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Circuit Calls for Reintroduction of Parole for Federal Defendants

With its opinion in 'Portillo', the Second Circuit points out a real problem in sentencings of young people for serious crimes.

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Recently, in what could have been just a simple summary affirmance of a lengthy sentence, the Second Circuit (Judges Jon Newman and Rosemary Pooler) issued a plea to lawmakers and to the Sentencing Commission to consider bringing parole back into the federal system. The opinion in *United States v. Portillo*, No. 19-2158, in which the Circuit upheld a 55-year sentence for a juvenile defendant whom it suggested would be a prime candidate for parole, comes at a time when criminal justice and sentencing reform is again a headline topic. It demonstrates that some courts see themselves playing a role in that process. The panel also raises the notable question of whether parole—which was abolished in 1987 as part of the 1984 Sentencing Reform Act—should be reintroduced.

Background

In April 2017, 15-year-old Josue Portillo, a member of the MS-13 gang, lured members of a rival gang to a park with the intention of killing one of those members in retaliation for a petty grievance. The intended target escaped, but Portillo and fellow gang members killed the four other rivals using machetes, an ax, knives, and tree limbs. Portillo, wielding a machete, participated in all four murders. Portillo was initially charged as a juvenile, but the District Court granted the government's motion to transfer Portillo to adult status after hearing testimony from a psychiatrist. Portillo then pled guilty to racketeering activity based on the four murders. The District Court imposed a sentence of 55 years, a downward departure from the life sentence recommended by the Sentencing Guidelines.

The Appeal

Portillo appealed his sentence on the grounds that (1) the District

Court failed to consider the factors that the Supreme Court held in *Miller v. Alabama* must be considered when sentencing a juvenile to life imprisonment without the possibility of parole, and (2) the sentence was substantively unreasonable.

The Second Circuit considered, and rejected, each argument. As to the first, the Second Circuit noted that the District Court not only *did* consider each of the *Miller* factors—which direct a district court to consider a juvenile's age and its characteristics such as immaturity and impetuosity, the juvenile's family and home circumstances, the circumstances of the offense, the effect of peer pressure, and the possibility of rehabilitation—but also relied on those factors to depart downward from the Guidelines recommendation of life imprisonment. And as to the second, the panel held that, while a sentence of 55 years is "unquestionably severe," it is "not unreasonable in any legally cognizable sense" in light of the "heinous" circumstances of the crime: four brutal, premeditated murders planned in retaliation for a petty grievance.

Availability of Parole for Federal Defendants

The panel could have stopped here, but instead abruptly pivoted to a discussion of "the unfortunate consequences" of Congress's decision to eliminate parole in 1984. The court began with a detailed history of the introduction of parole (the release of an incarcerated individual before the completion of his or her sentence) in the federal system in 1910, and of Congress's decision to eliminate parole in the Sentencing Reform Act of 1984. When parole was available, federally incarcerated individuals could be eligible for release after serving one-third of their respective sentences, or at any time at the discretion of the sentencing judge. Parole release decisions were made by the United States Parole Commission, which considered factors such as the individual's conduct in prison and his or her prospects for leading a law-abiding life upon release.

In 1984, in response to sentencing reform efforts aimed at establishing "truth in sentencing"—that is, consistency in sentences imposed for federal offenses—Congress passed the Sentencing Reform Act which established federal mandatory minimum sentences and did away with parole for individuals who committed crimes after Nov. 1, 1987. Prior to this date, it was sometimes the case that a defendant would serve only a short portion of his or her actual sentence.

As the Second Circuit noted, this elimination of parole for federal offenses has not actually achieved "truth in sentencing" aims. Over 99% of all criminal prosecutions in the United States occur at the state level, and for most individuals convicted of state charges, parole is still available. As a result, the court wrote, the general public does not actually expect criminal sentences to be served in full, and may in fact be surprised that federal sentences do not provide the opportunity for parole. Moreover, the elimination of parole has had potentially harmful effects on the criminal justice system. As the court remarked, the abolition of parole, along with other changes in federal sentencing, has lengthened the average sentence in federal prison from 14.6 months in 1986 to 37.5 months in 2012. And it has eliminated for prison wardens and for incarcerated individuals a powerful incentive for encouraging and complying with, respectively, prison regulations and participation in rehabilitative programs during the pendency of a long sentence.

Portillo's case, the Second Circuit wrote, perfectly illustrates the effects of Congress's decision to eliminate parole 35 years ago: now 19 years old, and unless he receives a slight sentence reduction for good time, Portillo will remain in prison until he is 71. While "the seriousness of his crime, considered along with his age and personal circumstances, permits that result," the practical effect is that Portillo has little incentive to spend the next 55 years participating in educational or rehabilitative programs, complying with prison regulations, or otherwise doing anything to "demonstrate … that he has matured beyond the seemingly incorrigible person of his youth." His lengthy legal sentence is effectively no different from those sentencings that the Supreme Court found troubling in *Miller*. And, the court noted in a footnote, its imposition runs counter to the reasoning underlying the *Miller* decision: "that

children who commit even heinous crimes are capable of change."

Commentary

With this opinion, the Second Circuit points out a real problem in sentencings of young people for serious crimes. The problem, as the court explains, is not with the application of the law by the District Court but rather with the law itself. The court does not invent a new rule to address the problem—it follows existing rules and affirms the lawful sentence—but it does not let the sentence pass without noting its unfairness.

On the one hand, the existence of parole did make it hard for the public to understand the true sentences that were imposed on defendants. A 10-year sentence could easily become a 3-year sentence without the public necessarily knowing why this decision was made or even that it was made. The Parole Commission's operations lacked the type of transparency associated with federal court proceedings.

At the same time, the Second Circuit raises an important question: Do the very long sentences that are imposed in some cases justify the creation of an "escape hatch" in order to incentivize incarcerated individuals and for society to recognize, as Heraclitus wrote, that "no one ever steps in the same river twice"? An individual who is convicted in their teens or early twenties may be a very different person when they are in their 50s and 60s. By that point, it is possible that some of the sentencing objectives—such as incapacitation or rehabilitation—will no longer be achieved by continued incarceration.

If political and public sentiment do not permit the full reinstitution of parole and the establishment of a parole commission, perhaps it would be possible to see an alternative created for defendants whose facts are similar to those of Portillo: those defendants who, at an age of 25 years or less, received sentences of 30 years' imprisonment or longer. Such a defendant could, upon turning 55 years old, apply for parole. The decision could be left to the district judge who sentenced the defendant, or more likely to a district judge assigned randomly from the district in which the defendant was sentenced. The district judge would decide whether to order release and to set conditions for release if such would be in the interests of justice. The government could be directed to prepare a submission that addresses the defendant's time in prison—did the defendant comply with prison rules and participate in programs aimed at education and rehabilitation?

Social science research has shown that "all but the most exceptional criminals, even violent ones, mature out of lawbreaking before middle age, meaning that long sentences do little to prevent crime." Dana Goldstein, "Too Old To Commit Crime?" N.Y. Times (March 20, 2015). An approach along the lines proposed here might help to reduce the prison population and achieve case-specific justice without increasing the risk to public safety. Perhaps someone should send a copy of the *Portillo* decision to Congress, the Department of Justice's policy staff, and the Sentencing Commission in order to focus their attention on how to address the problem that Judge Newman has identified.

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