

**[J-68-2013]**  
**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

**DISSENTING OPINION**

**MR. JUSTICE BAER**

**DECIDED: October 30, 2013**

While I find merit in much of the Majority’s analysis, I ultimately conclude that Miller v. Alabama, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2455 (2012), should apply retroactively to juveniles sentenced to life without parole on timely collateral as well as direct review because I find Miller to be an effectively substantive rule. See Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013) (applying Miller to juvenile on direct appeal). I am guided by the United States Supreme Court’s decision reversing the judgment of the collateral appeal defendant in Miller and the High Court’s overarching recognition in its development of this area of law that “children are constitutionally different.” Miller, 132 S.Ct. at 2464.

As my colleagues recognize, the Supreme Court recently held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” Id. at 2460. The

Majority also observes that the High Court did not explicitly address the retroactive effect of its decision, which reversed the judgments of Evan Miller, a juvenile on direct appeal, and Kuntrell Jackson, a juvenile on collateral appeal.

I fully agree with the Majority's determination that Miller represents a new rule for the purpose of determining retroactivity. See Maj. Slip Op. at 5, n.5. While it may derive from Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010)(prohibiting life without parole for non-homicide juvenile offenders), Roper v. Simmons, 543 U.S. 551 (2005)(precluding death sentence for juveniles), and cases requiring individualized sentencing, it is clear that those cases did not announce the bar to mandatory life sentences without parole for juveniles set forth in Miller.

Given that Miller created a new rule of law, the next logical question is whether the rule announced therein should be applied retroactively to those whose judgments became final prior to its filing. Under the United States Supreme Court precedent discussed below, a retroactivity determination requires consideration of whether the rule is substantive, and therefore retroactive, or procedural, and accordingly prospective, unless subject to an exception.

The Majority astutely characterizes this distinction between new procedural rules and new substantive rules as an exercise in "line drawing" rather than "a precise demarcation between rules which are innately substantive versus procedural in character." Maj. Slip Op. at 6-7, n. 7. Given that many rules have both procedural and substantive attributes, we have repeatedly observed that the line between procedural and substantive rules in other contexts is "nebulous." Freed v. Geisinger Medical Center, 5 A.3d 212, 226 (Pa. 2010) (Saylor, J., dissenting); see also Samuel-Bassett v. Kia Motors America, Inc., 34 A.3d 1, 55-56 (Pa. 2011)("We recognize that the question of what in particular is substantive and what is procedural is not always clear.").

In addressing the question of retroactivity and the substantive/procedural dichotomy, the Majority properly recounts the development of the law from Teague v. Lane, 489 U.S. 288 (1989), to Schriro v. Summerlin, 542 U.S. 348 (2004). As noted by the Majority, the High Court in Summerlin explained that, in general, new rules apply to all criminal cases still pending on direct review, but only apply in limited circumstances to convictions that are already final, such as the final judgment against the PCRA defendant in the case at bar. Summerlin, 542 U.S. at 351; see also Commonwealth v. Bracey, 986 A.2d 128, 141-142 (Pa. 2009).

Thus, the High Court instructed that new rules apply retroactively to defendants on collateral review when the new rule is a “substantive rule,” a term which the Court defined to include “decisions that narrow the scope of a criminal statute by interpreting its terms[,] as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.” Summerlin, 542 U.S. at 351-352 (internal citations omitted).<sup>1</sup> Substantive rules apply retroactively under Summerlin “because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.” Id. at 352 (internal quotation marks omitted).

Conversely, the Supreme Court observed that new procedural rules generally do not apply retroactively because they “merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.” Id. Given the “speculative connection to innocence,” the Court limited the retroactive effect of new procedural rules to “watershed rules of criminal procedure implicating the

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<sup>1</sup> As noted by the Majority in this case and in Summerlin, the Supreme Court had previously categorized the second half of this current explanation of a substantive rule as part of the Teague test for the limited number of procedural rules that apply retroactively. Id. at 352, n.4.

fundamental fairness and accuracy of the criminal proceeding.” Id. (internal quotation marks omitted). Moreover, the Court restricted the concept of “fundamental fairness” to situations where “the likelihood of an accurate conviction is seriously diminished.” Id. (internal quotation marks omitted, emphasis in original).

The Supreme Court noted that while substantive rules alter “the range of conduct or the class of person that the law punishes” or the punishment imposed on a class of persons, procedural rules “regulate only the manner of determining the defendant’s culpability.” Id. at 353 (emphasis removed). Applying this rubric in Summerlin, the Court determined that its prior decision in Ring v. Arizona, 536 U.S. 584 (2002), should not apply retroactively because it merely addressed the process of determining a defendant’s culpability, specifically that a jury rather than a judge must determine the aggravating factors necessary for a death sentence. It noted that rules allocating decision making authority are “prototypical procedural rules.” Summerlin, 542 U.S. at 353.

