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Taylor Imperiale†

INTRODUCTION

A seventeen-year-old male joins a criminal enterprise that produces and sells fake identification documents and access devices. Through the enterprise’s online channels, the juvenile makes contact with a would-be purchaser. The two arrange a time to meet, and the juvenile sells him a fake identification document. It turns out, however, that this purchaser was an undercover FBI agent. Rather than bringing charges for making and selling fake identification documents immediately after making the purchase, the FBI waits for the young man to commit a second offense in furtherance of the enterprise, so as to bring Racketeer Influenced and Corrupt Organizations Act (RICO) charges against him. A few months later, after the young man has turned eighteen years old, a second FBI undercover agent purchases a counterfeit access device from him. This time, the FBI brings the juvenile into custody and the U.S. Attorney charges him with a RICO enterprise count.

On these facts, the U.S. Attorney in a majority of jurisdictions would have sufficient evidence on which to convict the young man of a RICO offense, which requires two predicate acts in furtherance of the enterprise, in federal district court. Such a prosecution would succeed in the majority of federal jurisdictions because most courts have read a “ratification exception” into the Federal Juvenile Delinquency Act.

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² This is a stylized version of the facts in Camez v. United States, 839 F.3d 871 (9th Cir. 2016).

³ See Goren v. New Vision Intern., Inc., 156 F.3d 721, 728 (7th Cir. 1998).

⁴ The ratification exception provides that if a defendant continues his pre-majority partici-
(FJDA). The D.C. and Fourth Circuits, by contrast, have refused to read in such an exception. Thus, a jury in one of those jurisdictions cannot convict such a defendant without having found that the defendant committed two predicate acts in furtherance of the criminal enterprise after his eighteenth birthday. Similarly, in the case of conspiracy charges, a jury in the D.C. and Fourth Circuits would not be able to convict the defendant unless the post-majority conduct was alone sufficient to warrant conviction.

How federal courts deal with facts like these is significant because, as the Supreme Court has recognized, the decision whether to place a juvenile in adult or juvenile court is a “critically important action determining vitally important statutory rights of the juvenile.”

As the Fourth Circuit put it, “nothing can be more critical to the accused than determining whether there will be a guilt determining process in an adult-type criminal trial . . . . [I]f jurisdiction is waived to the adult court, the accused may be incarcerated for much longer” and lose certain rights of his citizenship.

The split among the circuit courts comes down to a single question of statutory interpretation: whether the FJDA precludes a jury from relying on pre-majority conduct as substantive proof of guilt in a conspiracy or RICO case spanning the defendant’s eighteenth birthday. The majority of circuits hold that the FJDA includes an implied post-majority ratification exception. The D.C. and Fourth Circuits disagree and hold that no such exception exists.

As outlined below, there are good policy and statutory interpretation reasons for adopting the minority position—that prosecutors cannot rely on pre-majority conduct to prove a defendant’s guilt in the case of a continuing crime like conspiracy or a RICO offense. Courts that have adopted the majority approach have been misapplying something akin to the absurdity doctrine and placing too much em-

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6 Conspiracy and RICO are two continuing crimes that are susceptible to the conceptual issue addressed in this Comment.

7 This Comment uses the terms “post-majority” and “pre-majority” to refer to acts that occur before and after a defendant’s eighteenth birthday, respectively.


10 For a description of the absurdity doctrine, see John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2389–2390 (2003) (”[T]he absurdity doctrine . . . permits a court to adjust a clear statute in the rare case in which the court finds that the statutory text diverges from the legislature’s true intent, as derived from sources such as the legislative history or the purpose of the statute as a whole.”).
phasis on judicial economy at the expense of sound textual and policy justifications for reaching the opposite conclusion. The minority approach is superior, and if the Supreme Court were to take up this issue in the future, it should adopt the D.C. Circuit’s rule.

This Comment begins, in Part I, by describing the mechanics of the FJDA and the legislative history behind its enactment. In Part II, the Comment outlines the circuit split and the rationales that various courts have employed in reaching their own conclusions. Part III briefly addresses previous scholarship on this issue. In Part IV, the Comment employs canons of statutory interpretation like *expressio unius* and the rule of lenity to argue that the minority position is a more faithful reading of the statute. Then, the Comment argues that the minority position is most in keeping with Congressional intent and the policies Congress meant the FJDA to serve—namely, providing juvenile offenders with process and rehabilitative services appropriate for their culpability and rehabilitative capacity. The Comment then explores state analogs to the issue of continuing crimes spanning the age of majority, finding that despite state courts’ support for the majority position, those courts’ opinions are of limited value. Finally, Part IV concludes by refuting counterarguments regarding judicial economy and the absurdity doctrine.

I. STATUTE AND LEGISLATIVE HISTORY

As with any question of statutory interpretation, it is critical to begin with the text of the relevant statutes.11 In 1974, Congress amended the FJDA to read: “A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States . . . .”12 The amendments also define “juvenile” as “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” as “the violation of a law of the United States committed by a juvenile which would have been a crime if committed by an adult . . . .”13 The statute goes on to create an exception to the general rule that a juvenile shall not be proceeded against in federal court. The rule may be circumvented if the Attorney General certifies that (1) the State does not have jurisdiction over the defendant, (2) the State does not have available programs

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and services adequate for the needs of juveniles, or (3) the offense charged is a violent crime or specific felony, and (4) there is substantial federal interest in the case so as to warrant the exercise of federal jurisdiction.\textsuperscript{14} If the Attorney General does not so certify, then the “juvenile shall be surrendered to the appropriate legal authorities of such state.”\textsuperscript{15}

The Report of the Senate Judiciary Committee\textsuperscript{16} explains that body’s reasons for adopting the FJDA amendments. The Committee relied on a report by the National Advisory Commission on Criminal Justice Standards and Goals, which completed “an exhaustive study of the problem of crime in America” and found that “the first priority in reducing crime should be given to juvenile delinquency.”\textsuperscript{17} With the Commission’s report in hand, Congress authored these amendments and indicated that its findings included:

(5) that States and local communities, which experience the devastating failures of the juvenile justice system, do not presently have sufficient technical expertise or adequate resources to deal comprehensively with the problems of juvenile delinquency;

\ldots

(8) that juvenile delinquency constitutes a growing threat to the national welfare requiring immediate, comprehensive, and effective action by the Federal Government.\textsuperscript{18}

While these findings may indicate Congress’s intention that the amendments broaden the scope of federal involvement in juvenile delinquency cases, some of the statements of purpose attached to the amendments indicate a contrary intention.

