful defendants' actions—viewed in the context of the criminal enterprise and the conduct of their coconspirators—and (ii) inferences as to the state of mind of the various actors . . . These are matters especially suited to jury resolution.[198]

The danger of imposing punishment without a jury finding of ratification is highest in cases where courts give neither a ratification instruction nor a limiting instruction on the use of pre-majority conduct. In such cases, a conviction is properly subject to being overturned.[199] In several instances where convictions were affirmed despite the lack of an instruction, the requisite finding was satisfied by juries contemporaneously convicting defendants of substantive crimes committed in furtherance of a conspiracy or separate counts that parallel

463 S.E.2d 182, 187 (N.C. 1995) (remanding for a new trial where "the trial court did not instruct the jury as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder, or the essential elements of murder, occurred in North Carolina, it should return a special verdict so indicating").

195 *See Machen*, 576 F. App'x at 566; *Vargas-De Jesús*, 618 F.3d at 64–65 (vacating convictions for two substantive drug offenses where the indictment charged post-majority conduct but the record showed only pre-majority supporting evidence); United States v. White, 116 F.3d 903, 922 (D.C. Cir. 1997) (per curiam) ("To convict [the defendant of conspiracy], the Government had to prove that [the defendant] ratified his participation in the conspiracy at some point after his eighteenth birthday . . . .").

196 *See* United States v. Delatorre, 157 F.3d 1205, 1209 (10th Cir. 1998); United States v. Tolliver, 61 F.3d 1189, 1200 (5th Cir. 1995); United States v. Doerr, 886 F.2d 944, 967–68 (7th Cir. 1989); United States v. Cruz, 805 F.2d 1464, 1476 (11th Cir. 1986).

197 *Welch*, 15 F.3d at 1207–08.

198 *Id.* at 1209.

199 *See Machen*, 576 F. App'x at 566; *cf. Vargas-De Jesús*, 618 F.3d at 67 (assuming without deciding, for purposes of plain error analysis, that the trial court's failure to instruct the jury that it could only find the defendant guilty if it found that he ratified his participation in the conspiracy after turning eighteen was clear and obvious).

racketeering acts in a RICO charge.[200] Without either an appropriate instruction or contemporaneous convictions, however, appellate courts are quite unnecessarily left with mere conjectures about what trial juries could reasonably have found. Courts generally affirm convictions where the trial jury reasonably could have found that the defendant ratified his pre-majority conduct,[201] but this is not the same as the jury actually finding ratification.[202] Given the significance of the finding in this context and the substantial interests involved for defendants, there is no compelling reason for inviting such speculation by declining to instruct the jury on the matter.

To protect accused persons' rights and ensure jury verdicts' integrity, trial courts should instruct juries on the necessity of finding adult ratification. The Supreme Court has consistently maintained that trial juries are presumed to follow their instructions.[203] Naturally, then, "[p]roperly instructed in the performance of their traditional tasks, trial juries can be entrusted to discriminate between pre-majority and post-majority conduct."[204] This would assure that the courts do not improperly

200 *See, e.g.*, *Vargas-De Jesús*, 618 F.3d at 61–63 (affirming an age-of-majority-spanning cocaine trafficking conspiracy conviction despite the trial court's failure to instruct the jury regarding the findings of post-majority conduct necessary to convict the defendant where the defendant was also convicted contemporaneously of two substantive cocaine offenses after his eighteenth birthday); United States v. Peters, 283 F.3d 300, 309 (5th Cir. 2002) (affirming an age-of-majority-spanning cocaine trafficking conspiracy where the defendant was also convicted of two substantive cocaine offenses after his eighteenth birthday); United States v. Thomas, 114 F.3d 228, 239, 266–67 (D.C. Cir. 1997) (finding that the omission of a limiting instruction regarding defendant's age was harmless where he was also convicted of two substantive offenses committed in furtherance of the conspiracies after he turned eighteen); *cf.* United States v. Hall, 629 F. App'x 504, 507 (4th Cir. 2015) (per curiam) (finding harmless error where the district court imposed a life sentence after failing to seek a specific verdict from the jury on whether defendant's participation in the conspiracy continued after the date on which his prior convictions became final but the jury convicted him of receiving cocaine from co-conspirators after his prior convictions became final).