The Majority in the case at bar provides a supportable analysis of the Miller rule’s retroactivity under Summerlin and Teague, concluding that Miller has procedural attributes. Indeed, the Supreme Court in Miller distinguished its holding from Graham and Roper using procedural language, stating that the Miller decision did “not categorically bar a penalty for a class of offenders or type of crime - as, for example, we did in Roper or Graham. Instead, it mandates only that a sentencer follow a certain process - considering an offender’s youth and attendant characteristics - before imposing a particular penalty.” Miller, 132 S.Ct. at 2471. Moreover, a number of courts around the country have also found Miller to be procedural and not retroactive. See, e.g., Chambers v. State, 831 N.W.2d 311 (Minn. 2013) (concluding that Miller is not retroactive because it was neither a substantive rule nor a watershed rule); Craig v.

Cain, 2013 WL 69128 (5th Cir. Jan. 4, 2013)(concluding Miller not retroactive because it did not create a categorical bar to a penalty and because it was not a watershed rule); People v. Carp, 828 N.W.2d 685 (Mich. Ct. App. 2012)(deeming Miller procedural because it altered the manner in which the punishment was imposed); Geter v. State, 115 So. 3d 375 (Fla. Dist. Ct. App. 2012)(concluding Miller not retroactive, inter alia, because it is a procedural rule and because of the need for finality of sentences).

However, with full appreciation of the intrinsic difficulties and uncertainties of the procedural-substantive dichotomy, I do not find the analysis as “straightforward” as does the Majority. Maj. Slip Op. at 14. Rather, I view Miller’s categorical bar on the mandatory imposition of life without parole for juveniles as also containing substantive attributes which would require retroactive application. Under the framework of Summerlin, I conclude that the High Court in Miller made a “constitutional determination[] that place[d] particular . . . persons . . . beyond the State's power to punish.” Summerlin, 542 at 351-352. The rule in Miller provides that mandatory life without parole is “a punishment that the law cannot impose upon” juveniles. Id. at 352.

Although the prohibition in Miller is not as broad as the clearly retroactive prohibitions of Roper (barring capital punishment for juveniles) and Graham (prohibiting a sentence of life without parole for juveniles convicted of non-homicide offenses), Miller is a categorical prohibition against mandatory life sentences without parole for juvenile offenders. Unlike Ring, as analyzed in Summerlin, Miller did not allocate the decision making authority from one party to another, but instead defined the limits of the decision making authority. In other words, the Miller holding does not address the procedural

aspect of “how” the determination is made, but rather defines “what” the substantive limits of that determination must be.<sup>2</sup>

I additionally recognize that other courts around the nation have applied Miller retroactively. See State v. Ragland, 836 N.W.2d 107, 115-116 (Iowa 2013) (holding Miller retroactive because it mandated a new procedure resulting from “a substantive change in the law” and because of the Supreme Court’s application of the new rule to Jackson, the defendant on collateral review); People v. Morfin, 981 N.E. 2d 1010 (Ill. App. Ct. 2012)(concluding Miller is retroactive because it created a new substantive rule, reinforced by Supreme Court’s application of Miller to Jackson); People v. Williams, 982 N.E. 2d 181 (Ill. App. Ct. 2012)(concluding Miller is retroactive as a “watershed rule” of criminal procedure and recognizing that the Supreme Court reversed the judgment of Jackson); see also State v. Simmons, 99 So. 3d 28 (La. 2012) (remanding for a sentencing hearing under Miller).<sup>3</sup> Additionally, although in dicta, a

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<sup>2</sup> I agree with the Majority that Miller does not fit into the Teague exception for a “watershed” rule of criminal procedure because that category is limited to rules “implicating the fundamental fairness and accuracy of the criminal proceeding.” Summerlin, 542 U.S. at 355. The Supreme Court has additionally noted that “[t]o fall within this exception, a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” Tyler v. Cain, 533 U.S. 656, 665 (2001) (internal quotation marks and emphasis omitted). The holding in Miller has no relation to the accuracy of a juvenile defendant’s convictions.

<sup>3</sup> The Court of Appeals for the Third Circuit recently entered a brief order finding that petitioners before that court had made a prima facie showing that Miller was retroactive for purposes of the court’s grant of authorization to file second or successive habeas corpus petitions, which require a showing that the asserted claim relies upon “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h)(2). The court, however, emphasized that the determination was tentative. In re Pendleton, \_\_\_ F.3d \_\_\_, No. 12-3617 (3d Cir. Oct. 3, 2013).

federal district court fervently admonished, “if ever there was a legal rule that should - as a matter of law and morality - be given retroactive effect, it is the rule announced in Miller. To hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice.” Hill v. Snyder, 2013 WL 364198, 2 (E.D.Mich. Jan. 30, 2013)(emphasis in original).