It is the purpose of this Act—

\ldots

(2) to increase the capacity of State and local governments . . . to conduct innovative, effective juvenile justice and delinquency prevention and treatment programs and to provide useful re-

\textsuperscript{14} 18 U.S.C. § 5032.
\textsuperscript{15} Id.
\textsuperscript{17} Id. at 20; see also National Advisory Commission on Criminal Justice Standards and Goals, “A National Strategy to Reduce Crime” at 41–43 (1973), https://www.ncjrs.gov/pdffiles1/Digitization/54466NCJRS.pdf [https://perma.cc/QB46-JB3F].
\textsuperscript{18} S. REP. NO. 93-1011, at 2.
search, evaluation, and training services in the area of juvenile delinquency;

(3) to develop and implement effective programs and services to divert juveniles from the traditional juvenile justice system and to increase the capacity of State and local governments to provide critically needed alternatives to institutionalization.\textsuperscript{19}

Given the way Congress framed the goals of the amendments as simultaneously expanding and shrinking the federal government’s role in juvenile delinquency, it is not surprising that the courts have been left uncertain as to whether they should exercise jurisdiction in these borderline cases.

Congress also amended the FJDA so as to align the federal government’s juvenile justice policies with the dictates of \textit{Kent v. United States}.\textsuperscript{20} In that case, the Supreme Court held that where juvenile courts attempt to waive their jurisdiction over juvenile defendants, they may only do so after satisfying basic requirements of due process.\textsuperscript{21} In part to ensure lower courts’ compliance with \textit{Kent}, Congress enacted the amendments to the FJDA, which represented a significant overhaul of the nation’s juvenile justice systems.\textsuperscript{22}

\section*{II. The Circuit Split}

With guidance from \textit{Kent}, the text of the FJDA amendments, and Congress’s statements of purpose, federal courts of appeals have crafted disparate rules for dealing with evidence that defendants charged with conspiracy committed acts in furtherance of those conspiracies prior to attaining eighteen years of age. The text of the FJDA itself provides no guidance regarding “the treatment to be accorded a juvenile whose involvement in a conspiracy spans his or her eighteenth birthday.”\textsuperscript{23} The text makes clear that state courts have presumptive jurisdiction over acts of juvenile delinquency, but the text does not specify whether a crime spanning the age of majority is such an act. Given this difficulty, rather than rely on the text itself, the majority of

\begin{itemize}
\item \textsuperscript{19} \textit{Id}.
\item \textsuperscript{20} 383 U.S. 541, 557 (1966).
\item \textsuperscript{21} \textit{Id}. Because the decision whether to subject a defendant to the jurisdiction of adult court can result in dramatically different sentences, juvenile courts can only waive jurisdiction after having a hearing, giving the defendant access to counsel, and writing a statement describing its reasons for waiving jurisdiction.
\item \textsuperscript{22} \textit{See} S. REP. No. 93-1011, at 54 (pointing out the Supreme Court’s admonition in \textit{Kent} that children get “the worst of both worlds” when it comes to the justice system; juvenile defendants get “neither protections accorded adults nor the solicitous care . . . postulated for children”) (quoting \textit{Kent}, 383 U.S. at 555).
\item \textsuperscript{23} United States v. Thomas, 114 F.3d 228, 266 (D.C. Cir. 1997).
\end{itemize}
courts have relied on common sense, and a desire to avoid creating loopholes in the law in order to resolve the question. The courts have not, however, utilized common canons of statutory interpretation. The result of these varying interpretations is that the Second, Seventh, Ninth, Tenth, and Eleventh Circuits are in the majority, while the D.C. and Fourth Circuits sit in the minority.

Despite the circuit split, all federal appeals courts agree on two fundamental points: (1) “a defendant charged with conspiracy may be tried as an adult even if he first became involved in the conspiracy while still a minor” if he continues to participate in the conspiracy after reaching the age of majority and the post-majority acts would alone be sufficient to convict him and (2) pre-majority acts may be brought into evidence in an adult proceeding in accordance with Federal Rule of Evidence 404(b).

A. The Minority Approach—No Ratification Exception

The D.C. Circuit and the Fourth Circuit are the only circuit courts to hold that in a conspiracy or RICO case involving a defendant between the ages of eighteen and twenty-one who became a part of the conspiracy or enterprise prior to his eighteenth birthday, a jury may only consider post-majority acts as proof of guilt; pre-majority acts may only be admitted into evidence to help the jury contextualize the post-majority acts. The D.C. Circuit ruled that such evidence can only be admitted in keeping with Federal Rule of Evidence 404(b), which permits the government to introduce evidence of prior conduct to prove the mens rea element, but forbids the introduction of such evidence to infer the charged actus reus element. Essentially, the D.C. Circuit permits introduction of pre-majority evidence for the purpose of contextualizing the defendant’s involvement in the conspiracy, but not for proving his guilt.

24 United States v. Cruz, 805 F.2d 1464, 1477 (11th Cir. 1986) (“Common sense suggests that Congress did not intend to bifurcate the prosecution of any continuing offense which began prior to the defendant’s reaching the age of eighteen and continued thereafter.”).

