

No. _____

IN THE

Supreme Court of the United States



JOSUE PORTILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit*

REDACTED PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED.

Absent proof of incorrigibility, can a district court sentence a defendant to fifty-five years imprisonment without parole for participating in a execution style gangland murder under this Court's holding in *Miller v. Alabama*, 567 U.S. 460 (2012) ?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Josue Portillo, an inmate currently incarcerated at FCI in Coleman, FL respectfully petitions this Court for a writ of certiorari to review the decision of the U.S Court of Appeals for the Second Circuit, dated November 24, 2020 which affirmed the district court's fifty-five-year sentence imposed upon Petitioner.

OPINION BELOW

On November 24, 2020, the Second Circuit affirmed Petitioner's sentence and entered judgment in the Eastern District of New York. The Court's opinion is reported in *United States v. Portillo*, 2020 U.S. App. LEXIS 36989, __ F.3d __, 2020 WL 6878443 and annexed in the Appendix at A1.

JURISDICTION

The Second Circuit Court of Appeals entered judgement on November 24, 2020. This Court has jurisdiction under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U. S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

A. ***The MS-13 Quadruple Murders***¹. In April of 2017, Petitioner was fifteen years and eleven months old and a member of the MS-13 gang on Long Island when he participated in the execution-style murders of four members of a rival gang. The original plan was to kill a person identified as “Witness 1,” with whom Petitioner had had a previous altercation. Petitioner and other MS-13 members instructed two females to invite Witness 1 to a public park in Central Islip, New York, to smoke marijuana. After learning that Witness 1 had invited four others to accompany him, Petitioner and members of his gang decided to kill all five, believing that all of them were members of the rival gang. Petitioner sought and obtained a gang leader’s approval to commit the murders. He, along with several gang members, surrounded the suspected rival gang members and, after Witness 1 escaped, killed the remaining four, using machetes, an ax, knives, and tree limbs. Portillo wielded a machete.

B. ***The Prosecution and Transfer Hearing***. Petitioner fully confessed to his participation in the murder scheme when first confronted by the FBI case agent when he was in custody at the Shenandoah Valley Juvenile Center for illegally entering the United States.

Petitioner fully cooperated by identifying others who had participated in the slaying. After being arraigned on juvenile information charging him with the murders, Petitioner further cooperated by granting four separate interviews

¹ Petitioner adopts the Second Circuit version of the offense.

consuming ten hours to federal prosecutors and agents. But no cooperation agreement was offered Petitioner, nor was there any claim that Petitioner's cooperation was anything but truthful.

On June 19, 2018, the district court held a Transfer Hearing to decide the government's motion to prosecute Petitioner as an adult pursuant to 18 U.S.C. § 5032. The government called no witnesses, but offered the Psychiatric Report of Eric Goldsmith M.D., a forensic psychiatrist appointed pursuant to the Criminal Justice Act.² Defense counsel called Dr. Goldsmith to establish the following facts.

Petitioner was born out of wedlock in Lolotiquillo, El Salvador. His father abandoned his 23-year-old mother, Vilma Portillo, when she was three months pregnant. A165. Petitioner was reared by his 68-year maternal grandmother. When Petitioner was 3-years old, his mother, emigrated to the United States where she eventually settled down in Central Islip, N.Y. with her partner, Jose Diaz, and Genesis, their daughter. A88-90

By age fourteen Petitioner had been smoking marihuana since twelve and became a concern for his mother and grandmother who arranged to have Petitioner smuggled into the United States.A90. The odyssey proved traumatic:

The transition from rural El Salvador to New York appears to have been a difficult and destabilizing one for Mr. Portillo. He endured significant trauma during the journey, and had a hard time adjusting to the crowds and academics in his new school. In addition, the lack of relationship with his mother left him more isolated and with few sources of support in a country where he

² Eric Goldsmith: M.D. is certified by the American Board of Psychiatry and Neurology Diplomate in Psychiatry with Certification in Subspecialty of Forensic Psychiatry.

did not speak the language. This destabilization left him vulnerable to dangerous influences, particularly in the form of an older cousin who was already a member of the MS-13 gang and had also immigrated to the U.S. from Lolotiquillo.