Moreover, in resolving the uncertainties abounding in this case, I emphasize that the High Court reversed the judgment of Kuntrell Jackson, the defendant before it on collateral review. Specifically, the Court held:

By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. We accordingly reverse the judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion.

Miller, 132 S.Ct. at 2475. Thus, the Court made no distinction between the collateral review defendant from Arkansas and the direct review defendant from Alabama.

It is implausible that the Supreme Court granted review of these two juvenile life-without-parole cases randomly, just as it was not accidental that this Court chose to address a juvenile on direct review in Commonwealth v. Batts, 66 A.3d 286(Pa. 2013), and this case in which a juvenile seeks collateral review. Indeed, while making a different point in dissent, Justice Alito emphasized that the two cases were “carefully selected.” Miller, 132 S.Ct. at 2489. Therefore, by reversing the lower court’s decision as to Jackson and directing further proceedings consistent with its opinion, I find it a fair, if not compelling, inference that the High Court intended to apply the rule to other juveniles on collateral review. Similarly, the Iowa Supreme Court observed, “There

would have been no reason for the Court to direct such an outcome if it did not view the Miller rule as applying retroactively to cases on collateral review.” Ragland, 836 N.W.2d at 116. As noted in Teague, “once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.” Teague, 489 U.S. at 300.<sup>4</sup>

As Chief Justice Castille articulates in his concurrence, I too am bothered by the “seeming inequity” that “arises from the fact that the prospect of an individualized, discretionary judicial determination of whether a juvenile murderer should ever be

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<sup>4</sup> While I recognize that the prosecution may not have raised a Teague retroactivity argument before the United States Supreme Court in regard to Jackson, the state, upon remand, conceded retroactivity, as noted by the Majority. Maj. Op. at 9 n.10. Additionally, the Arkansas Supreme Court agreed with the state that Jackson was “entitled to the benefit of the United State[s] Supreme Court’s opinion in his own case.” Jackson v. Norris, \_\_\_ S.W.3d \_\_\_, 2013 WL 1773087, 4 (Ark.) (Ark. Apr. 25, 2013)

In his concurring opinion, the Chief Justice correctly observes that the High Court did not overtly hold that Miller should apply retroactively. Had the Court so held, this case indisputably would have fallen within the PCRA’s timeliness exception allowing for the filing of a petition when “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). The Chief Justice applies this section to forbid relief via the PCRA, because the Supreme Court did not speak specifically to the retroactivity question. Concurring Opinion at 3-4 (Castille, C.J.). I, however, conclude that Section 9545(b)(1)(iii) can be read more broadly to apply to the situation at bar, where, as I view the case, the United States Supreme Court granted relief, de facto allowing for the new constitutional rule to be applied retroactively to Jackson on collateral review, even though the Court did not address retroactivity in the text of the opinion. See Ragland, 836 N.W. 2d at 116 (“There would have been no reason for the Court to direct such an outcome if it did not view the Miller rule as applying retroactively to cases on collateral review.”).

afforded parole eligibility depends solely upon the happenstance of the moment that the defendant's conviction became final." Concurring Opinion at 1-2 (Castille, C.J.).<sup>5</sup>

Finally, I am guided by the rationale underlying the holdings in Miller, Roper, and Graham that "children are constitutionally different from adults for the purpose of sentencing." Miller, 132 S.Ct. at 2464. The High Court noted "three significant gaps" between juveniles and adults:

First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[[]] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity].

Id. (internal citations and quotation marks omitted). The Court further noted that these "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 2465. The Court additionally prohibited mandatory sentences of life without parole to juveniles because it concluded that the mandatory sentencing scheme violated its prior cases' "requirement of individualized sentencing for defendants facing the most serious penalties." Id. at 2460. The Court noted that the mandatory sentence prohibits a judge from "taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." Id. at 2467. The Court opined,

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<sup>5</sup> Additionally, while I disagree with the concurrence's conclusion on Miller's retroactivity, I concur with its call for an argument framed in terms of the Pennsylvania Constitution or for legislative action to correct the current inequality, in the absence of retroactive application of Miller by this Court.

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features - among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him - and from which he cannot usually extricate himself - no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth - for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 2468 (internal citations omitted). These arguments against prohibiting mandatory life sentences without parole apply equally to the juvenile on direct appeal as they do to the juvenile on collateral appeal.

My conclusion that the Miller rule should apply retroactively for the various reasons stated, however, should not be interpreted as a suggestion that life without parole should not be imposed on this appellant or any other juvenile murderer. However, the decision should be, at least in this instance, in the discretion of a trial judge observing the facts of the case and the characteristics of the defendant to determine whether life without parole is appropriate. Moreover, the ultimate decision of whether to release the juvenile on parole, if awarded, will rest with the parole board.

Accordingly, I respectfully dissent because I conclude that Miller should be applied retroactively to juveniles on collateral review.

Madame Justice Todd and Mr. Justice McCaffery join this opinion.