25 Camez v. United States, 839 F.3d 871, 875–76 (9th Cir. 2016) (“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.”).

26 See, e.g., Thomas, 114 F.3d at 238–39; Cruz, 805 F.2d at 1476; United States v. Spoone, 741 F.2d 680, 687 (4th Cir. 1984).

27 See, e.g., Camez, 839 F.3d at 874–75; Thomas, 114 F.3d at 265; United States v. Welch, 15 F.3d 1202, 1211 n.11 (1st Cir. 1993).

28 Id. at 228.

29 Id. at 265.

30 Id. at 266 (“E]vidence of pre-majority acts . . . is admissible in order to help the jury assess the post-majority acts.”).
In *United States v. Thomas*,\(^{31}\) a jury convicted Donnell Williams under RICO for his involvement in a conspiracy to sell drugs. He became a part of the conspiracy at the age of eleven, but was indicted after reaching the age of majority.\(^{32}\) In ruling that Donnell Williams’s conviction could only be upheld if there was sufficient post-majority evidence of his guilt, the D.C. Circuit specifically rebuked other courts of appeals that had relied on the “common sense” notion that ‘Congress did not intend to bifurcate the prosecution of any continuing offense which began prior to the defendant’s reaching the age of eighteen and continuing thereafter.’\(^{33}\) The D.C. Circuit rejected that logic because “it is the adult participation [in the conspiracy] that gives the district court jurisdiction,”\(^{34}\) so an “adult conviction for such age-of-majority spanning conspiracies must be based solely on the adult participation in the conspiracy.”\(^{35}\) To the *Thomas* Court, relying on “evidence of conspiratorial acts committed under eighteen” for the purpose of establishing the defendant’s guilt contradicts “the statutory procedures Congress established to try juveniles in adult court for pre-majority acts.”\(^ {36}\)

The Fourth Circuit has adopted a position similar to that of the D.C. Circuit. In *United States v. Spoone*,\(^ {37}\) a defendant was charged with conspiracy to sell stolen automobiles in interstate commerce.\(^{38}\) At the time the defendant agreed to join the conspiracy, he was a minor; at the time of his arrest and indictment, however, he had already turned eighteen years old.\(^{39}\) A jury convicted him of the conspiracy count after the trial court instructed the jury that it could not consider the defendant’s juvenile acts as evidence of the defendant’s guilt. The Fourth Circuit ruled that the trial judge had properly instructed the jury that “it could not consider the juvenile acts as evidence of [the defendant’s] guilt.”\(^{40}\) Unlike the majority of circuits that have read in a ratification exception to the FJDA, the Fourth Circuit reads the FJDA as disallowing the prosecution of “an adult in federal district court for crimes committed while a minor except in narrowly defined circum-

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\(^{31}\) 114 F.3d 228 (D.C. Cir. 1997).

\(^{32}\) Id. at 262.

\(^{33}\) Id. at 266 (quoting *Cruz*, 805 F.2d at 1477).

\(^{34}\) Id.

\(^{35}\) Id. at 239.

\(^{36}\) Id. at 266. Note that this is an oblique *expressio unius* argument like the one this Comment makes below—that because Congress included one procedure for trying juveniles in federal district court, it foreclosed other processes for adjudicating juvenile conduct in federal court.

\(^{37}\) 741 F.2d 680 (4th Cir. 1984).

\(^{38}\) Id. at 687.

\(^{39}\) Id.

\(^{40}\) Id.
stances.” Thus, like the D.C. Circuit, the Fourth Circuit is unwilling to allow juries to consider juvenile conduct as proof of guilt in federal court.

B. The Majority Approach—Ratification Doctrine

Other circuits that have explicitly considered this question disagree with the D.C. and Fourth Circuit’s analysis, and hold that the FJDA does not impose any limitations on the use of pre-majority conduct as proof of guilt in adult proceedings in federal district court. The Eleventh Circuit, for example, holds that so long as a juvenile committed affirmative acts in furtherance of a conspiracy or criminal enterprise after his eighteenth birthday in violation of federal law, federal courts have jurisdiction, and the prosecutor can introduce whatever evidence (in keeping with the Federal Rules of Evidence) that might help prove his guilt, including acts committed as a juvenile. Likewise, the Tenth Circuit disagreed with the D.C. Circuit’s decision in Thomas because it viewed that decision as incorrectly determining that Congress meant for the FJDA to change the “substantive standard of criminal liability for a racketeering enterprise or conspiracy spanning a defendant’s eighteenth birthday.” That is, inherent in the Thomas decision is the requirement that the government must prove the age of the defendant in every conspiracy case, and according to the Tenth Circuit, Congress did not intend for the FJDA to “add an additional substantive element to the government’s burden of proof.” Congress merely intended, according to that court, to impose greater procedural burdens on the government when proceeding against a juvenile.

In United States v. Doerr, the Seventh Circuit considered whether evidence of pre-majority conduct in furtherance of a conspira-