201 *See, e.g.*, United States v. Guerrero, 768 F.3d 351, 361–62 (5th Cir. 2014); *Peters*, 283 F.3d at 309.

202 *See Machen*, 576 F. App'x at 566 ("Although a rational jury *could* have found that [the defendant] ratified his participation in the conspiracy after he turned eighteen, it is far from clear that a properly instructed jury *would* have reached that conclusion.").

203 Williams v. Illinois, 567 U.S. 50, 105 (2012) (Thomas, J., concurring) ("Rules of limited admissibility are commonplace in evidence law. And, we often presume that courts and juries follow limiting instructions." (citation omitted)); Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."); Jones v. United States, 527 U.S. 373, 394 (1999) ("The jurors are presumed to have followed these instructions."); Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.").

204 United States v. Welch, 15 F.3d 1202, 1210 (1st Cir. 1993); *see also* United States v. Spoone, 741 F.2d 680, 687 (4th Cir. 1984) ("There is simply no basis to believe that the jury convicted [the

invade the jury's factfinding function.[205] It would also ameliorate the risk that a jury might unwittingly convict a defendant over whom the district court does not properly have jurisdiction.[206]

D. *Juvenile Conduct Should be Admissible to Prove Guilt*

The most pivotal place of departure among federal appellate courts centers on the use of evidence of a defendant's conduct as a minor.[207] All permit its introduction, but some do so only for limited purposes. Generally, this means juries can only consider juvenile acts to put adult conduct into context, but most courts are more liberal and admit the evidence as potentially direct proof of guilt. The latter view is preferable for at least three reasons.

First, as long as courts properly instruct juries regarding the necessity of post-majority ratification, admitting evidence of pre-majority conduct pursuant to the Federal Rules of Evidence as direct proof of guilt is consonant with the JDA's text and purposes. Because the harms contemplated by continuing offenses persist each day, a person who participates in such a crime on his or her eighteenth birthday actually commits the crime as an adult. While the designation of that day for discontinuing the Act's protections is somewhat arbitrary—just as it is somewhat arbitrary in the infant contract ratification context—the protections simply do not apply to persons who commit crimes on or after that day any more than they would apply to a person who completed an offense as a minor and was indicted after reaching his or her twenty-first birthday.[208] As the Ninth Circuit observed in *Camez*, the JDA does not

defendant] of conspiracy solely because of his pre-eighteenth birthday activity, for the trial court repeatedly instructed the jury that it could not consider the juvenile acts as evidence of [his] guilt.").

205 The use of one or more special interrogatories on the verdict form would be ideal in removing the necessity of speculation by the trial and appellate courts. Trial courts could simply ask the jury to indicate whether it found that the defendant ratified his participation after reaching his eighteenth birthday. *See, e.g.*, United States v. Camez, 839 F.3d 871, 873 (9th Cir. 2016).

206 *See* United States v. McCurdy, No. CR-06-80-B-W, 2008 U.S. Dist. LEXIS 103804, at *6–7 (D. Me. Dec. 23, 2008) ("[A]ny risk that the jury will convict [the defendant] on events that occurred outside the statute of limitations can be ameliorated by a limiting instruction, if requested."); *see also* United States v. Young, 702 F. Supp. 2d 11, 16 (D. Me. 2010) (noting the court's intention to instruct the jury that it must conclude that the defendant committed all the elements of the crime within the statute of limitations in order to convict him).

207 *See* United States v. Cruz, 805 F.2d 1464, 1476 (11th Cir. 1986) (calling this "the more difficult question").