A90,95.

When Petitioner eventually arrived in Central Islip, he had difficulty adjusting he felt "uncomfortably estranged from his mother. He says he 'did not know her,' 'it was weird.'" A90. In 8th grade Petitioner joined MS-13 with the aid of his cousin because "he had a desire for respect, and he believed that the people in his area in the U.S. had respect for the gang members...He also stated that he thought that the gang would allow him access to friends, women and marihuana, which he had been using regularly since his arrival in the U.S." A161. Petitioner understood that "in order to be promoted in MS-13, it was necessary to kill a member of a rival gang." A90-93

Dr. Goldsmith made the following diagnoses: (1) Oppositional Defiant Disorder, (2) Cannabis Use Disorder and (3) Adolescent Anti-Social Behavior. A94

With respect to immaturity Dr. Goldsmith found:

Mr. Portillo seemed less anxious and distressed than would usually be expected, given the gravity of his charges. This is potentially due to the fact that he appears to be immature for his age. *This immaturity is manifested* in his difficulty understanding or expressing his motivations for his behavior (such as to join MS-13), the superficiality with which he views his current situation, and the self-involved way in which he frames events leading to his arrest, and his difficulty in considering the ways his actions are likely to impact others.

A96. Emphasis added.

The district court pressed Dr. Goldsmith to opine whether Petitioner would benefit from the treatment programs offered in a juvenile detention facility:

THE COURT: All right. But you don't know the likelihood that he's going to be successful in the program, right?

THE WITNESS: I don't know the likelihood of whether he would be successful. I do know that he does not evidence the kind of hurdles, barriers to being successful. *So he doesn't evidence that uncooperative psychiatric problems that would – and intelligence difficulties that would be barriers* to benefitting from the kinds of services and treatment available to him in a juvenile facility.

A73 Emphasis added.

Dr. Goldsmith concluded: "If Josue Portillo is able to successfully complete the treatment, education, and vocational components of juvenile treatment program, his risk of recidivism would be significantly reduced." A97

On August 6, 2018, the district court granted the government's motion to prosecute appellant as an adult. *United States v. Juvenile Male*, 327 F. Supp 3d 573, 586 (2018):

The Court does not believe that his immaturity, brain development and excessive use of marihuana adequately explain his alleged violent tendencies in this case (including his alleged premediated, pivotable role in the murders)...In short, the Court concludes that the defendant's rehabilitation potential is low, and the juvenile system is imply ill-equipped and woefully insufficient, under the circumstances of this case to adequately address, in the interest of justice, these alleged violent crimes when considered in conjunction with other statutory factors.

C. *The Sentencing Proceeding.* On August 20, 2020, Petitioner waived indictment and entered a plea of guilty to a superseding indictment charging him with the murders. The Probation Department recommended a life sentence in accordance with the guidelines; the government recommended a sixty-year sentence; and Petitioner's counsel recommended a reasonable sentence taking into

account Petitioner's transient immaturity and his rehabilitation potential in accordance with the *Miller* and *Montgomery* decisions.

The district court resumed the public phase of the sentencing at which the judge heard compassionate pleas from both the mother of the murdered victim, Michael Lopez, and from Petitioner who stated the following:

Honorable Judge Bianco, I expect a severe sentence because as a MS-13 member what I did to Michael Lopez and others, but please do not put me in jail for the rest of my life. I know that what I have done was very wrong. I apologize for my heinous crime and will always pray for the families of the victims, none of whom deserved to die. I respectfully pray that I be given a second chance to prove to your Honor and the victims' families that I can be a different person than I was at 15. I pledge to make you proud. I now realize how selfish it was for me to be consumed by soccer, girls and marihuana offered by MS-13. I will learn a trade or skill in prison that will enable me to help others after my deportation to El Salvador. I will prove to your Honor that I can become a law-abiding person helping others. I

have every confidence that your Honor appreciates my personal circumstances at 15.