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41 Id. at 686 n.2.
42 See United States v. Cruz, 805 F.2d 1464, 1476 (11th Cir. 1986) (holding “that once sufficient evidence has been introduced that would allow a jury to reasonably conclude that the defendant’s participation in a conspiracy continued after his eighteenth birthday, then he may be tried as an adult”).
43 United States v. Delatorre, 157 F.3d 1205, 1210 (10th Cir. 1998). The First, Second, Fifth and Sixth Circuits also agree that the FJDA imposed no limitation on the use of pre-majority conduct as proof of guilt in adult proceedings in federal court. See United States v. Wilson, 116 F.3d 1066 (5th Cir. 1997); United States v. Wong, 40 F.3d 1347, 1365 (2d Cir. 1994); United States v. Welch, 15 F.3d 1202, 1211–12 (1st Cir. 1993); United States v. Maddox, 944 F.2d 1223, 1233 (6th Cir. 1993). United States v. Wong, United States v. Welch, and United States v. Maddox all rely on ratification doctrine, a principle borrowed from contract law wherein a minor cannot enter into a contract, but upon attaining majority age that same individual may be liable for the contract he entered into as a minor. See Restatement (2d) of Contracts §§ 14, 85.
44 United States v. Frasquillo-Zomosa, 626 F.2d 99, 101 (9th Cir. 1980).
45 Id.
46 886 F.2d 944 (7th Cir. 1989).
cy “to promote, carry on, and distribute the proceeds of unlawful activities involving prostitution” in interstate commerce should have been admitted at trial. Without considering whether the post-majority conduct alone would have been sufficient to support a conviction, the court held that there was no need for a limiting instruction requiring that the jury only consider post-majority conduct in order to find the defendant guilty. Because there was evidence of some post-majority conduct, there was no need to consider whether that conduct alone would suffice to prove the defendant’s guilt; all of the defendant’s conduct, including the juvenile conduct, was available for proving the defendant’s guilt.

While the cases that originally created this circuit split are decades old, the Ninth Circuit recently brought the split back to life with its decision in United States v. Camez. In that case, the defendant was seventeen when he committed one act in furtherance of a racketeering enterprise and eighteen when he committed another act in furtherance of the same enterprise. Those were the only two acts for which the jury found that the government had met its burden. On appeal, Camez’s main argument was that the jury could not have convicted him under an instruction that the district judge had provided based on the judge’s understanding of the interplay between the FJDA and RICO. The instruction read: “You may not convict Mr. Camez of RICO or RICO conspiracy based solely on juvenile acts. You may convict him only if you find beyond a reasonable doubt that Mr. Camez continued to participate in the . . . RICO conspiracy after he turned 18 years of age.” According to Camez, the word “solely” must be applied to each predicate act, and because one of the predicate acts that was necessary for the conviction exclusively took place prior to the defendant’s reaching the age of majority, the jury convicted Camez without satisfying the instruction. The Ninth Circuit rejected this contention and decided that the instruction was consistent with the law and that the conviction was consistent with the instruction. The court went on to specifically reject Thomas because, in its view, that decision effectively added a new substantive element to the crime of conspiracy

47 Id. at 948.
48 Id. at 970.
49 Id.
50 839 F.3d 871 (9th Cir. 2016).
51 Id. at 872.
52 Brief for Appellant at 25, Camez, 839 F.3d 871, (No. 14-10251).
53 Id. at 32.
55 Camez, 839 F.3d at 873 n.2.
(proving the defendant’s age at the time of the predicate act) whereas the FJDA was meant only to create a distinct procedural mechanism for processing juveniles.\(^{56}\)

According to the *Camez* Court, the D.C. Circuit’s reasoning would create a loophole wherein a defendant would be subject to “no rehabilitation or punishment whatsoever . . . merely because the crime happened to span the defendant’s eighteenth birthday.”\(^{57}\) That is because racketeering requires a pattern of conduct.\(^{58}\) And the prosecution cannot establish such a pattern if the jury is not permitted to consider pre-majority acts in furtherance of a conspiracy or RICO enterprise that spanned the defendant’s eighteenth birthday.\(^{59}\) That said, the court’s conclusory statement that “[n]othing in the FJDA or in any other statute suggests that Congress intended to create a loophole”\(^{60}\) is rather unconvincing because it does not cite to any legislative history or to the FJDA amendment’s express purposes to describe what Congress indeed intended.

The Second Circuit has also recently rebuked *Thomas*\(^{61}\) and reaffirmed its holding in *United States v. Wong*.\(^{62}\) In *United States v. Scott*,\(^{63}\) the court reaffirmed its support of ratification doctrine, whereby all a defendant must do in order to subject himself to a federal district court’s jurisdiction is ratify his pre-majority conduct with a post-majority act in furtherance of the conspiracy he joined as a minor.\(^{64}\) Under *Scott*, prosecutors can bypass the usual FJDA requirement that the Attorney General certify a juvenile defendant for prosecution in federal court so long as they show that the “charged crime began before the defendant reached the age of eighteen and he affirmatively continued his participation after his eighteenth birthday.”\(^{65}\)

### III. Previous Scholarship

The only comprehensive academic treatment of this topic to date, produced by D. Ross Martin,\(^{66}\) was written before the courts decided

\(^{56}\) *Id.* at 875.

\(^{57}\) *Id.* at 876.

\(^{58}\) 18 U.S.C. § 1961(5). To establish a pattern of racketeering activity for purposes of RICO liability, there must be evidence of “[a]t least two acts of racketeering activity.”

\(^{59}\) *Camez*, 839 F.3d at 875.

\(^{60}\) *Id.* at 875–76.

\(^{61}\) See *United States v. Scott*, 681 F. App’x 89 (2d Cir. 2017) (upholding both a RICO conspiracy and a drug distribution conspiracy conviction).

\(^{62}\) 40 F.3d 1347, 1365 (2d Cir. 1994).

\(^{63}\) 681 F. App’x 89 (2d Cir. 2017).

\(^{64}\) *Id.* at 93.

\(^{65}\) *Id.*

\(^{66}\) D. Ross Martin, *Conspiratorial Children? The Intersection of the Federal Juvenile Delin-
some of the most relevant cases and before the Supreme Court refused to grant certiorari to resolve this split.\(^{67}\) Accordingly, this Comment attempts to update the scholarship on this question in light of rebukes of the D.C. Circuit’s position by the Ninth and Second Circuits. Martin’s piece focuses primarily on the notion that the FJDA, according to all the courts that had yet considered the question, permitted pre-majority conduct to be admitted in accordance with Federal Rules of Evidence. Martin’s piece does not suggest a particular preference for one rule over another with respect to the circuit split.