208 *See* 18 U.S.C. § 5031 (2018); United States v. Gjonaj, 861 F.2d 143, 144 (6th Cir. 1988) ("[T]he Juvenile Delinquency Act 'does not, of course, prevent an adult criminal defendant from being tried as an adult simply because he first became embroiled in the conspiracy with which he is charged while still a minor.'" (quoting *Spoone*, 741 F.2d at 687)).

furnish people with a "clean slate" when they turn eighteen.[209] So long as an appropriate ratification instruction is given, there is no practical need for a separate limiting instruction to disregard evidence of pre-eighteen conduct when assessing guilt.[210] Courts are to presume that juries follow their well-worded instructions.

Second, this position is consistent with the courts' handling of conspiracy cases straddling a statute of limitation. Once the prosecution has proven the conspiracy continued into the limitations period, evidence of conduct before the bar date is admissible as direct proof of guilt.[211] Age-of-majority-straddling crimes are analogous to those cases,[212] so should be treated similarly.

Third, this position is logical since the circuits are consistent in finding that courts can consider juvenile conduct for sentencing purposes once guilt has been established.[213] While the Supreme Court declared that, "[C]hildren are constitutionally different from adults for purposes of sentencing,"[214] juvenile conduct is still potentially relevant conduct under the US Sentencing Guidelines.[215] Even the Fourth, Sixth, and D.C. Circuits, which disallow the use of pre-majority conduct to establish guilt, permit

209 *Camez*, 839 F.3d at 876.

210 *See* United States v. Welch, 15 F.3d 1202, 1211 (1st Cir. 1993) (rejecting the proposition "that further limiting instructions to the jury are unnecessary once the evidentiary threshold has been met to the satisfaction of the trial court"); *McCurdy*, 2008 U.S. Dist. LEXIS 103804, at *6–7 ("[A]ny risk that the jury will convict [the defendant] on events that occurred outside the statute of limitations can be ameliorated by a limiting instruction, if requested.").

211 *See, e.g.*, United States v. Nowak, 448 F.2d 134, 140 (7th Cir. 1971) ("Once the conspiracy is proved to have continued into the limitations period, any overt act, whether or not pleaded, may be used to show a defendant's connection with the scheme.").

212 *Welch*, 15 F.3d at 1211.

213 *See* United States v. Harstine, No. 19-4384, 2020 U.S. App. LEXIS 21186, at *1–2 (4th Cir. July 8, 2020) (per curiam); United States v. Hinojosa, 749 F.3d 407, 416 (5th Cir. 2014) ("[T]he Guidelines do not contain any prohibition, for relevant conduct purposes, on activities occurring during a scheme that spans from before a defendant reaches the age of majority to after he reaches the age of majority."); United States v. Rodríguez, 731 F.3d 20, 29 (1st Cir. 2013) ("[A] defendant who joined a conspiracy before the age of majority can be held accountable, for sentencing purposes, for his own and his co-conspirators' acts that occurred before he reached the age of majority once it has been shown that he ratified his participation in the conspiracy after attaining the age of majority."); United States v. Flores, 572 F.3d 1254, 1270 (11th Cir. 2009) (per curiam) ("[W]e conclude that in the context of a RICO conspiracy, if the defendant continues his participation in the activities of the conspiracy past the age of majority, those crimes may be considered for *both* determining guilt and his sentence."); United States v. Hough, 276 F.3d 884, 898 (6th Cir. 2002) ("Even if the district court lacked jurisdiction to prosecute [the defendant] for his juvenile conduct as a separate crime, it did not lack jurisdiction to consider his juvenile behavior in calculating his sentence under [US Sentencing Guidelines]§ 1B1.3(a)(2) for a crime he committed as an adult.").