A124-25

In pronouncing sentence, Judge Bianco stated the following:

This court has seen approximately 50 murders on Long Island committed by the MS-13 gang over the past ten years.³ There is no clearer evidence of how dangerous this gang is and how dangerous individuals who choose to join this gang, including juveniles, present to the community... Obviously I know I have the discretion to give him less than 55 years in light of his age...in light of his age and other factors I pointed to and I went back and read the Miller decision because the Supreme Court, as Mr. Ryan noted, did emphasize that ...a juvenile's brain is different. Obviously, I accept that science...Although a 15 year old's brain is different and Dr. Goldsmith concluded this defendant is immature and his marihuana use compounded his lack of judgment, I don't believe that they explain the defendant's conduct in this case...This is not a teenager who was confronted with an evolving situation that happened on a moment's notice and had to make a quick decision about whether to participate or not. This was something that developed in advance...Finally, on efforts of rehabilitation and likelihood of those efforts, the records showed that there were efforts in the school through the community reinvestment program to try to get him to disassociate himself with the gang and they were unsuccessful. *I don't mean to suggest by noting that that means he could never change or turn his life around. I don't believe that...But even assuming that that would dissipate over some time prior to the 55 years, I believe the other factors that I pointed to warrant this sentence in any event. I don't believe the Miller factors are strong in this case are outweighed by the other factors that I have pointed to.* But what I am trying to do by this sentence, reflecting again at some point I believe at an advanced age he would pose a danger to the community and because of his acceptance of responsibility I'm trying to fashion this 55-year sentence given the possibility of not dying in jail, having some

³ All MS-13 prosecutions in the Eastern District of New York were assigned to U.S. District Judge Joseph F. Bianco before the Judge was elevated to the Second Circuit.

period of what Mr. Ryan referred to as his last stage of life, to have the hope, although not the certainty, of not dying in jail.

Emphasis supplied. A139-45

D. The Second Circuit Decision. The Court's 14-page Opinion upheld the "unquestionably severe" sentence as "substantively reasonable." The Opinion notes that the Judge departed downward because of Petitioner's youth after consideration of the *Miller* factors, but notes the "unfortunate consequence" that Petitioner will be denied the opportunity to prove that he is capable of change due to the 1987 elimination of federal parole, citing this Court's holding that "children who commit even heinous crimes are capable of change." *Montgomery v. Louisiana*, 136 S. Ct 718, 736 (2016). A1-14.

REASONS FOR GRANTING THE WRIT⁴

District court judges need guidance on whether and how to apply the *Miller* factors when confronted with a sentencing of a juvenile-defendant for homicide because there exists confusion, uncertainty and errors when applying this Court's holdings in *Miller v. Alabama, supra*, and *Montgomery v. Louisiana, supra*.

This Court has never ruled on whether the Eighth Amendment requires a finding of "incorrigibility" before sentencing a federal defendant to a life-long sentence for committing the crime of homicide as a juvenile. Given the absence of

⁴ We note this Court has pending before it, *Jones v. Mississippi* No. 18-1259, *sub judice*, following oral argument on November 23, 2020 concerning whether the Mississippi sentencing court was required to find that the Jones was "incorrigible" before imposing a life without parole sentence upon a juvenile-defendant.

federal parole, the rationale and objective of the *Miller* holding may become undermined unless this Court clarifies the applicability of its holding.

The existing confusion among the federal courts was made eminently clear by the Fifth Circuit recent decision, *United States v. Sparks*, 942 F.3d 748 (2019) *cert den.* 140 S. Ct. 1281. The Circuit held that while the district court was not required to apply the *Miller* factors when imposing a thirty-five-year sentence upon a juvenile, it remains unclear whether a court must find a juvenile "incorrigible" before imposing a life sentence.

The *Sparks* opinion confirms that there remains "some confusion" over whether application of the *Miller* factors should be made independent of, or in conjunction with, the sentencing factors required of an adult in 18 U.S.C. § 3553 (a). *Sparks* referred to a Second Circuit decision *United States v. Garcia*, 666 F.App'x 74 (2d Cir. 2016) which upheld a life sentence imposed upon a seventeen year old by Judge Bianco for the defendant's participation in a separate MS-13 brutal gang murder on Long Island based upon 3553 (a) factors.