IV. DISCUSSION

A. The Rule of Lenity and *Expressio Unius* Support the Minority Approach

The courts of appeals agree that the text of the FJDA does not clearly state which court should adjudicate a case involving a defendant whose participation in a continuing crime spans his eighteenth birthday. As such, this may be an ideal opportunity for the courts to apply the rule of lenity. That is, where the text of a criminal statute is ambiguous with respect to a particular situation, it is best for the courts to read the statute such that it places the least possible burden on the defendant that a reasonable reading of the statute can provide.\(^{68}\) A court applying the rule of lenity to the present circuit split should adopt the *Thomas* position because juvenile court provides more lenient penalties aimed at rehabilitation than federal court.\(^{69}\)

Just as the rule of lenity favors the *Thomas* position, so does an application of the canon of *expressio unius*. Congress knew how to make exceptions to the rule that juvenile conduct must only be tried in juvenile court by creating the Attorney General exception process.

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\(^{67}\) Camez v. United States, No. 16-8386, 2017 WL 1037310 (U.S. Oct. 16, 2017). There is also another circuit split embedded in several of the cases relevant to this circuit split. The other split pertains to the procedure by which the Attorney General may certify a juvenile defendant for prosecution as an adult. For a description of this split, see *Scott*, 681 F.App’x at 93 n.4; Bradley T. Smith, *Interpreting “Prior Record” Under the Federal Juvenile Delinquency Act*, 67 U. Chi. L. Rev. 1431 (2000).

\(^{68}\) See, e.g., Skilling v. United States, 561 U.S. 358, 410–11 (2010) (relying on the “familiar principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity’”) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Hughey v. United States*, 495 U.S. 411, 422 (1990) (“Longstanding principles of lenity preclude the resolution of the ambiguity against [the defendant].”); see also *Martin*, supra note 66, at 878 (briefly mentioning this as possible justification for adopting the now-minority position, but without pursuing the topic in detail).

\(^{69}\) See United States v. Juvenile JG, 139 F.3d 584, 586 (1998) (noting that in deciding whether to exercise jurisdiction under the FJDA, federal courts must consider the fact that juvenile courts treat crime more leniently).
Congress did not make a similar exception for continuing conduct spanning a defendant’s eighteenth birthday. Where Congress includes one exception to a general rule and not others, *expressio unius* dictates that the courts should not read in additional exceptions that Congress did not specify. The *Thomas* position is thus more in keeping with this standard tool of statutory construction because it avoids adding an exception that the text itself does not specify. *Camez*, *Scott*, and their predecessor cases, by contrast, create an additional exception—the “ratification” exception—to the general FJDA rule that juvenile conduct should be adjudicated in juvenile court, in clear violation of *expressio unius*.

While some judges may not like relying on *expressio unius* in every situation, applying the canon to this question of statutory interpretation is especially apt, given the statute’s express statement that juveniles “shall be surrendered to the appropriate [state] legal authorities” in the absence of certification from the Attorney General. The defendants in the cases relevant to this circuit split are no longer juveniles, so this language is not directly on point. The language does, however, lead to the plausible inference that Congress intended to create a single exception—the Attorney General certification exception—to the rule that juvenile conduct be adjudicated in juvenile court, and that it intended that no additional exceptions be read into the statute. Because Congress specified its intention that absent this sole exception the statute’s default should apply (that state courts should adjudicate juvenile conduct), courts that have adopted the ratification exception are failing to follow Congress’s express intention.

B. The Absurdity Doctrine is Inapplicable

Most of the courts that have adopted the majority position did so partially because they thought that the bifurcation of juvenile and adult criminal cases for the same defendant involved in one continuous conspiracy or criminal enterprise is something of an absurdity. This is, however, a misapplication of the absurdity doctrine no matter how one construes it. For some judges, the absurdity doctrine only applies to scrivener’s errors. For those judges, the absurdity doctrine is

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70 See Silvers v. Sony Pictures Ent., Inc., 402 F.3d 881, 885 (9th Cir. 2005) (noting that “when a statute designates certain persons, things or manners of operation, all omissions should be understood as exclusions”) (quoting Boudette v. Barnette, 923 F.2d 754, 756–57 (9th Cir. 1991)).


inapplicable to this situation because there is clearly no scrivener’s error in this statute. For other judges, the absurdity doctrine should apply whenever a plain reading of the statute would produce a result clearly at odds with the legislature’s purpose(s) in drafting the statute. Regardless of the version of the absurdity doctrine to which a judge subscribes, the bifurcation of proceedings is not an absurd outcome. There is nothing inherently absurd about requiring that juvenile conduct be adjudicated in juvenile court and that adult conduct be adjudicated in adult court. It would be perfectly sensible to think that this result is precisely what Congress intended in these situations.

A judge utilizing standard tools of statutory interpretation who finds that her sound reading of a statute (i.e. applying canons like expressio unius and the rule of lenity) results in a policy that she disfavors should not reject that proper reading merely because she disagrees with the results it produces.73 Under this widely recognized principle, that the Camez rule might create duplicative or contradictory litigation is an insufficient reason for not applying an otherwise sound reading. If Congress agrees that a reading of the statute that leads to bifurcation is indeed absurd, then it has the power to specify what it meant when it used ambiguous language in the FJDA.74 It is up to Congress to decide what is absurd unless the best reading of the statute produces patently absurd results.75 Because statutory canons favor the minority approach and because there is nothing patently absurd about the possible bifurcation of juvenile and adult conduct into juvenile and adult courts, the courts’ application of the absurdity doctrine in these cases is unwarranted.

C. A Purposivist Approach is Consistent with the Minority Approach

The Ninth Circuit may be correct that it does not make much sense for Congress to have given criminal defendants a “clean slate”

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74 Rivers v. Roadway Exp., Inc., 511 U.S. 298, 313 (1994) (noting that if Congress dislikes the Court’s interpretation of a statute, it is free to respond by amending the statute to clarify a perceived ambiguity).

