[J-68-2013] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 38 EAP 2012
	:	
Appellee	:	Appeal from the Judgment of the Superior
	:	Court entered on 7/27/09 at No. 1386 EDA
	:	2007 affirming the order entered on 5/8/07
v.	:	in the Court of Common Pleas, Criminal
	:	Division of Philadelphia County at Nos.
	:	CP-51-CR-0203131-2000 and CP-51-CR-
IAN CUNNINGHAM,	:	0203141-2000
	:	
Appellant	:	
	:	ARGUED: September 12, 2012
	:	RESUBMITTED: August 14, 2013

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: October 30, 2013**

I join the well-reasoned Majority Opinion in its entirety. The question of the retroactive effect of new federal constitutional rules adopted by the U.S. Supreme Court requires a mastery of difficult and often arcane principles. The Majority's cogent and comprehensive accounting of those principles, which makes clear the restrictions upon what actions this Court may undertake in response to this PCRA[1] appeal under existing law and the arguments that have been forwarded here, is convincing. I write separately to express my own view of what, if anything, might be done to mitigate the seeming inequity that is a result of the High Court's ruling in Miller v. Alabama, __ U.S. __, 132

[1] Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.

S.Ct. 2455 (2012). The "seeming inequity" here arises from the fact that the prospect of an individualized, discretionary judicial determination of whether a juvenile murderer should ever be afforded parole eligibility depends solely upon the happenstance of the moment that the defendant's conviction became final.

Prior to Miller, there was nothing in Pennsylvania organic law, legislation or decisional law to restrict the legislative power to establish a mandatory sentence of life imprisonment without possibility of parole ("LWOP") as appropriate punishment for a juvenile who commits murder of the first or second degree. That mandatory sentencing scheme as adopted by the General Assembly represented the Commonwealth's policy on the issue. Under Miller and by operation of the Supremacy Clause of the U.S. Constitution, that expression of policy can no longer apply going forward. However, as the Majority notes, the Miller Court did not address the inevitable aftermath in states, such as Pennsylvania, with an existing (and substantial) roster of defendants currently serving LWOP for murders committed while they were juveniles; some of these defendants no doubt have already served decades in prison. See Majority Slip Op. at 5 ("Significantly, for present purposes, the Miller majority did not specifically address the question of whether its holding applies to judgments of sentence for prisoners, such as Appellant, which already were final as of the time of the Miller decision. As such, the opinion does not set out the principles governing the High Court's retroactivity jurisprudence.").

The Miller Court's silence on retroactivity, combined with the High Court's clear, existing law on retroactivity – ably detailed by the Majority here – suggests that it would require a constitutional decision as innovative as Miller itself to divine an existing Eighth Amendment basis for holding that Miller is to be afforded retroactive effect of sufficient scope so as to upset judgments that have become final. Any such Eighth Amendment

extension of existing federal retroactivity law, in my view, should only come from the U.S. Supreme Court. Given the retroactivity confusion arising in the wake of Miller, we may have the definitive federal answer some day.

Moreover, even if there were a stronger case to be made for predicting that the High Court will one day hold that Miller applies retroactively to final judgments, this appeal proceeds under the PCRA, and as a PCRA matter, the retroactivity claim is at best premature. Accord Majority Slip Op. at 13-14 (noting "the social policy and concomitant limitations on the courts' jurisdiction and authority reflected in the Post Conviction Relief Act."). The PCRA's eligibility provisions speak of convictions or sentences resulting from violations of **existing** law. See 42 Pa.C.S. § 9543(a)(2). Thus, subsection (a)(2)(vi) speaks of "the imposition of a sentence greater than the lawful maximum." When appellant's sentence was imposed, it was lawful. Appellant's collateral sentencing claim depends upon Miller being deemed globally retroactive. The only court that can render a definitive answer on that federal question is the U.S. Supreme Court. Until that Court holds that Miller has such an effect, appellant's LWOP sentence cannot be deemed to be one greater than the lawful maximum.

The very structure of the PCRA presupposes that this is the only proper approach. Thus, Section 9545(b) recognizes that new constitutional rights (state or federal) may come into existence after a sentence is final, and indeed, after a defendant's right to PCRA review has been exhausted. The statute allows new constitutional rights to be vindicated, but only after the Court announcing the new right has also held that the right operates retroactively: "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." 42 Pa.C.S. § 9545(b)(1)(iii). This safety valve for

vindication of new and retroactive rights is logically limited to pronouncements from the two courts of last resort that can recognize new rights and makes clear that the court of last resort announcing the new right should also issue the holding on the retroactivity of the new right. There is nothing irrational in the statute's accommodation of new constitutional rules in this manner. Under the construct, appellant's federal constitutional claim is, at best, premature; and his assumption that this Court can substitute for the U.S. Supreme Court in rendering the retroactivity holding is erroneous, where this Court did not announce the "right" at issue.