214 Miller v. Alabama, 567 U.S. 460, 471 (2012).

215 *See Hinojosa*, 749 F.3d at 416; United States v. Gibbs, 182 F.3d 408, 442 (6th Cir. 1999).

its consideration when imposing punishment.[216] So long as the requisite jury findings call on the jury to confirm the district court's jurisdiction over an offense, it is truly a matter of "common sense" that Congress did not intend to bifurcate JDA sanctions and adult punishment any more than it intended to bifurcate the prosecution of straddle offenses.[217] Congress adopted the JDA to protect juveniles from the rigors of the adult justice system and afford them opportunities for rehabilitation, but a person who persists in criminal behavior upon turning eighteen forfeits the benefits of those protections and opportunities.[218]

Conclusion

"It is clear beyond dispute that the waiver of [juvenile] jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile."[219] Yet, the Courts of Appeals have split on handling prosecutions of continuing crimes that straddle a defendant's eighteenth birthday for more than three decades. Accordingly, the government faces lower obstacles to proving guilt in some cases than in others, and defendants in some federal courts are potentially subject to conviction based on evidence that other federal courts could not consider as proof of guilt. These variances impact accused persons' Fifth and Sixth

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[216] United States v. Sparks, 309 F. App'x 713, 717 (4th Cir. 2009) ("We find the reasoning of the Sixth and D.C. Circuits to be persuasive and therefore hold that in sentencing an adult defendant for conspiracy, a district court may consider *all* relevant conduct, including conduct which occurred when the defendant was a juvenile participant in the conspiracy. Accordingly, we find [the defendant's] argument that the district court erred in considering the drug quantities attributable to him as a juvenile to be without merit."); *Gibbs*, 182 F.3d at 442 ("As long as the government successfully prosecutes a defendant for a crime that occurred after the defendant reached the age of majority, the district court may consider relevant conduct that occurred before the defendant reached the requisite age as long as such conduct falls within the limitations set forth in [US Sentencing Guidelines] § 1B1.3(a)(2)."); United States v. Thomas, 114 F.3d 228, 267 (D.C. Cir. 1997) ("Since [the defendant] was properly convicted in adult court of a conspiracy he joined as a juvenile but continued in after eighteen, the Guidelines unambiguously permit the court to consider his and his co-conspirators' foreseeable conduct 'that occurred during the commission of the [entire conspiracy] offense,' starting when he joined the conspiracy at age eleven." (citation omitted) (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1) (U.S. SENTENCING COMM'N 1995))); *see also* Vassell v. O'Brien, No. 5:17cv9, 2018 U.S. Dist. LEXIS 45468, at *25 (N.D. W. Va. Jan. 31, 2018) ("Accordingly, as an adult with adult criminal liability, there can be no Eighth Amendment violation when a district court takes a defendant's juvenile conduct into account in determining a sentence."), *aff'd*, 745 F. App'x 477 (2018).

[217] *See* United States v. Cruz, 805 F.2d 1464, 1477 (11th Cir. 1986); *see also Flores*, 572 F.3d at 1270; *Hough*, 276 F.3d at 898–99; *Gibbs*, 182 F.3d at 423.

[218] *See* United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990).

[219] Kent v. United States, 383 U.S. 541, 556 (1966) (discussing the D.C. Juvenile Court Act).

Amendment rights and potentially deprive them of the vital protections that the JDA guarantees.

This Article propounded a four-pronged paradigm that the Courts of Appeals, and ultimately the Supreme Court, should adopt to resolve the split. First, a district court should always require a finding of adult ratification to exercise jurisdiction over an age-of-majority-spanning crime. Second, it is properly within the domain of juries to make the requisite ratification findings. Third, district courts should instruct juries on the necessity of finding adult ratification before convicting defendants of offenses that begin before and continue after a defendant's eighteenth birthday. Fourth, assuming that proper ratification instructions are given, district courts should permit juries to consider evidence of pre-majority conduct for all purposes permissible under the Federal Rules of Evidence, including direct proof of guilt. This approach complies with the JDA's text and purposes, is consistent with approaches generally taken in roughly analogous contexts, and respects areas of broad agreement among the circuits.