75 Pub. Citizen v. U.S. Dep’t of Just., 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring) (positing that courts should only invoke the absurdity doctrine “where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone”).
when they turn eighteen. There are, nonetheless, good purposivist reasons for the D.C. Circuit’s holding. While it is clear that Congress had no single overriding purpose in passing the FJDA, the relevant provisions defining the scope of the federal courts’ jurisdiction over minor defendants evince a primary purpose of limiting that jurisdiction.\footnote{See United States v. Juvenile Male, 864 F.2d 641, 644 (9th Cir. 1988)} Because we are presented with an ambiguous statute that reasonable courts can (and have) disagreed upon, it makes good sense to read that ambiguity in favor of the apparent purpose of those specific provisions. While some of the rest of the statute suggests an expanded role for the federal government in the areas of juvenile treatment and rehabilitation, the provisions defining the scope of federal courts’ jurisdiction serve only to limit that jurisdiction in favor of state juvenile court.\footnote{See United States v. Juvenile, 599 F. Supp. 1126, 1130 (D. Or. 1984) (“It has long been recognized that the federal court system is at best ill equipped to meet the needs of juvenile offenders. Deference to the state courts should always be observed except in the most severe of cases.”).} A purposivist reading of those particular provisions, 18 U.S.C. §§ 5301–02, thus leads one to side with the D.C. Circuit’s approach in \textit{Thomas}.

D. Policy Goals Are Better Served by the Minority Approach

The D.C. Circuit’s position is not only a better reading of the statutory texts, it also is more in keeping with general policy goals of the juvenile justice system. Courts that concern themselves with policy justifications when engaged in statutory interpretation should adopt the \textit{Thomas} position for several reasons. First, the majority position creates perverse incentives for law enforcement. Second, the majority position imposes greater liability on a subset of criminals who are most capable of rehabilitation and for whom incarceration is unlikely to lead to rehabilitation. Finally, because the sorts of criminal acts that are not eligible for the Attorney General’s certification tend to be \textit{mala prohibita} rather than \textit{mala in se},\footnote{See Michael L. Travers, \textit{Mistake of Law in Mala Prohibita Crimes}, 62 U CHI. L. REV. 1301, 1301 n.3 (1995) (defining \textit{mala prohibita} as offenses that are wrongful merely because a legislature has chosen to criminalize it and \textit{mala in se} as offenses that have traditionally been regarded as inherently evil).} juveniles are less likely to have the culpability required to warrant conviction in adult court and the stiffer penalties that accompany such a conviction.

1. Incentivizing authorities to wait for adult ratification

Courts that have dealt with this question, including \textit{Thomas}, have failed to consider the incentives that the majority position gives federal law enforcement officers. Under \textit{Camez}, law enforcement
agents are incentivized to wait and see whether they can get a juvenile to ratify his involvement in a conspiracy as an adult.\textsuperscript{79} If it were not for \textit{Camez}, law enforcement would instead be incentivized to pursue juvenile penalties for underlying criminal behavior rather than wait. \textit{Camez} thus creates a perverse incentive and is a counterproductive policy given the culpability and rehabilitation issues discussed below. Of course, law enforcement may often have legitimate reasons for waiting to bring charges, such as learning more about the conspiracy or criminal enterprise. But \textit{Camez} creates an incentive to wait in cases where there may be no need to wait. That is, it incentivizes waiting for the purpose of imposing a more severe punishment instead of waiting for the purpose of solving crime.

Because young people are more capable of rehabilitation,\textsuperscript{80} law enforcement should be incentivized to seek to correct criminal behavior immediately rather than waiting for additional criminal behavior to transpire. \textit{Thomas} is in keeping with this principle. Authorities hoping to prosecute a juvenile under RICO or other criminal conspiracy laws in jurisdictions that follow the \textit{Thomas} rule have less of an incentive to wait and see because they would have to wait for two additional, post-majority predicate acts, rather than the single additional act required under \textit{Camez}.

2. Incarceration and rehabilitation

One goal of the criminal law is to rehabilitate offenders. That goal is, and should be, especially pronounced for young people who are more capable of rehabilitation. The Supreme Court has recognized that a young person’s character is not as “well-formed” as an adult’s and that juveniles lack maturity and have “an underdeveloped sense of responsibility.”\textsuperscript{81} As such, juveniles’ irresponsible conduct “is not as morally reprehensible as that of an adult”\textsuperscript{82} and “a greater possibility exists that a minor’s character deficiencies will be reformed.”\textsuperscript{83} Unfortunately, the majority rule in this split necessarily leads to greater punishment being imposed on those most likely to be rehabilitated.\textsuperscript{84} Subjecting these defendants to the much more substantial penalties

\textsuperscript{79} This assumes that law enforcement is incentivized, generally speaking, to pursue more substantial sentences for the individuals it pursues.

\textsuperscript{80} See \textit{Roper} v. Simmons, 543 U.S. 551, 569 (2005).

\textsuperscript{81} \textit{Id.} at 569.

\textsuperscript{82} \textit{Thompson} v. Oklahoma, 487 U.S. 815, 835 (1988).

\textsuperscript{83} \textit{Roper}, 543 U.S. at 570.

\textsuperscript{84} See \textit{Miller} v. Alabama, 567 U.S 460, 471 (2012) (citing \textit{Roper}, 543 U.S. at 570) (According to the Court’s review of social science research, juveniles exhibit “transient rashness, proclivity for risk, and inability to assess consequences,” all of which lessen juveniles’ moral culpability and increase the likelihood that their “deficiencies will be reformed.”).
that can be imposed by adult courts based in part on substantive conduct committed as minors is not in keeping with the goal of rehabilitation. Rather, the Camez rule appears to produce just the opposite effect. The authors of the FJDA amendments intended that they would “increase the capacity of State and local governments . . . to conduct innovative, effective juvenile justice and delinquency prevention and rehabilitation programs.” This goal stands in stark contrast with Camez and its predecessor cases, which create an additional pathway for the federal government to pursue adult punishments for juvenile conduct. The Thomas rule does a better job of recognizing that Congress passed the FJDA “in order to encourage rehabilitation of juveniles.” Rehabilitation and delinquency prevention are not the same as incarceration in federal prison.