Given the dynamism of the U.S. Supreme Court's retroactivity jurisprudence and that Court majority's new emphasis on age as a disqualifying criterion in Eighth Amendment matters (perhaps an emerging "youth is different" view to accompany the Court's "death is different" approach), Mr. Justice Baer's Dissenting Opinion may well be accurate in predicting the High Court's ultimate retroactivity conclusion – notwithstanding the Court's existing precedent on retroactivity and the Miller majority's deliberate emphasis of the procedural nature of its holding. The difficulty with implementing the dissent's predictive federal judgment in this PCRA appeal is that the dissent never comes to terms with the PCRA's approach to the vindication of new constitutional rights held to be retroactive.

The resulting landscape in Pennsylvania is ironic: federal *habeas corpus*-based restrictions premised upon respect for state sovereignty and the finality of judgments result in a circumstance that is certainly unusual, if not arbitrary: the longer a juvenile murderer has been in prison, the less likely he is ever to have the prospect of an individualized assessment of whether LWOP was a comparatively appropriate punishment, given his age, other characteristics, and the specifics of his offense (including the degree of the murder) as required by Miller. The circumstance is no fault

of Pennsylvania, but it is a reality, nevertheless. As the Majority notes, the High Court has recognized that state courts can go further – as a matter of state law – than is commanded by federal law in implementing new federal constitutional rules. See, e.g., Danforth v. Minnesota, 552 U.S. 264, 282 (2008). But, the Majority properly cautions that a litigant advocating for a broader retroactive application of a federal constitutional rule, as a matter of state law, should attempt to persuade this Court that the broader rule comports with Pennsylvania norms, and accounts for competing concerns, such as the abiding concern with the finality of judgments and the restrictions of the PCRA. No such developed argument for a broader Pennsylvania approach to retroactivity is forwarded and developed here; appellant's position on retroactivity is premised solely upon federal law, and our Court remains properly reluctant to ignore the PCRA's approach to new rights, and to go beyond the affirmative commands of the U.S. Supreme Court, in the absence of a legislative policy directive or some grounded basis in Pennsylvania law. See Commonwealth v. Sanchez, 36 A.3d 24, 66 (Pa. 2011). See also Commonwealth v. Bracey, 986 A.2d 128, 146-47 & n.19 (Pa. 2009) (states that have recognized right to jury determination of mental retardation generally have done so by statute; Danforth-based claim that state court might provide more protection than federal courts waived).

Because the PCRA addresses and accommodates claims premised upon new constitutional rights that are in fact of retroactive effect, appellant's federal claim is not particularly difficult: the claim is premature. What is of more concern to me is the Pennsylvania consequence of the Miller decision – if the decision is ultimately deemed not to be retroactive by the U.S. Supreme Court. That circumstance may pose more difficult questions of state constitutional law which, it would appear, fall outside the auspices of the PCRA. As noted, the U.S. Supreme Court has held that state courts

may, as a matter of state law, afford greater retroactive effect to new federal constitutional rights than is commanded by the High Court. However, for prisoners whose sentences are final, the PCRA offers no avenue to pursue that argument. New rules and rights are more properly the province of preservation and presentation in the direct review process; and Section 9545 of the PCRA provides a safety valve for collateral relief only after a new right has been held to be retroactive.

There is no Pennsylvania constitutional difficulty with this paradigm restricting the extension of new federal rights: nothing in the Pennsylvania Constitution confers a right to the broadest possible interpretation and extension of those rights. However, a new federal rule, if sufficiently disruptive of state law -- such as by requiring the state to treat identically situated defendants differently – may pose an issue of Pennsylvania constitutional law independent of the federal rule. But, in what manner could such a state constitutional claim be vindicated? The state constitutional claim cannot be pursued via direct review because, by definition, the aggrieved defendants have already exhausted their direct appeals. Nor does it appear that the PCRA provides an avenue to articulate and seek vindication of a novel state constitutional claim arising from the effect of a new and disruptive federal rule.