Sparks also pointed out how a Third Circuit panel decision was reversed because it attempted to adopt a rule that would have required a finding of "incorrigibility" if the length of the juvenile's sentence was equivalent to the national age of retirement. See: *United States v. Grant*, 887 F.3d 131 (2018), *reh'g en banc granted*, opinion vacated, 905 F.3d 258.

Finally, *Sparks* cited the Ninth Circuit *en banc* decision which remanded a life sentence imposed upon a juvenile who committed felony-murder. Eleven out of

thirteen judges found that the district court “sentencing remarks ***focused on the punishment warranted by the terrible crime Briones participated in, rather than whether Briones was redeemable.***” *United States v. Briones*, 929 F. 3d 1057, 1066 (2019). Emphasis added.

Why the *Miller* rationale (“how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison”) should not apply to a *de facto* life sentence must be resolved. ***Petitioner, now nineteen years old, will continue serve his sentence until he is seventy-one years old.*** The U.S. Sentencing Commission has declared:

the length of sentence imposed is so long that the sentence is, for all practicable purposes, a life sentence and likely intended to be such by the judge who imposed it...For purposes of this analysis, a sentence length of 470 months or longer was used as a proxy to identify cases in which a *de facto* life sentence had been imposed.”⁵

Petitioner’s life expectancy is seventy-five.

As to “incorrigibility,” the district court wrote that Petitioner is “not likely to be successful in rehabilitation and that his current state of recidivism is high...The Court views the defendant as an extremely dangerous individual from whom society must be protect for an extended period of time.” See Statement of Reasons. A159. But this “reason” was flatly contradicted by the record. At the transfer hearing Dr. Goldsmith explained:

⁵See: *Life Sentences in the Federal System*, (USSC 2015):
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences_at_10.pdf.

Being, you know, outside of a structured facility environment, his decision-making at that time, of course, was to abandon the positive forces of the school and education and participate in the gang. *There's no evidence from a psychiatric perspective, there's no hurdles that I can see that in a structure environment that he not learn, he could not be fully [conversant] in English, and be educated and then participate in vocational training to give him some skills, that he could be marketable as an employable person*

A67 Emphasis added. A social worker independently found Petitioner to be a “very resilient adolescent who desires to do well and improve his school behavior and drug use.” A99. Even the district court’s sentencing comments counter “incorrigibility”:

I don't mean to suggest by noting that that means he could never change or turn his life around. I don't believe that...But even assuming that that would dissipate over some time prior to the 55 years, I believe the other factors that I pointed to warrant this sentence in any event.

A144

The consequence of the Second Circuit affirmance will effectively eliminate any “hope for some years of life outside prison walls [which] must be restored.” *Montgomery* at 737. For fifty-two more years at a taxpayer expense well over Two Million Dollars, Petitioner will be warehoused in the custody of the U.S. Bureau of Prisons. And should Petitioner survive, he will not be met by any surviving family members upon his arrival in his native El Salvador, pursuant to his mandatory deportation.

This result contravenes the very objectives of Miller and magnifies the “unfortunate consequence” of the elimination of federal parole because:

if parole were available, there would be two consequences worth considering. On the one hand, Portillo’s custodians would have an effective means of encouraging his observance of priors

regulations, resulting from his awareness that misconduct would jeopardize any hope of parole. On the other hand, Portillo would have an incentive to obtain an education, participate in rehabilitative programs, and just possibly demonstrate, at some point in the future, that he has matured beyond the seemingly incorrigible person of his youth to become an adult whom parole authorities might reasonably think should be permitted to rejoin society.

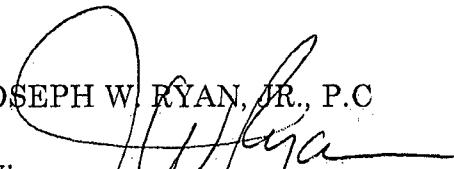
As the Second Circuit noted: "children who commit even heinous crimes are capable of change." Citing *Montgomery v. Louisiana*, 136 S. Ct 718, 736 (2016). A13-14

CONCLUSION

Certiorari should be granted to clarify whether the Eighth Amendment requires a district court to make a finding of "incurrigibility" *before* imposing what is tantamount to a life sentence without parole upon a juvenile for committing murder at fifteen years of age. .

Dated: Melville, New York
January 12, 2021

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