Those supportive of the Camez rule would likely object on this point and claim that an offender’s ratification as an adult indicates that he no longer has the enhanced capacity for rehabilitation that he may have had as a juvenile. This argument is true but also misses the point. It is true in the sense that at the moment that he turned eighteen years old, he lost that enhanced capacity for rehabilitation, at least according to the legal fiction of Miller v. Alabama and the FJDA. But the argument misses the point in that, ex ante, a juvenile offender could have received the appropriate rehabilitative treatment and punishment had he been charged as a minor. He only has his case tried in adult court because, ex post, law enforcement had not brought charges before he could commit a second criminal act as an adult. By allowing the adult conduct to serve as the only conduct relevant to the jurisdictional issue, courts that follow the Camez rule fail to incentivize law enforcement to give the appropriate court jurisdiction at the appropriate moment, thereby missing the opportunity for rehabilitation before the offender reaches the age of majority.

85 See Jacob L. Zerkle, Rehabilitate the Community by Rehabilitating Its Youth—How Cognitive Science, Incarceration, and Jurisprudence Relate to the Criminal Justice System’s Treatment of Juveniles, 36 CHIL.D. LEGAL RTS. J. 201 (2016) (arguing that young people need positive role models to avoid becoming embroiled in criminal conduct, and that incarcerating young people deprives young people of the role models they need and exposes them instead to some of the “most violent communities in the United States”).

86 Juvenile Delinquency: Hearing Before the Subcommittee to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary, 92nd Cong. 8 (1972–73).

87 Thomas, 114 F.3d at 263.

88 It should be noted here that there is a broad consensus that the United States incarcerates too many people. See, e.g., Kathryn M. Young and Joan Petersilia, Keeping Track: Surveillance, Control, and the Expansion of the Carceral State, 129 HARV. L. REV. 1318 (2016). Rules like Camez needlessly exacerbate this problem by granting jurisdiction to courts that impose more severe punishments, including longer terms of incarceration.

89 567 U.S 460 (2012).
3. Juvenile mens rea

After the *Camez* decision, one commentator wrote in strong opposition to the rule declared in that opinion because of his belief that the primary purpose of the FJDA was to create a procedural and substantive enclave for juveniles.\(^{90}\) According to the commentator, *Camez* flies in the face of neurological research that shows that juveniles lack the culpability required to warrant conviction in adult court and the harsher sentences that accompany such convictions.\(^{91}\) *Camez*, the argument goes, cuts against the very purpose of the FJDA in that it makes the juvenile enclave a bit smaller by creating the “ratification exception,” which forces the adjudication of juvenile conduct in courts less equipped to provide the appropriate process and sanctions.

As the Supreme Court recognized in *Miller*, juveniles are constitutionally different from adults, at least for the purposes of sentencing.\(^{92}\) Constitutional principles, like the Eighth Amendment’s ban on cruel and unusual punishment, preclude courts from treating juveniles in the same fashion that they treat adults.\(^{93}\) While it would be a stretch to claim that the majority approach violates the Eighth Amendment, it is at least worth considering that the majority position does not afford juvenile defendants any sort of favorable treatment. And while the Court has focused its attention on how the differences in culpability between minors and adults should affect how courts sentence defendants, there is no reason to think that those same principles should not apply with equal force to substantive criminal law and criminal procedure.\(^{94}\) Courts that take seriously the notion that juvenile offenders are less culpable should therefore defer to the procedure Congress established and states’ substantive law for adjudicating juvenile conduct.

As described above, the FJDA makes certain explicit exceptions to the general rule that juveniles cannot be tried in federal adult court; those exceptions are largely for felony crimes of violence for which there is reason to believe that juveniles may have a higher level of culpability. Given that the RICO enterprises and other conspiracies

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\(^{90}\) *Id.*


\(^{92}\) *Miller v. Alabama*, 567 U.S. at 471.

\(^{93}\) *Id.* at 465.

\(^{94}\) See Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 540 (2016) (arguing that “[j]ust as modern neuroscience counsels against the imposition of certain penalties on juvenile defenders . . . so it counsels toward a reconsideration of culpability as applied to juvenile offenders through the element of mens rea”).
involved in this circuit split are not typically crimes of violence, the juveniles that commit these acts may have less cognitive understanding of their consequences. As the Supreme Court has indicated, because there is a legal assumption that juveniles lack this cognition, there is less penological justification for imposing harsher sentences on them. Adjudicating pre-majority conspiracy involvement in federal court rather than juvenile court will frequently lead to stiffer penalties and less rehabilitative treatment. As such, courts should follow by not adjudicating juvenile conduct in federal court except in cases where the text of the FJDA so requires.

E. State Analogs

Questions regarding how to adjudicate criminal cases against defendants whose involvement in conspiracies spans the age of majority are not unique to the federal system. State courts have had to deal with this question as well, with little guidance from state statutes. For the sake of consistency and predictability in the law, it may be useful for the states and federal government to be in alignment with respect to their treatment of these defendants in conspiracy and state RICO cases.