I offer the following tentative thoughts upon the prospects of other methods of remedying the seeming inequity arising in the post-Miller landscape. First, it is notable that the General Assembly acted quickly in the wake of Miller to address new cases involving sentencing for juvenile murderers, see 18 Pa.C.S. § 1102.1. The General Assembly made a policy judgment about appropriate mandatory minimum terms (before parole eligibility may arise) for new cases arising after Miller, establishing minimum term benchmarks for parole eligibility of twenty-five years and thirty-five years, depending

upon the juvenile defendant's age at the time of the offense.[2] The new statute, however, does not reach the existing class of juveniles, such as appellant, whose mandatory LWOP sentences were automatic and became final before Miller was decided.

Presumably, the General Assembly has the power to revise the applicable statutory provisions related to parole, without affecting the underlying judicial judgments in these cases. Miller's concern was not with sentences of LWOP for juveniles *per se*, but rather with the absolute, mandatory unavailability of parole irrespective of individualized circumstances that the High Court deemed relevant for juvenile offenders. The restriction on parole opportunities in Pennsylvania is not a function of the Crimes Code, which establishes the appropriate term of a sentence, but rather is dictated by relevant provisions of the Commonwealth's Prisons and Parole Code, specifically those which govern the authority of the Pennsylvania Board of Probation and Parole, 61 Pa.C.S. §§ 6101-6153, and which the General Assembly may certainly amend. Cf. Myers v. Ridge, 712 A.2d 791, 795 (Pa. Cmwlth. 1998) (General Assembly has power to make changes in terms and conditions of parole; there is no guarantee against changes in parole laws as long as change does not violate prohibition against *ex post facto* laws). Revisions to the Parole Code would not affect the underlying judicial judgments in cases such as this; the judgment remains guilt for first- or second-degree murder, and the term remains life in prison.[3]

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[2] New Section 1102.1 still authorizes, consistently with Miller, a sentence of life imprisonment without parole in appropriate cases. 18 Pa.C.S. § 1102.1(a)(1).

[3] Alternatively, the General Assembly could amend the eligibility provisions of the PCRA, as it did in 1998 with its addition of a provision addressing impediments to extraditing convicted defendants who flee to certain foreign countries. See 42 Pa.C.S. § 9543(c) ("If the petitioner's conviction and sentence resulted from a trial conducted in his absence and if the petitioner has fled to a foreign country that refuses to extradite him (…continued)

Indeed, the General Assembly has amended the Parole Code to account prospectively for the addition of 18 Pa.C.S. § 1102.1 after the Miller decision. See 61 Pa.C.S. § 6139(a)(3.1) (board shall not be required to consider or dispose of application by an inmate or an inmate's attorney in the case of an inmate sentenced under 18 Pa.C.S. § 1102.1 if parole decision was issued by the board within five years of the date of current application); 61 Pa.C.S. § 6139(a)(3.2) ("Nothing under this section shall be interpreted as granting a right to be paroled to any person, and a decision by the board and its designees relating to a person sentenced under 18 Pa.C.S. § 1102.1 may not be considered an adjudication under 2 Pa.C.S. Chs. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) and 7 Subch. A (relating to judicial review of Commonwealth agency action).").

Again, I stress that the inequitable situation arising in the wake of Miller – with respect to individuals in appellant's position – is not the fault of anything in the prior Pennsylvania statutory scheme as it affects final judgments – and Miller plainly is a new procedural rule. But, the situation does raise a question of Pennsylvania policy that I respectfully suggest the General Assembly should consider. See Majority Slip Op. at 16 ("Our role in establishing social policy in the arena is a limited one, however."). The fact that Pennsylvania is not required to go further than new federal law or policy does not

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(continued…)
because a trial in absentia was employed, the petitioner shall be entitled to the grant of a new trial if the refusing country agrees by virtue of this provision to return him and if the petitioner upon such return to this jurisdiction so requests. This subsection shall apply, notwithstanding any other law or judgment to the contrary."). In addition, for this narrow class of prisoners, the PCRA time-bar provisions, which, as stated earlier, recognize an exception for new rules of constitutional law expressly held to be retroactive, could be amended not to require a retroactivity holding, in instances involving this sort of juvenile-specific rule. See id. § 9545(b)(1)(iii).

mean that the Commonwealth should not do so. There is at least a colorable argument that there are now two classes of sentenced juvenile murderers, for whom the distinguishing factor has nothing to do with their crimes or their circumstances: those with final sentences who can never be assessed to determine if parole is appropriate, and those going forward who must be so assessed, based on Miller factors.[4]

Policy arguments aside, I would further note that the situation resulting from Miller is "unusual" in terms of basic fairness and proportionality, but the more relevant constitutional question may be whether the situation is "cruel"? I pose the question that way because the Pennsylvania Constitution's Declaration of Rights prohibits the infliction of cruel punishments, but it does not refer to "unusual" punishments. Compare U.S. CONST. amend. VIII (cruel and unusual punishments shall not be inflicted) with PA. CONST. art. I, § 13 (cruel punishments shall not be inflicted). No such state constitutional claim having been developed here, this Court's decision today necessarily does not foreclose an argument premised upon our organic charter.

In Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013), which was argued along with this case, the Court was faced with the question of how to implement Miller in a direct appeal scenario. Appellant Batts and his *amicus* raised a broader "corollary argument that a categorical ban on the imposition of life-without-parole sentences on juvenile

[4] I recognize that there are policy considerations apart from the circumstances of the defendants in these cases. The finality of the LWOP regime gave the victims' families a sense of closure, and Miller-style relief would disrupt that expectation. See Commonwealth's Brief for Appellee, at 8 n.4 ("a life-*with*-parole sentence has been likened to 'sentencing the victim and the victim's family, as well. … It's a sort of virtual prison, because … as long as [the killers] are in jail … and as long as they come up for parole, we're sharing that sentence with them'") (quoting Brief of *Amicus Curiae* The National Organization of Victims of Juvenile Lifers in Support of Respondents, at 27, filed in the Miller case).

offenders is required by Article I, Section 13 of the Pennsylvania Constitution, which prohibits 'cruel punishments.'" Id. at 297. Mr. Justice Saylor's unanimous Opinion recognized that the Court had previously held that Article I, Section 13 was coextensive with the Eighth Amendment in several discrete contexts,[5] but that "none of those cases involved juvenile offenders, who the Supreme Court has indicated are to be treated differently with respect to criminal punishment." Id. at 298 n.5. The Court also noted that Batts had not provided a "fully developed analysis in accord with Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)," the seminal case from this Court setting forth the factors to be considered in determining whether a provision of the Pennsylvania Constitution affords broader protections than its federal counterpart, but instead had relied upon the brief of his *amicus* on that point. Id. at 297.

Nevertheless, the Batts Court weighed the assertion of a separate and categorical state constitutional proscription seriously and engaged the Article I, Section 13 argument on the merits. The Court ultimately deemed the argument for a categorical ban on juvenile LWOP sentences to lack merit noting, *inter alia*, that the "purport of the argument is that this Court should expand upon the United States Supreme Court's

[5] See id. at 298 n.5. The Batts Court cited Commonwealth v. Zettlemoyer, 454 A.2d 937, 967-69 (Pa. 1982), cert. denied, 461 U.S. 970 (1983), abrogated on other grounds by Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003) (rejecting claim that death penalty was *per se* cruel punishment); Commonwealth v. 5444 Spruce Street, 832 A.2d 396, 399 (Pa. 2003) (addressing excessive fines provision); and Jackson v. Hendrick, 503 A.2d 400, 404 n.10 (Pa. 1986) (addressing prison conditions). The Court had previously recognized that Zettlemoyer spoke to a coextensive standard only within the context in which that case was decided, in Commonwealth v. Means, 773 A.2d 143, 151 (Pa. 2001) (Opinion Announcing the Judgment of Court) (addressing challenge to statute allowing victim impact testimony in penalty phase; recognizing that Zettlemoyer holding on coextensive standard was distinguishable because different Article I, Section 13 challenge was involved).

proportionality approach, not that it should derive new theoretical distinctions based on differences between the conceptions of 'cruel' and 'unusual.'" 66 A.3d at 298.

The Article I, Section 13 claim considered and rejected in Batts focused on juvenile LWOP sentences as a categorical or *per se* matter. The claim to which I write here is very different, as it has to do with the uneven state-law effect that is a necessary byproduct of a non-retroactive decision such as Miller. In Article I, Section 13 terms, it may be viewed as a type of proportionality claim. It is also a claim, like the one raised in Batts, that has not been considered by this Court before.

Of course, the U.S. Supreme Court has developed decisional law concerning sentencing proportionality. See Solem v. Helm, 463 U.S. 277, 290-292 (1983) (courts should be guided by objective criteria: (i) gravity of offense and harshness of penalty; (ii) comparison of severity of crimes for which same sentences imposed in same jurisdiction; and (iii) comparison of sentences imposed for commission of same offense in other jurisdictions). To my knowledge, however, this Court has not definitively addressed the appropriate proportionality test under Article I, Section 13. Moreover, even if we had, the potential proportionality/cruelty claim arising in this instance is both unique and peculiar to the states, since it is the very disruptive effect of a federal constitutional decision within a state's borders that raises the issue. In assessing such a claim, this Court, unlike a court determining an Eighth Amendment claim, may rightly be concerned only with comparative and proportional justice within Pennsylvania's own borders, and certainly our review would not have to account for federalism concerns. In short, in this instance, the existing Eighth Amendment standard may not sufficiently vindicate the state constitutional value at issue. See, generally, Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the*

Acknowledged Prophylactic Rule, 59 N.Y.U. ANNUAL SURVEY OF AM. L. 283, 309-10 (2003).