State courts in both California and New York have chosen to side with the majority of the federal circuits. In People v. Quiroz, a California appellate court ruled that for a continuing offense like conspiracy that spans a defendant’s eighteenth birthday, the defendant may be tried as an adult. In coming to this decision, the Quiroz court implicitly employed ratification doctrine: “Those [persons who engaged in a continuing crime while a minor and then as an adult] chose to continue their criminal conduct as adults, and should face the consequences of such a choice.” In People v. Victor J., a New York

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95 See, e.g., Camez v. United States, 839 F.3d 871, 871 (9th Cir. 2016) (involving a counterfeit identification scheme); United States v. Spoone, 741 F.2d 680 (4th Cir. 1984) (involving a scheme to sell stolen vehicles).
97 See Zerkle, supra note 85, at 208 (“[Y]outh in the juvenile system . . . have a constitutional or statutory right to rehabilitative treatment. In contrast, youth in the adult criminal system are incarcerated under the state’s police power and have no such right . . . . Even further, juveniles lack access to educational materials, appropriate healthcare, and other rehabilitative treatment in adult institutions.”).
98 Surprisingly, there is not more state law on this issue beyond the case law from these two states. See People v. Quiroz, 155 Cal. App. 4th 1420, 1429 (2007) (noting the lack of California law on the issue and looking instead to federal courts for guidance).
100 Id. at 1430.
101 Id. at 1430 n.4.
state court relied on the Eleventh Circuit’s opinion in *United States v. Cruz*\(^{103}\) in concluding that it makes little sense for a defendant to face a bifurcated criminal proceeding merely because the defendant’s involvement in the conspiracy spanned his eighteenth birthday.\(^{104}\) Reasoning that bifurcation of the proceedings would lead to a waste of judicial resources and “confusing and possibly contradictory” results, the adult court maintained jurisdiction over the entire case, including the defendant’s pre-majority conduct.\(^{105}\)

*Quiroz* and *Victor* are both instructive because they indicate that the states that have dealt with this issue are generally in alignment with the majority of the circuits. For sake of predictability, it may therefore make sense for all courts to adopt the majority federal rule.\(^{106}\) That being said, the courts in *Quiroz* and *Victor* heavily, if not entirely, relied on federal precedent.\(^{107}\) They both noted the lack of state law on the issue and sided with the majority in the circuit split based on their agreement with the ratification doctrine employed by the majority. While principles of consistency and predictability counsel in favor of aligning state and federal policy, few state courts have had the opportunity to make a rule in this situation and those that have considered the issue did not actually employ their own reasoning. Those facts suggest that we should heavily discount those rulings in crafting a rule for the federal and state systems. They also deserve less weight because neither was a decision of a state’s highest court.

F. Judicial Economy and the Absurdity Doctrine Do Not Justify the Ratification Exception

The most common argument proffered by the courts (both state and federal) that take the majority position comes in three parts: (1) that separating one conspiracy or criminal enterprise into two proceedings is a waste of judicial resources; (2) that because such a separation is so wasteful, it must be an absurd result that Congress did not intend; and (3) that Congress must not have intended to create a loophole wherein a defendant could escape all RICO liability merely because his predicate offenses spanned his eighteenth birthday. This

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\(^{103}\) 805 F.2d 1464 (11th Cir. 1986).

\(^{104}\) *Victor J.*, 720 N.Y.S. 2d at 307–08 (overruled on other grounds).

\(^{105}\) *Id.* at 308.

\(^{106}\) See *Quiroz*, 155 Cal. App. 4th at 774 (concluding that the underlying principle employed by the majority of federal courts in FJDA conspiracy cases—that a trial court need not transfer a case to juvenile courts merely because the adult defendant began participating in a conspiracy before the age of eighteen—“applies with equal force” in state cases).

\(^{107}\) See *id.*; *Victor J.*, 720 N.Y.S.2d at 308 (arguing that “the reasoning applied in *Cruz* is persuasive here”).
is really an argument about judicial economy—that it would be an absurd waste of judicial resources to bifurcate a single conspiracy case into two separate proceedings, particularly given the possibility that the bifurcation could lead to no RICO liability. While these positions are plausible, judicial economy and judges’ views of what is absurd should not be the deciding factors when a whole host of other textual and policy considerations dictate a different approach.\textsuperscript{108}

Similarly, the argument proffered by the Quiroz court—that defendants should face the consequences of continuing their criminal activity as adults—is a red herring. As long as courts can get past their worries about bifurcating proceedings, a defendant can be charged in state juvenile court and federal district court and receive the punishment that accords with the acts committed as juveniles and as adults, respectively.

V. Conclusion

Methods of statutory interpretation and several policy rationales counsel against reading a ratification exception into the FJDA. Courts agree that the statute provides no guidance on this question, and when a statute is ambiguous as to its application to a particular set of facts, courts should invoke the rule of lenity. Likewise, because Congress was capable of making exceptions to the general rule that the default preference is for juvenile courts (typically state-run institutions) to adjudicate juvenile conduct, the canon of expressio unius counsels courts not to read in an additional exception to the statute.

On the policy side, the majority position creates a troubling incentive for law enforcement to delay rather than enforce juvenile penalties, which are more likely to lead to rehabilitation than the blunter instrument that is adult incarceration. And while drawing a dividing line between a seventeen-year-old and an eighteen-year-old is arbitrary, separating juvenile and adult conduct is more in keeping with 1) teachings courts have drawn from neuroscience that younger people are generally less culpable than adults and 2) one of Congress’s central intentions in drafting the FJDA—to ensure that juveniles receive process and punishment appropriate for their age and greater capacity for rehabilitation.

With the exception of the statutorily enumerated carve-outs (and those drawn from the Federal Rules of Evidence), courts interpreting

\textsuperscript{108} See, e.g., Merritt v. Dillard Paper Co., 120 F.3d 1181, 1188 (11th Cir. 1997) (noting that the absurdity doctrine must only be applied when normal principles of statutory interpretation lead to truly absurd results because otherwise “clearly expressed legislative decisions would be subject to the policy predilections of judges”).
the FJDA should do as Congress intended and keep juvenile conduct in juvenile court.