Notably, this Court has conducted a separate Article I, Section 13 analysis, even in instances where the Court believed that the governing Pennsylvania standard was coextensive with the federal standard. This was so in Zettlemoyer, the first Article I, Section 13 case of any real moment issued by this Court. In Zettlemoyer, the defendant argued that imposition of the death penalty was "inevitably" cruel punishment under Article I, Section 13. The Court responded that the same claim, when raised under the Eighth Amendment's proscription against "cruel and unusual" punishments, had been rejected by the U.S. Supreme Court in Gregg v. Georgia, 428 U.S. 153, 169, 187 (1976). The Court then summarily concluded that "the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments." Zettlemoyer, 454 A.2d at 967.[6] The Court's finding of a coextensive standard, however, did not mean that a separate analysis under Pennsylvania law, in applying the standard, was not required. And indeed, the Court went on to independently analyze the claim at some length in light of specific indicators in Pennsylvania history. Id. at 967-69.

The Opinion Announcing the Judgment of the Court ("OAJC") in Commonwealth v. Means, 773 A.2d 143 (Pa. 2001) is to similar effect. The relevant issue in Means was whether a statute allowing victim impact evidence at the penalty phase of capital trials violated the Eighth Amendment and/or Article I, Section 13. Under Payne v. Tennessee, 501 U.S. 808 (1991), the OAJC held the Eighth Amendment claim was meritless. The OAJC then engaged in a full-blown analysis of the issue under Article I,

[6] There is no indication that a separate and developed state constitutional analysis was forwarded in Zettlemoyer's brief; notably, the case predated Edmunds.

Section 13, pursuant to the Edmunds test, ultimately concluding that the legislation was not constitutionally infirm. 773 A.2d at 149-58. And, finally, as noted, the Court in Batts engaged in a separate state constitutional analysis; notably, the claim for a broader approach to retroactivity there ultimately failed, in large part, because it sought merely to build upon and expand the existing federal approach, rather than deriving from considerations sufficiently specific to Pennsylvania.

In the absence of legislative action to address the policy question of how to treat juveniles whose mandatory sentences of LWOP became final before Miller, I would remain open to considering whether there is a basis in Pennsylvania constitutional law – specifically, under Article I, Section 13 – to afford global retroactive effect to Miller. See, e.g., State v. Ragland, 836 N.W.2d 107 (Iowa 2013) (prisoner brought Miller-based challenge to his mandatory LWOP sentence under both U.S. and Iowa Constitutions; no argument made that application of standard under Iowa Constitution was other than that employed by U.S. Supreme Court under Eighth Amendment; in determining to apply Miller retroactively, Iowa Supreme Court used federal substantive standard of cruel and unusual punishment while reserving right to apply it in more stringent fashion than federal precedent); People v. Williams, 982 N.E.2d 181 (Ill. App. 1st Dist. 2012) (Miller applied retroactively to final mandatory LWOP sentence based on arguments grounded in U.S. and Illinois Constitutions).

As noted earlier, I realize that it is not apparent that such a state constitutional claim, arising from the effect of a federal decision, is cognizable under the PCRA.[7] To

[7] On the other hand, this Court on many occasions has noted the need to engage in a broad construction of the PCRA so as to avoid tension with the traditional scope of the writ of *habeas corpus*. See, e.g., Commonwealth v. Haun, 32 A.3d 697, 702-05 (Pa. 2011); Commonwealth v. Cruz, 851 A.2d 870, 877-78 (Pa. 2004).

the extent that is so, however, there is at least some basis in law for an argument that the claim is cognizable via a petition under Pennsylvania's *habeas corpus* statute, found at 42 Pa.C.S. § 6501 *et seq*. See, e.g., Commonwealth v. Judge, 916 A.2d 511, 518-21 (Pa. 2007) (since PCRA did not provide remedy for appellant's claim regarding deportation from Canada, which essentially challenged "the continued vitality of his sentence," claim could be raised in a petition for writ of *habeas corpus*). See also Coady v. Vaughn, 770 A.2d 287, 290-94 (Pa. 2001) (Castille, J., concurring, joined by Newman, J.) (explaining interrelationship of PCRA and traditional *habeas corpus*).